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KENYA NATIONAL ASSEMBLY

NINTH PARLIAMENT

FOURTH SESSION

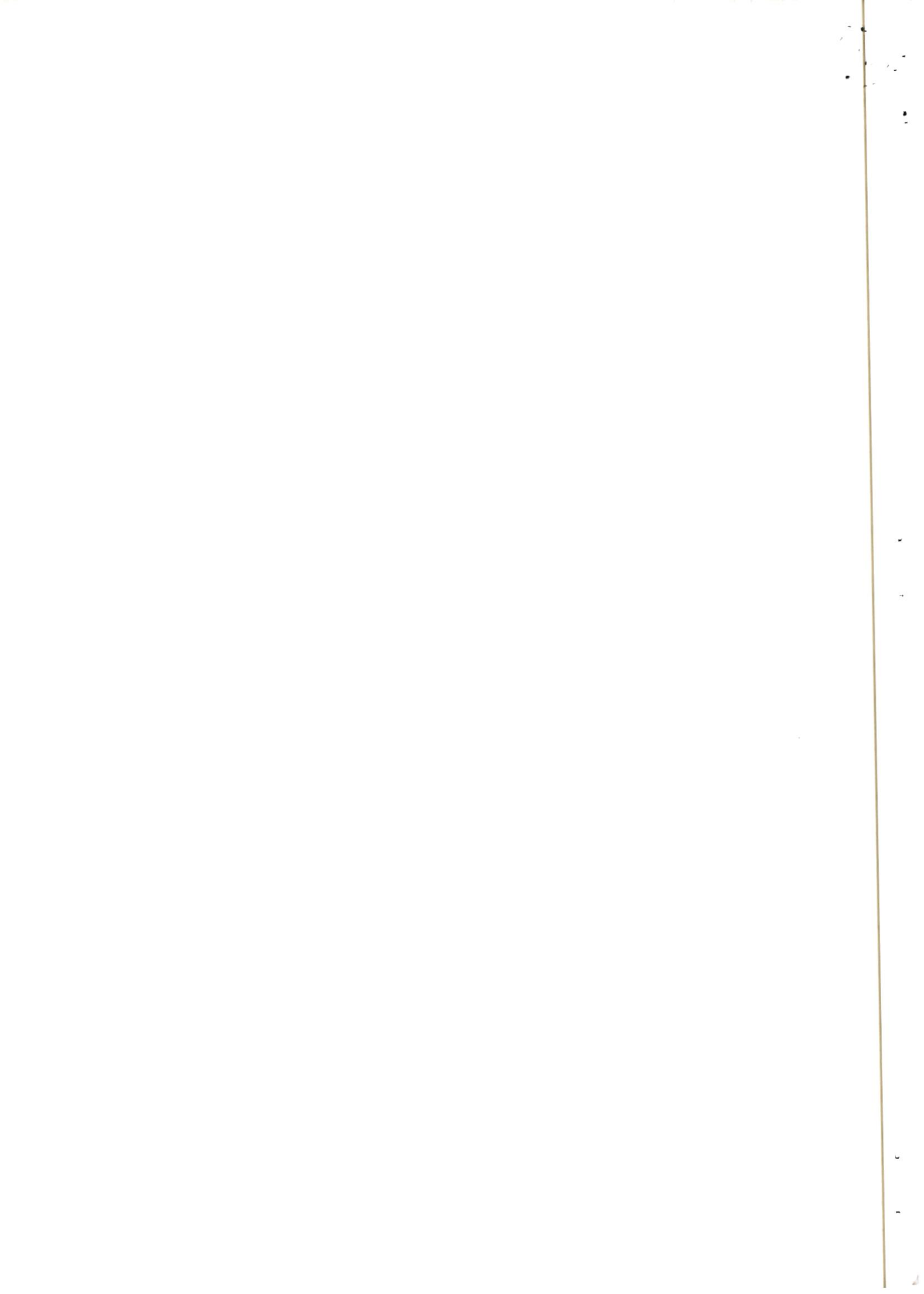
SELECT COMMITTEE ON REVIEW OF THE
CONSTITUTION OF KENYA

**REPORT ON CONTENTIOUS ISSUES
AND THE WAY FORWARD IN
CONSTITUTION REVIEW PROCESS.**

PARLIAMENT BUILDINGS

NAIROBI

JUNE 2005



INTRODUCTION

Mr. Speaker Sir,

1. The Select Committee on Review of the Constitution of Kenya was re-constituted on May 5, 2005 to urgently provide leadership in the Constitution making process. The Committee was mandated to compile and present to the National Assembly Contentious Issues pursuant to Section 27(2) the provisions of the Constitution of Kenya Review (Amendment) Act, 2004.

ESTABLISHMENT, MANDATE AND FUNCTIONS.

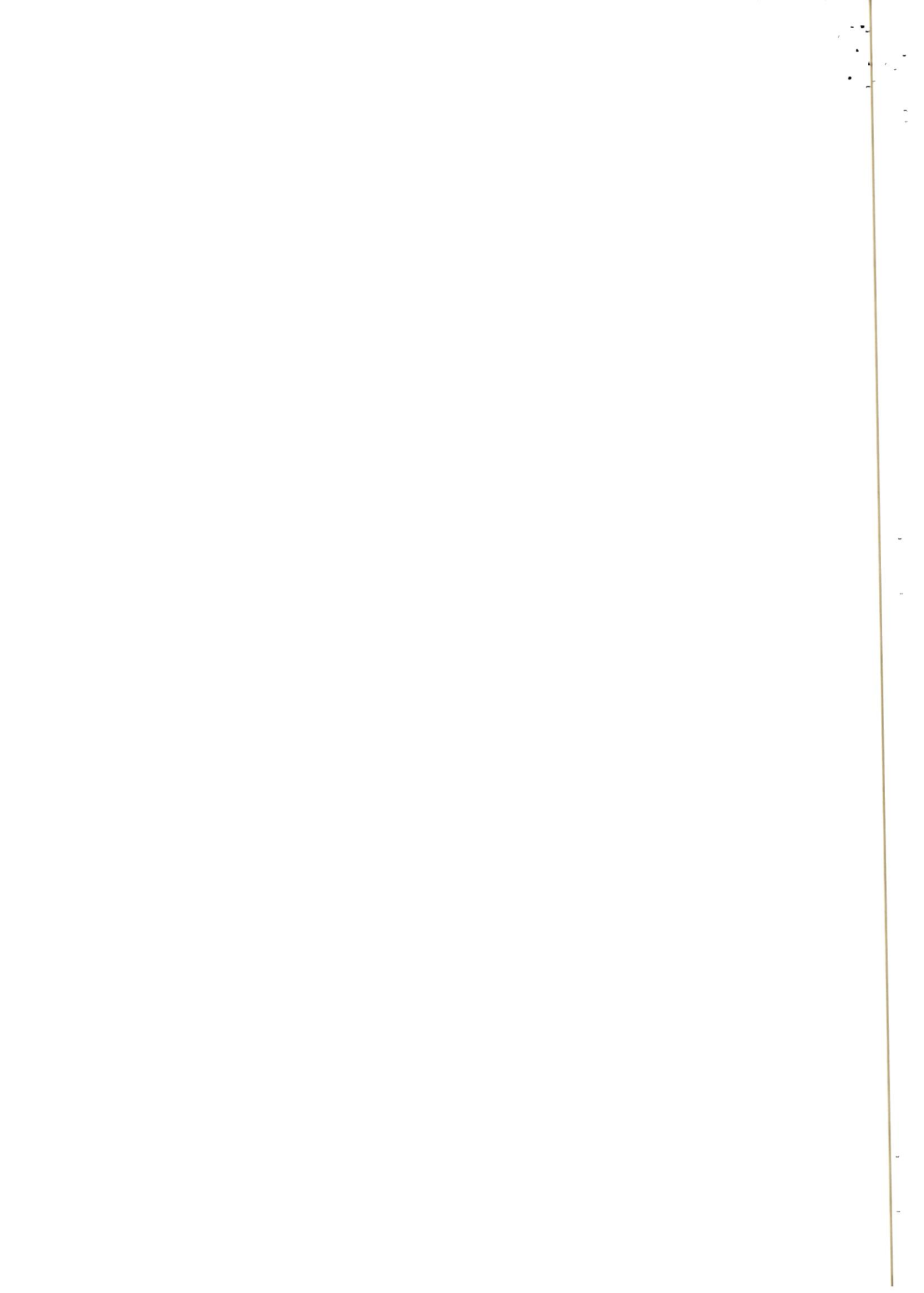
2. The Committee was established pursuant to provisions of Standing Order 153 and in furtherance to Section 10 of the Constitution of Kenya Review Act, Cap. 3A which provides;

“The National Assembly shall, in accordance with Standing Orders, establish a Select Committee, consisting of not less than five and not more than twenty seven Members to assist it in the performance of its functions under the Act.”

3. Further, the provisions of Section 5 of the Act, stipulate the functions as follows;

“In the exercise of the powers or the performance of the functions conferred by this Act, the organs specified in section 4(a),(b),(c) and(e)

1. *be accountable to the people of Kenya*
2. *ensure that the review process accommodates the diversity of the Kenyan people including socio-economic status, race, ethnicity, gender ,religious faith, age, occupation, learning, persons with disability and the disadvantaged;*



3. *ensure, particularly through the observance of principles in the Third Schedule that the review process –*
 - i. *provides the people with an opportunity to actively, freely and meaningfully participate in generating and debating proposals to alter the Constitution;*
 - ii. *is subject to this Act, conducted in an open manner; and*
 - iii. *is guided by respect for the universal principles of human rights, gender equity and democracy;*
4. *ensure that the final outcome of the review process faithfully reflects the wishes of the people of Kenya.”*

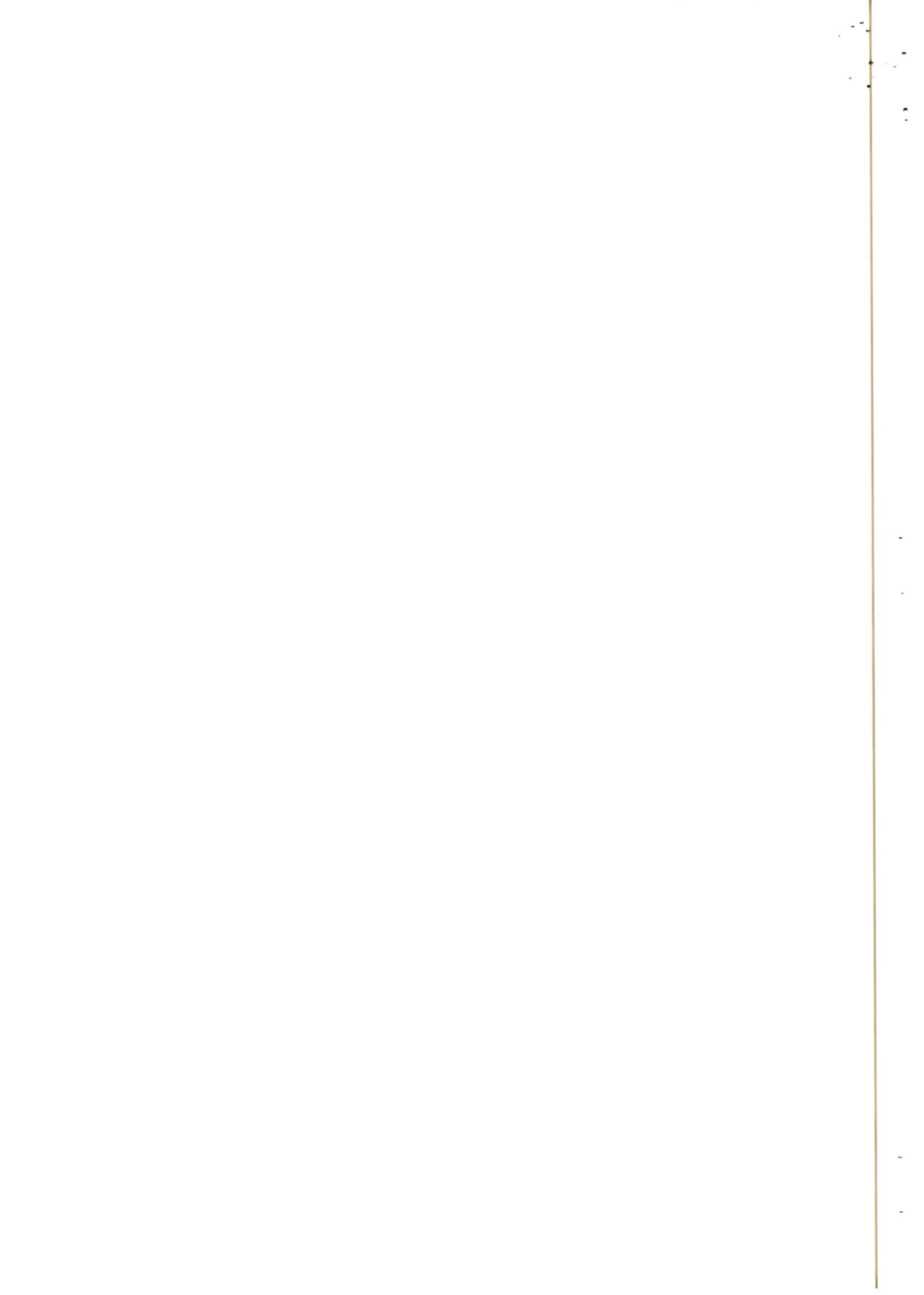
4. Its mandate is also stipulated under section 27 (1) (b) & 27(2) of the Constitution of Review (Amendment) Act 2004 which provides that the National Assembly shall:

(b) submit to the Attorney General, the draft Bill and recommendations only on the contentious issues as identified and recommended by the Parliamentary Select Committee on the Constitution Review for the approval by the National Assembly.

(2) In considering the report and the draft Bill, the National Assembly may undertake consultations to initiate, facilitate and promote a national consensus on the contentious issues as recommended by the Parliamentary Select Committee on Constitutional Review and approved by the National Assembly

5. The following are the Members of the Committee:-

- (i) The Hon. Simeon Nyachae, M.P - **Chairman**
- (ii) The Hon. Kiraitu Murungi, M.P.



- (iii) The Hon. (Dr.) Christopher N. Murungaru, M.P.
- (iv) The Hon. Raila A. Odinga, M.P.
- (v) The Hon. Raphael Tuju, M.P
- (vi) The Hon. Musikari N. Kombo, MP
- (vii) The Hon. Moses M. Wetang'ula, M.P.
- (viii) The Hon. Peter K., Kaindi M.P.
- (ix) The Hon. Kipkalya Kones, M.P
- (x) The Hon. John Munyes, M.P.
- (xi) The Hon. Stephen Tarus, M.P
- (xii) The Hon. Rashid Shakombo, M.P
- (xiii) The Hon. Joseph Kingi, M.P
- (xiv) The Hon. Paul K. Muite, M.P
- (xv) The Hon Norman M.G.K. Nyaga, M.P
- (xvi) The Hon. Njoki Ndungu, M.P
- (xvii) The Hon. Adelina Mwau, M.P
- (xviii) The Hon. Uhuru M. Kenyatta, M.P.
- (xix) The Hon. William S. Ruto, M.P
- (xx) The Hon. Otieno G. Kajwang', M.P.
- (xxi) The Hon. (Dr.) Bonaya A. Godana, M.P
- (xxii) The Hon. Maj. (Rtd.) Marsden H. Madoka, M.P
- (i) The Hon. Henry K. Kosgey, M.P
- (ii) The Hon. Mohammed Yusuf Haji, M.P
- (iii) The Hon. Moses Cheboi, M.P
- (iv) The Hon. Mutula Kilonzo, M.P
- (v) The Hon. Gonzi Rai, M.P



EXECUTION OF MANDATE

Mr. Speaker Sir,

6. In execution of its mandate, the Committee:-

(a) held its first sitting on June 10, 2005 at which;

i. it observed that there was need to move with precision and speed to conclude its work owing to the limited time provided by the timetable of the review process pursuant to the provisions of the Constitution of Kenya Review CKRC (Amendment) Act, N0.9,2004 which came into force on April 22, 2005 ;

ii. a technical Sub- Committee was constituted;

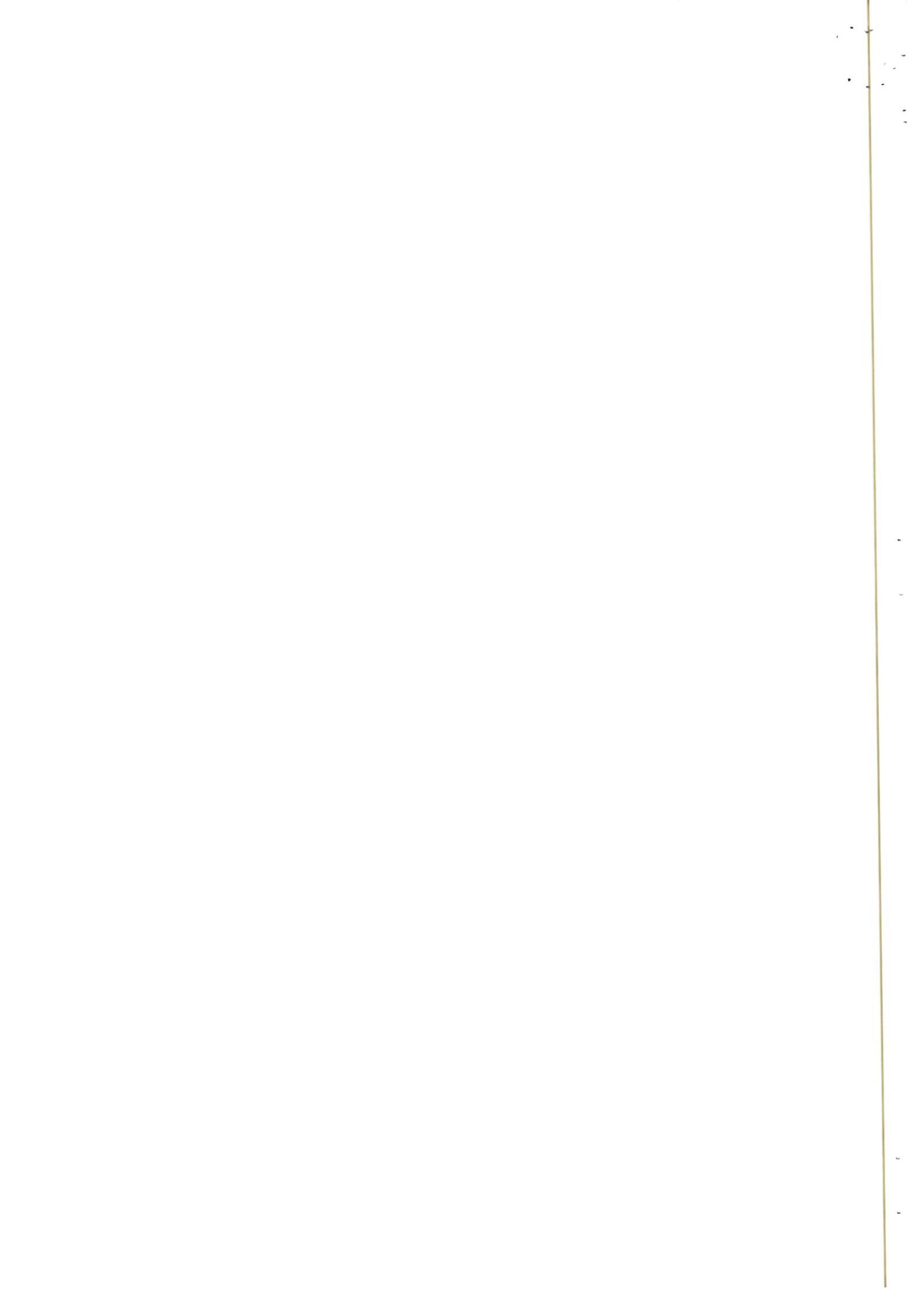
(b) has held three sittings and deliberated on:-

i. the report of the Sub-Committee; and,

ii. the contentious issues and the way forward.

ESTABLISHMENT OF A SUB - COMMITTEE

7. The Committee established a Sub-Committee whose mandate was:-



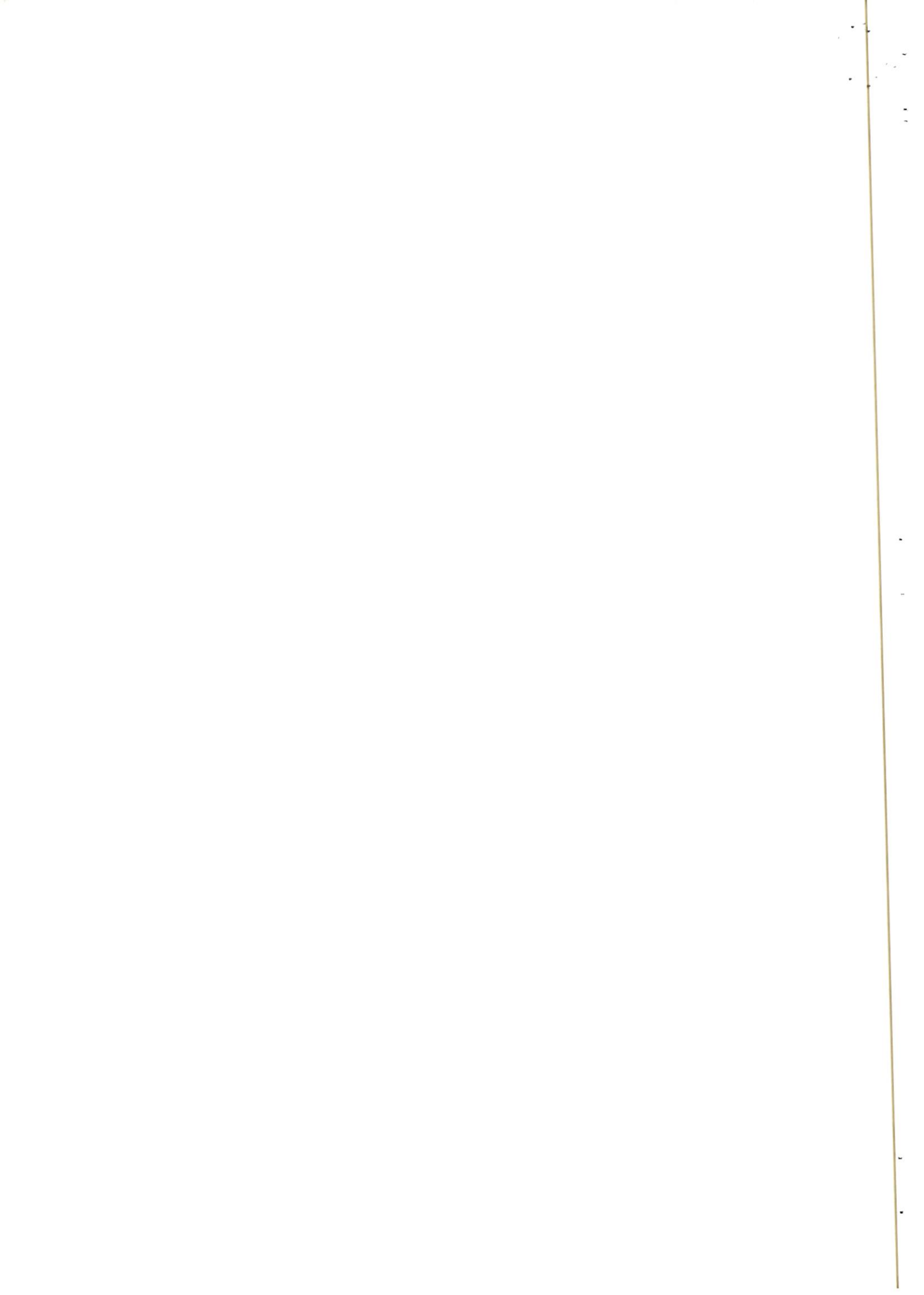
- i. to study the Bomas Draft Bill and the CKRC Report as adopted on 15th March 2004 and compile a list of contentious issues for presentation to the Committee;
- ii. to prepare a draft Bill based on the Bomas Draft and the contentious issues as identified in (i) above for presentation to the Committee;

The Sub-Committee may, in execution of its mandate, co-opt such experts as it may deem necessary to facilitate in its work.

8. The membership comprised:

The Hon. Moses Wetangula, M.P. - Chairman
The Hon. Moses Cheboi, M.P.
The Hon. Paul Muite, M.P.
The Hon Njoki Ndung'u, M.P.
The Hon Otieno Kajwang' M.P.
The Hon. Joseph Kingi, M.P
The Hon. Stephen Tarus, M.P
The Hon. Kipkalya Kones, M.P
The Hon. Kyalo Kaindi, M.P
The Hon (Dr.) Bonaya Godana, M.P
The Hon. Mutula Kilonzo, M.P.
The Hon. Henry Kosgey, M.P
The Hon. Gonzi Rai, M.P

9. Constitution of Kenya Review Commissioners and Officers of the Attorney General's Office were invited to sit with the Sub-Committee to offer technical advice.



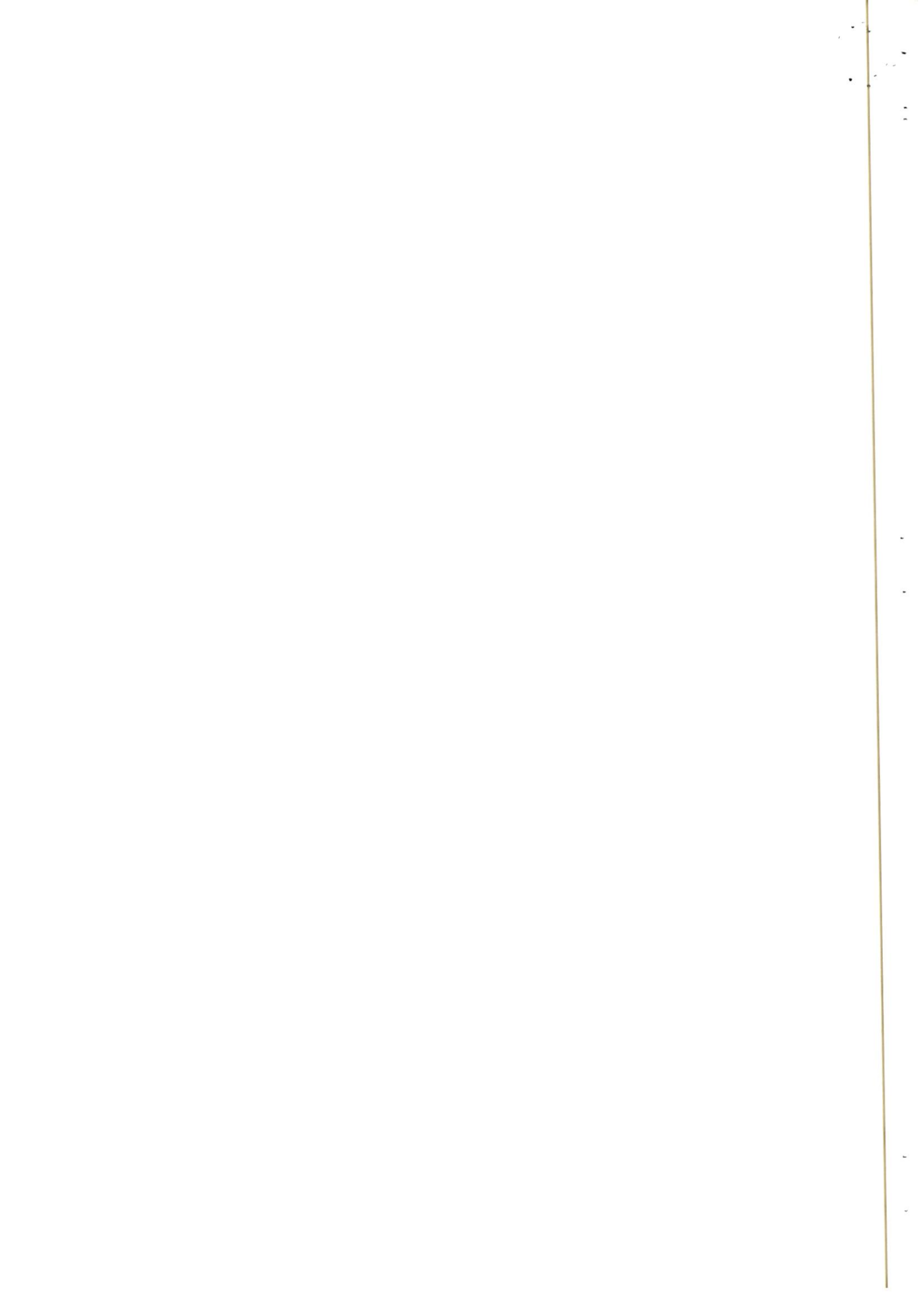
10. The Committee compiled a list of the contentious issues and recommended that a motion to adopt the contentious issues be tabled in the House in accordance with the Constitution of Kenya Review (Amendment) Act, 2004;
11. The Contentious Issues identified are contained in:-
- (i) Chapter 4: Citizenship
 - (ii) Chapter 6: Bill of Rights
 - (iii) Chapter 11: The Legislature
 - (iv) Chapter 12: The Executive
 - (v) Chapter 13: Judicial and Legal Systems
 - (vi) Chapter 14: Devolved Government
 - (vii) Chapter 18: Constitutional Commissions
12. The report and recommendations on Contentious Issues as adopted by the Select Committee established on June 30, 2004 during the 3rd Session of this Parliament at Naivasha, is attached as Appendix IV

RECOMMENDATIONS.

Mr. Speaker, Sir

13. I now wish to bring to the attention of the House, our recommendations;-

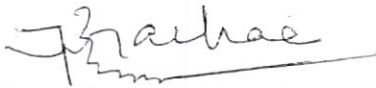
That, the Select Committee undertakes the exercise to;



- (i) incorporate into the Draft Constitution of Kenya, 2004 (Bomas Draft), the Report on Contentious Issues “the Naivasha Accord” and
- (ii) examine the draft Constitution of Kenya, 2004 (Bomas Draft) with a view to editing the Bill, by identifying and recommending provisions which would appropriately be in legislation (Acts of Parliament) and/or policy.

Mr. Speaker, Sir

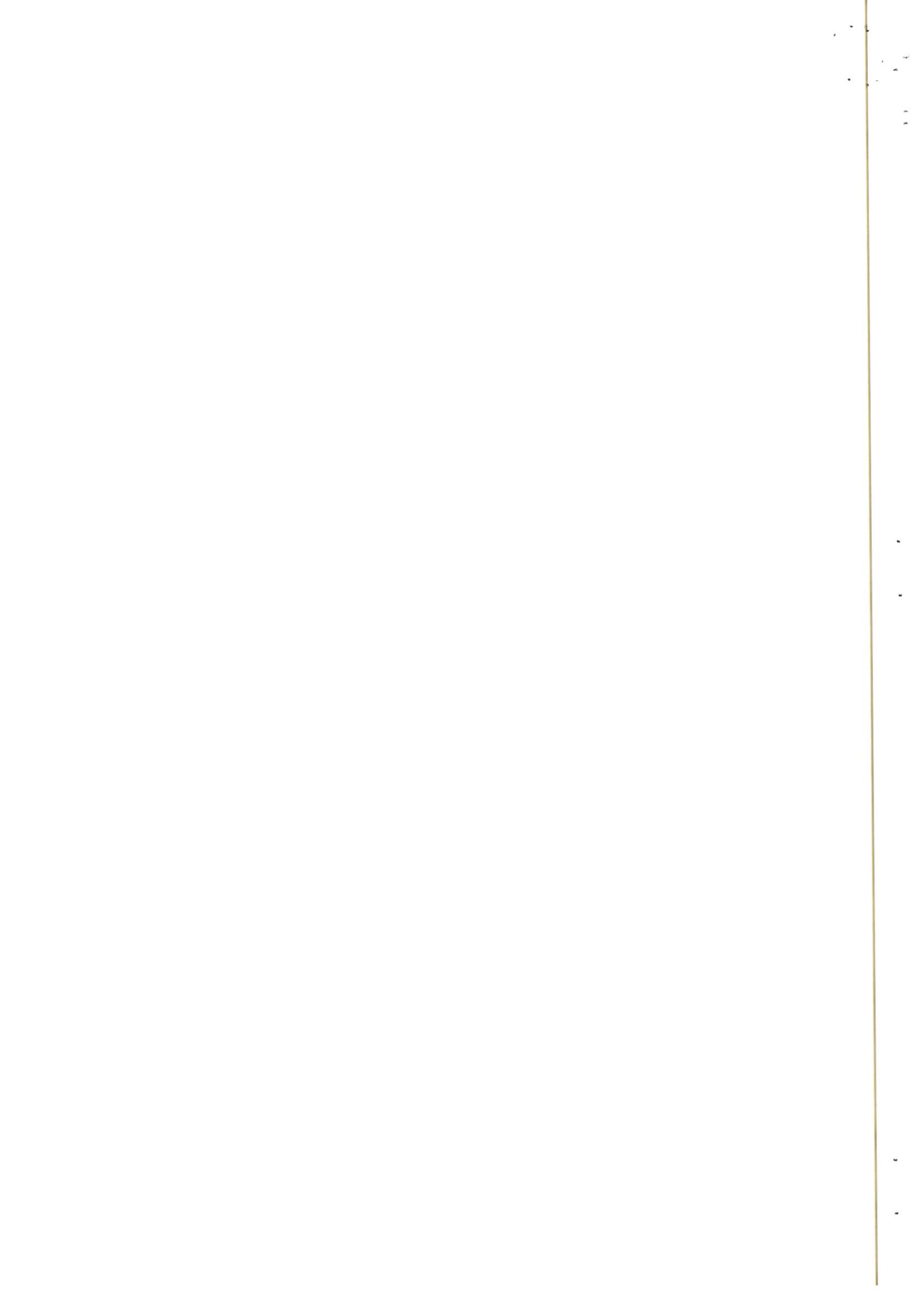
14. It is now my pleasant duty, on behalf of the Select Committee on Review of the Constitution of Kenya, to present and commend this report to the House.



Hon. Simeon Nyachae, MP

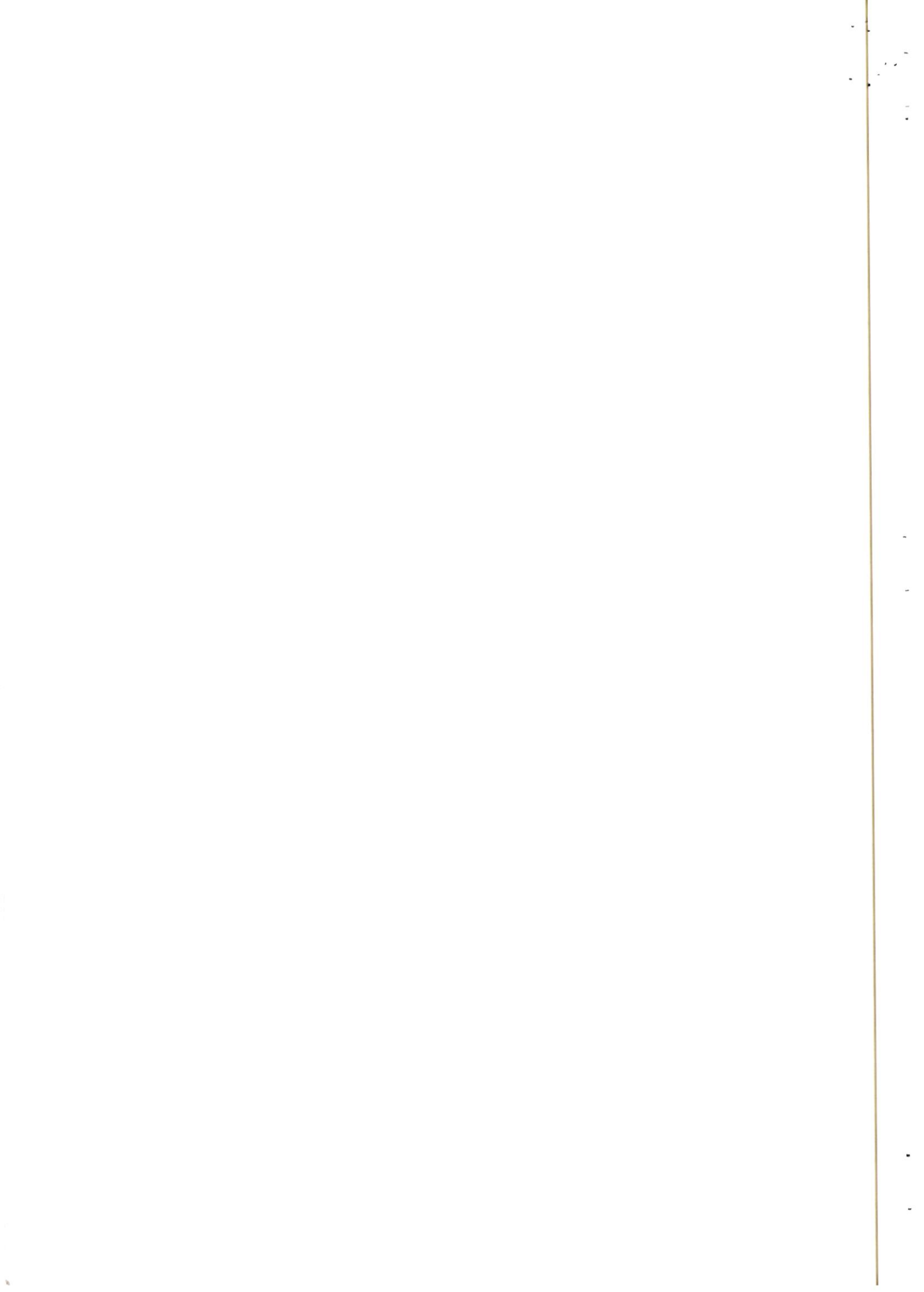
Chairperson

June 29, 2005



APPENDIX IV

REPORT OF THE RETREAT OF THE SELECT COMMITTEE, NOVEMBER 4-7, 2004 (PROPOSED AMENDMENTS TO CONTENTIOUS CHAPTERS ON THE DRAFT CONSTITUTION OF KENYA, 2004 - BOMAS DRAFT)



SUMMARY OF PROCEEDINGS OF THE RETREAT BY THE SELECT COMMITTEE: NOVEMBER 4 – 7, 2004.

The Select Committee undertook a retreat at Naivasha from November 4 to 7, 2004 to discuss contentious issues as identified by the Sub-Committee. The Committee made the following recommendations on the Bomas Draft:-

CHAPTER 4: CITIZENSHIP

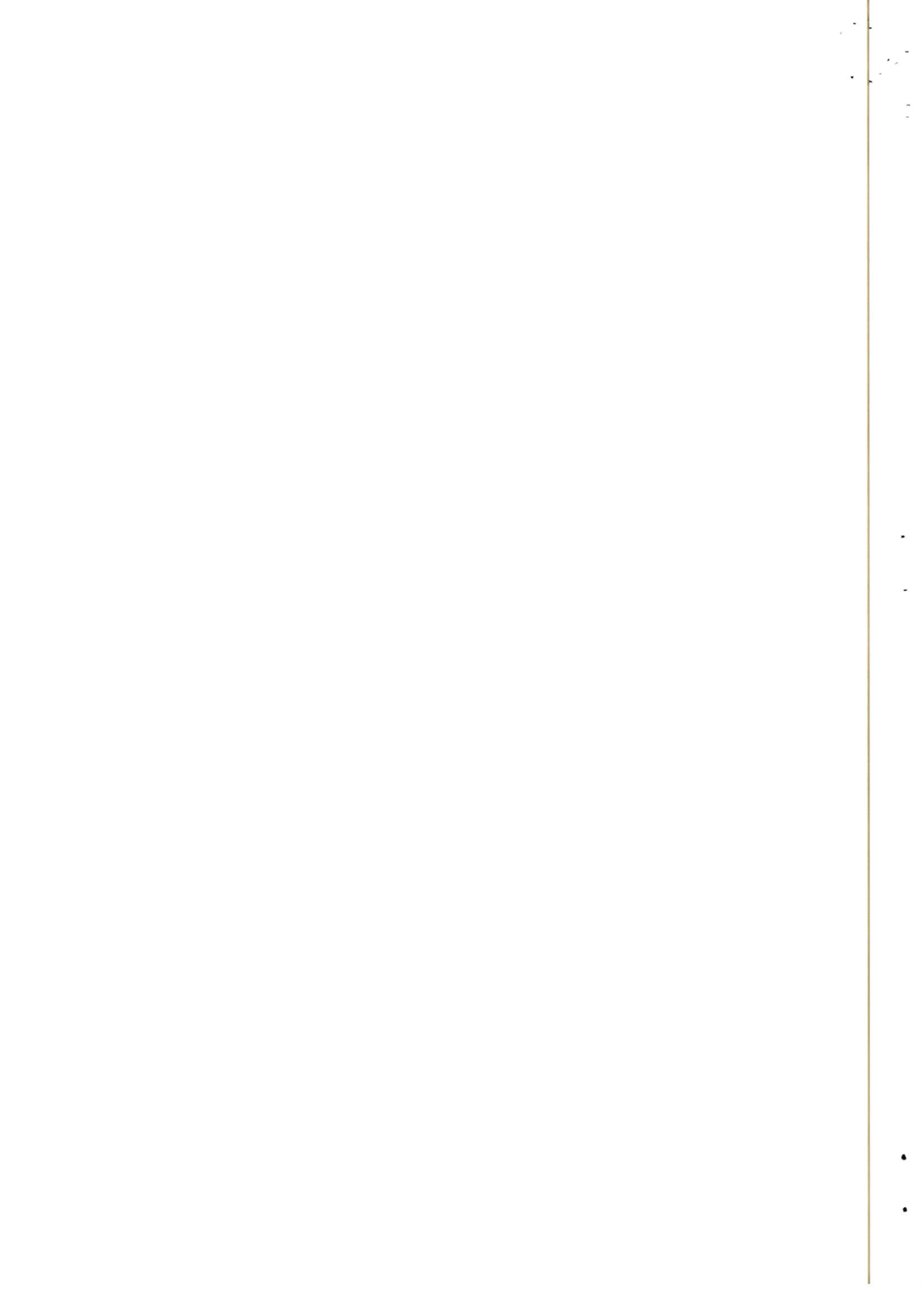
The Committee adopted the recommendations of the Sub-Committee providing for dual citizenship for persons who are citizens of Kenya by birth. Further, that;

(a) Under Article 17(1) delete the words '*is entitled on application*' and substitute in place thereof, the words '*is entitled to apply*'

(b) Under Article 18, applications for naturalization be provided for in an Act of Parliament.

CHAPTER 6 - BILL OF RIGHTS

The Committee adopted the recommendations of the Sub-Committee subject to an additional amendment for limitation of exercise of some of the rights in certain specified circumstances.



(a) **Article 34 – Right to Life**

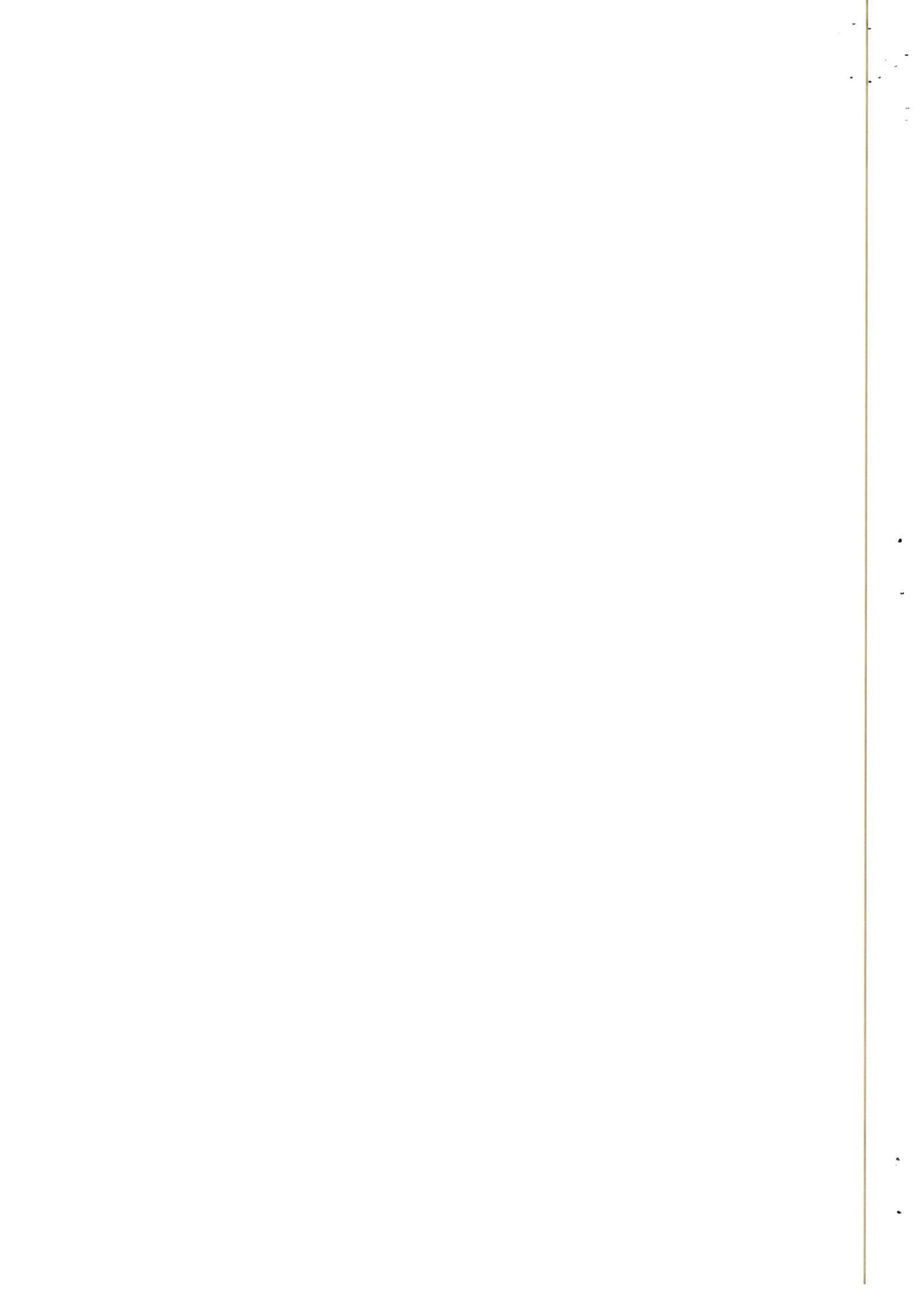
The Committee adopted the recommendations of the Sub-Committee; and further that Clauses (2) and (3) of the Article be deleted and a new Clause be substituted in place thereof to provide for limitations and qualifications to the Right to Life.

(b) **Article 50 – Freedom of the Media**

The Committee adopted the recommendations of the Sub-Committee and recommended that, provision be made that the rights stipulated under this Article require media responsibility especially, in relation to matters of public morality, safety, law and order. The Committee further recommended that additional provision be made for limitations as in the current Constitution and also as found in the International Covenant on Civil and Political Rights.

(c) **Article 51-Access to Information**

The Committee recommended that provision be made in the Article for legislation to provide for limitation of access



to certain information which could jeopardise state security.

CHAPTER 10 – REPRESENTATION OF THE PEOPLE.

The Committee considered the recommendations of the Sub-Committee and recommended that the provisions of the Chapter should remain as they are in the Draft Bill.

CHAPTER 11- THE LEGISLATURE

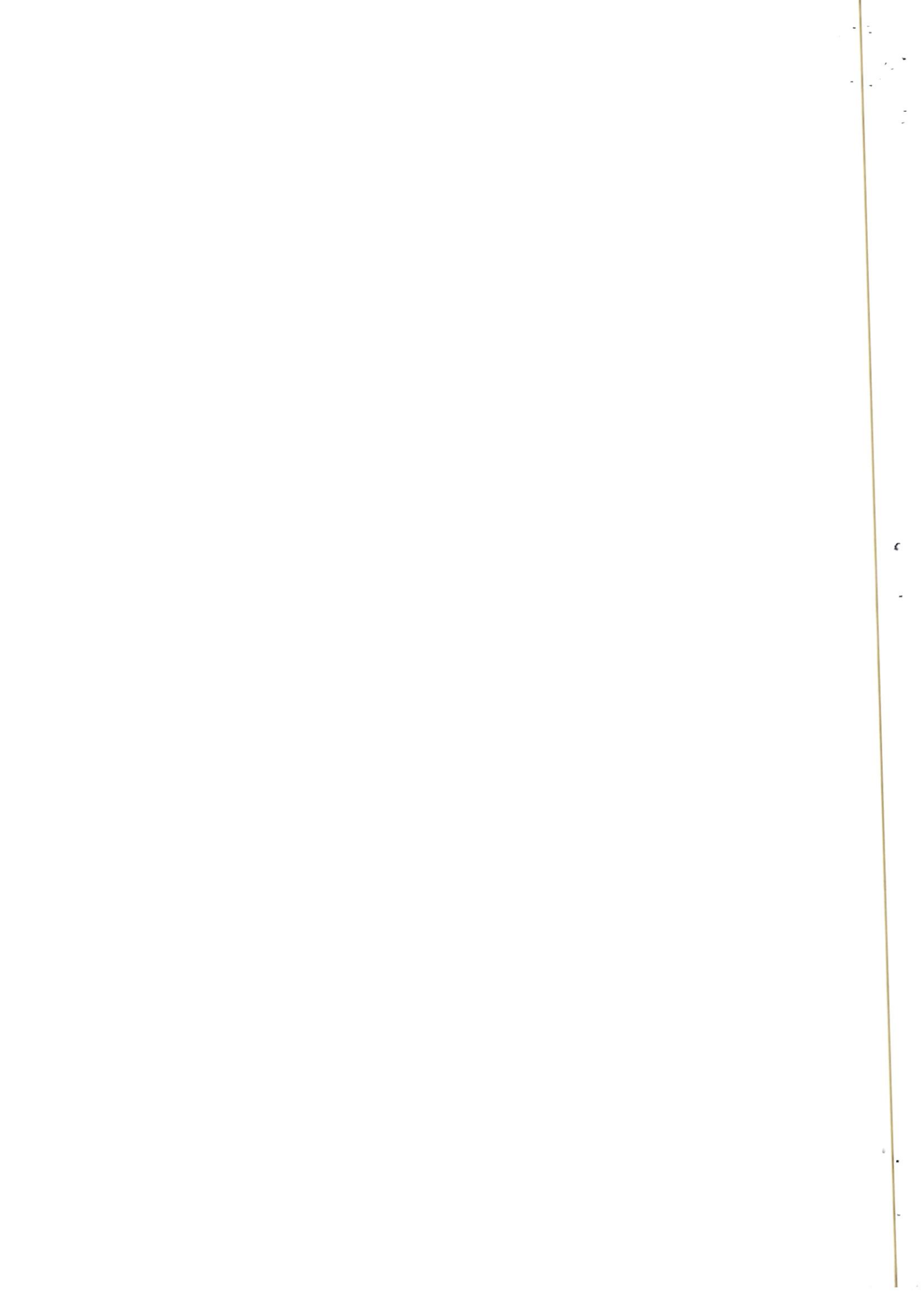
- (i) The Committee adopted the recommendations of the Sub-Committee and concurred in the scrapping of the Senate. The Committee recommended that provision be made for a forum for the leaders of the Counties to meet and deliberate on issues affecting the Counties.
- (ii) The Committee further recommended that, the process of impeachment of the President be by the National Assembly by a two third majority of all the Members of the Assembly.

CHAPTER 12 - THE EXECUTIVE

The Committee recommended the adoption of the Bishop Sulumeti Report (II) subject to certain amendments.

The following points were agreed upon:

1. That, the Executive authority of the Republic of Kenya will repose in the President, the Prime Minister and the Cabinet.
2. That, the President shall be elected in accordance with rules which will require the President to garner majority of votes countrywide and 25% in a majority of the Counties.
3. That, the President is the Head of State, Head of Government, Commander-in-Chief of the Armed Forces and Chair of the National Security Council.
4. That, the President shall appoint as Prime Minister the person who is the leader in Parliament of the Party or coalition of Parties with the majority support in Parliament and shall submit the name of the appointed Prime Minister to Parliament for approval by at least 50% vote of all Members of Parliament.
5. If the Parliament does not approve the nominated Prime Minister, the President shall nominate the leader in Parliament of the second largest party or coalition of parties and if the Parliament rejects the second nominee, then, the President shall nominate

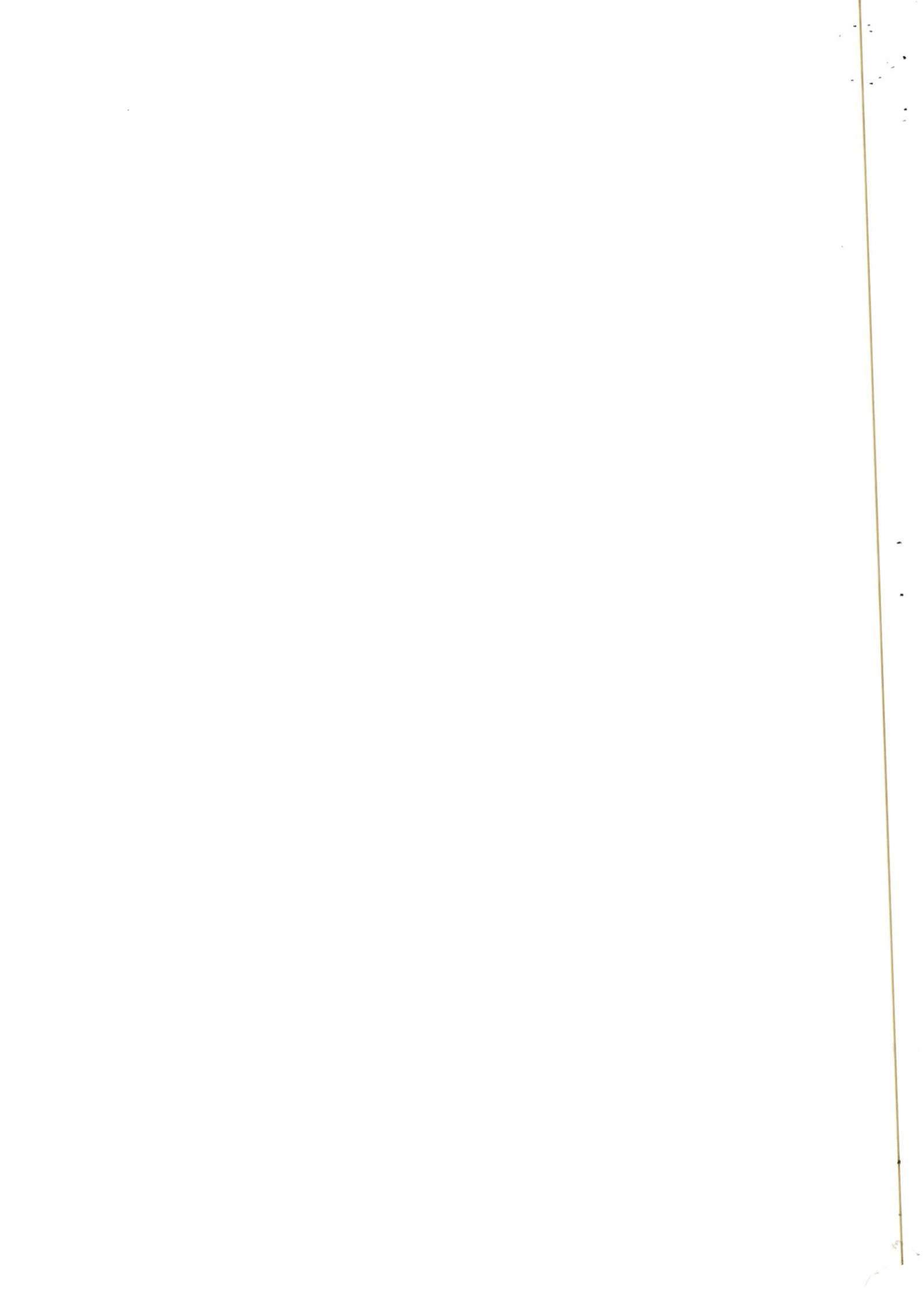


the third nominee who shall be accepted by the Parliament.

6. That, Cabinet Ministers shall be members of Parliament, but up to 20% of the Cabinet may be appointed from outside Parliament but such Ministers shall be ex-officio MPs.
7. That, the number of Cabinet Ministers and their Deputies shall each be not more than 25.
8. That, most of Government decisions shall be through the Cabinet.
9. That, (i) the Prime Minister shall have authority over the control, supervision and execution of the day-to-day functions and affairs of the Government of Kenya;

(ii) the Prime Minister shall be the Leader of Government Business in the National Assembly;

(iii) in the exercise of authority, the Prime Minister shall perform or cause to be performed any matter or matters which the President directs to be done; and



(iv) Subject to the provisions of this Constitution, the Prime Minister shall be accountable to the President for the exercise of his authority and responsible to the Cabinet and National Assembly – for the execution of the affairs of the Government of Kenya.

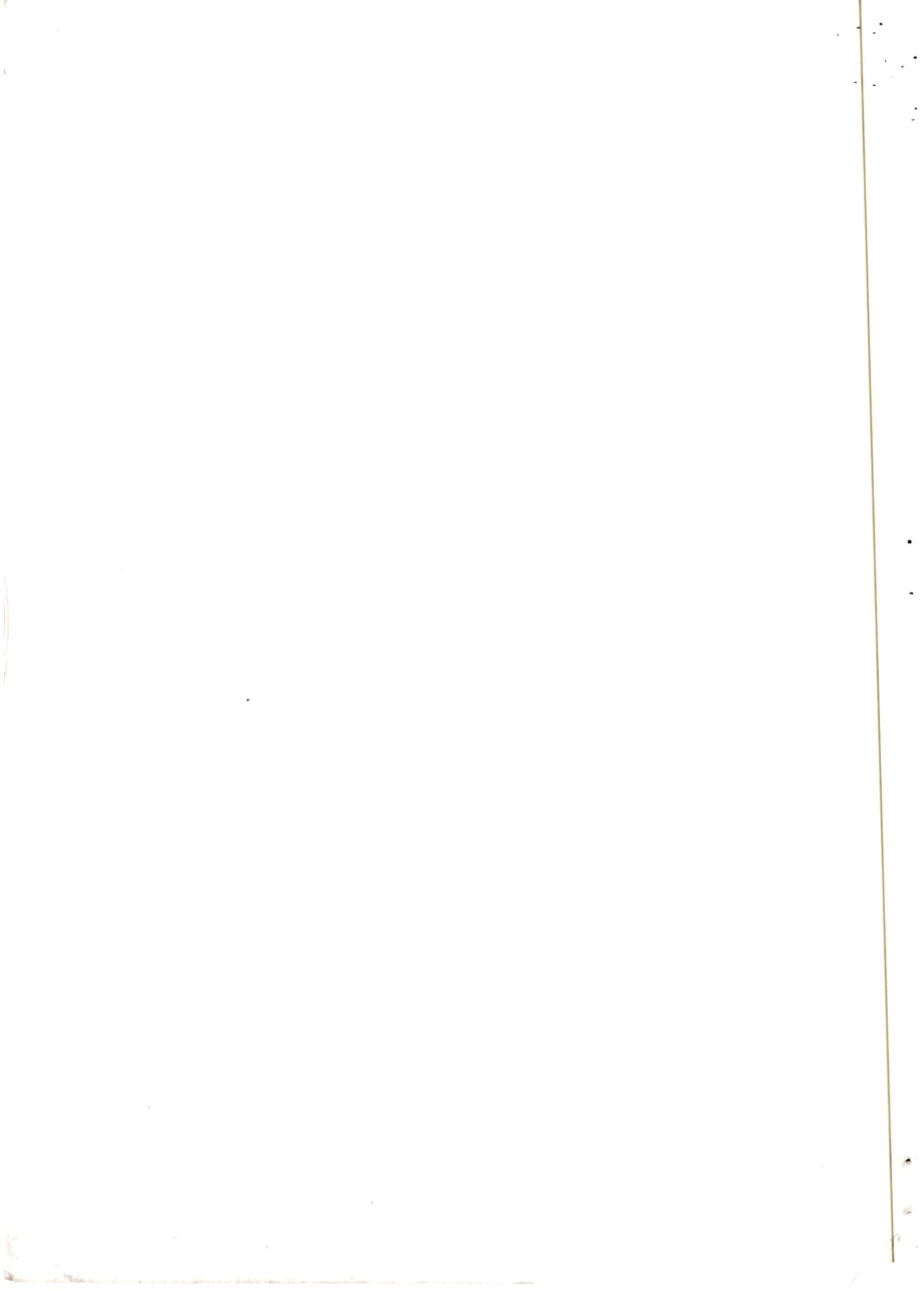
10. That, the Prime Minister may be dismissed in one of the following two ways:

(a) through a Motion introduced by the President and supported by fifty percent (50%) of Members of Parliament; and

(b) through a vote of No Confidence introduced by a Member of Parliament with the support of a third of Members of Parliament and voted for by at least fifty (50%) of Members of Parliament.

11. That, the functions of the President, the Prime Minister and the Cabinet are to be revised in light of these recommendations.

12. That, the President shall serve a maximum of two-five-year-terms. That, the emphasis is on the



President and the Prime Minister working in harmony.

13. That, the President shall appoint Principal Secretaries and members of the Public Service Commission in consultation with the Prime Minister.

14. That,

(i) the President shall appoint Ministers of the Cabinet and Deputy Ministers, and,

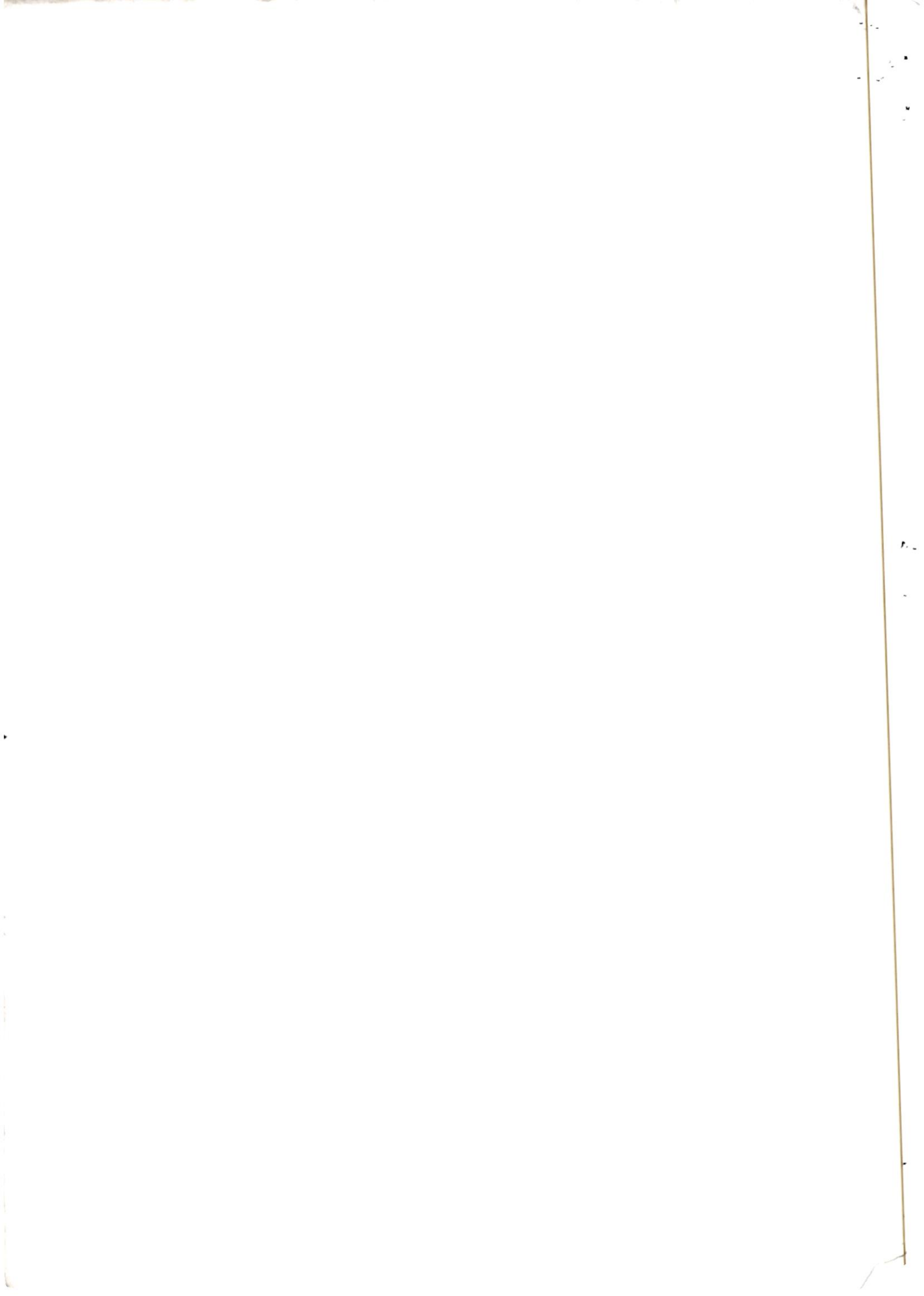
(ii) the President shall consult the Prime Minister and take into account the advice of the Prime Minister before appointing Ministers of Cabinet and Deputy Ministers under (i) above.

CHAPTER 13 – JUDICIAL AND LEGAL SYSTEM

The Committee adopted the recommendations of the Sub-Committee subject, to the following amendments:

(a) Article 33(5) – Limitation of rights

That, this Clause be deleted as it excludes persons covered under Articles 198 and 199 from access to other Courts.

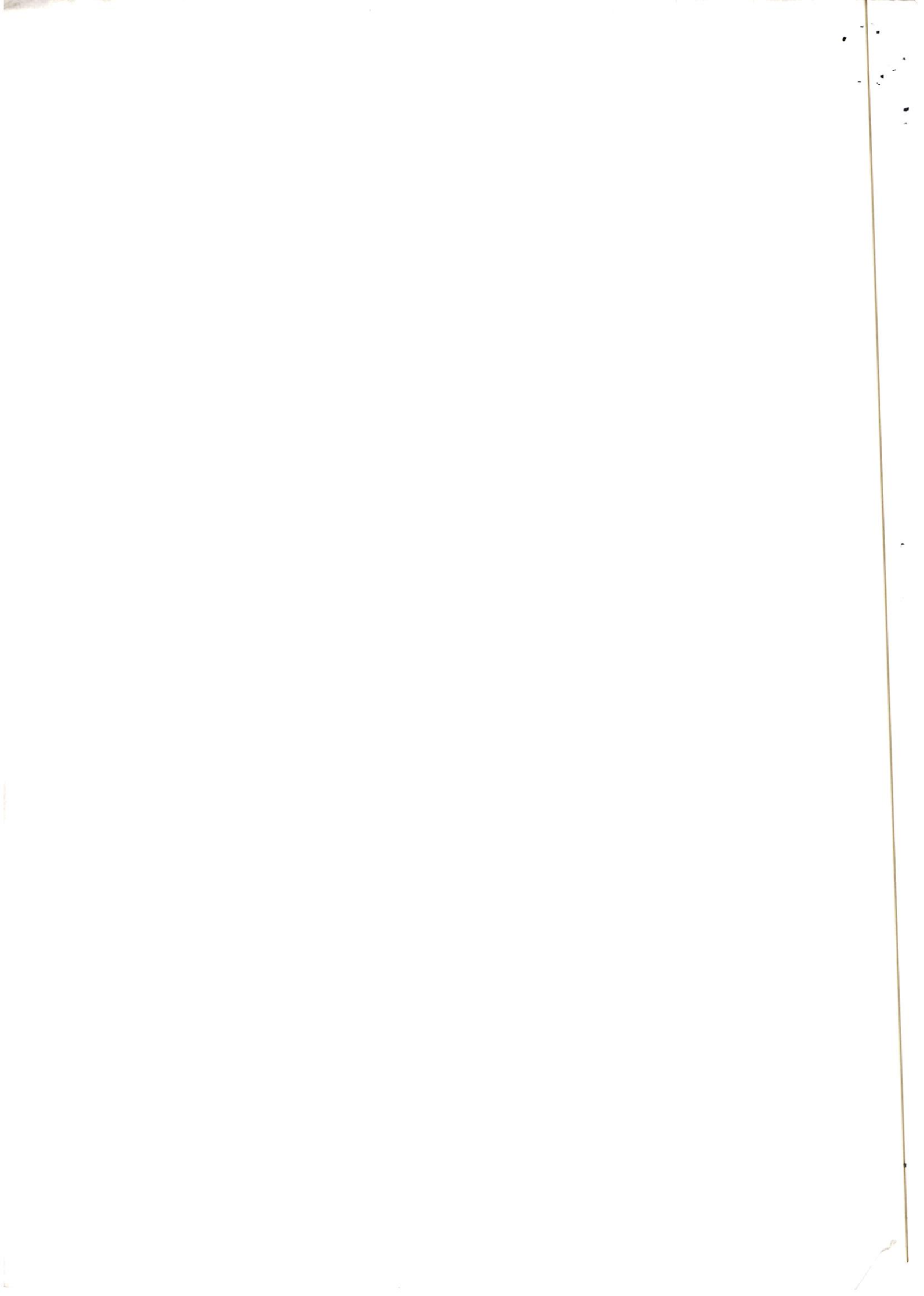


- (a) the roles assigned to the Regions, the Districts and the Locations in the Draft Bill be brought together to be the roles of the Counties. However, the current districts would remain in place as operational units;
- (b) independent Civil Service be established at each devolved level with linkage mechanism between the two levels, and the entire government; and
- (c) the Sub-Committee should develop the criteria for determining the size and the number of the Counties.

At a subsequent sitting held on November 30, 2004, the Committee adopted the recommendations of the Sub-Committee which proposed that, on the devolved Government:-

- (i) the existing 74 districts shall be the Counties;
- (ii) the Counties may be increased to not more than 100;
- (iii) in arriving at the additional Counties, following criteria be observed;

- Population density
- Community interest
- Geographical area



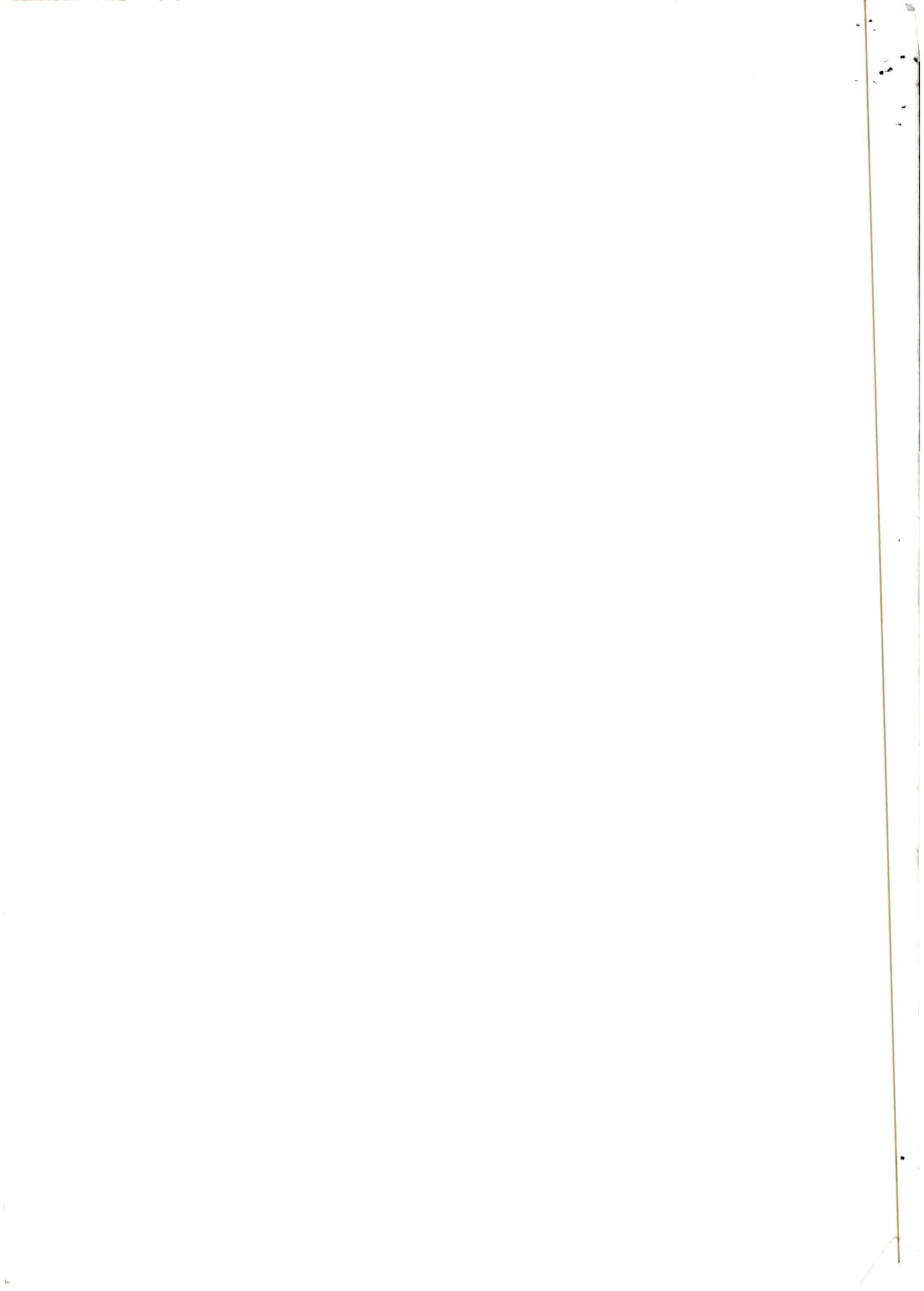
CHAPTER 18: CONSTITUTIONAL COMMISSIONS

The Committee adopted the recommendations of the Sub-Committee. However, the Sub-Committee was requested to reconsider the provisions of the Chapter and make recommendations with respect:

- (a) to reviewing and harmonizing the roles and functions of the Commissions to avoid duplication and ambivalence;
- (b) on possible merger and scrapping of some of the Commissions; and
- (c) on possible exclusion from the Constitution of those Commissions already existing by statute.

At a subsequent sitting held on November 30, 2004, the Committee adopted the recommendations of the Sub-Committee which proposed that the following Commissions be established by the Constitution, while the rest be created by appropriate legislation;-

- (a) Public Service Commission
- (b) Parliamentary service Commission



(b) **Article 198/199 - Jurisdiction of the Kadhi's Courts.**

- That, the words '*and submit to the Court's jurisdiction*' be inserted at the end of Article 199.
- That, provisions on Kadhi's Courts be left as in the current Constitution but that negotiations by the Constitution of Kenya Review Commission with the various stakeholders on the status of the Kadhi's Courts, should continue. If difficulties arise, then Article 200 may need to be reconsidered to determine whether to remove the Chief Kadhi from membership of the Judicial Service Commission or to increase its membership to include leaders of Christian religious denominations.

CHAPTER 14 – DEVOLVED GOVERNMENT

The Committee concurred with the Sub-Committee that there should be two levels of devolution; the National and the County; and further that:-

(c) Electoral and Boundaries Commission

(d) Judicial Service Commission

(e) Commission on Revenue Allocation

OTHER MATTERS

The Committee considered any other matter and resolved thus:-

- i. under Article 157, paragraph (d) and (e) be deleted;
- ii. that, the Draft Constitution was voluminous and the Review Commission should edit the document and recommend articles that can be reduced to Acts of Parliament

