

CONSTITUTION OF KENYA REVIEW COMMISSION

CKRC

VERBATIM REPORT OF

**DISSEMINATION OF REPORT AND DRAFT BILL, STAREHE
CONSTITUENCY, KICC ROOM 7**

ON

OCTOBER 11, 2002

Final Copy

**DISSEMINATION OF REPORT AND DRAFT BILL, STAREHE CONSTITUENCY, KICC ROOM 7, ON
OCTOBER 11, 2002**

Commissioners Present

1. Prof. Yash Pal Ghai

Secretariat Staff in Attendance

1. Achieng Olende - Programme Officer
2. Gilbert Omoke - Assistant Programme Officer

3. Hellen Kanyora - Verbatim Recorder
4. Catherine Rimberia - District Co-ordinator

Meeting was called to order at 11.10 a.m.

Catherine Rimberia: Morning ladies and gentlemen? Sorry for keeping you long, but you understand why. A lot of things were happening outside so we decided to hold the meeting until they leave. However, we do want to start now. We expect the Chairman any time. But I think we will start with a word of prayer. I will ask one of us here to start the meeting with a word of prayer, please, somebody can volunteer.

Prayers: *Let us pray. Lord our God, we come in front of you thanking you for giving us the gift of life, for giving us the gift of this country and for giving us the gift of living upto where we are today. Lord it is your choice that we should be here today listening to these deliberations which are already going to take place. Lord, we do not know, some of us do not know what is going to happen but because you are ahead of us, we give you the graces to guide us. Lord bless each one of us here and outside the country. To give us the understanding of this constitution which we are hearing, we are not knowing what it is. Give us the gift of understanding so that we are able to implement it and let it be ours not theirs Lord so that we are able to be guided by whoever is coming forth. We ask you this, believing and trusting in your name.*

Catherine Rimberia: Thank you very much. Now, I will ask we introduce ourselves so that as we start, we start together. I will start with the staff from the Constitution of Kenya Review Commission, they will introduce themselves and then we will come back to you. Thank you.

Good morning? My name is Gilbert Omoke.

Hallo, I am Achieng Olende

I am Subi Mulindi

Hellen Kanyora.

I am Esther Waliya

I am Liz Kingi.

I am Janet Wangu

Present

I am Mwithiga Ibrahim

I am Doughlas Gakuu

I am Maina Alex, District Co-ordinator Review Commission Embakassi/Kasarani

I am Mohammed Ahmed Adam from ACRF

I am Elieza Matanyala, Oscar Foundation.

Martin Otiemo from the Electoral Commission of Kenya

I am Bernard Luthuli Shikuli.

I am Joan Makaya

Nichodemus Mulwa

Pastor Julius Sireri

I am Lucy Njagi

I am Eunice from KNAD

Lucy Atieno from KNAD

Catherine Rimberia: O.K. My name is Catherine Rimberia the Co-ordinator for Starehe/Westlands. Now, we called you here, I am sure by now you know why. We have the Draft Bill which you have with you and if you do not have, the Draft Bill is up here so make sure you have a copy for yourself. Now, because we called you some time back to give your views and we are now calling you back again to tell you what happened to those views and I am sure you have a product there in the name of the Draft Bill where your views were put together and a Draft Bill is out for you now to discuss and debate on it. Remember the Draft Bill was launched on the 28th of last month so we do have 30 days to debate, to discuss on it and that is why we are here. We will take you through that Draft Bill but we will still ask you to get time and go through it and debate on it, discuss with members of your family, your friends and if there is anything that you want to recommend further, apart from the views you gave us, now this is the time to do it, at the 28th of this month. You are free to give any of your recommendations.

So, I will ask one of us, to go through, you have the programme so you know what is our next agenda in that programme. I will ask Achieng to take us through the next item in that particular programme.

Gibert Omoke: Alex Maina, please come and assist us.

Alex Maina: In a very short time, I will point out some things that you have, in the past looked at and these are the objectives and the purpose of the Review of the Constitution. I want to go back to it so that as we look at the Draft Bill, we can try as much as possible to see whether some of these objectives have been met and if there are things that you feel need to be done, then you can tell us. The objectives and the purpose of the review are contained in the Review Act, Chapter 3A and they are as follows:

One, is the whole issue of guaranteeing peace, national unity, integrity for the people of Kenya so as to safeguard our well being. So that was the first objective that the new constitution was supposed to ensure.

The second one is establishing a free and democratic system of government. That includes the whole issue of good governance, constitutionalism, rule of law, human rights and gender equity. As you go through the Bill, you will see these things are reflected in it. I am sure you will really appreciate that the issue of human rights are very very well taken care of.

The third one has something to do with the demarcation of the visions of responsibility among the Executive, the Legislature and Judiciary. I am sure this was a very contentious issue on how the demarcation needed to be done and the Bill has really tried to take care of that. There is also the whole issue of people's participation in the governance, the whole issue of electoral process, devolution and exercise of power. As you go through the Bill, I am sure you will see something to that direction.

Then number five, the whole issue of ethnic and regional diversity. There is the whole issue of communal rights including the right of communities to organize and participate in cultural activities and the expression of their identities. I am sure that you will see something to do with the culture, it is something that has really been taken care of. Then there is the whole issue of basic needs of all Kenyans through equitable framework of economic growth and equitable access to national resources and so the Bill has really taken care of basic needs. People really talked about the need for the new constitution to really take care of this. I am sure it has been reflected and like I am saying, if there are some things that you still feel that needed to be done much more better, you can let us know.

There is also the whole issue of promoting and facilitating regional and international cooperation to ensure economic development, peace and stability and to support democracy and human rights. That one I am sure is taken care of. Then there is the whole issue of strengthening national integrity and unity. There is also the whole issue of creating conditions conducive to fully exchange of ideas. I am sure you will see something to that effect.

The other objective was ensuring the full participation of people in the management of public affairs and lastly, enable Kenyans to resolve national issues on the basis of consensus where people can be able to come to an agreement on some pertinent issues affecting their lives.

So what I would really encourage you to do, is as you are taken through the Bill, try as much as possible to see whether these objectives have been met and in areas where you feel some things need to be done, you have a chance, this is just but a draft, to advise on what you think needed to have been done better. Thank you very much.

Catherine Rimberia: Thank you Alex Maina for those objectives. It is upon you as Kenyans, these were the objectives that were guiding the Commission to come up with that draft. It is up to you to check if all that was captured in that Draft Bill. So as you read through, you may not be able to read through today but still you have the copy of the Draft Bill and it will be now upto you to check if all those objectives and principles that were guiding the Commission to come up with that Draft Bill were captured.

Now, mine is just a small item. Just to tell you where we are around in the review process and I am going to look at the stages of the review process. I am sure you are very familiar with these stages. Remember we started with the first stage, which was the civic education, where we called you in Charter Hall and in many other places for civic education, just to prepare people to participate in this process because we said it is a constitution that is people-driven. It is a constitution that was going to be for the people and made by the people, by the Kenyans. That is why we begun with the civic education. Making people aware about the review process.

After that we did hold public consultations. What we dubbed the Public Hearings. For Nairobi we had quite a number of them. I remember towards the end of December-January we did hold the first public hearings and then later on we still came back to you in every constituency and you gave us the views. That is to say that, this Draft Bill is based on what Kenyans told us. I am sure most of you participated in those public hearings. You gave your views orally, some of you wrote them down. There were other meetings, consultations that were done between the Commission and the public and these were views that were collected and they produced what you have today as the Draft Bill.

Recommendations were done and the Draft Bill was produced and it was circulated to the Kenyans in different ways. One of the ways is by what you are holding today. I am sure it is quite familiar to you because it did occur in some of the Daily Newspapers. We got it from there. We also have a website. Most of you have their copies from the website and we also had some summaries, like this one which I have here which initially was in the form of a newspaper pull- out like the one you have but now we have a better version, that is the short version just to make you understand the Draft Bill.

Then the other stage where we are now, we have the 30 days where we need to debate, to discuss about the Draft Bill so that after 30 days we have what we call the NCC that is the National Constitutional Conference. Now, it should be held around the 28th of October because I think the 30 days will expire on the 28th of this month. But before that time comes, you should have been familiar with the Draft Bill. You should have made your recommendations but the question maybe you have today is, after making our recommendations, where shall we take them?

Now, every district, including Nairobi district will have 3 delegates and you have a sheet of paper like this, with the three delegates from Nairobi. Now, the name there, Nancy Lunagi is the person who took the women's seat and who represents the interests of women in the NCC. Now we have the others, we have their telephone numbers so in case you have any recommendations to make you can call them. However, today we are here and whatever recommendations you want to make, we will take them back to the Commission. You give them today and then we will put them back to the Commission.

Now those are not the only people who are in the NCC. Again you have another sheet of paper with delegates that will be drawn from various organizations and the NCC will have about 629 delegates. Now these delegates are drawn from the

religious organizations, from professional bodies, from women's organizations, from trade unions, from the Non-Governmental Organizations, from other interest groups, the District representatives whom I have just talked about. Now, all the Members of Parliament, both the elected and the nominated will be delegates. Then we have political parties representatives and we have the 29 Commissioners. So you have a number of people and these people can carry your recommendations to the National Constitutional Conference.

So that is a point that you need really to note because it is important but still you have the 30 days or so to debate on this Draft Bill. After that, of course after the NCC the next step the draft will go to the National Assembly if the NCC agrees on all the matters contained in the Draft Bill. If it goes to the National Assembly, that will now be enacted as law and we will have a new constitution.

So, those are the main stages of the Review process just to make you aware of where we are right now, because right now we are at the point where we are discussing and debating on the Draft Bill and that is important for us because maybe there are some of the things that were put there and you are not happy with them. Let me point out at this point also, the draft bill alone will not make you understand on how the Commission came up with some of the recommendations but we do have another report which should be read together with that Draft Bill for better understanding of whatever recommendations have been made. So you will get the report in all the documentation centres from whatever constituency you come from, there is a documentation centre and you better visit that documentation centre to have that report so that you can have a better understanding of why the Commission came up with some of the recommendations. What I am saying is essentially that you cannot understand the Draft Bill alone, you have to get the other report and it is available in all the documentation centres in Nairobi.

There is one documentation centre in the city here, Macmillan library, if you go there and ask for the report it will be given to you. We all know where Macmillan Library is, next to Jamia Mosque so if you get there you will get those reports.

I think that is the much I had and at this point I need to say that the chairman is with us. Chairman karibu to this gathering. Thank you for coming. As the chairman organizes himself, I will ask Achieng to do the next, which is the data management, to know actually how the information that was gathered in the field, how we treated it at the various stages. So thank you so much for listening to me.

Achieng Olende: Good morning. Let me briefly walk you through our data management before I hand over to the chairman to take us through the Draft Bill. Basically, there were six steps in our data management process. The first one was the design of our data tool which was the red book that was handed out and that provided the guidelines for the public hearings.

After that, we proceeded to what we term reconnaissance and pre-testing. During that stage, the Commission conducted civic

education throughout the country and we listened to what people had to say about the process we were undertaking and try to make sure that we understood all Kenyans' fears, all their concerns, what they would like to see us do and during that pre-testing stage, we also completed the design tool. We finalized the substance of that red book.

Next was the third stage which was gathering the data. Actually going around the country and collecting people's views. So Commissioners went out with panels comprised of our secretariat staff, to all 210 constituencies in the country and during that time, we gathered memoranda from Kenyans detailing what they would like to see changed, what they would like to see added, what they might like to see removed from the current constitution or included in the new Draft Bill. We took these written memoranda and where there were no memoranda, we took the tapes, the recordings of these hearings in the field and we went back to our headquarters here in Nairobi.

The fourth stage in this data management process was collation of the data. During this time, we had our data base developed. We coded all the views that we received using the red book as the guideline. During this process we also realized that we had additional themes, there were other areas than those included in the red book where we were given views by Kenyans. We took note of this and added those in our collation of the data. All memoranda, everything that was said, everything that was expressed during our hearings, was analyzed. Some feel that perhaps because you do not see a provision detailing what you said or what your group said in the Draft Bill, we were being selective in our analysis of the data. But every single memoranda we received was coded and analyzed, all our tapes from the hearings were down-loaded and all of these data was collated during this stage.

We also produced what we call data-runs from the constituencies that we visited. These were again sub-divided into what we call thematic data -runs and essentially all that means is where we had many submissions about the Executive for example, or human rights, those were put together and analyzed as such from all the constituencies in Kenya.

The fifth stage was report writing. Now the data -runs that were yielded during the collation stage were now combined into a narrative so that we could have the national report, the short version of which has been published and disseminated and this also informed the writing of the Draft Bill. The actual provisions that are contained in the Draft Bill.

The sixth stage is where we are now. We are calling that feedback and storage. We are going back to Kenyans throughout the country. Again all 210 constituencies and we are getting your feedback. We want to see did we accurately include your views in the Draft Bill? Are there some things that have changed since the time we were last with you? Are there some things you would like us to remove, that kind of thing. This stage also involves storage. We want to ensure that the record of our entire process is accurate for historical purposes. So during this stage, we are also completing the database, making sure that we have everything the way it should be so that even after this is finished, the record remains there for analysis, for scrutiny and subsequent debate, and again all the views that we receive are included in this final stage of feedback and storage. So that is all

I have to say before handing over to the chairman to walk us through the Draft Bill and the report. Thank you.

Prof. Yash Pal Ghai: Thank you. It is nice to be with you. I am sorry I was delayed. I had another meeting which did not finish in time. Esther has said that in order to understand the Draft Bill which contains our recommendations you also need to read the report that we published from Mombasa about three weeks ago. That report gives you an account of the process, it is considered with terms of reference that was given to us in the Review Act. The Review Act says that certain values and institutions and principles must be included in the new constitution. So we discuss what these values are and they are principally values of democracy, separation of powers, rule of law, protection of human rights, the sharing of power, meeting the basic needs of Kenyans in terms of food, health, education, shelter and generally an environment which can sustain a decent living and we also describe in that report the way in which we conducted our work in particular how we consulted with the people. You have already had a summary of that just now so I will not go through that.

The Bill does describe what people told us, what they found wrong with the present system and what changes they would like to see made. In making our report we have tried to follow the recommendations that people gave us. The Review Act says that we must reflect the views of the public when we make our report and recommendations and we have tried to do that. It was not so difficult to reflect public views for two reasons at least.

One is that many of the views that we received were quite in line with the agenda or the terms of reference in the Review Act. Most Kenyans wanted a more democratic system. they wanted more social justice, they wanted power to be transferred to districts and villages. They wanted both control of their own lives. They criticized the concentration of power in Nairobi, and particularly in one person, the president, and they wanted a better distribution of these State powers.

They also wanted a better distribution of our natural resources, our national resources so that we do not have a situation which we have today where some Provinces are quite well developed, others are left behind. We want all our people to share in the benefits of development equally. Because the views of Kenyans were in line with the Review Act and also because Kenyans agreed among themselves as to what changes they wanted, our task was quite easy and we were able to make our report in record time and part because we found this great agreement and consensus among the people of this country.

Now, let me just very quickly take you through some of the principle provisions in our draft constitution. We have first of all I should say tried to write the constitution in as simple a language as we could. I am sure there is room for improvement and we will continue to simplify the language but we believe that the language we have used is non technical and we are not using many difficult words or have long sentences. If any of you have tried to read the present constitution, you will know how difficult it is to understand that. So we feel that every Kenyan should be able to read and understand the constitution without requiring the help of lawyers.

We have also translated the constitution into Kiswahili as indeed we have translated the report and we hope that once the constitution is adopted that it will be translated into other Kenyan languages, just as the Bible and the Koran are translated into other languages we want our constitution also to be translated into other languages for those who cannot read English or Kiswahili will also be able to follow what we have recommended.

We have indicated throughout the constitution the purposes of State power. We have given organs of the State, the Executive, the Legislature the Judiciary the Public Service and specialized bodies like the Electoral Commission, important powers. But we want these powers to be used to serve the people and not to rule the people. The present constitution does not give any indication as to why we have given power to the President or to Parliament and so they do not have any clear guidance as to how they should use these powers. We believe that it is important to state in the constitution what the people expect from the government. What they expect from institutions of the State and we have called these values and principles which should be supported and promoted by not only the institutions of government but also by the people themselves.

We have also indicated each time we start a new chapter, let us say about the Executive, what are the duties and the responsibilities of the Executive. So the president and the Prime Minister will know why they have these powers. For example today the president has the power to dissolve the Parliament and as you know this is an issue which has been much debated because the president has said that he wants elections under the old constitution therefore he is going to dissolve Parliament now before our work is complete.

Now, it is true that he does have the power under the constitution to dissolve Parliament. But the question we could ask ourselves: why has he been given this power? What is the purpose of this power? So we have tried to indicate that all the powers under the constitution are really for only one purpose and that is to serve the people. It is not because the president likes to dissolve Parliament because it helps him in his own personal life, that will not be a good reason for dissolving. So all the powers have to be exercised to serve the people and we have given very detailed guidelines for the Judiciary, for Parliament for Public Institutions for civil servants as to how they should discharge their functions.

Maybe we will not be able to go through the whole document of course. It is quite a long document but what we can try to do is to give you some of the highlights and we can maybe begin by looking at some of these values that I mentioned that everybody is committed to or everybody is bound by and these appear in Chapter 3 of the document that you have. I have a different document so I do not know what page it is but –

The values that I am talking about begin on page 4 of the document you have and they are called chapter 3 and says that all these values are binding on all institutions of government and indeed on citizens as well and those are the promotion of national unity and the commitment to Kenya as our common country.

We are also required to recognize the diversity of our people. We have many different languages and religions and races and tribes in Kenya and we want all of them to be recognized and their welfare to be promoted. We want then to promote democracy. Democracy not understood in terms of going to vote every five years, but democracy in which people are constantly involved in public affairs. Not only every five years but every day almost of their lives. So we have suggested that power should go to the people, in their villages and in their locations, in the districts, we have proposed that people should have a right to participate in the work of Parliament, in the work of the Executive and be able to influence government throughout the period of its life.

We have also said that State officials should be accountable. That the way in which State organs and the way in which leaders of these institutions exercise power should be explained to the people and people should be able to remove leaders in whom they have no confidence. We have recommended for example if Members of Parliament who do not discharge their functions well can be removed by the electorate.

We then want to remove all corruption, as you know ours is one of the most corrupt country in the world. The reason we are so poor and the reason why so many people cannot eat three meals or one meal even a day, why schools are closing down, why there is no medicine in our hospitals, why roads are now almost impossible to use, is because so much of our money, your money, my money, citizens' money, country's money has been stolen by some of our leaders.

We want to stop in future corruption by high leaders and low leaders, by businessmen or by others. We have made a number of recommendations to try to stop corruption. To increase moral and professional standards of Parliament, of ministers, of public servants and we have developed rules to avoid a conflict between the public power and private interests. So that nobody will find himself or herself in a position where they might want to give preference to their personal interests at the expense of the public interest.

We have then provided for a competent and independent judiciary and we have said that people should have a right to go to court and other institutions which will deal with their complaints. At the moment we just have the judiciary as the way of raising complaints, of trying to get a remedy for the wrongs done to us but we know from experience that the legal system is an expensive system, people do not have the money to go to court. They also do not know what the procedures are to go to court and therefore many rights are never corrected or the violations of rights are never corrected. In addition to a stronger judiciary than at the moment, a more independent judiciary, then at the moment we are recommending the establishment of a Commission on Human Rights and Administrative Justice which will hear complaints from the people and take steps to deal with those complaints. You will not have to pay any money to go to this body, we have recommended at least to start with, every district should have an office so whether you have a complaint against the DO, or the chief or the councillor or MP or minister, you should be able to go to this body, whether you are a disabled person whose rights have been violated, whether you are a woman who has not enjoyed equal rights with men, whether you are a child whose rights are not recognized. In all these cases

you will be able to go to just one office and even then decide which body should deal with your complaints and you will just have to give a simple statement of what your complaint is then it is the responsibility of this body to collect the evidence, to interview ministers of public servants and then to find out if really there has been a breach of the law or administrative practice and they will try to give you an appropriate remedy.

We are increasing the human rights that are protected and we are increasing the protection for human rights. In human rights we are including not only what are in the present constitution which we call civil and political rights, rights of assembly, rights of free speech but we are also adding rights to food, to culture, to shelter, to health, to sanitation, to clean water. So, in future, the government will have to implement policies which will enable people to go to school, to have decent shelter, to have secure titles to their property, have medicine and so on. So these will become the rights of the people and the State policies must make sure that people either through their own efforts or the assistance of the State are able to enjoy the very basic necessities of life.

We have mentioned special provisions for women, for children, for pastoral communities and other groups in our society who have suffered from discrimination in the past. We want all citizens to be treated equally and we want all communities to be respected. Many groups came to us and said they felt they were not respected, that people mocked them, they had no regard for their culture, thought they were uncivilized and they felt they were constantly humiliated. We want every community in our country to be respected and to feel that they are an important part of the whole nation.

Maybe that is what I would say about the obligations of the State. We have also mentioned duties of citizens because we believe that each of us has the responsibility to make democracy work, to assist our neighbors, to help children, to develop the country economically, to exercise our vote responsibly and not be bribed, not give a vote to the highest bidder, but to try to understand. Similarly citizens who earned a sufficient income, that they have to pay a tax should pay a tax because unless we pay taxes, the State will not be able to provide the services that we all think the State should provide. It will not be able to help the poor, and the rich will get richer, the poor will get poorer. So it is our duty to pay taxes.

We have set out a number of duties that we have towards other citizens, towards the community we live in and to the State which is Kenya. We believe that it is only citizens and other residents exercise their rights responsibly, use the votes responsibly, sensibly, and take part in public affairs, march down the streets if that becomes necessary, lobby their MPs, organize societies and meetings, only then will we have the kind of democracy and the kind of accountability that we have provided for in our draft constitution. So I want to emphasize this point that no democracy can work without the commitment of the people and their active participation. No constitution however good it may be will help the people, unless they make use of that constitution. Therefore an important responsibility on you is to continue your involvement in the review process but also when we have the constitution to study it, to understand it and to participate in the mechanisms in the institutions that the constitution will establish.

Now the first substantive part of the constitution deals with citizenship. We will not discuss it in details today but we want all citizens to be treated equally. This is on page five of your document, chapter four and we want all citizens to be treated equally, to have the same rights and the same obligations. We also want the women to have the same rights as men, to pass on citizenship to their children or to their husbands or wife if they want to become Kenyans.

At the moment, our citizenship laws discriminate against women. For example if a Kenyan woman marries a non-Kenyan, that husband cannot become a citizen. But if a male citizen marries a non-citizen woman, she can become a Kenyan citizen. Why should it be that? A Kenyan woman living in England for example has a child, that child does not become a Kenyan citizen even though the mother is Kenyan. But if the father has a child in England and is a citizen, the child will become a citizen. So why should we discriminate in this way between men and women? We want equal rights for men and women and we also said that if Kenyans are living abroad and they want to remain Kenyans but also to become British, they should be able to do so. Because those who live in Britain as Kenyans, they suffer from many discriminations, they do not have equal rights and we believe that it will enable them to live in Britain with dignity and equal rights. If they want to become British, they could still remain Kenyan. This is known as dual nationality.

We feel that people who have lived many years in Kenya have made this Kenya their home should have the right to become citizens if they are not already so. So, we have allowed them to apply to become citizens and we have recommended that a citizenship board should be established to review all these applications.

We then have the next chapter, the Bill of Rights. I will not say very much about the Bill of Rights, not because the Bills of Rights are not important, in our view they are extremely important. They are perhaps the most important part of the constitution because they are setting out the rights of citizens and other residents of the country. Citizenship and human rights are two concepts to which the relationship of individuals and communities are defined in relation to the State. We have obligation to the State, the State has obligations to us, what the State can do to us, what the State cannot do to us are largely determined by citizenship rights and the human rights. So citizenship rights and human rights are extremely important and this chapter is very important you will see it is perhaps the longest chapter in the whole constitution and we believe that it is only by protecting citizens and residents that they can be sure of life and freedom and dignity, are able to enjoy their culture, are able to associate with other people, form organizations, lobby, have the right to work, to form trade unions and so on. And to be protected against the tyranny of the State, to have fair trial, to have independent judges and competent judges. All these are part of your rights as Kenyans and these are included in chapter five which begins on page 6 of your document.

We hope you will study this carefully because as I have said, unless you know your rights, you will not be able to protect them. So the first step is to understand what your rights are, then find out in the constitution how you can protect your rights. At the moment we do have some rights. They are not very extensive and they are not very full, but there are some rights but these rights are not well protected and we want therefore to strengthen the machinery for protecting rights. As I had mentioned

earlier, are not only making much stronger the system of courts, but we are also recommending new institutions to whom you can complain and the most important of these Commissions, of these bodies is the Commission on Human Rights. So we are increasing the range of rights, giving them more protection but we are also improving the machinery through which you can protect those rights.

The next chapter, chapter 6, starts on page 11 of your document is called representation of the people and this is dealing with the right of the people to vote and the right of the people to stand for elections. Every citizen has the right to vote by registering as a voter and the right to stand for elections, at the national level as well as at the local level. We have said in the document that certain people may be denied the right to vote or the right to stand for elections if they have been involved in serious crimes, corruption or unlawful practices in relation to elections. Apart from these few cases, everybody has the right to vote and the right to stand for election. Later on we have provided the precise method of election for Parliament and for other councils and we will talk about that in a while.

Here we are basically saying that the government should not use procedures for registration of voters to deny them the vote. It is of course necessary to register that it should be a simple exercise and should not be used as people tell us, it is used at present to prevent the people from exercising their right to vote. We are saying that everybody should have right to registration without great formalities and that registration should be continuous and we have recommended certain provisions in order to ensure that the voting will be done or the counting will be done fairly and voting will perhaps take place where the votes are cast and so everybody has an equal chance to be elected, equal chance to vote.

We have recommended more independence for the Electoral Commission and we have also made recommendations on the regulation of political parties. That is the third part of that chapter we are looking at on page 12 on the last column on the right hand. We believe that democracy depends a great deal on the way in which political parties function. As you know when you vote for candidates, you are really voting for parties. Parliament is controlled by political parties. The government is controlled by political parties. Election campaigns at the present are conducted by political parties and if political parties are themselves not democratic, then the country cannot be democratic. We have actually a good example today and yesterday about democracy within KANU. Mr. Raila Odinga is saying, KANU must be democratic for the country to be democratic.

So what we are saying is that every party must be democratic and every party must be national. We do not want tribal parties, we do not want religious parties we do not want regional parties. We want the parties, to be a principle way of bringing the people together. Whether you are in Wajir or Migori, different parts of the country, we all must be brought together and not made to fight each other. Parties will only be registered in future if it shows it is truly a national party, that it has branches in all parts of the country, that its policies are not ethnic or tribal or religious but are national.

We also want parties to be democratic so that their own officials are elected democratically, elections are held regularly, the

party makes a commitment to avoid violence, and any use of violence or thugs or private armies, militia by political parties will lead to the disqualification of parties and the punishment of their leaders. We believe that if parties commit themselves to fair elections, to giving people a choice, to exercising control of their own members so that they do not break the law, then chances of the whole country becoming democratic will be improved.

We also have recommended that some assistance should be given to political parties because we do not have many rich people. So parties need to raise money and we do not want them to depend on large companies, foreign companies for their money or for corruption for their money so that they will have money from the government for which they will be accountable and the party work can be then facilitated by that money and they will be protected from undue influence from the private sector and so on.

The next chapter, chapter 7 is dealing with the legislature which starts at the bottom of page 13 and we are recommending first of all that there should be two Chambers of Parliament. The National Assembly and the National Council. The National Assembly will represent the national interest and the government will be responsible to the National Assembly and the National Council will represent the districts. I will explain in a minute that we are recommending the transfer of important powers of government to districts. District councils and district governments will become very important institutions in the future and we want therefore the interests of the districts to be represented also in Parliament. Therefore, the National Council which we call the Upper House will be elected by people in the districts and the function of the National Council will be to protect the district interests but also the national interest of course.

So we have two different chambers and lots of people told us that they wanted a second chamber where ethnic communities could be represented, minorities could be represented and we believe the National Council will do that because people will come from districts and even locations to this body.

We have tried to increase the role of Parliament. First, we have tried to make Parliament more representative. At the moment it is possible for a party to win a majority of the votes of the seats. Majority of the seats in Parliament but not as a majority of the national votes. In some constituencies, a Member of Parliament may be elected only by 20% of the votes, if there are a lot of candidates but does not enjoy a majority support of the constituency. So they want Parliament to be more representative and one way that can be done, one way which other countries have followed is known as the mixed member proportional. So we combine two different systems under this formula. We have constituency members chosen by the people in every constituency as at present but we also total the number of votes throughout the country, that a party has.

So if a party has got let's say 40% of the national vote but only 30% of the seats in Parliament, then we will give that party new seats so that the number of seats then reflect the national vote. This is why we have recommended that 90 seats should be kind of reserved seats. The way the system would work is as follows. Every political party will nominate their candidate for every

constituency but they will also produce a list of upto 90 members. They do not have to do 90 but they can. Upto 90 members and release this list at the same time as you release the nominations for the constituencies. People will be able to see who are on the list of each party. That is if these are people who are experienced, educated, honest, committed to the national interest and so on. So when you vote for a candidate, you are also voting for a party. At the end of the elections, if one party does not get enough seats to correspond to its national vote, then it will get certain number from the reserve list and if a party gets 10 from the reserved list, then the first top 10 on the party list will be taken into Parliament. We have also said that this list should contain as many women as men so that the number one will be woman, second man, three woman, four man and so on. So this way women have a better chance of getting into Parliament and we have also said that this list should contain people who are disabled, people from minorities, from communities like the pastoral communities which might not otherwise have a chance of being elected and so this way we believe that lots of people who might not otherwise be elected will get into Parliament. So all the different groups will be represented.

Now, people have misunderstood this system and they are saying we are providing for 90 nominations. It is not true. People who will be put in Parliament are the ones you have chosen because you know the list and you will vote for the party which has a better list. So you are choosing those people, they are not nominated. No one who fails in the constituency elections will be able to get back to Parliament on the list because the list will come at the same time as the list for constituencies and no one who stands for a constituency can be put on the list, so that there is no way that candidates who have been rejected by the people will be able to come back.

So this is a system we have used to create more representation for different sectors as well as a true reflection of people's choice. Now for the National Council we have recommended that 70 of the seats, one for each district will be elected in the district by the present system of voting but that the candidate who gets the highest vote gets elected. We have also recommended that 30 seats in the National Council should be reserved for women and so these women candidates should be chosen from provinces. Every province will get four seats, Nairobi will get two seats. Everybody will vote in the districts for those seats but only women will be candidates. So we believe for a period of time, maybe 10 years, maybe 15 years we need to have special rules to promote the participation of women in politics

Similarly, we have committed ourselves to the principle that one third of the members of the National Assembly, the Lower House will also be women and we hope that maybe in 15 years time we will not need this special provision because women will have by time, began to play an equal role in politics as men and we will not need these special provisions. But for the time been, we do need it, Kenya has among the lowest members of women in government, in Parliament, in the public service and we want to change that and give them equal opportunities with men.

Now, the function of Parliament of course is to represent public opinion, public interest, to make laws, to prove the budget and to keep supervision over the way in which the money from the public revenue is given to government and how it is spent. We

want Parliament to have better control over the expenditure and indeed the collection of taxes basically. And we want to make sure that money given to the government is not abused, it is not used for corrupt purposes and we are strengthening the machinery of the Auditor General in order to ensure that we achieve these results.

We have many suggestions for strengthening the role of Parliament through an improved committee system, through allocation of more resources, for better reserve capacity, more role for back benchers in the work of Parliament, giving Members of Parliament the right to introduce bills, committees of the House to introduce bills. At the moment as you know most of the laws are prepared by the government and then are approved by Parliament. We want Parliament to be an active body in the making of laws, not only in approving of laws. Similarly we want Parliament to have more of a role in making the budget and not only mainly approving the budget proposals prepared by the government. And we believe that this more active role of Parliament will be an important way to get more accountability from the government.

We have recommended that all the important posts in the country, in the judiciary, in the public services and in independent institutions should be vetted by Parliament and should have the approval of Parliament. For example if the Chief Justice is to be appointed, then the Judicial Service Commission will make recommendations to the president, the president will appoint on the basis of that recommendation. But then before the person is actually sworn in, that Bill will go to Parliament and Parliament will have to approve. If Parliament does not approve, we have to find another person like the Chief Justice. So this rule will apply for many positions and we hope that in this way, we will get high quality of Judges, Ambassadors, Permanent Secretaries and so forth.

Now, let me turn to the Executive. That is chapter 8 which starts on page 19 of your draft and so the powers of government, the powers to implement laws, to collect taxes, to make policies, determine expenditure of State money, all these are done by the government. So for many people the most important institution in the country is the Executive because of the enormous power that it has. Lots of people told us and I am sure some of you told us that at the moment the president has too much power and they want this power to distributed both among other organs of national government but also to provinces and districts.

What we have done is we have divided Executive powers between different organs at the national level. I have already explained the way in which we have tried to make Parliament a stronger body than it is, more powers, more resources, and Parliament will not be dissolved by the president. At the moment the president can dissolve Parliament any time he likes. This rule weakens Parliament because Parliamentarians are always afraid that the president will dissolve Parliament and they will have to stand for elections again. Therefore they tend to support the president so that he does not dissolve Parliament. In our proposals, Parliament cannot be dissolved by the President and so members can be quite independent and free and criticize the government without fearing that the President might dissolve Parliament.

Also Parliament will have control over its own calendar. At the moment the president decides also Parliament should go on recess, when Parliament should come back and so on. We believe that these powers should be given to Parliament itself to decide and this will give them more independence. One way we have tried to distribute power is by giving power to different organs at the national level, and secondly we have distributed powers by taking some power away from Nairobi and giving it to provinces, districts and villages. So, there are two ways in which power has been redistributed.

Now, when we come to look at the Executive as the government at the national level, we have provided for two different arms of the government. One is that of the president and the other is of the cabinet headed by a Prime Minister. If powers had been separated because people said we do not have enough control over the Executive, too much power in the Executive so even within the Executive, we have tried to separate power. The president has certain powers which are given to the president and which are set out in the constitution and on the other hand, the Prime Minister and the cabinet have their own powers which are set out in the constitution. So neither can interfere in the power of the other but each in some sense is accountable to the other.

We have provided for a president who will have 3 primary responsibilities. One is to promote national unity and there are many ways in which that can be done. Secondly to protect the constitution, to make sure that constitutional values and institutions are respected and maintained and there are resources for them and the general principle of accountability to people, of independence of the judiciary and some other institutions are respected.

The third one is to some extent mediate between Parliament and the cabinet. If there is conflict between Prime Minister and Parliament it will be for the president to deal with that dispute keeping always in mind the constitutional principles, the values of the constitution. Now, in order to discharge these functions, the president is made Commander in Chief of the Armed Forces, what we call the Defense Forces, we do not like the word Armed Forces which is used now, we want to call them Defense Forces because they are defenders. We have changed the name of the police from Police Force to Police Service because police should serve us and not force us so in this way we are trying to indicate the approach of these institutions.

President will appoint to many senior positions, to the Judiciary, to ambassadors and other senior officials, the Attorney General, the Auditor General, the independent Commissions we have, the Central Bank and so on. The idea is to remove these appointments from political considerations because the president himself or herself will be slightly above party politics and will look through the national interest.

The president as I mentioned will not be able to dissolve Parliament except when there has been a vote of no confidence, the government has been removed and it is not possible to form another government. So, the president will in one sense be protecting Parliament because the government will not be able to dismiss Parliament.

There are other powers too, to declare emergency, to declare war, to be chair of the National Defense Council and the

National Security Council. These are extremely important powers. So these powers are given to the President, these are important powers but they are not Executive powers. They are not powers about agriculture, on land, or education but they are powers about defense policy, internal security policy and the general well being of the people., maintaining the constitution.

We have provided that the President should be elected by the people directly as it is at present. But the president will not be a member of – or will not be a candidate for a constituency as is necessary at the moment. We have provided that the president must get 50% or more of the national vote, plus 20% of the support in each Province. At the moment you need to be the person with the most votes and 25% in five provinces. We believe that a person to be president should have a majority vote of all the Kenyans who are voting. So if at the first count no person gets majority of all the Kenyans, then elections may be held three weeks or so later and only two candidates will be allowed to compete, the two top candidates and then the winner among them will be elected president.

Now, the other important part of the Executive is the Prime Minister and the Cabinet and we describe those institutions on page 21 onwards. The Prime Minister will be appointed from within the National Assembly and will normally be the person who leads the largest party or the largest coalition of parties. The appointment will be by the president but Parliament will have to approve that appointment within a specified time. The Prime Minister will then appoint his or her own cabinet but we have said that the Prime Minister can appoint the two deputy Prime Ministers from within Parliament but the appointment of other ministers must be made from outside Parliament.

Why have we said that the ministers must come from outside Parliament? Well, the reason is that many of you said that ministers were not working full time, they were spending too much time on their party or constituency business and they often did not have the qualifications for the job. And therefore ministers should be both qualified for the job, they should be full time ministers and there should be no conflict between their role as ministers and their role as MPs.

So we have provided that only Prime Minister and the two deputy ministers can be Members of Parliament, others must come from outside. But the appointment of all ministers will be subject to Parliament. Parliament will be able to remove a minister by vote of no confidence, he will also be able to remove a government by vote of no confidence. So this is democratic system because government has always to be there to explain to Parliament what its policies are and can be disciplined or removed by Parliament on a daily basis. Not on the fifth year but on a daily basis they can remove them. So this means that the government has to work hard and to be accountable to Parliamentarians so that they can stay in office.

The Prime Minister is in charge of the cabinet and the cabinet is in turn accountable to the Prime Minister but also to Parliament.

We have said that there cannot be more than 15 ministers in addition to the Prime Minister and the deputy Prime Ministers. We believe that we do not need a larger cabinet. At the moment I believe that if you add the ministers and the deputy ministers, you have something like 90. That is too large. You do not need 90 ministers and I believe we can do with 15 full ministers and

15 deputy ministers and that will not only mean saving for the country, but better co-ordination of government business.

We have provided that salaries and allowances of the Prime Minister and other ministers, Members of Parliament and even the President would be determined by an independent Salaries Commission which will be appointed every four or five years and will examine the salaries and the cost of living and so on and then provide for whatever is a suitable salary. Many many people complained that at the moment, the MPs set their own salaries, ministers effectively set their own policies, and this is not good and they complained about the high salaries that Parliamentarians are giving themselves. So, what we are saying is that this matter should be determined by an independent body which has no interest in high or low salaries but will look at objectively at what is necessary and desirable.

We have also and this applies to all public officers, provided for a leadership code as a way of ensuring integrity and honesty. We have proposed there should be a leadership code which will bind all senior public servants, MPs, councillors, ministers, even the president. This code which is in a schedule in the constitution sets out things that the minister or any leader cannot do, makes it illegal or is illegal, reinforces the illegality and immorality of corruption and tries to make sure that there is no conflict between the private interest of the public officer, public holder and his or her private interests. So business people cannot become ministers or public servants unless they give up their businesses, and civil servants, ministers cannot indulge in business because that is the way corruption started in our country when ministers and MPs and public servants begun to get engaged in business activities.

Now time is running let me just try to speed up a little. We have said that judges should be independent, they should be competent, they should have enough resources so that they can do their work well. So the principles of the judiciary are not very different from the principles in the present constitution. What we have tried to do is to find the machinery to make sure that these principles are observed. Whether you believe that our judiciary is corrupt or not, I can tell you that the constitution does not allow for a corrupt judiciaries and one of the problems we have had is that neither the President nor the Chief Justice has used a mechanism under the present constitution to get rid of incompetent or immoral or corrupt judges. The mechanism exists, but it has not been used.

What we are suggesting is ways in which it will be easier to use the mechanisms for removing corrupt judges. We are providing for more independent way, method of appointing judges. We have expanded the Judicial Service Commission so that it is not as at present something that the government or the president controls but it is a generally independent Commission which will recommend the appointment of generally independent lawyers and judges, and we have provided for the participation of the law society, of law universities, of the general public in the Judicial Service Commission itself. So there is not very much new in the judicial section except to try to make it more effective and more honest.

We have also provided for Kadhi Courts who will administer Islamic law in relation to parties for those who are Muslims. We

have also said that the Attorney General should now no longer be a Member of Parliament and should no longer be Director of Prosecutions. That the job of the Attorney General is to advise the President or Parliament or the government on what the law is but to be independent in doing so. We have suggested that the power to prosecute, which power can be used critically both to avoid prosecution against the friends of the government and to take prosecutions against the enemies of the government will no longer be possible because the power to prosecute, to decide when and how to prosecute will be vested in an independent director of public prosecutions which is completely separate from the office of the Attorney General. And we believe that that power will help to get better prosecution for offences like corruption and theft and so on but also it will mean that prosecutions will not be politically motivated.

There are many complaints that the government prosecutes opposition people but never prosecutes ministers or its own supporters even though they may have done serious offences. So, we are also recommending that there should be a new office called the Public Defender and the role of this office will be to ensure that the public has access to the courts, to legal advice and if they do not have the money to pay for legal advice then they will not have to pay any fees and this body will give them representation, will look after the case or their other interest. So, this will be an independent office and this will increase the safe-guard of the legal system.

Let me say finally a few words on the devolution of powers which is Chapter 10 on page 26. I have already mentioned two or three times today that power will have to be given to districts, to provinces and many many powers which are today exercised in Nairobi will be transferred to the districts. About primary school, secondary schools, nursery education, agriculture, many functions of delivering of services will become the responsibility of these new bodies which will be elected bodies accountable to the elected councils as at present and we have recommended a separate Executive at the district level what we are calling the Administrator, who will be elected directly by the people and will be in charge of the government of the district but will be accountable to the District Council. We have provided for many powers to go to the districts and these are set out in a schedule which is in your documents so you can have an idea.

We expect to do more work on this list and to get it in such a way that it does give real powers to the districts but does not create too much conflict between the District Administrator and the District Council. I will not say more about the system of devolution except to say that in our view that is extremely important because we believe that people are able to exercise power directly at the village level, at the location level, when it comes to Nairobi they have very little control. So we want people to exercise power directly and devolution is important.

Devolution is important to get better distribution of resources throughout the country. To get more development in the districts away from Nairobi. So we believe that districts governments will make a very big difference to our lives. Partly as a result of our recommendation, we have proposed that Provincial Administration should be abolished. Some of the people who work for Provincial Administration will become part of the staff of the district government and will be accountable to the district

authorities, others will be re-absorbed in government ministries and become part of the national public service or remain part of the national service. Some may have to be retrenched unfortunately but we hope they will find some other suitable appointments.

So, the relationship between chiefs and the people will change. We will not have a DO, DC, PC, but instead officers either elected by the people or accountable to the people elected by the constituents. This will increase democracy; we hope it will also increase efficiency.

Now, those are the main points I wanted to talk about because they give you an idea of the structure of government and the different offices. But let me just say we have provision for land and property generally and land has been subject of much complaint and dissatisfaction and almost everywhere we went we had complaints about the way land was distributed or land is used or land is given away or of increasing landlessness among the people. We have made a number of proposals but these are very general proposals because the Njonjo Commission is meeting on the land issue and will have more detailed recommendations on land. So we did not want to stop the work of that by making too many recommendations on land. So, there are few principles and they are rather general but we believe that what we are recommending about the management of land will improve resources, will improve the use of land, will have a better distribution of land and we have recommended for these purposes a Lands Commission should be set up which will be independent. So the president will no longer have the power to give away public land as he has done in the past. Any land given away from the State will have to be bought from the State either through auctions or some tendering process because that land belongs to the people and if they have to sell some of it for good reason, then people should get the money for that purchase.

So we have made those kinds of recommendations, we have also suggested that the Commission should investigate allegations of land grabbing, misappropriation of land, even going back to the colonial period when many communities lost their land to the British Government or British settlers, we want them to be compensated for those loss of land. But also more particularly, the loss of land since independence where in particular individuals have thrown people out of their land and started to occupy them,

Now, we also have provisions on environment and natural resources. One reason I was late coming here is that I was taking part in a ceremony to plant trees and I announced yesterday that our intention and the intention of the civil society, organizations, is to plant a million trees between now and the end of the Conference and we started that today and everyday there will be more and more trees planted because trees are essential to the protection of the environment.

To get adequate rains, to stop soil conservation, to keep the air clean and so on, trees are really fundamental and we have very strong provisions on the protection of the environment. We have also provisions on better accounting of State monies, better use of it and finally I come back to the point I made about the leadership code, whereby leaders will have to declare their wealth, will not be able to take two salaries, will not be able to engage in private businesses and many other restrictions which

are set out in the schedule. We have said that there should be a Leadership and Integrity Commission which will have the responsibility to implement the Leadership Code. There will be a machinery behind that code and we hope that will lead to high standards of morality in public life.

Finally, we have recommended that there should be a Constitution Commission for a period of maybe four, five years, a very small Commission but its responsibility will be to implement the constitution because many parts of the constitution will require further legislation, more resources, more administrative arrangements, and we hope by two or three years of the adoption of the constitution, there will be in place and the Constitution Commission will be responsible to make sure they are in place.

Finally we have made it harder to amend this constitution. Some parts of the constitution can only be amended by two thirds of the votes of the two Houses plus a referendum so that people will take part in any amendments. Many people said that it had been very easy to amend the 1963 constitution and that many of our problems arise from that fact. So we are trying to create here a system under which people themselves will participate in the key changes to the constitution and these amendments cannot be rushed, there must be at least 90 days from the time the government announces the intention to change the constitution and the time when the final vote can be taken. So this period will allow public debates to take place, people to express their ideas and it will not happen as it has happened in the past in two hours to change the most fundamental parts of the constitution and people only hear of the change in the evening news when the deed has been done. So we want to strengthen that system.

So thank you for your patience. I am sorry if you found it very boring to listen to all these without help of charts and so on but I hope you have been able to follow and we will be happy to discuss this with you, to receive your views so that others know what you are thinking and we will try to summarize all the comments given to us and present them to the National Constitutional Conference which will debate our proposals. We will have the benefit of your comments as well. Thank you very much.

Catherine Rimberia: Thank you very much Professor for that review of the Draft Bill. Now, I hope you still have some energy to answer some questions. So we will open the floor and we will have your questions and please there are instructions to be followed. Now, once you raise up to ask your question or to give your recommendation, say your name and then proceed on to your question or your recommendation. It is not about questions alone, you can also give your recommendations. So thank you.

Dr. Sobby Mulindi: Thank you very much Professor. My name is Dr. Sobby Mulindi representing professionals on the constitutional review, Westlands constituency. Professor Sir, you have taken us through this process diligently and with a great deal of understanding of our people and aspirations. My question is actually what is at stake right now. In view of the importance of this important document and the forth-coming elections and the majority of Kenyans indeed want the current

elections to be held under this new constitution but again we see the timing to be extremely very short. Do you in your own wisdom think that we can still have elections under this new constitution or some kind of amendments should be made in the current constitution to allow the elections to be taken? The reason why I am saying there is likely to be a lot of opposition from the current powers. Since this document really is about devolution of powers and you know quite obviously people will like to retain their powers and this is part of human nature. So, my question is do we really see the possibility of elections being held under this new constitution or amendments being made to some extent to allow the elections to take place?

Mr. Njoroge: Professor. My name is Njoroge. I would like first of all to express my joy about the changes you have made on the Judiciary but we are sorry we have concentrated too much on the judges than on dispensation of justice. We find that there is a situation which is not even in the way justice has been administered in this country. We find that small offenders are punished more severely and yet those who hold this country at ransom, for looting the treasury, the public coffers, embezzling public funds, their cases are still pending in courts. 10 years! they have never slept in remand even a single day.

So, what do you think can be done because I have not seen this in the draft constitution, harmonizing dispensation of justice between – because actually when I was summarizing this, what happens in Kenya is that the law catches and the rich rule the law. How is this going to be done and how are you going to structure the judiciary to accommodate this?

Mary Arivitsa: I stand here more concerned about chapter 9, on the judiciary and legal system and more so on the hierarchy of the courts. The superior courts it is recorded are the Supreme Courts, the Courts of Appeal and the High Courts in order of seniority from the top. The subordinate courts are the Magistrates Courts and the Chief Kadhi's and any other courts established as an Act of Parliament to the High Court and any other traditional local tribunals with limited jurisdiction in issue of local significance that may be established by an Act of Parliament.

Now, so far at least the Chief Kadhi's Court is at a level of Magistrate's in the present constitution. However, in the present one, there seems to be a parallel court system upto the Court of Appeal that goes on with the Chief Kadhi. However, the contradiction of the above, as there is the other section of the short report that shows that the Chief Kadhis court have a parallel court system and this goes upto the Court of Appeal as I have said and they can only be challenged in the highest court system, that is the Supreme Court and the Supreme Court according to this draft says that it is only the interpretation of the constitution. That means our brothers and sisters in the Muslim faith have got their own court system from the Kadhi's in the village or in the district and so on upto the Court of Appeal and how will that be harmonized such that there will be harmony in the court system? Because if they have a parallel court system upto the Court of Appeal, it means they really will be running their own thing.

An Appeal for the Chief Kadhi's Court of Appeal, this is another quote, that is another quote on chapter five, 200 (4). An appeal from the Chief Kadhi's Court of Appeal lies in the Supreme Court only on the point of the Islamic law or, on the issue of affecting the interpretation of the constitution. What this means is that there will be only an appeal on the interpretation of the constitution and as it has happened in other Islamic places and I will mention some. In Nigeria for instance even recently we

had it, there is always a conflict of those that are of the Muslim faith and those who are not and the Koran Tukufu tells them that actually they are more superior than the others.

Let me just read a few of those readings. For instance in **Sura II, 228** it is said that “.. *and the women shall have rights similar to the rights against the men but men have a degree over them. In a matter of inheritance, a man gets twice to a woman..*” The quotation is, “... *To the male, a portion equal to that of two females.*” Now, my question is, will the Bill of Rights be instituted when there is a parallel system that goes upto that and when the religious system that is under question now, makes the Bill of Rights not be able to be functional?

Prof. Yash Pal Ghai: I think we have gotten that point, there is no need to give more *Suras*.

Mary Arivitsa: On Chapter 2, (13). The National Days are named only as June, Madaraka Day and December, Jamuhuri Day and the enactment day or Katiba Day. What this does leave out is that it leaves out other public holidays that are of interest to the Christian Calendar for instance Easter and Christmas.

Prof. Yash Pal Ghai: These are not public holidays, these are national days.

Mary Arivitsa: But if they are not instituted, somebody – because elsewhere in the constitution it is that people are not allowed to be - -

Prof. Yash Pal Ghai: (*Interjection*) No! no! No! We are not listing holidays, we are listing National days. Anyway go on.

Mary Arivitsa: What about – Sir, I am very sorry. Maybe you can clarify to me and which I appreciate but when I read through, what I saw, it was like nobody will be forced to keep the day that is not supposed to be to them a holiday and what I fear here if it is not, maybe then there is need to be, under the national days, the public holidays because somebody may say we do not need to keep Christmas, and we may not need to keep Easter because if it is not put there as public holidays, then somebody will do like that. So I was very concerned because it is not mentioned anywhere.

In chapter five under the Bill of Rights states that a person may not be compelled to receive religious instructions to take part in attending religious ceremony to observe a day of their interest. So, that is the reason why I am saying that. Please just give me time, these are my concerns and I am a Kenyan citizen. Christians go to air their views in the meetings of their demand. So, my recommendation is the removal of the Chief Kadhi’s Court because it parallels another court system and we may not know which one to obey and which one not. And it is a common factor that where Islam is practiced the Christians or other people that practice other faiths, they are discriminated against because the Koran Tukufu tells them that they are slightly superior than others.

Prof. Yash Pal Ghai: You are repeating yourself!

Jacob Opiyo: Chairman, let me take this opportunity to thank you for a job well done. My name is Jacob Opiyo, I am the acting secretary, and also sector branch of Kenya Union Commercial Food and Workers Union. When this draft came out Bwana Chairman, there were accusations against the Commission particularly from the FKE and COTU that you did not take into account the aspirations or matters which are actually in breach of the workers rights. Now, I do not want to take much time but just to make some few comments or recommendations. That is in respect to Article 55 on the Draft Constitution. Now, these particular recommendations which I want to make, is actually to have a good working environment for the workers in this country because as at now, workers in Kenya actually are not protected by any law.

They are not protected under the Employment Act, they are not protected under the Constitution of Kenya, so you find the employer has the got the right to sack a worker at any given time because we do not fall to any legislation. Now, despite that, the government of Kenya has also actually ratified many ILO conventions or Universal Declaration on Human Rights. But when it comes to the working place, workers are not actually being respected. So for us to have the Workers' Rights, to be in the law of the country, I would like to make the following recommendations.

One, every worker has a right to fair labour practices. I will give you this document but I will just read very briefly. Because if we do not have a fair labour practice, I think the environment in which workers actually work will not be good for them.

Secondly workers are also entitled to just and favourable remuneration for himself and his family, which is worth of human dignity and supplemented if necessary by any other means of social security. You will find many workers in Kenya, their salaries are actually too low, because when it comes to compensating workers for what they have done, the employer normally when they pay something like maybe Ksh. 3,400/=, that is the minimum wage in Kenya. Now, that minimum wage according to an employer somewhere will say that particular Ksh. 3,400/= is actually a fair remuneration for the worker while if you compare the lower worker and the upper worker, you will find the Chief Executive, particularly one like a bank of which I represent is getting 3.4 million per month! And this other fellow is getting Ksh. 3,400/= and they have got the same facilities, they go to the same market, they go to the same hospital, they go to almost the same things. So, because of lack of legislation in our labour laws, that is why workers are not actually compensated well.

The other things you have talked about, the workers have got a right to form and join a Trade Union, that one is quite okay. Now, workers also have got a right to form and join National Trade Union Centre because like in COTU, we have got only one COTU but under the Kenyan constitution, any worker cannot just wake up and start a new national centre. So, they should be providing in the constitution that if another worker wants to open another centre, particularly to rival COTU because COTU has not done a good job for the worker, then the constitution should allow that to take place.

Now, the other thing also as per work, a worker also has got a right to work and for free choice of employment. A worker also has got a right to equal pay for equal work because there are some cases whereby we find you do the equal work but the pay is different. So you find there is discrimination in terms of payment.

A worker also has a right to just and favourable condition of work and protection against unemployment. In most cases you find workers work in very pathetic conditions. Look at the flower farmers in Naivasha.

Catherine Rimberia: Please summarize.

Jacob Opiyo: Let me summarize because I will give you this document. Now also Mr. Chairman, if you look at our labour laws, there is no job security in the Kenyan system. Now for us to have that job security, what I have recommended here is that employer shall not engage in such practices as discrimination, restraint, coercion against any worker because of recognizing due to a trade union. Victimization of any worker or abuse of _____ in uniform or unfair labour practices which is very rampant in Kenya. Word of good faith where you dismiss a worker and then camouflage it with another thing all together, then unduly harsh treatment of workers whereby instead of actually giving a warning letter you give a summary dismissal to a worker, and also we talk about retrenchment, it has become the order of the day. There is no law which actually protects the worker so the employer can just wake up and retrench you, saying today your job has fallen off then you go home like that. These are the rights Bwana Chairman which I think we should be able to address but because I do not want to take much time I will give this documents to you. Thank you very much.

Jared Oginga: I would like to revisit the jurisdiction of the Kadhi's Court. Reading through the jurisdiction of the Kadhis Courts, it states that the Kadhi whoever it will be, will be dealing specifically with issues related to Islam. Now as far as I know, Islam is a religion just like Christianity and Buddhism and other religions. Why should then the Chief Kadhi be, or the laws of Islam and the Chief Kadhis be entrenched in the constitution and paid by the tax payers, even those that do not ascribe to the Islamic faith? Why could not then also, the Bishops and other leaders of other religions be maintained at the government's expense?

Nicodemus Mulwa: Bwana Chairman thank you. I am just raising a very simple question on the holidays. We have mentioned Madaraka Day and Jamuhuri day as the two National days. But there is one important day that is very important to us, the Liberation or Heroes day of the 20th October which I think should be renamed and entrenched in the constitution as a National Day. Thank you.

Lucy Njagi: I do not represent any institution but this is an observation I am just trying to forward. I do not know, I have not read the constitution but I do not know what the current constitution has done about the insecurity in Kenya especially where it involves the prisons. Under the Criminals Rights from the courts, that they are supposed to rehabilitate these people but the

rehabilitation I have observed is they are taught skills on how to handle themselves after coming from prison but they are not empowered as to how to deal with these skills. At the same time, the prison staff does not seem to know the skills and techniques of handling the criminals as they go into prison. This leads them to come in from prison being better criminals than they went in. The one who went in as a petty criminal becomes a bigger criminal. I do not know what the constitution has done about that. I just happened to work in a prison and I have seen this is a requirement which is required and my recommendation was to train all prison officers in counselling skills and techniques.

Prof. Yash Pal Ghai: Thank you very much for those questions. We will be glad to receive your views when you have had more time to think about these recommendations. Let me just comment on the issues which have been raised. The first general point which I want to make is that our Draft Bill is really our proposals. They are not the final word, as you know we now have a period of 30 days from the time our draft was published for public debate, discussions, like the meeting we are having here and many many other meetings which are taking place throughout the country. So we will be glad to hear suggestions for improvement. We do not believe that we have a monopoly of wisdom or that our draft is perfect. So the purpose of these meetings is to improve our recommendations.

Of course the final word to some extent will lie with the National Constitutional Conference. As I said earlier, we will try to make sure that your views are conveyed to that body and maybe sitting here, there may be a delegate who will be present at the Conference and that delegate will have heard you and take your views to the Conference. So, the purpose of this meeting is not for me just to defend all that we have said, but rather to explain the reasons for why we have recommended what we have and if you are still not convinced by our reasoning, then please make sure that your views are presented at the Conference, we will do our bit to make sure your views are heard there as well.

Now with that introduction let me say that on the question of timing, of course we do not control the timing. Our role as a Commission has been to promote public debate which we did ourselves and with the help of other organizations, to receive public views which we have done and then on the basis of that to make our recommendations which we have done. So as far as the Commission is concerned, we have discharged most of our obligations. The remaining stages of the process do not depend on us, rather then in the sense that we are the managers of the process. Our job as it is to convene the Conference, to make sure delegates are properly elected which they have been now and we should publish the names today or on Monday. That the Conference facilities are organized and so on. So we have a secretariat kind of work, so therefore I cannot give you any very definite answer because we do not control the remaining stages of the process.

My own view is that yes it is possible to have elections under the Draft Bill that we have recommended. We have followed the Review Act very closely, nobody can accuse us of having taken shortcuts or having denied people a chance to speak, we have

been to every constituency, stayed two days some places, three days in others, Commissioners and our staff are now at this very moment all over the country having meetings like the one we are having, so we are not rushing anybody. And the Act says that within after a month of these discussions we must call a conference. We have already set aside 28th of October as the day for the commencement of that Conference. I believe if we use our time well, between now and then there will be many opportunities for people to express their views and for the Conference to be informed of these views.

It is hard for me to say how long the Conference will actually last. We had tentatively budgeted for a period of four weeks. I think a Conference longer than that will be difficult to sustain because all the delegates are otherwise occupied and they will not be able to take more than four weeks; in fact I will be surprised and I will be very pleased if the delegates could take all of that four weeks to work at the Conference with us. So, we believe that in four weeks it is possible to debate, to amend and then to adopt our Draft Bill.

We hope that meetings like this will identify issues which are controversial about which people are a little unhappy, identify ways in which we can improve the draft and so in this way we can begin to build a consensus already. So that by the time the Conference meets, issues will have been identified, proposals for reform will have been prepared and we can move a little bit quickly. I believe that on the whole the people of Kenya are quite happy with our proposals, there are a few points here and there, some of which you have raised that need to be looked at but I have not heard anybody except 3 or 4 persons who have said the whole document is useless. So I believe we have put proposals which have the support of Kenyans which will enable us to move with some speed.

After the Conference as you know the Bill goes to Parliament and Parliament has about 7 days in which to adopt it since every parliamentarian will have been at the Conference and participated fully and hopefully supported the Draft Bill which will actually go to Parliament which may be different from the one we have produced. That Parliament can finish the adoption in a week or even less. So if that would be the case, then I think we can finish the whole constitutional process as I have said and I was quoted in the papers yesterday, by Jamuhuri day, one of the national days we are proposing. But it all depends on everyone cooperating and I believe most Kenyans do want a constitution adopted by that time and I am sure delegates will be under pressure from the public to do so.

Of course there are those who are not so interested in reforms, whether they will change their views if we have elections now under the old constitution, it is not clear to me, they will still be there, they will still be obstructing and even people who are supporting this Draft Bill now, if they become government they might begin to change their views because this present constitution is very friendly to the President and to the executive and the new president, new executive may feel “..well, we struggled to become president why should we give up these powers?”

So for me, this is a good moment to finish the work. There is a lot of public enthusiasm and let us capture that, let us use that to

get the new constitution in place and then it will be equal playing field for everyone but we will have a new constitution when the new government comes in then they cannot obstruct that. So my own preference would be let us work hard and get the constitution in place by December. If the president does not dissolve Parliament prematurely and Parliament is given the chance to go on until the 3rd or the 2nd of February 2003 which is the normal period, then I am sure we have ample time to finish the work. And then if we have elections in March as I have proposed, we will have two months or 2 ½ months in which people can debate the new constitution, understand it, know the voting system as we are saying, political parties can organize their campaigns, have their nomination under the new constitution and the Electoral Commission will have enough time to prepare the arrangements under this constitution.

So we believe that having elections in March will be quite consistent with the present constitution because under the present constitution, elections must be held within three months of the dissolution of the Parliament. If Parliament is dissolved in February, then elections can be held in April. What we are suggesting is March and it is not an extension of any office.

Now, on the question of the purpose of criminal law and sentencing policy, I agree that maybe not enough of a distinction is made between serious offences and petty offences. That the rich are treated better than the power, that the ministers are treated better than opposition MPs. All that is true. How do we deal with that problem? Well, we deal with that problem partly by now making sure that the person responsible for prosecution is an independent officer. At the moment the Attorney General can not be said to be an independent officer because he is really part of a government effectively. The Attorney and the DPP will be independent and will be able to treat all the offenders equally. And so will be able to pursue cases against ministers with energy and vigour, which we do not have at the moment.

As far as the sentencing policies are concerned, yes I believe that the sentences people get should be related to the seriousness of the offence but also I think importantly should be determined by the purpose of punishment. Why do we send people to jail? We believe that we should send people to jail, not as a kind of revenge though of course we have to protect the public interest, we have to give security, but we send them to jail to rehabilitate them and if you turn to page 33 of the document you have, we have a section on what we call Correctional Services, this is Article 267. There we try to define the purpose of punishment. We say the primary object of the Kenya Correctional Services, by the way we have changed the name of prison services to correctional services to emphasize that the role is correction and not just locking people up for the sake of locking them up.

The primary object of the Kenya Correctional Services is to rehabilitate persons convicted of crime and facilitate the return of those persons to useful lives in the community. We have said that the prison or the correctional services in sub-paragraph two, must be professionals, must eliminate corruption, must observe the human rights of people in custody and so on. So, we do see the correctional services as a place which is humane, which will respect individuals, which enables them to return to the community as useful citizens and we hope under the new constitution these objectives will be taken very seriously.

We have also recommended in our report though not in the constitution, that there should be a council on sentencing policy. At the moment we do not have any clear principles and one judge can send someone to jail for six years and another judge on an identical kind of case suspend them for six months. There is no consistency and some people who have committed rape are given three months or suspended, whereas in most countries rape is a serious offence and you can expect five, six years imprisonment.

So we need some kind of national policy. In some countries a chief justice guides a country, guides other judges on sentencing policy. We believe we need some mechanism, maybe a policy council with people who work in the social welfare field, criminologists, others with the right background to help develop sentencing policies.

The question of Kadhi courts has come up twice. Let me give a background to this first and then let me try to explain exactly what the provisions about Kadhi Courts do. You know that when we were still part of the British Empire, Kenya was divided into two parts. The largest part was called the Colony of Kenya, the smaller part was called the Protectorate of Kenya. The protectorate was a 10-mile strip along the Coast which belonged to Zanzibar. At that time we had the Sultan of Zanzibar who had sovereignty over that 10-mile strip but even though the administration was done by the Kenyan government. As we came close to independence, it was felt that it would be better if that 10-mile strip could become a complete part of Kenya and the sovereignty of the new State of Kenya.

The Sultan of Zanzibar was persuaded to give that land to Kenya and the sovereignty over that land, but he in return wanted some protection for his Muslim subjects on the Coastal strip and one of his request was that Islamic law should continue to apply and the Kadhi Courts which we had at that time also should continue to apply. This was agreed by the Madaraka Government of Kenya, this was shortly before independence, I believe in June of 1963 and in return for that, the 1963 constitution established in the constitution the Kadhi Courts and the jurisdiction over Muslims in matters relating to personal law.

So what we are doing is not anything new. We are honouring the treaty obligations, which our government has entered into. We are repeating the provisions which already exist in our constitution, we are slightly improving the Kadhi Court system because we are separating the post of Kadhi as judicial officers from their posts as religious leaders. We are saying that if you become a Kadhi, you are a judicial officer and you have no business preaching. You are not a spiritual leader anymore, you do not decide when Idd takes place. We are separating those from the judicial functions and that I think is an improvement.

We are providing for an appeal structure within the Kadhi Courts and eventually of course cases could end up in the Supreme Court which is the Supreme Court of the country. So there is that historical background which we have to understand, and secondly I want to say that there may be some misunderstanding as to precisely what the recommendations are. We are not saying that Muslims are completely outside the national court system. We are saying that when it is a matter of personal law, by

which we mean essentially law about the family, law about marriage and divorce, custody of children, rights within marriage, dissolution of marriage and inheritance, that these questions are governed for the Muslims by Islamic Law, by the Koran, and that they are entitled that that law should continue to ply them and that those disputes which arise in their own internal matters would be heard by the Kadhi Court which would mean that a Muslim scholar of Islamic Law will hear the case. The Koran says that Muslim law will be applied by Muslims and we are recognizing that.

We are trying very hard in this constitution as I mentioned before, to respect every community, to respect their culture and their religious beliefs. And Muslims feel very strongly that they want to preserve their culture, but more importantly their law which they believe has been given by God and is recorded in the Koran. We have to respect their position. We received very many recommendations from Muslim organizations to maintain the Kadhi Court system because they were afraid that we might recommend their abolition.

Now, all of us have our own personal laws. I am a Hindu and the Kenya laws have a Hindu law of marriage and succession and that law applies to me. You come from different ethnic communities in Kenya and you are subject to your own law. Your customary law of marriage and succession is what you are bound by. So all of us have our own personal law. This is nothing special created for the Muslims. You and I are happy to take our dispute to the ordinary courts. Much of the law of Kenya is based on Christian principles. Much of our law has come from England and it is based on Christian values. So you already have the bulk of our law is Christian law, you do not need a separate court. So, when I go to court, I go to the High Court and the State pays for the High Court, and Muslims go to Kadhi Courts, the State pays for this court. So there is no discrimination in favour of Muslims. We are not saying that Muslims are free from the jurisdiction of our courts in commercial cases and criminal cases and land cases. They are in such cases as much as you and I are. It is only in this very narrow way that they have these different courts. We are happy to go to ordinary courts and those courts are funded by the State. So really, in practice there is no discrimination against or in favour of any group.

Some Muslim groups did say they wanted the Koranic criminal law to apply too and we said “NO!” we are one country, we must have same values in criminal law. As you know in Nigeria they now have Sharia Law and it has created a lot of problems for many people. We rejected that. We said we are Kenyans, we are subject to the same laws but in a personal assembly life, we have different choices, and therefore the law recognizes these choices. So please understand the very restricted role we have given to Kadhi Courts.

Now the question of national holidays, national days. Well, what we are recommending is national days. In other words, days which have a national significance and which we want to mark together as one community. Things which are historically very important for us. Madaraka Day, when we got self government, and Jamuhuri day when we become independent and then we became republic in the same year, on the 12th of December. These are days common to all of us and we recognize them, but we must distinguish holidays from national days. So the holidays are determined I do not know for sure, from national law or

administrative practice and they will remain open for Kenyans to decide and so we have not put Christmas there because we are sure Christmas will remain a holiday.

There are many other days which are holidays because once we start putting a day as a holiday in the constitution, then you cannot add to them, you cannot subtract from them without a major constitutional amendment and that seems unnecessary. So we are not saying Christmas is not important, of course it is important. Majority of the people are Christians so you can be sure that Christmas will be observed. In fact Christmas is observed everywhere in the world. China which is largely non Christian now has Christmas holiday. So it has become a universal holiday, I do not think Christians in this room need to worry about being compelled to work on Christmas day.

Now on the Trade Union rights, we have provided for the ways in which the gentleman read out that chapter. I should say that in addition to Article 55, we can refer you to Article 53 on page 8, which is the freedom of trade, occupation and profession and we say every citizen has the right to choose his or her trade, occupation or profession freely and then the practice of

by law, so we are giving the choice in so far as it can be made effective of your kind of employment or occupation you want, rather we should have gone further in defining the rights of workers. It is something we can discuss, I can explain why we did not put in more and here I have to explain the role of a constitution.

Already our constitution is quite long, the one we are recommending. Even the present one is quite long. If we put everything that every person or every group wants, we will have a constitution of about 2000 pages. Now the functions of a constitution is to state general and broad principles. It is not like law, it is not like legislation where we need the details, a lots of details. The constitution is the basis under which legislation is prepared and we were trying very hard to create principles about labour which we thought would help workers. Read the first section. Everyone has a right to fair labour practices. Well, what are fair labour practices. Our friend kindly defined that and I would agree with him. Security of employment is part of fair labour practice. Living wages are part of a right of a worker and we have said, every worker has a right to a fair remuneration. But we cannot in the constitution say whether it should be Ksh. 10,000/= a month or Ksh. 5,000/= or Ksh. 20,000/=. These are matters to be developed in legislation, to be negotiated between employers, employees, the government. And so many many areas that you may not find here, which you may have told us earlier is not that we rejected them.

In our report we have given for example sentencing policies which I talked about earlier. It is in our report. We said there should be uniform sentencing policy but we have not put it here. Maybe we should have, but every word we add lengthens the constitution and people then can get discouraged from reading.

So we wanted it to be not too long but we want the basic principles under which new legislation will be prepared. What we have given in this section on labour, is a charter to the trade union. We say use it and then negotiate. Urge reform of legislation on the basis of these principles. Fair remuneration. Well that can give you much details. Reasonable working conditions. That

talks about when you start work, when you finish work, it talks of public holidays, other holidays, it talks of safe working conditions, all these things. So each one of these has many many points and it is your role to see what you can get out of it and make sure that the legislation is reformed in accordance with these.

Similarly I noticed the other day some auctioneers attacked me, attacked the Commission. They said we had ignored the rights of auctioneers. Auctioneers have a very difficult life. They go and take property and they can be attacked. Well, you cannot do that! We provide for protection of persons, we do all the things. So if they are attacked, well, they are protected like everybody else. So if you start putting for every group, these special concerns – even disabled people attacked me in bigamy. They said I ignored the disabled. Well, you see I have not ignored the disabled. If you look at the section on the rights of the disabled, which is Article 39 on page 7, you will notice that we have made many recommendations for the disabled. We say that the State should facilitate the acquisition of materials and devices to enable the disabled to overcome constraints due to disability. They can have wheelchairs, other things they need duty free and so on. We have required that access to public buildings should be facilitated and so on, and now they are saying we have not said they cannot have wheelchairs. Well, we cannot list everything. What we do is to set the general principles. The disabled people need certain supports. Blind people need certain support. People with limb problem, moving problems the other things. So what we are saying is that all these should be recognized. I think in the end, this is the best provision I know of any constitution in the whole world, talking of disability. Yet they were not happy but now I think they have realized that and the latest statement from them has been very positive.

So I think you will have to see that the role of a constitution is not to put down every single point that was raised, but to lay the foundation under which those questions can be dealt with and we hope that we have a fair constitution, we have a good system of government under the new constitution and it will be easier to make decisions under that system. People will have more influence, more participation, their voices will be heard.

Remember we have allow you now to recall your MP. If you do not like what the MP is doing, get rid of the MP. You can do that now for you will be able to do that under the new constitution. So in these ways we are trying to make a more democratic system which will respond more clearly and more speedily to the needs of the people. But we have also set out many principles as I mentioned in the very beginning. We have set out the principles and the values by reference to which public power must be exercised and I believe that will help us a lot if those values are observed by organs of State.

I believe I have taken care of all the questions. There was the last question about insecurity. I hope I have dealt with that in my answer to the whole question of prisons. We have provided for rights of prisoners, right of all persons in custody because they remain human beings even if they are in jail, they should have the right to the minimum respect that we all individuals desire, which preserves our dignity as individuals. And we have suggested other ways in which people who are in custody can be helped to become part of the community again. Thank you very much.

Catherine Rimberia: Now, we will take just three questions so I will give you the numbers. We will start with you, the one at the back and there is somebody seated here and I am being reminded I have to be gender sensitive, so we will have the lady there as number four. Please be very brief in your questions please.

Abwire Robert: Thank you very much Professor. I had talked about this, but I still want to emphasize on it because I feel it is very important because of the people we live with. I feel the new constitution should recommend that districts do not have tribal names like Meru, Kisii, Suba and Teso Districts. I feel these names are too tribal, we should make them to have a common feature or town.

I have another observation here. I feel we should have borrowed from Ugandan constitution of decentralization when we are dealing with devolution of power. Whereby we elect people at the districts, even at location level, even at the village level but the government of the day still have government – in Uganda they are called RDCs- government representatives who are taking interest of the government even if the government at the district is run by the elected councils.

About the funding of political parties. The recommendation is saying that non- citizens should not fund. I do not see a problem with that because looking at the economy of most of our African countries, leave alone even Kenya I feel non-citizens should be guided by the constitution how they will contribute, not to be banned. Thank you.

Dr. S.O Okiys: Thank you very much Mr. Chairman. We have got to thank you very much as Kenyans. I am speaking on behalf of 30 million Kenyans apart from the three, Sunkuli, Ruto and the other ones who do not like what you have done! I am very very impressed. I fully support your recommendation that cabinet ministers should not be Members of Parliament because this has been the root cause of corruption in this country. You cannot have somebody belonging to the Executive and at the same time he wants to sit in Parliament to deliberate on peoples issues. This person will be representing two people. He will not be representing the people who elected him into Parliament, he will be representing the Executive. The only thing which I wanted you to look at is instead of cabinet ministers and permanent secretaries both appointed by the Chief Executive, you should remove one of those posts. If the cabinet ministers are going to be appointed from outside Parliament, then there should be no Permanent Secretaries.

My second point is the scrapping of the provincial administration. This has been the biggest problem this country has been having since independence and I fully support the dismantling of the provincial administration. What I would like you to do even tomorrow, those members who are elected to the East African Legislative Assembly, should be made to head the Provincial Councils so that when they go to the East African Legislative Assembly, they can talk about the provinces from which they were nominated. I believe they were nominated to the East African Legislative Assembly on a provincial basis.

My third and last point. Your draft constitution has covered the East African Community. You remember very well that before 1978 and for this we must condemn the former Constitutional Affairs Minister, Honourable Charles Njonjo who dismantled the East African Community. By that time the economy of this country was thriving. I think the dollar was almost 6 to 7 shillings compared to what it is now. What we want is the return of the East African Community so that we can have non tribalistic institutions in this country because the root cause of the problems we are having in this country is tribalism. The tribalism is being manipulated because if you have the Kalenjin in control of State House, then nobody else has got space. So, if the East African Community comes in, there will be no tribalism, there will be too many tribes starting from Sudan all the way to Ruvuma. You cannot go there and say ati “ only Kikuyus can be president or be anything like that”. So the East African Community should come back to the centre of public life in this country.

If the issues of the East African Community are addressed, I feel that issues which are going to be let’s say defense, disaster management, will be tackled more efficiently because if we transfer Eldoret International Airport, the Kenya Ports Authority to the East African Community, it will be much more easy to maintain because we will be having at least 80 million people paying taxes instead of now all of us, only 30 million of us are expected to fund Eldoret International Airport. That is wrong. Thank you.

Walter Henry Ogutu: Thank you very much Mr. Professor for the beautiful work you are doing for this country. I hope nobody will forget you whenever we think of a new constitution been enacted in this country even for 100 years to come. First of all I would like to congratulate you, your Commission for the beautiful work you have done for this country and when I congratulate you, I would like to inform you that we as the common man in this country, we cannot allow anybody to disrupt this constitution and therefore you should be at peace.

I have been seeing in the newspapers, over the TVs some people trying to come in but they have their own agenda. First I would like to thank you for putting the problems of people with disability in this constitution. I speak as a disabled person and in fact the last time when the Commission was going round, I was trying to give some views and it has pleased me that these views have been put in this constitution especially for people with disability.

The present constitution we have in Kenya has discriminated people with disability and has closed all the doors for any person with disability to be recognized in these national offices or any other way. Therefore, I am very pleased with the way you have come up with the problems for people with disability, to be put inside the constitution so that our problem can have a place or a room to forward in.

I would like to talk about the diagram. This diagram whoever has it should look at it, the new structure of the government. If you look at that diagram, there is an arrow going to the devolved government, provincial councils. This diagram also has an arrow going up on the national council, one from each district the Upper House. Mr. Professor I was very happy when you

mentioned that the youth, the minority and the disabled are going to be appointed into these offices.

The area which I do not understand very much is how the disabled are going to vote and to elect their representative in this National Council or in the National Assembly because last time, I borrowed something from Uganda, whereby when it comes to the elections of people with disability, they were electing their own people. So I do not know how we are going to do this because as I can see light, I may be in Parliament next time, maybe.

Mary Njoki: Thank you very much Mr. Chairman, I would like to commend you on a very good job done on the Draft Bill. I have various concerns and I need some clarification regarding some Articles. First and foremost I have a proposition on citizenship by naturalization. I do not think that we should make it very easy for anyone to get citizenship through naturalization and I would like to propose that the 7 years that is currently in the Draft Bill should be increased to at least 15 years.

Number two; I have another concern regarding Article 35 (5) regarding women. There is that thing which says that it provides “reasonable”. I have a problem as to what “reasonable” is. Is there anything in the constitution which would actually give a minimum of what reasonable is? Minimum standards which the government should put into place?

Schedule 41, on freedom and security of the person. How has the Draft Bill catered for the rights of the arrested person? Is there anything that says if someone is arrested, what kind of rights do they have?

Another one is Article 44 (1) about freedom of worship. Does it also give equal rights to devil worshippers? I would also like to draw your attention to Article 106 (3) about the representation of four women from each province and two women representatives from Nairobi. My question is, does this mean that Nairobi is regarded as a province or as a district and if it is regarded both as a province and as a district, does it mean Nairobi will have a representation of 6 women?

Also, I would like to also refer to Chapter 10 on devolution. Number 213 (1) (b). Basically my problem is now about the party list and how people are going to be elected in the National Assembly. It has something to do with devolution but it is 107 (1). Members to the National Assembly. What is the draft constitution doing regarding members of the civil society who are not aligned to any political party? Is there anything that the Draft Bill says about them? Do they have a chance to be elected because what Article 107 (1) states about the party list, you have to be affiliated to a particular political party.

I propose that instead of the party list by political parties, the Bill should allow for the drawing of the 90 members from marginalized sections of the society, be they from ethnic, minorities and by minorities I mean minorities in terms of numbers, in terms of race, so that we have an all inclusive parliament.

Finally, I would like to make a comment regarding internal democracy regarding political parties. As can be evidenced with the

current political parties, there is very little internal democracy. So if they use now the party list, what will happen is that some sections of the society will actually not be included in the party list because if you have to be affiliated to a particular political party and elected on that principle, some members of the society might be marginalized out of decision-making positions in government. Thank you.

Prof. Yash Pal Ghai: I have to answer that because I am late for another meeting so my colleagues will stay behind and continue the discussion with you. On the question of the district system, we did look at Uganda and we have in fact followed and I hope improved the Ugandan system. We have not used the term the resident whatever that term is in Uganda which is the official from the national government who lives in the district but we assume that in addition to the public servants who are employed by the districts and are accountable to districts, there will be either at the district or provincial or both levels, certain officials of the national government because the national government will need some officials in the districts.

We hope that these officials will work closely with the officials of the districts and the government of the districts. But we did not want to put too much on that because if we create office of the senior government official at the district, we were afraid that he or she might inter-dominate the district and we want districts to be free to make their own policies.

The point about the minister and the permanent secretaries, we do not need both if we have ministers drawn from outside Parliament. We do not agree. We believe that the minister has the responsibility of policy making, of explaining to the public policies of the ministries, of being in Parliament periodically to defend policies, to answer questions, to be called up by the committee. So we want to separate the policy-making functions of a ministry from the purely administrative functions of the ministry.

Somebody has to look after the operation of the ministry in purely bureaucratic terms. You need some kind of command structure and the minister cannot be dealing with all the public servants in the ministry. We believe that there is need both for a minister for policy questions and for a permanent secretary for carrying out the administration. The ministry makes policy, the department or ministry carries out the policy and it is quite common in most countries that I know of, in fact all countries I know of, to have this division. Otherwise the minister will get too much involved in the administrative matters. You do not want that to happen. You want the minister to be thinking of broad policy questions, traveling in the country, talking to people, finding out people's problems and if he or she has also to run the day to day operations, it will not work. He or she will be distracted from the real policy-making task by mere routine administrative things. So I think it is important to separate.

What maybe we need to do more work on it is what is the precise division and when I looked at the way we have drafted it, it can be improved because we have left it a bit unclear. We need to say that under the direction of the minister, the permanent secretary will manage the department. So we may need to make that clear but I do believe from my experience, in many countries that we need to separate these two positions. But we must make sure that they are not in conflict.

What has happened is that some ministers have already told us about that. What happens at the moment, permanent secretaries get their instructions either from the Head of the Public Service or sometimes even from the president himself. Now that is not good because then you get conflict. The permanent secretaries are there to serve the ministries and to take broad instructions from the minister. And in fact if you notice in our proposals, we have not provided and we do not support the office of the Head of Public Service because that means also the president dominates every ministry and ministers then feel that their permanent secretaries do not listen to them because they listen to the State House. That we believe is not good. So we need to think through but we do support having two separate offices.

On the question of the members of the East African Assembly becoming heads of provinces, I have no comment on that. I do believe as the speaker believes, we need to recognize more centrally the East African Community. We have provided of course that the East African Community law is also the law for Kenya. We could have perhaps gone further in recognizing the community but the community itself as you can see is evolving. If it had been fully established, it would have been easier to accommodate that in the constitution, but because itself is involving it was a bit hard to do that. But certainly, we can look at this again at the Conference.

How are disabled to be represented? Two things. One, this party list that we have mentioned, we have required that the persons to be put on that list should be drawn from gender, we have discussed that, from minorities, from the disabled, from youth. We have not provided as in Uganda for separate representation of the disabled or the youth, we have for women. The reason that we have not done that is that we believe that the youth and the disabled and women can achieve their objectives much better - - -

I am told that 10% of Kenyans have some disability. So you are a very powerful group. That means 3 million votes. That is a lot of votes. Use your votes to influence political parties, their policies and who they represent. Say for women, I do not in principle support separate representation of women. We just have this historical situation that we have to redress and for a limited period I would say yes, we have separate women representation but if the men, youth and minorities go separately in parliament, they will not have much influence. If you have at the most two or three disabled persons in parliament, what can they achieve? They can speak but they have no real influence. But if the disabled are members of the key parties, that party will have to listen to them.

Similarly women play active roles in major political parties. They can influence policy much more than they can be in Parliament. So in principle, I am opposed to having special representation for particular groups of communities. I think they should all come together into political parties because this is where power is, and having two or three disabled persons in parliament, I can assure you from experience elsewhere, will make no difference. But if you get involved in NAK, or KANU, or Rainbow, you will have much more influence ultimately. You have to be heard, you have to make yourself heard, you have

to be a nuisance sometimes but you have these votes.

Again, why are women – women always remind me whenever I discuss with them. “We are 53% we must have special seats!”.

I say “If you are 53% you do not need any special seats! You are already majority of the voters. Only minorities need special representation”. But I do realize the historical context and there may be a short period when we need that, but my general advise would be to minorities and disabled to get involved in the mainstream political parties. Lobby within that. Tell them you are 3 million voters and if you ignore us, we will ask them not to vote for you. People do that in other countries. The elderly for example form their own group and they go to different parties and say, “what benefits are you giving to the elderly?” and if they are not satisfied they tell their members not to vote for that particular party. So you will have to use a political process to further your objectives and not just rely on what really would be a token, a small representation in Parliament.

But we have throughout the constitution said, that all institutions of the State, parliament, public service, cabinet, e.t.c, must reflect what we call the national diversity. So every institution must make sure that all ethnic groups are properly represented in public service and police, that the disabled are appointed, that women are appointed and certainly when we were making up the National Conference, our instructions to all the groups were, that they have to bring youth and disabled among the delegates to the Conference. And only early this week, I checked all the names that I got from the districts as well as from the civil society groups and in some cases I wrote back and said “sorry, I do not accept your list because there is no disabled I can see here” or “you do not have sufficient women” or “you have too much dominance of one or two provinces”.

They have now given me new lists with which I am not satisfied. That is why I have delayed publishing the list of delegates. But now I have a final list, I am happy with it, I am sure the youth have been taken care of, the disabled have been taken care of, the minority have been taken care of and then we will publish the list either today, but I am losing time already but by Monday. So that is the way to go I think. To have the general principle that all groups, communities have the right to be represented in all institutions and in the private sector too and then you fight politically.

What this constitution has done really is to give all the groups ammunition. I try to explain that in terms of Trade Unions but other groups too. If you say now the constitution has given us this right and this is the supreme law. Make sure your administrative practice, your recruitment policies, your national policies are not consistent with that. So this is the start of a long journey. It is not the end of a journey, it is the start of a long journey and all of you who feel that you have been discriminated against or oppressed, now is your chance to use this constitution, this is why it is very important that you understand the constitution and know how to use it because it has given you the possibility of advancing your agenda and you must do that. This is a piece of paper, that is all it takes. It will only become a living thing through your own efforts. So do not just say, “now we have a good Katiba and life will be fine”. Life will not change one bit, after the constitution is adopted unless you get engaged and involved and participate.

So read the constitution carefully, see how it protects you, it might not seem to do that immediately but if you look at it closely, - some businessmen asked me yesterday, “you have done nothing for us!”. I said well “I have done a lot for you”. “We have a good system of governance. We have tried to eliminate corruption. What more do you want? we have a good judiciary, your context will be enforced, you will have good policy making, you will not be having to pay for licenses in a corrupt way if all that we have done works”. Then this is a wonderful constitution for a business community and we fully expect a lot of investment to come provided this is adopted. So you will have to see where exactly you are being helped and use that to go to court, to lobby and so on.

Let me then deal with the question of citizenship. I think seven years is probably okay. Most countries have five years now, seven, we should not be afraid of foreigners. We live in a global world. We have 37,000 Kenyans living in Britain. There are 40,000 Kenyans living in the United States. So people are moving around. Do not be suspicious of foreigners. Why would people want to become Kenyans? We are a poor country. 60% of people are starving. So it is not like America where people want to go because of all the wealth. We need people of skills and if people have lived here 7 years and have commitment to this place, let us welcome them! Let us not have this notion of antagonism. If people want to damage your country, they do not need citizenship. Look at people who bombed our buildings and Embassies and so on. They did not have citizenship documents. It does not matter. So do not get too paranoid about other people coming and living among us. We live among them, they live among us, that is the way of the future and let us benefit from foreigners living among us, contributing towards our economy because they are contributing and if they are breaking the law, we can deal with them.

Somebody said the other day, I read in the papers, we have said that if a person married to a Kenyan, after three years of marriage, they can apply to become Kenyans and someone wrote to the papers and said “this is terrible because now a lot Kenyans will marry our women and that is terrible for our country, inconvenience!”. Well, that chap forgot that ever since independence, our rule is that any woman marrying a Kenyan automatically can be Kenyan. So what about that? What about all the women who become Kenyans because they are married to a man?

Now we say wives can also bring their husbands and they get upset! So we have to have a sense of fairness about it. If somebody marries a Kenyan and comes and lives here, well, he or she has adopted our land and let us welcome them, let us not have this xenophobia about people outside.

What is reasonable? Reasonable is what the government thinks reasonable, what parliament thinks reasonable, what judges think reasonable. It is our own sense of proper balance between competing interests and so on. So you cannot define that but it is what a reasonable person would decide. Let us put it that way. Ultimately you can go to court if you think the government lawyer is not reasonable on a particular point and the courts will have developed criteria to determine that question.

Freedom of prisoners and other people in custody. One of the longest Articles in the constitution is about that so I will not

repeat it but just read it. It is the longest Article on the Bill of Rights, it says about the rights of fair trial, rights of prisoners, rights of detainees and so on.

Freedom of worship. Did we outlaw devil worship? Well, my difficulty is, I do not know what devil worship is! As I have gone up and down the country, I have said: what is devil worship? Could people talk about it? And nobody has given me an answer and I do know that some people think that Hindus are devil worshippers. I am a Hindu, do you want to exterminate me? In Pakistan there are many Muslim sects and some Muslim sect says, it is Nasharies or Buras, they are not Muslims, and Pakistan government has a very repressive policy against these Muslim sects. They call them devil worshippers. Somebody here does not like SDA and they will start saying “SDA are devil worshippers and we must get them out of the country!” Where will we end? People should have the freedom to do what they want. Unless they are harming other people and if they are harming other people use the criminal law to deal with them. If somebody wants to go to a dark corner and chant in a strange way to you, let the person do it! Unless he is harming your children or drinking your blood as I am told they do. I do not believe a word of it myself. So, let people be. We want to be a tolerant society. So we have said nothing about devil worship but of course what is religion, what is religious belief are questions that can be determined.

Many many countries have this question because a group comes along and says, we are a religious group and in many countries as you know, religious groups have tax exemption, tax benefits and they say “we will not pay tax on this building or this because it is our place of worship or it is our religious asset” and the law says “Yes, in that case you do not pay tax”. So then the question may have to be raised: what is a religion? What is a religious institution? And India and the United States have a lot of cases on that. So if there is a group which has no commitment to any fundamental religious values, is claiming freedoms of religion, well it can be dealt with on that basis. So do not get too worried about devil worship. It is an imagination. You know, women were burnt for being witches in the United States and indeed today too, we treat people very badly, we think they are witches. This is superstition and I think we need to release our minds from those kinds of notions.

Representation of women from each province. Well, Nairobi is treated as a province for the purpose where it will only have two women. We have 30 women and there are 7 provinces, that makes it 28, we have only two left which we give to Nairobi.

Finally, on the question of party membership, well you do not have to be a member of a party to compete for elections. We have said that both for the elections of the President and the elections of Parliament as well as elections of councils, you can be an independent candidate. So there is no requirement as at the present time there is for a person to be supported by a political party. So if independent candidates want to compete they are allowed to compete but we do believe that parties should be subject to greater control than they are at the moment, otherwise corruption will continue.

A lot of corruption is connected with politics, and campaigns and parties need funds for campaigning, for even bribing

candidates, and so they do that. What we believe is that we need clean parties and in order to encourage them to be clean parties, we have even said, “we will give you some money so you do not need to steal money from the government, you do not need to borrow or take money from abroad”. Why are we saying non-citizens should not give contributions? Because in many countries, policies are made by corporations. They bribe ministers and that is what happens. Look at many laws, many countries which are trying to fight this bait and protection of medicine. People are dying of AIDS, we can manufacture those medicines at hundreds of the costs that we have to pay and yet we have to pay. What happens is big pharmaceutical companies buy up a few ministers, even the party, and then laws never change for the better.

So we need to reflect the sovereignty of Kenyan people, on which the constitution is based, we need to control these negative aspects of foreign intervention. That is what we are proposing. But we have also said that there should be a political parties funds and that donor and foreigners and corporations are free to give to that fund and that fund will be distributed equally among parties by the Electoral Commission. So we will not stop them from contributing politically but they can not give to individual parties, they have to give in a common fund which should be distributed in a set way to all the parties.

Well, I have to leave you. I deject that, I have been enjoying this discussion but I am late for another meeting and since you all live in Nairobi I am sure there will be other opportunities for us to meet again. And I thank you once again for your participation in the process. As you can see we are at a very critical point in this process and every ounce of public support is worth its weight in gold. So please continue engaging in the process and I hope supporting the Draft Bill in its essential principles. Thank you very much.

Esther Waliya: I would like to ask those of you who have any questions to give them in memo form so that we can go with them. Let us close with a word of prayer. Any Muslim?

***Prayer:** Our Father in Heaven we thank you so much for you are our God who created us and gave us laws to guard us against harming one another. You did give us Kings to lead us and you did give us Prophets to guide us in your word. Father we do pray as our nation goes through the throes of birthing a new constitution, that your Holy Spirit would infuse in us the rule of God and that you will be our King and no other. That we may fear you and love one another in the truth of your word. In Jesus’ name I pray, Amen.*

Meeting ended at 2.00 p.m.

