



**Kenya National Assembly**

**TENTH PARLIAMENT - FOURTH SESSION (2011)**

**REPORT OF THE DEPARTMENTAL COMMITTEE  
ON JUSTICE AND LEGAL AFFAIRS**

On the Nominations to the Offices of Chief Justice,  
Attorney General and Director of Public Prosecutions

Clerk's Chambers  
Parliament Buildings,  
**NAIROBI**

**February 2011**

# PREFACE

Mr. Speaker Sir,

The Departmental Committee on Justice and Legal Affairs derives its mandate from provisions of Standing Order No. 198(3) which defines functions of the Committee as being:

- a) To investigate, inquire into, and report on all matters relating to the mandate, management, activities, administration, operations and estimates of the assigned ministries and departments;
- b) To study the programme and policy objectives of ministries and departments and the effectiveness of their implementation;
- c) To study and review all legislation referred to it;
- d) To study, assess and analyze the relative success of the ministries and departments measured by the results obtained as compared with their stated objectives;
- e) To investigate and enquire into all matters relating to the assigned ministries and departments as may be deemed necessary, and as may be referred to it by the House or a minister; and
- f) To make reports and recommendations to the House as often as possible, including recommendations of proposed legislation.

In accordance with Schedule II of the Standing Orders, the Committee is mandated to consider:

- a) Constitutional Affairs
- b) The administration of law and order (Judiciary, police, prisons department, and community service orders)
- c) Public prosecutions
- d) Elections
- e) Integrity

- f) Anti-corruption and human rights.

The Committee oversees the following Ministries/Departments:

- a) Ministry of Justice, National Cohesion and Constitutional Affairs
- b) State Law Office
- c) The Judiciary
- d) Kenya Anti-Corruption Commission
- e) Independent Electoral and Boundaries Commission

The Committee also has the mandate to oversee all matters relating to political parties as well as bills and petitions committed to it. The Committee also deals with matters referred to it by the House.

### **COMMITTEE MEMBERSHIP**

The Committee comprises of the following members:

- 1. Hon. Ababu Namwamba, M.P - Chairperson
- 2. Hon. Njoroge Baiya, M.P - Vice-Chairperson
- 3. Hon. Abdikadir Mohammed, M.P
- 4. Hon. Millie Odhiambo-Mabona, M.P
- 5. Hon. Mutava Musyimi, M.P
- 6. Hon. George Omari Nyamweya, M.B.S., M.P
- 7. Hon. Amina Abdalla, M.P
- 8. Hon. Olago Aluoch, M.P
- 9. Hon. Isaac K. Ruto, E.G.H., M.P
- 10. Hon. Sophia Noor Abdi, M.P
- 11. Hon. Eugene Wamalwa, M.P

## The Matter under Inquiry

On 28<sup>th</sup> January, 2011, the office of the President announced names of four nominees for the constitutional offices of Chief Justice (CJ), Attorney General (AG), Director of Public Prosecutions (DPP), and Controller of Budget. Shortly thereafter, the Right Honourable Prime Minister asserted that the said nominations had been done without the requisite consultation with his office, as required by the National Accord and Reconciliation Act, 2008.

The matter raised considerable public outcry, with different groups issuing press statements on the same, including the Commission for the implementation of the Constitution (CIC) and the Judicial Service Commission (JSC). The matter ultimately found its way to the floor of the House when the Member for Imenti Central, Hon. Gitobu Imanyara, MP, rose on a point of order to seek *“the assurance, guidance and direction of the Chair on what members of the National Assembly should do when incidents of gross violation of the Constitution occurred instigated by either members of the House, the Executive or the Judiciary”*. (Annex 1)

Subsequently, on Thursday 3<sup>rd</sup> February, 2011 the Hon. Speaker pronounced himself on the matter of the constitutionality of the said nominations, referring the matter to the relevant Departmental Committees in accordance with the Standing Orders and the law. The respective Committees were tasked with conducting the requisite inquiries into the nomination process and report to the House on or before Thursday 10<sup>th</sup> February, 2011, given the urgency of the matter and in consideration of constitutional deadlines. Standing Order 198 (3) empowers a committee of the House to, inter alia, *“investigate and inquire into all matters relating to the assigned ministries and departments as they deem necessary, and as may be referred to them by the House or a minister”*. Article 125 of the Constitution mandates Parliament and its Committees to call evidence, including summoning witnesses, and in doing so *“a House of Parliament and any of its Committees has the same power as the High Court”*. (Annex 1)

## Committee Sitings

The Committee commenced sittings on this matter on 7<sup>th</sup> February, 2011. At this first sitting, Members discussed and adopted the following issues as constituting the specific task the Committee was seized of pursuant to the afore-mentioned Communication from the Chair:

- a). Constitutionality of the nomination process
- b). Whether the ruling by Justice Daniel Musinga in Nairobi High Court Petition No. 16 of 2011 was binding on Parliament and by extension on the Committee
- c). Applicability and implications of the *Sub-Judice* rule
- d). Implications of this whole matter on the legitimacy and credibility of the state institutions concerned.

It was concluded that depending on the responses to the above questions, if constitutional, the Committee would proceed to vetting of the nominees, and if unconstitutional, vetting would not proceed.

In interrogating these issues, the Committee held a total of thirteen (13) sittings besides a 3-day report writing retreat. The Committee received various written memoranda on the subject, as well as oral submissions from the following eleven institutions:

1. Office of the President
2. Office of the Prime Minister
3. Commission for the Implementation of the Constitution
4. Judicial Service Commission
5. Law Society of Kenya
6. Federation of Women Lawyers
7. International Commission of Jurists
8. Transparency International
9. National Coalition of Women on the Constitution
10. Youth Platform on Reform, and

11. The National Muslim Leaders Forum (NAMLEF).

The substance of evidence gathered from them is contained elsewhere in this report (see *“Summary of Evidence Received”* from page 14 hereof). The Committee further identified the following documents as key reference material on this matter:

1. Records of meetings and correspondence between the two Principals, His Excellency President Mwai Kibaki and the Rt. Hon Raila Odinga, Prime Minister of the Republic.
2. The National Accord and records leading to its signing.
3. Hansard record of constitutional talks by the Committee of Experts (CoE) and the Parliamentary Select Committee on Constitution Review (PSC) on the relevant matters.
4. Minutes and statements by the Judicial Service Commission (JSC) and the Commission on Implementation of the Constitution (CIC).
5. The Hon. Speaker's rulings, including the ruling on the question of Leader of Government Business.
6. The pleadings (including the affidavits), court proceedings and the court ruling by Justice Musinga.

### **Acknowledgements**

The Committee wishes to thank the Offices of the Speaker and the Clerk of the National Assembly for the support extended to it in the execution of its mandate.

**Mr. Speaker Sir,**

It is my pleasant duty and privilege, on behalf of the Departmental Committee on Justice and Legal Affairs, to present and commend this report to the House pursuant to Standing Order No. 181.

**Signed.....**

**Hon. Ababu Namwamba, MP**

**CHAIRPERSON**

**Date: .....**

## BACKGROUND

1. On Tuesday 1<sup>st</sup> February, 2011, the Member for Imenti Central, Hon. Gitobu Imanyara, rose on a point of order to seek *“the assurance, guidance and direction of the Chair on what members of the National Assembly should do when incidents of gross violation of the Constitution occur, instigated by a Member of the House, Executive or the Judiciary”*. **(Annex 1)**
2. The Honourable Member drew the attention of the Speaker to provisions of Article 3(1) of the constitution that enjoins every person to respect, uphold and defend the Constitution. The Member further drew the attention of the Chair to, and tabled a press statement by the Judicial Service Commission, *inter alia*, *“expressing concern and misgivings about the nomination of the Chief Justice made by the President”*. The Judicial Service Commission held the view that in order to give the process of appointing judicial officers legitimacy, public confidence, ownership and acceptance by the people of Kenya, the Commission must play an integral role in the process as contemplated by Article 172 as read with Article 166(1) of the Constitution, alongside Section 24 of the Sixth Schedule to the Constitution. **(Annex 2)**
3. The Honourable Member also tabled a press statement by the Commission for the Implementation of the Constitution (CIC) which *inter alia*, stated that the process of appointment of the Chief Justice should commence with recommendations by the Judicial Service Commission to the President who in turn should consult the Prime Minister after which the President should forward the name of the nominee to the National Assembly. **(Annex 3)**
4. The Honourable Member claimed to be aware that the Right Honourable Prime Minister disassociated himself from the nomination process and it was the Member’s view that there was a clear attempt to undermine the Constitution thereby creating a dangerous precedent defeating the essence of the long crusade for a new constitutional order.

5. The Honourable Member further tabled a letter from the Prime Minister addressed to the Hon. Speaker disputing that he was consulted on the nominations and that nominations were made jointly between himself and the President. **(Annex 4)**
6. Hon. Imanyara sought direction and guidance from the Chair on how the House should proceed, highlighting provisions of Standing Order No. 47 which gives the Speaker discretion to outlaw any proposed Motion that is contrary to the Constitution without expressly proposing appropriate amendment of the Constitution.
7. The Speaker allowed considerable ventilation on this matter and filtered the issues as follows:-
  - a) Whether the Speaker is competent to pronounce or determine the constitutionality of the nominations to the office of Chief Justice, Attorney General, Director of Public Prosecutions and Controller of Budget;
  - b) Whether Parliament is properly seized of the matter of the nominations and their propriety for disposal by the House or whether this would be a matter for other constitutional organs and, in particular, the Judiciary;
  - c) Whether the opinion of the Commission for the Implementation of the Constitution and the Judicial Service Commission on such a matter should be considered;
  - d) Whether the Judicial Service Commission ought to have been involved in the nomination process and whether the process ought to have been competitive, transparent and participatory as provided in the Constitution;
  - e) Whether there was consultation between the President and the Prime Minister as contemplated by Section 29(2) of the Sixth Schedule to the Constitution and whether consultation denotes concurrence, consensus or other measure of agreement;

- f) Whether a serving member of the Judiciary is eligible to be nominated and appointed as Chief Justice;
  - g) Whether the nominations meet the constitutional requirements of regional balance and gender parity; and
  - h) Whether the questions raised on the nominations amount to a dispute within the provisions of the Political Parties Act.
8. In his Communication from the Chair on 3<sup>rd</sup> February, 2011 (**Annex 1**), the Hon. Speaker determined, *inter alia*, that:
- a) Standing Order No. 47 is inapplicable in the circumstances and cannot be relied on for the guidance sought by Hon. Imanyara as there was no Motion before the House; and further that the procedure and practice that have evolved in the House in relation to the vetting of persons for approval by the National Assembly required the relevant Committees to consider all aspects related to the suitability of the candidates proposed as well as the constitutionality or legality of the processes by which the nominees were determined and thereafter bring a Motion to the House for debate.
  - b) The Committee in its deliberations may call for evidence in the usual manner, including summoning the nominees to physically appear before it for vetting, summoning witnesses to assist it in making findings both of fact and of law and receiving representations from the public on the legality of the process or the suitability or otherwise of particular nominees.
  - c) The letter from the Office of the President forwarding the names of the nominees (**Annex 5**) and another by the Prime Minister objecting the list of nominees be forwarded to the Departmental Committee on Justice and Legal Affairs and that of Finance, Planning and Trade according to their respective mandates for disposal as provided for in the Standing Orders and the law.

# COMMITTEE DELIBERATIONS

In inquiring into the matter of nominations to the three constitutional offices of Chief Justice, Attorney General and Director of Public Prosecutions, the Committee applied the following four parameters as the guide:

## 1. Constitutionality of the Process:

The Committee considered the full spectrum of constitutionality of process, including the question of interpretation of the constitution; the central constitutional principles of rule of law, good governance, equal opportunity, public participation, gender equity and regional balance; as well as the meaning and constitutional threshold of “*consultation*” as envisaged by the Constitution and the National Accord and Reconciliation Act, 2008. Members agreed that there was need to define what consultation is and the applicable constitutional threshold. Majority of the Members held the view that consultation is neither concurrence nor mere information or notification. Some Members thought it prudent to define varied meanings of consultation such as ‘*full consultation*’, ‘*after consultation*’, ‘*in consultation*’, ‘*with consultation*’, ‘*prior consultation*’ and ‘*post consultation*’. Ultimately, the Committee was unanimous in noting the importance of having a constitutional threshold against which consultation could be measured, and resolved that this issue should be settled from expert opinion rendered before the Committee as well as persuasive precedent.

## 2. The Question of *Sub-Judice*

The Committee had extensive discussions on whether it could properly and legally proceed with consideration of the matter of the nominations in light of the recent ruling delivered by Justice Daniel Musinga on 3<sup>rd</sup> February, 2011 in Nairobi High Court Petition No. 16 of 2011<sup>1</sup> on the matter (**Annex 6**), and other pending cases, given that Standing Order No. 80(2) provides that:

---

<sup>1</sup> Centre for Rights Education and Awareness (CREW) and Others vs the Attorney General

*“A matter shall be considered to be sub-judice when it refers to active criminal or civil proceedings and the discussion of such matter is likely to prejudice its fair determination”.*

Opinion was varied on this matter. Some Members were of the view that Standing Order 80(2) did not preclude the committee from proceeding with its work since even after the matter was brought to the attention of the Speaker, he had still asked the Committee to proceed. Others held the opinion that the Speaker had not been given the full substance of the matter and that indeed the case was active since the applicants had requested for a hearing date and consequently, only the Speaker could authorize the Committee to proceed in accordance with Standing Order 80(5), which provides that.

*“Notwithstanding this Standing Order, the Speaker may allow reference to any matter before the House or Committee”.*

Majority of the Members agreed that the matter was not *sub-judice*, anyway, since procedure is *“the handmaiden of substance”*, intended to facilitate not to curtail the same. It was further agreed to bring to the attention of the Speaker this issue of *sub-judice* for his further guidance that would form part of the report, but meanwhile proceed to consider other matters. Indeed the Hon. Speaker did subsequently make a ruling on the matter on Thursday, February 10<sup>th</sup>, 2011 (**Annex 5**) to the effect that the Legislature could still proceed with a matter in its domain notwithstanding a ruling from the courts on the same matter.

### ***3. Whether the Court Ruling was Binding***

Members unanimously agreed that courts of law could not stop Parliament from conducting its legislative business, a truism underscored by the hallowed principle of Separation of Powers, which dictates that one arm of government cannot control the other on how and when to conduct its business. The Committee agreed that the

Court ruling would be part of the reference materials for its deliberations, but it could not stop the Committee from proceeding with its business.

#### ***4. The credibility and legitimacy of the concerned institutions***

The Committee noted that both the Judiciary and the State Law Office are key organs of state that required a high degree of public confidence, which is in turn determined by their demonstrable legitimacy and credibility. It was accordingly essential to consider how this whole nomination process would impact the two institutions, especially in view of the prevalent lack of public faith.

To help inquire into these four issues, the Committee identified the following documents as reference materials in its deliberations:

- 1) Minutes and agenda of meetings between the President and Prime Minister
- 2) Minutes and report of the Technical Committee on the nominations
- 3) Court pleadings (including affidavits), proceedings and ruling in HC No. 16/2011.
- 4) The letter from the President to Parliament
- 5) The letter from the Prime Minister to Parliament
- 6) The Speaker's ruling of 3<sup>rd</sup> February, 2011
- 7) Minutes of the Commission for the Implementation of the Constitution meeting that led to its press release, and the press statement itself
- 8) Minutes of the Judicial Service Commission meeting that led to its press release, and the press release itself
- 9) Hansard records of the Parliamentary Select Committee on Constitution Review (PSC) on discussions regarding transitional provisions on the Judiciary, and the appointment procedure of the Chief Justice, Attorney General, and Director of Public Prosecutions
- 10) The Hansard records of the Committee of Experts (CoE) on discussions regarding the transitional provisions on the Judiciary, and the appointment procedure of the Chief Justice, Attorney General, and Director of Public Prosecutions.

11) The National Accord and Reconciliation Act, 2008, and records leading to its signing

The Committee then framed the following questions to guide its deliberations:-

- a) What is the meaning of the word '*consultation*' with regard to the Constitution and the National Accord and Reconciliation Act, 2008?
- b) Has there been consultation in the process of the nominations of the Chief Justice, the Attorney General and the Director of Public Prosecution?
- c) What are the relevant constitutional principles and how do they impact the nominations to the offices in question?
- d) What is the best way forward?

## **SUMMARY OF EVIDENCE RECEIVED**

The Committee invited and received oral and written submissions from the following institutions in relation to this matter:

1. Office of the President
2. Office of the Prime Minister
3. Commission for the Implementation of the Constitution (CIC)
4. Judicial Service Commission (JSC)
5. Law Society of Kenya (LSK)
6. Federation of Women Lawyers (FIDA) – Kenya
7. International Commission of Jurists (ICJ) – Kenya
8. Transparency International (TI) – Kenya
9. National Muslim Leaders Forum (NAMLEF)
10. National Women’s Coalition for the Constitution
11. Youth Partnership for Change (YP4C)

A brief written submission was received from a source calling itself “*Youth Katiba Network*”, which, however, did not appear before the Committee.

### **1.0 SUMMARY OF PRESENTATION BY THE OFFICE OF THE PRESIDENT**

The office of the President was represented by the following officials:

- 1) Amb. Francis Muthaura, EGH: Head of Civil Service and Secretary to the Cabinet
- 2) Professor Kivutha Kibwana: Advisor to the President on Constitutional Affairs
- 3) Professor Nick Wanjohi: Private Secretary to the President
- 4) Mr. K. Kihara: Liaison Officer, Office of the President.

- 1.1 Ambassador Muthaura, accompanied by the three officers from the Office of the President highlighted that there was consultation between the President and the

Prime Minister on the nominations to the offices of Chief Justice, Attorney General and Director of Public Prosecutions. He noted that two meetings had been held on the matter - on 6<sup>th</sup> January, 2011 and 27<sup>th</sup> January, 2011.

1.2 In the meeting of 6<sup>th</sup> January 2011, the agenda was: fast tracking of the appointments necessary for the establishment of local mechanism for the trial of the post-election violence suspects; advertisement for the three positions of Attorney General, Chief Justice and Director of Public Prosecutions; advertisement for the post of Controller of Budget; and renewal of the contract for the Director-General of National Intelligence Service.

1.3 He submitted that the President was guided by provisions of the Constitution on the process of appointment to these offices as follows:

1.3.1 For the office of the Chief Justice, by Section 24 of the Sixth Schedule to the Constitution, which provides that:

*A new Chief Justice shall be appointed by the President, subject to the National Accord and Reconciliation Act, and after consultation with the Prime Minister and with the approval of the National Assembly.*

His view was that after the transition period, the process would be carried out in accordance with Article 166(1)(a) of the Constitution, which states:

*The President shall appoint:*

*(a) the Chief Justice and the Deputy Chief Justice, in accordance with the recommendation of the Judicial Service Commission, and subject to the approval of the National Assembly.*

1.3.2 For the offices of the Attorney General and Director of Public Prosecutions, by Articles 156 and 157, as appropriately read together with Section 29 of the Sixth Schedule to the Constitution:

*156(2) the Attorney-General shall be nominated by the President and, with the approval of the National Assembly, appointed by the President.*

*157 (2) the Director of Public Prosecutions shall be nominated and, with the approval of the National Assembly, appointed by the President.*

- 1.4 With respect to appointments to these three offices, the process was also guided by Article 259(11) of the Constitution, which provides that:

*If a function or power conferred on a person under this Constitution is exercisable by the person only on the advice or recommendation, with the approval or consent of, or on consultation with, another person, the function may be performed or the power exercised only on that advice, recommendation, with that approval or consent, or after that consultation, except to the extent that this Constitution provides otherwise.*

- 1.5 Ambassador Muthaura acknowledged that approval or consent of the National Assembly was mandatory, and that consultation by the President with the Prime Minister was equally mandatory. However, he submitted that consultation does not mean the Prime Minister must concur, or approve, or consent, otherwise the word consultation in Article 259(11) would have been excluded and replaced with approval or consent.

- 1.6 The officers present also highlighted that a strict reading of Section 4(2) and (3) of the National Accord and Reconciliation Act, 2008 which defines the composition of the coalition government does not extend the Accord law to cover non-cabinet positions. The said sections 4(2) and (3) provide as follows:

*4(2) In the formation of the coalition government, the persons to be appointed as Ministers and Assistant Ministers from the political parties that are partners in the coalition other than the President's party shall be*

*nominated by the parliamentary leader of the party in the coalition and thereafter there shall be full consultation with the President on the appointment of all Ministers.*

*4(3)The Composition of the coalition Government shall at all times reflect the relative parliamentary strength of the respective parties and shall at all times take into account the principle of portfolio balance.*

- 1.7 The officials further informed the Committee that they had prepared gazette notices to advertise the jobs, but upon advice from the Prime Minister's Chief of Staff informing the Principals that there was no legal requirement for the advertisement, the Principals opted to go ahead with the nomination process through a Technical Team comprised of officials from both offices. This position was supported by Professor Kivutha Kibwana, the President's Advisor on Constitutional Matters. The Technical Team was to provide a list of names to submit to the Principals for consideration. It was further agreed that nomination of the Deputy Chief Justice was to be done through the Judicial Service Commission.
- 1.8 At the meeting of 27<sup>th</sup> January, 2011, a list of proposed names was presented, but there was no agreement between the Principals, especially on the positions of Chief Justice and Attorney General. The Prime Minister proposed a commonwealth judge to be interim Chief Justice as the current judges had not been vetted yet. He was also of the view that the name proposed for Chief Justice, Justice Paul Kihara Kariuki, did not have a track record in reforms and was way below in on the roll of seniority. He proposed that if the idea of an interim Commonwealth judge was not acceptable, then seniority should be the guiding criteria, in which case the top contender would be Justice Riaga Omollo, who is currently the senior most judge in the judiciary, besides current Chief Justice Evan Gicheru.
- 1.9 He further indicated that it was noted that Mr. Fred Ojiambo, who had been originally proposed by the President for the position of Attorney General, did not have post graduate qualifications and that is why his name was dropped.

- 1.10 Because of the impending foreign travel by the President and Prime Minister, the President's office proposed two new names for Chief Justice and Attorney General to expedite the matter. The Prime Minister is said to have been okay with the choice of Attorney General, but still felt a commonwealth judge should be interim Chief Justice.
- 1.11 The President's office repeatedly tried to reach the Prime Minister in Addis Ababa for the Principals to continue consultations and make a final determination on the appointees, without success.
- 1.12 Due to the need for the process to be concluded by Saturday, before the President left to attend the AU Summit in Addis Ababa, coupled with the failure to reach the Prime Minister, the President went for a third choice, Justice Alnashir Visram, to forestall ethnic concerns, and proceeded to announce the list of nominees in a press statement on the evening of Friday, 28<sup>th</sup> January, 2011.
- 1.13 The President's office believes adequate public participation was done. Ambassador Muthaura however did concede that if the African Union Summit had not been due that weekend, consultations would have continued and ended with a more harmonious decision. The haste was occasioned by the urgency of presenting a position to the African Union on the pace of judicial reforms in order to persuade them to lobby for deferral of the cases currently before the International Criminal Court (ICC). In the words of Muthaura, they had indeed been consulting with the intention of *"reaching agreement"*.
- 1.14 On the issue of gender, Muthaura stated as follows (**Annex 8**):
- ".....it is a very serious constitutional obligation to make sure that either gender is adequately represented. Gender here does not mean women. It means that either gender is represented in these state offices and the public service as a whole. There is a 30 per cent threshold requirement and we have an obligation to make sure that it happens. Here we are talking about no discrimination on gender basis as to who*

*becomes the chair, the vice, the chief or the deputy. Women are not condemned and I am sure that is the concern of our sister there. Not only women will be considered as deputies or leaders. In these appointments, our view was that representation should be looked at in terms of institutions because these are heads of institutions. For example, in the judiciary, if you have a Chief Justice who is a man at least you need to have a deputy who is a woman or vice-versa. That is the rule that we are using. This also applies to the other institutions like the Controller of Budget. The same applies to other jobs like the Attorney-General. If you go to the Attorney-General's office women actually reign”.*

- 1.15 When asked by a member of the Committee whether the office of the President or the office of the Prime Minister had given any instructions to the Attorney General to represent the position he took in the Nairobi High Court Petition No. 16/2011, Ambassador Muthaura said the Executive was a bit upset on those proceeding in view of the position which the AG took during the case. According to him *“the AG became partisan in that case”*.
- 1.16 When asked whether he had the constitutional power to write to Parliament on the nominations, he said he was instructed to do so on behalf of the President.
- 1.17 Amb. Muthaura summed up consultation in the context of the coalition government thus: *“for persons working together, you can consult through the telephone, somebody going across the office and somebody asking another person to convey a message. Consultation in the setting of the President and the Prime Minister is a daily affair. If you structure it too much you make it too rigid and sometimes you create more conflict...they approve a decision, we make it public”*.
- 1.18 Questioned on the apparent casual manner of keeping record of meetings between the Principals, Muthaura stated that often the Principals met alone and only gave a briefing to their aides, with each side taking notes according to their understanding. This explains the absence of regular minutes, and could be a sources of constant misunderstandings.

1.19 Finally, as a way forward, he said the President would like Parliament to approve the nominees in order to push the reform agenda forward.

## 2.0 SUMMARY OF PRESENTATION BY THE OFFICE OF THE PRIME MINISTER

The Office of the Prime Minister was represented by:-

1. Mr. Caroli Omondi: Chief of Staff
2. Mr. Mugambi Imanyara: Prime Minister's Special Advisor on Legal Affairs
3. Mr. Miguna Miguna: Permanent Secretary for Coalition Affairs.

2.1 The Chair invited the officers from the Office of the Prime Minister and posed to them the following questions:-

- a) *What the office of the PM considers to be consultation with reference to the National Accord and Reconciliation Act, 2008 and the Constitution.*
- b) *Whether there were consultations in the process that led to nominations for the three offices of Chief Justice, Attorney General and Director of Public Prosecution.*

2.2 Mr. Caroli Omondi reiterated that the matter in issues was much broader than the question of consultation: it went to the very core of the Constitution and the very heart of the Coalition Government and how it came to be. He opened his presentation with by reading a passage from the Executive Summary of the *Kriegler Report* and conclusions therein to the effect that due to the anomalies in the results of the 2007 elections, there had been no way to ascertain the clear winner in that presidential race. He reminded the Committee that the legitimacy of the current Government was wholly anchored on the National Accord and Reconciliation Act signed in 2008.

2.3 Referring the Committee to the preamble of the National Accord and Reconciliation Act, 2008 and the main document signed by the Principals as the precursor to the Act, Mr. Omondi reiterated that there was now a coalition government with two Principals sharing executive powers and therefore neither side could govern the country on its own and that power sharing must be real. He pointed out that all new appointments today under the new Constitution are regulated by National Accord and Reconciliation Act, as expressly required by Section 29 of the Sixth Schedule to the Constitution. The National Accord sets out the partnership between the Principals and real power sharing and therefore not one principal can unilaterally make appointments without the other.

### **The Key Tests on Consultation**

2.4 In the most elaborate submission on the threshold of consultation, the delegation from the Prime Minister's office presented to the Committee the following 12 key tests of consultation, based on case studies submitted and which form part of this report:

- 1) Consultations require that each party must have sufficient opportunity to exchange views. The question therefore is, did the parties have sufficient opportunity to exchange their views?
- 2) Parties in consultation must share sufficient information available on each nominee, in this particular case on the basis of full disclosure of accurate and material information;
- 3) Parties consulting must act reasonably and not with caprice or in a manner that undermines the very process they are trying to engage in;
- 4) There must be free and frank exchange of views;
- 5) parties must receive the views of the other side with an open mind;
- 6) Consultation must begin at the very preliminary stage and continue to the end;
- 7) Consultation must not be treated as a mere formality;

- 8) Consultation is not an act of notification;
- 9) In some specific circumstances it means agreement;
- 10) Macmillan dictionary states that consultation must be practical; conducted within a time frame for a matter to be fully interrogated;
- 11) Urgency is not a substitute to sufficient time for practical consultations;
- 12) It means compromise - a meeting of minds, what is called in law "*consensus ad idem*". It requires compromise and good faith. Appointments must be made jointly.

2.5 Furthermore Article 259(11) of the new Constitution contemplates consultations between the President and the Prime Minister and not their agents. Therefore, consultation:

- a) is mandatory;
- b) is between the two Principals - they have to make a joint nomination and must have an agreement of mind.
- c) is in accordance with the National Accord and Reconciliation Act.

### **Historical perspective on the current matter**

2.6 In December, 2010, there was a first meeting between the President and the Prime Minister on the appointments.

2.7 On 6<sup>th</sup> January, 2011 there was a second meeting at which it was agreed that a panel be constituted comprising of representatives from offices of the President and the Prime Minister, Law Society of Kenya (LSK), Judicial Service Commission (JSC), Permanent Secretaries from the Ministries of Justice and Internal Security, and the Kenya Law Reform Commission (KLRC). A meeting of the panel was subsequently convened by Amb. Francis Muthaura, but representatives from JSC, LSK and KLRC were not invited. Those present were the President's Private Secretary - Mr. Nick Wanjohi; the Permanent Secretary Office in the Prime Minister - Dr. Mohammed

Isahakia; and the Prime Minister's Chief of Staff - Mr. Caroli Omondi. The panel agreed on the following criteria for the nominations:

- Seniority;
- Competence;
- Integrity; and
- Reform-minded person.

2.8 The pool agreed for sourcing the nominees for Chief Justice and Attorney General was the Judiciary in Kenya, private legal practice, the Commonwealth or the private sector. For the Director of Public Prosecutions, it was agreed the nominee should be sourced from lawyers in the State Law Office's Prosecutions Department, those in private practice specializing in Criminal law and Magistrates. There were no minutes for this meeting nor was a joint report issued. The practice is that both sides report to their respective principals separately.

2.9 On 27<sup>th</sup> January, 2011, President and the Prime Minister met again. The agenda was generated from items agreed upon by both sides. It was reiterated to the Committee that there are normally no minutes for the meetings between the President and the Prime Minister and thus "confirmation of minute" is never an agenda item. It was at this meeting that the President, for the very first time, presented a list of names to the Prime Minister for the four positions. The Prime Minister's reaction was that it was the first time he was seeing the list, and would thus need some time to consider the same. The names were:

Chief Justice:	<b>Justice Paul Kihara Kariuki</b>
Deputy Chief Justice:	<b>Lady Justice Hannah Okwengu</b>
Attorney General:	<b>Mr. Fred Ojiambo</b>
Director of Public Prosecution:	<b>Mr. Kioko Kilukumi</b>

Prof. Patrick Lumumba was, inexplicably, also on the list as Director of the Ethics and Anti-Corruption Commission. It was not clear why his name was there since the position is already filled.

2.10 The Prime Minister's side raised a query on inclusion of the name of Justice Okwengu on the list whereas it was clear that appointment of the Deputy Chief Justice was to be done by the Judicial Service Commission as outlined in the Constitution, hence the process being proposed was unconstitutional. Prof. Nick Wanjohi, the President's Private Secretary, agreed with this view and promised that they would propose this name to the Judicial Service Commission. With regard to Justice Kihara, there was a query in terms of seniority since he is number 21 in the High Court pecking order, and number 32 overall in the Judiciary. A list was obtained from the Registrar of the High Court which showed that the senior most judge, besides the Chief Justice, is Justice Riaga Omollo. The Prime Minister pointed out that he preferred the new Chief Justice to be drawn from the Commonwealth in the interim during the transition period. The President declined. The Prime Minister's side then asked the President's side to consider seniority as a criterion, but no answer was forthcoming. A query was also raised on appointing somebody in the current bench who had not undergone vetting. The Prime Minister then suggested that a team be convened to look at that list, pending further consultations. The meeting adjourned with no agreement on any of the proposed nominees.

2.11 The Prime Minister instructed Mr. Omondi to write a letter to the President to advise that the Prime Minister would be away in Addis Ababa to brief the AU Summit on his Cote de Ivore Mission, and therefore proposed postponement of the discussions on the nominations to the following week once the Prime Minister returned to the country. The Prime Minister went to Addis Ababa the following day where he had a closed door meeting until 11pm. At 6.30pm, Mr. Omondi received a call from the Comptroller of State House on his phone informing him that the President wanted to talk to the Prime Minister. He was unable to get hold of the Prime Minister due to lack of access to the meeting venue. In such meetings, due to the nature of persons in attendance, security is premium and access is very restricted. The Prime Minister had a refreshment break after 9pm, by which time the President's office had released a press statement announcing the nominations. In

fact the Prime Minister got the information from the media, when he was asked to comment on the nominations by the President.

### **Proposed Way forward:**

2.12 The Office of the Prime Minister made the following proposals on how this matter could be brought to a close:

- a) In view of the fundamental constitutional principles flouted in these nominations, including integrity and suitability (Article 73); fair competition and merit (Article 232 (1)(g)), and equal opportunity for men and women (Article 232(1)(i)), the Speaker has the divine duty, and indeed the power, to make a constitutional Interpretation of the matter. This he must do without fear or favour, with utmost fidelity to the constitution.
- b) The Committee should offer guidance over the question of Constitutionality.
- c) The Commission for Implementation of the Constitution has a duty to report on the process and the impediments faced;
- d) Although the Judicial Service Commission does not have a role under the transitional clause of the Constitution, it would be consistent for the Executive to engage this Commission in the process to encourage competitiveness. There is already a precedent of this in the setup of the CIC and Commission on Revenue Allocation.
- e) No serving judge should be appointed before vetting.
- f) Gender balance and regional representation must be addressed.
- g) The appointments must respect all laws of the land, including the National Cohesion and Integration Act, which, at section 7(2) requires that no public office shall have more than one third of its establishment drawn from one community.

He tabled a document to illustrate his argument but the Committee did not interrogate him on the matter. The document is appended to the report. **(Annex 4)**

## SUMMARY OF SUBMISSIONS BY THE COMMISSION FOR THE IMPLEMENTATION OF THE CONSTITUTION (CIC)

The Commission was represented by 8 Commissioners: Kibaya Laibuta, Kamotho Waiganjo, Charles Nyachae, (Chairman), Elizabeth Muli, (Vice Chairperson), Florence Omosa, Peter Wanyande, Chatherine Mumman and Philemon Mwaisaka.

1. The Commission informed the Committee that its mandate is buttressed by Article 249 (1) (a), (b), and (c) of the Constitution, which states:

- a) The objects of the commissions and the independent offices are to—*
  - i. protect the sovereignty of the people;*
  - b) secure the observance by all State organs of democratic values and principles;*
  - and*
  - c) promote constitutionalism.*

2. The CIC also highlighted the provisions relating to the Appointment of the Chief Justice based on the following sections of the law:

a) Article 166(1) (a) of the Constitution which provides that:

*The President shall appoint the Chief Justice and the Deputy Chief Justice, in accordance with the recommendation of the Judicial Service Commission, and subject to the approval of the National Assembly;*

b) Section 24 (2) of the Sixth Schedule which provides that:

*A new Chief Justice shall be appointed by the President, subject to the National Accord and Reconciliation Act, 2008, and after consultation with the Prime Minister and with the approval of the National Assembly.*

- c) Section 29 (2) of the Sixth Schedule reinforces this provision by providing that:

*Unless this Schedule prescribes otherwise, when this Constitution requires an appointment to be made by the President with the approval of the National Assembly, until after the first elections under this Constitution, the President shall, subject to the National Accord and Reconciliation Act, appoint a person after consultation with the Prime Minister and with the approval of the National Assembly.*

3. They contended that Article 166 (1) of the Constitution therefore contemplated that the appointment of the Chief Justice of the Republic of Kenya shall be a shared responsibility among the three arms of government namely the Judiciary (through the Judicial Service Commission – (JSC), the Executive (through the President) and the Legislature (through the National Assembly) and that in carrying out the mandate of appointing the new Chief Justice, the President shall consult the Prime Minister.
4. In view of the above, it was the position of the CIC that the letter of the Constitution as provided for in Article 166 as read together with Sections 24 and 29 of the Sixth schedule required that the appointment of the Chief Justice by the appointing authorities should be as follows:
- a) That the process of appointment should commence with recommendations by the Judicial Service Commission to the President, who in turn should consult the Prime Minister after which the President forwards the name of the nominee to the National Assembly for approval before final appointment by the President.
- b) That the role of the Judicial Service Commission in the appointment of the Chief Justice should be respected and the Commission allowed to undertake the function reserved to it by the Constitution.
5. In respect to the appointments of the Attorney General and the Director of Public Prosecutions, the CIC view was that the two Constitutional office holders are to be

nominated and eventually appointed by the President subject to the approval of the National Assembly.

6. In the period before the first election Article 166 of the Constitution must be read together with the provisions of Section 29 of the Sixth Schedule of the Constitution, which provide as follows:

*(1) The process of appointment of persons to fill new offices and vacancies arising in consequence of the coming into force of this Constitution shall begin on the effective date and be finalised within one year.*

*(2) Unless this Schedule prescribes otherwise, when this Constitution requires an appointment to be made by the President with the approval of the National Assembly, until after the first elections under this Constitution, the President shall, subject to the National Accord and Reconciliation Act, appoint a person after consultation with the Prime Minister and with the approval of the National Assembly.*

7. Consequently, such appointments being made prior to the first elections require the President to consult the Prime Minister prior to appointment, subject to the National Accord and Reconciliation Act, 2008. The process of appointment should also reflect the letter and spirit of the Constitution. Only if the above processes were followed would the nominations be constitutional.
8. In conclusion, the nature of the ongoing public debate on the legitimacy of the nominations can only do harm to the delicate process of implementing the new Constitution.
9. The Commission informed the Members that the clause being cited by the Executive to qualify its position — that the principals have the mandate to push through the nominations, and that the Judicial Service Commission (JSC) had no mandate in the first appointment — did not, in any way expressly exclude the body from carrying out a competitive recruitment. He cited that the Commission found it difficult to argue for the exclusion of the JSC because as per Article 259 of the Constitution, the

CIC has to construe the Constitution in a manner that promotes its values and purposes.

10. The Commission was categorical that it would not compromise when it comes to compliance with the law.

## **SUMMARY OF SUBMISSIONS BY THE FEDERATION OF WOMEN LAWYERS (FIDA-KENYA)**

The Federation appeared before the Committee on 9<sup>th</sup> February 2011, and was represented by Grace Maingi Kimani, Maryanne Kamunga and Jane Serwanga. They made the following submissions:-

1. In the appointment of the Chief Justice, FIDA referred to Article 159 (1) of the Constitution of Kenya which provides that *“judicial authority is derived from the people and vests in, and shall be exercised by, the courts and tribunals established by or under this Constitution”* and Article 166(1) (a) of the Constitution of Kenya which provides that *“the President shall appoint the Chief Justice and the Deputy Chief Justice, in accordance with the recommendation of the Judicial Service Commission, and subject to the approval of the National Assembly”*.
2. They submitted that these provisions point to the role that is to be played by each of the three arms of Government in the selection and eventual appointment of a person to the office of the Chief Justice. The provisions further re - affirms the principle of sovereignty of power of the people as set out in Article 1 of the Constitution.
3. Section 24 (2) of the Sixth Schedule of the Constitution of Kenya provides that *“A new Chief Justice shall be appointed by the President, subject to the National Accord and Reconciliation Act, and after consultation with the Prime Minister and with the approval of the National Assembly.”* This position is further ingrained in Section 29 (2) of the Sixth Schedule which provides that in all new appointments that require approval by the National Assembly; these shall be made by the President, subject to

the National Accord and Reconciliation Act, after consultation with the Prime Minister.

4. FIDA-KENYA proposed that the appointment process ought to be an inclusive process and uphold the national values and principles of governance set out in Article 10 of the Constitution. The corollary of the aforesaid is that the appointment to the position of the Chief Justice should be handled through the newly established Judicial Service Commission (JSC) which must be allowed to carry out its mandate and functions as reserved under the Constitution in Article 172(2) which provides that-

*“in the performance of its functions the Commission shall be guided by the following:*

*(a) Competitiveness and transparent process of appointment of judicial officers and other staff of the judiciary; and*

*(b) The promotion of gender equality.”*

5. Further, Article 156[2] provides that *“the Attorney General shall be nominated for appointment by the President and, with the approval of the National Assembly, appointed by the President.”* Accordingly, this section must be read together with the provisions of Section 29 of the Sixth Schedule of the Constitution, which provides as follows:

*(1) The process of appointment of persons to fill new offices and vacancies arising in consequence of the coming into force of this Constitution shall begin on the effective date and be finalized within one year.*

*(2) Unless this Schedule prescribes otherwise, when this Constitution requires an appointment to be made by the President with the approval of the National Assembly, until after the first elections under this Constitution, the President shall, subject to the National Accord and Reconciliation Act, appoint a person after consultation with the Prime Minister and with the approval of the National Assembly.*

6. *Under Article 157 (2) of the Kenyan Constitution sets out that “The Director of Public Prosecutions shall be nominated and, with the approval of the National Assembly, appointed by the President.”*

7. Accordingly, FIDA Kenya recommended the following to the Committee:-

- a. The JSC must call for applications from qualified and interested persons to the position of Chief Justice, who should then proceed to shortlist, interview the persons and make recommendations to the President as to persons suitable for this position. Upon receipt of the forwarded names, the President following consultations with the Prime Minister shall nominate at least 3 persons, one third of whom should be from either gender. The name of the nominees shall be forwarded to the National Assembly for approval. Following approval by the National Assembly, the final appointment shall be made by the President.
- b. With respect to the position of Attorney General and Director of Public Prosecutions; that the Executive must call for applications from qualified and interested persons who would *then* proceed to shortlist and interview the persons and make recommendations to the President as to persons suitable for this position. Upon receipt of the forwarded names, the President following consultations with the Prime Minister shall nominate at least 3 persons, one third of whom should be from either gender. The names of the nominees shall be forwarded to the National Assembly for approval. Following approval by the National Assembly, the final appointment shall be made by the President.

#### **SUMMARY OF SUBMISSIONS BY THE LAW SOCIETY OF KENYA (LSK)**

The Law Society of Kenya was represented by Mr. Ochieng Opiyo, Council Member, Marykaren Kigen Sorobit, Deputy Secretary/CEO and Donald B. Korir, Representative.

The LSK focused on the exclusion of the Judicial Service Commission (JSC) in the process, and submitted that:-

- a) The JSC ought to have been consulted since Chapter 9 of the Constitution is not suspended in the Sixth Schedule.
- b) If it were the intention of the framers of the Constitution to do so, then Article 166 ought to have been suspended.
- c) Further Article 172(1) states that the JSC shall promote and facilitate the independence and accountability of the Judiciary and the efficient, effective and transparent administration of justice.

## **SUMMARY OF SUBMISSIONS BY THE INTERNATIONAL COMMISSION OF JURISTS (ICJ) – KENYA**

ICJ (K) was represented by Priscillah Nyokabi, (Council Member), Anne Nderi, Elsie Sainna and Chris Gitari, (all Program Officers).

The organization presented as follows:

1. The perception that the Chief Justice appointed is likely to protect the interests of the appointing authority is a legitimate concern and is likely to have a knock on effect on public confidence in the new Judiciary.

2. In relation to constitutional provisions on the appointment of the Chief Justice, the following sections of law apply:

(i) Under Article 166 (1) the President '*shall appoint both the Chief Justice and the Deputy Chief Justice in accordance with the recommendation of the Judicial Service Commission which shall be subject to the approval of the National Assembly*'.

(ii) The minimum qualifications of the Chief Justice are set out under Article 166(3) of the Constitution which includes 15 years experience as a superior court judge or distinguished academic, judicial officer, or legal practitioner.

(iii) With regard to transitional clauses for the Chief Justice, Chapter 18 of the Constitution and in particular Article 262 provides the legal authority and basis for interpreting the transitional clauses as follows:

Schedule 6 and specifically article 24 (2), stipulates that;

*‘A new Chief Justice will be appointed by President subject to the National Accord and Reconciliation Act in consultation with the Prime Minister and approved by the National Assembly’.*

The transitional clauses confer on the President and the Prime Minister the constitutional mandate to appoint the next Chief Justice but their choice of candidate is subject to the approval of the National Assembly.

3. The preamble of the National Accord and Reconciliation Act, 2008 provides that the coalition government *‘must be a partnership with commitment on both sides to govern together and push through a reform agenda for the benefit of all Kenyans’*. The literal interpretation of this provision means that the decisions on the two Principals must at all times bear in mind the *‘interest of the Kenyan people’*.

#### **SUMMARY OF SUBMISSIONS BY THE JUDICIAL SERVICE COMMISSION (JSC)**

The Commission was represented by Ms. Florence Mwangangi and Ms Emily Ominde.

1. The Judicial Service Commission (JSC) began by stating that the minutes of the meeting that led to the press statement that had been requested by the Committee had not been confirmed hence could not be released till they were confirmed.
2. The Commission did highlight that the agenda of the same meeting, also requested by the Committee was: to hold retreat to discuss JSC mandate and its workings, and remuneration, but due to the President’s press release, this nomination issue was added to the agenda.
3. The Commission believed it was very important to get things rights from the beginning in the implementation process.

4. The officers present also stated that the Section 24 of the Sixth Schedule and Article 166 of the Constitution should be read jointly to give the full procedure to be used for the nominations.
5. They also underscored the need to retain the independence of the Judiciary, and this must start from the head as is envisioned in Article 160 of the Constitution. The JSC under Article 172 of the Constitution is also mandated to promote and facilitate independence and transparency in the Judiciary.
6. Additionally, Article 10 of the Constitution on the national values should be taken into account when processing the nominations.
7. They pointed out that Article 232 of the Constitution highlights the values of public service, high standard of professional ethics, involvement of the people of Kenya, accountability, transparency, fair competition and merit, representation of diversity, and equal opportunity.
8. The Commission believes that since it was duly constituted and sworn in, then left out of this process, the thinking of the drafters was that JSC would not have been properly constituted by this time thus would require no consultation. However, now that it was in place it should have been involved.
9. The JSC pointed out that the legitimacy of the appointments was compromised, yet should have the widest acceptance possible.
10. The concern of the JSC is the process, and not the qualifications of the persons nominated.
11. Asked if they would accept the nominations if the Principals had agreed on the names without passing through the JSC, the officials stated that the JSC still considered the process was unconstitutional as it was not consulted. The process that occurred would only be acceptable if the JSC were not in place.

12. The JSC also informed the Committee in reply to a query that the current Chief Justice is not an interested party in this matter as he can only be considered as a Court of Appeal Judge in future, according to Section 24 of the Sixth Schedule.
13. The Judicial Service Commission is of the view that both the Judiciary and Kenyan People must start the new era heralded by the constitution on the right footing. Both the letter and the spirit of the new constitution must be adhered, to in their view.
14. JSC is of the view that a withdrawal of the nominations be done and a fresh process started in order to give the process of appointing Judicial Officers legitimacy, public confidence, ownership and acceptance by the People of Kenya, and the JSC must play an integral role in the process.
15. It is their view that Articles 172 (1)(e) and (2) read together with Article 166 (1) and Section 24 of the Sixth Schedule, gives the JSC powers to play an important role.

## **SUMMARY OF SUBMISSIONS BY THE TRANSPARENCY INTERNATIONAL (TI) – KENYA**

**Transparency International was represented by the Executive Director Mr. Samwel Mbithi Kimeu and Willis Otieno, a Program Officer.**

1. The organization based its arguments on the following sections of the law:
  - a) The preamble of the Constitution states that recognizing the aspirations of all Kenyans for a government based on the essential values of human rights, equality, freedom, democracy, social justice and the rule of law.
  - b) Article 2 (1) of the Constitution which provides that the Constitution is the supreme law of the Republic and binds all persons and all state organs at both levels of government.
  - c) Article 2(2) which provide that no person may claim or exercise state authority except as authorized under this Constitution. The officials invited the Committee to consider if the exercise of state power in making the nominations was done in accordance with the Constitution.

- d) Article 10 of the Constitution setting out the national values and principles of governance that are binding on all state organs and persons. Of import are the principles of inclusiveness rule of law, democracy, and participation of the people, transparency and accountability.
  - e) Article 21 of the Constitution assigning an obligation on the state and all its organs to observe, respect, protect, promote and fulfill the rights and fundamental freedoms on the Bill of Rights.
  - f) Article 27 on equality and freedom from discrimination. Equality granted to all citizens to aspire to and be considered to all appointive offices that come up for filling.
2. In regards to the appointment of the Chief Justice, the organization wondered how Article 166 of the Constitution could be implemented in harmony with Section 24 (2) of the Sixth schedule bearing in mind the provisions of Section 2 of the Sixth Schedule specifically setting out the provisions of the Constitution whose coming into effect have been suspended until the next general elections.
3. Transparency International noted that there is clearly a dispute between the two Principals that need to be resolved. The organization proposes that in the event that the President and the Prime Minister are unable to resolve it, they should present the matter to the courts – which are the final arbiter on matters of law and fact.

## **SUMMARY OF SUBMISSIONS BY THE NATIONAL MUSLIM LEADERS FORUM (NAMLEF)**

NAMLEF was represented by Mr. Abdullahi Abdi, the Chairman and the other members of the delegation included Abubakar Said, CEO, CEDMAC and Al Hajj Yussuf Murigu, NAMLEF Vice Chairman.

1. The organization was of the view that the President did not follow constitutional process in the appointment of the four persons in the new Constitutional offices per the Constitution.

2. NAMLEF felt that the consultation referred to in the Constitution clearly does not mean the principles informing one another or one principle informing the other over a decision, nor does it mean listening to the other and ignoring the advice of the other.
3. Consultation must be understood in context of the National Accord and Reconciliation Act, 2008, which has been made an integral part of the Constitution.
4. The officials highlighted that the National Accord was put in place because of the disputed presidential elections of 2007, and it was a mechanism through which Kenya was to be returned to peace, with emphasis on establishing proper institutional frameworks including the promulgation of the Constitution.
5. As per the report by the Kriegler Commission the disputed elections had a violent outcome because Kenyans had no confidence in the Judiciary. It therefore follows that if the proper process of appointment to the Judiciary does not abide by the Constitution, Kenyans will not have faith in this important office, which could lead to violence and a disputed election in 2012.
6. NAMLEF proposes that appointments must conform with the Constitution to ensure that there is regional balance, gender equity and equality and keeping in mind the national values provided for under Article 10 and Article 232, (1) (h) and (i) of the Constitution.

#### **SUMMARY OF SUBMISSIONS BY THE YOUTH PLATFORM FOR CHANGE (YP4C)**

The organization had about several representatives and was led by Mr. Anthony Oluoch Advocate. They had filed a case **Petition No. 16 of 2011 (Patrick Njuguna & Others vs The Attorney General)** challenging the appointments. They also attached a petition to Parliament signed by amongst others: Vivien Nemayian, Erick Owuor, Patrick Njuguna and Fret Lutta Emurgat.

1. The group is made up of a total of eleven youth-based, youth-led, non-governmental organizations and community based organizations. They made a submission to the Committee making reference to their filed petition in court. The

petitioners also included thirteen individuals/petitioners working for gain/volunteers with various youth organizations.

2. The petitioners recently filed a Petition before the High Court of Kenya at Nairobi which Petition is still pending determination and will be coming up for *inter parties* hearing of the Petitioners applications for Conservatory orders on the 14<sup>th</sup> of February, 2011. This **Petition No. 16 of 2011 [Patrick Njuguna & Others versus the Attorney General]** was filed on the 3<sup>rd</sup> of February, 2011 and comes in the wake of what the Petitioners consider to be the unconstitutionality of the nominations made by his Excellency the President to the offices of the Chief Justice, the Attorney General, Deputy Public Prosecutor and Controller of Budget.
3. The group informed the Committee that they strongly felt that their rights had been violated, and stated the following to the Committee:-
  - a) There was indeed no proper consultation within the meaning/spirit of the entire Constitution.
  - b) By consultation, they do not subscribe to the school of thought that the two parties  
Merely confer and either agree/concur or fail to do so.
  - c) Consultation was intended under section 24 of Sixth Schedule of the Constitution to give principles and appointment to author the opportunity to vet proposed names against certain benchmarks and ensure they pass the test under Articles 10(1) and (2), 27 (1) and (2) Article 55(6), Article 73(1) and (2) of the Constitution.
  - d) Article 10 (1) and (2) of the Constitution very deliberately and consistently upholds its values – especially Article 10, read with Article 259, and Article 20 (4) (a) and (b). Only then could the President, after being satisfied (in process of such a consultation) that the candidates met requirements under the Constitution over and above provisions of article 166 (1), 56 (1) ,and 157 (3), could he

properly make the nominations. Anything short of this must and should be declared unconstitutional.

4. The organization proposed making the process open, participatory and transparent, one that provides opportunity for equal treatment, equity and non discrimination including opportunity for youth and women to apply and be considered for nomination, and appointment.
5. This Committee must find out whether the nominations meet the test of constitutionality.
6. The President should not only have forwarded the names but also given reasons as to why and how he settled for the names/nominees for Parliament to debate the process/procedure and constitutionality.

## **SUMMARY OF SUBMISSIONS BY THE NATIONAL COALITION FOR WOMEN ON THE CONSTITUTION**

The Coalition was represented by Mary Kiuma and Beldine Atieno.

1. The National Coalition for Women on the Constitution called for a revision of the nominations. They stated that the executive nominations were *ultra vires* to the extent that they locked women out of those positions. They were a direct violation of women's constitutional rights of equality and non-discrimination based on sex. They believe that this action, if left uncorrected, would widen the gap between men and women in leadership positions.
2. They made reference to Article 249 of the Constitution which stipulates the meaning of any provision and how it is to be construed and applied. They highlighted Article 10 of the Constitution as an interpretive reference point of Article 259(1) (a).

3. They also stated that the nominations purported to breach authorizing provisions of the Constitution citing Articles 20(1), 21, and 27. They went further to emphasize that the letter and spirit of the Constitution require that the Executive allocate women a minimum allocation of positions equal to men in the nominations under discussion, and in all future public appointments under the Constitution.

### **SUMMARY OF SUBMISSIONS BY THE YOUTH KATIBA NETWORK (WRITTEN SUBMISSION)**

This organization gave a written submission but did not appear before the Committee. The submission is signed by 12 members of the Federal Party of Kenya, Shirikisho Party of Kenya, Central Rift Youth Network, Young Political Caucus, Chama Cha Uzalendo and Kipawa Youth). They include Caleb Burudi, Benjamin Gakuru, Felix Cheruiyot, Antony Kahara, Simon Mbaruku and Millicent Chege. Its submission are as follows:

1. That Section 24(2) of the Sixth Schedule of the Constitution clearly provides for the appointment of the Chief Justice, noting that it shall be made by the President, subject to the National Accord and Reconciliation Act, 2008 after consultation with the Prime Minister, with the approval of the National Assembly.
2. That there is no requirement for the involvement of the Judicial Service Commission, or for the advertisement of the positions.
3. That the vetting process should be fair and not used as a tool to discourage competent people from seeking higher office.
4. The organization supports the choice of Hon. Justice Visram as he is the youngest judge in the Court of Appeal, and also from a minority community.
5. The organization proposes that as a way forward, the matter should proceed to Parliament to approve or reject the nominations.

## COMMITTEE OBSERVATIONS

The Committee recorded the following views with respect to the process of nominations to the offices under inquiry:

### 1. NOMINATION OF JUSTICE ALNASHIR VISHRAM TO THE OFFICE OF THE CHIEF JUSTICE OF THE REPUBLIC OF KENYA:

#### *a. Constitutional Provisions on the appointment of the Chief Justice.*

Article 159 (1) of the Constitution of Kenya provides *that “judicial authority is derived from the people and vests in, and shall be exercised by, the courts and tribunals established by or under this Constitution”*

Under Article 166 (1) the President ‘*shall appoint both the Chief Justice and the Deputy Chief Justice in accordance with the recommendation of the judicial service commission which shall be subject to the approval of the national assembly*’.

These provisions point to the role that is to be played by each of the three arms of Government in the selection and eventual appointment of a person to the office of the Chief Justice. The provisions further re - affirms the principle of sovereignty of power of the people as set out in Article 1 of the Constitution.

It was however noted that the role of the Judicial Service Commission (JSC) was not anticipated in the transitional period before the next general elections, as all appointments during this time are done under the grand coalition government which is not envisaged under Article 166 of the Constitution. If Article 166 is applied to the fullest, Article 168 would then need to be applied in full to the procedure of removal of the current Chief Justice.

Further, the minimum qualifications of the Chief Justice are set out under article 166(3) which places a 15 years experience as a superior court judge or distinguished academic, judicial officer, legal practitioner.

These provisions are clear and are not in dispute as they spell out the broad framework within which any future appointment of a Chief Justice must be undertaken in the new constitutional dispensation. However, in the current transitional period of implementing the new Constitution, the above article must be read together with the transitional clauses.

***The transitional clauses:***

Chapter 18 of the Constitution and in particular Article 262 provides the legal authority and basis for interpreting the transitional clauses as follows; the Sixth Schedule and specifically Article 24 (2), stipulates that;

***‘A new Chief Justice will be appointed by President subject to the National Accord and Reconciliation Act in consultation with the Prime Minister and approved by the National Assembly’.***

This position is further ingrained in Section 29 (2) of the Sixth Schedule which provides that in all new appointments that require approval by the National Assembly before the next general elections shall be made by the President, subject to the National Accord and Reconciliation Act, after consultation with the Prime Minister.

The transitional clauses confer on the President and the Prime Minister the constitutional mandate to appoint the next Chief Justice but their choice of candidate is subject to the approval of the National Assembly.

***b. The National Accord and Reconciliation Act***

The preamble to the Act provides that the coalition government ***‘must be a partnership with commitment on both sides to govern together and push through a reform agenda for the benefit of all Kenyans’.*** It is however noted that reference to the National Accord

*is limited to the transitional schedule which provides for appointments before the next general elections. The effect of the Accord lapses thereafter.*

The literal interpretation of this provision means that the decisions of the two Principals must at all times bear in mind the '*interest of the Kenyan people*'. Thus the Committee is of the firm opinion that, the citizenry, having exercised their will through the referendum, expect the Principals to undertake any significant decision, such as the appointment of the next Chief Justice, with their concerns in mind. In particular, the Committee notes that any delay in the setup of a new Judiciary and other institutions would not be in the interest of the public. The implementation of the Constitution is already behind schedule and it is imperative that Parliament moves to fast track such processes.

From the foregoing there emerged three shades of opinions among the members of the Committee. The first and second shades of opinions are related to one another while the third is distinct and separate in nature. These shades of opinions can be summarized as follows:-

- a) Two Members were of the view that the nominations were constitutional and only questions of suitability of the candidates should be addressed by the Committee at the vetting stage. Process was constitutional and any issues regarding the credibility of the institution should be addressed at the vetting stage. These Members were Hon. Isaac Ruto, M.P and Hon. George Omari Nyamweya, M.P.
- b) Four Members were of the view that the process of the nomination of the chief justice was constitutional but to address the issue of legitimacy, credibility and public buy-in, the nomination should be reprocessed through the Judicial Service Commission to recommend three candidates to be considered for nominations by the President in consult with the Prime Minister. These Members were Hon.Amina Abdalla, M.P; Hon. Mutava Musyimi, M.P; Hon. Abdikadir Mohammed, M.P and Hon. Njoroge Baiya, M.P.

c) Three Members were of the view that the nomination process to the office of the Chief Justice was out rightly unconstitutional. These Members were Hon. Ababu Namwamba, M.P; Hon. Millie Odhiambo- Mabona, M.P; Hon. John Olago, M.P.

It must be noted that during this voting, Hon. Eugene Wamalwa, M.P and Hon. Sophia Noor, M.P were absent with apology.

***(a) Argument in support of the view that the nomination process was constitutional.***

Members advancing this shade of opinion were of the view that the president had complied with all the relevant provisions of the constitution as regards to the appointment. They said that from the evidence adduced before the Committee, it was clear that the President had consulted with the Prime Minister as required under Section 24(2) of the Sixth Schedule. The Members also observed that the Court's Ruling in High Court Petition No. 16 of 2010 had found that there was some consultation between the president and the Prime Minister.

These members were of the view that the word consultation as used in the constitution does not mean "concurrence" "consent" "approval" "agreement" or "consensus". The Members were of the view that the Parliamentary Select Committee Constitutional Review had deliberately removed the words "agreement" and "concurrence" from the Revised Harmonized Draft Constitution (dated 8<sup>th</sup> January, 2010) and replaced it with the word "Consultation" in the final Proposed Constitution (dated 23<sup>rd</sup> February, 2010).

***(b) Argument that the nomination process was constitutional but it had raised issues affecting the Legitimacy and Credibility of office of the Chief Justice and Institution of Judiciary.***

These Members were of the firm opinion that there is need to retain the legitimacy and credibility of the Office of the Chief Justice and the Institution of the Judiciary as a whole. For this reason the Members made the following observations that:

1. There is need to retain the independence of the Judiciary, and this must start from the head as is envisioned in Article 160 of the Constitution
2. Additionally, Article 10 of the Constitution on the national values should be taken into account when processing the nominations for judicial office holders.
3. Article 232 of the Constitution highlights the values of public service, high standard of professional ethics, involvement of the people of Kenya, accountability, transparency, fair competition and merit, representation of diversity, and equal opportunity.
4. The legitimacy and credibility of the office may be questioned since the nomination process had raised considerable controversy in the country.

**(c) Arguments in support of the dissenting view that the nomination process was unconstitutional.**

The three Members in the minority registered their dissent on the appointment of the Chief Justice on several grounds. The same grounds for opposing the appointments of the Chief Justice are the same as for those opposing the Director of Public Prosecutions and the Attorney General and is hence provided in the section of the Minority position herein under.

## **2. NOMINATION OF PROF. GITHU MUIGAI TO THE OFFICE OF THE ATTORNEY GENERAL**

The Committee voted to determine the constitutionality of the process of the appointment of the Attorney General and the Director of Public Prosecution and six out of nine members voting, voted that the process was constitutional and three out of the nine present and voting voted that the process was unconstitutional.

Those approving the process as constitutional:

1. Hon. Njoroge Baiya, MP
2. Hon. Mohammed Abdikadir, MP
3. Hon. Amina Abdalla, MP

4. Hon. Mutava Musyimi, MP
5. Hon. Isaac Ruto, EGH, MP
6. Hon. George O. Nyamweya, MBS, MP

The members in the majority confirmed that the nomination of the candidate to the offices of the Attorney General and Director of Public Prosecutions was constitutional and should proceed for vetting.

Those voting that the process was unconstitutional were:

1. Hon. Ababu Namwamba, MP
2. Hon. Olago Aluoch, MP
3. Hon. Millie Odhiambo-Mabona, MP

It must be noted that during this voting, Hon. Eugene Wamalwa, M.P and Hon. Sophia Noor, M.P were absent with apology. Hon. Wamalwa has subsequently agreed to the position of the majority as stated above.

### **3. NOMINATION OF MR. KIOKO KILUKUMI TO THE OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTION OF THE REPUBLIC OF KENYA**

The Committee voted to determine the constitutionality of the process of the appointment of the Attorney General and the Director of Public Prosecution and six out of nine members voting, voted that the process was constitutional and three out of the nine present and voting voted that the process was unconstitutional.

Those approving the process as constitutional:

1. Hon. Njoroge Baiya, MP
2. Hon. Mohammed Abdikadir, MP
3. Hon. Amina Abdalla, MP
4. Hon. Mutava Musyimi, MP
5. Hon. Isaac Ruto, EGH, MP
6. Hon. George O. Nyamweya, MBS, MP

Those voting that the process was unconstitutional were:

1. Hon. Ababu Namwamba, MP
2. Hon. Olago Aluoch, MP
3. Hon. Millie Odhiambo-Mabona, MP

The members in the majority confirmed that the nomination of the candidate to the offices of the Attorney General and Director of Public Prosecutions was constitutional and should proceed for vetting.

It must be noted that during this voting, Hon. Eugene Wamalwa, M.P and Hon. Sophia Noor, M.P were absent with apology. Hon. Wamalwa has subsequently agreed to the position of the majority as stated above.

# Majority View on Constitutionality of the Nomination Process

This view is supported by the following six members of the Committee:

1. Hon. Njoroge Baiya, MP
2. Hon. Mohammed Abdikadir, MP
3. Hon. Amina Abdalla, MP
4. Hon. Mutava Musyimi, MP
5. Hon. Isaac Ruto, EGH, MP
6. Hon. George O. Nyamweya, MBS, MP

1.1 Under Section 29 of the Sixth Schedule ALL new appointments before the next general election are done by the President after consultations with the Prime Minister and approval of Parliament. The Sixth Schedule also expressly provides that the Executive retains all its powers and functions under the former constitution, including those of appointment of Chief Justice.

The debate around the constitutionality of all appointments has been centered on the meaning of the word “Consultation”. In view of the need to go beyond the letter of the Constitution, the Committee discussed both letter and spirit, including the intention of the drafters with regard to the use of the word ‘Consultation’. An examination of the Revised Harmonized Draft submitted to the PSC in Naivasha by the Committee of Experts, and further discussions by the PSC reveal that the words “agreement with” and “concurrence of” were removed and replaced with “after consultation with” in regard to appointments by the President and Prime Minister. The PSC clearly articulated that the replacement of the word was to ensure that the Prime Minister was consulted and informed of the President’s appointments but that in the event of any disagreement a deadlock should not be created, and the appointing authority would therefore prevail. The Committee noted that this definition is further confirmed by Article 259(11) which

clearly differentiates methods of appointment, such that “consultation” does not include the “approval, recommendation, consent of” another person. Having considered the letter by the Prime Minister to the Hon. Speaker in which allegations were made that there was lack of consultations, and having studied other documents and listened to witnesses, the Committee has come to the conclusion that consultations were held and therefore that the nominations for appointment do meet the constitutional standard. The Committee also confirms that consultation between the President and Prime Minister does not mean concurrence. In any event, the appointments can only be complete, when Parliament approves the nominations, which is clearly a key step in confirming the constitutionality of the appointment process. With this affirmation, the Committee has taken the following steps.

**Having agreed on the interpretation of the process by the President and the Prime Minister, the Committee observes that had there been agreement on the candidates, the issue of constitutionality would not have arisen.**

## **2.0 Appointment of Chief Justice**

With regard to the argument that the Judicial service Commission should make recommendations to the President, the Majority view, is that the JSC as perceived under the 6th Schedule is an interim body and that examination of the Hansard copies of both the Committee of experts and the PSC, reflect that the interim JSC would have no role in the transitional period before the next general election. This process is spelt out in Art 124 and 5.24 and 29 of the 6th Schedule. Indeed it was determined that vetting of an incoming Chief Justice before elections will be done by more superior body, one more representative of the people of Kenya and a separate arm of government - Parliament - to ensure a thorough vetting of the Chief Justice. The people’s participation is exercised through their elected representatives in Parliament and audience will be given to the public during the vetting process of nominees by the Committee. As such there was no intention by the drafters of the

constitution that the CJ and deputy CJ will be subjected to a double vetting. (i.e. to both a vetting Tribunal and Parliament).

2.1. However, there has been public outcry based on an erroneous interpretation of the Constitution on the appointment of the Chief Justice particularly with the involvement of the Judicial Service Commission. It is therefore majority opinion is that since members of the JSC have since been vetted and approved by the August House, and even though the involvement of the JSC in this appointment is not mandatory under the Constitution, it may boost public confidence in the appointment of the new Chief Justice if the interim JSC interviews, shortlists and identifies three names of candidates from which the Executive may choose a new Chief Justice. By giving this direction the Committee instructs that a member of the Judicial Service Commission who is interested in the position must resign in order to avoid a conflict of interest. Further the JSC must ensure that its sittings should not include the current CJ Evans Gicheru or the AG Amos Wako as they cannot be considered members of the JSC since they have not been approved by Parliament to be. The Judicial Service Commission must take cognizance of constitutional deadlines with regard to this appointment and submit names within 3 working days, after adoption of the Committee's report, to the President and Prime Minister, who must then, after consultation and within 24 hours, submit a name to the Committee for vetting and for onward transmission to the House for approval.

2.2 It is important for the house to note that the competitive sourcing of a Chief Justice is unprecedented by the Commonwealth and other democracies and we will be testing new waters, not commonly found in political appointments. In democracies, strong political parties and alternative policy platforms are encouraged and political appointments often ideology held by the appointing authority. The step thus taken at this particular time should not be considered as a precedent to follow in the future as it will water down the need for effective political government.

Further to this, an excerpt from the verbatim report of the House on 1<sup>st</sup> February 2011 (**Annex 9**), recorded the following remarks of the Prime Minister in response to a chronology of events from the Vice President:

The Prime Minister (Mr. Raila):

“Mr. Speaker, Sir, guided by the National Accord, we have perfected the art of consultation with the President. We meet regularly. Usually, we agree on the agenda we are going to discuss before we meet. That means we do not have to spend a lot of time. I want to say that I wish the Vice-President and Minister for Home Affairs had shared with me the Statement that he had been given to read here. He would probably have thought twice before he read that Statement. There are certain aspects of that Statement which are correct. I want to inform the House in advance that I am going to be very candid and very factual. I think it is important to do so.

Mr. Speaker, Sir, the dates that the Vice-President and Minister for Home Affairs has mentioned, that is 6th December and 16th December, 2010 are correct. Indeed, we met on 6th December, 2010 and said that we would meet again. We met on 16th December, 2010. When we met on 16th December, our experts drew our attention to Transitional Clause 24, on the appointment of the Chief Justice, which says:-

“24(2) The new Chief Justice shall be appointed by the President subject to the National Accord and Reconciliation Act and after consultation with the Prime Minister and with the approval of the National Assembly.”

Advised that way, we decided that there must be some kind of procedure we were going to follow to be able to identify the Chief Justice, the Attorney-General, the Director of Public Prosecutions and the Controller of Budget. We agreed that a panel be set up to handle this matter and come up with recommendations of three names for each of those positions. We suggested that the panel should consist of one officer from the Office of the President, one officer from the Office of the Prime Minister, one officer from the Law Reform Commission, one officer from the Law Society of Kenya, one officer from the Judicial Service Commission, and one officer from the Public Service Commission. We agreed that that panel should find a way of interviewing Kenyans and then making recommendations of three names from which we would be able to pick individuals.

Mr. Speaker, Sir, that was on 16th December, 2010. We did not meet again until 27th January, 2011, which was Thursday, last week. Before our meeting of Thursday, our aids had agreed on the agenda we were going to discuss. The Minister for Justice, National Cohesion and Constitutional Affairs has said that we met for a long time. On that day, we were not talking about these positions. The agenda from my office was:-

First, I was going to brief the President on the drought situation in the country and the measures we were taking as Government to deal with that situation. When I was in North Eastern Kenya, parents petitioned that during this period of serious drought, as Government, we needed to find a way of waiving school fees for them. This is a decision which has financial implications, and which is to be taken to him. Secondly, I was going to brief the President on my mediation role in Ivory Coast.

Mr. Speaker, Sir, on the other side, the President's agenda was:-

First, he was to brief me on the issue of the African Union and the "shuttle diplomacy", which the Vice-President and Minister for Home Affairs talked about. Secondly, he was to brief me on the issue of the International Criminal Court (ICC). Thirdly, he was to brief me on the issue of these appointments. Having dealt with the three other items, we came to this other one, and I said that we had appointed a panel to give us advice but that panel had not come up with any names. Over the issue of the Chief Justice, I told the President that because we were setting up a process of vetting all the judges and the process had not started, we appoint a new person before 27th February, 2011, when the term of the current Chief Justice would expire. I suggested that we get a judge from the Commonwealth for a fixed term of three years, non-renewable, as we go through the process of vetting the current judges and looking at them before we do the appointment.

Mr. Speaker, Sir, His Excellency the President said: "Yes, that is also a good idea. However, we can also look at the people we have locally and maybe, we can have somebody who has got near it. That way, we will be seen to have rewarded merit locally." I told him: "Mr. President, I have no serious objection about that if we can get somebody who is acceptable." At that time, no name had been mentioned. I asked him: "Do you have any suggestions?" He told me: "Yes, I have made some consultations and I have the names." I said: "Then let us look at those names." He then produced a list of names, which I have here, and which are as follows:-

(i) The Chief Justice is Justice Paul Kihara Kariuki, High Court Judge, Kiambu County.

(ii) The Deputy Chief Justice is Justice Hannah Okwengu, High Court Judge, Homa Bay County. The Attorney-General is Mr. Fred Ojiambo, private practice; Director of Public Prosecutions is Mr. Kioko Kilukumi, private practice. The Controller of Budget is Mr. William Kirwa who is the Managing Director, Agricultural Development Corporation (ADC). The Director of the Kenya Anti-Corruption Commission (KACC) is Dr. PLO Lumumba. That is the list that I was given by His Excellency, the President. I informed him that because I was seeing the list for the first time, I needed time to consult. He then told me that he wanted us to agree so that those names could be announced the same day.

Mr. Speaker, Sir, you understand that this is a weighty issue because I said that we had already appointed a panel. I was told that one of the two gentlemen who were with us in the room were members of the panel. They told us that they only met once and they interviewed persons for the position of the Director of Public Prosecution and had come up with two names. One was Mr. Kioko Kilukumi and the other was Mr. Kiage. They adjourned to meet again to deal with the issues of the Attorney-General, the Chief Justice and the Controller of Budget but they had not yet met. We agreed with the President that I should go, make some consultations and send my Permanent Secretary and Chief of Staff to meet with his Permanent Secretary and Personal Secretary or advisor that afternoon. When I made some consultations, our view was that to pick from the current Judiciary people who have not been vetted will not be right. Through those consultations, we came up with the name of Mr. Pheroze Nowrojee as the Chief Justice. We said that, that was the name we had from the private sector, otherwise we would get somebody from outside and if not he would come up with another name. We have nothing against Justice Paul Kihara Kariuki except that he is a member of the current bench and has not been vetted. When this team went back to consult, they did not agree.

First, they said that Mr. Pheroze Nowrojee is an activist and, therefore, is not acceptable. I said that I will be very candid. Mr. Pheroze Nowrojee's name, having been dropped, they came up with a list of judges in the Judiciary. That is something that I was amazed with. During the first consultation with the President, I asked what the background of Mr. Kariuki was and I was told that he is a reformer. That is the reputation that he has. So, the list of pecking order was provided from the Office of the President and not from me. So, when they were discussing at that time, they came up with a pecking order of the Judiciary which

they got from the Judiciary. It is in that list that the names of Justice Ringa Riaga and Justice C.S. Omolo appear. I had never talked about Justice Omolo. This was never my idea. I did not talk about Justice Omolo being the Chief Justice. This list was provided when the experts were discussing at the Office of the President. It was provided from the Office of the President.

The Prime Minister (Mr. Raila): Mr. Speaker, Sir, I said that if they insist then I would say that Justice Omolo is a serving judge and, therefore, he does not qualify because he has not been vetted. I said that if they insist that they must have people from the bench then let them go by the seniority. I said that in that pecking order there is, first,

Justice Omolo, Justice Phillip Tanui, Justice Samuel Bosire, Justice Emmanuel Okubasu, Justice Bowijo ole Keiwua, Justice Erastus Githinji, Justice Phillip Nyamu Waki, Justice Onyango Otieno, Justice Aganyanya, Justice Magan Visram and Justice Gregory Nyamu.

Mr. Speaker, Sir, on the list of High Court judges which they had, we found the first one was Justice Mbogholi Musagha. We also found that Justice Kariuki who had been projected was number 21 on the list of High Court judges. Our view was that this matter needed more time for consideration. The gentlemen from the Office of the President left my people and said that they were going to consult with the President. After they came back I was called later and told that they were saying that I should pick the Attorney-General of my choice and they would pick the Chief Justice. I said that it is not a question of me or the President's preference in picking people to fill very important offices in the country. It was not an ODM's Attorney-General or PNU's Chief Justice but we were picking a Chief Justice for the Republic of Kenya. That is why I said that this matter needed further consultations. I instructed my secretary to write a letter to the Permanent Secretary, Office of the President. The letter says:-

"I have been instructed to advise you that the Rt. Hon. Raila Odinga, the Prime Minister of the Republic of Kenya will be travelling to Addis Ababa, Ethiopia tomorrow on 28th January, 2011 to present his report on the Cote d'Ivoire to the Africa Union Peace and Security Council. Consequently, the consultations between His Excellency, Mwai Kibaki, the President and Commander-in-Chief of the Armed Forces of the Republic of Kenya and the Prime Minister on the appointments of the Chief Justice, the Attorney-General, the Director

of Public Prosecutions and the Controller of Budget should be held sometime next week on a date convenient to both Principals.”

Later on, I was told that the President, in consultation with the Prime Minister, had appointed not Justice Paul Kihara Kariuki but Justice Visram and not Mr. Ojiambo but Prof. Githu Muigai as the Attorney General. At that point I said that when we discussed with His Excellency the President, those two names never appeared in the list. When I discussed with His Excellency the President, those two names never appeared anywhere. I am prepared to swear to this. Therefore, I was never consulted. I would say that I have nothing against the appointment of Justice Visram as the Chief Justice of the Republic Kenya and Prof. Githu Muigai as the Attorney-General. He is a good friend of mine. In fact, he is also my neighbour. His fence touches mine, and he is someone I have known for a long time. I would have no objection at all to these being appointed, but we must create proper criteria for appointing these people.

Mr. Speaker, I feel very strongly that there must be some kind of transparency and competitiveness in these appointments, because we are not appointing them for this Government. We are going for elections and there will be another Government, but these positions will be there for another number of years. That is why it is important that we have a neutral, transparent and credible process of choosing these people.”

In a separate submission, Amb. Muthaura (**Annex 8**) stated the following:

”So, we reported separately, and the two Principals insisted on their positions. So, I called Ishakia and told him: “Please, try to see whether the Prime Minister can be flexible and meet the President somewhere.” On my part, I also asked the President to see whether he could be flexible and meet the Prime Minister somewhere. After two hours or so, I called Ishakia. That was in the evening of Thursday. I told him: “The President is insisting on Justice Kariuki, but he has said he would propose that the Prime Minister proposes an Attorney-General of his choice.” This was an attempt to see whether he could break the deadlock. Ishakia came back to me and told me that the Prime Minister was still insisting on Justice Omolo as Chief Justice. So, I conveyed this matter to the President, who said: “In that case, could you ask the Prime Minister to make sure that we are able to solve this problem by mid-day tomorrow?” That was to be Friday. It was on Thursday when we talked. That is the message I conveyed to Mr. Ishakia to convey to the Prime Minister, and I am sure he did.

So, we went to sleep and came back to the office the following morning. In the morning, I found a note in my office from Mr. Caroli Omondi, saying that the Prime Minister had left at 8.00 a.m. for Addis Ababa and that he was proposing that the discussion on the appointments be continued sometime next week. I called Ishakia and told him: "This type of message will not be received well by His Excellency the President, because of the deadline and because he wanted this decision taken before he goes to the AU Summit." The Prime Minister was still accessible via telephone. So, I asked him: "Why can they not continue with negotiations to see whether they can have an agreement?" He told me that he was going to convey that message to the Prime Minister. I told him: "It is very important that there is an agreement", because if there was an agreement, there would not have been all these things we are talking about; constitutionality and all that. We wanted an agreement. I told him: "Try to make sure that you reach the Prime Minister and tell him that it is important that we have a way out of this deadlock. On my part, I am going to convey the same message to the President; to tell him that we have to find a way out of this deadlock."

So, I went to see the President and told him where we were, and that it was important that we had a solution. Ishakia did the same. I have no doubt to believe that he did not do the same. We were now talking about between 9.30 a.m. and 10.00 a.m. At around noon, I went back to Ishakia and asked him whether he had gotten any feedback from the Prime Minister, and he told me that the Prime Minister did not change his position. I told him that the President had made a final offer, which was very important in terms of getting us out of the situation we were in. I told him that since the Prime Minister wanted us to get out of tribal prejudices, the President had proposed that we have Justice Visram as the Chief Justice, because he was qualified, and we have Githu Muigai as the Attorney-General. Muigai is also an eminently qualified lawyer. I am saying this because it is very important. If you go back to why we are talking of a broader equation of the people in this system, there is always need to make sure that there is a wider representation. I told Ishakia: "It is very important that we have a reaction on this matter quickly." So, at around 12.30 p.m. Ishakia called and told me: "The Prime Minister has no problem with Githu Muigai, but he is still insisting on Justice Omolo."

Mr. Chairman, Sir, I am a diplomat. We had such negotiations even during the formation of all the other Commissions. It is not like this one is special. We try to facilitate solutions. I told Ishakia: "I will not tell the President about the reaction of the Prime Minister on this one because we are almost moving towards an agreement. I will not tell him because I do not want to prejudice the process, but I recommend that the Prime Minister conveys this message himself to the President, so that they see whether they can come to an agreement." Ishakia came back to me and told me: "Give us the number, and the Prime Minister is going to call the President." I gave them the number. At that time, the President was in Harambee House. So, I just walked across and told him: "The Prime Minister is going to call any time now." So, I alerted even the President's Secretary to facilitate. The President waited until 3.00 p.m. There was no call. I called Ishakia again. I asked him what was happening. He told me: "The Prime Minister is going to call. He is about to call." I told him: "If he is going to call now, the President has gone to State House. So, you have to use a different number." I gave him the number so that they could talk.

The President waited up to 6.00 p.m. and then asked me what was happening. I told him: "Let me check." I asked the Comptroller of State House to call the Prime Minister himself and try to connect them, because Ishakia told me that there was a problem in connection. I asked the State House Comptroller to call the Prime Minister, so that he could facilitate connection. At that time, the Comptroller of State House called and talked to Caroli Omondi, who said that the Prime Minister was not available until after one-and half hours, because he was engaged. That was 6.00 p.m.

At that point, the President said: "I have made my effort. I tried to compromise and address the points raised by the Prime Minister. So, go ahead and prepare a Press Release", which we did. He said he consulted enough, and that he had fulfilled his constitutional mandate. So, that was the time we made the announcement. What I have said is, of course, contained in a note, which is here. First of all, the agenda of the meeting is here. With it is the report which I prepared for the Vice-President and Minister for Home Affairs when he was coming to address Parliament on these consultations. All that I have said to this Committee is captured in the report I sent to the

Vice-President and Minister for Home Affairs. A copy is here. I also have the minutes and the decisions of the meeting of 27th. We have the list of the names which were being proposed and the minutes of the meeting of the technical team.”

From the foregoing, it is apparent that extensive consultations did occur, but it was impossible to conclude in concurrence as the Prime Minister was unavailable for further consultations despite repeated attempts to reach him.

An excerpt from the court ruling by Justice Musinga (**Annex 6**), states the following:

“On the basis of the concession made by the Attorney General, who is the respondent in this petition, it must be accepted that the said nomination did not comply with the constitutional requirements of **Article 166(1) (a)** as read together with **Section 24(2) of Schedule Six** of the Constitution. To that extent, the petitioners have proved that the nomination was unconstitutional. The rule of harmony in interpreting the Constitution as earlier stated has to be borne in mind.

The second issue relating to the constitutionality of the nomination to the office of the Chief Justice is whether it was done after consultation between the President and the Prime Minister in accordance with the **National Accord and Reconciliation Act**. The Constitution does not define the word “**consultation**”. Other than media reports that were annexed to the petitioners’ affidavit, there is no other evidence relating to the consultations. What does the word “consultation” therefore mean? The **Shorter Oxford English Dictionary** defines “consult” as, inter alia, “**take counsel together, deliberate, confer**.” “Consultation” is said to mean, inter alia, “**the action of consulting or taking counsel together, deliberation, conference**.” **Websters New Universal Unabridged Dictionary** suggests that it means “**consulting, a meeting of persons to discuss, decide, or plan something**”, while ‘consult’, in the relevant context means “**to ask advice of, to seek the opinion of as a guide to one’s judgment**”. In the **Readers Digest Universal Dictionary**, ‘consult’ is rendered in such context as “**to exchange views, confer**, and ‘consultation’ as “**the act or procedure of consulting, a conference at which advice is given or views are exchanged**.”

In the South African case of **MAQOMA vs. SEBE & ANOTHER 1987 (1) SA 483** the meaning of consultation was considered in the context of the Administrative Authorities Act 37 of 1984, which like our Constitution, does not define ‘consultation’. Pickard J observed:

“It seems that ‘consultation’ in its normal sense without reference to the context in which it is used, denotes a deliberate getting together of more than one person or party ..... in a situation of conferring with each other where minds are applied to weigh and consider together the pros and cons of a matter by discussion or debate. The word “consultation” in itself does not presuppose or suggest a particular forum, procedure or duration for such discussion or debate. Nor does it imply that any particular formalities should be complied with. Nor does it draw any distinction between communications conveyed orally or in writing. What it does suggest is a communication of ideas on a reciprocal basis.”

In AGRICULTURAL, HORTICULTURAL AND FOREST INDUSTRY TRAINING BOARD vs. AYLESBURY MUSHROOMS LTD [1972] 1 All ER 280 at 284 it was held that:

“The essence of consultation is the communication of a genuine invitation, extended with a receptive mind, to give advice. If the invitation is once received, it matters not that it is not accepted and no advice is proffered. Were it otherwise organizations with a right to be consulted could, in effect, veto the making of any order by simply failing to respond to the invitation. But without communication and the consequent opportunity of responding there can be no consultation.”

From the definitions of the word ‘consultation’ as hereinabove stated and from the authorities cited and from the annexures to the petitioner’s affidavit, it appears to me that there was some consultation between the President and the Prime Minister. However, there was no consensus or agreement between the two principals, which I must state, is not a requirement under the provisions of **Section 24(2)** of Schedule Six of the Constitution”.

From the first sentence of the excerpt of the court ruling, it appears that the Judge referred to the actions of the Attorney-General (AG), i.e. in signing the press statement by the JSC, to declare the appointments as unconstitutional. The Attorney General was subsequently named as a petitioner in a different case, representing the Government in supporting its view that the appointments were unconstitutional. The Judge should not have relied on actions of the AG when he had not been substantively instructed to act on

behalf of the Government in the JSC. This strengthens the view that the appointment was constitutional, and the nominees should proceed for vetting.

It should also be noted that Justice R. Omollo, the senior most judge, was not acting in good faith in rejecting the appointment of the new Chief Justice while part of the JSC as he probably would be the acting CJ in the event that a new one was not appointed by February 27, 2011, according to submissions received from the Judicial Service Commission.

The section of the majority view that fully supports the constitutionality and vetting of the three candidates is comprised of Hon. Isaac Ruto, EGH, MP and Hon. George Nyamweya, MBS, MP.

### **3.0 Appointment of Attorney General and Director of Public Prosecutions:**

The Committee affirms that these appointments were done properly after consultations between the President and Prime Minister. The Majority in the Committee therefore decided to vet the Candidates as required of them by the Constitution and propose its recommendations to the House for conclusion on this matter. The Committee recognizes the urgent need for implementation of the constitution and affirms its commitment to the same by making a conclusive determination on these appointments. There is also recognition that the mandatory exit of the current Chief Justice and Attorney General will bring discordance in the workings of Government until their successors are in place. Indeed the Attorney General's deliberate failure to heed instructions by government in recent court proceedings on interpretation of the Constitution is a point to note. In view of the need for stability in the country, confidence in the Government and most importantly urgent reforms in the judicial system, The Committee cannot overemphasize the urgency of immediate appointments to the position of the office of the Attorney General and the Director of Public Prosecutions under the new Constitutional dispensation.

#### **4.0 Affirmative Action**

On the issue of Gender parity and affirmative action in regard to Appointments, the Committee supports the principle but recognizes that the Constitution itself, applies the gender requirement of one third appointments to elective and appointive bodies (Art 27.7). There is also a general gender equality proviso for appointment of judicial offices by the Judicial Service Commission under the Judiciary Chapter. The quota however is best analyzed after all appointments are made to the positions of Deputy Chief Justice, Supreme court, Court of Appeal, High court, Magistracy, Registrars etc. in order to confirm whether the gender quota in the Judiciary has been filled. The issue therefore is premature at this early stage and until all appointments are made the constitutionality of quota thresholds for affirmative action cannot be considered. The Committee further recognizes that it is not only gender but minority interests and regional balance that should be considered and this may be considered during the vetting processes done by Parliament.

#### **5.0 Conclusion**

The Committee affirms that, despite several attempts to prevent Parliament and this Committee from concluding in this matter, the independence of the August House is secured and the principle of Separation applies such that it must perform its constitutional mandate without interference. It is regrettable that some discussions within the Committee have found their way into the media before the report of the Committee was table. However, in view of heated discussions around the appointments of the Chief Justice, Attorney General and Director of Public Prosecutions, is important to reiterate the universal democratic parliamentary principle that "the minority will have its say and the majority will have its way". The Minority in the Committee have been heard and the Majority in the Committee have prevailed. The Speaker of the House is also commended for his neutrality in the matter and his strict adherence to the rule

of law and parliamentary procedure, particularly, in the confidence with the ability of Parliamentary committees to deal with matters within their jurisdiction.

# **STRONG Dissenting Opinion on Constitutionality of the Nomination Process for the Three Constitutional Offices**

## **1.1 Background**

1.1 It is important to note right from the outset that this essentially is a “*two-in-one*” report, primarily because this is a matter of constitutional interpretation and personal conscience. There was no consensus on any of the three appointments, and each decision was put to a vote.

1.2 And so the verdict of the Committee on this matter represents two diametrically opposite positions: one that believes the nominations were constitutional and the other that is strong in conviction that all the nominations not only violated the constitution but indeed places the very survival of the new order at grave risk.

1.3 This dissenting opinion is strongly and unequivocally backed by the following three members of the Committee:

1. Hon. Ababu Namwamba, MP
2. Hon. Olago Aluoch, MP
3. Hon. Millie Odhiambo-Mabona, MP

1.4 The opinion is anchored on the following four central pillars:

- a) Progressive interpretation of the Constitution.
- b) Fundamental principles of Constitutionalism, and fidelity to the spirit and letter of the Constitution.
- c) Consistency on due process.
- d) Faithfulness to the evidence adduced.

1.5 The members holding this opinion are proud in their belief that often it is not multitudes that stand on the right side of history, but rather the conscientious ones ready to pay any price to uphold ultimate fidelity to truth, justice and the rule of

law. The Members are inspired by the words of Dr Martin Luther King Junior, that: *“the ultimate measure of a man (and woman) is not where he stands in moments of comfort and convenience but where he stands at times of challenge and controversy”* and further by the refrain of Abraham Lincoln that to remain silent when you must speak makes cowards of men (and women).

- 1.4 The members are convinced that they have risen to the challenge of E.G. White, when he says *“the greatest want of the world is the want of men. Men who cannot be bought or sold. Men whose hearts are true and honest; men who can call sin by its name; men whose conscience is true to duty as a needle is to the pole; men who can stand for the truth, though the heavens fall”*. It is not numbers that count in standards this high.

## 2.0 The Four Pillars Anchoring this Opinion

### 2.1 *Progressive Interpretation of the Constitution*

- 2.1.1 After a lengthy and costly search for a new constitutional order, Kenyans must jealously guard the very soul of this new dawn. The beginning point in this almost divine calling is to maintain the highest possible standards of fidelity to the spirit and letter of the constitution. In this regard, Kenyans must indeed be like Caesar’s wife - beyond a shred of reproach. But this pursuit would be rendered nugatory, *ab initio*, with minimalist, conservative and misleading interpretation of that spirit and letter. Article 259(1) of the Constitution raises the bar in interpreting this Mother Law, by requiring that:

*This Constitution shall be interpreted in a manner that:-*

*(a) promotes its purposes, values and principles;*

*(b) advances the rule of law, and the human rights and fundamental freedoms in*

*the*

*Bill of Rights;*

*(c) permits the development of the law; and*

*(d) Contributes to good governance*

It is the very strong view of the dissenting members that the President's action has violated every single principle contained in this article, as demonstrated below.

- 2.1.2 The purposes of the Constitution are found in, amongst other places, the Preamble that states: *"We, the people of Kenya...RECOGNIZING the aspirations of all Kenyans for a government based on the essential values of human rights, equality, freedom, democracy, social justice and the rule of law"*. Article 10 of the Constitution provides further that *"The national values and principles of governance in this Article bind all State organs, State officers, public officers and all persons whenever any of them applies or interprets this Constitution; enacts, applies or interprets any law; and makes or implements public policy decisions* (emphasis added). The National values and principles of governance include **National Unity, the Rule of Law, Democracy and Participation of the People, Equity, Social Justice, Inclusiveness, Equality, Human Rights, Non-discrimination and Protection of the Marginalized; Good Governance, Integrity, Transparency and Accountability.**
- 2.1.3 Article 27 of the Constitution provides for equality and freedom from discrimination, which is an entitlement of every single Kenyan. Article 232 sets forth the values and principles of public service that include: *"...accountability for administrative acts; fair competition and merit as the basis of appointments and promotions; and affording adequate and equal opportunities for appointment, training and advancement, at all levels of the public service, of men and women; members of all ethnic groups; and persons with disabilities"*. These values and principles of public service apply to public service in *"all State organs at both levels of government"*.
- 2.1.4 And so the first question that must be posed here is, **was Article 259(1)(a) of the Constitution complied with?** Did the Principals interpret the constitution in a manner that *promotes its purposes, values and principles* as is constitutionally required? From the evidence adduced by all parties, including by the office of the

President and the office of the Prime Minister, the answer is emphatically NO. This is obvious for the following reasons:

- a) There was an attempt at identification of candidates between about four (4) officers from the office of the President and the office of the Prime Minister. The process was neither **transparent nor accountable**, not only between the two Principals but also, and especially so, between government and citizens of this land. For Constitutional offices that need to inspire public confidence, this was not only unconstitutional but also a blot on the integrity, legitimacy and credibility of the institutions concerned.
- b) **Fair competition and merit** was never even considered as a basis for selection. It has been indicated that the nominee for the position of Chief Justice was appointed on the sole basis of being a minority. Even though the promotion of minorities is laudable, it has to be justifiable within an overall framework of constitutionality and the judicial reform agenda. Commitment and industry must be recognized in the reform agenda in equal measures with the process of weeding out corruption. The nominees for Attorney General and Director of Public Prosecutions were not selected from a competitively generated list. It has been argued that in a pure Presidential system such as Kenya's, the President has unfettered powers of appointment, and so that besides the Legislature that has the power to vet, there is no role for any other person or institution. This is certainly is not in tandem with both the letter of the Constitution and the spirit of the same as backed by the *Legislative History* contained in the Hansard Reports on deliberations of the Parliamentary Select Committee on Constitution Review (PSC) and the Committee of Experts (CoE). Records show that members in fact settled for a hybrid system fusing a bit of American Presidentialism and British Parliamentarism, because it was recognized that given its history and the propensity for impunity by its leaders, Kenya needed a system that is more accountable, transparent and competitive - even in the context of a Presidential system. Below are excerpts from Hansard record of the PSC proceedings in Naivasha.

## APPOINTMENT OF CHIEF JUSTICE, DEPUTY CHIEF JUSTICE AND OTHER JUDGES

**Mr. Chairman:** ... I think what Ms. Odhiambo pointed out is very critical. In view of the nature of the Executive we are likely to take, does that impact on the form of appointment, discipline of the judges? This is because we can have the Judicial Service Commission as proposed in the current draft which has no role for Parliament except in terms of removing the judges or do we have the American system where it is the President and Parliament's decision that do the appointments. The President appoints and Parliament vets. There are two different philosophies.

**Mr. Chachu:** Mr. Chairman, Sir, that is the question I was trying to pose and basically, in terms of the appointment of judges. If we use the American model where Parliament will have to vet these appointments, what will be the role of the Judicial Service Commission? **I thought that was one of its key functions as established here.**

**The Minister for Agriculture (Mr. Samoei):** I think it is important for the people through their representatives to have a say on some of these people. It provides the connection between the **supremacy of the people** and all these institutions.

**The Minister for Justice, National Cohesion and Constitutional Affairs (Mr. M. Kilonzo):** Mr. Chairman, Sir, I am afraid, we must provide for vetting judges. The experience has been very bad and when reach even the Judicial Service Commission, I am going to request that we insert a provision for them to recruit these judges before recommending them to the President transparently.

**Mr. Ethuro:** Mr. Chairman, Sir, I know opposites, but not on this one. I would imagine the President is not going to appoint people because he knows them or he plays golf with them. The President should be guided by the Judicial Service Commission in term of these people, particularly consistent with the High moral character, integrity and impartiality. The role of Parliament is just to affirm and confirm. Parliament would be expected really not to go into the details unless there are serious lapses. So, I find that there is no contradiction in having both.

**Mr. Chairman:** Will it not be too elaborate?

**The Deputy Prime Minister and Minister for Local Government (Mr. Mudavadi):** Mr. Chairman, Sir, I am really not deviating from hon. Ethuro has said. In fact I am perpetuating it.

...

**The Minister for Lands (Mr. Orengo):** So, we can say that the President shall appoint from a list.

**Ms Odhiambo:** Mr. Chairman, Sir I do not think that that means that we do not want a Presidential system. Even if you look at the American system, it is Presidential. As much as we want a Presidential system, we need to put higher standards, even higher than the American system for purposes of accountability. When we say that we let the President appoint, for example, our first President was Jomo Kenyatta who was a non-lawyer, the second one was President Moi, a non-lawyer, and the third one is President Kibaki, a non-lawyer. The fourth one, I will be a lawyer, but that is the only exclusion. Whenever they made appointments or whenever they have had to make appointments, they do not sit somewhere and say pinky ponky, they actually consult. So in this situation, you have the Judicial Service Commission to recommend. If you do not have the Judicial Service Commission, they will be actually be consulting someone, meaning that we will be having a kitchen Judicial Service Commission. So, why can we not just do it properly instead of letting the President choose from among his friends to recommend for him the people they like?

...

**Ms. Karua:** ... So how can we improve on the American and British systems? Even in the British system, the administration hand picks. That is why in Kenya, a judge under investigations is picked and sworn in so that somebody else can appoint an ageing Chief Executive in a certain parastatal. This is the trade off which later embarrasses everyone. The same executive does not stop the prosecution of the judge under question. That is why they promote magistrates famous for fixing drug cases. They are taken to the High

Court or Court of appeal a man whose sole qualifications is having fixed a petition for someone. You avoid it by running away little from the American and the British and mixing a little bit of the Italian system. Italy may not be famous for many things but there is one thing they do which many people do not except for Canadians. This is to hire judges competitively. We should include the word “competitive”. I saw this in the Constitution that Judges will be hired competitively. The details will be for the Judicial Service Commission Act. When we hired the judges who were dealing with Constitutional disputes, apart from an oral interview, those people will also do a written interview. ....

I would also let the President pick the Chief Justice but from among the judges of the Supreme Court. Remember they have been hired competitively. They are already there. So, let him have his choice among those the system has already cleared so that we run away from the American system where one system can favor retrogressive policies at the behest of those in authority.”

- c) **Due diligence of the nominees** was not undertaken and hence the integrity of the process is highly questionable. The vetting by Parliament does not preclude a *‘due diligence’* test by the Executive arm.
- d) The two central issues of **equity and equality** were not addressed. A woman candidate was added ‘improperly’ and as an afterthought, indeed not for the positions that were under consideration and certainly for considerations other than gender equity. Where there are at least three positions being considered at the same time, the Constitutional *“one-third principle of appointment of either gender”* must apply. The appointing authorities are also obligated to take into account previous important appointments, and whether those appointments have addressed these concerns. Recent constitutional appointments have included the Commission on Implementation of the Constitution and the Commission on Revenue Allocation. Both Institutions are headed by men. There was, accordingly, a clear breach of Article 259 and related provisions of the Constitution.

2.1.5 The second question that begs an answer is **whether Article 259(1)(b) on advancing the rule of law and the human rights and fundamental freedoms in the Bill of Rights was complied with?**

(a) The process failed on the significant test of observation of the rule of law, human rights and fundamental freedoms. The Chapter on the Bill of Rights reinforces the Article 10 principles. It provides, at 20 (1), *inter alia*, that “...*the Bill of Rights applies to all laws and binds all State organs and all persons*”. And further that “*in interpreting the Bill of Rights, a court, tribunal or other authority shall promote the values that underlie an open and democratic society based on human dignity, equality, equity and freedom*”. 20(4).

(b) A select club of five persons were the only individuals involved in the selection of four core Constitutional offices on behalf of forty million Kenyans. This is not what was intended by the framers of the Constitution, neither was it what Kenyans intended when they gave unto themselves a new constitution order. It definitely does not fit within the framework of “*an open and democratic society*”. Further, Article 27 outlaws discrimination and, at sub-article (4) provides that “*the State shall not discriminate directly or indirectly against any person on any ground, including sex, disability or age...*”

(c) None of the officers interviewed indicated that there had been any clear criteria or any at all to determine any nominations to public offices within the meaning of article 27. The result was direct and indirect discrimination against women. Indeed the direct discrimination argument seems to be in tandem with the argument by the legal counsel for PNU in the Nairobi High Court Petition No. 16/2011 (the *Anne Njogu case*). One Mr. Steve Njiru noted that such issues can only be considered after 2012. This means that the exclusion of women was purposeful and intentional.

(d) In relation to indirect discrimination, Ambassador Muthaura in answering a question as to what positions women were considered for, gave a telling

answer, that it must be “*one of those positions*” – indicating that he was not clear in his mind what positions women candidates were considered for. On the other hand he was very clear as to what positions the male nominees were considered for. In addressing the gender equation, it has been suggested that discrimination can only be determined upon the finalization of all core appointments. The minority disagree. If this principle were to be applied, then by the time the issue of gender discrimination is raised, it may be cosmetic as not much may be done. The spirit and letter of the Constitution requires that all those dealing with implementation of the Constitution must constantly take into account issues of equality and equality. In any event, if the earlier suggestions were followed, then it would mean that persons already appointed would have to be terminated to take into account gender considerations. That in itself would be unconstitutional.

(e) It must also be noted that, the nominations viewed holistically, there was also similarly inadequate regional balance as contemplated by the Constitution, both in letter and in spirit.

2.1.6 The third question is **whether the nominations are in consonance with Article 259 (c) requiring interpretation that advances development of the law.** The letter and spirit of the Constitution encourages a progressive as opposed to a restrictive interpretation of the Constitution. Article 259 (3) provides that “*Every provision of the Constitution shall be construed according to the doctrine of interpretation that the law is always speaking*”. **The law speaks to the circumstances that Kenya found itself in around 2007/8. The law speaks to national healing and reconciliation. The law speaks to reforms. An interpretation that takes the traditional conservative approach is not in keeping with this forward march to reforms, national healing and reconciliation.** (emphasis deliberate).

From the presentation of Mr. Caroli Omondi, the appointments must respect all laws of the land, including the National Cohesion and Integration Act, which, at section 7(2) requires that no public office shall have more than one third of its establishment drawn from one community. This requirement has already been

flouted in many public institutions, including the State Law Office whose top officers are:

- 1) Proposed Attorney General: Githu Muigai
- 2) Solicitor General: Muchemi Wanjuki
- 3) Deputy Solicitor General: Muthoni Kimani
- 4) Registrar of Political Parties: Lucy Ndung'u
- 5) Registrar General: Bernice Gachegu
- 6) Deputy registrar-general: F. M. Ng'ang'a

2.1.7 It is also trite law that Constitutional provisions should not be construed in isolation from all other parts of the Constitution, but should be construed in harmonious reference to and correlation with those other parts. A provision of the Constitution must be construed and considered as part of the Constitution and it should be given a meaning and an application which does not lead to conflict with other Articles, and which conforms with the Constitution's overall frame and intent. When there are two provisions in a statute, which are in apparent conflict with each other, they should be interpreted such that effect can be given to both and that construction which renders either of them inoperative and useless should not be adopted except in the last resort<sup>2</sup>. This approach is what has widely become the basic cannon of interpreting the Constitution, otherwise known as the *doctrine of harmonious construction*.

2.1.8 Indeed his position is firmly backed by Case Law. In **Centre For Rights Education and Awareness (CREAW) & 7 others v Attorney General**,<sup>3</sup> the High Court pointed out that:

---

<sup>2</sup> Raj Krishna vs Binod, AIR 1954

<sup>3</sup> [2011] eKLR

*“In interpreting the Constitution, the letter and the spirit of the supreme law must be respected. Various provisions of the Constitution must be read together in order to get a proper interpretation”.*

In the Ugandan case of **TINYEFUZA vs. ATTORNEY GENERAL, CONSTITUTIONAL APPEAL NO. 1 OF 1997**, the court held as follows:

*“The entire Constitution has to be read as an integrated whole and no one particular provision destroying the other but each sustaining the other. This is the rule of harmony, rule of completeness and exhaustiveness and the rule of paramountcy of the written Constitution.”*

A similar principle was enunciated by the United States Supreme Court in **SMITH DAKOTA vs. NORTH CAROLINA** 192 U.S. 268 [1940]. The court stated:

*“It is an elementary rule of Constitutional construction that no one provision of the Constitution is to be segregated from the others and to be considered alone but that all the provisions bearing upon a particular subject are to be brought into view and to be interpreted as to effectuate the great purpose of the instrument”.*

2.1.9 From the foregoing, it is apparent that sections 24 and 29(2) of the Sixth Schedule must be read with Articles 166, 156 and 157 of the Constitution and also together with articles 10, 27 and 232 of the Constitution and not in isolation if we will have to give effect to the provisions of the Constitution. The absurd results that would be arrived at if the Constitution was not read in whole is that those arguing that article 166 does not apply in the appointment of the current Chief Justice imply that the qualifications as provided in 166(2) are also suspended. That means the Chief Justice can be a beautician or a mortician alone and qualify as a Chief Justice.

2.1.10 The fourth question is **whether Article 259 (1)(b) on promoting good governance was complied with**. Good governance entails amongst others, transparency, accountability to the people, responsiveness to the public, public participation and integrity. The process failed the good governance test for the following reasons:

- a) From the presentations as indicated herein, the public has no confidence in the process of appointment of the officers. A process that is responsive to the public must take into account public concerns and issues raised.
- b) The Constitution mentions the principle of “public participation” and involvement severally including in Article 221 (5), 217 (d), 201 (a), 196 (2), 174 (c) amongst others. The legislative history from the collection and collation of views on the first Constitutional Draft indicate that the public wanted more direct say in the affairs of the government and indeed that is why they reserve the right to exercise their sovereign power *“directly or through their democratically elected representatives”*. (Article 1(2)). Where the public has ceded the power, it is clearly indicated in the Constitution, for instance under the Chapter on Legislature, they have given the power of law-making to their democratically elected leaders. However, in issues such as public appointments of key offices, this power is not ceded and the public must exercise this power directly. Members were of the view that the process of nomination was not inclusive and therefore Article 129 and 131(2) of the Constitution were not upheld. Good governance requires respect for the rule of law. This requires regard for the law. Appointment of core and public offices in flagrant abuse and disregard of the Constitution does not amount to good governance.

## **2.2 Fundamental principles of constitutionalism, and Fidelity to the spirit and letter of the Constitution**

- 2.2.1 A constitution is more than just the letter and text of the law. It has a soul, a spirit. And the principle of constitutionalism entails a culture that not only reflects but indeed lives up to this soul, this spirit. It’s about a culture of living in accordance with the constitution, in a manner that respects constitutional principles and that upholds both the letter and the spirit of the Constitution. In the Kenyan context, this requires an understanding of the motivation behind the push for a new Constitutional dispensation. Kenyans rebelled against imperialism and sought a more inclusive and transparent system of governance that is accountable to the

populace. Through the Constitution, Kenyan people claimed back the sovereign power from the Executive sovereign.

- 2.1.2 Constitutionalism requires that the core principles and aspirations contained in the Constitution remain alive through compliance by all government agents. The letter and Spirit of the Constitution was not followed on various issues, including the following:

### ***Consultation***

- 2.1.3 On basic interpretation of the Constitution, it is obvious that the issue of consultation is core in the transitional period. Indeed there are core provisions in the Constitution that deal with the issue of consultation. Article 24 (2) of the Sixth Schedule to the Constitution stipulates that “a *new Chief Justice will be appointed by the President subject to the National Accord and Reconciliation Act in consultation with the Prime Minister and approved by the National Assembly*’.
- This position is further ingrained in Section 29 (2) of the Sixth Schedule which provides that “*Unless this Schedule prescribes otherwise, when this Constitution requires an appointment to be made by the President with the approval of the National Assembly, unless after the first elections under this Constitution, the President shall, subject to the National Accord and Reconciliation Act, appoint a person after consultation with the Prime Minister and with the approval of the National Assembly.*”
- 2.1.4 The transitional clauses confer on the President and the Prime Minister the constitutional mandate to appoint the next Chief Justice but their choice of candidate is subject to the approval of the National Assembly. The fact that the President has to consult the Prime Minister has not been disputed. What is disputed is the definition of consultation and whether it did take place. We find that it did not take place.
- 2.1.5 Here we must pause and ask **what exactly is “Consultation”?** It is submitted here that in this context **Consultation means Concurrence**. While Members have noted

that the Constitution of Kenya does not define the expression consultation, the country can nonetheless borrow from the experience of other countries and not from subjective views on the word “consultation”. The expression “**in consultation**” and “**after consultation**” have been examined in other jurisdictions such as South Africa where in the interim Constitution it was defined thus:

*“such decision shall require **the concurrence** of such other functionary; provided that if such functionary is a body of persons, it shall express **its concurrence** in accordance with its own decision-making procedure<sup>4</sup>...by using the expression “**in consultation**”, the legislature attempted to “describe the joint action of the head of government and the members of the Cabinet as it exists in the Westminster system”*

The term “**after consultation**”, which is used in Section 24(2) of Schedule Six of the Constitution of Kenya is also used in the interim Constitution of South Africa as well as the present Constitution of South Africa.<sup>5</sup> In South Africa, consultation has been taken to mean **concurrence**.

2.1.6 It is also the opinion here that **Consultation requires a High degree of Consensus.**

According to the Court of Appeal of New Zealand:-

*“if the party having the power to make a decision after consultation **holds meetings** with the parties that it is required to consult, **provides those parties with relevant information** and with such further information as the request, comes to the meeting with an **open mind**, takes due notice of what is said, **and waits until they have had their say** before making a decision, the position is properly described as having been made after consultation. For a minority or coalition government, **consultation processes are particularly relevant to achieving a high degree of consensus in the exercise of these powers<sup>6</sup>**”.*

(emphasis added).

---

<sup>4</sup> Constitution of the Republic of South Africa of 1993, Section 233(3)

<sup>5</sup> See Constitution of the Republic of South Africa 108 of 1996 Section 174(3) dealing with appointment of judicial officers.

<sup>6</sup> CA 23 AND 73 1992

2.1.7 It is our further view that **The Element of Time should not compromise Consultations.** In *Reg. vs Social Services Secretary*<sup>7</sup> in a question that involved the powers of the Secretary of State under section 28(1) of the Social Security and Housing Benefits Act, 1982 to make regulations “in consultation with organizations that appeared to him”, the Queen’s Bench Division of the English High Court held that:-

*“for there to be consultations within the meaning of the subsection, there had to be genuine request for advice and a genuine desire to receive that advice; that the amount of information given with the request for the advice and the time limit within which the advice was to given depended on the circumstances but there could be no degree of urgency which absolved the secretary of state from his duty to consult”.* (emphasis added)

2.1.8 We also hold that in coalition governments, **Agreements is Critical and necessary.** Since a coalition by the very name, connotes two, agreement is required. Indeed the practice of the Coalition government in Kenya has been through constant communication by phone, meetings and other means that is ultimately geared towards agreement. In the words of Ambassador Muthaura and as confirmed by Mr. Caroli Omondi of the Prime Minister’s office:

*“for persons working together, you can consult through the telephone, somebody going across the office and somebody asking another person to convey a message. Consultation in the setting of the President and the Prime Minister is a daily affair. If you structure it too much you make it too rigid and sometimes you create more conflict....they approve a decision, and it is that decision that we make public.”*

Amb. Muthaura did not talk of an individual approving a decision but of the Principals approving a decision. Ambassador Muthaura did acknowledge that what may have compromised consultations in this instance was the African Union Summit

---

<sup>7</sup> [1986]WLR QBD

in Addis Ababa and the urgency to finalize the process of appointment for these key officers as proof of a credible local mechanism as an alternative to the ICC process.

2.1.9 But what is the import of usage of different terminologies before and after the word “consultation”? A lot has been inferred from the usage of different terminologies before or after the word ‘consultation’. In Section 4 (5) of the National Accord and Reconciliation Act it is indicated that removal of ministers can only be “*after prior consultation and concurrence in writing*”. It has been suggested that by implication, consultations in other areas should have also been qualified in this regard and failure to do so would lead to a conclusion that consultation should not amount to concurrence. We certainly hold a contrary opinion. Indeed from the other wordings of the National Accord and Reconciliation Act, the opposite is intended. The Accord was signed to end hostilities and to foster agreement in a Coalition government. The framers of the Accord were alive to the fact that both sides needed to work together and hence the use of the following phraseology: “*there must be real power-sharing to move the country forward and bring the healing and reconciliation process*” and “*...we commit ourselves to work together in good faith as true partners, through constant consultation and willingness to compromise*”. Both the practice and letter of the law shows that consultations cannot be information but must result in agreement. Information given by Ambassador Muthaura indicates that consultations by their very nature have been fluid as that is what facilitates agreement.

2.1.10 And are there any **precedents on this matter in the Kenyan context?** Indeed the Speaker has previously ruled on a similar matter, regarding appointment of the Leader of Government Business in Parliament. In this past ruling, the Speaker highlighted that the Constitution and the National Accord and Reconciliation Act, 2008 contemplated only one Government of Kenya. This therefore means that any nominations or designations forwarded to Parliament for approval must be made through consultations and willingness to compromise. In a more recent ruling, the Speaker noted that he does not have leeway to change his mind unless there are compelling reasons to do so. In this case, for the stability of the institution of

parliament, this dissenting opinion urges the Hon. Speaker to find as he has in the past, that nominations in a coalition government must be by both sides of the coalition, signified by concurrence of the two Principals.

2.1.11 It is also significant to refer to **Legislative History**. The Legislative history of the PSC and the CoE deliberations indicates that the word “consultation” was chosen as the one that is more conducive to the spirit of the National Accord and Reconciliation Act, which places a premium on “*good faith, true partnership, constant consultations and willingness to compromise*”. A more positive as opposed to compulsive language was urged to foster good working relations and was not at any time meant to preclude concurrence or agreement. Indeed legislative history shows that attempts to remove the National Accord and Reconciliation Act was not allowed and indeed was instead entrenched in the further in the Constitution. The Accord talks of “real power-sharing”. Real power sharing connotes just that - sharing of decisions, including on appointments. If the drafters of the Constitution had intended to provide that Consultation is mere information or does not result in agreement, there was nothing stopping them from expressly stating so. They instead incorporated the National Accord and Reconciliation Act that obligates the Principals to work together for reforms through real power sharing.

## 2.3 Consistency on Due Process

2.3.1 Decisions, especially on a matter as weighty as constitutional interpretation, must be backed by clear, unambiguous and firm logic and consistency. This dissenting opinion holds that all three appointment being considered were done by the same authority within the same process on the same interpretation of the Constitution and therefore cannot be separated. It therefore follows that if one were to question the credibility of one institution, one cannot avoid raising credibility over the other institution.

2.3.2 There is no public confidence in all the offices and hence if, on principle, there is need to refer one office back due to lack of public confidence, then there is need to refer all of them for lack of public confidence. All the offices under

consideration are core offices in the reform agenda and a false start in the appointment of any key officers in any of the institutions will compromise the reform agenda. All the offices being considered are very important offices that serve the public interest. It cannot be presumed that a public outcry over the mode of appointment of the offices of the AG and the DPP should not be given equal weight to that of the office of the Chief Justice. All offices in the Public Service must be treated seriously and must earn public confidence and respect.

## **2.4 Faithfulness to evidence adduced**

- 2.4.1 It is further held here that all the evidence adduced can only lead to one conclusion: the process was contaminated and must be repeated for the public to have confidence in the concerned institutions. Of the eleven institutions that appeared before the Committee, ten seriously questioned the constitutionality of the process. Only a single one – the one responsible for the appointments – found reason to support the action. And accordingly, on the balance of evidence alone, the appointments can only be found to have been certainly against both the letter and spirit of the constitution. That evidence hinged on law.
- 2.4.2 The Law is clear on the mode of appointments. Where it is argued the law is not clear, the method picked must be that which promotes the letter and spirit of the Constitution, including the values and principles of governance. Professional public and Non-Governmental Organizations of repute, including ICJ, FIDA, LSK, Transparency International, Commission on Implementation of the Constitution and the Judicial Service Commission all agreed that there was a violation of the Constitution on various grounds. There is need to take heed of their interpretations.
- 2.4.3 On **Consultations**, the evidence considered whether consultations were concluded or if indeed consensus was necessary. From the presentation of Ambassador Muthaura, haste over the AU process compromised consultations. However, given that the AU process is now complete, it is important that the process be

recommitted to the Principals in order to gain public confidence in the institutions under consideration.

2.4.4 **On Impartiality** of the Persons of the Attorney General and the Director of Public Prosecutions, questions were raised as to the impartiality of the Attorney General and the Chief Justice on the matter given that they were deemed as interested parties. The evidence shows that: The Attorney General is the Chief Legal advisor of the Government and the Government is not the chief legal advisor of the Attorney General. He can only advise the government on law and not politics. He has standing instructions by law and he executed his legal mandate by law. No evidence was adduced to show that either the AG or the Chief Justice placed the issue of the nominations in the Agenda of the Judicial Service Commission. They can hence not be deemed to be complicit through an independent action of a different person. The Chief Justice is precluded from holding the office of a Chief Justice by operation of law and therefore is not an interested party.

2.4.5 Based on all the foregoing, the following it is untenable to approve of the nominations. Section 24 (2) of the Sixth Schedule provides that *“A new Chief Justice shall be appointed by the President, subject to the National Accord and Reconciliation Act, and after consultation with the Prime Minister and with the approval of the National Assembly.”* This is a serious Constitutional obligation on all the persons who are designated to act variously. Consultations cannot be delegated as it is only to the Prime Minister and the President. Similarly, appointments or nominations cannot be delegated under the Constitution. The letter before the house is signed by Ambassador Francis Muthaura and not the President. There is therefore no legal letter forwarding any nominations by the President and consequently no nominations before the house.

2.4.5 It is equally difficult to find compliance with the National Accord. The dissenting view holds that the National Accord and Reconciliation Act is part of the Constitution and must be complied with. Justice Musinga in his ruling noted that: *“ notwithstanding, the values and principles stated under Article 10, the spirit of*

*the National Accord and Reconciliation Act ought to have been borne in mind in making the nominations.”* It is held here that the appointments were not done in accordance with the letter and the spirit of the National Accord and Reconciliation Act. The preamble to the Act provides that the coalition government ‘*must be a partnership with commitment on both sides to govern together and push through a reform agenda for the benefit of all Kenyans*’. A reform agenda cannot be pushed through a divisive scenario. The Principals must work together for the common good of the country. The issues as presented to the Members and as agreed by Honourable Muthaura, could have been solved if a little more time was put to consultations. The Principals are urged, for the sake of the country, to forge a united agenda and steer the country towards reforms.

2.4.6 The dissenting Members hold the opinion that in light of the Accord, the citizenry expect the Principals to undertake any significant decision, such as the appointment of the next Chief Justice, with their concerns in mind. The National Accord does not only speak to portfolio balance but provides that “*The composition of the Coalition Government shall at all times reflect the relative parliamentary strength of the respective parties...*” Government means the Legislature, Executive and Judiciary. All appointments in these arms of government must reflect the Parliamentary Strength of the respective parties and is not limited to portfolio balance. A reading that excludes the earlier part of this section not only incorrect but misleading.

## CONCLUSIONS

On proper and progressive interpretation of the Constitution of the Republic of Kenya; on the balance of evidence adduced before the Committee by eminent sources; in the interest of credibility and legitimacy of the three institutions concerned; for the sake of rescuing the new constitutional dispensation from a reincarnation of impunity; and in respect for the sovereign people of Kenya, all the three nominations must be taken back to the nominating and appointing authorities.

## **2.1 The Chief Justice**

The Constitution was violated as there was no compliance with article 166 as read together with sections 24 and 29 (2) of the Sixth Schedule to the Constitution; as well as the National Accord and Reconciliation Act, 2008. There was no gender and regional balance in contravention of article 27 of the Constitution. Principles of public service as contained in articles 10 and 232 were violated. There was no public participation, transparency and accountability. The public confidence in the office is at risk of being eroded irreparably.

## **2.2 The Attorney General and the Director of Public Prosecutions**

The respective articles of the Constitution were violated: 156 and 157 as read together with Sections 24 and 219 (2) of the Sixth Schedule to the Constitution. There was no gender and regional balance in contravention of article 27 of the Constitution. Principles of public service as contained in article 10 and 232 were violated. Indeed the legislative history of the CoE and the PSC shows that the two bodies were meant to be chosen through a system that is a blend of British Parliamentarism and American Presidentialism.

There was certainly no public participation. It is our strong view that while the offices of Attorney General and Director of Public Prosecution are part of the executive, they are nevertheless institutions in the public service and must similarly enjoy a high degree of credibility and legitimacy. Furthermore, during existence of the coalition government, the Attorney General advises not only the President but also the Prime Minister and therefore it is absolutely essential for him to enjoy confidence of both Principals.

# RECOMMENDATIONS OF THE DISSENTING OPINION

1. **THAT** having found that the process of nominations to the offices of Chief Justice, Attorney General and Director of Public Prosecutions all, severally and collectively, fail the tests of constitutionality, legitimacy and credibility, they should accordingly be referred back to the two Principals and the process be conducted afresh in accordance with the Constitution.
2. **THAT** given the need for stability in government and country, and the importance of consultation in ensuring this, a precise constitutional threshold of what entails “*consultation*” should be developed and adopted, alongside structured guidelines to manage the process of in the coalition Government.
3. **THAT** the two Principals should establish a framework to guide the proper operations and management of the coalition Government in a manner in consonance with the letter and spirit of the Constitution as it incorporates the letter and spirit of the National Accord and Reconciliation Act, 2008.
4. **THAT** the two Principals should consult honestly and in good faith for the sake of the country and steer the country towards a reform agenda.
5. **THAT**, above all, the Principals should lead the country, from the front, in maintaining the highest possible standards of fidelity to the letter and spirit of the Constitution to help entrench the principle of Constitutionalism.

## COMMITTEE RECOMMENDATIONS

After extensive deliberations, and with due regard for the dissenting opinions, the Committee resolves:-

1. THAT the process of nomination of the Chief Justice was constitutional and in accordance with Section 24(2) and Section 29 of the Sixth Schedule, however, given the reasons argued above regarding the importance of the head of a newly reformed Judiciary, we recommend the re-processing of this nomination through the Judicial Service Commission.
2. THAT the process of nomination for the office of the Attorney General was constitutional and the nominee should proceed to vetting.
3. THAT the process of nomination for the office of the Director of Public Prosecutions was constitutional and the nominee should proceed to vetting.
4. THAT from the foregoing, the nominees for the offices of the Attorney General and the Director of Public Prosecutions do proceed for vetting immediately.

-----end-----