

**CONSTITUTION OF KENYA REVIEW COMMISSION
(CKRC)**

**NATIONAL CONSTITUTIONAL CONFERENCE
(NCC)**

VERBATIM REPORT OF

**PLENARY PROCEEDINGS
HELD AT THE PLENARY HALL, BOMAS OF KENYA**

ON

10.03.2004

CONSTITUTION OF KENYA REVIEW COMMISSION

NCC - PLENARY PROCEEDINGS HELD ON 10TH MARCH 2004 HELD AT THE PLENARY HALL, BOMAS OF KENYA

Present:

Prof. Yash Pal Ghai	-	Chairman
Hon. Delegate Wilfred Koitamet ole Kina	-	Vice Chairperson
Hon. Delegate Bonaya Godana	-	Vice Chairperson

Presenters

PLO Lumumba

Secretariat in Attendance:

Christine Mwambua	-	Clerk of the National Assembly
Mary Babu	-	Verbatim Recorder
Emma Kaaga	-	“

The meeting commenced at 9:05 a.m. with Prof. Yash Pal Ghai in the Chair.

Prof. Yash Pal Ghai: I would like to call the meeting to order, and I would like to ask Sheikh Ali Shee, Sr. Gachambi, Rev. Patrick Musungu, to say the prayers this morning. There will be a National Anthem as usual, so please stand up now and you will sit after the National Anthem.

Hon. Delegate Sheikh Ali Shee: *(Maombi) Bismillahi, kwa jina lako Muumbaji wa mbingu na ardhi, na vitu vyote vilivyoko kwenye mbingu na ardhi, tuko mbele yako tukiwa waja wako wanyenyekevu na wanyonge. Tunatoa shukurani zetu kwako Mola mkarimu kwa kutuweka katika hali ya kuridhisha. Hali ya amani na usalama na kutulinda katika hali hiyo kwa miaka mingi toka Kenya iwe huru. Mola, hii ni neema ambayo umetupa wananchi wa nchi hii. Sisi tunatoa shukurani zetu kwako kwa neema hii. Eh Mola, usitunyime neema hii uliotupa. Endelea kutupa neema kama hii ili watu wako, waishi katika hali iliyo bora ya maendeleo, mafanikio na upendo. Mola unajua udhaifu wetu, tuliona wakujipenda binafsi na kupenda mtu, watu wake zaidi kuliko watu wengine. Mola ingiza moyo, ingiza roho, ingiza nguvu kwetu sisi, ili tuweze kuwa watu wema kwa kuwapendelea wenzetu yale ambayo tunajipendelea sisi wenyewe.*

Mola nakuomba ututenge na fikira na mawazo ya kiunyama ya tamaa nyingi ambayo ndiyo imeangamiza wanadamu katika ulimwengu. Mola, tulinde, utupe nguvu tufanye kazi ambayo iko mbele yetu, tuliyo pewa na raiya wa nchi hii, kazi ya tutengeza Katiba. Kazi ambayo hivi sasa, tuko katika kiwango cha mwisho cha kumaliza. Mola, bariki wananchi wako walioko hapa, uwape busara na hekima, ya kuweza kutengeza Katiba hii, na kumaliza kwa njia iliyo bora. Hasa, hivi sasa, baada ya kukatwa shauri ya kutengezwa Kamati ya kwenda kushikanisha mambo ambayo yana utata. Eh Mola, tunakuomba Kamati hiyo ikiundwa, iwe ni yenye kupata baraka zako, ili iweze kufika pahala ambapo ni pazuri pa kuridhisha sisi sote tulioko hapa na wananchi wa Kenya wote ambao tuko hapa sisi tunawatumikia. Mola tubariki, tupee neema zako na Shetani utuepushie, utulinde. Tupe nguvu tuweze kupambana nae na kumtoa kwenye mawazo yetu, ile tuweze kuwa na mawazo yale ambayo, yatakuridhisha wewe Mola wetu, na kuridhisha watu wetu. Tubariki eh Mola, Amen.

Hon. Delegate Sr. Marie Therese Gachambi - (Prayer): : In the name of the Father and of the Son, and of the Holy Spirit, Amen. Oh, God, creator, bless this our land and nation. Bless us as we gather this morning in your name, because Lord, you have entrusted to us the responsibility of reflecting, of discerning and making decisions that are going to affect each and every *mwananchi*, that is going to bring peace, harmony and unity in our land. Give us the guidance of your Spirit, that Spirit, that takes into consideration every person, and every community, that Lord we may live in glory, and may foster the right and the fullness of life. We ask you that we may deliberate and discuss, and whatever decisions we take, may be for the well being of this our land and nation. Heavenly Father, we want to entrust to you the work we are going to do today, so that we may be guided by your wisdom, and we ask all this in Jesus name.

Hon. Delegates: Amen.

Hon. Delegate Rev. Patrick Musungu – (Maombi): *Mungu mwenye enzi, twakuuliza asubuhi ya leo, ukatamalaki katika kumbi hili. Zote tuko mbele yako kama wananchi, raia wa taifa hili, tukijumuika pamoja kutoka katika makabila mbali mbali, katika itikadi mbali mbali, na imani mbali mbali na hata kwa misingi ya kimataifa na utaalumu. Tumeshirikishwa katika wadhifa na nyathfa mbali mbali, lakini tuko hapa kwa makusudi moja, kushauriana na kushirikiana, kukarabati Katiba ya jamuhuri ya Kenya. Mungu tulianza na wewe, kitambo cha miaka tisa, na*

hasaa katika kikao hichi cha tatu cha Bomas. Tulikuuliza uwezo wako ukashuke mahali hapa na tumeona mkono wako siku baada ya siku. Ijapokuwa dharuba na mawimbi yamekuwa mengi, lakini kwa mkono wako wa ushindi, tumefika siku ya leo.

Eh Mungu, tuwezeshe kumaliza safari hii. Ukatutajie sisi wajakazi wako, ijapokuwa tumedhauliwa na walio na hila, ijapokuwa tumesukwa sukwa, lakini sio kwa uwezo wetu, bali umekuwa Mungu upande wetu. Ushindi huu, ni shukrani zetu kwako. Siku ya leo, ukashuke chini ya Mwenye Kiti wa Kamati hii ya kundi lote na mwandishi wake, na wasaidizi wao na sisi kwa ujumla wetu ni jadala ambayo iko mbele yetu siku ya leo, ukatupatia ufahamu, uhakika na ujasiri kwa kukata kauli, pasina uoga wala kinyongo. Bali tufanye maamuzi kwa ujumla, tukijua ya kwamba, tunafanya hivyo kwa uwezo wako na kwa niaba ya milioni thelathini raia wa nchi hii.

Kristo ukalete upatano, uwasama wa kidini, uwasama wa kikabila, uwasama wa kugawanya wananchi baina ya wanawake kwa wanaume na, wazee kwa vijana, ukatushindanie. Kristo mwana wa Mungu ulileta umoja, na umoja huu ukadhirike miongoni wa watu wako. Tunakuuliza haya kwa jina lako ewe Yesu Kristo, uliye mpatanishi wetu. Amen.

(National Anthem).

Prof. Yash Pal Ghai: We have some guests from Canada, some students who have come to observe our proceedings, and they are led by Professor, John Ngeleti, they are sitting here in the Observers' Gallery and I welcome them to this meeting. Canada has been struggling for years to amend their Constitution. Maybe they will pick some lessons from the way we are doing it here. I want to start with a couple of announcements.

You will remember that yesterday, we agreed to set up a mechanism for building consensus on a few outstanding matters. The Steering Committee, considered that proposal this morning and after discussions, it agreed on a certain number of principles to be followed in the establishment of the group and the procedure and I am presenting it to you for your approval. These are recommendations from the Steering Committee. The Steering Committee, considered that it was important to keep the membership of the Committee to a small size, so that it will be possible to

proceed with some expedition, with some speed. The number agreed was seven, in addition to the Chair, whom we unanimously felt should be Bishop Sulumeti, who has already made such valuable contribution, to developing a consensus, not only in Bomas, but even when the negotiations of the discussions on Constitutional reform began over 10 years ago. So, we are very fortunate that he is available to chair, at this point to us, the extremely unenviable position that the Chair would have to have, but we are grateful that he has agreed to be available for that position.

We also agreed that the Committee will begin its work as soon as possible. We certainly want their recommendations by Friday. As you know, we had planned to finish the adoption of all the Articles by this Friday so that the Drafting team can use the weekend and may be by Monday to finalize the text. So, it is important that that Committee comes to the Plenary with recommendations by Friday. We also agreed that the Political Parties will not be members of the Committee, but they will of course address the Committee and they will be consulted as the Committee feels is desirable. We felt that for consensus building, it was good to get people on the Committee, who are somewhat, if I can use the term neutral.

So, what we have done now is to agree on seven names in addition to the Chairperson and since my Secretary has a much better voice than I have, I am going to ask him to read the names of the seven nominees that we bring to you for your approval.

PLO Lumumba: Thank you very much Chair. The proposals are as follows:

1. *Mzee* Gitu wa Kahengeri. (*Clapping*).
2. Dr. Ruth Kibiti. (*Clapping*).
3. Mama Grace Ogot. (*Clapping*).
4. Professor Wangari Maathai. (*Clapping*).
5. Sheikh Ali Shee. (*Clapping*).
6. Sofia Abdi. (*Clapping*).
7. Maj. Rtd Marsden Madoka. (*Clapping*).

PLO Lumumba: Thank you very much Mr. Chairman.

Prof. Yash Pal Ghai: 594.

Hon. Delegate Orié Rogo Manduli: Thank you very much Chair and Secretary of the Commission, for giving us the names suggested, one of them is very respected and I know all of us here respect the Delegates named as peacemakers and people who help us break the deadlock, because at the end of the day, we must give Kenyans a Constitution. I am 594, Rogo Manduli, and I am humbly suggesting that we add on. I know we want to keep the group as small as possible, but could we also add on the name of Honourable Delegate Kimaiyo arap Sego? Do I have the support here of the Plenary for that? Thank you.

Prof. Yash Pal Ghai: Do you approve this list of candidates? Say “**AYE**” if you do.

Hon. Delegates: “**AYE**”.

Prof. Yash Pal Ghai: “**NAY**” if you say no.

Some Hon. Delegates: “**NAY**”.

Prof. Yash Pal Ghai: I think the “**AYES**” have it and thank you very much indeed. So, I would now invite Bishop Sulumeti to organize the first meeting and I think the proposal is that the Committee should meet at lunch.

(Inaudible murmurs on the floor)

Hon. Delegate James Kayila: Point of order.

Prof. Yash Pal Ghai: 407.

Hon. Delegate James Kayila: Mr. Chairman, my name is Kayila, a District Delegate number 407. I think it would be good if we know what the terms of reference of this Committee are, and then be assured that after they have completed their work, we will dissolve it. (*Clapping*).

(Consultation at the “high” table).

Prof. Yash Pal Ghai: The idea was that they would do their Terms of Reference over lunch. We have arranged lunch for the Committee members in the Board room, which is in the canteen area, and I hope that by this afternoon, we may have a report from them. 368

Hon. Delegate Joel Sang: Thank you Honourable Chair, I am Delegate number 368, Joel Sang. Honourable Chair, before anything starts, we have to be very clear on certain issues, because the legitimacy of the document we are creating must be there. And the concurrence of this Conference to whatever transpires there, will only allow what they decide to go into the final Draft. That we continue undisturbed as they go on. Whether we finish even the whole Chapters and then when they come back, if we agree, we can insert whatever they arrive at in the main Draft. *(Clapping)*.

Secondly, because certain fundamental questions are there, we are going to go on and realize that the Government does not have a position. If we represent the people of Kenya, whom does the Government represent? This is the question that must be answered to Kenyans so that this Conference does not become a charade. It should be something that is taken seriously, that we are doing it for the good of Kenyans. The Government does not have a stand, a position. We are doing it for the good of Kenyans, and the Conference must legitimize what transpires from the consensus building. The Government shall give no condition and mark you, what these Delegates expect is that wherever we give, the Government must give and be seen to give in whatever it is stating.

Prof. Yash Pal Ghai: Thank you very much. Thank you.

Hon. Delegate Joel Sang: Otherwise, we are not going to accept their outcome, if those conditions are not met. *(Clapping)*.

(Background consultation at the “high” table).

Prof. Yash Pal Ghai: Can I just clarify on this, because this was discussed in the Steering? It was agreed that this Committee of the Conference will continue with its work. And it is also of course clear that the final decision rests with this Committee, when it converts itself in to the Plenary. So, nothing will be forced on us. Equally, if we do have a Committee, we have to consider the recommendations seriously, but the final word, remains with this Conference. *(Uproar)*.

Prof. Yash Pal Ghai: We really need to proceed unless-- 50.

Hon. Delegate Charles Keter: Mr. Chairman, I am Honourable Charles Keter, Member of Parliament. I am wondering whether the suggestion from Honourable Orié Manduli has been included the name of Honourable Sego. Has it been included?

Prof. Yash Pal Ghai: Yes, it has, because we took a vote and we got majority of “AYES”. 396.

Hon. Delegate Gloria Wabwire: Thank you Chair. I am Delegate number 396, Happy Gloria Wabwire. I appreciate Chair, you say that the Committee has to finish its work by Friday. But I am at a loss Chair, because we still do not know what is contentious. What is the modality of determining what is contentious? So, I am requesting that what is contentious should be determined by this Conference, as we go through the Articles. *(Clapping)*. We go through the Articles, Article by Article when we vote. If an Article does not attain two thirds majority, instead of taking a second vote, then we say, that one is a contentious issue, it goes to the Committee. *(Clapping)*.

Prof. Yash Pal Ghai: Well, as I said, the Committee will continue with its work and the contentious issues will emerge. Likewise, the Committee will meet this afternoon, and they may also have a report for us today or first thing tomorrow morning. Can we now please proceed?

(Background consultation at the “high” table).

Prof. Yash Pal Ghai: We have seven, eight names, if we go through them all, we will spend another hour. Can we on this understanding and assurances please proceed with our work? I beseech you please.

(Inaudible responses on the floor).

Prof. Yash Pal Ghai: 154.

Hon. Delegate Henry Obwocha: Thank you Chair. 154, Henry Obwocha. Mr. Chairman, we have come from very far. We do not want a ‘circus’. This Conference mandated a Consensus Building Group, which started at AFC, we went to Karen, and I was a member. We brought some of the recommendations which were consensus. That Committee was being chaired by Bishop Sulumeti and we went back to zero after agreeing on consensus. We do not want another Committee here without a mandate specified on what they are going to do and whether their recommendations are going to be binding on this Conference or not. We want something that is clear. We say look, “this issue we have not agreed on if this Consensus comes up with this, then we will agree”, we do not want to go on a ‘circus’, setting up a Committee every time and we do not agree. We want a Constitution for this country.

Mr. Chairman, what I am asking is that this Conference should mandate this Committee, and I agree with the Delegates from the other side, I do not know the number, that when we have mandated them, which contentious issues are they going to look at? And if they come with that consensus, this Conference must accede to that. *(Clapping)*. Thank you Chair.

Prof. Yash Pal Ghai: Thank you very much, I think that is a fair point, so can we proceed now with our core-business?

Yesterday we discussed the Bill of Rights and we agreed on the adoption, but when we put the matter to formal vote, we had 280 in favour and about 203 opposed. But that means that we did not actually have a quorum at that time, and so, in accordance to the regulations, the first business we would like to cover is to formally approve the Articles in the Chapter on human Rights. But there is one point that needs our reconsideration, and that is the Chapter dealing with

the Right to Life. You will know that the Draft contains Sub Clause (2), which says that capital punishment does not apply. We took a vote on that and on a Motion by Prof. Ruth Oniang'o, we had an opportunity to study that particular Motion which was adopted last evening, and there are some problems with that. So, I am going to give - the floor to Prof. Oniang'o to speak on that issue and to introduce another Motion on that question. Thank you.

(Inaudible murmurs on the floor).

Hon. Delegate Ruth Oniang'o: Thank you, Chair. If you recall yesterday, we voted on my Motion which sought to remove that particular Sub-Clause in its entirety and I gave reasons for that and we voted on it, I believe, quite overwhelmingly and it is a Motion that in fact in that same form had been presented by two other Delegates; Ibrahim Salim and David Erulu. However, there is another version of its amendment by Honourable Isa Ileri Ngunia which said, "except in the case of murder." Unfortunately, when we go together, we drafted something and even consulted a lawyer to read, "except in the case of murder and child molestation" which then changed to "child defilement". People have a problem with specificity. I think when we say "murder" then you are leaving out issues of treason, you are leaving out issues where somebody has been shot and left as a vegetable and not having died.

So, I would like to appeal that we reword this and we vote it on the basis of just expunging it from the Draft and leaving the specificities to legislation. I have consulted Honourable Ngunia but he wants to retain his as it is. So, Mr. Chairman, with your advice, it would appear that we have to vote on the two Motions: My Motion and Mr. Ngunia's Motion. However, the general sentiments from the people are that, we cannot completely do away with the death sentence. It is a question of the wording of it that is causing a problem and I truly need your advice on this. Thank you.

Prof. Yash Pal Ghai: Well, it seems to me - if I could just repeat that explanation - that if we delete Clause 2, then the Constitution obviously will say nothing about capital punishment and the matter will then rest with Parliament. If we have something on capital punishment, then I think we have to agree very carefully on the extent to which we do allow capital punishment.

So, Professor Oniang'o is proposing the total deletion of Clause 2. So, the matter will rest with Parliament. The other proposal is to say that the capital punishment is abolished except in one instance. That, I believe, is conviction for murder. So, we have two options here and maybe, the best thing is to put the question to vote since we have debated this previously. So, let me just consult my colleagues for a minute.

(Consultation at the "high" table).

Prof. Yash Pal Ghai: It is our view that it will be procedurally best to start with Professor Oniang'o's Motion because if that is carried, then the other Motion falls. So, I now ask those who support the Motion, that Clause 2 be deleted so that the Constitution says nothing about the death penalty to raise your number plates.

Hon. Delegates: No!

Prof. Yash Pal Ghai: What does, "No" mean? It is not clear?

(Inaudible response from the floor).

Prof. Yash Pal Ghai: Well, what we are putting to vote now because the feeling was that what we adopted yesterday had many loopholes and we had left to certain things which if we are going to abolish that penalty, we may wish to retain for those two cases we had in the Motion. Please do not disturb the Chair. It is a very established rule. Treason, for example should perhaps go in if we want to retain it. So, it seemed appropriate that we should either decide to abolish capital punishment through the Constitution or leave the matter in its entirety to Parliament. So, what I am asking for a vote at this stage is whether you approve Professor Oniang'o's proposal that Clause 2 be deleted. I think it is Article 41--

PLO Lumumba: 41, actually.

Prof. Yash Pal Ghai: 41(2), in which case the Constitution will say nothing about capital punishment, but the laws of Kenya might say something about it. So, we are leaving the discretion to Parliament as regards the application of the death penalty. Is that clear enough?

Hon. Delegate Mwandawiro Mghanga: No!

Prof. Yash Pal Ghai: Okay, what is your--?

Hon. Delegate Mwandawiro Mghanga: Mr. Chairman, I am Delegate number 131. Mwandawiro Mghanga is my name. Just as we have a lot of what we are calling contentious issues, political or social issues. This is a very very important point, because we are dealing with a matter which concerns life; the ability of human beings to take other people's lives. Just as we have moved these other contentious political issues for discussions, even this matter should be really discussed further before we debate, because it is my contention that no one at this political period really should take other people's lives. Death penalty should be abolished and should remain as it is! I think for these doubts we are having here where some are saying it should be done because of treason or child molestation, we are not sure. I think we should be sure before we vote. That is my Point of order.

(Consultation at the "high" table).

Prof. Yash Pal Ghai: We have debated this but I am happy to listen to some views but we cannot spend a great deal of time on it. As important as it is, we have debated the issue for nearly two years now.

PLO Lumumba: 028.

Prof. Yash Pal Ghai: 028.

Hon. Delegate Robinson Githae: Thank you, Mr. Chairman. My name is Robinson Njeru Githae, Delegate number 28. Mr. Chairman, I think the way we are approaching the issue is wrong. Either we abolish death sentence or we retain death sentence, in which case then it will

be up to the other laws that would provide. However, we seem on one hand as saying that we abolish death sentence expect-- That is not abolishment.

So, I am suggesting, Mr. Chairman, that the Motion be either we abolish death sentence or not. Then it will up to Parliament to provide. If we say for example we do not abolish, then it will be up to Parliament to pass laws which then would impose the penalty of death. However, we cannot say we are abolishing death sentence "except" - then we are going to have a new list of exceptions every day. I want to be on record as one of the people who are totally opposed to death sentence. It is inhuman and it cannot be justified under any circumstances. Most of the modern States have now abolished death sentences.

Hon. Delegate Sylvester Wafula: Point of Order!

Hon. Delegate Robinson Githae: So, Mr. Chairman, my point is, let us make a resolution: Either death sentence or not death sentence, but not we abolish, "except" - It will not work! Thank you.

Hon. Delegate Sylvester Wafula: Point of Order, Mr. Chairman!

An Hon. Delegate: Chair!

Prof. Yash Pal Ghai: 484.

Hon. Delegate Sylvester Wafula: Thank you, Chairman, fro giving me this chance. My name is Sylvester Wafula, Delegate 484. In my opinion, Chairman, this point is being diluted. I would wish that we give a chance to Professor Oniang'o to move this Motion because she seems to be articulate and I think if she does it, more Delegates will understand and voting will actually be in the right position.

Prof. Yash Pal Ghai: I will take two or three more views and then we will decide if we vote now. 545.

Hon. Delegate Simeon Shitemi: Thank you, Mr. Chairman. My name is Simeon Shitemi, Delegate 545. We have debated this issue and we thought it was finalized even though some of us were thoroughly disgusted that we should be determining death sentence threats to fellow human beings. If in fact this Act had been in this country, Dedan Kimathi would be alive today. Fellow, Delegates, let us be human! I suggest, Mr. Chairman, that this debate should be fully reopened and thoroughly discussed. We have a conscience. I have noticed one thing that I want to share with you. In Botswana, they advertised the job of a hangman. Nobody applied for it! *(Laughter)*. In this country, for over twelve years we have not carried out any hanging here. We are moving towards a civilized society. Mr. Chairman, I am thoroughly opposed of this question of retaining death sentence. Thank you very much *(Clapping)*.

Prof. Yash Pal Ghai: Let us ask Shikuku. 595 and the mic is still in the neighbourhood.

Hon. Delegate Martin Shikuku: Thank you, Mr. Chairman. I will stand here to speak with a heavy heart. On one side we said, "Everybody is entitled to life", then somebody takes the other person's life. When you want him to answer for his misdeeds you say it is not human. What about that one who has died? Is he/she not a human? *(Clapping)* Was he a dog or something? He was a human life, he had a family, and he had Children! Somebody just approached him shoots three bullets in his head and then that man must not-- it will be inhuman to hang him for his crime! *(Clapping)*.

Mr. Chairman, I know this in the past: Some people have been mistaken and hanged though they did not commit the crime. Yes! I accept, I know but now we have DNA. We cannot make a mistake now but just to kill and then you say you will get away and there are so many murders being committed now. You do not know through what situation this family of this person who has been killed is in and you want him to go and stay in jail and *Bwana* Minister for Home Affairs gives him television, swimming pool and all these *(Applause)* and when the family of that other guy has died?

Prof. Yash Pal Ghai: Okay, I am afraid your time is up. Thank you.

Hon. Delegate Martin Shikuku: Mr. Chairman, I say, let him get punished.

Prof. Yash Pal Ghai: Thank you. Delegate 124.

(Murmurs on the floor).

Prof. Yash Pal Ghai: Order, please!

Hon. Delegate Kiraitu Murungi: Thank you, Mr. Chairman. I am Kiraitu Murungi, Delegate number 124 *(Clapping)*. Thank you. Mr. Chairman, I would like to support the Draft as it is in Section 41 *(Clapping)* because, Mr. Chairman, I have been campaigning against death sentence in this country for the last ten years. Mr. Chairman, we introduced a Motion twice in Parliament. At one time, the Attorney General and many members in the last government supported it but there was a last-minute change of mind so, we were not able to remove this from our books. This Government, Mr. Chairman, is determined not to hang anybody. Mr. Chairman, the President has requested that we make arrangements to commute all the death sentences to life imprisonment *(Clapping)*. Mr. Chairman, we do not need to address this in great detail because the trend in all civilized modern nations today is to abolish death sentence *(Clapping)* So, since we are making a modern Constitution, I think it will be retrogressive for us to retain death sentence in the new Constitution. Thank you *(Clapping)*.

Prof. Yash Pal Ghai: Delegate 555.

(Murmurs on the floor).

Com. Salome Muigai: Thank you, Chair. My name is--

Prof. Yash Pal Ghai: Order please!

Com. Salome Muigai: --Salome Muigai. I was the Rapporteur of the Committee that dealt with this issue. I would just like to share with you, Chair, and the House where we were coming from. One, was the issue of the African Culture. Wherever we went to any of our traditional judiciaries that we used to have, there is nowhere that we were told that somebody was ever killed for killing. The Kikuyus who were too scared to bury their dead told us they did not feed the hyenas

twice, so once somebody is dead, they did not kill another one. We went to the Somalis where we were told that they paid blood money, so there was compensation. The Kalenjins also had a way of compensation. So, there was nowhere where somebody got killed as a first result.

Secondly, Chair, the Muslim culture also told us that the religion encouraged also compensation rather than a second killing and so did the Christianity. In fact, the Christians went a little further and said that here was, “an eye for an eye” in the Old Testament, but which was revealed by Christ and he said, “When you are hit on one side, please turn the other cheek.” So, we were coming from a point of view whereby killing was not African in our Tradition and neither was it in our religion. Thank you very much (*Clapping*).

Hon. Delegate Koitamet Ole Kina: We can take 539, Bishop Njue. They will speak the same.

Prof. Yash Pal Ghai: 539.

An Hon. Delegate: Point of Order!

Prof. Yash Pal Ghai: Please continue.

Hon. Delegate Bishop John Njue: Thank you, Chair. I am number 539, Archbishop Njue. Since this seems to have been reopened again as a discussion, I would like to say this: We may have different opinions, but we have stated that we are a God-fearing nation. **(PA Failure)**.

The meeting adjourned for tea at 10.40. a.m.

AFTER TEA BREAK

Meeting reconvened at 11.10 a.m.

Prof. Yash Pal Ghai: *(Public Address system failure).*

Hon. Delegate Bishop John Njue: *(Public Address system failure).* Life is a gift from God and no one else has authority over it but God. *(Clapping).* It is for this reason that I would like to put it this way. In killing one uses his or her freedom and I believe, rather than enter into a situation of revenge, there must come a situation where one is deprived of that freedom so that he is not given that opportunity to utilize that freedom for harming anyone. This is why I would say, dear Delegates, painful as this may be, as I have myself been affected when my own brother was murdered, I would have emotionally looked for ways to encourage people to do something to kind of get rid of him but I do not think I would feel free even today. This is why I still hold very strongly that the death sentence should not be upheld as a way of punishment. I appeal to the Delegates to look at it from this point of view and maybe ask Parliament to look for ways in which those who have been involved in these kinds of activities can be made to pay without having to get rid of their lives. Thank you.

Prof. Yash Pal Ghai: Delegate number 104. I do intend to conclude this debate quite soon and move to a vote but I am going to allow one or two more Speakers.

(Noise from the floor).

Prof. Yash Pal Ghai: Order please, order.

Hon. Delegate Petkay Miriti: Thank you, Mr. Chairman. I am Delegate number 104, Honourable Petkay Miriti from Parliament. Let me start by saying that I sympathize very much with those of us who have lost their dear ones to criminals and I feel such people should be punished. I am happy that Delegates supported Article 41(1), which says that “every person has the right to life”, but I am also concerned that no Delegate here is sure that those people who are convicted are the ones who commit crimes. It is very difficult to say that just because someone

has been arrested, taken to Court and convicted of a crime, he is surely the one who committed the crime.

We have seen on several occasions when crimes have been committed, police round up suspects, take them to cells and thereafter a number of them are taken to Court. After the hearing some are acquitted and others are convicted. Who for sure can say that that one who is convicted is the one who committed the crime? It is very difficult to say that. We know there are people who have been sentenced to death and later it is discovered or realized that they are actually not the ones who committed the crimes. I am very sure, if lawyers can tell us, even as they defend criminals, whether they are the ones who are accused of committing the offences or the state Counsels who said that the others have committed the offences, none of those two parties can tell us whether he is arguing on the right points.

So, my point is this, because we can never be sure that those who are convicted are the ones who have committed the crime, we should not impose the death penalty. So, I plead with Delegates to support Article 41(2), that there shall be no death penalty, so that people will not die for nothing. Thank you.

Prof. Yash Pal Ghai: Delegate number 590.

Hon. Delegate Patrick Onyango: Thank you, Mr. Chairman. My names are Patrick Onyango, Delegate number 590. I rise to share--

Hon. Delegate Ashepete Barasa: Point of Order.

Prof. Yash Pal Ghai: Please continue.

Hon. Delegate Patrick Onyango: --with this Conference--

Hon. Delegate Ashepete Barasa: Point of Order.

Prof. Yash Pal Ghai: Delegate number 393.

Hon. Delegate Ashepete Barasa: Honourable Chair, I am Delegate number 393, my name is Ashepete from Teso. I realize with a lot of regret that you are really being gender biased. We have points to talk about and you are not giving us the chance. Why do you give the men alone the chance to talk? Does it mean that we are not having points on the death penalty? Thank you.

Prof. Yash Pal Ghai: There is no policy of discrimination against women. On the contrary, but please continue Delegate number 590.

Hon. Delegate Patrick Onyango: Thank you very much. As I said, my names are Patrick Onyango, Delegate number 590. I said, I am rising to share with this Conference the fact that if it was not for the international community, if it was not for the Human Rights movement in this country, I would have been a dead man now, struggling for freedom and democracy in this country. Twice I have come close to being sentenced of treason because of fighting for democratic space. On this account, Mr. Chairman, I want to share with the Delegates that the concept of death penalty was sneaked into this country as a tool of exterminating our freedom fighters, suppressing resistance against dictatorship and us of the latter day generation were also subjected to this penalty.

Honourable Delegates, I rise to say, it pays not to subject someone to death if we can subject that person to a long-term sentence with restricted conditions in prison. I beg to move to oppose this Motion, Mr. Chairman, and that we do not have the death penalty in this country. Thank you.

Prof. Yash Pal Ghai: Thank you very much. I now want to put the Motion to vote.

Hon. Delegates: No.

Prof. Yash Pal Ghai: Many of you have been telling me during the break that we have spent too much time on it and we need to move forward. So that, I believe is the general wish of the Conference. I want to put the question in the following way--

(Noise from the floor).

Prof. Yash Pal Ghai: To simplify the matter, I am going to ask those who support capital punishment to vote for and then those against that. So, the position is clear in this way, those who support the retention of capital punishment, the death penalty, please raise your hands.

Prof. Yash Pal Ghai: Please Tellers, take down their numbers.

(Counting of Delegates' placards).

Prof. Yash Pal Ghai: Order. Those who oppose the death penalty, would you please raise your hands or your number plates. Those who oppose the death penalty.

(Counting of Delegates' placards).

Prof. Yash Pal Ghai: Now, those who are abstaining, please.

(Counting of Delegates' placards).

Prof. Yash Pal Ghai: Honourable Delegates, I now have the tally of the votes, 311 voted of which 205 voted for the retention of the death penalty and 106 voted against the death penalty. In accordance with the Constitutional Review Act we have made no decision today because we need two thirds for the adoption of the Motion and we are one short of that two thirds. So, as I understand the Act, this Motion fails, at the same time Clause 2 cannot stay in the Constitution because everything that goes in the Constitution must have a two thirds vote. So, Clause 2 will disappear from Article 41, but of course it is possible for us, given that it is such a contentious issue, to continue our discussions informally, maybe even remit this to the Consensus Building. If we do nothing more--

Hon. Delegates: No!

Prof. Yash Pal Ghai: Just a minute, if we do nothing more then Article 2 disappears and the matter is then left as it is today in which case Parliament can make legislation. Now, we have to make up for the time we have spent, most of this morning and I explained to you at the beginning

of the Session today-- Please listen to me, then you say you do not understand but you do not listen to me. We did not have a quorum yesterday, so we need now to adopt all the Article of the Chapter on the Bill of Rights with the two-thirds vote. So, what we are going to do as we have been doing in the past, I will just put to vote the Articles in Chapter 5?

PLO Lumumba: Yes, Chapter 5.

Prof. Yash Pal Ghai: The Chapters in Chapter 6 as amended are adopted and I am going to ask those who support the adoption of the Articles in the Bill of Rights to vote first and then those who oppose that. So, those who support the adoption of the Articles in the Bill or Rights, Chapter 6, please raise you hands or you placards.

(Counting of Delegates placards).

Prof. Yash Pal Ghai: Those who oppose the adoption of the Articles, please raise your hands.

(Counting of Delegates placards).

Prof. Yash Pal Ghai: While the Tellers are collecting the results, we can proceed with the other items. It seems very obvious that the decision has been adopted, we need the count for the two-thirds rule but sitting from where I am, there is no question whatsoever that we have two-thirds on the adoption of Chapter 6. So, if that is okay then I will ask the Secretary to start reading from where we left when we were discussing the Chapter on Land I believe and we had taken care of some Articles so can you please commence from where we were yesterday?

PRESENTATION OF CHAPTER SEVEN: LAND AND PROPERTY RIGHTS

PLO Lumumba: Mr. Chairman, we stopped at a point where we were on Article number 87, Tenure of Land.

(Consultations at the “high” table).

PLO Lumumba: And we were calling Philip Ole Sironka who had a Motion and that too was dealt with.

(Noisy comments from the floor).

PLO Lumumba: He withdrew?

Hon. Delegates: Yes.

PLO Lumumba: Which means that your Secretary is behind news, which therefore makes him read Article 88 on Protection of Land Rights.

Hon. Delegates: Sawa.

PLO Lumumba: Article number 89 Regulation of Land Use.

Prof. Yash Pal Ghai: There is I believe--Yes, Professor Wangari I was looking for you.

Hon. Delegate Wangari Maathai: Thank you very much Mr. Chairman. Delegate 087. In moving this article Mr. Chairman, I want to say that I was a member of this Committee of Land and Environment and we discussed very much the definition of community. We even formed a sub-committee to try to help us understand what community is and we finished with it and agreed on the definition of a community as written here in the proposed amendment. But later on this was incorporated or some members of my community tell me that it was incorporated in Article 87(3)--

Prof. Yash Pal Ghai: Excuse me Professor are you speaking to Article 91 or?

Hon. Delegate Wangari Maathai: 87.

Prof. Yash Pal Ghai: 87? Yes.

Hon. Delegate Wangari Maathai: 87(3).

Prof. Yash Pal Ghai: I thought we dealt with that yesterday.

Hon. Delegate Wangari Maathai: Oh 91, okay, I am sorry.

Prof. Yash Pal Ghai: I think we will call you on 91 in a few minutes.

PLO Lumumba: We have now read 89 Regulation of Land Use.

Prof. Yash Pal Ghai: 611.

Hon. Delegate Philip Nyakundi: I have a motion there.

Prof. Yash Pal Ghai: Yeah, 611 you had a motion?

Hon. Delegate Peter Nyakundi: Thank you, Chairman for giving me this chance. My names are John Peter Nyakundi. I think I have a motion here, because of time, this are two motions to amend two Clause-- I want to do them together.

I propose to move a Motion on Land and Property. The indigenous people whose ancestors land were taken away from them for development purposes, to be compensated or be given royalties for the use of that land. Secondly, I am amending that one before I go to the next. Article 88(2)(c), my amendment is on Article 88(c)(iii), "the compensation or royalties of 15 percent shall be paid annually to persons whose land has been acquired for development purposes".

Prof. Yash Pal Ghai: Let us deal with that first then, and--

Hon. Delegate Philip Nyakundi: Yeah, and then I go to another Article--

Prof. Yash Pal Ghai: No, no, let us deal with this first, we cannot have too many, we will get confused. So we just deal with this issue.

Hon. Delegate Philip Nyakundi: In Kenya, there are communities whose land were taken away without getting compensation. I request my fellow Delegates to deal with these things and see that these people are well compensated. Let me do the next one.

Prof. Yash Pal Ghai: Yes, okay.

Hon. Delegate Philip Nyakundi: Or you want to move that one? Yeah, then it is all right if somebody wants to Second me it is all right.

Prof. Yash Pal Ghai: Please let us deal with this one amendment you have proposed.

Hon. Delegate Philip Nyakundi: I am dealing with the compensation or royalties. I am requesting the Delegates to support me for those people to be paid compensation--

Prof. Yash Pal Ghai: Does anybody wish to speak in support of that Motion?

Hon. Delegates: Put the question.

Prof. Yash Pal Ghai: Put the question. The question then is, that Section 88(2)(c) be amended by adding a new Sub-Clause, which reads as follows;

“A compensation or royalties of 15 percent shall be paid annually to persons whose land has been acquired for development purposes”.

Those who support this Motion please raise you hands, your number plates however you indicate your support.

(No placards raised).

Prof. Yash Pal Ghai: Those opposed to the Motion please raise your hands.

(Many placards raised).

Prof. Yash Pal Ghai: I think the Motion is defeated so we move on to?

PLO Lumumba: To 89.

Prof. Yash Pal Ghai: To 89?

PLO Lumumba: Mr. Chairman, I had read 89 on Regulation of Land Use.

Prof. Yash Pal Ghai: None has given notice on this?

PLO Lumumba: Article 90 on The National Land Commission.

Prof. Yash Pal Ghai: I have no notice of any Motion.

PLO Lumumba: Article 91, which is the Definition section.

Prof. Yash Pal Ghai: Yes, Professor Wangari you want to take that? It is similar one from Honourable Jane Kihara, you are speaking on behalf of both of you and I take it? It is the same issue please proceed.

Hon. Delegate Wangari Maathai: Thank you very much, Mr. Chairman. As I was saying, I was in the Committee of Land and the Environment and we discussed the issue of the definition of community for a very long time and we even formed a sub-committee to try to find a definition of what a community is. Eventually we agreed that we would have a definition so that in 91, we would have the third definition that would explain what a community is. When the Motion came up, some members of my committee have drawn my attention to the fact that at a later date it was agreed that, that definition should be removed and that we should incorporate that in 87(3), which reads Mr. Chairman;

“Community land shall vest in and be held by communities identified on the basis of ethnicity, culture or community of interest”

But the definition I was suggesting is that;

“The community means a group of Kenyan citizens living in a specific geographical area irrespective of their ethnicity and culture”.

My understanding yet, is that the two are very different and we all know that we are a multi-ethnic society, we live in very many different places, we have just come out of a situation where we had tribal clashes precisely because of our lack of understanding of what forms this community. So, while I do not want to antagonise the members of my community, I find that the two are completely different but I would like to ask Mr. Chairman through you one member who feels very strongly about this definition is Honourable Delegate William and maybe he could try to explain to the Delegates. The definition I have offered that “a Kenyan citizen” I think the problem is “citizen” but a group of Kenyan citizen living in a specific geographical area irrespective of their ethnicity or culture, should form a community for the purposes of this Chapter. Thank you very much.

Prof. Yash Pal Ghai: Who did you say you wanted to-- Delegate 361.

Hon. Delegate William Ole Yiaile: Thank you very much, Mr. Chairman.

Prof. Yash Pal Ghai: Order please! Let us listen to the Speaker.

Hon. Delegate William Ole Yiaile: 361, Ole Yiaile is my name. I want to agree that we discussed this thing at the Technical Working Committee. I also want to point out that the definition in Article 87(3) applies to Tenure and Classification of Land. I also want to point out that going by the Citizenship Regulation that we passed yesterday, if we adopt what the Honourable member has just suggested, it would be very dangerous to this country. In the sense that community land can even end up being owned by foreigners so long as they marry a citizen of this land. Even the big farms for example in Laikipia and elsewhere that currently are owned by foreigners, all what those foreigners will need to do, is just marry a local Samburu girl there and they will defeat the 99 years lease because they will become part of the community.

I want to request this Honourable Conference to reject that Motion, reject it completely. We go by what is there because communities are known, those people who live there are known, they can be identified by their cultures, they can be identified by ethnicity, they can also be identified by the interest. If a community has moved and it has some interest in another place, it is recognised and is sufficiently covered by this one. The other one is dangerous even for national security. Thank you very much and I hope you are going to *nyonga* that one.

Prof. Yash Pal Ghai: Okay, that is enough time please thank you. I had actually asked for those who are supporting the Motion—

Hon. Delegate William Ole Yiaile: Put the question (*Laughter*).

Prof. Yash Pal Ghai: --and so I will take a Speaker who is supporting the Motion. Please only those who are support to raise-- 028.

Hon. Delegate Njeru Githae: Thank you, Mr. Chairman. My name is Robinson Njeru Githae, Delegate 028. I wish to strongly support this Motion in the sense that when you talk of a community, a community is a specific area in a given place. If somebody can fit in that community, if for example you marry in that community you become part and parcel of that community. If you have lived there for some time, you become part and parcel of that community. Mr. Chairman, my feeling is that if this definition is not allowed then it actually may infringe on the Bill of Rights which we have just passed because then it tends to discriminate a person just because he is not from that ethnic group or is not identified himself or herself with that culture. Chair, what I am saying is that there are some areas where it is not very clear which community the land belongs to particularly those ones--

Hon. Delegates: Where?

Hon. Delegate Njeru Githae: Yes, there are many where-- For example, if it is this large ranches like in Laikipia or wherever where somebody has got ten or four thousand acres. The community will be those people living in that area, the ones who own that land. So what I am

saying, is that we need to amend this Clause so that we include this definition, so that somebody is not discriminated just because you do not identify yourself with that culture or that ethnic group. Thank you.

Prof. Yash Pal Ghai: Delegate 045.

Hon. Delegate Njenga Karume: Thank you, Mr. Chairman. My name is Njenga Karume, MP for Kiambaa. Mr. Chairman, we all know that Kenyans are very generous and sometime if somebody has got land and they see somebody without any land, they go and ask the owner of that land to give them a portion to put up a house or maybe to plant maize, potatoes or anything, they do give Mr. Chairman. According to today's law if you gave somebody land today and they stay there for twelve years, if they go to the Court and demand saying that the land belongs to them, that land will be taken from you and given to them. Instead of thanking you, they take your land and you remain with none. So, it is my opinion that we must see where we can put this somewhere so that we can say, "if someone owns the land whether they gave somebody for a few years or not, the land still belongs to you". Thank you, Mr. Chairman.

Prof. Yash Pal Ghai: I will now take two Speakers in opposition to the Motion. We had one already so--

(Consultations at the "high" table).

Prof. Yash Pal Ghai: 353.

Hon. Delegate Joseph Shuel: Thank you Chair. My name is Joseph Shuel, District Delegate from Laikipia. I am standing to oppose this Motion very strongly and I want to bring to the attention of Honourable Njeru Githae that the definition I have put in Article 87(3) where a community of interest also includes various tribes living in that particular place. I want to take an example of Laikipia which is a cosmopolitan District, it has all ethnic groups in this country and all of us live here as a community of interest. So, the worry that Professor Wangari has, is well taken care of in that particular Article and therefore, I would like to say that we do not need to go. They are the same people who are talking about specificity that are bringing about now

and start to mention a particular ethnic group, brings bad feelings and in my view, it is not right to have that definition. So, let us go by what is provided for in Article 87(3). Thank you. *(Clapping)*.

Prof. Yash Pal Ghai: Are we ready for a vote now?

Hon. Delegates: Yes.

Prof. Yash Pal Ghai: Okay, those who support the proposal which will require an addition of a Sub-Clause to Article 91 and will define community to mean “a group of Kenyan citizens living in a specific geographical area irrespective of their ethnicity and culture”. Those who support that please raise your hands.

(Some placards are raised).

Prof. Yash Pal Ghai: Those who oppose the Motion.

(Many placards raised).

Prof. Yash Pal Ghai: The Motion is defeated and we move on.

(Noise on the floor).

Prof. Yash Pal Ghai: Order please! Order! We right now have the count on the Bill of Rights Chapter. 327 Supported the adoption of the Chapter and my record shows that there was no one opposing adoption. So, the Chapter’s text is adopted and I can tell you it is one of the best Chapters on Human Rights in the entire World, you should be proud of that. *(Clapping)*.

(Consultations at the “high” table).

Prof. Yash Pal Ghai: 115.

Hon. Delegate Mungatana Danson: Point of Order Chairman.

Prof. Yash Pal Ghai: Yes, I have a point of order here they are two.

Hon. Delegate Mungatana Danson: Mr. Chairman.

Prof. Yash Pal Ghai: Please proceed.

Hon. Delegate Mungatana Danson: Mr. Chairman, I am demanding that we must have a division over the last voting that we did. The reason--

(Noise from the floor).

Hon. Delegate Mungatana Danson: Sorry, excuse me.

(Noise from the floor).

Prof. Yash Pal Ghai: Let us here the Honourable Delegate.

Hon. Delegate Mungatana Danson: Mr. Chairman the reason is this, that definition, for me it is futuristic our country is not going to remain the way it is. We are going to mix up throughout and Mr. Chairman, it is wrong for us to leave it hanging--

An Hon. Delegate: Point of Order.

Hon. Delegate Mungatana Danson: Mr. Chairman, I believe that voting must be properly counted I demand.

Prof. Yash Pal Ghai: Honourable member the rule--

Hon. Delegate Mungatana Danson: I demand it be properly counted Mr. Chairman because you are saying it has been defeated and there is no counting that was done. We demand that it be counted. We are at least a hundred of us who believe in the future of this country.

Prof. Yash Pal Ghai: Please listen to me please sit down first.

PLO Lumumba: Just listen so that you are guided Honourable Mungatana we are coming--

Hon. Delegate Mungatana Danson: No, he is not counting he is just saying it is defeated we cannot have that.

Prof. Yash Pal Ghai: Mr. Mungatana the rule is that, if a member insists on a poll and thirty other Delegates support that Delegate then there will be a vote. This is in the procedures and I am following the procedures. So if you can persuade thirty Delegates--

Hon. Delegate Mungatana Danson: I have thirty of them Mr. Chairman.

Prof. Yash Pal Ghai: Those who want a poll would you please stand up.

Hon. Delegate Mungatana Danson: Yeah, let us stand thirty of us. We are more of us here, we believe in the future of this country Mr. Chairman.

Prof. Yash Pal Ghai: Okay, we have a poll. So I put the question again and the Tellers please be ready we do not have much time. So those who support the amendment will you please raise your hands and Tellers will you please take down the votes as quickly as you can.

(Some placards raised).

(Counting of placards).

Prof. Yash Pal Ghai: Can I now call upon those who oppose the Motion to raise their hands. Please be silent this is not the way to conduct the voting system.

(Majority placards raised).

(Clapping and cheering on the floor).

Prof. Yash Pal Ghai: I now have the results of the poll. Those who support the Motion are 85 while those who oppose it are 246. (*Applause*).

Prof. Yash Pal Ghai: Could I make a plea at this point, when the Chair has looked at the placard this is not actually a voice vote because people are raising their hands and it is possible from my vantage point to make a fairly reliable assessment of the way the voting is going. There was an occasion this morning when I was not absolutely sure and then we had a poll on that. So, please let us not delay the proceedings by raising frivolous questions. Thank you. (*Applause*).

(Consultations at the “high” table).

Prof. Yash Pal Ghai: I want to put the entire Chapter on Land for formal adoption. At this stage we will have to--

(Consultations at the “high” table).

Prof. Yash Pal Ghai: Yes, 576.

Hon. Delegate Mwai Gakuya: Thank you, Chair. My name is Mwai Gakuya, number 576. I would like the Chair to clarify about - if a Motion is passed in the Plenary, is it possible to be told that later it is covered on a different Article?

Prof. Yash Pal Ghai: Yes, it is indeed because if an issue had been covered already, there is no point repeating.

Hon. Delegate Mwai Gakuya: And it was passed in the Plenary? This is because where it was covered it was talking about eviction, and I was talking about demolition. Those are two different things, Chair. Thank you.

Prof. Yash Pal Ghai: Yes, I think it is covered – demolition would cover eviction. Or rather eviction would cover demolition but we will talk to the Drafters and cover that point. Thank

you. Now, can I put Chapter 7-- Land and Property to vote? Those who support the adoption of all the Articles as amended please raise your hands.

(Inaudible discussions on the floor).

Prof. Yash Pal Ghai: 352, you say you have a Motion?

Hon. Delegate John Kiniti: Thank you, Mr. Chairman. I do not know why I can see that my Motion is appearing number 100 which deals with Article 91, Sub-Article (1) and (2). Do I have the floor Mr. Chairman?

Silence.

Hon. Delegate John Kiniti: Thank you, Mr. Chairman. My Motion--

Prof. Yash Pal Ghai: Sorry, which Article is it?

Hon. Delegate John Kiniti: This is 91, Sub-Article (1) and (2) and it is in the Order Paper.

Prof. Yash Pal Ghai: Why didn't you stand up at the relevant time? Okay, go ahead.

Hon. Delegate John Kiniti: You were discussing that particular Article Mr. Chairman.

PLO Lumumba: Go on, go on.

Hon. Delegate John Kiniti: Thank you, Mr. Chairman. My Motion seeks to expunge that Article from that particular Chapter and move it to Chapter 20 which deals with explanation of various terminologies used under this Constitution. Mr. Chairman, if you look at page 226, we have an elaborate explanation on what Land is. If you also look at page 226, the same explanation is given. So, I do not think we should have this Article under this because we have various definitions covered under Chapter 20. I beg to move this Motion. Thank you, Mr. Chairman.

Prof. Yash Pal Ghai: Could I just explain. I think first we should leave these matters to the Drafting team and they will certainly get notice of your Motion. But certainly, I suspect - I am not sure, that the reason these two definitions are in this Chapter and not in the General Provisions Chapter is because they are only related to property as used in that particular Chapter. They do not define property for all purposes like this. They define it only for this purpose. But can we leave it to the Drafters to look into this question and I will give them a copy of your notice and leave the decision to them - this is a technical decision. Is that alright?

Hon. Delegates: Yeah.

Prof. Yash Pal Ghai: Thank you very much. So now can we take up—

PLO Lumumba: 228, I do not know what he wants to say, he is sending notes.

(Inaudible discussions on the floor).

Prof. Yash Pal Ghai: Can we take the vote first and then I can take--

Hon. Delegates: Yes.

Prof. Yash Pal Ghai: It is okay, what is your point 84? You have been raising your hand and I am calling on you. Yes, please go on.

Hon. Delegate Wangari Maathai: Thank you, Mr. Chairman. I was seeking a clarification because there is something I am not quite sure about and that is the rule that, for the Article to get into the Constitution, it requires two thirds. Is that right?

Prof. Yash Pal Ghai: Yes.

Hon. Delegate Wangari Maathai: Yeah. When we have had a Clause, when we are divided, and then we vote at the end like we are just about to vote for the entire Article, how do we reflect

the fact that there was an Article where there was a large margin and that, if that Article was individually voted for, it might not have gotten the two thirds? Just a clarification Mr. Chairman.

Prof. Yash Pal Ghai: What we normally do is we call at the end for those who want to abstain or those who object to particular Articles or particular Clauses and if they are obviously the majority, then that is defeated. So, I believe that “Note-takers” are aware of that procedure, so if you have broadly in agreement that there is an Article or part of an Article, please let them know and make a note of that. And if it seems to me that there is a majority in that category then obviously that Article had not been adopted and I shall so announce. Thank you. 304.

Hon. Delegate Hezekiah Minjire: Chairman, my question was on that one that Professor did ask. I am now asking, if on this Chapter we go 85 to 246, would this Chapter go through, or would it go to the next stage?--

(Inaudible comments from the floor).

Hon. Delegate Hezekiah Minjire: No, no, let me-- I am asking the question, no interruption. I think I need the-- So, I am asking, if we vote in the order we did, what would be the result, because I am asking us to vote 85 versus 246 on this particular one?

Prof. Yash Pal Ghai: The rule is two thirds of those present and voting provided we have a quorum of course. So, now can I put the thing to vote please, it is getting late?

Hon. Delegates: Yes.

Prof. Yash Pal Ghai: So, those who support the adoption of all the Articles in Chapter 7 on Land as amended please raise your hands. *(Counting continues)*. Those opposed to the adoption of the Articles, please raise your hands.

(Consultations at the “high” table).

Prof. Yash Pal Ghai: Now, those who have reservations to any Clause will you please let the Teller nearest to you, let him or her know of your objection to a particular Article.

(Consultations at the “high” table).

Prof. Yash Pal Ghai: Now, as the counting proceeds, I suggest we move on to the next Chapter, the Chapter on Environment and I invite the---

PLO Lumumba: There is a point of order.

Prof. Yash Pal Ghai: No, no, do not worry. I invite the Secretary to read the Articles of the Chapter on Environment.

(Consultations at the “high” table).

Prof. Yash Pal Ghai: Yes 84.

Hon. Delegate Wangari Maathai: Thank you very much Mr. Chairman. We do not want to appear like we are being a nuisance but we want to understand so that we do the right thing. My understanding was that we vote because we do approve in general that Chapter. However, there is this Chapter 91 (3) that we wanted-- No, not 87, 91 (3) which we wanted to express reservation for the one a large number of people voted. So, I wanted us to understand, what did you want us to--

Prof. Yash Pal Ghai: If a Delegate objects to a particular Article or part of an Article, they can indicate that to the Teller, it will be recorded, but if you have lost a Motion and that Article or Clause was never adopted, then I do not think there is any way of indicating that. That is not the way we normally work.

Hon. Delegate Wangari Maathai: Okay. *(Clapping)*.

Prof. Yash Pal Ghai: So, but if it is something which we have agreed, which you are not happy with you can indicate your dissent. Thank you.

(Consultations at the “high” table).

**PRESENTATION OF CHAPTER EIGHT:
ENVIRONMENT**

PLO Lumumba: We go to Environment?

Prof. Yash Pal Ghai: Yes, please go to Environment.

PLO Lumumba: With Chairman’s permission, may I now read from page No. 60--

Prof. Yash Pal Ghai: No, please proceed.

PLO Lumumba: Page 60, Chapter 8 on the Environment.

(Uproar from the floor).

Prof. Yash Pal Ghai: No, please go on.

PLO Lumumba: I am reading from Article 92 - Principles.

(Inaudible comments from the floor).

Prof. Yash Pal Ghai: I have given the Secretary to proceed with the reading of the Articles. Please go ahead.

PLO Lumumba: Article 93 - Obligations of the State Concerning the Environment

An Hon. Delegate: Point of Order!

(Inaudible comments on the floor).

PLO Lumumba: Article number 94, concerning Environmental Rights and Duties.

Hon. Delegates: Point of Order!

PLO Lumumba: Article number 95, concerning Environmental Protection.

Hon. Delegates: Point of Order!

PLO Lumumba: Article number 96, concerning Enforcement of Environmental Rights.

Hon. Delegates: Point of Order!

PLO Lumumba: Article number 97, concerning Natural Resources.

Hon. Delegates: Yes.

PLO Lumumba: Article Number 98, concerning the National Environment Commission?

Hon. Delegates: Yes.

PLO Lumumba: Article number 99, concerning Environmental Legislation.

Hon. Delegates: Yes.

PLO Lumumba: Article Number 100, concerning Definition.

Hon. Delegates: Yes. Point of Order!

Prof. Yash Pal Ghai: So, I put the-- I would like now to put all the Articles in Chapter 8 on the Environment to vote. Those who support these Articles, please raise your hands. (*Counting continues*)

(*Consultations at the “high” table*).

Prof. Yash Pal Ghai: I have now the results of the vote on the Chapter on the Environment--

PLO Lumumba: They have not put the other negative votes, those--

Prof. Yash Pal Ghai: Sorry?

PLO Lumumba: You said those who oppose.

Prof. Yash Pal Ghai: Which one?

PLO Lumumba: Those who oppose the--

Prof. Yash Pal Ghai: I see, those who oppose, I thought we had gone through that. No, on-- On Environment.

PLO Lumumba: On Environment.

Prof. Yash Pal Ghai: Yeah, we are now dealing with the Chapter on Environment and we now have the votes of those who support and-- So, we now need to have indication of those who are opposed to the adoption of the Articles on Environment. (*Clapping*).

Prof. Yash Pal Ghai: On the Land, they are in support 318 except that 85 have registered objection to the missing Articles. In other words they would have liked to have seen a Clause (3) 91. But 318 have supported the Articles, 9 have opposed the Articles. So, the “AYES” have it.

PLO Lumumba: As we wait for the count on Environment, let us go to Leadership and Integrity.

Prof. Yash Pal Ghai: Yes, now we move on to Chapter 9 Leadership and Integrity and I will ask our Secretary to read the Articles.

PLO Lumumba: With the Chairman's permission, may I now read from page 67, Chapter 9 the Title is Leadership and Integrity.

Article 101 – Principle of Representative Leadership.

Hon. Delegates: Yes.

PLO Lumumba: Article 102 – Assumption of Office

Hon. Delegates: Yes.

PLO Lumumba: Article 103 – Conduct of State Officers

Hon. Delegates: Yes.

PLO Lumumba: Article 104 – Abuse of Office.

Hon. Delegates: Yes.

PLO Lumumba: Article 105 – Finances of State Officers.

Prof. Yash Pal Ghai: I think there is a Motion.

PLO Lumumba: Just confirm that there is a Motion. 581.

Hon. Delegate Mahmoud Abubakar: Thank you. My name is Yusuf Mahmoud Abubakar, number 581. Honourable Chairman, I have a Motion on Article 105 (1) (b). Mr. Chairman, the

Article requires that a State Officer shall submit a written declaration and Sub-Article (1) (b) says at the end of “every fourth year in the office”. My amendment Mr. Chairman, seeks to delete “every fourth year” and replace it with “every year”. Mr. Chairman, the practice is that a requirement as significant as this one, ought to be annually. The National budget is annual, the requirement of submission of returns for political parties, societies is annually, finances are annually. So I think there is merit in requiring that these officers should submit these written declaration, each year, not every fourth year. I think Mr. Chairman, and I beg with the Honourable Delegates that it is vital for us, if we want to maintain leadership and integrity, it is vital if you want to eradicate corruption, then let us have annual audits of the properties and the acquirements of the leaders. Thank you very much Mr. Chairman.

Prof. Yash Pal Ghai: So, shall I put the vote?

Hon. Delegates: Yes.

Prof. Yash Pal Ghai: So, those who support the amendment please raise your hands.

Hon. Delegates: Yes.

Prof. Yash Pal Ghai: Well, it seems to be carried. Thank you very much.

PLO Lumumba: With the Chairman’s permission, may I now read;

Article 106 – Restriction on Activities.

Article 107 – Ethics and Integrity Commission.

Hon. Delegates: Yes.

PLO Lumumba: Article 108 – Leadership Legislation.

Hon. Delegates: Yes.

Prof. Yash Pal Ghai: So I put the Article then to formal vote. Those who support Articles in Chapter 9 as amended, please raise your hands. We will have to take a count on this so please keep your hands up for a while.

(Delegates raise their hands.)

(Consultations at the “high” table).

Prof. Yash Pal Ghai: Those who oppose please raise your hands.

(No Delegate raised their hands).

Prof. Yash Pal Ghai: Those who abstain?

(No Delegate raised their hands).

Prof. Yash Pal Ghai: Those who wish to record their dissent from a particular Clause?

(No Delegate raised their hands).

Prof. Yash Pal Ghai: Thank you very much. I now I have the results of the vote on the environment and they were three hundred and fifty in support and no one opposing so Kenyans keenly are very concerned about the environment. Thank you. Now, may be since it is close to lunch (*uproar*).

Hon. Delegates: No!!!

Prof. Yash Pal Ghai: No? okay.

(Consultations at the “high” table)

Prof. Yash Pal Ghai: So, we go on to the Chapter on Representation of the People.

PLO Lumumba: With the Chairman's permission, I am now reading from page number 73, Chapter number 10, the title is Representation of the People. Part I, the Electoral System and Process.

Article 109, General Principles.

(Inaudible discussions on the floor).

Prof. Yash Pal Ghai: Yes, there is a Motion from Sheikh Ali Shee.

Hon. Delegate Sheikh Ali Shee: *Asante Bwana Chairman. Mwenyekiti, katika Uwakilishi-Representation, kuna uwakilishi aina mbili kama unavyojua. There are two kinds of Representation. Kuna uwakilishi ambao ni wa demokrasia ya moja kwa moja-direct democracy-ambao wananchi wenyewe wanakata shauri, people decide what they want, na kuna indirect democracy, representation or representative democracy. Wananchi wanapenda kuchagua Mbunge au Councillor ina maana kwamba wao wamempa uwezo yule Mbunge au Councillor au mtu wanayemchagua. Sasa katika hii uwakilishi wa kupitia Wabunge na ma-councillor - indirect democracy - a Member of Parliament or Councillor can turn to be a dictator and this is what used to happen and is happening now. We used to call it democratic dictatorship. Mbunge au Councilor anaenda anakata shauri vile anavyotaka. He can go there and decide what he wants to decide. Mimi ninapendekeza iongezwe kifungu cha nane to add that, a Member of Parliament or any elected person or officials wawe wata-consult, watashauri watu wao waliowachagua kabla ya ku-support na kuunga mkono Bill au Motion yoyote. Ikiwa Mbunge au Councillor ameenda pale ashauri watu wake katika Bill ile au Motion kama ile apate idhini kutoka kwa watu wake, aende akaunge mkono ile Bill au ile Motion au aikatae. Sio anaenda pale anakuwa yeye ni dictator anawalazimisha watu wake waunge mkono kitu ambacho wao hawaungi mkono. Hii inaleta faida, there is an advantage for it, there will be sort of involving people. This is a kind of Devolution also, wananchi wanaangalia kitu Mbunge wao anafanya, Councilor wao anafanya na wao wanakuwa wamo ndani katika kukata shauri. Kwa hivyo ninaomba muunge mkono tuongeze kifungu cha nane cha kusema kuwa --*

Prof. Yash Pal Ghai: Can you please wind up now, please?

Hon. Delegate Sheikh Ali Shee: Yes, I am winding up. *Kuunga mkono kuwa Wabunge na ma-Councillor lazima wapate ushauri wa watu wao. Namna ya kushauri na namna ya kufanya nafikiri tunaweza shauri na Parliament Act.* Thank you very much.

Prof. Yash Pal Ghai: So, shall I put it to vote?

Hon. Delegates: Yes.

Prof. Yash Pal Ghai: Those who support the amendment which involves addition of a new Sub-Clause? I do not need to read. “All persons in elective offices shall ensure adequate consultation with their electors on all matters that have consequences and impact on the livelihood of electors in question.”

Clause 9, “Parliament shall, within one year of the coming into force of this Constitution, put in place legislation to give effect to the above principles.” Those who support this Motion, please raise your hands.

(Hon. Delegates raise their hands).

Prof. Yash Pal Ghai: Those who oppose the Motion, please raise your hands.

(Hon. Delegates raise their hands).

Prof. Yash Pal Ghai: So, the Motion is defeated. We have further the Motions. 109, Ruth Kibiti, is first on my list.

Hon. Delegate Ruth Kibiti: Thank you, Mr. Chair. My name is Ruth Kibiti from Women’s Organisations. Mr. Chair, I beg to move a Motion which seeks to transform every district and borough to become electoral units because Mr. Chair, we would then have this as a mechanism for electing women representatives to the National Assembly. Mr. Chair, this Clause is not new but was expunged, omitted from the revised version of the Zero Draft. Mr. Chair, this issue was deliberated upon by the Committee on Representation of the People and it was agreed upon.

However, in producing a revised version of the Zero Draft, this issue was omitted. So, Mr. Chair, I beg to move that every district and borough shall be an electoral unit for the election of women representatives. I beg to move. (*Clapping*).

Prof. Yash Pal Ghai: Those who wish to speak in favour, I will take one or two speakers, please raise your hands. Those who want to speak in favour of this Motion. 217.

(Inaudible discussions on the floor).

Prof. Yash Pal Ghai: Please Honourable Delegates be patient and listen to the speakers, these are all important issues.

Hon. Delegate Cecily Mbarire: Thank you, Mr. Chair. 217, Cecily Mbarire. I think this is not a new issue. I know that the Committee on Legislature did actually come up with district representation of women and therefore this is not very new and there is no harm in having it where it is. So, I wish to support. Thank you.

Prof. Yash Pal Ghai: Thank you. Those who are opposed to the Motion. 279, are you opposing the Motion?

(Consultations at the "high" table).

Hon. Delegate Grace Nduyo: Thank you, Chair. I am Delegate 279, Grace Nduyo, District Delegate. I am in support of that Motion--

Prof. Yash Pal Ghai: Sorry, you sit down then. I asked for those who are opposed to the Motion. We already had people in favour. Those who are opposed to that? 361.

An Hon. Delegate: We vote.

Prof. Yash Pal Ghai: Please let the Chair decide when it is appropriate to go to vote. 361.

Hon. Delegate William Ole Yiaile: Mr. Chairman, we are not opposing but it does not belong here. It belongs to when you come to creation of these voting units. So I move that you put the question. You move this Motion to the right place. We should be getting guidance from you, Mr. Chairman, otherwise, we are wasting a lot of time. Thank you.

(Consultations at the “high” table).

Prof. Yash Pal Ghai: I think one way to deal with this Motion if Ms. Kibiti is agreeable, is to leave it for the time being because I believe there are later on provisions for representation of women. We have committed ourselves to at least one-third women members of elective bodies and we will have to try to meet that challenge, that legal obligation, but I am not sure if, further down the line, there are other specific provisions of the representation of women and if there are, then I suggest we can hold this over to that point when we reach there. Would that be agreeable?

Hon. Delegates: Yes.

Prof. Yash Pal Ghai: I am asking Dr. Kibiti, are you comfortable with that?

(Noise on the floor).

Prof. Yash Pal Ghai: Please let her respond.

PLO Lumumba: Ruth Kibiti, please. Where is the microphone to Ruth?

Hon. Delegate Ruth Kibiti: Thank you, Mr. Chair. If it is going to be connected with the section on Legislature, I will be comfortable, provided that it will be there.

Prof. Yash Pal Ghai: Yeah, so we will really need to come back to this if we find at the end there is no provision for women because we have committed ourselves in various Articles and have already adopted that at least one-third women representation must be in elective bodies.

PLO Lumumba: We have another Motion.

Prof. Yash Pal Ghai: And there is another Motion. Godfrey Mbuba, 277.

Hon. Delegate Godfrey Mbuba: Mr. Chairman, I am Godfrey Mbuba, number 277, from Meru South, a District Delegate. Mr. Chairman, I have a Motion on 109 and to start with, I was in the Committee on Representation. I remember in Article 1, we used the word “indigenous” and the word “indigenous” here meant all the communities of Kenya, irrespective of females or males. The reason was, due to the current death rate, especially on HIV which is too high about seven hundred people per day, and the influx of foreigners to this country which is about seven hundred and fifty people per day; it may be very dangerous to leave this country open to foreigners. We are therefore, suggesting that let foreigners play with anything else but leave the Executive of this country, that is Executive and Legislative bodies, to the indigenous Kenyans of this country. Thank you. I beg to move the Motion..

(Consultations at the “high” table).

Prof. Yash Pal Ghai: Can we take one in support and then two in opposition? 586.

Hon. Delegate Mwaura Mburu: Thank you. I am Mwaura Mburu, Delegate number 586, from the Political Parties. Actually, it can be a very, very great insult whereby you get a foreigner here, he is naturalized as a Kenyan and then he goes to stand for Parliament, for Councillor, for Presidency, for a governor. It can be a great insult. To give a fact, I do not want to tire you Delegates, there was a case in Taveta, the home where--

Prof. Yash Pal Ghai: Can you wind up now, please?

Hon. Delegate Mwaura Mburu: -- Professor Kivutha Kibwana--

Prof. Yash Pal Ghai: You have thirty seconds.

Hon. Delegate Mwaura Mburu: They were represented for many years by a white person. That was very, very, very ugly and annoying and this can be put in the Constitution now, “indigenous.” I support and I beg the Delegates - all of us - let us support this Motion.

Prof. Yash Pal Ghai: Thank you. 500. Those who are opposed to the Motion now. 500.

Hon. Delegate Sikand Kamla: I am Kamla Sikand, Delegate number 500, but unfortunately I am not considered an indigenous citizen. I sit here as a Kenyan citizen fully involved in the development of this country. How dare you have any Motion like that? I have a right to contest any seat I want to, at whatever point I want, because I am a Kenya Citizen, fully committed to the development of the country.

Prof. Yash Pal Ghai: 015.

Hon. Delegate Billow Kerrow: Thank you, Mr. Chairman.

Prof. Yash Pal Ghai: Order, please.

Hon. Delegate Billow Kerrow: My name is Billow Kerrow, Delegate number 015. Mr. Chairman, I rise to oppose the Motion by the Honourable Delegates, for two reasons.

One, Mr. Chairman, I think we are living in a changing world. We are living in a global environment where Kenyans are moving to the rest of the world and other people are also moving into our country and it is going to be discriminatory if we allow one citizen to contest an elective post and we do not allow another citizen to contest. I think it is going to be discrimination amongst our citizens. So, all citizens, whether they are naturalized or indigenous, should be allowed. We have seen a situation where a Kenyan is today contesting a Senate seat in the United States of America (*clapping*). I think it will send the wrong signal if we say only indigenous Kenyans will be allowed to contest, and for that reason, I stand to oppose that Motion by the Honourable Delegate. Thank you.

Prof. Yash Pal Ghai: I now intend to put the Motion to vote. Those who support the Motion that only indigenous persons can be voters, please raise your hands.

(Delegates raise their hands).

(Consultations at the “high” table).

Prof. Yash Pal Ghai: Those who are opposed to the Motion?

(Delegates raise their hands).

Prof. Yash Pal Ghai: I think the Motion is clearly defeated and I am personally delighted. Some day somebody will call me non-indigenous. *(Laughter)* Thank you very much. *(Laughter)*. The next Motion is by Ruth Oniang’o and this amendment that she is going to propose has been proposed by a number of other Delegates too. So, in a way she is speaking for several succeeding Motions which are of the same purport.

Hon. Delegate Ruth Oniang’o: Thank you, Chair. I am aware this Motion is keenly awaited and Mr. Chairman, I am also aware that there are others who have put there difference versions for it. Let me start by saying that I put in my own wording on the presumption that it does not apply to offices which already have a time limit, like that of the President where it is two terms. I want to make that clear right now, that it just applies to other elective offices such as Parliament and others that will find themselves in the new Constitution.

Mr. Chairman, I want to say also that there is no President anywhere, especially in the Commonwealth countries and other countries indeed, where we limit the term of, say, Parliamentarians. I also want to say that in fact, given the way Kenyans are behaving now - their election behaviour - we can say that in fact we have come of age and Kenyans should be allowed to use their voting cards to make a decision as to who goes to office and who does not. This is because if we limit them by legislation we shall be dis-empowering them and that is not democracy.

Mr. Chairman, another reason is, how do we select and identify our top leaders of the nation like a President, if we are saying he goes in for two terms and then come out for five years, come again. We do not even know where they will be because people need to make a career out of politics in order to rise to the top and then become national leaders.

I am not afraid, Mr. Chairman, of making sure Kenyans decide, they can put in people, they can remove them and the people have to be of integrity and therefore I oppose this and my suggestion therefore is this: I do not want to leave it ambiguous and again I want to repeat that it does not apply to the Presidency where already we expect no more than two terms, that there is no limit on the number of terms that the person may serve in an elective office. I hope that the Delegates will actually support this.

I also want to say that this is for posterity Mr. Chairman, it is for posterity and for today, we want to see ourselves working as Kenyans and not just doing this in self-interest. Thank you, Mr. Chairman.

(Consultations at the "high" table).

Prof. Yash Pal Ghai: Can I get one in support and then two in opposition and then we will have a vote? 125.

Hon. Delegate David Musila: Thank you, Mr. Chairman. My name is David Musila, Parliament, 125. Mr. Chairman, I stand to support this Motion probably with a slight amendment, that instead of what the gracious lady says we substitute, we just delete entirely. I say this Mr. Chairman, because there is a lot of justification for having to limit the term the President occupies the office but there can never be any justification Mr. Chairman, to limit the term of a Councillor or Member of Parliament. As the gracious lady said, if we did this, this would be unprecedented, Mr. Chairman. We must give the citizens a chance and opportunity to elect or refuse to elect when the prescribed term of a Councillor or Member of Parliament or for that matter any other elective office, comes. Therefore I want to appeal to my fellow Delegates, most of who are very good friends, that in view of the new found relationship for whatever reason this was inserted from the beginning let us delete 97 (7). Thank you, Mr. Chairman. 109 (7) *(Clapping)*.

Prof. Yash Pal Ghai: Are we ready to vote on this?

(Inaudible discussions on the floor).

Prof. Yash Pal Ghai: Okay, there is a slight discrepancy between the way Professor Oniang'o has put the Motion and other Delegates; Delegate 433, 308, 240 have all said, just delete Clause (7). Ms. Oniang'o, are you happy if we adopt that as our form of voting?

Hon. Delegate Ruth Oniang'o: Chair, it is actually saying the same thing, so we delete.

Prof. Yash Pal Ghai: Yeah, we delete?

Hon. Delegate Ruth Oniang'o: Yeah.

Prof. Yash Pal Ghai: Thank you. So, the Motion is that we delete Clause (7) of Article 107. Those in support of it, please raise you hands.

Hon. Delegates raise their hands.

Prof. Yash Pal Ghai: So, I think it is carried. Thank you.

(Consultations at the "high" table).

Prof. Yash Pal Ghai: Ladies and gentlemen, you have worked hard this morning and we will reward you with lunch now, but please come back in one hour, so be here at 2.15 sharp so we can finish all this Chapter and other Chapters as well.

Meeting adjourned for lunch at 1.15 pm.

The Meeting reconvened at 2.55 p.m. with Prof. Yash Pal Ghai in the Chair.

Prof. Yash Pal Ghai: We will now resume our meeting. Before we proceed with the – Order! Order please - Articles in the Chapter on Representation, I would like to give the floor to Bishop Sulumeti, because the Consensus Group that you established this morning had a meeting over lunch and the Bishop would like to report in the spirit of transparency and constant consultation with the Plenary. Thank you.

(Consultations at the “high” table).

Prof. Yash Pal Ghai: Honourable Delegates, please observe silence so that the Bishop can begin his presentation. Please be quiet. Thank you.

Hon. Delegate Bishop Philip Sulumeti: Honourable Delegates please lend me your ears for a moment. I will not keep you long. The first thing is, you established a Consensus Making Group this morning and the names are:

1. Honourable Grace Ogot
2. Honourable Ruth Kibiti
3. Honourable Sophia Noor.
4. Honourable Wangari Maathai
5. Honourable Gitu Wa Kahengeri
6. Honourable Maj. Marsden Madoka
7. Honourable Kimaiyo arap Segoo
8. Honourable Sheikh Ali Shee
9. And myself, Philip Sulumeti as the Moderator.

On behalf of these people that you elected this morning, you did not give us a chance first of all to thank you for your confidence in us. So, on their behalf and on my own behalf, I want to thank you very much and very sincerely for that confidence that you have in us. At the same time, we would like to ask you to cooperate with us because you have put on our shoulders a very grave and heavy duty, a bag of maize on one’s back is heavy to carry. This is more than a bag of maize,

200kgs. So, please my request is, we have had our meeting over lunch time and in our own limited way, we have tried to identify what are contentious issues. I am not saying that those are all, there will be some that will be coming up from the floor. So, my group asks that we carry on with the Chapter on Representation and then we ask you please to allow us sometime this evening, to meet with the people concerned, concerning the Executive and Devolution and try to arrive at a consensus. Then bring that consensus to you and then you can handle those two Chapters. So, our humble request is, in my language we say, the person who is sent is never beaten. So, you have sent us, so please do not beat us now when we come back to you.

So, we ask you please, do Representation, from Representation then we go to Judicial System, then Public Finance and then Public Service Commissions. By the time you reach, we shall have brought to you to this Plenary, the Consensus on matters that I have just said. We promise to carry out our work with fairness, with justice to each and all. We promise to do our work transparently. Sometimes we might be forced to meet at night, please do not impute ill motives on those night meetings. It is only because God gave us a day of twenty-four hours and not thirty-six hours. So, we might have to meet after we have finished with this place to find consensus on contentious issues then we bring them in the morning. So, all we ask please, let us all be patient and understanding. Thank you very much. (*Clapping*).

Prof. Yash Pal Ghai: 416.

Hon. Delegate David Oyao: Mr. Chairman, my name is Oyao, Delegate 416 from Migori. I want to point out one thing here. That the Consensus Group is going to discuss the same things they have discussed. In the morning, we tried to establish really what is Consensus. In those two Chapters, those two; Devolution and Executive. What exactly is contentious? Because you cannot tell us you are discussing the whole Chapter without identifying the items in those Chapters which are contentious. Because this is taking us back to go and discuss what has already been discussed. I think now things have crystallized to the extent that somebody can come and tell this meeting, this is what is contentious. Today, we had a very obvious contentious issue, death penalty, we voted here and we could not decide. Considering the time which is remaining, I am proposing that that Committee crystallizes within those two Committees or reports what they think is contentious.

Secondly, I would like during the Consensus Building that quite a number of the people of those Committees are involved because the product belongs to that Committee. Therefore, I would ask you that when this Consensus people meet, in fact Mr. Chairman, if you had agreed with what my colleagues here, one Honourable Delegate said, that we should put these people on standby when we precipitate a contentious here, they go and discuss it and we accept their consensus. But now, what we have been told is that two Chapters are contentious. Contention does not mean that when a few people do not like something, it is contentious, we will never have a consensus. *(Clapping)*.

So, I am requesting that we be told exactly that they have met, what is contentious on those issues, so that when they are discussing them we can also consult and lobby for whatever is there. Thank you very much.

Prof. Yash Pal Ghai: Could I suggest that maybe there will be a report tomorrow morning. The Committee had only one hour to meet and in that time they discussed procedural issues and other issues, so it was impossible to make a detailed list of the contentious issues. Give the Committee a day as they have requested. They have scheduled a meeting for tonight. We will be in a better position to report tomorrow morning. 228.

Hon. Delegate Raphael Livu: Thank you Chair. My name is Raphael Livu.

Prof. Yash Pal Ghai: Please go on.

Hon. Delegate Raphael Livu: Delegate 228. Mr. Chairman, I am rising on a point of procedure. I believe the way we have been adopting or rejecting Articles in this Conference is by way of, the way the Secretary has laid them as defined in the Draft Bill. However, Mr. Chairman, this morning there was a document circulated to me and I believe the other Delegates have, by the Conference Rapporteur which has instruction that, "please ensure that these corrections are inserted." Mr. Chairman, my position is, it is not possible to insert documents or Articles unless they have been read as we passed them or adopted them at this Conference. I would like the direction of the Chair to actually explain in particular whether we have to revisit the particular Articles for purposes of inclusion or otherwise. Thank you.

Prof. Yash Pal Ghai: I am not sure exactly which document you are referring to. But are these corrections made? Do you have a title of the document?

Hon. Delegate Raphael Livu: Mr. Chairman, the document is dated 8th March and it says, Corrections to Chapters 1,2,11,14 and so on and so forth. I know we have visited and addressed some of the Articles and this is the reason why I arise to question that. Thank you.

Prof. Yash Pal Ghai: Well, actually I know all the decisions that go in the Constitution are the decisions made on the floor of this Conference. So, I need to look into that but I can assure you that anything that goes in the Draft will have come to the floor of this house and have been approved. 382.

Hon. Delegate Sammy Aswani: Thank you very much Honourable Chairperson. My names are Aswani Sammy Amunga, Delegate number 382. Mr. Chairman, what I wanted to know, now that we have the Committee which will be dealing with the contentious issues. Mr. Chairman, we had the report which Kenyans talked of and had indicated what they want. While they will be discussing those issues, are they going to run away from what Kenyans said so that they come with their own version? That is what I wanted to know from you. By so doing Mr. Chairman, it will mean that we are contravening Section 5 of Chapter 3 (A) (d).

(Consultations at the “high” table).

Prof. Yash Pal Ghai: The Bishop has made a very simple request that the Committee be given – we set up the Committee, you set up the Committee, you approved it and you gave them a mandate to go ahead. They have discussed the issue, they have considered that it will be easier to proceed if these issues could be first discussed by the Consensus Committee. They are requesting you that we proceed with other Chapters which are non-controversial and--

(Noise on the floor).

Prof. Yash Pal Ghai: 354.

Hon. Delegate Liza Chelule: Thank you. My name is Liza Chelule, Nakuru district. This morning Mr. Chairman, we were made to understand that the contentious issues will originate from the Plenary. Now, I am surprised to learn this afternoon that the Chairman of the Consensus Group is ready to give us reports for Devolution and Executive and it has not originated from this Plenary. What is wrong? What is happening? What is the modality of having these contentious issues? Thank you. (*Clapping*).

Prof. Yash Pal Ghai: We do know that there are serious differences in at least two areas. Devolution and--

(Noise and protestations on the floor).

Prof. Yash Pal Ghai: And if you are not willing to accommodate those differences, then in beneath you do not believe in consensus. Since we had committed ourselves to Consensus, I think we have to follow the procedure recommended by the Consensus Group.

(Noise and protestations on the floor).

Prof. Yash Pal Ghai: 392.

Hon. Delegate Paul Nakitare: Thank you Chair. Paul Nakitare, 392. Generally, I think Honourable Chair, we all subscribe to the tenets of Consensus. But I think the problem is the way in which we want to do it. I suggest that instead of wasting our remaining very valuable time, we continue the way we have been doing since morning and I suggest that the Consensus Committee, they are not many, they sit somewhere in a very comfortable place, so that when there is an issue that comes up whether in Devolution or Executive, we refer it to them and they continue doing it. (*Clapping*).

This way Honourable Chair, we will be killing two birds with one stone. Instead of packing everything and letting these people dwell on it in the night, because when they bring it back in the morning, we will again start from scratch. That is my proposal Honourable Chair. Thank you.

Prof. Yash Pal Ghai: 111.

Hon. Delegate Geoffrey Muchiri: Thank you Chairman. My name is Honourable Muchiri, Delegate 111. Mr. Chairman, I want to support Bishop Sulumeti because it is necessary that we do not do what is called double effort. We may go through a Chapter and then changes come. I want to plead to the Delegates and let me tell you Ladies and Gentlemen, in Constitution making, there are no losers or winners. We should all be winners and the whole purpose of the Consensus Committee is to pull the minority to join the majority because at the end of the day, there are no minorities or majorities in this Conference. *(Clapping)*.

Hon. Delegate Geoffrey Muchiri: Mr. Chairman, Bishop Sulumeti has said very clearly, there are contentious issues in Devolution, Representation and Executive.

Hon. Delegates: No.

Hon. Delegate Geoffrey Muchiri: I would say this Mr. Chairman even at the risk of being shouted, because the truth is the truth.

(Noise on the floor).

Hon. Delegate Geoffrey Muchiri: Mr. Chairman, I want to ask the Delegates to accept the request by Bishop Sulumeti. In any case Mr. Chairman, the members of the Consensus Committee are part of us. Why should we exclude them under a tree? They need to join us here and then they meet at their own time. Mr. Chairman, let this Conference not appear like there are some people being hunted and others are the hunters. Thank you.

(Noise on the floor).

Prof. Yash Pal Ghai: 356.

Hon. Delegate Ezekiel Kesendany: Mr. Chairman, my name is Kesendany, 356. Mr. Chairman, if we have to proceed, we must tell one another the truth. I am realizing Mr. Chairman

that we are starting to play cards here and that the real contentious issue in this hall is LDP and NAK. It has nothing to do with Devolution, it has nothing to do with Transition and it has nothing to do with the Executive Mr. Chairman. So, I am asking the Chairman that we proceed the way we are proceeding. Those people in the Consensus Building can proceed and we continue the way we have been doing Mr. Chairman. Thank you.

(Noise on the floor).

Prof. Yash Pal Ghai: 393.

Hon. Delegate Ashepete Barasa: Honourable Chair, I am Delegate 393, Ashepete from Teso. I realize that we have a problem because the issues being considered as contentious have not been enumerated and we do not know whether they are going to say they are going to expunge the whole Chapter. That is the worry and we wanted these issues that are being considered as contentious, to be enumerated so that we see in transparency, why hide if you are sincere. Thank you.

(Consultations at the “high” table).

Prof. Yash Pal Ghai: This is what I referred to earlier when I said the Committee needs a little bit more time. They had only one hour over lunch. Give them till this evening and tomorrow they will come up with the list. Is that too much to ask?

Hon. Delegates: No.

Prof. Yash Pal Ghai: You Delegates have the last word anyway, so there can be no decision made that you will not have debated and approved. All we are asking is to slightly rearrange the order and indeed the Chair has authority under the rules to change the sequence of Chapters for discussion. So, is that too much to ask the Delegates to give.

(Noise on the floor).

Prof. Yash Pal Ghai: 37.

Hon. Delegate Otieno Kajwang': Thank you Mr. Chairman, I am 037, so I did not know it was me. I think what the members are asking, I think they have already given the mandate to the Committee and they want the Committee to work. But they want us to be the ones to give them a job to do. The only way of knowing whether a matter is contentious or not, a matter which has not been passed by two-thirds majority, is definitely contentious. *(Clapping)*.

So we go on as we are going, when we reach a matter in which we do not get two-thirds, we take it to the Committee and we give them an hour or two. When they come back, we take a second vote where the majority takes it. *(Clapping)*.

That is the only way of knowing what is contentious and what is not contentious. *Lakini si hii siasa ya nje, na kusema hii, hii. Asante sana. (Clapping)*.

Prof. Yash Pal Ghai: Mr. Kajwang' you have been involved in many Consensus Building meetings. You have been going to them, you have been trying to find a solution. So, I thought at least you realize that there are some contentious issues.

(Noise on the floor).

Hon. Delegate Koitamet Ole Kina: Honourable Delegates, we may not achieve a lot this afternoon. Just lend me your ears please. I am saying, we came up with a Consensus Building Group this morning, we have approved it. But you have said that you want to give them work to do. So, if that is the way we want to go, definitely, we will go that way. But I want to assure you that you have the final word. Even if that group went now and sat somewhere and came with an issue and said this is contentious, until we vote it here and agree, it will not do. So, my plea to you is, my plea to these Honourable Delegates is, we do not waste a lot of time now, we proceed at least to see that we finish the Chapters that are here and if within these Chapters we have any contentious issue, that will be the first to go to the group. *(Clapping)*. Again, if the group wants to meet and give us whatever suggestions they have, we will listen to them. So, let us not close. So as we said, we were told here yesterday by Mzee Kahengeri that if you are called, you go but

you must not necessarily follow what you are told. So, please let us proceed. Please let us proceed. Let us not waste time this afternoon. Do we go on?

(Noise on the floor).

Prof. Yash Pal Ghai: The Secretary will read out the Articles now from where we left off and we will proceed in the usual way.

PLO Lumumba: With the Chairman's permission, I am now referring you to page 73, Article number 110, which deals with elections. There are a number of Motions on the subject.

(Consultations at the "high" table).

Prof. Yash Pal Ghai: I have a submission from Ms. Chesoni but I believe somebody else as you are speaking – please go ahead.

Hon. Delegate Atsango Chesoni: Thank you. I am Atsango Chesoni, Delegate number 510. I would like to request that Nancy Lung'ahi moves that Motion. It was originally hers, she just was not in a position to sign it at that time, as I had requested. She also has one on the exact same matter. With your permission.

Prof. Yash Pal Ghai: Do you want to speak to that?

PLO Lumumba: She is inviting Nancy Lung'ahi.

Prof. Yash Pal Ghai: Okay.

Hon. Delegate Atsango Chesoni: I would like Nancy Lung'ahi to be the one to move it and then I will only speak to it if it is necessary.

Prof. Yash Pal Ghai: Okay.

Hon. Delegate Nancy Lung'ahi: Thank you. My name is Nancy Lung'ahi, Delegate number 224, that Motion I originally raised it but I was not in a position to sign, so Ms. Atsango Chesoni handed me the Motion for me and signed it because I was not present at that time. I would like to move a Motion to Article 110 (2) and I would like that Article deleted in its entirety because this Article says that, "Parliament shall enact legislation to provide for the nomination of candidates for election to the Senate shall not be based on political parties." What I feel is that this goes against the Bill of Rights and it bars candidates from freedom with the choice that they want to make. The building and strengthening multi-party democracy in this country, I do not think it is good to leave political parties out because we are trying to build political parties structures in this country and one way of doing that is allowing for their participation in this field. I do not think it is going to bar independent candidates from participating.

So, this Article that seeks to have the Senate elections not to be based on political parties, I think should be deleted in its entirety so that it can give independence and freedom to those members who belong to any political party to vie for those seats and those who also do not belong to any political party to vie for those seats. It should not be pegged to not political parties. So, I beg to move. Thank you.

Prof. Yash Pal Ghai: Yes, Ms. Chesoni, you want to speak now?

Atsango Chesoni: Sorry. Atsango Chesoni, Delegate number 510, representing the Women's Organization. Simply to say that the way the Article reads, it appears that in order for one to be able to run for the Senate and become a Senator, they will have to not belong to a political party. I think that eliminates a lot of people and therefore that a Senator should be able to be somebody who, either if they feel like, and they have the resources, and they want, and they meet the requirements, can run as an independent candidate. But also if it is somebody who is a member of political party and they want to be a Senator, they should also be able to run with the support of their party. I do not understand the context of this Article and I also share Nancy Lung'ahi's views. Thank you.

Prof. Yash Pal Ghai: Okay. 587.

Hon. Delegate Caroline Ng'ang'a: Mr. Chairman, I am Delegate number 587, Caroline Ng'ang'a and I happen to be a Convenor of that Committee. I want to find out whether it is the in order for the Delegates in this Plenary to deliberate on something which the Committee changed and you did not make the alterations as the Committee did. You have been assuring me that you are going to put it in order, but now they are deliberating on our last position. I think it is Out of Order. We need to be given a chance to put the position as the Committee arrived at, so that the Delegates have an opportunity to deliberate on this issue, Chair.

Prof. Yash Pal Ghai: If you are opposing it, why don't you make your point?

Hon. Delegate Caroline Ng'ang'a: I am not opposing. I am saying the true position of that Committee, what they came up with has not been reflected and I have been saying this for a long time. So, I want to put the correct position so that they can deliberate knowing what the Committee has done. And I said--

Prof. Yash Pal Ghai: If--

Hon Delegate Caroline Ng'ang'a: Honourable Chair, I said in respect of any other items here, and I have been trying to ask you to put them in their right perspectives so that people can deliberate on the correct issues.

Prof. Yash Pal Ghai: --sorry, I am not following you. Are you saying that your Committee had two different positions?

Hon Delegate Caroline Ng'ang'a: Yes. And I have put in writing two times.

Prof. Yash Pal Ghai: But we only have one in the Draft, which is the majority view. Was this a majority view?

Hon. Delegate Caroline Ng'ang'a: Honourable Chair, with all due respect, I have written a letter to the Rapporteur General. I have come there severally and you told me you are going to amend to agree with what we have said.

(Interjection Inaudible)

Hon. Delegate Caroline Ng'ang'a: --so, it has not been captured even up to-date. So, can I say what the Committee said?

Hon. Delegates: Yes.

Hon. Delegate Caroline Ng'ang'a: Yeah. The Committee's position was as follows: It said this, "a person wishing to stand as a candidate for election to be in the Senate shall apply directly to the Electoral and Boundaries Commission for nomination to stand in the relevant unit". This position captured here was the earlier position but we changed. So, this is what I want the Delegates to deliberate on because this is the position of the Committee as at that time, Chair.

(Clapping)

(Consultations at the "High" table)

PLO Lumumba: Caroline, could you kindly just dictate it again so that we can read it to everybody, kindly?

Hon. Delegates: Point of Order. Point of Order.

Prof Yash Pal Ghai: Let us get this down first and then you can get your Point of Order.

PLO Lumumba: 428.

Prof. Yash Pal Ghai: Yes 428 - -

Hon. Delegate Caroline Ng'ang'a: For ease of reference I want to refer you to our own template which is the latest and the Delegates have got.

Hon. Delegate Richard Kibagendi: I thought I was on a Point of Order.

Prof. Yash Pal Ghai: There is a Point of Order. So, can you hold on for a moment?

Hon. Delegate Caroline Ng'ang'a: Okay.

Hon. Delegate Richard Kibagendi: Mr. Chairman, thank you very much. I happen to have been in that Committee and I totally agree with Mrs. Ng'ang'a because even when this Chapter was being presented here, the Chair pleaded with her that she reads what had come out so that the mistakes were to be corrected later. Up to now a lot of omissions are in that Chapter, they have not been corrected and therefore, maybe you make those corrections before we discuss this particular Chapter. Thank you very much. (*Clapping*)

Prof. Yash Pal Ghai: Well, I wonder if there are many errors in this case, whether we should just move on and we distribute the corrected version.

Hon. Delegate Caroline Ng'ang'a: Chair, if I may respond. There are quite a number of omissions and some are inclusions. So, if it is possible to leave it, you do the corrections as you had promised us, then we will be happy because some of them look ridiculous here. For example, we did not talk about expelling people from parties and I can see it here in black and white. We do not know where they are coming from, Chair.

Hon. Delegates: Yeah.

Hon. Delegate Caroline Ng'ang'a: Yeah.

Prof. Yash Pal Ghai: Well, I am a bit puzzled. I do not know why this should happen because we had agreed texts from Committees and those are the ones we are using. But if what you are saying is true, then I think it would be better to postpone this Chapter until we have the corrected version (*clapping*).

(Discussions at the "High" table)

Prof. Yash Pal Ghai: Well, Commissioner Zein Abubakar has mentioned that if we are going to move or postpone Chapter 10, then we will also have to postpone Chapter 11, because Chapter 11 is very much connected to the system of representation in Chapter 10, because I do not think we can proceed with Chapter 11 without having gone through Chapter 10. 225.

Hon. Delegate Salim Ibrahim: Thank you, Mr. Chairman, as a way forward we do have the Committee's report that was done by that specific Committee and I think we ought to use that instead of postponing anything.

Prof. Yash Pal Ghai: I think that would take too much time if we go through the report and so on. It is probably simpler to distribute the corrected version of this Chapter.

Hon Delegates: Point of Order.

(Discussions at the "High" table)

Prof. Yash Pal Ghai: I do have the discretion to change the order of the sequence of – and I am now making a ruling that in view of the close connection between 10 and 11, we postpone both of these Chapters until the corrected version of Chapter 10 has been distributed.

(Discussions on the floor)

PLO Lumumba: Please the Chairman has made a ruling pursuant to regulation 28 which says that nothing in these regulations or in the rules contained in the schedule to those regulations shall affect the discretion of the Chairperson to alter the Order papers he may deem necessary or to authorize debate on the Report and Draft Bill in a manner appearing to him most expedient.

(Noise and Uproar on the floor)

Prof. Yash Pal Ghai: Thank you very much. Then, we go to the Executive. So, we move to the Chapter on the Executive.

Hon. Delegates: Yes.

Prof. Yash Pal Ghai: And the Secretary will read the Articles in the usual way.

PLO Lumumba: Honourable Delegates, with the permission of the Chair, I now have the floor and I am now reading from page number 104. I am reading the Chapter titled, The Executive. I am reading from part (1) of it that says,

That principles and structure of the National Executive,

Principles of Executive Authority, Article Number 171.

Structure of the National Executive Article Number 172.

Prof. Yash Pal Ghai: I have a request here for an amendment. Delegate 589, Honourable Daniel Njoroge, please move your Motion now.

Hon. Delegate Daniel Njoroge: Thank you, Mr. Chairman. My name is Daniel Njoroge, 589. Mr. Chairman, according to the previous Article, we had already stated that the structure of the Kenya Government will be the Executive, Legislature, the Judiciary and the Independent Commissions, that is the Constitutional Commissions. I am moving, Mr. Chairman, that we separate all that and I have already moved a Motion saying that, those people who are in the Executive should not be in the Legislature, so that those people in the Legislature will not also be in the Executive. Therefore, all I am saying is that all those institutions, we keep them separate so that there will be no mix up between the three of them and that the Executive will be put separate by itself along with the presidency and we carry on and that Motion, Mr. Chairman, I beg to move.

Prof. Yash Pal Ghai: I will have one speaker in favour of this proposal and then I will call for two speakers opposing the motion. So, those who want to speak in favour of his motion, please raise your hand? Those opposing the Motion?

PLO Lumumba: In favour? 593

Prof. Yash Pal Ghai: Yes, 593 please?

Hon. Delegate Gervase Akhwabi: Thank you, Honourable Chairman and Honourable Delegates. It is a cardinal principle of a democratic Government that there should be separation of powers. Sorry, my name is GBK Akhwabi. Political Parties, 593. In the report that we have on the views expressed by the people of this country, they clearly stated that they wanted the three Arms of Government to be separated and be totally de-linked. That is very clear, they said they wanted them totally separated and de-linked. Now, if we have members of the Cabinet being part of Parliament, we will be offending this principle of separation of powers. We will be making the Executive part of the Legislature and the Legislature part of the Executive. This will have the effect of contradicting and making it impossible for Parliament to effectively control the Executive and we need the Executive to be controlled. We need not take away powers from the Executive but to leave the Executive control and check the powers of the Executive. Parliament is not going to do so when Members of Parliament will be aspiring to become Members of the Executive by being appointed Ministers. I therefore, support the Motion that we should totally de-link the Executive from the Legislature just as we have de-linked the Executive, the Legislature from the Judiciary. I beg to support the Motion.

Prof. Yash Pal Ghai: Thank you. Those who oppose the Motion. Would anybody like to speak? 368.

Hon. Delegate Joel Sang: Thank you, Honourable Chair. I am 368, Joel Sang. I know when it is an argument I will not be given a chance. But now, I am given and I am happy for that. Honourable Chair, the previous speaker has referred to a total separation of powers. When we look at this more closely, we will realize that it is not possible to totally separate powers. If really we are talking about control, we have had a system where the President is all powerful in this country and anybody here will agree with me that the people of Kenya have actually powerless in controlling the President. The President is elected, he brings his tribesmen and tribeswomen to eat and the rest of the country is left looking on helplessly. So, actually, we are improving the system. We do not want to maintain the social ills that have made us to make

another Constitution in forty years. It is a shame that we are making a Constitution when America has had one for almost three hundred years. Therefore, actually Parliament is the right place where the Executive can be questioned, subjected to interrogation and can even go home in broad daylight. The Prime Minister can be voted out with the Government. If there is anything serious. But, we create a king on the hill and then we want to remove him, we do not know how, and then we tell ourselves that we elected him for 5 years and the country is going to ruin, I do not think that is okay. If we have to slightly make the line of demarcation between the Executive Arm of Government and the Legislature in order to get more efficient delivery of services and more accountability of Government to the people, then Parliament is the right place to have Ministers who will be part of the Executive and who will be answerable to the people and can be removed through a vote of no confidence in Parliament or can be removed after 5 years if they are not delivering. Therefore, to deceive ourselves that we have to have a rigid demarcation of powers between the Executive and the Legislature is actually to endorse the Presidential system or rather the Mongrel we have had in this country for forty years and has done a lot of harm to this country.

Prof. Yash Pal Ghai: I think that is enough

Hon. Delegate Joel Sang: Thank you very much.

(Inaudible consultations at the “High” table)

PLO Lumumba: 252

Prof. Yash Pal Ghai: 252.

Hon. Delegate Dubat Ali: Thank you very much, Mr. Chairman. Without wasting time, I want to oppose that amendment very strongly. Mr. Chairman, even in the Preamble we said this country will be ruled by the democratically elected people. There is no way that we will allow ministers to come from outside Parliament. We know what P.S.’s have been doing, we know what they have been doing with the Senior Civil Servants. We are not going to compromise for the interest of this country. We want our elected leaders to take responsibility. Let them become

Ministers and Assistant Ministers. The President is elected. The Prime Minister is elected and then the National Assembly forms the Cabinet. Mr. Chairman, we do not want people who will not have responsibility and when they make a mistake after twenty years, they apologize to the Nation.

(Laughter by the Honourable Delegates)

Hon. Delegate Dubat Ali: With those few remarks, Mr. Chairman, I strongly oppose this idea of bringing democrats to the Prime Minister.

Prof. Yash Pal Ghai: Okay. Thank you. Therefore, I intend to put this Motion to vote. Those who support the proposed amendment and which the President, the Deputy President, the Prime Minister, the Deputy Prime Ministers and Cabinet Ministers will not be members of the Legislature or other segments of the Government. Those who support this proposal, please raise your hand.

(Counting going on)

Prof. Yash Pal Ghai: Those opposed to it, raise your hands. The Motion is lost and we proceed.

(Consultations at the “High” table)

Prof. Yash Pal Ghai: We have now – I have now also a notice of a Motion from Honourable George Nyamweya, Delegate 615 and I now give the floor to him.

PLO Lumumba: George Nyamweya.

Hon. Delegate George Nyamweya: Thank you very much. Mr. Chairman--

Hon. Delegates:

(Inaudible)

Hon. Delegate George Nyamweya: --George Omari Nyamweya, Delegate number 615. Mr. Chairman, you had skipped an earlier Motion of mine which was on 172. Now, perhaps I do not know whether you want me to go to that one or to the next one? Because Mr. Chairman, as you know, we have a series of Motions--

Prof. Yash Pal Ghai: Yes. Okay. I--

Hon. Delegate George Nyamweya: On the entire Chapter.

Prof. Yash Pal Ghai: --yes. Okay. I thought you said 172. So, it is my fault. Sorry.

Hon. Delegate George Nyamweya: Yes. And indeed, Mr. Chairman, although you did rule that this is not a contentious – I do not know whether it was ruled that it is not a contentious Chapter, it is indeed Mr. Chairman, because if you recall that we had a substantive minority report on the entire Chapter and I do not know whether that – how we are going to proceed because we are going to argue all these Articles basically, Mr. Chairman. I think there should be some guidance on how you want us to proceed on this one. (*Uproar*)

Hon. Delegate George Nyamweya: All right, Mr. Chairman--

Prof. Yash Pal Ghai: I think, of course my own preference had been that we give the Consensus Committee to look at this and that was rejected by the Delegates. So, we now have to proceed in accordance with the procedure we have followed. It is going to be very messy. You are quite right. There are very, very large number of Motions, but I am afraid that, that is what the Delegates want to do.

Hon. Delegate George Nyamweya: All right. Mr. Chairman, the reason why, when we look at this executive authority, Mr. Chairman, it is my submission that there is no system where you can have executive authority distributed to various persons and the principle really here is, if Kenya wishes to have executive authority vested in a directly elected President, then executive authority should lie with that particular person. If we wish to adopt that we should have a Prime

Minister with executive authority, then that is where that – that Prime Minister should seek direct elections so that, that executive authority goes to that person.

Now, Mr. Chairman, in line with that, my belief is that we have a directly elected President, then that particular Article, we do not need to say, that the authority lies with the President, the Deputy President, Prime Minister, Deputy Prime Ministers and then the Cabinet, because Mr. Chairman, the Cabinet itself is defined as having a Prime Minister, Deputy Prime Ministers and Ministers. Now, those are appointed by the President. Therefore, in my view the people who are directly elected by the President and the Deputy President, then that Article should read just, the President, the Deputy President and the Cabinet. That is neater way of dealing with that particular issue and there is no question then of bringing up any competition. Mr. Chairman, throughout this Chapter, my intention is to avoid in every possible way areas of possible conflict between the President and the Prime Minister and if we take that as being – because I am sure there is nobody here in this Conference who subscribes to the idea that there should not be a Prime Minister. I think we are all saying that there should be a President and there should be a Prime Minister and we all agree, I am sure that the powers of the President as currently established are too excessive and we want those powers reduced. I think there is no question about that one. I think the question of how we are going to deal with it is how do we reduce those powers? We do not want to transfer powers from one possible dictator to a tyrant on the other side. I think we must learn how we are going to check the powers of whoever we give executive authority in this Constitution. Mr. Chairman, it is for those reasons that I move that we delete the words, Prime Minister, Deputy Prime Ministers and just have President, Deputy President and the Cabinet as being the National executive of the Republic. I beg to move.

(Consultations at the “High” table)

Prof. Yash Pal Ghai: So, can I get the clarification from you? You want to delete all words after the Deputy President?

PLO Lumumba: After. Yeah.

Hon. Delegate George Nyamweya: Mr. Chairman, I would wish it to read, The National Executive of the Republic of Kenya, comprises the President, the Deputy President and the Cabinet Ministers appointed under Article 174.

Prof. Yash Pal Ghai: Thank you very much. That is very clear now. I will take one or more speakers in support and then in opposition.

PLO Lumumba: Take Mungatana.

Prof. Yash Pal Ghai: 116.

(Noise and Uproar from the Honourable Delegates)

PLO Lumumba: The Chairman has given the floor, please.

Hon. Delegate Danson Mungatana: Mr. Chairman, thank you for giving me this opportunity to speak. Mr. Chairman--

(Noise from the floor).

Prof. Yash Pal Ghai: Order! Please, let us listen to the speaker on the floor.

Hon. Delegate Danson Mungatana: --Mr. Chairman, in Constitution making, people generally speaking, and we have had a history in this world since a few years ago, over two hundred Constitutions have been made, modern Constitution making. Mr. Chairman--

(Noise from the floor).

Prof. Yash Pal Ghai: Please listen to the speaker.

Hon. Delegate Danson Mungatana: Sorry, Mr. Chairman, let me just introduce myself. My name is Mungatana. I am Honourable Delegate number 116. (*Uproar*)

Hon. Delegate Danson Mungatana: Thank you.

PLO Lumumba: Please, could you kindly listen to him in civility.

Hon. Delegate Danson Mungatana: Yes. Thank you, Mr. Chairman. Mr. Chairman, I want to just state that in Constitution making, people will generally have to be aware of the history from where they come from, and make some innovation in that history so that wherever we come from, and to where we are going, we have a system that is workable, that is better, that is understood by most people. Mr. Chairman, I would like to support what the fellow Delegate has already said and I would like to be given an opportunity to say, in some countries they have had tradition and this tradition, Mr. Chairman, is mixed with innovation or the new ideas to make a Constitution that works for everyone.

Mr. Chairman, if we go to Britain, for example, they have had a tradition of an unwritten Constitution. In Kenya, Mr. Chairman, our tradition has been a tradition of written Constitution. Mr. Chairman, in Britain again, I would like to use that example because we have a colonial history with them. Mr. Chairman, in Britain again, they have a Kingdom. You can never tell any Briton from their tradition to elect their King. That is not understood. That kind of language is not understood by them. Mr. Chairman, in Switzerland, they have a system where the Government is made up of 7 people. The Ministers are people who hold various responsibilities, so that environment can be together with so many other things. The President of Switzerland, Mr. Chairman, is the oldest sitting Member of Parliament. So they do not have elections. He is somebody who just stands – he is nominated after every one year.

Prof. Yash Pal Ghai: Mr. Mungatana--

Hon. Delegate Danson Mungatana: They have a tradition--

Prof. Yash Pal Ghai: --I want to let you know that we are rationing time here.

Hon. Delegate Danson Mungatana: --thank you, Mr. Chairman.

Prof. Yash Pal Ghai: --so, you have another minute. Please carry on.

Hon. Delegate Danson Mungatana: Thank you, Mr. Chairman. Mr. Chairman, I beg to talk because I would want us to be understood. (*Uproar*)

Prof. Yash Pal Ghai: We have these rules, I am afraid. We are bound by the rules.

Hon. Delegate Danson Mungatana: Mr. Chairman, the tradition that we have had in this country is that we have always elected the office of the person who wields the highest executive authority in the land and Mr. Chairman, the innovation we are making here as most Kenyans have spoken, is that we will need a Prime Minister and in support of what my friend has spoken or the fellow Delegate has said, is that this Prime Minister must never have authority that will conflict with the elected leader. Mr. Chairman, I think--

Prof. Yash Pal Ghai: I think you have run out of time. I am sorry.

Hon. Delegate Danson Mungatana: --may I finish, Mr. Chairman.

Prof. Yash Pal Ghai: I give you thirty seconds to conclude.

Hon. Delegate Danson Mungatana: Thank you, Mr. Chairman. I would like to say that as we are pushing in our new innovation, we should not abandon the tradition we have had and Mr. Chairman, we are saying that the tradition we have had in this country is that the Executive powers have lied in the presidency and the Vice-President.

Prof. Yash Pal Ghai: Thank you very much.

Hon. Delegate Danson Mungatana: Mr. Chairman, I would therefore add--

Prof. Yash Pal Ghai: I am sorry I have to ask you to stop now.

Hon. Delegate Danson Mungatana: --I would therefore add, Mr. Chairman.

Prof. Yash Pal Ghai: I have to ask you to stop please.

Hon. Delegate Danson Mungatana: I have not even started speaking

Prof. Yash Pal Ghai: I am sorry; the rules do not allow that. This is adoption stage. So, I would now like to ask the Delegates who wish to speak against the Motion.

PLO Lumumba: Take 531.

Hon. Delegate Danson Mungatana: I have not even started--

Prof. Yash Pal Ghai: 531. Order! Order! Please.

Hon. Delegate Mustafa Ali: Thank you Chair. Mustafa Ali is my name. Delegate number 531. Chair I rise to oppose this Motion in totality. We are not going to say that Britain has got an unwritten Constitution and Kenya has got a written Constitution, that is why we are going to say that we do not want a Prime Minister or a Deputy Prime Minister in this Country. That is wrong.

Secondly Mr. Chairman, this country we just got independence 40 years ago, and 40 years is not enough for us to say that we have got a complete history. We are making history here and I want to say that this House and Kenyans demanded that they want a Prime Minister and a Deputy Prime Minister. (*Clapping*). Thank you Mr. Chairman.

An Hon. Delegate: Put the question!

PLO Lumumba: Kones, 147

Prof. Yash Pal Ghai: 147.

Hon. Delegate Kipkalya Kones: Mr. Chairman I am at a loss. I thought the Motion was reading that “the Members of the National Executive will include the President, the Deputy President the Prime Minister and the two Deputy Prime Ministers”, and the question here was, whether really

we should define Executive as those four powers or we are saying the National Executive will comprise the President the, Deputy President and the Cabinet. But now it seems there is a confusion here where we are saying either we want to have the President and the Prime Minister or we do not. Are we together Mr. Chairman? What is the Motion reading?

(Inaudible comments from the floor).

Prof. Yash Pal Ghai: 599.

Hon. Delegate Leslie Betawa Mwachiro: Thank you Chair. Leslie Betawa Mwachiro. Chair the Motion moved by Delegate 615 wants to delete the words, *The Prime Minister*, the *two Deputy Prime Ministers* from the structure of the Executive. So, it is very important here to know what the Motion is all about. The Motion basically intends to remove the creation of the office of the Prime Minister. And we have got to see it in that light. So, when we take a vote we are basically voting for whether we will have a Prime Minister or not and that is the bottom-line. So Chair, I think it is now very clear--

Prof. Yash Pal Ghai: No. Mr. I do not think you have the right interpretation, because I do not think this Article will determine whether or not there is a Prime Minister. The Prime Minister would normally be a member of a Cabinet and will be included in this formulation as well, so there really isn't that much difference between the two formulations--

Hon. Delegate Leslie Betawa Mwachiro: Chair!

Prof. Yash Pal Ghai: --I guess it is a matter of--

Hon. Delegate Leslie Betawa Mwachiro: Chair, let me continue. Chair, if the Prime Minister is appointing the Cabinet, he cannot be in the Cabinet, he is actually separate from the Cabinet. So, if the Prime Minister is the one to appoint the Cabinet, sincerely he must be mentioned in the Executive.

Prof. Yash Pal Ghai: We are not talking of appointments, we are talking of the definition of what the Executive is.

Hon. Delegate Leslie Betawa Mwachiro: Chair the Executive as we are putting it should actually include the words, *the Prime Minister and the two Deputy Prime Ministers*. If you want to stick to that, I can confine myself to that, that we are going to have the words of, *the Prime Minister and the two Deputy Prime Ministers*, included in this definition of the Executive power. Thank you Chair.

Hon. Delegates: We vote, we vote!

Prof. Yash Pal Ghai: 525.

Hon. Delegate Ibrahim Ahmed Yussuf: Thank you very much Chair. My names are Ibrahim Ahmed Yussuf, Delegate 525. Chairman in my understanding of that Motion, what it entails is that we remove the office of the Prime Minister from the Cabinet level. Chair, the last time we had the people from Lancaster House presenting their Constitution that they brought here, it was very clear what they came up with was an office of the Prime Minister to govern this government. What happened there after Chair is a disaster that will forever be a mark in this country. *(Clapping)*. We went on to create an office of the President, Chair after creating that office the political assassinations that have happened in this Country is still lingering with us. Chair, if it was not for that office of the Presidency, Ouko would still living here with us. Ouko, because the Americans in there naivety decided that they wanted to propose him for the presidency--

(Inaudible comments from the floor)

Hon. Delegate Ibrahim Ahmed Yussuf: --we have suffered for it. Chair, the presidency--

Prof. Yash Pal Ghai: I think you better conclude that please.

Hon. Delegate Ibrahim Ahmed Yussuf: --it was, Chair I have to go on. Chair--

(Inaudible comments from the floor)

Hon. Delegate Ibrahim Ahmed Yussuf: --the presidency is the thing that has brought us and our economy to our knees.

Prof. Yash Pal Ghai: Thank you I think you made the point.

Hon. Delegate Ibrahim Ahmed Yussuf: We agree that the Prime Minister is what we want in this Country, let us just put it to vote and vote for it. Thank you very much.

Prof. Yash Pal Ghai: Thank you. 487. Order please, order.

An Hon. Delegate: Point of Order.

Hon. Delegate Rihal Singh: Do I make my point Mr. Chairman?

Prof. Yash Pal Ghai: Mr. Rihal has the floor please sit down.

Hon. Delegate Rihal Singh: This is-- Honourable Delegates please this is Rihal 487, from the Professional Organizations. If I can speak as a member of the Committee dealing with the Executive. We discussed this matter exhaustively in that Committee and there is the reason why at the out set we want to define the National Executive and specifically state that the Prime Minister, the two Deputy Prime Ministers and the Cabinet, form the National Executive because they have to be there because that is what the new Executive will comprise and we are making history for the future. *(Clapping)*. We do not want to go by the history of Britain or Switzerland or any other Country. *(Clapping)*. We are writing a Constitution for Kenya!

Hon. Delegates: Yes!

Hon. Delegate Rihal Singh: So let us have our own standards and we set the National Executive from the beginning. I know later, the Prime Minister's position is described in the Cabinet, but we want to have it at the outset as part of the National Executive.

Hon. Delegates: Yes! (*Clapping*)

Hon. Delegate Rihal Singh: And that is what we want. (*Clapping*)

Prof. Yash Pal Ghai: Okay, I now want to put it to vote, those who support the amendment that, “the President the Deputy”, - I am sorry I – the amendment that, “the deletion of the words the Prime Minister, the two Deputy Prime Ministers from Article 172”, please raise your hand.

(Inaudible comments from the floor).

Prof. Yash Pal Ghai: Yes, I want to put it to vote now, and I am asking for those who support the Motion to raise their hands. (*Hon. Delegates raised up their hands*).

Prof. Yash Pal Ghai: Those who oppose the Motion, (*Hon. Delegates raised up their hands*).

Prof. Yash Pal Ghai: The Motion is rejected. (*Clapping*).

PLO Lumumba: With the Chairman’s permission I refer you to page number 104.

Part II - The President and the Deputy President

Authority of the President

Article 173.

Prof. Yash Pal Ghai: I do not have any Motions on that.

PLO Lumumba: Article 174,

State functions of the President.

There is a Motion.

Prof. Yash Pal Ghai: I think there is a Motion on 173 and I am sorry, I overlooked 173 from Delegate 284--

PLO Lumumba: Yeah, yeah and Wangari Maathai.

Prof. Yash Pal Ghai: --John Munyi and then from Professor Maathai, yes these two. So, we will start with Delegate 284.

PLO Lumumba: Delegate 284, John Gitari Munyi please. 173 (2) (a).

Hon. Delegate John Gitari Munyi: Thank you Mr. Chairman. I am John Gitari Munyi, Delegate number 284. I want to move Mr. Chairman an amendment on: -

Article 173 (2) (a) to be amended by deleting all the words after the words, "Head of State", and inserting the following words, "Head of Government, the Commander-in-Chief of the Armed Forces, the Chairperson of the Nation Security Council and the Chair to the Cabinet".

Mr. Chairman, the person who has gone round and this is what has been the wish of the people that the Head of the Government is that person they have elected directly.

Hon. Delegate Sammy Aswani Amunga: Point of Order!

Hon. Delegate John Gitari Munyi: And Mr. Chairman I know as I beg to get support on this Motion, I remember what Honourable Delegate I am not sure of his name who is over there what he mentioned in the earlier session. I know the forces outside this Plenary are strong. I know decisions have been made, but what I plead with the Delegates is as we look into various sections of these Articles, we try to bring ourselves and reason and check indeed, not only our destination but the direction we want to move to. So, it is my humble pray that I get support, that the person who has been elected directly is the Head of Government. Thank you.

Prof. Yash Pal Ghai: Can you please wind up now? Thank you.

Hon. Delegate Sammy Aswani Amunga: Point of Order!

Prof. Yash Pal Ghai: 382.

Hon. Delegate Sammy Aswani Amunga: *Wapi hiyo kitu?* Mr. Chairman, My names are Sammy Aswani Amunga, Delegate number 382, Butere Mumias. My Point of Order is, is it in order for any Delegate to mis-lead the Conference.

Hon. Delegates: How?

Hon. Delegate Sammy Aswani Amunga: Yes he has said if the wishes of the people, and I will take you to page 243 of the Report. What people said their wishes of the people, “the Prime Minister should be the Head of the government”.

(Inaudible comments from the floor).

Hon. Delegate Sammy Aswani Amunga: It is here page 243.

Prof. Yash Pal Ghai: We - I think we better move on. Can we--

(Consultation at the “high” table).

Prof. Yash Pal Ghai: Delegates there is a Motion on every Section. Don’t you want to leave this to the Consensus Committee in the first place?

Hon. Delegates: No, no!

Prof. Yash Pal Ghai: All right, you will be willing to be here to the end of the month?

(Inaudible comments from the floor)

Prof. Yash Pal Ghai: I will call for a vote on this Motion. The Motion being that “the word “and the Chair of the Cabinet”, be introduced after the words, “National Security Council”, in Article 173 (2) (a). Those who support this please raise you hands. (*Hon. Delegates raised up their hands*).

Prof. Yash Pal Ghai: Those opposed to the Motion, (*Hon. Delegates raised up their hands*).

Prof. Yash Pal Ghai: The Motion is defeated.

Now, Professor Maathai you have the floor to move your Motion. Order please.

(Inaudible comments from the floor).

Hon. Delegate Wangari Maathai: Mr. Chairman,

Hon. Delegate Geoffrey Gachara Muchiri: Point of Order.

Prof. Yash Pal Ghai: Please Maathai go on with your Motion. Please listen to her we have a lot of Motions we need to move quickly. We need to listen to the Speakers.

Hon. Delegate Wangari Maathai: Mr. Chairman, I find myself in a very difficult situation and I do not know why history has put me at this place at this time. Because Mr. Chairman, yesterday the Minister spoke and he mentioned - you all remember, a few areas of contentions, but this morning we created a Committee and we were supposed to look at the issues, but we did not know what those issues are. Then this afternoon, Bishop Sulumeti made an appeal, we are scheduled to meet this evening, I therefore find myself unable to discuss an issue in the situation in which I am. Therefore Mr. Chairman, I want to withdraw all the Motions I had put forward (*Clapping*), I want to withhold, there is a difference. I want to withhold all the Motions I had put forward in the Chapters that have been mentioned, simply because I find that I have a mandate from you Delegates and I do not know how I can fight while still in that situation. I am very sorry I hope you can understand. (*Clapping*)

Prof. Yash Pal Ghai: I understand and I sympathize with you. We--

(Consultation at the "high" table).

Prof. Yash Pal Ghai: Order!

Hon. Delegate Koitamet Ole Kina: Order, order Delegates. Apparently we have quite a number of Motions in this Chapter. So, we have only two ways and we have to choose one.

One, is we discuss every Motion and so we need you to be orderly so that we go through every Motion immediately or--

An Hon. Delegate:

(Inaudible).

Hon. Delegate Koitamet Ole Kina: --I said we have two, or follow the other leg that says, there is a lot of contention, we take it to contentions.

Hon. Delegate: No!

Hon. Delegate Koitamet Ole Kina: Okay. So, if you choose to discuss every Article, then we need you to be orderly so that we proceed. There is no order at the moment, we are finding it difficult to proceed, so, please let us also have your attention so that we go as fast as we can.

Prof. Yash Pal Ghai: The Secretary will read the next Article.

Hon. Delegates: No!

Hon. Delegate Geoffrey Gachara Muchiri: Point of Order.

Prof. Yash Pal Ghai: Okay 111.

Hon. Delegate Geoffrey Gachara Muchiri: Mr. Chairman, if you do not want to give us a chance to speak, I am asking our people who support our Presidential system to walk out of this, because you are not giving us--

(Noise from the floor).

PLO Lumumba: Yes.

Hon. Delegate Geoffrey Gachara Muchiri: Mr. Chairman I have the floor.

Prof. Yash Pal Ghai: 111 again--

Hon. Delegate Geoffrey Gachara Muchiri: Mr. Chairman I have the floor. *(Clapping)*. Mr. Chairman--

Prof. Yash Pal Ghai: Yes please go on.

Hon. Delegate Geoffrey Gachara Muchiri: --thank you for giving me the floor. I think it is important Mr. Chairman we all think together. Here we are we have already appointed a Consensus Committee, a lot of the issues that are contentious including what we are discussing are what they will be discussing. Mr. Chairman, I want to say this, let us leave this discussion on Executive until the Consensus Committee gives us a Report.

(Noise from the floor).

Hon. Delegate Geoffrey Gachara Muchiri: If that is not the case Mr. Chairman we shall walk out and I walk out.

PLO Lumumba: Ladies and Gentlemen, could we kindly have the floor please.

Prof. Yash Pal Ghai: 124. Order please.

PLO Lumumba: Please.

Prof. Yash Pal Ghai: Hold on 124 please.

PLO Lumumba: 124. Please do not walk out as we are discussing, please kindly remain inside, please.

Hon. Delegate Kiraitu Murungi: Thank you Mr. Chairman. Kiraitu Murungi, Delegate number 124. Mr. Chairman, I think we are now reaching the very core of this Conference because if there has been any contentious issue in the Document that we are discussing, it is the Chapter on the Executive. And, Mr. Chairman, in fact all the debates, all the noise and all the division that there have been in this Conference have been as a result of this particular Chapter. Mr. Chairman, yesterday we said let us be sober, let us look again at this Document, because we want to develop a national Consensus. I thought we started off very well yesterday, we agreed we will form a Committee, on which we would refer these this contentious issue. At the pace in which we are going I see us undermining the very decision that we made yesterday.

Hon. Delegate David Ekwee Ethuro: Point of Order.

Hon. Delegate Kiraitu Murungi: Mr. Chairman. Mr. Chairman, I am begging the Delegates to listen to me in silence I have been listening to them. Mr. Chairman, we cannot consider in isolation the various sections of this Chapter because they are inter-linked and they are intertwined. We cannot look separately at the powers to the President with out looking at the power to the Prime Minister. Because what we are trying to do is to strike a balance between these two. I am one of those who support this Country to have both a President and a Prime Minister. But what we have been saying is that, let us not plant seeds of instability in this Country. Let us not create two powerful centers of power, because these are likely to throw us into political turmoil, into deadlocks at some time in future. So I am pleading with the delegates, let this matter go before the Committee that we set up, the Consensus Building Committee.

(Inaudible comments from the floor and Clapping).

They can be given a time within which to report and then we proceed from there, because you remember even when Jesus Christ was being crucified, there was still a crowd there saying – when Pontius Pilate asked, “what has this man done”. There was a crowd there who did not want to listen, they just said “hang him”. It is not all the time that the people who are making a lot of noise are right. There is time to look at issues and I beg you my brothers and sisters this is the time to look at these issues. (*Clapping*). Let us refer this matter to the Consensus Building Committee. Thank you.

Prof. Yash Pal Ghai: 024.

PLO Lumumba: Could you please – the Chair has given the floor, could we respect that please.

Hon. Delegate David Ekwee Ethuro: Mr. Chairman, I want to thank you for the opportunity to contribute to this particular Motion. Mr. Chairman I am Honourable Ekwee Ethuro, MP for Turkana Central, Delegate number 024.

I am speaking as a friend of this Conference and I am think I speaks for many. As one of those ones who are committed to ensure that we come with a document out of Bomas and not else where and I want just to echo the words of the Minister, and please just listen to me.

It is not often that I agree with that Minister, but I think we have a process that we agreed from this particular Conference to have a Consensus Committee that will deal with these particular issues. And for the sake of economy of time, given that we have a hundred and one Motions of this particular Chapter, let us give that Committee the opportunity to look at these things. We retain the responsibility, Honourable Delegates.

(Inaudible comments from the floor and Clapping)

Hon. Delegate David Ekwee Ethuro: We retain the responsibility not to adopt ourselves but let’s give them the opportunity to refine this so that we have a consensus. Thank you very much Mr. Chairman.

Hon. Delegate Moses Wetangula: Point of Order.

Prof. Yash Pal Ghai: 209

(Inaudible discussions on the floor).

Hon. Delegate Moses Wetangula: Thank you, Mr. Chairman.

Prof. Yash Pal Ghai: Order please.

Hon. Delegate Moses Wetangula: I am number 209, my name is Wetangula from Parliament. Mr. Chairman, I want to plead with my colleagues, Honourable Delegates, that we have been here for a very long time, we are carrying responsibility for the whole of this country. Everybody, even those we do not agree with count. Everybody matters. Even the minority should be listened to, and I want to plead Mr. Chairman, that looking at the Motions that are before us and knowing that we must deliver to the people of Kenya a Constitution, that not a single person will walk away and say, "Bomas betrayed me". We have an opportunity, Mr. Chairman and I believe we shall achieve it, to give the Sulumeti Committee an opportunity to listen even to the minority, give them a mandate, and let us abide by what they will bring back here and tell us that having listened to the protagonists on this Chapter, which is the nerve centre of our Constitution, which is the nerve centre of the exercise and player of power in the country, they bring us results that we shall all own, that we shall all carry to the future for this country. *(Clapping)*.

I plead Mr. Chairman, that you yourself had already given the lead, that having seen the Motions before you, you believed that it was desirable and I believe too that it is desirable for the doves and hawks of this Conference, that we give the Sulumeti Committee an opportunity to listen to divergent views and bring us back some report that we can own and have a way forward. Thank you, Mr. Chairman. *(Clapping)*.

Prof. Yash Pal Ghai: Thank you.

(Consultations at the “high” table).

Prof. Yash Pal Ghai: 539. Yes 539, Archbishop.

Hon. Delegate Archbishop John Njue: Thank you, Chair. Many a time, when prayers have been said in this hall, there has been the plea asking God that He gives us the spirit to be able to accept one another and to listen to one another. As it has been mentioned, definitely this is not the easiest of the Chapters in our Draft and the atmosphere that we have experienced right from when we started is rather worrying, my dear friends, because you know, there seems to be a tendency of losing our own tempers. There seems to be a tendency of having to say, “what I came up with, that is what must be”, and we forget that where there are two or three heads, there are divergent opinions.

Dear Delegates, it has been said over and over again, as you see these cameras here, there are people watching us all over this country and I think the best picture that we can send out is that we are a tolerant congregation, that is ready and willing to listen to one another irrespective of how divergent his or her opinion may be.

My dear friends, I humbly ask, as it has been mentioned by some others and even though it may be very, very – you know - distant from what the majority may think, may I plead with you, that at this juncture, if we went to anything, I think it will more or less divide us far much more. Why not take the opportunity at this juncture Chair, that this Committee that has been chosen, can be given an opportunity? Whenever there is something that is burning, let it be poured to that Committee so that we can be able to come back and be able to dialogue on this very important issue without having to you know, boo at one another because that will not help us. That is my submission Chairman, that let us-- *(Clapping)*. Let us give this Committee an opportunity and let them come with the possible solution. Thank you.

Prof. Yash Pal Ghai: Thank you. 155.

Hon. Minister Raila Odinga: Thank you, Mr. Chairman. Raila Odinga, Parliament. Mr. Chairman, I would have preferred not to have spoken on this Chapter but I think it is very

important Mr. Chairman that where we are, we find a way to reach our final destination. If you take a journey down the memory lane, thirteen years ago, in 1991, we were talking about Constitutional Review, and we said that we wanted to have a Constitution Review before the elections of the year 1992. It has been a very long journey, Mr. Chairman, to reach where we have reached. We have very little left to reach the final destination and we should reach that destination.

We are doing a Constitution, not only for this generation, but also for the future generations and we should therefore take a long-term view of what we are doing. We should not be actuated by considerations of the temporary situations; we should look at Kenya a hundred years from now. *(Clapping)*. What kind of society do we envisage we will be? And therefore Mr. Chairman it is important that in this exercise, we tolerate each other so that we accommodate everybody. We should create a win-win situation guided by the view, which is the cardinal principle of democracy, the right to say that “I may not agree with what you have to say, but I shall defend unto death your right to say it”. So, therefore Mr. Chairman, I want to support strongly the proposal which is being made. I know that you are seized with some information which Delegates may not have, but I know that already there are certain proposals which have been put forward and which are being discussed and I am sure that if opportunity is given for that Consensus Building Group which has been set up here, to be informed of those views, they will be able to synthesis these views and come and give a report here to the Delegates. *(Clapping)*.

Therefore Mr. Chairman, I would like to appeal to my fellow Kenyans here, that we agree to the request which has been put forward by my colleague, Honourable Minister for Constitutional Affairs, Honourable Kiraitu Murungi, that we do give this Consensus Building Group a chance to go and come forward with a proposal that we can look at. Thank you, Mr. Chairman. *(Clapping)*.

(Consultations at the “high” table).

Prof. Yash Pal Ghai: 003.

Hon. Delegate Abdirahman Ali: Thank you, Mr. Chairman. My names are Abdirahman Ali Hassan, Delegate number 003. We sat here from yesterday, listening to the proceedings. It is always important to realize where we came from. We know very well that this Conference for sometime, or at one time or the other was marred by confusion, suspicion and loss of trust between the various categories that represent Kenyans in this Conference.

For me, the problem, the way I see it this afternoon, is that we are not able to agree on a process. If the process becomes faulty, you always have a problem, in the sense that we developed a Consensus Building Group, which we all agreed to. The question is, at what point do they make some reference to those who contributed to this document? What I want to ask the Chair is to give some guidance. We know either from what we read or what we contributed, that there are issues which we really need to iron out. How do we go about that? There was no clear direction on how and at what point the Consensus Building Group should revert back to the Plenary and at what stage. That is something which we need clarity on.

The other bit, which I probably want to throw to my colleagues, is that the Constitution belongs to Kenyans, no individual should walk out of this room, it does not belong to individuals. *(Clapping)*. We all have a stake, we all have a stake! We want to see a united Kenya; we want to see a united Kenya! We have taken months here, so many resources have been committed to this process, we all know and we must tolerate each other. We have a few days left, let us allow the process to roll on and we give our views depending on what we think is rational. We must be rational in our thinking. Thank you very much.

Prof. Yash Pal Ghai: I would like to put the matter to vote now. We have had very moving pleas, from very distinguished people, to give the Consensus a chance.

Hon. Delegates: Yes.

Prof. Yash Pal Ghai: People out in the country are saying that Bomas are an intolerant lot. I have defended you against these accusations most of the times but we are being watched. Every second of the proceedings of this Conference are broadcast through the country. I warned you last week that the eyes of all Kenyans and indeed of many people outside Kenya are upon us. If

this is the best we can do, I do not think we will get much sympathy from the people. People are longing for peace and you are plunging the country into chaos.

Hon. Delegates: No! No! No!

Prof. Yash Pal Ghai: I think you have to give consensus a chance. We have all agreed that we are bound by the Act to reach consensus and you are denying an opportunity for us to reach consensus.

(Uproar from the floor).

Prof. Yash Pal Ghai: We have the opportunity to end this Conference on a high note, with the Constitution that all Kenyans will own and that will provide the basis for us to move forward. If we get a Constitution which does not enjoy this respect, then the country cannot move forward and we cannot live together as a people. So, I plead with you, please give the Consensus Committee 24 hours and they will come back to us and report.

Hon. Delegates: Yes, yes. *(Uproar).*

PLO Lumumba: Put it to the vote.

Prof. Yash Pal Ghai: I now put the question to the vote. Those who support-- *(Uproar).*

Prof. Yash Pal Ghai: I want to put the question to vote, please let me do that as Chair. Those who support giving the Consensus till tomorrow morning to come and report to us and we postpone this, please raise your hands.

(Hon. Delegates raise their placards).

(Inaudible discussions on the floor).

Prof. Yash Pal Ghai: Those who oppose?

(Few Delegates raise their placards).

Prof. Yash Pal Ghai: It seems to me there is a very strong support for the Consensus Committee to carry on. *(Clapping)*. And on that we have a tea break, we come back and we deal with Chapters which are not dealing with these two issues. Thank you very much.

Meeting adjourned for tea at 4.30 p.m.

TEA BREAK

The meeting reconvened at 5.10 p.m.

(Inaudible discussions on the floor).

Prof. Yash Pal Ghai: It seems that we do not have a quorum.

(Noise on the floor).

Prof. Yash Pal Ghai: Order please, order. Order! It seems that we do not really have a quorum and we cannot usefully do any business. I want to personally apologize for my harsh words. *(Clapping)*. All of you are my friends and the last group I want to-- But what I really meant to say was that unless this Conference ends successfully, our country will be in trouble. I did not express myself carefully and I apologize to you all, if you felt that you were the target. *(Clapping)*.

The Committee on Consensus will work very hard; they assure me and hope they can come to you tomorrow with some suggestions.

Hon. Delegates: Yes.

(Inaudible discussions on the floor).

Prof. Yash Pal Ghai: So, we can proceed quickly. We are all determined to finish.

(Noise on the floor).

Prof. Yash Pal Ghai: Please listen to me or leave the room. So, we are all determined to finish the process by the 19th March 2004. This effectively means we must finish the consideration almost, if we can, by the end of the week. Perhaps there is a meeting on Saturday, if the Delegates would wish that. *(Clapping)*. So, I can assure you my full cooperation in trying to complete the process by this weekend, so we give the Draftspersons two, three days to refine the document and for us to meet then to adopt it. *(Clapping)*.

So, now unless there is some business I will adjourn the meeting, to wish you good night. Get some rest, we are all under pressure, that is why we lose our tempers, that is why I lose my temper, but let us get a good night's rest and we will work fast tomorrow. Good night. *(Laughter)*.

The meeting was adjourned at 5.15 p.m.

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