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NATIONAL ASSEMBLY

EIGHTH PARLIAMENT—FOURTH SESSION

Report  
of the  
Parliamentary Select Committee  
Reviewing the  
Constitution of Kenya  
Review Act, 1997



PARLIAMENT BUILDINGS  
NAIROBI

APRIL, 2000

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## INTRODUCTION

Mr. Speaker, Sir,

The Select Committee to review the Constitution of Kenya Review Act, 1997 was constituted on December 15, 1999 by a Resolution of the National Assembly.

The text of the Resolution as adopted is as follows:

*"THAT, while noting that the Constitution of Kenya Review Commission (Amendment) Act 1998 received Presidential Assent on December 24, 1998, with a commencement date of December 30, 1998; cognisant of the fact that the implementation of the Act has been hampered by the disagreement over the nomination of Commissioners among some stakeholders, and concerned that the review process is now behind schedule as a result of the impasse; and in order to facilitate consensus-building necessary to resolve the stalemate amongst the bodies specified in the First Schedule to the Act, the formation of a Review Commission and the coordination of the Constitutional review process, this House resolves to establish a Select Committee comprising 27 Members to review the Constitution of Kenya Review Act according to the wishes of Kenyans and facilitate the formation of the Review Commission."*

The Terms of Reference of the Select Committee as drawn from the above Resolution are:-

1. To review the Constitution of Kenya Review Act, 1997 as per the wishes of Kenyans.
2. To facilitate the formation of the Commission to review the Constitution.
3. To coordinate the review process

The following Members were appointed by the House Business Committee to serve in the Committee:-

1. Hon. Raila A. Odinga, MP (**Chairman**)
2. Hon. Musalia Mudavadi, MP
3. Hon. Stephen K. Musyoka, MP
4. Hon. Julius ole Sunkuli, MP
5. Hon. Joseph J. Kamotho, MP
6. Hon. George M. Anyona, MP
7. Hon. Mwai Kibaki, MP
8. Hon. John B. Munyasia, MP

9. Hon. Suleiman R. Shakombo, MP
10. Hon. Charity Ngilu, MP
11. Hon. Adan Keynan, MP
12. Hon. Kiraitu Murungi, MP
13. Hon. Joseph O. Kiangoi, MP
14. Hon. Justin B. Muturi, MP
15. Hon. Otieno G. Kajwang', MP
16. Hon. Njeru Kathangu, MP
17. Hon. Mohammed Affey, MP
18. Hon. Jembe Mwakalu, MP
19. Hon. Ramadhan S. Kajembe, MP
20. Hon. Isaack Shabaan, MP
21. Hon. Zipporah J. Kittony, MP
22. Hon. Daniel L. Khamasi, MP
23. Hon. Zephaniah M. Nyang'wara, MP
24. Hon. Paul K. Sang, MP
25. Hon. Fidelis F. Gumo, MP
26. Hon. Chege Mbitiru, MP
27. Hon. Stephen Ndicho, MP

The following Members did not take their positions in the Committee:-

1. Hon. Mwai Kibaki, MP
2. Hon. Kiraitu Murungi, MP
3. Hon. Charity K. Ngilu, MP
4. Hon. Daniel L. Khamasi, MP
5. Hon. Njeru Kathangu, MP

The Hon Stephen Ndicho attended only one Sitting while the Hon. Chege Mbitiru withdrew after 24 Sittings.

Mr. Speaker, Sir,

On behalf of Members of the Select Committee mandated by this House to review the Constitution of Kenya Review Act, 1997, (herein after referred to as the "Act") it is my privilege and honour to present the Report of the Committee not only on the Act, but also on the constitutional review process in general. Before I present the Committee's specific proposals on the Act, allow me to give the background of the events culminating in the establishment of the Committee I had the privilege of chairing.

Constitutional change is not new in Kenya as there have been twenty nine amendments to the Constitution since Independence. Sometimes these changes were well intentioned but in other instances, I dare say, they were motivated by pure political expediency. Many people have argued that the present Constitution has so many patches that one cannot recognize its original texture. This is the reason why many Kenyans feel there is a need for comprehensive review of the Constitution.

Mr. Speaker Sir, before I delve more into our local situation, allow me to make a few general remarks on the African and global developments which have a bearing on developments in our country.

The final two decades of the twentieth century have witnessed one of the most traumatic upheavals in the political history of Africa. As the winds of change have blown through Eastern Europe, so too have they blown throughout Africa, bringing down former single-party and military regimes. The dramatic changes that Africa has undergone in the last few years have been aptly called "the second liberation".

If the first liberation struggle was against alien rule, this new crusade is for African democracy. If the first liberation effort was for political independence, this second struggle is for wider human rights. If the first endeavour was for collective self-determination, this second liberation is for individual fulfilment.

The end of one-party and no-party systems of rule and the return to the vogue of multipartyism have brought about a veritable rejuvenation of party politics in most parts of Africa.

Similarly, legislatures have been resurrected in many African countries as part of the process of moving towards liberal democracy. With the advent of multi-party politics, many African countries have embarked on a vigorous exercise to revise, rewrite or totally change their Constitutions in order to accommodate the new circumstances.

Throughout the world, in countries where conflicts have existed, Constitutions have acted as mediators between opposing sides. For example, the Magna Carta (1215), the Petition of Rights (1628) and the *Bill of Rights* (1688/9) resolved disputes between the English kings and their subjects. After the successful overthrow of a tyrannical monarchy, the French adopted a Constitution, of which the Declaration of the Rights of

Man and of the Citizen (1789) formed an integral part, to avert possible future conflicts between the ordinary citizen and the State.

When Americans declared their independence from England following a dispute on taxation, they drew up a Constitution setting up the authority of the State and the rights of the people and established a Supreme Court to resolve constitutional disputes between the citizen and the state.

Africa is therefore not unique in this regard. A democratic Constitution heralded the end of apartheid and the birth of a new South Africa. Uganda is in the process of implementing a new Constitution after years of military and political dictatorships.

In our own experience, Kenya reintroduced multi-party politics in 1991 after the repeal of Section 2A of the Constitution which had made Kenya a de jure one party state. We have organised two multiparty elections since 1991. Our challenge now lies in reforming our Constitution to reflect the multi-party character of our new political dispensation.

Mr. Speaker, Sir,

As I have already mentioned, the clamour for fundamental constitutional change in this country is not a new phenomenon; however, it was only in the latter part of 1997 that practical steps were made when the Attorney-General published a Bill seeking the establishment of a Commission to review the Constitution.

The Bill was enacted just before Parliament was dissolved in readiness for the ensuing 1997 General Elections with input by the Inter-Parties Parliamentary Group (IPPG). That Act was not, however, implemented and instead became a subject of fundamental amendments in the last Quarter of 1998 which were agreed upon at the Bomas of Kenya and Safari Park Hotel Fora on the Constitutional Review Process.

Mr. Speaker, Sir,

The year 1999, was therefore, greeted with a lot of hope that after the 1998 amendments to the Act, the constitutional review process would proceed without any impediments. This optimism turned out to be misplaced partly due to, *inter alia*, internecine wrangles amongst the nominating bodies listed in the Act especially those in Part 'A' of the First Schedule, and due

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to some inherent flaws in the Act itself.

This situation brought a stand-off between the protagonists, a stalemate to the process and visited a sense of hopelessness and resignation to the people of Kenya collectively and individually.

Mr. Speaker, Sir,

The manner in which a Constitution is developed and finally adopted by the people is very important in demonstrating the legitimacy, popularity and acceptability. A Constitution which is imposed on the people cannot form the basis of a stable, peaceful and democratic governance of the people. To command loyalty, obedience, respect and confidence, the people must identify themselves with it through involvement and a sense of attachment. As Prof. Nwabueze points out in his book, "The Presidential Constitution of Nigeria".

*"To achieve this understanding and acceptance, a Constitution needs to be put through the process of popularization with a view to generating public interest in it, that everybody has a stake in it, that it is the common property of all. The people must be made to identify themselves with the Constitution. Without this sense of identification, of attachment, a Constitution would always remain remote and artificial with less real existence than the paper on which it is written".*

Mr. Speaker, Sir,

The involvement of the people in constitution making is therefore important in conferring legitimacy and acceptability to the Constitution. It should also be mentioned that such a democratic and popular method of evolving a Constitution serves to explode the misconception commonly held that the power to govern means the exclusive power to make a Constitution.

The Constitution is the supreme law of the country. Parliament and all other governing bodies are subordinate to it and no law can contradict any of its provisions. The right to change a Constitution should remain with the people, just like the right to elect their leaders. The people are the sovereign authority in the constitution-making process.

Mr. Speaker, Sir,

Of the peoples' right to participate in constitution making, the Indian constitutional expert and leader Jawaharlal Nehru had this to say:

*"This cannot be done by the wisest of lawyers, sitting together in conclave; it cannot be done by small committees trying to balance interests and calling that constitution-making; it can only be done effectively when political and psychological conditions are present, and the urge and sanctions come from the masses".*

These words were very instrumental in the making of the Indian Constitution in the 1930's and they still hold sway today as then.

However, Mr. Speaker, it is important that a clear understanding is reached on the term "people-driven" as it is applied to the constitutional review process. The detractors of the Select Committee have argued that it is "Parliament-driven". They fail to recognise the fact that both Bomas of Kenya and Safari Park consultative meetings were organised and convened by the Inter-parties Parliamentary Committee (IPPC), which was, to all intents and purposes, a select committee of Parliament. The Bomas of Kenya and Safari Park fora cannot, by any stretch of imagination, be considered more representative than the many Kenyans who appeared before the Select Committee.

Mr. Speaker Sir,

The days of the ancient Greek City States when the people gathered together in a "baraza" to deliberate and decide on issues affecting them directly are long gone. Tacitus "*Germania*" describes a first-century Germanic Assembly thus:

*"About minor matters the chiefs confer; about major matters, all: yet even that which is decided by the common people is dealt with by the chiefs as well. They convene, unless something accidental and unexpected befalls, on regular days.....presently, a king or chief.....is heard, more on account of his persuasive influence than his power to command. If displeased with his views, they (the assembled multitude) murmur with disdain; if pleased, they brandish their spears"*

That was the era of direct democracy in governance. A similar process in Kenya would mean that over 28 million people gather in a football stadium to debate and write a Constitution; that is simply impossible. In modern times direct democracy usually means the institution of the referendum; the electorate decides a specific issue by voting instead of leaving the decision to its elected representatives. It should be noted here that throughout the world, the referendum is an exceptional measure.

Indirect or representative democracy is the general rule. There also seems to be general agreement that this is to some extent a necessity in any modern society.

Mr. Speaker, Sir,

In the context of constitutional review, direct or representative democracy must be seen in terms of the people's participation in the process. Our understanding of a people-driven process is that mechanisms are created from grass-roots upwards through which the people can voice their views about the type of Constitution they want; for the Constitution is but a contract between the people and their rulers. It is in recognition of the need for more popular participation that we have proposed to move the district consultative forums down to the constituency level.

From the evidence received, Kenyans who appeared before the Committee were unanimous that the word "stakeholders" means the **entire citizenry** of Kenya and not just a few individuals or groups of people who claim to speak on behalf of the Kenyans.

Mr. Speaker, Sir,

You will certainly recall that we were in a stalemate last December when Parliament passed a resolution to establish a Select Committee with the following Terms of Reference:-

- (i) To review the Constitution of Kenya Review Act, 1997 as per the wishes of Kenyans.
- (ii) To facilitate the formation of the Commission to review the Constitution.
- (iii) To coordinate the review process.



You will also recall that the establishment of the Committee resulted in some acrimony in some sections of our society generally and also in this House where a few Members refused to take up their positions on the Committee. The rest is now history and I will leave it at that point because it does not help us to move forward as a country.

Mr. Speaker, Sir,

Compromise is key to the success of every negotiation and this is only possible if there is trust. One of the most crucial hurdles that must be overcome in our country, therefore, is the question of lack of **trust**. Experience in other countries shows that the basic tenet of mutual-cooperation is respect for one another. This code of equality serves as the founding stone for disciplined, constructive and progressive approaches to situations. The desire and commitment to find solutions leads to objectivity and flexibility.

It is our hope as a Committee that this Report and the proposals contained therein will be adopted by this House which will in turn lead to the establishment of the Commission and resuscitate the review process. The Commission will then collect and collate views from Kenyans.

Mr. Speaker, Sir,

Allow me to pay tribute to the Members of the Select Committee who actively participated in its deliberations culminating in the production of this report.

They endured long sitting hours and their determination in salvaging a cause which at times appeared doomed exhibited an admirable and patriotic disposition.

In addition, I would like to thank all Kenyans who presented written memoranda and/or oral submissions to the Committee. Their suggestions, and support were invaluable to the Committee. By offering to be part of the solution and not part of the problem, they exhibited a high degree of patriotism which was a challenge and a source of inspiration to the Committee.

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Mr. Speaker, Sir,

Allow me to make several remarks by way of conclusion. Constitutional review is first and foremost a socio-political and legislative process and hence in terms of providing leadership and guidance to the Nation, the position and role of Parliament is central and distinct from that of a lobby group. This is the ethos of the provisions of Sections 30, 46 and 47 of the Constitution of Kenya.

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Lastly, Mr. Speaker, Sir,

We have wasted more than two years talking at each other rather than talking with each other. There has been a lot of mistrust and suspicion amongst bodies listed in the Act. This has created confusion amongst Kenyans in general. This must be overcome. Indeed, if we have any dreams and aspirations of building a strong democratic and prosperous Nation, we have to communicate by creating consensus and rapport.

It is only in this way that you will discover that there are more things that unite us than those that divide us. In fact, having sat through all the committee meetings with Legal Experts, Freedom Fighters, Political Veterans, and Kenyans of all walks of life, it is my humble submission that there is nothing that should divide us.

Finally, I would like to thank all the Members of the Committee for working tirelessly to ensure that the report was completed before the House resumed. In executing its mandate, the Committee received invaluable support from the officers from the Clerk's office and the Attorney-General's office who sat in the Committee throughout all the Sessions. The minutes of the Committee are attached to this report.

### **INTERPRETATION OF TERMS OF REFERENCE**

The Committee to review the Constitution of Kenya Review Act was established through a resolution of the House on December 15, 1999. The resolution of the House and the Terms of Reference are as follows:-

*"THAT, while noting that the Constitution of Kenya Review Commission (Amendment) ACT, 1998 received Presidential Assent on December 24, 1998, with a Commencement date of December 30, 1998; cognisant of the fact that the implementation of the Act has been hampered by the disagreement over the nomination of Commissioners among some stakeholders, and concerned that, the review process is now behind schedule as a result of the impasse; and in order to facilitate consensus building necessary to resolve the stalemate amongst the bodies specified in the First Schedule to the Act, the formation of a Review Commission and the co-ordination of the constitutional review process, this House resolves to establish a Select Committee comprising 27 Members to review the Constitution of Kenya Review Act according to the wishes of Kenyans and facilitate the formation of the Review Commission".*

The Terms of Reference of the Select Committee as drawn from the above Resolution are:-

- (i) To review the Constitution of Kenya Review Act, 1997 as per the wishes of Kenyans.*
- (ii) To facilitate the formation of the Commission to review the Constitution.*
- (iii) To coordinate the review process.*

The task placed before the Committee was, therefore, not only the review of the Act and formation of the Commission but also coordination of the review process. The Resolution of the House established a Committee comprising twenty seven (27) Members, five of whom did not attend the Sittings of the Committee. The Members who did not attend the sittings did not, however, formally resign in writing as required by Section 121 of the Constitution of Kenya and therefore their positions were not filled. The Hon. S.N. Ndicho attended only one sitting while the Hon. Chege Mbitiru withdrew after the twenty fourth (24) Sitting of the Committee.

To ensure that the Committee took into consideration the views and opinions of as many Kenyans as possible, the Committee invited individuals, groups and organisations to present written memoranda and to appear before it. In particular, the Committee invited all the bodies listed in the First Schedule to the Act as specified in the Resolution of the House.

## THEORETICAL AND PHILOSOPHICAL BASIS OF REVIEW

In discharging its mandate, the Committee was guided by the following principles for a new Constitutional order:

- (a) **The new constitutional order should be responsive to Kenya's potentially vulnerable geographical position.** The objective is to safeguard our national independence, sovereignty and territorial integrity.

The means of achieving this objective should include strengthening our nation-state and fostering policies of cooperation, understanding and friendliness at regional, continental and broader international levels.

- (b) **The new constitutional order should come to terms with Kenya's multi-ethnic and cultural diversities.** The objective is to promote nation building and national unity while fully respecting our cultural diversities and ethnic identities. One of the means of achieving that is to adopt a form of government that can best respond to the above principle.

- (c) **The new constitutional order should come to terms with Kenya's past and present and should be sufficiently flexible to meet internal and external challenges and people's aspirations for the future.** The aim is to avoid the pitfalls of the past, which have caused much suffering while building on values of the past, which have proved workable, and have survived all odds. The present should also be taken into account critically in order to identify both values that are permanent and those which seem transitory. The aspirations for the future indicate the direction which people want the country to take. They can be responded to by making a constitution that is sufficiently flexible to meet those challenges as they come.

- (d) **The new constitutional order should be so devised as to enable government to govern effectively and democratically.** The objective is to avoid both anarchy and tyranny. One of the effective remedies is to distribute power and responsibility in such a way that no loopholes are left for agitators to cause anarchy and for dictators to impose their will.

- (e) **There should be such a balance of forces in the new constitutional order that no one single force or group should be able to establish its hegemony to the extent of flouting the established democratic principles.** The objective is to eliminate the politics of exclusion, sectarianism and unconstitutionality. To remedy such a situation, there is need to control all social forces within the constitutional order and to put in place institutions that can effectively resolve conflicts fairly and peacefully.
- (f) **No social force or group should be politically marginalized as evidenced by Kenya's historical experience.** The aim is to establish solid foundations of equality, equity and social justice. One of the ways to achieve this is to give clear constitutional support to the rights of women, children, handicapped persons and minorities.
- (g) **The new constitutional order should ensure that major controversial issues are resolved through democratic discussion and where necessary national referenda.** The objective is to ensure that controversial issues do not lead to polarization of the nation into hostile camps. One of the ways to achieve this may be through use of national referenda to resolve issues democratically.
- (h) **The new constitutional order should ensure that constitutional structures are viable and flexible, coherent and integrated to promote a culture of constitutionalism.** The aim is to safeguard the constitutional arrangements as suggested by the people and approved by them or by their elected leaders. The means would include clear procedures for amending the constitution, making the constitution widely known and studied and empowering people to defend it.

## **OBSERVATIONS AND RECOMMENDATIONS**

The Committee held thirty nine (39) Sittings and received written memoranda from seventy (70) groups and individuals. A prominent feature which emerged after analyzing the memoranda was that a majority of the people initially thought the Committee was reviewing the Constitution while the correct mandate of the Committee was to review the Act. This gave the Committee additional responsibility to inform Kenyans and the diplomatic community on the activities of the Committee.

The Committee received views and opinions from a wide ranging group of Kenyans from various religious faiths, Kenya Mau Mau Union, civil society, eminent personalities who participated in the Lancaster House Conference some of whom were Members of the First Parliament. The Committee also benefited a great deal from the expertise of the following constitutional lawyers; Prof. J.B. Ojwang' of the faculty of law, University of Nairobi, Dr. Kenneth Kiplagat, a lecturer in law at the Nairobi University and private practitioner, Mr. Mutakha Kangu of Moi University who is also a legal practitioner, Mr. Lee Muthoga, legal Practitioner, Patrick O. Lumumba of University of Nairobi, and a legal practitioner, Mr. P.M. Wambua, Legal Practitioner and lecturer at the school of Law. The Committee had also an opportunity to interact with Justice Akinola Aguda, a Nigerian national who is also a former Chief Justice of Botswana and Justice Ben Odoki, Chairman of the Judicial Service Commission-Uganda and a former Chairman of Uganda constitution Commission.

After these broad based consultations and interaction with Kenyans and other interested parties, the Committee made the following observations and recommendations.

### **TIME FRAME OF THE CONSTITUTIONAL REVIEW PROCESS**

The majority of the people who appeared before the Committee were of the view that elections after every five (5) years is a feature that Kenyans are used to and any event that may shift Kenyans from this practice may affect the stability of the NATION. Concern was also voiced of the dangers of tying the review of the Constitution to an event which would then mean that the Constitution may not be comprehensively reviewed. The fact that the constitutional review is not an exercise that is frequently undertaken, is expensive and should be done for posterity was also given consideration. The Committee after giving consideration to all the opinions was of the view that the current political environment would be exacerbated by extending the life of Parliament beyond the year 2002. Reviewing the Constitution hurriedly would also be unfair to the citizens and subject them to further and prolonged uncertainty.

The Committee having given thought to all sides of the arguments resolved that efforts should be made to complete the review before the year 2002 and if it is impossible to achieve this deadline, then the Commission once established should work on minimum amendments to the Constitution so that the General elections in the year 2002 are not interrupted. The Committee

was of the view that with cooperation and goodwill the review can be completed in 24 months. However, in the event that the Commission is unable to complete review before the elections are held, it should within 12 months from commencement of the Act submit proposals for minimum amendments to the Constitution and other relevant statutes to Parliament to provide for a conducive environment for free and fair elections.

## **THE COMMISSION**

The Committee received many presentations on the composition of the Commission. The Committee took cognisance of the fact that one main issue that led to the stalemate were disagreements amongst the nominating bodies over the nomination of Commissioners. The Committee was concerned that the list of nominating bodies specified in the First Schedule of the said Act included bodies with vested interests which militated against selection of non-partisan Kenyans as Commissioners. Having considered all the views, the Committee found it most appropriate that the Commission is nominated by a Committee of Parliament and then presented to the President for appointment. As regards the composition of the Commission, the Committee was of the view that a Commission of fifteen (15) Members including the Chairman would be a suitable number that may split into Committees to collect and collate views from Kenyans. The Attorney-General or his representative should be an ex-officio member of the Commission.

The Committee recommended that Parliament nominates up to twenty one (21) persons from whom the President would appoint fifteen (15) Commissioners. At least three of the Commissioners shall be women and at least one from each Province provided no province will have more than two. Seven of the Commissioners shall be legal experts. In making the nominations the National Assembly will take into account geographic, ethnic, religious and gender considerations. The President would appoint a Chairman from among the Commissioners while the Commissioners would elect a Vice-Chairman at their first sitting.

On the Secretary to the Commission, the Committee was of the view that the Secretary should be nominated by a Committee of Parliament and appointed by the President. The officers to assist the Commission may be appointed or seconded from either the Public Service Commission, Teachers Service Commission, the Judicial Service Commission or the Parliamentary Service Commission.

A distinction was made between the duties of the Secretary and those of the Chairman. It was agreed that the Secretary would be responsible for:

- (a) the day to day administration of the affairs of the Commission.
- (b) the coordination of the Commissions' studies, research and evaluation
- (c) the recording of the proceedings
- (d) the custody of all records and documents of the Commission

To ensure that the Chairman has full control of the Commission and that duties do not conflict with those of the Secretary, the Committee agreed that the duties of the Chairman should include the following:

- (a) supervise and direct the work and staff of the Commission
- (b) preside at all meetings of the Commission, and in his absence the Vice-Chairman shall preside.
- (c) Be the spokesperson of the Commission and in the absence of the Chairperson, the Vice-Chairperson shall be the spokesperson.

### **CONSTITUENCY FORUM**

To enable the Commission get the views directly from the people, the Committee decided to replace the District Forum with a constituency forum where the Commission will interact and receive views from the people in the constituency without necessarily going through the rigours of an election to determine the members of the forum. The existing leadership comprising Members of Parliament, councillors, community based organisations, religious groups and individuals should be able to present views and opinions directly from the grassroots. The constituency forum would be an open forum with no specific structures. It should be flexible and easy to manage.

### **NATIONAL FORUM**

The Committee heard from the elders, the experts and from all the individuals and organisations that appeared before it that the report by the



Commission and the draft constitution should be read, understood and discussed as widely as possible. In an endeavour to ensure that all the citizens participate in the review process, the report should be made available to Kenyans and the Commission should facilitate this.

The Committee therefore decided that the National Consultative Forum should be conducted in two phases as follows:

### **1) National Debate**

After the initial report and the draft Constitution has been completed, the Commission will subject it to countrywide debate by holding seminars, media meetings, workshops etc.

### **2) National Constitutional Conference**

After the countrywide public debate, the report will further be subjected to debate at a national conference. The conference will comprise all the MPs; three representatives from each County Council (At least one of whom shall be a woman and one a councillor), three representatives from each Municipal Council (At least one of whom shall be a woman and one a Councillor) and one representative from each Town Council. The Commission shall invite representatives from religious groups; the media; civic organisations; NGOs; Business community, Trade Unions, professional bodies, disabled groups, educational institutions and minority groups. The total number should not be more than 10% of the MPs and the nominees from the local Authorities put together.

On conclusion of the National debate and the National Conference, the Commission will finalise the report and draft Constitution and present it to the Attorney-General for publication. The Attorney-General will then present the draft Constitution Bill to Parliament.

## **STANDING CONSTITUTIONAL COMMITTEE OF PARLIAMENT**

The Committee was concerned that the current constitutional review Act could not be operational because it lacked a dispute-solving mechanism. The Committee was of the view that a Standing Committee of Parliament could play this role sufficiently. Parliament's vital functions, such as those relating to public finance, are entrusted to standing committees provided for under the Standing Orders. Experience since 1990 has shown that constitutional

matters and issues pertaining to constitutional reform, require similar provision under the Standing Orders. Parliament as the elected and duly authorised law-making body, should arm itself with a specific agency in the form of a Standing Committee for deliberating upon and co-ordinating initiatives of constitutional reform, on a continuous basis.

In addition to providing a fall back position to the Commission, the Standing Committee of Parliament would also nominate Commissioners, the Secretary to the Commission and also coordinate generally the operations of the Commission. It will also receive periodic reports from the Commission. The Committee will in addition, arbitrate disputes referred to it by the Commission. To enable the Standing Committee to represent all political parties and all shades of opinions, the Committee recommends that a Committee comprising of not less than five (5) and not more than twenty seven (27) Members would be suitable for this role. The Committee further recommends that Parliament should amend Standing Orders to provide for a Standing Constitutional Committee of Parliament and also to amend Standing Order 101A(4) so that no Bill is exempted from consideration by Committees of the House.

### **THE ROLE OF THE ATTORNEY-GENERAL**

The critical role of the State Law Office in the provisions of the Constitution, and in all constitutional and legal processes, must be upheld at all times. All governmental functions are required to be guided by the Constitution and by the law. The preparation and drafting of such laws in accordance with authorised procedure, and the safe-keeping and implementation of these laws, revolve in the first place around the State law office. This office is a central agency in the Constitutional and legal system; and no process of law-making or law reform should even attempt to follow a path that excludes the State Law Office, which is the custodian of legal craftsmanship and the facilitation of Parliament's law-making function. It was clearly a mistake for the making of the constitution of Kenya Review Commission (Amendment) Act, 1998 to take a course that largely marginalised the State Law Office.

### **CIVIC EDUCATION**

The Committee underscored the importance of civic education in the review process and resolved that immediately the Commission is established, civic education should commence and should go on hand in hand with the review process.

The Committee was of the view that civic education is and should be a continuous process.

The Committee was also of the view that the Commission and the Communications Commission of Kenya should consult on how best the information on the review process could be availed to the public.

Cognisance was made on how practice in other countries require their licensees to devote certain amount of air time at their own cost on public programmes. A similar requirement should be considered by the media during the Constitutional Review Process.

The Committee recommends that the Commission should coordinate civic education by drawing a national programme, setting standards and accreditation of bodies to do civic education.

The Commission will also ensure that resources not coming through the Fund to conduct civic education are declared and accounted for.

### **PROPOSED AMENDMENTS TO THE CONSTITUTION OF KENYA REVIEW ACT, 1997**

Following lengthy deliberations, the Committee resolved as follows:-

#### **(A) LONG TITLE**

- (i) That the word "**comprehensive**" on the first line be deleted.
- (ii) That "**District Constitutional Forums**" on the fourth line be replaced with "**Constituency Constitutional Forums**" and wherever it appears in the Act.

#### **(B) PART 1 - PRELIMINARY**

- (i) Section 2
  - (a) That the definition of "**District Forum**" be replaced by that of "**Constituency Forum**" as below:

Constituency shall bear the meaning set out in the National Assembly and Presidential Elections Act (Cap.7)

- (b) That the term "**youth**" be deleted
- (ii) (a) That the word "**eventual**" on the second line of the renumbered Section 3 be deleted and that the words "**but not limited to**" be inserted immediately after the word "**therein**" on the third line.
- (b) Sections 2A, 2B & 2C

These Sections were agreed. The Committee recommended that they be renumbered as sections 3, 5 and 4 and rearranged accordingly.

(C) **PART II - ESTABLISHMENT AND COMPOSITION OF THE COMMISSION**

- (i) (a) That Section 3 (2) be amended by deleting paragraphs b,c,d,e,f and g.
- (b) That a new paragraph (b) be inserted to read; the Vice-Chairperson elected from amongst the Commissioners.
- (c) That Section 3(3),(4) and (5) be deleted.
- (ii) (a) That Section 4(1) be amended to read;  
Within thirty (30) calender days of the commencement of this Act, the National Assembly shall nominate Twenty one (21) persons from whom the President will appoint fifteen (15) Commissioners.
- (b) That Section 4(2), (3) and (4) be deleted

- (c) That Section 4(4) be amended to read;

The President shall, upon receipt of the list of nominees under subsection (1), notify the appointment of the Commissioners so nominated in the Gazette.

- (iii) (a) That Section 4A(1) be amended by deleting (c)

- (b) That Section 4A (2) be amended to read;

Notwithstanding the provisions of subsection (1) , a person shall not be qualified for appointment as a Commissioner if such person is an undischarged bankrupt.

- (c) That Section 4A(2) be further amended by deleting (b)

- (iv) (a) That Section 5 (1) be amended to read;

There shall be a chairperson of the Commission who shall be appointed by the President in accordance with this section.

- (b) That Section 5(2) be amended to read;

The Chairperson shall, within fifteen(15) days of the appointment of the Commissioners, convene the first meeting of the Commission.

- (c) That section 5, (4),(5),(6),(7) and (8) be deleted.

- (v) That Section 6 (1) be amended to read;

There shall be a Secretary of the Commission who shall be appointed by the President from amongst a list of two persons nominated by the National Assembly.

The Secretary shall serve on a full time basis and shall be an ex-officio member of the Commission.

- (vi) That Section 7(1) (b) be amended to read;

Such public officers as may be necessary for the purposes of the Commission as may, upon the request of the Commission be seconded thereto by the Public Service Commission, Parliamentary Service Commission, or the Judicial Service Commission and such public officers shall, during their secondment be deemed to be officers of the Commission and subject to the direction and control of the Commission.

- (vii) That Section 8(2) be amended to read,

Every oath and affirmation made and subscribed to under this section shall be deposited with the Secretary and with the Chief Justice.

- (viii) (a) That Section 9(3)(f),(g) and (h) be amended by deleting references to the District and National Forums.

- (b) That Section 9 (4) be amended to read:

Where any vacancy occurs on the Commission under Section 4(2) or under this Section, the Commission shall, within Seven days of such occurrence, notify the President of the vacancy through the Chairperson or in the absence of the Chairperson, by the Vice-Chairperson.

- (c) (i) That Section 9(5) be amended to read;

The President shall, within seven days of the notification under subsection (4) appoint a suitable replacement from the residue of the Twenty (21) names nominated by the National Assembly.

- (ii) That Section 9(5) be further amended by deleting the proviso.
- (iii) That Section 9(6) and (7) be deleted.

### PART III - FUNCTIONS, POWERS AND PRIVILEGES OF THE COMMISSION AND COMMISSIONERS

- (i) That Section 10(d) be amended by inserting a new sub-paragraph immediately after sub-paragraph (xiv) to read;
 

Establish and uphold the principle of public accountability by the holders of public or political offices;
- (ii) That a new section be inserted to define the role of the Commission in civic education. The functions should include co-ordination, drawing a national programme, setting standards and accrediting bodies to do civic education.
- (iii) (a) That Section 11(1)(b) be amended by deleting the words "**public officer**" and inserting the word "**person**" in place thereof.
- (b) That Section 11(1) be further amended by inserting a new paragraph (c) to read;

A Public officer who, without lawful cause or excuse, fails to appear before the Commission pursuant to any summons by the Commission commits an offence and shall be liable on conviction to a fine not exceeding Ten thousand shillings(10,000/=) or to imprisonment for a term not exceeding three months, or to both such fine and imprisonment.

- (iv) That Section 12 be amended to include the following clause.
 

That the Committees so established shall have the same rights as the Commission.

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- (v) That Section 12A be deleted and be replaced by the following:-

Without prejudice to the discretion of the Commission in the collection and collation of the views of members of the public, the Commission shall visit the various Constituencies of the country for the purpose of receiving views.

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- (vi) (a) That Section 13 (3) be amended by inserting a new paragraph (a) to read;

Supervise and direct the work and staff of the Commission;

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- (b) That Section 13(5) be rephrased to read;

All questions before the Commission or a Committee of the Commission shall be determined by consensus but in the event that there is no unanimity, decisions shall be reached by a simple majority of members present and voting.

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That Section 13(5) be further amended by deleting the proviso.

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- (c) That Section 13(6) be amended by deleting (c) and (e).

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- (vii) (a) That Section 13A(1) be amended to read;  
The Commission shall make its report available to the public after publication through the media and other means.

- (b) That Section 13A(2) be amended to read;

The Commission shall, for the purposes of sub-section (1) (c), consult with the Communications Commission of Kenya (CCK) to allocate air time on both radio and television.



That the Section be further amended by deleting 13A(2) (a) and (b)

- (viii) That Section 15 be transferred to become sub-section 11(1)(c).

#### **PART IV-REPORT OF THE COMMISSION AND ACTION THEREON**

- (i) That Section 16(1) be deleted and be replaced by the following new clause;

The Commission shall complete the review work within 24 months of the commencement of the Act. In the event that this is impossible, then the Commission should submit to Parliament within 12 months from the commencement of the Act, proposed minimum constitutional and statutory amendments to provide for a conducive environment for free and fair elections.

- (ii) That Section 16A(1) to(10) be deleted and be replaced by new Sections to read;

1. There shall be a National Consultative Forum which shall be chaired by the Chairman of the Commission. It shall be conducted in two phases,
  - a) National debate - After the initial report and draft constitution has been completed, the Commission will subject it to countrywide debate by holding seminars, media meetings, workshops etc.
  - b) National Constitutional Conference - After the countrywide public debate, the report will further be subjected to debate at a national conference comprising all Members of Parliament, three representatives from each County Council (At least one of whom shall be a woman and one a councillor), three representatives from each Municipal Council (At least one of whom shall be a woman and

one a Councillor) and one representative from each Town Council. The Commission shall also have the authority to invite representatives from religious groups, the media, civic organisations, NGO's, educational institutions and minority groups who would not exceed 10% of the MPS and the nominees from the local Authorities put together.

2. a) On conclusion of the National debate and the National Conference, the Commission will finalise the report and draft Constitution and present it to the Attorney-General for publication.
- b) The Attorney-General will then present the draft Constitution Bill to Parliament.

#### **PART V - EXPENSES OF THE REVIEW PROCESS**

- (i) That Section 17(1) and (2) needs to be harmonised.
- (ii) That Section 17A(1) and (4) be amended by deleting the word "**Secretary**" and insert the words "**Clerk of the National Assembly**" in place thereof.

#### **PART VI - DISSOLUTION OF ORGANS OF REVIEW AND FINAL PROVISIONS**

- (i) That Section 18 be deleted and replaced by the following;
  - (1) Notwithstanding anything to the contrary in this Act or in any other written law, the submission of the report and the draft Bill to alter the Constitution to the Attorney-General under Section 16A shall operate to dissolve the National forum.
  - (2) Upon the enactment of the Bill to alter the Constitution tabled before the National Assembly under Section 16A, the Attorney-General shall introduce before the National Assembly a Bill for the repeal of this Act.

- (3) Upon the repeal of this Act as required under subsection (2) of this section, the Commission shall stand dissolved; and the terms of office of the commissioners shall thereupon expire, save that the secretary and such number of staff as shall be necessary, shall remain in office for such period as may be necessary to conclude the financial and administrative affairs of the Commission.

The Committee further recommended as follows:-

- (1) That a saving clause be inserted in the Act to provide that in the event that any other law is inconsistent with the Review Act, the latter Act shall prevail.
- (2) That the Constitutional Review Act, 1997 should be amended instead of being repealed because of its background.
- (ii) That the First Schedule of the Act be deleted.

**SIGNED** .....



**HON. RAILA A. ODINGA, M.P.**

**(CHAIRMAN)**

**PARLIAMENTARY SELECT COMMITTEE  
REVIEWING THE CONSTITUTION OF  
KENYA REVIEW ACT, 1997**

**DATE** .....

*05<sup>th</sup> April 2000* .....

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# APPENDICES

## **APPENDIX I**

**MINUTES OF THE FIRST SITTING OF THE SELECT COMMITTEE  
REVIEWING THE CONSTITUTION OF KENYA REVIEW ACT, 1998,  
HELD IN THE SMALL DINING HALL, PARLIAMENT BUILDINGS,  
NAIROBI ON FRIDAY DECEMBER 17, 1999 AT 10.00 A.M.**

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### **PRESENT:**

The following Members were present:-

Hon. Raila Odinga, M.P. - **Chairman**  
Hon. Musalia Mudavadi, M.P.  
Hon. John B. Munyasia, M.P.  
Hon. Julius L. ole Sunkuli, M.P.  
Hon. Joseph Kiangoi, M.P.  
Hon. Isaack Shabaan, M.P.  
Hon. Joseph J. Kamotho, M.P.  
Hon. Zipporah J. Kittony, M.P.  
Hon. Ramadhan S. Kajembe, M.P.  
Hon. Rashid Shakombo, M.P.  
Hon. Stephen K. Musyoka, M.P.  
Hon. Otieno G. Kajwang, M.P.  
Hon. Jembe Mwakalu, M.P.  
Hon. Adan Keynan, M.P.  
Hon. Mohamed A. Affey, M.P.  
Hon. Justin B. Muturi, M.P.  
Hon. Stephen N. Ndicho, M.P.

### **ABSENT WITH APOLOGY:**

Apology for absence was received from the following:-

Hon. George M. Anyona, M.P.  
Hon. Zephania M. Nyang'wara, M.P.  
Hon. Fidelis F. O. Gumo, M.P.  
Hon. Paul K. M. Sang, M.P.

### **IN ATTENDANCE: THE NATIONAL ASSEMBLY**

Mr. Murumba Werunga - Deputy Clerk  
Mr. Stephen Njenga - Third Clerk Assistant

## **MIN.NO.1/99**

### **AGENDA**

The Committee resolved to set the following as the Agenda:-

- (i) Define the parameters of the Terms of Reference.
- (ii) Membership of the Committee.
- (iii) Programme of the Work of the Committee.
- (iv) Public image of the Committee including relations with the Media.
- (v) Funding of the Work of the Committee.

## **MIN.NO.2/99:**

### **PROCEDURE**

#### (i) **Quorum**

The Committee resolved to keep the quorum of the Select Committee as provided for in the Standing Orders. However, it was unanimously agreed that Members would endeavour to attend in large numbers.

#### (ii) **Mode of decision Making**

The Committee resolved to arrive at decisions as provided for in the Standing Orders.

#### (iii) **Secretariat**

The Committee was informed by the Chairman that, the Clerk of the National Assembly would provide the Secretariat and necessary support in form of facilities and services.

(iv) **Funding for the Work of the Committee**

The Committee was informed by the Chairman that the Clerk of the National Assembly had given assurance that, he would discuss with relevant organs of Government including, Office of the Attorney-General, Head of the Public Service and the Permanent Secretary to the Treasury to secure sufficient funding.

**MIN.NO.3/99 MEMBERSHIP OF THE COMMITTEE**

Following extensive deliberations on how to treat the status of the membership of the Committee by the Members who declined nomination by the House Business Committee, the Committee resolved as follows:-

- (i) Should any of them have a change of mind and decide to take up their seats on the Committee, they would be welcome.
- (ii) Arising from (i) above, the Chairman was mandated to inform the Speaker in writing of the participation of such Members.

**MIN.NO.4/99 PUBLIC IMAGE AND RELATION WITH THE MEDIA**

Following extensive deliberations on how to counter the negative public image of the Committee concocted by the Media, the Committee resolved to undertake the following corrective measures:-

- (i) To visit the Provinces and address public rallies to acquaint Wananchi with its mandate, terms of reference and general operations.
- (ii) To constitute as and when necessary small Sub-Committees to deal with specific constituencies e.g. the Diplomatic Corps, the Mass Media, the donor community including specific groupings of European Union etc.

- (iii) To participate in specific programmes on the radio, television and print media so as to expound on its mandate and work.
- (iv) To visit as may be possible foreign countries which have undertaken similar exercise in the recent past.
- (v) To publicize all provisions of the Constitution of Kenya Review Act by ensuring its availability at all Provincial, District headquarters and serialisation of the same in the print media.

### **MIN.NO.5/99 TERMS OF REFERENCE**

Following extensive deliberations, the Committee resolved on the following as constituting its Terms of Reference, pursuant, to the Resolution of Wednesday, December, 15, 1999 viz:-

- (i) To review the Constitution of Kenya Review Act as per the wishes of Wananchi.
- (ii) To facilitate the formation of the Commission to review the Constitution.
- (iii) To coordinate the review process

### **MIN.NO.6/99 IMPLEMENTATION OF THE TERMS OF REFERENCE**

Following extensive deliberations, the Committee resolved that, the following modality would be applied in the implementation of its Terms of Reference:-

- (i) To keep in focus the expressions and views of Wananchi of all shades of opinion and from every corner of the Republic.
- (ii) To mount tours to the provinces to receive the views of Wananchi both orally and in written submissions.



- (iii) To facilitate presentations and discussions with persons either individually or collectively, believed to possess certain expertise in constitutional process. The experts will be both local and foreign.
- (iv) To invite specific foreign based persons with experience in constitutional making process to make presentations and hold discussions with the Committee.
- (v) To visit specifically targeted countries to learn from their experiences in constitution making.

**MIN.NO.7/99 PRESS RELEASE**

The Committee resolved to make the Press Release appearing in the Appendix to these Minutes.

**MIN.NO.8/99 DATE FOR THE NEXT SITTING**

It was resolved that the next Sitting be held on Tuesday, December 21, 1999 at 10.00 a.m. in the Small Dining Room.

**MIN.NO.9/99 ADJOURNMENT**

And there being no Any Other Business for discussion, the Chairman adjourned the Sitting at One O'Clock.

**HON. RAILA A. ODINGA, MP**  
**CONFIRMED.....**  
**(CHAIRMAN)**

**21ST DECEMBER, 1999**  
**DATE .....**

**MINUTES OF THE SECOND SITTING OF THE SELECT COMMITTEE  
REVIEWING THE CONSTITUTION OF KENYA REVIEW ACT, 1997,  
HELD IN THE SMALL DINING HALL, PARLIAMENT BUILDINGS,  
NAIROBI ON TUESDAY, DECEMBER 21, 1999 AT 10.00 A.M.**

**PRESENT:**

The following Members were present:-

Hon. Raila Odinga, M.P. (**Chairman**)  
Hon. Musalia Mudavadi, M.P.  
Hon. John B. Munyasia, M.P.  
Hon. Julius L. ole Sunkuli, M.P.  
Hon. Joseph Kiangoi, M.P.  
Hon. Isaack Shabaan, M.P.  
Hon. Joseph J. Kamotho, M.P.  
Hon. George Anyona, M.P.  
Hon. Ramadhan S. Kajembe, M.P.  
Hon. Suleiman Shakombo, M.P.  
Hon. Zephania M. Nyang'wara, M.P.  
Hon. Stephen K. Musyoka, M.P.  
Hon. Otieno G. Kajwang, M.P.  
Hon. Jembe Mwakalu, M.P.  
Hon. Paul K.M. Sang, M.P.  
Hon. Adan Keynan, M.P.  
Hon. Mohamed A. Affey, M.P.  
Hon. Justin B. Muturi, M.P.  
Hon. Chege Mbitiru, M.P.

**ABSENT WITH APOLOGY:**

Apology for absence was received from the following:-

Hon. Zipporah J. Kittony, M.P.  
Hon. Stephen N. Ndicho, M.P.  
Hon. Fidelis F.O. Gumo, M.P.

**IN ATTENDANCE**

**THE NATIONAL ASSEMBLY**

Mr. Samuel W. Ndindiri

-

Clerk of the National  
Assembly

Mr. Murumba Werunga - Deputy Clerk  
Mr. Justin N. Bundi - Ag. Principal Clerk  
Mr. Stephen Njenga - Third Clerk Assistant

**MIN.NO.10/99**

**CONFIRMATION OF MINUTES OF PREVIOUS SITTING**

Minutes of the first Sitting held on Friday, December 17, 1999 were confirmed by the Members present and signed by the Chairman.

**MIN.NO.11/99**

**MATTERS ARISING**

- (i) Under Min.No.2/99(iv), the Clerk of the National Assembly confirmed that funds and facilities would be made available to facilitate the work of the Committee.
- (ii) Under Min.No.3/99, on membership of Select Committee, the Committee requested the Chairman to hold consultations with the Speaker regarding the way forward on whether Members who declined to take their position should be replaced.
- (iii) Under Min.No.4/99, the Committee resolved to conduct press briefings as may be necessarily without infringing excessively on the requirements of the Standing Orders, as it was necessary to keep the public informed of the work of the Committee.

Further, Members undertook to be proactive in disseminating information about their mandate to the media through Radio/TV interviews and conferences.

- (iv) Under Min. No. 5/99, the Committee resolved to request the Attorney-General to second a draftsman, to serve on the Committee, preferably, the one who served in the Sulumeti Committee.

The Committee further resolved to invite the Attorney General at a later date to give his views on the Constitution of Kenya Review Act, 1997.

**MIN.NO.12/99**

**DELIBERATION ON THE PROGRAMME OF THE WORK OF THE COMMITTEE**

After lengthy discussions, the Committee resolved to follow the following sequence in the consideration of the Constitution of Kenya Review Act, 1997.

- (i) Members to meet and exchange views;
- (ii) Meet the invited local experts to brainstorm on the Constitution of Kenya Review Act, 1997;
- (iii) The Committee to focus on the specific areas isolated in course of discussions.

The Committee also agreed on the programme, the names of local experts and the countries from which international experts will be invited as below:-

- (i) January 6, 2000 - Host a reception for the members of the Diplomatic Community.
- (ii) January 12, 2000 - Sitting of the Committee.
- (iii) January 13-14,2000 - Meet the local experts, namely;
  - (a) Prof. J.B. Ojwang'
  - (b) Dr. John Mutakha
  - (c) Dr. Kenneth Kiplagat
  - (d) Prof. Yash Ghai, and;
  - (e) One lady expert to be identified by FIDA.

- (iv) During the second half of January, 2000 - Meet the foreign experts from United States of America, Britain, India, South Africa and Nigeria.
- (v) Dates for the provincial visits to be decided later.

The Committee further resolved to invite written memoranda from all the groups listed in the Schedule to the Constitution of Kenya Review Act, 1997 and accordingly requested the Secretariat to write to them individually giving them fourteen (14) days to respond and also place advertisements in the print media inviting written submissions on the Constitution of Kenya Review Act, 1997 from the public.

**MIN.NO.13/99**

**ANY OTHER BUSINESS**

- (i) A Member enquired on the allowances that would apply to the Committee.

The Clerk replied that the Attendance Allowance was governed by the National Assembly Remuneration Act, Cap 5, Laws of Kenya and hence the sum could only be altered by an amendment to the Act.

With regard to staff, the Clerk informed the Committee that payment of honoraria to Civil Servants had been scrapped.

- (ii) A Member asked if the Attorney General could guide the Committee on the proper procedure and the players in the review of the Constitution.

The Committee was in agreement that the issue needed clarification, but resolved to proceed in carrying out its mandate.

**MIN.NO.14/99**

**PRESS BRIEFING**

The Committee briefed the Press, clarifying their role and gave their programme for January, 2000.

The Committee further, agreed that, the Hon. Kalonzo Musyoka and the Hon. Otieno Kajwang' would arrange an interview with KTN while Hon. Jembe Mwakalu and Hon. George Anyona would speak to Citizen Radio.

**MIN.NO.15/99**

**ADJOURNMENT**

And there being no Other Business for discussion, the Chairman adjourned the Sitting at thirty minutes past One O'clock until January 6, 2000 at 10.00 a.m.

**HON. RAILA A. ODINGA, MP**

**CONFIRMED** .....  
**(CHAIRMAN)**

**6TH JANUARY, 2000**

**DATE** .....

