FINAL REPORT OF THE COMMITTEE OF EXPERTS ON
CONSTITUTIONAL REVIEW

11TH OCTOBER, 2010
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<th>Acronym</th>
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<tr>
<td>CIC</td>
<td>Commission for the Implementation of the Constitution</td>
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<td>CKRC</td>
<td>Constitution of Kenya Review Commission</td>
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<td><em>CKRC Draft</em></td>
<td><em>CKRC Draft Constitution</em></td>
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<td>CoE</td>
<td>Committee of Experts</td>
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<td>CRA</td>
<td>Commission for Revenue Allocation</td>
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<td>ECK</td>
<td>Electoral Commission of Kenya</td>
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<td>HDC</td>
<td><em>Harmonised Draft Constitution</em></td>
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<td>IIBRC</td>
<td>Interim Independent Boundaries Review Commission</td>
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<td>IIEC</td>
<td>Interim Independent Electoral Commission</td>
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<td>IPPG</td>
<td>Inter-Parties Parliamentary Group</td>
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<td>KNDR</td>
<td>Kenya National Dialogue and Reconciliation Team</td>
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<td>MMPR</td>
<td>Mixed Member Proportional Representation</td>
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<td>MoJNCCA</td>
<td>Ministry of Justice, National Cohesion and Constitutional Affairs</td>
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<td>NA</td>
<td>National Assembly</td>
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<td>NARC</td>
<td>National Alliance Rainbow Coalition</td>
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<td>NCC</td>
<td>National Constitutional Conference</td>
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<td>NCCK</td>
<td>National Council of Churches of Kenya</td>
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<td>ODM</td>
<td>Orange Democratic Movement</td>
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<td>PCIOC</td>
<td>Parliamentary Constitutional Implementation Oversight Committee</td>
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<td><em>PNC</em></td>
<td><em>Proposed New Constitution of 2005</em> (also known as the <em>Wako Draft</em>)</td>
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<td>PNU</td>
<td>Party of National Unity</td>
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<td>Term</td>
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<td>-----------------------------------------------------------------------------</td>
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<td>Proposed Constitution</td>
<td>Proposed Constitution of Kenya</td>
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<td>PSC</td>
<td>Parliamentary Select Committee on the Review of the Constitution</td>
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<td>PR</td>
<td>Proportional Representation</td>
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<td></td>
<td>issued on the Publication of the Harmonised Draft Constitution</td>
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<td>PSC Draft</td>
<td>Draft Constitution prepared by the PSC to indicate changes that it</td>
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<td>proposed to the RHDC</td>
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<td>PSC Report</td>
<td>The Report of the Parliamentary Select Committee on the Review of the</td>
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<td></td>
<td>Constitution</td>
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<td>RG</td>
<td>Reference Group</td>
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<td>RHDC</td>
<td>Revised Harmonised Draft Constitution</td>
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<td>Report on the</td>
<td>Report of the Committee of Experts on Constitutional Review Issued on the</td>
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<td>of the Draft Constitution</td>
<td>Submission of the Reviewed Harmonized Draft Constitution to the</td>
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<td>to the Parliamentary</td>
<td>Parliamentary Select Committee on Constitutional Review</td>
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<td>Select Committee</td>
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Acknowledgment

On my own behalf and on behalf of the Committee, I salute H.E. President Mwai Kibaki C.G.H., The Right Honourable Prime Minister Raila Odinga E.G.H., H.E. Vice President Kalonzo Musyoka E.G.H., all Cabinet Ministers, Members of Parliament, PSC, leaders of all sectors including the professions, civil society, religious groups, business groups, councillors, the media, trade unions, the academia and the public service for having faithfully led Kenyans to their moment of glory in the attainment of a new Constitution.

We shall forever remain indebted to the staff of our secretariat particularly our Deputy Directors (complete list in Annex 3), the entire staff of the Ministry of Justice, National Cohesion and Constitutional Affairs, members of the Reference Groups, Development Partners and foreign missions for their unwavering support during the tumultuous period of framing the new Constitution of Kenya.

We however acknowledge that their efforts and ours would have been in vain without the zeal of Kenyans for self-determination. We pay tribute to the many Kenyans who lost their lives, limb, means of livelihood and property in the struggle for a new Constitution. We pay homage to all Kenyans who participated in the enactment of the new Constitution.

And over and above everything else we thank the Almighty and merciful God for guiding us and giving His blessings to peacefully attain our historic moment.

Nzamba Kitonga (SC)
Chairman – Committee of Experts
Foreword

The story is told of a rural woman who was walking along a dusty rural road carrying a baby and luggage at the same time. A Good Samaritan who was driving by stopped to give her a lift. When she reached her destination he stopped the car. Without uttering a word the woman alighted and moved towards the path to her village. The Good Samaritan shouted asking her “can’t you at least say thanks”. The woman stopped and told him “what you have done for me is beyond thanks. God bless you”.

In a manner of speaking that is what Kenyans did, not only for the Committee of Experts but also for the casualties of the long struggle for a new Constitution and for themselves. It was a great kindness beyond any word of thanks.

A new Constitution is something which many wanted and it is the result of the combined effort of everyone. A tale from the Lancaster negotiations at Independence is most illuminative. It is said that the late President Jomo Kenyatta on a particular day had made lengthy submissions at Lancaster. In the process he drank many glasses of water. Jaramogi Oginga Odinga sensing that the old man was hoarse and tired called out to Tom Mboya in anguish “Tom Tom saidia Mzee”. Whereupon the eloquent Tom Mboya signaled to the old man to sit down. He then took over and continued with the submissions without batting an eyelid. The spirit of co-operation is epitomized in this tale.

When the Committee of Experts embarked on the herculean task of preparing a draft Constitution which would be acceptable to all Kenyans its members were not in doubt that its first step was to develop a spirit of unity and trust. At our first meeting we were unanimous that the Kenyan constitutional review process needed to be concluded within the shortest possible period. Experience had proven that the longer the process, the more controversial it becomes. It was also true that any proximity to a general election would render the process meaningless. It may be regrettable but it is a fact of history that Kenyan
politicians become ridiculously hostile to each other as a general election approaches. And a new Constitution without the co-operation of politicians is unheard of anywhere in the world.

The Committee understood the desperate need to complete the process long before the 2012 general election. Not surprisingly therefore the Committee as its first order of business decreed that it would never seek an extension of time. It agreed to work within the strict statutory time frames mandated by Parliament.

The Committee was so determined to observe this time frame that it could not allow any bureaucratic or political obstacle to derail the process. I can now confirm as true the rumour that owing to delays in the release of funds by the Government, the Committee Members initially actually contributed money from their own pockets to purchase stationery and other materials to at least commence the process. Luckily for the Treasury, the law does not allow it to refund us!

The second item which the Committee had to grapple with, was to purge itself of all personal prejudices be they political, social or economic. We understood that we were a motley crowd from diverse religious, political, ideological and other persuasions. Yet we had a moral and legal obligation to deliver on our mandate. The nation had survived an unprecedented period of political turmoil, turbulence and instability. The Committee could not bear the heavy moral responsibility of having failed the nation at its darkest hour of need.

Thirdly the Committee understood the realities of its limitations. The Committee as a body of professionals did not have a political constituency of its own. On the contrary it was a statutory creature of diverse and conflicting political interests delicately held together by an unruly and fluctuating coalition. Its product had to meet at a minimum the expectations of the Coalition partners and Kenyans in general who are also subscribers to coalition politics.
As agreement started emerging on most chapters of the Constitution, the Committee understood that its waterloo would be how it handled the chapter on the Executive. The Committee therefore presented to Kenyans a deliberate cocktail of a Parliamentary/Presidential hybrid system of government.

The idea was to let the politicians make this ultimate decision. It might sound laughable at this point in time but the truth is that if we had opted for one pure system against the other, the process would have become as dead as a dodo.

We are grateful that the politicians finally bit the bullet and decided to opt for one system of government; pure presidential system. We are also grateful that they accepted our scheme of the devolved system of government amongst other proposals. The kind of Senate which they envisaged as a lower house of parliament was as we said at the time, a constitutional absurdity. This is a decision which we had to overturn to maintain the structural integrity of the system of government.

In sum we respected most of the decisions of the politicians related to the mandate of the Parliamentary Select Committee of assisting us in the resolution of contentious issues. The Parliamentary Select Committee most generously strayed into the arena of none-contentious issues and made useful suggestions some of which we also considered and incorporated into the Proposed Constitution of Kenya.

It is however true that we indeed expunged some other suggestions which sharply conflicted with the aspirations of Kenyan or established constitutional principles. This was part of our mandate: to achieve a delicate balance which recognizes the diverse and often conflicting views of all Kenyans.
Happily as well, the Judiciary after considerable hesitation and misplaced suspicion finally accepted that the vetting of Judges and Magistrates was meant to re-invent integrity in the system of the administration of justice and to inject public confidence in the work of Judges and Magistrates. Because of well documented factual and historical reasons Kenyans would have been skeptical of any new constitutional dispensation which did not include some realignment of the Judiciary.

 Opposition to some of the provisions in the land chapter was not unexpected. This is so particularly in respect to the provisions relating to illegally acquired property in the Bill of Rights (read grabbed land) and those authorizing the setting up of a maximum acreage for land holdings. Such opposition was to be expected from the owners of obscenely vast tracts of land and the beneficiaries of land acquired fraudulently and corruptly through abuse of office by previous regimes.

 The Committee will however never forget the undifying and pitiable images of some of the poor and the landless Kenyans vigorously opposing these provisions based on distorted information peddled by some prominent opponents of the Proposed Constitution of Kenya. This spectacle clearly portrayed the kind of stranglehold which the powerful have over the weak and how this relationship is exploited and abused.

 This particular deadlock was surprisingly resolved by enlightened land owners and entrepreneurs with the benefit of understanding that it is the delicate relationship between labour and capital which is the foundation of national stability.

 This understanding dictates that the better endowed members of our society must be allowed to create capital and wealth. However, their privileged survival is pegged on ensuring that the poor and the under privileged have the opportunity to mitigate their plight by being given a chance and through the provision of basic welfare facilities. In common analogy, this is the point which Queen Marie Antoinette is said to have missed in
provoking the French revolution. In reality the survival of modern civilizations is grounded on this foundation. Our appreciation must go to those who understood the need of maintaining this delicate balance.

This foreword would be incomplete was I to make no reference to the so called contentious issues. I say so because in reality the Kadhi’s Courts and Life clause (which is misguided called the abortion clause) were never identified as contentious issues during the Bomas Conference and the subsequent 2005 referendum.

But that notwithstanding during the Committee’s many interactions with the clergy the Committee discerned a rather unfortunate constant shifting of positions by the clergy. At a meeting held at KICC on 15th July 2009, the Catholic Church was categorical that it had no objection to the inclusion of Kadhi’s Courts in the Constitution. It maintained this position in various other meetings but it insisted that abortion must be outlawed in the Constitution. The Evangelical churches leadership was however vehement in its opposition to the inclusion of the Kadhi’s Courts in the Constitution during the said KICC meeting.

However all these matters were agreed upon during our meeting held in Nanyuki on 16th October 2009 with the statutorily created Reference Group of which both religious groups were represented. After the meeting a joint statement was issued signed by all parties and was read in the full glare of televisions cameras. The nation sighed in relief.

In the statement it was agreed that the Kadhi’s Courts be included in the Constitution and the Life clause be expressed in the neutral terms that “Every person has the right to life” thereby leaving the rest for debate at legislative level.

Subsequent activities by the clergy were however most disheartening and disappointing. The same pastor who spoke on their behalf at Nanyuki appeared in the press thereafter to disown the statement. Thereafter the clergy appears to have prevailed upon the Parliamentary Select Committee to enlarge the life clause with the inclusion of the words
“life begins at conception until natural death”. This provoked strong objections from the medical fraternity, gender groups and many other Kenyans.

The Committee struggled to rephrase the clause so as to accommodate all competing interests and this is why the clause appears the way it does in the Constitution. But the clergy remained adamant and refused to budge despite the inclusion of the words “abortion is not permitted….”

Perhaps in pique the Catholic clergy then abandoned its previous publicly stated position and vociferously opposed the inclusion of the Kadhi’s Court in the Constitution. This is how a section of the clergy decided to solidly oppose the enactment of the new Constitution.

This was unfortunate because the clergy had historically supported the enactment of a new Constitution. It was however permissible in a democratic state. What was not permissible was the cocktail of distortions, misinformation and sheer propaganda which some members of the clergy unleashed on their unsuspecting congregants. It was said abortion would be procured on demand, Kenya would become an Islamic Sharia Law State and finally the Chairman and some Members of the Committee are Muslims!

The repercussions of the activities of some of the clergy during the Constitutional Review Process on the Kenyan Christian fraternity are at this point in time a matter of public debate.

Nevertheless it is to be hoped that this is a passing phase and history will be kinder to that section of the leadership of clergy which refused to stand with the people at their greatest hour of need.

This foreword may appear unusually long. However the Committee and I are alive to the fact that this report is a document of perpetual historical significance. It will explain to generations upon generations of Kenyans why our Constitutional Review Process was so controversial, protracted and convoluted.
Apart from some outright dishonesty, the vibrant debate, discourse and even the controversies were healthy. They demonstrated that Kenyans wanted to own their document and were vigilant and informed in the articulation of their rights and expounding their vision of the Kenya they wanted.

Law is after all the product of the realization that man is inherently selfish and disorderly if left to his own devises. Law seeks to create order in society so that competing human interests do not lead to mutual annihilation which destroys the society itself.

Throughout human history the struggle of mankind has been informed by the need to ensure that good triumphs over evil. In the enactment of their Constitution Kenyans have made their positive contribution to that struggle and earned a deserved page in history.

**Nzamba Kitonga (SC)**

**Chairperson – Committee of Experts on Constitutional Review**

Members of the Committee of Experts on Constitutional Review:

- Atsango Chesoni (Vice Chairperson)
- Abdirashid Abdullahi
- Otiende Amollo
- Chaloka Beyani
- Bobby Munga Mkangi
- Christina Murray
- Njoki S. Ndung’u
- Fredrick Ssempebwa

Ex-officio Members of the Committee:

- Ekuru Aukot (Director)
- Amos Wako (the Honourable Attorney General)
CHAPTER ONE – INTRODUCTION

This is the final report of the Committee of Experts (CoE) on how the new Constitution of Kenya of 2010 was made within the framework and process established by the Constitution of Kenya Review Act (2008).

Members of the CoE were appointed on 23 February 2009 and were sworn in on 2 March 2009. On the same day, they elected Mr Nzamba Kitonga, SC and Ms Atsango Chesoni, as Chairperson and Vice Chairperson of the CoE respectively. The CoE officially assumed its mandate to embark on a constitutional review process under the Review Act on 2 March 2009, building on the work of the Constitutional Review Commission of Kenya (CKRC). The CoE saw its mandate successfully discharged on 27 August 2010 when Kenya entered a new constitutional dispensation with the promulgation of the new Constitution. This was almost twenty years after the search for a new constitution had begun.

The adoption of the new Constitution should be acknowledged nationally and acclaimed as an historic achievement by the people of Kenya as a whole. This Report records the last part of the long process that led to the passage of the new Constitution.

The CoE prepared a report at each of three key stages of the review process. The first report, the Preliminary Report of the Committee of Experts on Constitutional Review Issued on the Publication of the Harmonised Draft Constitution, was released to the public upon the publication of the Harmonised Draft Constitution on 17 November 2009. The second report, the Report of the Committee of Experts on Constitutional Review Issued on the Submission of the Revised Harmonised Draft Constitution to the Parliamentary Select Committee on Constitutional Review was issued on the submission of the Revised Harmonised Draft Constitution (RHDC) to the Parliamentary Select Committee (PSC) on 8 January 2010. The third report, the Report of the Committee of Experts on Constitutional Review Issued on the Submission of the Proposed Constitution of Kenya was issued on the submission of the Proposed Constitution to the National Assembly on 23 February 2010.

In the Preliminary Report, the CoE identified those issues in the constitution making process that were not contentious and were agreed upon, and issues that were contentious and not agreed upon, in accordance with section 30(1) of the Review Act. It is important to appreciate that the contentious issues had long stood as obstacles to the adoption of a new Constitution for the people of Kenya. The mandate of the CoE was therefore to make appropriate recommendations to the PSC on their resolution.

From the day that the Harmonised Draft Constitution was published the public had 30 days to debate and comment on it. Then, under section 32 of the Review Act, the CoE had 21 days to revise that draft in the light of the public’s views. The CoE worked over Christmas and New Year to meet this deadline. In terms of section 32(1(c) of the Review Act, the CoE
submitted the revised draft, together with a report, to the PSC “for deliberation and consensus building on the contentious issues.” The second report of the CoE, the Report on Submission of the Draft Constitution to the Parliamentary Select Committee, provided an overview and summary of the publication and dissemination of the Harmonized Draft Constitution, the public’s views on the draft, and the key areas of change arising from the views of the public.

On Tuesday 2 February 2010, the CoE received from the PSC a draft containing proposals for changes to the Revised Harmonized Draft Constitution. Sections 33(1) and 33(2) of the Review Act gave the CoE 21 days in which to “revise the draft Constitution taking into account the achieved consensus” of the PSC. Among other things, the PSC had reached consensus on a presidential system of government for Kenya.

However, the PSC had not amended the draft fully and requested the CoE to make adjustments to ensure that the Proposed Constitution of Kenya would contain appropriate checks and balances to ensure a sound democratic presidential system of governance for the people of Kenya, in keeping with the principles established in the Review Act. (The PSC’s explicit request was that the constitution should follow the American model.) The third report, the Report on the Proposed Constitution of Kenya, outlines the adjustments made by the CoE to the PSC draft. That Report and the Proposed Constitution of Kenya was submitted to the National Assembly for deliberation on 28 February 2010.

Section 33(4) of the Review Act gave the National Assembly 30 days within which to debate the Proposed Constitution, and approve it, or propose amendments to it. Following spirited debate, the National Assembly unanimously adopted the proposed Constitution on 2 April 2010 without amendments. Approval of the Proposed Constitution by the National Assembly set the stage for the Attorney-General to publish the Proposed Constitution within 30 days after receiving it from the National Assembly by virtue of section 34(1) of the Review Act. In terms of section 34(3), a referendum on the Proposed Constitution was to be held within 60 days of its publication by the Attorney-General.

The referendum was held on 4 August 2010 and an overwhelming majority voted in favour the Proposed Constitution. The people of Kenya celebrated the new Constitution when it was promulgated by His Excellency President Mwai Kibaki at Uhuru Park on 27 August 2010.

This is the setting in which the final Report of the CoE is situated. The Report consolidates the CoE’s previous reports, and goes further to examine the contours of the constitutional review process as they unfolded during the debate and passage of the Proposed Constitution in the National Assembly on 2 April 2010, the conduct of civic education generally, the period leading up to the referendum, the outcome of the referendum and the promulgation of the Proposed Constitution on 27 August 2010.
The Report is arranged in 12 Chapters. After this introductory Chapter, Chapter 2 lays out the history and context of constitution making in Kenya. Challenges to the constitutional review process are considered in Chapter 3, and Chapter 4 outlines the method used by the CoE and the ways in which the public participated in the making of the new Constitution. Chapters 5 and 6 respectively indicate areas of agreement and areas where there was no agreement when CoE commenced its work.

Chapters 7 and 8 relate to the processes of making the Harmonized Draft Constitution, the Revised Harmonized Draft Constitution (RHDC), and the Proposed Constitution which became the Constitution of Kenya. Chapter 9 deals with the manner of approval of the Proposed Constitution by the National Assembly, Chapter 10 the civic education conducted by the CoE prior to the referendum and Chapter 11 considers the affirmation of the Proposed Constitution in the referendum and the promulgation of the new Constitution. Finally, Chapter 12 concludes the Report with some brief reflections by the CoE.
CHAPTER TWO – HISTORY AND CONTEXT OF CONSTITUTION MAKING IN KENYA

2.1. Introduction and Background

Almost twenty years ago, the people of Kenya formally embarked on a quest for a new democratic constitutional dispensation through the repeal of section 2A of the then Constitution of Kenya in 1991. Section 2A declared Kenya a one-party state. Its repeal was an important step in the reclamation of Kenya’s democratic space and led to the rebirth of multi-party politics. However, this alone was insufficient to create a democratic constitutional framework.

Subsequently minor constitutional reforms were enacted in 1997 as part of the Inter-Parties Parliamentary Group (IPPG) agreement. The IPPG package focused on political and electoral reform concerns but it dealt with the problems inadequately. Important agreements, such as the appointment procedures for the members of the Electoral Commission of Kenya (ECK), for example, were not enacted let alone constitutionalized. Furthermore, discrimination against many Kenyans in the existing constitutional framework was not addressed.

The country had an opportunity to conclude a comprehensive reform of the Constitution successfully in 2002 – 2005, but this process was not allowed to bear fruit. A tragic result of the unfinished constitutional agenda was the post-electoral violence in late 2007 to February 2008 that brought the country to the edge and necessitated the intervention of the African Union. Over 1000 Kenyans lost their lives in this conflict.

The lack of constitutional reform was identified under Agenda Item Number Four at the Kenya National Dialogue and Reconciliation Team (KNDR) meeting in February 2008 as one of the long term issues that caused conflict in Kenya. The principal signatories to the National Accord, His Excellency President Mwai Kibaki and the Right Honourable Prime Minister Raila Odinga, committed themselves to instituting legal and political measures of reform to effectively address all the Agenda Four concerns. Pursuant to this commitment, a statutory roadmap for the completion of the review process was enacted in December 2008 through the new Constitution of Kenya Review Act. Section 28 of the Review Act provided for the completion of the new constitutional review process within twelve months. The statutory framework also provided for four organs of review: the CoE; the PSC; the National Assembly; and the people of Kenya through a referendum.
In January and February 2009, pursuant to the Review Act, the PSC and Panel of Eminent African Persons advertised for and recommended the appointment of the nine Members and an administrative Director of the CoE.¹ It was imperative for the CoE to take stock of the context and history of constitution making in Kenya as a starting point for its work.

2.2. **History of Constitution Making**

Constitution making in Kenya can be contextualised in key defining periods that situate significant constitutional developments. These are the pre-colonial period from 1887 to 1920; the colonial period from 1920 to 1963; the period of independence and post-independence constitutional developments from 1963 to 1992 that culminated in the transition from the one-party state to multi-party democracy; and the period of struggle for constitutional reform from 1992 to 2010 including the National Constitutional Conference (Bomas) from 2003 to 2005, the referendum on a *Proposed New Constitution* in 2005, the disputed presidential elections in 2007, and the current constitutional review process started in 2008 that led to the new Constitution of Kenya of 2010.

2.3. **The Pre-Colonial Period: 1887 - 1920**

Kenya’s earliest constitutional foundation was laid in 1887 when an agreement was reached between the Imperial British East Africa Company and the Sultan of Zanzibar, granting the Imperial British East Africa Company a fifty-year lease over the Coastal strip. In 1890 the lease was converted to a concession under which the Imperial British East Africa Company acquired the power to administer the territory by appointing Commissioners, administering districts, making laws, operating courts, and acquiring and regulating land.

In 1895 the administration of the territory changed hands from the Imperial British East Africa Company to the British government, and the constitutional status of Kenya changed formally to a protectorate in 1897. The *East Africa Order in Council* 1897 provided the constitutional instrument by which the protectorate was governed, with increased powers for Commissioners, application in Kenya of the common law of England, equity and statutes of general application, and the establishment of a judicial system.

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¹ The total membership of the CoE was 11. Six of the members were Kenyans chosen by the PSC and approved by Parliament; three were foreigners, chosen by the PSC from a list of five prepared by the Panel of Eminent African Persons and approved by the National Assembly. The additional two were the Director and the Attorney-General who were non-voting members.
2.4. The Colonial Period and Independence 1920-1963

In 1920 the protectorate status of the mainland territory of Kenya (excluding the Coastal Strip) changed to colonial status and the inhabitants became “British subjects” instead of British protected persons. The colonies constitutional arrangements were initially set out in the Letters Patent and Royal Instructions of 1920. As African political resistance to direct British rule grew, major constitutional changes were attempted. For instance, the Littleton and Lennox-Boyd Constitutions of 1954 and 1958 respectively were aimed at bringing an end to racism. However, the changes they introduced did not go far enough and they were rejected. Finally, the Lancaster House Constitutional Conference was convened in 1960. Kenya’s independence constitutional settlement was agreed at the Lancaster House Constitutional Conference and paved the way to independence in 1963.


The independence Constitution of Kenya of 1963 established a parliamentary system of government with a Parliament consisting of the National Assembly and the Senate; a Prime Minister and Cabinet drawn from Parliament and dependent on the support of Parliament to remain in power; and a devolved system of government. However, because the constitutional settlement was reached at Lancaster House, there was a political undercurrent suggesting that the constitution was not autochthonous or home grown, and Kenyans did not have ownership of their Constitution.

In 1964, the first post-independence government successfully introduced amendments to the Constitution that changed it fundamentally: The parliamentary system of government was converted to a predominantly presidential one. The following year the system of devolution was largely dismantled in an amendment backdated to independence. Further gradual amendments to the Constitution between 1964 and 1982 increasingly concentrated power in the office of the President. The cumulative effect of these amendments undermined democracy, eroded the idea of limited government, and removed from the independence Constitution the important principle of checks and balances, which is the hallmark of constitutionalism. An imperial presidency emerged as the positions of the Head of State and Head of Government were unified without the attendant checks that exist in a presidential system that respects principles of constitutionalism.

Constitutional protection against redrawing regional and district boundaries or creating new regions or districts was removed, as were limitations on powers to declare a state of emergency and the requirement that Members of Parliament who defected or started a new party had to seek a fresh mandate from their constituents was put in place. The Senate was abolished altogether and the President acquired the power to appoint twelve Members of Parliament. In 1982 Kenya was transformed into a de jure one party state through the
introduction of section 2A to the Constitution and what little semblance of multi-party democracy that had appeared to exist disappeared. These developments damaged the country’s constitutional development profoundly.

2.6. The Struggle for Constitutional Reform: 1992 - 2010


A wind of change swept across Africa in the early 1990s and popular resistance to dictatorial and self-perpetuating regimes grew. In Kenya, political pressure for the restoration of multi-party democracy intensified and in 1991, section 2A was repealed. Following this, elections were held in 1992, but the general mood in the country was that these did not introduce a genuinely open democracy in Kenya. Attention became focused on spearheading comprehensive constitutional reforms.

On 4 August 1997, the Constitution of Kenya Review Act was published after intense negotiations between the government and the opposition. This Act was part of the minimal constitutional and legislative reforms package adopted prior to the 1997 general elections under the aegis of the Inter-Party Parliamentary Group (IPPG) reforms. In October 1999, the political momentum generated by this development led to the formation of a multi-party Parliamentary Select Committee on Constitutional Review, which had the mandate to recommend how the Constitution should be reviewed under a legislative framework provided by the Constitution of Kenya Review Commission Act (as amended in 1998).

The main challenge facing the Committee was to propose a process that would command legitimacy. In particular it needed to consider how to accommodate the parallel civil society reform initiative known as the Ufungamano Initiative in the process. Parliament adopted the report of the Select Committee on April 26, 2000. The report recommended that Parliament nominate 21 persons from whom the President would appoint 15 to become Commissioners of the Constitution of Kenya Review Commission (CKRC). On 18 May 2001, the Constitution of Kenya Review Commission Act was amended once again to facilitate the merger of CKRC and the Ufungamano group.

The members of the CKRC were appointed in 2000 with Professor Yash Pal Ghai as its chairperson. The work of the CKRC is well documented in its Report.\(^2\) Pursuant to its mandate, the CKRC embarked on a massive programme of public education followed by the collection of the views of Kenyans on a new constitution and, on 19 September 2002

published the CKRC Draft Constitution. This set the stage for the National Constitutional Conference anticipated in the 1997 Review Act.

However, despite the clear programme for constitutional review in the amended 1997 Review Act, former President Daniel Moi prorogued Parliament in October 2002 to hold general elections, and thus effectively put the constitutional review process in abeyance.

2.6.2 The Quest for a New Constitution: the National Constitutional Conference (Bomas) 2003-2005

A coalition of parties under the umbrella of the National Alliance Rainbow Coalition (NARC) Party was formed to contest the 2002 elections against the then ruling Kenya African National Union (KANU). In its campaign, NARC promised to deliver a new constitution for Kenya within one hundred (100) days if the party were to be elected to power. On being elected, NARC reconvened the National Constitutional Conference. The Conference produced a draft constitution referred to as the Bomas Draft Constitution. However, before the adoption of this draft at the National Constitutional Conference, political differences arose and a group of delegates walked out in disagreement about the position of the Prime Minister, amongst other matters. Nonetheless, the Conference adopted a new draft constitution, known as the Bomas Draft on 23 March 2004.

Shortly after this a group of Kenyans led by Reverend Timothy Njoya commenced judicial proceedings to review the constitutionality of the constitutional review procedure as set out in the amended 1997 Review Act and the existing Constitution. Among other things, they argued that the Constitution permitted its amendment by Parliament but not its replacement and that the process denied the people of Kenya their sovereign right to approve a new constitution. In Timothy Njoya and others –v- the Hon. Attorney-General & others, the High Court, led by Justice Ringera with Justice Kubo dissenting, agreed. For replacement of the Constitution, the Court said, full participation of the people was required apparently through both a constituent assembly and a referendum. As not all the members of the National Constitutional Conference were directly elected and the MPs had not been elected for the specific purpose of replacing the Constitution, the Conference was not a constituent assembly. In addition, the process had not given the people their fundamental right to ratify the proposed constitution in a referendum.

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3 Miscellaneous Civil Application No 82 of 2004.
2.6.3 The 2005 Referendum on a Proposed New Constitution in 2005

After the collapse of the Bomas process, a Proposed New Constitution of Kenya (2005) (commonly known as the Wako Draft) was adopted by the National Assembly and presented to Kenyans in a referendum on 21 November 2005. It was rejected by 57% of the votes cast. The referendum became the perfect forum for the political elite to air long standing grievances. Each group resorted to distortion and incitement based on ethnicity and tribal affiliation, and raised hostility and animosity to levels that exacerbated the divides in Kenya. It was apparent that a process of reconciliation was needed but no efforts were made to institute a process of national healing. This laid the ground for the catastrophic consequences of the 2007 elections.

2.6.4 The Disputed Presidential Elections and the Electoral Crisis in 2007

During the referendum, the campaign for a “yes” vote was characterised by the symbol of a banana and the campaign for a “no” vote was characterised by the symbol of an orange. The deep political divide that arose from Bomas and was manifest in the referendum led to the collapse of the NARC coalition after the referendum. The Oranges became organised under the umbrella of the Orange Democratic Movement (ODM) while the Bananas, what remained of NARC and other allied political parties, e.g., KANU, formed a loose coalition under the banner of the Party of National Unity (PNU).

The general elections held on 27 December 2007 were heavily contested with the two main presidential candidates being the incumbent, His Excellency President Mwai Kibaki, and the Honourable Raila Odinga, MP. The final results were delayed and then announced amidst public tension and accusations that the delay was a sign that the President’s party was attempting to rig the elections. Eventually the results were announced on 30 December 2007 and President Kibaki was sworn in for a second term.

Violence erupted in different parts of the country and scenes of people killed, and property being destroyed, were projected by the national and international media. More than 1,300 people died and about 350,000 people allegedly not “indigenous” to particular regions were displaced through forcible evictions or in fleeing the violence. The country was visibly torn apart and teetered on the brink of civil war.4

The African Union became the focal point for mediation efforts and the Panel of Eminent Persons led by the former United Nations Secretary General, Kofi Annan brokered a

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delicate agreement which was signed by His Excellency the President Mwai Kibaki and the Right Honourable Prime Minister Raila Odinga on 28 February 2008. This agreement resulted in the formation of a Coalition Government and effectively restored calm in the country. The agreement also laid the foundation for the formulation and implementation of constitutional and institutional reforms aimed at guaranteeing the political stability of Kenya in the long term.

Four main agenda items for reform were identified by the Kenya National Dialogue and Reconciliation Team (KNDR):

1. Immediate action to stop violence and restore fundamental rights and liberties.
2. Immediate measures to address the humanitarian crisis, promote reconciliation, and healing.
3. How to overcome the political crisis.
4. Addressing long-term issues, including constitutional, legal and institutional reforms, tackling youth unemployment, tackling poverty, inequality and regional development, imbalances, consolidating national unity and cohesion, and addressing impunity, transparency and accountability.

2.6.5 The Revived Constitutional Review Process: 2008-2010

These circumstances offered Kenya a constitutional moment, an opportunity to reinvigorate the stalled constitutional process. To that end, two key pieces of legislation were enacted in 2008: the second Constitution of Kenya Review Act and the Constitution of Kenya (Amendment) Act.

The purpose of the 2008 Review Act was “to facilitate the completion of the review of the Constitution of Kenya.” The Act set up the CoE as an organ of review with the mandate to identify and resolve outstanding issues before preparing a draft Constitution for adoption by Parliament and ratification in a national referendum.

In addition to the CoE, three other organs of review were identified in Section 5 of the Act:
   a) The PSC – a 27 member, multi-party parliamentary committee;
   b) The National Assembly (NA); and
   c) The Referendum.

These organs were guided by principles laid out in section 6 of the Review Act. Under these principles, the review organs were to:
   (a) ensure that the national interest prevails over regional or sectoral interests;
   (b) be accountable to the people of Kenya;
(c) ensure that the review process accommodates the diversity of the people of Kenya including socio-economic status, race, ethnicity, gender, religious faith, age, occupation, learning, persons with disabilities and the disadvantaged;

(d) ensure that the review process—
   (i) provides the people of Kenya with an opportunity to actively, freely and meaningfully participate in generating and debating proposals to review and replace the Constitution;
   (ii) is guided by the principle of stewardship and responsible management;
   (iii) is conducted in an open manner; and
   (iv) is guided by respect for the principles of human rights, equality, affirmative action, gender equity, and democracy;

(e) ensure that the outcome of the review process faithfully reflects the wishes of the people of Kenya.

According to section 4 of the 2008 Review Act the object of the review process was to secure a constitution that contained provisions:

(a) guaranteeing peace, national unity and integrity of the Republic of Kenya in order to safeguard the well-being of the people of Kenya;

(b) establishing a free and democratic system of government that guarantees good governance, constitutionalism, rule of law, human rights, gender equity, gender equality and affirmative action;

(c) recognising and demarcating divisions of responsibility among the various state organs including the executive, the legislature and the judiciary so as to create checks and balances between them and to ensure accountability of the Government and its officers to the people of Kenya;

(d) promoting the peoples’ participation in the governance of the country through democratic, free and fair elections and the devolution and exercise of power;

(e) respecting ethnic and regional diversity and communal rights including the right of communities to organise and participate in cultural activities and the expression of their identity;

(f) ensuring the provision of the basic needs of all Kenyans through the establishment of an equitable framework for economic growth and equitable access to national resources;

(g) promoting and facilitating regional and international co-operation to ensure economic development, peace and stability and to support democracy and human rights;

(h) strengthening national integrity and unity;

(i) creating conditions conducive to a free exchange of ideas;

(j) ensuring the full participation of people in the management of public affairs; and

(k) committing Kenyans to peaceful resolution of national issues through dialogue and consensus
In addition to the Review Act, other constitutional and legislative changes introduced as a result of the KNDR process influenced the course of the constitution making exercise. The *Constitution of Kenya* was amended to achieve four main things:

- To entrench the political agreement reached by the KNDR team. The amendment authorised Parliament to enact legislation concerning the Coalition Government, and appointment and termination of the offices of the Prime Minister (PM), Deputy Prime Ministers and Ministers as well as to determine their functions. The new cabinet would consist of the President, the Vice-President, Prime Minister, two Deputy Prime Ministers and the other Ministers.
- To establish a procedure for its replacement by a new constitution.
- To establish the Interim Independent Constitutional Dispute Resolution Court.
- To establish a new Interim Independent Electoral Commission (IIEC) and an Interim Independent Boundaries Review Commission (IIBRC).

The National Accord and Reconciliation Act (2008) (The National Accord) reinforced the constitutional amendment by giving effect to the agreement of the two Principals to establish a Coalition Government and foster national reconciliation.  

The provisions in the constitutional amendment that established a procedure for the replacement of the former constitution with a new one was of particular relevance to the review process. First, it contemplated comprehensive reforms – the replacement of the *Constitution* and not mere amendment. Most importantly, the Act required a new constitution to be adopted by the people of Kenya in a referendum. In addition, the Interim Independent Constitutional Dispute Resolution Court was intended to protect the process from unfounded legal challenges and was granted exclusive original jurisdiction to hear and determine matters arising from the constitutional review process. (The Court made decisions that were vital to the success of the process when this was challenged before the referendum and promulgation of the new Constitution.)

The function of the IIEC was to reform the electoral process and management of elections in order to institutionalize free and fair elections. Importantly this body was mandated to organise the constitutional referendum and it played a magnificent role to that end.

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5 The issue that arose in relation to the National Accord Act in the context of the constitutional review process was the terminal effect that a new constitution would have on the Act and the arrangements for a coalition government that it established. Under section 8, the Act would cease to apply upon dissolution of the tenth Parliament, if the Coalition was dissolved, or if a new constitution was enacted, depending on whichever was earlier. This showed that the coalition arrangement was transitional in nature and that a new constitutional settlement was necessary for longer term stability.
CHAPTER THREE – CHALLENGES TO THE PROCESS

Since the repeal of section 2A of the Constitution of Kenya in 1991 it was evident that for a peaceful and democratic system of governance in Kenya the entire constitutional framework would have to be overhauled. This Chapter discusses the challenges faced in realising a new constitution.


Persistent causes of conflict in Kenya identified under Agenda Item Number Four of the Kenya National Dialogue and Reconciliation included the need for constitutional, legal and institutional reforms; the need for land reform; and inequality. However, the peaceful resolution of the constitutional question was key to addressing the other identified long term causes of conflict effectively.

Kenya had come full circle. Political inability to establish a new constitutional framework, including the unsuccessful 2005 referendum and the discontent it caused, are acknowledged as contributing factors to the conflict between December 2007 and February 2008. The new challenges created by the 2005 constitutional referendum process including deepened suspicion, cynicism and apathy. Kenyans doubted their ability to adopt a new constitution and were anxious about another referendum which they feared would further polarise the country without yielding a new constitution. They wondered whether yet again they would give their views to a review body, only for a small political elite to produce a document that did not embody their collective vision. Kenyans were deeply suspicious of the political elite and especially of a constitutional review process that vested as much decision making power in political institutions, in particular the PSC and the National Assembly, as the new Review Act did.

Suspicion of potential politicisation of the new process was manifested in:
(a) Continuous questioning of the process and requests to the CoE to “amend the process;” or include particular groups of citizens;
(b) Calls to remove the requirement for a referendum or provide for a Yes/Yes referendum; and
(c) Legal challenges to the process, including a suit filed on the premise that parliamentarians could not be entrusted to represent citizens’ interests in the constitutional review.\

6 See High Court of Kenya at Nairobi, Petition No. 55 of 2009, Bishop Joseph K. Methu and 33 others – v – The Honourable Attorney-General. This case was filed on 26 January 2009, almost a month before the members of the CoE were gazetted let alone sworn into office.
As a post-conflict society, Kenya in 2009 was characterised by anger and a general suspicion of government institutions and initiatives. This was in direct contrast to the period after the 2002 election when the National Constitutional Conference was held; where Kenyans were rated as the most optimistic people in the world. Some key institutions to the constitutional review process, such as the ECK (which oversaw the 2005 Referendum), lost credibility during the 2007 elections. The ECK was so mistrusted that an entirely new body, the IIEC, was formed under the Accord. The new constitutional review process was therefore needed to be carried out in a way that restored public confidence in the country’s governance institutions, a challenge that did not face the CoE’s predecessor, the CKRC on quite the same scale.

The climate of suspicion after the electoral violence led to the greater politicisation and personalisation of various constitutional issues. New gatekeepers of constitutional reform emerged, with entrenched hard line positions. In the discourse on systems of government, for example, the choice of a particular system of government was perceived as being based on affiliation with a particular political party or politicians, rather than based on a systematic analysis of the merits and demerits of a particular system. Given Kenya’s ethno-political patterns, this discourse also bore ethnic and religious overtones.

3.2 The Legacy of the 2005 Referendum: Suspicion, Cynicism and Apathy

The 2005 Referendum gave birth to suspicion, cynicism and apathy. One of the questions that confronted the CoE during public hearings was: “Why should we give you our views only for a small group of people to go and change what we say?” Furthermore, members of the public alleged that it was now habitual in Kenya to establish Commissions, whose reports were “never made public”. When reports were made public, the commonly expressed view was that such reports would then be “shelved to gather dust.” Members of the public would then ask why they should bother to offer their views or participate at all.

The evolution of new anti-reform energies at the end of the Bomas process and what became a perpetual cycle of contention also presented challenges to the new review process.

The new anti-reform energies were characterized by several cases initiated to frustrate the intended outcome of the 2004 National Constitutional Conference. The cases questioned various aspects of the review process, including whether or not the CKRC had the mandate to make provisions for a new judicial framework in a new constitution, filed and heard by the judiciary itself! This trend continued and several cases were brought to challenge the mandate of the CoE, the results of the 2010 referendum, and indeed the promulgation of the new Constitution. None were successful.
As the review process gathered pace, it also became clear that Kenya was in a perpetual cycle of contention in which issues which were settled and agreed prior to the 2005 National Referendum became new sources of tension and polarisation. The issue of the Kadhis’ Courts is an example. Until 2002, the religious sector was united on the need for constitutional review. Indeed the Ufungamano Initiative was key to the formation of the CKRC and the establishment of a pro-people constitutional review process. Yet, in November 2005, the continued constitutionalisation of the Kadhis’ Courts became an issue of concern between Christians, Muslims and Hindus. This was despite the fact that the CKRC and Bomas Drafts and the PNC provided for Kadhis’ Courts, and the Summary of the Views of the Kenyan people as documented by the CKRC illustrated overwhelming support for the continued retention of the Kadhis’ Courts within Kenya’s constitutional framework and despite the fact that most delegates to the NCC had voted in favour of retention of the Kadhis’ Courts.

The Kadhis’ Court question was politicised and remained contentious through the new review process. Indeed, a curious ruling by the High Court in May 2010 stated that the inclusion of the Kadhis’ Courts under the 1963 Constitution was unconstitutional.\(^7\) This case had commenced six years earlier during the previous constitutional review process. But the decision was timed to be delivered during the civic education exercise in the run up to the referendum on the new Constitution on 4 August 2010.

Politicisation of the Kadhis’ Courts had international dimensions – with allegations that it was fuelled by conservative international political interests. Political and religious tension generated by agitation over the continued constitutionalisation of the Kadhis’ Courts provided fodder for those opposed to constitutional reform. The danger posed by this and other issues that were brought into contention was that of Kenyans being trapped in a perpetual cycle of contention, with those opposed to reform constantly finding new reasons to block change.

3.3. The Challenge of the Statutory Framework: the Constitution of Kenya Review Act

The statutory framework for the review created several challenges for the CoE. The most significant of these were –

a) the time frame;
b) the Reference Group;
c) the method of work required by the Act and definition of “contentious”;
d) lack of clarity about the differences between the CoE and CKRC processes; and

\(^7\) Jesse Kamau and 25 others –v- the Attorney-General Miscellaneous Civil Application 890 of 2004 decided on 24 May 2010.
e) the temporary nature of the CoE.

### 3.3.1 The Time Frame: Road to the Review of the Constitution of Kenya

The timeframe for the review as originally contained in the Review Act was rushed and not always clear. For instance, the original section 28 of the Act provided that the review must be completed within twelve months from commencement of the Act (22 December 2008) and yet the Members of the CoE were not sworn into office until 2 March 2009. This meant that by the time CoE took office, three months had been lost, leaving only nine months for the review. The CoE successfully sought a clarification and amendment of the Act to provide that the timeline for review should run from when its members were sworn in.

Even so, it was important to complete the reform process within the statutory period, as 2012 would be the year of general elections and the window for reform would narrow, if not close altogether. The CoE estimated that if the constitutional referendum was not held before mid-2010, the country would be in an electioneering mood that would not be conducive to the constitutional review process. The risk of further polarisation and violence would increase as the country approached the election, and this risk would have been exacerbated if the new constitution were not in place in 2010.

With these concerns in mind the CoE was committed to ensuring compliance with the steps set out in the Review Act and the existing Constitution of Kenya. These are set out in Chapter 4.

### 3.3.2 The Reference Group

The Review Act required the CoE to engage with a Reference Group of representatives of civil society. The membership of the Reference Group was purportedly published in the Fourth Schedule to the Act, yet at the time of the publication of the Act there was no Fourth Schedule. So the Reference Group could not be convened until August 2009 when the Schedule was added to the Act. The fact that the Reference Group had not been identified in the Act and thus not convened was a source of tension and suspicion especially in civil society and the religious sector. Some members of these groups did not understand that the CoE had no statutory powers to convene the Reference Group before the National Assembly had identified its members.

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8 See sections 30 and 31 of the Review Act.
3.3.3 Statutory Method on Contentious Issues

The method set out in the Review Act for identifying contentious issues departed from the popular understanding of the term “contentious.” The Act assumed that the relevant contentious issues had emerged from the earlier review process. In particular under sections 23(a), 23(b), 29, and 30 of the Act, in identifying contentious issues, the CoE was to:

a) draw upon the views of the people of Kenya as collected by the CKRC;
b) study the earlier drafts; and
c) identify areas where these drafts agreed and where they were not in agreement (areas in contention).

The CoE did not have an unfettered discretion in determining what was contentious or not. This had both advantages and disadvantages. The main advantage lay in the fact that the statutory approach provided guidance and limited the scope of what could be classified as contentious. This allowed a focus on limited areas of contention. Furthermore, the statutory approach enabled the current review process to build on gains of the earlier review processes. Inherent in this methodology was an assumption that, if there was agreement on a principle in the CKRC and Bomas Drafts and the PNC, consistent with the views submitted to the CKRC, then there was agreement on the issue.

The disadvantage of the statutory methodology and obligation to identify areas of agreement in the drafts was that it did not take cognisance of the fact that areas of contention emerged largely after the views of the people had been collected. There had also never been an opportunity to state openly what was actually contentious. Moreover, guessing what these issues would have been would not really have brought them to light. This made it possible for those opposed to reform to identify a plethora of areas of contention. Moreover, several political actors deliberately misrepresented areas of contention among the various drafts.

Most importantly, the meaning of “contentious” in the Review Act and the popular understanding of the term had become an area of contestation. For instance, while land is generally an area of concern in Kenya and is indeed historically a source of conflict, there is generally agreement in the views of the people as to how it should be treated. Consequently, the Chapter on Land and the provision protecting the right to property remained substantially the same in all three earlier drafts and was consistent with the views submitted to the CKRC. Yet the lack of clarity about the process and the role of the CoE, led many critics to fault the CoE for not labelling the issue of land as “contentious.”

An even more complicated variation of this problem occurred in relation to the Kadhis’ Courts. As described above, the principle of the Kadhis’ Courts was accepted in all the previous drafts and so could not have been classified as an area of contention under the Act. However, a constituency within the religious sector wanted Kadhis’ Courts declared...
“contentious” because this was an issue of concern to them. The CoE therefore faced the challenge of explaining to certain sections of the religious sector that it did understand their concerns and had heard them, but that it was constrained by the statutory framework within which it operated and did not enjoy an unfettered discretion in identifying contentious issues.

3.4 CoE and the CKRC Processes

The CKRC process was widely consultative with over two years dedicated to nothing but consultations. Indeed, the CKRC was the most travelled commission in the history of Kenya, having visited all the existing 210 constituencies. In contrast, the CoE was to build on the work of the CKRC. Its mandate for consultations with the public, for example, was limited to “thematic consultations” and consultations on the issues in contention. The time allocated to the CoE was shorter than the period over which just one of the CKRC review phases ran. The challenge that confronted the CoE was that certain segments of the public that did not understand the difference between the roles of the CoE and CKRC and sought a replication of the CKRC process.

3.5 Temporary Nature of CoE

The fact that the CoE was a temporary body of itself posed operational challenges as well as challenges to its independence and integrity. Government processes and procedures were not set up to deal with such bodies and no special provisions had been made to address the needs of the Agenda Four bodies. Thus a lot of time was lost in establishing offices and securing resources for the review process. In fact, the CoE commenced its work without financial resources and appropriate accommodation for its work.

3.6 Integrity of the Constitutional Review Process

A long and thoroughly consultative constitution making process such as was Kenya’s could not be completed without detractors. In the process, the CoE encountered some who wanted a new, good constitution, some who did not want a new constitution at all, and others who wanted a new constitution which fully protected their partisan interests. In the course of the review, some people contributed positively, others sought to control the outcome, while yet others resorted to tactics of intimidation.

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9 Section 23(d) of the Review Act.
10 The NCC ran from September 2002 – March 2004, one and a half years, even if one takes into account the period where the conference was disrupted by the prorogation of Parliament by President Moi, one still has a period longer than a year.
In a bid to control the outcome, various methods were used by diverse persons, including adverse and intimidating media coverage of members of the CoE; religious intolerance with “photocopied” doctrinal positions presented over and over again at hearings in different parts of the country; and “leaks” on purported CoE positions on sensitive chapters in the press. For instance, false reports were made that the CoE had adopted a 14-region system of devolution and reports of a pure Westminster-style parliamentary system etc.

Severally, the CoE was attacked as being composed of Muslims and hence favouring Muslims, and as having introduced foreign ideas or values into the process. This urge to control did not leave out the PSC. Before publication of the HDC, the PSC demanded to see what it called the “Zero Draft”. The CoE declined on the basis that it was independent. After the publication of the HDC, rather than consider it and give recommendations as required by the Act, the PSC proceeded to redraft substantial portions of the document and presented the CoE with a complete, revised draft – presumably to minimize any interference with the consensus they had reached.

The CoE sought a soft copy of this document and the proceedings of the PSC as recorded in *Hansard* to help understand the consensus of the PSC. None was forthcoming officially, although one was obtained by the CoE by other means. When the CoE was revising the draft in the light of the PSC’s recommendations, it convened a meeting in Karen with the PSC to clarify the PSC’s recommendations. Again, the PSC demanded a copy of the document on which the CoE was working. Maintaining its independence, the CoE refused again, insisting that it only required clarification from the PSC on certain aspects of the draft. The meeting was nearly aborted, and was saved only when an agreement was reached that the Chair and Vice-Chair of the PSC would be the only PSC members to explain the thinking of the PSC around the issues on which clarification was necessary.

At the same time there were attempts to derail the process. The scheme was multi-pronged. The first came through “friendly advice;” there were those who advised the CoE right from the date of swearing in that twelve months was too short, and it should have sought immediate extension of time before starting on its work. Others advised the CoE not to commence work until the IIBRC completed the task of delineating boundaries. Yet others advised that it would be pointless to proceed when clearly the IIEC could not hold a referendum without even an Electors Register. The CoE stood its ground and defied the advice of these “friends”. Indeed the first resolution adopted by the CoE at its first meeting was that it would complete its work within twelve months and it remained true to this resolution.

The next brigade was of the “learned analysts.” It comprised columnists of indefatigable pessimism who predicated the failure of the CoE before its members were appointed, criticized the appointments, and called the CoE the “Committee of Quacks” and too young to deliver. When the CoE recommended a parliamentary system they cried foul, when this
was changed to a presidential system because of the recommendation of the PSC, they called it unworkable and unsuitable.

There was a “disband the CoE” group. It argued that the CoE was not doing its work, was too strong-headed or not cohesive enough, and should be disbanded. This group, with considerable influence, held high level meetings and even included some members of the clergy who had failed to have their way.

Then came the “expired term” argument. The argument was that despite the continued application of the Review Act, the term of CoE had expired and an extension was needed – that would have been the surest way to kill the process just before the CoE forwarded the Proposed Constitution to the PSC and Parliament. Members of the CoE saw through this argument, and resolved not to apply for renewed appointment, even if it meant work without salary. That argument died in time, but the derailment efforts did not. Soon, these mutated into new constraints, such as the inexplicable omission of the CoE budget in the Supplementary Budget; insertion of the word “national security” as a ground for qualifying rights in Article 24(1)(d) of the Bill of Rights; and the numerous court cases that sought the dissolution of the CoE; direction to insert or remove some clauses in the Proposed Constitution; or the postponement of the referendum itself.

In all these instances, the CoE had to maintain its independence and impartiality. Happily, aided by the elaborate process in the Review Act and with the assistance of Kenyans and many genuine supporters of the process of constitutional review, the CoE weathered these storms.

### 3.7 Civic Education

Article 23(i) of the Review Act generally required the CoE to facilitate civic education in order to stimulate public discussion and awareness on constitutional issues generally. However, section 35 of that Act also specifically mandated the CoE to facilitate civic education for a period of thirty days from the publication of the Proposed Constitution.

The CoE conceptualised civic education on several levels. At the general level, the CoE’s efforts to ensure that Kenyans understood that the process of constitutional review was ongoing: it explained its mandate and what the timelines were to the public particularly during public hearings that were held in different parts of the country. In addition, general debates and public awareness initiatives on the process were held and meetings arranged with various stakeholders, e.g., the Media Owners’ Association.

At another level, the CoE conducted civic education on specific drafts, particularly the Harmonized Draft Constitution and the Proposed Constitution. The content of these documents,
and the changes that were made as the constitutional review process progressed, were explained directly to the public during dissemination as well as in the newspapers, on radio, and television. Moreover, civic education was to be facilitated by the CoE on the Proposed Constitution particularly during thirty days in the period preceding the referendum. This included preparing materials for civic education on the Proposed Constitution for training civic educators, explaining the content of the Proposed Constitution in fuller and simplified versions, and in the newspapers. Constituency Civic Educators were recruited for each constituency and Provincial Coordinators of civic education were also recruited for each region.

Civic education presented the CoE with one of its most difficult challenges. The challenges were logistical, resource constraints, allegations of partisanship, and political manoeuvring and deliberate distortion of the Proposed Constitution. Both the dissemination and distribution of the Harmonized Draft Constitution and the Proposed Constitution to every part of the country to give Kenyans access to these documents proved difficult logistically, so much so that CoE had to hire helicopters for that purpose.

In the case of the Harmonized Draft Constitution, it was clear that the role of dissemination and distribution was that of the CoE. In the case of the distribution of the Proposed Constitution, it was not clear whose role it was. Although the Attorney-General had to publish the Proposed Constitution within thirty days of receiving it from the National Assembly under section 34 of the Review Act, his office did not envisage a role for itself in disseminating the Constitution by virtue of publication, and had no budget to undertake a dissemination exercise. The CoE took it upon itself to do so as part of its responsibility for civic education, otherwise there would have been nothing to educate the public about.

Yet the CoE embarked on a civic education programme on the Proposed Constitution without resources allocated to it because, apparently the CoE budget, as pointed above, was not included in the annual supplementary budget. The CoE therefore found itself in the same position as it had at the beginning of the review process when it had no financial resources. As then, the CoE was not deterred, but it was constrained from conducting as effective a civic education exercise as it wished. It also encountered the challenge of deliberate charges partisanship. How could the CoE conduct civic education especially in explaining the contents of the draft without appearing to be partisan? Having drafted the Proposed Constitution, the COE had the greatest challenge of explaining it and remaining neutral at the same time.

Other challenges emerged as the referendum drew closer. Politicians who opposed the Proposed Constitution and those who supported it maneuvered politically to take centre stage in the countdown to civic education in the thirty day period leading to the referendum. A big challenge was for the CoE to compete for space with politicians who were not answerable to anyone in their conduct and had no obligations to follow under the Review Act. Even before
the official campaign period, the politicians had hit the ground misrepresenting and distorting the contents of the *Proposed Constitution* on such issues as the Kadhis’ Courts, abortion, land, etc. It was a headache for the CoE to counter the myths, misrepresentations, and distortions under the guise of ‘contentious’ issues. The CoE found a polarized ground during civic education, especially in places where key politicians had taken a negative stand on the *Proposed Constitution* as was the case in the 2005 referendum. However, the CoE was determined and ensured that civic education on what the *Proposed Constitution* was all about was conducted throughout the country.
CHAPTER FOUR – PROCESS, METHOD AND PUBLIC PARTICIPATION

4.1  The Process established by the Review Act

The Review Act set up a process for the review with an overall timeframe of a year and specific timelines for different stages of the process. As we note in Chapter 3, the provision requiring the entire process to be complete within a year was overly ambitious and the Act was amended to adjust this and to make various other small changes to the times it set. The process established by the Act is most easily understood as involving 12 steps.

**Step 1:** First the CoE was to identify agreed and contentious issues, harmonise those that are agreed, propose a resolution to the contentious issues and publish a harmonised draft constitution. No specific time limit was set for this task but the time it could take was implicitly determined by the overarching timeframe of one year for the entire process and the periods set aside for other steps in the process (Review Act section 30).

**Step 2:** Upon the publication of a harmonised draft constitution and a preliminary report, the public had 30 days within which to give their views (Review Act section 32(a) and (b)).

**Step 3:** The Committee of Experts had 21 days within which to incorporate the views of the public in the Draft (Review Act section 32 (c)). At the end of this period it was to present a revised harmonised draft constitution to the PSC for deliberation and consensus building on the contentious issues (Review Act section 33(1(c)).

**Step 4:** The PSC had 21 days to reach agreement after which it was to return the draft constitution with recommendations to the CoE (Review Act section 33(1)).

**Step 5:** The CoE was to revise the draft taking into account the consensus achieved by the PSC and submit the revised draft and its final report to the PSC within 21 days (Review Act section 33(2)).

**Step 6:** The PSC was to table the report and draft before the National Assembly within seven days (Review Act section 33(3)).

**Step 7:** The National Assembly was to approve the draft or propose amendments within 30 days of its tabling by the PSC (Review Act section 33(4)).

If the National Assembly approved the draft without amendments, it was to forward it to the Attorney-General for publication.
If the National Assembly proposed amendments to the draft constitution, it would return it to the CoE and the CoE would consider those amendments and resubmit the draft to the National Assembly within seven days (Review Act section 33(4)).

If the National Assembly failed to approve the draft constitution, a joint meeting between the PSC, the Reference Group and the CoE would be convened by the Chairman of the CoE to consider the issues and to make recommendations to the National Assembly. The National Assembly would then within 21 days approve the draft constitution and submit it to the Attorney-General for publication.

**Step 8:** The Attorney-General was to publish the Draft Constitution within 30 days of receipt from the National Assembly and was prohibited from effecting any alterations to the draft except for editorial purposes and in consultation with the PSC (Review Act section 34).

**Step 9:** Within 7 days of the publication of the draft constitution the IIEC was to publish the question to be determined by the referendum. The question was to be framed in consultation with the PSC (Review Act section 37(1)).

**Step 10:** The IIEC was to organize, conduct and supervise the referendum to be held 90 days after the publication of the constitution by the Attorney-General (Constitution of Kenya Article 42A). During this 90-day period the CoE was to conduct civic education for a period of 30 days (Review Act section 35).

**Step 11:** The IIEC was to publish the results of the referendum within two days of the referendum (Review Act section 43).

**Step 12:** If the final result of the referendum was that the people of Kenya ratified the draft constitution, the President was to proclaim the new Constitution to be law not later than 14 days after the publication of the final result of the referendum (section 43A). Failing this, the ratified Constitution would come into effect on the 15th day after the announcement of the result.

These steps were completed successfully.
4.2 The Method used by the Committee of Experts

The CoE’s approach to its work was governed by the Review Act. Harmonisation of the earlier drafts involved a careful examination of each of them and compilation of a text that best captured their shared meaning. Work on the contentious issues was more difficult. Following section 23 of the Act, the CoE engaged with a wide variety of different people in developing recommendations on those issues.

The first thing the CoE did after taking office was to reconstitute itself into ad hoc committees to:

(a) examine the Act, shortcomings and areas of amendment;
(b) examine functions and timelines towards finalization of work plan;
(c) consider personnel requirements and develop an organogram;
(d) develop rules of procedure for Committee of experts generally;

These sub-committees were to report to the main Committee for endorsement of their decisions.

The CoE then clustered the various parts of the previous draft constitutions along themes, study groups and related areas as shown in Table 1 of Annex 2 of this report. It also formulated ten principles to guide its work and these under lined the need:

a) To unify and strengthen the nation of Kenya;
b) To constrain executive power, embracing the separation of powers, with checks and balances;
c) To decentralize power;
d) To avoid dangerous and acrimonious presidential/national elections and avoid winner-take-all elections;
e) To deepen democracy, and an accountable government;
f) For an effective government;
g) For a stable government;
h) For equity in distribution of resources;
i) To strengthen and regulate political parties; and
j) For ethnic, regional and gender balance.
In this context, the key elements that informed the CoE’s approach were:

(a) *The statutory timeframe.* Section 28 of the Review Act provided that the CoE “shall complete its work within a period of twelve months.” The legal definition of these “twelve months” was one of the clarifications and amendments that the CoE successfully sought from Parliament.

(b) *The framework of the review process and process set out in the Review Act:* In particular:
   - Sections 4 and 6 set out the object and purpose of the review and principles to guide the review organs
   - Section 23 set out the functions of the CoE;
   - Section 29 listed reference materials that the CoE was required to consult;
   - Section 30 required national discussion of a draft constitution;
   - Section 31 established a “Reference Group.”

(c) *The participatory and consultative nature of Kenya’s constitution-making tradition.*

(d) The CoE’s *Operational Plan, 2009 – 2010.*

### 4.3 The Statutory Base of the CoE’s Method under the Constitution of Kenya Review Act

The method adopted by the CoE in order to fulfil its mandate was firstly informed by section 23 of the Review Act as read together with the other provisions of the Act, in particular sections 4, 6, 29-33. Section 23 referred to the powers and functions of the CoE. Section 23 (a) and (b) set out the minimum obligatory criteria that the CoE was to use in identifying issues that were “agreed” and “not agreed upon” or “contentious” in the constitutional review process.

According to section 23 (a) and (b):

“The Committee of Experts shall –

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11 Other than section 28, and as noted below, the other statutory timelines are mainly contained in sections 32 - 35; 37; 43; and 47 of the Review Act.

12 As noted already, the Review Act commenced on 22 December 2008 yet the members of the CoE were not sworn into office until 2 March 2009; the CoE lost three months *ab initio* and therefore in reality initially only had nine months in which to complete its work, until the Review Act was amended in July 2009 through the Statute Laws (Miscellaneous) Act (2009). Regardless of the amendment to section 28, the members of the CoE immediately agreed on assuming office that they would complete their work within the statutory period if not earlier.
(a) identify the issues already agreed upon in the existing draft constitutions;
(b) identify the issues which are contentious or not agreed upon in the existing draft constitutions.”

The “draft constitutions” referred to in sections 23 (a) and (b) are identified in section 29 of the Act. Section 29(b) identifies the first two draft constitutions to be examined by the CoE as “the various draft constitutions prepared by the Commission and the Constitutional Conference”; i.e. the September 2002 draft constitution prepared by the Constitution of Kenya Review Commission (CKRC Draft) and the draft that emerged out of the National Constitutional Conference on 15 March 2004 (the Bomas Draft). Section 29(c) identifies the third constitutional draft as “the Proposed New Constitution, 2005” (the PNC).

Section 29 also acknowledges the rich base of resource materials developed in the previous review processes and places a statutory obligation on the CoE to build on the work of the CKRC rather than beginning anew. At section 29, the Review Act provided that the “Committee of Experts shall draw upon the views and materials collected or prepared by the various organs of the review under the expired Act.” Thus, the CoE’s consultative role was far more limited than that of the CKRC. In fact, section 23(c) emphasised that the CoE was to solicit “written memoranda and presentations on the contentious issues” and conduct “thematic consultations with caucuses, interest groups and other experts” (section 23(d)). And section 29 (a) obliged the CoE to draw upon “the summary of the views of Kenyans collected and collated by the Commission.”

Section 29 also provided for the CoE to draw on other reference materials such as “documents reflecting political agreement on critical constitutional questions.” But, the statutory requirement that the CoE specifically rely on the three previous drafts in identifying areas of agreement and contention was emphasised by section 30(1) of the Act which provided that:

“The Committee of Experts shall study all existing draft constitutions and such other material as it may consider appropriate and prepare a report which shall identify –
(a) the issues that are not contentious and are agreed upon; and
(b) the issues that are contentious and not agreed upon.”

Finally, sections 30 to 33 of the Act not only reinforced the statutory minimum criteria for the identification of “issues that are agreed” and those that are “contentious,” they also mandated the CoE to propose means of resolution and stipulated the minimum statutory

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13 Section 29(a); the “expired Act,” here is the Review Act (1997)
methodology for preparation of the CoE’s reports, drafts, and consultations on them, including the order and timing of the publication of reports for submission to the public; the PSC and National Assembly.

4.4 How the CoE Approached and Fulfilled its Functions under section 23 of the Review Act

The approach of the CoE to its functions under section 23 exposes the extent of the CoE consultation and activities and the specific methods employed to discharge its functions and powers as defined in section 23 of the Act.

4.4.1 Identification of contentious and non-contentious issues (ss.23 (a & b))

In order to identify both contentious and non-contentious issues under section 23 (a) and (b), the CoE clustered the various parts of the draft constitutions along themes. It isolated five clusters and assigned at least two members to examine each of them (see Table 1 of Annex 2).

Using this method, the CoE:
(a) Studied the existing draft constitutions as required under s.29, that is,
   (i) The CKRC Draft of September 2002 (Ghai Draft)
   (ii) The Bomas Draft of March 2004
(b) Consulted the summary of views collected and collated by the former CKRC;
(c) Examined documents reflecting political agreement on critical constitutional questions;
(d) Considered analytical and academic studies undertaken by CKRC and the National Constitutional Conference;
(e) Considered reports related to Agenda Four including:
   - The Report of the Commission to Investigate Post-Election Violence, 2008 (The Waki Report);
   - The Report of the Task Force on Judicial Reforms, 2009; and
(f) Studied memoranda it received on what issues the public considered to be contentious. In this respect it is important to note that:
- The CoE made its first call for submissions on what Kenyans considered to be contentious on 30 March 2009, that is, 28 days after members of the CoE were sworn in; and
- The CoE repeated its call for submissions on what the public considered contentious in mid-April 2009 to ensure that as many Kenyans as possible were aware of the opportunity to submit their views.
- At this stage of the review process, 12,133 responses were received.

The CoE then identified the three contentious areas:

(i) The System of Government i.e. the nature of Executive and Legislature;
(ii) Devolution; and
(iii) Transitional Clauses or Bringing the New Constitution into Effect

On 19 June 2009, the CoE published advertisements, inviting the public to submit memoranda on these three areas of contention.

4.4.2. Solicit and receive from the public written memoranda and presentations on the contentious issues (section 23(c))

Within eight months of being established, the CoE had collected a total of 26,451 memoranda and presentations from members of the public as compared to some 35,000 written memoranda collected by the CKRC in five years. Of the submissions to the CoE, 5,212 were received from organized groups, 88 from political parties; 50 from the private sector; 2969 from religious organizations; and 32 from statutory bodies. Of those received from organized groups, 2073 were from civil society organisations and 107 of those were from women’s’ organizations. A further 1,917 were oral presentations from regional hearings and other various consultations. The memoranda and presentations informed the CoE’s identification of and proposals for the resolution of contentious issues.

_Provincial/Regional hearings/consultations_

The CoE devised several means to solicit written memoranda and presentations, including provincial/regional hearings and consultations. To reach all the provinces within the strict timeline imposed by the Act, the CoE constituted itself into three groups which visited different parts of the country. Between 20 and 25 July, 2009 members of the CoE visited 18 locations in the 8 provinces of Kenya, conducting public hearings that enabled members of the public across the country to submit their views. These visits were dictated by the resources available to the CoE at the time. The CoE visited:

- Rift Valley Province: Lodwar, Eldoret, Narok, Nakuru and Maralal;
• Nyanza Province: Kisumu and Kisii;
• Western Province: Kakamega;
• Central Province: Nyeri and Thika;
• Eastern Province: Kitui, Machakos, Meru and Isiolo;
• North Eastern Province: Garissa; and
• Coast Province: Mombasa, Kilifi and Wundanyi.

The hearings were publicised through print, electronic and community media throughout the Republic and were attended by 6,046 members of the public.

4.4.3. Undertake thematic consultations with caucuses, interest groups and other experts (section 23 (d))

The CoE fulfilled the function of thematic consultations in two ways. First, technical thematic consultations were held on the areas it had identified as being in contention: systems of government; devolution and transitional clauses. Two additional consultations were then held on the electoral system, affirmative action and inclusiveness. Experts and representatives of relevant sectoral institutions were invited to these consultations (See Table 1 of Annex 1).

Secondly, the CoE held sector specific consultations with the private sector, political parties, the religious sector, and civil society on the contentious issues, where these groups also had the opportunity to raise issues that concerned them. (See Table 2 of Annex 1). Representatives of all forty-seven registered political parties attended two such fora, which included a two day retreat at which presentations on systems of government were made. The sectoral consultation with religious groups was attended by 214 people, most of whom were representatives of Christian organisations, who presented their memoranda on what they considered to be contentious as well as their perspectives on the issues identified as contentious.

In addition to initiating and facilitating thematic consultations with caucuses and interest groups, the CoE participated in meetings arranged by various other institutions. A detailed description of these can be found in Annex 4. All the members of the CoE also responded to requests for further consultations by various interest groups on the constitutional review process or Agenda Four related discussions. Overall, members participated in and/or made presentations to over fifty-three such meetings including fora organised by the Minority Rights Consortium and the National Council of Churches of Kenya (NCCK) (see Annex 5).
4.4.4. Carry out or cause to be carried out studies, research and evaluations concerning the constitution and other constitutions and constitutional systems (section 23 (e))

The CoE set up a library with relevant resources on constitution-making globally, including all the constitutions in the world. It also carried out its own research with seven in-house researchers to assist it in this task. It produced reports and evaluations of the views submitted by Kenyans, which are to be archived in the National Archives.

4.4.5. Articulate the respective merits and demerits of proposed options for resolving the contentious issues (s 23 (f))

In accordance with sections 30 and 31 of the Act, the CoE held meetings with the 30 members of the Reference Group, as well as meetings with groups in civil society, the religious sector, the private sector, the 47 registered political parties, parliamentary political parties, the two Principals in the Coalition Government, as well as the other review organs, the PSC and parliamentarians. It drew on a variety of resources to assist it in proposing resolution of the contentious matters:

a) Public views: The CoE considered the views received from the public and adopted majority opinion unless it was against a constitutional principle, or was manifestly against the rights of a minority in need of protection.

b) Thematic consultations: As noted above, the CoE held various thematic consultations which sought expert opinion. It also sought expert opinion on the ways in which the principles of inclusivity and affirmative action could be implemented in the constitution because, although they were agreed upon in the three drafts, there were concerns about the way in which they were implemented in the electoral systems for Parliament and the devolved governments. These consultations included an in-house meeting with the IIEC.

c) Sectoral consultations: These consultations enabled dialogue with sectors that had concerns about particular aspects of the drafts. They consisted of meetings with, and the solicitation of views and proposals from political parties, religious organisations, the private sector and civil society.

d) Expert engagement: The CoE engaged various specialists on fiscal devolution and delimitation of electoral units.

e) Internal discussions of CoE: As provided for in section 23(4) of the Review Act, the CoE members interrogated every issue, examining the merits and demerits, and usually arrived
at decisions by consensus. However, consensus did not necessarily mean unanimity and the Act contemplated a vote where consensus is not reached. In practice, members holding a dissenting view recorded it, if they so choose. Nonetheless the CoE encouraged, preferred, and largely carried its decisions by consensus.

f) Consultations with the Reference Group: The Review Act provided for a Reference Group of “thirty representatives chosen by the interest groups identified in the Fourth schedule.” As noted in Chapter 3, the establishment of the Reference Group was delayed by Parliament’s failure to identify members of the Group. After this was done, the CoE held four meetings with members of the Reference Group (RG). The first meeting was on 11 of August 2009 at the Hilton Hotel with 46 participants. At this meeting the CoE brought the RG members up to date on the process and together they defined a working methodology.

The second meeting of the CoE and the RG was on 24 September 2009 at the Serena Hotel, where it was resolved:

1. That the Reference Group will appoint its own spokesperson.
2. That the CoE will harmonize and share with the Reference Group information received from all respondents to ensure that the Reference Group feeds into the process.
3. That for the future the Reference Group is to be kept in the know.
4. That the Reference Group underscores the importance of complying with the law in discharging its mandate.
5. That the Committee of Experts will facilitate meetings of the Reference Group when they want to meet on their own.
6. That the experts being the experts, the Committee of Experts will present to the Reference Group expert decisions on the contentious issues.
7. That the Reference Group is fully supportive of the work of the Committee of Experts and the constitutional review process.
8. That the Reference Group does not want to be perceived as being in the way of the completion of the process.

The third meeting of the CoE and the RG was a retreat in Nanyuki, from 14 – 16 October 2009 where the following resolutions were adopted:

1. The path to reforms
The CoE and the Reference Group discussed and appreciated that the path to constitutional and institutional reform in Kenya has taken exceedingly long and that there was urgent need for a new constitutional order to avert the type of Kenya we all witnessed in the last post election violence in which Kenyans killed one another. The CoE and the RG noted that over 1200 Kenyans died,
300,000 were displaced and millions worth of property destroyed. Members of the RG and CoE resolved that they would not wish this state of affairs to be repeated. The RG and the CoE observed that Kenyans were capable of making suitable choices to give effect to the provisions of sections 4 and 6 of the Review Act which refer to the objects and principles of constitution making in Kenya respectively.

(2) Methodology and timelines
The CoE and the RG appreciated the times lines in the making of the Constitution. It is appreciated that the process must somewhat come to an end to give Kenyans the long awaited Constitution. In this regard the CoE had conducted consultations to the best of its ability within the timelines, and continued to consult.

(3) Transitional clauses
The RG and the CoE appreciated the contentions on the transitional clauses of the past three drafts; and were working to ensure that the new constitution remains the basis for peaceful transition to a new order, inclusion and acknowledgement of past mistakes and the need to remedy them.

(4) Devolution
The RG and the CoE acknowledged that while Kenyans want devolution, it is important that the levels of devolution are carefully thought out so that the architecture does not become impossible to implement and or fail the very purpose for which it was intended; the RG and the CoE agreed on the need, formulation and design of devolution at three levels of government.

(5) The Kadhis’ Courts
The RG and CoE appreciated that the Kadhis’ Courts raised various concerns and these were important socio-cultural issues in our society. To this extent, the RG and CoE deliberated on the issue of the Kadhis’ Courts and there was an emerging consensus. While members of CoE and RG would continue to educate and engage with Kenyans and religious leaders, the CoE and RG wished to affirmatively state that the Kadhis’ Courts issue will no longer be a reason to object to the process of constitution making or to defeat the draft constitution.

(6) Systems of government
The CoE and the RG acknowledged that the issue of which system of government to adopt is contentious to Kenyans generally. Both acknowledged
the need to carefully design a system of government that would resonate with the views and needs of Kenya.

(7) Way forward
The RG and the CoE re-affirmed their commitment to give Kenyans a new Constitution. Members of the RG declared their confidence in the CoE under the chairmanship of Mr. Nzamba Kitonga. The RG and the CoE urged all members of the public, the political class, civil society, and the religious sector to support the completion of this process to give Kenyans and Kenya a new constitution.

After the publication of the Harmonised Draft Constitution and the Preliminary Report, the CoE held a series of consultations with various interest groups including the other organs of reform under Agenda Four, such as the IIEC, the IIBRC, and the Truth Justice and Reconciliation Commission (TJRC), so that these bodies could inform the draft where it concerned matters that within their mandates.

4.4.6. Make recommendations to PSC on the resolution of contentious issues for the greater good of the people of Kenya (section 23 (g))

On publication of the Harmonised Draft Constitution and the Preliminary Report, the CoE met with the PSC to share the contents of the draft with them as required by law.

4.4.7. Prepare a Harmonized Draft Constitution for presentation to the National Assembly (section 23 (h))

After reviewing the Harmonized Draft Constitution and the changes proposed to it by the PSC the CoE presented a Proposed Constitution to the National Assembly on 28 February 2010.

The process following this is described in other parts of this Report.

4.5. CoE’s Operational Plan, 2009-2010

The CoE’s Operational Plan, 2009-2010 (“the Plan”) was developed in April, 2009, a month after the CoE members assumed office. It supplemented the framework for its work set out in the Review Act and was necessary to define the modus operandi of the CoE and help the Committee needed to achieve its objectives and deliver on its mandate according to the timetable in the Act.
First, the Plan identified overall key result areas that would ensure that the technical writing of the draft was not defeated by competing interests and that the review process would be realised successfully. Secondly, the Plan identified the four programmes of the CoE secretariat based on the administrative framework established by the Review Act. These were: Finance and Administration; Drafting, Research, and Technical Support; Civic Education, Mobilisation and Outreach; and Public Information and Media. Thirdly, the Plan outlined the activities of these programmes and a budget for programme activities.

4.5.1. The Key Result Areas:

The CoE identified key result areas that would play a crucial role in the finalization of the review process. The CoE thought that if the process of making a new Constitution did not meet the broad specifications of the key result areas it would not inspire public confidence and the Constitution would be difficult to sell to the public.

The key result areas were:

(a) **Financial independence and a fully capacitated secretariat:** The CoE recognised that to complete its work without insurmountable difficulties, its secretariat had to be fully capacitated with the necessary resources to support its core function. An important support arm of the secretariat included a fully resourced research and technical department.

(b) **Political consensus and agreement:** The CoE realised that unless there was tolerance and political will in support of the constitutional review process, realization of the new Constitution would be difficult. It was important to remind Kenyans that political disagreements had the potential of obstructing the adoption of the long-awaited constitution.

(c) **Religious and cultural consensus:** As noted previously, religious and cultural intolerance could derail the review process and these need to be addressed. There was need for dialogue with and between religious and cultural actors, organisations and institutions to address concerns that they had.

(d) **Effective public participation in the review process:** For a long time, the people of Kenya had been promised a new constitution without success. Public apathy and scepticism had set in. To that extent the CoE needed to inspire the general public through public participation and build confidence in the constitution making process. As stated already, it was also important for the public to understand the different roles of the CoE and CKRC that preceded it.

(e) **A draft constitution by the due date:** The mandate of the CoE was to deliver a *Harmonized Draft Constitution* within twelve months, which it did. It was important for the public to
understand that twelve months provided enough time to harmonize the already existing drafts whilst synthesising the views received from the public and those that had been given to the CKRC and producing proposals for resolving contentious issues. Although the CoE emphasized this, there was still public clamour to extend specific timelines, e.g., the 30 days in which the public had to give their views after publication of the Harmonized Draft Constitution. The major problem seemed to be that the Review Act was not sufficiently publicized when it was being made into law.

4.5.2. The Programmes of the CoE

To be able to achieve its mandate, engage in relevant activities and present Kenyans with a new constitution, the CoE established the four programmes under the following departments:

(a) **Finance and Administration**: This Department would oversee the proper use of resources disbursed to the CoE as well as manage the finances of the CoE.

(b) **Drafting, Research & Technical support**: This Department provided technical support for drafting, research and any other matter needed by the Experts. The Department undertook the crucial task of collating and collecting the views of Kenyans, documented them, and produced relevant reports as well as maintaining a rich library to inform the process.

(c) **Civic Education, Mobilization & Outreach**: This Department managed the administrative and logistical programme of civic education on constitutional review. It prepared civic education materials and also organized all outreach activities of the CoE. (See in particular Chapter 10.)

(d) **Public Information & Media**: This Department was responsible for the media strategy of the CoE. It dealt with the dispatch of information from the CoE to the public, and liaised with the various media houses to acquaint them with the work of the CoE and progress that was being made in the process of constitutional review.

4.5.3. High Level Meetings

It was important for the CoE to engage several key national and international decision makers that would be instrumental to the outcome of the process, to ensure that they supported it strongly. Several such meetings took place at the beginning of the process and throughout its course.
(a) Meetings with the Ministry of Justice, National Cohesion & Constitutional Affairs: On the day its members were sworn into office, the CoE embarked on a series of meetings with the line ministry, the Ministry of Justice, National Cohesion and Constitutional Affairs (MoJNCCA). The CoE met with the Minister for MoJNCCA, and several times subsequently with the Permanent Secretary of MoJNCCA, to ensure a speedy establishment of the secretariat, finalization of its operational budget, and the acquisition of the resources necessary to begin its work.

(b) Meetings with PSC: As noted earlier the CoE held four meetings with the PSC to appraise the PSC of CoE’s understanding of the Review Act to share with the PSC progress made and materials prepared on constitutional review, as well as the implications of the amendments proposed by the PSC to the RHDC. The attention of the PSC was drawn to the challenges posed by the law and certain administrative obstacles such as the absence of a fund ready to be administered by the CoE, contrary to the provisions of the law. The meetings also discussed challenges and opportunities in the review process and the role played by the PSC during this process.

(c) Meeting with the two Principals: The CoE met with the two principals, His Excellency President Mwai Kibaki and the Right Honourable Prime Minister Raila Odinga to discuss the review process. It was during this meeting that the principals expressed their support for the CoE and the finalization of the process. This meeting was very important because in it the principals stated their support for the making of the new constitution and this support continued throughout the process.

(d) Meetings with Development Partners: Because the Review Act gave the CoE independence in terms of its work and fundraising, the CoE met from time to time with development partners who supported the process generously (USD 5.4 million). Without this support from development partners the CoE would not have met its financial needs or secured the financial independence that enabled the secretariat to support to the constitutional review process properly.
CHAPTER FIVE – AGREED ISSUES IN THE HARMONISED DRAFT CONSTITUTION

5.1. Introduction

As Chapter 4 explains, the two principal tasks of CoE were to:

   a) Identify contentious issues and propose solutions to them; and
   b) Harmonize the non contentious matters.

Sections 23 (a) and (b), 29 and 30 of the Review Act provide that in dealing with these issues, the main working documents of the CoE would be the CKRC Draft, the Bomas Draft and the PNC. These drafts were in agreement on many issues. However, harmonization involved editorial work to ensure consistency across the draft constitution and to deal with differences in drafting styles. In addition, the CoE ensured that all provisions in the final draft fulfilled the principles in section 4 of the Act.

5.2. Technical and other similar changes

Some issues in the drafts were agreed but crafted differently with minor variations in substance. Others needed attention as a result of changes elsewhere in the constitution. This section explains how the CoE dealt with these issues.

5.2.1. Citizenship

The CKRC Draft, the Bomas Draft and the PNC differed on the right to citizenship. One approach was automatic citizenship to persons married to Kenyan citizens for more than seven years, children adopted by Kenyans, and people who would have been entitled to citizenship if the constitution had been in effect in the past. The other approach was for a right to apply for citizenship, which could be granted or refused. The Harmonized Draft adopted the first approach. It accorded with the views of the people as submitted to the CKRC, was in line with the requirement in the Review Act that the new constitution guarantees human rights and, in the case of the citizenship of adopted children, is compliant with international law.
5.2.2. Commissions

The CKRC Report noted the importance of constitutional commissions as bodies that were separate from government and capable of applying and protecting the constitution. It recommended twelve commissions. In the Bomas Draft and the PNC the number of independent commissions was increased to 15.

Concerns had been expressed about the number of constitutional commissions; the fact that some functions overlapped; and that some commissions were assigned tasks that were more appropriately carried out by government. These concerns were valid.

Accordingly the Harmonized Draft Constitution included the following eleven permanent independent constitutional commissions:

(a) The Human Rights and Gender Commission;
(b) The National Land Commission;
(c) The Judicial Service Commission;
(d) The Public Service Commission;
(e) The Ethics and Anti-Corruption Commission;
(f) The Independent Electoral and Boundaries Commission;
(g) The Commission on Revenue Allocation;
(h) The Teachers’ Service Commission;
(i) The Police Service Commission; and
(j) The Salaries and Remuneration Commission.

In addition, the Commission on the Implementation of the Constitution would exist for a limited period of time to oversee the implementation of the Constitution. The Parliamentary Service Commission would remain as a commission separate from government but part of Parliament. The Human Rights Commission would incorporate the Gender Commission proposed in two of the earlier drafts. It would have a very wide mandate to investigate matters concerning all aspects of human rights. The Public Service Commission would absorb aspects of the work that had been envisaged for a Health Service Commission by the other drafts.

5.2.3. Prisoners’ rights

Earlier drafts contained lengthy provisions on prisoners’ rights. The Harmonized Draft Constitution captured only the principle on which these rights are based: human treatment and international standards.
5.2.4. Non-derogation clause

All the previous drafts placed limitations on human rights to underscore the fact that rights must be exercised in a way that does not lead to the infringement of other rights or unduly hamper government functions. In accordance with recognised and acceptable international norms, the Harmonized Draft Constitution allowed limitations in carefully defined circumstances. However, the CoE took the view that some rights should not be limited under any circumstances. There are, for instance, no circumstances in which torture is justified. For this reason the CoE included in the Harmonized Draft Constitution a non-derogation clause on certain rights.

5.2.5. Electoral system

Each of the past draft constitutions suggested a slightly different system for the election of members of the National Assembly. All the drafts required measures to be taken to ensure the fair representation of women and men, persons with disabilities, and minorities. As far as the electoral system itself was concerned, the CKRC Draft proposed a “mixed member proportional system” in which 210 members would be elected from constituencies and another 90 drawn from lists provided by the parties so that, as far as possible, the number of seats each party had in the Assembly would be proportionate to the number of votes it received.

The Bomas Draft did not have a proportional component. It provided for the election of MPs from constituencies (the number is to be determined by law), the election of a woman from every district, and 14 representatives of marginalized groups elected through electoral colleges. Like the CKRC Draft, the PNC proposed a mixed member proportional system although with variations in the detail. In addition to MPs elected from constituencies, it provided for women elected from “special constituencies”. An additional number of members were to be drawn from lists in proportion to the votes received by parties. These lists were to be used to secure the fair representation of women and minority groups.

Kenya has had a long history of struggles for fair representation of women, persons with disabilities and youth in national decision-making institutions. Indeed, Kenya is the only member state of the East African Community that has less than 30% percent representation of women in its Parliament. In fact, Rwanda, a member state of the East African Community has the highest female to male ratio of Parliamentarians in the world. While the principles of affirmative action and inclusion were agreed in all three drafts and were one of the principles advanced by the people in the views submitted to the CKRC, the means by which they could be secured in respect of elective office remained elusive. Exclusion on the basis of gender, disability and age are further reinforced by the fact that people who face
discrimination on these basis, like all other Kenyans may also face exclusion on the basis of their ethnic and regional identities – i.e. multiple forms of exclusion intersect to further marginalise people who may already belong to marginalised groups.

Although political parties have always relied on votes from women and other disadvantaged people, they are notorious for reneging on promises to represent historically excluded and marginalised peoples and are generally unwilling to support them as candidates. Women, persons with disabilities, youth and other marginalised peoples were therefore unwilling to entrust the matter of their access to elective office purely in the hands of political parties. Further it was felt that if political parties were to be entitled to public funds, they must also be required to ensure the representation of all Kenyan peoples (as all citizens pay taxes) at all levels.

But the design of an inclusive system of representation had to take another factor into account as well. Discrimination occurs at multiple levels. For example, women in marginalized groups experience ethnic discrimination from other women, whilst women with disabilities and young women experience sexism in addition to discrimination on the basis of their disability. People from smaller ethnic communities are discriminated against by those from larger communities. And so on. Thus, an acceptable system of representation needed to ensure that these intersecting forms of exclusion were addressed – so that for example not all women representatives entering Parliament through an affirmative measure are from one region or that all disabled MPs are men. These are some of the reasons why the mixed member proportional representation approach of the CKRC was rejected at Bomas.

After consultations on this matter (described above), the CoE adopted the Bomas approach in the Harmonized Draft Constitution but divided the 14 representatives of marginalized groups into two categories: seven must be persons with disabilities and seven must be representatives of other marginalized groups, with respect to representation in the National Assembly. At the level of the county assemblies and Senate, party lists and other proportional representation mechanisms and electoral colleges would be employed to achieve the affirmative action measures. But, nothing would bar anyone from competing on a political party ticket or as independent candidates. The emphasis was on flexibility to enable equitable access to electoral office for all Kenyans.

As discussed below, the proposal in the Harmonized Draft did not survive to the final constitution (see Chapter 8).

5.2.6. The Constitutional Court
In the Harmonised Draft, the CoE recommended that a Constitutional Court be established for the following reasons:

- A court presided over by judges that have specialised in, or have experience in constitutional law and human rights, who would concentrate on matters or interpretation and implementation of the constitution would promote constitutionalism and the proper implementation of the Constitution.
- It would permit the speedy determination of disputes arising out of presidential election.
- It would ensure effective resolution of disputes between the national and devolved governments.
- It would permit speedy and effective handling of disputes/appeals over elective and administrative boundaries.

The recommendation for a specialised court was made against the background of the eroded confidence in the independency and integrity of the judiciary; the prevailing baggage of judicial practice that denied access to justice; and the introduction in the draft, of new provisions, including an expanded Bill of Rights whose interpretation necessitated a specialised court.

As we discuss in Chapter 8, the proposed Constitutional Court was deleted from the draft by the PSC.

5.3. Smaller editorial decisions

As noted above, large portions of the Bomas Draft and the PNC were identical. Nevertheless, as part of its task as an expert body, the CoE considered all these provisions and, where necessary, revised them. This was necessary because both the Bomas Drafts and the PNC had been completed under considerable pressure of time. As a result, there were instances where language was unclear and where provisions were repeated or even contradicted one another.

5.4. Issues where there was agreement in principle between the texts but about which sectoral concerns arose: Kadhis’ Courts and Land

Two issues on which there was agreement in principle and which were consistent with the views of the people as expressed to the CKRC became a particular source of sectoral concern. These were the Kadhis’ Courts and Land.

5.4.1. Kadhis’ Courts

(a) Reasons why the Kadhis’ Courts were not identified as contentious
As already pointed out, the Committee’s functions, roadmap and methodology were
guided by the Review Act. The CoE arrived at the decision that Kadhis’ Courts were not
contentious, based on the directions laid down by the Review Act, in particular:

- **Views of Kenyans collected and collated by the CKRC:** The Committee’s examination of these
  views revealed that Kenyans had indeed sought to have the Kadhis’ Courts provided for
  in Kenya’s new constitutional dispensation.\(^{14}\) There was no indication of the contrary on
  this particular issue in the Commission’s final Report.

- **Proceedings at the National Constitutional Conference:** As required by the Review Act, the CoE
  went through the records of the proceedings of the National Constitutional Conference
  at Bomas. The delegates to the National Constitutional Conference voted in favour of the
  retention of the provisions pertinent to the Kadhis’ Courts.

- **Provisions of the past Draft Constitutions:** The past draft constitutions all provided for Kadhis’
  Courts, though with certain differences. The **CKRC Draft** provided for Kadhis’ Courts in
  Chapter 9 (see sections 185 (3) (a), 192 (2), 199, 200, 201, 202, 203 (3), 204 (b) and (g)).
  Article 11 of the Eighth schedule, which addressed transitional and consequential
  provisions, also addressed the Kadhis’ Courts. The **Bomas Draft** also provided for Kadhis’
  Courts in Chapter Thirteen (see sections 184 (3) (a), 197 (2), 198, 199, 200 (e)) and clause
  13 of the Seventh Schedule. Finally the **PNC** provided for Kadhis’ Courts, though
differently to the other drafts. It included Kadhis’ Courts in section 195, referred to as
Religious Courts.

- **Views from the Kenyan public on what they considered contentious:** As earlier pointed out, the
  Committee received over 12,000 memoranda from Kenyans on what they considered
  contentious. These memoranda did not show Kadhis’ Courts as contentious. Only a
  minority mentioned Kadhis’ courts as a contentious issue. Others supported their
  retention as it was in the former **Constitution**.

Thus, the CoE could not identify Kadhis’ Courts as contentious. However, it noted its
importance as a national socio-cultural issue that needed resolution amongst Kenyans.

\(\text{(b) The CoE’s position on the issue} \)

Beyond identifying contentious and non-contentious issues, within the framework of the
current review process, the CoE was also mandated to provide recommendations on diverse
issues concerning the review process. On the issue of Kadhis’ Courts, the Committee
proposed that the **status quo** be maintained, i.e., Kadhis’ Courts be entrenched in Kenya’s new
constitution in exactly the same format as in the independence Constitution.

Before arriving at the position mentioned above, the CoE examined the following options:

(i) Remove the Kadhis’ Courts from the Constitution

Because, as outlined above, Kadhis’ courts were not a contentious issue, this was not a viable option. Moreover, the views received by the CoE that were opposed to the courts were from a minority. Moreover, the Kadhis’ Courts were not prejudicial to Kenya’s judicial and legal system or to individuals.

(ii) Retain but enhance the structure of the courts as per the Bomas Draft

This option was also untenable because upon evaluation, the CoE was of the opinion that it would present an almost parallel judicial system for Muslims and other Kenyans who professed other faiths. Views presented to the Committee from Kenyans who spoke to the issue also suggested that their discomfort was not with the entrenchment, but the proposed enhancement of the courts.

(iii) Retain Kadhis’ Courts as religious courts as couched in the PNC

This proposal also could not stand because the PNC was rejected during the Referendum in November 2005. Moreover an examination of views from Kenyans presented to the CKRC did not reveal any call for religious courts.

(iv) Remove Kadhis’ Courts from the Constitution but propose to have them provided for in legislation

Provision of Kadhis’ Courts in legislation without entrenchment in the constitution was also considered. The CoE rejected this idea for various reasons. First, the entrenchment of Kadhis’ Courts in Kenya’s Constitution has a history (outlined below) that informed the totality of the makeup of Kenya’s territory since independence. Secondly, Muslims in Kenya comprise a minority reflected in Parliament. Therefore ordinary legislation would be vulnerable to repeal.

(v) Maintain the status quo

The Committee considered this option and decided to follow it for the following main reasons:
• Kadhis’ Courts were in the former Constitution

Kadhis’ Courts were provided for in Kenya’s former Constitution and their existence has neither threatened nor in any way negatively affected persons who profess other religions. Kadhis’ Courts handle Muslim personal law in situations where all the parties are Muslims.

• The 10 mile Coastal Strip

Until independence, the 10 mile Coastal Strip which represents the current Coast Province was a protectorate under the British via an agreement with the Sultan of Zanzibar. In determining that although the Kadhis’ Courts was a non-contentious issue within the purview of the Review Act, but was an issue of concern, the Committee took into account, in addition to the factors stipulated above, the special status of the Courts as part of the historical agreements underlying the constitutional settlement of Kenya. These agreements were incorporated into the Constitution at independence and could not be abrogated retrospectively by removing the Kadhis’ Courts from the Harmonized Draft Constitution.

It is necessary to lay out the agreements in question in summary. On 14\textsuperscript{th} June 1890 an agreement was made on behalf of Her Majesty Queen Victoria with His Highness Sultan Seyyid Ali bin Said that His Highness’ dominions should be placed under her Majesty’s protection. By a further agreement made on behalf of Her Majesty Queen Victoria on 14\textsuperscript{th} December 1895 with His Highness Sultan Seyyid Hamed bin Thwain, it was agreed that His Highness’ possessions on the mainland of Africa and the adjacent islands, exclusive of Zanzibar and Pemba should be administered by officers appointed directly by Her Majesty’s Government and those territories would be administered as part of Kenya under the name of the Kenya Protectorate.

An Order in Council of 1897 allowed application of Islamic law in the Coastal Strip, but Article 55 of the 1897 Order in Council restricted Islamic law to civil matters of marriage, divorce, and succession in the Colony of Kenya. This effectively provided the foundation for the jurisdiction of the Kadhis’ Courts in settling disputes among Muslims in matters of marriage, divorce, and succession. At the same time, the Order in Council of 1897 provided for the application of common law in Kenya.

In 1920, the mainland territory of Kenya became a colony and its inhabitants became British subjects. By contrast, the Coastal Strip, still on lease from the Sultan of Zanzibar, was renamed the Protectorate of Kenya. This means that the Coastal Strip was a separate legal entity with protectorate status and its residents were considered “British protected persons” rather than “British subjects”.

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This status continued until independence. At the start of the Lancaster House constitutional talks in 1961, the status and fate of the Coastal Strip came up for determination. The difference in status between mainland Kenya as a British colony, and the Coastal Strip as a British protectorate was emphasized as the British Government organized separate talks for the delegates from the Kenya colony, and from the protectorate of the Coast.

Sir James Robertson, formerly Governor-General of Nigeria, was mandated to recommend to the British Government and to the Sultan of Zanzibar what changes should be made in the 1895 agreement that had been signed concerning the Coastal Strip. He recommended that, despite the different status of the Coast, it had been governed for a long time as part of Kenya and should therefore be integrated into mainland Kenya. It was agreed that the Sultan would receive suitable compensation and the following guarantees were to be enshrined in the Constitution:

a) A declaration of human rights including freedom of worship;

b) Safeguards for the retention of Kadhis’ Court; and,

c) Arrangement that future appointment of administrative officers from predominantly Muslim areas be Muslims.

Consequently, on 8th October 1963, the Government of the United Kingdom, His Highness the Sultan of Zanzibar, the Government of Kenya and the Government of Zanzibar, signed an agreement whereby the Sultan of Zanzibar relinquished his claim of sovereignty over the Coast of Kenya. As part of the independence agreement, Prime Minister Jomo Kenyatta and the Prime Minister of Zanzibar, Mr Shamte, on behalf of the Sultan of Zanzibar, exchanged letters stipulating the terms of integrating the Coastal Strip to Kenya. Then Prime Minister Mzee Kenyatta made written undertakings in the letters of exchange that contained the agreement.

With respect to the Kadhis’ Courts, the undertaking was that:

The jurisdiction of the Chief Kadhi and of all the other Kadhis will at all times be preserved and will extend to the determination of questions of Muslim law relating to personal status (for example marriage, divorce and inheritance) in proceedings in which all parties profess the Muslim religion.

On the basis of this and other guarantees, the Sultan agreed to waive all his authority over the Coastal Strip. By virtue of the independence agreement between the British Government, the Kenyan Government and the Sultan of Zanzibar, the Kadhis’ Courts were entrenched in the Independence Constitution.
It is this constitutional settlement that would be abrogated by removing the Kadhis’ Courts from the Kenyan Constitution. The obvious danger would be that the Coast, along with a sea belt of an exclusive economic zone of 200 miles enjoyed by the country in terms of resources and access to the sea, including underwater cables supplying internet communication, would separate from Kenya as the terms on which the Coast was integrated would have been breached. In other words, provision for the existence of the Kadhis’ Courts in the Constitution is part of the constitutional and territorial foundation of Kenya as well as the basis for the protection of the diversity of Muslims and their belonging within Kenya. All this had to be preserved for the peace, stability, integrity, and economic good of the country.

- Established expectations

The doctrine of legitimate expectation in law entitles individuals to continue to enjoy existing forms of protection. The protection accorded to Muslims by the Kadhis’ Courts under the Independence Constitution lay in providing a mechanism for settling disputes that are uniquely resolved on the basis of their personal law and faith.

- Underlying principles of the civil courts in the judicial system

Leaving aside the Kadhis’ Courts, the existing judicial system operates on the basis of the Judeo-Christian philosophy implicit in the laws introduced when Kenya was a colony.

- Objects and Principles of the Review Process

In deciding that the Kadhis’ Courts should remain in the Constitution, the CoE was also guided the sections 4 and 6 of the Review Act. Of particular importance among the objects and purposes of the review process set out in section 4 were paragraphs (a), (e), (h) and (k) which required the new constitutional to guarantee peace, respect diversity and strengthen national unity and, of the principles in section 6 of the Act, paragraphs (c), (d) and (e) which emphasise the need to accommodate diversity, respect human rights, and reflect the wishes of the people.

The nature and jurisdiction of the Kadhis’ Courts as established under the past Constitution met these requirements. Section 179 (1) required the appointment of a Chief Kadhi and no fewer than three Kadhis. The Judicial Service Commission would appoint a person to hold or act in the office of Kadhi who professed the Muslim religion and possessed knowledge of Muslim law applicable to any sector or sects of Muslims. It is true that section 179 (4) provided that the Chief Kadhi and the other Kadhis shall each preside over a Kadhis’ Courts
having jurisdiction within the former Protectorate and that no part of the former Protectorate shall be outside the jurisdiction of some court of a Kadhi. However, over time, the Muslim population has grown and the jurisdiction or location of the Kadhis’ Courts could not be confined to the original Coastal Strip.

Guided by the objects and purposes provided in the Review Act, particularly those pertaining to peace, the promotion of human rights and the national integrity of Kenya, as well as the obligation that national interest prevail over sectoral interest, CoE recommended the continued entrenchment of the Kadhis’ Courts in the _Harmonised Draft Constitution_ as established in the former _Constitution of Kenya_.

### 5.4.2. Land

The issue of access to and control over land has historically been one of concern in Kenya and a source of tension, especially given that the country is a former settler colony. Historical injustices in relation to land emanating from colonial occupation and how it was addressed in the post-colonial period, coupled with corruption in relation to illegal acquisition of land, has resulted in contesting claims and inequitable access to and ownership of land being a source of tension underpinning all the Agenda Four concerns.

However, the CoE did not find the issue of land to be contentious within the context of constitutional review. As observed earlier, the Land chapter remained virtually the same in all three drafts and was consistent with views expressed to the CKRC by the people. The Committee took note of how the Land chapter was heavily negotiated at the National Constitutional Conference. So while some members of the public expressed concerns about land in their memoranda to the CoE, these concerns did not fall outside of what had been provided for in the Land Chapter. In addition, the Bill of Rights in the _Harmonised Draft Constitution_ reinforces the Land Chapter by protecting rights to own property.

Of further significance was that the chapter on land was consistent with the national land policy which seeks to address longstanding grievances on the land question in the country.
CHAPTER SIX – AREAS OF CONTENTION: THE SYSTEM OF GOVERNMENT, DEVOLUTION, AND TRANSITION

6.0 Introduction

The approach taken by the CoE to determine areas of contention generally is outlined in Chapter 4. It should be recalled that section 23(b) of the Review Act mandated the CoE to “identify the issues which are contentious or not agreed upon in the draft constitutions,” while section 23(f) required the CoE to “articulate the merits and demerits of proposed options for resolving the contentious issues.” In doing so, as explained in Chapter 4, the CoE studied the draft constitutions, other materials such as the Kiplagat Report, the “Naivasha Accord”, the Waki and Kriegler Reports, and the memoranda received from the public on what they considered to be contentious.

On this basis the CoE identified the following three areas of contention in the constitution making process:

a) System of Government, i.e., the nature of the Executive and Legislature;
   a) Devolution; and
   b) Transitional clauses, i.e., bringing the new Constitution into effect.

These three issues alone covered four full chapters (those on the Executive, the Legislature, Devolution, and Transition), but none of them was contentious in its entirety. For example, accountability of the executive and legislature and the need for devolution were never in contention. The differences were over the form of government and the levels of devolution.

Nonetheless, the chapters on the Executive, Legislature, Devolution, and Transition, differed markedly in content in the three drafts. These differences were mirrored in the views of the public. Virtually all memoranda received by the CoE identified one or all of these issues as being contentious. In devising solutions, the CoE was conscious of the interrelationships between the issues and the linkages to the final outcome of the constitutional review process. This is the context of the proposals to resolve the contentious issues as is elaborated in this chapter.

6.1 System of Government: The Executive

The constitutional systems of government of democracies can be placed into three major groups: parliamentary, presidential, and hybrid. The key differences among the three
systems are the extent to which powers of government are separated functionally between branches of government. In a presidential system, political and administrative powers are divided between the executive, legislative and judicial branches. In a parliamentary system, the executive is part of the legislature and depends on the support of legislature to remain in power. In a hybrid system, executive power is shared between a separately elected president and prime minister who depends on the support of the legislature. The merits and demerits of the various under the above major groups were considered to guide the choice that was made.

Various models of these systems were considered for the purpose of inspiring informed discussions and debate on resolving the contentious issue of the system of government to be adopted under the new Constitution of Kenya. Key elements, advantages and disadvantages, of Parliamentary systems, the Presidential system, and Hybrid systems, were outlined in general. A synthesis of these systems was provided to indicate possible ways forward on the issue of the system of government in the context of making a new Constitution for Kenya.

Considerations that emerged from Kenya’s constitutional history made the choice of system difficult:

   a) Consultations undertaken by the Committee prior to the decision of the PSC to introduce a presidential system showed that the country was polarised between choosing either a presidential or a parliamentary system of government.

   b) People were almost unanimous in demanding that a president should be directly elected and that the presidency should have limited powers.

   c) There was a strong sentiment in favour of a Prime Minister, in addition to an elected President, the latter being a Member of Parliament with majority support in Parliament.

   d) There was less clarity on the relationship and division of powers between a President and a Prime Minister. Who should bear executive power, how much power should the President have, what system of accountability would work best?

6.1.1 Parliamentary Systems

Parliamentary systems are of Western European in origin and were imported to many Commonwealth countries and to Anglophone Africa.

Parliamentary systems were designed against a backdrop of despotism and absolutism, they are premised on limited government – i.e. controls on the power of the executive. Their main characteristic is that the executive (usually a Cabinet headed by a Prime Minister) retains the authority to govern only as long as it has the confidence of Parliament. In other
words, Parliament can vote the executive out of office. Usually the roles of head of state and head of the executive are separated in a parliamentary system (Botswana and South Africa are exceptions) and the head of state has mainly ceremonial functions. Members of cabinet may be drawn from within Parliament (as in the UK, Canada, India for instance) or from outside Parliament or both (as in a number of European countries).

### 6.1.1 Presidential Systems

The quintessential Presidential system is associated with the United States. It was designed as an improvement on the parliamentary system in the special circumstances surrounding the aftermath of the American civil war.

In a presidential system, as exemplified by the US, the head of the executive (President) is directly elected by the people. The President acts as both head of state and head of the government assisted by a cabinet he or she selects. The appointment of the members of the Cabinet and other senior executive officers must be approved by the legislature. The power of a President is curtailed by limiting the number of terms that he or she can hold office. There is a strong separation between the legislature, the executive and the judiciary. Members of the executive may not be members of the legislature. The President may be removed from office only through a process of impeachment which requires special majorities in the legislature.

### 6.1.3 Hybrid Systems

There are many variations on systems of governments. Those that depart from the “classic” or “pure” parliamentary and presidential forms are usually generally referred to as “hybrids”. The most important hybrid model is the French one, followed to some extent in many francophone African countries. In it, power is shared between a President and a Prime Minister.

### 6.1.4 Synthesis

All constitutional systems carry inherent strengths, advantages, disadvantages, and weaknesses. Ultimately the choice depends on a deliberate judgment on what is suitable for unity, peace and political stability, social and economic progress in the country, and its overall development and modernisation.

It was the view of the CoE at this stage of the review process that neither the parliamentary system in its Westminster form nor a presidential system in its purest form would provide an
ideal framework of a system of government for now or for the foreseeable future. In making recommendations, the CoE took particular account of the strong view that the system chosen had to provide a system of accountable and responsive government in which executive power was exercised within the bounds of the Constitution.

6.1.5. Recommendations

Against the above background, the Harmonized Draft Constitution proposed:

a) A directly elected State President as Head of State to exercise state-related functions.

b) A Prime Minister drawn from the party commanding majority support in Parliament, as Head of Government to develop and execute government policy. The cabinet would be drawn from both within and outside Parliament.

c) Checks and balances on both the President and the Cabinet. The President would in the majority of cases act on advice or recommendation, and be subject to impeachment. The Cabinet, including the Prime Minister, would be subject to censure and to dismissal through a vote of no confidence.

As is described in Chapter 8, these proposals were revised subsequent to the PSC choice of a presidential form of government.

6.2. System of Government: The Legislature

The structure and composition of the national legislature were areas of contention since Bomas. While the original CKRC and Bomas drafts sought to establish a Parliament with two houses, the Wako Draft sought to establish a unicameral Parliament. But the provision for a second house in the CKRC and Bomas drafts was consistent with the views of the people as represented to CKRC.15

The role of a second house varies depending on the particular needs of the country. The functions it may perform include:

- Representation of special interests or groups
- Representation of sub-national governments
- Review of legislation or decisions taken by the other House
- A check on the powers of the Executive

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15 See, The Final Report of the Constitution of Kenya Review Commission (10th February 2005) at page 191: “The people told the Commission…that there is need for a second chamber, although views differed on its role and composition…”
The CoE proposed the establishment of a second chamber to fulfil important and specific constitutional roles that could not be satisfied by national representation in the National Assembly alone. As proposed in the Harmonised Draft, it was to provide special representation for both special groups in Kenya and devolved units of government, to review acts of the other house, and to check the executive.

The Harmonized Draft Constitution provided for a Senate mainly for the protection of the system of devolved government. Senate was to consist of representatives of county governments elected by counties as electoral colleges who would:

(i) Participate in the passage of national legislation.
(ii) Deliberate on issue pertaining to the division of revenue between the national and devolved governments.
(iii) Oversee the interests of a devolved government under suspension by the national government.

6.2.1. Recommendations

In light of the analysis above, the CoE made the following recommendations in the Harmonized Draft Constitution:

a) There be established in the new Constitution a second house to be known as the Senate;

b) The Senate will be a house of representation for devolved government, marginalized groups, minorities, women, youth, and persons with disabilities; and,

c) Members of the Senate shall be elected on the basis of an electoral college at county level as well as regional representation.

The Senate was subsequently included in the Proposed Constitution as shown in Chapter 8 this Report and became a prominent feature of the Legislature in the new Constitution of Kenya.

6.3. Devolution of Power

6.3.1. The objects of review and the mandate of the Committee

With respect to the mandate of the CoE regarding devolution, the objectives of the Review Act pointed out the need:

(i) to promote the peoples’ participation in the governance of the country through democratic, free and fair elections and the devolution and exercise of power;
(ii) to ensure the provision of basic needs of all Kenyans through the establishment of an equitable framework for economic growth and equitable access to national resources; and

(iii) to respect diversities, inclusive of ethnic and regional diversity and community rights including the right of communities to organize and participate in cultural activities and the expression of their identities.

(iv) to ensure that the national interest prevails over regional or sectoral interests.

The issues identified as contentious were:

(a) Whether there should be two or more levels of government.
(b) What the powers of each level of government should be.
(c) How much power to supervise devolved governments and ensure equity across the country should be vested in the national government.

6.3.2. What system do the people want?

The people’s quest for democratic governance under a system in which powers were distributed among organs of government at the centre and other levels of government has been consistent. The historical context of this demand was the unilateral abolition of the system of devolved government provided by the independence Constitution, followed by the concentration of powers in the executive in post-independence governments. In debates that took place during the review process, some people recalled the semi-federal system of government with nostalgia. They contrasted it to the concentrated powers of post-independence governments controlled by the dominant communities. For others, federalism emphasized differences and hindered national cohesion.

The demand for devolved government was addressed by the CKRC which translated the views of the people into Chapter Ten of the CKRC Draft constitution. It provided for a devolved system with a national government and four other levels of government: the region, district, location and village.

The people’s delegates at Bomas debated the CKRC Draft. Their consensus was captured in Chapter Fourteen of the Bomas Draft which provided for governments at the national and three other levels: (a) regional; (b) district; and (c) locational.

A variety of proposals emerged from the post-Bomas initiatives aimed at finding fresh consensus after the review process failed. The Wako Draft was the ultimate of these initiatives. Chapter Fourteen of that draft provided for two levels of government, the national and district. The question of how many levels of government should be adopted remained in contention after the rejection of the Wako Draft in the 2005 Referendum.
6.3.3. Resolving the Contentious issues - the levels of government

On studying the materials, reports and drafts mandated by the Review Act and considering proposals from the thematic consultations as well as views from the public, the CoE found that the preponderance of views was for either two or three levels of government.

A substantial minority supporting the two level system argued for large geographical units of devolved governments comparable to the regions or provinces existing at independence. However, most of those supporting two levels proposed a smaller unit based on districts, counties or local council and constituencies. The search was for a unit that would be viable demographically and have adequate resources for effective governance without endangering service delivery.

The proponents of a three level system of devolution proposed that the lowest level of government, with the smallest units, should be the basic level of devolution. A middle tier of regional government would supplement to contribute to building national unity and to provide a basis for representation of local interests at the national level.

In making a proposal for three levels of governments, in addition to the objectives of the review and the guiding principles, the CoE took account of:
(a) the functions that a system of devolved government is intended to serve;
(b) the history of local government; and
(c) the cost of administration.

6.3.3.1 The Functions

Devolution serves both political and administrative functions. The political function is self-governance through democratic and accountable institutions, capable of providing checks on the exercise of power at the national level. This implies a division of powers and resources that give the devolved governments real capacity to govern. The administrative function promotes development, the delivery of services in a manner that responds to local diversity and equity in resource allocation.

It followed that determining levels of government, delineating the units and assigning functions should provide for viable political entities and effective administration at all levels. Relevant considerations were:
(a) geographical features of areas in relation to the services to be delivered;
(b) means of communication or accessibility for effective governance;
(c) density of population;
(d) resources, including human and physical infrastructure;
(e) social feasibility in terms of accommodating into the administrative unit;
(f) the historical and cultural ties of communities;
(g) minority interests; and
(h) the views of the people.

6.3.3.2 The Cost of Administration

Views differed on the cost of devolved government but it was generally accepted that more levels of government would increase the cost of government. However, the CoE believed that, although cost should not override democratic participation and better service delivery, because the cost would be borne by the people of Kenya it was a relevant consideration.

6.3.4. Proposals for the Harmonized Draft Constitution

6.3.4.1 Levels and Powers of Governments

The Harmonized Draft Constitution adopted three levels of government: national, regional and county.

The National Government

As described above, the National Government was to consist of the three organs of government, the Legislature, Executive consisting of a President and a Prime Minister and Cabinet, and Judiciary as well as institutions in support of democracy (such as commissions). The Legislature and the President would be directly elected by the people of Kenya. The national government would exercise all the powers not specifically reserved for the other levels of government.

The Basic Level of Government: County Government

Under the Harmonized Draft Constitution was projected to one basic unit of government: either at the county or at the regional level. Various proposals as to the shape the basic unit should take were received and considered. These included:

a) adopting the districts as currently constituted;
b) making the constituency both a representative and an administrative unit;
c) clustering several constituencies;
d) clustering several of the current districts;
e) converting the Bomas regions into the basic levels of government; and
f) using Bomas districts as basic units.
The districts as currently constituted were not considered to be viable units of devolved governments because:

(a) There had been a great increase in districts largely as a response to demands for administrative units in which people have a sense of belonging, but this did not take proper account of the considerations underlying the establishment of devolved government.

(b) With over 250 districts translated into devolved governments, there would be a costly replication of organs and institutions of government.

(c) A High Court decision that districts created after 1992 were unlawful cast doubt on their legitimacy.

Considerations underlying cost also made constituencies unviable as units of devolved government, in addition to the fact that using constituencies as units of devolved government would have confused the roles of MPs and devolved governments. Clustering constituencies or districts would simply exacerbate the problems noted above.

The regions suggested in the Bomas draft were objected to as basic units of devolution because their size and, in some cases, population size was likely to compromise service delivery. But, districts agreed at Bomas were considered a viable starting point. They were the result of careful deliberation, which balanced the communities’ sense of belonging with the needs of service delivery. Besides, the cost of supporting 79 units of government was not comparable to that of over 250 units.

Nonetheless, the CoE recognised that the boundaries of the districts agreed at Bomas would have to be reviewed and streamlined in accordance with the criteria outlined above because decisions at Bomas involved various political compromises and there had also been considerable movements in population since then. Balancing this need with the fact that the efficiency of devolved government would be endangered by frequent changes of boundaries, the Harmonized Draft Constitution provided for an ad hoc Commission to review boundaries when the need arose.

The Harmonized Draft Constitution thus proposed that the basic level of devolution should be the 79 districts agreed at Bomas; that they be referred to as counties to avoid confusion with the exiting districts; that review of their boundaries would be by an ad hoc body when that was required; and that country government at this level would consist of a directly elected County Assembly with legislative authority, and an Executive Committee elected by the County Assembly from amongst the members of the Assembly.
The Regional Government

Among the reasons for adopting the region as a level of government, although not the basic one, in the *Harmonized Draft Constitution* were:

a) The proposed regions would be large geographical units with substantial populations. They would accommodate ethnic and cultural diversity and contribute to nation building.

b) It was important to have a regional level of government to coordinate the functions of the county governments and to plan for services that cut across county boundaries; and

c) For equitable allocation of resources and the protection of the interests of devolved governments, regional governments would form a productive linkage to the national government.

The *Draft* therefore provided for regional governments with legislative and executive functions at the regional level and a representative role at the national level. Regional assemblies and executives would be elected by county assemblies within the region. Their principal function would be to coordinate the implementation of programmes and projects that extended across two or more counties within the region. This would involve:

a) the formulation of policies for harmonious implementation of the programmes and projects, and

b) monitoring the implementation of programmes.

The representative role would be performed through the Senate, whose members would be elected from the county assemblies.

After due deliberation, the CoE decided not to adopt the *Bomas* regions for purposes of the proposed regional level of government. The decision was taken mindful of the fact that those regions were carefully deliberated by people’s delegates at the NCC. However, the CoE was looking at larger and fewer units better placed to provide checks and balances on the exercise of power at the national level. This is why the *Harmonized Draft Constitution* adopted the original eight provinces as the basis of the regional level of government.

### 6.3.4.2 Functions and Resources

Devolved governments are meant to exercise the powers and perform the functions assigned by the Constitution. These should target areas of development better carried out with the participation of the people and services better provided closer to the people on the basis of their needs and priorities. The *Bomas Draft* and *PNC* did not differ substantially in the assignment of powers and functions of devolved governments. The list of functions of
devolved governments as laid out in the Fourth Schedule of the PNC was adopted by the Harmonized Draft Constitution with minor modifications.

Local taxes are obvious sources of finance for devolved governments. However, because all counties are not equally endowed with resources from which revenue can be generated, as in other countries with devolved government, provisions for the equitable disbursal of national revenue to counties were necessary. Such provisions appear in all three earlier drafts and were harmonized in the Harmonized Draft Constitution. Issues of fairness or equity in allocation of resources amongst the levels of government, it was proposed, would be addressed by a Commission on Revenue Allocation on which the devolved governments would be represented.

6.3.4.3 A supervisory role for the National Government

The Harmonised Draft provided that the relationship amongst the levels of government would be co-operative. In extreme cases (emergency or war) where a county or regional government failed to function, the national government was mandated to intervene by suspending the county or the regional government.

6.3.4.4 Decentralization to levels below the County

CoE considered it expensive to provide for devolved levels of government below the county. Instead, it was recommended that county governments set up structures below whether at the location or the village level for purposes of service delivery. In order to facilitate this, the Harmonized Draft Constitution adopted the principle stated in Article 201 of the Wako Draft to the effect that delivery of services shall be decentralized to the extent that it is efficient to do so.

6.4. Bringing the Constitution into Effect: Transitional Issues

6.4.1. Introduction

When a new constitution is introduced, a range of provisions are needed to ensure that the move from the old order to the new order is smooth, and, in particular, that the changes expected by the new constitution are implemented effectively and those institutions that are retained under the new constitution continue to function properly.

The “transitional” provisions that do this are usually not included in the body of the constitution because they have a temporary lifespan. Instead they are included in a schedule which is part of the constitution but, because it is appended at the end of the constitution, its
provisions will not interfere with the ‘permanent’ provisions of the constitution in the future. In the Harmonized Draft these provisions appeared in Schedule 7.

Most of the provisions dealing with transitional matters are very technical – they ensure that existing laws continue to have force, that the public service continues to operate and that public servants continue to receive their pay, that courts continue to operate, etc. However, there are some transitional provisions that have significant policy implications. In identifying contentious issues the CoE accordingly stated:

With respect to bringing the new constitution into effect, there is consensus that:

a) A new Constitution should create a fresh start for Kenya establishing the rule of law, protection of human rights, and respect for everyone irrespective of their gender, ethnicity, disability, age, religion, culture or political persuasion.
b) The institutions and office bearers in the new Constitution must have the confidence of the people and be accountable to them.
c) All government action and every exercise of power should be based on the new Constitution.

The issues which are contentious or not agreed upon are:

a) How should the adoption and coming into force of the new Constitution affect holders of political constitutional positions or offices, such as the President, Vice-President, Prime Minister, Deputy Prime Ministers, Cabinet, and Members of Parliament? Should these office holders complete their terms?
b) How should the adoption and coming into force of the new Constitution affect holders of unelected constitutional positions or offices, such as the Auditor-General, the Attorney-General, and Judges?
c) A new Constitution will require many new laws. What measures can be put in place to ensure that Parliament will pass these laws?

This part of the report discusses each of these issues under the following headings:

a) implementing a new system of government;
b) the judiciary;
c) commissioners and other appointed constitutional office holders; and
d) adopting new laws. In addition, implementing a new system of devolved government will be a considerable task. This is also discussed.

6.4.2. A preliminary matter: Oaths and the register of interests

Like the three drafts that preceded it, the Harmonized Draft Constitution provided for public representatives, constitutional office holders and other senior public officials to swear an
oath to uphold the constitution and also, for certain categories of state office holder, to submit a statement of interests for inclusion in a register of interests. The reason for this is to mark the new beginning that the constitution represents and to highlight the fact that all these office holders are committed to adhering to the set of values that the new constitution represents. The requirement that all these office holders submit a statement of interests would be a first step in implementing the new constitution’s commitment to honest and accountable government. The statement of interests would ensure that citizens are aware of the private interests of public representatives and holders of constitutional offices and can check that these people do not further their private interests in their decision making.

6.4.3. Implementing a new system of government

The question here was “what should happen to existing elected representatives and the current power sharing arrangements when the new constitution comes into force?”

Under Article 47A(7) of the former Constitution of Kenya, a new constitution will come into effect no more than 14 days after the referendum results are declared but the new constitution itself may suspend the operation of any of its provisions. The Kenya National Accord and Reconciliation Act added to this by stating that it would cease to apply on enactment of a new constitution. This meant that the power sharing arrangements secured in the Accord Act would cease to apply unless the new constitution explicitly protected them.

There were two options to consider:

a) To have all the provisions in the new constitution come into effect immediately. This would involve the abolition of the current power sharing arrangements and the best way of doing this would probably be to hold a new election immediately; and

b) To delay implementation of the provisions of the new constitution that relate to the Executive and Legislature until the next elections in 2012.

The Committee received submissions supporting each of these options. There were obvious attractions in the first option: Kenyans had waited a long time for a new constitution and one of the key demands of Kenyans was for executive arrangements under which power was better controlled through good checks and balances. Accordingly the implementation of new arrangements for the exercise of executive power seemed urgent. But, this approach was also likely to be more disruptive and to raise opposition to the new constitution. On this approach (i) MPs with a legitimate expectation that they are in office until 2012 would have to fight an election earlier than expected; (ii) the carefully balanced power-sharing arrangements captured in the Accord would be set aside; and (iii) either new election law would have to be rushed through or elections would have to be fought under the old system.
The CoE decided that, on balance, it would be in the interests of political stability to suspend the operation of those provisions of the new constitution that concern the executive and legislature until the current incumbents have completed their terms, and to extend the operation of the *Accord* until the next scheduled elections. This followed the approach in both the *Bomas* and *PNC* (*Bomas* Seventh Schedule item 3; *PNC* Sixth Schedule item 3)

**6.4.4. The Judiciary**

Submissions to the CoE on the Judiciary were virtually unanimous on one point: the Judiciary must be reformed. The CoE received a number of submissions on how this should be done. These submissions can be classified into two groups: those that proposed that the entire Judiciary should be reappointed (with all judicial officers or at least all judges being treated as having lost their jobs but permitted to reapply); and those that proposed a more gentle approach - that judicial officers remain in office but are required to take a new oath and to undergo a ‘vetting’ process.

The first question that the CoE had to consider in relation to the justice system was whether all judicial officers should be treated in the same way. Although equality of treatment is superficially attractive, the Committee decided that it was not practical and that judges and other judicial officers should be treated differently. This is because there were significant differences between judges and other judicial officers. The first difference was in their numbers. The Judiciary is relatively small making their reappointment or vetting under a strict timetable possible. The magistracy, on the other hand, is large. Reappointment or vetting would be a long and complicated process with severe implications for the operation of the subordinate courts unless it was handled very carefully.

The second difference relates to the independence of the Judiciary. Although judicial independence was not expressly provided for in the *Harmonised Draft Constitution*, it was implied in a number of provisions. These provisions gave judges stronger protection than judicial officers serving in subordinate courts. For instance, magistrates can be removed from office by the Judicial Service Commission while a special procedure involving Parliament is required for the removal of a judge of the superior courts. Generally the initiation of a procedure to remove a judge should be a rare occurrence. Thus, it seemed appropriate to consider the appropriate procedure in relation to judges and other judicial officers separately and to ensure that all questions about judges were dealt with at the beginning of the life of the new constitution.

Below the CoE explains how the *Harmonized Draft Constitution* dealt with judges and magistrates respectively.
6.4.4.1 Judges

Informed by submissions, the weight of opinion at a technical consultation on the issue, the concerns of many of those directly involved in the justice system and its own understanding of the issue, the CoE decided that to retain the status quo and simply allow members of the judiciary to continue in office was not appropriate. In addition, on careful consideration of the options suggested in submissions, the CoE decided that wholesale reappointment of the judiciary was not appropriate. Instead, it decided that some form of vetting of the current judges should take place as was done in Bosnia-Herzegovina, East Germany, the Czech Republic and elsewhere in Eastern Europe and as proposed by the CKRC and Bomas Drafts. This approach is also similar to that proposed by the August 2009 report of the Task Force on Judicial Reforms.

There had been calls for the total renewal of the judiciary. On this approach, all judges would lose office when the constitution comes into effect but, to ensure that the court system continues working, they would continue working in an acting capacity. A process would then be followed which allowed judges to reapply for positions on the bench. (Those that chose not to reapply would be provided with suitable retirement benefits.) The process of reappointing judges would be done by the Judicial Service Commission at the same time as filling new positions in the judiciary. However, this approach would be disruptive, causing a sense of insecurity amongst judges.

The alternative of vetting would achieve the same goal as renewal: judges with problematic records would not be able to remain on the bench. However, it would be less disruptive than a process requiring all judicial positions to be filled anew.

On the ‘vetting’ approach adopted in the Harmonized Draft Constitution, every judge would be given an opportunity to resign (with appropriate benefits). Those that remained in office would be ‘vetted’ by an independent commission (the Interim Judicial Service Commission). The main aim of the process would be to ensure that any serious complaints against sitting judges were properly considered. If, on an initial review of the record of a judge, including any complaints against him or her, the Commission found that further investigation was warranted, the matter would be referred to the process established in the constitution for investigating complaints against judges. The Constitution would guide the process to be followed by the Commission, but the Commission would establish its own procedure and develop criteria for the process.

Once ‘cleared’ in the vetting process, the judge would continue in office and would be free to be considered for more senior judicial positions.
6.4.4.2. Magistrates

As noted above, the CoE did not think that the approach provided for judges should be applied to magistrates and other subordinate court judicial officers. The approach the CoE decided to take was that the newly composed Judicial Service Commission should have the authority to investigate complaints against them (whether the complaint arose before or after the new constitution came into effect) but that no special process should be adopted to vet every magistrate. This approach also reflected the fact that decisions of the subordinate courts are reviewable by higher courts and so these judicial officers are subject to control by judges of the superior courts. Nonetheless, the CoE recognised that most of the public’s experiences of the justice system were at this level and therefore provided for the newly appointed JSC to recommend as to how concerns about efficiency and corruption could be addressed at the magistrates’ level.

6.4.5. Commissioners and other appointed constitutional office holders

The Harmonized Draft Constitution included a range of commissions and constitutional office holders. Some of these were included in the former Constitution (e.g. the Attorney-General); others already existed but were established by an Act of Parliament and not included in the Constitution (e.g. the Kenya National Commission on Human Rights); yet others were new (e.g. the National Land Commission).

Arrangements concerning the new positions would be relatively simple. The new Constitution could set a time period within which they must be established. Arrangements concerning existing positions were more complicated. The new constitution would have to include provisions concerning what would happen to people serving in existing bodies and when these bodies started operating under the new Constitution.

6.4.5.1. A fresh start

The CKRC (Eighth Schedule item 8(1)) and Bomas (Sixth Schedule item 7(1)) approached existing institutions with a fresh start: they would allow people holding office under the current constitution to continue in office on an interim basis until an appointment was made under the constitution. (These drafts did not appear to deal with people who held office under a law and whose position would in future be governed by the new constitution (such as the Human Rights Commission).)
6.4.5.2. Retention of status quo

The *Wako Draft* (Sixth Schedule item 7(1)) retained existing office holders: they were to continue in office as if appointed under the new Constitution. The *Wako Draft* did not specify what would happen when the new constitution imposes a term limit on such offices such as is proposed for the Attorney-General. Was the term to start running from the date the constitution took effect or should the term served be assessed from the actual date on which the person assumed office?

6.4.5.3. Assessing offices individually

The Committee realised that it would be difficult to deal with all constitutional offices in a similar way: the situation of an office established by statute is, in many ways different from those established under the former constitution. And, the situation in relation to offices whose incumbents served a limited term was different from those offices whose incumbents had no term limit. This suggested yet another approach: treating offices differently according to their specific circumstances in the review process.

6.4.5.4. Assessment

Many people suggested treating all offices alike. At first glance this sounded fair but a closer examination of the issue showed that (i) in fact there were very few constitutional offices that needed transitional arrangements and (ii) very different conditions applied to each affected office (e.g. the Attorney-General and the office of the Controller of Budget and Auditor-General were to be split in different ways; the Gender Commission had a very specific brief etc). This suggested that serious consideration should be given to individual treatment of those offices.

6.4.6. Adopting new laws

The challenge here was to ensure that the new laws envisaged by the new Constitution would be promptly enacted. Not only did all the drafts propose many new laws but many of the laws that were proposed would be complex pieces of legislation.

Each of the existing drafts included a table which identified the *Acts* needed and specified the time within which they must be adopted. The *Bomas* and *Wako Drafts* took the matter a step further. Under *Bomas* Article 308, if Parliament failed to adopt a particular law within the time stipulated in the table, anyone may petition the High Court for a declaratory order instructing Parliament to enact the law within a specified period. If this was not done, Parliament would be dissolved. The *Wako Draft* (Article 287) offered a less radical solution. It required such bills to be prepared by the Attorney-General and the Commission on
Implementation of the Constitution and tabled in Parliament. If such a bill was not passed in time, first, the Wako Draft gave Parliament the option of extending the time once. If this did not work, the Bill prepared by the A-G and Commission would become law.

Initial reactions to the Wako Draft are usually negative: allowing a bill to take effect without it actually having been passed by Parliament seemed undemocratic and allowed a member of the executive undue power. However, the Wako approach had real strengths. First, while the extreme measure of dissolution of Parliament in the Bomas Draft would put the necessary pressure on MPs, in the event of the law not being passed it would also lead to a flouting of the constitution. This would put enormous pressure on the new constitutional order. Second, under the Wako Draft, the Bill tabled in Parliament would have been agreed to by an independent Commission. Thirdly, the Attorney-General under the new constitution would be serving in an independent office and not be an appointee of the executive. Finally, the Bill concerned would have been tabled in Parliament. MPs would have had the opportunity to take it up if they had fundamental objections.

Another approach might have been to attach different consequences to different provisions. For instance, in some cases the transitional Schedule could include “default” provisions which will come into effect if the relevant law was not adopted. This would be more easily done in relation to rights than other issues. Dissolution of Parliament could be retained in relation to devolution and other laws that would affect the structure of the state in a fundamental way, and the Wako approach could apply to other cases.

**Recommendations**

In light of the analysis above, the CoE made the following recommendations under the Harmonized Draft Constitution:

a) To use an approach combining both the Bomas and Wako Drafts, in which the lack of implementation of laws pertaining to certain provisions of the Harmonized Draft Constitution would attract the possibility of dissolution of Parliament.

b) However, dissolution would not be immediate. The option of extending the deadline for enactment for a year only was taken from the Wako Draft.

c) During that year, the Attorney-General would partner with the Commission on the Implementation of the Constitution to ensure the passage of the necessary legislation.

d) Should the legislation not be passed, Parliament would stand dissolved.
These recommendations informed the content of the transitional clauses in the *Proposed Constitution* and were adopted in the new *Constitution* of Kenya.

### 6.4.7. Establishing Devolved Governments

Implementing a system of devolved government and, in particular, establishing new legislative and executive bodies that can respond to the needs of people and deliver services effectively is always a challenge. All three drafts, the CKRC, Bomas and Wako Drafts, envisaged a special commission to oversee the implementation of the constitution. Clearly, monitoring the implementation of the system of devolved government would be a major component of the work of such a commission. A critical part of this work would be to ensure that devolved governments are not given tasks before they have the capacity to implement them – this would set them up for failure. On the other hand, it is well-known that no national government is eager to give up powers, so a system needed to be crafted to ensure that the national government could not delay devolving power on the basis of claims of incapacity of the devolved governments.

### 6.4.8 Publication and Dissemination of the Harmonized Draft

Over four million hard copies of the *Harmonized Draft Constitution* were published and disseminated in more than 74 locations in Kenya. In addition there were 2,889,352 million visits to the CoE website in order to download the HDC and its report, bringing the total number of distributed copies of the HDC to over 6,889,352. This figure is an approximation of the minimum number of copies disseminated and did not include the copies of the draft further disseminated by individuals and institutions that downloaded the 2,889,352 online copies.

<table>
<thead>
<tr>
<th>Means of Dissemination</th>
<th>HDC format disseminated</th>
<th>Number of copies disseminated</th>
</tr>
</thead>
<tbody>
<tr>
<td>(1) CoE Staff Distribution (outside Nairobi)</td>
<td>Hard copy</td>
<td>1,435,000</td>
</tr>
<tr>
<td>(2) Courier G4S Countrywide</td>
<td>Hard copy</td>
<td>333,000</td>
</tr>
</tbody>
</table>

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16 CKRC Article 292; Bomas Article 299; and Wako Sixth Schedule item 13.
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<tr>
<th>outlet Distribution</th>
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</tr>
</thead>
<tbody>
<tr>
<td>(3) Media (Inserts) Newspapers</td>
<td>Hard copy</td>
<td>605,000</td>
</tr>
<tr>
<td>• Nation = 250,000</td>
<td></td>
<td></td>
</tr>
<tr>
<td>• Standard = 250,000</td>
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<tr>
<td>• Nairobi Star = 100,000</td>
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<tr>
<td>• Times = 5,000</td>
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<td>(4) Partners</td>
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<tr>
<td>(5) Website</td>
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<td>2,889,352</td>
</tr>
<tr>
<td>Total</td>
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<td>6,889,352</td>
</tr>
</tbody>
</table>

**Dissemination of the HDC**

As illustrated in Annexes 1, 2 and 3 the CoE made efforts to ensure that the *Harmonized Draft Constitution* was disseminated in as many parts of the country as possible including hiring a helicopter to ensure physical delivery to: Mandera, Wajir, Moyale, Marsabit, North Horr, Maralal, Baragoi, Loyangalani, Lodwar, Lokichogio, Lokitaung, and Lokichar.

**Public Response to the Harmonized Draft Constitution**

As stated before, after the *Harmonized Draft Constitution* was published on 17\(^\text{th}\) November 2009, the public had 30 days to debate and comment on it under section 32 of the Review Act. Public response to the HDC was overwhelming and during the month of publication, the CoE received 39,439 substantive memoranda and other written materials. Most of the memoranda submitted before 15\(^\text{th}\) December 2009 averaged 60 recommendations per memo. However, a large number of memoranda submitted after the 15\(^\text{th}\) of December 2009, about 11,122 only had an average of three recommendations per memoranda. Considering the average pieces of recommendations per material submitted, the total number of suggestions or recommendations by the members of the public stood at 1,732,386. Both the public demand for the HDC and its response were indicative of Kenyans’ commitment to effectively participate in the review process and to do so from an informed perspective.

During the launch of the Harmonised Draft and the distribution period, the CoE also proactively solicited editorial publicity (non-paid for publicity) in the print, electronic media and bulk short message services updating Kenyans on the progress of the distribution, the format of submitting their views. In total, during the month of November, an equivalent of
84 full pages of newspapers were generated on articles related to the HDC across 10 print media titles in Kenya, there were 14,349 radio spots and 3,967 TV spots over the same period, which had an advertising equivalent of Kshs. 211 million.\(^1\)

However, the public raised concerns about the short statutory period for dissemination of and public debate on the draft. The CoE sought to address these concerns by not only seeking to disseminate the draft as widely as possible but also participating in dissemination fora and partnering with other institutions such as civil society networks to ensure dissemination of the draft. The CoE also sought to ensure consistent civic education about the review process and, in particular, the fact that the HDC was not only going to be subjected to review by the public at large but also subsequently by the PSC and the National Assembly. Each of these stages of the review process offered the public opportunities to contribute to the drafting of the constitution.

\(^{17}\) According to an independent monitoring report by Synovate Media Monitoring (formerly Steadman)
CHAPTER SEVEN – THE REVISED HARMONIZED DRAFT CONSTITUTION

7.1 Introduction

Upon reviewing the Harmonized Draft Constitution in light of the views received from the public, the CoE submitted the Reviewed Harmonized Draft Constitution (RHDC) to the PSC on 8 January 2010 as required by the Review Act. The CoE also presented the PSC with a report that provided an overview and summary of the publication and dissemination of the Harmonized Draft Constitution, together with views of the public, and the key areas that had been revised by the CoE.

7.2 Methodology used by the CoE to review the Harmonized Draft Constitution

The CoE used the following methodology in reviewing the Harmonized Draft Constitution:

a) First, the Research Department of the CoE coded, collated and analyzed memoranda, communications, and views received from the public. This work began on 18 November 2009 the day submissions started coming in. Two databases were established, one for the bio-data and background information of persons sending memoranda, while the other was formatted as a compendium of the observations and recommendations from the public.

b) Individual members of the CoE were assigned the task of reviewing specific chapters of the Harmonized Draft Constitution as indicated in the Table below.

<table>
<thead>
<tr>
<th>SUBJECT</th>
<th>COE MEMBER</th>
</tr>
</thead>
<tbody>
<tr>
<td>Accompanying Report</td>
<td>Atsango Chesoni</td>
</tr>
<tr>
<td>Executive &amp; Legislature,</td>
<td>Dr. Chaloka Beyani</td>
</tr>
<tr>
<td>Judiciary &amp; Land</td>
<td>Otiende Amollo</td>
</tr>
<tr>
<td>Transitional and Consequential Provisions</td>
<td>Prof. Christina</td>
</tr>
<tr>
<td>&amp; Public Finance</td>
<td>Murray</td>
</tr>
<tr>
<td>Devolution</td>
<td>Prof. Fredrick Ssempebwa</td>
</tr>
</tbody>
</table>
In analyzing the views received from the public, the CoE members categorized issues raised by the public as follows:

a) Issues where the CoE had had extensive debate and consciously elected to decide on one way or another; and

b) Areas where the issue in question was not considered, or required fresh consideration, in light of the weight of recommendations; new facts or evidence; and/or consensus reached by any groups.

In addition, the review of the Harmonized Draft Constitution was guided continuously by the provisions in sections 4 and 6 of the Review Act. Since section 5 of the Review Act provided that “the Referendum” is an organ of review, implicitly all the people of Kenya were bound by the provisions of section 6 and, therefore, in reviewing the Harmonized Draft Constitution, the CoE was bound to apply the tests in it to recommendations made by the public.

### 7.3 Sources of views

Views were received from a diversity of sources including Kenyans living in the Diaspora and international scholars. In respect of the substantive memoranda received, the sources were as follows:

<table>
<thead>
<tr>
<th>Representation</th>
<th>Njoki Ndungu</th>
</tr>
</thead>
<tbody>
<tr>
<td>Constitutional Commissions, Leadership &amp; Integrity</td>
<td>Abdirashid Abdullahi</td>
</tr>
<tr>
<td>Bill of Rights, Technical Issues &amp; Issues in the rest of the draft</td>
<td>Nzamba Kitonga</td>
</tr>
<tr>
<td></td>
<td>Dr. Ekuru Aukot</td>
</tr>
<tr>
<td></td>
<td>Bobby Mkangi</td>
</tr>
</tbody>
</table>

*Table 2: Members of the CoE responsible for reviewing respective chapters of the HDC*
<table>
<thead>
<tr>
<th>Source</th>
<th>Number Received</th>
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<tr>
<td>Political Parties</td>
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<tr>
<td>State Agencies</td>
<td>799</td>
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<tr>
<td>Religious Organizations</td>
<td>7737</td>
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<tr>
<td>NGOs</td>
<td>3321</td>
</tr>
<tr>
<td>Face book</td>
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</tr>
<tr>
<td>Individual memos</td>
<td>25907</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td><strong>39,439</strong></td>
</tr>
</tbody>
</table>

*Table 3: Breakdown of sources of memoranda*

### 7.4 Summary and Overview of Public Views on draft

There were several distinct trends in the views received from the public: Views that spoke to the overall format (and particularly size) of the document;

(a) Views that raised concerns about specific technical aspects of the draft; and
(b) Views that addressed substantial issues.

(a) Views that spoke to the overall format of the document

With respect to views on the overall format of the document, the public expressed concerns about two specific issues in particular:

(i) the length of the *Harmonized Draft Constitution*; and
(ii) the level of detail contained in the *Harmonized Draft Constitution*, including the fact they perceived aspects of the draft as having delved into areas of policy and legislation.
While the CoE would have preferred to keep to the principle of brevity, the methodology laid by the Review Act and the evolution of the *Harmonized Draft Constitution* presented several challenges to this. First, as noted before, sections 29 and 30 of the Review Act required the CoE to take into consideration the views of the people of Kenya as presented to the CKRC as well as the three earlier draft constitutions. The *Harmonized Draft Constitution* emanated from the three draft constitutions that preceded it and from which the CoE had a very limited discretion to deviate. Those drafts were long and, because they had been agreed upon in their lengthy format, the *Harmonized Draft Constitution* was bound to be long too.

Similarly on the issues of detail, policy and legislative content, it is worth recalling that there was public suspicion of the State and political leadership at the time at which the CKRC and Bomas Drafts and the PNC developed. Consequently these drafts tended to protect principles of governance and rights by constitutionalizing them in a detailed manner. Furthermore, the drafts from which the *Harmonized Draft Constitution* originated were intensely negotiated documents that were outcomes of a highly inclusive, consultative and participatory constitution-making process. Given the wide extent to which citizens participated in the process of the CKRC and Bomas, many people expected to see themselves reflected in these earlier drafts. Thus again, while the CoE sought to limit the extent of detail in the *Harmonized Draft Constitution* to constitutional principles, the fact that much of that detail now constituted agreed principle did limit the CoE’s discretion in preparing the *Harmonized Draft Constitution*. Nonetheless, the several clauses were edited out of the RHDC and four chapters were harmonized into two.

(b) Views that raised concerns about specific technical aspects of the draft

Some of these views were editorial. Suggestions were offered about how the text could be clarified to make meaning clear or to deal with technical legal issues more precisely. In response to these, the CoE’s in-house drafting team began correcting grammatical and drafting errors from the very beginning of the period of public submissions on 18 November. In addition, the CoE enlisted the services of additional draftspersons during the review period to ensure that the reviewed draft could be completed as promptly as possible.

Technical concerns raised by the public that did not concern policy were attended to by the CoE. Where further technical expertise was required in order to for the CoE respond effectively, such expertise was sought –an example is in the process of the revision of the Public Finance chapter which is discussed below.

(c) Views that addressed substantial issues

Although the public offered views on all articles of the *Harmonized Draft Constitution*, most were on ten chapters as shown in the Table below.
<table>
<thead>
<tr>
<th>Chapter</th>
<th>Percentage of Memoranda with comments on the chapter</th>
</tr>
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<tbody>
<tr>
<td>Executive</td>
<td>95</td>
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<tr>
<td>Devolution</td>
<td>68</td>
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<tr>
<td>Legislature</td>
<td>67</td>
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<td>Judiciary</td>
<td>63</td>
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<tr>
<td>Bill of Rights</td>
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<td>Public Finance</td>
<td>48</td>
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<tr>
<td>Public Service</td>
<td>46</td>
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</table>

*Table 4: Percentage of submissions responding to the key issues*

As can be noted from the Table above, the public offered the most views in relation to the chapters that had been identified as being in contention by the CoE: the system of government i.e. the executive and legislature; devolution; and transitional clauses. In addition, the Chapter on Representation of the People also received a lot views requesting a reconsideration of the provisions in the *Harmonized Draft Constitution*. And, as we have already noted, although other chapters did not receive as great a number of comments, many of the memoranda did indicate the need for technical adjustments to the *Draft*. Some of the
more significant changes in chapters that were not contentious such as that on Public Finance are highlighted below.

**7.5 Public views on Contentious Issues**

This section of the report highlights the nature of the commentary on the chapters that had been identified as being in contention and speaks to changes made as a consequence of the review of those chapters in light of the responses from the public.

**7.5.1 System of Government: the Executive**

Over 95% of the submissions received by the CoE related specifically to the nature of the executive organ of government in the *Harmonized Draft Constitution*. Analysis of these submissions by the CoE showed that the people of Kenya remained as deeply divided on the nature of the executive as they were when the CoE held public hearings on contentious issues across the country. Public views were divided among those who preferred a presidential, a parliamentary, or a hybrid executive system of government. Submissions reflected widespread concern that the structure of the executive in the *Harmonized Draft Constitution* was ambiguous, and would be unworkable because it could lead to frequent tensions between the President and the Prime Minister, especially when they came from different parties.

The views showed preference for:

a) a President and Prime Minister;

b) proper delineation of powers between the State President and the Prime Minister;

c) a clear distinction between offices of State and offices of government; and

d) whatever form was adopted, a chief executive elected by members of the public, whether as President, Prime Minister, or both.

In considering these views, the CoE considered that public preference for a President and a Prime Minister in the main pointed to a the desire for a collective executive system of government that accommodates both offices while maintaining a distinction between offices of State and offices of government as laid out in the *Harmonized Draft Constitution*. It retained this approach in the *RHDC*. (As already noted, this position changed in the *Proposed Constitution* when the PSC agreed by consensus reached in Naivasha to adopt a Presidential system of government. That was a political responsibility taken by the political leadership.)

The notion of a collective executive was further clarified in the *RHDC* by a stipulation that executive authority under the Constitution derived from the people and was to be exercised by their elected representatives in accordance with the Constitution. The executive was
defined more clearly, with the authority of the State President in decision making delineated, and the holding of regular consultations between the State President and the Prime Minister elaborated.

7.5.2 System of Government: the Legislature

About 67% of the submissions made by the public to the CoE addressed the framework for the legislature in the Harmonized Draft Constitution. Analysis of these submissions showed that there was overwhelming support for a bicameral legislative body comprising of a National Assembly and a Senate.

The substance of the views expressed by the public was:

a) Concern regarding the potentially large number of members of the legislature and the need to reduce these;

b) A desire for some provision for Proportional Representation (PR) in electing members of the legislature;

c) A desire for a statement of the educational qualifications of members of parliament;

d) A need for further clarity in the respective roles of the Senate and the National Assembly;

and
e) A need for elaborating modalities on the recall clause.

In considering these views in the RHDC, the CoE took the view that whilst appreciating the express public desire for a lean Parliament, the exact number of Members of Parliament could not be capped by the constitution as it would require the completion of the review of constituency boundaries. This was being undertaken by the Interim Independent Boundaries Review Commission (IIBRC). This position changed in the Proposed Constitution when the PSC fixed the number of the Members of the National Assembly, before the IIBRC completed its work. As regards qualifications, the CoE’s position was that an Act of Parliament should set educational qualifications for Senators and Members of the National Assembly as these could change over time and should therefore not be stipulated in the constitution. The detailed elaboration of the modalities or procedure relating to the recall of Members of Parliament would also require legislation.

The CoE made the following changes to the Chapter:

(i) Size and nature of the Legislature as well as method of election to office for parliamentarians

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18 See Article 97 of the Proposed Constitution of Kenya.
There was a significant reduction in the number of Senators under the RHDC as the number of counties had been reduced from 74 to 47. (See below on Devolution.) Both the First Past the Post (FPTP) and PR systems were drawn from to ensure adequate representation of women and marginalized groups, persons with disabilities, and youth, in such a way as to also take account of the proportion of votes secured by political parties in the direct elections of Senators and Members of the National Assembly. Given that the exact number of parliamentary seats had not been fixed in the RHDC, the flexibility of using both these approaches would ensure that the minimum constitutional requirements for diversity in representation were also satisfied whilst taking into account the diverse needs of all actors in the political and electoral processes. The section on Representation of the People elaborates more on this point below.

(ii) *Delineation and clarification of the roles of the National Assembly and Senate*

In the RHDC, the CoE outlined more clearly the legislative authority of Parliament, and within that the roles of the National Assembly and the Senate were distinguished and clarified. The National Assembly would continue to play its legislative role while the Senate would represent the interests of devolved government at the national level, act as a house of review over matters specified in the RHDC, and discharge any other functions specifically assigned to it by the RHDC.

**7.5.3 Devolution**

The views received in response to the *Harmonized Draft Constitution* confirmed the people’s support for the system of devolution. The views contained diverse comments and suggestions that guided the CoE to make improvements to the system. The areas which were most intensely discussed are outlined below.

(i) *The levels of governments*

Whereas the three-level system of devolution provided by the HDC was widely supported, a strong sentiment in favour of a two-level system was discernable from the suggestions and comments. The main reasons for this preference were:

(a) the three level system of the *Harmonized Draft Constitution* would be costly; and
(b) the 74 counties in the First Schedule of the *Harmonized Draft Constitution* were said to be small units which would lack resources to govern effectively or to provide checks on the exercise of power at the national level.
(ii) **Boundaries of the devolved units**

Public comments on the boundaries of devolved units were mainly expressions of concern that:

a) The selection of 74 counties and eight regions was random. The devolved units were not rationalized in terms of population, geographical features and command of resources; and

b) Some of the proposed counties were based on district units whose establishment had been successfully challenged as being unlawful.

(iii) **The necessity of the government at the regional level**

Again the main standpoint of public comments on this issue was a concern that the regional level of government had no clear role and may become irrelevant because regional governments as proposed:

a) had no clear source of funds and, therefore, would not be effective in coordinating the functions of county governments or in capacity building and providing technical assistance to counties;

b) had structures that did not allow for effective supervision and monitoring of county activities since they consisted of delegates (and their appointees) of the counties that were supposed to be supervised and monitored; and

c) had been assigned the functions of planning, formulation of policies, setting regional standards and delivery of regional services with no indication as to what exactly the region was to handle or deliver.

The CoE therefore made the following changes to the Devolution Chapter:¹⁹

(i) **Levels of devolved government**

In accordance with the majority’s preferences, the levels of government in the RHDC were reduced to two: national and county. This responded to concerns about the role of regional government and the cost of administration. For the units of county governments, the Districts enacted in 1992 by The District and Provinces Act were adopted as proposed counties. The regional units in the Harmonized Draft Constitution had been conceived to be large units better posed to apply checks and balances to the exercise of power at the national level. Without the regional level, it was necessary to establish units of devolved government in the RHDC that could be effective for this purpose, while at the same time, with capacity

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¹⁹ This only highlights key changes to the Devolution chapter.
to provide services close to the people. This, and the fact that they were lawfully recognized administrative units, explains the adoption of the 1992 Districts.

The RHDC provided for a review of boundaries by a specialized commission. The object of including the units of devolution in this Draft was to provide a starting point for a new dispensation of devolved units. But the boundaries of the devolved units could then be altered in accordance with the procedure provided. It is to be noted that, whereas electoral boundaries would be reviewed and could change periodically, those for the counties as units of devolution would not change regularly.

As is noted below, the provisions in the Chapter on Public Finance were also clarified to ensure that the relationships between the levels of government addressed in principle matters regarding taxation so as to ensure that powers of taxation of the counties would not inhibit trade and business.

(ii) The Senate

Many submissions questioned the ability of the Senate as proposed in the Harmonized Draft Constitution, to carry out both of its roles, as a review organ of Parliament, and, as a representative of the interests of devolved governments. The fact that members were to be indirectly elected was perceived as a weakness. It was argued that persons of the right calibre were unlikely to emerge from this method of election and that Senators without popular support would carry less weight than members of the proposed National Assembly.

In response to these concerns the RHDC provided for the direct election of Senators. Given that Senators were to be directly elected, the CoE made provision for them to have a nexus to the county assembly of the counties that they represented. They would have rights of audience in their respective county assemblies without a right to vote therein. To ensure a reciprocal relationship of accountability, Senators would also be required to furnish annual reports in their county assemblies.

(iii) The national government's role in the supervision of devolved governments

Memoranda from many expert groups indicated concern that the Harmonized Draft Constitution did not provide mechanisms by which the performance of devolved governments could be monitored and supervised. This, it was suggested, would have been necessary to supplement capacity, or to intervene where a government failed to deliver an essential service or simply because of the need to oversee the utilization of the funds transferred from the national government. It was argued that the suspension measures under Article 235 of
the Harmonized Draft Constitution would be invoked only in the extreme cases of decay of administration when there was little room for remedies.

The Committee appreciated these concerns. Whereas it may have been useful to empower the national government to take measures to ensure the success of devolution, care had to be taken not to open wide the opportunities for interference in the affairs of the counties. It was in this context that an additional provision was made requiring the national government to ensure that county governments were given adequate support and resources and a power of intervention that would used only to maintain the integrity of the system of devolution and the provision of essential services.

(iv) Provincial Administration

Under the transitional arrangements of the Harmonized Draft Constitution, the system of Provincial Administration stood to be dissolved upon the implementation of the devolved system. Some memoranda expressed opinions in favour of continuing with Provincial Administration at the level of chiefs, the District Officers, and the District Commissioners, as they were “accessible to the people.”

The CoE’s view on this matter was that the representatives elected under the structures of the devolved system would even be more accessible to the people who elected them. The role played by the chiefs could continue under the county governments, as was provided for in the Transitional Clauses. Section 4 of the Review Act provides that the new constitution should “secure provisions therein … promoting the peoples’ participation in the governance of the country through democratic, free and fair elections and the devolution and exercise of power.” The system of Provincial Administration in its current form, was incompatible with, and may impede the implementation of the system of devolution.

It is true, however, that the national government needed to maintain structures for purpose of monitoring the implementation of its functions, including security of the nation. Both the Harmonized Draft Constitution and the RHDC required Provincial Administration to be phased out in a period of five years from the implementation of the constitution with the rationale that the necessary structures could be established during that period. The Proposed Constitution altered the phasing out of Provincial Administration and provided for its reform and restructuring to accord with the devolved system of government.

7.5.4 Transitional and Consequential Provisions: Bringing the New Constitution into Effect
The provisions on transition contained in the *Harmonized Draft Constitution* attracted less commentary than the other contentious chapters. Other than the provisions relating to the transition of the judiciary and devolution, the commentary in relation to most of the provisions in the chapter on Transitional and Consequential Provisions and Schedules 6 and 7 of the *Harmonized Draft Constitution* pertained to further need for clarification and modification.

(i) **Transitional provisions relating to devolution:**
The public concerns on devolution and the transition concerned:

a) Ensuring that functions were not devolved all at once in a ‘big-bang’ model, but rather in a phased approach ensuring that the new units of devolved government would develop capacity to fulfill their functions;
b) Allowing the asymmetrical devolution of power, i.e., to units according to their specific capacity;
c) Providing checks so that the national government could not undermine devolved government either by refusing to transfer functions or by transferring functions that the new units could not fulfill; and
d) the proposed phasing out of the Provincial Administration, which is addressed above.

In response to public concerns about how the system of devolved government would come into effect, the CoE made necessary adjustments in the *RHDC* so that the system of devolved government would come into effect until:

a) The necessary laws were passed transferring functions and providing for other matters; and
b) Elections to county assemblies were held.

These new provisions provided a role for the Commission on the Implementation of the Constitution to monitor the process of implementing the new devolved system.

(ii) **Boundaries and Electoral Processes**

A number of submissions raised questions about the boundaries of devolved governments. These questions are discussed above. In essence Article 230 of the *Harmonized Draft Constitution* provided for the review of boundaries of devolved units. In respect of the electoral process, the *RHDC* further clarified the provisions on the IIEC and IIBRC so that it became clear that these Commissions would continue to exercise their mandate in connection with the conduct of elections and the review of constituency boundaries.
(iii) Transitional provisions on the Judiciary

Views about the transitional provisions with respect to the Judiciary manifested three trends:

a) First, there were views expressed that mistakenly claimed that the Judiciary was to resign in its entirety upon the promulgation of a new constitution. The *Harmonized Draft Constitution* actually offered sitting judges who opt to do so the choice of resigning with benefits upon the promulgation of a new constitution. Those who chose to stay on would be vetted in a phased approach on the basis of clearly identified principles. Judges who were cleared by the Judges Review Commission would automatically continue to serve under the new Constitution. The provisions for a phased approach were to ensure that the provision of judicial services would not be disrupted.

b) Secondly, some argued that the transitional provisions pertaining to the Judiciary were unfair and suggested that existing judges should, upon the promulgation of a new constitution, be sworn into office under the new constitution and continue to serve without being subjected to any transitional process.

c) Finally, there were contrary views proposing that all the judges currently in office should be sent home to ensure “a clean slate.”

The Judiciary is the third organ of government. Unlike some members of the executive and the members of the legislature, members of the Judiciary (i.e. judges) are not elected and enjoy security of tenure. While the provisions concerning elections would ensure that the constitutional office holders who belong to the other organs of government could be transited effectively through the electoral process, which will actually “vet” their suitability under the new constitution – no such mechanism exists for judges and other appointive constitutional office holders.

The transitional provisions with respect to other appointive office holders such as the Attorney-General provided that the officeholder would cease to hold office within a year of the coming into effect of the new constitution. The provisions also provided that some of the incumbent constitutional officeholders would be eligible for reappointment on application if they qualified and were successful.

There was therefore also need for an appropriate transition mechanism for judges. The *Final Report of the Constitution of Kenya Review Commission*,\(^\text{20}\) stated that “serious allegations were made against the Judiciary, including inefficiency, incompetence and corruption.” Furthermore the need for Judicial Reform was identified as one of the long term issues causing conflict in Agenda Four of the Kenya National Dialogue and Reconciliation in February 2008. The

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Judiciary itself acknowledged this need for reform and established a Task force on Judicial Reform, the report of which was published in August 2009 and informed the CoE’s proposals.

Like all the other forms of institutional reform that have a constitutional dimension, judicial reform entailed structural reform as well as mechanisms that would enable and require individual officeholders to comply with the provisions for office within the new constitutional order. Given the public’s expressed concerns about the poor state of the judicial system, there was need that these concerns be addressed in a way that restored public confidence in the administration of justice. Not providing for a transitional mechanism for the Judiciary would have further eroded the public’s confidence in the justice system.

Yet the means of restoring public confidence must also not undermine the Judiciary as an institution. The CoE considered the suggestion of the “clean slate” approach but were of the opinion that like the “radical surgery” it ran the risk of undermining the Judiciary and also would condemn wholesale all members of the Judiciary. The CoE held the view that the vetting procedure allowed those members of the Judiciary who wanted to continue serving to be eligible for reappointment whilst those who preferred not to could choose the option of resigning with their appropriate benefits. The transitional provisions in the RHDC also provided that the processes for vetting be in keeping with international principles. Accordingly, the CoE retained the framework of the Harmonized Draft Constitution in the RHDC with some minor modifications to the detail.

(iv) General revisions pertaining to Schedule 6

Schedule 6 of the Harmonized Draft Constitution related to legislation required to enable the new constitution. This Schedule was revised to:

(a) Remove from the list legislation that was not required by the Constitution but which the Constitution gave Parliament discretion to enact.
(b) Ensure that all the legislation necessary for the following matters was enacted before the 2012 elections:
   (i) Elections;
   (ii) Leadership and the management of political parties; and
   (iii) The system of devolved government to come into effect.
(c) Ensure that the timetable for law-making was reasonable so that it would be likely that the government and Parliament could comply with it. In doing so, the Committee was aware that the legislative load over the 5 year period established in the table remained very heavy, especially taking into account that there will be an election in this period.
7.5.5 Summary of Changes to Non-Contentious Chapters

As has been noted earlier there were also views on non-contentious chapters that recommended either changes of a technical nature, modifications or clarifications of clauses. This was particularly so in respect of the chapters on Representation of the People; the Judiciary, and Public Finance. Key aspects of these changes, modifications and or clarifications are briefly highlighted below.

7.5.5.1 Changes to the chapter on Representation of the People

The CoE received several memoranda, particularly from governance institutions, expressing concern that the Harmonized Draft Constitution provided for only one system of election: First Past the Post (FPTP). This system it was felt exacerbated disparities due to the fact that it is a winner take all and can sometimes lead to minority candidates. There were recommendations to make provision for a Proportional Representation (PR) usually in the form of Mixed Member Proportional Representation (MMPR), which allowed political parties to benefit from the total votes cast for their candidates whether or not their candidates win in the particular constituency that they stood in. There was also need to ensure that the affirmative action principles agreed and provided for in the Harmonized Draft Constitution and earlier drafts would have an enabling mechanism so that minimum requirements were met. Thus, there were provisions in the Harmonized Draft Constitution for the direct election of parliamentarians to both the National Assembly and Senate on the basis of single member constituencies and also for seats ensuring regional diversity in representation in the Parliament, filled through proportional representation.

There were also PR provisions for the county assemblies to ensure representation of all members of society in all legislatures. The proportional representation system would work through provision of party lists that would entitle political parties to a certain number of seats on a proportional basis relative to their votes won and that would also ensure opportunities for representation of women and marginalised groups in keeping with the Harmonized Draft Constitution provisions.

7.5.5.2 Changes to the chapter on the Judiciary

The CoE received memoranda concerning the chapter on the Judiciary that raised concerns about the need to clarify the role of the constitutional court relative to other courts. Some members of the public were of the view that a constitutional court was unnecessary and that the CoE had “gone out of its mandate” by creating one in the Harmonized Draft Constitution. The Judiciary also were concerned that their financial independence had not been adequately
addressed and that the provisions in the *Harmonized Draft Constitution* required that they be vetted by Parliament on appointment. They felt that the latter would politicise the appointment process.

The CoE responded to these concerns by:

a) Clarifying the role of the Constitutional Court. The CoE’s constitutive Act, the Review Act, did require in section 4 that the provisions of the new constitution secure and ensure constitutionalism and the rule of law. Kenya has hitherto not had a strong culture of constitutionalism. This may have led to the views expressed by the people to the CKRC and contained in their report at page 209 where, in speaking to the issue of the structure of the courts, they are said to have expressed “a need to establish a constitutional court.” The Report of the CKRC was the statutory primary source document for the *Harmonized Draft Constitution* under section 29 of the Review Act. While some memoranda argued that a Division of the High Court, as is the current arrangement, could play the role of a Constitutional Court, the CoE found that this would not be adequate. Divisions of the courts are not established by the constitution and so could be abolished over time. The existing Division was also temporary and did not have judges who sat on it permanently. Nor is experience in constitutional law required for a judge to serve on the Division. But, the *Harmonized Draft Constitution* provided for a new and strengthened Bill of Rights as well as several new constitutional institutions, such as the devolved governments. There was therefore need for a permanent judicial mechanism that would enhance constitutional jurisprudence that promotes constitutionalism. The CoE was of the view, however, that there was need to further clarify the role of the Constitutional Court to ensure that there would not be conflicts between it and the other courts.

b) In respect of the issue of an independent vote for the Judiciary, the revised chapter on Public Finance contained clauses making provision for a separate budget vote for Parliament and the Judiciary.

c) With the exception of the Chief Justice and Deputy Chief Justice, the RHDC did not provide for judges to be approved by Parliament.

d) The RHDC made provision for a slightly more expanded Judicial Service Commission.

### 7.5.5.3 Changes to the Chapter on Public Finance

A number of memoranda regarding the Chapter on Public Finance proposed changes consistent with technical advice that the CoE had received on the Chapter. Accordingly, it was reorganised and, in some places, redrafted to clarify issues, remove internal inconsistencies and ensure that the three key principles of public finance that it encompasses are clearly articulated and sustained through the Chapter.

The three principles of public finance on which the Chapter was based are:
(a) the governance principle, often captured in the phrase “no taxation without representation”, and which means that the management of public finance must be transparent and controlled by the people through democratic institutions;
(b) the principle of resource allocation which means that both taxation and public spending should be fair and equitable; and
(c) the principle of accountability which means that there must be no corruption and those entrusted with public money must account to citizens for the way it is spent. These were captured in the opening provision of the Chapter.

In establishing a framework for the management of public finance that adheres to these principles, the Chapter on Public Finance does two main things:

(a) it establishes the key institutions and processes for sound financial management at both levels of government, and
(b) it provides a framework for the equitable distribution of revenue between the two levels of government and amongst devolved governments.

As the principles on which the Chapter is based assert, sound financial management includes openness and accountability, with proper opportunities for public participation in all processes, equity and responsible management of state assets. In the Revised Harmonized Draft Constitution these principles were realized in the following way:

(a) instituting controls for the use of public money;
(b) establishing a framework for the equitable sharing of public revenue through special provisions for marginalized communities and a mechanism for the division of national revenue between the national government and county governments;
(c) establishing a number of other institutions and procedures to protect the integrity of the management of public finance.

7.5.5.4 Controlling public money

The Chapter controls the use of public money by –

(a) requiring all money raised by the national government and county governments to be paid into public funds regulated by law (usually the Consolidated Fund for the national government and Revenue Funds for counties);
(b) allowing taxes and licensing fees to be waived only in terms of a law, requiring proper public records to be kept of any waivers and preventing any law from exempting special classes of people, such as MPs, from tax purely on the basis of the jobs that they do;
(c) requiring all public spending to be approved by the National Assembly or county assemblies;
(d) giving Parliament the power to control borrowing by both the national government and counties and requiring the national executive to provide information about the state’s liability on loans and guarantees to Parliament when asked;
(e) giving the treasury the power to establish controls over the use of public money both at national level and by county governments, subject to law
(f) requiring a proper system controlling public procurement’;
(g) establishing the Controller of Budget as an independent office to monitor the withdrawal of public money from public funds at both national and county level; and
(h) establishing the Auditor-General as an independent office to audit and report in public on the accounts of all government institutions each year.

The roles of the Auditor-General and the Controller of Budget were separated in the CKRC Draft and this approach retained in all later drafts. It is particularly important in strengthening financial oversight. The Auditor-General acts after the event. This ensures that the financial management of the country is assessed regularly by an independent body and that misuse of funds and systematic problems are identified. However, because the audits of the Auditor-General are done some time after money has been spent they are post mortems. The Controller has a preventative function, overseeing spending when it happens and ensuring that money is spent only in accordance with the law. To secure each of these separate offices properly, both the Auditor-General and the Controller of Budget were listed as independent institutions in Chapter 16 (on Commissions and Independent Offices) and are protected by the provisions of that Chapter.

7.5.5.4 Equitable sharing of revenue:

This Chapter seeks to ensure that the national government and county governments receive a fair share of the revenue that is raised by governments in Kenya. As in all countries in the world with systems of devolved government, the fiscal capacity of counties will vary greatly. Some will be rich and others poor. To remedy this, the Chapter establishes a system of revenue sharing.

The most significant sources of revenue (including income tax and value-added tax, for example) are granted to the national government. Then, the Chapter requires the revenue raised by the national government to be equitably shared between the national government and the county level of government. Once the share that is to go to the county level of government is determined, that share too is divided equitably amongst the counties.

The Chapter provides criteria that are to be taken into account in sharing the national revenue. These include the national interest, the need to ensure that county governments can fulfill their functions, economic disparities amongst regions, and the need to provide
incentives to counties to develop their capacity to raise revenue, among other things. Overall, this ensures that the national government and counties are allocated funds according to their needs. Not all counties will receive the same funding. Their different needs will be considered.

In the RHDC, the independent and specialized Commission on Revenue Allocation (CRA) was to determine the basis for the sharing of national revenue. The support of a majority of the members of both the National Assembly and Senate was required to amend these recommendations. play a special role in the process of division of revenue.

7.5.5.4 The Salaries and Remuneration Commission

The functions of the Salaries and Remuneration Commission were revised in the RHDC. Its power to set the remuneration of MPs, members of the executive, including the president, members of commissions and other independent offices and other senior office holders was retained but its power to set the remuneration of other public officers was removed. This is because setting salaries in the public service is a matter closely linked to government policy and subject to collective bargaining. It is therefore not appropriately taken out of the hands of the executive (and unions) and given to an independent body. Instead, under the RHDC the Commission was to make recommendations on all other salaries etc in the public service. The Commission was covered by the provisions of Chapter 16 of that draft and so is independent. A rigorous process must be followed to remove members of the Commission.

The composition of the Commission was also revised to ensure that each sector affected by its decisions can nominate members to serve on it. In addition, three additional members of the Commission were to supply professional advice and do not vote (these are persons designated by the Attorney-General’s office, by the Cabinet Secretary responsible for finance and by the Cabinet Secretary responsible for human resources).

The Salaries and Remuneration Commission protects constitutional democracy in two important ways. First, following practice in many modern democracies, it ensures that people do not set their own salaries – thus although MPs must pass the budget, they do not set their own salaries. Secondly, it protects the remuneration of members of the institutions that are intended to guard the Constitution and oversee the executive and Parliament. So, for instance, Parliament or the executive cannot intimidate judges by threatening to lower their salaries – the salaries are set and protected by the Commission.
CHAPTER EIGHT – THE MAKING OF THE PROPOSED CONSTITUTION

8.1. Introduction

The Revised Harmonized Draft Constitution (RHDC) was submitted to the Parliamentary Select Committee (PSC) on 8 January 2010. Twenty-one days later, on 2 February 2010, the CoE received the PSC’s proposals on the RHDC. In terms of section 33 of the Review Act, the CoE had 21 days in which to “revise the draft Constitution taking into account the achieved consensus” of the PSC. The PSC proposals made substantial changes to the RHDC, not only in the contentious chapters but, controversially, also to provisions in agreed areas.

This part of the Report identifies changes to the RHDC proposed by the PSC and consequential adjustments made by the CoE. Many of these adjustments were necessary in view of the decision of the PSC to introduce a presidential system of government. They were intended to bring the Draft in line with best practices pertaining to a presidential system. In some instances the CoE did not adopt the changes introduced by the PSC and reaffirmed the position it had taken in the RHDC for reasons of coherence and in order to adhere to the guiding principles of the process of constitutional review.

After reviewing the proposals by the PSC, the CoE prepared the Proposed Constitution of Kenya (Proposed Constitution) which it submitted to the National Assembly for deliberation and debate on 23 February 2010. The Chapter numbers used below refer to those in the Proposed Constitution.

8.2 Legal Basis for Reviewing the Proposals of the PSC

Changes made by the CoE in the Proposed Constitution were guided by sections 4 and 6 of the Review Act, which have been noted already. The principles established in these provisions bound all the organs of review, that is, the CoE, PSC, the National Assembly, and the Referendum. It was clear to the CoE that the review process was designed to ensure that these principles were met at all times, including the primary requirement for the CoE to prepare a harmonized draft constitution based on earlier drafts. Section 30(2) of the Act stipulated that issues agreed in the three earlier drafts of the constitution are “closed” and only those not agreed were “contentious” and “outstanding.” It was the view of the CoE that, apart from technical detail, provisions concerning these issues could not be changed through proposals made by the PSC.
8.3 The Preamble

The only change made in the Preamble by PSC was the removal of the word “other” in respect of diversity. The consequence of this was that the only forms of diversity recognized were “ethnic,” “cultural” and “religous”. As a consequence, at least two key forms of diversity, gender and disability, were not recognized in the third sentence of the Preamble. The CoE did not make any adjustment to this change by the PSC, although it drew its attention to its implications.

8.4 Chapters Two and Three: The Republic; National Values and Culture

The PSC collapsed two chapters of the RHDC: Chapter Two concerning “The Republic” and Chapter Three relating to “National Values and Culture,” into one chapter. The new chapter was entitled “The Republic” and contained several significant changes.

(a) Territory

Earlier drafts provided that Kenya’s territory was the territory “recognized as such under international law.”\(^{21}\) The PSC Draft instead provided for the territory of Kenya to be as at “12th December, 1963 and the territorial waters of Kenya as for the time being defined by an Act of Parliament.”\(^{22}\) The challenge in respect of the PSC definition was that state territory is recognized and protected by international law, and that the territory comprising Kenya has changed since 1963. Accordingly, minor adjustments were made by the CoE to address the PSC’s concern that Kenya should determine its own territory and to ensure that in doing so all current parts of the Republic of Kenya are recognized.

(b) Languages and Modes of Communication

The PSC changed what was originally Article 9 of the RHDC on “Languages and Modes of Communication” to a new Article 7 entitled “National and Official Languages.” The change in title was not the only significant change to the provision, however. The PSC also deleted Article 9(3) on the promotion of the diversity of language and Article 9(4) which provided that:

“The State shall promote the development and use of Kenyan sign language, Braille and other communication formats and technologies accessible to persons with disabilities.”

\(^{21}\) Article 5 of the RHDC.
\(^{22}\) Article 5 of the PSC Draft.
The CoE acknowledged the PSC’s commitment to producing a shorter document reflected in these changes. However, the original Article 9(4) contained a central principle that protected the rights of persons with disabilities. This principle had not been contentious and was provided for in the earlier drafts. The CoE had also received no submissions whatsoever suggesting its removal. Finally, section 6(c) of the Review Act provided that the organs of review and the review process must “accommodate the diversity of the people of Kenya including … persons with disabilities and the disadvantaged.” The CoE reinstated the substance of the former Article 9(3) and (4) of the RHDC in the new Article 7 of the Proposed Constitution.

(c) Merger of RHDC Chapter Three on National Values and Culture with Chapter Two

The PSC deleted the bulk of Chapter Three of the RHDC and merged it with RHDC Article 13 on national values into a broad statement formulated in a new Article 10.

Chapter Three of the RHDC had itself condensed material that was contained in two full chapters of previous drafts. Since it was clear that the provisions of the original Chapter Three on National Values, Principles and Goals of the RHDC were contained in all three drafts of the constitution, the CoE was bound by the Review Act to treat the content of that Chapter as agreed and non-contentious and to retain it. But the CoE adopted the PSC’s rendering of principles.

The PSC deleted RHDC Article 14 entirely. The opinion of the PSC was that “culture need not be entrenched in the Constitution.” However, the CoE noted that Article 14 of the RHDC did not seek to entrench a particular culture, but rather established a constitutional, legal and regulatory framework that would facilitate the promotion of the arts and sciences, all of which were important contributors to the economy. Again, too, the provisions on culture were not contentious and had been greatly abridged in the RHDC, from a full chapter in previous drafts to a single article. In addition, the CoE had received representations from, amongst others, the business community through the Kenya Private Sector Alliance (KEPSA), and performing artists, expressing concern about insufficient safeguards for intellectual property rights in the original drafts.

The constitutional protection and promotion of the arts and sciences is not unusual. Indeed, section 8 of Article One of the United States Constitution lists as the eighth power of Congress the responsibility to “promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and

Discoveries.” In an age when there have been external attempts to alienate, privatize and patent the indigenous knowledge, intellectual property rights and innovations of Kenyan communities, such as the ciondo and kikoi, it is important to provide for the protection of intellectual property. Finally, section 4(e) of the Review Act provided that the new constitution should, among other things, include provisions that respect “the right of communities to organise and participate in cultural activities and the expression of their identities.”

The Committee therefore reinstated Article 14 albeit in a shortened form, focused purely on the principles necessary for protection and promotion of the arts and sciences and the intellectual property rights of Kenyan scientists, artists and other innovators.

8.5 Chapter Three: Citizenship

Provisions concerning citizenship had been included in Kenya’s Constitution since independence. All three earlier drafts of the constitution and the RHDC similarly contained provisions on citizenship but they revised the provisions in the independence Constitution by, among other things, eliminating discrimination on the basis of gender and ensuring that Kenyans could acquire dual citizenship. The PSC Draft contained proposals for some changes to these rights, the key aspects of which are highlighted below.

8.5.1 Retrospective application of the right to citizenship for Kenyans

All previous drafts provided rights to citizenship for various classes of people and made these rights retrospective. In other words, people who had met the criteria for citizenship before the constitution came into force would also be able to claim the right. The most obvious application of the retrospective application of the right to citizenship concerns children born to a Kenyan woman living outside the country. Under the independence Constitution, such children did not have a right to Kenyan citizenship. Children born abroad to Kenyan fathers had a right to citizenship but not children born to Kenyan mothers. The provision securing the retrospective application of the right would correct this injustice and secure Kenyan citizenship for children born out of the country to Kenyan mothers before the Constitution came into effect. The provision also gave Kenyan citizens who had lost citizenship because they had acquired the citizenship of another country before the constitution came into effect the right to dual citizenship.

The PSC deleted this provision, depriving many Kenyans of the new citizenship rights. However, alert to the discrimination that its omission would perpetuate, the CoE reinstated it (through Article 14(2) and (5) and Article 15(5)).
8.5.2 Provisions with respect to “foundlings”

All three earlier drafts and the RHDC contained provisions granting citizenship to children under the age of eight of unknown parentage and whose nationality was also unknown if found within Kenya (“foundlings”). The PSC converted this right to a right for those children to apply for citizenship (which would not necessarily be granted). The PSC’s concern was based on the difficulty of revocation of citizenship by birth. However, the amendment had the effect of nullifying the right completely. The CoE adjusted the PSC provision to restore the right of citizenship of these children and provide explicitly for nullification of citizenship if at any time evidence emerged to show that any of the grounds on which citizenship was based turned out to be false. These changes conform to Kenya’s obligations under the U.N. Convention on the Rights of the Child, 1989.

8.5.3 Changes to provisions for dual citizenship

Whereas previous drafts and the RHDC provided for all categories of citizens to hold dual citizenship, the PSC Draft restricted this right to those who were citizens by birth. This provision had two effects that appeared to be unintended:

(i) Kenya did not exist as a country before 1963 and Kenyans born before 1963 were not citizens by birth. They, therefore, would not enjoy the same benefits as those enjoyed by other citizens. This was reinforced by the PSC’s deletion of the article of the RHDC which sought to make citizenship rights retrospective. To rectify this, the CoE incorporated a provision in the transitional clauses with the effect of a savings clause that treats this category of citizens as citizens by birth.

(ii) Foreign spouses of Kenyans who chose to become Kenyan had no constitutional right to dual citizenship as their Kenyan citizenship would be by registration rather than by birth. There was need to examine how to prevent them from suffering this form of discrimination. The compromise that the CoE introduced was to include Article 15(4) in the Proposed Constitution, stating that Parliament will enact legislation establishing conditions on which citizenship may be granted to individuals who are citizens of other countries. The intention behind Article 15(4) was clear in the mind of the Committee: it was to regulate the acquisition of Kenyan citizenship by citizens of other countries, including spouses of Kenyans, within the framework of the Constitution, in a way that would not deny them citizenship merely because they not Kenyan citizens by birth.
8.6 Chapter 4: The Bill of Rights

Referred to as the “People’s Chapter” by Kenyans, the Bill of Rights is the Chapter in which the people see and identify themselves. It also serves as a check on the government. The Bill of Rights was an agreed Chapter throughout the process of constitutional review and the principles contained in it remained consistent in the earlier three drafts. The CoE considered and welcomed some of changes made to this Chapter by the PSC, which appeared largely to have been in the interests of brevity. However, in order to ensure consistency with the rest of the Proposed Constitution; to entrench relevant constitutional norms; and to comply with the Review Act, certain revisions and adjustments had to be made. These adjustments and changes can be placed in three categories as discussed below.

8.6.1 Minor drafting changes

These changes involved editing and other technical adjustments effected to ensure that the Chapter was technically sound, coherent and accessible. Changes of this nature could not be captured in this Report but can be seen in the Proposed Constitution.

8.6.2 Reinstatement of constitutional rights and principles that may have been lost through abridgement

After careful consideration and guided by the principles, objects and purpose of the review process set out in the Review Act, the CoE reinstated certain provisions which contained principles that had been lost when the PSC either deleted or merged them with other articles. The key articles are discussed below:

(a) Access to information
This right was contained in Article 40 of the RHDC. The PSC sought to provide for it under Article 32(4) of its draft which read, “Parliament shall, by legislation, provide for the right to access to information.” Article 32(4) of the PSC Draft, converted the right to access information to a right to have legislation on access to information. As rendered in the PSC Draft, the right would be accessible only through the motion of Parliament whereas this right should be accessible to all Kenyans, fettered only by the limitations provided for in the Proposed Constitution.

The CoE reinstated the right to access to information as it existed in the RHDC. It is important to spell out the right to access to information because it is closely linked to accountability and checking government, especially in the context of the proposed presidential system. It is the means by which citizens hold the state accountable. This right
was not guaranteed in the former Constitution of Kenya and its inclusion in the *Proposed Constitution* met international standards of democratic governance.

**(b) Marginalised and vulnerable groups**

The *PSC Draft* collapsed the rights of marginalised and vulnerable groups such as children, women, youth, persons with disabilities and marginalised communities into one article. The PSC, as noted in its Report, did not perceive that part of the Bill of Rights (former part 3 of the Chapter 5 of the *RHDC*) as “providing any additional right.” However, the CoE amended the PSC proposal first by separating the different groups of persons and, then, by stipulating measures that were to be specifically guaranteed to each group. In doing so it drew on the provisions in previous drafts but abridged them to capture only the specific principles distinctly applicable to the categories of persons concerned. Persons with disabilities, for example, have specific needs with respect to access that are specific to their experience of discrimination and which needed to be addressed in order to ensure their equality with other groups in society.

In making these adjustments, the CoE was moved by the fact that, throughout the process of constitutional review, Kenyans have demanded an expanded Bill of Rights that explicitly guarantees the specific rights of women, children, youth, and persons with disabilities. These demands were recognized by the Review Act when it provided that one of the objectives of the review process was to ensure that Kenya’s new constitution established a free and democratic system of government that also guaranteed “human rights, gender equity, gender equality and affirmative action.” The Review Act also counseled all organs of review to ensure that “the review process accommodates the diversity of the people of Kenya including socio-economic status, race, ethnicity, gender, religious faith, age, occupation, learning, persons with disabilities and the disadvantaged;” and further to ensure that the process of reviewing the Constitution, “is guided by respect for the principles of human rights, equality, affirmative action, gender equity, and democracy.”

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24 Article 49 *PSC Draft*.
25 *PSC Report* p. 7
27 Section 4 (b) of the Review Act.
28 The CoE, PSC, Parliament and the Referendum.
29 *Section 6 (c) of the Review Act (2008)*.
30 *Section 6 (d(iv)) of the Review Act (2008).*
8.6.3 Reformulation of provisions

The main provisions that were reformulated by the PSC and then revised by the CoE were:

(a) Economic and Social Rights:

The PSC Draft reformulated the provisions on economic and social rights by, first, collapsing them into one article (Article 40 of PSC Draft) and, secondly, by deleting the elaboration of their meaning in the RHDC and earlier drafts. The CoE welcomed the consolidation of the provisions in one article but revised it by returning to the language of the RHDC. This ensured that the rights were consistent with section 4(f) of the Review Act and international standards binding on Kenya under the International Covenant on Economic, Social and Cultural Rights (ICESCR). Providing for these rights as formulated in the Proposed Constitution of Kenya creates constitutional thresholds for their implementation and facilitates legislative, policy and programmatic interventions.

(b) Equality Commission

The PSC Draft aggregated the human rights institutions proposed in the RHDC, i.e., the Kenya Human Rights and Gender Commission and the People’s Protector into one institution called the Equality Commission. The CoE accepted this structural change but made minor changes of detail. First, the CoE changed the name of the Commission to the Kenya National Human Rights and Equality Commission. The name proposed by the PSC captured only one facet of human rights – equality – and therefore would not address the full scope of the Commission’s work. In addition, the CoE’s change of name was intended to redirect the Commission to the core of its work on human rights and reflects international practice in naming such bodies. The second change to the PSC proposal was to leave the door open for Parliament in the future to separate out the functions of the Commission by creating distinct independent commissions through legislation if it deemed it wise and necessary to do so.

(c) The right to life

One of the most significant changes made in the Bill of Rights by the PSC was to Article 31 of the RHDC on the right to life. The right to life appeared in Article 25 of the PSC Draft with two new clauses: clause (2) stating “The life of a person begins at conception” and clause (4) stating “Abortion is not permitted unless in the opinion of a registered medical

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31 Articles 49 – 54 of the RHDC
32 Article 72 of the RHDC
33 Article 71 of the RHDC
34 Article 51 of the PSC Draft
practitioner the life of the mother is in danger.” Despite reservations regarding its formulation, the CoE left the statement in clause (2) that “life begins at conception” intact because the PSC pointed out that this was a “deal breaker” (or deal maker) in getting some sections of the religious sector to support the Proposed Constitution. (That did not turn out to be the case as the discussion of civic education below shows.)

It should be noted that the reformulated provision was itself contrary to Article 31 of the PSC Draft on freedom of conscience, religion, belief and opinion, and there are different views held on when life begins. Muslims believe life beings at "ensoulment", which is on the 40th day of a pregnancy, while some Christian churches believe it starts at "quickening" (at about 12 weeks’ from conception). Traditionalists believe life begins at birth and scientists have varied other opinions. Some people believe that life begins before conception.

The proposed clause (4) was unusual by international standards. Only a handful of countries, such as El Salvador, Nicaragua and Bolivia have clear references to abortion in their constitution. Moreover, medical practitioners raised concerns about the new wording which forbade abortion, pointing out that abortion may be spontaneous (miscarriage), and therefore could not be prohibited or “permitted”. Secondly, the medical practitioners said, there are situations where the mother’s life is not in danger but her health would be seriously damaged if an abortion was not performed or where an operation on her reproductive organs would result in an abortion. Examples include tumors which present as what appear to be pregnancies or ectopic pregnancies which, if not terminated, could result in infertility or even death. The requirement that abortion could be performed by medical practitioners alone also raised concerns. It would mean that women in poor rural communities without such services would be unable procure abortions with potentially serious or fatal repercussions for some poor women. There was also need to ensure that the language used by the PSC did not outlaw methods of fertility control, such as emergency contraception. The CoE accordingly amended the draft to include language that would enable appropriate medical intervention to be available when necessary.

8.7 Chapter Six: Leadership and Integrity

The key change made to Chapter Six on Leadership and Integrity by the PSC was the deletion of the provisions establishing an Ethics and Anti-Corruption Commission. Page 8 of the PSC Report explains this deletion on the basis that such a body already existed in statute. In addition, the PSC was of the view that corruption was not a permanent feature of life in Kenya and that it therefore did not require a permanent body. The challenge, however, was that previous anti-corruption bodies had been proscribed by the courts on the basis that they were “unconstitutional.” Given the prevalent nature of corruption, the levels in society at which it occurs, and the fact that a body investigating corruption would in many
instances investigate the actions of powerful members of the executive, it was important for an anti-corruption body to have independence and enjoy constitutional protection. The CoE also considered such a body to be an important means of checking the exercise of executive power. It responded by requiring Parliament to establish an independent anti-corruption body.

### 8.8 Chapter Seven: Representation of the People

The PSC made several changes to Chapter Seven on Representation of the People. These changes were substantial especially on the delimitation of electoral units: The PSC fixed the number of constituencies for the purposes of National Assembly elections at two hundred and ninety. It also departed from the RHDC principle that constituencies should be delineated in such a way that “an approximate equality of constituency population” is achieved, taking into account various factors and replaced it with the principle that the IEBC should work towards ensuring that “the number of inhabitants in each constituency is, as nearly as possible, equal to the population quota” (*PSC Draft* Article 77(4) and (6)). *PSC* Article 77(6) also stated that the population quota was to be calculated by dividing the total population of Kenya by the number of constituencies, i.e. 290. To ensure that sparsely populated areas were not disadvantaged by this formula, Article 77(5) of the *PSC Draft* allowed for a margin of deviation of up to 80% between densely and sparsely populated areas: “the number of inhabitants of a constituency to be greater or lesser than the quota by a margin of not more than (a) forty percent for cities and sparsely populated areas; and (b) thirty percent for the other areas”.

The CoE retained these provisions as they were central to the consensus reached by the PSC. However, a minor adjustment had to be made for the provision of wards which had been accidentally deleted. Other adjustments that the PSC made to the Chapter are considered below.

#### 8.8.1 Ceiling on how much candidates can spend during elections

The provisions of Article 106(3) (j) of the RHDC gave the IEBC responsibility for “the regulation of the amount of money that may be spent by or on behalf of a candidate” in election campaigns. This provision was deleted by the PSC. However, in a democratic society it is important to put a ceiling on spending during campaigns. This provision was consistent with the requirements of good governance as it sought to enhance transparency and reduce incentives for grand corruption and other vices that tempted looting in order to pay for political campaigns. For these reasons the CoE decided to reinstate it.
8.8.2 Provision on petitions, including the service of petitions:

Kenya’s history shows clearly that service of petitions in legal proceedings involving presidential office and sitting members of Parliament has been difficult. The courts have attempted to change this trend, but have met serious challenges. To prevent the reversal of gains made in this area, the Proposed Constitution retained the provision stipulating that the service of petitions may be either direct or by advertisement.

8.8.3 Provisions on nominated seats and county assemblies:

The CoE reintroduced provisions deleted by the PSC on party lists to cater for special seats in county assemblies and elsewhere. Deletion of these provisions appeared to have been an oversight, because although the PSC seemed not to want party lists for Parliament, the special seats in the county assemblies could not be filled otherwise.

8.9 Chapter Eight: The Legislature

Section 4 of the Review Act instructed the organs of review to produce a constitution which guaranteed good governance and constitutionalism. This mandate was reiterated by the PSC when it asked the CoE to ensure that the proposed system of government had adequate checks and balances. In examining the PSC revisions to the chapter on the legislature, the central question that the CoE was faced with was how and to what extent did the design of the legislature ensure effective checks and balances?

This question, the statutory obligations of the review organs, the statutory criteria for the new constitution and the principles agreed in earlier drafts informed the CoE’s review of the changes that were made by the PSC. As described below, the recommendations of the PSC were incorporated to ensure a robust Parliament that would be an effective check on the other organs of state.

8.9.1 Prohibition on Members of Parliament being Cabinet Secretaries:

The PSC Draft prohibited members of Parliament (MPs) from holding the office of Cabinet Secretary (minister) and thus from being a member of cabinet. However, in doing so, it explicitly made provision for Members of Parliament to be appointed as Cabinet Secretaries provided that they resigned in that event. This change was in line with the PSC choice of the presidential system in which there is a clear demarcation between the executive and the legislature. The CoE maintained the change which was also consistent with section 4(c) of the Review Act which provided that the new constitution must recognise and demarcate “divisions of responsibility among the various state organs including the executive,
legislature and judiciary” in order to “create checks and balances between them and … ensure accountability of the Government and its officers to the people of Kenya.”

The CoE noted that because the roles of head of state and government are fused in a presidential system and the President can be removed from office only in very limited circumstances, the presidency is extremely powerful. The check on this power that the Legislature exercises is most important. It checks the executive chiefly through its control of appointments, legislation and the budget. These functions cannot be carried out effectively if the President has the power to offer MPs cabinet positions without requiring them to relinquish their secure seats in Parliament and while cabinet members can influence parliamentary proceedings.

8.9.2 Changes to the nature, role and functions of the Senate

The PSC Draft provided for a “Senate” that would be a “lower house” with a “limited legislative” role primarily to represent counties. These proposals reduced the role of the Senate considerably. On the other hand, it gave the Senate considerable power over certain matters concerning counties: a “proposal” by the Senate relating to matters affecting counties, including the allocation of revenue, could be rejected by the National Assembly only on the vote of two thirds of the members of the Assembly.

(a) Role and function of the Senate

The CoE was concerned about the proposals concerning the functions of the because: (i) the county matters over which the Senate had power did not extend to standard that the national government might impose on county governments; (ii) although a second chamber plays an important role in a devolved system of government in representing the devolved units it should not be able to overrule the National Assembly in a way that might limit the ability of the national government to govern effectively; (iii) a second chamber may play an important role in checking executive power; (iv) section 4(d) of the Review Act provided that the new constitution must promote “the peoples’ participation in the governance of the country through … the devolution and exercise of power”; and (v) the people had asked the CKRC for a second house of Parliament and, in doing so anticipated a Senate with full legislative and oversight powers.35

Because presidential system is highly centralized and concentrates power and access to resources in one individual, devolution plays a particularly important role in such a system in ensuring equity and inclusion. A bicameral legislature with one chamber representing individual citizens equally and the other representing people on a territorial basis (for

example by county) provides robust checks on the executive and enhances opportunities for participation by citizens at the national level. In particular, the Senate can (i) prevent legislative checks on the executive being nullified when the National Assembly is controlled by the party of the President; (ii) by representing people in their counties, ensure that the interests of people in densely populated areas do not always override those of people in less populated areas; and (iii) provide an opportunity for the representation of disadvantaged groups. The second house is also an institution through which devolved governments can interact with the national government – it is therefore instrumental to the design of an effective devolution system.

The CoE accordingly expanded the role proposed for the Senate by the PSC, giving it a say in all legislation affecting county government in addition to its control of the distribution of national funds to counties. But, it reduced its power over most matters concerning counties so that in most cases Senate proposals could be overturned by the National Assembly by an ordinary majority. As discussed below, the CoE also reinstated the role of the Senate in the impeachment process and returned provisions giving representation in the Senate to disadvantaged groups.

(b) The name and status of the Senate

As noted above, the PSC Draft explicitly referred to the Senate as a “lower house.” However, in modern constitution making it is unusual to create a hierarchy of the houses of Parliament and the RHDC had not done so. Even in older jurisdictions where there is a hierarchy in the houses of parliament, the Senate is not the “lower house.” This would set a precedent unique to Kenya that would not strengthen the legislature. The CoE recommended that the Proposed Constitution should abide by modern principles of constitutional design and not create a hierarchy between the two houses of Parliament.

Finally, the PSC Draft removed the provisions of the RHDC that gave the Senate a role in the impeachment of the president. However, having the same house impeach and try the president offends the principles of natural justice, conflating the roles of investigator, prosecutor, judge and jury into one. In the USA, for example, the House of Representatives impeaches whilst the Senate tries the President. In addition, requiring both the Senate and the National Assembly to participate in the impeachment process ensures that the President is not held hostage to transient majorities in the National Assembly. The CoE accordingly restored the role of the Senate in the impeachment process.

The CoE also removed Article 127(8) of the PSC Draft which provided that the Chief Justice would preside over impeachment proceedings on the basis that it is important for the Judiciary to remain outside the impeachment process because it may be required subsequently as an avenue of appeal.
8.9.3 Changes in the composition of Parliament

As is noted earlier, the Review Act stated that the new constitution must guarantee human rights, gender equity, gender equality and affirmative action and “the full participation of people in the management of public affairs.” The composition of the new Parliament would be instrumental in fulfilling the requirements of good governance, equality and participation.

The PSC Draft included several changes in respect of the composition of Parliament. First, it provided for a mandatory 290 members representing geographical constituencies in the National Assembly. Secondly, however, it retained the 47 seats in the National Assembly for which only women could compete. This was an effort to ensure that the one third requirement for gender representation agreed the earlier drafts as well as the affirmative action requirements of the Review Act were met. (Although the 47 seats set aside for women in the RHDC did not itself meet the requirement these seats were important in establishing a minimum threshold towards the constitutional target.)

Thirdly, the PSC changed the RHDC’s provisions on affirmative action with regard to representation of persons with disabilities, youth and other marginalised groups in the National Assembly. The RHDC had provided for the 5% affirmative action measure for persons with disabilities to be met through specifically designated seats and a system that would ensure that all other marginalised groups were represented and that the balance of the one-third seats for women were properly filled. However, the PSC Draft retained the former Constitution’s twelve nominated seats in the National Assembly to be filled by people representing “special interests, including the youth, persons with disabilities and workers.” This fell short of the one-third requirement for the representation of women. Furthermore, persons with disabilities have raised concern and noted that when seats were filled in this manner in the past, rarely was a single seat assigned to a person with disabilities. The CoE noted that the allocation of seats provided for in the PSC Draft was considered part of the consensus reached by the PSC and therefore retained the PSC’s formulation but urged Parliament to re-examine the issue of representation of persons with disabilities in the National Assembly. Article 100 of the Proposed Constitution would provide the constitutional the basis for doing so.

The PSC Draft did not provide for the representation of persons with disabilities and youth in the Senate as had been provided in the RHDC. In keeping with the statutory obligation to “ensure that national interest prevails over regional and sectoral [and]… that the review process accommodates the diversity of the people of Kenya including…age… [and] persons

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36 Sections 4(b); 4(f) and 4(j)
37 Article 85(c) of the PSC Draft
with disabilities”, the CoE added four seats to the Senate, two for persons with disabilities, and two for the youth. It proposed that these seats be filled through party lists on the basis of the seats won in a general election. Additionally, the CoE recommended that, rather than leave the method of filling the seats for women in the Senate to legislation, these seats could be filled through party lists in the same way.

8.9.4 Money Bills

The PSC Draft provided that money bills could not be introduced without the consent of the President. While the CoE appreciated the potential risk of appropriations that could overburden the exchequer, it also noted that provisions on money bills should not enable the executive to unduly constrain the legislature’s independence and thus erode its oversight function. As noted above, control of “the purse” is an important check on the executive in a presidential system. For example the United States Constitution (Article 1 section 7) does not provide in any special way for Revenue Bills (Money Bills) other than that they must originate in the House of Representatives. The CoE inserted a provision in the Proposed Constitution stating that, if in the opinion of the Speaker of the National Assembly a bill was a Money Bill, the Assembly could proceed to consider it only on the recommendation of the relevant Committee of the Assembly, after taking into account the views of the Cabinet Secretary responsible for finance.

8.9.5 Majority and Minority Leaders and Chairs of Parliamentary Committees

The PSC Draft provided that the Majority and Minority Leaders in the House as well as chairs of parliamentary committees would enjoy a stature equivalent to that of Cabinet Secretaries. The CoE was concerned that in a system in which the members of the cabinet are not drawn from Parliament, the Cabinet Secretaries would actually not necessarily enjoy the same stature as parliamentarians and to place leaders in Parliament at the same level as Cabinet Secretaries may actually diminish their stature, contrary to the intention of these provisions. Adjustments were therefore made to remove this purported equation of status between Cabinet Secretaries on the one hand, and Majority and Minority Leaders on the other hand. It was noted that parliamentary committees play an important role in a presidential system and Parliament would have to develop mechanisms for strengthening the role of chairs of parliamentary committees and in particular departmental committees of the houses.

38 See Article 96(4) of the PSC Draft
8.9.6 Other changes

Pursuant to the instruction that the constitution should contain a good system of checks and balances, Article 124(4) establishes the basic procedure that must be followed when either the Senate or the National Assembly approves an appointment, including appointments made by the President.

In Article 111(7)(h), the PSC Draft provided for the Parliamentary Service Commission, “from time to time as necessity arises, to appoint an independent body to review and make recommendations on the salaries and allowances of Members of Parliament.” However, the Kenyan public was of the view that public officials, including parliamentarians, must no longer be allowed to determine their salaries. Accordingly, express provision had been made in all three prior drafts for a Salaries and Remuneration Commission that would set and review salaries of all public officials, including MPs. Moreover, this provision was retained in the PSC Draft at Article 203(1). The Proposed Constitution preserved this role of the Salaries and Remuneration Commission and dispensed with the PSC’s proposal that the Parliamentary Service Commission would have powers to appoint an independent body to deal with salaries and allowances of Members of Parliament.

One further change made by the PSC to the RHDC was to provide for the security of tenure of the Clerks of the Houses of Parliament Article 95 of the PSC Draft stated that the Clerks could be removed from office only through a petition presented to a tribunal, the findings of which had to be supported and ratified by at least half the members of the House. This procedure in the PSC Draft made it easier to remove the Speakers of the Houses of Parliament than the Clerks and was similar to the procedure for the impeachment of the President. The CoE removed these provisions as it was not satisfied that constitutional protection of the tenure of Clerks of the Houses of Parliament was justified.

8.10 Chapter Nine: the Executive

The most significant decision of the PSC was to adopt a presidential system of government. Implementing this decision required substantial changes to the Chapter on the Executive. The PSC indicated to the CoE that it intended the system to be well balanced with adequate checks on executive power. Changes to the Chapter are discussed below.

39 See page 323 of the Final Report of the Constitution of Kenya Review Commission, where it reads: “In asking for a Salaries and Remuneration Commission, the people submitted that it should…review the benefits, salaries and working conditions of Members of Parliament.”

40 Page 9 of the PSC Report
8.10.1 Authority of the President

The CoE revised Article 114 of the *PSC Draft* to affirm the authority of the President as head of state and government. While the President would not hold any other State or public office within the Republic, there was a question whether he or she could hold an elected office or appointment within a political party, given the likelihood that a presidential candidate would be a leader of a political party at the time of the elections. The concern was that President would be overburdened with both sets of responsibilities. In its review, the CoE deliberately left the *Proposed Constitution* silent on this issue allowing political parties to determine what would work best.

8.10.2 Functions of the President

In the RHDC the President had functions that related to the position of Head of State only. To accommodate the President’s role as head of government, the President’s functions in Article 115(3) of the *PSC Draft* were adjusted in the *Proposed Constitution* to include:

(a) chairing Cabinet meetings;
(b) directing and co-ordinating the function of Ministries and State departments; and
(c) assigning responsibility for the implementation and administration of any Act of Parliament to a Cabinet Secretary in accordance with the requirements of an Act of Parliament.

8.10.3 Checks and Balances

The *PSC Draft* required senior executive appointments to be approved by Parliament, thus putting in place an important check on the power of the executive. The positions requiring parliamentary approval included:

(a) the Cabinet Secretaries;
(b) the Attorney-General;
(c) the Secretary to the Cabinet;
(d) Principal Secretaries;
(e) High Commissioners, Ambassadors, diplomatic and consular representatives; and
(f) any other State or public officer whom the Constitution required the President to appoint.

However, careful thought would have to be given to the way in which the National Assembly would actually vet and approve nominees by the President. Involvement of specialised Committees of the National Assembly, with the assistance of professionals in areas in which nominees would be chosen for consideration by the National Assembly,
would be necessary to have an effective, rather than rubberstamping mechanism. The CoE provided for appropriate measures in this regard in Chapter Eight of the Proposed Constitution.

Although the powers of the president to appoint persons specified in (a) to (e) above would be checked by the National Assembly, the power to dismiss these persons would belong to the President alone. However, a caretaker President’s power was limited and did not extend, in this regard, to the nomination or appointment or dismissal of Cabinet Secretaries and other state or public officers. This was seen as a necessary safeguard against a care taker President usurping authority.

As head of government, the President would be required to perform a range of executive functions not expressly identified in the Constitution. Article 132(4) checks this power by requiring such functions to be authorised by legislation. The provision anticipates that the President may establish offices in the public service, but requires this to be done on the recommendation of the Public Service Commission. The CoE viewed both of these provisions as necessary safeguards against an “imperial presidency”.

8.10.4 Election of the President

The PSC provided that presidential elections were to be held on a different day from parliamentary elections. However, the CoE revised the provisions of Article 119(2) of the PSC Draft so that presidential and parliamentary elections would be held on the same day. The most important reason for proposing simultaneous elections was to promote unity of purpose between the executive and legislature. One of the difficulties of presidential systems is the possibility of deadlocks between the executive and legislature. These occur when there is a divided government i.e. when the President comes from a different party to that which holds a majority of the seats in the legislature. Simultaneous elections have been shown to help to prevent this and thus to promote effective government.

Additional reasons for the change included:
- the high cost implications of separate elections;
- the potential increase in the propensity towards violence during presidential elections, in the light of the known outcome of preceding general elections to the National Assembly; and
- the fact that political parties could also be strengthened by participating simultaneously in presidential and parliamentary elections.

The CoE also believed that simultaneous elections would promote national cohesion by closing space that ‘ethnically’ oriented forces would seek to exploit in separate elections.
8.10.5 Procedure at Presidential Elections

It is in the electoral process in a presidential system that the popularity and legitimacy of presidential candidates should be tested and demonstrated. For this reason, the CoE supported the PSC’s proposal that a candidate should receive more than half of all the votes cast in the election and at least twenty-five per cent of the votes cast in at least half of the counties to be elected. But the CoE thought that when a new presidential election must take place due to death of a candidate the period of thirty days within which to hold fresh elections proposed by the PSC was too short to organise and mobilise fresh elections, particularly taking into account traditional and state protocol regarding funeral arrangements, the printing of new ballot papers, etc. The CoE therefore adjusted the period indicated in Article 121 of the PSC Draft to sixty days.

8.10.6 Assumption of office of President and Term of office of the President

The main issues that the CoE reconsidered in respect of assumption of office under Article 124 of the PSC Draft were the swearing in of the President-elect and the beginning of the term of office of the President. It was the opinion of the CoE that, in order to have rapid and effective transition, the President-elect should be sworn in as quickly as possible, i.e., fourteen days instead of twenty-eight, after the date of the declaration of the result of the presidential election.

8.10.7 Removal of President by Impeachment

Amongst the major changes made by the PSC was the removal of the role of the Senate in the impeachment of the president, vesting this role in the National Assembly. This is discussed above together with other matters relating to the Senate.

8.10.8 Cabinet

The CoE examined two aspects of the PSC Draft relating to the Cabinet. The first was whether the Proposed Constitution should provide for Deputy Secretaries in addition to Cabinet Secretaries. Deputy Secretaries would clearly not be members of the Cabinet; they would lead to a bloated government, contrary to the wishes of the public. Moreover, the justification for Deputy Secretaries was diminished in view of the fact that Cabinet Secretaries would be full time, would not be Members of the National Assembly, and would have had no representative function. Consequently, the CoE took the position that the positions of Deputy Secretaries ought not to be included in the Proposed Constitution.
The second issue relating to the Cabinet was whether MPs could serve as Cabinet Secretaries. This is discussed in the section on the Legislature above.

**8.11 Chapter Ten: The Judiciary**

The PSC made five fundamental alterations to the chapter on the Judiciary. These were:
(a) Removal of the provisions for the Constitutional Court;
(b) Provision for the Chief Justice to be a member and Chairperson of the Judicial Service Commission (JSC);
(c) Removal of all references to vetting or transitioning of the Chief Justice and Judiciary;
(d) Subjecting the appointments of all judges to parliamentary approval; and
(e) Removal of provisions for the establishment of specialized courts on employment, and land and the environment.
The PSC made a number of other less significant changes as explained below. In the end, the CoE largely adopted the recommendations of the PSC except where, for technical or other reasons stated below, it decided this would not further the interests of justice.

**8.11.1 Judicial Authority**

The CoE reinstated reference to derivation of judicial authority from the people consistent with provisions in the Chapters on the Executive and Legislature. This provision is also consistent with the provisions stating that state and public officials provide a service to the people: the public are not merely consumers of justice, but are also be treated justly, reasonably and without bias. The CoE also reinstated paragraphs deleted by the PSC from Article 191(3), which expressly subjected all courts and dispute resolution mechanisms to the Constitution and Bill of Rights.

**8.11.2 Offices of Chief Justice and Deputy Chief Justice**

The PSC recommended reinstating the Chief Justice as the chair of the JSC. For reasons stated above, the CoE’s initial position was that it was important to keep the Chief Justice out of the JSC if the latter institution was to be independent and effective. However, the CoE accepted the PSC’s reinstatement of the Chief Justice in the JSC. Consequently, the need for a Deputy Chief Justice became self evident. The JSC established in the Proposed Constitution is an active and busy commission. If the Chief Justice were to chair it, he or she would have to have a deputy in the courts or at the JSC and for other administrative functions.
The Deputy Chief Justice would also double as the Vice-President of the Supreme Court and as the person to swear in the President if the Chief Justice is not available. Additionally, the RHDC had reserved the roles of “implementing continuous education and training of judicial officers” and “advising national government on improving efficiency of the judiciary” for the Chief Justice when the office was not part of the JSC. As the Chief Justice was now chair of the JSC, the CoE made these functions the responsibility of the JSC in the Proposed Constitution.

8.11.3 System of Courts

The CoE agreed to delete references to the Constitutional Court in the Proposed Constitution following the recommendations of the PSC. However, it did not support the PSC’s recommendation that the specialised courts on employment and land and the environment be removed and replaced with a broad grant of authority of Parliament to establish “other courts” with “such jurisdiction, functions and status” as Parliament may determine. First, such provisions would give Parliament a blank cheque to establish courts whose level and jurisdiction might supplant the superior courts established in the Constitution.

Further, this would not signal establishment of specialized courts on employment and land/environment, and would not solve the competing jurisdictional issues that have historically existed between the High Court and the Industrial Court. Thus, the CoE reinstated the provision allowing Parliament to establish, by legislation, employment and land/environment courts with a status equivalent to the High Court as had been provided for in the earlier drafts.

The PSC retained the new Supreme Court and its jurisdiction but its recommendation concerning the composition of the Court resulted in a total of eight judges on the bench. The CoE reformulated this to avoid an even number. Thus, the Court would now comprise the Chief Justice, the Deputy Chief Justice, and five other judges, totalling seven.

In respect of the Court of Appeal and the High Court, the PSC agreed with the RHDC provisions for a President and Principal Judge respectively, but suggested that he or she be the most senior judge. On consideration the CoE amended this so that the President and Principal Judge would be elected by their peers. Seniority may be easy to implement, but may not achieve gender and other diversity requirements, or ensure the most qualified, efficient or respected person gets to lead his/her peers. The CoE therefore reverted to the mode of election to ensure respect, accountability and efficiency of holders of this important office.
With respect to the High Court, the PSC retained that Court’s fundamental structure and functions. It also anticipated this Court assuming the functions of the Constitutional Court. However, the PSC Draft did not transfer the functions of the Constitutional Court fully. The CoE rectified this by providing for jurisdiction respecting interpretation of the new constitution, including unconstitutionality of any action taken under the constitution; differences over the powers and function of national and county government and between counties inter se; disputes between state organs; and questions of conflict of laws. The CoE also made provision for constituting a bench of multiple judges for matters raising substantial matters of a constitutional nature.

However, it was noted by the CoE that the removal of the provisions for a Constitutional Court inhibited the development of a pool of judges specialised in constitutional matters. It was particularly concerned that the High Court would not be well suited to exercise the full mandate initially accorded to the Constitutional Court.

### 8.11.4 Appointments of Chief Justice, Deputy Chief Justice and other Judges

Concern that the appointment of judges should be protected from political pressures led the CoE to remove the requirement of parliamentary approval for all judicial appointments other than those of Chief Justice and Deputy Chief Justice when it prepared the RHDC. This was changed by PSC to make all appointments of judges subject to approval by Parliament. After lengthy deliberations and especially noting the role of the Chief Justice in the JSC, the CoE agreed to retain the requirement of parliamentary approval for the appointment of the Chief Justice and the Deputy Chief Justice. However, the CoE was not satisfied that there were sufficient safeguards in the parliamentary process to shield other judicial appointees from political negotiation and political horse trading. The CoE settled for a competitive and transparent appointment process conducted by the JSC, and for the President to appoint the other judges on the JSC’s recommendation.

In the same vein, the CoE restored the involvement of “three judges from the Commonwealth” to be involved in the removal of the Chief Justice from office. As formulated by PSC, three sitting judges would determine if their “boss” was fit to continue to hold office. This state of affairs would be vulnerable to perceptions of subjectivity and victimisation.

### 8.11.5 The Judicial Service Commission

The CoE seriously considered the merits and demerits of having the Chief Justice as a member of the JSC at all, and especially as the chairperson. The CoE chose to accept the PSC decision, despite misgivings. But, it also provided that appointment of two lay
members of the JSC by the President should be subject to the approval of the National Assembly.

**8.11.6 The Judiciary Fund**

Amendments proposed by the PSC did not significantly alter the Judiciary Fund. However, in introducing new provisions on the JSC, the PSC inadvertently removed the Chief Registrar, as the Accounting Officer of the Judiciary, and inserted the JSC in that role. Clearly, PSC could not have intended this in light of having retained Article 146(3). The formulation was adjusted accordingly, and the regulation of finances of the Judiciary accorded the same stature, sanctity and prescience as the budget of Parliament.

**8.12 Chapter Eleven: Devolved Government**

In line with the desire of the people for dispersal of power to the grassroots, the PSC agreed on the principle of devolution and a two tier system of devolved government.

**8.12.1 Relationship between the national and the county governments:**

A presidential system of government should be subject to checks and balances both at the centre and at the devolved level. Ideally, the political consensus on the presidential system should have been followed by a fundamental revision of the structure of devolution (size and number of units, powers and functions, and revenue capacity) towards a more effective system of checks by the devolved governments, over the national governments. The CoE could not undertake such revision without endangering other aspects of the consensus of the PSC.

Irrespective of that, the object of devolution as a means to provide for another layer of checks and balances was still pursued by the CoE. Therefore, enhancing “checks and balances and the separation of powers” as one of the objects of devolution, which object the PSC had suggested to delete, was retained in the *Proposed Constitution*.

It was also important to maintain the relationship between the two levels of government as one in which each level respected the functional and institutional integrity of the other. Respecting this constitutional status implied that neither of the governments is subordinate to the other. In view of this, the Proposed Constitution did not adopt the PSC proposal for a provision that the “national government takes precedence over county governments”. The CoE also retained in the *Proposed Constitution* the distribution of functions to the county governments free from a general power of regulation by the national government as had been suggested by the PSC.
8.12.2 County Executive Committees

The RHDC provided for a county executive committee consisting of the county governor and the deputy county governor, both of whom were to be elected by the county assembly from among members of the assembly. The governor would then appoint other members of the executive from among the members of the assembly. Although there had been a demand from some sectors of the public for direct election to all offices at the devolved level, the indirect method of constituting the county executive had been adopted to reduce the cost and the complications of a multiplicity of elections at both the national and the county levels, and also to institute a workable system of government at the county level. A system akin to a parliamentary one would be less susceptible to strains between the executive and the assembly.

The PSC consensus was in favour of direct election of the governor and the deputy governor as the running mate of the governor. The governor would then, with the approval of the assembly, appoint the members of the executive from among persons who were not members of the assembly. This proposal by the PSC was accommodated in the Proposed Constitution. This change also responded to public preference in favour of direct election of leaders at the county level.

8.12.3 Removal of the county executive

Because of the system of government that had been designed at the county level, the RHDC had provided for the removal of the county executive through a vote of no confidence. The motion for a resolution of removal could be passed by more than half of the members of the assembly. In the system of government adopted by the Proposed Constitution, it would not be appropriate to maintain a provision for a vote of no confidence. The governor and the deputy governor would have the direct mandate of the people. Good governance requires that the power of the majority in the assembly to overturn the people’s choice be circumscribed. The Proposed Constitution therefore provided for the removal of the governor on specified grounds of misconduct.

8.12.4 Succession to office of the governor of the county

Having agreed on the direct election of the governor, the PSC proposed the inclusion in the Proposed Constitution, of provisions for succession to the office of governor in case of a vacancy. The proposal was that in case a vacancy occurred, the deputy governor would assume office for the remainder of the term of the governor. However, the Proposed Constitution adopted a modified version of the PSC proposal. Where a vacancy occurred in the office of the governor with less than two and half years of the term left, the deputy
governor would assume office for the remainder of the term. Otherwise a fresh election would be held to fill the vacancy for the remainder of the term.

8.13 Chapter Twelve: Public Finance

Expert advice given to the CoE after reviewing the proposals from the PSC on the RHDC led the CoE to make further substantial revisions to the Chapter on Public Finance. The major proposals made by the PSC were for the establishment of the Equalization Fund for marginalised areas and the stipulation of the minimum share of the national budget that county governments are to receive. This part of the Report outlines these changes and other changes by explaining how the Chapter on Public Finance was reformulated in the Proposed Constitution.

8.13.1 The Equalisation Fund:

The introduction of the Equalisation Fund by the PSC strengthened the constitutional commitment to equity in the distribution of national resources. It is an affirmative or restitution measure and secures special spending on marginalized communities and areas. Under the PSC proposals, each year 0.5% of the revenue collected by the national government (currently about Kenya Shillings 2 billion) must be set aside to be used to provide basic services to marginalized communities and areas so that they are brought to the same standard of development as other communities in Kenya. The use of the term “marginalised areas” which had not appeared in earlier drafts, indicates that it is not only specific groups that may benefit from this Fund but also people living in underdeveloped including slums and certain peri-urban areas.

The CoE made a number of adjustments to the Draft to integrate this proposal fully in the Constitution in a manner consistent with the principles of public finance on which the Chapter on public finance is based.

First, it provided a method of identifying the people for whom the Fund may be used because, although the term ‘marginalized community’ was defined in the RHDC, the term “marginalized area” was not. The Commission on Revenue Allocation was given the task of identifying marginalised areas.

Secondly, the CoE introduced controls on spending from the Fund. The national government can spend the money itself or allocate it to counties to spend but, whatever approach is chosen, money from the Fund may be spent only after the Commission on Revenue Allocation is consulted and on proper appropriation by Parliament.
Thirdly, the CoE inserted a provision permitting unspent money in the Fund at the end of a financial year to be “rolled over” from one financial year to the next. This is intended to remove any incentive on the part of the national government to save the money in the Fund by under-spending and also acknowledges that in the early years spending the full amount in the Fund might be difficult. It will first be necessary to build up the necessary infrastructure for the communities it is intended for. In later years, much higher spending should be possible.

Finally, the Proposed Constitution includes a “sunset clause” which states that the Fund ceases to exist after 20 years. This is to ensure that communities do not treat it as a permanent right and come to rely on it, to encourage the national government to use it well and energetically, and to ensure that the national government does not get locked into the programme in perpetuity. Nonetheless, because the Fund may not fully achieve its purpose in 20 years, Parliament may decide to extend the life of the Fund. When the Fund comes up for renewal the spotlight will be on whether it had worked at all and whether or not it would be renewed.

8.13.2 Equitable sharing of revenue between the national government and counties and amongst the county governments

As described in Chapter 7 of this Report, the Chapter on Public Finance in the Constitution plays a central role in the system of devolved government in setting out a procedure for the equitable division of revenue amongst governments.

The PSC Draft proposed far-reaching changes to the provisions in the RHDC concerning the division of revenue. First, it removed the Commission on the Allocation of Revenue (CRA) entirely. Second, it gave the Senate a decisive role in both the determination of the division of revenue raised nationally between the national and county level of governments and in the division of the share allocated to counties among the counties.

In finalizing the Proposed Constitution the CoE reinstated the CRA for reasons discussed below and refined the role of the Senate. This means that two institutions, the Senate and the CRA, are to play a special role in the process of division of revenue. The CRA provides expert, independent advice to the Senate, national government and county governments on the division of revenue and the Senate determines the way in which the share of revenue allocated to counties should be divided.

As revised, taking into account the PSC’s proposals, the Proposed Constitution does not give the Senate the virtually exclusive role in determining the division of revenue between the national and county governments proposed by the PSC but requires the Senate and National Assembly to agree (Articles 110 and 112).
For the division of revenue among the counties the *Proposed Constitution* provided the following procedure:

**Step 1:** Every five years the Senate would determine the basis on which the share of the national revenue that is allocated to counties is to be divided amongst the counties. Its decision would be informed by expert advice given by the CRA. It is likely that the CRA will propose a formula. In other countries such formulas take into account the population size of counties, the number of children and old people, the revenue that county governments could be expected to raise, and so on. Importantly, the constitutional criteria require that the developmental needs of counties are considered.

In addition, in determining the basis of the division of revenue amongst the county governments, the Senate must consult the Cabinet Secretary responsible for finance, the county governors and the public. This ensures that the Senate has access to any information that the national government may have concerning financial management and spending across the country, is alert to the needs of county governments, and is informed by both professionals and other members of the public who have reflected on the financial position of counties.

Proposals made by the Senate on the basis of the division of revenue are binding unless the National Assembly overrides them with a 2/3rds majority.

Five-year intervals between the determination of the division of revenue are important because:

(a) the decision about the basis of revenue sharing should be separated from the annual budgeting and division of revenue so that it is not informed by immediate political and budget priorities but takes a longer term view of matters;

(b) the formula should not be changed too often because there must be stability in allocations and county governments must be able to plan properly and embark on longer term projects confident of a steady flow of revenue; and

(c) on the other hand, the formula should be reviewed regularly to take account of changing circumstances.

The Chapter sought to avoid too much rigidity and permitted amendment of the formula within the five year period in two situations: First, under the provisions of Schedule 6 of the *Proposed Constitution* the first two cycles after the constitution comes into force will each be three years only. This will give greater flexibility in the initial stages while the most effective basis for revenue sharing is developed. Secondly, the Senate can change the basis of the determination of the division of revenue amongst county governments at any time within a five-year cycle by a vote supported by at least two thirds of its delegations.
This arrangement for the determination of the basis of the division of revenue amongst counties draws on experience in other countries which demonstrates that systems work particularly well if these decisions are informed by experts (here through the CRA), the most important political actors (here Senate, and through Senate, the county governors and national executive) and knowledgeable members of the public.

**Step 2:** Every year two Revenue Bills will be introduced in the National Assembly, a National Division of Revenue Bill and a County Allocation of Revenue Bill. The National Division of Revenue Bill will divide all revenue raised by the national government between the national government and the county level of government. (This is usually referred to as the vertical division.) This Bill must be approved by both Houses of Parliament. The amount allocated to the county level of government must be at least 15% of the revenue raised by the national government in the previous financial year. The County Division of Revenue Bill will divide the share of revenue allocated to the county level of government among the counties on the basis determined by the Senate under the first step above, the Senate’s decisions on this Bill are binding unless the National Assembly overrules them with a 2/3rds majority.

**Step 3:** The national executive and county executives prepare their budgets (annual estimates of income and expenditure) and submit them to the National Assembly and county assemblies for approval.

**Step 4:** The National Assembly and county assemblies approve the estimates and they are adopted in the form of Appropriation Bills.

**8.13.3 The Commission on Revenue Allocation (CRA):**

The CRA is mentioned above in connection with the five-yearly determination of the basis on which revenue should be divided among the county governments. However, the CRA has other functions as well:

(a) Each year it makes recommendations on the division of revenue between the national government and the county level of government as well as the actual annual division of revenue amongst counties;

(b) It makes recommendations on any other financial legislation affecting county government such as an Act of Parliament that deals with the taxing power of counties or that sets conditions on which guarantees might be provided for county borrowing; and

(c) It makes recommendations concerning the use of money in the Equalisation Fund.
Despite the PSC’s proposal to remove the CRA from the Constitution, the CoE retained it for the following reasons:

(a) **Technical complexity**
Financial management in a system of devolved government is both technical and complex. For instance, the division of revenue, the assessment of the impact of granting various taxing powers to counties, and the assessment of the conditions under which counties should be able to borrow require a specialised understanding of the national economy. It is appropriate that the Parliament should make the final decisions on these matters but its political decisions need to be informed by independent, skilled and professional analyses of the problems. The CRA does not supplant Parliament. Its technical advice will strengthen debate in Parliament and enable Parliament to make informed decisions. In addition, because the CRA is an independent body, its advice is more likely to be trusted.

The analysis of needs and recommendations provided by the CRA will also empower county governments to engage constructively in the processes that concern their finances. In the absence of the CRA, most of these governments would be totally dependent on information and ideas generated by the national government.

(b) **Protecting the criteria for revenue sharing**
The constitution establishes a set of criteria that must be taken into account in determining the way revenue is shared among governments. The CRA is obliged to apply these criteria in its recommendations. Its recommendations will also provide an explanation of how it has done this. If Parliament deviates from the recommendations of the CRA, it will have to be able to explain how its revision of the proposals nonetheless complies with the criteria in the constitution.

(c) **Independent, impartial, long-term advice**
Decision-making by politicians is inevitably informed by the immediate political concerns that they face. This can lead to decisions that do not take a long term perspective. Moreover, each politician has a particular constituency to serve and the interests of different constituencies will not always coincide. The recommendations of the CRA will start the debate from a broader perspective. As an independent, specialist body it will be able to take a longer term view and to accommodate the sometimes competing needs of the national government and different county governments without abandoning the overall goals of equity and the national interests.

(d) **Linking county governments to national decision making on their finances**
Many decisions concerning the finances of county governments will be taken by the national Parliament. Although there will be a member of Senate representing each county, these members of Senate are directly elected and will not necessarily have any link to the county
government. They may even come from a party different from the one governing the county. This means that there may be no link between a particular county government and decision-making in Parliament on matters that concern it directly. In the context of county government finances, the CRA can contribute to closing this gap. The CRA would engage with county governments, seek to understand their needs and concerns, and factor these into recommendations.

(e) Accountability
The CRA enhances accountability in financial management particularly through recommendations concerning the use of the Equalisation Fund and on the division of revenue. For instance, although revenue sharing among the counties necessarily involves budgetary decisions, it is also important that these decisions are based on transparent and understood principles with long-term consequences taken into account. A system that is based on sound principles and open to public scrutiny will be both fairer and more efficient.

8.13.4 The budgets of the Judiciary and Parliament

All over the world, the national budget is largely controlled by the national executive. This is because it is assumed that the executive is best placed to assess the costs of the programmes that it must carry out. Sometimes, however, the control that the executive has over the national budget undermines the other two branches of government, the Judiciary and Parliament.

The PSC Draft resolved this problem by separating the annual budgets of the Judiciary and Parliament from the budget of the national executive. This proposal is reflected in the Proposed Constitution. Each branch of government submits its budget independently to Parliament (the budget of Parliament is submitted by the Parliamentary Service Commission). Parliament must then assess the three budgets in the light of the estimated revenue for the year and make necessary appropriations to each branch. These provisions are designed to address the problem of an underfunded Judiciary and Parliament without allowing those two branches of government to determine their own budgets to the detriment of the budget of the national executive.

8.14 Chapter Twelve: National Security

Provisions subjecting armed forces to constitutional checks, including civilian control, usually by both Parliament and the executive, are a feature of modern democratic constitutions. Chapter Fourteen aimed to achieve this by establishing the principle that ‘national security is subject to the authority of the Constitution and the Parliament’ and that ‘national security shall be pursued in compliance with the law’. These principles appeared consistently in the three constitutional drafts since the first CKRC report.
The remaining provisions of the Chapter give flesh to the commitment to maintaining effective disciplined armed forces that operate under the law. In this regard, and again pursuant to its mandate under the Review Act and on the recommendation of the PSC, the CoE adjusted the chapter in a number of ways to ensure that the operation of the system of national security would contribute to good government, contain adequate checks and balances and be accountable.

**8.14.1 National Security Council**

There was agreement that the National Security Council should be established in the Constitution. Once this was done, it was important also to determine who would be on the Council – there would not be value in merely establishing the framework in the Constitution. Therefore the CoE returned the provisions relating to membership that the PSC had removed. As the purpose of the Council is to oversee national security organs, the RHDC established a membership consisting of those members of the executive most directly concerned with matters of security (providing a civilian element on the Council) and the heads of the three national security organs, the Kenya Defence Forces, the National Intelligence Service and the National Police Service. The CoE also added more detail to the role of the Council than appeared in the *PSC Draft* to ensure accountability through, among other things, annual reports to Parliament.

**8.14.2 Kenya Defence Forces**

The Kenya Defence Forces are responsible for the defence of Kenya. Usually defence forces are used in defence of the country against threats from outside. However, in all modern democracies, situations arise when members of the defence forces are used within a country. The most obvious example of this is when a natural disaster occurs that cannot be handled adequately by the regular emergency services. However, a threatened government may also resort to the use of defence forces to quell opposition in times of political unrest. This could amount to the use of defence forces against their own people. Modern constitutions respond to this danger by requiring any use of defence forces in such situations to be approved by the legislature and, if an emergency arises that does not permit prior approval, prompt reporting of such use to the legislature. This check on the executive’s use of the armed forces is set out in Part Two of Chapter 14 of the *Proposed Constitution*. 
8.14.3 National Police Service

The name of the police service changed a number of times in the course of the review. The HDC and the RHDC referred to the “Kenya Police Service”. The PSC changed this to “Kenya Internal Security Service” – with the acronym KISS. The Proposed Constitution reverted to a name closer to that in the previous drafts for two reasons. First, the acronym seemed likely to make the Services the butt of jokes. But, secondly, and more importantly, the CoE was concerned that the reference to ‘internal security’ in the PSC’s name, carried with it the unfortunate connotation of a service intended to target an enemy. Just as the defence services deal with the enemy from without, the newly named police would be seen to be dealing with an enemy within. This did not accord easily with current understandings of policing which emphasize the importance of the engagement of police forces with citizens and community policing. For these reasons, the Proposed Constitution named the police the National Police Services.

The most controversial issue concerning the police services was whether or not the two separate police services should be retained: the Kenya Police and the Administration Police. The dangers of two potentially parallel police services are well known and include the fact that they may be prompted to undermine each other and that, in the context of an executive that attempted to exceed its powers, if one police service was not compliant, the other could be used.

This problem was resolved in the PSC Draft by introducing a new position: the Inspector-General of the Kenyan Police Services who would have command over both forces. Under the PSC proposals, in addition to the Inspector-General, each of the separate forces would be controlled by a “Commandant”. The Proposed Constitution changes this arrangement slightly. To ensure that the hierarchy of command is absolutely clear, it designates the commanders of each of the two services ‘Deputy Inspector General’.

A second concern in the provisions relating to the police was how to maintain sufficient independence in the office of the commanders of the police services without handing uncontrolled power to them. Two particular issues arose here: the appointment and the dismissal of the Inspector-General and the Deputies. The question of appointment was resolved by providing that the Inspector-General would be appointed by the President with the approval of the National Assembly for a single four year non-renewable term. The Deputy Inspectors-General would be appointed by the President on the recommendation of the National Police Service Commission. Both forms of appointment are important checks on the powers of the President.

The PSC deleted provisions on the removal of the Inspector-General. To protect the integrity of the police force and avoid accusations that the Inspector-General was removed...
simply because he or she was not implementing partisan orders, the CoE restored provisions controlling the removal of the Inspector-General. Under the Proposed Constitution the Inspector-General could be removed from office by the President only on grounds specified in the Constitution. This was, in part, a departure from the position in the RHDC which also required dismissal of the Inspector-General to be recommended by a tribunal (RHDC Article 291). Nonetheless, the CoE believed that the provisions in the Proposed Constitution would check the power of the executive to remove the Inspector-General for partisan reasons by limiting dismissal to circumstances in which she or he was not performing properly.

8.15 Chapter Eighteen: Transitional and Consequential Provisions

Transitional provisions on promulgation and implementation of the Proposed Constitution are elaborated separately in Chapter 11. This part deals with other aspects of the transitional arrangements.

8.15.1 The Judiciary

How to deal with the reform of the Judiciary continued to preoccupy the CoE in its review of the changes made to the RHDC by the PSC. As mentioned earlier, the CoE was in favour of a process of vetting judges in order to reform the Judiciary. The PSC, however, was reluctant to support a process of vetting judges and raised two specific concerns about the vetting procedure: (i) judges might all resign and court proceedings would be delayed if too many judges were removed from the bench at one time for vetting; and (ii) establishing an additional Commission to deal with vetting, particularly one with foreign judges on it was inappropriate.

The CoE weighed these concerns carefully. It did not believe that Kenyan judges with integrity would choose to resign but that they would undergo a vetting process. It also did not accept that the approach proposed in the HDC would disrupt the courts. However, the CoE recognized that there were other ways to structure a vetting process for judges. Accordingly, the Proposed Constitution in Schedule 6 provided that, within a year of the constitution coming into force, Parliament would establish a process for reviewing the suitability of all sitting judges and magistrates. This would allow Parliament to consult widely, consider approaches adopted in other countries, and undertake the responsibility for judicial reform confident that it had addressed all the challenges that such a process inevitably raises.

Because the Chief Justice is head of the Judiciary, that office required separate consideration. All other offices were to be changed within twelve months of the Constitution coming into force (e.g., Attorney-General, Auditor General). Taking into account the general framework
for the transformation of the Judiciary, the CoE provided for the replacement of the Chief Justice within six months. This period was determined by the fact that the Judicial Service Commission (JSC) was to be constituted within sixty days of the coming into force of the new constitution and the CJ was its chairperson. Furthermore, the Supreme Court was to be established and its judges appointed within a year. The JSC was also to “oversee” the vetting process contemplated in the transitional provisions and would undertake the process of recommending new judges for appointment.

8.15.2 Commissioners and other appointed constitutional office holders

Like its predecessors, the Proposed Constitution included a range of Commissions and constitutional office holders. Some of these, like the Attorney-General, existed in the 1996 Constitution; others, such as the Human Rights Commission, already existed, established by Acts of Parliament; yet others, e.g., the National Land Commission, were new.

Arrangements concerning the new positions were relatively simple. The Proposed Constitution set a time period within which they were to be established. Arrangements concerning existing positions were more complicated. The CoE considered a number of alternatives:
(a) retaining the status quo in all cases;
(b) requiring all such office holders to resign and filling the positions afresh; and
(c) selecting an approach, depending on the office concerned.

The CKRC Draft (Eighth Schedule item 8(1)) and Bomas Draft (Sixth Schedule item 7(1)) provided for a fresh start for existing office holders: they would allow people holding office under the former Constitution to continue in office on an interim basis until an appointment was made under the new constitution. The PNC (Sixth Schedule item 7(1)) retained existing office holders: they were to continue in office as if appointed under the new constitution.

On examination of the particular offices that would be affected, the Committee decided that each institution and office needed particular treatment that took its functions and composition into account.
CHAPTER NINE – APPROVAL OF THE PROPOSED CONSTITUTION BY THE NATIONAL ASSEMBLY

9.0 Introduction

The CoE submitted the Proposed Constitution to the National Assembly on 28 February 2010. At first the National Assembly attempted to reach ‘consensus’ on the Proposed Constitution by holding a retreat to discuss it before debating it in the National Assembly. This effort did not succeed and therefore a full debate on the Proposed Constitution took place on the floor of the House. At least one hundred and fifty amendments were proposed by Members of the National Assembly. But the Constitution of Kenya (Amendment) Act required that any amendment to the Proposed Constitution should be supported by 65% of the Members of the National Assembly. None of the proposed amendments was able to receive this margin of support because either, there were not enough members in the House at any given vote to reach this threshold, or motions proposing amendments were defeated, or those who proposed the amendments were not in the House when the motion concerning such amendments was moved. At given times some Members of the National Assembly who opposed the proposed amendments symbolically walked out of the House to deprive it of the requisite majority.

The Table below shows some of the main amendments that were proposed and, in some cases, the reasons why these amendments were proposed.

<table>
<thead>
<tr>
<th>PROPOSED AMENDMENT</th>
<th>RATIONALE</th>
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<tbody>
<tr>
<td>Article 4: Declaration of the Republic</td>
<td>To ensure inclusivity by restating commitment to a unitary Republic.</td>
</tr>
<tr>
<td>An amendment to Article 4 was proposed to insert a new clause (3) – 3) Kenya is a unitary state with a common citizenship and universally applicable Bill of Rights.</td>
<td></td>
</tr>
<tr>
<td>Article 6: Devolution and access to services</td>
<td>To add province or region as the second tier of devolution to ensure that power at the centre could be checked and counter balanced.</td>
</tr>
<tr>
<td>An amendment to Article 6 was proposed to provide for 3 levels of devolution.</td>
<td></td>
</tr>
<tr>
<td>Article 8: State and Religion</td>
<td>There was need to separate out the State and Religion. Kenya was a multi-religious and multi-ethnic state and the issue was more about values that held</td>
</tr>
</tbody>
</table>
2) State and religion should be separate; and  
3) The State shall treat all religions equally.

Kenyans together. Kenyans had to agree on the values that united them and had to accept things that held them separately like religion.

<table>
<thead>
<tr>
<th>Article 24: Limitation of Rights and Fundamental Freedoms</th>
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<tbody>
<tr>
<td>It was proposed to delete clause (4) of Article 24.</td>
</tr>
<tr>
<td>There was need to treat all religions equally. People of a certain faith should not be exempt from supervision of the Constitution. There should be equal protection before the law for all.</td>
</tr>
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<table>
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<tr>
<th>Article 24</th>
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<tbody>
<tr>
<td>It was proposed to delete clause (5) and substituting it with a new clause.</td>
</tr>
<tr>
<td>Members of the disciplined forces should be expressly excluded from participating in demonstrations, picketing and going on strike. (Note that Article 24(5)(c) of the Proposed Constitution had already made an exception this).</td>
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<table>
<thead>
<tr>
<th>Article 24</th>
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<tbody>
<tr>
<td>It was proposed to amend the Article by adding the term ‘other uniformed services’ after the words ‘National Police Services’.</td>
</tr>
<tr>
<td>It was crucial to include other uniformed services under the purview of the provision.</td>
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<tr>
<th>Article 26: Right to Life</th>
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</thead>
<tbody>
<tr>
<td>It was proposed to delete clauses (2) (3) and (4).</td>
</tr>
<tr>
<td>Article 26(1) clearly addressed the right to life and other issues could be legislated on. The clauses in Article 24(2)(3)(4) could have a detrimental effect on family planning through use of contraceptives, in particular the morning after pill</td>
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<thead>
<tr>
<th>Article 26</th>
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| It was proposed to delete clause 4 and substitute therefore the following new clause:  
(4) Termination of pregnancy is not permitted, but expectant mothers are entitled to emergency medical treatment in life threatening conditions. |
<p>| Deletion of the clause and the subsequent substitution would avoid unnecessary controversy in the constitution making process and would take care of the interests of all, and in particular the religious sector. |</p>
<table>
<thead>
<tr>
<th>Article 26</th>
<th>Another attempted amendment was to delete clause (4).</th>
<th>This would solve the problems of Article 26 by removing the word ‘abortion’ and the contradictory text and allowing legislation under clause (3).</th>
</tr>
</thead>
<tbody>
<tr>
<td>Article 26</td>
<td>It was proposed to delete Clause (2) and (4).</td>
<td>Clause (2) should have been deleted since life began even before conception. Clause (4) should have been deleted since its formulation would cause problems for interpretation in the future.</td>
</tr>
<tr>
<td>Article 26</td>
<td>It was also proposed to delete Clause (2) (3) and (4).</td>
<td>Legislation could be enacted to deal with the issues contained in clauses (2) (3) and (4) to avoid unnecessary controversy in the constitution making process and take care of the interests of all stakeholders.</td>
</tr>
<tr>
<td>Article 26</td>
<td>Another proposal to delete clauses (2) (3) and (4) was made for different reasons.</td>
<td>Deletion of the clauses and their subsequent substitution would avoid unnecessary controversy in the constitution making process. The word ‘abortion’ was the problem, and it should have been replaced it with “termination”.</td>
</tr>
<tr>
<td>Article 27: Equality and Freedom from Discrimination</td>
<td>It was proposed to delete clause (8) of Article 27 in that it required the state to take legislative and other measures to implement the principle that not more than two-thirds of the members of elective or appointive bodies should be of the same gender.</td>
<td>Clause (8) was superfluous in that affirmative action was not a principle of Constitution making.</td>
</tr>
<tr>
<td>Article 31: Privacy</td>
<td>It was proposed to delete paragraphs (a) and (b).</td>
<td>Clause (a) would affect security measures with regard to searches, especially in this era of terrorism. Clause (b) would complicate financial transactions as collateral for loans would be rendered useless.</td>
</tr>
<tr>
<td>Article 32: Freedom of Conscience, Religion, Belief and Opinion</td>
<td>It was proposed to insert new clauses in clause 32: (5) Everyone has a right to propagate their religion or convert from one religion to another;</td>
<td>Various religions should be allowed to compete with each other. Religious institutions set up…</td>
</tr>
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</table>
and 

(6) Clause (3) shall not apply to institutions and facilities that are established solely or partly for religious purposes.

<table>
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<tr>
<th>Article 34: Freedom of the Media</th>
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<tbody>
<tr>
<td>It was proposed to delete paragraphs (b) of clause (2).</td>
</tr>
<tr>
<td>An amended was also proposed to insert a new paragraph (d) to make ‘hatred’ to be subject to Article 33(2) of the Constitution.</td>
</tr>
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<tr>
<th>Article 35: Access to Information</th>
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<tbody>
<tr>
<td>It was proposed to delete paragraph (b) of clause (1).</td>
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</tbody>
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<thead>
<tr>
<th>Article 35: Access to Information</th>
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</thead>
<tbody>
<tr>
<td>An amendment was made to insert a new clause after clause (3):</td>
</tr>
<tr>
<td>(4) Notwithstanding anything contained in this Article, access to information on matters relating to national security may be limited in such manner as an Act of Parliament may provide.</td>
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<thead>
<tr>
<th>Article 40: Protection of right to property</th>
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<tbody>
<tr>
<td>An amendment was proposed to clause 2(a)(b) as follows:</td>
</tr>
<tr>
<td>(a) deleting the word “or” appearing at the end of clause (2)(a) and substituting it with the word “and”; and</td>
</tr>
<tr>
<td>(b) inserting the words “by the court, after due process of law” immediately after the word “acquired” in clause (6).</td>
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</tbody>
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<tr>
<th>Article 41: Labour Relations</th>
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<tbody>
<tr>
<td>An amendment was proposed to insert a new paragraph:</td>
</tr>
<tr>
<td>(6) The provisions of clauses (1), (2), (3), (4) and (5) shall not apply to the national security organs provided for under Chapter Fourteen.</td>
</tr>
</tbody>
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<thead>
<tr>
<th>Article 43: Economic and Social Rights</th>
</tr>
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<tbody>
<tr>
<td>It was proposed to amend clause (1)(a) of Article 43 by deleting the words “which includes the right to health care services, including reproductive health care”.</td>
</tr>
<tr>
<td>Article 43</td>
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<tr>
<td>-----------</td>
</tr>
<tr>
<td>It was proposed to amend Article 43(1)(3) by:</td>
</tr>
<tr>
<td>(a) deleting the words, “Every person has” appearing in clause (1) and substituting them with the words “A person shall not be denied”; and</td>
</tr>
<tr>
<td>(b) deleting clause (3).</td>
</tr>
<tr>
<td>No justification was given.</td>
</tr>
</tbody>
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<thead>
<tr>
<th>Article 45: Family</th>
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<tbody>
<tr>
<td>It was proposed to delete the word “person” appearing immediately after the word “marry” and substituting it for the words “an adult”.</td>
</tr>
<tr>
<td>This would avoid legalization of child marriages.</td>
</tr>
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<tr>
<th>Article 60: Principles of Land Policy</th>
</tr>
</thead>
<tbody>
<tr>
<td>It was proposed to insert the words “for all land holders, users and occupiers in good faith” immediately after the word ‘rights’ appearing in paragraph (b) and to delete the words “consistent with this constitution” appearing in paragraph (g).</td>
</tr>
<tr>
<td>The security of land rights should be qualified for those using them in good faith.</td>
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<thead>
<tr>
<th>Article 60: Principles of Land Policy</th>
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</thead>
<tbody>
<tr>
<td>It was proposed to amend clause (1) (a) of Article 60 by deleting the word “equitable”.</td>
</tr>
<tr>
<td>No justification was given.</td>
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<tr>
<th>Article 62: Public Land</th>
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</thead>
<tbody>
<tr>
<td>It was proposed to delete the words “government game reserves, national parks, government animal sanctuaries, and especially protected areas” appearing in paragraph (g) of clause (1).</td>
</tr>
<tr>
<td>The amendment was aimed at deleting this clause from public land and place it under community land managed by counties to enable the latter generate revenue.</td>
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<tr>
<th>Article 62: Public Land</th>
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<tbody>
<tr>
<td>It was also proposed to delete the wording in clause (2) and substitute it with the following new clause:</td>
</tr>
<tr>
<td>“(2) Public land shall vest, be held and administered on their behalf by the county government if it is classified under—</td>
</tr>
<tr>
<td>(a) clause (1)(a), (c), (d) or (e); and</td>
</tr>
<tr>
<td>(b) clause (1)(b), other than land held, used or occupied by a national State organ”.</td>
</tr>
<tr>
<td>In the spirit of devolution, communities should be empowered to play a role in controlling land within their areas.</td>
</tr>
<tr>
<td>It was further proposed to delete clause (3) and substitute it with the following new clause:</td>
</tr>
<tr>
<td>“(3) Public land classified under clause (1)(f) and (m) shall vest in and be held by the national and county governments in trust for the people of Kenya and shall be administered on their</td>
</tr>
</tbody>
</table>
behalf by the county governments and the National Land Commission.”

<table>
<thead>
<tr>
<th>Article 63: Community Land</th>
</tr>
</thead>
<tbody>
<tr>
<td>It was proposed to insert a new paragraph immediately after paragraph (iii) in clause (2) as follows:</td>
</tr>
<tr>
<td>“(iv) government game reserves, national parks, government animal sanctuaries; or”.</td>
</tr>
</tbody>
</table>

In the spirit of devolution, communities should be empowered to play a role in controlling resources within their areas.

9.3 Conclusion

On 1 April 2010, the National Assembly unanimously adopted the Proposed Constitution. His Excellency President Mwai Kibaki and His Excellency the Right Honourable Prime Minister Raila Odinga, and His Excellency the Vice-President Kalonzo Musyoka had graced the floor of the National Assembly and urged the members to adopt the Constitution. Some of the members of the National Assembly had raised questions on whether the Proposed Constitution was governed by the requirement that it be adopted by a 65% majority since it was not a “bill”, or whether the Review Act itself could be amended, to enable them effect the amendments that they sought to make. In an historic ruling, the Speaker decided that amendments to the Proposed Constitution were governed by the 65% requirement and that members of the National Assembly were bound by the Review Act, which they had passed. With the approval of the Proposed Constitution, the countdown to the referendum was set unequivocally.
CHAPTER TEN - CIVIC EDUCATION AND PUBLIC PARTICIPATION

10.1 Introduction

As earlier noted, the review process was to culminate with the final decision coming from Kenyans themselves through a referendum. This they had to do from an informed position. The CoE was tasked with the onerous task of ensuring that wananchi were well informed of the process and content of the Proposed Constitution.

The Review Act provided the framework for the above mandate:

- Section 6 (d) (i): the review processes should provide “the people of Kenya with an opportunity to actively, freely and meaningfully participate in generating and debating proposals to review and replace the Constitution”
- Section 23 (i): the CoE shall “facilitate civic education in order to stimulate public discussion and awareness of constitutional issues”
- Section 27 (1): “The Committee of Experts shall, in furtherance of the completion of the review process, facilitate and promote civic education in order to stimulate public discussion and awareness”
- Section 27 (2): “The Committee of Experts shall ensure that civic education materials are made available in a form accessible to the various categories of persons with disabilities”
- Section 35 (1): “The Committee of Experts shall, upon publication of the Proposed Constitution facilitate civic education for a period of 30 days”
- Section 35 (2): “The Committee of Experts shall involve non-state actors in the delivery of civic education”

As can be seen, the CoE was mandated to deliver civic education generally and in the course of the entire process and also but more specifically on the content of the Proposed Constitution for a period of thirty days before the referendum.

To achieve the above, the CoE employed a three-pronged strategy. It involved:

- Direct engagement – this entailed proactive engagement by members of the CoE and secretariat staff through forums such as meetings
- Media engagement – this involved conveyance of information thorough diverse media
- Partnerships and alliances – this called for identification of partners and cooperation between CoE and other organizations, primarily CSOs.
10.2 General civic education

Throughout its existence, the CoE conducted civic education on the process, constitutionalism and other related areas. Specifically, the CoE developed material in the form of brochures and posters that laid out information about the institution, milestones and timelines of the process. The CoE also set up a website (www.coekenya.go.ke) whereby information on the CoE and other issues was posted for public consumption.

The CoE – both committee members and members of the secretariat) also graced different forums which enabled it to educate Kenyans on the process. Such forums included agricultural shows and trade fairs where the CoE was able to meet thousands of Kenyans at a time.

Upon publication of the *Harmonized Draft Constitution*, the CoE divided itself into teams and visited different parts of the country where it conducted civic education and distributed copies of the HDC (See Page 80 for further information).

CoE also used public media as a partner and exploited its reach to convey general information during the course of its mandate.

10.3 Civic Education prior to the Referendum

10.3.1 Concept and Infrastructure

During the run up to the referendum, the CoE undertook various activities aimed at ensuring that not only did as many Kenyans as possible receive a copy of the *Proposed Constitution* but that they also received information on the document.

To succeed in the above the CoE philosophized civic education under the slogan - JISOMEE, JIAMULIE, JICHAGULIE. The slogan aimed at empowering Kenyans and invoking the onerous personal responsibility they were to undertake during the referendum. It was also informed by the lesson learnt during the 2005 referendum when Kenyans made their decisions based on what diverse leadership, especially political leadership, directed them to do. During that period, many Kenyans around the country stated that they would not bother reading the then draft (*PNC*) but would rely on the decisions of their leaders. It was therefore prudent to remind Kenyans of their singular patriotic responsibility of ensuring that they made the right and responsible decision. As such the concept placed *wananchi* at the centre of the process.

---

41 Jisomee (Read for yourself) Jiamulie (Decide for yourself) Jichagulie (Choose for yourself)
To get a successful infrastructure, the CoE divided the country into fifteen (15) regions namely:

- Nairobi;
- Central;
- Western;
- Upper Eastern;
- Mid-Eastern;
- Lower Eastern;
- North Rift;
- Central Rift;
- South Rift;
- Upper North Eastern;
- Lower North Eastern;
- Coast Inland;
- Coastline;
- North Nyanza; and
- South Nyanza

A Regional Coordinator was hired to oversee and coordinate civic education activities in each region. Additionally, 210 Constituency Civic Educators (CCEs) were employed to conduct civic education in each constituency of Kenya.

To assist in the packaging and delivery of the concept, message and information, the CoE further engaged the services of a public relations firm.

**10.3.2 Distribution and Dissemination of the Proposed Constitution**

The distribution and dissemination was aimed at achieving two goals – the distribution of as many copies of the *Proposed Constitution* as possible as well as ensuring accessibility of it content.

The CoE printed and distributed more than ten million copies of the *Proposed Constitution*. These were in the form of English and Kiswahili copies, newspaper pull outs, soft copies (downloadable from the CoE website) and Braille. The copies were distributed directly by CoE members and secretariat staff, through partners, as pull outs in major newspapers and through the Provincial Administration. Helicopters were rented to supply copies of the document in remote areas of the country.

To make the document more accessible the CoE engaged a team of consultants to develop the following documents:
• Handbook on the Proposed Constitution;
• Manual for Training on the Proposed Constitution; and
• Curriculum for Training on the Proposed Constitution

These materials were illustrated and rendered in simple non-technical language aimed at providing standardized and uniform content for partners that conducted training workshops and other fora on the Proposed Constitution. They were also translated into Kiswahili.

Additionally, the CoE hired a consultant to translate the Proposed Constitution from English to Kiswahili. Other publications developed included ‘The Simplified Version - Your Guide to the Proposed Constitution’ – a short and simple rendition of the highlights of the Proposed Constitution, the brochure ‘Frequently Asked Questions on the Proposed Constitution’ and fliers carrying different messages on the proposed document. The CoE also published a series of articles dubbed ‘Know Your Proposed Constitution’ in one of the local dailies. All these publications were available electronically on the CoE website.

Members of CoE also took time to publish various articles expounding on diverse issues concerning the Proposed Constitution in different dailies, periodicals and other publications. Banners, posters and other IEC materials were also developed and distributed all over the country.

Beyond printed media, the CoE also exploited the reach that electronic media has using the mainstream media such as TV and radio and also alternative media such as Facebook and blogs.

Through TV and radio, the CoE recorded and broadcasted a nineteen part drama series dubbed ‘Know Your Constitution’ on the content of the Proposed Constitution. The CoE also carried spot messages on both radio and TV. CoE Members also engaged with wananchi through different shows on TV and radio. The CoE also relayed facts on the Proposed Constitution to wananchi through their cell phones.

10.4 Direct Engagements

10.4.1 First Round

During the first 30 days of civic education on the Proposed Constitution, the CoE visited over 280 places all over the country. The CoE members and members of staff formed ten teams that held meetings all these destinations. The meetings entailed sessions where a synopsis of the Proposed Constitution was delivered by the CoE followed by a question and answer session where CoE members and members of the Secretariat were able to clarify issues coming from members of the public. Additionally, copies of the Proposed Constitution were distributed.
10.4.2 Second Round – High Impact Civic Education

Upon evaluation of the first round of civic education and based on the challenges and lessons learnt, the CoE resolved to undertake a second round of civic education which was dubbed ‘High Impact Civic Education’. This entailed selecting specific destinations in different parts of the country. These destinations were chosen for a variety of reasons including reports from the earlier trips that more information was required in them. During this phase, all the members of CoE visited the selected places where they would explain the content of the *Proposed Constitution* and then answer questions from *wananchi*. This was complemented with a live one-hour transmission of the proceedings of the meeting through the popular local/vernacular radio stations and in some instances stations with a national reach. The meetings were publicized through roadshows whereby materials and other information on the *Proposed Constitution* was disseminated.

10.5 Other Forums

CoE members were also invited to other forums where they expounded on the content of the proposed document. These included workshops, seminars, meetings and conferences.

10.6 Partnerships

The CoE identified and engaged about one hundred community based organizations (CBOs) to conduct civic education and distribute copies of the Proposed Constitution. The CBOs were selected based on factors such as regional reach, sector, target group/area and previous experience. These CBOs conducted workshops and held public meetings where they explained further the content of the *Constitution*.

10.7 Public Participation

As reported earlier (see Chapter 4) the CoE was obliged to collect and consider the views of Kenyans. It did this by calling for memoranda at various stages of the process, holding thematic consultations and public hearings. The CoE also used electronic mediums. It developed an interactive website and also hosted a Facebook forum whereby *wananchi* were able to air their views and ask their questions.

10.8 Conclusion

Through the methodology and processes outlined above, the CoE successfully delivered on its mandate of conducting civic to education and ensuring that the public participated enthusiastically. However the process had its challenges (see Chapter Four for further information) that made the conducting of civic education harder than expected. The high turnout during the referendum and the affirmative result are testimony to this. It is the
CoE’s recommendation that the Government devises effective programmes to ensure that civic education on the new Constitution is a going concern.
CHAPTER ELEVEN – PROMULGATION OF THE NEW CONSTITUTION
AND THE BIRTH OF THE SECOND REPUBLIC

11.1 Introduction

Article 47A (6) and (7) of the former Constitution of Kenya prescribed that if the Proposed Constitution were to be ratified in a referendum, it would come into force when promulgated by the President, or if the President failed to promulgate it within 14 days of the announcement of the final results of the referendum, it would come into force on the 15th day after that announcement. Article 263 of the Proposed Constitution contained similar provisions.

In the event, the promulgation of the new Constitution took place on 27 August 2010 at an elaborate ceremony held to mark the occasion at Uhuru Park. There was a “vuvuzela” affected atmosphere as thousands of Kenyans and foreign dignitaries thronged Uhuru Park to witness the rebirth of Kenya. A spirit of national unity truly prevailed and speeches by His Excellency President Mwai Kibaki, His Excellency the Right Honourable Prime Minister Raila Odinga, and His Excellency the Vice President Kalonzo Musyoka, underscored the significance of the promulgation of the new Constitution in Kenya’s history.

The Chief Justice, His Excellency President Mwai Kibaki, His Excellency the Right Honourable Prime Minister Raila Odinga, and His Excellency the Vice President Kalonzo Musyoka immediately took oaths of allegiance under the new Constitution, while Judges, Ministers, Members of Parliament, Senior Civil Servants, and members of existing Commissions, including those of the CoE, also took oaths of allegiance under the new Constitution.

11.2 After Promulgation: the effect of the new Constitution

The coming into force of the new Constitution would have a major effect on:

(i) Rights, duties and obligations of the State. Except where the new Constitution expressly provided for to the contrary, all rights and obligations of the Government or the Republic that subsisted immediately before the coming into force of the new Constitution would continue under the new Constitution.

(ii) Existing laws. Consequently all law in force just before the new Constitution came into force would be constructed with the alterations, adaptations, qualifications and exceptions necessary to bring them into conformity with the new Constitution.

(iii) Existing land holdings. Any interest in land greater than a ninety-nine year lease held by a non-citizen became converted into a ninety-nine year lease and any freehold
interest in land in Kenya held by non-citizens reverted to the Republic of Kenya to be held on behalf of the people of Kenya, and granted to non-citizens for a ninety-nine year lease.

(iv) Elections and by-elections. The first elections for the President, the National Assembly, the Senate, county assemblies and county governors under the new Constitution would be held within sixty days after the dissolution of the National Assembly at the end of its term. Accordingly, Chapter Seven of the new Constitution regarding representation would only apply to the first general elections to be held under the new Constitution.

(v) The National Assembly. The National Assembly that existed before the coming into force of the new Constitution continues to exist for its unexpired term, and Chapter Eight relating to the National Assembly and the Senate were therefore suspended until the first general elections. The National Assembly will exercise the functions of the Senate or of both Houses of Parliament until the first Senate is elected.

(vi) The Executive. The President and Prime Minister continue to serve in their respective capacities under the previous Constitution and the National Accord and Reconciliation Act, 2008 until either the first general elections or they vacate office in terms of the previous Constitution and the National Accord and Reconciliation Act, 2008. Similarly, the Vice-President, Deputy Prime Ministers, Cabinet Ministers, and Assistant Ministers, continue to hold their positions after the coming into force of the new Constitution, unless they are removed from office or vacate office in accordance with the previous Constitution and the National Accord and Reconciliation Act, 2008. The President is not eligible to stand for re-election as President.

11.3 After Promulgation: the framework for implementing the new Constitution

Although all organs of governments are required to implement the Constitution, two temporary bodies, a Parliamentary Constitutional Implementation Oversight Committee (PCIOC) and the Commission for the Implementation of the Constitution (CIC) will have the main responsibility for overseeing its proper implementation. The CIC was included in all three earlier draft constitutions, the CKRC and Bomas Drafts and PNC. The PCIOC is a creature of the new constitution introduced on the recommendation of the PSC. Schedule 6 to the new Constitution makes provision for both of these institutions.

The PCIOC and the CIC have distinct roles. The CIC, with tenure of five years, is a ‘hands on’ organ. It will be comprised of nine people with proven skills in public administration, human rights and government. Its members need expertise in structuring programmes and taking initiative when they are delayed or have failed. The CIC will monitor, facilitate, and oversee, the development of legislation and administrative procedures required to implement the new Constitution. It will coordinate with the Attorney-General and the Kenya Law
Reform Commission in preparing, for tabling in Parliament, the legislation required to implement the new Constitution. It is required to report to PCIOC on the progress made in, or on any impediments to, the implementation of the new Constitution. These are responsibilities that cannot be fulfilled by Parliament. They will require fulltime attention which MPs cannot give as they have many other responsibilities. Moreover, the new Constitution will generate a huge legislative agenda as well as significant new roles for Parliament such as approving Presidential nominees for appointment.

The role of the PCIOC is to assist Parliament in overseeing the process of implementing the new Constitution and to facilitate the adoption of the laws required by the Constitution. Because the CIC will act independently and will be non-partisan, it will be able to support the PCIOC work by offering neutral assessments of progress, and to report objectively on proposals. Through its composition, CIC is capable of yielding a range of expertise and views to enrich, and contribute to the success of the implementation process.

**11.4 Adopting new laws:**

As noted above, the new Constitution requires a large number of new Acts of Parliament to be passed. Schedule 5 set out a timetable for the passage of these laws. Broadly speaking, it provides for the following:

(a) Laws that are to be passed in the first year after the new Constitution comes into effect:
   i. Electoral laws
   ii. Laws supporting democratic participation (freedom of association, the media, access to information etc)
   iii. Laws relating to the establishment of county governments
   iv. Laws that involve only minor amendments to existing statutes (e.g. citizenship).

(b) Laws to be passed in the second year:
   i. Laws relating to new courts
   ii. Certain financial laws
   iii. Additional laws relating to county governments.

(c) The rest of the laws required by the new Constitution are to be passed within 5 years.

The new Constitution also set out a procedure to be followed if a law were not enacted within the scheduled time. The challenge was to ensure that the new laws envisaged by the new constitution are promptly enacted.

Under Article 308 of the Bomas Draft, if Parliament failed to adopt a particular law within the time stipulated in the table, anyone could petition the High Court for a declaratory order instructing Parliament to enact the law within a specified period. If this was not done,
Parliament would be dissolved. The PNC (Article 287) offered a less radical solution. It required such bills to be prepared by the Attorney-General and the CIC and tabled in Parliament. If such a bill was not passed in time, first, the PNC gave Parliament had the option of extending the time once. If this did not secure the passage of the bill, it automatically became law.

The new Constitution follows the Bomas approach in allowing the National Assembly to extend the time within which a Bill is to be passed, provided that the extension is justified by exceptional circumstances and has the support of at least two-thirds of its members. It also permits any person to petition the High Court to deal with a failure by the National Assembly to pass a law in time. If the National Assembly fails to abide by the court order, it will be dissolved and a new election held.

11.5 Implementation of Devolution

Monitoring the implementation of the system of devolved government will be a major component of the work of the CIC. A critical part of this work will be to ensure that devolved governments are not given tasks before they have the capacity to implement them – this will set them up for failure. On the other hand, it is well-known that no national government would be eager to give up its powers and the CIC will have to be alert to this problem and report any difficulties to the PCIOC.

Under the new system of devolved government, the system referred to as provincial administration must be restructured and operated in such a way that it does not undermine the integrity of the devolved structures and governments. Local Authorities existing under the Local Government Act (Cap. 265) continue to exist until Parliament passes legislation for the management of urban areas and cities under Article 184 of the new Constitution.
CHAPTER TWELVE – CONCLUSIONS AND REFLECTIONS

Upon being sworn into office on 2 March 2009, the CoE took stock of the gravity of the political context in which the task of constitutional review in Kenya was to be undertaken. Thousands of Kenyans had lost their lives in pursuit of a new constitution; and the country had already invested billions of Kenya Shillings in previous review initiatives. But, the Accord of 2008 offered a new opportunity for constitution making.

As the 2012 elections approached, it seemed that the window for constitutional reform would close. There was the risk that the country would once again be seized by election fever and important but more long-term concerns such as “constitutional reform,” conveniently forgotten, seemed real. Worse still was a danger that the fatal spectacle of December 2007 would be repeated with potentially irreversible consequences. It was therefore imperative that all Kenyans pull together and seize the opportunity to create a prosperous new future and affirm a culture of dialogue, peaceful resolution of their differences; and a country in which all citizens would enjoy equality of opportunity. Only a new constitutional dispensation could ensure the far-reaching democratic institutional reform and equal access to resources necessary to create a truly enabling environment in which all Kenyans could live in dignity.

As this Report documents, Kenyans seized the opportunity to complete the process of constitutional review. The new Constitution of Kenya offers a strong framework for democratic government and society that respects the rule of law and the rights of all.

The process established in the Review Act for this last stage of a long-drawn out struggle for a new constitution, contributed significantly to the success.

First, drawing lessons from the 2005 referendum, and mindful of the ease with which Kenyan society could become dangerously polarised, the Review Act demanded political consensus on a new Constitution by incorporating a strong role for Parliament in the review process. Secondly, the Act recognised that politicians could not impose their will on Kenyans and that a process that was entirely in their hands of politicians would not command the confidence of Kenyans. The CoE, with a mandate to respect the agreements reached in earlier stages of the review process and with its independence protected by law, was created to address the problem of legitimacy.

Finally, and most importantly, the Review Act ensured that the new Constitution was made by all Kenyans. As this Report describes, the Constitution that Kenyans approved in the Referendum of 4 August 2010 was built on the three drafts that preceded it: the CKRC and Bomas Drafts and the PNC. In different ways each of those drafts reflected the views of the many, many Kenyans who engaged with the CKRC. These views, in turn, drew on the long
struggle of Kenyan democrats against authoritarian rule. Kenyans also had the last word through the referendum. It ensured that every Kenyan had a say.

Of course, a process and institutions established by statute need not necessarily have worked. Chapter 4 of this Report discusses some of the challenges that the CoE faced in fulfilling its mandate, which included anomalies in the process established in the Review Act, the difficulty of setting up the CoE and its secretariat within the tight timeframes in the Act; and the challenge of civic education in hostile environments.

Perhaps the most important lesson learnt in the process is the importance of compromise and tolerance of divergent ideas. Members of the CoE had divergent views on many issues. If the CoE had insisted on unanimity on every point the process would have been derailed. If it had resorted to frequent voting, the collegial atmosphere necessary to complete the task could not have been sustained. Instead, it worked on achieving a broad consensus on issues.

The public of Kenya seems to have followed suit. It is likely that no one is happy with every provision of the Constitution and that everyone would change something if they had their way. But a constitutional settlement necessarily involves compromises and concessions. The debate preceding and after the referendum reflects a broad acceptance of this requirement.

The new Constitution of Kenya is a compromise and none of the interest groups, including the CoE itself, politicians, the religious sector, and Kenyans at large, got all that they wanted. But Kenyans must stand tall in the knowledge of having bestowed on themselves and future generations a constitution of their own and one that corresponds to their will and aspirations for a better, peaceful and prosperous future.

What remains is to be vigilant in ensuring that the new Constitution is implemented in the way in which it was designed to be. This task – which is in essence the task of building a culture of constitutionalism – falls not only to the special bodies established in the Constitution to guide its implementation and govern under it, but also to every Kenyan.

The triumph of the referendum and Kenya’s consultative constitutional review process is that there is a great sense of ownership of the new Constitution. This augurs well for the entrenchment of a culture of constitutionalism in Kenya.
Annexure

Annex 1: Meetings, Thematic Consultations

Table 1: Thematic, Technical Consultations on Contentious and Other Issues

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Table 2: Consultations with Various Sectors/Interest Groups

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Annex 2: Sub-Committees of the CoE

In order to ease its work, the CoE has constituted itself into the following sub-committees:

- The sub-committee on Research: This was convened by Otiende Amollo and had four other members (Chaloka Beyani, Atsango Chesoni, Christina Murray and Frederick Ssempebwa. The CoE’s Deputy Director for Research, Michael Chellogoy also sat on this sub-committee). The sub-committee on Research not only oversaw the substantive area of research, but also to kept an eye on what instructed the final report of the committee.

- The Sub-Committee on Drafting: This was convened by Fredrick Ssempebwa and had five other members (Otiende Amollo, Chaloka Beyani, Bobby Mkangi, Christina Murray and
Njoki Ndung’u). This sub-committee was tasked with following recommendations on various aspects, noting that the drafting was to be a continuous process.

- **The Sub-Committee on Civic Education**: This sub-committee was convened by Bobby Mkangi and had three other members (Abdirashid Abdullahi, Chaloka Beyani and Njoki Ndung’u. The Deputy Directors for Civic Education, Public Information and Mobilisation, Veronica Nduva and Vitalis Musebe respectively also sat on this sub-committee). This sub-committee not only focused on the continuing mandate of Civic Education throughout the process, but also led and guided the Committee of Experts during the 30 day period of civic education contemplated by the *Review Act*.

- **The Sub-Committee on Finance and Administration**: was convened by the Chairperson, Nzamba Kitonga and had three other members (Abdirashid Abdullahi, Ekuru Aukot (the Director) and Atsango Chesoni (Vice Chairperson), the Deputy Director, Finance and Administration, Peter Ayugi also sat on this sub-committee). This sub-committee’s mandate included oversight of administrative matters and fundraising and ultimately guided the final hand over phase contemplated by section 60 of the *Review Act*. 
## Annex 3: List of Members and CoE Secretariat Staff

<table>
<thead>
<tr>
<th>First Name</th>
<th>Last Name</th>
<th>Designation</th>
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<tr>
<td>Nzamba</td>
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<tr>
<td>Atsango</td>
<td>Chesoni</td>
<td>Vice-Chairperson</td>
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<tr>
<td>Christina</td>
<td>Murray</td>
<td>Expert</td>
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</tr>
<tr>
<td>Bobby</td>
<td>Mkangi</td>
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<tr>
<td>Njoki</td>
<td>Ndung'u</td>
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<tr>
<td>Otiende</td>
<td>Amollo</td>
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<tr>
<td>Chaloka</td>
<td>Beyani</td>
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<td>Abdirashid</td>
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<td>Fredrick</td>
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<td>Hon. Amos</td>
<td>Wako</td>
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<tr>
<td>Ekuru</td>
<td>Aukot</td>
<td>Director/Ex-officio</td>
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<tr>
<td>Peter</td>
<td>Ayugi</td>
<td>Deputy Director</td>
<td>Finance &amp; Administration</td>
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<tr>
<td>Michael</td>
<td>Chelogoy</td>
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<td>Research, Drafting &amp; Tech. Support</td>
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<tr>
<td>Vitalis</td>
<td>Musebe</td>
<td>Deputy Director</td>
<td>Public Information &amp; Media</td>
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<tr>
<td>Veronica</td>
<td>Nduva</td>
<td>Deputy Director</td>
<td>Civic Edu, Mobilization &amp; Outreach</td>
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<tr>
<td>Mugambi</td>
<td>Laibuta</td>
<td>Asst. Prog. Officer/PA Director</td>
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<tr>
<td>Philip</td>
<td>Wuantai</td>
<td>Internal Auditor</td>
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<tr>
<td>Cleon</td>
<td>Obwar</td>
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<td>Mary W.</td>
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<td>Anne</td>
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<td>Fredrick</td>
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<td>Sammy</td>
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<td>Jacqueline</td>
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<td>Data Entry Clerk</td>
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