

**NATIONAL CONSTITUTIONAL CONFERENCE DOCUMENTS**

**THE FINAL REPORT OF TECHNICAL WORKING GROUP “E” ON THE  
JUDICIARY**

**APPROVED FOR ISSUE AT THE 110<sup>TH</sup> PLENARY MEETING OF THE CONSTITUTION OF  
KENYA REVIEW COMMISSION HELD ON 30 NOVEMBER, 2005**

## TABLE OF CONTENTS

	Page:
<b>1. Introduction.....</b>	<b>3</b>
<b>2. The Mandate of the Committee.....</b>	<b>3</b>
<b>3. General Comments on the Main Report.....</b>	<b>6</b>
3.1 Judicial Power.....	6
3.2 Hierarchy of Courts.....	6
3.3 The Supreme Court.....	6
3.4 The Court of Appeal.....	7
3.5 The High Court.....	7
3.6 The Industrial Court.....	8
3.7 Kadhis' Court.....	8
3.8 Tribunals.....	9
3.9 Independence of the Judiciary.....	10
3.10 Appointment of Judges.....	10
3.11 Qualifications for appointment of Judges.....	10
3.12 Tenure of office of Judges.....	11
3.13 Removal from office.....	11
3.14 The Judicial Service Commission.....	12
3.15 The Attorney General.....	12
3.16 The Director of Public Prosecutions.....	13
3.17 The Public Defender.....	13
3.18 Prerogative of Mercy.....	13
<b>4 Specific Recommendations on the Amendments to the Draft Bill.....</b>	<b>14</b>
<b>5. Conclusion.....</b>	<b>24</b>
<b>6. Appendices.....</b>	<b>77</b>
Appendix A– List of Committee Members.....	77
Appendix B – Minority Reports .....	79
Appendix C – Drafter’s Annotated Report.....	80
Appendix D – Drafters Narrative Report.....	97
Appendix E – Agenda.....	115
Appendix F– Minutes of the Committee’s Meeting.....	143
Appendix G – Motions.....	347

## 1. **Introduction**

The judicial and legal system is a very important part of the constitutional setup of a country. The courts of law play a cardinal role in upholding constitutionalism and the rule of law. The Judiciary is the organ of state vested with the powers to interpret the law and determine all justiciable disputes. The rationale for this principle is derived from the doctrine of separation of powers, which merely means a demarcation of the responsibilities among the legislative, executive and judicial organs of state. This also implies a scheme within which one organ of the state checks or balances another, and, logically, immunity or independence of one branch of government from another.

The Committee noted that the Judiciary and the administration of justice have been matters given much attention by the people in the constitutional reform process. Regrettably, the Committee noted that the Judiciary rivals parliamentarians and the Police Force as the most criticized public sectors of the Kenyan society. Serious allegations have been made against the Judiciary, including inefficiency, incompetence, lack of access to the justice system and corruption in the administration of justice and courts. The Committee considered further that many people who made submissions to the Constitution of Kenya Review Commission expressed concern about the institutional decline of the Judiciary and the office of the Attorney General in the past three decades. In addition, there was a feeling among many that during much of the said period, the said institutions did not act independently or play their role of upholding the Constitution and the Bill of Rights. In other words they may have contributed to the failure of constitutionalism and the rule of law.

It is clear from these and many more views presented to the Commission by Kenyans that they have high expectations of a new Constitution that provides for a judicial system that guarantees the independence and integrity of the judicial process and upholds constitutionalism and the rule of law. Kenyans want to see major changes and fundamental improvements in the Judiciary and in the way justice is administered in Kenya.

This Report summarises the deliberations and discussions of the Technical Working Committee on the Judiciary. It contains the issues emerging from the debate on the Draft Bill to amend the Constitution and the accompanying Report of the Commission, points of agreement and recommendations and specific proposals on the Judiciary and the Legal System for the annotation of the Draft Bill. The Committee wishes to thank the Convenor, Hon. (Bishop) Philip Sulumeti, the acting Convenor Hon. (Rev.) Patrick Musungu, the Rapporteurs Hon. (Commissioner) Paul Musili Wambua and Hon. (Commissioner) Ahmed Issack Hassan, the Secretariat and entire membership of the Committee for their commitment and engaged participation in its work.

## 2. **The Mandate of the Committee and the Context of the Review**

The Constitution of Kenya Review Act (Cap 3A) was enacted to facilitate the ‘comprehensive review of the Constitution by the people of Kenya’. The Act establishes the Constitution of Kenya Review Commission and other organs of review. Under Section 5(3), the object and purpose of the review of the Constitution is to secure provisions therein, *inter alia*: -

- (a) guaranteeing peace, national unity and the integrity of the Republic in order to safeguard the people’s well being;
- (b) establishing a free and democratic system that enshrines good governance, constitutionalism and the rule of law, human rights and gender equity;

(c) recognising and demarcating divisions of responsibility among the various state organs including the Executive, the Legislature and the Judiciary so as to create checks and balances between them and to ensure accountability.

Further, the Review Act requires the principal organ of the review, namely the Commission, to ensure that in reviewing the Constitution, the people of Kenya:

- examine and recommend the composition and the functions of the organs of the state including the Executive, the Legislature and the Judiciary and their operations with the aim of maximizing the mutual checks and balances and securing their independence;
- examine and recommend improvements to the existing constitutional commissions, institutions and offices and establishment of additional ones to facilitate constitutional governance;
- examine and make recommendations on the Judiciary generally and in particular, the establishment and jurisdiction of the courts, aiming at measures necessary to ensure the competence, accountability, efficiency, discipline and independence of the Judiciary

The Commission was mandated to collect and collate the views of the people of Kenya on proposals to alter the Constitution, and on this basis, to draft a Bill to alter the Constitution and compile a Report to accompany the said Bill. Upon the publication of the Draft Bill and the Report, the Commission convened, pursuant to section 27(1)(c) of the Constitution of Kenya Review Act, the National Constitutional Conference on 28<sup>th</sup> April 2003, to debate, discuss, amend and adopt the Report and Draft Bill to amend the Constitution.

Under *Regulation 49 of the Constitution of Kenya Review (National Constitutional Conference)(Procedure) Regulations 2003*, the Conference is empowered to appoint Technical Working Groups to consider any issue or theme arising from the Draft Bill. *Regulation 49(4)* as amended establishes thirteen Technical Working Groups to consider thematic issues in the Draft Bill. The present Technical Working Group 'E' on the Judiciary is one such Committee established under the said Regulation.

## **2.1 The Mandate of the Committee**

The Regulations of the Conference establish thirteen Technical Working Groups in addition to the Steering Committee, the Committee on Privileges, Welfare and Discipline and the Media Advisory Committee. The latter three are administrative committees that deal with various aspects of the day-to-day running of the National Constitutional Conference.

The purpose of establishing the Technical Working Groups was to expedite the disposal of the matters before the Conference (*Regulation 49 (1)*) and to enhance the deliberative character of the Conference along thematic lines. The thematic model is characteristic of committee specialization in most law making Conferences. The Committees were mandated to examine particular issues identified in the course of the debate at the Conference in plenary and to submit recommendations and findings on possible options. It was the expectation that this design would provoke an informed discussion, as the Committees would not be subject to the strict time limitations of the plenary sessions.

## **2.2 Terms of Reference**

The Technical Working Committee is established under *Regulation 49(4) of the Constitution of Kenya Review (National Constitutional Conference)(Procedure) Regulations, 2003*:

- to consider provisions of the Draft Bill and the Commission's Report in relation to the Judiciary and the legal system (*Regulation 49(4)*);

- to consider issues on any related subject matter referred to it by the Chairperson of the Conference (*Regulation 49(2)*), the Steering Committee (*Regulation 49(1)*) or the Conference (*Regulation (45(9))*);
- to make recommendations on the Judiciary generally and in particular, the establishment and the jurisdiction of the courts and to design measures to ensure the competence, accountability, efficiency, discipline, impartiality and independence of the Judiciary (*section 17d(v) of the Review Act*);
- to recommend provisions for separation of powers between the Judiciary, Legislature and Executive and checks and balances (*section 3 of the Review Act*).

### **2.3 Method of Work**

*Section 5 of the Constitution of Kenya Review Act Cap 3A* enshrines the guiding principles of the review process. These provisions enjoin the organs of the review to be accountable to the people, ensure the review process accommodates the diversity of the Kenyan people, and provide the people with an opportunity to actively, freely and meaningfully participate in the constitutional debate and ensure that the process is conducted in an open manner and that the final outcome of the review process faithfully reflects the wishes of the people of Kenya.

The Committee places on record that it adhered to these principles in its method of work. The basic framework for the Committee business was the *Constitution of Kenya Review (National Constitutional Conference)(Regulations) Procedures 2003*. Additionally, the Committee discourse was also guided by the Rapporteur General's *Guidelines for the National Constitutional Conference Ad Hoc and Technical Working Committees*.

### **2.4 Membership**

The Committee comprises fifty four (54) members drawn from different categories of Delegates to the Conference. Notably, members of the Committee had a clear understanding of the judicial and legal system. Majority were present or past members of the Judiciary, religious organisations, the legal profession and parliamentarians among others. This was indeed an asset evidenced by the high quality of the debate by the Committee.

### **2.5 Procedures in the Committee Generally**

The business of the Committee was conducted mainly under *Regulation 45 of the Constitution of Kenya Review (National Constitutional Conference)(Procedure) Regulations 2003*. The first business of the Committee was the election of the Convenor, on the 27<sup>th</sup> day of May 2003. Under the Regulations, the Convenor calls and presides over the meetings of the Committee and oversees the general administration of the Committee. The Committee had two Rapporteurs who played the role of resource persons to the Committee. The Rapporteurs ensured the availability of technical and logistical support for the Committee. Throughout its work, the Committee was served by a small Secretariat comprising the Committee Clerk, Programme Staff, a Hansard Reporter, a Draftsperson and other support staff.

The sittings of the Committee were open and public; any delegate could participate in its proceedings, which were also monitored by local and international observers. The debate at the Committee progressed through two stages. The first was the general debate where the delegates addressed the Committee on various aspects of the judicial system. The general debate session has since then been held at the commencement of each of the Committee's meetings. The general debate session played a critical role in building confidence among delegates while also laying the foundation for consensus. The second stage of the Committee's work was the consideration and deliberation stage at which members discussed the Report of the Commission and the Draft Bill to

amend the Constitution on an article-by-article basis. The outcome of these discussions is expected to form the content of the drafting instructions to the Drafting Team.

The Committee used the statutory documents of the Conference – the Report and Draft Bill and the working documents of the Conference as its main reference materials. Members particularly considered the views of the people as captured in the Commission’s Report, the summary of issues at the plenary session of the Conference and written submissions by the delegates. The Committee also gave particular attention to the constitutional provisions of comparable jurisdictions, as well as proposals put forward by previous committees and working groups on judicial reforms in Kenya.

## **2.6 Role of Resource Persons**

The contribution of experts to the Committee’s work was of paramount importance. Incidentally a number of members of the Committee had special skills that assisted the Committee in its work. These included a Judge of the Court of Appeal of Kenya, the Honourable the Attorney General, practising Advocates, the Rapporteurs among other resource persons. Further, it invited experts on labor law to advice on the viability of a proposal to entrench the Industrial Court as a distinct superior court of record. The resource persons included Orao Obura, Abisai Ambenge, Gerrishon K’Onditi, Brig. T.K. Githiora and Judge Murtazar Jaffer. The Committee also hosted a resource person on prerogative of mercy, George Omondi, a Senior Deputy Commissioner of Prisons, and a delegate at the Conference.

## **3. General Comments on the Main Report**

### **3.1 Principles of Judicial Power**

Most of the delegates supported the statement of basic principles that shall guide the courts of law in the exercise of judicial power. These values should act as guidelines for the Judiciary, which in turn should commit itself to promoting and guaranteeing their implementation. Whereas it was acknowledged that the Judiciary should be insulated from any form of ‘popular’ influence or interference, the Committee adopted the view that judicial power is derived from the people, and must be exercised in the name, and for the common good of the people.

The Committee considered sovereignty of the people as the power by which the state is governed. The sovereignty of the people is the supreme political authority; the supreme will and the source of all political power from which specific state powers are derived. The recognition of the people as the repository of all power and authority implies that the people shall be governed through their will and consent and that the state organs should at all times acknowledge the supremacy of the people and remain subordinate to the people. In the exercise of judicial power, the courts and tribunals shall act in accordance with the Constitution and shall strive to uphold the good of the people and shall not be subordinate to any other organs of state or authority.

### **3.2. Hierarchy of Courts**

There were elaborate deliberations amongst the Delegates on the broad proposal on the Structure and Hierarchy of the superior courts and subordinate courts. The Committee considered that the superior courts of record as proposed in the Report should be the Supreme Court, the Court of Appeal and the High Court. Further, the Committee took the view that the subordinate courts of law should comprise magistrates courts, the Kadhis’ court, courts martial, the Industrial Court and any other courts or judicial tribunals that may be established by or under an Act of Parliament.

### **3.3 The Supreme Court**

The Committee considered the proposal that the Supreme Court should be at the peak of the hierarchy of the courts of law in Kenya. Members felt that the arguments in favour of the Supreme Court were clearly convincing - that it would infuse new values into the system; streamline case law

emanating from lower courts; set clear precedent and develop constitutional norms and jurisprudence in the new constitutional order. The question that arose is whether original jurisdiction, in addition to the final appellate jurisdiction should be vested in the Supreme Court. The Committee adopted the proposal that original jurisdiction in respect of some matters which require speedy determination should be vested in the Supreme Court.

After protracted debate, the Committee considered that the Supreme Court should be vested with special original jurisdiction in some matters which require prompt adjudication. It was felt that since the Supreme Court would be the final appellate Court, it should not be vested with original jurisdiction in matters which could ordinarily be commenced in other courts. Accordingly, the range of issues in which the Supreme Court should have original jurisdiction should be limited. These should be presidential election petitions and issues relating to the impeachment of the President.

Due to the importance of these cases, it would be imperative that the court dealing with such issues be the Supreme Court. The advantage of this arrangement would be the finality and certainty in such litigation, for there would be no appeal from the decision of the Supreme Court. The Committee took the view that given the uncertainty and anxiety that would result from litigation with respect to presidential election petitions and issues relating to the impeachment of the President, the Supreme Court as the final court should be repository of original jurisdiction in respect of the same. For the same reasons, the Supreme Court should be required to dispose of such matters as promptly as is practicable.

However, other members opposed the granting of original jurisdiction in the Supreme Court in respect of Presidential election petitions. They argued that this would extinguish the right of appeal in such petitions. Further, it was also argued that a right to appeal contributes to a fair trial, and should be available in all cases. In the alternative, some members posited that these category of cases be heard in the first instance in the High Court and be “leap frogged” to the Supreme Court.

The Committee unanimously adopted the vesting of appellate jurisdiction in the Supreme Court as conferred by an Act of Parliament. The Supreme Court would be at the peak of the hierarchy of the courts of law, making it the highest appellate court. The Committee noted that the Supreme Court should play a cardinal role in setting constitutional norms and precepts for the lower courts. The court should seek to ensure that the values and principles that underlie the new Constitution are nurtured and protected so that they endure. Further, the Committee also considered that whereas the Supreme Court should be the precedent setting court, it should not be bound by its previous decisions where a departure therefrom is in the interest of justice and the development of jurisprudence. Such a departure from its decision should only be made by a sitting of the Court attended by all of the Judges of the Supreme Court, for the time being holding office.

### **3.4 The Court of Appeal**

The Committee considered that the Court of Appeal should be retained as a superior court of record. Members of the Committee felt that given the dynamic nature of the administration of Justice, the organization, administration and composition of the Court of Appeal should be prescribed by an Act of Parliament. The Committee took the view that some of the details contained under the clause on the Court of Appeal should be prescribed by an Act of Parliament.

### **3.5 The High Court**

The Committee considered that there should be a High Court vested with unlimited original jurisdiction in civil and criminal matters. Members felt that it was imperative to have a court vested

with powers in relation to constitutional interpretation. What members underscored is that there must be special institutions charged with the mandate of protecting the Constitution. Further, the Committee departed from the Draft Constitution's provisions vesting original jurisdiction in the Supreme Court in respect of the constitutionality of an Act of Parliament. The Committee took the view that since the Supreme Court shall sit in Nairobi, it would be impractical to grant original jurisdiction in the said Court as there would inevitably arise a lot of litigation in respect of constitutionality of legislation or administrative actions in the new constitutional order. It was thus decided that the High Court should have original jurisdiction in matters relating to the interpretation and enforcement of the provisions of the Constitution as it was more accessible.

Whereas the Committee considered that the exercise of supervisory jurisdiction played a critical role in upholding legality by the lower courts of law, members felt that the Supreme Court should not be the repository of such powers. The Committee took the view that supervisory jurisdiction should be exercised by a superior court of record with geographical spread in the country, such as the High Court. Members preferred the current arrangement whereby the High Court has jurisdiction to supervise any civil or criminal proceedings before a subordinate court and make such orders as it may deem appropriate for the purpose of administering justice. Given that such jurisdiction should be exercised over subordinate courts and any person, body or authority which exercises a judicial or quasi-judicial function, the Committee noted that the vesting of supervisory jurisdiction in the Supreme Court would overload the said court.

### **3.6 The Industrial Court**

The current Industrial Court is established under *section 9 of the Trade Disputes Act (Cap 234) Laws of Kenya* to hear and arbitrate any dispute between employers and employees, or between employees, or between employers and trade unions, or between trade unions and trade unions. The Court also exercises *sui generis* jurisdiction in respect of certain decisions of the Minister for Labour, which are subject to appeal or review by the Court. *Section 17* of the Act stipulates that the decisions of the Industrial Court shall be final. The Committee noted that the clause was *ultra vires* the Constitution and accordingly proposed that appropriate amendments be instituted to ensure the Statute's conformity with the Constitution.

The Committee heard from the experts that the finality clause implies that the decisions of the Court cannot be challenged. However in practice, the High Court exercises supervisory jurisdiction over the Industrial Court. This poses a practical problem given that the Constitution grants supervisory jurisdiction on the High Court over all other courts and judicial tribunals. The scenario also creates a dual system of judicial disposition of labour disputes. The Committee deferred further deliberation on this issue to a later date, whereupon it was resolved that the Industrial Court be enshrined as a subordinate court.

### **3.7 Kadhis Courts**

The debate on this aspect of the structure of the courts was complicated and extremely delicate. The question that arose is whether the Constitution should expressly or impliedly provide for the establishment of Kadhis Courts. Some members felt that Kadhis courts should be established by statute without any reference to the same in the Constitution. The basis of this argument was that the entrenchment of these courts would contradict the provisions of Article 10 of the Draft Bill that provides for the separation of state and religions and the treatment of all religions as equal.

Other members felt that Kadhis courts should have a constitutional basis as enshrined in the Draft Bill saying that the existence of the courts in the current constitutional framework had not been prejudicial to the legal system or individuals. Access to justice through the Kadhis courts, they posited, was an accrued right that should not be extinguished by the deletion of Kadhis courts from the Draft Bill to amend the Constitution. Reference was made to the Commission's Report which

gives a historical account of Kadhis' Courts in Kenya. Others also proposed that these courts be established as provided for in the current Constitution of Kenya. Section 66 (1) thereof provides that there shall be a Chief Kadhi and such number, not being less than three, of other Kadhis as may be prescribed by or under an Act of Parliament.

After protracted debate, the Committee resolved that the Kadhis courts should be entrenched in the Constitution as subordinate courts. **A minority view was recorded, which we hereby report, that the Constitution should not categorise Kadhis courts in the structure of subordinate courts. This view by the minority proposed that the Constitution should merely stipulate that subordinate courts be established by or under specific Acts of Parliament.**

The Committee also discussed the jurisdiction of Kadhis' courts at length. What came out from the debate is that given the establishment of Kadhis' courts as subordinate courts, and given their special status, their jurisdiction should come out in the fine print of the fundamental law. This would check the possibility of enhancing the jurisdiction of the said courts by or under an Act of Parliament. The other innovation the Committee approved through a motion was the stipulation that only parties submitting to the jurisdiction of the courts would be subject to proceedings of the said courts. A minority view objecting the latter view was recorded, the argument being that most parties would raise numerous frivolous objections relating to jurisdiction. Revisited, the Committee considered that the clause would limit the jurisdiction of the courts as most sued parties would object to the jurisdiction of Kadhis. The Committee resolved to delete the stipulation that only parties submitting to the jurisdiction of the courts would be subject to the proceedings of the said courts. Further, the Committee considered that it was the discretion of the person instituting a case to elect the forum, subject to jurisdiction. The Committee also took the view that it would be conceptually and practically ambiguous to grant jurisdiction with one hand and take it away with the other.

### **3.8 Tribunals**

Members of the Committee discussed the tribunal system at length. It was noted that the role of tribunals played a crucial role in the administration of justice. Specialised tribunals are usually established by statute empowering persons or bodies other than the ordinary courts of law to solve particular kinds of disputes. The question that arose is whether these tribunals should form part of the formal judicial structure.

The Committee contrasted tribunals exercising discretion in the determination of questions of law and fact (judicial or quasi-judicial) with administrative tribunals. The former operate as courts of law, conduct proceedings that are adversarial in nature and observe procedural rules of natural justice. It was further noted that the designation "administrative tribunals" and "judicial tribunals" can be misleading as decisions of most tribunals are in truth judicial in the sense that administrative tribunals find facts and then apply legal rules to them impartially without regard to policy of the Executive.

The Committee also considered that there should be traditional tribunals to dispose of disputes relating to personal and customary law. What the members noted is that the people would want to see much improvement and greater access to the administration of justice with courts closer to them. To this end, it was considered that there should be provisions to secure geographical spread of courts and small claims courts. It was generally felt that such small claims courts should operate at the locational level. This principle of access would also imply that justice would be secured cheaply and easily for all Kenyans.

### **3.9 Independence of the Judiciary**

The Committee further considered that judicial independence and integrity are fundamental pillars of the rule of law. Essentially, an independent Judiciary is necessary in order to protect and enforce rights of the people; ensure fair treatment of individual litigants; assure the viability of judicial review of administrative action and to preserve the integrity of the judicial process. Considering these functions, the need to ensure judicial propriety and independence cannot be gainsaid. Judges and judicial officers should therefore uphold and exemplify judicial independence both in its institutional and individual aspects.

### **3.10 Appointment of Judges**

The Committee noted that one of the causes of the politicization of the Judiciary is the use of non-transparent and unpredictable procedures in the appointment of Judges. It was considered that there should be some checks on the power of the executive arm of the government in appointing members of the Judiciary. There is a movement in the world all over to shift this function away from the exclusive fiat of the executive to an institutional arrangement whereunder consultation with an independent Judicial Service Commission is provided before making such appointments. Members were in agreement with the proposals made by people who would wish to see the President continuing to appoint judges, but only acting on the advice of the Judicial Service Commission and with the approval of Parliament.

The Committee took the view that the integrated, participatory and consultative process would ensure the selection of the best and most suitable persons to the bench. The idea behind merit selection is to take politics out of the judicial selection process and ensure that only the most highly qualified individuals are considered for nomination to the Judiciary. Further, the role of the Judicial Service Commission in the appointment of Judges will check the danger that these vital positions will be filled solely at the whim of the President. The approval by Parliament would provide a second level of checking for judicial appointments, that is, a level additional to that provided by the Judicial Service Commission. It was argued that the approval by Parliament, the people's representatives, would also legitimise the judicial organ of state. The Committee considered that the process should ensure that the majority party in Parliament does not use its numbers to block proposed judicial appointments on political grounds, or even influence appointments in the interests of the party.

### **3.11 Qualifications for Appointment as Judges**

There was unanimity that the Chief Justice and the Deputy Chief Justice and Judges of the Supreme Court should be legal practitioners of the highest integrity. Because of the nature of their duties, it is also believed that it would be wise if they were persons who have gained fifteen years experience in either a judicial role as a Judge of the Court of Appeal or High Court or as an advocate. In the case of the Court of Appeal, candidates for appointment would need ten years of experience as High Court Judges or as advocates. High Court Judges must be appointed from among candidates with ten years experience as magistrates or advocates. Further, to enrich Kenyan jurisprudence, persons who have served in similar commonwealth jurisdictions may also be appointed to the offices.

Whereas the Committee considered the requirement that some of these appointments be made from the ranks of persons serving in the bench, some members opposed the elevation of magistrates to the superior courts of record. After some debate, the Committee came to the finding that the appointment of magistrates would both ensure the necessary experience and opportunities for upward promotion of this category of judicial officers from time to time. However, majority members of the Committee opposed the candidacy of law teachers for appointment to the superior courts of record, the argument being that they did not have the necessary practical experience in the court process. Others felt that there is no good reason why persons who have had lengthy and

exemplary careers as law teachers should not also be excellent Judges. Indeed, there may at times be every reason to introduce fresh perspectives to the ranks of the Judiciary by doing just that.

### **3.12 Tenure of Office of Judges**

The Committee reiterated that the tenure of office for members of the Judiciary should be guaranteed by the Constitution. This is so fundamental a practice that needs no elucidation. Thus some were opposed to a proposal that the Chief Justice serve for five years renewable for a further and final term as this would appear to be contractual. It was resolved that the Chief Justice should serve for a non-renewable term of ten years. By the same token, members opposed the appointment of acting Judges. The suggestion of contracts for the Judiciary or acting Judges was opposed on the ground that it may undermine judicial independence, as there would be obvious potential for pressure to be applied to Judges approaching the end of a contract period, or acting Judges who needed confirmation to judicial office. Additionally, Judges should not be open to dismissal save in very clearly defined circumstances of incapacity or misbehaviour, through the due process of law.

It is therefore proposed that a person appointed a Chief Justice or Judge should normally serve until retirement age. As of now the retirement age for Judges is 74 years. In a departure from this, and the Draft Constitution's proposal of 60 years, the Committee considered that 70 years would be an appropriate retiring age for Judges. However, a Judge who has attained that age is authorized to remain in office for a limited period of not more than six months so as to enable him deliver judgment or to do any other thing in relation to the proceedings that were commenced before attainment of that age. The Committee took the view that the appropriate age may vary from person to person so that it should be possible to retire voluntarily with full benefits at any early age of 60 years, while it should be compulsory once a person attains the age of 70 when it will be normal for there to be some reduction in mental capacity to perform judicial functions.

### **3.13 Removal from Office**

The Committee considered that in order to protect the integrity and credibility of the Judiciary, there must be a procedure for removal of Judges who are incompetent, incapacitated or corrupt. On the other hand, there must be constitutional safeguards to protect the independence of the Judiciary, so that removal procedures cannot be wrongly utilized to victimize Judges who are not popular with those in positions of political power. Removal procedure must balance these two concerns. The necessary balance should be achieved by specifying in the Constitution the circumstances in which a Judge may be removed from office and the procedure to be followed in such cases.

The Committee took the view that where a question arises in relation to any of the grounds, an impartial tribunal to investigate the issue and advise the President should be established. The tribunal investigating the Judge's removal should be composed of four members from among persons who hold or have held office as a Judge of a superior court of record, or who are qualified to be appointed as such and three other persons with experience in public affairs. It was proposed that where complaints are forwarded for the removal of the Chief Justice, the President shall appoint the Speaker of the Senate as chairperson, three judges from states which have a common law jurisdiction and three other persons with experience in public affairs.

The innovation the Committee considered is that the tribunals should be self-regulatory and independent. Thus it was proposed that in the case of a tribunal investigating the removal of a Judge other than the Chief Justice, members should elect their Chairperson from among themselves. To maintain the integrity of the Judiciary, a Judge who is suspended from office pending investigation shall retain his or her full emoluments and benefits of office until such time as he or she may be removed from office, if such be the recommendation of the tribunal.

There was consensus that in order to guarantee the independence of the Judiciary, there should be an independent Judicial Service Commission involved in the procedures for appointment and removal of Judges. If it is to have sufficient standing and independence, this important body must be provided for in the Constitution. In general the functions of the Commission should be to control, discipline and recommend appointments and dismissals of officers within the Judiciary.

The Judicial Service Commission is at present provided for under section 68 of the Constitution of Kenya. It is composed of the Chief Justice as chairman; the Attorney General; two Judges designated by the President from the High Court and the Court of Appeal and the chairman of the Public Service Commission. The Commission is merely advisory to the President in matters of appointment and discipline of Judges; the ultimate power remains with the President. On this basis, the Committee proposed that the Commission should have more independent members and be given powers in appointment, and discipline of judicial officers.

### **3.14 The Judicial Service Commission**

There was consensus on the need for persons of integrity and credibility to be appointed to this body. Other than members holding positions on the Commission by virtue of another office (e.g. the Attorney General), members of the Judicial Service Commission should be appointed by the President, but subject to the approval of Parliament. This approval procedure should reduce risks of purely political appointments to this important body. They should be people of high integrity. After lengthy debate, the Committee resolved that the Commission should comprise of the Attorney General, three Judges designated by the Supreme Court, the Court of Appeal and the High Court, the Chief Registrar of the Judiciary, the Chief Kadhi, a representative of the Public Service Commission and the Law Society of Kenya.

It is obviously necessary for the Judges of the superior courts of record to be represented. Equally, to ensure that government views are considered, the Attorney General should continue to be involved. The Committee also considered that the Law Society of Kenya should be represented on the Commission by prominent, distinguished and experienced advocates in order to counter-balance what might be seen as the dominance by the Judiciary and the Attorney-General. While it is accepted that the legal profession should be involved, as its members will have useful insights into the capabilities of candidates for judicial appointment, they should not be so many as to dominate, as there are many other interests involved. As the Commission will be involved in appointments of magistrates, it will be useful for members of the Public Service Commission to be involved. By the same token, it was considered that the Chief Kadhi should be a member of the Commission as the body would be involved in the appointment and removal of kadhis.

### **3.15 The Attorney General**

Members of the Committee agreed that there should be an office of the Attorney General who should be the principal legal advisor to government. Secondly, when government is being sued, the Attorney General would be the official representative in such proceedings. There was consensus that the Attorney General should be appointed by the President on the recommendation of the Public Service Commission and subject to approval by Parliament. What members underscored is that the new constitutional framework should guarantee the independence of the Attorney General's office.

In many governments the Attorney General is also the Minister of Justice. In other cases the two offices are separated. Under the current Constitution of Kenya, the Attorney General is a member of the cabinet and an ex-officio Member of Parliament, the argument being that the Attorney General is able to develop better legislative proposals when he is party to the Cabinet's discussion and decision. The Committee noted that the people who presented their views to the Commission

suggested the separation of the offices. There were suggestions that there should be a professional Attorney General and a separate political Minister for Justice.

The Committee considered that the Attorney General's functions should be purely professional: drawing, perusing and recommending approval of all agreements in respect of which the Government has an interest, drafting legislation and representing the Government in any legal proceedings other than criminal proceedings. The Committee also considered that since the Attorney General will be a professional, his tenure of office should be guaranteed by the Constitution and should not depend on the incumbent President. However, some posited that the office of the Attorney General is both political and professional and should fall vacant if a new President assumes office or if the President so directs. It was their view that as an advocate, the Attorney General should not be imposed on the incumbent President, where the latter has no confidence in his legal services.

After protracted debate, there was a division in which the majority voted for the entrenchment of the Attorney General's tenure. **A minority view was registered, which we hereby reported, that the Attorney General should hold office at the pleasure of the incumbent President. Consequently, the proponents of the view felt that the Attorney General should be appointed by the President with the approval of Parliament.**

### **3.16 The Director of Public Prosecutions**

The Committee discussed the proposed establishment of an office of the DPP at length. Whereas the office exists at present, the Constitution of Kenya does not provide for the office. The Committee noted that the present DPP operates under the direction and control of the Attorney General who vide section 26(3) of the Constitution is the repository of constitutional authority in respect of all public prosecutions. Members took the view that since it is envisaged that the responsibility for instituting criminal prosecutions should vest in the DPP, the said office should be entrenched as an independent constitutional institution. Indeed the independence of the office is a fundamental issue. It should be understood that it is the DPP who decides whether to prosecute on behalf of the state as the powers are discretionary. It is the expectation of the Committee that the DPP should be enjoined by the Constitution to act in the best interest of the general society in making such a decision. Members also supported the proposition that the said body sever links with the Attorney General's office and the Ministry of Justice and Constitutional Affairs.

### **3.17 The Public Defender**

The importance of legal representation in the administration of justice cannot be gainsaid. Indeed, an accused who is not represented by an advocate in criminal proceedings may be doomed to lose his or her case largely because of inability to deal with the technicalities in the criminal law. But the fact is that the majority of the people cannot afford the fees charged by advocates. This fact contributes to great inequality between the rich and poor before the criminal courts. The Committee therefore supported the Report's proposal that there be established an independent office of Public Defender to provide legal advice and representation to persons who cannot afford legal services.

### **3.18 Prerogative of Mercy**

The Committee noted that it is important for the President to have the power to commute a sentence of death, to grant pardons, and reduce sentences. Such power should be mainly intended to enable the government to rectify injustices which only become apparent after the time for appeal against a conviction or sentence has passed. Members took the view that whereas the power should be vested in the President, such power should not be termed a prerogative.

The Committee also noted that the term prerogative powers connoted those powers recognized as inhering in but one person, the monarch. Such powers could only be exercised at the unqualified and unfettered discretion of the King over and above all other persons. Considering the history of

prerogative powers, the Committee felt that the powers should be exercised at the instance of an Advisory Committee. It was felt that the retention of the term “prerogative” would be a misnomer if such power was intended to be exercised by the President on the advice of a Committee. The Committee therefore renamed the clause: “Presidential Powers of Clemency”.

In order to ensure that the Presidential Powers of Clemency is not abused or exercised for political reasons, it was proposed that before the President exercises the power of mercy, he or she should be advised by an independent Advisory Committee and should act in accordance with the advice received. It was considered that the Committee be composed of persons from the legal profession while others have proposed that it should be a mixture of both legal officials and ordinary respectable citizens.

The current Advisory Committee on the Prerogative of Mercy is chaired by the Attorney General and is composed of not less than three and not more than five other persons appointed by the President. What members considered is that the membership of the said Committee should include representatives of the legal and medical professions, the Commission on Human Rights and Administrative Justice, the Probation Service and respectable ordinary citizens of high moral standing representative of religious organizations. It was considered that the Attorney-General as the principal legal advisor to the government should continue to be a member of the Committee, for it is important that full account is taken of all the issues that can be brought before it by virtue of the Attorney-General’s office.

Others proposed that the Director of Public Prosecutions should instead sit in the Committee as the Attorney General would no longer have prosecutorial powers. This argument was countered by the position that since the Director of Public Prosecutions is part of the judicial (read legal) process, it may cause difficulties to involve him or her in decisions on the grant of mercy to a person he or she may have prosecuted. Nonetheless, government concerns should not dominate, but rather, the concerns of society as a whole should be taken into account. It was therefore suggested that the Committee should include three prominent citizens. Another innovation is that the provisions enjoin Parliament to enact legislation establishing the criteria which the Advisory Committee shall apply in recommending cases for consideration for clemency. A member of the Committee however opposed the concept, arguing that sentences of convicted criminals should be carried out so as not to frustrate the independence of the Judiciary. Further, he posited that research had shown that a considerable percentage of previous beneficiaries of the prerogative of mercy had been involved in crime thereafter.

#### **4. Technical Recommendations and Decisions on the Draft Bill**

##### **Article 184: Principles (and Structure) of Judicial Power**

The Committee noted that the entire Draft Constitution acknowledges the sovereignty of the people and has made specific references thereof in Chapter 1- *the Sovereignty of the People and the Supremacy of the Constitution*; Chapter 7 -*the Legislature* and Chapter 8 - *the Executive*. *Article 1* provides that all sovereign authority belongs to the people and may be exercised by the Legislature, Executive and the Judiciary and Constitutional Commissions in the name of and for the benefit of the people. *Article 102* reiterates that Parliament has authority to exercise the sovereignty of the people whereas *Article 148* reaffirms that the powers of the Executive shall be exercised for the well being and benefit of the people of Kenya.

For purposes of consistency, it was reaffirmed that the courts should, by the same token, be required to exercise judicial power in the name of and for the common good of the people.

- The Committee amended sub-article (1)(a) to provide that judicial power shall be exercised ‘in the name and for the common good of the people’.
- Sub-article (1)(c) was amended by inserting the words “subject to ‘b’ above” whereas sub article (2) was adopted without any amendment(s).
- A new sub article (3) establishing the offices of Chief Justice, Deputy Chief Justice and Chief Registrar of the Judiciary was introduced. As a result, the numbering of sub articles (3), (4) and (5) changed accordingly.
- Sub article 184(3), now 184(4) was amended to require courts and tribunals to administer ‘justice to all irrespective of their status’; to promote alternative dispute resolution mechanisms where appropriate and to protect and promote the ‘purpose and principles of the Constitution’. Sub articles (4) and (5), now (5) and (6) respectively were adopted without amendment(s).

The Committee considered that the scheme of separation of executive, legislative and judicial powers as a basis of preserving political liberty. Each organ of the state must confine its activities to its sphere, without encroaching upon the functions of other organs. The Committee noted that the clause vesting ‘judicial power’ exclusively in the courts and tribunals prohibits the other organs of the State from interfering with or overruling an individual adjudication.

- The Committee adopted the ‘vesting clause’ – that judicial power shall vest exclusively in the courts of law.

The Committee considered that the Constitution should establish the offices of the Chief Justice, the Deputy Chief Justice and the Chief Registrar of the Judiciary as substantive constitutional offices. Members noted that this would streamline judicial administration in the courts and tribunals. Members agreed that the Chief Registrar should be the Chief Administrator and accounting officer of the Judiciary.

The Committee noted that improving access to justice is a critical element in judicial reforms. There was general agreement amongst the members that the judicial process should be accessible to the ordinary Kenyans and that the administration of justice should be speedy, efficient, meritorious, accessible and restorative. Another proposal that the Committee considered was the need to promote Alternative Dispute Resolution mechanisms in the new constitutional order. The Committee reaffirmed that the Judiciary should uphold legality and constitutionalism by protecting and promoting the purpose and principles of the Constitution.

The Committee further considered that judicial independence and integrity are fundamental pillars of the rule of law. The Judiciary upholds the rule of law and legality by making authoritative interpretations of the law, settling legal disputes in accordance with the law and ensuring the supremacy of the law in its adjudicative role. Considering these functions, the need to ensure judicial propriety and independence cannot be gainsaid.

The Committee approved the establishment of an appropriate infrastructure to uphold ethical standards in the Judiciary. Further, the Committee proposed that there should be improved professionalism among judicial personnel. Accordingly, continuing education for Judges and training for other court officials to improve their skills should be accepted as an imperative. The state should be required to provide resources and opportunities to members of the Judiciary to enable them deliver the highest standards of service to the public. The Committee therefore approved and adopted constitutional safeguards enshrined in the article to ensure Judicial Independence.

### **Article 185: Hierarchy of Courts**

The Committee examined the judicial structure as currently constituted in the Constitution of Kenya. Whereas it was noted that the current Court of Appeal and the High Court should be retained as superior courts of record, the Committee supported the establishment of a further tier namely the Supreme Court. Members took the view that the Supreme Court should be the apex judicial structure. The Committee also took the view that the magistrates' courts and Kadhis courts should be retained as subordinate courts. Another innovation the Committee approved was the establishment of traditional or local courts by specific Acts of Parliament. Members also approved a motion to entrench courts martial as courts subordinate to the High Court. Further, the Committee entrenched the Industrial court as a subordinate court. It was noted that the Industrial Court played a critical role in resolving labour disputes hence its elevation to constitutional status.

The Committee therefore adopted the article albeit with a few amendments thus:

- Article 185(3) (b) was amended by inserting courts martial as a category of subordinate courts.
- A new clause was immediately after article 185(3) empowering Parliament to enact legislation establishing a court with jurisdiction to determine disputes arising a lot of labour relations.

### **Article 186: Independence of the Judiciary**

The Committee considered that an independent Judiciary is indispensable to impartial administration of justice under the law. Generally, judicial officers should uphold and exemplify judicial independence both in its institutional and individual aspects. Decisional independence ensures that the Judiciary is independent of extraneous influence, which enables it to render impartial and objective decisions in individual cases. Institutional independence of the Judiciary ensures that this organ of state is not controlled by any other organ of state. This has a particular bearing on the appointment and removal of judicial officers, their security of tenure and their financial independence in terms of allocation and remuneration and judicial discipline. The Committee therefore adopted the constitutional safeguards enshrined in the article to ensure judicial integrity and independence. Further,

- The Committee enshrined a new provision that the office of a judge of the superior court of record shall not be abolished while there is a substantive holder of the office.

### **Article 187: The Supreme Court**

The Committee considered that the Constitution should establish the Supreme Court as the highest court in the land. The Committee took the view that the Supreme Court should consist of the Chief Justice, who shall be the President of the Court, the Deputy Chief Justice as Vice President of the Court and not less than five and not more than seven other judges. Further, it was considered that since the Chief Justice would retire upon the effluxion of his or her term of ten years, she or he should have the option to continue in office as a Judge of the Supreme Court, notwithstanding that there may already be the maximum permitted number of Supreme Court Judges holding office. Thus, the article was reformulated to factor the provisions and further that:

- The Supreme court shall sit in Nairobi;
- The office of the Chief Justice, and the Deputy Chief Justice be established as substantive constitutional offices.

### **Article 188: General Jurisdiction of the Supreme Court**

Debate on the jurisdiction of the Supreme Court began with a motion to delete the provisions granting original jurisdiction in the apex court. Proponents of the motion took the view that the Supreme Court should be the final arbiter, and solely an appellate court. It was considered further that the granting of original jurisdiction in the Supreme Court with respect to advisory opinion requested by the President and the impeachment of the President would undermine the ideals of the doctrine of separation of powers. Members also felt that such an arrangement would impugn judicial independence.

On a balance, the Committee took the view that whereas the Supreme Court should not be the repository of unlimited original jurisdiction, a certain range of issues which require speedy and authoritative adjudication should be determined by the Supreme Court. Members considered that given the uncertainty and instability that may be occasioned by litigation in respect of presidential election petitions and disputes relating to the impeachment of the President, these cases should be determined with dispatch. Accordingly, articles 188(1) (ii) and (iii) were retained whereas articles 188 (1), (i), (iv) and (v) were deleted. Further;

- The Committee inserted a new clause as a control measure requiring the Supreme Court to be constituted by all the Judges thereof where it is in the interest of justice and jurisprudence to depart from its previous decisions.

### **Article 189: Supervisory Jurisdiction of the Supreme Court**

The Committee considered that the exercise of supervisory jurisdiction played a critical role in upholding legality by the lower courts of law. Members however felt that the Supreme Court should not be the repository of such powers. The Committee took the view that supervisory jurisdiction should be exercised by a superior court of record with a spatial spread in the country such as the High Court. It was felt that it would not be practical to vest the Supreme Court with supervisory jurisdiction over all other lower courts as the said Court would be overloaded with such cases.

### **Article 190: The Court of Appeal**

In a departure from the Draft Bills formulation, the Committee took the view that matters of the administration of justice were dynamic and as such the number of Judges and the organization and administration of the Court should be prescribed by an Act of Parliament. Accordingly, the provisions regarding the President of the Court, the constitution of the Court, the minimum number of Judges, the creation of Divisions of the Court and the sittings of the Court of Appeal were deleted, the argument being that these details should be enacted under ordinary legislation.

### **Article 191: Jurisdiction of the Court of Appeal**

It was considered that the Court of Appeal should be retained as a superior court of record with jurisdiction to hear appeals from the High Court and any other court or tribunal prescribed by an Act of Parliament. Whereas it follows that appeals to the Court of Appeal would emanate ordinarily from the High Court in terms of the hierarchy of courts, the Committee's formulation contemplates that Parliament may vest appellate jurisdiction in the Court of Appeal through

ordinary legislation. Such may include "leap frog" appeals from lower courts or tribunals. Further, the Committee deleted clause (2) as it deemed it superfluous.

#### **Article 192: The High Court**

In a departure from the Draft Bill's formulation, the Committee took the view that matters of the administration of justice were dynamic and as such the number of Judges, the organization and the administration of the High Court should be prescribed by an Act of Parliament. Accordingly, the provisions regarding the Principal Judge, the minimum number of Judges, the creation of Divisions of the High Court and the sittings of the High Court were deleted, the argument being that these details should be enacted under ordinary legislation.

#### **Article 193: Jurisdiction of the High Court**

It was considered that the High Court should have unlimited original jurisdiction in criminal and civil cases and in all cases relating to the interpretation and enforcement of the provisions of the Constitution. The Committee noted that it should come out in fine print that the Supreme Court shall have exclusive jurisdiction in relation to presidential election petitions and disputes relating to the process of impeachment of the President. The Committee also adopted the formulation that the High Court may have any other jurisdiction, appellate or original, conferred on it by or under an Act of Parliament.

#### **Article 194: Appointment of Judges**

The Committee took the view that the system of appointment of Judges should ensure that the best candidates are appointed to judicial office. Members considered that the appointments process should ensure scrutiny at all levels of the involved institutions. The Committee rejected the formulation that where a vacancy exists in a judicial office, the most Senior Judge by reference to the appointment date should be appointed thereto. It was considered that seniority did not translate to competence and that the process of appointment should be left open in order to attract eligible candidates. Thus the Committee redrafted the article so that the Chief Justice, the Deputy Chief Justice and Judges of the superior courts of record are appointed by the President on the recommendation of the Judicial Service Commission and the approval of the National Assembly.

#### **Article 194A: Supervisory Jurisdiction of the High Court**

The Committee adopted a new article granting the High Court supervisory jurisdiction over subordinate courts and other bodies exercising judicial or quasi-judicial functions. Further, members approved a formulation that such jurisdiction may not be exercised by the High court over any other superior court of record. Members observed that the exercise of supervisory jurisdiction was an important instrumentality in ensuring the fair administration of justice by the lower courts of law.

#### **Article 195: Qualifications for Appointment of Judges**

The Committee adopted most of the provisions of the Draft Bill on qualifications for appointment of Judges of the superior courts of record. The Committee however deleted the provision on the eligibility of full time law teachers for appointment to the superior courts of record. The provisions on intellectual ability as a qualification was retained and buttressed by a provision recognizing eminence in legal practice as a further qualification. Further, the Committee considered that only

professionally qualified magistrates in the case of the High Court should be eligible for appointment.

#### **Article 196: Tenure of Office**

The Committee considered that a Judge should retire from office on attaining the age of seventy years but may retire at any time after attaining the age of sixty years. Further, the Committee adopted the formulation that a Judge shall continue in office for a period of not more than six months in order to enable him or her deliver a judgment in relation to proceedings commenced before the attainment of the retirement age.

#### **Article 197: Removal from Office**

The Committee adopted the provisions on the removal of Judges from office albeit with a few amendments. Members considered that misbehaviour whether in the performance of a Judge's function(s) or otherwise should be a ground for removal from judicial office. Further, the Committee took the view that a breach of a code of conduct for judicial officers and bankruptcy should constitute grounds for removal from office.

The Committee also approved the formulation that any person (including a juristic person) may petition the Judicial Service Commission setting out the alleged facts constituting the grounds for a Judge's removal. Upon receipt and examination of the petition, the Judicial Service Commission shall send the petition to the President if it is satisfied that it discloses the existence of a ground. The President would then be obliged to act in accordance with the advice of the Judicial Service Commission. Should the Judicial Service Commission advise the appointment of a tribunal, the tribunal shall inquire into the matter and report on its findings to the President who shall act in accordance with the recommendations of the tribunal. The Committee further inserted two clauses thus:

- That a Judge suspended from office shall retain his full remuneration and benefits until such a time as the Judge may be removed from office, if such be the recommendation of the tribunal;
- That the tribunals(s) inquiring into the removal of a Judge shall elect a Chairperson from among its members and shall in all other respects be responsible for the regulation of their affairs.

#### **Article 198: Subordinate courts**

The Committee adopted the article with a minor amendment enshrining courts martial as subordinate courts of law.

#### **Article 199: The Kadhis Courts**

The Committee noted that it had consistently recommended the composition, administration and organisation of other courts by specific Acts of Parliament. The article was therefore reformulated with most provisions deleted and recommended for inclusion in ordinary legislation.

#### **Article 200: Jurisdiction of the Kadhis Courts**

The Committee took the view that Kadhis courts should be subordinate courts with confined and defined jurisdiction to determine questions of Islamic law relating to personal status, marriage,

divorce, inheritance and succession in proceedings in which parties profess the Islamic faith. Accordingly, the article was fundamentally reformulated. The provision on the other jurisdiction contemplated by the Draft Bill such as civil and commercial disputes between parties who are Muslims, and disputes over the administration of Wakf property were deleted. Similarly, the provisions on the appeal system of Kadhis' courts were deleted.

#### **Article 201: Appointment of Kadhis**

The Committee considered that the appointment of Kadhis should be done by the Judicial Service Commission in accordance with an appropriate Act of Parliament. Accordingly, the article was deleted in its entirety.

#### **Article 202: Qualifications of Kadhis**

Noting the Committee's decision that the composition, administration and organisation of Kadhis courts should be prescribed by an act of Parliament, Members resolved that the qualifications of Kadhis should also be a candidate for prescription in an Act of Parliament. Accordingly, the article was deleted in its entirety.

#### **Article 203: Rules Committee**

The Committee took the view that the Rules Committee should not be elevated to constitutional status. It was suggested that considering the dynamic nature of the administration of justice, the Rules Committee should not be constitutionalised. Members further noted that the said Committee is currently constituted under the Civil Procedure Act (Cap 21) Laws of Kenya.

#### **Article 204: The Judicial Service Commission**

Considering the fundamental role(s) vested in the Judicial Service Commission, the Committee observed that the said commission should be representative and independent. In a departure from the current Judicial Service Commission in the Constitution of Kenya, the Committee approved the provisions of the Draft Bill on a more representative Judicial Service Commission. Members however felt that certain categories of persons listed in the Draft Bill should not sit in the Commission and accordingly deleted the corresponding provisions. Another innovation the Committee considered is that the Commission should elect a chairperson from among its members.

#### **Article 205: Functions of the Judicial Service Commission**

The Committee considered that the Judicial Service Commission should be granted adequate functions to enhance the independence of the Judiciary. According to the formulation, the Commission shall be responsible for recommending to the President persons for appointment as Judges; reviewing and making recommendations on the terms of service of judicial officers; reviewing and investigating complaints against Judges in accordance with the Constitution and implementing programmes for judicial training among other functions. The Committee noted that given the dynamism in the administration of justice, additional functions may be granted to the Commission by or under an Act of Parliament. What members underscored is that the Commission should be independent so as to perform its oversight functions over judicial officers.

### **Article 206: Appointment and removal of certain judicial officers**

Whereas the Committee observed that the appointment and removal process of judicial officers had implications on their independence and integrity, it was considered that the details in the article should be prescribed in ordinary legislation. Further, the Committee took the view that the provision had been captured under article 198(2) of the Draft Bill which states that no judicial officer in the office of magistrate or Kadhi may be removed from office except after determination by the Judicial Service Commission on such grounds as may be prescribed by an Act of Parliament. Accordingly, the article was deleted in its entirety.

### **Article 207: Salaries and retirement benefits**

Whereas the Committee noted that the provisions guaranteeing the financial stature of the Judiciary would enhance the institutional independence of the Judiciary, it was considered that the article was superfluous, as the provisions had been captured in article 186 on the *Independence of the Judiciary*. Accordingly, the article was deleted in its entirety.

### **Article 208: Attorney General**

The Committee observed that the Constitution should establish the office of the Attorney General as an independent institution. It was further considered that the said institution be an office in the public service. Accordingly, and given that the Attorney General is not a judicial officer, the Committee considered that the Attorney General be appointed by the President on the recommendation of the Public Service Commission with the approval of the National Assembly. The Committee also observed that given that the Attorney General is the titular head of the bar, the qualifications for his or her appointment should be similar to the qualifications for appointment to the office of the Chief Justice. The Committee approved the formulation that the Attorney General be the principal legal advisor to the Government and further fleshed out specific duties of the office. Further, the Committee redrafted the article by adding the following new clauses:

- that the Attorney General shall promote, protect and uphold the rule of law and defend the public interest;
- that the powers of the Attorney General may be exercised by subordinate officers acting in accordance with his or her general instructions;
- that the Attorney General shall not be under the direction or control of any person or authority in the exercise of his or her functions;
- that the Attorney General shall hold office for a term of ten years and shall not be eligible for reappointment.

### **Article 209: Director of Public Prosecution**

The Committee unanimously approved the division of powers currently vested in the Attorney General to different institutions including the offices of the Director of Public Prosecutions and the Public Defender. Members considered that the latter two be established as an independent office in the Public Service. Appointed by the President on the recommendation of the Public Service Commission and the approval of the National Assembly, the DPP shall hold office for a term of ten years and shall not be eligible for reappointment.

The Committee also elevated to constitutional status a provision on criminal law, that where a discontinuance of a case by the DPP takes place after the accused has completed the delivery of his or her defence, the accused shall be acquitted.

#### **Article 210: Public Defender**

The Committee approved the establishment of the office of the Public Defender as an office in the Public Service. Considering that the Public Defender is not a judicial officer, she or he should be appointed by the President on the recommendation of the Public Service Commission and with the approval of the National Assembly. Further, the Committee adopted two new clauses thus:

- That the Public Defender shall hold office for a term of ten years and shall not be eligible for reappointment.

#### **Article 210A: Removal from Office**

The Committee considered that in order to ensure the accountability and integrity of the offices of Attorney General, Director of Public Prosecutions and the Public Defender, there should be provisions prescribing the grounds for their removal and the mode thereof. The Committee adopted the provisions on article 197 *mutatis mutandis* on removal from office for Judges. Removal from office would be initiated by a person aggrieved petitioning the Public Service Commission setting out the alleged facts constituting the grounds for removal of the office holder in question. In the case of the Attorney General, the removal would proceed in the terms of removal of the Chief Justice, of course with the necessary changes. Similarly, the Director of Public Prosecutions and Public Defender would be liable to removal in the terms of removal of a Judge.

#### **Article 211: Prerogative of Mercy**

In a departure from the Draft Bill and the present Constitution of Kenya, the Committee renamed the article as Presidential Powers of Clemency. The Committee also substituted the substance of the article with other novel provisions such as a requirement that the powers be exercised by the President on the petition of any person and in accordance with the advice of an Advisory Committee on the Presidential Powers of Clemency.

Further, the Committee enshrined a clause requiring Parliament to enact legislation establishing criteria to be applied by the said Advisory Committee in formulating its advice to the President. Additionally, the Committee substituted the composition of the Advisory Committee with members representative of various categories of society including the medical profession, the religious fraternity, the legal profession and governmental organizations such as the Correctional Services and the Commission on Human Rights and Administrative Justice. The Committee also adopted the innovation that the Advisory Committee shall elect its chairperson from among the members and regulate its own procedure.

#### **Article 212: The Profession of Law**

Whereas the Committee acknowledged that the people of Kenya had decried the professional decline of members of the legal profession, it was considered that the retention of the article would be tantamount to constitutionalising the profession. Accordingly, the article was deleted in its entirety.

## **Conclusion**

The rule of law is built on the cornerstone of an efficient and effective judicial system. The rule of law and constitutionalism cannot succeed if there is no judicial system that is independent and where the courts can interpret and apply the law in an impartial, predictable, efficient and transparent manner. The Committee considered that judicial independence has two-core functions- to limit government power and to protect the rights of individuals. Two main themes ran through the debate-

- Judicial reforms aimed at institutional redesign, the institution of mechanisms to ensure judicial independence through merit selection of judges, the enforcement of an appropriate ethical infrastructure for judicial officers, the professionalisation of the Judiciary and the establishment of constitutional safeguards to ensure judicial accountability;
- Legal reforms aimed at enhancing the independence, integrity, effectiveness, efficiency and equity and accountability in the administration of justice through the establishment of the offices of the Attorney General, Director of Public Prosecutions, the Public Defender and the creation of measures generally to enhance access to justice.

The Committee notes that public confidence in the Judiciary is perceived by many to be in a serious state of decline. The recent ‘radical surgery’ in the Judiciary both confirms and reflects the declining public confidence in the courts. Yet if judicial independence and integrity is to be preserved, the public’s trust in the Judiciary must be restored. Revitalizing public confidence in the Judiciary and the legal system depends to a large extent on the present constitutional moments. The Committee considers that the best way to reform the Judiciary is through long-term institutional reforms entrenched in the Constitution. Such constitutional provisions may also have to be buttressed with ordinary legislation. These are the prospects and challenges.

**5. SPECIFIC RECOMMENDATIONS ON THE AMENDMENTS TO THE DRAFT BILL ARTICLE BY ARTICLE**

ARTICLE	AS PRINTED IN THE DRAFT BILL	AS ADOPTED BY THE TWC	AS FORMULATED BY THE MINORITY	EXPLANATORY NOTES
184(1)	<p><b>Judicial power</b></p> <p>Judicial power is derived from the people and shall be exercised by the courts –</p> <p>(a) in the name of the people;</p> <p>(b) in conformity with the Constitution and the laws; and</p> <p>(c) in conformity with the values, norms and aspirations of the people.</p>	<p><b>Principles and Structure of Judicial Power</b></p> <p>(1) Judicial power is derived from the people and shall be exercised by the courts –</p> <p>(a) in the name and for the common good of the people;</p> <p>(b) in conformity with this constitution and the laws; and</p> <p>(c) subject to paragraph (b) above, in conformity with the values, norms and aspirations of the people.</p>		<p>The entire Draft Constitution recognizes sovereignty of the people; that the people are the repository of all state powers including judicial power.</p> <p>The Judiciary is the main organ charged with upholding constitutionalism and the rule of law.</p> <p>Considering that the people are sovereign, the Judiciary should uphold the common good of the people, as long as such is in conformity with constitutional norms and principles.</p>
184(2)	Judicial power shall vest exclusively in the courts and tribunals established under this Constitution.	(2) Judicial power shall vest exclusively in the courts and tribunals established under this Constitution.		The vesting clause prevents any other organ of state from arrogating itself judicial power.
<b>184(2a)</b>	<b>New</b>	<b>(2a)(a) There is established the office of the Chief Justice who</b>		The offices of the Chief Justice, Deputy Chief

ARTICLE	AS PRINTED IN THE DRAFT BILL	AS ADOPTED BY THE TWC	AS FORMULATED BY THE MINORITY	EXPLANATORY NOTES
		<p><b>shall be the head of the Judiciary;</b></p> <p><b>(b) Subject to Article 196(1), the Chief Justice shall serve for a period of ten years or until the Chief Justice reaches the age of seventy years, whichever shall be the earlier.</b></p> <p><b>(c) If the Chief Justice has not reached the age of seventy years at the expiry of the period of ten years referred to in paragraph (b) the Chief Justice may –</b></p> <p><b>(i) retire (provided that the Chief Justice has reached the age of sixty years);</b></p> <p><b>(ii) continue in office as a judge of the Supreme Court, notwithstanding that there may already be the maximum permitted number of supreme court judges holding office, or</b></p> <p><b>(iii) resign from the bench.</b></p> <p><b>(d) There is established the office of the Deputy Chief Justice who shall be the principal Assistant to</b></p>		<p>Justice and Chief Registrar shall be established as substantive constitutional offices.</p> <p>Considering the judicial functions of the Chief Justice, it was felt that it is necessary to limit the term of the office to ten years.</p> <p>Upon effluxion of the Chief Justice's term before attaining the retirement age, he or she should be given an option of continuing to serve as a judge of the Supreme Court.</p>

ARTICLE	AS PRINTED IN THE DRAFT BILL	AS ADOPTED BY THE TWC	AS FORMULATED BY THE MINORITY	EXPLANATORY NOTES
		<p><b>the Chief Justice;</b></p> <p><b>(e) (i) There is established the office of the Chief Registrar of the Judiciary and such other offices of Registrars as may be created by the Judicial Service Commission;</b></p> <p><b>(ii) The Chief Registrar of the Judiciary shall be the Chief Administrator and Accounting officer of the Judiciary.</b></p>		
184(3)	<p>In applying the law to cases of a civil or criminal nature, the courts shall be guided by the following principles:</p> <p>(a) justice shall be done to all, irrespective of social or economic status;</p> <p>(b) justice shall not be delayed;</p> <p>(c) adequate compensation shall be awarded to victims of wrongs;</p> <p>(d) reconciliation, mediation and arbitration between parties shall be promoted;</p> <p>(e) justice shall be administered without undue regard to technicalities;</p>	<p>(3) In applying the law to cases of a civil or criminal nature, the courts and tribunals shall be guided by the following principles:</p> <p>(a) justice shall be done to all, irrespective of their status;</p> <p>(b) justice shall not be delayed;</p> <p>(c) adequate compensation shall be awarded to victims of wrongs;</p> <p>(d) reconciliation, mediation and arbitration between parties should be promoted;</p>		<p>The administration of justice should be fair, equitable, efficient and effective. Further, the courts of law and tribunals should administer justice without undue regard to technicalities.</p>

ARTICLE	AS PRINTED IN THE DRAFT BILL	AS ADOPTED BY THE TWC	AS FORMULATED BY THE MINORITY	EXPLANATORY NOTES
	(f) the protection and promotion of the principles and purpose of the Constitution.	(e) justice shall be administered without undue regard to technicalities; and  (f) the purpose and principles of this Constitution shall be protected and promoted.		
184(4)	In the performance of their functions the courts, their officers and persons participating in the administration of justice –  (a) shall strive to deliver the highest standard of service to the public;  (b) are bound by the Leadership and Integrity Code of Conduct; and  (c) shall continue to educate themselves in current development in the laws of Kenya and comparative law.	(4) In the performance of their functions the courts, their officers and persons participating in the administration of justice –  (a) shall strive to deliver the highest standard of service to the public;  <b>(b) shall comply with the duties prescribed under Article 277 and in the Code of Conduct set out in the Fifth Schedule; and</b>  (c) shall continue to educate themselves in current development in the laws of Kenya and comparative law.		There should be an appropriate ethical infrastructure as one of the mechanisms for enhancing the independence and integrity of the Judiciary.
184(5)	The state shall provide reasonable resources and opportunities shall be made available for members of the Judiciary to enable them to deliver the highest standards of service to the public	(5) The state shall provide reasonable resources, and opportunities shall be made available for members of the Judiciary to enable them to deliver		Such a constitutional safeguard would ensure financial autonomy of the Judiciary and logically judicial

ARTICLE	AS PRINTED IN THE DRAFT BILL	AS ADOPTED BY THE TWC	AS FORMULATED BY THE MINORITY	EXPLANATORY NOTES
		the highest standards of service to the public.		independence.
185(1)	<p><b>Hierarchy of Courts</b></p> <p>The Judiciary consists of the courts, judges, magistrates and other judicial officers of superior courts of record, and subordinate courts.</p>	<p><b>Hierarchy of Courts</b></p> <p>(1) The Judiciary shall consist of the courts, judges, magistrates and other judicial officers of superior courts of record, and subordinate courts.</p>		
185(2)	The superior courts of record are the Supreme Court, the Court of Appeal, and the High Court.	(2) The superior courts of record shall be the Supreme Court, the Court of Appeal, and the High Court.	The superior courts of record shall be the Supreme Court, the Court of Appeal, the High Court and the Industrial Court.	The Industrial Court is a special statutory tribunal whose status, composition, jurisdiction and administration should be stipulated by an Act of Parliament.
185(3)	<p>The subordinate courts are –</p> <p>(a) the Magistrates’ courts and the Kadhis’ courts,</p> <p>(b) any other courts established by an Act of Parliament subordinate to the High Court, and</p> <p>(c) any traditional or local tribunals with limited jurisdiction in issues of local significance, that may be established by an Act of Parliament.</p>	<p>(3) The subordinate courts shall be –</p> <p>(a) the Magistrates’ courts and the Kadhis’ court;</p> <p>(b) the courts martial and any other courts subordinate to the High Court established by an Act of Parliament ; and</p> <p>(c) any traditional courts or local tribunals that may be established by an Act of Parliament.</p>	<p>The subordinate courts are –</p> <p>(a) the Magistrates’ courts and other courts established by an Act of Parliament.</p>	<p>It was considered that there should be a constitutional basis for Kadhis courts as these are judicial bodies that adjudicate on matters of law relating to personal law where both parties are Muslim.</p> <p>Noting that there should be improved and greater access to the administration of justice,</p>

ARTICLE	AS PRINTED IN THE DRAFT BILL	AS ADOPTED BY THE TWC	AS FORMULATED BY THE MINORITY	EXPLANATORY NOTES
				there should be a category of courts namely traditional or small claims courts with greater geographical spread.
185(4)	<b>New</b>	<b>(4) Without prejudice to the generality of paragraph (3)(b), parliament shall, within six months of the coming into force of this Constitution, enact a law to establish a court with jurisdiction to hear and determine disputes relating to employment that may arise among employers and employees.</b>		The Committee revisited the issue of an Industrial Court. Noting the role such a court would play in the resolution of disputes relating to labour relations, the said Court should be constitutionalised, albeit as a subordinate court, and the details thereof to be provided in ordinary legislation.
186(1)	<b>Independence of the Judiciary</b>  In the exercise of judicial power, the Judiciary is subject only to the Constitution and is not subject to the control or direction of any other person or authority.	<b>Independence of the Judiciary</b>  (1) In the exercise of judicial power, the Judiciary shall be subject only to this Constitution and shall not be subject to the control or direction of any other person or authority.		
<b>186(1a)</b>	<b>New</b>	<b>(1a) The office of a judge of the superior courts of record shall not be abolished while there is a substantive holder of the office.</b>		This is a common clause in most constitutions for ensuring the security of tenure of Judges and

ARTICLE	AS PRINTED IN THE DRAFT BILL	AS ADOPTED BY THE TWC	AS FORMULATED BY THE MINORITY	EXPLANATORY NOTES
				judicial independence.
186(2)	The administrative expenses of the Judiciary, including the salaries, allowances, gratuities and pensions payable to, or in respect of, persons serving in the Judiciary are a charge on the Consolidated Fund.	(2) The administrative expense of the Judiciary, including the salaries, allowances, gratuities and pensions payable to, or in respect of, persons serving in the Judiciary, shall be a charge on the Consolidated Fund.		
186(3)	No judicial officer shall be liable in an action or suit in respect of anything done in the performance of a judicial function.	(3) No judicial officer shall be liable in an action or suit in respect of anything done in good faith in the lawful performance of a judicial function.		
186(4)	The salaries, allowances, gratuities and pensions payable to, or in respect of persons serving in, the Judiciary, shall not be varied to their disadvantage.	(4) The salaries, allowances, benefits, gratuities and pensions payable to, or in respect of persons serving in, the Judiciary, shall not be varied to their disadvantage.		
186(5)	Court fees shall be reasonable and shall not be such as to discourage the use of the court system.	Deleted (Referred to the Committee on the Bill of Rights for possible incorporation under article 67 on Access to Courts)		Whereas the Committee acknowledged that exorbitant court fees may be a bar to access to justice, it was felt that the clause requiring the setting of reasonable court fees was an issue of human rights related to article 67 of the Draft Constitution on the

ARTICLE	AS PRINTED IN THE DRAFT BILL	AS ADOPTED BY THE TWC	AS FORMULATED BY THE MINORITY	EXPLANATORY NOTES
				Right to access to Courts.
186(6)	The Salaries and Remuneration Commission shall ensure that the emoluments and terms of conditions of service encourage and enhance the integrity and independence of the Judiciary.	Deleted		The Draft Constitution establishes a Salaries and Remunerations Commission (article 290) whose functions is to set salaries of all constitutional office holders including judges and it would be unnecessary to state that under article 186.
187(1)	<p><b>The Supreme Court</b></p> <p>The Supreme Court consists of –</p> <p>(a) the Chief Justice, who is the head of the Judiciary, and</p> <p>(b) not more than six judges.</p>	<p><b>The Supreme Court</b></p> <p>(1) The Supreme Court shall consist of –</p> <p>(a) the Chief Justice, who shall be the president of the court;</p> <p>(aa) the Deputy Chief Justice who shall be the vice-president of the court; and</p> <p>(b) not less than five and not more than seven other judges.</p>		The Committee took the view that considering the institutional decline of the Judiciary, a new tier namely the Supreme Court should be established as the final court in the land.
187(2)	New	(2) <b>The Supreme Court shall be</b>		

ARTICLE	AS PRINTED IN THE DRAFT BILL	AS ADOPTED BY THE TWC	AS FORMULATED BY THE MINORITY	EXPLANATORY NOTES
		properly constituted for the purposes of its proceedings if it is composed of five judges.		
187(3)	New	(3) The Supreme Court shall sit in Nairobi.		
188(1)	<p><b>General Jurisdiction of the Supreme Court</b> The Supreme Court has –</p> <p>(a) original jurisdiction –</p> <p>(i) with respect to advisory opinions requested by the President;</p> <p>(ii) in respect of presidential election petitions</p> <p>(iii) in issues relating to impeachment of the President;</p> <p>(iv) in respect of any challenge to the constitutionality of any Act of Parliament; and</p> <p>(v) in respect of any dispute between the districts or between a district and the national government.</p> <p>(b) appellate jurisdiction as conferred by an Act of Parliament.</p>	<p><b>Jurisdiction of the Supreme Court</b></p> <p>(1) The Supreme Court shall have –</p> <p>(a) original jurisdiction –</p> <p>(i) in respect of presidential election petitions;</p> <p>(iii) in issues relating to impeachment of the President; and</p> <p>(b) appellate jurisdiction to hear appeals from the Court of Appeal or from any other court or tribunal as may be prescribed by an Act of Parliament.</p>		<p>Due to the anxiety, uncertainty and instability that may be occasioned by protracted litigation in issues relating to the impeachment of the President and presidential election petitions, the cases should be heard promptly and with finality, the forum being the Supreme Court from where there would be no appeal.</p>
188(2)	Where a question relating to original	Deleted		The Supreme Court's

ARTICLE	AS PRINTED IN THE DRAFT BILL	AS ADOPTED BY THE TWC	AS FORMULATED BY THE MINORITY	EXPLANATORY NOTES
	jurisdiction of the Supreme Court arises in any other court, that court shall stay the proceedings and refer the question to the Supreme Court for determination; and the court from which the question arose shall act in accordance with the decision of the Supreme Court.			original jurisdiction as prescribed in article 188 (1) ousts the jurisdiction of other courts in relation to the same. This clause is rendered otiose.
188(3)	The Supreme Court may depart from its previous decisions in the interests of justice.	(3) The Supreme Court shall not be bound by its previous decision if it were to be in the interests of justice and of the development of the law and jurisprudence not to be so bound.		
<b>188(3A)</b>	<b>New</b>	<b>(3A) Notwithstanding the provisions of Article 187(2) a decision made in accordance with clause (3) may only be made by a sitting of the Court attended by all of the judges of the Supreme Court for the time being holding office.</b>		
188(4)	All other courts are bound by the decisions of the Supreme Court.	(4) All other courts shall be bound by the decisions of the Supreme Court.		
189(1)	<b>Supervisory Jurisdiction of the Supreme Court</b>  The Supreme Court has supervisory jurisdiction over all Courts and over any	Deleted		Whereas the Committee noted that the exercise of supervisory jurisdiction was a fundamental control

ARTICLE	AS PRINTED IN THE DRAFT BILL	AS ADOPTED BY THE TWC	AS FORMULATED BY THE MINORITY	EXPLANATORY NOTES
	person, body or authority which exercises an adjudicating function.			mechanism of subordinate courts, it was felt that the Supreme Court would be overloaded if it was vested with the power. Article 189 was deleted in its entirety.
189(2)	For the purposes of clause (1), the Supreme Court may call for the record of any proceedings before any court or tribunal and make such orders, issue such writs and give such directions as it may consider appropriate for the purpose of ensuring the fair administration of justice.	Deleted		
190(1)	<p><b>The Court of Appeal</b></p> <p>The Court of Appeal consists of –</p> <p>(a) the President of the Court, and</p> <p>(b) not less than ten judges.</p>	<p><b>The Court of Appeal</b></p> <p>The Court of Appeal shall –</p> <p>(a) consist of such number of judges; and</p> <p>(b) be organised and administered, as may be prescribed by an Act of Parliament.</p>		
190(2)	The Court of Appeal is constituted by three judges.	Deleted		The Committee considers that this clause will be catered for in

ARTICLE	AS PRINTED IN THE DRAFT BILL	AS ADOPTED BY THE TWC	AS FORMULATED BY THE MINORITY	EXPLANATORY NOTES
				legislation.
190(3)	The Court of Appeal is bound by the decisions of the Supreme Court and by its own previous decisions.	Deleted		
190(4)	The High Court and the subordinate courts are bound by the decisions of the Court of Appeal.	Deleted		Where the Supreme Court overturns the decision of the Court of Appeal, the High Court would not be bound by such decision of the latter.
190(5)	<p>The President of the Court of Appeal may, in consultation with the Chief Justice, create Divisions of the Courts of Appeal –</p> <p>(a) consisting of the number of judges assigned to them by the Chief Justice, and</p> <p>(b) sitting at the places determined by the President of the Court of Appeal in consultation with the Chief Justice</p>	Deleted		
191(1)	<p><b>Jurisdiction of the Court of Appeal</b></p> <p>The Court of Appeal is an appellate Court with jurisdiction in –</p> <p>(a) appeals from a decree, judgement or an order of the High Court, and</p> <p>(b) any other appellate jurisdiction conferred</p>	<p><b>Jurisdiction of the Court of Appeal</b></p> <p>The Court of Appeal shall be an appellate court with jurisdiction to hear appeals from the High Court and such other court or tribunal as may be prescribed by an Act of Parliament.</p>		

ARTICLE	AS PRINTED IN THE DRAFT BILL	AS ADOPTED BY THE TWC	AS FORMULATED BY THE MINORITY	EXPLANATORY NOTES
	on it by any other law.			
191(2)	An appeal to the Court of Appeal lies as of right from a judgement, decree or order of the High Court.	Deleted		
192(1)	<p><b>The High Court</b></p> <p>The High Court consists of –</p> <p>(a) the Principal Judge of the Court; and</p> <p>(b) such number of judges, not being less than fifty, as may be prescribed by an Act of Parliament.</p>	<p><b>The High Court</b></p> <p>The High Court shall –</p> <p>(a) consist of such number of judges; and</p> <p>(b) be organised and administered as may be prescribed by an Act of Parliament.</p>		
192(2)	The Principal Judge may, in consultation with the Chief Justice, create Divisions of the High Court and specify their jurisdiction.	Deleted		The Committee considered that this provision be made in an Act of Parliament.
192(3)	The High Court shall sit in such places as the Principal Judge may appoint.	Deleted		
193	<p><b>Jurisdiction of the High Court</b></p> <p>The High Court has unlimited original jurisdiction in –</p> <p>(a) criminal and civil cases, and</p>	<p><b>Jurisdiction of the High Court</b></p> <p>Subject to the provisions of Article 188(1)(a), the High Court shall have unlimited original jurisdiction in –</p>		One of the institutions that should be charged with the responsibility of protecting the Constitution is the Judiciary. This implies that there must be a

ARTICLE	AS PRINTED IN THE DRAFT BILL	AS ADOPTED BY THE TWC	AS FORMULATED BY THE MINORITY	EXPLANATORY NOTES
	(b) any other jurisdiction, appellate or original, conferred on it by or under an Act of Parliament	(a) criminal and civil cases;  (aa) all matters relating to the interpretation and enforcement of the provisions of this constitution; and  (b) any other jurisdiction, appellate or original, conferred on it by or under an Act of Parliament.		specific judicial institution charged with constitutional interpretation, in the Committee's view, the High Court.
<i>193A</i>	<b>New</b>	<b>Supervisory Jurisdiction of the High Court</b>  <b>(1) The High Court shall have supervisory jurisdiction over the subordinate courts and over any person, body or authority which exercises a judicial or quasi-judicial function, but not over a superior court of record.</b>  <b>(2) For the purposes of clause (1) the High Court may call for the record of any proceedings before any subordinate court or person, body or authority as is mentioned in clause (1) and may make such orders and give such directions as it may consider appropriate to ensure the fair administration of</b>		The Committee took the view that supervisory jurisdiction should be exercised by a court with considerable spatial spread throughout the country, the High Court.

ARTICLE	AS PRINTED IN THE DRAFT BILL	AS ADOPTED BY THE TWC	AS FORMULATED BY THE MINORITY	EXPLANATORY NOTES
		<b>justice.</b>		
194(1)	<p><b>Appointment of judges</b></p> <p>When there is a vacancy in the office of the Chief Justice, the most senior judge of the Supreme Court by reference to the date of appointment, shall be appointed the Chief Justice.</p>	<p><b>Appointment of judges</b></p> <p>The Chief Justice, the Deputy Chief Justice and the judges of the superior courts of record, and any vacancies in such posts, shall be filled by persons appointed by the President of the Republic on the recommendation of the Judicial Service Commission, which recommendation shall have been approved by the National Assembly.</p>		<p>The Committee took the view that the role of the Judicial Service Commission in the appointment of the Chief Justice, the Deputy Chief Justice and other Judges of the superior courts of record will check the danger that these vital positions are filled solely at the whim of the President.</p> <p>The approval by Parliament would be a second level of check and balance in judicial appointments.</p>
194(2)	When there is a vacancy in the office of the President of the Court of Appeal, the most senior judge of the Court of Appeal by reference to the date of appointment, shall be the President of the Court of Appeal.	Deleted		
194(3)	When there is a vacancy in the office of the Principal Judge of the high Court, the most senior judge of the High Court, by reference to the date of appointment, shall be the Principal	Deleted		

ARTICLE	AS PRINTED IN THE DRAFT BILL	AS ADOPTED BY THE TWC	AS FORMULATED BY THE MINORITY	EXPLANATORY NOTES
	Judge.			
194(4)	The other judges of the superior courts of record and the Chief Kadhi shall be appointed by the President acting in accordance with the advice of the Judicial Service Commission and with the approval of the National Council.	Deleted		
195(1)	<p><b>Qualifications for appointment of judges</b></p> <p>The Chief Justice and Judges of the Supreme Court shall be appointed from persons who possess the following qualifications –</p> <p>(a) fifteen years experience –</p> <p>(i) as a Judge of the Court of Appeal or the High Court; or</p> <p>(ii) in practice as an advocate; or</p> <p>(iii) full-time law teacher in a recognised university;</p> <p>(b) intellectual ability as demonstrated by academic qualifications and legal practice; and</p> <p>(c) high moral character and integrity.</p>	<p><b>Qualifications for appointment of judges</b></p> <p>(1) The Chief Justice and the judges of the Supreme Court shall be appointed from persons who possess the following qualifications –</p> <p>(a) at least fifteen years experience in Kenya or in another Commonwealth common law jurisdiction –</p> <p>(i) as a Judge of the Court of Appeal or the High Court; or</p> <p>(ii) in practice as an advocate;</p> <p>(b) intellectual ability as demonstrated by academic qualifications and eminence in legal practice; and</p> <p>(c) high moral character and</p>		<p>Whereas the Committee considered that it may be necessary to introduce fresh perspectives to the ranks of the Judiciary by appointing eminent practicing advocates, most members took the view that experience attained as a full time law lecturer was not sufficient for appointment as to the superior courts of record.</p> <p>Experienced Advocates of other common law jurisdictions should also be eligible for appointment as Judges to enrich Kenyan jurisprudence.</p>

ARTICLE	AS PRINTED IN THE DRAFT BILL	AS ADOPTED BY THE TWC	AS FORMULATED BY THE MINORITY	EXPLANATORY NOTES
		integrity.		
195(2)	<p>The Judges of the Court of Appeal shall be appointed from persons who possess the following qualifications –</p> <p>(a) ten years experience –</p> <p>(i) as a Judge of the Court of Appeal or the High Court; or</p> <p>(ii) in practice as an advocate; or</p> <p>(iii) full-time law teacher in a recognised university;</p> <p>(b) intellectual ability as demonstrated by academic qualifications and legal practice; and</p> <p>(c) high moral character and integrity.</p>	<p>(2) The judges of the Court of Appeal shall be appointed from persons who possess the following qualifications –</p> <p>(a) at least ten years experience in Kenya or in another Commonwealth common law jurisdiction –</p> <p>(i) as a Judge of the High Court; or</p> <p>(ii) in practice as an advocate;</p> <p>(b) intellectual ability as demonstrated by academic qualifications and eminence in legal practice; and</p> <p>(c) high moral character and integrity.</p>		
195(3)	<p>Judges of the High Court shall be appointed from persons who possess the following qualifications –</p> <p>(a) ten years experience –</p>	<p>(3) The judges of the High Court shall be appointed from persons who possess the following qualifications –</p> <p>(a) at least ten years experience in</p>		

ARTICLE	AS PRINTED IN THE DRAFT BILL	AS ADOPTED BY THE TWC	AS FORMULATED BY THE MINORITY	EXPLANATORY NOTES
	(i) as a magistrate; or (ii) in practice as an advocate; or (iii) full-time law teacher in a recognised university; and (b) intellectual ability as demonstrated by academic qualifications and legal practice. (c) high moral character and integrity.	Kenya or in another Commonwealth common law jurisdiction – (i) as a professionally qualified magistrate; or (ii) in practice as an advocate; (b) intellectual ability as demonstrated by academic qualifications and eminence in legal practice; and (c) high moral character and integrity.		
195(4)	The office of a judge of the superior courts of record shall not be abolished while there is a substantive holder of the office.	Deleted		Transferred to article 186 (Independence of the Judiciary)
196(1)	<b>Tenure of office of judges</b> A judge and other judicial officers of the subordinate courts shall retire from office, on attaining the age of sixty-five years, but may retire at sixty.	<b>Tenure of office of judges</b> (1) A judge shall retire from office on attaining the age of seventy years, but may retire at any time after attaining the age of sixty years.		The Committee took the view that the retiring age was 70 years and that Judges should retire upon retirement of that age.
196(2)	On attaining the retirement age, a Judge of the superior courts of record may continue in office for a period not exceeding six months in order to enable the Judge to deliver a	(2) On attaining the retirement age, if there are proceedings that were commenced before a judge of the superior courts of record prior to his		Since the appropriate age may vary from person to person, it should be possible for

ARTICLE	AS PRINTED IN THE DRAFT BILL	AS ADOPTED BY THE TWC	AS FORMULATED BY THE MINORITY	EXPLANATORY NOTES
	judgement, or perform any other function in relation to proceedings that were commenced before the Judge prior to attaining the age of retirement.	attaining the age of retirement, the judge shall continue in office for a period of six months in order only to enable the judge to deliver a judgment, or to perform any other function in relation to such proceedings.		any judge to retire voluntarily on attaining the age of 60, subject to continuing in office for six months in order to perform functions in relation to proceedings commenced before the retirement.
197(1)	<p><b>Removal from office</b></p> <p>A Judge of the superior courts of record may be removed from office in accordance with this Article and on the grounds of –</p> <p>(a) inability to perform the functions of office arising from infirmity of body or mind, or from a sufficient cause; or</p> <p>(b) a breach of the Code of Conduct; or</p> <p>(c) incompetence and misconduct.</p>	<p><b>Removal from office</b></p> <p>(1) A judge of the superior courts of record may be removed from office in accordance with this Article and on the grounds of –</p> <p>(a) inability to perform the functions of office arising from infirmity of body or mind;</p> <p>(b) a breach of a code of conduct which shall be prescribed for judges of the superior courts of record by an appropriate Act of Parliament;</p> <p>(c) bankruptcy;</p> <p>(d) incompetence; or</p> <p>(e) misconduct or misbehaviour whether in the performance of the</p>		<p>In order to protect the integrity and credibility of the Judiciary there must be a procedure for removal of Judges who are incompetent, corrupt or unable to perform judicial functions by reason of infirmity of body or mind.</p> <p>To uphold ethical standards in the Judiciary, there should be a code of conduct prescribed for Judges by or under an appropriate Act of Parliament.</p> <p>Alternatively or additionally, Judges should be liable to</p>

ARTICLE	AS PRINTED IN THE DRAFT BILL	AS ADOPTED BY THE TWC	AS FORMULATED BY THE MINORITY	EXPLANATORY NOTES
		judge's duties or otherwise.		removal for breach of the code of conduct set out in the fifth schedule of the Draft Constitution.
197(2)	An individual, institution, a society, or group of persons desiring the removal of a judge of a superior court of record may present a petition to the Judicial Service Commission.	(2) A person desiring the removal of a judge of a superior court of record may present a petition to the Judicial Service Commission setting out the alleged facts constituting the grounds for the judge's removal.		As a means of ensuring judicial accountability and integrity, there is need to open up the categories of persons who can initiate the process of removal of a Judge of a superior court of record.
197(3)	The Judicial Service Commission shall consider the petition and, if it is satisfied that it discloses the existence of a ground under clause (1), it shall send the petition to the President of the Republic.	(3) The Judicial Service Commission shall consider the petition and, if it is satisfied that it discloses the existence of a ground under clause (1), it shall send the petition to the President of the Republic.		
197(4)	On receipt and examination of the petition, the President may, acting in accordance with the advice of the Judicial Service Commission –  (a) suspend the judge from office; and  (b) in the case of a judge who is not the Chief Justice, appoint a tribunal consisting of –  (i) the Chairperson;	(4) On receipt of the petition the President shall within 14 days suspend the judge from office pending action by the President in accordance with clause (5) and shall, acting in accordance with the advice of the Judicial Service Commission –  (a) in the case of the Chief Justice,		The President should be obliged to appoint a tribunal to investigate the conduct of a judge on receipt of a petition from the Judicial Service Commission. Thereafter the President shall also act in accordance with the recommendations of

ARTICLE	AS PRINTED IN THE DRAFT BILL	AS ADOPTED BY THE TWC	AS FORMULATED BY THE MINORITY	EXPLANATORY NOTES
	<p>(ii) four other members from among persons who hold or have held office as a judge of a superior court of record; or who are qualified to be appointed as judges of the superior courts of record; and</p> <p>(iii) three other persons with experience in public affairs, at least one of whom shall be a woman.</p> <p>(c) In the case of the Chief Justice, appoint a tribunal consisting of –</p> <p>(i) the Speaker of the National Council as Chairperson;</p> <p>(ii) two Judges from the member states of the East African Community; and</p> <p>(iii) three persons with experience in public affairs, at least one of whom shall be a woman.</p>	<p>appoint a tribunal consisting of –</p> <p>(i) the Speaker of the Senate as chairperson;</p> <p>(ii) three judges from states which have a common law jurisdiction; and</p> <p>(iii) three other persons with experience in public affairs.</p> <p>(b) in the case of a judge who is not the Chief Justice, appoint a tribunal consisting of –</p> <p>(i) four members from among persons who hold or have held office as a judge of a superior court of record, or who are qualified to be appointed as such, but in either case have not been within the preceding three years, members of the Judicial Service Commission; and</p> <p>(ii) three other persons with experience in public affairs.</p>		<p>the tribunal, the reason being that the said tribunal arrives at its verdict through the due process of law.</p> <p>Since the Judicial Service Commission would be involved in the initial stages of the investigation of the conduct of a Judge, a Judge who has been a member of the said Commission should not be appointed to the tribunal as it would be a case of double appearance which would prejudice the case.</p>

ARTICLE	AS PRINTED IN THE DRAFT BILL	AS ADOPTED BY THE TWC	AS FORMULATED BY THE MINORITY	EXPLANATORY NOTES
197(5)	The tribunal shall inquire into the matter and report on the facts and make recommendations to the President of the Republic, who shall act in accordance with the recommendations of the tribunal.	(5) The tribunal shall inquire into the matter and report on the facts and make recommendations to the President of the Republic, who shall act in accordance with the recommendations of the tribunal.		
<b>197(6)</b>	<b>New</b>	<b>(6) A judge who is suspended from office under clause (4) shall retain the judge's full emoluments and benefits of office until such time as the judge may be removed from office, if such be the recommendation of the tribunal.</b>		Considering the principle of independence of the Judiciary, and further the innocence of the Judge until the verdict of the tribunal is handed (as guilty if at all), a Judge suspended pending the outcome of the tribunal should continue to receive the salaries and benefits of office until removal, if such be the recommendation of the tribunal.
<b>197(7)</b>	<b>New</b>	<b>(7) A tribunal appointed under clause (4)(b) shall elect a</b>		Considering the possibility that the

ARTICLE	AS PRINTED IN THE DRAFT BILL	AS ADOPTED BY THE TWC	AS FORMULATED BY THE MINORITY	EXPLANATORY NOTES
		<p><b>chairperson from among its members and tribunals appointed under clauses (2)(a) and (4)(b) shall in all other respects be responsible for the regulation of their affairs.</b></p>		<p>removal of Judges may be manipulated, it is imperative to ensure the institutional independence of a tribunal investigating the removal of a Judge.</p>
198(1)	<p><b>Subordinate courts</b></p> <p>Parliament may, by an Act of Parliament, establish courts subordinate to the High Court that shall have, subject to the Constitution, the jurisdiction and functions conferred on them by the Act or any other law.</p>	<p><b>Subordinate courts</b></p> <p>(1) Parliament may, by an Act of Parliament, establish courts martial and other courts subordinate to the High Court that shall have, subject to this Constitution, the jurisdiction and functions conferred on them by the Act or any other law.</p>		
198(2)	<p>No judicial officer in the office of magistrate or Kadhi may be removed from office, except after determination by the Judicial Service Commission on such grounds as may be prescribed by an Act of Parliament.</p>	<p>(2) No judicial officer in the office of magistrate or Kadhi may be removed from office, except after determination by the Judicial Service Commission on such grounds as may be prescribed by an Act of Parliament.</p>		
199(1)	<p><b>The Kadhis' courts</b></p> <p>There are established Kadhis' Courts, the office of Chief Kadhi, office of Senior Kadhi and the office of Kadhi.</p>	<p><b>The Kadhis' court</b></p> <p>There is established a Kadhis' Court.</p>		<p>That Kadhis courts should have a constitutional basis but details of the composition, structure, and appellate system should be fleshed out in</p>

ARTICLE	AS PRINTED IN THE DRAFT BILL	AS ADOPTED BY THE TWC	AS FORMULATED BY THE MINORITY	EXPLANATORY NOTES
				an Act of Parliament.
199(2)	There shall be a number, being not less than thirty, of other Kadhis as may be prescribed by the Act of Parliament.	The Kadhis' Court shall – (a) consist of the Chief Kadhis and such number of Kadhis, all of whom profess the Islamic faith; and (b) be organised and administered, as may be prescribed by an Act of Parliament.		
199(3)	A Kadhi is empowered to hold a Kadhis' court called a District Kadhis' Court, having jurisdiction within a district or districts as may be prescribed by, or under, an Act of Parliament.	Deleted		
200(1)	<p><b>Jurisdiction of the Kadhis' courts</b></p> <p>The Jurisdiction of a Kadhis' court extends to –</p> <p>(a) the determination of questions of Muslim Law relating to personal status, marriage, divorce, including matters arising after divorce, and inheritance and succession in proceedings in which all the parties profess Islam;</p> <p>(b) the determination of civil and commercial disputes between parties who are Muslims, in the manner of a small claims court as by law established, but without prejudice to the rights of parties to go to other courts or tribunals with similar jurisdiction;</p>	<p><b>Jurisdiction of the Kadhis' court</b></p> <p><b>The Kadhis' Court shall be a subordinate court with jurisdiction to determine questions of Islamic law relating to personal status, marriage, divorce and matters consequential thereto, inheritance and succession in proceedings in which the parties profess the Islamic faith.</b></p>		<p>Considering the concerns by some delegates that Kadhis courts should not exercise parallel jurisdiction, the Committee considered that it should prescribe the jurisdiction of the courts in the Constitution so that the Act of Parliament envisaged to prescribe the details on the said court does not exceed the jurisdiction enshrined in the Constitution.</p>

ARTICLE	AS PRINTED IN THE DRAFT BILL	AS ADOPTED BY THE TWC	AS FORMULATED BY THE MINORITY	EXPLANATORY NOTES
	(c) the settlement of disputes over or arising out of the administration of wakf properties.			<p>Considering that Kadhis Courts shall be subordinate with jurisdiction to determine questions of Islamic law relating to personal status, marriage, divorce, inheritance and succession, the Committee felt that the parties should profess the Islamic faith.</p> <p>The existence of the courts and the access to their jurisdiction is an accrued fundamental right whose enjoyment should not be extinguished.</p>
200(2)	Subject to the Constitution, an appeal lies, as of right, from a judgement, decree or order of the District Kadhis' Court to the Provincial Kadhis' Court, presided over by a Senior Kadhi, in any matter or cause determined by the lower court.	Deleted		
200(3)	An appeal lies, as of right, from a judgement, decree or order of the Provincial Kadhis' Court to the Kadhis' Court of Appeal, presided over by the Chief Kadhi and two senior Kadhis.	Deleted		

ARTICLE	AS PRINTED IN THE DRAFT BILL	AS ADOPTED BY THE TWC	AS FORMULATED BY THE MINORITY	EXPLANATORY NOTES
200(4)	An appeal from the Kadhis' Court of Appeal lies to the Supreme Court only on a point of Islamic Law or on an issue affecting the interpretation of the Constitution or any other constitutional issue.	Deleted		
200(5)	For the purposes of hearing and determining an appeal within its jurisdiction, the Provincial Kadhis' Court and the Kadhis' Court of Appeal have all the powers, authority and jurisdiction in the court from which the appeal is brought.	Deleted		
200(6)	The Chief Kadhi shall, in consultation with the Chief Justice and the Law Society of Kenya, make rules of Court for the practice and procedure to be followed by the Kadhis' Courts	Deleted		
201(1)	<p><b>Appointment of Kadhis'</b></p> <p>Kadhis shall be appointed by the Judicial Service Commission.</p>	Deleted		<p>Considering that article 199 stipulates that the organisation and administration of Kadhis courts should be prescribed by an Act of Parliament, the Committee expunged the clause from the Draft Bill. The import of this is that the appointment of Kadhis would be provided for in the</p>

ARTICLE	AS PRINTED IN THE DRAFT BILL	AS ADOPTED BY THE TWC	AS FORMULATED BY THE MINORITY	EXPLANATORY NOTES
				envisaged legislation.
201(2)	In the appointment of the Kadhis, the Judicial Service Commission shall take into account the qualifications of the Kadhi in Muslim personal law applicable to the different sects of Islam.	Deleted		
201(3)	The Chief Kadhi shall have the same status, privileges and immunities as a High Court judge; the senior Kadhi as a Chief Magistrate and the District Kadhi as a District Magistrate in a magistrate court.	Deleted		
201(4)	The Chief Kadhi and the other Kadhis shall be full-time judicial officers.	Deleted		
202(1)	<p><b>Qualifications for appointment of Kadhis'</b></p> <p>A person is qualified to be appointed as a Chief Kadhi if that person –</p> <p>(a) Muslim of not less than thirty-five years of age;</p> <p>(b) an advocate of the High Court of Kenya of at least ten years experience as a legal practitioner and has attended, and obtained a recognized qualification in Muslim personal law, applicable to any sect or sects of Islam, from a recognized University; and</p> <p>(c) has obtained a degree in Islamic law from a recognized University, and has not less than</p>	Deleted		Considering that article 199 stipulates that the organisation and administration of Kadhis courts should be prescribed by an Act of Parliament, the Committee expunged the clause from the Draft Bill. The import of this is that the qualifications for appointment of Kadhis would be provided for in the said legislation.

ARTICLE	AS PRINTED IN THE DRAFT BILL	AS ADOPTED BY THE TWC	AS FORMULATED BY THE MINORITY	EXPLANATORY NOTES
	ten years experience in the practice of Islamic Law, or has held the office of a Kadhi for a similar period.			
202(2)	The qualification for appointment as a Kadhi or Senior Kadhi is the same as the qualification for the appointment of the Chief Kadhi except that the requisite number of years of experience shall be five years.	Deleted		
203(1)	<p><b>The Rules Committee</b></p> <p>There shall be a Rules Committee with authority to make rules of procedure applicable to the various courts set up under this Constitution.</p>	Deleted		<p>The Committee considered that the Constitution as the basic law of the land should not be overloaded with matters of legislative character. The Committee noted that currently, there is a Rules Committee established under the Civil Procedure Act (Cap 21) Laws of Kenya. The Committee expunged the clause from the Draft Bill.</p>
203(2)	<p>The Rules Committee shall consist of –</p> <p>(a) the Chief Justice;</p> <p>(b) the President of the Court of Appeal;</p>	Deleted		

ARTICLE	AS PRINTED IN THE DRAFT BILL	AS ADOPTED BY THE TWC	AS FORMULATED BY THE MINORITY	EXPLANATORY NOTES
	<p>(c) the Principal Judge of the High Court;</p> <p>(d) the Chief Kadhi;</p> <p>(e) the Registrars of the Supreme Court, the Court of Appeal and the High Court; and</p> <p>(f) two representatives of the Law Society of Kenya</p>			
203(3)	The Rules Committee shall have authority to determine the fees payable in respect of any matter or suit filed before any court.	Deleted		
204(1)	<p><b>The Judicial Service Commission</b></p> <p>To ensure and enhance the independence and judicial accountability of the judiciary and the efficient and effective administration of justice, there is hereby established the Judicial Service Commission consisting of –</p> <p>(a) a full-time chairperson who is qualified to be appointed a Judge of the Supreme Court, appointed by the President of the Republic and approved by the National Council;</p> <p>(b) Muslim woman to represent the Muslim community, nominated by the National Muslim Organization;</p>	<p><b>Composition of the Judicial Service Commission</b></p> <p>(1) There is established the Judicial Service Commission consisting of –</p> <p>(a) the Attorney-General;</p> <p>(b) one Supreme Court Judge elected by the judges of the Supreme Court;</p> <p>(c) one Court of Appeal judge elected by the judges of the Court of Appeal;</p> <p>(d) one High Court judge elected</p>		<p>In order to guarantee the independence of the Judiciary, there should be an independent Judicial Service Commission.</p> <p>Considering that one of the qualifications for appointment to judicial office is moral integrity, religious communities should be represented in the Judicial Service Commission.</p> <p>To avoid any wrangles</p>

ARTICLE	AS PRINTED IN THE DRAFT BILL	AS ADOPTED BY THE TWC	AS FORMULATED BY THE MINORITY	EXPLANATORY NOTES
	<p>(c) the Attorney-General ;</p> <p>(d) one Supreme Court Judge elected by Judges of the Supreme Court;</p> <p>(e) one Court of Appeal Judge elected by the Judges of the Court of Appeal;</p> <p>(f) one High Court Judge elected by the Judges of the High Court;</p> <p>(g) the Chief Kadhi;</p> <p>(h) two magistrates, one of whom shall be a woman, elected by the magistrates;</p> <p>(i) two advocates of fifteen years standing, one whom shall be a woman, nominated by the Law Society of Kenya;</p> <p>(j) two law teachers, one of whom shall be a woman, elected by the faculties of law of public universities;</p> <p>(k) a member nominated by the Council of Legal Education;</p> <p>(l) the chairperson of the Public Service Commission or a nominee of the chairperson; and</p>	<p>by the judges of the High Court;</p> <p>(e) the Chief Registrar of the Judiciary for the time being, who shall also be the Secretary to the Judicial Service Commission;</p> <p><b>(fa) the Chief Kadhis</b></p> <p>(f) two advocates each of at least fifteen years' standing nominated by the Law Society of Kenya or such other body as may succeed it as generally representative of the legal profession in Kenya; and</p> <p>(g) one person nominated by the Public Service Commission.</p>		<p>that may emerge from the nomination of persons to the said body, the religious groups envisaged should be stipulated.</p> <p>Whereas the stipulation of the three religious groups was opposed by some members as discriminatory, the Committee took the view that since there would be Kadhis appointed by the JSC, there was necessity to secure the representation of Muslims in the said body.</p> <p>The Attorney General as the principal legal advisor to the government should continue to be a member of the Judicial Service Commission.</p> <p>The Chief Registrar as the chief administrator</p>

ARTICLE	AS PRINTED IN THE DRAFT BILL	AS ADOPTED BY THE TWC	AS FORMULATED BY THE MINORITY	EXPLANATORY NOTES
	(m) three lay members, one of whom is a woman, to be nominated by the Non-Governmental Organization, established under the NGOs Co-ordination Act or any other similar legislation in force at the time.			of the Judiciary should be a member of the Commission. The Law Society of Kenya or such other body as may succeed it as generally representative of the legal profession in Kenya should be represented in the Commission in order to counter balance what might be seen as dominance by the judiciary, the attorney General and the Public Service Commission. (Read State).
204(2)	Members of the Commission shall hold office for a term of five years and are eligible for re-appointment for a further and final term of five years.	(2) Members of the Commission, apart from those appointed under clause (1)(b) and (f), shall hold office for a term of five years and shall be eligible for re-appointment for a further and final term of five years.		It is also necessary by the same token that members of the Commission apart from the Attorney General and the Registrar serve for a defined term, 5 years renewable once for a final and further term of 5 years.
204(3)	New	<b>(3) The Commission shall elect a chairperson from among its members and shall otherwise</b>		Considering the function of the JSC on the process of appointment

ARTICLE	AS PRINTED IN THE DRAFT BILL	AS ADOPTED BY THE TWC	AS FORMULATED BY THE MINORITY	EXPLANATORY NOTES
		<b>regulate its own procedure.</b>		and removal of judges, the body should be self-regulatory and should elect its own chairperson from among its members.
205(1)	<p><b>Functions of the Judicial Service Commission</b></p> <p>The functions of the Judicial Service Commission are –</p> <p>(a) to recommend to the President of the Republic persons for appointment as judges;</p> <p>(b) to review and make recommendations on the terms of service of Judges, magistrates and other judicial officers, other than salaries and remuneration;</p> <p>(c) to appoint, discipline and remove registrars, magistrates and other judicial officers, including paralegal staff in accordance with the law prescribed by Parliament;</p> <p>(d) to review and investigate complaints against judges in accordance with the Constitution;</p> <p>(e) to prepare and implement programmes for</p>	<p><b>Functions of the Judicial Service Commission</b></p> <p>(1) The functions of the Judicial Service Commission shall be –</p> <p>(a) to ensure and enhance the independence and judicial accountability of the judiciary and the efficient, effective and transparent administration of justice;</p> <p>(b) to recommend to the President of the Republic persons for appointment as judges;</p> <p>(c) to review and make recommendations on the conditions of service of judges, magistrates and other judicial officers, other than their salaries and remuneration;</p> <p>(d) to advise the President of the</p>		<p>The Committee adopted the innovation in granting additional functions to the JSC that would buttress the independence, accountability, efficiency, effectiveness, and transparency of the Judiciary.</p> <p>The committee also felt that the JSC as the body charged with investigating complaints against judges in accordance with the Constitution should advise the President of the republic on the members of the tribunal with respect to removal of a judge.</p>

ARTICLE	AS PRINTED IN THE DRAFT BILL	AS ADOPTED BY THE TWC	AS FORMULATED BY THE MINORITY	EXPLANATORY NOTES
	<p>the education and training of judges, magistrates and paralegal staff;</p> <p>(f) to advise the Government on improving the efficiency of the administration of justice, and access to justice - including legal aid;</p> <p>(g) to encourage gender equity in the administration of justice; and</p> <p>(h) any other function prescribed by the Constitution or by an Act of Parliament.</p>	<p>Republic on the membership of the Tribunals referred to in Articles 197(4);</p> <p>(e) to appoint, discipline and remove registrars, magistrates and other judicial officers, including paralegal staff, in such manner as may be specified by an Act of Parliament;</p> <p>(f) to review and investigate complaints against judges;</p> <p>(g) to prepare and implement programmes for the continuing education and training of judges, magistrates and other judicial officers, and paralegal staff;</p> <p>(h) to advise the Government on improving the efficiency of the administration of justice, and on access to justice, including legal aid; and</p> <p>(i) any other function prescribed by this Constitution or by an Act of Parliament.</p>		
205(2)	In performing its functions the Commission is subject only to the Constitution and the law.	(2) In performing its functions the Commission shall be subject only to		The Committee entrenched the

ARTICLE	AS PRINTED IN THE DRAFT BILL	AS ADOPTED BY THE TWC	AS FORMULATED BY THE MINORITY	EXPLANATORY NOTES
		this Constitution and the law.		independence of the Judicial Service Commission by stipulating that in performance of its functions, the JSC shall be subject only to the constitution and the law.
205(3)	The Commission may regulate its own procedures.	(3) In this Article “judge” means a judge of the superior court of record.		There is a need to clarify the term Judge. The term Judge within the Chapter does not apply to other categories, for instance Judges of the Industrial Court.
206(1)	<p><b>Appointment and removal of certain judicial officers</b></p> <p>The Judicial Service Commission is responsible for the appointment of –</p> <p>(a) judicial officers; and</p> <p>(b) the Registrars of the Courts, the Chief court administrator and other officers and employees of the Judiciary,</p>	Deleted		Article 206 (1) is superfluous as article 205 (1) c provides for the appointment of registrars magistrates and other judicial officers in accordance with an Act of Parliament.
206(2)	A judicial officer shall retire on attaining the age of sixty-five years, but may retire on	Deleted		Whereas the Committee acknowledged that

ARTICLE	AS PRINTED IN THE DRAFT BILL	AS ADOPTED BY THE TWC	AS FORMULATED BY THE MINORITY	EXPLANATORY NOTES
	attaining the age of sixty years.			judicial officers other than Judges of superior courts of record should be protected from arbitrary dismissal, it was felt that this category of officers should not enjoy security of tenure.
206(3)	<p>A judicial officer may be removed from office by the Judicial Service Commission on the ground of –</p> <p>(a) inability to perform the functions of office, arising from infirmity of mind or body or from any other sufficient cause;</p> <p>(b) incompetence;</p> <p>(c) a breach of the Code of Conduct applicable to judicial officers; or</p> <p>(d) any other misconduct.</p>	Deleted		
206(4)	<p>For the purposes of this Article, “judicial officer” means a person who holds, or is acting, in the office of –</p> <p>(a) magistrate or Kadhi; and</p>	Deleted		

ARTICLE	AS PRINTED IN THE DRAFT BILL	AS ADOPTED BY THE TWC	AS FORMULATED BY THE MINORITY	EXPLANATORY NOTES
	(b) registrar or deputy registrar and any other office connected with the Judiciary, as specified in regulations made by the Judicial Service commission.			
207(1)	<p><b>Salaries and retirement benefits</b></p> <p>The salaries, allowances, gratuities and the pension payable to the judges and other staff of the Judiciary are charged on the Consolidated Fund.</p>	Deleted		Whereas the Committee acknowledged that article 207 (1) protects the independence of the Judiciary, it was noted that the said clause has already been prescribed under article 186 (2) and (4). Consequently, the article was expunged from the Draft Bill.
207(2)	The salaries, allowances, privileges and other conditions of service of the judges and of superior courts of record shall not be varied to the disadvantage of the judges.	Deleted		
208(1)	<p><b>The Office of Attorney General</b></p> <p>The office of the Attorney General is established as a constitutional office.</p>	<p><b>Attorney General</b></p> <p>(1) There is established the office of the Attorney-General which shall be an office in the public service as defined in Article 270.</p>		The Committee considered that the AG should be a professional and that the AG's office be in the Public Service.
208(2)	The Attorney General shall be appointed by the President on the recommendation of the Judicial Service Commission and with the approval of the National Council.	(2) The Attorney-General shall be appointed by the President of the Republic on the recommendation of the Public Service Commission and	The Attorney-General shall be appointed by the President of the Republic with the	Since the AG shall be a public officer, he or she shall be appointed on the recommendation of the

ARTICLE	AS PRINTED IN THE DRAFT BILL	AS ADOPTED BY THE TWC	AS FORMULATED BY THE MINORITY	EXPLANATORY NOTES
		with the approval of the National Assembly.	approval of Parliament.	President and with the approval of Parliament.
208(3)	The qualifications for appointment as Attorney General are the same as for appointment to the High Court.	(3) The qualifications for the appointment as Attorney General shall be the same as for appointment to the office of Chief Justice.		Considering that the AG is the titular head of the legal profession and further that the said office shall be the principal legal advisor to the government, the qualifications for appointment should be the same as for appointment to the office of the Chief Justice.
208(4)	The Attorney General is the principal legal adviser to the National Government.	(4) The Attorney General shall be the principal legal adviser to the Government. <b>(4A) The Attorney-General shall be responsible for –</b>  <b>(a) drawing, perusing and recommending approval (or otherwise) of all agreements, contracts, treaties, conventions and documents by whatever name called, to which the Government is a party or in respect of which the Government</b>		Considering that the establishment of the office of the Director of Public Prosecutions is proposed, the AG should represent the government in court and any other legal proceedings in which the government is a party, other than criminal proceedings.

ARTICLE	AS PRINTED IN THE DRAFT BILL	AS ADOPTED BY THE TWC	AS FORMULATED BY THE MINORITY	EXPLANATORY NOTES
		<p>has an interest.</p> <p>(b) representing the Government in court or any other legal proceedings to which the Government is a party, other than criminal proceedings; and</p> <p>(c) drafting legislation, including subsidiary legislation.</p>		
208(5)	It is the special responsibility of the Attorney General to promote and uphold the rule of law.	<b>(5) The Attorney-General shall have authority to appear as a friend of the court in any civil proceedings to which the Government is not a party.</b>		By the same token the AG should have authority to appear as a friend of the court in any proceedings to which the government is not a party.
<b>208(6)</b>	<b>New</b>	<b>(6) The Attorney General shall promote, protect and uphold the rule of law and defend the public interest.</b>		
<b>208(7)</b>	<b>New</b>	<b>(7) The powers of the Attorney General may be exercised in person or by subordinate officers acting in accordance with his general or special instructions.</b>		Considering the substantial functions vested in the AG, it should come out in fine print that such powers and functions may be delegated by the AG to another person or

ARTICLE	AS PRINTED IN THE DRAFT BILL	AS ADOPTED BY THE TWC	AS FORMULATED BY THE MINORITY	EXPLANATORY NOTES
				authority.
208(8)	New	<b>(8) Subject to the provisions of this Constitution the Attorney General shall not be under the direction or control of any person or authority in the exercise of any of the Attorney General's functions.</b>		Considering that the functions of the AG may both be political and technical, it is necessary to state the institutional independence of the office.
208(9)	New	<b>(9) The Attorney General shall hold office for a term of ten years, and shall not be eligible for re-appointment.</b>		The Committee considered that since the AG will be a professional, his tenure of office should be guaranteed by the Constitution and should not depend on the incumbent President.
209(1)	<b>Director of Public Prosecutions</b>  The office of the Director of Public Prosecutor is established as a constitutional office.	<b>Director of Public Prosecutions</b>  (1) There is established the office of the Director of Public Prosecutions which shall be an office in the public service as defined in Article 270.		The Committee considered that the DPP should be a professional and that it should be an office in the Public Service.
209(2)	The Director of Public Prosecutions shall be appointed by the President on the recommendation of the Public Service Commission and with the approval of the	(2) The Director of Public Prosecutions shall be appointed by the President of the Republic on the recommendation of the Public		Since the said office shall be a public office, he or she shall be appointed by the

ARTICLE	AS PRINTED IN THE DRAFT BILL	AS ADOPTED BY THE TWC	AS FORMULATED BY THE MINORITY	EXPLANATORY NOTES
	National Council.	Service Commission and with the approval of the National Assembly.		President on the recommendation of the Public Service Commission and the approval of Parliament.
209(3)	The qualifications for appointment as Director of Public Prosecutions are the same as for appointment to the High Court.	(3) The qualifications for appointment as Director of Public Prosecutions shall be the same as for the appointment as a judge of the High Court.		
209(4)	The Director of Public Prosecutions shall exercise state powers of prosecution. In the exercise of that power he shall not be subject to the control of any other person or authority.	(4) The Director of Public Prosecutions shall have powers to direct the Inspector-General of the Kenya Police Service to investigate any information or allegations of criminal conduct.		Since the DPP relies on other state machinery for the detection and investigation of crime, he or she should be empowered to direct the Inspector General of the Kenya Police Service to investigate into any matter.
209(5)	The Director of Public Prosecutions shall have power to direct the police to investigate any information or allegations of criminal conduct.	(5) The Director of Public Prosecutions shall exercise state powers of prosecution and may –  (a) institute and undertake criminal proceedings against any person before any court (other than a court martial) in respect of any offence alleged to have been committed;		In order to check the abuse of the DPP's powers in relation to taking over private prosecutions, the DPP must obtain the permission of the person or authority instituting the private prosecutions.

ARTICLE	AS PRINTED IN THE DRAFT BILL	AS ADOPTED BY THE TWC	AS FORMULATED BY THE MINORITY	EXPLANATORY NOTES
		<p>(b) take over and continue any criminal proceedings commenced in any court (other than a court martial) that have been instituted or undertaken by another person or authority with the permission of that person or authority; and</p> <p>(c) subject to clause (7), discontinue at any stage before judgment is delivered any criminal proceedings instituted by the Director of Public Prosecutions or taken over by the Director of Public Prosecutions under paragraph (b).</p>		
209(6)	Parliament may confer powers of prosecution on other authorities.	<b>(6) Where the discontinuance referred to in clause (5)(c) takes place after the defendant has completed the delivery of his defence, the defendant shall be acquitted.</b>		To check any abuse of the DPP's powers, the Committee deemed it necessary to elevate this principle to constitutional status.
209(7)	The Director of Public Prosecutions may not withdraw a prosecution without the permission of the court.	(7) Parliament may confer powers of prosecution on authorities other than the Director of Public Prosecutions.		Considering the conservative judicial interpretation of the clause that vests the powers of prosecution in the AG, the Constitution should prescribe that Parliament may confer

ARTICLE	AS PRINTED IN THE DRAFT BILL	AS ADOPTED BY THE TWC	AS FORMULATED BY THE MINORITY	EXPLANATORY NOTES
				powers of prosecution on authorities other than the DPP.
209(8)	The Director of Public Prosecutions does not require the consent of any person or authority for the commencement of prosecution proceedings.	<b>(8) The Director of Public Prosecutions may not discontinue a prosecution without the permission of the court.</b>		In relation to the DPP's powers to discontinue prosecutions there should be a check mechanism namely the permission of a court before such discontinuation of a criminal prosecution.
209(9)	(i) In exercising his or her powers under this Article, the Director of Public Prosecutions shall have, to the public interest, the interest of the administration of justice and the need to prevent abuse of the legal process.  (ii) The Director of Public Prosecution shall have authority to appear' as a friend of the court, in any criminal prosecution commenced before any court or tribunal.	(9) The powers of the Director of Public Prosecutions may be exercised in person or by subordinate officers acting in accordance with general or special instructions.		Considering the substantial functions vested in the DPP, it should come out in fine print that such powers or functions may be delegated by the DPP.
<b>209(10)</b>	<b>New</b>	<b>(10) The Director of Public Prosecutions shall not require the consent of any person or authority for the commencement of criminal proceedings, and in the exercise of the Director of</b>		

ARTICLE	AS PRINTED IN THE DRAFT BILL	AS ADOPTED BY THE TWC	AS FORMULATED BY THE MINORITY	EXPLANATORY NOTES
		<b>Public Prosecutions’ powers or functions the Director of Public Prosecutions shall be subject only to this Constitution.</b>		
209(11)	New	<b>(11) In exercising the powers conferred by this Article, the Director of Public Prosecutions shall have regard to the public interest, the interests of the administration of justice and the need to prevent and avoid abuse of the legal process.</b>		Since the powers of prosecution of the DPP are discretionary, the Constitution should stipulate that the said powers should be exercised having regard to the public interest in the administration of justice.
209(12)	New	<b>(12) The Director of Public Prosecutions shall hold office for a term of ten years, and shall not be eligible for re-appointment.</b>		
210(1)	<b>Public Defender</b>  There is established the office of the Public Defender as a constitutional office.	<b>Public Defender</b>  (1) There is established the office of the Public Defender which shall be an office in the public service as defined in Article 270.		The Committee considered that the Public Defender should be a professional and that it should be an office in the Public Service.
210(2)	The Public Defender shall be appointed by the President on the recommendation of the Judicial Service Commission and with the	(2) The Public Defender shall be appointed by the President of the Republic on the recommendation of		

ARTICLE	AS PRINTED IN THE DRAFT BILL	AS ADOPTED BY THE TWC	AS FORMULATED BY THE MINORITY	EXPLANATORY NOTES
	approval of the National Council	the Public Service Commission and with the approval of the National Assembly.		
210(3)	The qualifications for appointment as Public Defender are the same as for appointment to the High Court.	(3) The qualifications for appointment as Public Defender shall be the same as for the appointment as a judge of the High Court.		
210(4)	The Public Defender shall provide legal advice and representation to persons who are unable to afford legal services.	(4) Subject to Clause (5) the Public Defender shall provide legal advice and representation to persons who are unable to afford legal services.		
210(5)	The Public Defender shall disseminate information on access to the law and legal institutions.	<p><b>(5) Parliament shall by an Act of Parliament make provision for –</b></p> <p><b>(a) the effective, efficient and transparent management and administration of the Public Defender’s office;</b></p> <p><b>(b) the categories of persons who qualify for legal aid;</b></p> <p><b>(c) the categories of cases that qualify for legal aid;</b></p> <p><b>(d) such other limitations in accessing legal aid as it may</b></p>		Considering the role of legal aid and representation in ensuring access to justice, the Constitution should provide for the enactment of legislation on the organisation, administration and management of the Public Defender’s office.

ARTICLE	AS PRINTED IN THE DRAFT BILL	AS ADOPTED BY THE TWC	AS FORMULATED BY THE MINORITY	EXPLANATORY NOTES
		<p><b>consider appropriate; and</b></p> <p><b>(e) publicising information as to the availability of legal aid.</b></p>		
210(6)	<p>Parliament shall enact a law making provision for –</p> <p>(a) the effective management of the public defender’s office;</p> <p>(b) the categories of persons who qualify for legal aid;</p> <p>(c) the categories of cases that qualify for legal aid; and</p> <p>(d) other limitations in accessing legal aid</p>	(6) The powers of the Public Defender may be exercised in person or by subordinate officers acting in accordance with general or special instructions.		Considering the functions vested in the Public Defender, it should come out in fine print that such powers or functions may be delegated by the Public Defender.
210(7)	New	<b>(7) The Public Defender shall hold office for a term of ten years, and shall not be eligible for re-appointment.</b>		The Committee felt that this was consistent with the Draft Bill’s limitation on the term of most constitutional offices.
210A(1)	New	<p><b>Removal from office</b></p> <p><b>(1) The Attorney-General, the Director of Public Prosecutions or the Public Defender may be removed from office in accordance with this Article and</b></p>		The entire Draft Bill emphasizes the need for accountability and integrity of public holders. This implies that there must be check-and-balance and

ARTICLE	AS PRINTED IN THE DRAFT BILL	AS ADOPTED BY THE TWC	AS FORMULATED BY THE MINORITY	EXPLANATORY NOTES
		<p><b>on the grounds of –</b></p> <p><b>(a) inability to perform the functions of office arising from infirmity of body or mind;</b></p> <p><b>(b) a breach of the duties prescribed under Article 277 and in the Code of Conduct set out in the Fifth Schedule;</b></p> <p><b>(c) bankruptcy;</b></p> <p><b>(d) incompetence; or</b></p> <p><b>(e) misconduct or misbehaviour whether in the performance of the office-holder’s duties or otherwise.</b></p>		<p>oversight mechanisms; and prescription on the manner of removal of constitutional office holders on the grounds prescribed under the Constitution.</p> <p>Since the qualifications for appointment to the offices of Attorney General, the Director of Public Prosecutions and the Public Defender are the same as those for the appointment of Judges, the Committee considered that the same procedure be adopted <i>mutatis mutandis</i>.</p>
<b>210A(2)</b>	<b>New</b>	<p><b>(2) A person desiring the removal of the Attorney-General, the Director of Public Prosecutions or the Public Defender may present a petition to the Public Service Commission setting out the alleged facts constituting the grounds for the removal of the office-holder in question.</b></p>		<p>By the same token, the same arguments on the manner of removal of Judges under article 197 apply.</p>

ARTICLE	AS PRINTED IN THE DRAFT BILL	AS ADOPTED BY THE TWC	AS FORMULATED BY THE MINORITY	EXPLANATORY NOTES
210A(3)	New	(3) The Public Service Commission shall consider the petition and, if it is satisfied that it discloses the existence of a ground under clause (1), it shall send the petition to the President of the Republic.		
210A(4)	New	<p>(4) On receipt and examination of the petition the President of the Republic shall within 14 days suspend the office holder in question from office pending action by the President of the Republic in accordance with clause (5) and shall, acting in accordance with the advice of the Public Service Commission—</p> <p>(a) in the case of the Attorney General, appoint a tribunal consisting of-</p> <p>(i) the Speaker of the Senate as chairperson;</p> <p>(ii) three judges from states which have a common law jurisdiction; and</p> <p>(iii) three persons with experience in public affairs.</p> <p>(b) in the case of the Director of Public Prosecutions or the Public</p>		

ARTICLE	AS PRINTED IN THE DRAFT BILL	AS ADOPTED BY THE TWC	AS FORMULATED BY THE MINORITY	EXPLANATORY NOTES
		<p>defender, appoint a tribunal consisting of -</p> <p>(i) four members from among persons who hold or have held office as a judge of a superior court of record, or who are qualified to be appointed as such;</p> <p>(ii) one advocate of at least fifteen years standing nominated by the Law Society of Kenya or such other body as may succeed it as generally representative of the legal profession in Kenya; and</p> <p>(iii) two other persons with experience in public affairs.</p>		
210A(5)	New	(5) The tribunal shall inquire into the matter and report on the facts and make recommendations to the President of the Republic, who shall act in accordance with the recommendations of the tribunal.		
210A(6)	New	(6) An Attorney General, a Director of Public Prosecutions or a Public Defender who is suspended from office under clause (4) shall retain the office holder's emoluments and benefits		

ARTICLE	AS PRINTED IN THE DRAFT BILL	AS ADOPTED BY THE TWC	AS FORMULATED BY THE MINORITY	EXPLANATORY NOTES
		of office until such time as the office holder may be removed from office, if such be the recommendation of the tribunal.		
210A(7)	New	(7) A tribunal appointed under clause (4) (b) shall elect a chairperson from among its members and shall in all other respects be responsible for the regulation of its affairs.		
211(1)	<p><b>Prerogative of Mercy</b></p> <p>The prerogative of mercy shall be exercised by the President in accordance with the advice of the Committee on the Prerogative of Mercy.</p>	<p><b>Presidential Powers of Clemency</b></p> <p>(1) There shall be a power of clemency which shall be exercised on the petition of any person by the President of the Republic in accordance with the advice of the Committee referred to in Clause (3), which power shall not be delegated to any other person.</p>		<p>The Committee noted that if prerogative of mercy should be exercised by the President as a function, the retention of the term “prerogative” would be a misnomer. The Committee renamed the article as “Presidential powers of clemency”.</p>
211(2)	<p>The Committee on the Prerogative of Mercy shall consist of the Attorney General as chairman and six prominent Kenyans appointed by the President.</p>	<p><b>(2) Parliament shall enact an Act of Parliament establishing criteria that shall be applied by the advisory Committee referred to in clause (3) in formulating its advice referred to in clause (1).</b></p>		<p>The exercise of presidential powers of clemency should be meritorious, intended to redress injustices against a conviction. Since the criteria for the granting of such remedy cannot</p>

ARTICLE	AS PRINTED IN THE DRAFT BILL	AS ADOPTED BY THE TWC	AS FORMULATED BY THE MINORITY	EXPLANATORY NOTES
				<p>be stipulated in the Constitution, an Act of Parliament should prescribe them.</p> <p>There should be a representative and independent advisory Committee on Presidential powers of clemency.</p>
211(3)	A member of Parliament or a member of the District Council, or a judge or judicial officer is not qualified for appointment to the Committee on the Prerogative of Mercy.	<p><b>(3) There shall be an advisory Committee on the Presidential Power of Clemency which shall consist of –</b></p> <p>(a) the Attorney-General;</p> <p>(b) the Minister for the time being responsible for the Kenya Correctional Services;</p> <p>(c) a medical practitioner nominated by the Medical Practitioners and Dentists Board or such body as may succeed it as generally representative of the medical and dental professions in Kenya;</p>		

ARTICLE	AS PRINTED IN THE DRAFT BILL	AS ADOPTED BY THE TWC	AS FORMULATED BY THE MINORITY	EXPLANATORY NOTES
		<p>(d) the head of the probation;</p> <p>(e) a person nominated by the Commission on Human Rights and Administration of Justice for as long as that body continues in existence;</p> <p><b>(f) three persons, each of whom shall be nominated by each of the religious organisations representative of the Christian, Muslim and Hindu faiths; and</b></p> <p><b>(g) one advocate of at least fifteen years' standing nominated by the Law Society of Kenya or such other body as may succeed it as generally representative of the legal profession in Kenya.</b></p>		
211(4)	<p>The President may, on the advice of the Committee on the Prerogative of Mercy –</p> <p>(a) grant to any person convicted of an offence, a pardon either free or subject to lawful conditions;</p> <p>(b) postpone, either for a specified period or indefinitely, the carrying out of punishment imposed on a person; and</p>	<p><b>(4) Persons appointed to the Advisory Committee under clause (3)(c), (e), (f) and (g) shall remain members of the Advisory Committee for a period of one year and may be re-appointed for two further term of one year.</b></p>		

ARTICLE	AS PRINTED IN THE DRAFT BILL	AS ADOPTED BY THE TWC	AS FORMULATED BY THE MINORITY	EXPLANATORY NOTES
	(c) substitute a less severe form of punishment for a punishment imposed on a person for an offence.			
211(5)	When appropriate, the President shall consult the victims of the offence in respect of which he or she intends to exercise the prerogative of mercy.	(5) The Advisory Committee may act despite there being a vacancy in its membership.		
<b>211(6)</b>	<b>New</b>	<b>(6) The Advisory Committee may regulate its own procedure.</b>		
<b>211(7)</b>	<b>New</b>	<p><b>(7) In exercise of the powers conferred by clause (1) the President of the Republic may –</b></p> <p><b>(a) grant to a person convicted of an offence a pardon, either free or subject to lawful conditions;</b></p> <p><b>(b) postpone, either for a specified period or indefinitely, the carrying out of a punishment imposed on a person;</b></p> <p><b>(c) substitute a less severe form of punishment for a punishment imposed on a person for an offence; and</b></p> <p><b>(d) remit the whole or part of a</b></p>		

ARTICLE	AS PRINTED IN THE DRAFT BILL	AS ADOPTED BY THE TWC	AS FORMULATED BY THE MINORITY	EXPLANATORY NOTES
		<p><b>punishment imposed on a person for an offence.</b></p>		
<p><b>211(8)</b></p>	<p><b>New</b></p>	<p><b>(8) The Advisory Committee may take into account the views of the victims of the offence in respect of which it is considering recommending the exercise of the power of clemency by the President of the Republic.</b></p>		

## **6. APPENDICES**

### **APPENDIX A-LIST OF MEMBERS TECHNICAL WORKING COMMITTEE “E” THE JUDICIARY**

**Convener: Hon. (Bishop) Philip Sulumeti, Delegate 546**

**Acting Convener: Hon. (Rev.) Patrick Musungu, Delegate**

**Rapportuers: Hon. Paul M. Wambua, Delegate 564 and  
Hon. Ahmed Issack Hassan, Delegate 566**

	<b>DELEGATE</b>	<b>NUMBER</b>	<b>CATEGORY</b>
1	Hon. Abdalla Ngozi	145	Parliament
2	Hon. Abdi Tari Sasura	185	Parliament
3	Hon. Abdirahman Ali Abbas	249	District
4	Hon. Abdurahman Badawy	238	District
5	Hon. Agnes Abuom	513	Religious Org
6	Hon. Ali Shee Mohammed	515	Religious Org
7	Hon. Amina Abdalla	211	Parliament
8	Hon. Amina Ahmed	242	District
9	Hon. Asli Ibrahim	248	District
10	Hon. Benta Auma	403	District
11	Hon. Bishop Phillip Sulumeti	546	Religious Org
12	Hon. Daniel Rasugu	579	Political Parties
13	Hon. El-Busaidy Abdulghafur	517	Religious Org
14	Hon. Fadhil Sultana	518	Religious Org
15	Hon. Fatuma Boi Bakari	230	District
16	Hon. Francis Waweru	442	Trade Unions
17	Hon. Fred Ojiambo	535	Religious Org
18	Hon. Gervase A. Akhaabi	593	Political Parties
19	Hon. Archbishop Zachaeus Okoth	541	Religious Org
20	Hon. Godana Adhi Doyo	268	District
21	Hon. Hubbie Hussein Al Haji	251	District
22	Hon. Isaiah Kubai	448	Trade Unions
23	Hon. Issack Derrow Ibrahim	258	District
24	Hon. Jamila Mohamed	476	Professional Org
25	Hon. Jane J. Kiptum	338	District
26	Hon. Kajembe Seif Ramadhan	36	Parliament
27	Hon. Kathurima M’inoti	454	NGOs
28	Hon. Kembi Gitura	47	Parliament
29	Hon. Khadija Fugicha	261	District
30	Hon. Kivutha Kibwana	57	Parliament
31	Hon. Lilian Wanjera	491	Women’s Org

32	Hon. Margaret Muchai	523	Religious Org
33	Hon. Mirugi Kariuki	43	Parliament
34	Hon. Mohamed Abu Chiaba	108	Parliament
35	Hon. Mohammed Abdi Haji	107	Parliament
36	Hon. Mohammed Nyaoga	456	NGOs
37	Hon. Nathaniel Tum	332	District
38	Hon. Omino Joab H. O.	166	Parliament
39	Hon. Onesmus K. Mwangi	132	Parliament
40	Hon. Owino Charles Oyugi	174	Parliament
41	Hon. Joachim Gitonga	311	District
42	Hon. R. O. Kwach	618	Special Interest
43	Hon. Rev. Patrick M. Musungu	529	Religious Org
44	Hon. Salim Ibrahim	225	District
45	Hon. Shakeel Shabir	406	District
46	Hon. Sheikh Mustafa Ali	531	Professionals
47	Hon. Victor P. Gituma	274	District
48	Hon. Victoria Mutheu M.	294	District
49	Hon. Viscount Kimathi	61	Parliament
50	Hon. Waithaka Mwangi	201	Parliament
51	Hon. Waithanje Minjire	304	District
52	Hon. Walubengo Lumatete	532	Religious Org
53	Hon. Rapinder Singh Sehmi	544	Religious Org
54	Hon. Yusuf Mahmud Aboubakar	581	Political Parties
55	Hon. Zablun Nthamburi	540	Religious Org

**Committee Staff:**

1. Draftsperson:
2. Assistant Programme Officers:
3. Clerk:
4. Verbatim Recorder:
5. Secretary:

Clive Grenyer  
Dan O. Juma and  
Rahma Adan Jillo  
Michael R. Sialai  
Emma Kamunga  
Alice Thuo Wambui

## **APPENDIX B- MINORITY REPORTS**

The Committee considered the following formulations of minority views in relation to the respective decisions.

1. **(Article 185(2) Now renumbered 209(2))** The superior courts of record shall be the Supreme Court, the Court of Appeal, the High Court and the Industrial Court.  
**(Hon. Isaiah Kubai, 448)**
2. **(Article 185(3) Now renumbered 209(3))** The subordinate courts are –  
(a) the Magistrates' courts and other courts established by an Act of Parliament.  
**(Hon. Onesmus Kihara Mwangi, 132)**
3. **(Article 208(1) Now renumbered 226(1))** The Attorney General shall be appointed by the President of the Republic with the approval of Parliament.  
**(Hon. Gervase Akhaabi, 593)**

**APPENDIX C**  
**DRAFTSMAN’S ANNOTATED REPORT**

**CHAPTER NINE**  
**JUDICIAL AND LEGAL SYSTEM**

*Part I — The Judicial System*

Principles **and structure** of Judicial power

**184.** (1) Judicial power is derived from the people and shall be exercised by the courts –

- (a) in the name and for the common good of the people;
- (b) in conformity with this constitution and the laws; and
- (c) subject to paragraph (b) above, in conformity with the values, norms and aspirations of the people.

(2) Judicial power shall vest exclusively in the courts and tribunals established under this Constitution.

(2a) (a) There is established the office of the Chief Justice who shall be the head of the Judiciary;

**(b) Subject to Article 196(1), the Chief Justice shall serve for a period of ten years or until the Chief Justice reaches the age of seventy years, whichever shall be the earlier.**

(c) If the Chief Justice has not reached the age of seventy years at the expiry of the period of ten years referred to in paragraph (b) the Chief Justice may –

- (i) **retire (provided that the Chief Justice has reached the age of sixty years);**
- (ii) continue in office as a judge of the Supreme Court, notwithstanding that there may already be the maximum permitted number of supreme court judges holding office, or
- (iii) resign from the bench.

(d) There is established the office of the Deputy Chief Justice who shall be the principal Assistant to the Chief Justice;

**(e)(i) There is established the office of the Chief Registrar of the Judiciary and such other offices of Registrars as may be created by the Judicial Service Commission;**

(ii) The Chief Registrar of the Judiciary shall be the Chief Administrator and Accounting officer of the Judiciary.

(3) In applying the law to cases of a civil or criminal nature, the courts and tribunals shall be guided by the following principles -

- (a) justice shall be done to all, irrespective of their status;
- (b) justice shall not be delayed;
- (c) adequate compensation shall be awarded to victims of wrongs;
- (d) reconciliation, mediation and arbitration between parties should be promoted;
- (e) justice shall be administered without undue regard to technicalities; and
- (f) the purpose and principles of this Constitution shall be protected and promoted.

(4) In the performance of their functions the courts, their officers and persons participating in the administration of justice –

- (a) shall strive to deliver the highest standard of service to the public;
- (b) shall comply with the duties prescribed under Article 277 and in the Code of Conduct set out in the Fifth Schedule; and
- (c) shall continue to educate themselves in current development in the laws of Kenya and comparative law.

(5) The state shall provide reasonable resources, and opportunities shall be made available for members of the Judiciary to enable them to deliver the highest standards of service to the public.

## **Hierarchy of Courts**

- 185.** (1) The Judiciary shall consist of the courts, judges, magistrates and other judicial officers of superior courts of record, and subordinate courts.
- (2) The superior courts of record shall be the Supreme Court, the Court of Appeal, and the High Court.
- (3) The subordinate courts shall be –
- (a) the Magistrates' courts and the Kadhis' court;
  - (b) the courts martial and any other courts subordinate to the High Court established by an Act of Parliament ; and
  - (c) any traditional courts or local tribunals that may be established by an Act of Parliament.
- (4) Without prejudice to the generality of paragraph (3)(b), parliament shall, within six months of the coming into force of this Constitution, enact a law to establish a court with jurisdiction to hear and determine disputes relating to employment that may arise among employers and employees.

## **Independence of the Judiciary**

- 186.** (1) In the exercise of judicial power, the Judiciary shall be subject only to this Constitution and shall not be subject to the control or direction of any other person or authority.
- (1a) The office of a judge of the superior courts of record shall not be abolished while there is a substantive holder of the office.
- (2) The administrative expenses of the Judiciary, including the salaries, allowances, gratuities and pensions payable to, or in respect of, persons serving in the Judiciary, shall be a charge on the Consolidated Fund.
- (3) No judicial officer shall be liable in an action or suit in respect of anything done in good faith in the lawful performance of a judicial function.
- (4) The salaries, allowances, benefits, gratuities and pensions payable to, or in respect of persons serving in, the Judiciary, shall not be varied to their disadvantage.

## **The Supreme Court**

- 187.** (1) The Supreme Court shall consist of –
- (a) the Chief Justice, who shall be the president of the court;
  - (aa) the Deputy Chief Justice who shall be the vice-president of the court; and
  - (b) not less than five and not more than seven other judges.
- (2) The Supreme Court shall be properly constituted for the purposes of its proceedings if it is composed of five judges.
- (3) The Supreme Court shall sit in Nairobi.

## **Jurisdiction of the Supreme Court**

- 188.** (1) The Supreme Court shall have –
- (a) original jurisdiction –
    - (ii) in respect of presidential election petitions;
    - (iii) in issues relating to impeachment of the President; and
  - (b) appellate jurisdiction to hear appeals from the Court of Appeal or from any other court or tribunal as may be prescribed by an Act of Parliament.**
- (3) The Supreme Court shall not be bound by its previous decision if it were to be in the interests of justice and of the development of the law and jurisprudence not to be so bound.
- (3A) Notwithstanding the provisions of Article 187(2) a decision made in accordance with clause (3) may only be made by a sitting of the Court attended by all of the judges of the Supreme Court for the time being holding office.
- (4) All other courts shall be bound by the decisions of the Supreme Court.

## **The Court of Appeal**

**190.** The Court of Appeal shall –

- (a) consist of such number of judges; and
- (b) be organised and administered,

as may be prescribed by an Act of Parliament.

## **Jurisdiction of the Court of Appeal**

**191.** The Court of Appeal shall be an appellate court with jurisdiction to hear appeals from the High Court and such other court or tribunal as may be prescribed by an Act of Parliament.

## **The High Court**

**192.** The High Court shall –

- (a) consist of such number of judges; and
- (b) be organised and administered,

as may be prescribed by an Act of Parliament.

## **Jurisdiction of the High Court**

**193.** Subject to the provisions of Article 188(1)(a), the High Court shall have unlimited original jurisdiction in –

- (a) criminal and civil cases;
- (aa) all matters relating to the interpretation and enforcement of the provisions of this constitution; and
- (b) any other jurisdiction, appellate or original, conferred on it by or under an Act of Parliament.

## **Supervisory Jurisdiction of the High Court**

**193A. (1)** **The High Court shall have supervisory jurisdiction over the subordinate courts and over any person, body or authority which exercises a judicial or quasi-judicial function, but not over a superior court of record.**

**(2) For the purposes of clause (1) the High Court may call for the record of any proceedings before any subordinate court or person, body or authority as is mentioned in clause (1) and may make such orders and give such directions as it may consider appropriate to ensure the fair administration of justice.**

### **Appointment of Judges**

**194.** The offices of the Chief Justice, the Deputy Chief Justice and the judges of the superior courts of record, and any vacancies in such offices, shall be filled by persons appointed by the President of the Republic on the recommendation of the Judicial Service Commission, which recommendation shall have been approved by parliament.

### **Qualifications for Appointment of judges**

**195.** (1) The Chief Justice and the judges of the Supreme Court shall be appointed from persons who possess the following qualifications –

- (a) at least fifteen years experience in Kenya or in another Commonwealth common law jurisdiction –
  - (i) as a Judge of the Court of Appeal or the High Court; or
  - (ii) in practice as an advocate;
- (b) intellectual ability as demonstrated by academic qualifications and eminence in legal practice; and
- (c) high moral character and integrity.

(2) The judges of the Court of Appeal shall be appointed from persons who possess the following qualifications –

- (a) at least ten years experience in Kenya or in another Commonwealth common law jurisdiction –
  - (i) as a Judge of the High Court; or
  - (ii) in practice as an advocate;
- (b) intellectual ability as demonstrated by academic qualifications and eminence in legal practice; and

- (c) high moral character and integrity.
- (3) The judges of the High Court shall be appointed from persons who possess the following qualifications –
- (a) at least ten years experience in Kenya or in another Commonwealth common law jurisdiction –
    - (i) as a professionally qualified magistrate; or
    - (ii) in practice as an advocate;
  - (b) intellectual ability as demonstrated by academic qualifications and eminence in legal practice; and
  - (c) high moral character and integrity.

#### **Tenure of office of judges**

**196.** (1) A judge shall retire from office on attaining the age of seventy years, but may retire at any time after attaining the age of sixty years.

**(2) On attaining the retirement age, if there are proceedings that were commenced before a judge of the superior courts of record prior to his or her attaining the age of retirement, the judge shall continue in office for a period of six months in order only to enable the judge to deliver a judgment, or to perform any other function in relation to such proceedings.**

#### **Removal from office**

**197.** (1) A judge of the superior courts of record may be removed from office in accordance with this Article and on the grounds of –

- (a) inability to perform the functions of office arising from infirmity of body or mind;**
- (b) a breach of a code of conduct which shall be prescribed for judges of the superior courts of record by an appropriate Act of Parliament;**
- [(b) a breach of the duties prescribed under Article 277 and in the Code of Conduct set out in the fifth Schedule;]
- (c) bankruptcy;
- (d) incompetence; or

(e) **misconduct or misbehaviour whether in the performance of the judge's duties or otherwise.**

**(2) A person desiring the removal of a judge of a superior court of record may present a petition to the Judicial Service Commission setting out the alleged facts constituting the grounds for the judge's removal.**

**(3)The Judicial Service Commission shall consider the petition and, if it is satisfied that it discloses the existence of a ground under clause (1), it shall send the petition to the President of the Republic.**

**(4) On receipt of the petition the President shall within 14 days suspend the judge from office pending action by the President in accordance with clause (5) and shall, acting in accordance with the advice of the Judicial Service Commission –**

**(a) in the case of the Chief Justice, appoint a tribunal consisting of –**

**(i) the Speaker of the National Council as chairperson;**

**(ii) three judges from states which have a common law jurisdiction; and**

**(iii) three other persons with experience in public affairs; or**

**(b) in the case of a judge who is not the Chief Justice, appoint a tribunal consisting of –**

**(i) four members from among persons who hold or have held office as a judge of a superior court of record, or who are qualified to be appointed as such, but in either case have not been within the preceding three years, members of the Judicial Service Commission; and**

**(ii) three other persons with experience in public affairs; or**

**(5) The tribunal shall inquire into the matter and report on the facts and make recommendations to the President of the Republic, who shall act in accordance with the recommendations of the tribunal.**

**(6) A judge who is suspended from office under clause (4) shall retain the judge's emoluments and benefits of office until such time as the judge may be removed from office, if such be the recommendation of the tribunal.**

**(7) A tribunal appointed under clause (4)(b) shall elect a chairperson from among its members and tribunals appointed under clauses (4)(a) and (4)(b) shall in all other respects be responsible for the regulation of their affairs.**

### **Subordinate courts**

**198. (1) Parliament may, by an Act of Parliament, establish courts martial and other courts subordinate to the High Court that shall have, subject to this Constitution, the jurisdiction and functions conferred on them by the Act or any other law.**

**(2) No judicial officer in the office of magistrate or Kadhi may be removed from office, except after determination by the Judicial Service Commission on such grounds as may be prescribed by an Act of Parliament.**

### **The Kadhis' court**

**199. There is established a Kadhis' Court consisting of the Chief Kadhi and such number of Kadhis who profess the Islamic faith as may be prescribed by an Act of Parliament.**

### **Jurisdiction of Kadhis' court**

**200. The Kadhis' Court shall be a subordinate court with jurisdiction to determine questions of Islamic law relating to personal status, marriage, divorce and matters consequential thereto, inheritance and succession in proceedings in which the parties profess the Islamic faith and submit to the jurisdiction of that court.**

### **Composition of the Judicial Service Commission**

**204. (1) There is established the Judicial Service Commission consisting of –**

**(a) three persons, each of whom shall be nominated by each of the religious organisations representative of the Christian, Muslim and Hindu faiths;**

**(b) the Attorney-General for the time being;**

- (c) one Supreme Court Judge elected by the judges of the Supreme Court;
- (d) one Court of Appeal judge elected by the judges of the Court of Appeal;
- (e) one High Court judge elected by the judges of the High Court;
- (f) the Chief Registrar of the Judiciary for the time being, who shall also be the Secretary to the Judicial Service Commission;
- (g) two advocates each of at least fifteen years' standing nominated by the Law Society of Kenya or such other body as may succeed it as generally representative of the legal profession in Kenya; and
- (h) one person nominated by the Public Service Commission.

(2) Members of the Commission, apart from those appointed under clause (1)(b) and (f), shall hold office for a term of five years and shall be eligible for re-appointment for a further and final term of five years.

(3) The Commission shall elect a chairperson from among its members and shall otherwise regulate its own procedure.

### **Functions of the Judicial Service Commission**

- 205.** (1) The functions of the Judicial Service Commission shall be –
- (a) to ensure and enhance the independence and judicial accountability of the judiciary and the efficient, effective and transparent administration of justice;
  - (b) to recommend to the President of the Republic persons for appointment as judges;
  - (c) to review and make recommendations on the conditions of service of judges, magistrates and other judicial officers, other than their salaries and remuneration;
  - (d) to advise the President of the Republic on the membership of the Tribunals referred to in Articles 197(4) and 210A(4);

- (e) to appoint, discipline and remove registrars, magistrates and other judicial officers, including paralegal staff, in such manner as may be specified by an Act of Parliament;
- (f) to review and investigate complaints against judges, the Attorney-General, the Director of Public Prosecutions and the Public Defender in accordance with this Constitution;
- (g) to prepare and implement programmes for the continuing education and training of judges, magistrates and other judicial officers, and paralegal staff;
- (h) to advise the Government on improving the efficiency of the administration of justice, and on access to justice, including legal aid; and
- (i) any other function prescribed by this Constitution or by an Act of Parliament.

(2) In performing its functions the Commission shall be subject only to this Constitution and the law.

(3) In this Article “judge” means a judge of the superior court of record.

## **Part II — Legal System**

### **Attorney-General**

**208.** (1) There is established the office of the Attorney-General which shall be an office in the public service as defined in Article 270.

**(2) The Attorney-General shall be appointed by the President of the Republic on the recommendation of the Public Service Commission and with the approval of Parliament.**

(3) The qualifications for the appointment as Attorney-General shall be the same as for appointment to the office of Chief Justice.

(4) Subject to the provisions of this Constitution, the Attorney-General shall be the principal legal adviser to the Government and shall be responsible for –

- (a) drawing, perusing and recommending approval (or otherwise) of all agreements, contracts, treaties, conventions and documents by**

**whatever name called, to which the Government is a party or in respect of which the Government has an interest.**

(b) representing the Government in court or any other legal proceedings to which the Government is a party, other than criminal proceedings; and

(c) drafting legislation, including subsidiary legislation.

**(5) The Attorney-General shall have authority to appear as a friend of the court in any civil proceedings to which the Government is not a party.**

(6) The Attorney-General shall promote, protect and uphold the rule of law and defend the public interest.

(7) The powers of the Attorney-General may be exercised in person or by subordinate officers acting in accordance with general or special instructions.

(8) Subject to the provisions of this Constitution the Attorney-General shall not be under the direction or control of any person or authority in the exercise of any of the Attorney-General's functions.

(9) The Attorney-General shall hold office for a term of five years, and shall be eligible for re-appointment for a further and final term of five years.

#### **Director of Public Prosecutions**

**209.** (1) There is established the office of the Director of Public Prosecutions which shall be an office in the public service as defined in Article 270.

**(2) The Director of Public Prosecutions shall be appointed by the President of the Republic on the recommendation of the Public Service Commission and with the approval of Parliament.**

**(3) The qualifications for appointment as Director of Public Prosecutions shall be the same as for the appointment as a judge of the High Court.**

**(4) The Director of Public Prosecutions shall have powers to direct the Inspector-General of the Kenya Police Service to investigate any information or allegations of criminal conduct.**

**(5) The Director of Public Prosecutions shall exercise state powers of prosecution and may –**

**(a) institute and undertake criminal proceedings against any person before any court (other than a court**

**martial) in respect of any offence alleged to have been committed;**

- (b) take over and continue any criminal proceedings commenced in any court (other than a court martial) that have been instituted or undertaken by another person or authority with the permission of that person or authority; and**
- (c) subject to clause (8), discontinue at any stage before judgment is delivered any criminal proceedings instituted by the Director of Public Prosecutions or taken over by the Director of Public Prosecutions under paragraph (b).**

**(6) Where the discontinuance referred to in clause (5)(c) takes place after the defendant has completed the delivery of his defence, the defendant shall be acquitted.**

**(7) Parliament may confer powers of prosecution on authorities other than the Director of Public Prosecutions.**

**(8) The Director of Public Prosecutions may not discontinue a prosecution without the permission of the court.**

**(9) The powers of the Director of Public Prosecutions may be exercised in person or by subordinate officers acting in accordance with general or special instructions.**

**(10) The Director of Public Prosecutions shall not require the consent of any person or authority for the commencement of criminal proceedings, and in the exercise of the Director of Public Prosecutions' powers or functions the Director of Public Prosecutions shall be subject only to this Constitution.**

**(11) In exercising the powers conferred by this Article, the Director of Public Prosecutions shall have regard to the public interest, the interests of the administration of justice and the need to prevent and avoid abuse of the legal process.**

**(12) The Director of Public Prosecutions shall hold office for a term of five years, and shall be eligible for re-appointment for a further and final term of five years.**

## **Public Defender**

**210.** (1) There is established the office of the Public Defender which shall be an office in the public service as defined in Article 270.

(2) **The Public Defender shall be appointed by the President of the Republic on the recommendation of the Public Service Commission and with the approval of Parliament.**

(3) **The qualifications for appointment as Public Defender shall be the same as for the appointment as a judge of the High Court.**

(4) **Subject to Clause (5) the Public Defender shall provide legal advice and representation to persons who are unable to afford legal services.**

(5) **Parliament shall by an Act of Parliament make provision for –**

- (a) **the effective, efficient and transparent management and administration of the Public Defender's office;**
- (b) **the categories of persons who qualify for legal aid;**
- (c) **the categories of cases that qualify for legal aid;**
- (d) **such other limitations in accessing legal aid as it may consider appropriate; and**
- (e) **publicising information as to the availability of legal aid.**

(6) The powers of the Public Defender may be exercised in person or by subordinate officers acting in accordance with general or special instructions.

(7) The Public Defender shall hold office for a term of five years, and shall be eligible for re-appointment for a further and final term of five years.

## **Removal from office**

**210A. (1) The Attorney-General, the Director of Public Prosecutions or the Public Defender may be removed from office in accordance with this Article and on the grounds of –**

- (a) **inability to perform the functions of office arising from infirmity of body or mind;**

- (b) a breach of the duties prescribed under Article 277 and in the Code of Conduct set out in the Fifth Schedule;
- (c) bankruptcy;
- (d) incompetence; or
- (e) **misconduct or misbehaviour whether in the performance of the office-holder's duties or otherwise.**

**(2) A person desiring the removal of the Attorney-General, the Director of Public Prosecutions or the Public Defender may present a petition to the Judicial Service Commission setting out the alleged facts constituting the grounds for the removal of the office-holder in question.**

**(3) The Judicial Service Commission shall consider the petition and, if it is satisfied that it discloses the existence of a ground under clause (1), it shall send the petition to the President of the Republic.**

**(4) On receipt and examination of the petition the President of the Republic shall within 14 days suspend the office holder in question from office pending action by the President of the Republic in accordance with clause (5) and shall, acting in accordance with the advice of the Judicial Service Commission appoint a tribunal consisting of –**

- (a) **four members from among persons who hold or have held office as a judge of a superior court of record, or who are qualified to be appointed as such, but in either case who are not, and have not been within the preceding three years, members of the Judicial Service Commission;**
- (b) **a member of the Public Service Commission; and**
- (c) **two other persons with experience in public affairs.**
- (5) **The tribunal shall inquire into the matter and report on the facts and make recommendations to the President of the Republic, who shall act in accordance with the recommendations of the tribunal.**

**(6) An Attorney-General, a Director of Public Prosecutions or a Public Defender who is suspended from office under clause (4) shall retain the office holder's emoluments and benefits of office until such time as the office holder may be removed from office, if such be the recommendation of the tribunal.**

**(7) A tribunal appointed under clause (4) shall elect a chairperson from among its members and shall in all other respects be responsible for the regulation of its affairs.**

### **Presidential powers of clemency**

**211. (1) There shall be a power of clemency which shall be exercised on the petition of any person by the President of the Republic in accordance with the advice of the Committee referred to in Clause (3), which power shall not be delegated to any other person.**

**(2) Parliament shall enact an Act of Parliament establishing criteria that shall be applied by the advisory Committee referred to in clause (3) in formulating its advice referred to in clause (1).**

**(3) There shall be an advisory Committee on the Presidential Power of Clemency which shall consist of –**

- (a) the Attorney-General for the time being;**
- (b) the Minister for the time being responsible for the Kenya Correctional Services;**
- (c) a medical practitioner nominated by the Medical Practitioners and Dentists Board or such body as may succeed it as generally representative of the medical and dental professions in Kenya;**
- (d) the head of the probation service for the time being;**
- (e) a person nominated by the Commission on Human Rights and Administrative Justice for as long as that body continues in existence;**
- (f) three persons, each of whom shall be nominated by each of the religious organisations representative of the Christian, Muslim and Hindu faiths; and**
- (g) one advocate of at least fifteen years' standing nominated by the Law Society of Kenya or such other body as may succeed it as generally representative of the legal profession in Kenya.**

**(4) Persons appointed to the Advisory Committee under clause (3)(c), (e), (f) and (g) shall remain members of the Advisory Committee for a period of one year and may be re-appointed for two further terms of one year.**

(5) The Advisory Committee may act despite there being a vacancy in its membership.

(6) The Advisory Committee shall elect a chairperson from among its members and may regulate its own procedure.

(7) In exercise of the powers conferred by clause (1) the President of the Republic may –

- (a) grant to a person convicted of an offence a pardon, either free or subject to lawful conditions;
- (b) postpone, either for a specified period or indefinitely, the carrying out of a punishment imposed on a person;
- (c) substitute a less severe form of punishment for a punishment imposed on a person for an offence; and
- (d) remit the whole or part of a punishment imposed on a person for an offence.

(8) The Advisory Committee may take into account the views of the victims of the offence in respect of which it is considering recommending the exercise of the power of clemency by the President of the Republic.

## APPENDIX D

### DRAFTERS NARRATIVE REPORT

#### CHAPTER NINE

#### JUDICIAL AND LEGAL SYSTEM

##### Part I — The Judicial System

1. Article 184 – the heading has been amended by inserting the words “Principles and structure of” before the words “judicial power”.
2. Article 184(1) has been adopted as in the Draft Bill.
3. Article 184(1)(a) has been amended by inserting the words “and for the common good” after the word “name”.
4. Article 184(1)(b) has been adopted as in the Draft Bill.
5. Article 184(1)(c) has been amended by inserting the words “subject to paragraph (b) above” at the beginning.
6. Article 184(2) has been retained as in the Draft Bill.
7. The following new clause (2a) has been inserted in Article 184:
  - “(2a) (a) There is established the office of the Chief Justice who shall be the head of the Judiciary;**
  - (b) Subject to Article 196(1), the Chief Justice shall serve for a period of ten years or until the Chief Justice reaches the age of seventy years, whichever shall be the earlier.
  - (c) If the Chief Justice has not reached the age of seventy years at the expiry of the period of ten years referred to in paragraph (b) the Chief Justice may –
    - (i) retire (provided that the Chief Justice has reached the age of sixty years);
    - (ii) continue in office as a judge of the Supreme Court, notwithstanding that there may already be the maximum permitted number of supreme court judges holding office; or

(iii) resign from the bench.

(d) There is established the office of the Deputy Chief Justice who shall be the principal Assistant to the Chief Justice;

(e) (i) There is established the office of the Chief Registrar of the Judiciary and such other offices of Registrars as may be created by the Judicial Service Commission;

(ii) The Chief Registrar of the Judiciary shall be the Chief Administrator and Accounting officer of the Judiciary.”.

8. Article 184(3) has been amended by inserting the words “and tribunals” after the words “courts”.
9. Article 184(3)(a) has been amended by deleting the words “social or economic” and substituting the word “their”.
10. Article 184(3)(b) has been retained as in the draft Bill.
11. Article 184(3)(c) has been retained as in the draft Bill.
12. Article 184(3)(d) has been amended by deleting the word “shall” and substituting the word “should”.
13. Article 184(3)(e) has been retained as in the draft Bill.
14. Article 184(3)(f) has been deleted and substituted by the following paragraph:

“(f) the purpose and principles of this Constitution shall be protected and promoted.”.
15. Article 184(4) has been retained as in the draft Bill.
16. Article 184(4)(a) has been retained as in the draft Bill.
17. Article 184(4)(b) has been deleted and substituted by the following paragraph:

“(b) shall comply with the duties prescribed under Article 277 and in the Code of Conduct set out in the Fifth Schedule; and”.
18. Article 184(4)(c) has been retained as in the draft Bill.

19. Article 184(5) has been retained as in the draft Bill.
20. Article 185(1) has been retained as in the Draft Bill.
21. Article 185(2) has been retained as in the Draft Bill.
22. Article 185(3) has been retained as in the Draft Bill.
23. Article 185(3)(a) has been retained as in the Draft Bill.
24. Article 185(3)(b) has been deleted and substituted by the following paragraph:

“(b) the courts martial and any other courts subordinate to the High Court established by an Act of Parliament;”.
25. Article 185(3)(c) has been amended by deleting the words “with limited jurisdiction in issues of local significance”, and by inserting the words “courts” after the word “traditional”.
26. A New Article 185(4) has been inserted as follows:

“(4) Without prejudice to the generality of paragraph (3)(b), parliament shall, within six months of the coming into force of this Constitution, enact a law to establish a court with jurisdiction to hear and determine disputes relating to employment that may arise among employers and employees.”
27. Article 186(1) has been retained as in the draft Bill.
28. A new Article 186(1a) has been transferred from Article 195(4) and inserted as follows:

“(1a) The office of a judge of the superior courts of record shall not be abolished while there is a substantive holder of the office.”.
29. Article 186(2) has been amended by deleting the word “are” after the word “Judiciary” and substituting the words “shall be”.
30. Article 186(3) has been amended by deleting the words “in the” and substituting the words “in good faith in the lawful”.
31. Article 186(4) has been amended by inserting the word “benefits” after the word “allowances”.
32. Articles 186(5) and (6) were transferred to be incorporated in Article 67 on the Bill of Rights.

33. Article 187(1) has been amended by deleting the word “consists” and substituting the words “shall consist”.
34. Article 187(1)(a) has been amended by deleting the words “is the head of the judiciary” and substituting the words “shall be the president of the Court”.
35. A new Article 187(1)(aa) has been inserted as follows:
- “(aa) the Deputy Chief Justice who shall be the vice president of the Court;”.
36. Article 187(1)(b) has been amended by deleting the words “more than six” and substituting the words “less than five and not more than seven other”.
37. A new Article 187(2) has been inserted as follows:
- “(2) The Supreme Court shall be properly constituted for the purpose of its proceedings if it is composed of five judges.”.
38. A new Article 187(3) has been inserted as follows:
- “(3) The Supreme Court shall sit in Nairobi.”.
39. Article 188(1) has been retained as in the draft Bill.
40. Article 188(1)(a) has been retained as in the draft Bill.
41. Article 188(1)(a)(i) has been deleted.
42. Article 188(1)(a)(ii) and (iii) have been retained as in the draft Bill.
43. Article 188(1)(a)(iv) and (v) have been deleted,.
44. Article 188(1)(b) has been deleted and substituted by the following paragraph:
- “(b) appellate jurisdiction to hear appeals from the Court of Appeal or from any other court or tribunal as may be prescribed by an Act of Parliament.”.
45. Article 188(2) has been deleted.
46. Article 188(3) has been amended by deleting the words “may depart from its previous decisions in the interests of justice.” and substituting the words “shall not be bound by its previous decision if it were to be in the interests of justice and of the development of the law and jurisprudence not to be so bound.”.

47. A new clause 188(3A) has been inserted as follows:
- “(3A) Notwithstanding the provisions of Article 187(2) a decision made in accordance with clause (3) may only be made by a sitting of the Court attended by all of the judges of the Supreme Court for the time being holding office.”.
48. Article 188(4) has been retained as in the draft Bill.
49. Article 189 has been deleted.
50. Article 190 has been deleted, and the following Article substituted:
- “190.** The Court of Appeal shall –
- (a) consist of such number of judges; and
- (b) be organised and administered,
- as may be prescribed by an Act of Parliament.”.
51. Article 191 has been deleted and the following Article substituted:
- “191.** The Court of Appeal shall be an appellate court with jurisdiction to hear appeals from the High Court and such other court or tribunal as may be prescribed by an Act of Parliament.”.
52. Article 192 has been deleted and the following Article substituted:
- “192.** The High Court shall –
- (a) consist of such number of judges; and
- (b) be organised and administered,
- as may be prescribed by an Act of Parliament.”.
53. Article 193 has been amended by inserting the words “Subject to Article 188(1)(a)” at the beginning, and by inserting the following new paragraph after paragraph (a):
- “(aa) all matters relating to the interpretation and enforcement of the provisions of this constitution; and”.
54. A new Article 193A has been inserted as follows:

“Supervisory Jurisdiction of the High Court

**193A.** (1) The High Court shall have supervisory jurisdiction over the subordinate courts and over any person, body or authority which exercises a judicial or quasi-judicial function, but not over a superior court of record.

(2) For the purposes of clause (1) the High Court may call for the record of any proceedings before any subordinate court or person, body or authority as is mentioned in clause (1) and may make such orders and give such directions as it may consider appropriate to ensure the fair administration of justice.”.

55. Article 194 has been deleted and the following Article substituted:

“**194.** The offices of the Chief Justice, the Deputy Chief Justice and the judges of the superior courts of record, and any vacancies in such offices, shall be filled by persons appointed by the President of the Republic on the recommendation of the Judicial Service Commission, which recommendation shall have been approved by parliament.”.

56. Article 195(1) has been retained as in the draft Bill.

57. Article 195(1)(a) has been amended by inserting the words “at least” at the beginning, and the words “in Kenya or in another Commonwealth common law jurisdiction” at the end.

58. Article 195(1)(a)(i) and (ii) have been retained as in the draft Bill.

59. Article 195(1)(a)(iii) has been deleted.

60. Article 195(1)(b) has been amended by inserting the words “eminence in” before the word “legal”.

61. Article 195(1)(c) has been retained as in the draft bill.

62. Article 195(2) has been retained as in the draft bill.

63. Article 195(2)(a) has been amended by inserting the words “at least” at the beginning, and the words “in Kenya or in another Commonwealth common law jurisdiction” at the end.

64. Article 195(2)(a)(i) has been amended by deleting the words “the Court of Appeal or”.

65. Article 195(2)(a)(ii) has been retained as in the draft bill.
66. Article 195(2)(a)(iii) has been deleted.
67. Article 195(2)(b) has been amended by inserting the words “eminence in” before the word “legal”.
68. Article 195(2)(c) has been retained as in the draft bill.
69. Article 195(3) has been retained as in the draft bill.
70. Article 195(3)(a) has been amended by inserting the words “at least” at the beginning, and the words “in Kenya or in another Commonwealth common law jurisdiction” at the end.
71. Article 195(3)(a)(i) has been amended by inserting the words “professionally qualified” before the word “magistrate”.
72. Article 195(3)(a)(ii) has been retained as in the draft bill.
73. Article 195(3)(a)(iii) has been deleted.
74. Article 195(3)(b) has been amended by inserting the words “eminence in” before the word “legal”.
75. Article 195(3)(c) has been retained as in the draft bill.
76. Article 195(4) has been deleted and transferred to form Article 186(2).
77. Article 196 has been deleted and substituted by the following article:
- “196. (1) A judge shall retire from office on attaining the age of seventy years, but may retire at any time after attaining the age of sixty years.
- (2) On attaining the retirement age, if there are proceedings that were commenced before a judge of the superior courts of record prior to his or her attaining the age of retirement, the judge shall continue in office for a period of six months in order only to enable the judge to deliver a judgment, or to perform any other function in relation to such proceedings.”
78. Article 197 has been deleted and substituted by the following article:
- “197. (1) A judge of the superior courts of record may be removed from office in accordance with this Article and on the grounds of –

(a) inability to perform the functions of office arising from infirmity of body or mind;

(b) a breach of a code of conduct which shall be prescribed for judges of the superior courts of record by an appropriate Act of Parliament;

[(b) a breach of the duties prescribed under Article 277 and in the Code of Conduct set out in the fifth Schedule;]

*Paragraph (b) of Clause (1) of Article 197 has been left in the alternative pending a decision in another committee on the retention or otherwise of the 5th Schedule. If the Schedule is deleted, the first alternative providing for a judges' code of conduct is to be retained, and the second alternative deleted, and vice versa.*

(c) bankruptcy;

(d) incompetence; or

(e) misconduct or misbehaviour whether in the performance of his or her duties or otherwise.

(2) A person desiring the removal of a judge of a superior court of record may present a petition to the Judicial Service Commission setting out the alleged facts constituting the grounds for the judge's removal.

(3) The Judicial Service Commission shall consider the petition and, if it is satisfied that it discloses the existence of a ground under clause (1), it shall send the petition to the President of the Republic.

(4) On receipt of the petition the President shall within 14 days suspend the judge from office pending action by the President in accordance with clause (5) and shall, acting in accordance with the advice of the Judicial Service Commission –

(a) in the case of the Chief Justice, appoint a tribunal consisting of –

(i) the Speaker of the National Council as chairperson;

(ii) three judges from states which have a common law jurisdiction; and

(iii) three other persons with experience in public affairs; or

(b) in the case of a judge who is not the Chief Justice, appoint a tribunal consisting of –

(i) four members from among persons who hold or have held office as a judge of a superior court of record, or who are qualified to be appointed as such, but in either case have not been within the preceding three years, members of the Judicial Service Commission; and

(ii) three other persons with experience in public affairs; or

(5) The tribunal shall inquire into the matter and report on the facts and make recommendations to the President of the Republic, who shall act in accordance with the recommendations of the tribunal.

(6) A judge who is suspended from office under clause (4) shall retain his or her emoluments and benefits of office until such time as he or she may be removed from office, if such be the recommendation of the tribunal.

(7) A tribunal appointed under clause (4)(b) shall elect a chairperson from among its members and tribunals appointed under clauses (4)(a) and (4)(a) shall in all other respect be responsible for the regulation of its affairs.”.

79. Article 198(1) has been amended by inserting the words “courts martial and other” after the word “establish”.

80. Article 198(2) has been retained as in the draft bill.

81. Article 199 has been deleted and substituted by the following Article:

**“The Kadhis’ court**

**199.** There is established a Kadhis’ Court consisting of the Chief Kadhi and such number of Kadhis who profess the Islamic faith as may be prescribed by an Act of Parliament.”.

82. Article 200 has been deleted and substituted by the following Article:

### **“Jurisdiction of Kadhis’ court**

**200.** The Kadhis’ Court shall be a subordinate court with jurisdiction to determine questions of Islamic law relating to personal status, marriage, divorce and matters consequential thereto, inheritance and succession in proceedings in which the parties profess the Islamic faith and submit to the jurisdiction of that court.”.

83. Articles 201 and 202 have been deleted.

84. Article 203 has been deleted.

85. Article 204 has been deleted and the following Article substituted:

“204. (1) There is established the Judicial Service Commission consisting of –

- (a) three persons, each of whom shall be nominated by each of the religious organisations representative of the Christian, Muslim and Hindu faiths;
- (b) the Attorney-General for the time being;
- (c) one Supreme Court Judge elected by the judges of the Supreme Court;
- (d) one Court of Appeal judge elected by the judges of the Court of Appeal;
- (e) one High Court judge elected by the judges of the High Court;
- (f) the Chief Registrar of the Judiciary for the time being, who shall also be the Secretary to the Judicial Service Commission;
- (g) two advocates each of at least fifteen years’ standing nominated by the Law Society of Kenya or such other organisation as may succeed it as representative of the legal profession in Kenya; and
- (h) one person nominated by the Public Service Commission.

(2) Members of the Commission, apart from those appointed under clause (1)(b) and (f), shall hold office for a term of

five years and shall be eligible for re-appointment for a further and final term of five years.

- (3) The Commission shall elect a chairperson from among its members and shall otherwise regulate its own procedure.”.

86. Article 205 has been deleted and the following Article substituted:

“**205.** (1) The functions of the Judicial Service Commission shall be –

- (a) to ensure and enhance the independence and judicial accountability of the judiciary and the efficient, effective and transparent administration of justice;
- (b) to recommend to the President of the Republic persons for appointment as judges;
- (c) to review and make recommendations on the conditions of service of judges, magistrates and other judicial officers, other than their salaries and remuneration;
- (d) to advise the President of the Republic on the membership of the Tribunals referred to in Articles 197(4) and 210A(4);
- (e) to appoint, discipline and remove registrars, magistrates and other judicial officers, including paralegal staff, in such manner as may be specified by an Act of Parliament;
- (f) to review and investigate complaints against judges the Attorney-General, the Director of Public Prosecutions and the Public Defender in accordance with the Constitution;
- (g) to prepare and implement programmes for the continuing education and training of judges, magistrates and other judicial officers, and paralegal staff;
- (h) to advise the Government on improving the efficiency of the administration of justice, and on access to justice, including legal aid; and

(i) any other function prescribed by the Constitution or by an Act of Parliament.

(2) In performing its functions the Commission shall be subject only to the Constitution and the Law.

(3) In this Article “judge” means a judge of the superior court of record.”.

87. Articles 206 and 207 have been deleted.

**Part II — Legal System**

88. Article 208 has been deleted and the following Article substituted:

“208. (1) There is established the office of the Attorney-General which shall be an office in the public service as defined in Article 270.

(2) The Attorney-General shall be appointed by the President of the Republic on the recommendation of the Public Service Commission and with the approval of Parliament.

(3) The qualifications for the appointment as Attorney-General shall be the same as for appointment to the office of Chief Justice.

(4) Subject to the provisions of this Constitution, the Attorney-General shall be the principal legal adviser to the Government and shall be responsible for –

(a) drawing, perusing and recommending approval (or otherwise) of all agreements, contracts, treaties, conventions and documents by whatever name called, to which the Government is a party or in respect of which the Government has an interest.

(b) representing the Government in court or any other legal proceedings to which the Government is a party other than criminal proceedings; and

(c) drafting legislation, including subsidiary legislation.

(5) The Attorney-General shall have authority to appear as a friend of the court in any civil proceedings to which the Government is not a party.

(6) The Attorney-General shall promote, protect and uphold the rule of law and defend the public interest.

(7) The powers of the Attorney-General may be exercised in person or by subordinate officers acting in accordance with general or special instructions.

(8) Subject to the provisions of this Constitution the Attorney-General shall not be under the direction or control of any person or authority in the exercise of any of the Attorney-General's functions.

(9) The Attorney-General shall hold office for a term of five years, and shall be eligible for re-appointment for a further and final term of five years.”.

89. Article 209 has been deleted and the following article substituted:

“209. (1) There is established the office of the Director of Public Prosecutions which shall be an office in the public service as defined in Article 270.

(2) The Director of Public Prosecutions shall be appointed by the President of the Republic on the recommendation of the Public Service Commission and with the approval of Parliament.

(3) The qualifications for appointment as Director of Public Prosecutions shall be the same as for the appointment as a judge of the High Court.

(4) The Director of Public Prosecutions shall have powers to direct the Inspector General of the Kenya Police Service to investigate any information or allegations of criminal conduct.

(5) The Director of Public Prosecutions shall exercise state powers of prosecution and may –

(a) institute and undertake criminal proceedings against any person before any court (other than a court martial) in respect of any offence alleged to have been committed;

(b) take over and continue any criminal proceedings commenced in any court (other than a court martial) that have been instituted or undertaken by another person or authority with the permission of that person or authority; and

(c) subject to clause (8), discontinue at any stage before judgment is delivered any criminal proceedings instituted by him or her or taken over by him or her under paragraph (b).

(6) Where the discontinuance referred to in clause (5)(c) takes place after the defendant has completed the delivery of his defence, the defendant shall be acquitted.

(7) Parliament may confer powers of prosecution on authorities other than the Director of Public Prosecutions.

(8) The Director of Public Prosecutions may not discontinue a prosecution without the permission of the court.

(9) The powers of the Director of Public Prosecutions may be exercised in person or by subordinate officers acting in accordance with general or special instructions.

(10) The Director of Public Prosecutions shall not require the consent of any person or authority for the commencement of criminal proceedings, and in the exercise of the Director of Public Prosecutions' powers or functions the Director of Public Prosecutions shall be subject only to this Constitution.

(11) In exercising the powers conferred by this Article, the Director of Public Prosecutions shall have regard to the public interest, the interests of the administration of justice and the need to prevent and avoid abuse of the legal process.

(12) The Director of Public Prosecutions shall hold office for a term of five years, and shall be eligible for re-appointment for a further and final term of five years."

90. Article 210 has been deleted and the following Article substituted:

"210. (1) There is established the office of the Public Defender which shall be an office in the public service as defined in Article 270.

(2) The Public Defender shall be appointed by the President of the Republic on the recommendation of the Public Service Commission and with the approval of Parliament.

(3) The qualifications for appointment as Public Defender shall be the same as for the appointment as a judge of the High Court.

(4) Subject to Clause (5) the Public Defender shall provide legal advice and representation to persons who are unable to afford legal services.

(5) Parliament shall by an Act of Parliament make provision for –

(a) the effective, efficient and transparent management and administration of the Public Defender’s office;

(b) the categories of persons who qualify for legal aid;

(c) the categories of cases that qualify for legal aid;

(d) such other limitations in accessing legal aid as it may consider appropriate; and

(e) publicising information as to the availability of legal aid.

(6) The powers of the Public Defender may be exercised in person or by subordinate officers acting in accordance with general or special instructions.

(7) The Public Defender shall hold office for a term of five years, and shall be eligible for re-appointment for a further and final term of five years.”.

91. The following Article has been inserted after Article 210:

**“Removal from office**

“210A.(1) The Attorney-General, the Director of Public Prosecutions or the Public Defender may be removed from office in accordance with this Article and on the grounds of –

(a) inability to perform the functions of office arising from infirmity of body or mind;

(b) a breach of the duties prescribed under Article 277 and in the Code of Conduct set out in the Fifth Schedule;

(c) bankruptcy;

(d) incompetence; or

(e) misconduct or misbehaviour whether in the performance of the office-holder’s duties or otherwise.

(2) A person desiring the removal of the Attorney-General, the Director of Public Prosecutions or the Public Defender may present a petition to the Judicial

Service Commission setting out the alleged facts constituting the grounds for the removal of the office-holder in question.

(3) The Judicial Service Commission shall consider the petition and, if it is satisfied that it discloses the existence of a ground under clause (1), it shall send the petition to the President of the Republic.

(4) On receipt and examination of the petition the President of the Republic shall within 14 days suspend the office holder in question from office pending action by the President of the Republic in accordance with clause (5) and shall, acting in accordance with the advice of the Judicial Service Commission appoint a tribunal consisting of –

(a) four members from among persons who hold or have held office as a judge of a superior court of record, or who are qualified to be appointed as such, but in either case who are not, and have not been within the preceding three years, members of the Judicial Service Commission;

(b) a member of the Public Service Commission; and

(c) two other persons with experience in public affairs.

(5) The tribunal shall inquire into the matter and report on the facts and make recommendations to the President of the Republic, who shall act in accordance with the recommendations of the tribunal.

(6) An Attorney-General, a Director of Public Prosecutions or a Public Defender who is suspended from office under clause (4) shall retain the office holder's emoluments and benefits of office until such time as the office holder may be removed from office, if such be the recommendation of the tribunal.

(7) A tribunal appointed under clause (4) shall elect a chairperson from among its members and shall in all other respects be responsible for the regulation of its affairs.”.

92. Article 211 has been deleted and the following Article substituted:

**“Presidential powers of clemency**

211. (1) There shall be a power of clemency which shall be exercised on the petition of any person by the President of the Republic in accordance with the advice of the Committee referred to in Clause (3), which power shall not be delegated to any other person.

(2) Parliament shall enact an Act of Parliament establishing criteria that shall be applied by the advisory Committee referred to in clause (3) in formulating its advice referred to in clause (1).

(3) There shall be an advisory Committee on the Presidential Power of Clemency which shall consist of –

- (a) the Attorney-General for the time being;
- (b) the Minister for the time being responsible for the Kenya Correctional Services;
- (c) a medical practitioner nominated by the Medical Practitioners and Dentists Board or such body as may succeed it as generally representative of the medical and dental professions in Kenya;
- (d) the head of the probation service for the time being;
- (e) a person nominated by the Commission on Human Rights and Administrative Justice for as long as that body continues in existence;
- (f) three persons, each of whom shall be nominated by each of the religious organisations representative of the Christian, Muslim and Hindu faiths; and
- (g) one advocate of at least fifteen years' standing nominated by the Law Society of Kenya or such other body as may succeed it as generally representative of the legal profession in Kenya.

(4) Persons appointed to the Advisory Committee under clause (3)(c), (e), (f) and (g) shall remain members of the Advisory Committee for a period of one year and may be re-appointed for two further terms of one year.

(5) The Advisory Committee may act despite there being a vacancy in its membership.

(6) The Advisory Committee shall elect a chairperson from among its members and may regulate its own procedure.

(7) In exercise of the powers conferred by clause (1) the President of the Republic may –

- (a) grant to a person convicted of an offence a pardon, either free or subject to lawful conditions;

- (b) postpone, either for a specified period or indefinitely, the carrying out of a punishment imposed on a person;
- (c) substitute a less severe form of punishment for a punishment imposed on a person for an offence; and
- (d) remit the whole or part of a punishment imposed on a person for an offence.

(8) The Advisory Committee may take into account the views of the victims of the offence in respect of which it is considering recommending the exercise of the power of clemency by the President of the Republic.”.

**APPENDIX E- AGENDAS**

**NATIONAL CONSTITUTIONAL CONFERENCE**

**TECHNICAL WORKING GROUP “E” - JUDICIARY**

**ORDERS OF THE DAY**

**TUESDAY 26<sup>TH</sup> MAY 2003 AT 8.30 A.M.**

**PRAYER**

1. Introduction.
2. Election of the Convenor.

**Approved for circulation**

**Comm. Paul Musili Wambua**

**Comm. Ahmed Issack Hassan**

**Rapporteurs**

Date .....

Time .....

**NATIONAL CONSTITUTIONAL CONFERENCE**

**TECHNICAL WORKING GROUP “E” - JUDICIARY**

**ORDERS OF THE DAY**

**TUESDAY 27<sup>TH</sup> MAY 2003 AT 8.30 A.M.**

**PRAYER**

1. Confirmation of Minutes.
2. Election of the Convenor.
3. Any other Business

**Approved for circulation**

**Comm. Paul Musili Wambua**

**Comm. Ahmed Issack Hassan**

**Rapporteurs**

**CONVENOR**

Date .....

Time .....

**NATIONAL CONSTITUTIONAL CONFERENCE**

**TECHNICAL WORKING GROUP “E” - JUDICIARY**

**ORDERS OF THE DAY**

**TUESDAY 19<sup>TH</sup> AUGUST 2003 AT 8.30 A.M.**

**PRAYER**

1. Confirmation of Minutes.
2. Matters Arising.
3. Communication by the Convenor of the Technical Working Group “E” - Judiciary.
4. Presentation of Chapter Nine By the Rapporteurs.
5. Presentation on conduct of Business in Committee.
6. Programme of work.

**Approved for circulation**

**PROF. KIVUTHA KIBWANA**

**CONVENOR**

Date .....

Time .....

**NATIONAL CONSTITUTIONAL CONFERENCE  
TECHNICAL WORKING GROUP “E” - JUDICIARY  
ORDERS OF THE DAY**

**MONDAY 8<sup>TH</sup> SEPTEMBER 2003 AT 9.00 A.M.**

**PRAYER**

1. Confirmation of Minutes.
2. Matters Arising.
3. Communication by the Convenor of the Technical Working Group “E” - Judiciary.
4. Presentation on conduct of Business in Committee.
5. General comments session.
6. Programme of work.

**Approved for circulation**

**PROF. KIVUTHA KIBWANA**

**CONVENOR**

Date .....

Time .....

**NATIONAL CONSTITUTIONAL CONFERENCE**

**TECHNICAL WORKING GROUP “E” - JUDICIARY**

**ORDERS OF THE DAY**

**TUESDAY 9<sup>TH</sup> SEPTEMBER 2003 AT 8.30 A.M.**

**PRAYER**

1. Confirmation of Minutes.
2. Matters Arising.
4. Communication by the Convenor of the Technical Working Group “E” - Judiciary.
5. General comments session.
6. Presentation on conduct of Business in Committee.
7. Programme of work.

**Approved for circulation**

**PROF. KIVUTHA KIBWANA**

**CONVENOR**

Date .....

Time .....

**NATIONAL CONSTITUTIONAL CONFERENCE**

**TECHNICAL WORKING GROUP “E” – JUDICIARY**

The Convenor presents his compliments to Members of the Technical Working Committee “E” and has the honour to inform them that a sitting of the Committee will be held **on Thursday, 11<sup>th</sup> September, 2003 in tent No. 5, Bomas of Kenya at 8.30 a.m.**

**AGENDA**

1. Prayers.
2. Confirmation of Minutes.
3. Matters Arising.
4. Consideration of Business.
  - (i) Recap of the presentation of the Draft Bill/Report by the Commissioners.
  - (ii) A brief on issues raised at the plenary on judiciary.
5. Consideration of the Report and Draft Bill (Article by Article).
6. Any Other Business.

**Approved for circulation**

**Prof. Kivutha Kibwana**

**Convenor**

Date .....

**NATIONAL CONSTITUTIONAL CONFERENCE**

**TECHNICAL WORKING GROUP “E” - JUDICIARY**

The Convenor presents his compliments to Members of the Technical Working Committee “E” and has the honour to inform them that a sitting of the Committee will be held **on Friday 12<sup>th</sup> September, 2003 in tent No. 5, Bomas of Kenya at 8.30 a.m.**

**AGENDA**

1. Prayers.
2. Confirmation of Minutes.
3. Matters Arising.
4. General Comments Session.
5. Consideration of the Report and Draft Bill (Article by Article).
6. Any Other Business.
7. Date of next Meeting.

**Approved for circulation**

**Prof. Kivutha Kibwana**

**Convenor**

Date .....

**NATIONAL CONSTITUTIONAL CONFERENCE**

**TECHNICAL WORKING GROUP “E” - JUDICIARY**

The Convenor presents his compliments to Members of the Technical Working Committee “E” and has the honour to inform them that a sitting of the Committee will be held **on Monday 15<sup>th</sup> September, 2003 in tent No. 5, Bomas of Kenya at 10.00 a.m.**

**AGENDA**

1. Prayers.
2. Confirmation of Minutes.
3. Matters Arising.
4. General Comments Session.
5. Consideration of the Report and Draft Bill (Article by Article).
6. Any Other Business.
7. Date of next Meeting.

**Approved for circulation**

**Prof. Kivutha Kibwana**

**Convenor**

Date .....

Time .....

**NATIONAL CONSTITUTIONAL CONFERENCE**

**TECHNICAL WORKING GROUP “E” - JUDICIARY**

The Convenor presents his compliments to Members of the Technical Working Committee “E” and has the honour to inform them that a sitting of the Committee will be held **on Tuesday 16<sup>th</sup> September, 2003 in tent No. 5, Bomas of Kenya at 10.00 a.m.**

**AGENDA**

1. Prayers.
2. Confirmation of Minutes.
3. Matters Arising.
4. General Comments Session.
5. Consideration of the Draft Bill (Article by Article).

**Article 184 (4); 5**

**Article 185**

**Article 186**

**Article 187**

6. Any Other Business.
7. Date of next Meeting.

Approved for circulation

**Prof. Kivutha Kibwana**

**Convenor**

Date .....

Time .....

**NATIONAL CONSTITUTIONAL CONFERENCE**

**TECHNICAL WORKING GROUP “E” - JUDICIARY**

The Convenor presents his compliments to Members of the Technical Working Committee “E” and has the honour to inform them that a sitting of the Committee will be held on **Wednesday 17<sup>th</sup> September, 2003 in tent No. 5, Bomas of Kenya at 8.30 a.m.**

**AGENDA**

1. Prayers.
2. Confirmation of Minutes.
3. Matters Arising.
4. General Comments Session.
5. Consideration of the Draft Bill (Article by Article).

**Article 184 (4) and (5)**

**Article 185**

**Article 186**

**Article 187**

6. Any Other Business.
7. Date of next Meeting.
8. Approved for circulation

**Prof. Kivutha Kibwana**

**Convenor**

Date .....

Time .....

**NATIONAL CONSTITUTIONAL CONFERENCE**

**TECHNICAL WORKING GROUP “E” - JUDICIARY**

The Convenor presents his compliments to Members of the Technical Working Committee “E” and has the honour to inform them that a sitting of the Committee will be held **on Friday 26<sup>th</sup> September, 2003 in tent No. 5, Bomas of Kenya at 8.30 a.m.**

**AGENDA**

1. Prayers.
2. General Comments Session.
3. Confirmation of Minutes.
4. Matters Arising.
5. Consideration of the Draft Bill (Article by Article).

**Article 188 - Amendment Proposed;**  
**Article 189**  
**Article 190**  
**Article 191**

6. Any Other Business.
7. Date of next Meeting.

**Approved for circulation**  
**Hon. Prof. Kivutha Kibwana**  
**Convenor**

Date .....

Time .....

**NATIONAL CONSTITUTIONAL CONFERENCE**  
**TECHNICAL WORKING GROUP “E” - JUDICIARY**

The Convenor presents his compliments to Members of the Technical Working Committee “E” and has the honour to inform them that a sitting of the Committee will be held **on Tuesday 13<sup>th</sup> January, 2004 in Tent No. 5, Bomas of Kenya at 11.30 a.m.**

**AGENDA**

1. Prayers.
2. General Comments Session.
3. Confirmation of Minutes.
4. Matters Arising.
5. Consideration of the Draft Bill (Article by Article).
  - i. Article 185(2) - Amendment Proposed;
  - ii. Article 188 - Amendment Proposed;
  - iii. Article 189
  - iv. Article 190
  - v. Article 191
6. Any Other Business.
7. Date of next Meeting.

Approved for circulation

**Hon. Prof. Kivutha Kibwana**  
Convenor

Date .....

Time .....

**NATIONAL CONSTITUTIONAL CONFERENCE**

**TECHNICAL WORKING GROUP “E” - JUDICIARY**

The Convenor presents his compliments to Members of the Technical Working Committee “E” and has the honour to inform them that a sitting of the Committee will be held **on Wednesday 14<sup>th</sup> January, 2004 in Tent No. 5, Bomas of Kenya at 9.30 a.m.**

**AGENDA**

1. Prayers.
2. General Comments Session.
3. Confirmation of Minutes.
4. Matters Arising.
5. Consideration of the Draft Bill (Article by Article).

<b>Article 192</b>	-	<b>(renumbered 191)</b>
<b>Article 193</b>	-	<b>(renumbered 192)</b>
<b>Article 194</b>	-	<b>(renumbered 193)</b>
<b>Article 195</b>	-	<b>(renumbered 194)</b>
<b>Article 196</b>	-	<b>(renumbered 195)</b>
<b>Article 197</b>	-	<b>(renumbered 196)</b>
<b>Article 198</b>	-	<b>(renumbered 197)</b>
<b>Article 199</b>	-	<b>(renumbered 198)</b>

6. Any Other Business.
7. Date of next Meeting.  
Approved for circulation

**Hon. Prof. Kivutha Kibwana**  
Convenor

Date .....

Time .....

**NATIONAL CONSTITUTIONAL CONFERENCE**

**TECHNICAL WORKING GROUP “E” - JUDICIARY**

The Convenor presents his compliments to Members of the Technical Working Committee “E” and has the honour to inform them that a sitting of the Committee will be held **on Thursday 15<sup>th</sup> January, 2004 in Tent No. 5, Bomas of Kenya at 9.30 a.m.**

**AGENDA**

1. Prayers.
2. Confirmation of Minutes.
3. Matters Arising.
4. Consideration of the Draft Bill (Article by Article).

**Article 197**  
**Article 198**  
**Article 199**  
**Article 200**  
**Article 201**  
**Article 202**  
**Article 203**  
**Article 204**

5. Any Other Business.
6. Date of next Meeting.

Approved for circulation

**Hon. Prof. Kivutha Kibwana**  
**Convenor**

Date .....

Time .....

**NATIONAL CONSTITUTIONAL CONFERENCE**

**TECHNICAL WORKING GROUP “E” - JUDICIARY**

The Convenor presents his compliments to Members of the Technical Working Committee “E” and has the honour to inform them that a sitting of the Committee will be held **on Monday 19<sup>th</sup> January, 2004 in Tent No. 5, Bomas of Kenya at 9.00 a.m.**

**AGENDA**

1. Opening Prayers
2. Apologies
3. Confirmation of Minutes.
4. Matters Arising.
5. Consideration of the Draft Bill (Article by Article).

**Article 204**

**Article 207**

**Article 210**

**Article 205**

**Article 208**

**Article 211**

**Article 206**

**Article 209**

**Article 212**

6. Any Other Business.
7. Date of next Meeting.
8. Closing prayers.

Approved for circulation

**Hon. Prof. Kivutha Kibwana**  
**Convenor**

Date .....

Time .....

**NATIONAL CONSTITUTIONAL CONFERENCE**

**TECHNICAL WORKING GROUP “E” - JUDICIARY**

The Convenor presents his compliments to Members of the Technical Working Committee “E” and has the honour to inform them that a sitting of the Committee will be held **on Wednesday 21<sup>st</sup> January, 2004 in Tent No. 5, Bomas of Kenya at 9.00 a.m.**

**AGENDA**

1. Opening Prayers
2. Apologies
3. Confirmation of Minutes.
4. Matters Arising.
5. Consideration of the Draft Bill (Article by Article).

**Article 209**

**Article 211**

**Article 210**

**Article 212**

6. Any Other Business.
7. Date of next Meeting.
8. Closing prayers.

**Approved for circulation**

**Hon. Bishop Philip Sulumeti**

**Ag. Convenor**

Date .....

Time .....

**NATIONAL CONSTITUTIONAL CONFERENCE**

**TECHNICAL WORKING GROUP “E” - JUDICIARY**

The Convenor presents his compliments to Members of the Technical Working Committee “E” and has the honour to inform them that a sitting of the Committee will be held on **Thursday 22<sup>nd</sup> January, 2004 in Tent No. 5, Bomas of Kenya at 9.00 a.m.**

**AGENDA**

1. Opening Prayers
2. Apologies
3. Confirmation of Minutes.
4. Matters Arising.
5. Consideration of the Draft Bill (Article by Article).  
**Article 211**
6. Any Other Business.
7. Date of next Meeting.
8. Closing prayers.

**Approved for circulation**

**Hon. Bishop Philip Sulumeti  
Convenor**

Date .....

Time .....

**NATIONAL CONSTITUTIONAL CONFERENCE**

**TECHNICAL WORKING GROUP “E” - JUDICIARY**

The Convenor presents his compliments to Members of the Technical Working Committee “E” and has the honour to inform them that a sitting of the Committee will be held **on Friday 23<sup>rd</sup> January, 2004 in Tent No. 5, Bomas of Kenya at 9.00 a.m.**

**AGENDA**

1. Opening Prayers
2. Apologies
3. Confirmation of Minutes.
4. Matters Arising.
5. Consideration of the Draft Bill (Article by Article).

**Article 211**

6. Any Other Business.
7. Date of next Meeting.
8. Closing prayers.

**Approved for circulation**

**Hon. Bishop Philip Sulumeti**  
**Convenor**

Date .....

Time .....

**NATIONAL CONSTITUTIONAL CONFERENCE**

**TECHNICAL WORKING GROUP “E” - JUDICIARY**

The Convenor presents his compliments to Members of the Technical Working Committee “E” and has the honour to inform them that a sitting of the Committee will be held **on Monday 26<sup>th</sup> January, 2004 in Tent No. 5, Bomas of Kenya at 9.00 a.m.**

**AGENDA**

1. Opening Prayers
2. Apologies
3. Confirmation of Minutes.
4. Matters Arising.
5. Consideration of the Commissioners Report Page 249 – 263.
6. Any Other Business.
7. Date of next Meeting.
8. Closing prayers.

Approved for circulation

**Hon. Bishop Philip Sulumeti**  
**Convenor**

Date .....

Time .....

**NATIONAL CONSTITUTIONAL CONFERENCE**

**TECHNICAL WORKING GROUP “E” - JUDICIARY**

The Convenor presents his compliments to Members of the Technical Working Committee “E” and has the honour to inform them that a sitting of the Committee will be held **on Friday 30<sup>th</sup> January, 2004 in Tent No. 5, Bomas of Kenya at 9.30 a.m.**

**AGENDA**

1. Opening Prayers
2. Apologies
3. Confirmation of Minutes.
4. Matters Arising.
5. Adoption of the Committee’s Report and Draft Bill.
6. Any Other Business.
7. Date of next Meeting.
8. Closing prayers.

**Approved for circulation**

**Hon. Bishop Philip Sulumeti**  
**Convenor**

Date .....

Time .....

**NATIONAL CONSTITUTIONAL CONFERENCE**

**TECHNICAL WORKING GROUP “E” - JUDICIARY**

The Convenor presents his compliments to Members of the Technical Working Committee “E” and has the honour to inform them that a sitting of the Committee will be held on **Tuesday 17<sup>th</sup> February, 2004 in Tent No. 5, Bomas of Kenya at 9.30 a.m.**

**AGENDA**

1. Opening Prayers
2. Apologies
3. Confirmation of Minutes.
4. Matters Arising.
5. Consideration of the Zero Draft and other matters.
6. Any Other Business.
7. Date of next Meeting.
8. Closing prayers.

Approved for circulation

**Hon. Bishop Philip Sulumeti**  
**Convenor**

Date .....

Time.

**NATIONAL CONSTITUTIONAL CONFERENCE**

**TECHNICAL WORKING GROUP “E” - JUDICIARY**

The Convenor presents his compliments to Members of the Technical Working Committee “E” and has the honour to inform them that a sitting of the Committee will be held on **Wednesday 18<sup>th</sup> February, 2004 in Tent No. 5, Bomas of Kenya at 9.30 a.m.**

**AGENDA**

1. Opening Prayers
2. Apologies
3. Confirmation of Minutes.
4. Matters Arising.
5. Consideration of Cross cutting issues and other matters.
6. Any Other Business.
7. Date of next Meeting.
8. Closing prayers.

Approved for circulation

**Hon. Bishop Philip Sulumeti**  
**Convenor**

Date .....

Time .....

**NATIONAL CONSTITUTIONAL CONFERENCE**

**TECHNICAL WORKING GROUP “E” - JUDICIARY**

The Convenor presents his compliments to Members of the Technical Working Committee “E” and has the honour to inform them that a sitting of the Committee will be held on **Thursday 19<sup>th</sup> February, 2004 in Tent No. 5, Bomas of Kenya at 9.30 a.m.**

**AGENDA**

1. Opening Prayers
2. Apologies
3. Confirmation of Minutes.
4. Matters Arising.
5. Any Other Business.
6. Date of next Meeting.
7. Closing prayers.

**Approved for circulation**

**Hon. Bishop Philip Sulumeti**  
**Convenor**

Date .....

Time .....

**NATIONAL CONSTITUTIONAL CONFERENCE**

**TECHNICAL WORKING GROUP “E” - JUDICIARY**

The Convenor presents his compliments to Members of the Technical Working Committee “E” and has the honour to inform them that a sitting of the Committee will be held **on Friday 20<sup>th</sup> February, 2004 in Tent No. 5, Bomas of Kenya at 9.30 a.m.**

**AGENDA**

1. Opening Prayers
2. Apologies
3. Confirmation of Minutes.
4. Confirmation and Adoption of the Committees Report and Recommendations.
5. Matters Arising.
6. Any Other Business.
7. Date of next Meeting.
8. Closing prayers.

Approved for circulation

**Hon. Bishop Philip Sulumeti**  
**Convenor**

Date .....

Time .....

**NATIONAL CONSTITUTIONAL CONFERENCE**

**TECHNICAL WORKING GROUP “E” - JUDICIARY**

The Convenor presents his compliments to Members of the Technical Working Committee “E” and has the honour to inform them that a sitting of the Committee will be held **on Monday 23<sup>rd</sup> February, 2004 in Tent No. 5, Bomas of Kenya at 9.30 a.m.**

**AGENDA**

1. Opening Prayers
2. Apologies
3. Confirmation of Minutes.
4. Matters Arising.
5. Confirmation and Adoption of the Committees Report and Recommendations.
6. Any Other Business.
7. Date of next Meeting.
8. Closing prayers.

Approved for circulation

**Hon. Bishop Philip Sulumeti**  
**Convenor**

Date .....

Time .....

**NATIONAL CONSTITUTIONAL CONFERENCE**  
**TECHNICAL WORKING GROUP “E” - JUDICIARY**

The Convenor presents his compliments to Members of the Technical Working Committee “E” and has the honour to inform them that a sitting of the Committee will be held **on Tuesday 24<sup>th</sup> February, 2004 in Tent No. 5, Bomas of Kenya at 9.30 a.m.**

**AGENDA**

1. Opening Prayers
2. Apologies
3. Confirmation of Minutes.
4. Matters Arising.
5. Confirmation and Adoption of the Committees Report and Recommendations.
6. Any Other Business.
7. Date of next Meeting.
8. Closing prayers.

Approved for circulation

**Hon. Bishop Philip Sulumeti**  
**Convenor**

Date .....

Time .....

**NATIONAL CONSTITUTIONAL CONFERENCE**

**TECHNICAL WORKING GROUP “E” - JUDICIARY**

The Convenor presents his compliments to Members of the Technical Working Committee “E” and has the honour to inform them that a sitting of the Committee will be held on **Wednesday 25<sup>th</sup> February, 2004 in Tent No. 5, Bomas of Kenya at 9.30 a.m.**

**AGENDA**

1. Opening Prayers
2. Apologies
3. Confirmation of Minutes.
4. Matters Arising.
5. Any Other Business.
6. Closing prayers.

Approved for circulation

**Hon. Bishop Philip Sulumeti**  
Convenor

Date .....

Time .....

**NATIONAL CONSTITUTIONAL CONFERENCE**

**TECHNICAL WORKING GROUP “E” - JUDICIARY**

The Convenor presents his compliments to Members of the Technical Working Committee “E” and has the honour to inform them that a sitting of the Committee will be held **on Thursday 26<sup>th</sup> February, 2004 in Tent No. 5, Bomas of Kenya at 9.30 a.m.**

**AGENDA**

1. Opening Prayers
2. Apologies
3. Confirmation of Minutes.
4. Matters Arising.
5. Finalisation of the report writing.
6. Any Other Business.
7. Closing prayers.

Approved for circulation

**Hon. Bishop Philip Sulumeti**  
**Convenor**

Date .....

Time .....

## APPENDIX F

### Minutes Of The Committees' Meetings

#### **THE NATIONAL CONSTITUTIONAL CONFERENCE**

#### **MINUTES OF THE FIRST SITTING OF THE TECHNICAL WORKING GROUP "E" THE JUDICIARY, HELD ON 26<sup>TH</sup> MAY 2003 AT 11.30 A.M. IN COMMITTEE TENT NO. 5**

#### **PRESENT**

The following members were present

1. Hon. F. K. Waweru
2. Hon. Lilian Wanjira
3. Hon. Abass Ali Abdirahaman
4. Hon. R. O. Kwach
5. Hon. Khadija Fugicha
6. Hon. Victor P. Gituma
7. Hon. Victoria Mutheu Musyoka
8. Hon. Godana Adhi Doyo
9. Hon. Kivutha Kibwana
10. Hon. Kiptingos Saul Kikoech
11. Hon. Nathaniel Tum
12. Hon. Kembi Gatura
13. Hon. Kihara Mwangi
14. Hon. Waithanje Minjire
15. Hon. Fr. J. Gitonga
16. Hon. Owino Charles Oyugi
17. Hon. Archbishop Z. Okoth
18. Hon. Nyangau B. Onwonga
19. Ho. Amina Abdalla
20. Hon. Ali Shee Mohammed
21. Hon. El-Busaidy Abdulghafur H. H.
22. Hon. Fadhil Sultana
23. Hon. Archbishop David Gitari
24. Hon. Rev. Patrick M. Musungu
25. Hon. Mustafa Yusuf Ali
26. Hon. R. S. Sehmi
27. Hon. Mohammed Abdi Haji
28. Hon. Hubbie Hussein Al Haji
29. Hon. Asli Ibrahim

30. Hon. Issack Derrow Ibrahim
31. Hon. Kathurima M'noti
32. Hon. Singoei Korir
33. Hon. Jamila Mohamed
34. Hon. Nancy Ngeiywa
35. Hon. K. Marende
36. Hon. Roselyne Ashepete
37. Hon. Bishop Phillip Sulumeti
38. Hon. Gervase B. K. Akhaabi
39. Hon. Yusuf Aboubakar
40. Hon. Abdurhman Badawy
41. Hon. Fatuma Boy Bakari
42. Hon. Amina Ahmed

**IN ATTENDANCE**

Mr. Musili Wambua	-	Rapporteur/Commissioner
Mr. Michael Sialai	-	Committee Clerk/National Assembly
Mr. Dan Juma	-	Programme Assistant/CKRC

**MIN. NO. TWG/E/01:      INTRODUCTORY REMARKS**

Commissioner Musili Wambua, who convened the meeting, briefed the members on the responsibilities of a Convenor and the manner of electing him/her.

**MIN. NO. TWG/E/02:      ELECTION OF CONVENOR**

The Committee agreed that in order to have a properly elected Convenor, there was need for participation of all members in the election of the Convenor.

Thereupon, the Commissioner postponed the election of the Convenor to Tuesday 27<sup>th</sup> May, 2002 at 12.00 noon.

It was further agreed that prospective candidates to the post be proposed and seconded from the floor.

**MIN. NO. TWG/E/03:      ADJOURNMENT**

The meeting was adjourned at fifty minutes past eleven O'clock until **Tuesday 27<sup>th</sup> May, 2003 at 12.00 noon.**

**SIGNED .....**

DATE .....

**THE NATIONAL CONSTITUTIONAL CONFERENCE**

**MINUTES OF THE SECOND SITTING OF THE TECHNICAL WORKING GROUP "E" THE JUDICIARY, HELD ON 27<sup>TH</sup> MAY 2003 AT 1.30 A.M. IN COMMITTEE TENT NO. 5**

**PRESENT**

The following members were present

1. Hon. Kivutha Kibwana - **Convenor**
2. Hon. Lilian Wanjira
3. Hon. Abass Ali Abdirahaman
4. Hon. R. O. Kwach
5. Hon. Khadija Fugicha
6. Hon. Victor P. Gituma
7. Hon. Victoria Mutheu Musyoka
8. Hon. Dr. Nathaniel Tum
9. Hon. Kembi Gitura
10. Hon. Kihara Mwangi
11. Hon. Waithanje Minjire
12. Hon. Fr. J. Gitonga
13. Hon. Owino Charles Oyugi
14. Hon. Archbishop Z. Okoth
15. Hon. Amina Abdalla
16. Hon. Ali Shee Mohammed
17. Hon. El-Busaidy Abdulghafur H. H.
18. Hon. Fadhil Sultana
19. Hon. Archbishop David Gitari
20. Hon. Rev. Patrick M. Musungu
21. Hon. Mustafa Yusuf Ali
22. Hon. R. S. Sehmi
23. Hon. Mohammed Abdi Haji
24. Hon. Hubbie Hussein Al Haji
25. Hon. Issack Derrow Ibrahim
26. Hon. Kathurima M'Inoti
27. Hon. Jamila Mohamed
28. Hon. Nancy Ngeiywa
29. Hon. Mohammed Nyaoga
30. Hon. Shakeel Shabbir
31. Hon. Abdirahman Ali Hassan
32. Hon. Lumatete Muchai
33. Hon. Isaiah Kubai
34. Hon. Patrick Kiage

35. Hon. Abdalla Ngozi
36. Hon. Andrew Ligale
37. Hon. A. I. Hassan
38. Hon. Salim Ibrahim
39. Hon. Lydia W. Muriuki
40. Hon. Benta Auma Saoke
41. Hon. Rachelle Omamo
42. Hon. Jane J. Kiptum
43. Hon. Charles Kimani
44. Hon. K. Marende
45. Hon. Roselyne Ashepete
46. Hon. Bishop Phillip Sulumeti
47. Hon. Gervase B. K. Akhaabi
48. Hon. Yusuf Aboubakar
49. Hon. Abdurhman Badawy
50. Hon. Fatuma Boy Bakari
51. Hon. Amina Ahmed

#### **IN ATTENDANCE**

Mr. Musili Wambua	-	Rapporteur/Commissioner
Mr. Michael Sialai	-	Committee Clerk/National Assembly
Mr. Dan Juma	-	Programme Assistant/CKRC

#### **MIN. NO. TWG/E/04: ELECTION OF CONVENOR**

Commissioner Musili Wambua, the Chair-Protem called the meeting to order at 1.30 p.m. and informed the meeting that there was an understanding arising from consultation in the Steering Committee, that the Technical Working Group “E” should elect a delegate from Eastern province to be a convenor.

He proceeded to call for proposals, upon which Hon. Kivutha Kibwana and Hon. R. O. Kwach were proposed and seconded by Hon. Nathaniel Tum and Hon. Abdurham Badawy; Hon. Benta Auma Saoke and Hon. Bishop Philip Sulumeti respectively.

Hon. Richard O. Kwach, however, declined to contest, noting that since he comes from the Judiciary, his chairmanship may not promote neutrality in deliberating matters touching on Judiciary.

There being no other delegate proposed and seconded, the Chair-Protem declined Hon. Kivutha unanimously elected the Convenor of the Working Group.

In his acceptance speech, the elected Convenor thanked the delegates for electing him the convenor and pledged to convene in an extremely fair manner. He asked the delegates to

deliberate on the matters touching on the Judiciary in a broad, objective and sober manner.

**MIN. NO. TWG/E/05:      ANY OTHER BUSINESS**

1. The Committee was informed that the Steering Committee would be sending experts to assist the Committee in its work.
2. The meeting agreed that members should be responsible when talking to the press, as leaking Committee proceedings to the press is likely to cause division and jeopardize its deliberations.

**MIN. NO. TWG/E/06:      ADJOURNMENT**

The Convenor adjourned the meeting at ten minutes past two O'clock until a date to be notified.

**SIGNED** .....  
(CONVENOR)

**DATE:** .....

**THE NATIONAL CONSTITUTIONAL CONFERENCE**

**MINUTES OF THE THIRD SITTING OF THE TECHNICAL WORKING  
GROUP “E” THE JUDICIARY, HELD ON 19<sup>TH</sup> AUGUST 2003 AT 3.50 P.M. IN  
COMMITTEE TENT NO. 5**

**PRESENT**

1. Hon. Kivutha Kibwana - Convenor
2. Hon. Lilian Wanjira
3. Hon. Abass Ali Abdirahaman
4. Hon. Khadija Fugicha
5. Hon. Victor P. Gituma
6. Hon. Victoria Mutheu Musyoka
7. Hon. Dr. Nathaniel Tum
8. Hon. Kihara Mwangi
9. Hon. Waithanje Minjire
10. Hon. Fr. J. Gitonga
11. Hon. Archbishop Z. Okoth
12. Hon. Ali Shee Mohammed
13. Hon. El-Busaidy Abdulghafur H. H.
14. Hon. Fadhil Sultana
15. Hon. Mustafa Yusuf Ali
16. Hon. R. S. Sehmi
17. Hon. Hubbie Hussein Al Haji
18. Hon. Issack Derrow Ibrahim
19. Hon. Nancy Ngeiywa
20. Hon. Isaiah Kubai
21. Hon. Salim Ibrahim
22. Hon. Benta Auma Saoke
23. Hon. Jane J. Kiptum
24. Hon. K. Marende
25. Hon. Bishop Phillip Sulumeti
26. Hon. Gervase B. K. Akhaabi
27. Hon. Abdurhaman Badawy
28. Hon. Fatuma Boy Bakari
29. Hon. Amina Ahmed
30. Hon. F. K. Waweru
31. Hon. Abdi Tari Sasura
32. Hon. Mirugi Kariuki
33. Hon. Asli Ibrahim
34. Hon. Fred Ojiambo
35. Hon. Daniel M. Rasugu

## **ABSENT**

1. Hon. R. O. Kwach
2. Hon. Kembi Gitura
3. Hon. Owino Charles Oyugi
4. Hon. Amina Abdalla
5. Hon. Archbishop David Gitari
6. Hon. Rev. Patrick M. Musungu
7. Hon. Mohammed Abdi Haji
8. Hon. Kathurima M'inoti
9. Hon. Jamila Mohamed
10. Hon. Mohammed Nyaoga
11. Hon. Shakeel Shabbir
12. Hon. Abdirahman Ali Hassan
13. Hon. Lumatete Muchai
14. Hon. Patrick Kiage
15. Hon. Abdalla Ngozi
16. Hon. Andrew Ligale
17. Hon. A. I. Hassan
18. Hon. Lydia W. Muriuki
19. Hon. Raychelle Omamo
20. Hon. Charles Kimani
21. Hon. Roselyne Ashepete
22. Hon. Yusuf Aboubakar
23. Hon. Fatma Ali Saman
24. Hon. Peter Munya
25. Hon. Godana Adhi Doyo
26. Hon. Macharia Mukiri
27. Hon. Isaac Kipkosgei Bungei
28. Hon. Ruth Kamau
29. Hon. Singoei Korir
30. Hon. Murangi Waithaka
31. Hon. Abdirahman Wandati

## **IN ATTENDANCE**

Mr. M. R. Sialai - Committee Clerk/National Assembly  
Mr. Dan Juma - Programme Assistant/CKRC

### **MIN. NO.TWG/E/07/2003 BRIEFING BY THE CONVENOR**

The meeting started at 3.50 p.m. with a word of prayer.

The convenor introduced officials who will facilitate the Technical Working Committee and urged the Committee to read the guidelines and regulations pertaining to the running of the Committees.

The Members present were supplied with the following documents:

- (i) List of Members of the Technical Working Committee
- (ii) The Guidelines for the Technical Working Committees
- (iii) National Constitutional Conference Regulations
- (iv) Summary of the issues arising from the General Debate on the Judiciary.
- (v) Extract of the Report of Plenary Proceedings on the Judiciary.
- (vi) Extract of the Hansard Report of the Plenary Proceedings on the Judiciary.

The Committee resolved that the Agenda of the meeting will be as follows:-

- (i) Briefing by the convenor
- (ii) Appointment of Rapporteurs
- (iii) Election of Temporary convenor
- (iv) Form of Deliberation
- (v) Manner of voting

The Convenor reminded the meeting that Committee work is the engine of the constitutional review as it plays a pivotal role of considering the Draft Bill in detail. He urged them to put the requisite energy and wisdom in their work in order to come up with ideas that will guide the conference in its cardinal duty of reviewing the constitution.

#### **MIN. NO. TWG/E/08/2003**

#### **APPOINTMENT OF RAPPORTEURS**

The meeting noted that the Commission is empowered by regulation 45(6) to designate two Commissioners to be rapporteurs to each technical working committee. However, it was suggested that there might be need to amend the regulations to allow Committees to appoint one of their own to be a rapporteur. Members pledged to keep notes on the proceedings of the Committee for the purpose of cross-checking with the rapporteurs' report.

#### **MIN. NO. TWG/E/09/2003** **APPOINTMENT OF TEMPORARY** **CONVENOR**

The meeting agreed that in the unlikely event of absence of the Convenor, a temporary convenor be elected by the delegates present as provided for under Regulation 45(4).

The Committee deferred presentation on the form of discussing the Draft Report and Bill and manner of voting until the next meeting when the Rapporteurs and other officials will facilitate the Committee on how to conduct business in the Committee.

**MIN. NO. TWG/E/10/2003**

**ADJOURNMENT**

The Convenor adjourned the meeting at twenty minutes past Four O'clock until a date to be notified.

**SIGNED .....**  
**(CONVENOR)**

**DATE: .....**

**THE NATIONAL CONSTITUTIONAL CONFERENCE**

**MINUTES OF THE FOURTH SITTING OF THE TECHNICAL WORKING  
GROUP "E" THE JUDICIARY, HELD ON 9<sup>TH</sup> SEPTEMBER 2003 AT 10.00 A.M.  
IN COMMITTEE TENT NO. 5**

**PRESENT**

1. Hon. (Prof.) Kivutha Kibwana - Convenor
2. Hon. Abdi Tari Sasura
3. Hon. Abdurhaman Badawy
4. Hon. Agnes Abuom
5. Hon. Ali Shee Mohammed
6. Hon. Amina Abdalla
7. Hon. Amina Ahmed
8. Hon. Asli Ibrahim
9. Hon. Benta Auma
10. Hon. Bishop Philip Sulumeti
11. Hon. Fadhili Sultana
12. Hon. Fatuma Boy Bakari
13. Hon. Godana Adhi Doyo
14. Hon. Hubbie Hussein Al Haji
15. Hon. Jane J. Kiptum
16. Hon. Isaack Derrow Ibrahim
17. Hon. Kathurima M'inoti
18. Hon. Kembi Gitura
19. Hon. Khadija Fugicha
20. Hon. Lilian Wanjira
21. Hon. Mirugi Kariuki
22. Hon. Mohammed Abdi Haji
23. Hon. Dr. Nathaniel Tum
24. Hon. Owino Charles Oyugi
25. Hon. R. O. Kwach
26. Hon. Rev. Patrick M. Musungu
27. Hon. Roselyne Ashepete
28. Hon. Salim Ibrahim
29. Hon. Shakeel Shabir
30. Hon. Victor P. Gituma
31. Hon. Walubengo Lumatete
32. Hon. Mohamed Abu Chiaba
33. Hon. Gerves A. Akhwabi
34. Hon. Yusuf Mohamed Aboubakar
35. Hon. Margaret Muchai

36. Hon. Zablon Nthamburi
37. Hon. Francis Waweru
38. Hon. Fr. Joachim Gitonga
39. Hon. Viscount Kimathi
40. Hon. Waithaka Mwangi
41. Hon. Daniel Rasugu
43. Hon. Peter Munya
44. Hon. Waithanje Minjire
45. Hon. Zacheus Okoth Arch.
46. Hon. Onesmus K. Mwangi
47. Hon. Abdirahaman Ali Abbas
48. Hon. Kiptingos Saul Kipkoech
49. Hon. Ali Mustafa Yusuf
50. Hon. Rapinder Singh Sehmi
51. Hon. Archbishop David Gitari
52. Hon. El-Busaidy Abdulghafur

#### **ABSENT**

1. Hon. Abdalla Ngozi
2. Hon. Isaiah Kubai
3. Hon. Jamila Muhamed
4. Hon. Kajembe Seif Ramadhan
5. Hon. Mohammed Nyaoga
6. Hon. Omino Joab H. O.
7. Hon. Rose Waruhiu
8. Hon. Victoria Mutheu M.
9. Hon. Wandati Abdulrahman M
10. Hon. Fred Ojiambo

#### **IN ATTENDANCE**

Mr. P. M. Wambua	Rapporteur
Mr. Ahmed Issack Hassan	Rapporteur
Mr. M. R. Sialai	Committee Clerk/National Assembly
Mr. Dan Juma	Programme Assistant/CKRC
Ms. Rahma Jillo	Programme Assistant/CKRC

**MIN. NO.TWG/E/11/2003**

**CONFIRMATION OF MINUTES OF  
PREVIOUS SITTING**

The following sets of minutes were confirmed as true records of the proceedings of the Committee's sittings and signed by the Convenor.

- (i) Minutes of the First Sitting held on 26<sup>th</sup> May, 2003 having been proposed and seconded by Hon. Badawy and Hon. Minjire respectively.

- (ii) Minutes of the Second Sitting held on 27<sup>th</sup> May, 2003 having been proposed and seconded by Hon. Dr. Tum and Hon. Mustafa Ali respectively.
- (iii) Minutes of the Third Sitting held on 19<sup>th</sup> August, 2003 having been proposed and seconded by Hon. Sasura and Hon. Hubbie H. Haji respectively.

**MIN. NO.TWG/E/12/2003**

**MATTERS ARISING**

Under Min. No. TWG/E/05 (2), the second sentence was corrected by inserting the word “issues” between words “taking” and “to”.

It was also indicated that Commissioner Ahmed Issack Hassan was in attendance and that Hon. R. S. Sehmi had indeed been proposed for the seat of convenor but declined and that this had inadvertently been left out.

**MIN. NO.TWG/E/13/2003**

**GENERAL COMMENTS**

The Committee noted that religious matters are emotive and that issues that touch on religion which the committee may consider, should be dealt with in a dispassionate manner. It was noted that the Committee should attempt at all times to arrive at decisions by consensus and that the delegates should endeavor to make objective recommendations.

A delegate expressed concern on the composition of the Committee, but was informed that delegates chose the Committees they wished to serve in and that there was no ulterior motive on its composition.

**MIN. NO.TWG/E/14/2003**

**COMMUNICATION BY THE CONVENOR**

The Convenor welcomed the members to the meeting and informed the members that they have a monumental task of considering the chapter on judiciary and making appropriate recommendations for consideration by the Conference. He promised members that they will be given adequate time to contribute and suggest ideas and changes to the Report and the Draft Bill.

**MIN. NO.TWG/E/15/2003**

**PRESENTATION ON CONDUCT OF  
BUSINESS IN COMMITTEE**

The Rapporteurs led the Committee through the rules and regulations guiding the conduct of meetings in committees, the tasks to be undertaken among others.

Some of the areas presented included the preparation of the order paper, decorum and manner of speaking in the Committee, Quorum, Presiding of the Committee, membership and mode of voting.

The Committee sought clarification on the mode of decision making as regards section 27 of Cap 3A and its amendments thereof. It was agreed that the issue should be taken up with the relevant organs of the conference and the commission.

It was also agreed there is need to give more speaking time to delegates moving amendments and those seconding since the five minutes allowed under the Second Schedule, Rule 22 appears not enough.

**MIN. NO.TWG/E/16/2003**

**ADJOURNMENT**

The Committee resolved to adjourn at 1.20 p.m until Thursday 11<sup>th</sup> September 2003 at 8.30 a.m. in order to allow members to familiarize themselves with the contents of the documents presented to them.

**SIGNED** .....  
**(CONVENOR)**

**DATE:** .....

**THE NATIONAL CONSTITUTIONAL CONFERENCE**

**MINUTES OF THE FIFTH SITTING OF THE TECHNICAL WORKING GROUP  
“E” THE JUDICIARY, HELD ON 11<sup>TH</sup> SEPTEMBER 2003 AT 8.30 A.M. IN  
COMMITTEE TENT NO. 5**

**MORNING SITTING**

**PRESENT**

1. Hon. (Prof.) Kivutha Kibwana - Convenor
2. Hon. Abdi Tari Sasura
3. Hon. Abdurhaman Badawy
4. Hon. Agnes Abuom
5. Hon. Ali Shee Mohammed
6. Hon. Amina Abdalla
7. Hon. Amina Ahmed
8. Hon. Asli Ibrahim
9. Hon. Benta Auma
10. Hon. Bishop Philip Sulumeti
11. Hon. Fadhil Sultana
12. Hon. Fatuma Boy Bakari
13. Hon. Hubbie Hussein Al Haji
14. Hon. Jane J. Kiptum
15. Hon. Isaack Derrow Ibrahim
16. Hon. Khadija Fugicha
17. Hon. Lilian Wanjira
18. Hon. Mirugi Kariuki
19. Hon. Mohammed Abdi Haji
20. Hon. Owino Charles Oyugi
21. Hon. R. O. Kwach
22. Hon. Rev. Patrick M. Musungu
23. Hon. Roselyne Ashepete
24. Hon. Salim Ibrahim
25. Hon. Shakeel Shabir
26. Hon. Victor P. Gituma
27. Hon. Walubengo Lumatete
28. Hon. Gerves A. Akhwabi
29. Hon. Yusuf Mohamed Aboubakar
30. Hon. Zablon Nthamburi
31. Hon. Francis Waweru
32. Hon. Fr. Joachim Gitonga
33. Hon. Viscount Kimathi
34. Hon. Daniel Rasugu
35. Hon. Waithanje Minjire

36. Hon. Archbishop Zacheus Okoth
37. Hon. Abdirahaman Ali Abbas
38. Hon. Kiptingos Saul Kipkoech
39. Hon. Ali Mustafa Yusuf
40. Hon. Rapinder Singh Sehmi
41. Hon. El-Busaidy Abdulghafur
42. Hon. Victoria Mutheu M.
43. Hon. Kajembe Seif Ramadhan
44. Hon. Isaiah Kubai
45. Hon. Kembi Gitura

**ABSENT**

1. Hon. Abdalla Ngozi
2. Hon. Jamila Muhamed
3. Hon. Mohammed Nyaoga
4. Hon. Omino Joab H. O.
5. Hon. Rose Waruhiu
6. Hon. Wandati Abdulrahman M
7. Hon. Fred Ojiambo
8. Hon. Kathurima M'inoti
9. Hon. Dr. Nathaniel Tum
10. Hon. Mohamed Abu Chiaba
11. Hon. Margaret Muchai
12. Hon. Waithaka Mwangi
13. Hon. Peter Munya
14. Hon. Archbishop David Gitari
15. Hon. Onesmus K. Mwangi
16. Hon. Godana Adhi Doyo

**IN ATTENDANCE**

Mr. P. M. Wambua	-	Rapporteur
Mr. Ahmed Issack Hassan	-	Rapporteur
Mr. M. R. Sialai	-	Committee Clerk/National Assembly
Mr. Dan Juma	-	Programme Assistant/CKRC
Ms. Rahma Jillo	-	Programme Assistant/CKRC
Ms. Lucy Masua	-	Draftsperson/Ministry of Justice and Constitutional Affairs

**MIN. NO.TWG/E/17/2003**

**CONFIRMATION OF MINUTES OF  
PREVIOUS SITTING**

The minutes of the Fourth Sitting of the Committee were confirmed as true records of the proceedings of the Committee's sitting and were signed by the Convenor having been

proposed and seconded by Hon. Isaack Derrow Ibrahim and Hon. Ali Shee Mohammed respectively.

**MIN. NO.TWG/E/18/2003**

**MATTERS ARISING**

Under Min. No. TWG/E/13/2003 the Committee was informed that names of delegates who contributed may not necessarily be mentioned in the Minutes as the proceedings are recorded verbatim. The delegate who had expressed concern on the composition of the Committee clarified that he was concerned with the high table composition.

Under Min. No. TWG/E/15/2003 the Committee was informed that clarification on the mode of decision making as regards section 27 of Cap 3A and its amendments thereof will be taken up by the convenor with the Steering Committee. However, the Committee heard that the clarification to be sought would not impede the Business of the Committee as it only affects decision making in the conference. Decision in the Committee will be by consensus and in the absence of it, by vote of the majority pursuant to Regulation 45(15).

**MIN. NO.TWG/E/19/2003**

**RECAP OF THE PRESENTATION  
OF THE DRAFT BILL AND REPORT  
BY THE COMMISSIONERS**

The Rapporteurs made a recap on the main issues that emerged in the plenary during the consideration of Chapter “9” on Judiciary. The Committee heard that the Chapter addresses the Judicial and Legal reforms, which emanated from the views collected and collated by the Commission. The Commission also looked at the Kwach Report on Judiciary and a report of a panel of Commonwealth experts when developing the Draft Bill and the Report.

The Committee was informed that from the views collected, there was a general feeling that judiciary had become alien and needed drastic reforms to meet the challenges and aspirations of Kenyans.

**MIN. NO.TWG/E/20/2003**

**CONSIDERATION OF THE DRAFT BILL  
(ARTICLE BY ARTICLE)**

**Clause 184**

Motion made and Question proposed:  
“That Article 184 stand part of the Draft Bill”  
Debate arising;

**Sub article 184 (1) (a)**

Amendment proposed;

That Article 184 (1) (a) be amended by inserting the following words between words “name” and “of”

**“and for the common good”.**

(Hon. Ashepete)

Motion made and Question proposed:

Debate arising;

**MIN. NO.TWG/E/21/2003**

**ADJOURNMENT**

The Convenor adjourned the meeting at 1.15 p.m. until 2.15 in the afternoon.

**AFTERNOON SITTING**

The meeting reconvened at 2.30 p.m.

**MIN. NO.TWG/E/22/2003**

**CONSIDERATION OF THE DRAFT BILL  
(ARTICLE BY ARTICLE)**

Debate Resumed;

Question of the amendment put and **agreed to.**

**Sub article 184 (1) (b) – agreed to**

**Sub article 184 (1) (c)**

Amendment Proposed;

That Article 184 (1) (c) be amended by inserting the words **“and culture”** immediately after the word aspirations.

(Hon. Mirugi Kariuki)

Motion made and Question proposed:

Debate arising;

The question of the amendment was **postponed**.

Further amendment proposed;

That Article 184 (1) (c) be further amended by inserting the words “**subject to “b” above**”, before the words “in conformity”.

(Hon. Kivutha Kibwana)

Motion made and Question proposed:

Debate arising;

Question of the amendment put and **agreed to**.

**Sub article 184 (3)** – Debate deferred.

**MIN. NO.TWG/E/23/2003**

**ANY OTHER BUSINESS**

Under provisions of Regulations 45 (1) Hon. Delegate Isaiah Kubai (No.448) asked the Committee to invite M/s Orao Obura, an advocate and Mr. Gerishon Konditi, Deputy Executive Director of FKE to appear before the Committee, when a motion touching on the “anchoring” of the Industrial court into the Constitution will be moved in the Committee. The Committee conceded to the request and resolved that apart from the two persons, Justice Sayeed Cockar, Chairman, Task Force on the Review of the Labour Laws, should also be invited.

**MIN. NO.TWG/E/24/2003**

**ADJOURNMENT**

The Convenor adjourned the meeting at 5.00 p.m. until Friday 12<sup>th</sup> September 2003 at 8.30 a.m.

**SIGNED** .....  
**(CONVENOR)**

**DATE:** .....

**THE NATIONAL CONSTITUTIONAL CONFERENCE**

**MINUTES OF THE SIXTH SITTING OF THE TECHNICAL WORKING GROUP "E" THE JUDICIARY, HELD ON 12<sup>TH</sup> SEPTEMBER 2003 AT 8.30 A.M. IN COMMITTEE TENT NO. 5**

**MORNING SITTING**

**PRESENT**

1. Hon. (Prof.) Kivutha Kibwana - **Convenor**
2. Hon. Abdurhaman Badawy
3. Hon. Agnes Abuom
4. Hon. Sheikh Ali Shee Mohammed
5. Hon. Amina Abdalla
6. Hon. Amina Ahmed
7. Hon. Asli Ibrahim
8. Hon. Benta Auma
9. Hon. Bishop Philip Sulumeti
10. Hon. Fadhil Sultana
11. Hon. Fatuma Boi Bakari
12. Hon. Hubbie Hussein Al Haji
13. Hon. Issack Derrow Ibrahim
14. Hon. Khadija Fugicha
15. Hon. Lilian Wanjira
16. Hon. Mirugi Kariuki
17. Hon. Mohammed Abdi Haji
18. Hon. Owino Charles Oyugi
19. Hon. R. O. Kwach
20. Hon. Rev. Patrick M. Musungu
21. Hon. Roselyne Ashepete
22. Hon. Salim Ibrahim
23. Hon. Shakeel Shabir
24. Hon. Victor P. Gituma
25. Hon. Walubengo Lumatete
26. Hon. Gerves A. Akhwabi
27. Hon. Yusuf Mohamed Aboubakar
28. Hon. Francis Waweru
29. Hon. Fr. Joachim Gitonga
30. Hon. Viscount Kimathi
31. Hon. Daniel Rasugu
32. Hon. Waithanje Minjire
33. Hon. Archbishop Zacheus Okoth
34. Hon. Abdirahaman Ali Abbas

35. Hon. Kiptingos Saul Kipkoech
36. Hon. Ali Mustafa Yusuf
37. Hon. El-Busaidy Abdulghafur
38. Hon. Victoria Mutheu M.
39. Hon. Isaiah Kubai
40. Hon. Kembi Gitura
41. Hon. Onesmus Kihara Mwangi
42. Hon. Godana Adhi Doyo
43. Hon. Fred Ojiambo
44. Hon. Rev. Margaret Muchai
45. Hon. Amos Wako
46. Hon. Macharia Mukiri
47. Hon. Kathurima M'noti

### **ABSENT**

1. Hon. Abdalla Ngozi
2. Hon. Jamila Muhamed
3. Hon. Mohammed Nyaoga
4. Hon. Omino Joab H. O.
5. Hon. Rose Waruhiu
6. Hon. Wandati Abdulrahman M
7. Hon. Dr. Nathaniel Tum
8. Hon. Mohamed Abu Chiaba
9. Hon. Waithaka Mwangi
10. Hon. Peter Munya
11. Hon. Archbishop David Gitari
12. Hon. Jane J. Kiptum
13. Hon. Zablon Nthamburi
14. Hon. Rapinder Singh Sehmi
15. Hon. Kajembe Seif Ramadhan
16. Hon. Abdi Tari Sasura

### **IN ATTENDANCE**

Mr. P. M. Wambua	Rapporteur
Mr. Ahmed Issack Hassan	Rapporteur
Mr. M. R. Sialai	Committee Clerk/National Assembly
Mr. Dan Juma	Programme Assistant/CKRC
Ms. Rahma Jillo	Programme Assistant/CKRC
Ms. Lucy Masua	Draftsperson

## CONVENOR

Bishop Philip Sulumeti was appointed to stand in for the convenor who had indicated that due to unavoidable circumstances he would not make it by the time the meeting would start.

### MIN. NO.TWG/E/26/2003

### CONFIRMATION OF MINUTES OF THE PREVIOUS SITTING

The minutes of the Fifth Sitting of the Committee held on 11<sup>th</sup> September, 2003 were confirmed as true records of the proceedings of the Committee's sitting and were signed by the Convenor having been proposed and seconded by Hon. Rev. Patrick M. Musungu and Hon. Benta Auma Saoko respectively.

### MIN. NO.TWG/E/27/2003

### MATTERS ARISING

Under Min. No. TWG/E/20/2003, it was clarified that the proposed amendment to sub article 184 (1) (a) was proposed by Hon. Roselyne Ashepete and Hon. Yusuf M. Aboubakar.

The Committee resolved that, any resolution made by the Committee with regard to an article or sub-article should be reproduced for clarity and avoidance of doubt.

Thus: Sub article 184 (1) (a) will now read as follows:

**“in the name and for the common good of the people”**

Sub article 184 (1) (c) will now read as follows:

**“Subject to “b” above, in conformity with the values, norms and aspirations of the people”.**

### MIN. NO.TWG/E/28/2003

### GENERAL COMMENTS SESSION

During the general comments session, the committee expressed concern that the business of the conference was being bogged down by failure to keep time.

They stressed that the conference activities should be well guided in order to ensure that time is effectively used. However, it was agreed that the transactions of the business would not be hurried for the sake of it and that the draft bill should be considered exhaustively.

### MIN. NO.TWG/E/29/2003

### CONSIDERATION OF THE DRAFT BILL

**(ARTICLE-BY-ARTICLE)**

**Sub article 184 (3) - Amendment Proposed;**

That Article 184(3) be amended by inserting the words **“and tribunals”** immediately after the word “courts” in the second sentence.

(Hon. Fred Ojiambo)

Motion made and Question proposed;

Debate arising;

Question of the amendment put and agreed to.

(Thus it now reads):

*“In applying the law to cases of a civil or criminal nature, the courts and tribunals shall be guided by the following principles”.*

*Sub-article 184 (3) (a) - Amendment proposed;*

That Article 184 (3) (a) be amended by adding the following words immediately after the word “status” **“and in particular any fees charged shall not be such as to discourage the use of the justice system”**.

(Hon. Waithanji Minjire)

Motion made and Question proposed;

Debate arising;

*Motion withdrawn by the mover (matter covered under 210 (6)).*

Further amendment proposed;

That Article 184 (3) (a) be amended by deleting the following words **“social or economic”** and replacing thereon with the word **“their”**.

(Hon. Kivutha Kibwana).

Motion made and Question proposed;

Debate arising;

Question of the amendment put and agreed to.

Thus it now reads:

**“Justice shall be done to all, irrespective of their status”.**

*Sub-article 184 (3) (b) - Amendment proposed;*

That Article 184(3) (b) be amended by adding the word “**unduly**” between the words “be” and “delayed”.

(Hon. Rev. Patrick Musungu)

Motion made and Question proposed;

Debate arising;

Question of the amendment put and negatived.

(Thus the sub article remains as it is in the draft Bill and is agreed to).

Thus it still reads **“justice shall not be delayed”**

Sub article 184 (3) (c) consideration of the sub article postponed to afternoon sitting.

**Sub article 184 (3) (d) - Amendment proposed;**

Sub article 184 (3) (d) be amended by deleting the word “**shall**” between the words “parties” and “be” and replacing it with the word “**should**”.

(Hon. Fred Ojiambo).

Motion made and Question proposed;

Debate arising;

Question of the amendment put and agreed to.

Thus the sub article now reads **“reconciliation, mediation and arbitration between parties should be promoted”.**

**MIN. NO.TWG/E/30/2003**

**ADJOURNMENT**

The Convenor adjourned the meeting at 12.50 until 2.00 p.m. in the afternoon.

### **AFTERNOON SITTING**

The meeting reconvened at 2.35 p.m.

Debate Resumed;

#### **Sub article 184 (3) (c) - Amendment proposed;**

That Article 184 (3) (c) be amended by adding that words “**prompt and**” at the beginning of the sub article.

(Hon. Macharia Mukiri).

Motion made and Question proposed;

Debate arising;

Question of amendment put and negatived.

Sub article 184 (3) (e) – agreed to.

(Thus the sub-clause remains as it is in the draft Bill) and is agreed to.

Thus it still reads “**adequate compensation shall be awarded to victims of wrongs**”.

#### **Sub article 184 (3) (e) - Amendment proposed;**

That article 184 (3) (e) be amended by adding the words “**of procedure**” immediately after the word “technicalities”.

(Hon. Mirugi Kariuki)

Motion made and Question proposed;

Debate arising;

Question of amendment put and negatived.

(Thus the sub-article remains as it is in the draft Bill) – and is agreed to.

Thus it still reads “**justice shall be administered without undue regard to technicalities**”.

#### **Sub article 184 (3) (f) - Amendment proposed;**

That article 184 (3) (f) be deleted.

(Hon. Fred Ojiambo)

Motion made and Question proposed;

Debate arising;

Question of the amendment put and agreed to.

Sub-clause 184 (3) (f) is deleted.

### **MOTION TO REVISIT A DECISION ALREADY MADE**

That the decision arrived at in sub article 184 (3) (f) of deleting it, be rescinded and the sub article be reinstated.

(Hon. Mirugi Kariuki)

Motion made and Question proposed;

Debate arising;

Question of the motion put and agreed to.

Thus sub article 184 (3) (f) is reinstated and agreed to.

Further amendment proposed;

That the words “**principles**” and “**purpose**” be interchanged in sub article 184 (3) (f).

(Hon. Kivutha Kibwana)

Motion made and Question proposed;

Question of the amendment put and agreed to.

Thus the sub article now reads; “**the protection and promotion of the purpose and principles of the constitution**”.

### **MIN. NO.TWG/E/31/2003**

### **ANY OTHER BUSINESS**

#### **1. Invitation of Experts/Formation of Sub Committees**

The Committee considered the possibility of inviting experts to discuss the hierarchy of the courts. This, it was noted, would form a basis of discussion of the relevant section of the Draft Bill and Report of the Commission. Further, the Committee also considered the possibility of constituting sub committees to examine specific issues. After lengthy deliberations, it was resolved that it was not necessary to invite experts nor to constitute sub committees until the need arose.

2. The Committee reaffirmed that its cardinal duty was to draft a bill that would adequately protect human rights and uphold the rule of law.

**MIN. NO.TWG/E/32/2003**

**ADJOURNMENT**

The Convenor adjourned the meeting at 4.45 p.m. until Monday 15<sup>th</sup> September 2003 at 8.30 a.m.

**SIGNED** .....

(CONVENOR)

**DATE:** .....

**THE NATIONAL CONSTITUTIONAL CONFERENCE**

**MINUTES OF THE SEVENTH SITTING OF THE TECHNICAL WORKING  
GROUP "E" THE JUDICIARY, HELD ON MONDAY 15<sup>TH</sup> SEPTEMBER 2003  
AT 11.00 A.M. IN COMMITTEE TENT NO. 5**

**MORNING SITTING**

**PRESENT**

1. Hon. (Prof.) Kivutha Kibwana - **Convenor**
2. Hon. Paul Musili Wambua **Commissioner**
3. Hon. Ahmed Issack Hassan **Commissioner**
4. Hon. Sheikh Ali Shee Mohammed
5. Hon. Amina Abdalla
6. Hon. Amina Ahmed
7. Hon. Asli Ibrahim
8. Hon. Bishop Philip Sulumeti
9. Hon. Fadhil Sultana
10. Hon. Fatuma Boi Bakari
11. Hon. Hubbie Hussein Al Haji
12. Hon. Khadija Fugicha
13. Hon. Lilian Wanjira
14. Hon. Mirugi Kariuki
15. Hon. Mohammed Abdi Haji
16. Hon. Rev. Patrick M. Musungu
17. Hon. Roselyne Ashepete
18. Hon. Salim Ibrahim
19. Hon. Shakeel Shabbir
20. Hon. Victor P. Gituma
21. Hon. Gervase B. K. Akhaabi
22. Hon. Yusuf Mahmoud Aboubakar
23. Hon. Francis Waweru
24. Hon. Fr. Joachim Gitonga
25. Hon. Viscount Kimathi
26. Hon. Daniel Rasugu
27. Hon. Waithanje Minjire
28. Hon. Archbishop Zacheus Okoth
29. Hon. Abdirahaman Ali Abbas
30. Hon. Kiptingos Saul Kipkoech
31. Hon. Ali Mustafa Yusuf
32. Hon. El-Busaidy Abdulghafur
33. Hon. Victoria Mutheu M.
34. Hon. Onesmus Kihara Mwangi
35. Hon. Godana Adhi Doyo

36. Hon. Rev. Margaret Muchai
37. Hon. Macharia Mukiri
38. Hon. Kathurima M'noti
39. Hon. Willy Mutunga
40. Hon. Dr. Nathaniel Tum
41. Hon. Archbishop David Gitari
42. Hon. Zablon Nthamburi
43. Hon. Rupinder Singh Sehmi
44. Hon. Willy Mutunga

#### **ABSENT**

1. Hon. Abdalla Ngozi
2. Hon. Jamila Muhamed
3. Hon. Mohammed Nyaoga
4. Hon. Omino Joab H. O.
5. Hon. Rose Waruhiu
6. Hon. Wandati Abdulrahman M
7. Hon. Mohamed Abu Chiaba
8. Hon. Waithaka Mwangi
9. Hon. Peter Munya
10. Hon. Jane J. Kiptum
11. Hon. Kajembe Seif Ramadhan
12. Hon. Abdi Tari Sasura
13. Hon. Abdurhaman Badawy
14. Hon. Agnes Abuom
15. Hon. Benta Auma
16. Hon. Issack Derrow Ibrahim
17. Hon. Owino Charles Oyugi
18. Hon. R. O. Kwach
19. Hon. Walubengo Lumatete
20. Hon. Isaiah Kubai
21. Hon. Kembu Gitura
22. Hon. Fred Ojiambo
23. Hon. Amos Wako

#### **IN ATTENDANCE**

Mr. M. R. Sialai	-	Committee Clerk/National Assembly
Mr. Dan Juma	-	Programme Assistant/CKRC
Ms. Rahma Jillo	-	Programme Assistant/CKRC
Ms. Lucy Masua	-	Draftsperson/Ministry of Justice and Constitutional Affairs

**MIN. NO.TWG/E/33/2003**

**ADJOURNMENT**

Rising under Regulation, 32 Hon. Daniel Rasugu moved a motion of adjournment seeking to adjourn the committee's sitting until Tuesday 16<sup>th</sup> September 2003 in honour of the departed delegate Dr. Chrispine Odhiambo Mbai, Convenor, Devolution Committee, who was murdered yesterday.

The motion was seconded by Hon. Viscount Kimathi

Debate arose;

An amendment was proposed by Hon. Bishop Sulumeti that the Committee should adjourn until afternoon.

The Committee, however, while supporting the idea of honouring their departed colleague, noted that they were running short of time and that they should transact business despite the sorrowful mood they were in. They further noted that by transacting business and accomplishing their task they would be honouring the late delegate.

**MIN. NO.TWG/E/34/2003**

**CONFIRMATION OF MINUTES OF  
THE PREVIOUS SITTING.**

The minutes of the Sixth Sitting of the Committee held on 12<sup>th</sup> September, 2003 were confirmed as true record of the proceedings of the Committee's sitting and were signed by the Convenor having been proposed and seconded by Hon. Shakeel Shabbir and Hon. Waithanje Minjire respectively.

**MIN. NO.TWG/E/35/2003**

**MATTERS ARISING**

It was clarified that Hon. Rupinder Singh Sehmi who was inadvertently recorded as absent was in attendance in the Fifth Sitting of 12<sup>th</sup> September, 2003.

**MIN. NO.TWG/E/36/2003**

**GENERAL COMMENTS SESSION**

During the general comments session, the Committee noted that there is need to get expertise knowledge on the relationship between the Office of the Attorney General and that of the Minister for Justice and Constitutional Affairs. It was further noted that the powers and functions of the office of the Attorney General and that of the Director of Public prosecution should be clearly delineated in order to uphold the rule of law. The Committee affirmed that they should be well versed on matters touching on hierarchical order of the courts to enable the members arrive at appropriate recommendations.

It was resolved that the Attorney General, who had asked to be given an opportunity to make a presentation to the Committee on wide ranging issues touching on the Judiciary, should be availed time to share his knowledge and expertise on the hierarchical order of the courts among other issues when the relevant articles are being discussed.

**MIN. NO.TWG/E/37/2003**

**ADJOURNMENT**

The Convenor adjourned the meeting at 1.10 p.m. until 2.30 p.m. in the afternoon.

**AFTERNOON SITTING**

The Committee reconvened at 2.30 p.m. and elected Hon. Kathurima M’Inoti, Temporary Convenor. The meeting however, adjourned due to lack of Quorum as most delegates had gone to Dr. Mbai’s house to console his family and relatives.

The following delegates were present at adjournment:

	<b>Name</b>	<b>Delegate No.</b>	
1.	Hon. Kathurima M’Inoti	454	<b>Temporary Convenor</b>
2.	Hon. Paul Musili Wambua	564	<b>Commissioner</b>
3.	Hon. Ahmed Issack Hassan	566	<b>Commissioner</b>
4.	Hon. El-Busaidy Abdulghafur	517	
5.	Hon. Zablon Nthamburi	540	
6.	Hon. Lilian Wanjira	491	
7.	Hon. Mirugu Kariuki	043	
8.	Hon. Archbishop Zacheus Okoth	541	
9.	Hon. Daniel M. Rusugu	579	
10.	Ho. Hubbie Hussein Al Haji	251	
11.	Hon. Amina Abdalla	211	
12.	Hon. Sultana Fadhil	518	
13.	Hon. Asli Ibrahim	248	
14.	Hon. Abdirahman Ali Abbas	249	
15.	Hon. Rev. Miana Patrick Musungu	529	
16.	Hon. Godana Doyo	268	
17.	Hon. Rev. Margaret Muchai	523	
18.	Hon. Victor P. Gituma	274	
19.	Hon. RapinderS Singh Sehmi	544	
20.	Hon. Yusuf Mahmoud Aboubakar	581	
21.	Hon. Victoria Mutheu Musyoka	294	
22.	Hon. Ali Mustafa	531	
23.	Hon. Shakeel Shabbir	406	

**MIN. NO.TWG/E/38/2003**

**ADJOURNMENT**

The Temporary Convenor adjourned the meeting at 2.35 p.m. until Tuesday 16<sup>th</sup> September 2003 at 2.30 p.m.

**SIGNED** .....  
(CONVENOR)

**DATE:** .....

**THE NATIONAL CONSTITUTIONAL CONFERENCE**

**MINUTES OF THE EIGHTH SITTING OF THE TECHNICAL WORKING GROUP "E" THE JUDICIARY, HELD ON WEDNESDAY 17<sup>TH</sup> SEPTEMBER 2003 AT 9.00 A.M. IN COMMITTEE TENT NO. 5**

**MORNING SITTING**

**PRESENT**

1. Hon. (Prof.) Kivutha Kibwana - **Convenor**
2. Hon. Paul Musili Wambua - **Commissioner**
3. Hon. Ahmed Issack Hassan - **Commissioner**
4. Hon. Sheikh Ali Shee Mohammed
5. Hon. Amina Abdalla
6. Hon. Amina Ahmed
7. Hon. Asli Ibrahim
8. Hon. Bishop Philip Sulumeti
9. Hon. Fadhil Sultana
10. Hon. Fatuma Boi Bakari
11. Hon. Hubbie Hussein Al Haji
12. Hon. Khadija Fugicha
13. Hon. Lilian Wanjira
14. Hon. Mirugi Kariuki
15. Hon. Mohammed Abdi Haji
16. Hon. Rev. Patrick M. Musungu
17. Hon. Roselyne Ashepete
18. Hon. Salim Ibrahim
19. Hon. Shakeel Shabbir
20. Hon. Victor P. Gituma
21. Hon. Gervase B. K. Akhaabi
22. Hon. Yusuf Mahmoud Aboubakar
23. Hon. Francis Waweru
24. Hon. Fr. Joachim Gitonga
25. Hon. Viscount Kimathi
26. Hon. Daniel Rasugu
27. Hon. Waithanje Minjire
28. Hon. Archbishop Zacheus Okoth
29. Hon. Abdirahaman Ali Abbas
30. Hon. Kiptingos Saul Kipkoech
31. Hon. Ali Mustafa Yusuf
32. Hon. El-Busaidy Abdulghafur
33. Hon. Victoria Mutheu M.
34. Hon. Onesmus Kihara Mwangi
35. Hon. Godana Adhi Doyo

36. Hon. Rev. Margaret Muchai
37. Hon. Kathurima M'inoti
38. Hon. Dr. Nathaniel Tum
39. Hon. Archbishop David Gitari
40. Hon. Zablon Nthamburi
41. Hon. Rupinder Singh Sehmi
42. Hon. Jane J. Kiptum
43. Hon. Benta Auma
44. Hon. Issack Derrow Ibrahim
45. Hon. R. O. Kwach
46. Hon. Walubengo Lumatete
47. Hon. Isaiah Kubai
48. Hon. Abdalla Ngozi
49. Hon. Mohamed Abu Chiaba
50. Hon. Abdurhaman Badawy
51. Hon. Owino Charles Oyugi

#### **ABSENT WITH APOLOGY**

1. Hon. Agnes Abuom

#### **ABSENT**

1. Hon. Jamila Muhamed
2. Hon. Mohammed Nyaoga
3. Hon. Omino Joab H. O.
4. Hon. Rose Waruhiu
5. Hon. Wandati Abdulrahman M
6. Hon. Waithaka Mwangi
7. Hon. Peter Munya
8. Hon. Kajembe Seif Ramadhan
9. Hon. Abdi Tari Sasura
10. Hon. Kembi Gitura
11. Hon. Fred Ojiambo

#### **IN ATTENDANCE – DELEGATES**

1. Hon. Macharia Mukiri
2. Hon. Willy Mutunga
3. Hon. Beatrice Barui

#### **IN ATTENDANCE – OBSERVERS**

1. Hon. Bettie Opany

2. Hon. Cornelius Lupao
3. Hon. Peter O. Maanya
4. Hon. Charles K. Kimani
5. Hon. Abdi Mohamed
6. Hon. Peter Ligale
7. Hon. Y. S. Sheikh

**IN ATTENDANCE**

Mr. M. R. Sialai	-	Committee Clerk/National Assembly
Mr. Dan Juma	-	Programme Assistant/CKRC
Ms. Rahma Jillo	-	Programme Assistant/CKRC
Ms. Lucy Masua	-	Draftsperson/Ministry of Justice and Constitutional Affairs

**MIN. NO.TWG/E/39/2003**

**CONFIRMATION OF MINUTES OF  
THE PREVIOUS SITTING.**

The minutes of the Sixth Sitting of the Committee held on 15<sup>th</sup> September, 2003 were confirmed as a true record of the proceedings of the Committee's sitting and were signed by the Convenor having been proposed and seconded by Hon. Dr. Nathaniel Tum and Hon. Victor Gituma respectively.

**MIN. NO.TWG/E/40/2003**

**MATTERS ARISING**

It was clarified that Hon. Benta Auma and Hon. Issack Derrow Ibrahim, who were inadvertently recorded as absent, were in attendance in the Sixth Sitting of 15<sup>th</sup> September, 2003. However, Members were asked to ensure that they sign the register to facilitate proper recording of attendance.

It was also clarified that the Convenor and the Attorney General had indicated that they would not be present in the afternoon sitting due to other pressing matters in their offices.

**MIN. NO.TWG/E/41/2003**

**GENERAL COMMENTS SESSION**

During the General comments session, the Committee expressed the need to be briefed on proceedings and resolutions made in the other Committees touching on the Judiciary. The Secretariat was asked to obtain the above information and furnish the Committee as and when necessary.

The Committee recommended that the Steering Committee should develop a modality of ensuring that the Committees' business and proceedings are availed to the press to report on.

On the issue of establishing mobile courts and the power of the citizens to prosecute in criminal and civil cases, the Committee felt that they should be catered for in the relevant articles of the Chapter.

The Committee expressed concern that a programme circulated, allegedly emanating from the office of the Rapporteur General, had created confusion on the programme and sittings of Committees and urged that clear directions be given to the Committees. Circulars on such guidance should also be signed.

**MIN. NO.TWG/E/42/2003**

**CONSIDERATION OF THE DRAFT BILL**  
**(ARTICLE BY ARTICLE)**

Sub articles 184 (4) (a) and (b) agreed to.

Thus they still read

- (a) **“shall strive to deliver the highest standard of service to the public”;**
- (b) **“are bound by the Leadership and Integrity Code of Conduct”;**

**Sub article 184 (4) (c) – Amendment proposed;**

That sub article 184 (4) (c) be deleted.

(Hon. El-Busaidy Abdulghafur)

Motion made and Question proposed;

Debate arising;

Question of the amendment that the sub-article be deleted, be deleted put and negatived.

The Sub article remains as it is in the Draft Bill and is agreed to.

Thus it still reads; **“shall continue to educate themselves in current development in the laws of Kenya and comparative law”.**

**Sub article 184 (5) – amendment proposed;**

That sub article 184 (5) be amended by inserting the following words between the words “Judiciary” and “to” in the third sentence of the sub article:

**“and persons participating in the administration of justice”.**

(Hon. Yusuf Aboubakar)

Question made and Question proposed;

Debate arising;

Question of the amendment that the words proposed to be inserted, be inserted put and negatived.

The sub article remains as it is in the draft Bill and is agreed to.

Thus it still reads **“The state shall provide reasonable resources and opportunities shall be made available for members of the Judiciary to enable them to deliver the highest standards of service to the public”**.

**Article heading – amendment proposed;**

That the article heading be amended by adding the words **“principles of”** before the word “Judicial”.

(Hon. Yusuf Aboubakar)

Motion made and Question proposed;

Debate arising;

Question of the amendment that the words to be added, be added put and agreed to.

The article heading now reads **“principles of Judicial power”**.

Question that Article 184 as amended stand part of the draft Bill, put and agreed to.

## **RECOMMENDATION TO THE PREAMBLE COMMITTEE**

The Committee resolved that a recommendation be made to the Preamble Committee to ensure that all sources of law as they exist form part of the reference law.

### **Clause 185**

**Clause 185 – amendment proposed;**

That consideration of Article 185 be postponed

(Hon. Isaiah Kubai)

Motion made and Question proposed;

Debate arising;

Question of the amendment that the consideration of Article 185 be postponed, put and negatived.

**Consideration of Article 185 resumed.**

**Sub article 185 (1) – Amendment proposed;**

That sub article 185 (1) be amended by inserting the words “**and tribunals**” between the words “courts and Judges”.

(Hon. Rev. Patrick M. Musungu)

Motion made and Question proposed;

Debate arising;

Question of the amendment that the words to be added, be added put and negatived.

The Sub article 185 (1) remains as it is in the draft Bill and is agreed to.

Thus it still reads “**The Judiciary consists of the courts, judges, magistrates and other judicial officers of superior courts of record, and subordinate courts**”.

**Sub article 185 (2) – Amendment proposed;**

That sub article 185 (2) be amended by adding the words “**industrial court**” immediately after the words “High Court”.

(Hon. Isaiah Kubai).

Motion made and Question proposed;

Debate arising;

**MIN. NO.TWG/E/43/2003**

**ADJOURNMENT**

The Convenor adjourned the meeting at 1.05 p.m. until 2.30 in the afternoon.

### **AFTERNOON SITTING**

The Committee reconvened at 2.40 p.m. and elected Hon. Lilian Wanjira as Temporary Convenor pursuant to provisions of Regulation 45 (4) to stand in for the Convenor who had a pressing matter to attend to in the Office.

The Debate on amendment to sub article 185 (2) **resumed.**

The Committee resolved that the consideration of the amendment be **postponed** until experts appear before the committee as indicated in Min. No. TWG/E/23/2003.

The Committee also resolved that the Attorney General and the Commissioner of Labour should appear along with the experts.

**AMENDMENT TO THE COMMISSION’S REPORT**

That the Commission’s Report be amended in 11.54 (i) (h) by adding the following words **“a memorandum was received proposing the creation of an industrial court having the same jurisdiction as of the High Court”** immediately after the words “village tribunals” on page 258 of the Report.

(Hon. Paul Musili Wambua)

Motion made and proposed;

Debate arising;

The Committee **resolved** to **postpone** the consideration of the motion until the memorandum from the Trade Union is availed to the Committee for perusal.

Further amendment to sub article 185 (2)

That sub article 185 (2) be amended by deleting the words **“supreme court”**.

(Hon. Kihara Mwangi).

Motion made and Question proposed;

Debate arising;

**MIN. NO.TWG/E/44/2003**

**ADJOURNMENT**

The Temporary Convenor adjourned the meeting at 5.00 p.m. until Wednesday 18<sup>th</sup> September 2003 at 8.30 a.m.

**SIGNED** .....  
(CONVENOR)

**DATE:** .....

**THE NATIONAL CONSTITUTIONAL CONFERENCE**

**MINUTES OF THE NINTH SITTING OF THE TECHNICAL WORKING  
GROUP “E” THE JUDICIARY, HELD ON THURSDAY 18<sup>TH</sup> SEPTEMBER 2003  
AT 9.00 A.M. IN COMMITTEE TENT NO. 5**

**MORNING SITTING**

**PRESENT**

- |                                   |                     |
|-----------------------------------|---------------------|
| 1. Hon. (Prof.) Kivutha Kibwana   | <b>Convenor</b>     |
| 2. Hon. Paul Musili Wambua        | <b>Commissioner</b> |
| 3. Hon. Ahmed Issack Hassan       | <b>Commissioner</b> |
| 4. Hon. Sheikh Ali Shee Mohammed  |                     |
| 5. Hon. Amina Abdalla             |                     |
| 6. Hon. Amina Ahmed               |                     |
| 7. Hon. Asli Ibrahim              |                     |
| 8. Hon. Bishop Philip Sulumeti    |                     |
| 9. Hon. Fadhil Sultana            |                     |
| 10. Hon. Fatuma Boi Bakari        |                     |
| 11. Hon. Hubbie Hussein Al Haji   |                     |
| 12. Hon. Khadija Fugicha          |                     |
| 13. Hon. Lilian Wanjira           |                     |
| 14. Hon. Mirugi Kariuki           |                     |
| 15. Hon. Mohammed Abdi Haji       |                     |
| 16. Hon. Rev. Patrick M. Musungu  |                     |
| 17. Hon. Roselyne Ashepete        |                     |
| 18. Hon. Salim Ibrahim            |                     |
| 19. Hon. Victor P. Gituma         |                     |
| 20. Hon. Gervase B. K. Akhaabi    |                     |
| 21. Hon. Yusuf Mahmoud Aboubakar  |                     |
| 22. Hon. Francis Waweru           |                     |
| 23. Hon. Fr. Joachim Gitonga      |                     |
| 24. Hon. Viscount Kimathi         |                     |
| 25. Hon. Daniel Rasugu            |                     |
| 26. Hon. Waithanje Minjire        |                     |
| 27. Hon. Archbishop Zacheus Okoth |                     |
| 28. Hon. Abdirahaman Ali Abbas    |                     |
| 29. Hon. Kiptingos Saul Kipkoech  |                     |
| 30. Hon. Ali Mustafa Yusuf        |                     |
| 31. Hon. El-Busaidy Abdulghafur   |                     |
| 32. Hon. Victoria Mutheu M.       |                     |
| 33. Hon. Onesmus Kihara Mwangi    |                     |
| 34. Hon. Godana Adhi Doyo         |                     |

35. Hon. Rev. Margaret Muchai
36. Hon. Kathurima M'inoti
37. Hon. Dr. Nathaniel Tum
38. Hon. Archbishop David Gitari
39. Hon. Zablon Nthamburi
40. Hon. Rupinder Singh Sehmi
41. Hon. Jane J. Kiptum
42. Hon. Benta Auma
43. Hon. Issack Derrow Ibrahim
44. Hon. R. O. Kwach
45. Hon. Walubengo Lumatete
46. Hon. Isaiah Kubai
47. Hon. Abdalla Ngozi
48. Hon. Mohamed Abu Chiaba
49. Hon. Abdurhaman Badawy
50. Hon. Owino Charles Oyugi
51. Hon. Gichura Kibara
52. Hon. Omino Joab H. O.
53. Hon. Kajembe Seif Ramadhan
54. Hon. Kembi Gitura
55. Hon. Wandati Abdulrahman M

#### **ABSENT WITH APOLOGY**

1. Hon. Agnes Abuom

#### **ABSENT**

1. Hon. Jamila Muhamed
2. Hon. Mohammed Nyaoga
3. Hon. Rose Waruhiu
4. Hon. Waithaka Mwangi
5. Hon. Peter Munya
6. Hon. Fred Ojiambo
7. Hon. Shakeel Shabbir
8. Hon. Abdi Tari Sasura

#### **IN ATTENDANCE – DELEGATES**

1. Hon. Macharia Mukiri
2. Hon. Willy Mutunga
3. Hon. Beatrice Barui
4. Hon. Amos Wako
5. Hon. Mutula Kilonzo

6. Hon. Kerow Billow
7. Hon. Raila Odinga
8. Hon. Samuel Arap Ng'eny
9. Hon. Mohamed Yusuf Haji

**IN ATTENDANCE – OBSERVERS**

1. Bettie Opany
2. Cornelius Lupao
3. Peter O. Maanya
4. Charles K. Kimani
5. Peter Ligale
6. Y. S. Sheikh
7. Linda Agalothieno

**IN ATTENDANCE**

Mr. M. R. Sialai	-	Committee Clerk/National Assembly
Mr. Dan Juma	-	Programme Assistant/CKRC
Ms. Rahma Jillo	-	Programme Assistant/CKRC
Ms. Lucy Masua	-	Draftsperson/Ministry of Justice and Constitutional Affairs

**MIN. NO.TWG/E/45/2003**

**APPOINTMENT OF TEMPORARY  
CONVENOR**

Rev. Patrick M. Musungu was appointed to seat in for the Convenor who was committed elsewhere.

**MIN. NO.TWG/E/46/2003**

**CONFIRMATION OF MINUTES OF  
THE PREVIOUS SITTING.**

The minutes of the Seventh Sitting of the Committee held on 17<sup>th</sup> September, 2003 were confirmed as a true record of the proceedings of the Committee's sitting and were signed by the Temporary Convenor having been proposed and seconded by Hon. Mahmoud Aboubakar and Hon. Kiptingos Saul Kipkoech respectively.

**MIN. NO.TWG/E/47/2003**

**MATTERS ARISING**

Under Min. No. TWG/E/42/2003, it was clarified that Hon. Wambua's Motion was moved in response to a concern raised by delegates Hon. Isaiah Kubai and Hon. Francis Waweru that presentations of COTU on the need to create an Industrial Court having the same jurisdiction as that of the High Court had not been reflected in the Commission's Report.

Commissioner Wambua confirmed that the COTU's presentations were noted in the data run page 69, where a need for an Industrial Court to handle trade and commercial disputes was expressed.

**MIN. NO.TWG/E/48/2003**

**GENERAL COMMENTS SESSION**

During the General Comments Session, the Committee noted with concern that the meetings of the Committee are not started on time as delegates arrive late. Even though this was largely attributed to late pick-up by some buses, delegates were called upon to keep time in order to ensure smooth and timely transactions of business.

The Committee asked to be supplied with Committee's proceedings for cross checking with the minutes.

**MIN. NO.TWG/E/49/2003**

**AMENDMENT TO THE COMMISSION'S  
REPORT**

Arising from the proceedings of the Committee touching on Sub article 185 (2) and the proposed amendment to include 'industrial court', Commissioner Hon. Paul Musili Wambua, once again, sought the indulgence of the Committee to move an amendment to the Commission's Report to include COTU's views.

Thus, Commissioner Hon. Paul Musili Wambua moved the following motion pursuant to the provisions of Regulation 20 (3):

That the Commission's Report be amended in Chapter 11.54 (i) (h) by adding the following words "**a memorandum was received proposing the creation of an industrial court having the same jurisdiction as that of the High Court**" immediately after the words "village tribunals" on page 258 of the Report.

(Hon. Paul Musili Wambua)

Motion made and Question proposed;

Debate resumed;

Question of the amendment that the words be added, be added put and agreed to.

The words are therefore added to the Report.

**MIN. NO.TWG/E/50/2003**

**CONSIDERATION OF THE DRAFT BILL**

- (i) Debate on the motion that sub article 185 (2) be amended by deleting the words "supreme court" resumed.

Hon. Akhaabi claimed to move that the question be now put and the Temporary Convenor acceding to the claim, put the question and agreed to.

The Question of the amendment that the words to be deleted, be deleted put and negatived.

Thus words “**supreme court**” remains in the sub article.

Sub article 185 (2) is agreed to.

Thus it still reads “**The superior courts of record are the Supreme Court, the Court of Appeal and the High Court**”

The Committee, however, noted that the consideration of the motion by Hon. Isaiah Kubai seeking to add the words “industrial court” was postponed until experts appear before the Committee.

- (ii) A presentation was made by Hon. T. K. Githiora, delegate No. 629 on the need to include “courts martial” in the draft Bill.

**MIN. NO.TWG/E/51/2003**

**ADJOURNMENT**

The Temporary Convenor adjourned the meeting at 1.15 p.m. until 2.30 in the afternoon.

**AFTERNOON SITTING**

The Committee reconvened at 2.45 p.m. with the Convenor on the Chair.

**MIN. NO.TWG/E/52/2003**

**CONSIDERATION OF THE DRAFT BILL**

- (i) **Sub article 185 (3) (b) – amendment proposed;**

The Sub article 185 (3) (b) be amended by adding the following words before the word “any”.

**“the courts martial and”**

(Hon. Musili Wambua)

Motion made and Question proposed;

Debate arising;

Question of the amendment that the words to be added, be added put and agreed to.

Thus it now reads **“the courts martial and any other courts established by an Act of Parliament subordinate to the High Court, and”**.

(ii) **Article 198 – amendment proposed;**

Article 198 be amended by inserting the words **“courts martial and others”** between the words ‘establish’ and ‘courts’ in the first sentence.

(Hon. Paul Musili Wambua)

Motion made and Question proposed;

Debate arising;

Question of the amendment that the words to be inserted, be inserted put and agreed to.

Thus it now reads **“Parliament may, by an Act of Parliament, establish courts martial and others courts subordinate to the High Court that shall have, subject to the constitution, the jurisdiction and functions conferred on them by the Act or any other law”**

(iii) **Sub article 185 (3) (a) – Amendment proposed;**

That sub article 185 (3) (a) be amended by deleting the following words **“and the Kadhis’ courts”**.

(Hon. Onesmus Kihara Mwangi)

Motion made and Question proposed;

Debate arising;

Debate to resume on Monday 22<sup>nd</sup> September, 2003.

**MIN. NO.TWG/E/53/2003**

**ADJOURNMENT**

The Committee resolved to adjourn the meeting at 5.30 p.m. until Monday 22<sup>nd</sup> September 2003 at 8.30 a.m.

**SIGNED .....**  
**(CONVENOR)**

**DATE: .....**

**THE NATIONAL CONSTITUTIONAL CONFERENCE**

**MINUTES OF THE TENTH SITTING OF THE TECHNICAL WORKING GROUP "E" THE JUDICIARY, HELD ON MONDAY 22<sup>ND</sup> SEPTEMBER 2003 AT 9.00 A.M. IN COMMITTEE TENT NO. 5**

**MORNING SITTING**

**PRESENT**

- |                                   |                     |
|-----------------------------------|---------------------|
| 1. Hon. (Prof.) Kivutha Kibwana   | <b>Convenor</b>     |
| 2. Hon. Paul Musili Wambua        | <b>Commissioner</b> |
| 3. Hon. Ahmed Issack Hassan       | <b>Commissioner</b> |
| 4. Hon. Sheikh Ali Shee Mohammed  |                     |
| 5. Hon. Amina Abdalla             |                     |
| 6. Hon. Amina Ahmed               |                     |
| 7. Hon. Asli Ibrahim              |                     |
| 8. Hon. Bishop Philip Sulumeti    |                     |
| 9. Hon. Fadhil Sultana            |                     |
| 10. Hon. Fatuma Boi Bakari        |                     |
| 11. Hon. Hubbie Hussein Al Haji   |                     |
| 12. Hon. Khadija Fugicha          |                     |
| 13. Hon. Lilian Wanjira           |                     |
| 14. Hon. Mirugi Kariuki           |                     |
| 15. Hon. Mohammed Abdi Haji       |                     |
| 16. Hon. Rev. Patrick M. Musungu  |                     |
| 17. Hon. Roselyne Ashepete        |                     |
| 18. Hon. Salim Ibrahim            |                     |
| 19. Hon. Victor P. Gituma         |                     |
| 20. Hon. Gervase B. K. Akhaabi    |                     |
| 21. Hon. Yusuf Mahmoud Aboubakar  |                     |
| 22. Hon. Francis Waweru           |                     |
| 23. Hon. Fr. Joachim Gitonga      |                     |
| 24. Hon. Viscount Kimathi         |                     |
| 25. Hon. Daniel Rasugu            |                     |
| 26. Hon. Waithanje Minjire        |                     |
| 27. Hon. Archbishop Zacheus Okoth |                     |
| 28. Hon. Abdirahaman Ali Abbas    |                     |
| 29. Hon. Ali Mustafa Yusuf        |                     |
| 30. Hon. El-Busaidy Abdulghafur   |                     |
| 31. Hon. Victoria Mutheu M.       |                     |
| 32. Hon. Onesmus Kihara Mwangi    |                     |
| 33. Hon. Godana Adhi Doyo         |                     |
| 34. Hon. Rev. Margaret Muchai     |                     |

- 36.Hon. Dr. Nathaniel Tum
35. Hon. Zablon Nthamburi
36. Hon. Rupinder Singh Sehmi
37. Hon. Jane J. Kiptum
38. Hon. Benta Auma
39. Hon. Issack Derrow Ibrahim
40. Hon. R. O. Kwach
41. Hon. Walubengo Lumatete
42. Hon. Isaiah Kubai
43. Hon. Abdurhaman Badawy
44. Hon. Owino Charles Oyugi
45. Hon. Omino Joab H. O.
46. Hon. Kembi Gitura
47. Hon. Agnes Abuom
48. Hon. Shakeel Shabbir
49. Hon. Fred Ojiambo

### **ABSENT WITH APOLOGY**

1. Hon. Kajembe Seif Ramadhan

### **ABSENT**

1. Hon. Jamila Muhamed
2. Hon. Mohammed Nyaoga
3. Hon. Rose Waruhiu
4. Hon. Waithaka Mwangi
5. Hon. Peter Munya
6. Hon. Abdi Tari Sasura
7. Hon. Kiptingos Saul Kipkoech
8. Hon. Kathurima M'inoti
9. Hon. Abdalla Ngozi
10. Hon. Mohamed Abu Chiaba
11. Hon. Gichura Kibara
12. Hon. Wandati Abdulrahman M

### **IN ATTENDANCE – DELEGATES**

1. Hon. Macharia Mukiri
2. Hon. Amos Wako
3. Hon. Dubat Ali Amey
4. Hon. Archbishop David Gitari

## **IN ATTENDANCE – OBSERVERS**

1. Bettie Opany
2. Cornelius Lupao
3. Peter O. Maanya
4. Charles K. Kimani
5. Peter Ligale
6. Y. S. Sheikh
7. Linda Agalothieno

## **IN ATTENDANCE**

Mr. M. R. Sialai	-	Committee Clerk/National Assembly
Mr. Dan Juma	-	Programme Assistant/CKRC
Ms. Rahma Jillo	-	Programme Assistant/CKRC
Ms. Lucy Masua	-	Draftsperson/Ministry of Justice and Constitutional Affairs

## **MIN. NO.TWG/E/54/2003**

## **CONFIRMATION OF MINUTES OF THE PREVIOUS SITTING.**

The minutes of the Ninth Sitting of the Committee held on 18<sup>th</sup> September, 2003 were confirmed as a true record of the proceedings of the Committee's sitting and were signed by the Convenor having been proposed and seconded by Hon. Francis Waweru and Hon. Rev. Margaret Muchai respectively.

## **MIN. NO.TWG/E/55/2003**

## **MATTERS ARISING**

Under Min. No. TWG/E/50/2003 (i) the Hon. Delegate Francis Waweru requested the Committee to invite the Secretary General of COTU, Mr. Francis Atwoli to appear along with the experts in relation to the proposed creation of Industrial Court having the same jurisdiction as that of the High Court. The Committee acceded to the request.

## **MIN. NO.TWG/E/56/2003**

## **GENERAL COMMENTS SESSION**

During the General Comments Session, the Committee expressed great exception to the statements reported in the print and mass media and attributed to Hon. Shakeel Shabbir, Delegate No. 406 and the Chairperson of the Constitution of Kenya Review Commission alleging that the Committee was slowing down the work of the Conference.

The Committee affirmed that its adjournment of Thursday 18<sup>th</sup> September 2003 under Min. No. TWG/E/53/2003 was unanimous and that it was not the Convenor's unilateral decision. The Committee further affirmed that at no time has the Convenor adjourned the Committee's meetings without consensus neither has he made decisions touching on the Committee without consulting the members.

The Committee noted with concern that the irresponsible and offending statements were meant to upset the Convenor and to dent his credibility and role in the constitutional process, which speaks for itself.

The Committee further noted that these sideshows are meant to distract the Committee from its mandate and should be condemned with contempt that it deserves.

Hon. Shakeel Shabbir stood by his remarks and express his concern with time keeping by the Committee. He reiterated that he made these statements as an individual delegate and not a representative of the Committee.

In a motion moved by Hon. Abdurhaman Badawy, the Committee expressed its full confidence on the Convenor and called upon him to carry on with his duty without distraction.

The Committee resolved to ask the Chairperson of Constitution of Kenya Review Commission to appear before the Committee in order to explain to the Committee how he wants it to transact its business and why he thinks the Committee is slowing down progress at the Conference. The Committee further resolved to issue a press statement condemning the misleading statements made in the press and affirming their full confidence in the Convenor.

**MIN. NO.TWG/E/57/2003**

**CONSIDERATION OF THE DRAFT BILL**

(i) **Sub article 183 (3) (a) – Amendment proposed**

That sub article 185 (3) (a) be amended by deleting the following words  
**“and the Kadhis’ courts”**.

(Hon. Onesmus Kihara Mwangi)

Motion made and Question proposed;

Debate interrupted on Thursday, 18<sup>th</sup> September 2003 resumed:

Question of the amendment that the words to be deleted, be deleted put  
and negatived.

10 delegates were for the motion

28 delegates against the motion

3 delegates abstained

The Convenor did not vote as the need for casting the vote did not arise.

Thus the words **“and the Kadhis’ courts”** remain in the draft Bill.

## **MINORITY REPORT**

A minority of the members of the Committee submitted the following minority report which reads as follows:-

**That sub article 185 (3) (a) be amended by deleting the following words “and the Kadhis court”.**

### **MIN. NO.TWG/E/58/2003**

### **ADJOURNMENT**

The Convenor adjourned the meeting at 1.15 p.m. to 2.30 this afternoon.

### **AFTERNOON SITTING**

The Committee reconvened at 2.30 p.m.

### **MIN. NO.TWG/E/59/2003**

### **CONSIDERATION OF THE DRAFT BILL**

#### **(i) Sub article 185 (3) (b) – amendment proposed**

That Sub article 185 (3) (b) be further amended by adding the following words “**Juvenile courts**” between the words “Martial” and “and”.

(Hon. Rev. Patrick M. Musungu)

Motion made and Question proposed;

Debate arising;

Question of the amendment that the words to be added, be added put and negatived.

Thus sub article 185 (3) remains as amended.

#### **(ii) Sub article 185 (3) (c) – Amendment proposed;**

That sub article 185 (3) (c) be amended by deleting the following words “**with limited jurisdiction in issues of local significance**”.

(Hon. Bishop Philip Sulumeti)

Motion made and Question proposed;

Question of the amendment that the words to be deleted, be deleted put and agreed to.

Thus the sub article now reads **“any traditional or local tribunals, that may be established by an Act of Parliament”**.

The Question that Article 185 as amended stand part of the draft Bill is postponed.

### **Article 186**

(iii) **Sub article 186 (i) - agreed to.**

(iv) **Sub article 186 (2) – Amendment proposed;**

That sub article 186 (2) be amended by deleting the word **“are”** between the words “Judiciary” and “charge” and replacing thereon the words **“shall be”**.

(Hon. Gervase B. K. Akhaabi)

Motion made and Question proposed;

Question of the first amendment that the word to be deleted, be deleted put and agreed to.

Question of the second amendment that the words to be replaced thereon, be replaced put and agreed to.

Thus the sub article now reads as follows **“The administrative expenses of the Judiciary including the salaries, allowances, gratuities and pensions payable to, or in respect of, persons serving in the Judiciary shall be a charge on the Consolidated Fund”**.

(v) **Sub article 186 (3) – Amendment Proposed;**

That Sub article 186 (3) be amended by inserting the words **“in good faith”** between the words ‘done’ and ‘in the’.

(Hon. Sheikh Ali Shee Mohammed)

Motion made and Question proposed;

Debate arising;

The mover withdrew the motion before a decision was made.

**Further Amendment proposed;**

That sub article 186 (3) be amended by inserting the words “**lawful**” between the words “in the” and “performance”.

(Hon. Kariuki Mirugi)

Motion made and Question proposed;

Debate arising;

Further amendment proposed;

That sub article 186 (3) be further amendment by deleting the words “**in the**” between the words “done” and “performance” and inserting thereon the words “**in good faith in the lawful**” between the words “done” and “performance”.

Debate arising;

Question of the first amendment that the words to be deleted, be deleted put and agreed to.

Question of the further amendment that the words to be inserted, be inserted put and agreed to.

Thus the sub article now reads “**No judicial officer shall be liable in an action or suit in respect of anything done in good faith in the lawful performance of a judicial function**”.

(vi) **Sub article 186 (4) – Amendment proposed;**

That Sub article 186 (4) be amended by inserting the word “**benefits**” between the words “allowances” and “gratuities”.

(Hon. R.O. Kwach)

Motion made and Question proposed;

Debate arising;

Question of the amendment that the word to be inserted, be inserted put and agreed to:

Thus the sub article now reads “**The salaries, allowances, benefits, gratuities and pensions payable to, or in respect of persons serving in the Judiciary shall not be varied to their disadvantage**”.

(vii) **Sub article 186 (5) – Amendment proposed;**

Sub article 186 (5) be deleted.

(Hon. Paul Musili Wambua)

Motion made and Question proposed;

Debate arising;

**QUORUM**

Hon. Victoria Mutheu Musyoka drew attention of the Convenor to the fact that there was no quorum and having counted the members of the Committee present the Convenor confirmed that there was no quorum.

**MIN. NO.TWG/E/60/2003**

**ADJOURNMENT**

The Convenor adjourned the meeting at 5.00 p.m. until Tuesday 23<sup>rd</sup> September 2003 at 8.30 a.m.

**SIGNED** .....  
(CONVENOR)

**DATE:** .....

**THE NATIONAL CONSTITUTIONAL CONFERENCE**

**MINUTES OF THE ELEVENTH SITTING OF THE TECHNICAL WORKING  
GROUP "E" THE JUDICIARY, HELD ON TUESDAY 23<sup>RD</sup> SEPTEMBER 2003  
AT 9.00 A.M. IN COMMITTEE TENT NO. 5**

**MORNING SITTING**

**PRESENT**

1. Hon. (Prof.) Kivutha Kibwana
2. Hon. Paul Musili Wambua
3. Hon. Ahmed Issack Hassan
4. Hon. Sheikh Ali Shee Mohammed
5. Hon. Amina Abdalla
6. Hon. Amina Ahmed
7. Hon. Asli Ibrahim
8. Hon. Bishop Philip Sulumeti
9. Hon. Fadhil Sultana
10. Hon. Fatuma Boi Bakari
11. Hon. Hubbie Hussein Al Haji
12. Hon. Khadija Fugicha
13. Hon. Lilian Wanjira
14. Hon. Mirugi Kariuki
15. Hon. Mohammed Abdi Haji
16. Hon. Rev. Patrick M. Musungu
17. Hon. Roselyne Ashepete
18. Hon. Salim Ibrahim
19. Hon. Victor P. Gituma
20. Hon. Gervase B. K. Akhaabi
21. Hon. Yusuf Mahmoud Aboubakar
22. Hon. Francis Waweru
23. Hon. Fr. Joachim Gitonga
24. Hon. Viscount Kimathi
25. Hon. Daniel Rasugu
26. Hon. Waithanje Minjire
27. Hon. Archbishop Zacheus Okoth
28. Hon. Abdirahaman Ali Abass
29. Hon. Ali Mustafa Yusuf
30. Hon. El-Busaidy Abdulghafur
31. Hon. Victoria Mutheu M.
32. Hon. Onesmus Kihara Mwangi
33. Hon. Rev. Margaret Muchai
34. Hon. Zablon Nthamburi

**Convenor**  
**Commissioner**  
**Commissioner**

35. Hon. Jane J. Kiptum
36. Hon. Benta Auma
37. Hon. Issack Derrow Ibrahim
38. Hon. R. O. Kwach
39. Hon. Walubengo Lumatete
40. Hon. Isaiah Kubai
41. Hon. Abdurhaman Badawy
42. Hon. Owino Charles Oyugi
43. Hon. Kembi Gitura
44. Hon. Agnes Abuom
45. Hon. Shakeel Shabbir
46. Hon. Fred Ojiambo

#### **ABSENT WITH APOLOGY**

1. Hon. Kajembe Seif Ramadhan
2. Hon. Rupinder Singh Sehmi

#### **ABSENT**

1. Hon. Jamila Muhamed
2. Hon. Mohammed Nyaoga
3. Hon. Rose Waruhiu
4. Hon. Waithaka Mwangi
5. Hon. Peter Munya
6. Hon. Abdi Tari Sasura
7. Hon. Kiptingos Saul Kipkoech
8. Hon. Kathurima M'inoti
9. Hon. Abdalla Ngozi
10. Hon. Mohamed Abu Chiaba
11. Hon. Gichura Kibara
12. Hon. Wandati Abdulrahman M
13. Hon. Godana Adhi Doyo
14. Hon. Dr. Nathaniel Tum
15. Hon. Omino Joab H. O.

#### **IN ATTENDANCE – DELEGATES**

1. Hon. P. G. Muriithi

#### **IN ATTENDANCE – OBSERVERS**

1. Bettie Opany
2. Cornelius Lupao
3. Peter O. Maanya
4. Peter Ligale

5. Y. S. Sheikh
6. Linda Agalothieno

#### **IN ATTENDANCE**

Mr. M. R. Sialai	-	Committee Clerk/National Assembly
Mr. Dan Juma	-	Programme Assistant/CKRC
Ms. Rahma Jillo	-	Programme Assistant/CKRC

#### **MIN. NO.TWG/E/61/2003**

#### **APPOINTMENT OF TEMPORARY CONVENOR**

Bishop Philip Sulumeti was appointed Temporary Convenor after the resignation of the Convenor Hon. Prof. Kivutha Kibwana.

#### **MIN. NO.TWG/E/62/2003**

#### **CONFIRMATION OF MINUTES OF THE PREVIOUS SITTING.**

The minutes of the Tenth Sitting of the Committee held on 22<sup>nd</sup> September, 2003 were confirmed as a true record of the proceedings of the Committee's sitting and were signed by the Temporary Convenor having been proposed and seconded by Hon. Salim Ibrahim and Hon. Victor Gituma respectively.

#### **MIN. NO.TWG/E/63/2003**

#### **MATTERS ARISING**

- (a) Under Min. No. TWG/E/56/2003, the chairperson of the Constitution of Kenya Review Commission appeared before the Committee as requested to respond to press statements attributed to him which stated that the Chairperson had indicated that the Judiciary Committee was one of the Committees slowing down progress at the conference.

The Chairperson informed the meeting that in the course of briefing the press on the progress of constitution making at the Bomas, he had indicated that Judiciary was slowing down the conference work based on information availed to him on progress of Committees and complaints received from a section of the Committee to the effect that work was slow.

The Chairperson was informed that the offending statements he made to the press had indicted the Committee, which has had a vibrant debate and a committed Convenor. He was told that it would have been prudent for him to verify the allegations that the Committee had been dragging its feet before taking the matter to the press. The Committee confirmed that the Rapporteur – General has been updated on a daily basis on the progress of the Committee business and that if there was any problem it should have been raised with the Convenor and the Committee.

The Committee reiterated that it should be represented in the Committee analyzing the progress of work of the Committees.

The Committee took great exception with a section of the Committee who fail to raise matters of concern within the Committee and instead raise such matters with third parties.

The Committee regretted the resignation of the Convenor and appealed to him to rescind the decision.

The Committee appointed a group of members comprising of Hon. Archbishop Zacheus Okoth, Hon. Mirugi Kariuki, Hon. Sheikh Ali Shee Mohammed, Hon. Lilian Wanjira, Hon. Fadhil Sultana, Hon. Zablon Nthamburi and Hon. El-Busaidy Abdulghafur to approach the Convenor and convey the committee's decision expressing confidence in him and to ask him to rescind his decision to resign.

- (b) Under Min. No. TWG/E/57/2003, the Committee confirmed that Hon. R. O. Kwach voted against the motion which proposed that sub article 185 (3) (a) be amended by deleting the words "and the Kadhis' courts" contrary to a news item in KTN that reported that he had abstained from voting. It was resolved that the KTN be informed to correct the wrong impression made in the said news item.
- (c) Under Min. No. TWG/E/59/2003, the Committee resolved that a verbatim report on the Committee's proceedings be consulted to ascertain whether the Committee's decision in the said Minute included removal of the words "an action".

**MIN. NO. TWG/E/64/2003**

**CONSIDERATION OF DRAFT BILL**  
**(ARTICLE BY ARTICLE)**

**Sub article 186 (5) – Amendment proposed;**

That Sub article 186 (5) deleted.

(Hon. Paul Musili Wambua)

Motion made and Question proposed;

Debate interrupted on Monday, 22<sup>nd</sup> September 2003 resumed.

Question of the amendment that the sub article to be deleted, be deleted put and agreed to.

Sub article 186 (5) is deleted.

The Committee however, resolved that the provisions of sub article 186 (5) which were deleted be recommended for consideration by the Committee on the Bill of Rights under Article 67 and that should it be rejected, the Committee should reconsidered it.

**MIN. NO.TWG/E/65/2003**

**ADJOURNMENT**

The Temporary Convenor adjourned the meeting at 1.05 p.m. to 2.30 in the afternoon.

**AFTERNOON SITTING**

The Committee reconvened at 2.30 p.m. with the Temporary Convenor on the Chair.

**MIN. NO.TWG/E/66/2003**

**CONSIDERATION OF DRAFT BILL**  
**(ARTICLE BY ARTICLE)**

**(i) Sub article 186 (6) – Amendment proposed;**

That sub article 186 (6) be amended by deleting the sub article in its entirety.

(Hon. Gervase B. K. Akhaabi)

Motion made and Question proposed;

Debate arising;

Question of the amendment that the sub article to be deleted, be deleted put and agreed to.

Sub article 186 (6) is deleted.

Question that Article 186 as amended stand part of the Draft Bill put and agreed to.

**Article 187**

**(ii) Sub article 187 – Amendment proposed;**

That sub article 187 be amended by:-

(a) inserting the word “**shall**” between the words “Court” and “consists”.

(b) deleting the word “is” in paragraph (a) and replacing thereon the words “shall be”.

(c) **inserting the words “less than five and not” between the words “not” and “more” and by deleting the word “six” and replacing thereon with the words “eight other”.**

(d) **by adding a new paragraph (c) which reads as follows:**

“The Supreme Court shall be properly constituted for the purposes of its proceedings if it is composed of five judges”.

**(Hon. Garvase B. K. Akhaabi).**

**Motion made and Question proposed;**

**Debate arising;**

Further amendment proposed;

**That the Motion be further amended by:**

- i. deleting the words “who shall be the head of the Judiciary and” and replacing thereon the words “who will be the President of the Court” in paragraph (a).**
- ii. inserting the following new paragraph, “The Deputy Chief Justice who will be the Vice President of the Court”.**
- iii. deleting the word “eight” and replacing with the word “seven” in paragraph (b).**

**(Hon. Mirugi Kariuki)**

**Motion made and Question proposed;**

**Debate arising;**

**Question of the first amendment that the words to be deleted, be deleted put and agreed to.**

**Question of the second amendment that the words and the new paragraph to be inserted, be inserted put and agreed to.**

Further amendment proposed;

**That the following new paragraph be added to the amended Article 187.**

“The Supreme Court shall sit in Nairobi”.

**(Hon. R. O. Kwach)**

**Motion made and Question proposed;**

**Debate arising;**

**Question of the amendment that the new paragraph be added to the amended article, put and agreed to.**

**Question that Article 187 as amended stand part of the Draft Bill put and agreed to.**

**Article 187 as amended now reads:**

**187 - The Supreme court shall consist of:**

1. (a) **The Chief Justice** “who will be the President of the Court”.
- (b) “The Deputy Chief Justice who will be the Vice President of the Court” and.
- (c) **Not** “less than five and not” **more than** “seven other” **judges**.
2. “The Supreme Court shall be properly constituted for the purposes of its proceedings if it is composed of five judges”.
3. “The Supreme Court shall sit in Nairobi”.

**MIN. NO.TWG/E/67/2003**

**ADJOURNMENT**

The Temporary Convenor adjourned the meeting at 5.10 p.m. until Wednesday 24<sup>th</sup> September 2003 at 8.30 a.m.

**SIGNED** .....  
(CONVENOR)

**DATE:** .....

**THE NATIONAL CONSTITUTIONAL CONFERENCE**

**MINUTES OF THE TWELVETH SITTING OF THE TECHNICAL WORKING GROUP "E" THE JUDICIARY, HELD ON WEDNESDAY 24<sup>TH</sup> SEPTEMBER 2003 AT 9.00 A.M. IN COMMITTEE TENT NO. 5**

**MORNING SITTING**

**PRESENT**

1. Hon. (Prof.) Kivutha Kibwana **Convenor**
2. Hon. Paul Musili Wambua **Commissioner**
3. Hon. Ahmed Issack Hassan **Commissioner**
4. Hon. Sheikh Ali Shee Mohammed
5. Hon. Amina Abdalla
6. Hon. Amina Ahmed
7. Hon. Asli Ibrahim
8. Hon. Bishop Philip Sulumeti
9. Hon. Fadhil Sultana
10. Hon. Fatuma Boi Bakari
11. Hon. Hubbie Hussein Al Haji
12. Hon. Khadija Fugicha
13. Hon. Lilian Wanjira
14. Hon. Mirugi Kariuki
15. Hon. Mohammed Abdi Haji
16. Hon. Rev. Patrick M. Musungu
17. Hon. Roselyne Ashepete
18. Hon. Salim Ibrahim
19. Hon. Victor P. Gituma
20. Hon. Gervase B. K. Akhaabi
21. Hon. Yusuf Mahmoud Aboubakar
22. Hon. Francis Waweru
23. Hon. Fr. Joachim Gitonga
24. Hon. Viscount Kimathi
25. Hon. Daniel Rasugu
26. Hon. Waithanje Minjire
27. Hon. Archbishop Zacheus Okoth
28. Hon. Abdirahaman Ali Abass
29. Hon. Ali Mustafa Yusuf
30. Hon. El-Busaidy Abdulghafur
31. Hon. Victoria Mutheu M.
32. Hon. Onesmus Kihara Mwangi
33. Hon. Rev. Margaret Muchai
34. Hon. Zablon Nthamburi

35. Hon. Jane J. Kiptum
36. Hon. Benta Auma
37. Hon. Issack Derrow Ibrahim
38. Hon. R. O. Kwach
39. Hon. Isaiah Kubai
40. Hon. Abdurhaman Badawy
41. Hon. Owino Charles Oyugi
42. Hon. Kembi Gitura
43. Hon. Agnes Abuom
44. Hon. Shakeel Shabbir
45. Hon. Kathurima M'noti
46. Hon. Godana Adhi Doyo
47. Hon. Dr. Nathaniel Tum
48. Hon. Omino Joab H. O.

#### **ABSENT WITH APOLOGY**

1. Hon. Kajembe Seif Ramadhan
2. Hon. Rupinder Singh Sehmi

#### **ABSENT**

1. Hon. Rose Waruhiu
2. Hon. Abdi Tari Sasura
3. Hon. Kiptingos Saul Kipkoech
4. Hon. Abdalla Ngozi
5. Hon. Mohamed Abu Chiaba
6. Hon. Gichura Kibara
7. Hon. Walubengo Lumatete
8. Hon. Fred Ojiambo

#### **IN ATTENDANCE – OBSERVERS**

1. Bettie Opany
2. Peter O. Maanya
3. Yusuf S. Sheikh
4. Linda Agalothieno
5. Charles Kimani
6. Nyabonyi Kazungu

#### **IN ATTENDANCE**

Mr. M. R. Sialai	-	Committee Clerk/National Assembly
Mr. Dan Juma	-	Programme Assistant/CKRC
Ms. Rahma Jillo	-	Programme Assistant/CKRC

**MIN. NO. TWG/E/68/2003**

**ELECTION OF TEMPORARY CONVENOR**

Bishop Philip Sulumeti was unanimously elected Temporary Convenor.

**MIN. NO. TWG/E/69/2003**

**CONFIRMATION OF MINUTES OF  
THE PREVIOUS SITTING.**

The minutes of the Eleventh Sitting of the Committee held on 23<sup>rd</sup> September, 2003 were confirmed as a true record of the proceedings of the Committee's sitting and were signed by the Convenor having been proposed and seconded by Hon. Rev. Margaret Muchai and Hon. Asli Ibrahim respectively.

**MIN. NO. TWG/E/70/2003**

**MATTERS ARISING**

(i) Following the meeting between Hon. Prof. Kivutha Kibwana and a group of members who had been appointed under Min. No. TWG/E/03/2003 to talk to the Convenor and ask him to rescind his decision to resign and the appeal by the Committee that he reconsiders his decision, Prof. Kivutha Kibwana humbly conceded to the request and rescinded his decision to resign.

The Committee expressed total confidence and complete trust in him and assured the Convenor that he was capable of leading the Committee to its fruitful conclusion.

Hon. Shakeel Shabbir asked the Committee and Prof. Kibwana to forgive him for the statements in the press which had created a misunderstanding in the Committee.

The Committee expressed displeasure with the press statements attributed to the chairperson of CKRC Prof. Yash Pal Ghai insinuating that the Committee was slowing down the Conference work and reiterated that it was imprudent for the Chairperson to take matters of the Committee to the press before verifying with the Convenor and the Committee.

The Committee observed that Hon. Kivutha Kibwana had tried his best to conduct the business of the Committee in an impartial manner.

Hon. Prof. Kivutha Kibwana thereafter proceeded to take the chair.

(ii) Under Min. No. TWG/E/61/2003 the Committee noted that Hon. Bishop Philip Sulumeti was unanimously elected Temporary Convenor but not appointed as recorded in the Minutes.

(iii) Under the item of attendance, the Committee was informed that a letter

had been written to the Rapporteur General bringing his attention the fact that certain delegates who had been listed as members of the Committee have never attended the Committee's meetings and should be replaced.

(iv) Under Min. No. TWG/E/63/2003 (c), the Committee was informed that the verbatim report on the committee's proceedings regarding the proposed removal of the words "an action" in reference to article 186 (3) was not ready and would be availed to the Committee as soon as a fair copy is produced.

(v) Under Min. No. TWG/E/66/2003 (ii), it was clarified that the issue of **creating an office of the Chief Justice had not been concluded. The Committee proceeded to consider the matter.**

**Article 184 – Further amendment proposed;**

**That Article 184 be further amended by renumbering the sub-articles and creating the following new sub article (3)**

- “(3) (a) There shall be the office of the Chief Justice who shall be the head of the Judiciary.**
- (b) There shall be the office of the Deputy Chief Justice who shall be the principal Assistant to the Chief Justice.**
- (c) (i) There is established an office of the Chief Registrar of the Judiciary and such other offices of Registrars as may be created by the Judicial Service Commission.**
- (ii) The Chief Registrar of the Judiciary shall be the Chief Administrator and Accounting Officer of the Judiciary.**

(Hon. Shakeel Shabbir)

Motion made and Question proposed;

Debate arising;

Question of the first amendment that the sub articles to be renumbered, be renumbered put and agreed to.

Question of the second amendment that the sub article to be added, be added put and agreed to.

**MIN. NO.TWG/E/71/2003**

**FURTHER AMENDMENT TO TITLE  
HEADING**

**Title Heading 184 – Further amendment proposed;**

That Title heading in article 184 be further amended by inserting the words “**and structure**” between the words “Principles” and of “Judicial Power”.

(Hon. Rev. Margaret Muchai)

Motion made and Question proposed;

Debate arising;

Question of the amendment that the words to be inserted, be inserted put and agreed to.

The title heading now reads “**Principles and structure of the Judicial Power**”.

**MIN. NO.TWG/E/72/2003**

**CONSIDERATION OF DRAFT BILL  
(ARTICLE BY ARTICLE)**

Articles 188, 189, 190 and 191 were introduced.

Debate and consideration of the Articles to commence in the next sitting.

**MIN. NO.TWG/E/73/2003**

**ANY OTHER BUSINESS**

1. The Committee was informed that the Steering Committee had proposed that all Committee meetings should end at 1.00 p.m. to give delegates time to attend the memorial service of the Late Dr. Chrispin Odhiambo Mbai.
2. The Committee was further informed that the experts including the Attorney General will appear on Thursday 25<sup>th</sup> September 2003 in the afternoon in relation to the proposed creation of Industrial Court having the same jurisdiction as that of the High Court.

**MIN. NO.TWG/E/74/2003**

**ADJOURNMENT**

The Convenor adjourned the meeting at 1.00 p.m. until Thursday 25<sup>th</sup> September 2003 at 8.30 a.m.

**SIGNED** .....  
(CONVENOR)

**DATE:** .....

**THE NATIONAL CONSTITUTIONAL CONFERENCE**

**MINUTES OF THE THIRTEENTH SITTING OF THE TECHNICAL WORKING GROUP "E" THE JUDICIARY, HELD ON WEDNESDAY 25<sup>TH</sup> SEPTEMBER 2003 AT 9.00 A.M. IN COMMITTEE TENT NO. 5**

**MORNING SITTING**

1. Hon. (Prof.) Kivutha Kibwana
2. Hon. Paul Musili Wambua
3. Hon. Ahmed Issack Hassan
4. Hon. Sheikh Ali Shee Mohammed
5. Hon. Amina Abdalla
6. Hon. Amina Ahmed
7. Hon. Asli Ibrahim
8. Hon. Bishop Philip Sulumeti
9. Hon. Fadhil Sultana
10. Hon. Fatuma Boi Bakari
11. Hon. Hubbie Hussein Al Haji
12. Hon. Khadija Fugicha
13. Hon. Lilian Wanjira
14. Hon. Mirugi Kariuki
15. Hon. Rev. Patrick M. Musungu
16. Hon. Salim Ibrahim
17. Hon. Victor P. Gituma
18. Hon. Gervase B. K. Akhaabi
19. Hon. Yusuf Mahmoud Aboubakar
20. Hon. Francis Waweru
21. Hon. Fr. Joachim Gitonga
22. Hon. Viscount Kimathi
23. Hon. Daniel Rasugu
24. Hon. Waithanje Minjire
25. Hon. Archbishop Zacheus Okoth
26. Hon. Abdirahaman Ali Abass
27. Hon. Ali Mustafa Yusuf
28. Hon. El-Busaidy Abdulghafur
29. Hon. Victoria Mutheu M.
30. Hon. Onesmus Kihara Mwangi
31. Hon. Rev. Margaret Muchai
32. Hon. Zablon Nthamburi
33. Hon. Jane J. Kiptum
34. Hon. Issack Derrow Ibrahim
35. Hon. R. O. Kwach
36. Hon. Isaiah Kubai
37. Hon. Abdurhaman Badawy

**Convenor**  
**Comissioner/Rapporteur**  
**Commissioner/Rapporteur**

- 38. Hon. Owino Charles Oyugi
- 39. Hon. Kembi Gitura
- 40. Hon. Agnes Abuom
- 41. Hon. Shakeel Shabbir
- 42. Hon. Kathurima M'inoti
- 43. Hon. Omino Joab H. O.
- 44. Hon. Kajembe Seif Ramadhan
- 45. Hon. Rupinder Singh Sehmi
- 46. Hon. Mohamed Abu Chiaba
- 47. Hon. Benta Auma

#### **IN ATTENDANCE**

Mr. M. R. Sialai	-	Committee Clerk/National Assembly
Mr. Dan Juma	-	Programme Assistant/CKRC
Ms. Rahma Jillo	-	Programme Assistant/CKRC

#### **MIN. NO.TWG/E/75/2003**

#### **CONFIRMATION OF MINUTES OF THE PREVIOUS SITTING**

The minutes of the Twelveth Sitting of the Committee held on 24<sup>th</sup> September, 2003 were confirmed as a true record of the proceedings of the Committee's sitting and were signed by the Convenor having been proposed and seconded by Hon. El-Busaidy Abdulghafur and Hon. Amina Ahmed respectively.

#### **MIN. NO.TWG/E/76/2003**

#### **MATTERS ARISING**

- (i) Under Min. No. TWG/E/70/2003, (v), the Committee resolved that the amendment seeking to create the offices of the Chief Justice and Deputy Chief Justice should be forwarded to the Draftsperson to advise on the quality of draftsmanship and the import of using "Principal Assistant" in the proposed 184 (3) (b).
- (ii) On the question of who will occupy the office of the Chief Justice in the event of becoming vacant, the Committee resolved that the matter be dealt within the articles allocating powers to different Judicial officers bearing in mind the seniority of the Judicial Officers.

#### **MIN. NO.TWG/E/77/2003**

#### **GENERAL COMMENTS SESSION**

During the General comments session, the Committee heard that appointments in the Judiciary should be based on merit and that the Judiciary should be made independent.

**MIN. NO.TWG/E/78/2003**

**REPORTS IN THE PRESS**

Hon. Kembi Gitura observed with concern that a group of the clergy issued a statement yesterday and alleged that the members of the Committee have been strategically placed to arrive at specific decisions in the Committee. While it was observed with concern that such statements cast aspersion on the Committee, the Committee noted that there was little it can do to prevent such views from being raised but the truth will.

**MIN. NO.TWG/E/79/2003**

**CONSIDERATION OF DRAFT BILL  
(ARTICLE BY ARTICLE)**

**Article 188**

Sub article 188 (1) (a) (i) – **Amendment proposed;**

That Sub article 188 (1) (a) be amended by deleting paragraph (a) (i)

(Hon. Yusuf Mohmoud Aboubakar)

Motion made and Question proposed;

Debate arising;

The Committee noted that there is inherent conflict in the provisions of Article 163 (3) (a) and the provisions of Article 188 (1) (a) (iii). The Chief Justice cannot chair a Special Committee constituted to investigate the allegations against the President and let the Supreme Court have an original jurisdiction in issues relating to impeachment of the President resulting from the special Committee.

The Committee **resolved** that the apparent conflict should be brought to the attention of the Executive Committee.

**MIN. NO.TWG/E/80/2003**

**ADJOURNMENT**

The Convenor adjourned the meeting at 12.55 p.m. until 2.30 in the afternoon.

**AFTERNOON SITTING**

The Committee reconvened at 2.40 p.m. with the Temporary Convenor Hon. Bishop Philip Sulumeti on the Chair.

**MIN. NO.TWG/E/81/2003**

**APPEARANCE BY EXPERTS**

Pursuant to Min. No. TWG/E/42/2003 the following experts appeared before the Committee in relation to a proposal to create an Industrial Court with some jurisdiction as that of the High Court.

1. Hon. Amos Wako - Attorney General

- 2. Mr. Abisai O. Ambenge - Labour Department
- 3. Mr. Geolf Oraf Obura - ILO consultant
- 4. Mr. Gerishon Konditi - Federation of Kenya Employees

The Committee heard that the Industrial Court was established outside the normal court system because of its specialized knowledge and the need to dispose of cases before it fairly quickly and with finality.

The Committee further heard that the decisions of the Industrial Court should be final and only challenged when it has exceeded its jurisdiction on a matter of law. However, at the moment, certain judgements have been challenged in the High Court.

The Committee was informed that the High Court has continued to have supervisory powers over the Industrial Court and that the Committee should appreciate the great implications of upgrading of the Industrial Court on tribunals and other Courts.

The Committee to make a decision on whether to include Industrial Court as one of the superior courts of record with regard to article 185 (2).

**MIN. NO. TWG/E/82/2003**

**ADJOURNMENT**

The Convenor adjourned the meeting at 4.35 p.m. until Friday 26<sup>th</sup> September 2003 at 8.30 a.m.

**SIGNED** .....  
(CONVENOR)

**DATE:** .....

**THE NATIONAL CONSTITUTIONAL CONFERENCE**

**MINUTES OF THE FOURTEENTH SITTING OF THE TECHNICAL  
WORKING GROUP “E” THE JUDICIARY, HELD ON FRIDAY 26<sup>TH</sup>  
SEPTEMBER 2003 AT 9.00 A.M. IN COMMITTEE TENT NO. 5**

**MORNING SITTING**

**PRESENT**

- |                                   |                     |
|-----------------------------------|---------------------|
| 1. Hon. (Prof.) Kivutha Kibwana   | <b>Convenor</b>     |
| 2. Hon. Paul Musili Wambua        | <b>Commissioner</b> |
| 3. Hon. Ahmed Issack Hassan       | <b>Commissioner</b> |
| 4. Hon. Sheikh Ali Shee Mohammed  |                     |
| 5. Hon. Amina Abdalla             |                     |
| 6. Hon. Amina Ahmed               |                     |
| 7. Hon. Asli Ibrahim              |                     |
| 8. Hon. Bishop Philip Sulumeti    |                     |
| 9. Hon. Fadhil Sultana            |                     |
| 10. Hon. Fatuma Boi Bakari        |                     |
| 11. Hon. Hubbie Hussein Al Haji   |                     |
| 12. Hon. Khadija Fugicha          |                     |
| 13. Hon. Lilian Wanjira           |                     |
| 14. Hon. Mirugi Kariuki           |                     |
| 15. Hon. Rev. Patrick M. Musungu  |                     |
| 16. Hon. Salim Ibrahim            |                     |
| 17. Hon. Victor P. Gituma         |                     |
| 18. Hon. Yusuf Mahmoud Aboubakar  |                     |
| 19. Hon. Francis Waweru           |                     |
| 20. Hon. Fr. Joachim Gitonga      |                     |
| 21. Hon. Daniel Rasugu            |                     |
| 22. Hon. Waithanje Minjire        |                     |
| 23. Hon. Archbishop Zacheus Okoth |                     |
| 24. Hon. Abdirahaman Ali Abass    |                     |
| 25. Hon. Ali Mustafa Yusuf        |                     |
| 26. Hon. El-Busaidy Abdulghafur   |                     |
| 27. Hon. Onesmus Kihara Mwangi    |                     |
| 28. Hon. Rev. Margaret Muchai     |                     |
| 29. Hon. Zablon Nthamburi         |                     |
| 30. Hon. Jane J. Kiptum           |                     |
| 31. Hon. R. O. Kwach              |                     |
| 32. Hon. Isaiah Kubai             |                     |
| 33. Hon. Abdurhaman Badawy        |                     |
| 34. Hon. Owino Charles Oyugi      |                     |
| 35. Hon. Kembi Gitura             |                     |

36. Hon. Agnes Abuom
37. Hon. Shakeel Shabbir
38. Hon. Rupinder Singh Sehmi
39. Hon. Benta Auma

#### **ABSENT**

1. Hon. Abdi Tari Sasura
2. Hon. Abdalla Ngozi
3. Hon. Gichura Kibara
4. Hon. Walubengo Lumatete
5. Hon. Fred Ojiambo
6. Hon. Mohammed Abdi Haji
7. Hon. Roselyne Ashepete
8. Hon. Godana Adhi Doyo
9. Hon. Dr. Nathaniel Tum
10. Hon. Gervase B. K. Akhaabi
11. Hon. Viscount Kimathi
12. Hon. Victoria Mutheu M.
13. Hon. Issack Derrow Ibrahim
14. Hon. Kathurima M'inoti
15. Hon. Omino Joab H. O.
16. Hon. Kajembe Seif Ramadhan
17. Hon. Mohamed Abu Chiaba

#### **IN ATTENDANCE**

Mr. M. R. Sialai	-	Committee Clerk/National Assembly
Mr. Dan Juma	-	Programme Assistant/CKRC
Ms. Rahma Jillo	-	Programme Assistant/CKRC

#### **FACILITATORS**

1. Emma Kamunga
2. Victoria Mwakio
3. Lucy Waititu
4. Albert Oirere

#### **MIN. NO.TWG/E/83/2003**

#### **ELECTION OF TEMPORARY CONVENOR**

Bishop Philip Sulumeti was unanimously elected Temporary Convenor to seat in for the Convenor who was indisposed.

#### **MIN. NO.TWG/E/84/2003**

#### **CONFIRMATION OF MINUTES OF THE**

**PREVIOUS SITTING**

The minutes of the Thirteenth Sitting of the Committee held on 25<sup>th</sup> September, 2003 were confirmed as a true record of the proceedings of the Committee’s sitting and were signed by the Convenor having been proposed and seconded by Hon. Yusuf Mahmoud Aboubakar and Hon. Ali Mustafa Yusuf respectively.

**MIN. NO. TWG/E/85/2003**

**MATTERS ARISING**

- (j) Under Min. No. TWG/E/77/2003, it was clarified that in addition to basing appointments in the Judiciary to merit, moral integrity should be included.
  
- (ii) Under Min. No. TWG/E/79/2003, the Committee was informed that a brief was being prepared to notify other Committees of matters that have been referred to them by the Committee.

**MIN. NO. TWG/E/86/2003**

**CONSIDERATION OF DRAFT BILL  
(ARTICLE BY ARTICLE)**

That Sub article 185 (2) be amended by adding the words “Industrial Court” immediately after the words “High Court”  
(Hon. Isaiah Kubai)  
Motion made and Question proposed;  
Debate interrupted on 17<sup>th</sup> September 2003, under Min. No. TWG/E/42/2003, resumed.

**MOTION TO DEFER THE MAKING OF DECISION**

That the decision on the motion before the Committee is deferred.  
(Hon. Ali Mustafa Yusuf)  
Motion made and Question proposed;  
Question put and agreed to.

**MIN. NO. TWG/E/87/2003**

**ADJOURNMENT**

The Convenor adjourned the meeting at 11.00 a.m. until a later date.

**SIGNED** .....  
(CONVENOR)

**DATE:** .....

**THE NATIONAL CONSTITUTIONAL CONFERENCE**

**MINUTES OF THE FIFTEENTH SITTING OF THE TECHNICAL WORKING  
GROUP "E" THE JUDICIARY, HELD ON TUESDAY 13<sup>TH</sup> JANUARY 2004 AT  
11.30 A.M. IN COMMITTEE TENT NO. 5**

**MORNING SITTING**

**PRESENT**

- |                                   |   |                                |
|-----------------------------------|---|--------------------------------|
| 1. Hon. Bishop Philip Sulumeti    | - | <b>Temporary Convenor</b>      |
| 2. Hon. Paul Musili Wambua        | - | <b>Commissioner/Rapporteur</b> |
| 3. Hon. Sheikh Ali Shee Mohammed  |   |                                |
| 4. Hon. Amina Abdalla             |   |                                |
| 5. Hon. Amina Ahmed               |   |                                |
| 6. Hon. Asli Ibrahim              |   |                                |
| 7. Hon. Fadhil Sultana            |   |                                |
| 8. Hon. Fatuma Boi Bakari         |   |                                |
| 9. Hon. Hubbie Hussein Al Haji    |   |                                |
| 10. Hon. Khadija Fugicha          |   |                                |
| 11. Hon. Mirugi Kariuki           |   |                                |
| 12. Hon. Rev. Patrick M. Musungu  |   |                                |
| 13. Hon. Salim Ibrahim            |   |                                |
| 14. Hon. Victor P. Gituma         |   |                                |
| 15. Hon. Francis Waweru           |   |                                |
| 16. Hon. Fr. Joachim Gitonga      |   |                                |
| 17. Hon. Daniel Rasugu            |   |                                |
| 18. Hon. Waithanje Minjire        |   |                                |
| 19. Hon. Archbishop Zacheus Okoth |   |                                |
| 20. Hon. Abdirahaman Ali Abass    |   |                                |
| 21. Hon. Ali Mustafa Yusuf        |   |                                |
| 22. Hon. Onesmus Kihara Mwangi    |   |                                |
| 23. Hon. Rev. Margaret Muchai     |   |                                |
| 24. Hon. Zablon Nthamburi         |   |                                |
| 25. Hon. Jane J. Kiptum           |   |                                |
| 26. Hon. Isaiah Kubai             |   |                                |
| 27. Hon. Abdurhaman Badawy        |   |                                |
| 28. Hon. Owino Charles Oyugi      |   |                                |
| 29. Hon. Kembi Gitura             |   |                                |
| 30. Hon. Rupinder Singh Sehmi     |   |                                |
| 31. Hon. Benta Auma               |   |                                |
| 32. Hon. Abdi Tari Sasura         |   |                                |
| 33. Hon. Walubengo Lumatete       |   |                                |
| 34. Hon. Gervase B. K. Akhaabi    |   |                                |
| 35. Hon. Viscount Kimathi         |   |                                |

36. Hon. Issack Derrow Ibrahim

### **ABSENT WITH APOLOGY**

1. Hon. Ahmed Issack Hassan - Commissioner/Rapporteur
2. Hon. Lilian Wanjira

### **ABSENT**

1. Hon. (Prof.) Kivutha Kibwana - **Convenor**
2. Hon. Yusuf Mahmoud Aboubakar
3. Hon. El-Busaidy Abdulghafur
4. Hon. Agnes Abuom
5. Hon. Shakeel Shabbir
6. Hon. Abdalla Ngozi
7. Hon. Gichura Kibara
8. Hon. Fred Ojiambo
9. Hon. Mohammed Abdi Haji
10. Hon. Roselyne Ashepete
11. Hon. Godana Adhi Doyo
12. Hon. Dr. Nathaniel Tum
13. Hon. Victoria Mutheu M.
14. Hon. Kathurima M' inoti
15. Hon. Omino Joab H. O.
16. Hon. Kajembe Seif Ramadhan
17. Hon. Mohamed Abu Chiaba
18. Hon. R. O. Kwach

### **IN ATTENDANCE – OBSERVERS**

1. Peter O. Maanya
2. Yusuf S. Sheikh
3. Nyabonyi Kazungu
4. Carren Angara
5. Juma Mafubo
6. Peter Ligale
7. L. A. Agalothieno

### **IN ATTENDANCE**

Mr. M. R. Sialai - Committee Clerk/National Assembly  
Mr. Dan Juma - Programme Assistant/CKRC  
Ms. Rahma Jillo - Programme Assistant/CKRC

Mr. Clive Grenyer - Draftsperson

**FACILITATORS**

1. Emma Kamunga
2. V. Mwakio
3. Lucy Waititu
4. Albert Oirere

**MIN. NO.TWG/E/88/2003/2004**

**ELECTION OF TEMPORARY  
CONVENOR**

Bishop Philip Sulumeti was unanimously elected Temporary Convenor to seat in for the Convenor.

**MIN. NO.TWG/E/89/2003/2004**

**CONFIRMATION OF MINUTES OF  
THE PREVIOUS SITTING**

The minutes of the Fourteenth Sitting of the Committee held on 26<sup>th</sup> September, 2003 were confirmed as a true record of the proceedings of the Committee's sitting and were signed by the Convenor having been proposed and seconded by Hon. Patrick M. Musungu and Hon. Rupinder Singh Sehmi respectively.

**MIN. NO.TWG/E/90/2003/2004**

**MATTERS ARISING**

The Committee sought clarification on the status of membership of Hon. R. O. Kwach who has since ceased to be a Judge of Court of Appeal.

The Committee was informed that once a delegate has been gazetted, he remains a delegate irrespective of change of appointment unless he resigns as a delegate.

**MIN. NO.TWG/E/91/2003/2004**

**CONSIDERATION OF DRAFT BILL  
(ARTICLE BY ARTICLE)**

**Article 185**

- (i) **Sub article 185 (2) – amendment proposed;**

**THAT, sub article 185(2) be amended by adding the words “Industrial Court” immediately after the words “High Court”.**

(Hon. Isaiah Kubai)

Motion made and Question proposed;

Debate interrupted on 26<sup>th</sup> September 2003, under Min. No. MIN. NO.TWG/E/86/2003 resumed;

Question put and negatived.

Sub article 185(2) agreed to.

Question that Article 185 as amended stand part of the Draft Bill, put and agreed to.

Article 185 now reads as follows:-

### **Hierarchy of Courts**

185. (1) The Judiciary consists of the Courts, Judges, Magistrates and other judicial officers of superior courts of records, and subordinate courts.

(2) The superior courts of records are the Supreme Court, **the Court of Appeal, and the High Court.**

(3) The subordinate courts are-

- (a) the magistrates' courts and the Kadhis' courts,
- (b) **the courts martial and** any other courts established by an Act of Parliament subordinate to the High Court, and
- (c) any traditional or local tribunals, that may be established by an Act Parliament.

### **Article 188**

**(ii) Sub article 188 (1) (a) (i) - amendment proposed;**

That, sub article 188(1) (a) (i) be amended by deleting paragraph (a) (i).

(Hon. Yusuf Mohmoud Aboubakar)

Motion made and Question proposed;

Debate interrupted on 25<sup>th</sup> September 2003, under Min. No. TWG/E/79/2003 resumed;

The Question of the amendment that sub article 188 (I) (a) (i) be amended by deleting paragraph (a) (i), put and agreed to.

**Thus, sub article 188 (1) (a) (i) is deleted.**

**(iii) Sub article 188 (1) (a) (ii) – Amendment proposed;**

THAT, Sub article 188 (1) (a) (ii) be amended by deleting paragraph (a) (ii).

(Hon. Viscount Kimathi)

Motion made and Question proposed;

Debate arising;

The Question of the amendment was withdrawn at the request of the mover.

Sub article 188 (1) (a) (ii) agreed to.

**MIN. NO.TWG/E/92/2003/2004**

**ADJOURNMENT**

The Temporary Convenor adjourned the meeting at 1.15 p.m. until 2.30 p.m.

**AFTERNOON SITTING**

The Committee reconvened at 2.30 p.m. with the Temporary Convenor Hon. Bishop Philip Sulumeti on the Chair.

**MIN. NO.TWG/E/93/2003/2004**

**CONSIDERATION OF DRAFT BILL**  
**(ARTICLE BY ARTICLE)**

(iv) **Sub article 188 (1) (a) (iii), (iv) and (v) - agreed to .**

(v) **Sub article 188 (1) (b) – agreed to.**

(vi) **Sub article 188 (3) – Amendment proposed;**

THAT, Sub article 188 (3) be amended by deleting the word “**justice**” and replacing thereon with the words “**development of law and jurisprudence subject to such decision being made by the full Bench**”.

(Hon. Rupinder Singh Sehmi)

Motion made and Question proposed;

Debate arising.

The Question of the amendment that the word to be deleted, be deleted and the words to be replaced, thereon be replaced, put and agreed to.

(vii) **Further amendment proposed;**

**THAT, the word “justice” be retained.**

**(Hon. Gervase B. K. Akhaabi)**

Motion made and Question proposed;

Debate arising.

Question of the amendment that the word to be retained, be retained, put and agreed to.

Thus, the sub article now reads;

**“The Supreme Court may depart from its previous decisions in the interest of justice and development of law and jurisprudence subject to such decision being made by the full bench”.**

**(viii) Sub article 188 (4) – agreed to.**

Question that Article 188 as amended stand part of the Draft Bill, put and agreed to.

Article 188 now reads as follows:-

188. (1) The Supreme Court has-

(a) original jurisdiction

(i) in respect of presidential election petitions;

(ii) in issues relating to impeachment of President;

(iii) in respect of any challenge to the constitutionality of any Act of Parliament; and

(iv) in respect of any dispute between the districts or between a district and the national government.

(2) Where a question relating to original jurisdiction of the Supreme Court arises in any other court, that court shall stay the proceedings and refer the question to the Supreme Court for determination; and the court from which the question arose shall act in accordance with the decision of the Supreme Court.

(3) “The Supreme Court may depart from its previous decisions in the interest of justice and development of law and jurisprudence subject to such decision being made by the full bench”.

(4) All other courts are bound by the decisions of the Supreme Court.

**Article 189**

**(ix) Article 189 – Amendment proposed;**

THAT, Article 189 and its sub-heading be deleted in its entirety.

(Hon. Mirugi Kariuki)

Motion made and Question proposed;

Debate arising.

Question of the amendment that the article and its sub heading to should be deleted, be deleted, put and agreed to.

Article 189 is deleted.

**RESOLVED That the provisions of deleted Article 189 be dealt with under article 193.**

Article 190 – now renumbered as 189.

**(x) Article 189 - Amendment proposed;**

THAT, the renumbered Article 189, be deleted and be replaced with a new Article which reads as follows:-

**“There shall be a Court of Appeal with such number of judges as may be prescribed in an act of Parliament”.**

(Hon. Mirugi Kariuki)

Motion made and question proposed;

Debate arising;

Question of the first amendment that the article to be deleted, be deleted, put and agreed to.

Question of the second amendment that the new article to be inserted, be inserted, put and agreed to.

The renumbered Article 189 now reads as follows:-

**“There shall be a Court of Appeal with such number of judges as may be prescribed in an act of Parliament”.**

**Article 191 – now renumbered as 190.**

**(xi) Article 190 - Amendment proposed;**

THAT, the renumbered Article 190, be deleted and be replaced with a new article which reads as follows:-

**“The Court of Appeal shall be an appellate court with jurisdiction to hear appeals from the High Court or any other Court or Tribunal as prescribed by the law”.**

(Hon. Mirugi Kariuki)

Motion made and Question proposed;

Debate arising;

Question of the first amendment that the article to be deleted, be deleted put and agreed to.

Question of the second amendment that the new article to be inserted, be inserted, put and agreed to.

The renumbered Article 190 now reads as follows:-

**“The Court of Appeal shall be an appellate court with jurisdiction to hear appeals from the High Court or any other Court or Tribunal as prescribed by the law”.**

Question that Article 190 as amended stand part of the Draft Bill, put and agreed to.

**MIN. NO.TWG/E/93/2003/2004**

**ADJOURNMENT**

The Temporary Convenor adjourned the meeting at 4.15 p.m. until 14<sup>th</sup> January 2004 at 9.30 a.m.

**SIGNED .....**  
(CONVENOR)

**DATE: .....**

**THE NATIONAL CONSTITUTIONAL CONFERENCE**

**MINUTES OF THE SIXTEENTH SITTING OF THE TECHNICAL WORKING GROUP "E" THE JUDICIARY, HELD ON WEDNESDAY 14<sup>TH</sup> JANUARY 2004 AT 9.30 A.M. IN COMMITTEE TENT NO. 5**

**MORNING SITTING**

**PRESENT**

- |                                   |   |                                |
|-----------------------------------|---|--------------------------------|
| 1. Hon. Bishop Philip Sulumeti    | - | <b>Temporary Convenor</b>      |
| 2. Hon. Paul Musili Wambua        | - | <b>Commissioner/Rapporteur</b> |
| 3. Hon. Ahmed Issack Hassan       | - | <b>Commissioner/Rapporteur</b> |
| 4. Hon. Sheikh Ali Shee Mohammed  |   |                                |
| 5. Hon. Amina Ahmed               |   |                                |
| 6. Hon. Asli Ibrahim              |   |                                |
| 7. Hon. Fadhil Sultana            |   |                                |
| 8. Hon. Fatuma Boi Bakari         |   |                                |
| 9. Hon. Hubbie Hussein Al Haji    |   |                                |
| 10. Hon. Khadija Fugicha          |   |                                |
| 11. Hon. Mirugi Kariuki           |   |                                |
| 12. Hon. Rev. Patrick M. Musungu  |   |                                |
| 13. Hon. Salim Ibrahim            |   |                                |
| 14. Hon. Victor P. Gituma         |   |                                |
| 15. Hon. Francis Waweru           |   |                                |
| 16. Hon. Fr. Joachim Gitonga      |   |                                |
| 17. Hon. Daniel Rasugu            |   |                                |
| 18. Hon. Waithanje Minjire        |   |                                |
| 19. Hon. Archbishop Zacheus Okoth |   |                                |
| 20. Hon. Abdirahaman Ali Abass    |   |                                |
| 21. Hon. Ali Mustafa Yusuf        |   |                                |
| 22. Hon. Onesmus Kihara Mwangi    |   |                                |
| 23. Hon. Zablon Nthamburi         |   |                                |
| 24. Hon. Jane J. Kiptum           |   |                                |
| 25. Hon. Isaiah Kubai             |   |                                |
| 26. Hon. Abdurhaman Badawy        |   |                                |
| 27. Hon. Rupinder Singh Sehmi     |   |                                |
| 28. Hon. Benta Auma               |   |                                |
| 29. Hon. Walubengo Lumatete       |   |                                |
| 30. Hon. Gervase B. K. Akhaabi    |   |                                |
| 31. Hon. Issack Derrow Ibrahim    |   |                                |
| 32. Hon. Victoria Mutheu M.       |   |                                |
| 33. Hon. Kathurima M'inoti        |   |                                |
| 34. Hon. Kajembe Seif Ramadhan    |   |                                |
| 35. Hon. Yusuf Mahmoud Aboubakar  |   |                                |

36. Hon. El-Busaidy Abdulghafur
37. Hon. Agnes Abuom

#### **ABSENT WITH APOLOGY**

1. Hon. (Prof.) Kivutha Kibwana - **Convenor**
2. Lilian Wanjira

#### **ABSENT**

1. Hon. Shakeel Shabbir
2. Hon. Abdalla Ngozi
3. Hon. Gichura Kibara
4. Hon. Fred Ojiambo
5. Hon. Mohammed Abdi Haji
6. Hon. Roselyne Ashepete
7. Hon. Godana Adhi Doyo
8. Hon. Dr. Nathaniel Tum
9. Hon. Mohamed Abu Chiaba
10. Hon. Amina Abdalla
11. Hon. Rev. Margaret Muchai
12. Hon. Owino Charles Oyugi
13. Hon. Kembi Gitura
14. Hon. Abdi Tari Sasura
15. Hon. Viscount Kimathi
16. Hon. R. O. Kwach

#### **IN ATTENDANCE – OBSERVERS**

1. Peter O. Maanya
2. Carren Angara
3. L. A. Agalothieno
4. Marceline Nyambala
5. Juma Mafubo

#### **IN ATTENDANCE**

- |                   |   |                                   |
|-------------------|---|-----------------------------------|
| Mr. M. R. Sialai  | - | Committee Clerk/National Assembly |
| Mr. Dan Juma      | - | Programme Assistant/CKRC          |
| Ms. Rahma Jillo   | - | Programme Assistant/CKRC          |
| Mr. Clive Grenyer | - | Draftsperson                      |

## **FACILITATORS**

1. Emma Kamunga
2. V. Mwakio
3. Lucy Waititu
4. Albert Oirere

## **MIN. NO.TWG/E/94/2003/2004**

## **ELECTION OF TEMPORARY CONVENOR**

Bishop Philip Sulumeti was unanimously elected Temporary Convenor to seat in for the Convenor who was engaged elsewhere

The Committee observed one minute silence in respect of the late Hon. Joab H. O. Omino who passed away yesterday 13<sup>th</sup> January 2004. The late Hon. Delegate was a member of the Judiciary Committee.

## **MIN. NO.TWG/E/95/2003/2004**

## **CONFIRMATION OF MINUTES OF THE PREVIOUS SITTING**

The minutes of the fifteenth Sitting of the Committee held on 13<sup>th</sup> January, 2004 were confirmed as a true record of the proceedings of the Committee's sitting and were signed by the Temporary Convenor having been proposed and seconded by Hon. Amina Ahmed and Hon. Salim Ibrahim respectively.

## **MIN. NO.TWG/E/96/2003/2004**

## **MATTERS ARISING**

The Committee deliberated upon the previous minutes as herebelow:-

- a. Under the item of attendance, it was clarified that Hon. R. O. Kwach did not attend the fifteenth sitting of the Committee as indicated in the Minutes and that Hon. Victoria Mutheu, who was inadvertently indicated as absent was present.
- b. Under **Min. No. TWG/E/93/2003/2004 (vi)**, the Committee adopted a version of the article drafted by Draftsperson which now reads as follows:-

(3) The Supreme Court shall not be bound by its previous decision if it were to be in the interests of justice and of the development of the law and Jurisprudence not to be so bound.

(3A) Notwithstanding the provisions of Article 187 (2), a decision made in accordance with clause (3) may only be made by a sitting of

the Court attended by all the judges of Supreme Court for the time being holding office.

- c. Under **Min. No. TWG/E/93/2003/2004 (xi)** the Committee adopted a version of the article drafted by Draftsperson with amendment and it now reads:-

### **The Court of Appeal**

- 189 (1) There shall be a Court of Appeal which shall –
- (a) consist of such number of judges; and
  - (b) be organized and administered,
- as may be prescribed by Act of Parliament.

### **MIN. NO. TWG/E/97/2003/2004**

### **CONSIDERATION OF DRAFT BILL** **(ARTICLE BY ARTICLE)**

Article 192 (renumbered 191)

- (i) Article 191 - amendment proposed;

THAT, the renumbered Article 191 be deleted and be replaced with a new Article which reads as follows:-

### **The High Court**

- 191 (1) There shall be a High Court which shall –**
- (a) consist of such number of judges; and**
  - (b) be organized and administered,**
- as may prescribed by Act of Parliament.**

(Hon. Yusuf Mahmond Aboubakar)

Motion made and Question proposed;

Debate arising.

Question of the first amendment that the article to be deleted be deleted, put and agreed to.

Question of the second amendment that the article to be replaced, be replaced, put and agreed to.

The renumbered Article 191 now reads and follows:-

- 191 (1) There shall be a High Court which shall –
- (a) consist of such number of judges; and
  - (b) be organized and administered,
- as may prescribed by Act of Parliament.

### **New article 192**

(ii) THAT, a new Article 192 which reads as follows be part of the draft Bill;

### **Supervisory Jurisdiction of the High Court**

**192 (1) The High Court shall have supervisory jurisdiction over the subordinate courts and over any person, body or authority which exercises a judicial or quasi-judicial function.**

**(2) For the purposes of Clause 1 the High Court may call for the record of any proceedings before any subordinate court or any person, body or authority as is mentioned in Clause (1) and may make such orders, and give such directions as it may consider appropriate to ensure the fair administration of justice.**

(Commissioner Musili Wambua)

Motion made and Question proposed;

Debate arising;

Question of the amendment that the new article 192 be part of the draft Bill, put and agreed to.

(iii) Article 193 – agreed to.

### **Article 194**

(iv) Article 194 – Amendment proposed;

**THAT, article 194 be amended by deleting the article and be replaced by a new article which reads as follows:-**

**(1) The Chief Justice, Deputy Chief Justice, Judge of Supreme Court, Judge of Court of Appeal and Judge of High Court, shall be appointed by the president on recommendation by the Judicial Service Commission and on approval by Parliament (Upper House).**

**(2) When there is a vacancy in the office stated in sub article (1) the president shall fill such vacancy on recommendation of Judicial Service Commission and approval of Parliament.**

(Hon. Mirugi Kariuki)

Motion made and Question proposed;

Debate arising;

Question of the first amendment that the article to be deleted, be deleted, put and agreed to.

The Question of the second amendment that the article to be replaced thereon, be replaced, put and agreed to.

The Question that Article 194 as amended stand part of the Draft Bill, put and agreed to.

Article 194 now reads as follows:-

194 (1) The Chief Justice, Deputy Chief Justice, Judge of Supreme Court, Judge of Court of Appeal and Judge of High Court, shall be appointed by the president on recommendation by the Judicial Service Commission and on approval by Parliament (Upper House).

(2) When there is a vacancy in the office stated in sub article (1) the president shall fill such vacancy on recommendation of Judicial Service Commission and approval of Parliament.

### **Article 195**

(v) Article 195 – Amendment proposed;

**THAT, article 195 be amended by:**

- a. deleting sub-articles (1) (a) (iii); 2 (a) (iii) and (3) (a) (iii).**

- b. **by adding the words “eminence in” between the words “and” and “legal in (1) (a) (iii); 2 (a) (iii) and 3 (a) (iii).**

Question of the amendment, put and agreed to.

Further amendment proposed;

**THAT, the article be further amended by deleting the words “ten years” in sub article 195 (3) (a) and replacing thereon with the words “seven years”.**

(Hon. Yusuf Mahmoud Aboubakar)

Motion made and Question proposed.

Debate arising

The Question of the amendment that the words to be deleted, be deleted and the words to be replaced thereon, be replaced, put and negatived.

Further amendment proposed;

**THAT, the article be further amended by adding the words “professionally qualified” between the words “as a” and “magistrate” in sub article 195 (3) (a) (i).**

(Hon. Mirugi Kariuki)

Motion made and Question proposed;

Debate arising;

The Question of the amendment that the words to be added, be added, put and agreed to.

**MIN. NO.TWG/E/98/2003/2004**

**ADJOURNMENT**

The Temporary Convenor adjourned the meeting at 1.25 p.m. until 2.30 p.m.

#### **AFTERNOON SITTING**

The Committee reconvened at 3.20 p.m. with the Temporary Convenor Hon. Bishop Philip Sulumeti on the Chair.

**MIN. NO.TWG/E/99/2003/2004**

**CONSIDERATION OF DRAFT BILL**  
**(ARTICLE BY ARTICLE)**

Sub article 195 (4) – agreed to and RESOLVED that it should be transferred to Article 186.

*Article 196.*

(vi) Article 196 – Amendment proposed;  
THAT, Article 196 be amended by:

- a. deleting the following words in subarticle 196 (1) “**and other judicial officers of the subordinate courts**”.
- b. deleting the words “**sixty five years**” in sub article 196 (1) and replacing thereon with the words “**seventy years**”.

(Hon. Garvase Akhaabi).

Motion made and Question proposed;

The Question of the amendment that the words to be deleted, be deleted and the words to be replaced, be replaced put and agreed to.

Further amendment proposed;

THAT, Article 196 be further amended by adding the following proviso:

*“Upon appointment, the Chief Justice shall serve for a maximum term of ten years”.*

The proposal was agreed upon and **RESOLVED** that the amendment be transferred to Article 187.

Article 196 now reads as follows:-

196. (1) A judge shall retire from office on attaining the age of seventy years but may retire at sixty.

(2) On attaining the retirement age, a judge of the Superior Court of record may continue in office for a period not exceeding six months in order to enable the judge to deliver a judgement, or perform any other function in relation to proceedings that were commenced before the judge prior to attaining the age of retirement.

**MIN. NO.TWG/E/100/2003/2004**

**ADJOURNMENT**

The Temporary Convenor adjourned the meeting at 4.20 p.m. until 15<sup>th</sup> January 2004 at 9.30 a.m.

**SIGNED** .....  
(CONVENOR)

**DATE:** .....

## THE NATIONAL CONSTITUTIONAL CONFERENCE

### MINUTES OF THE SEVENTEENTH SITTING OF THE TECHNICAL WORKING GROUP "E" THE JUDICIARY, HELD ON THURSDAY 15<sup>TH</sup> JANUARY 2004 AT 9.30 A.M. IN COMMITTEE TENT NO. 5

#### MORNING SITTING

##### PRESENT

- |                                   |   |                                |
|-----------------------------------|---|--------------------------------|
| 1. Hon. Bishop Philip Sulumeti    | - | <b>Temporary Convenor</b>      |
| 2. Hon. Paul Musili Wambua        | - | <b>Commissioner/Rapporteur</b> |
| 3. Hon. Ahmed Issack Hassan       | - | <b>Commissioner/Rapporteur</b> |
| 4. Hon. Sheikh Ali Shee Mohammed  |   |                                |
| 5. Hon. Amina Ahmed               |   |                                |
| 6. Hon. Asli Ibrahim              |   |                                |
| 7. Hon. Fadhil Sultana            |   |                                |
| 8. Hon. Fatuma Boi Bakari         |   |                                |
| 9. Hon. Hubbie Hussein Al Haji    |   |                                |
| 10. Hon. Khadija Fugicha          |   |                                |
| 11. Hon. Mirugi Kariuki           |   |                                |
| 12. Hon. Rev. Patrick M. Musungu  |   |                                |
| 13. Hon. Salim Ibrahim            |   |                                |
| 14. Hon. Victor P. Gituma         |   |                                |
| 15. Hon. Francis Waweru           |   |                                |
| 16. Hon. Fr. Joachim Gitonga      |   |                                |
| 17. Hon. Daniel Rasugu            |   |                                |
| 18. Hon. Waithanje Minjire        |   |                                |
| 19. Hon. Archbishop Zacheus Okoth |   |                                |
| 20. Hon. Abdirahaman Ali Abass    |   |                                |
| 21. Hon. Ali Mustafa Yusuf        |   |                                |
| 22. Hon. Onesmus Kihara Mwangi    |   |                                |
| 23. Hon. Zablon Nthamburi         |   |                                |
| 24. Hon. Abdurhaman Badawy        |   |                                |
| 25. Hon. Rupinder Singh Sehmi     |   |                                |
| 26. Hon. Benta Auma               |   |                                |
| 27. Hon. Gervase B. K. Akhaabi    |   |                                |
| 28. Hon. Victoria Mutheu M.       |   |                                |
| 29. Hon. Yusuf Mahmoud Aboubakar  |   |                                |
| 30. Hon. El-Busaidy Abdulghafur   |   |                                |
| 31. Hon. Agnes Abuom              |   |                                |
| 32. Hon. Shakeel Shabbir          |   |                                |
| 33. Hon. Abdalla Ngozi            |   |                                |
| 34. Hon. Mohammed Abdi Haji       |   |                                |

35. Hon. Dr. Nathaniel Tum
36. Hon. Amina Abdalla
37. Hon. Rev. Margaret Muchai
38. Hon. Owino Charles Oyugi
39. Hon. Kembi Gitura
40. Hon. Viscount Kimathi
41. Hon. Issack Derrow Ibrahim
42. Hon. Godana Adhi Doyo

### **ABSENT WITH APOLOGY**

3. Hon. (Prof.) Kivutha Kibwana - **Convenor**
4. Lilian Wanjira

### **ABSENT**

1. Hon. Gichura Kibara
2. Hon. Fred Ojiambo
3. Hon. Mohamed Abu Chiaba
4. Hon. Abdi Tari Sasura
5. Hon. Jane J. Kiptum
6. Hon. Isaiah Kubai
7. Hon. Walubengo Lumatete
8. Hon. Kathurima M'inoti
9. Hon. Kajembe Seif Ramadhan

### **IN ATTENDANCE – OBSERVERS**

1. Peter O. Maanya
2. Carren Angara
3. L. A. Agalothieno
4. Marceline Nyambala
5. Juma Mafubo

### **IN ATTENDANCE**

- |                   |   |                                   |
|-------------------|---|-----------------------------------|
| Mr. M. R. Sialai  | - | Committee Clerk/National Assembly |
| Mr. Dan Juma      | - | Programme Assistant/CKRC          |
| Ms. Rahma Jillo   | - | Programme Assistant/CKRC          |
| Mr. Clive Grenyer | - | Draftsperson                      |

### **FACILITATORS**

1. Emma Kamunga

2. V. Mwakio
3. Lucy Waititu
4. Albert Oirere
5. Ken Kidali

**MIN. NO. TWG/E/101/2003/2004**

**ELECTION OF TEMPORARY  
CONVENOR**

Bishop Philip Sulumeti was unanimously elected Temporary Convenor to seat in for the Convenor who was engaged elsewhere

**MIN. NO. TWG/E/102/2003/2004**

**CONFIRMATION OF MINUTES OF  
THE PREVIOUS SITTING**

The minutes of the Sixteenth Sitting of the Committee held on 14<sup>th</sup> January, 2004 were confirmed as a true record of the proceedings of the Committee's sitting subject to corrections and were signed by the Temporary Convenor having been proposed and seconded by Hon. Victor Gituma and Hon. Daniel Rusugu respectively.

**MIN. NO. TWG/E/103/2003/2004**

**MATTERS ARISING**

The Committee deliberated upon the previous minutes as herebelow:-

1. The Committee was informed that Hon. R. O. Kwach was no longer a delegate as he had been appointed by virtue of being a Judge of Court of Appeal and that he will be replaced.
2. Under **Min. No. TWG/E/97/2003/2004** (i), the following omissions were noted; the word "be" has been omitted between "may" and "be" and "an" between "by" and "Act". The necessary amendments should be made.
3. Under **Min. No. TWG/E/97/2003/2004**, the Committee adopted a version of the Article drafted by Draftsperson which reads as follows:-
  - i. The Chief Justice, the Deputy Chief Justice and the judges of the superior courts of record, and any vacancies in such posts, shall be filled by persons appointed by the President on the recommendation of the Judicial Service Commission, which recommendation shall have been approved by (parliament) (the National Council).
4. Under **Min. No. TWG/E/97/2003/2004** (iv), the Committee noted that the proposed amendment made on Article 194 was moved by Hon. Yusuf Mahmoud Aboubakar and not Hon. Mirugi Kariuki as indicated in the Minutes.

5. Under **Min. No. TWG/E/99/2003/2004 (v)**, the Committee resolved that sub article 195 (4) be deleted and transferred to form clause (2) of the amended Article 186.
6. Under **Min. No. TWG/E/99/2003/2004 (vi)**, the Committee adopted a rephrased Article 196 which reads as follows:-

196.(1) A judge shall retire from office on attaining the age of seventy years, but may retire at any time after attaining the age of sixty years.

(2) On attaining the retirement age, a judge of the superior courts of record may continue in office for a period of six months in order to enable the judge to deliver a judgment, or to perform any other function in relation to proceedings that were commenced before the judge prior to his/her attaining the age of retirement.

The Committee also adopted a draft to be added to Article 187 in the stated paragraph and which read as follows:-

(4) The Chief Justice shall serve for a period of ten years or until the Chief Justice reaches the age of seventy years, whichever shall be the earlier.

(5) If the Chief Justice has not reached the age of seventy years at the expiry of the period of ten years referred to in Clause (4) he may-

- (a) retire (provided that he has reached the age of sixty years);
- (b) continue in office as a judge of the Supreme Court, notwithstanding that there may already be the maximum permitted number of supreme court judges holding office, or
- (c) resign from the bench.

**MIN. NO. TWG/E/104/2003/2004**

**CONSIDERATION OF DRAFT BILL**  
**(ARTICLE BY ARTICLE)**

**Article 197**

**Sub article 197 (1) (a) - Amendment proposed;**

**(i) THAT, sub article 197 (1) (a) be amended by deleting the words “or from a sufficient cause”.**

(Commissioner Wambua Musili)

Motion made and Question proposed;

Debate arising;

Question put and agreed to.

**Sub article 197 (1) (b) - Amendment proposed;**

**(ii)** THAT, sub article 197 (1) (b), be amended by adding the following words immediately after the word “conduct”;

**“as promulgated under an appropriate Act of Parliament”.**

(Hon. Rupinder Singh)

Motion made and Question proposed.

Debate arising;

Question of the amendment that the words to be added, be added, put and agreed to.

**Sub article 197 (1) (c) - Amendment proposed;**

**(iii)** THAT, sub article 197 (1) (c), be amended by deleting the word “**and**” and replacing thereon with the word “**or**”.

(Commissioner Wambua Musili)

Debate arising;

Question of the amendment that the word to be deleted, be deleted and the word to be inserted, be inserted, put and agreed to.

**Sub article 197 (1) - Amendment proposed;**

**(iv)** THAT, sub article 197 (1), be amended by adding a new paragraph “d” that will read as follows:-

**“(d) bankruptcy”**

(Hon. Rev. Partrick M. Musungu)

Motion made and Question proposed;

Debate arising;

Question of the amendment that the paragraph to be added, be added, put and agreed to.

**Sub article 197 (2) - Amendment proposed;**

(v) THAT, sub article 197 (2) be amended by deleting the words “**An individual, institution, a society, or group of persons**” and replacing thereon with the words “**Any person or persons**”.

(Hon. Gervase Akhaabi)

Motion made and Question proposed;  
Debate arising;

Question of the amendment that the words to be deleted, be deleted and the words to be replaced thereon, be replaced, put and agreed to.

(vi) Sub article 197 (3) agreed to.

**MIN. NO.TWG/E/104/2003/2004**  
**MISSIONS**

**PRESS STATEMENT BY FOREIGN**

Attention of the Committee was brought to the fact that several foreign missions to Kenya had issued a joint press statement applauding the opening of Bomas III which signaled the Kenyan people and their Government's commitment to transparent constitutional reform. They encouraged all parties to build consensus and remain committed to open and productive dialogue. The statement was signed by the following high Commissions and embassies:-Australian, British, Canadian, Czech Republic, Royal Danish, European Commission, Finland, Greece, Italy, Japan, Royal Netherlands, Royal Norwegian, Poland, Portugal, Slovak, Spain, Sweden, Switzerland and United States of America.

**MIN. NO.TWG/E/105/2003/2004**

**ADJOURNMENT**

The Temporary Convenor adjourned the meeting at 1.05 p.m. until 2.15 p.m.

**AFTERNOON SITTING**

The Committee reconvened at 2.20 p.m. with the Temporary Convenor Hon. Bishop Philip Sulumeti on the Chair.

**MIN. NO.TWG/E/106/2003/2004**

**CONSIDERATION OF DRAFT BILL**  
**(ARTICLE BY ARTICLE)**

**Sub article 197 (4) – Amendment proposed;**

- (i) **THAT, sub article 197 (4) be amended by deleting the words “and examination” and “may” and replacing the word “may” with the word “shall”.**

(Hon. Garvase Akhaabi)

Motion made and Question proposed;

Debate arising;

Question of the first amendment that the words to be deleted, be deleted, put and agreed to.

**Question of the second amendment that the word to be replaced thereon, be replaced, put and agreed to.**

Sub article 197 (4) (a) - Amendment proposed;

- (ii) **THAT, Sub article 197 (4) (a) be amended by adding the following words immediately after the word “office”.**

**“pending the findings of the tribunal”**

(Hon. Salim Ibrahim)

Motion made and Question proposed;

Debate arising;

Question of the amendment that the words to be added, be added, put and agreed to.

**Sub article 197 (4) (b) (i) - Amendment proposed;**

- (iii) **THAT, sub article 197 (4) (b) (i), be amended by adding the following words immediately after the word “chairperson”;**

“to be elected from amongst the members of the tribunal appointed under 4 (b) (ii) and (iii)”.

**(Hon. Rupinder Sehmi)**

**Motion made and Question proposed;**

**Debate arising;**

**Question of the amendment, put and agreed to.**

Sub article 197 (4) (b) (iii) and (c) (iii) - Amendment proposed;

(iv) **THAT, sub article 197 (4) (b) (iii) and (c) (iii) be amended by deleting the words “at least one of whom shall be a woman”.**

**(Hon. Viscount Kimathi)**

**Motion made and Question proposed;**

**Debate arising;**

**Question of the amendment that the words to be deleted, be deleted, put and agreed to.**

Sub article 197 (4) (c) (ii) - Amendment proposed;

(v) **THAT, sub article 197 (4) (c) (ii) be amended by deleting the words “two” and “East African Community” and replacing thereon with the words “three” and “Common Law jurisdiction” respectively.**

**(Hon. Gervase Akhaabi)**

Motion made and Question proposed;

Debate arising;

Question of the amendment that the words to be deleted, be deleted and the words to be replaced thereon, be replaced, put and agreed to.

(vi) Sub article 197 (5) agreed to.

(vii) Sub article 197 (6) deleted.

Question that article 197 as amended be part of the draft Bill, put and agreed to.

**Article 198**

(viii) Article 198 agreed to.

**MIN. NO.TWG/E/107/2003/2004**

**ADJOURNMENT**

The Temporary Convenor adjourned the meeting at 4.30 p.m. until 16<sup>th</sup> January 2004 at 9.00 a.m.

**SIGNED** .....  
(CONVENOR)

**DATE:** .....

**THE NATIONAL CONSTITUTIONAL CONFERENCE**

**MINUTES OF THE EIGHTEENTH SITTING OF THE TECHNICAL WORKING GROUP "E", THE JUDICIARY, HELD ON FRIDAY 16<sup>TH</sup> JANUARY 2004 AT 9.30 A.M. IN COMMITTEE TENT NO. 5**

**MORNING SITTING**

**PRESENT**

- |     |                               |   |                                |
|-----|-------------------------------|---|--------------------------------|
| 1.  | Hon. Bishop Philip Sulumeti   | - | <b>Temporary Convenor</b>      |
| 2.  | Hon. Paul Musili Wambua       | - | <b>Commissioner/Rapporteur</b> |
| 3.  | Hon. Ahmed Issack Hassan      | - | <b>Commissioner/Rapporteur</b> |
| 4.  | Hon. Sheikh Ali Shee Mohammed |   |                                |
| 5.  | Hon. Amina Ahmed              |   |                                |
| 6.  | Hon. Asli Ibrahim             |   |                                |
| 7.  | Hon. Fadhil Sultana           |   |                                |
| 8.  | Hon. Fatuma Boi Bakari        |   |                                |
| 9.  | Hon. Hubbie Hussein Al Haji   |   |                                |
| 10. | Hon. Khadija Fugicha          |   |                                |
| 11. | Hon. Mirugi Kariuki           |   |                                |
| 12. | Hon. Rev. Patrick M. Musungu  |   |                                |
| 13. | Hon. Salim Ibrahim            |   |                                |
| 14. | Hon. Victor P. Gituma         |   |                                |
| 15. | Hon. Francis Waweru           |   |                                |
| 16. | Hon. Fr. Joachim Gitonga      |   |                                |
| 17. | Hon. Daniel Rasugu            |   |                                |
| 18. | Hon. Waithanje Minjire        |   |                                |
| 19. | Hon. Archbishop Zacheus Okoth |   |                                |
| 20. | Hon. Abdirahaman Ali Abass    |   |                                |
| 21. | Hon. Ali Mustafa Yusuf        |   |                                |
| 22. | Hon. Onesmus Kihara Mwangi    |   |                                |
| 23. | Hon. Abdurhaman Badawy        |   |                                |
| 24. | Hon. Rupinder Singh Sehmi     |   |                                |
| 25. | Hon. Gervase B. K. Akhaabi    |   |                                |
| 26. | Hon. Victoria Mutheu M.       |   |                                |
| 27. | Hon. Yusuf Mahmoud Aboubakar  |   |                                |
| 28. | Hon. El-Busaidy Abdulghafur   |   |                                |
| 29. | Hon. Agnes Abuom              |   |                                |

30. Hon. Mohammed Abdi Haji
31. Hon. Dr. Nathaniel Tum
32. Hon. Amina Abdalla
33. Hon. Rev. Margaret Muchai
34. Hon. Owino Charles Oyugi
35. Hon. Issack Derrow Ibrahim
36. Hon. Godana Adhi Doyo
37. Hon. Jane J. Kiptum
38. Hon. Kathurima M'inoti
39. Hon. Ali Mustafa Yusuf
40. Hon. Viscount Kimathi

#### **ABSENT WITH APOLOGY**

1. Hon. Lilian Wanjira
2. Hon. Isaiah Kubai

#### **ABSENT**

- |                                 |   |                 |
|---------------------------------|---|-----------------|
| 1. Hon. (Prof.) Kivutha Kibwana | - | <b>Convenor</b> |
| 2. Hon. Gichira Kibara          |   |                 |
| 3. Hon. Fred Ojiambo            |   |                 |
| 4. Hon. Mohamed Abu Chiaba      |   |                 |
| 5. Hon. Abdi Tari Sasura        |   |                 |
| 6. Hon. Kajembe Seif Ramadhan   |   |                 |
| 7. Hon. Abdalla Ngozi           |   |                 |
| 8. Hon. Benta Auma              |   |                 |
| 9. Hon. Kembu Gitura            |   |                 |
| 10. Hon. Shakeel Shabbir        |   |                 |
| 11. Hon. Zablun Nthamburi       |   |                 |
| 12. Hon. Walubengo Lumatete     |   |                 |

#### **IN ATTENDANCE – OBSERVERS**

1. Peter O. Maanya
2. Carren Angara
3. L. A. Agalothieno
4. Marceline Nyambala
5. Juma Mafubo
6. Omar Mohammed

#### **IN ATTENDANCE**

- |                  |   |                                   |
|------------------|---|-----------------------------------|
| Mr. M. R. Sialai | - | Committee Clerk/National Assembly |
| Mr. Dan Juma     | - | Programme Assistant/CKRC          |

Ms. Rahma Jillo - Programme Assistant/CKRC  
Mr. Clive Grenyer - Draftsperson

### **FACILITATORS**

1. Emma Kamunga
2. V. Mwakio
3. Lucy Waititu
4. Albert Oirere
5. Ken Kidali

### **MIN. NO.TWG/E/108/2003/2004**

### **ELECTION OF TEMPORARY CONVENOR**

Bishop Philip Sulumeti was unanimously elected Temporary Convenor.

### **MIN. NO.TWG/E/109/2003/2004**

### **CONFIRMATION OF MINUTES OF THE PREVIOUS SITTING**

The minutes of the Seventeenth Sitting of the Committee held on 15<sup>th</sup> January, 2004 were confirmed as a true record of the proceedings of the Committee's sitting subject to corrections and were signed by the Temporary Convenor having been proposed and seconded by Hon. Dr. Nathaniel Tum and Hon. Victor Gituma respectively.

### **MIN. NO.TWG/E/110/2003/2004**

### **MATTERS ARISING**

The Committee deliberated upon the previous minutes as hereunder:-

1. The Committee noted that Hon. Jane J. Kiptum had excused herself from the meeting and should have been recorded as absent with apology.

The Committee further noted that Hon. (Prof.) Kivutha Kibwana had absented himself without an apology and expressed grave concern that the Convenor had continuously missed the sittings without reasonable cause.

The Committee was informed that consultations were ongoing on the fate of members who had persistently missed committees' sittings.

The Committee resolved to substantively discuss the absence of its Convenor in the next sitting.

2. Under **Min. No. TWG/E/104/2003/2004**, the Committee adopted a rephrased Article 197 which reads as follows:-

#### **Removal from office**

3. (1) A judge of the superior courts of record may be removed from office in accordance with this Article and on the grounds of –

- i. inability to perform the functions of office arising from infirmity of body or mind;
- ii. a breach of a code of conduct which shall be prescribed for judges of the superior courts of record by an appropriate Act of Parliament;

{(b)} a breach of the duties prescribed under Article 277 set out in the fifth Schedule;}

- iii. bankruptcy;
- iv. incompetence; or
- v. misconduct or misbehaviour whether in the performance of his duties or otherwise.

(2) A person desiring the removal of a judge of a superior court of record may present a petition to the Judicial Service Commission which shall set out the alleged facts constituting the grounds for the judge's removal.

(3) The Judicial Service Commission shall consider the petition and, if it is satisfied that it discloses the existence of a ground under clause (1), it shall send the petition to the President of the Republic.

(4) On receipt of the petition, the President shall within 14 days suspend the judge from office pending action by the President in accordance with clause (5) and shall, acting in accordance with the advice of the Judicial Service Commission -

(a) in the case of a judge who is not the Chief Justice, appoint a tribunal consisting of -

- (i) four members from among persons who hold or have held office as a judge or a superior court of record, or who are qualified to be appointed as such, but in either case who shall not have been

members of the Judicial Service Commission; and

(iii) three other persons with experience in public affairs; or

(b) in the case of the Chief Justice, appoint a tribunal consisting of -

(i) the Speaker of the National Council as chairperson;

(ii) three judges from states which have a common law jurisdiction; and

(iii) three other persons with experience in public affairs.

(5) The tribunal shall inquire into the matter and report on the facts and make recommendations to the President of the republic, who shall act in accordance with the recommendations of the tribunal.

(6) A judge who is suspended from office under clause (4) shall retain his or her emoluments and benefits of office until such time as he or she may be removed from office, if such be the recommendation of the tribunal.

(7) A tribunal appointed under clause (4) (a) shall elect a chairperson from among their members and tribunals appointed in (4) (a) and (b) above shall in all other respect be responsible for the regulation of their affairs.

**MIN. NO.TWG/E/111/2003/2004**

**CONSIDERATION OF DRAFT BILL**  
**(ARTICLE BY ARTICLE)**

**Article 199, 200, 201 and 202 - Amendment proposed;**

(i) THAT, articles 199, 201 and 202 be deleted and be replaced with the following new articles:-

**Article 199 -There shall be Kadhi's court which shall –**

**a. consist of such numbers of Kadhis who profess Islam/are Muslim; and**

- b. be organized and administered as may be prescribed by an Act of Parliament.**

**Article 200 -The Kadhis Court has jurisdiction in -**

- (a) The determination of Muslim law relating to personal status, marriage, divorce, inheritance/succession including matters arising after divorce, inheritance and succession in proceedings in which all the parties profess Islam or were married under Islamic law.
- (b) In all appeals originating from the Kadhis Court the Chief Kadhis shall sit with the presiding judges and advice on Islamic law.

(Hon. Ali Mustafa Yusuf)

Motion made and Question proposed;

Debate arising;

**Further amendment proposed;**

- (ii) THAT, the proposed amendments be deleted and be replaced with following new provisions:

**Article 199**

**There is hereby established a Kadhis Court consisting of the Chief Kadhi and such other Kadhis who profess Islam/or are Muslims as may be prescribed by an Act of Parliament.**

**Article 200**

**The Kadhis court shall be a court subordinate of the High Court with jurisdiction to determine question of Islamic law relating to personal status, marriage, divorce, inheritance and succession in proceedings in which the parties profess the Islamic faith and submit to the Jurisdiction of the court.**

(Hon. Gervase Akhaabi)

Motion made and Question proposed;

Debate arising;

Question of the amendment, put and agreed to.

A delegate Hon. Hubbie Hussein (No. 251) objected to the inclusion of the following words in the New Article 200; **“and submit to the jurisdiction of the court”**.

By indulgence of the Committee she requested for recording of a minority report.

Question that the new articles 199 and 200 stand part of the Draft Bill, put and agreed to.

**Article 203**

**Article 203 - Amendment proposed;**

**(iii)** THAT, Article 203 be deleted

(Hon. Mirugi Kariuki)

Motion made and Question proposed;

Debate arising.

Question that article 203 be deleted, be deleted, put and agreed to.

**MIN. NO.TWG/E/112/2003/2004**

**ADJOURNMENT**

The Temporary Convenor adjourned the meeting at 12.00 noon after a word of prayer until Monday 19<sup>th</sup> January 2003.

**SIGNED** .....  
(CONVENOR)

**DATE:** .....



**THE NATIONAL CONSTITUTIONAL CONFERENCE**

**MINUTES OF THE NINETEENTH SITTING OF THE TECHNICAL WORKING GROUP "E", THE JUDICIARY, HELD ON MONDAY 19<sup>TH</sup> JANUARY 2004 AT 9.30 A.M. IN COMMITTEE TENT NO. 5**

**MORNING SITTING**

**PRESENT**

- |     |                               |   |                                |
|-----|-------------------------------|---|--------------------------------|
| 1.  | Hon. Bishop Philip Sulumeti   | - | <b>Acting Convenor</b>         |
| 2.  | Hon. Paul Musili Wambua       | - | <b>Commissioner/Rapporteur</b> |
| 3.  | Hon. Ahmed Issack Hassan      | - | <b>Commissioner/Rapporteur</b> |
| 4.  | Hon. Sheikh Ali Shee Mohammed |   |                                |
| 5.  | Hon. Amina Ahmed              |   |                                |
| 6.  | Hon. Asli Ibrahim             |   |                                |
| 7.  | Hon. Fadhil Sultana           |   |                                |
| 8.  | Hon. Fatuma Boi Bakari        |   |                                |
| 9.  | Hon. Hubbie Hussein Al Haji   |   |                                |
| 10. | Hon. Khadija Fugicha          |   |                                |
| 11. | Hon. Mirugi Kariuki           |   |                                |
| 12. | Hon. Rev. Patrick M. Musungu  |   |                                |
| 13. | Hon. Salim Ibrahim            |   |                                |
| 14. | Hon. Victor P. Gituma         |   |                                |
| 15. | Hon. Francis Waweru           |   |                                |
| 16. | Hon. Fr. Joachim Gitonga      |   |                                |
| 17. | Hon. Daniel Rasugu            |   |                                |
| 18. | Hon. Waithanje Minjire        |   |                                |
| 19. | Hon. Archbishop Zacheus Okoth |   |                                |
| 20. | Hon. Abdirahaman Ali Abass    |   |                                |
| 21. | Hon. Ali Mustafa Yusuf        |   |                                |
| 22. | Hon. Abdurhaman Badawy        |   |                                |
| 23. | Hon. Rupinder Singh Sehmi     |   |                                |
| 24. | Hon. Gervase B. K. Akhaabi    |   |                                |
| 25. | Hon. Yusuf Mahmoud Aboubakar  |   |                                |
| 26. | Hon. Agnes Abuom              |   |                                |
| 27. | Hon. Dr. Nathaniel Tum        |   |                                |
| 28. | Hon. Amina Abdalla            |   |                                |
| 29. | Hon. Rev. Margaret Muchai     |   |                                |
| 30. | Hon. Issack Derrow Ibrahim    |   |                                |
| 31. | Hon. Godana Adhi Doyo         |   |                                |
| 32. | Hon. Jane J. Kiptum           |   |                                |

33. Hon. Ali Mustafa Yusuf
34. Hon. Viscount Kimathi
35. Hon. Benta Auma
36. Hon. Lilian Wanjira
37. Hon. Mohamed Abu Chiaba
38. Hon. Zablon Nthamburi
39. Hon. Victoria Mutheu M.
40. Hon. Shakeel Shabbir

#### **ABSENT WITH APOLOGY**

1. Hon. Isaiah Kubai
2. Hon. El-Busaidy Abdulghafur

#### **ABSENT**

1. Hon. (Prof.) Kivutha Kibwana
2. Hon. Gichira Kibara
3. Hon. Fred Ojiambo
4. Hon. Abdi Tari Sasura
5. Hon. Kajembe Seif Ramadhan
6. Hon. Abdalla Ngozi
7. Hon. Kembi Gitura
8. Hon. Walubengo Lumatete
9. Hon. Onesmus Kihara Mwangi
10. Hon. Owino Charles Oyugi
11. Hon. Kathurima M'noti
12. Hon. Mohammed Nyaoga
13. Hon. Mohammed Abdi Haji

#### **IN ATTENDANCE – OBSERVERS**

1. Peter O. Maanya
2. Carren Angara
3. L. A. Agalothieno
4. Marceline Nyambala
5. Juma Mafubo
6. Omar Mohammed

#### **IN ATTENDANCE**

Mr. M. R. Sialai	-	Committee Clerk/National Assembly
Mr. Dan Juma	-	Programme Assistant/CKRC
Ms. Rahma Jillo	-	Programme Assistant/CKRC
Mr. Clive Grenyer	-	Draftsperson

## **FACILITATORS**

1. Emma Kamunga
2. V. Mwakio
3. Lucy Waititu
4. Albert Oirere
5. Ken Kidali

## **MIN. NO.TWG/E/113/2003/2004**

## **ELECTION OF TEMPORARY CONVENOR**

Bishop Philip Sulumeti was unanimously elected Temporary Convenor.

## **MIN. NO.TWG/E/114/2003/2004**

## **CONFIRMATION OF MINUTES OF THE PREVIOUS SITTING**

The minutes of the Eighteenth Sitting of the Committee held on Friday 16<sup>th</sup> January, 2004 were confirmed as a true record of the proceedings of the Committee's sitting and were signed by the Temporary Convenor having been proposed and seconded by Hon. Yusuf Aboubakar Mahmoud and Hon. Rev. Margaret Muchai respectively.

## **MIN. NO.TWG/E/115/2003/2004**

## **MOTION ON REMOVAL OF CONVENOR**

### **MOTION - (Hon. Salim Ibrahim)**

THAT, in view of the continued absence of the Convenor without apology, this Committee resolves to replace the Convenor and declares that a vacancy has arisen in respect of that position.

(Hon. Salim Ibrahim)

Motion made and Question proposed;

Moved;

Seconded by Hon. Abdirahaman Ali Abass

Debate arising;

During the Debate, the Committee observed that the Convenor has persistently missed the sittings of the Committee and has not shown any interest in the Committee work.

The Question of the motion, put and agreed to.

**MIN. NO.TWG/E/116/2003/2004**  
**CONVENOR**

**ELECTION OF AN ACTING**

Commissioner Musili Wambua informed the Committee that following the removal of the Convenor, there was need for the election of an Acting Convenor. He proceeded to call for proposals upon which Hon. Bishop Philip Sulumeti was proposed and seconded by Hon. Rupinder Singh Sehmi and Hon. Daniel Rusugu respectively.

There being no other delegate proposed; Hon. Bishop Philip Sulumeti was unanimously elected the Acting Convenor.

The Committee also recommended to the Steering Committee that notwithstanding the earlier arrangement that the Technical Working Group “E” should elect a delegate from Eastern Province as its Convenor, Hon. Bishop Philip Sulumeti, be confirmed as the Convenor of the Committee.

The Acting Convenor thanked the delegates for electing him and promised to be fair, transparent and accountable.

**MIN. NO.TWG/E/117/2003/2004**

**CONSIDERATION OF DRAFT BILL**  
**(ARTICLE BY ARTICLE)**

**(a) Article 204**

The Committee deliberated on Article 204, and resolved as follows:-

- (i) That Judicial Service Commission should consist of following eleven members:-

three members from religious organizations, Attorney General, three judges, Chief Registrar, a chairperson of the public service or a nominee of the chairperson and two advocates.

- (ii) that the Commission elects one of their own to be a chairperson and regulate its own affairs.

- (iii) that sub articles 204 (1) (a) (g), (h), (j), (k) and (m) be deleted.

- (iv) that the subheading be amended to read as follows:- “**Composition of the  
Judicial Service Commission**”.

- (v) that sub article 204 (b) agreed to.

- (vi) that the Draftsperson comes up with a rephrased Article 204 taking into account the above amendments.

**(b) Article 205**

The Committee deliberated on Article 205 and resolved as follows:-

- (i) that sub article 205 (1) be amended by adding a new paragraph  
(a) which reads as follows:-

**“to ensure and enhance the independence and judicial accountability of the Judiciary and the efficient, transparent and effective administration of justice”.**

- (ii) that paragraphs 205 (1) “(a) – (h) be renumbered (b) – (g).

- (iii) that sub articles 205 (1) (c), (d), (g), and (h) be agreed to.

- (iv) that the renumbered paragraph (e) be amended by adding the following words between the words “judges” and “in”:-**

“and recommend to the president persons to be appointed members of tribunals as in Article 197 (4)”.

- (v) that the renumbered paragraph “(f)” be amended by adding the following words immediately before the word “education”:-**

“continuing legal”.

- (vi) that sub article 205 (3) be amended by deleting the word “**may**” and replace it with the word “**shall**”.

- (vii) that the Draftsperson comes up with a rephrased article for committee consideration and subsequent adoption.

**(c) Article 206**

**Article 206 – Amendment proposed;**

**THAT, Article 206 be deleted save for sub article 205 (4) which should be transferred to the Chapter on Interpretation.**

(Hon. Mirugi Kariuki)

Motion made and Question proposed;

Debate arising;

Question of the amendment put and agreed to.

Sub articles 206 (1), (2) and (3) are deleted and sub article 206 (4) transferred to interpretation Chapter.

**(d) Appearance of the Attorney General before the Committee**

**The Committee was informed that the Attorney General had requested to appear before it, when the Committee will be considering Chapter Nine, Part II – Legal system.**

In view of the fact that the Committee would be considering the section in the afternoon sitting, it was resolved that the Attorney General should appear in the afternoon sitting to make his presentation and proposals.

**MIN. NO.TWG/E/118/2003/2004**

**ADJOURNMENT**

The Convenor adjourned the meeting at 12.30 p.m. until 2.30 p.m.

**AFTERNOON SITTING**

The Committee reconvened at 2.30 p.m. with the Acting Convenor Hon. Bishop Philip Sulumeti on the Chair.

**MIN. NO.TWG/E/118/2003/2004**

**PRESENTATION BY THE ATTORNEY GENERAL**

The Attorney General made a presentation on the proposed provisions of Legal system.

He asked the Committee to make a Constitution that will serve for posterity. He emphasized that the office of the Attorney General should be a public office and be independent of political influence. He proposed that the Attorney General should serve for a specific term as proposed for other Constitutional offices.

**MIN. NO.TWG/E/119/2003/2004**

**ADJOURNMENT**

The Convenor adjourned the meeting at 4.05 p.m. after a word of prayer until Tuesday 20<sup>th</sup> January 2003 at 9.30 a.m.

**SIGNED .....**  
**(ACTING CONVENOR)**

**DATE: .....**

**THE NATIONAL CONSTITUTIONAL CONFERENCE**

**MINUTES OF THE TWENTIETH SITTING OF THE TECHNICAL WORKING GROUP "E", THE JUDICIARY, HELD ON TUESDAY 20<sup>TH</sup> JANUARY 2004 AT 9.30 A.M. IN COMMITTEE TENT NO. 5**

**MORNING SITTING**

**PRESENT**

- |     |                               |   |                                |
|-----|-------------------------------|---|--------------------------------|
| 1.  | Hon. Bishop Philip Sulumeti   | - | <b>Acting Convenor</b>         |
| 2.  | Hon. Paul Musili Wambua       | - | <b>Commissioner/Rapporteur</b> |
| 3.  | Hon. Ahmed Issack Hassan      | - | <b>Commissioner/Rapporteur</b> |
| 4.  | Hon. Sheikh Ali Shee Mohammed |   |                                |
| 5.  | Hon. Amina Ahmed              |   |                                |
| 6.  | Hon. Asli Ibrahim             |   |                                |
| 7.  | Hon. Fadhil Sultana           |   |                                |
| 8.  | Hon. Fatuma Boi Bakari        |   |                                |
| 9.  | Hon. Hubbie Hussein Al Haji   |   |                                |
| 10. | Hon. Khadija Fugicha          |   |                                |
| 11. | Hon. Mirugi Kariuki           |   |                                |
| 12. | Hon. Rev. Patrick M. Musungu  |   |                                |
| 13. | Hon. Salim Ibrahim            |   |                                |
| 14. | Hon. Victor P. Gituma         |   |                                |
| 15. | Hon. Francis Waweru           |   |                                |
| 16. | Hon. Fr. Joachim Gitonga      |   |                                |
| 17. | Hon. Daniel Rasugu            |   |                                |
| 18. | Hon. Waithanje Minjire        |   |                                |
| 19. | Hon. Archbishop Zacheus Okoth |   |                                |
| 20. | Hon. Abdirahaman Ali Abass    |   |                                |
| 21. | Hon. Ali Mustafa Yusuf        |   |                                |
| 22. | Hon. Abdurhaman Badawy        |   |                                |
| 23. | Hon. Rupinder Singh Sehmi     |   |                                |
| 24. | Hon. Gervase B. K. Akhaabi    |   |                                |
| 25. | Hon. Yusuf Mahmoud Aboubakar  |   |                                |
| 26. | Hon. Amina Abdalla            |   |                                |
| 27. | Hon. Issack Derrow Ibrahim    |   |                                |
| 28. | Hon. Godana Adhi Doyo         |   |                                |
| 29. | Hon. Jane J. Kiptum           |   |                                |
| 30. | Hon. Ali Mustafa Yusuf        |   |                                |
| 31. | Hon. Benta Auma               |   |                                |
| 32. | Hon. Lilian Wanjira           |   |                                |
| 33. | Hon. Zablon Nthamburi         |   |                                |

34. Hon. Victoria Mutheu M.
35. Hon. Shakeel Shabbir
36. Hon. Walubengo Lumatete
37. Hon. Onesmus Kihara Mwangi
38. Hon. Kathurima M'inoti
39. Hon. Viscount Kimathi

#### **ABSENT WITH APOLOGY**

1. Hon. Isaiah Kubai
2. Hon. El-Busaidy Abdulghafur

#### **ABSENT**

1. Hon. (Prof.) Kivutha Kibwana
2. Hon. Gichira Kibara
3. Hon. Fred Ojiambo
4. Hon. Abdi Tari Sasura
5. Hon. Kajembe Seif Ramadhan
6. Hon. Abdalla Ngozi
7. Hon. Kembi Gitura
8. Hon. Owino Charles Oyugi
9. Hon. Mohammed Nyaoga
10. Hon. Mohammed Abdi Haji
11. Hon. Agnes Abuom
12. Hon. Dr. Nathaniel Tum
13. Hon. Rev. Margaret Muchai
14. Hon. Mohamed Abu Chiaba

#### **IN ATTENDANCE – OBSERVERS**

1. Peter O. Maanya
2. Carren Angara
3. L. A. Agalothieno
4. Marcelline Nyambala
5. Juma Mafubo
6. Cornelius Lupano

#### **IN ATTENDANCE**

Mr. M. R. Sialai	-	Committee Clerk/National Assembly
Mr. Dan Juma	-	Programme Assistant/CKRC
Ms. Rahma Jillo	-	Programme Assistant/CKRC
Mr. Clive Grenyer	-	Draftsperson

## **FACILITATORS**

1. Emma Kamunga
2. V. Mwakio
3. Lucy Waititu
4. Albert Oirere
5. Ken Kidali

## **MIN. NO. TWG/E/120/2003/2004**

## **CONFIRMATION OF MINUTES OF THE PREVIOUS SITTING**

The minutes of the Nineteenth Sitting of the Committee held on Monday 20<sup>th</sup> January, 2004 were confirmed as a true record of the proceedings of the Committee's sitting and were signed by the Acting Convenor having been proposed and seconded by Hon. Rupinder Singh Sehmi and Hon. Patrick M. Musungu respectively.

## **MIN. NO. TWG/E/121/2003/2004**

## **MATTERS ARISING**

The Committee deliberated upon the previous minutes as hereunder:-

1. (a) Under **Min. NO. TWG/E/117/2003/2004 (a)**, the Committee noted that three members of the Commission referred to in 204 (i) were to be appointed from specific religious organizations.
- (b) Under **Min. NO. TWG/E/117/2003/2004 (a)**, the Committee adopted the rephrased article 204 with amendments and it now reads as follows:-

### Composition of the Judicial Service Commission

- 204 (1) There shall be established the Judicial Service Commission consisting of –
- (a) three persons, each of whom shall be nominated by each of the religious organizations representative of the Christian, Muslim and Hindu faiths;
  - (b) the Attorney-General, for the time being;
  - (c) one Supreme Court Judge elected by the judges of the Supreme Court;
  - (d) one Court of Appeal judge elected by the judges of the Court of Appeal;
  - (e) one High Court judge elected by the judges of the High Court;

- (f) the Chief Registrar of the Judiciary, for the time being;
  - (g) two advocates of at least fifteen years' standing each nominated by the Law Society of Kenya; and
  - (h) one person nominated by the Public Service Commission.
- a. Members of the Commission shall hold office for a term of five years and shall be eligible for re-appointment for a further and final term of five years.
  - b. The Commission shall elect a chairperson from among its members and shall otherwise regulate its own procedure.
2. Under **MIN. NO. TWG/E/117/2003/2004 (b)**, the Committee adopted the rephrased article 205 as drafted by Draftsperson and which reads as follows:-

**Functions of the Judicial Service Commission**

- 204 (1) The functions of the Judicial Service Commission shall be –
- i. to ensure and enhance the independence and judicial accountability of the judiciary and the efficient, effective and transparent administration of justice;
  - ii. to recommend to the President of the Republic persons for appointment as judges;
  - iii. to review and make recommendations on the conditions of service of judges, magistrates and other judicial officers, other than their salaries and remuneration;
  - iv. to advise the President of the Republic on the membership of the Tribunals referred to in Article 197 (4);
  - v. to appoint, discipline and remove registrars, magistrates and other judicial officers, including paralegal staff, in such manner as may be specified by an Act of Parliament;
  - vi. to review and investigate complaints against judges in accordance with the Constitution;
  - vii. to prepare and implement programmes for the continuing education and training of judges, magistrates and paralegal staff;

- viii. to advise the Government on improving the efficiency of the administration of justice, and on access to justice, including legal aid; and
- ix. any other function prescribed by the Constitution or by an Act of Parliament.

(2) In performing its functions the Commission shall be subject only to the Constitution and the Law.

3. Under **MIN. NO. TWG/E/118/2003/2004**, the Committee noted that it adopted the proposal put forward by the Attorney General as indicated in the annotated version with amendments. The Committee further noted that delegate Hon. Fr. Joachim Gitonga had moved a motion in relation to Articles 208, 209 and 210 which read as follows:-

Noting that the office of the Attorney General is not independent from the three arms of the government, our country has suffered from irreputable, bad and illegal atrocities which ought to have been stopped by the arms of the government but the office of Attorney General seemingly did not defend the rights of the people, neither did it direct the government on what to do or not to do, as it is the Attorney General perhaps whose arms were tied by the three arms of the government.

Such illegal atrocities were.

- (i) Political murders
- (ii) Political clashes in the Rift Valley and the Coast Provinces
- (iii) Wagalla Massacre in N.E.P.
- (iv) Political tortures in Nyayo House
- (v) Goldenberg corruption and others
- (vi) About 9,000 prisoners imprisoned without legal reasons
- (vii) Maintaining of corrupt judges and lawyers in legal system.
- (viii) Even here were are in Bomas, outside have claimed constitution is being made by people who are not experts together with all possible insults yet the Attorney General office cannot protect the Bomas which is full of all kinds of experts.

With all these in mind, I therefore move that this Committee amalgamates the office of the Attorney General, Director of Public Prosecutions and Public Defence as one office and make it independent of the three arms of the Government.

(a) Motion moved by Hon. Fr. Joachim Gitonga was withdrawn and replaced with a motion to ensure the independence of the Attorney General office which was agreed to.

**Article 208 (as in annotated version)**

(b) Article 208 - Amendment proposed;

THAT, subarticle 208 (1) be amended by adding the following words after the words “Attorney General”.

**“which shall be an office in public service”.**

(Hon. Rupinder Singh Sehmi)

Motion made and Question proposed;

Debate arising;

Question of the amendment put and agreed to.

**Article 208(2) - Amendment proposed**

(b) THAT, sub article 208 (2) be amended by deleting the following words after the word president **“on recommendation of the Public Commission and with approval of the National Council”** and replaced with the words **“with approval by Parliament”**, immediately after the word **“President”**.

(Hon. Gervase Akhaabi)

Motion made and Question proposed;

Debate arising;

Question of the amendment put and Negatived.

Ayes - 13

Nays - 18

Minority view recorded - (Hon. Gervase Akhaabi).

The Acting Convenor adjourned the meeting at 1.00 p.m. until 2.30 p.m.

**AFTERNOON SITTING**

The Committee reconvened at 2.35 p.m. with the Acting Convenor Hon. Bishop Philip Sulumeti on the Chair.

(c) **Article 208 (3)**

Agreed to as in the annotated Draft – it now reads as follows:-

**(3) The qualifications for appointment as Attorney General are the same as for appointment to the office of Chief Justice.**

**Article 208 (4)**

(d) THAT, article 208 (4) be amended by adding the following words “**subject to the provisions of this constitution**” before the article

(Hon. Garvase Akhaabi)

Motion made and Question proposed;

Debate arising;

Question of the amendment put and agreed to.

(e) Article 208 (4) a, b, c agreed to and adopted as in the annotated draft – it now reads as follows:-

**208 (4) the Attorney General is**

- (a) **principal legal adviser to the Government and its institutions and shall be responsible for:-**
- (b) **drawing and perusing agreements, contracts, treaties, conventions and documents by whatever name called, to which the Government is a party or in respect of which the Government has an interest;**
- (c) **representing the Government in courts or any other legal**

**proceedings to which the Government is party;**

**(d) drafting legislation including subsidiary legislation.**

(f) Article 208 (5) - Adopted as it appeared in the annotated Draft

Article 208 (5) now reads:-

**“(5) The Attorney General shall have authority to appear as a friend of the court, in any criminal prosecution commenced before any court or tribunal”.**

(g) Article 208 (6)

THAT, Article 208 (6) be amended to include:-

**“Subject to the provisions of this constitution the Attorney General in the performance of duties shall not be under the direction or authority of any person”.**

(Hon. Garvese Akhaabi)

Motion made and Question proposed;

Debate arising;

The Question of the motion, put and agreed to.

(h) The Committee resolved that the Draftsperson comes up with a rephrased sub article to provide term of office of the Attorney General be for five years renewable once.

(i) THAT, article 208 be transferred to the Chapter on Executive or on a Chapter of its own.

(Hon. Mirugi Kariuki)

Motion made and Question proposed;

Debate arising;

The Question of the motion, put and Negatived.

During the Debate on the manner of removal of the Attorney General, some delegates argued that there was need to revisit the manner of appointing the holder of the office bearing in mind his seniority.

**MIN. NO.TWG/E/125/2003/2004**

**QUORUM**

Pursuant to regulation 16, Hon. Daniel Rusugu objected that there was no quorum and the Convenor having counted the members present confirmed that there was no quorum.

The Committee resolved that the nineteen members present be recorded by the Secretariat.

**MIN. NO.TWG/E/126/2003/2004**

**ADJOURNMENT**

There being no quorum the Convenor adjourned the meeting at 4.00 p.m. until Wednesday 21<sup>st</sup> January 2004.

**SIGNED** .....  
(ACTING CONVENOR)

**DATE:** .....



**THE NATIONAL CONSTITUTIONAL CONFERENCE**

**MINUTES OF THE TWENTY FIRST SITTING OF THE TECHNICAL  
WORKING GROUP "E", THE JUDICIARY, HELD ON WEDNESDAY 21<sup>ST</sup>  
JANUARY 2004 AT 9.30 A.M. IN COMMITTEE TENT NO. 5**

**MORNING SITTING**

**PRESENT**

- |     |                               |   |                                |
|-----|-------------------------------|---|--------------------------------|
| 1.  | Hon. Bishop Philip Sulumeti   | - | <b>Convenor</b>                |
| 2.  | Hon. Paul Musili Wambua       | - | <b>Commissioner/Rapporteur</b> |
| 3.  | Hon. Ahmed Issack Hassan      | - | <b>Commissioner/Rapporteur</b> |
| 4.  | Hon. Sheikh Ali Shee Mohammed |   |                                |
| 5.  | Hon. Amina Ahmed              |   |                                |
| 6.  | Hon. Asli Ibrahim             |   |                                |
| 7.  | Hon. Fadhil Sultana           |   |                                |
| 8.  | Hon. Fatuma Boi Bakari        |   |                                |
| 9.  | Hon. Hubbie Hussein Al Haji   |   |                                |
| 10. | Hon. Khadija Fugicha          |   |                                |
| 11. | Hon. Mirugi Kariuki           |   |                                |
| 12. | Hon. Rev. Patrick M. Musungu  |   |                                |
| 13. | Hon. Salim Ibrahim            |   |                                |
| 14. | Hon. Victor P. Gituma         |   |                                |
| 15. | Hon. Fr. Joachim Gitonga      |   |                                |
| 16. | Hon. Waithanje Minjire        |   |                                |
| 17. | Hon. Archbishop Zacheus Okoth |   |                                |
| 18. | Hon. Abdirahaman Ali Abass    |   |                                |
| 19. | Hon. Abdurhaman Badawy        |   |                                |
| 20. | Hon. Rupinder Singh Sehmi     |   |                                |
| 21. | Hon. Gervase B. K. Akhaabi    |   |                                |
| 22. | Hon. Yusuf Mahmoud Aboubakar  |   |                                |
| 23. | Hon. Amina Abdalla            |   |                                |
| 24. | Hon. Issack Derrow Ibrahim    |   |                                |
| 25. | Hon. Godana Adhi Doyo         |   |                                |
| 26. | Hon. Jane J. Kiptum           |   |                                |
| 27. | Hon. Benta Auma               |   |                                |
| 28. | Hon. Lilian Wanjira           |   |                                |
| 29. | Hon. Zablun Nthamburi         |   |                                |
| 30. | Hon. Victoria Mutheu M.       |   |                                |
| 31. | Hon. Shakeel Shabbir          |   |                                |
| 32. | Hon. Kathurima M'inoti        |   |                                |
| 33. | Hon. Viscount Kimathi         |   |                                |
| 34. | Hon. El-Busaidy Abdulghafur   |   |                                |

35. Hon. Owino Charles Oyugi
36. Hon. Dr. Nathaniel Tum
37. Hon. Rev. Margaret Muchai
38. Hon. Mohamed Abu Chiaba
39. Hon. Daniel Rasugu
40. Hon. Francis Waweru

**ABSENT WITH APOLOGY**

1. Hon. Ali Mustafa Yusuf
2. Mr. M. R. Sialai - Committee Clerk/National Assembly

**ABSENT**

1. Hon. (Prof.) Kivutha Kibwana
2. Hon. Gichira Kibara
3. Hon. Fred Ojiambo
4. Hon. Abdi Tari Sasura
5. Hon. Kajembe Seif Ramadhan
6. Hon. Abdalla Ngozi
7. Hon. Kembi Gitura
8. Hon. Mohammed Nyaoga
9. Hon. Mohammed Abdi Haji
10. Hon. Agnes Abuom
11. Hon. Walubengo Lumatete
12. Hon. Onesmus Kihara Mwangi
13. Hon. Isaiah Kubai

**IN ATTENDANCE – OBSERVERS**

1. Peter O. Maanya
2. Carren Angara
3. L. A. Agalothieno
4. Marceline Nyambala
5. Juma Mafubo
6. Cornelius Lupao

**IN ATTENDANCE**

- |                   |   |                          |
|-------------------|---|--------------------------|
| Mr. Dan Juma      | - | Programme Assistant/CKRC |
| Ms. Rahma Jillo   | - | Programme Assistant/CKRC |
| Mr. Clive Grenyer | - | Draftsperson             |

**FACILITATORS**

1. Emma Kamunga

2. V. Mwakio
3. Lucy Waititu
4. Albert Oirere
5. Ken Kidali
6. Johnson Ngigit

**MIN. NO. TWG/E/127/2003/2004**

**CONFIRMATION OF MINUTES OF  
THE PREVIOUS SITTING**

The Minutes of the Twentieth Sitting of the Committee held on Tuesday 20<sup>th</sup> January, 2004 were confirmed as a true record of the proceedings of the Committee's sitting and were signed by the Convenor having been proposed and seconded by Hon. Rupinder Singh Sehmi and Hon. Amina Ahmed respectively.

**MIN. NO. TWG/E/128/2003/2004**

**MATTERS ARISING**

The Committee deliberated upon the previous minutes as hereunder:-

1. Under **Min. NO. TWG/E/120/2003/2004**, the Committee noted that the word acting Convenor should be replaced with Convenor as Hon. Bishop Sulumeti had been elected as the Convenor by the Committee.
2. Under **MIN. NO. TWG/E/124/2003/2004**,
  - (a) That on Article 208 (4) (b) the words "recommending for approval" had been omitted immediately after the word 'contracts' as had been recommended by the Attorney General and agreed to by the Committee.
  - a. That on Article 208 (5) the word 'criminal' between the words 'any' and 'prosecution' be replaced with the word 'civil'.

**MIN. NO. TWG/E/129/2003/2004**

**CONSIDERATION OF DRAFT BILL  
(ARTICLE BY ARTICLE)**

**(a) Article 209 (1)**

Agreed to as in the Annotated Draft – it now reads as follows: -

**(1) There shall be an office of the Director of Public Prosecutions.**

**(b) Article 209 (2)**

Agreed to as in the Annotated Draft – it now reads as follows: -

- (1) The Director of Public Prosecutions shall be appointed by the President on the recommendation of the Public Service Commission and the approval of Parliament.**

**(c) Article 209 (3)**

Agreed to as in the Annotated Draft – it now reads as follows:-

- (3) The qualifications for appointment as Director of Public Prosecutions are the same as for appointment as a judge of the High Court.**

**(d) Article 209 (5) (a)**

Agreed to as in the Annotated Draft – it now reads as follows:-

- (5) The Director of Public Prosecutions shall exercise state powers of prosecution and shall have power;**

**(a) to institute and undertake criminal proceedings against any person before any court (other than a court martial) in respect of any offence alleged to have been committed;**

**(e) Article 209 (5) (b)**

Agreed to as in the Annotated Draft – it now reads as follows: -

- (5) The Director of Public Prosecutions shall exercise state powers of prosecution and shall have power in any case:-**

**(b) to take over and continue any criminal proceedings that have been instituted or undertaken by another person or authority with the permission of the person or authority.**

**(f) Article 209 (5) (c)**

Agreed to as in the Annotated Draft – it now reads as follows: -

- (5) The Director of Public Prosecutions shall exercise state powers of prosecution and shall have power in any case:-**

**b. subject to clause (7), discontinue at any stage before judgement is delivered any such criminal proceedings instituted or undertaken by him or her or any other person or authority and in the exercise of these powers shall only be subject to the Constitution and the law.  
The Director of Public Prosecutions shall not be subject to the control of any other person or authority.**

**(g) Article 209 (6)**

Agreed to as in the Annotated Draft – it now reads as follows:-

**(6) Parliament may confer powers of prosecution on other authorities.**

**(h) Article 209 (7)**

Agreed to as in the Annotated Draft – it now reads as follows:-

**(7) The Director of Public Prosecutions may not withdraw a prosecution without the permission of the court.**

**(i) Article 209 (8)**

Agreed to as in the Annotated Draft – it now reads as follows:-

**(6) The Director of Public Prosecutions does not require the consent of any person or authority for the commencement of prosecution proceedings.**

**(j) Article 209 (9)**

Agreed to as in the Annotated Draft – it now reads as follows:-

**(9) In exercising his or her powers under this Article, the Director of Public Prosecutions shall have regard to the public interest, the interest of the administration of justice and the need to prevent abuse of the legal process.**

**(k) Article 209 (10)**

Agreed to as in the Annotated Draft – it now reads as follows:-

**The Committee resolved that the Draftsperson comes up with a rephrased sub article to provide for term of office of the Director of Public Prosecution for 5 years renewable once and should be removed from office in the terms of the clause as the Attorney General.**

**Article 210 - Office of the Public Defender**

**(m) Article 210 (1)**

Agreed to as in the Annotated Draft – it now reads as follows:-

**(1) There is established the office of the Public Defender.**

**(n) Article 210 (2)**

Agreed to as in the Annotated Draft – it now reads as follows:-

**(2) The Public Defender shall be appointed by the President on the recommendation of the Public Service Commission and with the approval of the Parliament.**

**(o) Article 210 (3)**

Agreed to as in the Annotated Draft – it now reads as follows:-

**(3) The qualifications for appointment as Public Defender are the same as for appointment as a judge of the High Court.**

**(p) Article 210 (4)**

Agreed to as in the Annotated Draft – it now reads as follows:-

**(4) Subject to clause (6) the Public Defender shall provide legal advice and representation to persons who are unable to afford legal services.**

**(q) Article 210 (5)**

Agreed to as in the Annotated Draft to be combined with Article 210 (6).

The Committee resolved that the Draftsperson comes up with a rephrased sub article to provide for term of office of the Public Defender to be five years renewable once and should be removed from office in the terms of the clause as the Attorney General.

**(r) Article 211 Prerogative of Mercy**

The Committee felt that the Attorney General ought to be invited so as to shed light on the concept and practice of prerogative of mercy. After consultations, members' resolved that the Minister for the time being responsible for the Penal Institution and the Vice President of Kenya Hon. Moody Awori be invited.

**(s) Article 212 Part III - Legal Profession**

That Article 212 be amended by deleting the whole article and replacing it with the following clause:

**“There shall be a legal profession which shall be independent and which shall be regulated by an Act of Parliament”.**

(Hon. Mirugi Kariuki)

Motion made and Question proposed;

Debate arising;

Question of the amendment put and agreed to.

**Minority view – recorded – that article 202 be retained**

(Hon. Shabbir Shakeel)

The Committee nominated Rev. Margaret Muchai, Yusuf Aboubakar, Rev. Patrick M. Musungu, Garvase Akhaabi and Salim Ibrahim to represent it at the media programme by the Media Advisory Committee.

**MIN. NO.TWG/E/130/2003/2004**

**ADJOURNMENT**

The Convenor adjourned the meeting at 1.00 p.m. until 2.30 p.m.

**AFTERNOON SITTING**

The Committee reconvened at 2.40 p.m. with the Convenor Hon. Bishop Philip Sulumeti in the Chair.

**MIN. NO.TWG/E/131/2003/2004**

**CONSIDERATION OF DRAFT BILL**  
**(ARTICLE BY ARTICLE)**

The Rapporteur through the chair informed the Committee that the Vice President was indisposed as he was hosting the visiting Chancellor of the Federal Republic of Germany.

**MIN. NO.TWG/E/132/2003/2004**

**ADJOURNMENT**

The Committee was informed that the Deputy Commissioner of Prisons, Mr. Omondi had been invited as an expert on Prerogative of Mercy to appear before it on 22<sup>nd</sup> Thursday 2004 at 10.00 am. For this reason the Committee adjourned at 2.45 pm.

**SIGNED** .....  
(CONVENOR)

**DATE:** .....

## THE NATIONAL CONSTITUTIONAL CONFERENCE

### MINUTES OF THE TWENTY SECOND SITTING OF THE TECHNICAL WORKING GROUP "E", THE JUDICIARY, HELD ON THURSDAY 22<sup>nd</sup> JANUARY 2004 AT 9.30 A.M. IN COMMITTEE TENT NO. 5

#### MORNING SITTING

##### PRESENT

1. Hon. Bishop Philip Sulumeti - **Convenor**
2. Hon. Paul Musili Wambua - **Commissioner/Rapporteur**
3. Hon. Ahmed Issack Hassan - **Commissioner/Rapporteur**
4. Hon. Sheikh Ali Shee Mohammed
5. Hon. Amina Ahmed
6. Hon. Asli Ibrahim
7. Hon. Fadhil Sultana
8. Hon. Fatuma Boi Bakari
9. Hon. Hubbie Hussein Al Haji
10. Hon. Khadija Fugicha
11. Hon. Mirugi Kariuki
12. Hon. Rev. Patrick M. Musungu
13. Hon. Salim Ibrahim
14. Hon. Fr. Joachim Gitonga
15. Hon. Waithanje Minjire
16. Hon. Abdirahaman Ali Abass
17. Hon. Abdurhaman Badawy
18. Hon. Rupinder Singh Sehmi
19. Hon. Gervase B. K. Akhaabi
20. Hon. Yusuf Mahmoud Aboubakar
21. Hon. Amina Abdalla
22. Hon. Issack Derrow Ibrahim
23. Hon. Godana Adhi Doyo
24. Hon. Jane J. Kiptum
25. Hon. Benta Auma
26. Hon. Lilian Wanjira
27. Hon. Zablon Nthamburi
28. Hon. Shakeel Shabbir
29. Hon. El-Busaidy Abdulghafur
30. Hon. Owino Charles Oyugi
31. Hon. Daniel Rasugu
32. Hon. Abdi Tari Sasura
33. Hon. Kajembe Seif Ramadhan
34. Hon. Onesmus Kihara Mwangi
35. Hon. Victor P. Gituma

36. Hon. Archbishop Zacheus Okoth
37. Hon. Victoria Mutheu M.
38. Hon. Francis Waweru

**ABSENT WITH APOLOGY**

1. Hon. Ali Mustafa Yusuf
2. Mr. M. R. Sialai - Committee Clerk/National Assembly

**ABSENT**

1. Hon. (Prof.) Kivutha Kibwana
2. Hon. Gichira Kibara
3. Hon. Fred Ojiambo
4. Hon. Abdalla Ngozi
5. Hon. Kembi Gitura
6. Hon. Mohammed Nyaoga
7. Hon. Mohammed Abdi Haji
8. Hon. Agnes Abuom
9. Hon. Walubengo Lumatete
10. Hon. Isaiah Kubai
11. Hon. Kathurima M'inoti
12. Hon. Viscount Kimathi
13. Hon. Dr. Nathaniel Tum
14. Hon. Rev. Margaret Muchai
15. Hon. Mohamed Abu Chiaba

**IN ATTENDANCE – OBSERVERS**

1. Peter O. Maanya
2. Carren Angara
3. L. A. Agalothieno
4. Marceline Nyambala
5. Juma Mafubo
6. Cornelius Lupao

**IN ATTENDANCE**

- |                   |   |                          |
|-------------------|---|--------------------------|
| Mr. Dan Juma      | - | Programme Assistant/CKRC |
| Ms. Rahma Jillo   | - | Programme Assistant/CKRC |
| Mr. Clive Grenyer | - | Draftsperson             |

## **FACILITATORS**

1. Emma Kamunga
2. V. Mwakio
3. Lucy Waititu
4. Albert Oirere
5. Ken Kidali
6. Johnson Ngigit

### **MIN. NO. TWG/E/133/2003/2004**

### **CONFIRMATION OF MINUTES OF THE PREVIOUS SITTING**

The Minutes of the Twenty First Sitting of the Committee held on Wednesday 21<sup>st</sup> January, 2004 were confirmed as a true record of the proceedings of the Committee's sitting and were signed by the Convenor having been proposed and seconded by Hon. Shakeel Shabbir and Hon. Amina Abdlla respectively.

### **MIN. NO. TWG/E/134/2003/2004**

### **MATTERS ARISING**

The Committee deliberated upon the previous Minutes as hereunder:-

1. Under **Min. NO. TWG/E/120/2003/2004**, the meeting was informed that the Steering Committee confirmed had Bishop Phillip Sulumeti as the Convenor of the Committee.
3. Under **MIN. NO. TWG/E/124/2003/2004**, the Committee adopted the rephrased article 208 with amendments thus it reads as follows:-

#### **(a) Article 208.**

#### **Office of the Attorney General**

**208 (1) There is established the office of the Attorney-General which shall be an office in the public service as defined in Article 270.**

**(2) The Attorney-General shall be appointed by the President of the Republic on the recommendation of the Public Service Commission and with the approval of Parliament.**

**(3) The qualifications for the appointment as Attorney-General shall be the same as for appointment to the office of the Chief Justice.**

**(4) Subject to the provisions of this Constitution, the Attorney-General shall be the principal legal adviser to the Government and shall be responsible for:-**

- (a) drawing, perusing and recommending for approval, or otherwise, all agreements, contracts, treaties, conventions and documents by whatever name called, to which the Government is a party or in respect of which the Government has an interest.**
- (b) representing the Government in courts or any other legal proceedings to which the Government is a party; and**
- (c) drafting legislation, including subsidiary legislation.**

**(5) The Attorney-General shall have authority to appear as a friend of the court in any civil proceedings to which the Government is not a party.**

**(6) The Attorney-General shall promote and uphold the rule of law and defend the public interest.**

**(7) Subject to the provisions of this Constitution the Attorney General shall not be under the direction or control of any person or authority in the exercise of any of his or her functions.**

**(8) The Attorney-General shall hold office for a term of five years, and shall be eligible for re-appointment for a further and final term of five years.**

c. Article 209

Office of the Director of Public Prosecutions

**209 (1) There is established the office of the Director of Public Prosecutions which shall be an office in the public service as defined in Article 270.**

**(2) The Director of Public Prosecutions shall be appointed by the President of the Republic on the recommendation of the Public Service Commission and with the approval of Parliament.**

**(3) The qualifications for appointment as Director of Public Prosecutions shall be the same as for appointment as a judge of the High Court.**

**(4) The Director of Public Prosecutions shall have powers to direct the Kenya Police Service to investigate any information or allegations of criminal conduct.**

**(5) The Director of Public Prosecutions shall exercise state powers of prosecution and may -**

- i. institute and undertake criminal proceedings against any person before any court (other than a court martial) in respect of any offence alleged to have been committed;**
- ii. take over and continue any criminal proceedings commenced in any court (other than court martial) that have been instituted or undertaken by another person or authority with the permission or that person or authority;**
- iii. Subject to clause (7), discontinue at any stage before judgement is delivered any criminal proceedings instituted by him or her or taken over by him or her under paragraph (b).**

**(6) Parliament may confer powers of prosecution on authorities other than the Director of Public Prosecutions.**

**(7) The Director of Public Prosecutions may not withdraw a prosecution without the permission of the court.**

**(8) The Director of Public Prosecutions shall not require the consent of any person or authority for the commencement of criminal proceedings, and in the exercise of his or her powers or functions he shall be subject only to this Constitution.**

**(9) In exercising the powers conferred by this Article, the Director of Public Prosecutions shall have regard to the public interest, the interests of the administration of justice and the need to prevent and avoid abuse of the legal process.**

**(10) The Director of Public Prosecutions shall hold office for a term of five years, and shall be eligible for re-appointment for a further and final term of five years.**

d. Article 210

**Office of the Public Defender**

**209 (1) There is established the office of the Public Defender which shall be an office in the public service as defined in Article 270.**

**(2) The Public Defender shall be appointed by the President of the Republic on the recommendation of the Public Service Commission and with the approval of Parliament.**

**(3) The qualifications for appointment as Public Defender shall be the same as for the appointment as a judge of the High Court.**

**(4) Subject to Clause (5) the Public Defender, shall provide legal advice and representation to persons who are unable to afford legal services.**

**(5) Parliament shall by an Act of Parliament make provision for -**

- 1. the effective, efficient, and transparent management and administration of the Public Defender's office;**
- 2. the categories of persons who qualify for legal aid;**
- 3. the categories of cases that qualify for legal aid;**
- 4. such other limitations in accessing legal aid as it may consider appropriate; and**
- 5. Publicizing information as to the availability of legal aid.**

**(6) The Public Defender shall hold office for a term of five years, and shall be eligible for re-appointment for a further and final term of five years.**

e. Removal for the process of the Attorney General, Director of Public Prosecutions and Public Defender.

Article 210 A

Removal from Office

**210A(1) The Attorney-General, the Director of Public Prosecutions or the Public Defender may be removed from office in accordance with this Article and on the grounds of –**

- (a) inability to perform the functions of the office arising from infirmity of body or mind;**
- (b) a breach of the duties prescribed under Article 277 and in the Code of Conduct set out in the Fifth Schedule;**
- (c) bankruptcy;**
- (d) incompetence; or**
- (e) misconduct or misbehaviour whether in the performance of his or her duties or otherwise.**

**(2) A person desiring the removal of the Attorney-General, the Director of Public Prosecutions or the Public Defender may present a petition to the Judicial Service Commission, which shall set out the alleged facts constituting the grounds for the removal of the office holder in question.**

**(3) The Judicial Service Commission shall consider the petition and, if it is satisfied that it discloses the existence of a ground under clause (1), it shall send the petition to the President of the Republic.'**

**(4) On receipt and examination of the petition the President of the Republic shall within 14 days suspend the office holder in question from office pending action by the President of the Republic in accordance with clause (5) and shall, acting in accordance with the advice of the Judicial Service Commission appoint a tribunal consisting of -**

- (a) four members from among persons who hold or have held office as a judge of a superior court or record, or who are qualified to be appointed as such, but in either case who shall not have been members of the Judicial Service Commission;**
- (b) a member of the Public Service Commission; and**
- (c) two other persons with experience in public affairs.**

**(5) The tribunal shall inquire into the matter and report on the facts and make recommendations to the President of the Republic, who shall act in accordance with the recommendations of the tribunal.**

**(6) An Attorney-General, a Director of Public Prosecutions or a Public Defender who is suspended from office under clause (4) shall retain his or her emoluments and benefits of office until such time as he or she may be removed from office, it such be the recommendation of the tribunal.**

**(7) A tribunal appointed under clause (4) shall elect a chairperson from among their members and shall in all other respect be responsible for the regulation of its affairs.**

(e) THAT, article 208 (7) be amended by deleting the following words  
“**and the law**” immediately after the word subject.

(Hon. Gervase Akhaabi)

Motion made and question proposed;

Debate arising;

Question of the amendment put and agreed to.

(f) THAT, article 209 (8) be amended by deleting the following words:

“**and the law**” immediately after the word Constitution.

(Hon. Gervase Akhaabi)

Motion made and Question proposed;

Debate arising;

Question of the amendment put and agreed to.

(g)The minority view recorded by Hon. Delegate Shabbir Shakeel was on article 212 and not 202 as has been recorded.

**MIN. NO.TWG/E/135/2003/2004    CONSIDERATION OF DRAFT  
BILL  
(ARTICLE BY ARTICLE)**

**Article 211**

Senior Deputy Commissioner of Prisons, Mr. Omondi presented a paper on the perspective of prisons department. He noted with great concern that the

Commissioner of Prisons does not sit on the committee on prerogative of mercy yet he is the one who deals directly with the prisoners.

**(a) Article 211**

Prerogative of mercy

THAT, article 211 be transferred to the Committee of the Executive with recommendations.

(Hon. Yusuf Aboubakar)

Motion made and Question proposed;

Debate arising;

Question of the amendment put and agreed to.

**(b) Article 211 (1)**

THAT, article 211 (1) be replaced by Article 211 (2) to read:-

**The prerogative of mercy shall be exercised by the President in accordance with the advice of the Committee on the Prerogative of Mercy.**

(Hon. Lilian Wanjira)

Motion made and Question proposed;

Debate arising;

Question of the amendment put and agreed to.

(c) THAT, section 27 and 28 of the current Constitution be adopted subject to amendments. (instructions to the Draftsperson)

(d) THAT, the composition of the Committee comprise of the Attorney General, Minister in charge of Prisons, Chief Probation Officer, a nominee of the Kenya National Commission on Human Rights and a Medical Practitioner. (instructions to the Draftsperson).

**MIN. NO.TWG/E/136/2003/2004**

**ADJOURNMENT**

The Convenor adjourned the meeting at 1.05 p.m. until Friday 23<sup>rd</sup> January 2003 at 9.30 a.m. for members to attend the requiem mass of the late Hon. Joab Omino.

**SIGNED** .....  
(CONVENOR)

DATE:.....

## THE NATIONAL CONSTITUTIONAL CONFERENCE

### MINUTES OF THE TWENTY THIRD SITTING OF THE TECHNICAL WORKING GROUP "E", THE JUDICIARY, HELD ON FRIDAY 23<sup>RD</sup> JANUARY 2004 AT 9.30 A.M. IN COMMITTEE TENT NO. 5

#### MORNING SITTING

#### PRESENT

1. Hon. Bishop Philip Sulumeti - **Convenor**
2. Hon. Paul Musili Wambua - **Commissioner/Rapporteur**
3. Hon. Ahmed Issack Hassan - **Commissioner/Rapporteur**
4. Hon. Sheikh Ali Shee Mohammed
5. Hon. Amina Ahmed
6. Hon. Asli Ibrahim
7. Hon. Fadhil Sultana
8. Hon. Fatuma Boi Bakari
9. Hon. Hubbie Hussein Al Haji
10. Hon. Khadija Fugicha
11. Hon. Mirugi Kariuki
12. Hon. Rev. Patrick M. Musungu
13. Hon. Salim Ibrahim
14. Hon. Fr. Joachim Gitonga
15. Hon. Waithanje Minjire
16. Hon. Abdirahaman Ali Abass
17. Hon. Abdurhaman Badawy
18. Hon. Rupinder Singh Sehmi
19. Hon. Yusuf Mahmoud Aboubakar
20. Hon. Issack Derrow Ibrahim
21. Hon. Godana Adhi Doyo
22. Hon. Jane J. Kiptum
23. Hon. Benta Auma
24. Hon. Lilian Wanjira
25. Hon. Zablon Nthamburi
26. Hon. Shakeel Shabbir
27. Hon. El-Busaidy Abdulghafur
28. Hon. Daniel Rasugu
29. Hon. Victor P. Gituma
30. Hon. Francis Waweru
31. Hon. Isaiah Kubai
32. Hon. Kathurima M'notin

## **ABSENT WITH APOLOGY**

1. Hon. Ali Mustafa Yusuf
2. Mr. M. R. Sialai - Committee Clerk/National Assembly
3. Hon. Amina Abdalla
4. Hon. Walubengo Lumatete

## **ABSENT**

5. Hon. (Prof.) Kivutha Kibwana
6. Hon. Gichira Kibara
7. Hon. Fred Ojiambo
8. Hon. Abdalla Ngozi
9. Hon. Kembi Gitura
10. Hon. Mohammed Nyaoga
11. Hon. Mohammed Abdi Haji
12. Hon. Agnes Abuom
13. Hon. Viscount Kimathi
14. Hon. Dr. Nathaniel Tum
15. Hon. Rev. Margaret Muchai
16. Hon. Mohamed Abu Chiaba
17. Hon. Gervase B. K. Akhaabi
18. Hon. Owino Charles Oyugi
19. Hon. Abdi Tari Sasura
20. Hon. Kajembe Seif Ramadhan
21. Hon. Onesmus Kihara Mwangi
22. Hon. Archbishop Zacheus Okoth
23. Hon. Victoria Mutheu M.

## **IN ATTENDANCE – OBSERVERS**

1. Peter O. Maanya
2. Carren Angara
3. L. A. Agalothieno
4. Marceline Nyambala
5. Juma Mafubo
6. Cornelius Lupao

## **IN ATTENDANCE**

1. Dan Juma - Programme Assistant/CKRC
2. Rahma Jillo - Programme Assistant/CKRC
3. Clive Grenyer - Draftsperson

## **FACILITATORS**

1. Emma Kamunga
2. V. Mwakio
3. Lucy Waititu
4. Albert Oirere
5. Ken Kidali
6. Johnson Ngitit

### **MIN. NO.TWG/E/137/2003/2004**

### **CONFIRMATION OF MINUTES OF THE PREVIOUS SITTING**

The Minutes of the Twenty Second Sitting of the Committee held on Thursday 22<sup>nd</sup> January, 2004 were confirmed as a true record of the proceedings of the Committee's sitting and were signed by the Convenor having been proposed and seconded by Hon. Abdulrahman Abbas and Hon. Amina Ahmed respectively.

### **MIN. NO.TWG/E/138/2003/2004**

### **MATTERS ARISING**

1. That the Committee had to take cognisance of Senior Deputy Commissioner of Prisons Mr. Omondi the invited guest in the attendance list.
2. Under **Min. No. TWG/E/135/2003/2004**, the Committee adopted the rephrased article 211 with amendments. It reads as follows:-

#### **Presidential powers of clemency**

211 (1) There shall be a power of clemency, which shall be exercised by the President of the Republic on petition of any person in accordance with the advice of the Committee referred to in Clause (2) which power shall not be delegated to any other person.

(2) There shall be an advisory Committee on the Presidential Power of Clemency, which shall consist of:-

- iv. the Attorney-General for the time being;
- v. the Minister for the time being responsible for the Kenya Correctional Services;
- vi. a medical practitioner nominated by the Medical Practitioners and Dentists Board or such body as may succeed it as generally representative of the medical and dental professions;

- vii. the head of the Probation Service for the time being; and
  - viii. a person nominated by the Commission on Human Rights and Administrative Justice for as long as that body continues in exercise.
- (3) Persons appointed to the Advisory Committee under clause (2) (c) and (e) shall remain members of the Advisory Committee for a period of three years and may be re-appointed.
- (4) The Advisory Committee may act despite there being a vacancy in its membership.
- (5) The Advisory Committee may regulate its own proceedings.
3. That persons be identified from each Committee to consult with the Members of Parliament in a process of healing: hon. Prof. El Busaidy, Hon .Rev. Musungu Maina and Hon. Hubbie Hussein were thus elected.
4. That, the Catholic Bishops have released a press statement –  
By Rt. Rev. Cornelius K. Arap Korir, Chairman Kenya Episcopal Conference.
5. That, it was entirely the decision of the Committee to unanimously replace the Convenor. It was also clarified that indeed Commissioner Wambua had deferred the issue in order to get in touch with Hon. Prof. Kivutha Kibwana. The Committee also noted that Bishop Sulumeti had been acting as temporary Convenor for a long time and the members felt prudent to replace Prof. Kibwana. Finally, the Committee noted that the Commissioners had never influenced the Committee in any decision. That the former Convenor must remember that the Committee extended its good will when he had earlier resigned.

**MIN. NO.TWG/E/139/2003/2004**

**CONSIDERATION OF DRAFT BILL**  
**(ARTICLE BY ARTICLE)**

**Article 211 (6 & 7)**

THAT, the suggested wording of Article 211 be adopted to read:-

- (6) In exercise of the powers conferred by clause (1) the President of the Republic may -
- (a) grant to a person convicted of an offence a pardon, either free or a subject to lawful conditions;

- (b) postpone, either for a specified period or indefinitely, the carrying out of a punishment imposed on a person;
- (c) substitute a less severe form of punishment for a punishment imposed on a person for an offence; and
- (d) remit the whole or part of a punishment imposed on a person for an offence.

(7) The Advisory Committee may consult the victims of the offence in respect of which the Advisory Committee are considering recommending the exercise by the President or the Republic of his powers of clemency.

(Hon. Yusuf Aboubakar)

Motion made and Question proposed;

Debate arising;

Question of the amendment put and agreed to.

**MIN. NO.TWG/E/140/2003/2004**

**ADJOURNMENT**

Having completed its work as per the Order Paper the Committee adjourned at 11.30 am.

**SIGNED** .....  
(CONVENOR)

**DATE:** .....

## THE NATIONAL CONSTITUTIONAL CONFERENCE

### MINUTES OF THE TWENTY FOURTH SITTING OF THE TECHNICAL WORKING GROUP "E", THE JUDICIARY, HELD ON MONDAY 26<sup>TH</sup> JANUARY 2004 AT 9.30 A.M. IN COMMITTEE TENT NO. 5

#### MORNING SITTING

#### PRESENT

- |                                   |   |                                |
|-----------------------------------|---|--------------------------------|
| 1. Hon. Rev. Patrick M. Musungu   | - | <b>Temporary Convenor</b>      |
| 2. Hon. Paul Musili Wambua        | - | <b>Commissioner/Rapporteur</b> |
| 3. Hon. Ahmed Issack Hassan       | - | <b>Commissioner/Rapporteur</b> |
| 4. Hon. Sheikh Ali Shee Mohammed  |   |                                |
| 5. Hon. Khadija Fugicha           |   |                                |
| 6. Hon. Mirugi Kariuki            |   |                                |
| 7. Hon. Salim Ibrahim             |   |                                |
| 8. Hon. Fr. Joachim Gitonga       |   |                                |
| 9. Hon. Waithanje Minjire         |   |                                |
| 10. Hon. Abdirahaman Ali Abass    |   |                                |
| 11. Hon. Abdurhaman Badawy        |   |                                |
| 12. Hon. Rupinder Singh Sehmi     |   |                                |
| 13. Hon. Yusuf Mahmoud Aboubakar  |   |                                |
| 14. Hon. Issack Derrow Ibrahim    |   |                                |
| 15. Hon. Godana Adhi Doyo         |   |                                |
| 16. Hon. Jane J. Kiptum           |   |                                |
| 17. Hon. Benta Auma               |   |                                |
| 18. Hon. Zablon Nthamburi         |   |                                |
| 19. Hon. El-Busaidy Abdulghafur   |   |                                |
| 20. Hon. Victor P. Gituma         |   |                                |
| 21. Hon. Abdi Tari Sasura         |   |                                |
| 22. Hon. Onesmus Kihara Mwangi    |   |                                |
| 23. Hon. Archbishop Zacheus Okoth |   |                                |
| 24. Hon. Amina Abdalla            |   |                                |
| 25. Hon. Walubengo Lumatete       |   |                                |
| 26. Hon. Gervase B. K. Akhaabi    |   |                                |
| 27. Hon. Fatuma Boi Bakari        |   |                                |
| 28. Hon. Lilian Wanjira           |   |                                |
| 29. Hon. Shakeel Shabbir          |   |                                |
| 30. Hon. Francis Waweru           |   |                                |
| 31. Hon. Mohammed Abdi Haji       |   |                                |

### **ABSENT WITH APOLOGY**

1. Hon. Bishop Philip Sulumeti - **Convenor**
2. Hon. Ali Mustafa Yusuf
3. Hon. Hubbie Hussein Al Haji
4. Hon. Daniel Rasugu

### **ABSENT**

1. Hon. (Prof.) Kivutha Kibwana
2. Hon. Gichira Kibara
3. Hon. Fred Ojiambo
4. Hon. Abdalla Ngozi
5. Hon. Kembi Gitura
6. Hon. Mohammed Nyaoga
7. Hon. Agnes Abuom
8. Hon. Viscount Kimathi
9. Hon. Dr. Nathaniel Tum
10. Hon. Rev. Margaret Muchai
11. Hon. Mohamed Abu Chiaba
12. Hon. Owino Charles Oyugi
13. Hon. Kajembe Seif Ramadhan
14. Hon. Victoria Mutheu M.
15. Hon. Amina Ahmed
16. Hon. Asli Ibrahim
17. Hon. Fadhil Sultana
18. Hon. Isaiah Kubai
19. Hon. Kathurima M'inoti

### **IN ATTENDANCE – OBSERVERS**

1. Peter O. Maanya
2. Carren Angara
3. L. A. Agalothieno
4. Marceline Nyambala
5. Juma Mafubo
6. Cornelius Lupao

### **IN ATTENDANCE**

1. Mr. M. R. Sialai - Committee Clerk/National Assembly
2. Dan Juma - Programme Assistant/CKRC
3. Rahma Jillo - Programme Assistant/CKRC

4. Clive Grenyer - Draftsperson

### **FACILITATORS**

1. Emma Kamunga
2. V. Mwakio
3. Lucy Waititu
4. Albert Oirere
5. Ken Kidali
6. Johnson Ngitit

### **MIN. NO.TWG/E/141/2003/2004**

### **ELECTION OF TEMPORARY**

#### **CONVENOR**

Hon. Rev. Patrick M. Musungu was elected Temporary Convenor to sit in for the Convenor who had indicated he would be away.

### **MIN. NO.TWG/E/142/2003/2004**

### **CONFIRMATION OF MINUTES OF THE PREVIOUS SITTING**

The Minutes of the Twenty Third Sitting of the Committee held on Friday 23<sup>rd</sup> January, 2004 were confirmed as a true record of the proceedings of the Committee's sitting subject to corrections and were signed by the Temporary Convenor having been proposed and seconded by Hon. Waithanje Minjire and Hon. Victor Gituma respectively.

### **MIN. NO.TWG/E/143/2003/2004**

### **MATTERS ARISING**

1. Under **Min. No. TWG/E/138/2003/2004 (2)**, the Committee noted that in Article 211, sub article (3), persons appointed to the Advisory Committee under clause 2(c) and (e) shall remain members for a period of one year and shall be eligible for reappointment for a further two terms of one year each.
2. Under the same Min. No., the Committee noted that items 3, 4 and 5 should have been reflected under Any Other Business. It was also noted that the press statement released by the Catholic Bishops supported the Bomas process.
3. The Committee observed that Hon. Yusuf Mahmoud Aboubakar had sought clarification on the manner of introducing a new article in the Draft Bill.
4. Under **Min. No. TWG/E/139/2003/2004**, the Committee observed that although they deliberated on Article 211, they had also resolved that the Article be referred to the Executive Committee.

The Committee was informed that once the referred Articles have been refined, they will be sent to the relevant Committees.

The Committee may also arrange for joint meetings with other committees to deliberate on Articles of mutual interest.

**MIN. NO.TWG/E/144/2003/2004**

**CONSIDERATION OF  
COMMITTEE'S REPORT AND  
DRAFT BILL**

The Committee resolved to give themselves time to peruse the draft Bill and harmonise with the minutes before adopting. The Committee asked to be provided with the amended draft Bill.

**MIN. NO.TWG/E/146/2003/2004**

**ADJOURNMENT**

The Temporary Convenor adjourned the meeting at 10.30 a.m. until 27<sup>th</sup> January 2004 at 9.30 a.m.

**SIGNED** .....  
(CONVENOR)

**DATE:** .....

## THE NATIONAL CONSTITUTIONAL CONFERENCE

### MINUTES OF THE TWENTY FIFTH SITTING OF THE TECHNICAL WORKING GROUP "E", THE JUDICIARY, HELD ON TUESDAY 27<sup>TH</sup> JANUARY 2004 AT 9.30 A.M. IN COMMITTEE TENT NO. 5

#### MORNING SITTING

##### PRESENT

1. Hon. Bishop Philip Sulumeti - **Convenor**
2. Hon. Paul Musili Wambua - **Commissioner/Rapporteur**
3. Hon. Ahmed Issack Hassan - **Commissioner/Rapporteur**
4. Hon. Rev. Patrick M. Musungu
5. Hon. Sheikh Ali Shee Mohammed
6. Hon. Khadija Fugicha
7. Hon. Mirugi Kariuki
8. Hon. Salim Ibrahim
9. Hon. Fr. Joachim Gitonga
10. Hon. Waithanje Minjire
11. Hon. Abdirahaman Ali Abass
12. Hon. Abdurhaman Badawy
13. Hon. Rupinder Singh Sehmi
14. Hon. Yusuf Mahmoud Aboubakar
15. Hon. Issack Derrow Ibrahim
16. Hon. Jane J. Kiptum
17. Hon. Benta Auma
18. Hon. Zablon Nthamburi
19. Hon. El-Busaidy Abdulghafur
20. Hon. Archbishop Zacheus Okoth
21. Hon. Amina Abdalla
22. Hon. Walubengo Lumatete
23. Hon. Gervase B. K. Akhaabi
24. Hon. Fatuma Boi Bakari
25. Hon. Lilian Wanjira
26. Hon. Shakeel Shabbir
27. Hon. Francis Waweru
28. Hon. Mohammed Abdi Haji
29. Hon. Hubbie Hussein Al Haji
30. Hon. Daniel Rasugu
31. Hon. Kembi Gitura
32. Hon. Owino Charles Oyugi
33. Hon. Kajembe Seif Ramadhan
34. Hon. Amina Ahmed
35. Hon. Rev. Margaret Muchai

36. Hon. Fadhil Sultana
37. Hon. Godana Adhi Doyo

**ABSENT WITH APOLOGY**

1. Hon. Ali Mustafa Yusuf
2. Hon. Victor P. Gituma
3. Hon. Asli Ibrahim
4. Hon. Isaiah Kubai

**ABSENT**

1. Hon. (Prof.) Kivutha Kibwana
2. Hon. Gichira Kibara
3. Hon. Fred Ojiambo
4. Hon. Abdalla Ngozi
5. Hon. Mohammed Nyaoga
6. Hon. Agnes Abuom
7. Hon. Viscount Kimathi
8. Hon. Dr. Nathaniel Tum
9. Hon. Mohamed Abu Chiaba
10. Hon. Victoria Mutheu M.
11. Hon. Kathurima M'inoti
12. Hon. Abdi Tari Sasura
13. Hon. Onesmus Kihara Mwangi

**IN ATTENDANCE – OBSERVERS**

1. Peter O. Maanya
2. Carren Angara
3. L. A. Agalothieno
4. Marceline Nyambala
5. Juma Mafubo
6. Cornelius Lupao

**IN ATTENDANCE**

- |                     |   |                                   |
|---------------------|---|-----------------------------------|
| 1. Mr. M. R. Sialai | - | Committee Clerk/National Assembly |
| 2. Dan Juma         | - | Programme Assistant/CKRC          |
| 3. Rahma Jillo      | - | Programme Assistant/CKRC          |
| 4. Clive Grenyer    | - | Draftsperson                      |

## **FACILITATORS**

1. Emma Kamunga
2. V. Mwakio
3. Lucy Waititu
4. Albert Oirere
5. Ken Kidali
6. Johnson Ngitit

### **MIN. NO.TWG/E/147/2003/2004**

### **ELECTION OF TEMPORARY CONVENOR**

Hon. Rev. Patrick M. Musungu was elected Temporary Convenor to sit in for the Convenor who had indicated that he would be away.

### **MIN. NO.TWG/E/148/2003/2004**

### **CONFIRMATION OF MINUTES OF THE PREVIOUS SITTING**

The Minutes of the Twenty Fourth Sitting of the Committee held on Monday 26<sup>th</sup> January, 2004 were confirmed as a true record of the proceedings of the Committee's sitting subject to corrections and were signed by the Temporary Convenor having been proposed and seconded by Hon. Waithanje Minjire and Hon. Benta Auma respectively.

### **MIN. NO.TWG/E/149/2003/2004**

### **MATTERS ARISING**

Under the item of attendance, it was noted that Hon. Amina Ahmed attended yesterday's sitting and was not absent as inadvertently indicated in the Minutes.

### **MIN. NO.TWG/E/150/2003/2004**

### **CONSIDERATION OF COMMITTEE'S REPORT AND DRAFT BILL**

The Committee considered **Articles 184 to 205** of the Draft Bill and adopted with the following amendments as in Articles hereunder:-

- 184(1) (c) be amended by deleting the word "**above**" and inserting thereon the words "**paragraph b**".
- 
- 184(5) (b) to alter to conform with the provisions of Article 277 and code of conduct as set out in the fifth schedule.
- 185(3) (c) – be amended by inserting "**courts**" between the words "**traditional**" and "**or local**".

- 187 (1) be amended by rephrasing it as follows:- **“There shall be Supreme Court which shall consist of”**.
- 187 (4) & (5) to be moved to Article 184 (3), and to add the words **“subject to Article 196”** after the word shall in paragraph 4.
- 188 – be amended by deleting the word **“General”** on the sub-heading.
- 188 (1) (a) (v) – be amended by deleting the word **“districts”** and replacing with the words **“devolve units”**.
- 188(1) (b) to be amended by adding the following words immediately after the word jurisdiction **“to hear appeals from the High Court or any other court or tribunal as may be prescribed”**.
- 189 – be amended by rephrasing as follows: **“The Court of Appeal shall consist of”**:-
- 190 – be amended by deleting the words **“or any other court or tribunal”** and replacing with the words **“and such other courts”**.
- 191 – be amended by rephrasing the article as follows:- **“The High Court shall .....**”.
- 192 – The article to be harmonized with 188 (2) as a matter of law. The Rapporteurs to look at other jurisdiction and advise the Committee.
- 193 (1) – that the Article be amended by adding the following words after the word **“function” “but not over superior courts of record”**.
- 195 – to put the words **“at least”** – whenever the fifteen and ten years appears. Draftsperson was asked to come up with appropriate words that would allow appointment to the superior courts of record to be made from states which have **“a common law jurisdiction”**.
- 196 – to be amended by replacing the words **“his/her”** with office holders designation (to erase reference to his/her).

The Temporary Convenor adjourned the meeting at 1.10 p.m. until 2.30 p.m.

**AFTERNOON SITTING**

The Committee reconvened at 2.30 p.m. with the Convenor Hon. Bishop Philip Sulumeti on the Chair.

**MIN. NO.TWG/E/152/2003/2004    CONSIDERATION OF COMMITTEE’S REPORT AND DRAFT BILL**

- 197 (2) – be amended by deleting words **“which shall set”** and replace with the word **“setting”**.
- 194 (4) (a) & (b) be swapped.
- 194 (7) be amended by deleting “4 (a)” in the first sentence and replace it with **“4(b)”** and deleting the word **“their”** and replace with the word **“its”** and the word respect to read **“respects”**.
- 204 – that the paragraph be rephrased as follows:- **“There is established the Judicial Service Commission consisting of”**
- 204 (1) (f) – be amended by adding at end of the paragraph the words **“who shall also be the secretary of the Judicial Service Commission”**.
- 204 (1) (g) –be amended by adding the words **“or its successor”** after the word **“Law Society of Kenya”**.
- 204 (2) – be amended so that the provision excludes the Attorney General and the Chief Registrar of the Judiciary.
- 205 (1) (b) be amended by adding the words **“of the superior courts of record”** at the end of the paragraph.
- 205 (1) (d) – be amended by adding **“Article 210 A”** after the words **“197 (4)”**. Be further amended by deleting the word **“judges”** wherever it appears and replacing with the words **“Judge of the Superior courts of record”**.



**THE NATIONAL CONSTITUTIONAL CONFERENCE**

**MINUTES OF THE TWENTY SIXTH SITTING OF THE TECHNICAL  
WORKING GROUP "E", THE JUDICIARY, HELD ON WEDNESDAY 28<sup>TH</sup>  
JANUARY 2004 AT 9.30 A.M. IN COMMITTEE TENT NO. 5**

**MORNING SITTING**

**PRESENT**

- |                                   |   |                                |
|-----------------------------------|---|--------------------------------|
| 1. Hon. Bishop Philip Sulumeti    | - | <b>Convenor</b>                |
| 2. Hon. Paul Musili Wambua        | - | <b>Commissioner/Rapporteur</b> |
| 3. Hon. Ahmed Issack Hassan       | - | <b>Commissioner/Rapporteur</b> |
| 4. Hon. Rev. Patrick M. Musungu   |   |                                |
| 5. Hon. Sheikh Ali Shee Mohammed  |   |                                |
| 6. Hon. Khadija Fugicha           |   |                                |
| 7. Hon. Mirugi Kariuki            |   |                                |
| 8. Hon. Salim Ibrahim             |   |                                |
| 9. Hon. Fr. Joachim Gitonga       |   |                                |
| 10. Hon. Waithanje Minjire        |   |                                |
| 11. Hon. Abdirahman Ali Abass     |   |                                |
| 12. Hon. Abdurahman Badawy        |   |                                |
| 13. Hon. Rupinder Singh Sehmi     |   |                                |
| 14. Hon. Yusuf Mahmoud Aboubakar  |   |                                |
| 15. Hon. Issack Derrow Ibrahim    |   |                                |
| 16. Hon. Jane J. Kiptum           |   |                                |
| 17. Hon. Benta Auma               |   |                                |
| 18. Hon. Zablon Nthamburi         |   |                                |
| 19. Hon. El-Busaidy Abdulghafur   |   |                                |
| 20. Hon. Archbishop Zacheus Okoth |   |                                |
| 21. Hon. Amina Abdalla            |   |                                |
| 22. Hon. Fatuma Boi Bakari        |   |                                |
| 23. Hon. Lilian Wanjira           |   |                                |
| 24. Hon. Francis Waweru           |   |                                |
| 25. Hon. Mohammed Abdi Haji       |   |                                |
| 26. Hon. Daniel Rasugu            |   |                                |
| 27. Hon. Kembi Gitura             |   |                                |
| 28. Hon. Owino Charles Oyugi      |   |                                |
| 29. Hon. Amina Ahmed              |   |                                |
| 30. Hon. Rev. Margaret Muchai     |   |                                |
| 31. Hon. Fadhil Sultana           |   |                                |
| 32. Hon. Godana Adhi Doyo         |   |                                |

33. Hon. Victoria Mutheu M.
34. Hon. Viscount Kimathi
35. Hon. Gervase B. K. Akhaabi

**ABSENT WITH APOLOGY**

1. Hon. Ali Mustafa Yusuf
2. Hon. Asli Ibrahim
3. Hon. Isaiah Kubai
4. Hon. Shakeel Shabbir
5. Hon. Victor P. Gituma

**ABSENT**

1. Hon. (Prof.) Kivutha Kibwana
2. Hon. Gichira Kibara
3. Hon. Fred Ojiambo
4. Hon. Abdalla Ngozi
5. Hon. Mohammed Nyaoga
6. Hon. Agnes Abuom
7. Hon. Dr. Nathaniel Tum
8. Hon. Mohamed Abu Chiaba
9. Hon. Kathurima M'noti
10. Hon. Abdi Tari Sasura
11. Hon. Onesmus Kihara Mwangi
12. Hon. Walubengo Lumatete
13. Hon. Hubbie Hussein Al Haji
14. Hon. Kajembe Seif Ramadhan

**IN ATTENDANCE – OBSERVERS**

1. Peter O. Maanya
2. Carren Angara
3. L. A. Agalothieno
4. Juma Mafubo
5. Cornelius Lupao

**IN ATTENDANCE**

- |                                 |   |                          |
|---------------------------------|---|--------------------------|
| 1. Hon. Amos Wako               | - | Attorney General         |
| 2. Prof. Okoth-Ogendo           | - | Rapporteur General       |
| 3. Mr. M. R. Sialai<br>Assembly | - | Committee Clerk/National |
| 4. Dan Juma                     | - | Programme Assistant/CKRC |

- |                  |   |                          |
|------------------|---|--------------------------|
| 5. Rahma Jillo   | - | Programme Assistant/CKRC |
| 6. Clive Grenyer | - | Draftsperson             |

### **FACILITATORS**

1. Emma Kamunga
2. V. Mwakio
3. Lucy Waititu
4. Albert Oirere
5. Ken Kidali
6. Johnson Ngitit

### **MIN. NO.TWG/E/154/2003/2004**

### **CONFIRMATION OF MINUTES OF THE PREVIOUS SITTING**

The Minutes of the Twenty Fifth Sitting of the Committee held on Tuesday 27<sup>th</sup> January, 2004 were confirmed as a true record of the proceedings of the Committee's sitting and were signed by the Convenor having been proposed and seconded by Hon. Isaack Derrow Ibrahim and Hon. Rev. Patrick Musungu respectively.

### **MIN. NO.TWG/E/155/2003/2004**

### **COMMUNICATION FROM THE CONVENOR**

The Convenor informed the meeting that a case has been filed in the High Court seeking to have the Bomas Conference stopped allegedly because it breaches the Constitution. He urged the delegates to continue with the Business unhindered.

He further informed the meeting that a Committee has been formed to facilitate consensus building amongst the delegates on contentious issues and dialogue with delegates with divergent views with a view to having a common ground before the plenary debate.

He appealed to delegates to play the same role of building consensus and work for the common good of Kenya.

### **MIN. NO.TWG/E/156/2003/2004**

### **CONSIDERATION OF COMMITTEE'S REPORT AND DRAFT BILL**

The Committee considered **Articles 208 to 212** of the Draft Bill and adopted with the following amendments in Articles hereunder:-

- 208 (4) (b) be amended by adding the following words immediately after a word **“party”**: **“other than criminal proceedings”**.
- 208 (6) be amended by adding the word **“protect”** between the words **“promote”** and **“and”**.

- 208 (7) be amended by rephrasing the paragraph as follows **“The powers of the Attorney-General may be exercised in person or by subordinate officers acting in accordance with general or special instructions”**.
- 209 (4) be amended by stating that the Director of Public Prosecutions shall direct the **“Inspector General of police”**.
- 209 (5) (c) be amended so that if the Director of Public Prosecutions discontinues prosecution the accused, person should be acquitted if defence has already been offered.
- 210 – to take care of gender interest
- 210 (A) – be amended by deleting the words **“which shall set”** in the third sentence and replacing thereon with the word **“setting”**
- 210 (A) 4 (a) be further amended by deleting the words **“and shall not have been”** and adding the words **“and have not been members in the proceeding three years”**.
- This should also apply to Article 197 (4) (a) (i)

**MIN. NO.TWG/E/157/2003/2004**

**ADJOURNMENT**

The Convenor adjourned the meeting at 1.00 p.m. until 2.30 p.m.

**AFTERNOON SITTING**

The Committee reconvened at 2.45 p.m. with the Convenor Hon. Bishop Philip Sulumeti on the Chair.

**MIN. NO.TWG/E/158/2003/2004**

**CONSIDERATION OF COMMITTEE’S  
REPORT AND DRAFT BILL**

- 211 (1) be amended by adding the words **“Parliament shall enact an Act of Parliament establishing criteria that shall be applied by the advisory Committee referred to in clause (3) in formulating its advice referred to in clause (1)”**.
- 211 (2) be amended by adding **“(c) Three persons from the Christian, Muslim and Hindu organizations (f) An Advocate”**.

- 211 (7) be amended by deleting the word “**consult**” and replacing it with the words “**take into account the views of**” immediately after the words “**may**” and “**the victims**”.
- 188 (1) (iii) and (iv) be deleted.
- 188 (2) be deleted
- 192 be amended by adding “**192 (b) in all matters relating to the interpretation of this constitution**”.

**MIN. NO.TWG/E/159/2003/2004**

**COMMITTEE TRIP**

The Committee asked whether it was possible to organize a comparative study tour to other Commonwealth Countries. The Committee was informed that the matter would be taken up with the relevant organs.

**MIN. NO.TWG/E/160/2003/2004**

**ADJOURNMENT**

The Committee having finished its mandate adjourned the meeting at 3.14 p.m.

**SIGNED** .....  
(CONVENOR)

**DATE:** .....

## **THE NATIONAL CONSTITUTIONAL CONFERENCE**

### **MINUTES OF THE TWENTY SEVENTH SITTING OF THE TECHNICAL WORKING GROUP "E", THE JUDICIARY, HELD ON FRIDAY 30<sup>TH</sup> JANUARY 2004 AT 9.30 A.M. IN COMMITTEE TENT NO. 5**

#### **MORNING SITTING**

##### **PRESENT**

- |                                   |   |                                |
|-----------------------------------|---|--------------------------------|
| 1. Hon. Bishop Philip Sulumeti    | - | <b>Convenor</b>                |
| 2. Hon. Paul Musili Wambua        | - | <b>Commissioner/Rapporteur</b> |
| 3. Hon. Ahmed Issack Hassan       | - | <b>Commissioner/Rapporteur</b> |
| 4. Hon. Rev. Patrick M. Musungu   |   |                                |
| 5. Hon. Sheikh Ali Shee Mohammed  |   |                                |
| 6. Hon. Khadija Fugicha           |   |                                |
| 7. Hon. Mirugi Kariuki            |   |                                |
| 8. Hon. Fr. Joachim Gitonga       |   |                                |
| 9. Hon. Waithanje Minjire         |   |                                |
| 10. Hon. Abdirahman Ali Abass     |   |                                |
| 11. Hon. Abdurahman Badawy        |   |                                |
| 12. Hon. Rupinder Singh Sehmi     |   |                                |
| 13. Hon. Yusuf Mahmoud Aboubakar  |   |                                |
| 14. Hon. Issack Derrow Ibrahim    |   |                                |
| 15. Hon. Benta Auma               |   |                                |
| 16. Hon. El-Busaidy Abdulghafur   |   |                                |
| 17. Hon. Archbishop Zacheus Okoth |   |                                |
| 18. Hon. Amina Abdalla            |   |                                |
| 19. Hon. Fatuma Boi Bakari        |   |                                |
| 20. Hon. Lilian Wanjira           |   |                                |
| 21. Hon. Francis Waweru           |   |                                |
| 22. Hon. Mohammed Abdi Haji       |   |                                |
| 23. Hon. Amina Ahmed              |   |                                |
| 24. Hon. Godana Adhi Doyo         |   |                                |
| 25. Hon. Asli Ibrahim             |   |                                |
| 26. Hon. Isaiah Kubai             |   |                                |
| 27. Hon. Shakeel Shabbir          |   |                                |
| 28. Hon. Agnes Abuom              |   |                                |

##### **ABSENT WITH APOLOGY**

1. Hon. Ali Mustafa Yusuf
2. Hon. Victor P. Gituma
3. Hon. Salim Ibrahim

4. Hon. Hubbie Hussein Al Haji

**ABSENT**

1. Hon. (Prof.) Kivutha Kibwana
2. Hon. Gichira Kibara
3. Hon. Fred Ojiambo
4. Hon. Abdalla Ngozi
5. Hon. Mohammed Nyaoga
6. Hon. Dr. Nathaniel Tum
7. Hon. Mohamed Abu Chiaba
8. Hon. Kathurima M'inoti
9. Hon. Abdi Tari Sasura
10. Hon. Onesmus Kihara Mwangi
11. Hon. Walubengo Lumatete
12. Hon. Kajembe Seif Ramadhan
13. Hon. Jane J. Kiptum
14. Hon. Zablon Nthamburi
15. Hon. Daniel Rasugu
16. Hon. Kembi Gitura
17. Hon. Owino Charles Oyugi
18. Hon. Rev. Margaret Muchai
19. Hon. Fadhil Sultana
20. Hon. Victoria Mutheu M.
21. Hon. Viscount Kimathi
22. Hon. Gervase B. K. Akhaabi

**IN ATTENDANCE – OBSERVERS**

1. Peter O. Maanya
2. Carren Angara
3. L. A. Agalothieno
4. Juma Mafubo
5. Cornelius Lupao

**IN ATTENDANCE**

- |                     |   |                                   |
|---------------------|---|-----------------------------------|
| 1. Mr. M. R. Sialai | - | Committee Clerk/National Assembly |
| 2. Dan Juma         | - | Programme Assistant/CKRC          |
| 3. Rahma Jillo      | - | Programme Assistant/CKRC          |
| 4. Clive Grenyer    | - | Draftsperson                      |

## **FACILITATORS**

1. Emma Kamunga
2. V. Mwakio
3. Lucy Waititu
4. Albert Oirere
5. Ken Kidali
6. Johnson Ngitit

## **MIN. NO.TWG/E/161/2003/2004**

## **CONFIRMATION OF MINUTES OF THE PREVIOUS SITTING**

The Minutes of the Twenty Fifth Sitting of the Committee held on Tuesday 27<sup>th</sup> January, 2004 were confirmed as a true record of the proceedings of the Committee's sitting and were signed by the Convenor having been proposed and seconded by Hon. Isaack Derrow Ibrahim and Hon. Bishop Okoth respectively.

## **MIN. NO.TWG/E/162/2003/2004**

## **CONSIDERATION OF COMMITTEE'SREPORT AND DRAFT BILL**

THAT, Article 185 (4) be amended to read

**“Without prejudice to the generality of paragraph 3(b) above, parliament shall, within 6 months of the coming into force of this constitution enact a law to provide for the establishment of an industrial court, its powers and functions, appeal structure, the recruitment of the officers serving in that court and for matters connected therewith and incidental thereto.”**

Hon. Isaiah Kubai

Motion made and Question proposed;

Debate arising;

Question of the amendment put and Agreed to.

Minority view recorded

(Hon. Shakeel Shabbir)

**MIN. NO.TWG/E/163/2003/2004**

**ADJOURNMENT**

Having completed its mandate the Committee adjourned at 10:35 a.m.

**SIGNED** .....  
(CONVENOR)

**DATE:** .....

**THE NATIONAL CONSTITUTIONAL CONFERENCE**

**MINUTES OF THE TWENTY EIGHTH SITTING OF THE TECHNICAL  
WORKING GROUP “E”, THE JUDICIARY, HELD ON TUESDAY 17<sup>TH</sup>  
FEBRUARY 2004 AT 9.30 A.M. IN COMMITTEE TENT NO. 5**

**MORNING SITTING**

**PRESENT**

- |                                   |                                  |
|-----------------------------------|----------------------------------|
| 1. Hon. Bishop Philip Sulumeti    | <b>Convenor</b>                  |
| 2. Hon. Paul Musili Wambua        | <b>- Commissioner/Rapporteur</b> |
| 3. Hon. Ahmed Issack Hassan       | <b>- Commissioner/Rapporteur</b> |
| 4. Hon. Rev. Patrick M. Musungu   |                                  |
| 5. Hon. Sheikh Ali Shee Mohammed  |                                  |
| 6. Hon. Khadija Fugicha           |                                  |
| 7. Hon. Fr. Joachim Gitonga       |                                  |
| 8. Hon. Waithanje Minjire         |                                  |
| 9. Hon. Abdirahman Ali Abass      |                                  |
| 10. Hon. Abdurahman Badawy        |                                  |
| 11. Hon. Rupinder Singh Sehmi     |                                  |
| 12. Hon. Yusuf Mahmoud Aboubakar  |                                  |
| 13. Hon. Issack Derrow Ibrahim    |                                  |
| 14. Hon. Benta Auma               |                                  |
| 15. Hon. El-Busaidy Abdulghafur   |                                  |
| 16. Hon. Archbishop Zacheus Okoth |                                  |
| 17. Hon. Fatuma Boi Bakari        |                                  |
| 18. Hon. Lilian Wanjira           |                                  |
| 19. Hon. Francis Waweru           |                                  |
| 20. Hon. Mohammed Abdi Haji       |                                  |
| 21. Hon. Amina Ahmed              |                                  |
| 22. Hon. Asli Ibrahim             |                                  |
| 23. Hon. Isaiah Kubai             |                                  |
| 24. Hon. Ali Mustafa Yusuf        |                                  |
| 25. Hon. Victor P. Gituma         |                                  |
| 26. Hon. Salim Ibrahim            |                                  |
| 27. Hon. Hubbie Hussein Al Haji   |                                  |
| 28. Hon. Dr. Nathaniel Tum        |                                  |
| 29. Hon. Mohamed Abu Chiaba       |                                  |
| 30. Hon. Kathurima M’noti         |                                  |
| 31. Hon. Onesmus Kihara Mwangi    |                                  |
| 32. Hon. Walubengo Lumatete       |                                  |
| 33. Hon. Jane J. Kiptum           |                                  |
| 34. Hon. Zablon Nthamburi         |                                  |

35. Hon. Daniel Rasugu
36. Hon. Owino Charles Oyugi
37. Hon. Fadhil Sultana
38. Hon. Gervase B. K. Akhaabi

### **ABSENT**

1. Hon. Gichira Kibara
2. Hon. Fred Ojiambo
3. Hon. Abdalla Ngozi
4. Hon. Mohammed Nyaoga
5. Hon. Abdi Tari Sasura
6. Hon. Kajembe Seif Ramadhan
7. Hon. Kembi Gitura
8. Hon. Rev. Margaret Muchai
9. Hon. Victoria Mutheu M.
10. Hon. Viscount Kimathi
11. Hon. Mirugi Kariuki
12. Hon. Amina Abdalla
13. Hon. Godana Adhi Doyo
14. Hon. Shakeel Shabbir
15. Hon. Agnes Abuom

### **IN ATTENDANCE – OBSERVERS**

1. Carren Angara
2. Juma Mafubo
3. Peter Ligale

### **ABSENT WITH APOLOGY**

1. Mr. M. R. Sialai - Committee Clerk/National Assembly

### **IN ATTENDANCE**

1. Hon. Amos Wako - Attorney General
2. Dan Juma - Programme Assistant/CKRC
3. Rahma Jillo - Programme Assistant/CKRC
4. Clive Grenyer - Draftsperson

### **FACILITATORS**

1. Emma Kamunga
2. V. Mwakio
3. Lucy Waititu

4. Albert Oirere
5. Ken Kidali
6. Johnson Ngitit

**MIN. NO.TWG/E/164/2003/2004**

**CONFIRMATION OF MINUTES OF  
THE PREVIOUS SITTING**

The Minutes of the Twenty Seventh Sitting of the Committee held on Friday 30<sup>th</sup> January, 2004 were confirmed as a true record of the proceedings of the Committee's sitting and were signed by the Convenor having been proposed and seconded by Hon. Sheikh Ali Shee and Hon. Archbishop Zachaeus Okoth respectively.

**MIN. NO.TWG/E/165/2003/2004**

**MATTERS ARISING**

Whether the Committee on Judiciary exceeded its mandate in proposing the deletion of articles 188 (2), 189(1) & (2), 190 (2) – (5), 191 (2), 192 (2) & (3), 194 (2) – (4), 195 (4), 199 (2) – (3), 200 (2) – (6), 201 (1) – (4), 202 (1) – (2), 203 (1) – (3), 206 (1) – (3), 206 (1) – (4), 207 (1) – (2) and 212 in the chapter, especially if the said articles were faithful reflection of the views of the people.

**MIN. NO.TWG/E/166/2003/2004**

**CONSIDERATION OF DRAFT BILL**

The Committee adopted the version of Chapter 9 – The Judiciary as it stood in the Zero Draft after the advice of the Rapporteurs, the Convenor and the Draftsperson that it was indeed a true reflection of the Committees deliberations.

**MIN. NO.TWG/E/167/2003/2004**

**CROSS CUTTING ISSUES**

1. **Article 184 (3)**

THAT, Article 184 (3) be amended by adding the words 'traditional oathing system'.

Motion raised;

Debate arising;

Question of the amendment put and negatived.

2. **Article 184(4)**

THAT, Article 184(4) be amended by adding the words "traditional dressing"

Motion raised;

Debate arising;

Question of the amendment put and Negatived.

3. **Article 185(3) (c)**

THAT, Article 185(3) (c) be amended by adding the words “Christian courts”.

Motion raised;

Debate arising;

Question of the amendment put and Agreed to.

Minority view – recorded – ‘THAT no religious courts should be included in the Constitution’.

(Hon. Daniel Rasugu)

4. **Article 188(1) (a) (ii)**

THAT, Article 188(1) (a) (ii) be amended to include ‘disputes arising from the impeachment process’.

Motion raised;

Debate arising;

Question of the amendment put and Agreed to.

5. **Article 190 and 192**

THAT, article 190 and 192 be amended by setting and stating the minimum number of judges to serve in the High Court and Court of Appeal.

Motion raised;

Debate arising;

Question of the amendment put and Negatived.

6. **Article 195**

THAT, article 195 be amended by including professors of law who are eminent in practice as one of the qualifications of judges.

Motion raised;

Debate arising;

Question of the amendment put and Agreed to.

7. Article 199, 204 and 205

THAT, articles 199, 204 and 205 be amended by stating clearly that, Kadhis are appointed and disciplined by the Judicial Service Commission and that the Chief Kadhi's should be a member of the Judicial Service Commission.

Motion raised;

Debate arising;

Question of the amendment put and Agreed to.

(Instructions to the Draftsman to provide for a provision that will ensure the enactment of an Act of Parliament for the organization and administration of Kadhi's courts.)

8. Article 208(9), 209(12) and 210 (7).

THAT, articles 208(9), 209(12) and 210(7) be amended to have a one ten (10) year term tenure.

Motion raised;

Debate arising;

Question of the amendment put and Agreed to.

9. Article 210 A

THAT, the removal from office of the Attorney General should be the same as the Chief Justice since the qualifications are the same, and that it should be separated from the offices of the Public Defender and the Director of Public Prosecutions.

Motion raised;

Debate arising;

Question of the amendment put and Agreed to.

10. Article 204(1) b, 211 (3) a and b.

THAT, articles 204(1) b, 211 (3) a and b be amended by deleting the following words 'for the time being'.

Motion raised;

Debate arising;

Question of amendment put and Agreed to.

11. Article 212

THAT, article 212 be amended by deleting this article.

Motion raised;

Debate arising;

Question of the amendment put and Agreed to.

**MIN. NO.TWG/E/168/2003/2004**

**ADJOURNMENT**

The temporary Convenor (Rev. Patrick M. Musungu) adjourned the meeting at 12.15 p.m. until 18<sup>th</sup> February, 2004.

**SIGNED** .....  
(CONVENOR)

**DATE:** .....

**THE NATIONAL CONSTITUTIONAL CONFERENCE**

**MINUTES OF THE TWENTY NINTH SITTING OF THE TECHNICAL  
WORKING GROUP “E”, THE JUDICIARY, HELD ON WEDNESDAY 18<sup>TH</sup>  
FEBRUARY 2004 AT 9.30 A.M. IN COMMITTEE TENT NO. 5**

**MORNING SITTING**

**PRESENT**

1. Hon. Bishop Philip Sulumeti - **Convenor**
2. Hon. Paul Musili Wambua - **Commissioner/Rapporteur**
3. Hon. Ahmed Issack Hassan - **Commissioner/Rapporteur**
4. Hon. Rev. Patrick M. Musungu
5. Hon. Sheikh Ali Shee Mohammed
6. Hon. Khadija Fugicha
7. Hon. Waithanje Minjire
8. Hon. Abdirahman Ali Abass
9. Hon. Abdurahman Badawy
10. Hon. Rupinder Singh Sehmi
11. Hon. Yusuf Mahmoud Aboubakar
12. Hon. Benta Auma
13. Hon. El-Busaidy Abdulghafur
14. Hon. Archbishop Zacheus Okoth
15. Hon. Fatuma Boi Bakari
16. Hon. Lilian Wanjira
17. Hon. Francis Waweru
18. Hon. Mohammed Abdi Haji
19. Hon. Amina Ahmed
20. Hon. Asli Ibrahim
21. Hon. Isaiah Kubai
22. Hon. Victor P. Gituma
23. Hon. Salim Ibrahim
24. Hon. Dr. Nathaniel Tum
25. Hon. Mohamed Abu Chiaba
26. Hon. Kathurima M'inoti
27. Hon. Onesmus Kihara Mwangi
28. Hon. Owino Charles Oyugi
29. Hon. Fadhil Sultana
30. Hon. Gervase B. K. Akhaabi
31. Hon. Kajembe Seif Ramadhan
32. Hon. Rev. Margaret Muchai
33. Hon. Amina Abdalla
34. Hon. Godana Adhi Doyo
35. Hon. Shakeel Shabbir



## **FACILITATORS**

1. Emma Kamunga
2. V. Mwakio
3. Lucy Waititu
4. Albert Oirere
5. Ken Kidali
6. Johnson Ngitit

## **MIN. NO.TWG/E/169/2003/2004**

## **CONFIRMATION OF MINUTES OF THE PREVIOUS SITTING**

The Minutes of the Twenty Seventh Sitting of the Committee held on Tuesday 17<sup>th</sup> February 2004 were confirmed as a true record of the proceedings subject to corrections and were signed by the Acting Convenor having been proposed and seconded by Hon. Kathurima M’Inoti and Hon. Victor Gituma respectively. Hon. Prof Abdulghafur El-Busaidy led prayers.

## **MIN. NO.TWG/E/170/2003/2004**

## **MATTERS ARISING**

1. That prayers ought to be recorded in the minutes as it stood part of the agenda.
2. That under **Min.No.TWG/E/167/2003/2004**, number 4 the article should read 188(1) (a) (iii) and not 188 (1) a (ii) as had been recorded.
3. That under **Min.No.TWG/E/167/2003/2004**, number 4 was not agreed to but negated as had been indicated.

## **MIN. NO.TWG/E/171/2003/2004**

## **CONSIDERATION OF DRAFT BILL**

### **1. Article 185**

THAT, article 185(1) 3 c be amended by inserting the words ‘Christian courts’ between the words any and traditional, to read as follows: -

- (1) The Judiciary shall consist of the courts, judges, magistrates and other judicial officers of superior courts of record, and subordinate courts.
- (2) The superior courts of record shall be the Supreme Court, the Court of Appeal, and the High Court.
- (3) The subordinate courts shall be –
  - (i) Magistrates’ courts and the Kadhis’ court;
  - (ii) the courts martial and any other courts subordinate to the High Court established by an Act of Parliament; and

- (iii) any **Christian Courts**, traditional courts or local tribunals that may be established by an Act of Parliament.
- (4) Without prejudice to the generality of paragraph (3) (b), parliament shall, within six months of the coming into force of this Constitution, enact a law to establish a court with jurisdiction to hear and determine disputes relating to employment that may arise among employers and employees.

Motion raised;

Debate arising;

Question of the amendment put and Agreed to.

## **2. Article 199**

THAT, article 199 be amended by inserting the words.

### **The Kadhis' court**

- (1) **There is established the Kadhis' Court.**
- (2) **The Kahdis' Court shall –**
  - (a) **be constituted of the Chief Kadhi and Kadhis who profess the Islamic faith; and**
  - (b) **be organized and administered, as may be prescribed by legislation.**

Motion raised;

Debate arising;

Question of the amendment put and Agreed to.

## **3. Article 204**

THAT, article 204 (1) a be amended by deleting the word 'three' and replacing it with 'two' thereon and deleting the word 'Muslim' between the words 'Christian' and 'Hindu faiths', and by inserting a new sub article to include the Chief Kadhi in the composition of the JSC to read as follows: -

- a. There is established the Judicial Service Commission consisting of –

- i. **two** persons, each of who shall be nominated by each of the religious organizations generally representative of the Christian, and Hindu faiths;
  - ii. the Attorney-General for the time being;
  - iii. one Supreme Court Judge elected by the judges of the Supreme Court;
  - iv. one Court of Appeal judge elected by the judges of the Court of Appeal;
  - v. one High Court judge elected by the judges of the High Court;
  - vi. the Chief Registrar of the Judiciary for the time being, who shall also be the Secretary to the Judicial Service Commission;  
**(via) the Chief Kadhi;**
  - vii. two advocates each of at least fifteen years' standing nominated by the Law Society of Kenya or such other body as may succeed it as generally representative of the legal profession in Kenya; and
  - viii. one person nominated by the Public Service Commission.
- b. Members of the Commission, apart from those appointed under clause (1) (b) and (f), shall hold office for a term of five years and shall be eligible for re-appointment for a further and final term of five years.
- c. The Commission shall elect a chairperson from among its members and shall otherwise regulate its own procedure.

Motion raised;

Debate arising;

Question of the amendment put and Agreed to.

#### **4. Article 205**

THAT, article 205 (1) b be amended by inserting the words 'the Attorney General, The Director of Public Prosecutions and the Public Defender', immediately after the word 'judges' in sub article b, to read as follows:-

(1) The functions of the Judicial Service Commission shall be -

- i. to ensure and enhance the independence and judicial accountability of the judiciary and the efficient, effective and transparent administration of justice;
- ii. to recommend to the President of the Republic persons for appointment as judges, the Attorney-General, the Director of Public Prosecutions and the Public Defender;
- iii. to review and make recommendations on the conditions of service of judges, magistrates and other judicial officers, other than their salaries and remuneration;
- iv. to advise the President of the Republic on the membership of the Tribunals referred to in Articles 197(4) and 210A(4);
- v. to appoint, discipline and remove registrars, magistrates and other judicial officers, including paralegal staff, in such manner as may be specified by an Act of Parliament;
- vi. to review and investigate complaints against judges, the Attorney-General, the Director of Public Prosecutions and the Public Defender in accordance with this Constitution;
- vii. to prepare and implement programmes for the continuing education and training of judges, magistrates and other judicial officers, and paralegal staff;
- viii. to advise the Government on improving the efficiency of the administration of justice, and on access to justice, including legal aid; and
- ix. any other function prescribed by this Constitution or by an Act of Parliament.

(2) In performing its functions the Commission shall be subject only to this Constitution and the law.

(3) In this Article “judge” means a judge of the superior court of record.

Motion raised;

Debate arising;

Question of the amendment put and Agreed to.

## 5. Article 208

THAT, article 208 (4) be amended by deleting the words ‘ Subject to the provisions of this Constitution’ in sub article 4 and the words ‘and shall be responsible for’ immediately after the words ‘ Government’ and replacing thereon with a new sub article (4a) to read as follows: -

- a. There is established the office of the Attorney-General which shall be on office in the public service as defined in Article 270.
- b. The Attorney-General shall be appointed by the President of the Republic on the recommendation of the **Judicial** Service Commission and with the approval of National Assembly.
- c. The qualifications for the appointment as Attorney-General shall be the same as for appointment to the office of Chief Justice.
- d. The Attorney-General shall be the principal legal adviser to the Government.

### **(4A) The Attorney-General shall be responsible for –**

- i. drawing, perusing and recommending approval (or otherwise) of all agreements, contracts, treaties , conventions and documents by whatever name called, to which the Government is a party or in respect of which the Government has an interest;
- ii. representing the Government in court or any other legal proceedings to which the Government is not a party;
- iii. drafting legislation, including subsidiary legislation.
- e. The Attorney-General shall have authority to appear as a friend of the court in any civil proceedings to which the Government is not a party.
- f. The Attorney-General shall promote, protect and uphold the rule of law and defend the public interest.
- g. The powers of the Attorney-General shall may be exercised in person or by subordinate officers acting in accordance with his general or special instructions.
- h. Subject to the provisions of this Constitution the Attorney-General shall not be under the direction or control of any person or authority in the exercise of any of the Attorney-General’s functions.

- i. The Attorney-General shall hold office for a term of **ten** years.

Motion raised;

Debate arising;

Question of the amendment put and Agreed to.

## 6. **Article 210**

THAT, article 210(2) be amended by deleting the word 'Public' after the word the 'Service' and replacing it with the word 'Judicial' thereof, to read as follows:-

- a. There is established the office of the Public Defender which shall be an office in the public service as defined in Article 270.
- b. The Public Defender shall be appointed by the President of the Republic on the recommendation of the **Judicial** Service Commission and with the approval of National Assembly.
- c. The qualifications for appointment as Public Defender shall be the same as for the appointment as a judge of the High Court.
- d. Subject to Clause (5) the Public Defender shall provide legal advice and representation to persons who are unable to afford legal services.
- e. Parliament shall be an Act of Parliament make provision for -
  - i. the effective, efficient and transparent management and administration of the Public Defender's office;
  - ii. the categories of persons who qualify for legal aid;
  - iii. the categories of cases that qualify for legal aid;
  - iv. such other limitations in accessing legal aid as it may consider appropriate; and
  - v. publishing information as to the availability of legal aid.

- f. The powers of the Public Defender may be exercised in person or by subordinate officers acting in accordance with general or special instructions.
- g. The Public Defender shall hold office for a term of **ten** years.

Motion moved;

Debate arising;

Question of the amendment put and Agreed to.

## **7. Article 210A.**

THAT, article 210A be amended by inserting a new sub article after sub article (4) to read as follows: -

- a. The Attorney-General, the Director of Public Prosecutions or the Public Defender may be removed from office in accordance with this Article and on the grounds of –
  - i. inability to perform the functions of office arising from infirmity of body or mind;
  - ii. a breach of the duties prescribed under Article 277 and in the Code of Conduct set out in the Fifth Schedule;
  - iii. bankruptcy;
  - iv. incompetence; or
  - v. misconduct or misbehavior whether in the performance of the office-holder’s duties or otherwise.
- b. A person desiring the removal of the Attorney General, the Director of Public Prosecutions or the Public Defender may present a petition to the Judicial Service Commission setting out the alleged facts constituting the grounds for the removal of the office-holder in question.
- c. The Judicial Service Commission shall consider the petition and, if it is satisfied that it discloses the existence of a ground under clause (1), it shall send the petition to the President of the Republic.
- d. On receipt and examination of the petition the President of the Republic shall within 14 days suspend the office holder in question from office pending action by the President of the Republic in accordance with clause

(5) and shall, acting in accordance with the advice of the Judicial Service Commission.

**i. in the case of the Attorney-General, appoint a tribunal consisting of –**

**(a) the Speaker of the Senate as chairperson;**

**(b) three judges from states which have a common law jurisdiction; and**

**(c) three other persons with experience in public affairs.**

**ii. in the case of the Director of Public Prosecutions or the Public appoint a tribunal consisting of –**

(i) four members from among persons who hold or have held office as a judge of a superior court of record, or who are qualified to be appointed as such, but in either case who are not, and have not been within the preceding three years, members of the Judicial Service Commission;

(ii) a member of the Public Service Commission; and

(iii) two other persons with experience in public affairs.

(3) The tribunal shall inquire into the matter and report on the facts and make recommendations to the President of the Republic, who shall act in accordance with the recommendations of the tribunal.

(4) An Attorney General, a Director of Public Prosecutions or a Public Defender who is suspended from office under clause (4) shall retain the office holder's emoluments and benefits of office until such time as the office holder may be removed from office, if such be the recommendation of the tribunal.

(5) A tribunal appointed under clause (4) shall elect a chairperson from among its members and shall in all other respects be responsible for the regulation of its affairs.

Motion made;

Debate arising;

Question of the amendment put and Agreed to.

**1. Article 197 (1) – vis-à-vis – Article 102 (2) (i)**

**THAT, Committee F deletes the words “Judicial officers’ in article 102 (2) (i) immediately after the word ‘cabinet’.**

Motion made;

Debate arising;

Question of the amendment put and Agreed to.

**2. Article 204 91) vis-à-vis 281 (1) a**

**THAT, article 204 (1) be amended to reflect less than ten members as envisaged in article 281 (1) a.**

Motion raised;

Debate arising;

Question of the amendment put and Agreed to.

**Article 204 (1) a – has been deleted.**

**3. Article 208 (2), 209(2) and 210 (2) vis-à-vis 103 (3)**

**THAT, article 208 (2), 209 (2) and 210 (2) be amended by adding the words ‘National Assembly’.**

Motion raised;

Debate arising;

Question of the amendment put and Agreed to.

**4. Article 103 vis-à-vis Article 122**

**THAT, Committee F amends article 122 (2) by deleting it.**

Motion moved;

Debate arising;

Question of the amendment put and Agreed to.

**5. Article 188 vis-à-vis 152 (2) b**

**THAT, Committee D amends article 152 (2) b by deleting it.**

Motion moved;

Debate arising;

Question of the amendment put and Agreed to.

**6. Article 188 vis-à-vis Article 163 (3) a**

**THAT, the Committee D provide for an alternative chair for the special committee.**

Motion moved;

Debate arising;

Question of the amendment put and Agreed to.

Recommendation made by the Committee members, that the chair should be a person who is not a judicial officer.

**7. Article 193 vis-à-vis Article 282 (1) b.**

**THAT, Committee 'K' deletes the words 'high Court ' immediately after the words 'powers of'.**

Motion moved;

Debate arising;

Question of the amendment put and Agreed to.

**8. Article 193 vis-à-vis 140 (3) (b) (1)**

**THAT, Committee F deletes the words 'High Court' in article 140 (3) (b) (1) immediately after the word 'power'.**

Motion moved;

Debate arising;

Question of the amendment put and Agreed to.

**9. Article 188 vis-à-vis 69 (6)**

THAT, Committee B, need to confer article 69 (6) to an Act of Parliament.

Motion moved;

Debate arising;

Question of the amendment put and Agreed to.

**10. Article 193 vis-à-vis Article 74**

THAT, article 193 be amended by inserting a new sub article as 193 (cc) to read as follows: -

**(cc) to hear applications for redress of a contravention of the Bill of Rights.**

Motion moved;

Debate arising;

Question of the amendment put and Agreed to.

**11. Article 208 vis-à-vis Article 89 (1)**

THAT, Committee C amends article 89 (1) by deleting the words ‘ under the office of the Attorney General ’.

Motion moved;

Debate arising;

Question of the amendment put and Agreed to.

**12. Article 188 vis-à-vis 217 (5 and 7)**

THAT, Committee 'G' amends article should 217 (5 and 7) by specifically stating which court has jurisdiction to decide cases in respect to inter and intra governmental disputes.

Recommendation by the Committee members that this court should be the High Court.

Motion moved;

Debate arising;

Question of the amendment put and Agreed to.

**13. Article 208 vis-à-vis Article 244 (2).**

THAT, Committee 'G' amends article 244 (4) by defining the functions of the District Attorney.

Motion moved;

Debate arising;

Question of the amendment put and Agreed to.

**14. Article 192 vis-à-vis S.4 (5) b**

THAT, Committee G amend article S.4 (5) by deleting the words "High Court" immediately after the word 'power'.

Motion moved;

Debate arising;

Question of the amendment put and Agreed to.

**15. Article 195 vis-à-vis Article 83**

THAT, Committee C amends article 83 by specifying qualifications of the Chair of the Commission

Recommendation by the Committee that the qualifications should be the same as a Judge of the High Court.

Motion moved;

Debate arising;

Question of the amendment put and Agreed to.

**16. Article 198, 185 (3) vis-à-vis Article 235 (4) a (vi) and 240 (3).**

THAT, Committee J amends articles article 235 (4) a (vi) and 240 (3) by deleting them.

Motion moved;

Debate arising;

Question of the amendment put and Agreed to.

**17. Article 185 (3) vis-à-vis Article 15H (1)**

THAT, Committee 'M' amends article 15 (H) (i) by deleting it

Motion moved;

Debate arising;

Question of the amendment put and Agreed to.

**18. Article 196 vis-à-vis 8<sup>th</sup> Schedule 16 (2).**

THAT, Committee L amends article 16 (2) in the 8<sup>th</sup> schedule by deleting '55 years' and replacing thereon by '60 years'.

Motion moved;

Debate arising;

Question of the amendment put and Agreed to.

**19. Article 211 vis-à-vis 8<sup>th</sup> schedule 18 (2)**

THAT, Committee 'L' amends article 18 (2) in the 8<sup>th</sup> schedule by clarifying the upshot of transitional arrangements.

Motion moved;

Debate arising;

Question of the amendment put and Agreed to

**MIN. NO.TWG/E/173/2003/2004 ADJOURNMENT**

The temporary Convenor Rev. Patrick M. Musungu adjourned the meeting at 12.15 p.m. until 19<sup>th</sup> Thursday February 2004.

**SIGNED** .....  
(CONVENOR)

**DATE:**.....

## THE NATIONAL CONSTITUTIONAL CONFERENCE

### MINUTES OF THE THIRTIETH SITTING OF THE TECHNICAL WORKING GROUP "E", THE JUDICIARY, HELD ON THURSDAY 19<sup>TH</sup> FEBRUARY 2004 AT 10.30 A.M. IN COMMITTEE TENT NO. 5

#### MORNING SITTING

#### PRESENT

1. Hon. Bishop Philip Sulumeti - **Convenor**
2. Hon. Paul Musili Wambua - **Commissioner/Rapporteur**
3. Hon. Ahmed Issack Hassan - **Commissioner/Rapporteur**
4. Hon. Rev. Patrick M. Musungu - **Temporary Convenor**
5. Hon. Sheikh Ali Shee Mohammed
6. Hon. Khadija Fugicha
7. Hon. Waithanje Minjire
8. Hon. Abdirahman Ali Abass
9. Hon. Abdurahman Badawy
10. Hon. Rupinder Singh Sehmi
11. Hon. Yusuf Mahmoud Aboubakar
12. Hon. Benta Auma
13. Hon. El-Busaidy Abdulghafur
14. Hon. Archbishop Zacheus Okoth
15. Hon. Fatuma Boi Bakari
16. Hon. Lilian Wanjira
17. Hon. Mohammed Abdi Haji
18. Hon. Amina Ahmed
19. Hon. Asli Ibrahim
20. Hon. Victor P. Gituma
21. Hon. Salim Ibrahim
22. Hon. Kathurima M'inoti
23. Hon. Onesmus Kihara Mwangi
24. Hon. Owino Charles Oyugi
25. Hon. Fadhil Sultana
26. Hon. Gervase B. K. Akhaabi
27. Hon. Amina Abdalla
28. Hon. Fr. Joachim Gitonga
29. Hon. Issack Derrow Ibrahim
30. Hon. Hubbie Hussein Al Haji
31. Hon. Zablon Nthamburi
32. Hon. Jane J. Kiptum

## **ABSENT WITH APOLOGY**

1. Mr. M. R. Sialai - Committee Clerk/National Assembly

## **ABSENT**

1. Hon. Gichira Kibara
2. Hon. Fred Ojiambo
3. Hon. Abdalla Ngozi
4. Hon. Mohammed Nyaoga
5. Hon. Abdi Tari Sasura
6. Hon. Kembi Gitura
7. Hon. Victoria Mutheu M.
8. Hon. Viscount Kimathi
9. Hon. Mirugi Kariuki
10. Hon. Agnes Abuom
11. Hon. Ali Mustafa Yusuf
12. Hon. Walubengo Lumatete
13. Hon. Daniel Rasugu
14. Hon. Kajembe Seif Ramadhan
15. Hon. Rev. Margaret Muchai
16. Hon. Godana Adhi Doyo
17. Hon. Shakeel Shabbir
18. Hon. Francis Waweru
19. Hon. Isaiah Kubai
20. Hon. Dr. Nathaniel Tum
21. Hon. Mohamed Abu Chiaba

## **IN ATTENDANCE – OBSERVERS**

1. Carren Angara
2. Juma Mafubo
3. Peter Ligale

## **IN ATTENDANCE**

1. Dan Juma - Programme Assistant/CKRC
2. Rahma Jillo - Programme Assistant/CKRC
3. Clive Grenyer - Draftsperson

## **FACILITATORS**

1. Emma Kamunga
2. V. Mwakio
3. Lucy Waititu
4. Albert Oirere
5. Ken Kidali
6. Johnson Ngigit

**MIN. NO.TWG/E/174/2003/2004**

**CONFIRMATION OF MINUTES OF  
THE PREVIOUS SITTING**

The Minutes of the Twenty Ninth Sitting of the Committee held on Wednesday 19<sup>th</sup> February 2004 were confirmed as a true record of the proceedings subject to corrections and were signed by the acting Convenor having been proposed and seconded by Hon. Rupinder Sehmi and Hon. Salim Ibrahim respectively. Hon. Zablon Nthamburi led prayers.

**MIN. NO.TWG/E/175/2003/2004**

**MATTERS ARISING**

1. That Hon. Hubbie Hussein Al Haji, Hon. Jane Kiptum and Hon. Daniel Rasugu were present and not absent as had been indicated.
2. Under **Min.No.TWG/E/171/2003/2004**, number 5 on article 208(1) should be 'an' immediately after the word 'be' and not 'on' as has been indicated.
3. Under **Min.No.TWG/E/171/2003/2004**, number 5 article 208(9) should read 'and shall not be eligible for re-appointment' after the word 'year'.

**MIN. NO.TWG/E/176/2003/2004**

**CONSIDERATION OF DRAFT BILL**

**1. Article 208**

THAT, article 208(2) be amended by deleting the word 'Judicial' and replacing it thereon with the word 'Public' immediately after the words 'of the' and 'Service'.

Debate arising;

Question of the amendment put and Agreed to.

**2. Article 209**

THAT, article 208 (4) be amended by deleting the words ' Subject to the provisions of this Constitution' in sub article 4 and the words 'and shall be responsible for' immediately after the words ' Government' and replacing thereon with a new sub article (4A).

Motion raised;

Debate arising;

Question of the amendment put and Agreed to.

**3. Article 210**

THAT, article 210(2) be amended by deleting the word 'Judicial' after the word the 'Service' and replacing it with the word 'Public' 'thereof'.

Motion moved;

Debate arising;

Question of the amendment put and Agreed to.

**4. Article 210A**

THAT, article 210A(2) be amended by deleting the word 'Judicial' and replacing it thereon with 'Public' immediately after the words 'to the' and 'setting out'.

Motion moved;

Debate arising;

Question of the amendment put and Agreed to.

**5. Article 210A**

**That article 210A(4) (b) (ii)** be amended by deleting it and inserting with the following words 'An advocate nominated by the Law Society of Kenya or its successor of not less than 15 years standing'.

Motion moved;

Debate arising;

Question of the amendment put and Agreed to.

**6. Article 210A**

THAT, article 210A (b) (i) be amended by deleting the words 'but in either case who are not, and have not been within the preceding 3 years, members of the Judicial Service Commission' immediately after the words 'appointed as such'.

Motion moved;

Debate arising;

Question of the amendment put and Agreed to.

**7. Article 200**

THAT, article 200 be amended by deleting the words ‘and submit to the jurisdiction of that court’ immediately after the words ‘Islamic faith’.

To read as follows: -

**200. Jurisdiction of the Kadhi’s Courts.**

The Kadhis courts shall be a subordinate court with jurisdiction to determine questions of Islamic law relating to personal status, marriage, divorce and matters consequential thereto, inheritance and succession in proceedings in which the parties profess the Islamic faith.

Motion moved;

Debate arising;

Question of the amendment put and Agreed to.

**MIN. NO.TWG/E/177/2003/2004 ADJOURNMENT**

The temporary Convenor Rev. Patrick M. Musungu adjourned the meeting at 11.50 p.m. until 20<sup>th</sup> Friday February 2004.

**SIGNED** .....  
(CONVENOR)

**DATE:**.....

**THE NATIONAL CONSTITUTIONAL CONFERENCE**

**MINUTES OF THE THIRTY FIRST SITTING OF THE TECHNICAL  
WORKING GROUP “E”, THE JUDICIARY, HELD ON FRIDAY 20<sup>TH</sup>  
FEBRUARY 2004 AT 10.15 A.M. IN COMMITTEE TENT NO. 5**

**PRESENT**

1. Hon. Paul Musili Wambua - **Commissioner/Rapporteur**
2. Hon. Ahmed Issack Hassan - **Commissioner/Rapporteur**
3. Hon. Rev. Patrick M. Musungu - **Temporary Convenor**
4. Hon. Khadija Fugicha
5. Hon. Waithanje Minjire
6. Hon. Abdirahman Ali Abass
7. Hon. Abdurahman Badawy
8. Hon. Rupinder Singh Sehmi
9. Hon. Benta Auma
10. Hon. El-Busaidy Abdulghafur
11. Hon. Archbishop Zacheus Okoth
12. Hon. Fatuma Boi Bakari
13. Hon. Lilian Wanjira
14. Hon. Amina Ahmed
15. Hon. Asli Ibrahim
16. Hon. Victor P. Gituma
17. Hon. Salim Ibrahim
18. Hon. Kathurima M’inoti
19. Hon. Onesmus Kihara Mwangi
20. Hon. Owino Charles Oyugi
21. Hon. Fadhil Sultana
22. Hon. Amina Abdalla
23. Hon. Fr. Joachim Gitonga
24. Hon. Issack Derrow Ibrahim
25. Hon. Hubbie Hussein Al Haji
26. Hon. Victoria Mutheu M.
27. Hon. Daniel Rasugu
28. Hon. Rev. Margaret Muchai
29. Hon. Shakeel Shabbir
30. Hon. Francis Waweru

**PARTICIPANTS ATTENDING CONSENSUS BUILDING GROUP MEETING**

1. Hon. Bishop Philip Sulumeti - **Convenor**

2. Hon. Sheikh Ali Shee Mohammed
3. Hon. Yusuf Mahmoud Aboubakar
4. Hon. Gervase B. K. Akhaabi
5. Hon. Jane J. Kiptum
6. Hon. Prof. Kivutha Kibwana
7. Hon. Mirugi Kariuki
8. Hon. Dr. Nathaniel Tum

**ABSENT WITH APOLOGY**

- |   |   |
|---|---|
| <ol style="list-style-type: none"> <li>1. Mr. M. R. Sialai</li> <li>2. Hon. Mohammed Abdi Haji</li> <li>3. Hon. Walubengo Lumatete</li> </ol> | <p>- Committee Clerk/<br/>National Assembly</p> |
|---|---|

**ABSENT**

1. Hon. Fred Ojiambo
2. Hon. Abdalla Ngozi
3. Hon. Abdi Tari Sasura
4. Hon. Kembi Gitura
5. Hon. Viscount Kimathi
6. Hon. Agnes Abuom
7. Hon. Ali Mustafa Yusuf
8. Hon. Kajembe Seif Ramadhan
9. Hon. Godana Adhi Doyo
10. Hon. Isaiah Kubai
11. Hon. Mohamed Abu Chiaba
12. Hon. Zablon Nthamburi

**IN ATTENDANCE – OBSERVERS**

1. Carren Angara
2. Juma Mafubo
3. Peter Ligale

**IN ATTENDANCE**

- |   |   |
|---|---|
| <ol style="list-style-type: none"> <li>1. Dan Juma</li> <li>2. Rahma Jillo</li> <li>3. Clive Grenyer</li> </ol> | <p>- Programme Assistant/CKRC</p> <p>- Programme Assistant/CKRC</p> <p>- Draftsperson</p> |
|---|---|

## **FACILITATORS**

1. Emma Kamunga
2. V. Mwakio
3. Lucy Waititu
4. Albert Oirere
5. Ken Kidali
6. Johnson Ngigit

## **MIN. NO.TWG/E/178/2003/2004**

## **CONFIRMATION OF MINUTES OF THE PREVIOUS SITTING**

The Minutes of the Thirtieth Sitting of the Committee held on Thursday 20<sup>th</sup> February 2004 were confirmed as a true record of the proceedings subject to corrections and were signed by the acting Convenor having been proposed and seconded by Hon. Hubbie Hussein and Hon. Rupinder Sehmi respectively. Hon. Rev. Margaret Muchai led prayers.

## **MIN. NO.TWG/E/179/2003/2004**

## **MATTERS ARISING**

1. That Hon. Daniel Rasugu had sent an apology through Hon. Yusuf Aboubakar although he had been indicated as absent.
2. That the former Convenor Hon. Kivutha Kibwana was back and had all along been with the Committee though not physically.
3. That Hon. Francis Waweru was present although he had been indicated as absent.
4. That closing prayers ought to be minuted since they stood part of the agenda.
5. Under **Min.No.TWG/E/176/2003/2004** number 5 on article 210A that the word 'with' should be deleted.

## **MIN. NO.TWG/E/180/2003/2004**

## **ADOPTION OF THE COMMITTEES REPORT AND RECOMENDATIONS**

Members of the Committee reached a consensus and agreed to adjourn so as to make themselves conversant with the content of the Committees final report for adoption I the next sitting.

## **MIN. NO.TWG/E/181/2003/2004 ADJOURNMENT**



**THE NATIONAL CONSTITUTIONAL CONFERENCE**

**MINUTES OF THE THIRTY SECOND SITTING OF THE TECHNICAL  
WORKING GROUP "E", THE JUDICIARY, HELD ON TUESDAY 23<sup>RD</sup>  
FEBRUARY 2004 AT 10.30 A.M. IN COMMITTEE TENT NO. 5**

**PRESENT**

1. Hon. Paul Musili Wambua - **Commissioner/Rapporteur**
2. Hon. Ahmed Issack Hassan - **Commissioner/Rapporteur**
3. Hon. Rev. Patrick M. Musungu - **Temporary Convenor**
4. Hon. Khadija Fugicha
5. Hon. Waithanje Minjire
6. Hon. Abdirahman Ali Abass
7. Hon. Abdurahman Badawy
8. Hon. Rupinder Singh Sehmi
9. Hon. Benta Auma
10. Hon. El-Busaidy Abdulghafur
11. Hon. Fatuma Boi Bakari
12. Hon. Lilian Wanjira
13. Hon. Amina Ahmed
14. Hon. Asli Ibrahim
15. Hon. Victor P. Gituma
16. Hon. Salim Ibrahim
17. Hon. Kathurima M'noti
18. Hon. Onesmus Kihara Mwangi
19. Hon. Fadhil Sultana
20. Hon. Amina Abdalla
21. Hon. Issack Derrow Ibrahim
22. Hon. Victoria Mutheu M.
23. Hon. Rev. Margaret Muchai
24. Hon. Yusuf Mahmoud Aboubakar
25. Hon. Gervase B. K. Akhaabi
26. Hon. Kembi Gitura
27. Hon. Godana Adhi Doyo
28. Hon. Mohamed Abu Chiaba
29. Hon. Zablon Nthamburi

### **ABSENT WITH APOLOGY**

1. Hon. Bishop Philip Sulumeti - **Convenor**
2. Hon. Walubengo Lumatete
3. Hon. Hubbie Hussein Al Haji
4. Hon. Ali Mustafa Yusuf
5. Hon. Mohammed Abdi Haji
6. Hon. Sheikh Ali Shee Mohammed
7. Hon. Mirugi Kariuki
8. Clive Grenyer **Draftsperson**
9. Mr. M. R. Sialai **Committee Clerk/National Assembly**

### **ABSENT**

1. Hon. Fred Ojiambo
2. Hon. Abdalla Ngozi
3. Hon. Abdi Tari Sasura
4. Hon. Viscount Kimathi
5. Hon. Agnes Abuom
6. Hon. Kajembe Seif Ramadhan
7. Hon. Isaiah Kubai
8. Hon. Owino Charles Oyugi
9. Hon. Shakeel Shabbir
10. Hon. Francis Waweru
11. Hon. Jane J. Kiptum
12. Hon. Dr. Nathaniel Tum
13. Hon. Prof. Kivutha Kibwana

### **IN ATTENDANCE – OBSERVERS**

1. Carren Angara
2. Juma Mafubo

### **IN ATTENDANCE**

1. Dan Juma - Programme Assistant/CKRC
2. Rahma Jillo - Programme Assistant/CKRC

### **FACILITATORS**

1. Emma Kamunga
2. V. Mwakio
3. Lucy Waititu
4. Albert Oirere

5. Ken Kidali
6. Johnson Ngitit

**. NO.TWG/E/178/2003/2004**

**CONFIRMATION OF MINUTES OF  
THE PREVIOUS SITTING**

The Minutes of the Thirty First Sitting of the Committee held on Friday 20<sup>th</sup> February 2004 were confirmed as a true record of the proceedings subject to corrections and were signed by the acting Convenor having been proposed and seconded by Hon. R. S. Sehmi and Hon. Victor P. Gituma respectively. Hon. Amina Ahmed led prayers.

**MIN. NO.TWG/E/179/2003/2004**

**MATTERS ARISING**

1. THAT, Hon. Gervase D. K. Akhaabi, Jane Kiptum, Hon. Prof. Kivutha Kibwana and Hon. Dr. Nathaniel Tum are not members of the consensus building as had been indicated in the previous meeting.
2. THAT under **Min. No. TWG/E/179/2003/2004** number 2 and 3, the statements ought to be qualified, to include the people who stated the statements.
3. THAT, under **Min. No. TWG/E/177/2003/2004** the meeting adjourned at 11.00 a.m. and not 11.00 p.m. as had been indicated.
4. THAT, the memo addressed to the Committee from the Committee on Transitional and Consequential Arrangements proposing that a judge suspended from duty for any cause should receive half pay during such suspension provided for in Schedule 8 clause 10(5) read together with. Article 197(6). Having discussed and deliberated on this provision the Committee resolved that the said article remains as it stood in the Zero Draft.

**MIN. NO.TWG/E/180/2003/2004 ADOPTION OF THE COMMITTEES  
REPORT AND RECOMMENDATIONS (PAGE BY PAGE)**

Members of the Committee RESOLVED that only substantial issues arising from the report should be addressed, and polishing up of the language should be left to the Secretariat.

1. THAT on page 5, the last paragraph (third last line) should read as sec. 27(1) (c) and not 27(1) b as has been indicated.
2. THAT on page 10, all the experts ought to be included and they should be referred to as resource persons.

**MIN. NO.TWG/E/177/2003/2004**

**ADJOURNMENT**

The Temporary Convenor Rev. Patrick M. Musungu adjourned the meeting at 1.15 p.m. with prayers from Hon. Father Joachim Gitonga until Tuesday 24<sup>th</sup> February 2004.

**SIGNED** .....  
(CONVENOR)

## THE NATIONAL CONSTITUTIONAL CONFERENCE

### MINUTES OF THE THIRTY THIRD SITTING OF THE TECHNICAL WORKING GROUP "E", THE JUDICIARY, HELD ON TUESDAY 24<sup>TH</sup> FEBRUARY 2004 AT 11.00 A.M. IN COMMITTEE TENT NO. 5

#### PRESENT

1. Hon. Paul Musili Wambua - **Commissioner/Rapporteur**
2. Hon. Ahmed Issack Hassan - **Commissioner/Rapporteur**
3. Hon. Rev. Patrick M. Musungu - **Temporary Convenor**
4. Hon. Khadija Fugicha
5. Hon. Waithanje Minjire
6. Hon. Abdirahman Ali Abass
7. Hon. Abdurahman Badawy
8. Hon. Rupinder Singh Sehmi
9. Hon. Benta Auma
10. Hon. El-Busaidy Abdulghafur
11. Hon. Fatuma Boi Bakari
12. Hon. Lilian Wanjira
13. Hon. Amina Ahmed
14. Hon. Asli Ibrahim
15. Hon. Victor P. Gituma
16. Hon. Salim Ibrahim
17. Hon. Kathurima M'noti
18. Hon. Onesmus Kihara Mwangi
19. Hon. Fadhil Sultana
20. Hon. Amina Abdalla
21. Hon. Issack Derrow Ibrahim
22. Hon. Victoria Mutheu M.
23. Hon. Rev. Margaret Muchai
24. Hon. Gervase B. K. Akhaabi
25. Hon. Kembi Gitura
26. Hon. Godana Adhi Doyo
27. Hon. Mohamed Abu Chiaba
28. Hon. Zablon Nthamburi
29. Hon. Walubengo Lumatete
30. Hon. Shakeel Shabbir
31. Hon. Francis Waweru
32. Hon. Jane J. Kiptum
33. Hon. Dr. Nathaniel Tum

34. Hon. Archbishop Zacheus Okoth

**ABSENT WITH APOLOGY**

1. Hon. Bishop Philip Sulumeti - **Convenor**
2. Hon. Hubbie Hussein Al Haji
3. Hon. Ali Mustafa Yusuf
4. Hon. Mohammed Abdi Haji
5. Hon. Sheikh Ali Shee Mohammed
6. Hon. Mirugi Kariuki
7. Hon. Fr. Joachim Gitonga
8. Hon. Daniel Rasugu
9. Hon. Yusuf Mahmoud Aboubakar
10. Clive Grenyer - Draftsperson
11. Mr. M. R. Sialai - Committee Clerk/National Assembly

**ABSENT**

1. Hon. Fred Ojiambo
2. Hon. Abdalla Ngozi
3. Hon. Abdi Tari Sasura
4. Hon. Viscount Kimathi
5. Hon. Agnes Abuom
6. Hon. Kajembe Seif Ramadhan
7. Hon. Isaiah Kubai
8. Hon. Owino Charles Oyugi
9. Hon. Prof. Kivutha Kibwana

**IN ATTENDANCE – OBSERVERS**

1. Carren Angara
2. Juma Mafubo

**IN ATTENDANCE**

1. Dan Juma - Programme Assistant/CKRC
2. Rahma Jillo - Programme Assistant/CKRC

**FACILITATORS**

1. Emma Kamunga
2. V. Mwakio
3. Lucy Waititu
4. Albert Oirere
5. Ken Kidali
6. Johnson Ngigit

**MIN. NO.TWG/E/182/2003/2004**

**CONFIRMATION OF MINUTES OF  
THE PREVIOUS SITTING**

The Minutes of the Thirty First Sitting of the Committee held on Monday 23<sup>rd</sup> February 2004 were confirmed as a true record of the proceedings subject to corrections and were signed by the acting Convenor having been proposed and seconded by Hon. R. S. Sehmi and Hon. Victor P. Gituma respectively. Hon. Amina Ahmed led prayers.

**MIN. NO.TWG/E/183/2003/2004**

**MATTERS ARISING**

1. THAT Hon. Mohammed Abdi Haji came late and had been indicated as absent with apology.
2. THAT Hon. Rev. Margaret Muchai's name had been left out among the participants attending the Consensus Building Committee.
3. THAT the two Rapporteurs of the Committee had to attend another meeting and it was the reason as to why the meeting was adjourned.
4. THAT the names of the resource persons left out ought to be reflected i.e. Hon. Brigadier T. K. Githiora and Hon. Justice Jaffer.
5. THAT the motion on the Christian courts as was moved was not recorded in the minutes, and that it was differed until guidance was sought, the Temporary Convenor then referred to Rule 29.

**MIN. NO.TWG/E/184/2003/2004**

**CONSIDERATION OF THE  
ZERO DRAFT**

1. THAT, article 185(3) c be amended by deleting the words 'Christian Courts' between the words 'any' and 'traditional' to read as follows: -

(c) any traditional courts or local tribunals that may be established by an Act of Parliament.

**(Hon. Lilian Wanjira)**

Motion made;

**Debate arising;**

Question of the amendment put and Agreed to.

**2. Article 200**

THAT, article 200 be amended by adding the words ‘and submit to the jurisdiction of that court’ immediately after the words ‘Islamic faith’ to read as:

Article 200: Jurisdiction of the Kadhi’s courts.

**The Kadhis courts shall be a subordinate court with jurisdiction to determine questions of Islamic law relating to personal status, marriage, divorce and matters consequential thereto, inheritance and succession in proceedings in which the parties profess the Islamic faith and submit to the jurisdiction of the court.**

(Hon. Rev. Margaret Muchai)

Motion made;

Debate arising;

Question of the amendment put and Negatived

(Minority Report recorded from Hon. Rev. Margaret Muchai, that the said words be deleted).

**MIN. NO.TWG/E/185/2003/2004 ADOPTION OF THE COMMITTEES REPORT AND RECOMMENDATIONS (PAGE BY PAGE)**

1. THAT, on page 11 of the Convenor’s Report under the sub title Hierarchy of Courts, be amended by deleting all the words immediately after the words ‘under Act of Parliament’.

(Hon. Lilian Wanjira)

Motion made;

Debate arising;

Question of the amendment put and Agreed to.

2. THAT, on page 17 of the Convenor’s Report on the 1<sup>st</sup> paragraph, amend it by deleting all the words immediately after the words ‘relating to jurisdiction’.

(Hon. Margaret Muchai)

Motion made;

Debate arising;

Question of the amendment put and Negatived.

**MIN. NO.TWG/E/186/2003/2004      ADJOURNMENT**

The Temporary Convenor Rev. Patrick M. Musungu adjourned the meeting at 1.10 p.m. for lunch break.

**MIN. NO.TWG/E/187/2003/2004      AFTERNOON SITTING**

The meeting reconvened at 2.40 p.m. with the Temporary Convenor in the chair.

**MIN. NO.TWG/E/188/2003/2004      ADOPTION OF THE COMMITTEES REPORT AND RECOMMENDATIONS (PAGE BY PAGE)**

Having gone through the entire report the Committee adopted it subject to amendments having been proposed and seconded by the Hon. Fadhil Sultana and Hon. Victor P. Gituma respectively.

**MIN. NO.TWG/E/189/2003/2004      A O B**

Having completed its mandate the Committee thought that it was imperative for members to adopt the agenda of tomorrow i.e. 25<sup>th</sup> Wednesday February. The Committee RESOLVED that the business of the next day should be for confirmation of minutes.

**MIN. NO.TWG/E/190/2003/2004      ADJOURNMENT**

Hon. Rev. Patrick M. Musungu the Temporary Convenor ended the session with prayers at 3.45 pm until Wednesday 25<sup>th</sup> February 2004.

**SIGNED .....**  
(CONVENOR)

**DATE:.....**

**THE NATIONAL CONSTITUTIONAL CONFERENCE**

**MINUTES OF THE THIRTY FOURTH SITTING OF THE TECHNICAL  
WORKING GROUP “E”, THE JUDICIARY, HELD ON WEDNESDAY 25<sup>TH</sup>  
FEBRUARY 2004 AT 11.00 A.M. IN COMMITTEE TENT NO. 5**

**1. PRESENT**

- |                                   |   |                                |
|-----------------------------------|---|--------------------------------|
| 2. Hon. Paul Musili Wambua        | - | <b>Commissioner/Rapporteur</b> |
| 3. Hon. Ahmed Issack Hassan       | - | <b>Commissioner/Rapporteur</b> |
| 4. Hon. Rev. Patrick M. Musungu   | - | <b>Temporary Convenor</b>      |
| 5. Hon. Khadija Fugicha           |   |                                |
| 6. Hon. Waithanje Minjire         |   |                                |
| 7. Hon. Abdirahman Ali Abass      |   |                                |
| 8. Hon. Abdurahman Badawy         |   |                                |
| 9. Hon. Rupinder Singh Sehmi      |   |                                |
| 10. Hon. Benta Auma               |   |                                |
| 11. Hon. Fatuma Boi Bakari        |   |                                |
| 12. Hon. Lilian Wanjira           |   |                                |
| 13. Hon. Amina Ahmed              |   |                                |
| 14. Hon. Asli Ibrahim             |   |                                |
| 15. Hon. Victor P. Gituma         |   |                                |
| 16. Hon. Salim Ibrahim            |   |                                |
| 17. Hon. Fadhil Sultana           |   |                                |
| 18. Hon. Mohamed Abu Chiaba       |   |                                |
| 19. Hon. Zablon Nthamburi         |   |                                |
| 20. Hon. Shakeel Shabbir          |   |                                |
| 21. Hon. Francis Waweru           |   |                                |
| 22. Hon. Jane J. Kiptum           |   |                                |
| 23. Hon. Archbishop Zacheus Okoth |   |                                |
| 24. Hon. Hubbie Hussein Al Haji   |   |                                |
| 25. Hon. Sheikh Ali Shee Mohammed |   |                                |
| 26. Hon. Fr. Joachim Gitonga      |   |                                |
| 27. Hon. Owino Charles Oyugi      |   |                                |

**ABSENT WITH APOLOGY**

- |                                |   |                 |
|--------------------------------|---|-----------------|
| 1. Hon. Bishop Philip Sulumeti | - | <b>Convenor</b> |
| 2. Hon. Mirugi Kariuki         |   |                 |
| 3. Hon. Daniel Rasugu          |   |                 |

4. Hon. El-Busaidy Abdulghafur
5. Hon. Yusuf Mahmoud Aboubakar
6. Hon. Walubengo Lumatete
7. Hon. Rev. Margaret Muchai
8. Clive Grenyer - Draftsperson
9. Mr. M. R. Sialai - Committee Clerk/National Assembly

**ABSENT**

1. Hon. Fred Ojiambo
2. Hon. Abdalla Ngozi
3. Hon. Abdi Tari Sasura
4. Hon. Viscount Kimathi
5. Hon. Agnes Abuom
6. Hon. Kajembe Seif Ramadhan
7. Hon. Isaiah Kubai
8. Hon. Prof. Kivutha Kibwana
9. Hon. Kathurima M'noti
10. Hon. Onesmus Kihara Mwangi
11. Hon. Amina Abdalla
12. Hon. Issack Derrow Ibrahim
13. Hon. Victoria Mutheu M.
14. Hon. Gervase B. K. Akhaabi
15. Hon. Kembi Gitura
16. Hon. Godana Adhi Doyo
17. Hon. Dr. Nathaniel Tum
18. Hon. Ali Mustafa Yusuf
19. Hon. Mohammed Abdi Haji

**IN ATTENDANCE – OBSERVERS**

1. Carren Angara
2. Juma Mafubo
3. Peter O. Maanya

**IN ATTENDANCE**

1. Dan Juma - Programme Assistant/CKRC
2. Rahma Jillo - Programme Assistant/CKRC

**FACILITATORS**

1. Emma Kamunga
2. V. Mwakio
3. Lucy Waititu
4. Albert Oirere
5. Ken Kidali
6. Johnson Ngigit

**MIN. NO.TWG/E/191/2003/2004**

**CONFIRMATION OF MINUTES OF  
THE PREVIOUS SITTING**

The Minutes of the Thirty Third Sitting of the Committee held on Tuesday 24<sup>th</sup> February 2004 were confirmed as a true record of the proceedings subject to corrections and were signed by the acting Convenor having been proposed and seconded by Hon. Salim Ibrahim and Hon. Amina Ahmed respectively. Hon. Sheikh Ali Shee led prayers.

**MIN. NO.TWG/E/192/2003/2004**

**MATTERS ARISING**

1. THAT under **Min. No. TWG/E/184/2003/2004**, on the minority report it ought to have the said words read as ‘reinstated’ and not ‘deleted’ as had been indicated. That the minority report was not a minority report perse under provisio 45(15). However, it should be recorded as a deviating position.
2. THAT under **Min. No.TWG/E/188/2003/2004** that the Committee adopted the report and the Zero Draft subject to amendments.

**MIN. NO.TWG/E/192/2003/2004**

**ANY OTHER BUSINESS**

The Committee members RESOLVED to allow the Rapporteurs finalize on the report that will be presented in plenary.

**MIN. NO.TWG/E/193/2003/2004**

**ADJOURNMENT**

Hon. Rev. Patrick M. Musungu the Temporary Convenor adjourned the meeting at 11.40 a.m. Hon. Bishop Zablon Nthamburi led prayers

SIGNED .....  
(CONVENOR)

DATE: .....

**APPENDIX G  
MOTIONS**

1. Article 185 (4)

‘The superior courts of record shall be the Supreme Court, the Court of Appeal, the High Court and the Industrial Court’.

(Hon. Isaiah Kubai 448)

2. Article 185 (4)

‘Without prejudice to the generality of paragraph 3 (b) above, parliament shall, within 6 months of the coming into force of this Constitution enact a law to provide for the establishment of an industrial court, its powers and functions, appeal structure, the recruitment of the officers serving in that court and for matters connected therewith and incidental thereto’.

(Hon. Isaiah Kubai 448)