ANNUAL PARLIAMENTARY HUMAN RIGHTS WORKSHOP

WORKSHOP REPORT

THE KENYAN SECTION OF THE
INTERNATIONAL COMMISSION
OF JURISTS

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ICJ Kenya is grateful for the input of the paper presenters, Mr Odhiambo Mak'oloo, Mr Erastus Wamugo and Mr Njonjo Mue and the discussants, Ms Koki Muli, Mr Wachira Maina and Hon Gitobu Imanyara as well as the chairpersons of the sessions, Mr Otiende Amollo and Mr Joe Kadhi.

ICJ Kenya would also like to thank Michael Nderitu, Priscilla Kanyua, Edwin Maitho, Nerida Nthamburi and Connie Anjiri for their efforts in organising the workshop and compiling this report.

We appreciate the continued support of Westminster Foundation for Democracy in the implementation of this project.

Samuel Mbithi
Executive Director

FOREWARD

The Kenyan Section of the International Commission of Jurists (ICJ-Kenya) is a member-based, voluntary, not for profit, non-governmental organization whose mandate is promotion and protection of human rights, the rule of law and democracy.

Towards this end ICJ-Kenya conceived and implements the Human Rights Education programme. The main project under this programme has been the training of paralegal workers by engaging rural communities with a view to imparting legal and human rights knowledge. The objective of the programme is to enhance effectiveness of rule of law and human rights in Kenya by contributing to people's understanding of the Kenyan legal system and building their capacity to use that legal system to monitor, safeguard and protect human rights and rule of law in their areas of operation and the country at large.

ICJ-Kenya is implementing a project on the protection and promotion of human rights through parliamentary procedures under its Human Rights Education Programme. The objective of the project is to introduce and acquaint Members of Parliament with contemporary human rights issues affecting Kenya and to promote the application of parliamentary procedures and opportunities incidental thereof to protect and promote human rights in Kenya.

As an activity implemented under this project, ICJ-Kenya held a two-day consultative residential workshop with Members of Parliament aimed at specific discussion outputs. The discussions were meant to illuminate the way forward in the promotion and protection of human rights through parliamentary procedures by incorporating best practices derived from experiences from other jurisdictions while incorporating suggestions, opinions and comments from Members of Parliament. In specific terms, the aim of the workshop was to identify the way forward in the constitutional review process following the enactment of Constitution of Kenya Review (Amendment) Act, 2004. In addition, the deliberations aimed at identifying law reform interventions by Members of Parliament in the promotion and protection of human rights in Kenya and how such mechanisms can be improved.

The proposed Access to Information Bill was used as the case study on how MPs can enact effective laws that protect and promote the human rights of

citizens. The right to information is one of the provisions in the draft Bill of Rights. This right is an important substructure for the protection of other human rights such as freedom of expression and of the media. It is vital for the evolution of democratic institutions and growth of participatory governance systems.

In light of the current stalemate, Mr. Odhiambo Mak'oloo, who was one of the paper presenters, defined a constitution and gave an overview of the history of the constitution. He queried the legitimacy of the constitutional review process and was of the view that Parliament has no capacity to enact a new constitution to the exclusion of the citizenry. The process must be people driven. The discussant was Ms. Koki Muli who underscored the role of political parties in unlocking the stalemate bedevilling the constitutional review process. She was of the view that political parties and their MPs need to accommodate divergent views from all stakeholders involved in the review process.

The draft Constitution has provisions that are vital to the promotion and protection of the rights of Kenyans. Mr. Erastus Wamugo analysed the Bill of Rights in the draft constitution with a view of providing solutions on improving the human rights environment. He stated that some of the rights provided therein were incapable of proper legal protection and enforcement. It was his opinion that the Bill should be re-examined by technical experts. He stressed that Members of Parliament had an important role to play in protecting human rights. He argued that they should be sensitized to make legislation that upholds human rights. One of the avenues which this can be done effectively is through constructive engagement with parliamentary committees.

In his presentation, Mr. Njonjo Mue defined the concept of freedom of information. He stated that the right to information has been recognised as a fundamental right as early as 1948 by the Universal Declaration on Human rights. The right to information is demonstrably one of the more important rights as it underpins other fundamental rights. The right has not been adequately provided for in Kenya in the Constitution, as there are so many exceptions which hamper full enjoyment of this right. Members of Parliament have a role to actively push for the legislation giving effect to this right.

The discussant Mr. Wachira Maina stated that the freedom of information law is part of the framework of open democracy laws. A good freedom of information law should incorporate the concept of maximum disclosure. He

stressed the need to provide for the protection of whistleblowers. Whistle blowers serve as early warning mechanisms and complement the work of regulatory and anti-corruption bodies.

A paper prepared by Honourable Gitobu Imanyara was presented at the workshop by Ms Priscilla Kanyua. The paper focussed on the provisions of the Johannesburg Principles on National Security, Freedom of Expression and Access to information. These principles provide important safeguards that can inform the drafting process of a Freedom of Information Bill.

We have deemed it necessary to publish the findings and positions that emerged at the workshop together with some of the presentations made at the workshop.

INTRODUCTORY REMARKS:

SUMMARY OF OPENING REMARKS BY MR SAMUEL MBITHI, ACTING EXECUTIVE DIRECTOR OF ICJ - KENYA

Mr. Mbithi welcomed the participants to the inaugural Annual Parliamentary Human Rights Workshop. He stated that the engagement of MP's and civil society actors is aimed at informing the legislative agenda of Parliament. The workshop was intended to inform the participants on the need for preserving and enhancing protection and promotion of human rights through the available parliamentary procedures.

He stated that the objective of the workshop was to interrogate the mechanisms of salvaging the constitutional review process with the aim of preserving the human rights gains espoused in the proposed Bill of Rights. In addition, he hoped that the workshop would identify appropriate strategies that can be employed to secure those human rights gains within the context of the current constitutional dispensation.

Mr. Mbithi opined that due to the unique position occupied by Parliament, the role of Members of Parliament cannot be taken lightly and thus Members of Parliament have to be sensitized on effective protection and promotion of human rights. He concluded by wishing the participants fruitful discussions and thanking the Westminster Foundation for Democracy for their continued support.

SUMMARY OF OPENING REMARKS BY MR OTIENDE AMOLLO, CHAIRMAN OF ICJ - KENYA

Mr. Amollo welcomed the participants to the workshop and informed them that the workshop was being held in line with the triple mandate of ICJ Kenya, which is to uphold the rule of law, democracy and the protection and promotion of all human rights. As such, recognizing the unique position occupied by Members of Parliament, ICJ-Kenya's Parliamentary Human Rights Project and the Freedom of Information project had jointly organized the workshop with the aim of interrogating the way forward in the constitutional review process and to lobby the members of parliament on the importance of enacting Freedom of Information legislation.

He stressed the fact that the capacity of Kenya to promote and protect human rights through would be enhanced by the enactment and promulgation of the proposed new constitution. In this regard, he informed the participants that ICJ Kenya has always been at the forefront in the demand for a new constitutional order. He stated that ICJ Kenya was proud to note that most of its proposals in regard to the judiciary and the Bill of Rights had been incorporated in the draft Constitution. His main concern however, was that these gains would be lost if we failed to collectively devise ways of moving the process forward. He noted that Kenya had gone full circle from the recalcitrant KANU government that was averse to calls for a new Constitution, to a current government that is of the opinion that Parliament should have the final word on the contents of the new Constitution.

He noted it is not possible to ignore the question of legitimacy, credibility and constitutionality of the draft Constitution. In this regard, he posed seven questions, which he urged the participants to consider, alongside other questions they had developed, during their deliberations: -

1. Was the draft Constitution generated by delegates at the National Constitutional Conference held at the Bomas of Kenya a reflection of the wishes of the people of Kenya?
2. Was this draft Constitution sustainable in fact and in law?
3. If the answers to the above two questions are negative, is Parliament then the proper avenue to subject the draft Constitution to further scrutiny?
4. Is it legitimate for the Minister for justice and Constitutional Affairs to publish and present a constitutional Bill or is this the preserve of the Attorney General?
5. Is there any residual role for the Constitution of Kenya Review Commission?
6. In case a referendum is held, will it be on the whole document or on sections deemed contentious?
7. Is it legitimate to extract parts of the draft Constitution and enact these into law without detracting from the spirit and intent of the document?

Mr. Amollo concluded by urging the participants to chart the way forward objectively and honestly, reminding them that the future of the country lies in their hands. He went on to invite the Assistant Minister for Justice and Constitutional Affairs, Honourable Robinson Githae to make his opening remarks.

SUMMARY OF OPENING REMARKS HON ROBINSON GITHAE, ASSISTANT MINISTER OF JUSTICE AND CONSTITUTIONAL AFFAIRS

The Assistant Minister underscored the critical role of Parliament in the promotion and protection of human rights while discharging its legislative duties. He stated that the Government of Kenya has endeavoured to draft and introduce legislation that enhances Kenya's compliance with international human rights standards.

In line with this spirit, he informed the participants that the government had recently ratified the Statute of the International Criminal Court and the Protocol to the African Charter on Human and Peoples Rights establishing the African Court on Human and Peoples Rights. Furthermore, he stated that the government submitted its report to the Human Rights Committee established under the International Covenant on Civil and Political Rights in 2005. He informed the participants that the process of preparing the state party report on the International Covenant on Economic Social and Cultural Rights is underway and a draft report was ready for further analysis and discussions.

He stated that the government is fully committed to the completion of the constitutional review process as evidenced by the publication of the Constitution of Kenya Review (Amendment) Act, 2004 and the subsequent constitution of the Parliamentary Select Committee on Constitution Review, which has already begun discharging its mandate as set out in the Act. He said that it was the government's hope that the constitutional review process would be completed this year.

He further stated that the government was committed to enacting a Freedom of Information Bill. The government was in the process of fine tuning its proposals and studying similar laws that have been successfully implemented in other comparable jurisdictions.

He wished the participants fruitful deliberations.

SESSION ONE

TOPIC: Interrogating the way forward in the constitutional review process following the enactment of the Constitution of Kenya Review (Amendment) Act, 2004.

An analysis of the role of political parties in defining the way forward on the enactment of a new constitution

Presentation by Mr. Odhiambo Mak'oloo*

WHICH WAY THE CONSTITUTIONAL REVIEW PROCESS IN KENYA: SOME REFLECTIONS AND THOUGHTS

Mr. Mak'oloo began his presentation by underscoring the importance of the Constitution as the supreme law of the land. As such, he stated weighty matters such as human rights issues have always been addressed in the Constitution.

He opined that human rights were comparable to divine revelation and natural law and as such were non-derogable. He stated that the thirst for new constitutions in Africa began in earnest soon after independence. The liberated African countries desired a new constitutional order that would mark the transition from an imposed social contract with the colonizers to a voluntary contract between the government and its citizens.

Thereafter, Mr. Mak'oloo traced the roots of the second liberation in Kenya, when the Citizens begun agitating for and demanding a new constitutional order. This culminated in minimal amendments to the current constitution in 1991 and 1992. Such amendments introduced multi party politics and the requirement that a person must be sponsored by a registered political party to run for a parliamentary seat. In 1997, there were the Inter Party Parliamentary Group negotiated amendments, which *inter alia* introduced the protection from discrimination on grounds of gender and a provision in the Constitution declaring that Kenya is a multi-party democracy. In addition, there was demand that the Chief Justice does make rules under section 84 of the Constitution prescribing a procedure for enforcing rights and freedoms provided in the Bill of Rights. The rules were eventually made in 2001.

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* Mr. Mak'oloo is an Advocate of the High Court of Kenya and the Director, Institute of Law and Environmental Governance.

Subsequently, the Constitution of Kenya Review Act, Chapter 3A of the Laws of Kenya was enacted to facilitate the review of the current constitutional order. Mr. Mak'oloo questioned the legitimacy of this Act in so far as the National Constitutional Conference held at Bomas of Kenya could be referred to as a constituent assembly. Of particular concern was that apart from the Members of Parliament, most of whom had been elected on the platform of a constitutional reform, the rest of the delegates could hardly be said to be representatives of the people. He stressed the importance of the people being able to identify themselves with a constitution as only then can it meet the test of legitimacy and credibility.

He stated that the question that will haunt the whole review process was whether the draft Constitution that emanated from this Conference is truly an expression of the wishes of the people and whether it is legitimate. He further stated that with the passing of the Constitution of Kenya Review (Amendment) Act, 2004, it still remains open to question whether Parliament is entitled to open the draft Constitution and isolate and discuss the contentious issues.

Mr. Mak'oloo addressed the issue of the role of political parties in the search for a new constitutional dispensation. He touched on the key functions of a political party which included *inter alia* representation of the people, participation in governance whether in government or in opposition, shaping opinions of the masses and channels of communication which circulate political ideas, principles and policy options among their members and entire society. He was of the opinion that the political party plays a key role in the constitution making process. He stated that the political parties are in a position to unlock or further complicate the current impasse. In this regard, the political party can employ the use of its party whip to ensure that it's Members of Parliament toe the party line and convince them to accept the party position.

Mr. Mak'oloo addressed the issue of why the draft Constitution is worth protecting. He lauded the expanded Bill of Rights and the innovative provisions on land, property, environmental and natural resources management. He stated that the draft Constitution provided for greater transparency and accountability for those in government, furthermore, the economic ramifications of non-delivery of a new Constitution would be great.

In forging the way forward, Mr. Mak'oloo was of the view that Parliament cannot enact a new constitution as this would be in contradiction to Section 47

of the current Constitution. In dealing with the question of a referendum, he was of the opinion that the Constitution of Kenya Review Commission and the Electoral Commission of Kenya should work in consultation with other stakeholders to agree on uniform civic education curriculum.

Remarks by Ms Koki Muli* – Discussant

Ms. Muli stated that political parties have a crucial role to play in unlocking the constitutional review process. She further stated that political parties, especially their Members of Parliament, need to provide firm and decisive leadership to ensure that we get a new Constitution before the next election. Political parties, especially their Members of Parliament need to do the following:

1. Determine their level of commitment and genuine interest in the realization of a new Constitution.
2. Set aside their political and sectarian interests and focus on the interests of Kenyans
3. Create an environment conducive to the finalisation of the review process. This will involve focusing on unifying political parties, through consensus, compromises or settlements, and especially Kenyans instead of dividing them along ethnic, political or other sectarian lines. Political parties need to speak develop common positions and to exercise tolerance with a degree of humility.
4. Political parties need to apply themselves genuinely to the real issues in the draft Constitution by widening their understanding and appreciation of the provisions that they like or do not like and the implications of such provisions.
5. Political parties need to have positions on the content and the process of the review in order to negotiate with their counterparts and other stakeholders. This is because whatever emerges as the new Constitution should not only be a negotiated document but it should be one that generally provides for the interests of all Kenyans. It should be a document that will be acceptable to Kenyans and that will not require amendments immediately after it is finally adopted.

* Ms Koki Muli is an Advocate of the High Court of Kenya and the Executive Director, Institute of Education in Democracy

She was of the opinion that once the above issues were resolved by political parties and their Members of Parliament what needs to be done thereafter includes the following: -

a) The Constitution of Kenya Review (Amendment) Act, 2004 (commonly known as the Consensus Act) needs to be amended to comply with the ruling of the case of *Republic versus Reverend Timothy Njoya and Others* (Njoya Case).
b) Political parties and their MPs need to accommodate divergent views from all stakeholders involved in the review process.

In trying to unlock the constitutional impasse, Ms. Muli suggested the following options:-

Option One: If Parliament is dissatisfied with the draft Constitution, developed at the National Constitutional Conference at Bomas of Kenya, it must return the draft Constitution back to the conference delegates or to another group of Kenyans fairly representative of the citizenry and stakeholders. This group must either be elected as in case of a Constituent Assembly, or appointed or nominated through a transparent and accountable method which ensures fair and genuine representation of every Kenyan and his or her interests, concerns and aspirations. This group of a few people will then be given a fixed period of about six months to open up the draft Constitution, review it exhaustively and conclusively deal with the contentious issues and thereafter amend, fine-tune and rewrite the Constitution as the case may be. Once the final product of this group is produced, the draft Constitution will be subjected to intense civic education and finally to a referendum for Kenyans to determine whether they agree with its contents.

Option Two: Parliament can have the draft Constitution ratified in its current form through a referendum and use Chapter 19 of the draft Constitution to amend the contentious provisions as provided for in this chapter immediately the new Constitution is adopted.

Chapter 19 of the draft Constitution proposes two ways of amending the provisions:

1. The first way is through amendments by Parliament as soon as the draft Constitution is adopted in the manner provided for in Article 303 of the draft Constitution. This means Parliament on its own, without subjecting amendments to referenda, will be able to amend all the provisions in the Chapter on Citizenship, the Chapter on Executive, the

Chapter on Judiciary and Legal System, the Chapter on Representation, Chapter on Legislature (except the functions of Parliament), Chapter of Devolution (except values and principles of Devolution), Chapter on Constitutional Commissions without regard or reference to the people of Kenya because amendments to them do not require referenda for ratification. In fact, Parliament can amend the entire draft Constitution except provisions outlined in article 302(1) (a) – (j), which can only be amended through a referendum (article 302(5)). Amendments to the Chapter on Public Finance for five years after the effective date will be set out in article 302(1) through a referendum as provided in section 21 of the 7th Schedule of the draft Constitution.

2. The second way in which the draft Constitution can be amended is through a popular initiative commenced by a petition signed by at least one million registered voters (article 304(1)), desiring an amendment to the draft Constitution. The proponents of the popular initiative shall forward their signatures and a draft Bill to amend the Constitution to the Electoral and Boundaries Commission to verify that the support of the one million voters (article 304(4)). The proposed amendment must be subjected to a referendum (article 304(8)).

In conclusion, she made a few observations as set out hereunder on what should happen in the absence of a review of the *Republic versus Reverend Timothy Njoya and others*:

1. To conclude the review process in compliance with the said ruling, we must have a referendum on the draft Constitution which is finally agreed upon.
2. Parliament cannot legally amend the draft Constitution except in accordance with this Ruling.
3. If Parliament completes with the constitutional review process in the manner and procedure set out in the Constitution of Kenya Review (Amendment) Act, 2004, Parliament will be contravening the Ruling of the High Court and therefore undermining the rule of law. This will result in a situation where, Parliament makes a new Constitution on the basis of a statute that is illegal and unconstitutional. This blatant disregard of the law can be challenged in a court of law. This means that Members of Parliament will essentially be violating the Constitution they swore to uphold and safeguard and thus inviting anarchy and disorder.

4. That for the review process to be concluded legally, the Constitution of Kenya Review (Amendment) Act, 2004 must be repealed. The Constitution of Kenya Review Act must, therefore, be amended to comply with this ruling.

She stressed that to facilitate successful conclusion of the review process, every Kenyan, who has equal right, must participate directly or through representation in the final stage of the constitution review process and directly through a vote in the referendum. This means the political elite, religious groups, professionals, media, public and private sectors, civil society and other stakeholders must learn to tolerate and accommodate one another and must bring to an end chest-thumping, grand-standing and other behaviour which is divisive and which undermines the review process.

Plenary Discussions

Hon. Dr Bonny Khalwale

He opined that the draft Constitution that should be brought to Parliament as amended by Naivasha Accord which was negotiated by the mainstream political parties. Civil society should allow Parliament to play its proper role in constitution making. He stated that FORD Kenya, which he was representing, supports the holding of a referendum but the main concern was how this would represent the interest of the people and who would mobilize the people to come out and vote.

Hon. Gachara Muchiri

He stated that the time had come to move away from the intrigues of constitutional review process. The focus should now shift to building consensus on the content of the draft Constitution. He was of the opinion that Parliament ought to provide the leadership in the review process as Members of Parliament are the legitimate representatives of the people. He stated that the greatest challenge to the review process may not come from Parliament itself but from the divide between Muslims and Christians. This is because of the raging controversy relating to the inclusion of the Kadhi's Courts in the Draft Constitution. He challenged the participants to remember that the constitution ought to be for posterity and not a few selfish and short term gains.

Hon. Peter Odoyo

As regards the role of Parliament in Constitution making, he stated that the function should not be interfered with by the judiciary. He emphasised that

constitution making is essentially a political process. The legal experts should therefore give their views after completion of the political phase. He stated that work that is in progress in Parliament ought to be granted *sub judice* treatment. The judiciary cannot be expected to resolve political issues. He stated that civic education needs to be done comprehensively and well before the referendum. The proponents of the presidentialist system are opposed to devolution which is supposed to decentralise political power and streamline allocation of public resources. He was concerned that during the referendum, the voice of the people will not be given effect, as the registered voters were one for every three Kenyans. In regards to the devolution of powers, there was need for different centres of power. Centralisation of absolute power in one person or body will induce corruption.

Hon. Jakoyo Midiwo

He stated that Parliament, as is currently constituted, is not suited to discuss and amend the draft Constitution since it cannot negotiate an acceptable document that will serve all Kenyans. He urged Members of Parliament to be selfless and to think of the welfare of Kenyan citizens during this process. The Constitution of Kenya Review (Amendment) Act provides for the amendment of the draft Constitution by a simple parliamentary majority. Since the quorum of the House is thirty, this means that theoretically, sixteen Members of Parliament, constituting a simple majority of the quorum may effect amendments to the draft Constitution. This is an infringement of the citizens' right to participate and make a Constitution of their own choice.

Mr Wachira Maina

He said that the draft Constitution is in dire need of polishing. The draft Constitution should therefore be subjected to a process of technical analysis. He stated that the ramifications of most of its provisions were not properly thought through and some of them are unworkable. He gave an example of the provision outlawing same sex marriages and the provision that life begins at conception. This was contrary to some customary systems, which allowed a childless woman to marry another woman for the sole purpose of getting children on her behalf. Again, the notion that life begins at conception means that the offence of abortion will be redefined as murder. Further, he noted that the process of constitution making has been marked by a lot of arguing but no bargaining among the stakeholders.

Ms Catherine Mumma

She stated that each and every provision of the draft Constitution needs to be discussed taking into account the legal implications. The political parties have not developed positions and reasoned justifications on each article in the draft Constitution. She stated that the current disagreement because of groups focusing on the procedure of constitutional review at the expense of content of the draft Constitution. She suggested that we could think of piece meal adoption of desirable and non-contentious sections of the draft Constitution.

Hon Peter Munya

The process of constitution making, as set out in the Constitution of Kenya(Amendment) Act, is not likely to be interrupted as the consensus building efforts have been going on for some time and are almost complete. These efforts are being undertaken under the aegis of the Parliamentary Select Committee on Constitution Review. The Committee has the mandate under the Act to make recommendations to, and set agenda on what will be discussed in, Parliament. The Government, and by extension Parliament, will pay a heavy political price if it does not deliver a new Constitution to Kenyans by the time the General Election is held.

Hon Kenneth Marende

He stated that the Liberal Democratic Party's position, which party he was representing, was that in order to bring about constitutional change legitimately, there was need to amend section 47 of the Constitution to provide that only a parliamentary majority can amend the draft Constitution when it is brought to Parliament for debate and to inbuilt provisions relating to the referendum and constituent assembly in to the Constitution. As it is now, there is no procedure for replacing the current Constitution with another Constitution under the provisions of the Constitution in force. He stated that it would be unconstitutional for sixteen Members of Parliament to amend the draft Constitution as may be done under the provisions of the Constitution of Kenya Review (Amendment) Act.

SESSION TWO

TOPIC: PROTECTING THE HUMAN RIGHTS GAINS SECURED IN THE PROPOSED CONSTITUTION OF KENYA

Paper presentation by Mr Erastus Wamugo*

Constitution Review Process: Safeguarding Human Rights?

Mr. Wamugo begun his presentation by making reference to a survey conducted by Independent Medico Legal Unit, a local non governmental organisation, which indicated continuity of human rights abuses since the year 2003. He stated that based on this survey the human rights situation in Kenya has not improved. He noted that the number of rape cases reported had not reduced significantly, the Kenyan prisons held more prisoners than their capacity, and security officers tortured persons in their custody. A survey by the Kenya Chapter of Transparency International classified police as the most corrupt department in the Kenyan public sector.

As concerns the monitoring of human rights abuses, he stated that there was no stand-alone government agency mandated to monitor and report on human rights violations in Kenya. Perhaps what came close to playing this role was the Kenya National Commission on Human Rights which is still at its infancy stage.

He examined the situation where the government has assimilated some of the leading lights in the civil society sector and the remaining ones are being targeted. This has created a stress of succession within the civil society human rights sector. He was of the opinion that the organisations were using the same strategies that they had been using before the transition which are not functional in today's scenario. Furthermore, some leading civil society players were now key government functionaries by virtue of their election as Members of Parliament and subsequent appointment to the Cabinet.

He proposed two main ways of improving the human rights situation in Kenya. One was by securing the benefits of the constitutional review process. By making provisions in the Bill of Rights, Parliament would be mandated to enact

* Mr. Wamugo is an Advocate of the High Court of Kenya

appropriate implementing laws on promulgation of the Constitution and courts will be bound to provide remedies for violations. Another method would be by improving the human rights environment. This would be streamlining the procedures for accessing administrative and judicial remedies and by enhancing the human rights monitoring mechanisms. Further, certain rights could be protected by innovative use of our legislative framework.

In regard to the Bill of Rights enshrined in the draft Constitution, he stated that some of the rights provided therein were superfluous and incapable of proper legal enforcement. He gave the examples of the right to marry and the right to housing. He stated that some of these rights were empty phrases incapable of enforcement and monitoring. He was of the opinion that they are aspirational phrases which are incapable of proper legal protection in the Kenyan legal system. However, there are important provisions in the Bill of Rights which ought to be protected. Some of these are the provisions on citizenship, incorporation of economic, social and cultural rights, provisions relating to land and the environment, reigning in the claw back clauses contained in the present Bill of Rights and introducing international human rights dimensions. In addition, the draft Constitution creates human rights gravitational centres such as the preamble and guiding principles on interpretation and implementation of the Constitution, strengthening the independence and autonomy of judicial institutions and creating supporting institutions like the Commission on Human Rights and Administrative Justice within the frame of the Constitution.

He mentioned that the influence of civil society in the constitutional review process has waned. This is because the civil society is heavily dependent on donor funding. Its programmes are constrained by this fact leading to fewer civil society activities. Another reason is that civil society has formed linkages with the Government, generally and the ruling party, (National Rainbow Coalition), in particular. With the election of the new Government, some civil society leaders were co-opted into government. On one hand the civil society is reliant on donor funds and on the other the sector is constrained by Government. In the post-2002 period, some civil society organisations and their activities have tended to focus on individuals rather than public offices and institutions. This has, in his view, polarised the civil society. This is unlike the pre-2002 period when the civil society's relationship with government of the day was strained.

In his opinion, one of the reasons why the civil society has not effectively engaged the government on the human rights front was because the civil society has applied the same response as the pre-2002 period to an altered threat. These strategies are not effective given the changed political environment. The civil society should therefore innovate and develop new and different strategies to enhance effectiveness. He came to the conclusion that the post-2002, Parliament offers itself as a better partner for civil society than government.

He proposed possible entry points in human rights protection given the altered environment. One method would be by directing efforts to Parliamentary Department Committees and caucuses. However, such engagement has to be issue-based and focused. In addition, the civil society should collaborate with Parliament in demanding and extracting more information and action from the Executive. He noted that it is increasingly difficult for civil society to prise information from the Executive. Procedures which can be applied in this exercise include demanding publication of reports, demanding presentation of ministerial statements in Parliament and by filing motions and asking questions in Parliament. Another method which can create great impact in human rights protection is through preparation and presentation of private motions and Bills.

He was of the view that there is need to clean up the Bill of Rights in the draft Constitution in the some areas. He noted that there was repetition of provisions in the Bill of Rights. For example, several provisions guaranteeing equality and non discrimination have been repeated. These are contained in articles 35 and 36 of the draft Constitution. Article 35 provides that every person is equal before the law and has the right to equal protection and equal benefit of the law. On the other hand, article 36 provides that the state shall not discriminate directly or indirectly against any person. Mr. Wamugo was of the view that these provisions are repetitive and should be harmonised.

The presenter was of the view that the provisions in the Bill of Rights should be geared towards curing a mischief. He stated that in the draft Bill of Rights there are rights provided that do not seem to be aimed at curing any mischief, for example the right to marry. Furthermore, the Constitutional of Kenya Review Commission did not give any legal justification or *raison d'etre* for including them in the Constitution.

The draft Bill of Rights elevates some categories of tort remedies to rights. In his view, tort remedies should not be elevated to constitutional rights. Mr. Wamugo argued that consumer rights, which are provided for in article 69 of the draft Constitution, should not be part of the Bill of Rights. The draft Bill of Rights could be improved by defining minorities and marginalized communities and groups. Though the draft Constitution provides in article 43 that marginalised groups and minorities are entitled to enjoy rights and freedoms set out in the Bill of Rights taking into account their special needs, the marginalised groups and minorities are not defined. This makes it extremely difficult to isolate which persons are entitled to these rights.

Enforcement mechanisms for economic, social and cultural rights need to be well thought out and incorporated in the Bill of Rights. The draft Constitution provides two ways of enforcing rights: it obliges the state to take progressive measures to realize these rights and, in addition, provides for the citizen right to have recourse to courts for human rights violations. In his view, this is not a coherent way of enforcing rights. The court should not be called upon to settle political aspects of rights which may be intertwined with the doctrine of progressive realisation of economic, social and cultural rights.

With regards to the provisions on culture in the draft Bill of Rights, Mr. Wamugo was concerned with how to distinguish between what is harmful and what was not. Further, who would be responsible for determining what is harmful?

The civil society should be advocating for editing and polishing up of the Bill of Rights. Civil society could use other approaches to improve the human rights environment in Kenya:

a) Civil society can utilise single issue lobby. This means that certain organisations with convergent views on particular issues in the Draft Bill of Rights can lobby for their incorporation into our laws.
b) The civil society can develop a comprehensive view on the Bill of Rights by undertaking a review of the Bill of Rights in entirety and thereafter correlating and harmonising it with the other provisions in the Draft Constitution.
c) The civil society could work within current legislative framework available by lobbying for legislation concerning human rights. Examples of such laws include the Children Act, Gender Commission Act, Persons with Disabilities Act and Kenya National Human Rights Commission Act, which have already been enacted and put in force. He noted that a similar Bill, the HIV/AIDS Prevention and Control Bill, is still pending.

The implementation of these laws demonstrates that it is possible to protect human rights legislatively and effectively even though the rights are not incorporated into the Bill of Rights directly. The procedures for enforcing human rights should be streamlined and harmonised. Such provisions are contained in section 84 of the Constitution and the Rules made there under, the Evidence Act, the Civil Procedure Act and the Criminal Procedure Code. He cited the fact that the Chief Justice made rules in 2001 on how to approach the High Court on violations of fundamental rights. However, the rules need to be harmonised with other available procedures and should expand the remedies available. He stated that this is a commendable development in the enforcement of human rights in Kenya.

d) Litigation on certain areas entrenching human rights for example on issues of fair trial, HIV/AIDS and non-discrimination. The outcome of the cases would influence changes in administrative procedures and government policy which violate human rights. Since the court judgements have value to serve as judicial precedents and will form part of our judge made law, the decisions will precipitate legislative reforms by the government to comply with the court decisions.

In conclusion, Mr. Wamugo stated that the Bill of Rights in the draft Constitution had some contentious provisions. He further stated that it was doubtful whether the gains that were made in the draft Constitution would stand the test of a referendum. It was his opinion that the Bill should be re-examined by technical experts. He concluded by stressing the role of Members of Parliament in protecting human rights. He argued that they should be sensitized to make legislation which upholds human rights.

Plenary Session

Hon. Robinson Githae

The Honourable Githae questioned why the survey report alluded to by Mr. Wamugo did not give statistics on the number of policemen who were killed by criminals in their line of duty. In regard to the economic, social and cultural rights, he queried if they were workable especially with regard to the state being compelled to provide *inter alia* food and shelter. He was of the opinion that the section of the draft Constitution dealing with economic, social and cultural rights needs to be reviewed and harmonised. He said that the blanket provision on non discrimination may not be acceptable to all as Muslim women support the application of Islamic law in matters of inheritance and marriage, which is viewed by some civil society organisations as discriminatory to women.

Ms Catherine Mumma

She stated that there have been problems with gathering and collating accurate human rights statistics due to the absence of a centralized agency charged with the task. She was of the opinion that the draft Bill of Rights is ideal and should be retained in the draft Constitution in its current form. Economic, social and cultural rights can be recognized in the Constitution. However, there is need to provide for the progressive realization of the rights to ensure their enforceability. Her opinion was that the government's task was to formulate ways of enforcing these rights in phases. She wanted to know how the economic, social and cultural rights can be framed to ensure that the government provides for its citizens. She added that Muslim women should be exempted from non-discriminatory provisions in the Bill of Rights. She opined that Muslim women probably enjoy more rights that many women in regard to inheritance. She was of the opinion that similar Bills of Rights have been successfully implemented in other jurisdictions and the rights are recognised under international human rights law. She said that some provisions in the draft Constitution need to be reviewed, for example the right not to follow unlawful instructions. Such a provision can be subject to abuse.

Ms Koki Muli

In her opinion, the Bill of Rights is one of the most important and progressive chapters in the draft Constitution. It is therefore necessary for Kenyans to safeguard these provisions. She pointed out that when the draft Constitution is eventually promulgated with the Bill of Rights in the current form, any amendments to it would necessitate conducting a referendum. In her view, the provisions of the draft Bill of Rights are not contentious. Nevertheless, she pointed out some shortcomings in the draft Bill of Rights:

a) Some parts are too idealistic for example Article 60 of the draft Constitution for example creates a welfare state. This means that those who cannot provide the basic necessities for themselves will be catered for by the state.

b) Provisions should be practical but should protect inherent human rights. The rights should be based on sound legal justification.

c) It is necessary to have a technical group with the task of analyzing the provisions and suggesting ways of making them practical.

Hon. Jakoyo Midiwo

He supported the inclution of economic, social and cultural rights in the draft Constituition. He was of the opinion that the role of the government was to make the environment suitable for the realization of these rights. In regards to the outlawing of cultural practices which are deemed to be harmful, he stated that we ought to think of the people and what value they attach to such practices. We must keep in mind that cultures cannot change overnight but they evolve over time. He was firmly opposed to any measures that would lengthen the time it takes to enact the new Constitution. One of the ways of ensuring the government delivers basic services to the citizenry was by incorporating such rights in the Constitution and creating in built enforcement mechanisms.

Hon. Kenneth Marende

He suggested that certain provisions in the Bill of Rights need to be amended. The draft Bill of Rights needs to be streamlined with other provisions in the draft Constitution.. He lauded the inclusion of economic, social and cultural rights in the draft Constitution and affirmed that they were properly provided for in the draft Constitution, as this would ensure equitable distribution of resources in the country. There is need for concerted effort to preserve the provisions in the draft Bill of Rights given the fact that a majority of a quorum of Members of Parliament can make amendments to the draft Constitution as produced at Bomas of Kenya

Hon. Peter Odoyo

He was of the view that sixteen Members of Parliament should not be able to amend the draft Constitution through a simple majority of the quorum of the House. The provisions on the Bill of Rights should be retained as they capture the nation's values for the future. He stated that ICJ Kenya needs to do more activities aimed at revamping and strengthening the Parliamentary Departmental Committees that have a duty to incorporate human rights issues, for example in preparation of Sessional Papers and draft Bills. He recommended preparation and sponsorship of human rights Bills for debate in Parliament by civil society. He gave the example of the Wildlife Management and Conservation (Amendment) Bill.

Hon Gachara Muchiri

In light of the provisions of the Standing Orders of Parliament, the business of Parliament is controlled by the Executive through the House Business Committee. This committee plays the role of preparing the Order Paper setting out the issues to be discussed in Parliament on any particular day. This really restrains individual Members of Parliament from proposing and driving human rights legislative agenda in Parliament.

DAY TWO:

SESSION THREE

Chairperson: Mr Joe Kadhi*

The third session was chaired by Mr. Joe Kadhi. He emphasized the importance of freedom of information in the process of nourishing a democratic state. He decried the fact that it has taken Kenya more than 40 years to come up with the first draft of Freedom of Information Bill. He stated that the country had suffered immensely because of the lack of a Freedom of Information Act. There is a trend of government steeped in secrecy. It took the efforts of a diplomat, namely the British High Commissioner, for example, to expose the extent of corruption in government. Journalists have also not taken up the task of investigative journalism. The President acknowledged the need to legislate the right to information at the opening of the 2005 International Press Conference held in Nairobi. He then invited Mr. Njonjo Mue to make his presentation.

Presentation by Mr Njonjo Mue*

The Importance of Freedom of Information in Evolution of Democratic Institutions: Making the case for a Freedom of Information Act in Kenya

Mr. Njonjo Mue began defining the concept of freedom of information. He stated that freedom of information signifies the right of access information from public authorities on request and the corresponding duty on the government to meet the request, unless specific defined exemptions apply. It also includes the duty of the government to proactively publish for public consumption certain key information, even in the absence of a request. The right to information, therefore, involves a right and a corresponding duty.

The right to information has been recognised as a fundamental right. As early as 1946, the United Nations General Assembly resolved: *Freedom of Information is a fundamental human right and the touchstone for all freedoms to which the United Nations is*

* Mr. Kadhi is a Lecturer, United States International University
* Mr. Njonjo is an Advocate of the High Court of Kenya

consecrated. It is enshrined in the Universal Declaration of Human Rights and affirmed in Article 19 of the International Covenant on Civil and Political Rights. Although in human rights discourse all rights are universal and indivisible, right to information is demonstrably one of the more important rights as it underpins other fundamental rights. The Constitution of Kenya provides for freedom of expression and information under Section 79(1). However, the implementing or facilitative legislation for the right has not been enacted.

Today more than ever before in human history, and with the advent of technological advances unimaginable a generation ago, information has come to occupy the centre stage of development. He quoted the Commonwealth Human Rights Initiative report that states that information is a public good like clean air and drinking water. It belongs to the public, not to the state, the government of the day or civil servants. Officials do not create information for their own benefit, but for the benefit of the public they serve, as part of the legitimate and routine discharge of the government's duties. Information is generated with public money by public servants paid using public funds. In the premises, such information cannot be unreasonably kept from citizens.

The right to information is essential to the evolution of democratic institutions in a number of specific contexts:

i. Good governance and inclusive democracy

Every person has a right to participate in decision making process of the society. This participation is through democratic processes such as elections. True democracy needs an informed public able to participate in its own governance. Members of Parliament have a right to get information relating to governance on behalf of their electorate. Information also enables the public to engage their representatives and the bureaucracy on an on-going basis. Likewise, the citizens can participate in the development and implementation of policies and activities purportedly designed for their benefit. The public is enabled to effectively participate in development processes. Access to information creates public trust in government. Availability of information helps to narrow the distance between the people and the government.

ii. Supporting Economic Growth and People-Centred Development

The right to information supports economic development. Free information is crucial to the development of a modern economy capable of engaging in the globalised international market place while fostering pro-poor economic growth.

In this context, transparency is a key tenet and the right to information is vital. Free flow of information is necessary to make rational and informed decisions in the market. Restrictions on the free flow of information has resulted not only in eroding democratic principles but has also resulted in the failure of government policies and development schemes for bettering the lot of the people. With assured information, marginalized groups will be given their rightful voice and a powerful tool to scrutinise and engage with the development programmes being implemented for their benefit.

iii. Promotes transparency and tackling corruption

Kenya has been consistently identified as one of the most corrupt countries in the world. Corruption thrives in secrecy. Corrupt officials need secrecy to hide their ill doings and a right to access information would tear down the walls of protection behind which they hide. Freedom of information is the antidote to this type of corruption. A legally entrenched right to information can be used to collect evidence of wrongdoing and hold officials accountable. It acts as a deterrent as officials act honestly if they know that their actions will be subjected to scrutiny. Examples of where the Freedom of Information Bill has been used by litigants to access publicly held information are in India and United Kingdom.

iv. Enforcing media capacity

In any democracy, the media has an important role to play as a watchdog, scrutinising the powerful and exposing mismanagement and corruption. It is the foremost means of distributing information. In Kenya, the media often relies on rumours, leaks and press releases for information. A freedom of information legislative regime would provide an environment where the media would be able to seek, receive and disseminate accurate and timely information. A sound right to information regime provides a framework within which the media can seek, receive and impart essential information accurately and is as much in the interest of government as it is of the people. Such legislation sets a clear framework for putting in place systems and creating cultures that foster openness in a uniform manner both in government and across public bodies.

A good right to information law should conform to the following minimum principles:

1. **Principle of maximum exposure.**
   There should be a presumption in favour of public access to information. The law should cover all public bodies as well as private bodies that carry out public functions or where their activities affect people's rights. Access to

information is a fundamental right where withholding information is the exception rather than the rule. It should be extended to apply to any person residing within the republic and not just citizens. The law should apply to all information the government or public authorities hold.

2. **Principle of minimum exemptions**
   The limitations should meet a four-tier test:
   a) The information withheld must relate to a legitimate aim, for example security or unreasonable release of personal information to a third party.
   b) The release of such information must threaten to cause substantial harm to that aim.
   c) The harm or the aim must be subsidiary to public interest, for example where public interest outweighs the harm caused.
   d) There should be no blanket exemptions. Exemptions should be based on the content rather than on the type. For example, the government sponsored Freedom of Information Bill mentions the issuance of certificates by the responsible Minister on matters of public interest. This defeats the purpose of the Act.
3. The law must provide a right to independent appeal on decisions made to deny information.
4. It must provide effective penalties for frustrating the spirit of the Act; for example concealment or destruction of records should be penalised
5. It should provide for the principle of release of active information. This means that the government should be obligated to periodically publish and release to the public certain categories of information.
6. Law should be simple and easy to access. Information sought should be inexpensive to access. Some jurisdictions do not charge any fee for access or charge a minimum fee.
7. The law should avail protection for whistleblowers.
8. The law should be subject to effective monitoring and evaluation. The Government should undertake to train the public on how to use the law. Proper records should be maintained in an effective and efficient way.

Freedom of Information Bill

The Kenyan Section of the International Commission of Jurists came up with a draft Freedom of Information Bill in 1999. The process commenced by conducting research on the state of freedom of information in Kenya at the time. The report, which was eventually published, provided research based

evidence of the state of freedom of information in the country. The report was the basis for drafting the Freedom of Information bill. The draft Bill was informed by the needs on the ground and was drafted out of the experiences of the last 40 years. The draft Bill has received criticism and the ICJ Kenya has the intention of reviewing the Bill taking into consideration the critique. Similarly the Ministry of Information and Communications has drafted a Freedom of Information bill. The said Bill has borrowed heavily from the Australian and British Acts that are very conservative. It also lacks internal consistency. In addition, the language used to draft the Bill is unnecessarily complex.

ICJ Kenya is planning to hold a stakeholder workshop to discuss and input into the government draft Bill recently published on the government website. This would be the opportunity to critique the Bill. The topics to be covered during the workshop include:-

- Why freedom of information law is important in a democracy
- The minimum standards for an appropriate freedom of information law.

The Members of Parliament have a role to actively push for the enactment of a proper freedom of information legislation and maintain a close watch on the effectiveness in implementation of the law by the government. The media can be used to raise awareness on the value of this right.

Remarks by Mr Wachira Maina* Discussant

Freedom of information and laws governing freedom of information are part of the framework of 'Open Democracy laws'. A good Freedom of Information law should make clear what information is automatically available to the public or accessible. For example, proceedings of Commissions of Inquiry should be archived automatically in a public place. In Sweden, for instance, a committee in Parliament can scrutinize cabinet decisions. This can be a yardstick for Kenyan Members of Parliament. One of the aspects of democracy is the control of force by civilians. Information should not be withheld from Parliament on grounds of state security since Members of Parliament are representatives of the people and are expected to keep the government in check. Furthermore, Parliament cannot discharge its watchdog role without proper and timely information.

* Mr. Wachira Maina is a Comparative Constitutional Lawyer.

He stated that a major problem with Kenyan legislation generally is that it does not incorporate inbuilt standards. He gave the Official Secrets Act as an example of this type of legislation. The Act protects certain categories of information from disclosure but fails to outline the criterion to be applied in determining which information needs to be protected. He said that standards should be set out in the Act and that these standards should be subject to judicial review in courts of law.

He stated that a good freedom of information law should incorporate whistleblower protection provisions. Laws protecting whistleblowers are useful to regulatory and anti-corruption authorities. Whistleblowers perform a function of early warning and complement work of regulators. Whistleblower provisions are meant to reward ethical behaviour. They enhance enforcement of accountability and transparency.

He opined that another important aspect of a freedom of information law should be corporate disclosures. Mr. Maina gave an example of persons who make multiple loan applications with different banks and then default to repay the loans. Since the banks are not required under the law to demand applicants to disclose their liabilities with other banks, he or she is granted the loan without comprehensive scrutiny or conditions. The banks end up battling for his or her property to recover money when he or she defaults payment. Such banks would benefit immensely from a law that requires maximum disclosure. Similarly, we have situations where companies declare false profits for the purposes of influencing the prices of stocks at the stock exchange. Some demand for disclosure should therefore be imposed on these corporate executives.

Finally, government officials holding public office should be subjected to high standards of disclosure. This is because they access certain information by virtue of the offices they hold. Public officers should not be allowed to hide behind the cloak of privacy in order to conceal certain information.

Discussion by Honourable Gitobu Imanyara*

The paper by Honourable Imanyara was read to the session by Ms Priscilla Kanyua. He recalled that the President had underscored the government's

* Advocate of the High Court of Kenya, Publisher, Nairobi Law Monthly and former MP, Imenti North.

commitment to publish and enact a Freedom of Information Act. He said that though disclosure of some types of information may compromise state security, the presumption was in favour of disclosure of information and not concealment of information.

He then analysed the Johannesburg Principles on National Security, Freedom of Information and Access to Information, which are important in establishing what constitutes the appropriate provisions in such legislation.

He noted the key role which Parliament must play effectively to ensure a proper Freedom of Information Act is enacted. Some of the things Parliament may do include non approval of budgetary allocation for the Ministry of Information and Communication until publication and tabling of the Bill, demands for a Ministerial Statement on the status of the Bill, asking questions and filing petitions and demand for the repeal of the Official Secrets Act.

Plenary Session
Mr. Joe Kadhi thanked the presenters for their insightful presentations and welcomed the participants to make comments and ask questions.

Hon. William Ruto
Freedom of information legislation proposed by government could end up enhancing the exemptions rather than the right to access information. Most governments are enthusiastic about keeping information away from the public rather than promote access to it. A practical example is where a Minister refused to provide information to Parliament on the number of people recruited into the army on grounds that the Official Secrets Act protected such information from disclosure. This action emphasizes the need for the enactment and implementation of Freedom of Information Act.

Hon. Dr Bonny Khalwale
The office of the Commissioner of Information should have the power to undertake investigations and a mandate to ensure that certain categories of information are published as a matter of law rather than waiting for applications to be made. The press will play an important role in dissemination of information. This aspect should be captured in the Freedom of Information Bill.

Hon. John Mutiso

Hon. Mutiso noted the need for openness in government and he supported the publication of reports of Commissions of Inquiry and their availability to Members of Parliament for debate in the House. To facilitate this, the standing orders of the House would have to be amended. He stated that currently, MP's are constrained in retrieving information from government. He said that to facilitate change, Parliament should reform its procedures. The Standing Orders should be amended to permit Members of Parliament to access vital information held by the government. He stated that the reason Members of Parliament had not spoken out in support of whistleblowers was because they were limited by the *sub-judice* rule from commenting on proceedings that are in court. In this regard, he stated that it was necessary to provide exemptions to these limitations which hamper Parliament's capacity to perform its functions effectively. He was of the opinion that there should be structural reform in the Attorney General's chambers to facilitate reform of the public corporate sector and the department's capacity to draft appropriate Bills. The restructuring would enhance the capacity of the Attorney General to enforce and secure freedom of information laws.

Hon. Kenneth Marende

Hon. Marende noted that both Bills proposed by the ICJ Kenya and the Government give appropriate reference to full disclosure. However, he noted that there is a lacuna concerning the statutory organs that disseminate the information. There ought to be provisions in the Act that compel the organs holding information to fully disclose this information to the public.

Hon. Charles Keter

In his opinion, the most effective way to disseminate information to the public is through implementation of appropriate Information and Communication Technology policy by for example uploading Bills, legal notices and reports on websites to enable citizens make their contributions on the internet.

Hon. Dr. Guracho Galgalo

The government usually conceals information from the public and releases information that is half-baked or skewed. Such release is geared towards representing the government in a positive light. He enquired what organization or department the Commissioner of Information will be in charge of since this was not provided for in the proposed Bill prepared by ICJ Kenya.

Mr Jack Muriuki

He stated that record keeping is an important aspect of the right to information. Therefore the right to information campaign must go hand in hand with the campaign for proper record keeping by public authorities.

Ms Koki Muli

Ms Muli was alarmed by the level of secrecy in relation to state security. She noted with concern that the Parliamentary Select Committee on Constitution Review has opened up provisions in the draft Constitution dealing with right to information and media. The committee has proposed that these provisions should be limited in terms of Section 79 of the current constitution. She noted that if these proposals were passed, it would be a serious reversal of the gains made in freedom of information advocacy.

Mr. Musyimi

Information and Communication Technology policy should integrate the process of registration of persons by the various institutions in Kenya to avoid cases of multiple registration. He proposed that the government should have a centralised information system to avoid the scenario in Kenya where a person can have more than two identity cards or birth certificates. He suggested the inclusion of provisions setting up an information centre in the Bill.

Mr. Erastus Wamugo

He expressed reservations about the control of information relating to private persons by the government. He opined that this might recreate a 'big-brother' type of scenario where the government watches over the lives of the citizens. The Privacy of individuals should be upheld and protected by the provisions of the Freedom of Information Bill.

THE WAY FORWARD IN THE CONSTITUTION REVIEW PROCESS

CHAIR PERSON OF SESSION – MS KOKI MULI

Ms. Koki Muli gave a summary of the session on interrogating the way forward in the constitutional review process following the amendment of Constitution of Kenya Review Act in 2004. She outlined recommendations that were made on the way forward on the enactment of a new Constitution to wit:

1. Undertaking the review through the provisions of the Constitution of Kenya Review (Amendment) Act, 2004.
2. Restart the constitutional review process. This process should be commenced by making appropriate amendments to Section 47 of the Constitution so as to legitimize the process.
3. The other option was to abandon the process and revive it after some years. Kenyans are fatigued by the uncertainty in the process and need a break from the process. Furthermore, there were opinions that this was not the appropriate constitutional making moment given the political environment.
4. Another option was to enact the draft Constitution, which emanated from the National Constitutional Conference at Bomas of Kenya, as it is.
5. The draft Constitution should be referred to a team of experts who would edit its contents without adulterating the principles and the spirit of the draft Constitution.
6. Another option was to effect piecemeal enactment by Parliament of the chapters that are not in contention. One of these Chapters is the Bill of Rights. A similar method has been adopted in South Africa and Sweden.
7. The last option identified was to abandon the process and make suitable amendments to our current constitution.

Mrs. Koki requested Members of Parliament who were not present during the first session to give the position of the Political parties they represent.

Hon. Kenneth Marende

He pointed out that Liberal Democratic Party's (LDP) position is the adoption of the Naivasha accord wholesale. In addition Section 47 of the Constitution should be amended to create a workable procedure for constitutional succession. The Constitution of Kenya (Amendment) Bill, that had been published by the

Attorney General and was shelved by Minister of Justice and Constitutional Affairs, recommended the amendment of this section. This position was supported by the Parliamentary Select Committee on Constitutional Review. The Constitution of Kenya Review (Amendment) Act, 2004 which provides that a simple majority can amend the draft Constitution is an infringement of the right of the people of Kenya to make a constitution. There is no safeguard for legitimacy if the draft Constitution is to be subjected to amendments by a simple majority. The parliamentary vote on any amendments to draft Constitution should be by a 2/3 majority of all MPs.

Hon John Mutiso

The making of a constitution should be completed using constitutional standards. A 2/3 majority of Members of Parliament should debate and agree on any amendments to the draft Constitution. It is possible that sixteen Members of Parliament can propose amendments to the draft Constitution if the document is referred to a simple majority. He said that it was impossible to have the 2/3 of the Members of Parliament sitting continuously for 6 weeks in Parliament to debate the Draft Constitution.

Hon William arap Ruto

Hon Ruto explained that Kenya African National Union (KANU) opted out of the review process because it has been converted to a circus. The proposals agreed in Naivasha were against a certain background. One was the need for leaders to keep this process legitimate. The Attorney General's advice to the Parliamentary Select Committee was that unless Section 47 of the Constitution was amended, not just the process but also the amendment of the Constitution will be subject to litigation in High Court. Debate on the Constitution of Kenya Review (Amendment) Bill was postponed for three months in Parliament based on the agreement that the amendment of Section 47 of the Constitution would be done. The Act is a faulty legislation and is wanting. He was of the opinion that Parliament had eroded every aspect of credibility.

The Members of Parliament have demonstrated a lot of intolerance. He wondered how Kenyans would view the Members of Parliament who purport to be the leaders of this process in light of this intolerance in the process. In his opinion, the Parliamentary Select Committee on Constitution Review has broken every rule and the Standing Orders to elect Hon. Simeon Nyachae as Chairman. KANU's position is that Members of Parliament should respect the decision to amend Section 47 of the Constitution and make any amendment of the draft

Constitution by the broadest clear consensus. Such amendment to the draft Constitution should be by a 2/3 majority of the Members of Parliament. The draft Constitution contains the widest views of majority of Kenyans and it should be respected. This process can only be concluded if other stakeholders are included in the process.

He believes that neither the Parliamentary Select Committee nor Constitution of Kenya Review Commission have the capacity to review the draft Constitution taking into consideration the views of the people. The Constitution of Kenya Review Commission has been in place for more than two years but the draft Constitution has not been edited and synchronized. He said that the Commission is of no relevance to the process at this time as it was not discharging its mandate. The kind of expertise required in examining chapters like devolution of powers needs a lot of time. The proposed time by the government is too short. His recommendation was that the Parliamentary Select Committee should be constituted legitimately in accordance with the Standing Orders of the Parliament. He suggested that we retain the recommendations of the Naivasha Accord and make necessary amendments to the Constitution.

Ms Koki Muli

Ms. Muli was of the opinion that KANU and Liberal Democratic Party share the same position that the draft Constitution should be reviewed constitutionally as was underscored in the Ruling in the Njoya case. The process must begin from an amendment of section 47 of the Constitution to make the process constitutional. Neither Parliament nor the Commission have capacity to technically interrogate the draft Constitution. All that is required is that the recommendations of the previous Parliamentary Select Committee be implemented. Some questions were raised on the way forward, to wit:

- How do you convince other Members of Parliament not to proceed with the process?
- How do you convince other Members of Parliament to amend section 47 of the Constitution?
- How do you constitute this wide committee of experts to include all stakeholders?

In response, it was suggested that the Minister of Justice and Constitutional Affairs should be invited to an informal meeting with the objective of reaching a consensus with other political parties. Participants thought it possible to persuade the Minister to see the logic of involving all stakeholders in making amendments to the draft Constitution as opposed to a simple parliamentary

majority. The best placed persons to meet and negotiate with the Minister are the leaders of the coalition parties, FORD People and Liberal Democratic Party.

In the alternative and if the first suggested approach does not work, the civil society should put pressure on the Minister to accept these recommendations.

If the negotiations fail, then stakeholders will be invited to constitute an expert committee of 25 members recommended by parliamentary political parties, Parliamentary Select Committee and civil society. There was concern however that the committee shall be similar to that of Constitution of Kenya Review Commission. With the setting up of this new committee, Constitution of Kenya Review Commission should be disbanded. However, this would require an amendment to the constitutive Act.

It was suggested that there should be a Parliamentary Human Rights Caucus. Members of Parliament opined however that ICJ Kenya should work with the already existing committees in Parliament, especially the Parliamentary Committee on Administration of Justice and Legal Affairs.

WAY FORWARD ON THE FREEDOM OF INFORMATION LEGISLATION

On the right to information legislation, participants agreed that as a follow up to the workshop, a Freedom of Information workshop convened by ICJ Kenya and other stakeholders would be the appropriate venue for discussing the draft Freedom of Information Bill on a clause by clause basis.

The objective of the workshop will be to harmonize the ICJ Kenya draft Bill with the government draft Bill inclusive of contributions from participants. The draft Bill would incorporate minimum standards for classification of information. It was felt that more journalists should be involved as stakeholders in this process.

RECOMMENDATIONS

a) ICJ Kenya to write a letter, on behalf of all stakeholders, on what transpired in the workshop to the Minister for Justice and Constitutional Affairs as well as leaders of political parties. The letter can be published in the newspapers and copied to the President.

b) ICJ Kenya will convene a joint stakeholder's consultative forum attracting wider representation from all interested parties.

c) The representatives of the political parties present are mandated to present the agreed positions to their respective party Parliamentary Groups on the positions consolidated during the workshop. The party leaders should then use the agreed positions to negotiate with other political parties as well as put pressure on and negotiate with the Minister for Justice and Constitutional Affairs.

d) It was agreed that there is need to respect the Standing Orders of the National Assembly in the selection of Members of the Parliamentary Select Committee on Constitutional Review and the election of the Chairperson of the Committee. The workshop underscored the need to insulate the process from legal challenge by amending section 47 of the Constitution thereby entrenching constitutional succession in the current Constitution.

e) If this approach fails to work, then civil society would be called upon to exert pressure on the government to complete the review process. The parliamentary Political Parties in conjunction with civil society and religious organisations will then constitute a committee of experts to fine tune the provisions in the draft Constitution for onward transmissions to the Parliamentary Select Committee on Constitutional Review.

CONCLUDING REMARKS

Closing Remarks by Mr Elijah Ireri- Treasurer, ICJ Kenya

Mr Ireri thanked the participants for attending the workshop and for making valuable contributions. He thanked the Members of Parliament present for taking time to attend and expressed appreciation for the resource persons and discussants for their presentations. He expressed gratitude to staff at the ICJ Kenya secretariat who worked tirelessly to ensure the workshop was a success.

ANNEXURE 1:

OPENING REMARKS BY THE ASSISTANT MINISTER FOR JUSTICE AND CONSTITUTIONAL AFFAIRS HONOURABLE ROBINSON GITHAE

Honourable Members of Parliament, Council Members of ICJ Kenya, Distinguished Guests, Ladies and Gentlemen-

It is my pleasure to deliver the opening remarks at this workshop. The critical role of parliament in the promotion and protection of human rights while discharging its legislative and oversight mandates needs no overemphasis. In an effort of utilise Parliament's central role in protection of human rights, the government has endeavoured to introduce Bills drafted to in a manner that enhances the Kenya's compliance with international human rights standards. This endeavour is supposed to enhance compliance with the provisions of human rights treaties to which Kenya is a party.

In its effort to implement these international standards, the government has ratified in the recent past the Statute of the International Criminal Court and the Protocol to the African Charter on Peoples and Human Rights establishing the African Court on Human and Peoples Rights. The government has submitted its report to the Human Rights Committee established under the International Covenant on Civil and Political Rights in 2004. This is the first time in more than twenty five years that the government submitted a state report in discharge of its obligations under the covenant. The submission of this report underscores the government's commitment to adhere to and implement international human rights standards. The process of preparing the state party report on the International Covenant on Economic Social and Cultural Rights is underway.

The government has made tremendous steps to enhance human rights promotion and protection through legislation. In this respect, one key measure is the establishment of the Kenya National Commission on Human Rights. This is an independent body dedicated to enhancing human rights promotion and protection both by the government and private actors. Another related measure is the removal of incompetent and corrupt judges from the judiciary. As we all know, the judiciary is the ultimate defender of human rights. Most disputes on rights violations are vindicated in the courts through cases. This

fact is underlined by the provisions of section 84 of the Constitution which provides that the High Court has jurisdiction to adjudicate on claims of human rights violations. Another measure has been the abolition of corporal punishment as a penal punishment imposable by a court of law.

On the legislative front, the government has pushed for the enactment of laws which promote and foster transparency and accountability in management of public resources. Notable among these are the Anti-Corruption and Economic Crimes Act and the Public Ethics Act. It is well known that a huge chunk of public resources allocated to enhancement of human rights especially the economic and social rights have in the past ended in private coffers due to rampant corruption. To stem these losses, the government has fully supported the operationalisation of the Kenya Anti-Corruption Commission and the reorganisation of the Attorney General's prosecution office. These measures are intended to enhance the capacity of government to prevent leakages of revenue through corruption and track down and punish the corrupt officials and recover their ill gotten wealth. The revenue conserved through these measures will no doubt be used to fund services such education, health, water, security and others. Provision of these services is part of fulfilment of the human rights obligations of the government to its citizens.

The government is fully committed to the completion of the constitutional review process. This is evidenced by the assent by His Excellency the President, and eventual publication, of the Constitution of Kenya (Amendment) Act, 2004 and the subsequent constitution of the Parliamentary Select Committee on Constitutional Review. Since this Committee is the link between the parliament and other actors on the review process, the Committee will lead in the consensus building process to isolate and define the contentious issues and seek solutions. Given the limited time granted to parliament to resolve these issues, the Committee has already embarked on this onerous task. It is the hope of the government that once these issues are resolved, other stages of the process as contemplated in the Act will be undertaken.

The government is committed to enacting a Freedom of Information Bill. This was emphasised by the President during the opening of the International Press Institute recently. The government is in the process of fine tuning its proposals for the Bill and studying similar0 laws which have been successfully implemented in other comparable jurisdictions. Indeed, the Ministry of

Information and Communication has already published a draft version of the Bill in its website. Additionally, the government has enhanced the capacity of the Kenya Law Reform Commission to review and revise laws. We, therefore, encourage any person or group with proposed legislative proposals to liaise with the Commission.

It is my hope that the deliberations of the workshop will add value to the on going debate on enhancing human rights protection in Kenya. This workshop and other activities aimed at enhancing the capacity of parliament on human rights issues provide an opportune moment to expand the human rights corps among the Members of Parliament and enhance human rights promotion and protection through legislative and other parliamentary processes.

With these few remarks, I wish you fruitful deliberations.

Thank you.

ANNEXURE 2:

ICJ KENYA'S CHAIRMAN'S OPENING REMARKS- MR OTIENDE AMOLLO

Honourable Assistant Ministers, Honourable Members of Parliament, Council Members of ICJ Kenya, Distinguished Guests, Ladies and Gentlemen: Good morning.

It is my sincere pleasure to welcome you to this Annual Parliamentary Workshop.

As you may be aware, the triple mandate of ICJ Kenya is the rule of law, democracy and protection of all human rights. Towards this end, ICJ Kenya has organised this workshop under the auspices of Parliamentary Human Rights Project and the Freedom of Information Project.

The principal objective of the Parliamentary Human Rights Project is to sensitize, introduce and acquaint Members of Parliament with contemporary human rights issues using international standards and formulate appropriate methodology which Members of Parliament can employ to protect and promote human rights. The project is intended to provide legal expertise to MPs where applicable on request.

The Freedom of Information Project, on the other hand, aims at developing appropriate legislative framework to facilitate the access of information held by public authorities or private bodies performing essentially public functions. This will be especially so where the information is required to enforce rights. The right to information is one of the provisions in the Draft Constitution and is viewed as a correlative to the right to freedom of expression. One cannot exercise the right to freedom of expression without information.

In this regard, the drive for the enactment of a Freedom of Information Bill is timely. Whereas the Government of Kenya has indicated its intention to publish and enact the Bill, it must be kept in mind that in the recent past senior Government officials have evoked the provisions of the Official Secrets Act to silence government officials bent on revealing wrong doings. This is an indication that this Act, which is a manifestation of the infringement by the state on the right to know, serves the government well and the Government may lack the willingness to readily repeal it. Repeal of this Act is quintessential to the enactment a Freedom of Access to Information legislation.

We are convinced that one avenue in which the capacity of Kenya to protect and promote human rights will be greatly enhanced is through the enactment and promulgation of a new Constitution.

ICJ Kenya has been at the forefront in the demand for a new constitutional order since February 1993, when the National Constitutional Convention was revived by ICJ Kenya, Kenya Human Rights Commission and the Law Society of Kenya to spearhead comprehensive reform of the constitution. In November 1994, ICJ Kenya, LSK and KHRC launched the proposed model constitution at Ufungamano House. This, in many ways, was the primordial germ for the constitutional review process in modern Kenya.

ICJ Kenya actively participated and submitted various memoranda to the Constitution of Kenya Review Commission. ICJ Kenya is proud to note that most of the provisions that it proposed, especially with regard to the Judiciary and the Bill of Rights, are enshrined in the Draft Constitution.

The proposed Bill of Rights expands the provisions of the present Bill of Rights and creates inbuilt enforcement mechanisms. Such mechanisms include the right to seek redress in a court of law or alternatively to file a complaint in the Commission on Human Rights and Administrative Justice. The Bill of Rights, coupled with the transparent and accountable governance structure as proposed, and an independent and impartial judicial institutions proposed in the draft Constitution would provide an appropriate environment for protection and promotion of human rights based on internationally accepted standards.

In our opinion, these gains espoused in the draft constitution will be lost if we do not collectively devise ways to move forward. The aim of this forum, therefore, is to interrogate the various possible alternatives.

In many ways, we have moved a full circle in the twelve years that the demand for a new constitution has kept burning. From a recalcitrant KANU Government that was averse to calls for a new constitution, to a declaration by the erstwhile President that only experts could amend the Constitution, finally to a parallel process under Ufungamano and the Government's initiative, to their final merger. All the while, we in Civil Society and others maintained that Parliament or the so called experts were not the proper avenue for making the constitution. Now, in 2005, we have rediscovered that retired President Moi was right, and that we the citizens cannot be trusted to make a new Constitution! We have elected to go back to the good will and wisdom of Parliament; and this, twelve years and billions later!

We stand on a delicate pedestal. The erstwhile inevitability of a new Constitution has become a mere possibility, dependent not even on Parliament *stricto sensu,* but on pacts discussed and negotiated by select groups outside of Nairobi in an effort to build consensus.

Unfortunately, whatever consensus we reach must still pass various hurdles. It must pass the hurdle of how these to be introduced in to the Constitution of Kenya Review (Amendment) Bill. The Bill itself, or its' progeny, must pass the test of constitutionality. Such questions must include whether an Act of Parliament can legitimately prescribe a Referendum when the Current Constitution does not, or whether the Original Jurisdiction of the High Court can be limited or ousted by an Act of Parliament as does the Bill, and other legitimate issues previously raised by observers.

Yet still, we must remain alive to the Court decisions already made, and the possibilities on the pending Court matters. Previously, we , as ICJ Kenya, have taken the view that Courts should have no business directing how a new Constitution should be promulgated, but instead await the final product and determine questions of Constitutionality should they arise.

Certain very fundamental questions must be posed and answered legitimately and openly as a spring board to the way forward. These must include the following:

i. Is the Bomas Draft a reflection of the wishes of the people of Kenya?

ii. Is the draft sustainable in fact and in law?

iii. Supposing the answers to the above are in the negative, is it the proper avenue to submit it to Parliament or should it be subjected to further scrutiny at another National forum?

iv. Is the Constitution of Kenya Review (Amendment) Bill legitimate in law?

v. Is it legitimate for the Hon. Minister for Justice and Constitutional Affairs to present a Constitutional Bill or should this be the preserve of the Attorney General?

vi. Is there any residual role for the Constitution of Kenya Review Commission or any other formal organs created for the purpose in view of the many informal consensus building caucuses, and the costs of

sustaining them?

vii. Assuming a referendum shall be held, which organs and on what issues will a "Yes" or "No" answer be required? On sections deemed contentious or on the whole document?

viii. Is it legitimate to extract parts of the draft constitution and enact these into law without detracting from the spirit and intent of the document?

However the above questions are answered, the Bill of Rights in the draft Constitution has admitted little controversy, and ought to be effected. A critical challenge for us then is whether and how to ensure effectuation of at least this Chapter of the Draft Constitution, if no other.

Ladies and Gentlemen, we face a challenge of monumental proportions. The future of the country and prosperity of our nation lies in our hands. We may squander it or seize it.

Our collective challenge is to chart the way forward objectively and honestly. How, and whether, we do this shall remain for presentations and plenary.

THANK YOU

OTIENDE AMOLLO
CHAIRMAN

ANNEXURE 3

OPENING REMARKS ACTING EXECUTIVE DIRECTOR OF ICJ KENYA – MR SAMUEL MBITHI

Honourable Members of Parliament, Council Members of ICJ Kenya, Ladies and Gentlemen.

I wish to welcome you all to this inaugural Annual Parliamentary Human Rights workshop. The workshop intended for Members of Parliament and selected Civil Society partners. The engagement of MPs and Civil Society actors is aimed at informing the legislative agenda of parliament. Specifically, this workshop is modelled on the need for preserving and enhancing protection and promotion of human rights through parliamentary procedures, especially in the context of emerging constitutional dispensation encapsulated in the draft Constitution.

The Bill of Rights proposed under the draft Constitution incorporates both civil and political rights as well as economic, social and cultural rights. Progressive realisation of economic, social and cultural rights involve a conscious effort by the Executive to allocate more resources to protection and promotion of human rights and to adopt a human rights based approach to development planning. This means that lack of resources *per se* cannot excuse a government from fulfilling its obligations under the international treaties. The signing and ratification of a treaty by a government indicates its willingness to be bound by the treaty's provisions as well as to be held accountable by the international community in case of violation of the provisions.

I have given this summary in light of the comprehensive provisions of the proposed Bill of Rights which incorporate international standards for local application through constitutional entrenchment. This workshop will interrogate the mechanisms of salvaging the constitutional review process with the aim of preserving these human rights gains. Additionally, the workshop will identify strategies that can be employed to preserve these human rights gains within the context of the current Constitution. Lastly, the workshop will examine the available avenues for pushing for the enactment of a Freedom of Information Bill.

The human rights discourse is all pervading and ties closely with the notions of nurturing democracy and observance of the Rule of Law. Further, the dictates and considerations of human rights are principal considerations for any country's

qualification for international development assistance and budget support. The right to development is viewed as a human right and it has been observed that extreme poverty constitutes a gross violation of human rights. During this workshop, we must interpret human rights in this broad manner.

Due to the unique constitutional position Parliament occupies as outlined in section 30 of the Constitution, we must at all times sensitize Members of Parliament on effective protection and promotion of human rights through parliamentary procedures. The methods which can be used in this regard include asking questions on human rights violations, through contributions to debate on legislation, moving private members bills and motions and other. In my view, parliament is an important partner in human rights protection.

I take this opportunity to wish you all fruitful deliberations during this workshop and to thank our partners, Westminster Foundation for Democracy and MS Kenya for their continued support.

Thank you.

ANNEXURE 4

Interrogating the way forward in the review process following the Amendment of the Constitution of Kenya Review Act (2004): The role of Political Parties in defining the way forward – Ms Koki Muli.

Political parties have a crucial role to play in order to move the review process forward. Mostly, they are the reason why the process is deadlocked and they are the ones who will unlock the process.

To unlock the review process political parties, especially their MPs will have to provide firm and decisive leadership to ensure that we get a new Constitution before the next election. Political parties, especially their MPs need to do the following:

1. Decide whether or not they are actually committed and genuinely interested in a new Constitution. This is a very important decision, without which we can move forward.
2. Set aside their political and sectarian interests and focus on the interests of Kenyans
3. Create an environment conducive to the finalisation of the review process. This will involve focusing on unifying political parties (through consensus, compromises or settlements) and especially Kenyans instead of dividing them along ethnic, political or other sectarian lines. Political parties need to speak one language, to exercise tolerance and a degree of humility.
4. Political parties need to apply themselves genuinely to the real issues in the draft Constitution by widening their understanding and appreciation of the provisions that they like or don't like and the implications of the provisions.
5. Political parties need to have positions on the content and the process of the review in order to negotiate with their colleagues and other stakeholders because whatever emerges as the new Constitution should not only be a negotiated document but it should be one that generally

covers the interests of all of us. It also should be a document that will not require immediate amendments after adoption.

Once political parties and their MPs are able to resolve the above then what needs to be done includes the following:

1. The Constitution of Kenya Review (Amendment) Act, 2004 (commonly known as the Consensus Act) need to be amended to be in tune with the Ruling of the case of Njoya and Others.

2. Political parties and their MPs need to be more accommodating of divergent views and all stakeholders involved in the review process. It is going to be very difficult to convince Kenyans that Parliament cares about the interests and concerns of Kenyans when it insists on identifying contentious issues, finding consensus on these issues and opening and amending the Bomas Draft Constitution and subjecting it to the Referendum. It will even be more difficult to insist on introducing other draft constitutions which Kenyans have generally not been part of. Certainly the voices of all Kenyans need to be heard including those belonging to the people who have produced the other draft constitutions, but political parties and their MPs need to find a more tactful and accommodating methods and language to ensure that they do not divide and antagonise Kenyans unnecessarily.

3. It is important for all of us to remember that the Constitution does not belong to the government or the opposition (all political parties); it belongs to all of us. The general disagreements amongst MPs and political parties have resulted in apathy and disinterest by Kenyans on the review process. Political parties and their MPs have a crucial role to play in rekindling Kenyans' interests and involvement in the review process.

4. It will be very sad if Kenyan voters were to vote "NO" in the referendum because of disagreements amongst political parties or because of Parliament's failure to allow stakeholders to complete what left of the review process is left. This would prove that the government, the ruling party, and indeed Parliament have no interests whatsoever to deliver the new Constitution.

It is possible that there are more options however; two significant options come to mind:

- **Option One:** If Parliament is dissatisfied with the Bomas Draft, it must return it back to Bomas delegates or to another group of Kenyans fairly representative of all Kenyan stakeholders. This group of Kenyans must either be elected as in case of a Constituent Assembly, or appointed or nominated through a transparent and accountable method which ensures fair and genuine representation of every Kenyan and his or her interests, concerns and aspirations. This group of a few people will then be given a fixed period of about six months to open up the Bomas Draft, review it, exhaustively and conclusively deal with the contentious issues, amend, fine-tune and rewrite it as the case may be. Once the final product of this group is produced, it is then subjected to intense civic education and finally to a referendum for Kenyans to determine whether what is contained in it, is what they want as their Constitution.

- **Option Two:** Parliament can have the Bomas Draft ratified as it is in a referendum and use Chapter 19 of the Bomas Draft Constitution to amend the contentious provisions as provided for in this chapter immediately the new Constitution is adopted.

This chapter processes two ways of amending the Draft Constitution:

1. The first way is through amendments by Parliament as soon as the Draft Constitution is adopted in the manner provided for in article 303 of the Bomas Draft Constitution. This means Parliament on its own without subjecting amendments to referenda, will be able to amend all the provisions in the Chapter on Citizenship, the Chapter on Executive, the Chapter on Judiciary and Legal System, the Chapter on Representation, Chapter on Legislature (except the functions of Parliament), Chapter of Devolution (except values and principles of Devolution), Chapter on Constitutional Commissions without regard or reference to the people of Kenya because amendments to them do not require referenda for ratification. In fact, the Parliament can amend the entire Draft Constitution except provisions outlined in article 302(1)

(a) – (j), which can only be amended through a referendum (article 302(5)). Amendments to the Chapter on Public Finance for five years after the effective date will be as is set out in article 302(1) through a referendum (section 21 of the 7th Schedule).

2. The second way in which the Draft Constitution can be amended is by registered voters of Kenya through a popular initiative signed by at least one million (1M) registered voters (article 304(1)), not just by anybody desiring an amendment to the Draft Constitution. The popular initiative shall forward their draft Bill to amend the Constitution to the Electoral and Boundaries Commission to verify that the support of the one million voters (article 304(4)). Such an amendment must be subjected to a referendum (article 304(8)).

In conclusion, there are few things which must happen unless the Njoya and Others case is reviewed:

1. To conclude the review process we MUST have a REFERENDUM on the Draft Constitution we agree on in the end.

2. Parliament cannot within the law/legally amend the Bomas Draft except in accordance with the Ruling of the Njoya and Others case.

3. If Parliament proceeds with the review process in the manner and procedure set out in the Consensus Act, they will be contravening the Ruling of the High Court and therefore undermining the Rule of Law. This will result in a situation where, Parliament makes a new Constitution on the basis of a law that is illegal and unconstitutional and it can be challenged in a court of law. This also means that Parliament will essentially be breaking the Constitution they swore to uphold and safeguard and thus inviting anarchy and disorder.

4. That for the review process to be concluded legally/within the law, the Consensus Act must be repealed and Cap 3A (the parent Act/law) amended to be in line with the Ruling of the Njoya and Others case.

That, for the successful conclusion of the review process, every Kenyan, who has equal right, must participate directly or through representation in the final stage of the Constitution review process and directly through a vote, in the

referendum. This means, the political elite, religious groups, professionals, media, public and private sectors, civil society and other stakeholders must learn to tolerate and accommodate one another and must bring to an end, chest-thumping, grand-standing and other behaviour which is divisive and which undermines the review process.

ANNEXURE 5

THE IMPORTANCE OF FREEDOM OF INFORMATION IN THE EVOLUTION OF DEMOCRATIC INSTITUTIONS:
Making the Case for a Freedom of Information Act in Kenya

Paper presented by Njonjo Mue at the Annual Parliamentary Human Rights Workshop 9th-11th June 2005, at Aberdare Country Club.

What is Freedom of Information?

Freedom of information signifies the right of the public to request access to information and the corresponding duty on the government to meet the request, unless specific, defined exemptions apply. It also includes the duty of the government to proactively provide certain key information, even in the absence of a request.

Although variously referred to as Freedom of information; access to information; the right to know; open government, etc, the term Right to Information (RTI) is preferred because rights in general imply corresponding duties. Hence the government or public body is under a duty to supply information that is rightly requested.

RTI has been recognised for quite some time as a fundamental right. As early as 1946, the United Nations General Assembly resolved: *Freedom of Information is a fundamental human right and the touchstone for all freedoms to which the United Nations is consecrated.*[1] It is enshrined in the Universal Declaration of Human Rights and affirmed in Article 19 of the International Covenant on Civil and Political Rights which states: "Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas though any media and regardless of frontiers." The right is also protected by the African Charter of Human and People's Rights.

The Kenyan Constitution provides in Section 79 (1);

> Except with his own consent, no person shall be hindered in the enjoyment of his freedom of expression, that is to say, freedom to

[1] UN General Assembly (1946) Resolution 59 (1), 65th Plenary Meeting, December 14.

hold opinions without interference, **freedom to receive ideas and information without interference, freedom to communicate ideas and information without interference** (whether the communication be to the public generally or to any person or class of persons) and freedom from interference with his correspondence. [Emphasis added]

A Primary Right

Although in human rights discourse all rights are universal and indivisible, RTI is demonstrably one of the more important rights as it underpins other fundamental rights. For example, freedom and expression and opinion inherently rely on the availability of adequate information to inform opinions. The right to food is also often reliant on the right to information. In India, people have used access laws to find out about their ration entitlements and to expose the fraudulent distribution of food. Hence "the right to information is at the core of the human rights system because it enables citizens to more meaningfully exercise their rights, assess when their rights are at risk and determine who is responsible for any violations."[2]

Why is RTI necessary and important?

We live in the information age. Today more than ever before in human history, and with the advent of technological advances unimaginable a generation ago, information has come to occupy the centre stage of development. Information is a global resource of unlimited potential. Most information kept by the government holds the memory of the nation and provides a full portrait of its activities, performance and future plans. The CHRI report points out:

> Information is a public good like clean air and drinking water. It belongs not to the state, the government of the day or civil servants, but to the public. Officials do not create information for their own benefit alone, but for the benefit of the public they serve, as part of the legitimate and routine discharge of the government's duties. Information is generated with public money by public servants paid out of public funds. As such, it cannot be unreasonably kept from citizens.[3]

In addition, Seyoum Hameso reminds us that information has always been the basis for knowledge; and knowledge is power.

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[2] Commonwealth Human Rights Initiative, *Open Sesame: Looking for the Right to Information in the Commonwealth*, 2003, p. 13.

[3] Ibid, p 10

> Lack of information contributes to knowledge deficiency both leading to powerlessness. Freedom of information in that sense implies a form of empowerment or better still, it signifies freedom from ignorance, from servitude, and ultimately, freedom to choose.[4]

The right to information is key to the evolution of democratic institutions in a number of specific contexts:

Good governance and inclusive democracy

Every person has a right to fully participate in framing the society in which he or she lives by means of free and democratic political processes. Regular free and fair elections and a functioning bureaucracy are necessary but not sufficient conditions for the exercise of this right as they do not in themselves ensure that government is responsive and inclusive. Access to information is key to moving from formal to consultative and responsive democracy. The Commonwealth Law Ministers have recognised that "the right to access information [is] an important aspect of democratic accountability and promotes transparency and encourages full participation of citizens in the democratic process."[5]

RTI is therefore an important aspect of democratic accountability. It promotes transparency and encourages full participation of citizens in the democratic process. True democracy is a system in which government is carried out on behalf of and for the benefit of the people. It cannot function properly in the absence of an informed public that is able to participate in its own governance.

Armed with the right to information, citizens are more readily able to call their government to account on a myriad of issues of concern to them on a continuous basis. Where RTI is lacking, political power remains in the hands of a tiny elite, is more easily abused and fundamental human rights violated.

MPs have a right to get information regarding governance on behalf of their electorate. Chermaine Rodrigues observes, "Parliamentarians committed to participatory and representative democracy have embraced the right to information as a practical mechanism for facilitating the meaningful engagement of their constituents in the activities of government."[6]

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[4] Seyoum Hameso, "Politics of Freedom of Information in Africa," *Focus on International and Comparative Librarianship*, Vol. 26. No. 3, pp. 156-164, 1995.

[5] Communiqué 02/88, Meeting of Commonwealth Law Ministers in Kingstone, St. Vincent and Grenadines, 18-21 November 2002, para. 20, www.thecommonwealth.org/docs/communiques/News88.doc.

[6] Charmaine Rodrigues, The Right to Information: The Key to Deepening Democracy and Development,Commonwealth Human Rights Initiative, www.humanrightsinitiative.org

Freedom of information also strengthens representative democracy by giving citizens sufficient information on which to base their choice when they vote. "Without such information, voters are forced to rely on tribal, clan or religious affiliations instead of the candidates' backgrounds and policies."[7]
Information also enables the public to engage their representatives and the bureaucracy on an on-going basis and can participate in the development and implementation of policies and activities purportedly designed for their benefit. Often, government activities are carried out in the dark without the public being aware of what their government is doing. To counter this, good RTI laws not only allow access to information upon request, they also require proactive disclosure of information regarding public consultations, regular open meetings of committees and any other opportunities for the public to input into government processes. MPs also benefit from RTI laws in this context which improves the overall quality of governance:

> Good access laws can also provide a useful oversight and participation mechanism for non-Cabinet MPs, who, in very closed governments, are also sometimes left out of key decision-making processes. MPs can use the right to information to more effectively engage with their own constituencies, for example, by gaining access to up-to-date information from the bureaucracy about the impact of government policies on their electorate.[8]

Finally, openness engenders greater public trust in the government and hence promotes stability. RTI gives people the ability to personally scrutinise government decision-making processes and to "reduce citizens' feelings of powerlessness, and weaken perceptions of exclusion from opportunity or unfair advantage of one group over another. It effectively reduces the distance between government and people and combats feelings of alienation."[9]

Supporting Economic Growth and People-Centred Development

Economic development is supported by RTI. Free information is crucial to the development of a modern economy capable of engaging in the globalised international marketplace while fostering pro-poor economic growth. In this context, transparency is key and the right to information is vital. "Notably, one

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[7] *Ibid.*
[8] *Ibid.*
[9] *Ibid.*

of the fundamental pillars underpinning market theory is the presumption of a perfect free flow of information which enables all actors in the market sufficient information with which to make rational informed decisions in the market."[10]

Restrictions on the free flow of information has resulted not only in eroding democratic principles but has resulted in the failure of government policies and development schemes for bettering the lot of the people. Rural populations and women are ignored and their contribution to development undervalued. With assured information, marginalized groups will be given their rightful voice and a powerful tool to scrutinise and engage with the development process being directed at them.

Transparency and tackling Corruption

Kenya has been consistently identified as one of the most corrupt countries in the world. Corruption undermines governance and the rule of law and places a heavy burden on citizens, especially on the poor, who are least capable of paying the extra costs associated with bribery and fraud or surviving the embezzlement of scarce public resources.

RTI is an essential safeguard against corruption. Corrupt officials need secrecy to hide their dark secrets and a right to access information would tear down the walls of protection behind which they hide. A legally entrenched RTI can be used to collect evidence of wrongdoing and hold officials accountable. It also acts as a deterrent as knowing that their actions are subject to scrutiny is likely to encourage officials to act honestly.

> In practice, access laws can be used to expose high-level corruption, for example, though obtaining documents that reveal tainted government decision-making processes. They can also be used very effectively at the community level, for example to expose cases where implementing agencies fail to properly discharge their duties, both to the government and the public. In this context, parliamentarians can utilize the law as a tool to oversee agencies working in their electorate and to ensure that constituents are collectively and individually receiving their proper entitlements from government.[11]

[10] *Ibid.*

[11] Rodrigues, p. 3

Reinforcing Media Capacity

In any democracy, the media has an important role to play as a watchdog, scrutinising the powerful and exposing mismanagement and corruption. It is the foremost means of distributing information. Unfortunately, the power of the media to reach the masses has often been seen as a threat by closed governments intent on hoarding information. They seek to closely regulate the media and frustrate its efforts. Unable to get reliable information held by government and other powerful interests, the media cannot fulfil its role. It is left to depend on leaks and press releases by the very people it is supposed to investigate. A sound RTI regime provides a framework within which the media can seek, receive and impart essential information accurately and is as much in the interests of government as it is of the people.

Towards an RTI Law in Kenya

As stated above, the right to information is enshrined in the Kenyan constitution, but this has not been enough to counter the culture of secrecy inherited from colonial rule or to cause the repeal of outdated laws such as the Official Secrets Act. Even in countries with very liberal constitutions, it has been found necessary to operationalise RTI through legislation. Kenya is no different. Legislation sets a clear framework for putting in place systems and creating cultures of openness that are uniform in government and across public bodies.

An RTI law should conform to the following minimum principles:

- **Maximum Disclosure**: There should be a strong presumption in favour of access. The law should cover all public bodies as well as private bodies that carry out public functions or where their activities affect people's rights. Any person, not just citizens, should be able to access information and people should not be required to provide a reason for requesting information because this is a fundamental right for which they are entitled. The definition of "information" should be wide and inclusive.
- **Minimum Exemptions:** The limits on disclosure need to be tightly and narrowly defined. Denial of information should be based on proving that disclosure would cause serious harm and that denial is in the overall public interest. Usually, exemptions allow non-disclosure where release of information would cause serious harm to national security, international relations, legitimate law enforcement activities, a fair trial, or the competitive position of a party. Unreasonable disclosure of personal information is also usually not permitted.

- **Independent Appeals:** Anybody denying information must provide reasons and there must be a right of appeal to an independent body which must have power to compel release and impose sanctions for non-compliance. The courts should be the final appeal body.
- **Strong Penalties:** The law should impose penalties and sanctions for unreasonable delay or withholding of information, deliberate provision of incorrect information, concealment or falsification of records, wilful destruction of records subject to requests, obstruction of the work of any public body under the law, etc.
- **Proactive Disclosure:** The law should impose an obligation on government to routinely and proactively disseminate information of general relevance to citizens, including updates about structure, norms and functioning of public bodies, the documents they hold, their finances, activities, and any opportunities for consultations.
- **Simple, Cheap Access**: People seeking information should be able to obtain it easily, inexpensively and promptly. The law should include clear and uncomplicated procedures that ensure quick responses at affordable fees. There should be a designated Public Information Officer in every public body charged with processing information requests.

- **Effective Monitoring and Implementation:** A body should be given specific responsibility for monitoring and promoting the Act. This could be the Human Rights Commission. MPs also have an important oversight role, as reports of compliance with the law are usually submitted annually to Parliament for consideration and comment. The law should require government to actively undertake training and public education programmes. Records management systems should be created and maintained which are designed to facilitate the aims of the law.

Role of MPs

MPs have an important role to play in making RTI a practical reality by actively pushing for the enactment of effective legislation and, once that is done, by maintaining a close watch on implementation to ensure that access is not undermined in practice.

The government has recently published an FOI bill that, although a good start, falls far short of the standards set out above. In collaboration with civil society, MPs now have the opportunity to strategically push for the development and passage of a well-drafted, effective law. In the meantime, parliamentarians can catalyse support for RTI by using the media to raise awareness in the community of the value of the right, while demonstrating its importance to the public to fellow MPs.

It must be remembered that in the face of a deeply entrenched culture of secrecy, anything MPs can do to promote open government will help to move the body politic towards a point where we all come to accept RTI as a practical reality of our daily lives even as we work towards entrenching it in legislation.

CONCLUSION

Justice K.K. Mathew of the Supreme Court of India has stated:
In a government...where all the agents of the public must be responsible for their conduct, there can be but few secrets. The people...have a right to know every public act, everything that is done in a public way, by their public functionaries.... The responsibility of officials to explain or to justify their acts is the chief safeguard against oppression and corruption.[12]

This statement underscores the fact that one of the most important outcomes of the struggles for democracy in Africa and elsewhere is that we no longer live in feudal systems characterised by secrecy and master/subject relationship between the rulers and the people. Democracy demands what has come to be known as 'government in the sunshine' where people are able to scrutinise their government's actions in order to call their leaders to account. In this regard, the fundamental right to seek and receive information is indispensable.

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ANNEXURE 6

THE IMPORTANCE OF FREEDOM OF INFORMATION IN THE EVOLUTION OF DEMOCRATIC INSTITUTIONS

Making the case for a freedom of information Act in Kenya

Response to Njonjo Mue by Gitobu Imanyara

While opening the IPI World Congress on 22nd May 2005, President Mwai Kibaki acknowledged the importance of freedom of information. Said he:

"... ***" the free flow of news and information is one of the hallmarks of a functioning democracy. An informed society is able to better participate in the design and execution of public policies. It is also more resourceful and creative in addressing social challenges. Such a society is therefore, better placed to increase productivity and prosperity".***

With words such as these emanating from the mouth of the most powerful individual in the country addressing the entire world, one would imagine that there is already in place in our laws a Freedom of Information Act in Kenya. Undeniably, there are circumstances in which national security and freedom of expression clash head on. For instance, protection of genuine national security interests requires the suppression of sensitive defence information or speech likely to promote violence against the state. The conflict is exacerbated by the fact that national security and related concepts (such as "state security," "internal security," "public security." and "public safety") are so imprecise that they may, and frequently have been, invoked by governments to suppress precisely the kinds of speech that provide protection against government abuse, such as information or expression exposing, circumvention of the democratic process, attacks on opposition parties, damage to the environment, corruption, wasting of public assets, and other forms of wrongdoing by government officials and their associates.

Moreover, courts in countries around the world demonstrate the least independence and greatest deference to the claims of government when national security in invoked. This deference is reinforced by provisions in the security laws of many countries that trigger exceptions to ordinary rules of evidence and due process upon a minimal showing by the government of national security risk. A government's claim of a security threat can deal a knockout blow to the main institutional safeguards against government abuse: independence of the courts, due process of law, freedom of the press and open government.

The tensions between expression and national security is particularly vexing because there is little margin for error and much at stake. Quick action often is necessary to thwart a genuine threat to national security but restraints on political speech can trigger inexorable slide into tyranny. The more fragile the democracy, the less likely it is to be able to tolerate either a threat to its genuine security or the suppression of legitimate political debate.

It is the recognition of this profound tension that led a group of international media experts to draft the Johannesburg Principles on National Security, Freedom of Expression and Access to Information. The Principles which you will find to be of benefit when debating the Freedom of Information Bill are as follows:

Principle 1: Freedom of Opinion, Expression and Information

(a) Everyone has the right to hold opinions without interference.

(b) Everyone has the right to freedom of expression, which includes the freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his or her choice.

(c) The exercise of the rights provided for in paragraph (b) may be subject to restrictions on specific grounds, as established in international law, including for the protection of national security.

(d) No restriction on freedom of expression or information on the ground of national security may be imposed unless the government can demonstrate that the restriction is prescribed by law and is necessary in a democratic society to protect a legitimate national security interest. The burden of demonstrating the validity of the restriction rests with the government.

Principle 1.1: Prescribed by Law

(a) Any restriction on expression or information must be prescribed by law. The law must be accessible, unambiguous, drawn narrowly and with precision so as to enable individuals to foresee whether a particular action in unlawful.

(b) The law should provide for adequate safeguards against abuse, including prompt, full and effective judicial scrutiny of the validity of the restriction by an independent court or tribunal.

Principle 1.2: Protection of a Legitimate National Security Interest
Any restriction on expression or information that a government seeks to justify on grounds of national security must have the genuine purpose and demonstrate effect of protecting a legitimate national security interest.

Principle 1.3: Necessary in a Democratic Society
To establish that a restriction on freedom of expression or information is necessary to protect a legitimate national security interest, a government must demonstrate that:

(a) the expression or information at issue poses a serious threat to a legitimate national security interest;

(b) the restriction imposed is the least restrictive means possible for protecting that interest; and

(c) the restriction is compatible with democratic principles

Principle 2: Legitimate National Security Interest

(a) A restriction sought to be justified on the ground of national security is not legitimate unless its genuine purpose and demonstrable effect is to protect a country's existence or its territorial integrity against the use or threat of force, or its capacity to respond to the use or threat, or an internal source, such as incitement to violent overthrow of the government.

(b) In particular, a restriction sought to be justified on the ground of national security is not legitimate if its genuine purpose or demonstrable effect is to protect interests unrelated to national security, including, for example, to protect a government from embarrassment or exposure of wrongdoing, or to conceal information about the functioning of its public institutions, or to entrench a particular ideology, or to suppress industrial unrest.

Principle 3: States of Emergency
In time of public emergency which threatens the life of the country and the existence of which is officially and lawfully proclaimed in accordance with both national and international law, a state may impose restrictions on freedom of expression and information but only to the extent strictly required by the exigencies of the situation and only when and for so long as they are inconsistent with the government's other obligations under international law.

Principle 4: Prohibition of Discrimination
In no case may a restriction on freedom of expression or information, including on the ground of national security, involve discrimination based on race, colour, sex, language, religion, political or other opinion, national or social origin, nationality, property, birth or other status.

Restrictions on Freedom of Expression

Principle 5: Protection of Opinion
No one may be subjected to any sort of restraint, disadvantage or sanction because of his or her opinions or beliefs.

Principle 6: Expression that may Threaten National Security
Subject to Principles 15 and 16, expression may be punished as a threat to national security only if a government can demonstrate that:

(a) the expression is intended to incite imminent violence;

(b) it is likely to incite such violence; and

(c) There is a direct and immediate connection between the expression and the likelihood or occurrence of such violence.

Principle 7: Protected Expression

(a) Subject to Principles 15 and 16, the peaceful exercise of the right to freedom of expression shall not be considered a threat to national security or subjected to any restrictions or penalties. Expression which shall not constitute a threat to national security includes, but is not limited to, expression that:

(i) advocates non-violent change of government policy or the government itself;

(ii) constitutes criticism of, or insult to, the nation, the state or its symbols, the government, its agencies, or public officials, or a foreign nation, state or its symbols, government, agencies or public officials;

(iii) constitutes objection, or advocacy of objection, on grounds of religion, conscience or belief, to military conscription or service, a particular conflict, or the threat or use of force to settle international disputes;

(iv) is directed at communicating information about alleged violations of international human rights standards or international humanitarian law.

(b) No one may be punished for criticising or insulting the nation, the state or its symbols, the government, its agencies, or public officials, or a foreign nation, state or its symbols, government, agency or public official unless the criticism or insult was intended and likely to incite imminent violence.

Principle 8: Mere Publicity of Activities that may Threaten National Security: Expression may not be prevented or punished merely because it transmits information issued by or about an organisation that a government has declared threatens national security or a related interest.

Principle 9: Use of a Minority or Other Language
Expression, whether written or oral, can never be prohibited on the ground that it is in a particular language, especially the language of a national minority.

Principle 10: Unlawful Interference with Expression by Third Parties
Governments are obliged to take reasonable measures to prevent private groups or individuals from interfering unlawfully with the peaceful exercise of freedom of expression, even where the expression is critical of the government or its policies. In particular, governments are obliged to condemn unlawful actions aimed at silencing freedom of expression, and to investigate and bring to justice those responsible.

Restrictions on Freedom of Information

Principle 11: General Rule on Access to Information

Everyone has the right to obtain information from public authorities, including information relating to national security. No restriction on this right may be imposed on the ground of national security unless the government can demonstrate that the restriction is prescribed by law and is necessary in a democratic society to protect a legitimate national security interest.

Principle 12: Narrow Designation of Security Exemption

A state may not categorically deny access to all information related to national security, but must designate in law only those specific and narrow categories of information that it is necessary to withhold in order to protect a legitimate national security interest.

Principle 13: Public Interest in Disclosure

In all laws and decisions concerning the right to obtain information, the public interest in knowing the information shall be primary consideration.

Principle 14: Right to Independent Review of Denial of Information

The state is obliged to adopt appropriate measures to give effect to the right to obtain information. These measures shall require the authorities, if they deny a request for information, to specify their reasons for doing so in writing and as soon as reasonably possible; and shall provide for a right of review of the merits and the validity of the denial by an independent authority, including some form of judicial review of the legality of the denial. The reviewing authority must have the right to examine the information withheld.

Principle 15: General Rule on Disclosure of Secret Information

No person may be punished on national security grounds for disclosure of information if (1) the disclosure does not actually harm and is not likely to harm a legitimate national security interest, or (2) the public interest in knowing the information outweighs the harm from disclosure.

Principle 16: Information Obtained through Public Service

No person may be subjected to any detriment on national security grounds for disclosing information that he or she learned by virtue of government service if the public interest in knowing the information outweighs the harm from disclosure.

Principle 17: Information in the Public Domain
Once information has been made generally available, by whatever means, whether or not lawful, any justification for trying to stop further publication will be overridden by the public's right to know.

Principle 18: Protection of Journalists' Sources
Protection of national security may not be used as a reason to compel a journalist to reveal a confidential source.

Principle 19: Access to Restricted Areas
Any restriction on the free flow of information may not be such a nature as to thwart the purposes of human rights and humanitarian law. In particular, governments may not prevent journalists or representatives of intergovernmental or non-governmental organisations with a mandate to monitor adherence to human rights or humanitarian standards from entering areas where there are reasonable grounds to believe that violations of human rights or humanitarian law are being, or have been, committed. Governments may not exclude journalists or representatives of such organisations from areas that are experiencing violence or armed conflict except where their presence would pose a clear risk to the safety of others.

Rule of Law and Other Matters

Principle 20: General Rule of Law Protections
Any person accused of a security-related crime involving expression or information is entitled to the rule of law protections that are part of international law. These include, but are not limited to, the following rights:

(a) the right to be presumed innocent;

(b) the right not to be arbitrarily detained;

(c) the right to be informed promptly in a language the person can understand of the charges and the supporting evidence against him or her;

(d) the right to prompt access to counsel of choice;

(e) the right to a trial within a reasonable time;

(f) the right to have adequate time to prepare his or her defence;

(g) the right to a fair and public trial by an independent and impartial court or tribunal;

(h) the right to examine prosecution witnesses;

(i) the right not to have evidence introduced at trial unless it has been disclosed to the accused and he or she has had an opportunity to rebut it; and

(j) the right to appeal to an independent court or tribunal with power to review the decision on law and facts and set it aside.

Principle 21: Remedies

All remedies, including special ones, such as *habeas corpus* or *amparo*, shall be available to persons charged with security-related crimes, including during public emergencies which threaten the life of the country, as defined in Principle 3.

Principle 22: Right to Trial by an Independent Tribunal

(a) At the option of the accused, a criminal prosecution of a security –related crime should be tried by a jury where that institution exists or else by judges who are genuinely independent. The trial of persons accused of security-related crimes by judges without security of tenure constitutes a *prima facie* violation of the right to be tried by an independent tribunal.

(b) In no case may a civilian be tried for a security-related crime by a military court or tribunal.

(c) In no case may a civilian or member of the military be tried by an ad hoc or specially constituted national court or tribunal.

Principle 23: Prior Censorship

Expression shall not be subject to prior censorship in the interest of protecting national security, except in time of public emergency which threatens the life of the country under the conditions stated in Principle 3.

Principle 24: Disproportionate Punishments

A person, media outlet, political or other organisations may not be subject to such sanctions, restraints or penalties for a security-related crime involving freedom of expression or information that are disproportionate to the seriousness of the actual crime.

Principle 25: Relation of these Principles to Other Standards
Nothing in these Principles may be interpreted as restricting or limiting any human rights or freedoms recognised in international, regional or national law or standards.

The principles are based on international and regional law and standards relating to the protection of human rights, evolving state practice (as reflected, *inter alia*, in judgements of national courts), and the general principles of law recognised by the community of nations.

They are neatly summarised by Thomas I. Emerson in his essay "*The State of the First Amendment as we enter 1984*" as follows:

1. Constitutional principles protecting freedom of expression occupy a preferred position in the hierarchy of democratic values; hence there is presumption in favour of the constitutional right.

2. Government claims of injury to national security must be viewed with a healthy scepticism.

3. The burden of proof to demonstrate its case of limitation rests upon the government.

4. The government must show a direct, immediate, grave and specific harm to national security, not just a vague or speculative threat.

5. The restriction sought by the government must be confined to the narrowest possible constraint necessary to achieve the goal, and should not be permitted where methods having a less drastic effect upon First Amendment rights are available.

6. Where possible, hard and fast rules, rather than loose balancing tests, should be formulated and applied.

Agreeing then as I hope we do that as honourable members of parliament we have a solemn duty to advance the democratic gains we have made since the abolition of Section 2A, what are the avenues available for you towards ensuring the law is enacted? I suggest the following:

1. Take this advantage of the Budget debate and the vote on ministries and require the passage of the vote of the Ministry of Information be made conditional on passage of the law,

2. Require a Ministerial statement in the House seeking government firm commitment within a given time frame to give effect to the President's promise to the world at the IPI Conference.

3. Put in questions to the Minister.

4. Make use of the Standing Order's provisions relating to Petitions to petition the government on the issue.

5. Ask questions.

6. Finally and most importantly, seek the repeal the Official Secrets Act. Our Official Secrets Act is borrowed from the Great Britain's version which, as an American Lawyer, Martin Garbus observes gives the government the "final, judicially unreviewable right to impose its own definitions of what information injures the nation, " or more bluntly in the words of Richard Curry, the Official Secret Act has the effect of enabling the executive arm of government "almost total control over what information is released to the public [and it is not only] future leakers of information who must face its chilling effect [but] also journalists, broadcasters, authors and publishers who receive such information and dare to use it...state-imposed secrecy and censorship, combined with disinformation campaigns and psycholinguistic manipulation, ordinarily succeed in drowning out weaker voices".

CONCLUSION:

The essence of democracy is decision making by an informed public, for, as James Madison said:

> *"Knowledge will forever govern ignorance, and a people who mean to be their own government must arm themselves with the power that knowledge brings.*

No government ever shares all its information with its citizens, but a government must be fundamentally open if it is to have any legitimate claim to democracy in this, the information technology age. A Freedom of Information Act is the single most important tool in uncovering the plans and activities of government.

ANNEXURE 7
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