

CONSTITUTION OF KENYA REVIEW COMMISSION

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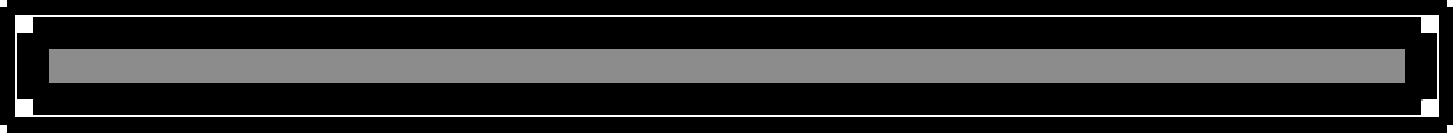
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PLENARY MEETING HELD AT LEISURE LODGE, MOMBASA

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CONSTITUTION OF KENYA REVIEW COMMISSION
PLENARY MEETING HELD ON AUGUST 31, 2002 AT LEISURE LODGE,
MOMBASA

Present

- | | | | |
|----|-------------------------|---|------------------|
| 1. | Prof. Yash Pal Ghai | - | Chairman |
| 2. | Com. Abida Ali | - | Vice Chairperson |
| 3. | Prof. Okoth-Ogendo | - | Commissioner |
| 4. | Dr. Domiziano Ratanya. | | “ |
| 5. | Mr. Ibrahim Lethome. | | “ |
| 6. | Dr. Mohammed Swazuri. | | “ |
| 7. | Bishop Bernard Njoroge. | | “ |
| 8. | Dr. Abdirizak Nunow | | “ |
| 9. | Dr. Githu Muigai | | “ |

10. Dr. Mosonik arap Korir. “
11. Mr. Mutakha Kangu. “
12. Ms. Nancy Baraza. “
13. Prof. Wanjiku Kabira. “
14. Mr. Zein Abubakar Zein. “
15. Mr. Isaac Lenaola. “
16. Mr. Isaack Hassan. “
17. Mr. Riunga Raiji “

Drafts Team

Mr. George Nagota
Prof. Crabbe

Verbatim Recorder

- Hellen Kanyora

Meeting was called to order at 8.30 a.m.

Com. Hassan: -- I think we should continue because we have been given a mandate by Kenyans to do our job and we went ahead with the work. The Review Act says that the Commissioners are immune from Civil and Criminal liability while they are in the course of their work and whilst they are proceeding to and returning from Commission. So I was wondering whether we could still go ahead and technically speaking be in contempt of court and still waive our immunity under the Act.

Com. Lethome: If I could add my voice to what my colleagues have said. I think the Court Order is just the tip of the iceberg. There is more politics to it than what is in the court order and the whole idea boils down to one thing, that there is a deliberate attempt to delay us in our work for obvious political reasons. So my approach would be that we waste no time, we try to make the best use of the time that we have at hand and cover as much ground as possible while we are waiting for the service of the injunction and maybe other consequences. But we should try as much as possible and make use of the time that we have at hand, do as much work as possible, cover as much ground as possible. Thank you.

Com. Prof. Okoth-Ogendo: Mr. Chairman, I am in doubt that we are not dealing with a legal judicial process. We are dealing with a political process and a political stratagem, designed to demonstrate that this Commission cannot deliver, cannot publish a report in the course of September and once that is clear, the political process out there whoever has that interest can justify other action on grounds that it is now absolutely clear, that the Commission cannot finished.

Therefore whereas I understand the legal argument that we may have to deal with, I am clear in my own mind that a judiciary that is prepared to be used for this kind of political purpose does not the respect that it is looking for and I am certain in my own mind that at this point in time, this Commission must work as expeditiously as indeed the Act says we should. We now

must be on first track, first forward what we are doing and finish up the work within the time that we have set for it. If we can do it earlier, so much the better and I think one of the things that we were discussing down there is that we must use this weekend very very economically, very wisely, pass on our drafts even before we discuss that in plenary to the drafts people. If there are any changes as a result of plenary discussions, those ones can be attended to but we really – clearly now, the process of report writing and drafting must move simultaneously and very quickly.

I want to put this on record Mr. Chairman. That if it comes to defying the Court Order, I am prepared to do so in pursuit of this exercise.

Com. Kangu: Mr. Chairman, I would like to add also that the problem at hand is a political problem. Maybe we have not handled it properly right from the beginning or it has slipped out of our hands but even so, we still have to find a way to deal with that political problem. As Okoth-Ogendo has said, it is clear that certain political quarters apparently do not want this process to go to the end and we must strategize very well to see how to deal with it.

I agree we must work very fast, we have not received the court order yet, but even if we received, I would like to take the position based on the argument we had yesterday which my colleague called ideologue that infact the theory of the Act is that it is the people of Kenya writing the Constitution not the Commission and that if the suit in court is against the Commission then there is *non-jointer* and they should sue the people. That they cannot do in that ideological approach and we just go on. Being a political problem, it is important that we go on, but it is also important that we set in motion some political machinery, or some machinery to handle the politics. We must ourselves also be able to use our ability to see how to maneuver around those politics and make sure that we get the right political quarters on our side to see whether they can help us to calm down this. So we must move on that political plane.

Com. Dr. Githu Muigai: Mr. Chairman, I want to associate myself with those who have stated that this reason to maneuver cannot be anything but mischievous to the extreme. It has no legal basis, cannot have been issued by any court that can seriously be considered to have taken into account the law and the precedent. If we were ever wrong in our thoughts on the judiciary, this indicates that something very drastic needs to be done there. Having said that, we must now move in a practical focal.

My first suggestion is this, as a matter of law, we become aware of the order once it is served upon us. Indeed, as we speak here, we are not aware about its contents and that is why as Abida has suggested, we don't know whether it says don't discuss the judiciary or don't discuss the Chief Justice or don't discuss another sacred cow, we don't know. So we have to wait and be serve with the orders in a proper way.

In the meantime, we have accepted a public duty, we have received payment from public coughers to do a public job, we must continue until the 11th and 12th hour. In my judgment therefore, today, tomorrow, Monday, until such a time as we are served

with an order that is clear, that is precise as to what we ought to do and what we ought not to do, we must continue. That is the second/

Thirdly, I think we ought to – as soon as we are in a position to do so, we ought to receive a legal opinion because as John Kangu has mentioned, we are a Commission that enjoys immunity. I remember the same judiciary a few years ago issued an injunction against Parliament discussing a motion or enacting some law which parliament treated with the very contempt that it deserved and the matter went to sleep. We must seek a legal opinion, do our immunities under the Act allows us as my judgment tells me we should treat this kind of orders with the contempt that they deserve.

Finally Mr. Chairman, I want to associate myself with Okoth-Ogendo's suggestion. That whatever we will do eventually, for the next 48 to 72 hours, we must accelerate the pace of our work and move on. That is what the Kenyan people expect, that is what every self-respecting professional would expect of himself and let this problem clear out in the court of public opinion and the public will tell who is right and who is wrong.

Com. Zein: Thank you Chair, the record will show that speaking for myself, I have not always been on the legal side of things. When we were Commissioners in the People's Commission of Kenya, we did not have an Act which protected us neither did we drive GK cars. Infact wherever we went, we were hounded and approached as enemies of the State. The question is right and wrong. Simple as that. Each one of us will have to make a decision what is right and what is wrong. What I would suggest Chair is that one of the things we should not do and I think this very important. One of the things we should not do, we should not allow an action like this. Because when an action like this is taken, it should assume that it has taken time to develop and people have given serious thought to what they want to achieve.

One of the things they are hoping to do is to unsettle us and unsettle us so that we rush our judgment and we take certain decisions which later on we will not either be proud of, or we will look back and say we wish we would have taken a little more time to think about. I know it is a gut feeling now to say, take many shortcuts. Let us take so many shot cuts that we can have even a document by Wednesday. I know in my heart the same way I know that this Order is wrong, taking shortcuts is wrong. I will resist this, in my opinion, immoral order, the same way I will resist attempts to make us take short cuts which will not in the end give our people the document that they deserve.

I think we need to be resolved about this. Obviously we need to be much more focused, we need to increase the pace of our work, but increasing the pace of our work does not mean for instance, that we can say "take all the documents to the drafts people even before plenary has had a chance to look at it". I think we can expatiate the work in many other areas but I beg us to think through some of the things we are proposing.

Now let me go to specific suggestions in terms of how were need to go on from here. One of the things we need to start

thinking seriously. Some of us were worried before coming here, that we will have to worry about our security and we will need to think seriously about security issues because some of us came from an orientation where that was paramount. You have to survive in order to continue with the work.

Secondly, we need to have people strategizing. We have to meet to have a small strategic team. Which will then process all ideas that are coming from us, some of them are emotional, some of them passionate, some of them are been given at the heat of the moment but we should have a small team looking at these things and following through each action, what are the possible consequences for each action we are taking. So we must be very deliberate about this.

Thirdly, we must start building a sense of unity. When we face external obstacles, we should poll in together internally. So we must start forgetting our little squabbles, they are not worth it. If we have little differences we forget them now and focus on the big picture. Also, it is absolutely important to walk together and this I cannot over emphasize. We must walk together. If we do not walk together, some people will start falling off and one thing we should never do, we should not close the door for those who feel for whatever reason, that they cannot be party to walking together. If somebody wants to quietly walk away, we should not call them names, we should not impute improper motives, we should leave that door open and I think experience has taught some of us that normally when the going starts getting tough, in this case it is not the Commissioners who will be the first target, it will be for the weak ones, who they consider weak strategically so they might start going for our members of staff. So we need to start preparing people mentally for the long haul. It is easy to say; "let us do this" but we need to start preparing ourselves mentally. Some of us have learnt that preparation is good. Preparation means also trying to figure out, who the enemy is and what their plans are and half of our battle will be won

Lastly Chair, I think that it is absolutely important now, to have the Commission continue with its work, some of us do not want to talk too much about these things, but what is right is right and we have faced guns before, we've faced *rungus* before, we've faced machineries which are sometimes impossible to imagine but if people are united with a common purpose and I believe that we are doing is right and just and I do not think the oath of office we have taken minds us to do anything else and particularly when we went around this country and people kept on telling u; "*How will we be sure that you will do what is just by us? You are asking us to come and you our views, to trust you, how can you guarantee that we can trust you?*" So in order not to become distrustful like many other processes, we must stick in for the long haul. Thank you chair.

Com. Dr. Nunow: Thank you Chair. I think I would like to start by saying that since we have not been served with the order yet. Certainly the specifics on how to proceed are probably not as yet what we should be discussing, but the generalities of how to ensure that we can continue carrying our mandate as we await the detailed specifics of the Order. Chair, I think there are two things that we have to learn from this kind of reactions to the Commissions work. One, the need for walking together, that we should never have internal secrecies and lack of information and more information with some Commissioners and not others, so that we have a joined position always. We would not be in this kind of scenario if we had done that. But that is now, I think

something that is already in the record, that the Commission made a decision regarding this draft which happens to be the subject of this injunction, that indeed it is not a Commission document and that can be reflected by the minutes.

The second major fundamental problem is in my opinion the perception of Kenyans. We have had enormous lack of trust and suspicion as we conducted the hearings and particular in Western Province when already there was probably an indication of a draft in the pipeline or something like that. I remember in Amagoro, Honourable Ekirapa taking about 1 ½ hours lecturing and that almost coming to very closely to telling the people not to give their views. Your views are been taken for public relations exercise, you may as well disperse! It took Commissioner Kangu and myself another hour to explain and get the confidence of the people. This in my opinion is a critical point. What exactly is the intention of those behind this kind of injunction?

My own feeling, instincts tell me that there can be no other thing other than of course generally to disrupt the process and delay it but not only that, but do it within the mechanisms of the people and messing with the perception of the people is the most fundamental blow that this process can withstand. It cannot because we are going to prepare a draft after which the debate and all that will follow and a conference is supposed to be convened. My instinct tells me that some of these injunctions and credibility questions are been raised to prepare the public for boycotting the process. We cannot underestimate that because if people are convinced that infact this draft existed even as your views were been collected in the field, then this people will not have any reason for participating in a conference that is supposed to be discussing what is supposed to be their views but in their own mind not their views. While our conscious are clear that we are dealing with Kenyans views and whatever recommendations we give will be based on Kenyans views the perception is a critical thing that takes time to change and we need to strategize as Commission Zein said again and ensure that we take care of that perception issue so that we do not have loss of faith by the Kenyans.

The conscience and our credibility internally is a different issue all together. We know we are perfectly doing the right job but how do we convince the man out there, in Somalia border? In Busia? At Uganda border? In Marsabit in the middle of nowhere and in the remote areas of Lamu that indeed this is the case and that what they see out there in the press and electronic media that have wide dissemination is of some individuals who are selfish and who have other masters to serve. We need to address that and if we do not do that, we might doing an exercise in futility.

We need to expedite the exercise while addressing the perception issue and repainting the face and confidence of Kenyans. This is one process, if ever there was one, in which Kenyans paint the entire hope and aspirations for redemption and we will have done them enormous damage if we do not address the perception issue and then give assurance that we are working on their order and no amount of anything to the contrary in the field of your media communication will change that. Thank you chair.

Com. Prof. Wanjiku Kabira: Thank you very much Chair. First of all, I want to associate myself with the statements from

Zein and suggest that I agree with others that I think we need to move first on this process and begin as soon as possible. I also wanted to say that this looks like a detailed - I asked whether we can be served with the Court Order over the weekend and I was told no, it can only be done on Monday. Nyegenye tells me it can be done today.

For the purposes of preparation, I think it is important to know that we can get it any time if that is the correct position so I thought that maybe it is good for us to confirm which ever way. I also want to agree with Zein that it is very important that we continue encouraging our staff because some of them are quite young people so the political anxiety will lay much more heavily on them maybe than many of us. I also again want to agree that we need a small team to actually be preparing political strategies. How do we move from here and what are the various options and if these options happen, how do we proceed as probably many of us continue working on the draft itself.

Prof. Yash Pal Ghai: Bishop and then I would like to round up.

Com Bishop B. Kariuki: Mr. Chairman, I was just coming from where I am staying and I happen to meet with many people who had read the paper and listened to the news and one thing they told me is go and tell Commissioners not to be destructed we understand what is happening. Some of these people I do not know them but the perception with the people is not going to be that bad. Infact, let me say this, this is the best that would have happened to us because in a way we have been accused of been so much pro-established and the very fact that we are now been fought in and out shows that now we are credible! So we should not really look at it as very bad.

The second thing, I am talking about what you and me have spent within this process for the last two years. We have earned from the people's coughers so it is important for us to finish because we do not want to go in the historical books as people who spent so much and did not do anything for this country. That I want to agree with Zein, first he has said we must be united. Secondly he said we must have a war committee whose duty is to advice us so that we can remain united and focused.

The draft Constitution – sometimes people who know where they are heading to, in certain ways they are helped to get to their end by - for instance, this so called draft which we rejected in the committee has become a tool for someone to destroy the process and to destroy the future of the people of Kenya. Zein said, those who want to pull out as Commissioners, we should not call them names because we are not the judges. Judgment will come later on when everything is finished and now people will look at things in perspective. So we should not hate anybody, we should not talk about anybody doing what or what, what we should do Mr. Chairman and remember this is coming – we were going to meet the Head of State and he said he was not going to meet us. O.K?

The second issue is, we are here very busy writing the Constitution, somebody goes to court. They are not the first, people get moved to go to court because I have a history of that, not for good, - so let us not be worried Mr. Chairman. As Zein said, let

us work hard, let the process go through us so that nobody accuses us that we are working hard without really going into the details. Let us come out with our document but I also do feel that when we get the order, I don't know whether it will be subjective to give out our minutes and say "we do not have a document and these are the minutes of our last meeting and there is no document that has been written by the Commission" but also please, let us not isolate the Chairman. Because in our Scriptures we read you strike the shepherd and what happens to the sheep? They will be scattered.

We may have our own weaknesses, but let us not go to the past, let us try to look at the future so that we can hold together for this nation rests on us and we are going to have so much support.

I want to conclude by saying this. I agree with Nunow that we must address the people of Kenya but deception has no logic. It cannot continue unto the end. It will go somewhere and it will be lost. We have the truth. We are determine to come with a Constitution reflecting the people of Kenya. that is the truth. The truth has never been won. It is only when we ourselves do not stick to the truth that we are going to look at the views, we are going to work at the document ourselves and truth never will find its way, so let us not be worried. Let us continue working and we hope that the powers from above will also be with us.

Com. Nancy Baraza: Thank you Mr. Chairman. I happen to be the only one who was blissful at night. I did not know of this Order but I think this is something which has been planned over some time. It has been going on through the minds of the powers that be even before this purported draft order. I did meet with a judge twice, who actually called me names. She abused us, she said "you fools! You don't know what you are doing!" she called me all manner of names and twice, not just once and she told me you cannot do away with a whole arm of government and she just told me you will see what will happen and we have just been meeting as judges and we are going to court. I though it was a joke! But the fury with which she called us names I could not believe, but she said exactly this.

Now, this report is just been used to create a basis for crippling this process. I don't think it is the report. They are some people who do not want changes in this country and the judiciary is one of them and it is the best weapon that anybody else would want to use because as she called me names she said that they had all met and said they would go to court. So you can imagine which judge will we go to and convince that we are upto some good? I don't know but that is such a good weapon.

Now, this report I believe – I don't know, whoever sourced it from the secretariat. I have good reason to believe that one Commissioner or Commissioners took it directly to the newspapers, to the media houses, that was a Commissioner in cohort with others. They took it to some senior government fellow who took it to State House and the abuse of that judge was like it is now a matter of the entire government and they are going to be a tool. So I concur with my colleagues here that we have to find a way of sticking together and to be wary of enemies within because this thing is been done from here and even as we discuss things, things are relayed to Nairobi by two Commissioners who would only want to appear here when it is convenient for them. I know if for a fact Mr. Chairman, I am not lying. That we have to stick together. – I will not do that and I believe

God is my witness an I believe God deals with evil and they will be dealt with, but we have to stick together. – yes I think it is an issue. I know this is a big plot by the government and we have to stick together. I don't know how, but this is a bigger plot than we think and what a better weapon than the judiciary.

Com. Raiji: Thank you Chair. I associate with the sentiments of those colleagues who have spoken particularly what Dr. Nunow said. I think the process has had its enemies right from the time of its birth. Part of our part one report traces the history.

Attempts to sabotage the process has been continuous and persistent even after we surmount to the present obstacles, there will be further obstacles and I think as Commissioners we will have to continue to make choices. Do we faithfully reflect the wishes of Kenyans who have paid us enormous amounts of money and sustained us and supported us since its inception upto this time or don't we? So even as we proceed, I think that it is necessary that Commissioners have to make a decision individually and collectively on where they stand.

I do not want to lay blame on anybody, people have made their own choices and will continue to make their choices, each choice has its own consequences and repercussions but I think my view is that let this not distract us from the reason why we came to Mombasa. We have not seen the order, we do not know what it says, we don't even know whether it affects us or whether it does not, that has not come. We proceed with work but taking into account that the enemies of the process have now seemed to have moved to a higher gear, I think it would be in our interest to expedite to move very fast with the process but ensuring that we mover faithfully and we are implementing the wishes of Kenyans.

I have no fear myself that intimately, the process will be completed and if they will be casualties on the way, I think we leave such things to God.

Prof. Yash Pal Ghai: Thank you. It seems to me that there is a general and very strong support for continuing with the work even when the notice is served, individuals may have to choose which way they want to proceed. Some have said they will continue regardless, others will need to consider the implications for themselves but we agree that we will proceed with due speed on our work and I would suggest that we take today the paper from committee IV, which has been distributed and if there are other drafts which are ready we could discuss them after distribution later in the day. I believe that we do need to set up a little committee to man our strategy, if it becomes necessary to explain to the people I think we should do that through some statement. I think we need to be very united and we know who are the enemies are within but I think we should not let them distract us, but I think we should continue with our work because we are convinced that that is the right thing to do.

I also have in this morning come across lots of people in this hotel who have all come to me and said how much they support the Commission. How anxious they are that we should continue with our work as speedily as we can and they expect us to give them a Constitution in the next few days. So I think we do have a very significant public report for carrying on with the work. So I would like to suggest that we set up this committee which can gather some more information, some more opinion and

constantly keep under review the situation and to advise us what action that might be necessary.

Secondly, I would suggest that we meet today maybe after a very short break and Nancy can introduce the paper on Human Rights and then the recommendations which I believe have been pulled together separately and we continue with that paper until we have made our decisions on the recommendations there. Then we shall review whether there is possibility of taking up another report which might be ready by the end of the weekend. So if that is so, then I think we need first to see who would serve on this small committee that many of you have recommended. I don't know if you have any suggestions?

Com. Prof. Wanjiku Kabira: I would like to propose Zein to be in that committee.

(Debate on the floor)

Prof. Yash Pal Ghai: Yes, then Bishop, Prof. Okoth-Ogendo, - -

Com. Hassan: *(Interjection)* I don't think this is – we are not forming a Thematic Task Force here, we are forming a much more important group and I think we should think through the people we want to put up in that committee. While I support the issue of going on with our work, I must take heed what Zein has said. We should not be seen to be subverting the process again so that we end up falling into the hands of those who have gone to the courts in the first place. So Mr. Chairman I think while we need to work very hard and expedite the process, we should not be seen to be cutting corners and I would be very worried if that was to happen.

The kind of committee we would want to set up is one that would look at the bigger picture. Although we want to stand together united and we want to fight and be independent. We all know that you cannot fight the government, at the end of the day you are going to lose. Others have discovered that already.

I think we should – maybe what we need to do, I have heard it from our colleague from South African this morning telling us that we need some sort of mediation. Some sort of mediate between the Commission and those that we think are unhappy with the way things have gone.

Com. Dr. Githu Muigai: *(interjection)* Point of order. Hassan is talking about Terms of Reference of the group and we are in the group itself.

Com. Hassan: Yes, but before I come to the group - the people I want to propose to the group. I wanted to set out the context in which we want to appoint those members. People who we think can help in trying to bridge that gap. Perhaps the breakdown in communication or the lack of communication between certain sectors of the government and the Commission or

the suspicion that has been created. So, when we are forming this committee I think we will need that kind of a group and we may even want to include some one for example like the Attorney General who is also a Commissioner of this Commission. Although he is not here now, I think he would serve a very useful purpose in that kind of a committee and we could even think of people who we think have been involved in the Review process. They are not necessarily Commissioners but perhaps people we think could be very useful also. I want us to look at the bigger picture and like I said we are not forming a thematic task force so Mr. Chairman I was going to propose that you and the Chair of the Research and Drafting Committee, sit together and think through and perhaps propose to us people whom you think we should approve so that they can be approached and perhaps they can start doing some work for us.

Coming to the law suit pending, I think while we want to go ahead with our work and do what we are doing, I have read the report, I want to imagine that it is a Judicial Review Proceeding which was filed and that perhaps there is an Order of Leave was granted and that Leave has been granted to that is probably what happened and it is wrong but that is what I think happened and it is also very unusual that that could have happened. I think as a Commission, once we are served with Order, must move with speed. While we are going ahead with our work, my view is that we should fight from all fronts. We should not limit our options. Even as we do our work and we go on with our meetings, we should also appoint a lawyer, preferable the same one who presented the Commission at the initial law suit by the judges, who can then go ahead and try to even

Prof. Yash Pal Ghai: Sorry, what are you proposing? You are proposing that we leave the committee till Monday.

Com. Zein: Yes sir. Both the Committee matter and this process ,discussing of the paper by the Thematic Group led by Commissioner Nancy Baraza. It might complicate things in a way, which we do not want. It might be misread in a way which I don't think we want at this time to have that kind of mis-interpretation Prof.

Com. Kangu: Mr. Chairman, I have one issue which I would like to share with the members so that when we move on we move on clear in our minds that we are not again falling into traps of others. While I was having lunch, I received a call from Hassan who said he was already in town and also another call from Commissioner Mosonik who also said he was town and both of them were of the view that this meeting we want to hold this afternoon has not been properly convened in terms of the rules we based yesterday. Their reasoning is that the programme was that today we have Thematic Task Force meetings but because of the reports about the Court case, an emergency meeting was called for this morning, which they say some members were not aware of, and it was at the morning meeting that it was changed and said that we have that meeting this afternoon. So, I just want to share with the members so that we think about it before we proceed. My fear is that they are those who will go and say "*you see, they are now even calling meetings secretly to pass things without notifying other members*".

Com. Githu Muigai: Mr. Chairman, I am concerned first by the question of how a member of this meeting intending in good faith to communicate a reservation as to the activity of the meeting would do so. If a member was here in the morning when we

deliberated and arrived at the conclusion that we should meet in the afternoon, it would appear to me that if he was acting in good faith he would raise such matters at that point.

We had a meeting in the morning, this is an adjourned meeting. This is the continuation of an adjourned meeting. We had quorum then and even if an argument could be made that there was a programme that we had agreed earlier and even if an argument could be made that under the rules, we would have to follow the programme we have adopted, it would appear to me that our power to vary that programme under the Zein rules was not taken away. It is obvious that in the morning when we agreed to meet and discuss this report, if that is the interpretation to be attached to it, we varied our programme and there was no dissenting voice.

Finally Mr. Chairman, we anticipated this. They are those who would try to put every conceivable impediment and if we try to find the rational explanation for their position, we will be wasting our time. We have a job to do, we have a limited time, let us get on with it.

Com. Raiji: Thank you Chair. I share the sentiments of Commissioner Zein and Commissioner Githu, but I think there is no need of splitting hairs over this issue. It is obvious and manifestly evident that there may be some of us who obviously would want to employ all manner of tactics to prevent the Commission from fulfilling its mandate. If I understood correctly, when we came for a retreat in Mombasa, it was meant to be an intensive working session, whereby we expect to work at night and over the weekends.

Secondly Chair, we are doing this because we are under tremendous pressure having already been given a statutory deadline which we must comply with, unless we do not want to fulfill our mandate and in my humble views chair, the fact of the matter is that we adjourn this meeting, to table the report which had been circulated a day before and if a Commissioner chooses not to attend without apologies, I do not think we should allow ourselves to be held at ransom. We were here in the morning, it was open to Commissioners to seek to be excused from this meeting if they indeed had a valid reason for doing it as we normally do and I would move that we proceed with our business as scheduled. Thank you.

Com. Lethome: Mr. Chairman, much as I would like us to proceed and that is why I am here precisely, but I think we need to give consideration to what we are hearing from other Commissioners. It is true that until the new development, we were today to have our Thematic Group meetings, but because of the new development we decided that we want to carry out our work expeditiously and that is why we decided to meet this afternoon. But Chair what we are hearing out there is that some of us would like to have an excuse to further give as evidence to the fact we are trying to short-circuit the process. So, I would really plead with colleagues and I do not fall in that category of Commissioner who are lazy who are trying to avoid working, but I think it would be worthwhile for us maybe to reschedule this meeting for Monday. Meanwhile maybe that group that we were thinking about, which I would call maybe a think tank, maybe we should continue meeting and consulting because we

need really to know the full implications of that Judicial process of the Court Orders which upto now we don't know how they are going to affect our work. So I would really plead to fellow colleagues that let us listen to those voices that we are hearing out there from our colleagues.

Com. Prof. Okoth-Ogendo: Mr. Chairman I take it that whenever the Commission meets and is quarried, it has powers to make decisions and we are not going to be saying that it is a particular type of Plenary meeting that can make decisions and others cannot. On that premise, we meet, we were quarried and we made decision and the rules that we passed allow us to schedule weekend meetings if it is necessary to do so, so that decision clearly was a decision of this Commission. When we meet here in the afternoon, there is nothing wrong in revising that decision and I believe that that is the spirit in which Zein has vested. So, we can at this meeting, make a decision that says we do not proceed or a decision that says we proceed but the authority to make that decision cannot lie with people who have chosen not to be at the meeting and are basically saying because they are not there, the Commission cannot proceed.

So, I would myself suggest that we re-affirm a decision to continue on the basis that we have authority to make that decision even now but we also have authority to postpone it.

Prof. Yash Pal Ghai: I gather that the sense of the meeting is that we should proceed. We are running out of time, we have to work expeditiously, we know that people are using tactics to delay meetings, we know the bad faith of some Commissioner and I think those of us who want to work should be allowed to get on with it.

Com. Zein: Thank you Chair. In the morning I said that it would be very important for us to have a process which will make us walk together. I think that is already been tested and I think Chair, although we have a right to make decisions, I think we also have the discretion to make this decision with wisdom. I am not saying that I have more than others but I think I have less, but the point is Chair, I think there are four issues which need to be identified.

The first one, the morning meeting was called as an emergency meeting in response to the purportedly court order which we saw in the news yesterday and in the papers today and I think it was the right think to do. From there, we went into two other decisions which was one; to establish a mechanism which will then refine our positions and our strategies as a Commission to counter those ones that will delay us and also that expatiate the work, if we can work as fast as possible. This was postpone to afternoon where we can then talk about the committee and also the work

They are people who have reservations that maybe we should have the whole Commission here so that when we make this finding decisions, if somebody decides to walk away, decides that we are going to have tactics, then we will have all the justification in the world to then stop that person or to continue with the work but if we allow a small matter like working on a Saturday/Sunday and waiting till Monday, particularly in view of the other Commissioners feelings and I can assure you Prof,

we said if we had talked about rules and one of the rules we passed was not to impute improper motives on other Commissioners. I can assure of at least two Commissioner who I know, it is not their intention to make this process slow, it is their intention to give legitimacy to action which will then be deliberate, will be reasoned, would have given everybody a chance to be with us, but if it is the will of the Commission that this matter proceeds, then Prof, I will beg with a lot of respect to be excused from the session. Because when Dr. Githu says that it is with good faith somebody to be here, I am here with good faith and I have laid the matters on the table the best way I know how and I am begging the other Commissioners, to allow reason to prevail so that we are able to consult and build consensus. I think this is also an issue of consensus and build consensus on this issue. We should not be seen that we were hoping we will get this kind of challenge to take short cuts. Thank you Chair.

Prof. Yash Pal Ghai: In all due respect this is not shortcut, I descent that expression.

Com. Zein: (Interjection): Chair I apologize. I am not saying that we are taking a short cut. I am saying that – I had said earlier, there is mis-representation Chair. If you think I am saying this is a short cut. If I believed this was a short cut I would not be here. I am here because I want to make myself heard. Thank you Chair.

Com. Bishop B. Kariuki: Mr. Chairman I believe we are going through a very difficult time and I guess there are things which you do not know. My sixth sense tells me that we continue with this meeting on Monday we are going to waste the whole morning arguing why the meeting was held, quarrelling, we can even waste the whole day on Monday.

I would like that we start the week together, so that we can be able to work be able to beat the deadline. I feel very bad that we all I have to be here but I can see the danger that is going to retard our progress the whole of next week. So it is us to decide – my sixth sense tells me that we may waste the whole day on Monday trying to argue and fight for nothing. I don't know what to say, but I am a little bit worried. I can see where we are been led to and we really have to use wisdom so that we do not fall into it.

Com. Prof. Okoth-Ogendo: Mr. Chairman, that was Dr. Maranga's calling me from Kavesta's home. I talked to Dr. Maranga and Commissioner Asiyo in the morning, I told them we were holding an emergency meeting, they know that we are holding a meeting, but that is not my point. Mr. Chairman, there are ways perhaps in which we can approach this. I would propose that we look at this draft informally and we will re-table it again on Monday and that the Commissioners who are here, should look at it and give their assessment of that draft. if on Monday it is necessary to formally table it for reasons that are coming around the table, we should be able to do so. I think we continue with it with the understanding that this is an informal meeting. That would be my suggestion.

Com. Dr. Githu Muigai: I have no problem with the suggestion by Professor Okoth-Ogendo, except that I would like to say

something on the issue of principle. You must forgive me Mr. Chairman if I appear to repeat myself. As a lawyer, I have tremendous discomfort in permitting a situation where fragrant disobedience of rules or regulations or decisions yields a reward for a person who does so. If we sit here and decide on a specific course of action, yet allow people violating that decision to hold the entire process hostage, that by withdrawing my participation, I have brought moral blackmail and therefore the process will not continue, I have a difficulty with that because then I do not know where we shall draw the line. What is to happen on Monday when we reconvene? Should we have another set of people who for another set of reasons will say “we cannot again hold the meeting now, let us adjourn until Wednesday, read the subtext, let us wait for an order of sort...” I think that there is an issue of principle there Mr. Chairman.

My last point is about my brother Zein’s comment about good faith. I believe all of us, in the speeches that were made here in the morning, we said that any person who for any personal reason, chooses not to participate in our further deliberations, we shall understand and shall make no remarks relating to that decision. But what we have now, is not a person saying, “I will not come to the meeting because I do not think it is proper ...”, he is saying; “I am not coming, but don’t go on with the meeting yourselves who are there..” I think that is all.

Com. Prof. Wanjiku Kabira: Thank you Chair. I must say that I am glad that Prof. Okoth-Ogendo came up with an alternative because in a sense although we are talking about legal technicalities and so on, I think we still have to keep reminding ourselves that the building of consensus within I think is very very important. I was just thinking about what do we have to lose if we did not discuss this document now, but discussed it on Monday morning. What do we lose? And I was feeling that I think there are many of the Commissioners that we want to carry with us, so it is a small price to pay to postpone this particular meeting and to be with many others on Monday morning. That was going to be my position. But I think Prof. Okoth-Ogendo’s proposition that we discuss this informally, makes it even better because even we can spend less time on Monday on the same paper and move on to the next one.

Having said that, I think if there are other papers we can table on Monday I think we need to think about distributing them within the course of the day so that those who can get time to read are able to read them.

Com. Raiji: Thank you Chair. This is a very painful afternoon. First of all Chair, the time has come when people have to take certain decisions, as individual Commissioners. The process is an under assault and one of the instrument of the assault is delay. I have no fear myself in saying that part of the lack of some of the Commissioners is obviously because they intend to slow down the process. I agree entirely with the reasoning behind my brothers Lethome and Zein, with whom we have come from very far and it pains me tremendously to see that we are not able to carry the rest of our colleagues with us. Now, whereas I for myself would like to go an extra mile to bring people on board, I think if people choose not to get on board, we really have no mechanisms of getting them there.

The other thing is – and this is an appeal to my brother Zein, irrespective of whatever decision the plenary takes, I would argue you to remain behind because probably it would be – if I myself felt unhappy with a decision taken, a decision that goes against what I consider to be right, I think we have some formal collective responsibility to participate as a Commission even if maybe our views do not prevail and other views do prevail. I know that at least for those of us who have come here, we have come here because we want the process to go forward and I would myself have proceeded with the debate this afternoon. Maybe the best we could do is perhaps debate it ourselves formally, not informally and then perhaps when we come on Monday morning, we can take views if any from those who might want to make a contribution but were genuinely unable to come today. But I think we would be setting a bad precedent, if a group of people who would by walking out or absenting themselves deliberately, paralyzed the work of this Commission. I would think that would be a very dangerous position to take. Thank you.

Prof. Yash Pal Ghai: I think as Chair I would like to rule that we proceed with this meeting. I have the responsibility under the Act to direct and supervise the work of the Commission. The extension given to us by Parliament comes with the conditions that we complete our work expeditiously, people of this country are waiting for a draft Constitution from us. A lot of us – people in this room have given up their afternoon prayer so they could be here, people who are now asking the meeting to be adjourned were here in the morning, they had every opportunity to make their points, it was Zein who moved the motion that we meet at 1.30 p.m. to resume our business and I don't think it would justify now to derail our work any more. So I suggest we proceed with the meeting and then if people on Monday have some objections to a particular set of recommendations they can express them but I really believe that we ought to proceed with our work.

Many committees are not distorted, thematic committees are meeting. I know some committees which have done very little work. They hardly met in Nairobi when we had attendance there, they haven't really met here much, they have made very little progress on some crucial issues and these are delaying tactics and I do not want to play to their hands. So I suggest that we now proceed and I invite Nancy to now proceed with her paper.

THEMATIC TASK FORCE GROUP IV

Com. Nancy Baraza	-	Convenor
Com. Salome Muigai	-	Member
Com. Ibrahim Lethome	-	“
Com. Musili Wambua	-	“

Com. Nancy Baraza: In front of you is our paper which I should try admitting that it is not in a perfect condition but I think what should concern us is the principle that we are bringing out and the recommendations which we are bringing out and I should also admit that we have had technical hitches here and there, what we have is really a draft not in its best form but I think the

issues come out so you will be bare with us.

I know from just looking at the recommendations, the summarized recommendations, we don't have recommendations of the current Bill of Rights, on the CPR, so that one we should start by noting that we could probably trace them in the main report, there are not there and you will be helping us as we debate this to give us ideas on the recommendations that you would want us to have.

I also noticed that we do not have – under the specific rights, one of the very very first draft we had, we had some right up on the refugees and their rights, it is not appearing here but again we should take it on board that we also did address the issue of refugees.

Some errors through out the report, we shall point out. We did not even edit it Mr. Chairman but I believe you will bare with us. It is a principle that we want to bring out. We are not very very thorough on the recommendations but I believe that is why we are here, you will help us where we have missed out.

Now, our report Mr. Chairman as you have seen we started off by identifying our mandate, which is on page four and the original page four is quite blurred, so we printed a fresh one. Fresh loose sheet which is there, that is our mandate which we all know is contained or enshrined in Section 3(b), (e) and (f) of the Constitution of Kenya Review Act. In the box we have listed what the Act says regarding our mandate. We have also referred to Section 17 (b) of the Constitution of Kenya Review Act, that is Section 3(A). Section 17(d) also requires us to look at the issue of citizenship, the issue that struck social, cultural promotion and then we are required to examine and review the rights of the child. So basically our mandate Mr. Chairman is contained in Section 3 and Section 17 of the Constitution of Kenya Review Act.

Basically what our mandate asked us to do was to give priority to human rights and include it in this agenda. Mr. Chairman, our next issue was to look at the general principles of human rights. We have given the principles that underlie human rights, that is page 5, then we have looked at the International Treaty Regime that give basis to human rights. That is page 6. At page 7 Mr. Chairman we have drawn a relationship between human rights and Constitutional rights then on that same page we have classified the rights. As you know they have been classified in three classes. The First Generation Rights, which are the Civil and Political Rights. Page 8 we talk about the Second Generation Rights which are the Economic, Social and Cultural Rights then we also talk about the Third Generation Rights which are the solidarity of Communal Rights.

Mr. Chairman, at page 9, we do recognize in our mandate that we are not just looking at rights and freedom, rights and freedom go hand in hand with duties and obligations, so we addressed that at page 9 and 10. At page 10 we have referred to a code of good citizenship, or what we would consider when we are drafting our Constitution. What some of those duties and obligations of good citizenry would be.

Mr. Chairman we have looked at enforcement mechanism. Both at the International level and the National level. We have referred to both the judicial and quayside judicial enforcement mechanism. That is at page 11. Page 13 we have gone specifically into the Kenyan (inaudible) as regards to human rights. We have looked at our current Bill of Rights and noted the shortcomings therein and what we need to address. We have looked at the limitations pertaining to the current Bill of Rights. We have identified on page 13 and 14. Page 15 Mr. Chairman, we addressed the current shortcomings of our current Bill of Rights and what we have noted is that the shortcomings are in various form. There is limited coverage. Of course we know that our Bill of Rights only envisages the CPR or the Civil and Political Rights, it has nothing or little on economical, social and cultural rights, there are totally lacking. The solidarity and communal rights are also lacking in our current Bill of Rights and as we look what I have run you through on the universality and the indivisibility of Human Rights, we cannot be talking of a good Bill of Rights if we are lacking on economic, social and cultural rights and on solidarity rights.

We have also looked at our own enforcement. We came out with what we considered to be our shortcomings in enforcement at the National level. We have noted that the courts have not been very good at implementing the Bill of Rights. Administrative machinery has been bridging the rights of Kenyans and at international level we have noted that we do not have a good reporting mechanism to make sure that we comply with the Treaties that we have. As a country we have 32, so that we have noted.

Mr. Chairman at page 17 we have captured from the data runs that were availed to us and here Mr. Chairman I should admit that we got data runs on some of the rights and not on the rest and I will also invite you to help us fill in the gaps because there are certain issues or certain views that Kenyans gave regarding rights which may not be captured here and that one I admit. So we have given you what Kenyans said generally about the Bill of Rights and then the recommendations.

Mr. Chairman the recommendations are the ones captured on the summarized page. I think we all have the summarized page our recommendations and those ones I should admit Mr. Chairman I started by saying that it does not capture the recommendations on people and the political rights so there you will be very very useful to us. We have them in our heads but somehow because of the disorganization it has been very very frustrating, we could have produced a better document that this.

Mr. Chairman, given recommendations on what we would like see in our Bill of Rights as regards economic, social and cultural rights that takes us to page 18. Page 19, we have gone into specific rights, there is the women rights, we have given general principles and what we consider are the issues relating to the women's rights in this country. At page 20 we look at it specifically in our Kenyan situation.

We go to page 23, we tried to capture the views of Kenyans regarding what we should have in the new Constitution regarding the rights of women but here I admit Mr. Chairman in the views of Kenyans, probably we have not captured all of them, but we

tried from the data runs available to us to capture what was there. We have done a comparative analysis with other countries regarding what they have in their Bills of Rights regarding the rights of women. We have looked at the Ugandan Constitution, we have looked at the Ghanaian Constitution and I think we also have looked at the South African Constitution and our recommendations are contained on the summarized page.

Mr. Chairman, page 26 we look at the rights of persons with disability, through the general principles we look at the Kenyan situation we looked at what Kenyans have said and we have made recommendations which are also on that paper. We have looked at the rights of children, page 29 though to 30. we have looked at what the Kenyan situation is, we have tried to capture what Kenyans said and then we have made recommendations which are also contained on that summarized page. We looked at the rights of elderly people Mr. Chairman, the general principles, the Kenyan situation, what Kenyans have said and the recommendations which are also on that summarized page.

There we ought to have looked at the rights, - originally we looked at the rights of refugees, it is missing here but we could discuss it. Then we have looked at the rights of vulnerable and minority groups. The recommendations are contained on that summarized page. Mr. Chairman I think because I spend so much time in North Eastern Province and Eastern, I came to close touch with pastoralists. They ought to be among vulnerable but we have singled them out because of their- if for nothing else, but they share size of land they occupy and their particular problems regarding their lifestyle. We have looked at them and at page 34, we have looked at what people said about them or what they said about themselves and then we have the recommendations at page 35, which are contained in the summarized recommendations. That is our report Mr. Chairman. With that I now invite you to take out your summarized copy of the recommendations so that you help us run through.

Prof. Yash Pal Ghai: Maybe we can receive some general comments on your report first. Yes John.

Com. Kangu: Mr. Chairman I would like to make some comments on the general principles and I would like to start with suggesting that that topic should be General Principles and Structure. Then under that, I noticed that there is lacking some discussion on the concept of limitation of rights. How to go about to limit rights. I think we need to discuss that as a general principle.

Two, we also need to discuss the concept of beneficiaries of rights. Who are entitled to benefit from the rights conferred or provided for in the Constitution. Then three, there is the question of the binding nature and extent of the rights. Who are bound by the rights and in which manner.

Number four, we also need some general discussions on the concept of remedies for breach of rights. Remedies for breach of rights. Another concept that should fall under general principles is the question of interpretation of rights. Finally, although it appears under the second section or the third section that deals with the Kenyan position, we need as a general principle to

discuss the question of the enforcement of rights and I am sure one of the major problem in Kenya has been the question of *locus standi* to enforce rights. Who has the locus to go to court to enforce rights? I think several other things can be discussed under enforcement but *locus standi* must come out clearly.

Now, I think having said that, it will follow that when we start identifying the problems with the current Kenyan Constitution, most of those things that we will have discussed at the general level will emerge as some of the problems that we have with the current Bill of Rights and that therefore when drafting a new Bill of Rights, we must seek to make provisions that can go towards solving some of those limitations so we may have to see how to phrase out or bring out problems into the limitations sections or limitations part that try to identify some of the problems with our system and then after limitation, that is at page 14, we need to distinguish between limitation of rights and suspension of rights because I think there are two distinct concepts and they should be distinguished so that each comes out – limitation of rights and suspension of application of rights.

What I have in mind is that there seems to be a new trend in the framing of Bills of Rights and one aspect of that is to understand certain general principles that must be reflected in what would appear to be a good and modern Bill of Rights and then at the structure level, like the question of limitations, it is a structural question. For instance in the Kenyan situation, we follow the old Europeans approach that was there in the other Century, of putting limitations in every section but the modern approach which started with the German basic law and went through the Canadian Bill of Rights and South Africans have borrowed from, is that of having a separate clause that sets out the conditions that must be satisfied before a Right is limited. Infact my argument is that it is a section that says, “Yes, Rights are not absolute, there are subject to limitations but the challenge is to ensure that the power to limit Rights, is in itself limited”.

Com. Dr. Githu Muigai: Mr. Chairman, I thank you, I will be very brief. I have three general comments. One has been covered by my friend John Kangu and I just want to mention in passing. I am personally concerned about this matter of conceptualizing rights. Because I am one of those people who believe that it is not possible although my friend Professor C.M. Tita the other day tried to persuade me that it is possible. I do not believe that it is possible to grant rights that no law limitation whatsoever. In my judgment what that does is cheapen what one is giving because then it becomes some moral – something to be aspired to without a definite quantity, quality to be enforceable.

I am not here thinking Sir, in terms of second and third generation rights, I am just talking about basic civil and political rights. I think it is possible, it is necessary in a democracy that we should limit rights. Let us take the most basic of all Rights. The Rights to speech, the right to free speech. It is a right that many democracies in the world limit if it is used for hate speech for example. To perpetrate xenophobia to inflame ethnic hatred and so forth. I do not see that the draftsman are in any by subjecting basic rights to a reasonable determinable framework of that which is necessary and justifiable in a democratic and just society.

So I think it is an issue we need to go back to as an issue of what Professor Okoth-Ogendo would call an issue of jurisprudence.

Two, is the question of another important issue that Nancy has raised, her team has raised in this context, Affirmative Action. In the history of our country, we have not had, to the best of my knowledge, a regime of Affirmative Action that is underpinned by a Statutory Regime. It is therefore in a sense a noble concept and we must be very clear in our own minds, what are the permissible parameters of Affirmative Action? So that Affirmative Action does not in itself become a programme that undermines the values for which it was intended and you are familiar Mr. Chairman with the jurisprudence not yet affirmed by the US Supreme Court but definitely in the State Courts or re-writing some of the fundamental assumptions of the Affirmative Programmes of the 60's and 70's and so we want to think about – in my judgment and I don't want to go to the details, things like do we have a time frame within which we affirm? Or what category of persons is this Affirmative Action in favour of? And so on and so forth.

Finally Mr. Chairman, I am concerned and I have raised this question with my colleagues. I am concerned about a proliferation of institutions. Implementation institutions, not only in this area of human rights, but across the entire spectrum of the Constitution because when I look at what they did in South Africa, South Africa is an economy probably 20 times bigger than ours if not more. The proliferation of institutions sometimes with overlapping jurisdiction are a major drain on the State coffers. We may not trust the politicians that we have, we must be very careful not to create an alternative government of Commissions. I mean we have a Ministry of Education that should run education properly or we sack them. We must be careful that when the Ministry is compromised, we then create a Commission for lower education, a Commission for higher education, Commission for university education and so on and so forth. I don't know Mr. Chairman, how we will go finally but I would wonder, if I still have the floor Mr. Chairman, I would wonder, if we would have an Ombudsman, let us say my friend Professor Wanjiku Kabira is the Ombudsman and I think she would be a very good Ombudsman. The Ombudsman is the name of the Ombudsman, it is an office. It cannot be changed any more than we can change Member of Parliament. The Ombud! So let there Mr. Chairman, on a more serious note. That we have an Ombudsman.

I would for my part like to see other methods, other mechanisms of protection of rights subsumed under the Ombudsman office so that then we can give the Ombudsman a budget that allows her to penetrate all the Districts of Kenya and then we will have an Ombudsman dealing with Human Rights working under her and Ombudsman dealing with cultural, economic and other rights. An Ombudsman dealing with press freedom and other issues working under her. Minority groups, religious and so on and so forth. Then we can rationalize the process. I do not want to make that point beyond there because I think my colleagues have understood.

Prof. Yash Pal Ghai: Ya and we will come in details to these institutions.

Com. Raiji: O.K. Thank you chair. Mine is rather short and it is an issue that I have shared informally with my colleague Professor Kabira. About all these many rights that we are creating. – this social economic rights. Now, my fear is more or less

allied to that of Dr. Githu. My fear is that some of these might probably be something like policy goals which would best be left to the Directive Principles of State Policy.

Now, the reason is that if we put all these rights, which for economic reasons or other things cannot in fact be enforced though they may be justiciable in the Constitution, that automatically deludes these rights. The right to food, water, houses and so many other things which in our present state of development, we may not be able to do it. Then basically they would be devalued so that successive government will really treat them contemptuously in the basis that they were never meant to be implemented. I would have thought Chair that whereas we will appreciate and our people require this, I think probably we would have to put them more on policy goals that specific rights which can be enforced through whatever mechanism, whether it is the Ombud or whatever it is now been called or other Commissions that we may set up. That is the only issue that I think I wanted to raise at this stage.

Com. Kangu: Now, Mr. Chairman, two points I meant to make but which apparently slipped my eye. At page 5, it is attempted to define Human Rights and I wanted to suggest that definition be expanded to come out clearly.

Two, at the same page, when talking about general principles, things like universality, inalienability, there is one important aspect that is missed out that normally goes closely to universality. The concept of cultural relativity, that whereas we are talking about rights been universal, we are not oblivious to the fact that there are cultural differences and therefore some relativity based on cultures can come in to change a little of some of those rights or the many in which we are rendered and enforced.

Prof. Yash Pal Ghai: Thank you very much, may I suggest the way to proceed? Oh, sorry.

Com. Prof. Wanjiku Kabira: Thank you the chair and I also want to thank the committee for the report. I have two general points. One of them been that in a sense the concept which was brought up by Githu Muigai on Affirmative Action you probably need to define it a little bit more in order to think about the temporaryness, the temporaryness of the principles we are adopting, the principle of Affirmative Action. Probably we need to develop it a little bit more so that we can bring that out. Because I think it is a very important framework within which you can move towards equity and you can continually also promote the rights of the various sectors of society.

While for instance for women we may argue that it can temporary to get rid of social, cultural obstacles that have been there in the past, with persons with disability, it maybe a continuous Affirmative Action for a long time so I think maybe we may want to define that particular term within a broader context and clarify it a little more.

I think I like and I have added some other things that I thought the Kenyans were talking about. There is a sense in which the Kenyans as we listened to, expect some of these very basic needs. For instance, provincial to basic – of course I do not agree

with Rajji on this particular point. Basic needs like health, access to water which we were promised in the year 2000, free education and people are complaining about it which again we were supposed to have in the year 2000 and every child was supposed to have been in school and I think in our committee we are actually recommending a committee to monitor whether that Commission is under Ombud. Is that what you said? (laughing) It is an Ombud for man, you know an Ombudsman, so that we can leave it at Ombud! So, in a sense we are saying that by bringing in basic needs and to begin with I think it is very important for us to reflect it in our report because majority of the Kenyans complained about basic things like lack of health facilities, hospitals which are empty, either there are no nurses, there are no drugs there is nothing, water which like we saw in North Eastern, they are still drinking from the pulls. They are talking about really lack of basic infrastructure. Lack of security and so on and I think I did not see security.

I think it is important that we put them down as basic rights in order to also force the government to find out what they can do in order to do that. And I believe we have enough resources. If we used the resources better and if the Constitution binds them to implement those rights. So, in my own understanding I think the broad framework of what our expectations are of the Kenyans as individuals and as communities within which the human rights I think emanates. Their own responsibilities as well as the government responsibilities to protect their basic rights needs to be probably just expanded a little.

Com. Nancy Baraza: Mr. Chairman, probably, sorry if you allow me. Can I Ibrahim before you?

Prof. Yash Pal Ghai: Sorry, I thought you were going to sum up. Why don't we hear Ibrahim and then you can sum up.

Com. Lethome: I hope been a member of that committee I am not burred from making my contributions or observations because infact we did not have time to edit this paper but all the same. My concern is on the use of the terminology, equality and equity. I feel that we should be very careful when making recommendations on how we use the two terms, equality, equal opportunities and equity because if we are not careful with those terms, then we might have some people in the streets like we had when some of our sisters went out in the streets because of the equal opportunities Bill which is called the Affirmative Bill. So for example, when you look at page 23, at what Kenyans said, the opening sentence there is that Kenyans said that women rights and gender equality should be entrenched in the Constitution.

I heard also some people talk about gender equity instead of gender equality. So how do we accommodate such people? I turn to page 26 also, Nancy I thought we had agreed you would draw our attention to that, the second bullet on page 26. where there is the issue of sex orientation, maybe that is something that we needed to note and maybe agree whether to leave it in the paper or not because I don't think that it is something that is agreed upon about the sexual orientation. So I just wanted to draw the attention to those two issues. Thank you.

Prof. Yash Pal Ghai: Thank you before I ask Nancy to take the matter further, I would say that maybe we could first look at

the recommendations that you have and then see how we supplement them in the ways they have been suggested particularly by John Kangu. I would also like to remind you that I myself contributed a paper on Human Rights which I think you have in your dossiers. It response to many of the concerns that John has expressed and some others so maybe if you think there are appropriate you could use that as a working paper as well.

Particularly it does have a long section on certain particular rights which are not dealt with in this paper. I just want to make one specific point about the place for economic and social rights and I want to take issue with Raiji. I think our commitment to meeting the basic needs of Kenyans are we are required under the Review Act would be met more effectively by putting these in the Human Rights section then mainly into Directive Principles.

I do know that there are difficulties and in creating these rights in the same way sometimes not always as social, civil and political rights, but I do believe that civil political rights also cost money. Many of the rights of the criminal justice system are civil particular rights and they are very expensive. So I don't think one can say that expensive resources is the specific factor. Nor I think is standards a distinguishing factor. Because sometimes people say that certain political rights are well defined, well understood, social economic rights are not. My reason for putting social economic rights in the Bills of Rights, apart from whatever we want to say in this statement of principles, is that the courts will have to take them seriously, the government will have to take them seriously. The South African case law or the emerging case law I think shows how courts can use these rights responsibly, acknowledging the limits on rights or resources and yet make sure that these rights have certain substance and I think they have started a very important dialogue between the courts and the legislature and the government and the public and I am suddenly encouraged law to say that we should put them there.

Also I see rights as a broad framework for policy. We are not talking of handouts when we talk of social economic rights, we are talking of policy, structures, which enable people themselves to achieve these standards in education, health and so. There have been some two sections that I had been to, people repeatedly talked about the lack of transport which means they cannot export their crops and therefore they cannot earn income. They talk of distance from their homes to the clinic, they talk of lack of employment opportunities, so I think human rights provide a framework for the design of institutions and more so policies. It is not merely handouts it is ensuring that the groups and individuals are facilitated to grow things, to create employment and so on.

My third point would be that countries do have resources to meet basic needs. It depends on how they allocate the resources. A study I read recently is that one economists showed that some of the countries which had the best record of social economic rights were poor countries. Cuba, Srilanka , China before capitalism came there, I think the five countries he looked at and he found that they had provided a very good system of education , very good system of health and they were such poor countries. So it depends how you allocate your resources and so I think putting these rights in the Bill of Rights section will bring out these elements but of course we can debate it as we go along. So back to you Nancy.

Com. Nancy Baraza: Thank you very much Mr. Chairman. I think we will admit everything that is noted as a shortcoming in our paper, we said it will kick us off in a debate and we have all your contributions which will enrich what will go into our Bill of Rights.

Now, we did note Mr. Chairman in our current Bill of Rights, the shortcomings which could also lead us into what recommendations to make. One of the most outstanding shortcomings there is the extensive derogation of the very rights that it purports to guarantee to an extent that the Kenyan Bill of Rights is actually a Bill of Exemptions. There are too many exemptions to the freedom and rights that are granted under our current Constitution so that could help us in the recommendations that we make.

Then we note that until the IPPG package of 1997, most of these rights - -

Prof. Yash Pal Ghai: (*Interjection*) can we take this one by one? I mean, do you say that at the moment there are too many limitations and there should not be there, can we be more specific so that we actually make a recommendation?

Com. Nancy Baraza: We note that that is a limitation and probably we could make a recommendation whether we want to retain it that way but our proposal is that we should not have too many derogations from our rights and freedom in the new Constitution.

Prof. Yash Pal Ghai: I mean, John's point was that the German and the South African model, the Canadian have a more general rather than each right – so would that be something that your committee would support?

Com. Nancy Baraza: My colleague I don't know if I have you on board on that? Then the preservation of Public Security Act, I think the IPPG dealt a little bit with it but it is still existence, I think so and that is one other derogation from our current provision of rights and freedoms in the sense that it actually provides to the government at this time what is obtainable in emergency situations. It can take away all those rights under the preservation of Public Security Act so that is another way of very severe derogation of the rights.

Then of course we have mentioned the limitations in the Bill of Rights. The limited category of the recognized and guaranteed rights and I do here take issue with my learned senior Mr. Raiji that we cannot put ESR the Economic and Social Political Rights, I think I will conqueror with what Professor Ghai has recommended and if you have read through our papers in passage as it may sound, we did not that one of the shortcomings of our Constitution now is lack of Directive Principles of State Policy which could have probably placed a moral obligation on the government when it comes to enforcement of social and economic rights. So that is one other thing that we need to look into, but we still take the position that we need to have these economic

and social rights and cultural rights secured in our Bill of Rights because that is the trend now and that is the requirement of Kenyans and we have found ourselves at the international level by been party to treaties that guarantee enforcement of social and economic rights for the peoples of the member countries of UN.

Another major shortcoming of our current Bill of Rights is the very very floored conceptualization of the formulation of the civil and political rights as they obtain now in the Bill of Rights. This has rendered the enforcement of those rights elusory. There is a lot of case law in which the courts have exhibited these floored conceptualization of these rights. If we may go to section 84 which gives the High Court powers to enforce the Bill of Rights. My colleague here Riunga Raiji will know that the interpretation of the codes of that section have been very very narrow to the extent that it has misinterpreted the rights of Kenyans. If we know the *ratiodate sendai* in Analita Njeru versus the Republic, then there is the case of man versus Republic also, so what we are saying Mr. Chairman is the very very broad conceptualization of even those Bill of Rights that exist now. So we would want probably to look as a recommendation, to look into interpretation of our entire Constitution in general and the Bill of Rights in particular, how do we want to word it so that the court is in no doubt as to how it should interpret the Bill of Rights. That would be our proposal. Do I have you on board Lethome?

I am just about to finish. You are bored Professor?

Com. Prof. Okoth-Ogendo: No, no go ahead.

Com. Nancy Baraza: Then the issue of the negative influence of the principle of the English law on our own interpretation of the Bill of Rights. It did come up yesterday and Professor Okoth stated it in no unclear terms that no sooner we break off from these very confusing principles of English law, because it has been noted that why courts have been able to interpret our current Bill of Rights in any sensible manner, it is because of the confusion of the Principles of English law which they have to use, when the Constitutional situation in England is totally different from ours. That is a non written staff and here we are, so that confusion also. So probably we will also have to look at that as a recommendation.

The issue raised by Kangu. I think these are conceptual issues and we will benefit from the scholars in this room, Professors, the Mutakha's I think that one we will agree you will help us on that. Then the issue raised by Dr. Githu on conceptualization, again we will take it and be helped on that but I don't know, because when he was commenting on too many implementing Commissions he was at the barge of women I don't know if he was of the opinion that we should not have a gender Commission? I don't know but we are also of the view – in our paper we have mentioned that one of the shortcomings we have in our enforcement mechanism now is lack of quartile judicial mechanism and we were proposing the Ombudsman, we are proposing a human rights Commission entrenched in the Constitution and then the gender Commission is not there but that would be our proposal but that is subject to what we shall debate generally but those are the Commissions we are suggest and if we come up with quartile judicial mechanisms it is also going to strengthen our Bill of Human Rights.

Then on the issue of Affirmative Action again my good learned friend did look at it when he was at the page of women. But again we invite us to look at it. Our proposal is that we entrench Affirmative Action not just for women, but that is one way through which human rights violations have been - infact some human rights violations in some countries have been addressed, that is a way we also see we could do that and also help in the enforcement of Rights in our new Bill of Rights Mr. Chairman. That is all I would say.

Com. Prof. Okoth-Ogendo: Mr. Chairman, I wanted to make a very small comment and this probably goes to the people who are going to be drafting which is a plea for innovation and originality particularly in language. We talk about the Ombudsman's or whatever. I would be happy to call it something else. Something perhaps more attractive. There are countries where they have called them Inspector General of Government others have it People's Protractor, Public Defender and what have you. So that is my first point. When it comes to the question of emergency power, in this country the word emergency has a very bad connotation. Historically and also technically when you talk about emergency you are talking about all kinds of stuff and I would want us to restate those powers not in the negative sense as clobbered provisions on Bills of Rights but also as positive powers that do have positive values in the management of public affairs.

In Latin America they talk about a State of Cease, others are talking about extra ordinary powers others are talking about emergency but for the point I want to make here is that we are saying that there are certain circumstances which the enjoyment of basic rights requires the exercise of extra ordinary powers rather than that the enjoyment of basic rights requires a claw back a limitation. So we get away from the language of limitation to the language of facilitation which may require powers that go beyond, or that look consistent with those kinds of rights but this is what I would like to make clear at this point. One, innovate, secondly as much as possible let us have reinstated as a positive, in terms of a positive value rather than as claw back or limitations or what have you. Thank you.

Com. Lethome: It is a comment on Kenya's approach to international instruments on human rights. I think this is something that we discussed and we had the privilege of been with Dr. Adede and I think from his experience he was sharing with us that it is something we need to look at. Currently, the Kenya's approach is what we call the dualistic approach on this international instruments of Human Rights. There is also the monist approach, so this is something that we need to consider here, the pros and cons of each of the approaches to these international instruments. Then something else on the reporting mechanism that Kenya has adopted now. Do we think it is effective or not. I know from NGOs that have been involved in the reporting to the Treaties bodies that Kenya has not been very effective on that, can we use the Constitution now, maybe to improve the monitoring mechanism of Kenya? Because now it is like they have to be forced and it is below the expectation.

Prof. Yash Pal Ghai: Thank you very much. I think instead of general comments at this stage we go to the recommendations. Then at the end additional recommendations to be made we should take them. But let us go through the paper. Is that O.K.

Prof. Kabira or do you want to say something?

Com. Prof. Wanjiku Kabira: I was wondering whether we could have a section on social economic rights rather than for them to appear generally if we are going to take them seriously. The basic needs. Whether we can have a section on the same way we have a section on women, on children, on the elderly on the disabled and then on basic needs.

Prof. Yash Pal Ghai: I think we ought to integrate them into the whole general body of the Rights. Nancy if you could take us through the paper.

Com. Nancy Baraza: Thank you Mr. Chairman. The recommendations we have here relate to the economic, social and cultural rights. We have already touched on what we would think would go to the CPR with the shortcomings now. We are recommending that we should first of all have Directive Principles of State Policy which should be the principles directing the State to come up with policies so as Prof. Ghai said here, we are not requesting the State to provide food, to be donating all these things. We are asking the new Constitution to come up with or to request the State to come up with a framework under which Kenyans can realize their basic needs and those basic needs would be needs relating to adequate housing, we got from the Kenyans themselves and we saw it. There was an overwhelming call for rights to access of health care, it came from almost every Kenyan. They are no longer in a position to afford the cost sharing thing we have put on them. They want free medical services. They are dying from the simplest and cheapest of diseases. So it came from across the country. They want access or even free health care.

They want food. We went to some places where they had not had food for four months, there is now water, they want water. So, they want things including social insurance. Those are the things that we want to be addressed in the new Constitution and again what we are saying here is what framework do we come up with? How do we put them, directly as rights or how? But I think that now we will be advised.

Then the right to work. People were complaining they are educating their children even in their poverty state they are making sure that they continue taking their children to school and after college there is no employment. So, how do we make Kenyans realize this - we have to recognize right to work as a Constitutional right and then how do we afford it to Kenyans?

There were the conditions of work. When it comes to payment to working hours, all those things we will be advised on how to do it. There was overwhelming call for right to education, people were saying that in the past, not so long ago, we used to have an affordable education system, now they cannot afford to take their children to school and we did note that the literacy levels in the country are falling and Kenya has been known to be a country with very very high illiteracy level and the reason is that

people can no longer afford to take their children to school. So Kenyans are saying they want a right to education guaranteed.

They want free and compulsory primary education. Then there is the question of upto what level? I think that is a question that we should be advised on but looking at the International Treaties on education, at primary level it is required to be free, secondary level should be accessible if not free and then university level accessible and should be pinned to capability. So we should be advised on that. But we are recommending a framework for a rights for education. I don't know, we will be advised on that.

Cultural rights. That was an overwhelming call from the majority of Kenyans. Kenyans want to be free to practice their culture. We are recommending that we also address that. Then there was a call for right to access information held by the State and private persons. We note that our current Bill of Rights, perhaps as mentioned to the rights of the media but there are restrictions on it. Probably as a recommendation we look into it with a view of making it more real. But people want a general provision for rights to access information especially government information so that probably if they have it they can be able to hold the government accountable.

One reason that the government is accused of been insensitive to the people is that people are not empowered enough to hold their government accountable. Then the rights of access to court. We are recommending it. I think this is where the issue of *locus standi* as raised by Commissioner Mutakha Kangu comes in. This has been a problem in our current Constitution where people have not been able to litigate the rights of others because of lack of *locus standi*, we would want to look at that and probably empower private people and non government organization in the enforcement of rights and here we have even in mind environmental rights for example. Those of us who have tried to enforce the rights of women, we have had A framework that will ensure policies that will open up the administrative process to the people. That is our recommendation and it also comes from what people said.

Prof. Yash Pal Ghai: From these recommendations are there any comments or are you comfortable with these proposals up to the middle of page 3?

Com. Prof. Okoth-Ogendo: Just a very quick comment on the obligation. Each one of those recommendations are saying the State shall take certain measures and I would want the committee to consider, the possibility of also creating an obligation on Parliament to pass legislation in respect to some of these rights so that we have a legislative programme that will define clearly how the State is expected to proceed in appropriate circumstances.

On education for example, it may not be enough simply to say that everybody is entitled to quality education and I think there should be basic legislation that defines what that quality education is and we should have an obligation on parliament to pass legislation for that purpose. This is particularly the case in this country where the education Act is some two or three pages which basically says the Ministry sector is responsible for education in this country. So the minister can do anything that he

wants. So my general comment is that to say the State shall do it is not placing a very clear obligation on the State. The State is the Parliament it is the Executive it is the Judiciary and I would want us to be a little bit more precise in that respect and when we come to Professor Kabira report, I will repeat that comment again. That it is just not enough to say we have certain rights, but we must say that those rights must be translated in terms of specific legislations so that we know what the parameters of the obligation of the State is. Thank you.

Com. Raiji: Thank you Chair. My contribution is on the right to access to court and Nancy has raised on of the impediments that is *locus standi*. I think there is another one which we discussed, I forget in what context, yesterday or the day before. The issue of the cost of litigation. At two levels. First, on account of those who cannot afford to pay for cost of defense or prosecuting suit in protection of their rights and also the general cost imposed by the courts have meant that severally that courts basically are used as a form of taxation and I would probably want that captured in your recommendation.

Secondly, in terms of technical, we did address that in Directive of State. That been a liberal and flexible interpretation to prevent shutting out or making courts inaccessible on the basis of undue technicalities as you know is currently the case in the court of appeal where basically appeals are knocked out and massed on some minor technical flow or otherwise.

Com. Kangu: Mr. Chairman the recommendation on everyone having a right to own property anywhere is something we have to arrive at after having appreciated that in some parts of this country there was vehement opposition to this provision and before we arrive at this conclusion, we must show how we have reasoned out those other people who think that we should not have such a right. In fact in Maasai land they were very specific, somehow they even knew the sections of the Constitution and they were saying that that is the section that has been used to cheat them of their land. They even were very specific about the rule that says that a fast registration is not challengeable in court even if it was obtained by fraud and they were saying they don't want such a thing, so let us find a way to reason out before we arrive to this conclusion so that those who read the report can have some justification.

Prof. Yash Pal Ghai: I think the land committee is looking at that issue especially in relation to pastoral communities where they have a different kind of tenure system all collective system. In Asia they have a different process, it is individual ownership. Yes I think that is right. We have been told in many many places that some kind of land or some uses of land have to be restricted to members of a particular community and it is clearly a very difficult issue and I think we have to look at this very very clearly. I wonder if Professor Okoth has - -

Com. Prof. Okoth-Ogendo: No, no, I think Mr. Chairman we will discuss this when it comes in the Nunow report.

Prof. Yash Pal Ghai: We need to look at this question of the right to own property anywhere so we leave that for the time been and come to it in the context of land discussions. O.K. go on.

Com. Nancy Baraza: Thank you Mr. Chairman. That brings us to the specific rights, that is the right of women and our recommendations is that we should have a framework for remedying the injustices visited upon women, to make sure that systems are put in place to improve daily presentation of women. That has been one area of complaint. That they are not well represented especially in decision making organs.

Another recommendation is we need to come up with a framework to address the economic gender inequalities that we have in this country. The other one is there is need and call for the repeal of Section 82, Sub-section 4 of the Constitution which permits discrimination with regards to certain matters of family law and we do state Mr. Chairman that that has been one of the most oppressive provision of our Constitution against the women. Our other recommendation relates to customary law and that its place should be reviewed so that its application where it is discriminatory against the women is subordinated to the application of written law in all matters including personal. We need to look at retrogressive customary law that infringe on the rights of women.

On the issue of citizenship, again we are making a recommendation that there should not be gender discrimination in conferment of citizenship. We are also looking at the issue of employment opportunities. We should look for a framework that will prohibit discrimination against women in employment. The other recommendation is creation of conducive environment to be created to enable women vying for political office. The complaint has been that the environment has been so hostile with political violence and political thuggery and all those manner of things that have inhibited the women from vying for political office. We need to look for ways and means of ensuring that that is curbed.

We are recommending a Bill of Rights that will guarantee equality to both men and women from all cultural and religious background. I don't know about this sexual orientation, we have not talked about it. I am not reneging on that, to me that is a right which needs to be debated. I personally have no doubt that it is a right. They are people who claim it and it should be something that – though I have been advised that probably in our own country it is not politically timed to talk about it but personally I believe that that is a right.

(Reaction from the floor)

Com. Nancy Baraza: Ya, my personal view Mr. Chairman. It is a right. Then we are recommending that the Constitution should make provision for Parliament to domesticate international instruments on women's rights, which Kenya has ratified and in this regard we have in mind the convention on the elimination on all forms of discrimination against women, that is CEDAW which we ratified as a country but we have not domesticated, so women cannot benefit from its provisions. We have the Beijing Platform for Action in which we participated. It has good recommendations but we have not domesticated.

We are recommending a provision to be made for the guarantee of the women, especially for women with disabilities who face double marginalization. Marginalization by virtue of been women and also by been disabled. We are also recommending a Bill of Rights which should provide for basic needs to education, food, healthcare, shelter to all women, girls and boys alike. We do recommend for everybody but in particular women suffer most when it comes to deprivation in this country.

We have argued all along in this country that the Constitutional language has been extremely gender insensitive. We want to see if that can be looked into. We want – probably place an obligation on the government to make laws to seek to promote the legal status of women which overwhelmed by the patriarchal attitude and stereotyped that are rooted in our country. We need to place an obligation on Parliament specifically to come up with law that will look into that. That is what we are recommending on women Mr. Chairman.

Com. Lethome: I don't know what is sexual orientation. I don't know what it means, I need to be guided on that, but my concern is on that paragraph, on the Bill of Rights that will guarantee equality for both men and women for all cultural and religious background whereas the same Bill of Rights will be guaranteeing freedom of worship and then in some religions, what we talk about is equity and not equality. I don't know what you are going to do so that we do not leave anybody or give a chance to anybody and go out in the street and considering what Kenyans are saying. Then can somebody explain to me what sexual orientation is?

Com. Dr. Githu Muigai: I don't know whether it is in my place to give the Right Honourable explanation or Nancy will be happy to do it. Sexual orientation as applied here, in my understanding is the right of a male or a female to choose the manner in which they would like to express their sexuality and whether by relating to members of the opposite sex or of the same sex or of a sex in between as technology may permit. Now, I hope I have helped the process move forward.

Mr. Chairman, speaking for myself, I am happy to associate myself with the idea that as a libertarian or one that aspires to be a libertarian, I think that there is a limit to how much I would want the law to pursue the private choices of individuals. I see the challenges that a legal system in a country like ours must face, been to keep the crooks of the street, so that our children can go to school in peace and to keep the thieves with their fingers in state coughers in prison and so on. I would be very worried if we had a moral police force knocking at doors to find what consenting adults are doing behind closed doors and again my concern is both one of allocation of resources and one of where the concerns of the State machinery must stop because individual liberty however used is a value that we must respect.

Having said that, as a practical man of affairs, or one who would like to be a practical man of affairs, I entertain a very grave doubt that this provision if it found itself in the Bill that we will present at the Bomas of Kenya would even go through the first round of debate. My own thinking about such matters Mr. Chairman is this and this is where I think we may have a slight difference of methodology and approach to drafting. This is the kind of liberty that I would like to grant in the general rubric of

rights and allow a progressive judiciary, a progressive supreme court, to speak the language itself, in a concrete case, challenging concrete – the danger Mr. Chairman as I see it, is that we have clear and uncontroversial issues like the rights of women to be treated with dignity and inequality. When there are subsumed with another category of rights, what it does, is that it allows those hostile to the general package to throw it out together as one.

I have had a quite word with Professor Kabira, about this question of approach, in my view it is purely a pragmatic one, it does not in any way take away the claim of this other rights to be rights that ought to be recognized and in the same context Mr. Chairman, if something like the death penalty. I have been concerned over the death penalty for a long time in this country and did numerous cases in the early years trying to empty the prison in Kamiti.

I have no doubt in my mind, that if we put an express provision in the Constitution, saying that the death penalty should not be implemented, it will be defeated because there are so many other people – and Mr. Chairman I do not want to take too much time. I was down in Malawi when they were writing their Constitution and one of the issues that I thought, that the people of Malawi should be united completely. I have given this example many times; was the death penalty. In my mind then, it was some simplest problem. The death penalty is primitive, barbaric, whatever you can call it. There was only one question that the people of Malawi were united to a man, that the death penalty must be preserved. That took me by great shock.

It is like in this country and I am now winding Mr. Chairman. I would have thought in this country before I started traveling up and down the country, that all Kenyans would be united behind one principle, the freedom of worship must be respected and must be placed beyond the regulation of the State. Not true! All Kenyans almost to a man said religion in Kenya must be limited. So that sometimes Mr. Chairman our own personal views of what is good for the general populace may not be shared by the general populace and we must find a way of a happy media and I am not sure I have such a way but I caution that we must look for it. Thank you Sir.

Prof. Yash Pal Ghai: I would like to take this issue systematically. Issue of sexual orientation has been raised; let us see if we can dispose of this before we move to other issues. So I think Githu has given us a good explanation of the way to approach this, but let us hear one or two more voices and see if we have some consensus on that.

Com. Prof. Wanjiku Kabira: I think on this particular issue, first of all I know we have said we want to reflect as faithfully as possible what Kenyans have said and in my own hearings I never had this particular recommendation but I think we may not be able to speak as eloquently as Githu but I think this is a very troubled and focused statement and I think we will not get anywhere with it. I want to say that when the purported, the draft Constitution was mentioned, the only example I was given is that, you people have written a Constitution where sexual orientation is allowed. That was the only thing I was told is in the Constitution and that was from the co-vision so I think it would be unwise to put it there.

Com. Nancy Baraza: Mr. Chairman, I think let me own up. We did not edit our paper and if you look through the views of the Kenyans it does not arise at all. So it is not our issue. We should own up. It did not arise from the people.

(Reaction from the floor)

Com. Bishop B. Kariuki: Mr. Chairman, let me also say this. Constitution goes with the development of the community. I remember one time we had what called amnesty conference and the African Bishops went to Britain and it was chaotic. Because what we were interested with was poverty and heavy debt burden. What the European Bishops were interest on was homosexuality and ordination of women because the state of their development was there. Let us remember we are making this Constitution with the pace of our development.

Mr. Chairman, anything we may come up with, which will bring a lot of complication in the National Conference, we better do away with it. Africans by nature are opposed to things about sexual orientation. The Bishops, religious people and this is why did not have it. In all the constituencies I never heard anybody saying, can a man be allowed to go down with a man.

(Reaction from the floor)

Prof. Yash Pal Ghai: Anybody who wants to speak in favour of sexual orientation I will give them the floor.

Com. Bishop B. Kariuki: So, Raiji, I have not yet made the point, I am yet to make it. So, this is what I am saying. Mr. Chairman, can we remove that statement? That statement should be removed completely! Nancy when you come up with a new draft, can you remove that statement and you burry it, never to appear again forever Amen!

Com. Kangu: I had a different point of view on that. That first, because we want to protect the rights we want to push for women, infact I do not understand why, if it were to arise, it should arise on the context of women rights, because we are saying it is a sexual orientation, it may be a man or a woman who choices to orient himself or herself in a particular way. So it is wrong in the first place that it is a women's affair. If it is an affair, it is an affair for both men and women.

Having said that, our people don't seem to think that this is the right thing to do but the reality on the ground is that we have this problem, we have people suffering from this and I want to look at it not as a question of a right, but infact as a disease, as something that should be dealt with in the context of a right to health, so that we are moving towards treating these people. Instead of saying that they have rights that they can claim. They should be able to claim a right for medical care or psychological care that can get them out of this, so let us deal with that in the context of health.

Prof. Yash Pal Ghai: O.K. Well let me try to sum up and express my own view to. I support exclusion of sexual orientation.

I don't think they are sick, they are ill, I have lots of gay friends,

Lot of lesbians friends and they are very normal human beings; they have no problem with that. 10% of people throughout the world, every country including Africa are gay or lesbians. God has created them like that and I don't think we should have some contempt from them, as to call them sick or deformed or anything like that. Whatever the Bishop says I am afraid that is the position I would take but it seems to me that given the point that others made, we should leave it to the development attitudes to such practices. I think having it here will create unnecessary controversy and I would say that we should delete it. But we should also remember that our task is to protect all minorities, all groups. Even if people have not told us, but infact I have been in the Board Room in Nairobi, from hearings where people have talked about gay rights.

Infact we had a gay rights group that came to give their views, but for the reasons of expediency, I would suggest we leave it out. The fact that it is left out does not mean that homosexual conduct must be criminalized, we can leave that to the development of social latitudes and positions and let us avoid controversy on this because it does not help gays to have this controversy debated. So I would therefore say that in general sense for different reasons is that we delete sexual orientation.

Com. Dr. Githu Muigai: Mr. Chairman, permit me to say in the gloomy times that we are working that there is a little bit of good news. I have just talked to Lumumba who has now seen the order made by the very Learned Mr. Justice Kuloba and we are able to confirm now that his order relates our deliberations relating to the judiciary and not to the entire process. So, we are able probably to go on with the rest of our work and Lumumba is faxing the order. I personally believe that it is a ridiculous order but -

Com. Lethome: Should we draft a Constitution without the judiciary? That section on the judiciary? Although that is a detail now that we can go into.

Prof. Yash Pal Ghai: What we can discuss is that - -

(Debate on the floor)

Prof. Yash Pal Ghai: I think that is a good idea. Let us continue with this. Are there any other provisions you disagree with?

Com. Lethome: - - but not because of their own choice, it is by nature or by God or they have acquired that kind of behaviour. I think we should include them under the clause on discrimination. Non discrimination on the basis of sexual orientation, then they will be taken care of, but to legislate for them that they have a right not under discrimination – for example when we say nobody should be discriminated, for example, one seeks for employment in your legal firm. Can you discriminate against that person just because of his sexual orientation? That I am not going to employ him because of this? Just like you cannot discriminate against a person with disability. Or maybe he is sick he goes to hospital, should he be turned away because

he is like that? Although we do not advocate it – you know where I come from. We condemn it totally, but should that person be discriminated on the basis of that? No treatment, hakuna kupewa whatever rights other Kenyans have. So I think my suggestion is that we include them under the clause of non-discrimination.

Com. Dr. Githu Muigai: Only to warn Mr. Chairman, but there is a bigger dimension. I am personally as I have confessed, I am in favour of individual having the full scope of their rights. But I do not want also that we should pass this without appreciating the full scope.

If we recognize and as I believe we should, that no person should be discriminated on the basis of their orientation of a sexual nature, we must repeal such legislation are in the Penal Code and any other Statute that criminalize homosexual behaviour between consenting adults. It is a logical and necessary connection.

Com. Bishop B. Kariuki: (inaudible) where it is at that particular time. It would be very bad for us to create a situation, where we will not push this Constitution because of the level of the society we have. You do not create rights before you move society to a certain extent and I am telling you, if this thing is even seen anywhere, that whole document will leave everything else, the whole document will be on that basis. Let me say this, for the churches, I am telling you this document will not go through and we will be categorized as individuals out to destroy the moral vibe of this society. As the chairman is saying, let us leave it for now -

Com. Dr, Githu Muigai: Tremendous respect, it is within the churches that you have the largest congregation of persons who can benefit from this right.

(Reaction from floor)

Prof. Yash Pal Ghai: The point Ibrahim raised was a different and not what we are discussing I think.

Com. Kangu: Mr. Chairman, may I ask Bishop one question. He is a man of God looking after flock. The truth of the matter is that we now have these people in our country. How do we deal with them? How do we solve their problem? You know the biggest problem with our society has been a lot of pretence that certain things do not exist. These things are all over. People talk about incest, it is all over, it is happening. How do we deal with these people? What is the approach of the church? What are the men of the flock saying about this? And Githu has said quite correctly that many of the beneficiaries might end up been amongst your flock. How do we deal with that? And quite importantly is the issue Lethome has raised and the criminal issue, Githu has raised.

We have listened to people with disabilities telling us, “you have for a long time continued treating us in a bad way, a

discriminatory way.” There are even some recommendations here, even some of the words we used about them, “kilema”, “kiwete” there are discriminatory. In some communities parents do not want to take to school children with disabilities, they hide them, but the reality is that every other day people give birth to children with disabilities. Now these people are amongst us.

I have myself had to listen to some people – let me tell you this, I have a friend of mine who divorced his wife because the wife had that problem and one day he stumbled- this was a man in Belgium and his colleague stumbles on a letter which had been written to his wife and he writes to his fellow man, “I don’t know you, but this is the letter your wife wrote to mine, it looks like they have an affair!” how do we deal with this?

Com. Bishop B. Kariuki: If for that reason, let me finish Raiji, you will have it. If for that reason, the Chairman, John, Dr. Muigai are prepared to go to the conference – that is one point I will be willing to append my signature as I am not going to be part of it. But if you want us to agree that those of you who support it go and support it to the conference, that is fine.

Com. Kangu: We are not supporting, what we are saying is, we have a problem on the table for which we must find a solution. I personally said we look at it as a disease. The Chairman has a different view. They are those who are saying we look at it as a right for women and we are saying that is dangerous. Give us your proposal!

Com. Raiji: I have not spoken for a long time I think I should be given priority. Now, Chair, I think I associate myself with the sentiments of the Bishop. We are supposed to write a Constitution that reflects the wishes of Kenyans and the Review Act. Now, this issue is where there was total unanimity, this word is never mentioned in this society. Whatever maybe the position elsewhere, in this country Kenya that is considered very negatively and all the views, if we intend to reflect the views of Kenyans, we should not mention that. I suggest we leave it to the technique that Githu said, courts will find their way of dealing with them, somebody can strike that provision from the Constitution, but I would respectfully submit that first of all, - right here in this conference, the colleagues who are not here, if we put that, we probably be opening a can of worms!

Secondly, I have a very strong suspicion that many of the problems that are coming is because these ones were found in the other document. I also come from a church background and I can guarantee that putting that very word there is going to loose the Constitution good will of the very many people who support and have sacrificed for this Constitution. There is very little to be gained, I refuse to express my views regarding this one because they might not be polite but there is very little to be gained by attempting to rule the problem which will resolve itself in the course of time but for now I am proposing that we delete any reference to that thing if we intend to have this Constitution approved by the entire plenary or even by the National Constitutional Conference.

Also noted that some of our strongest partners, the Muslim community may not even attend that conference if this reference appears there. Thank you.

Com. Nancy Baraza: What has been expressed on this issue, I personally I am a human rights crusader, to me it would not arise but the circumstances of our country are such that we shall be bogged down. As chairman says, I have my friends in Europe and America, I meet them in conferences, they are gays and to me I see it as a right. I would not condemn them. But if we may take our Beijing experience, we went to Beijing and rumour read back that that is what was discussed in Beijing and we have never just come out of it Mr. chairman, so for that reason, but personally I believe it is a right but now it will not be prudence for us to dwell on it, but we shall delete it. Although it is in the Act, but we shall delete it. So what have we concluded Mr. Chairman? Are we done on the recommendations on women? So that when we go for tea we know -

Prof. Yash Pal Ghai: Let us have a cup of tea and then come back.

Com. Raiji: Now, I have chair is this one if I think if we may address it in passing, this is on page four, the first bullet there, the repeal of Section 82(4). Now as all of us will remember Section 82, outlaws discrimination, but allows discrimination or rather exempts from that provision, application of family law and I think as presently worded, this recommendation would for example affect the application of Islamic law and also the application of customary law.

We warn ourselves that yesterday, we approved or rather we made reference and we had a lot of discussion regarding the hierarchy of laws and so forth. So, if we were to remove the proviso to Section 82(4), it would then mean that it would not be possible to apply the Islamic personal law and also the customary laws. I know that we have received a lot of submissions on customary law and they are of discriminatory nature and whereas many of them appear pressing to women, but we have received a lot of submissions from many communities particularly from the rural areas, who want the customary laws to be recognized and yesterday's plenary if we understood it, the substance of the discussions, the debate we had was that there must be a place for customary law. So I would think that it may be necessary to accommodate – that exceptional to put something similar and I would say that probably we can make this recommendation to say that perhaps except to Islamic law or customary law maybe subscribed by Statute.

Com. Prof. Okoth-Ogendo: Mr. Chairman, I think that this is a drafting problem. Instead of talking about personal laws as an exception to the rule against discrimination, we probably want to make a positive statement about them and restrict the question of discrimination to something much narrower because this area is far much important to be simply left as an exception, if we are going to say that personal laws, customary laws and so on apply, then they will apply in their own rights, then we can say that if they discriminate, any aspect that they discriminate will not be acceptable rather than to say that there is a rule against discrimination but we are allowing discrimination....give it a positive name in its own right. It could be rational differentiation, it could be Affirmative Action or whatever but not positive discrimination. That is like a double negative.

Prof. Yash Pal Ghai: I want to make sure we understand. Section 84 as it is drafted is not very good. I think we can all agree

on that. So the question is we would recognize - -

Com. Nancy Baraza: It is murky, it is murky.

Com. Lethome: We should not use the word murky. It is not murky. Even people have rights to exercise their freedom of worship or personal laws which are guaranteed by the Constitution. Infact it only affects the Muslims. Let us face it. It exempts the Muslims from the operation of the other laws of successions. Simple as that. What is murky about that Nancy?

Com. Nancy Baraza: No, No, No! what we are saying is, as Professor has suggested, we re-draft the - - but even as it appears in the Constitution, as Professor suggests, it needs to be probably re-arrange.

Com. Dr. Githu Muigai: Mr. Chairman with your kind permission, something has escaped my attention. When we talk about women's equal rights in matrimonial property and inheritance, we must be careful because again, the regime of law that quantifies the specific estate is not the Constitution. What I think we are trying to secure in the Constitution, is non-discriminatory practices. If a woman has made a contribution to the acquisition matrimonial property in a manner provided by law, that contribution cannot be taken from her in a manner that discriminates against her. The same is true of succession. But we cannot use the Constitution to suggest that we are creating, we are vesting property rights in either a woman or a man, that they do not own, by reference to the laws that vest properties.

Com. Prof. Okoth-Ogendo: Githu is making precisely the same conceptual mistake that they have always argued against, you are arguing from the legal system back to the Constitution. If the legal system does not create or creates matrimonial property and we disagree with what the content is, we shall create that content of property in the Constitution and require Parliamentary vie for legal system.

Com. Dr. Githu Muigai: I am in the very unhappy situation where I must disagree with the *guru*. Marriage does not create property relations. The law of marriage does not create property relations.

Com. Prof. Okoth-Ogendo: (*Interjection*) It can.

Com. Dr. Githu Muigai: Protect me Mr. Chairman so that I may finish my point. You see this is an area that I have done a little work myself and probably may know more than I know on the other issues. Mr. Chairman, when I create a Trust for my daughter, by denying myself whisky, it is that that trust should avail to my daughter a continuing sum that will assist her in her lifetime. If she reports to the university on the first day and finds a *Bhangi, panga* welding Mungiki thug! Who then says he is married to my daughter, that act of marriage is not a property relationship. It is a fundamental issue of the common law.

Marriage is a union relating to an entirely different bundle of rights. That is why in matrimonial property, we are talking about a

different bundle of rights relating to property acquired by people who happen to be married. They did not become married so that they could acquire – when you get married it is not like forming a joint stock company or a Limited Liability Company, therefore Mr. Chairman, what we want to do in the Constitution, is not to create assumption, - a young man or a young woman comes to the marriage with their own Estate. A woman who remarries for the second or third or fourth time, comes to each marriage with a subsisting Estate.

Com. Kangu: Mr. Chairman, can we also contribute at this point?

Com. Prof. Okoth-Ogendo: (*Interjection*) Just one – O.K. Githu is stating what the law is. But I am saying we can create new ways of acquiring property. If the Constitution was to say that every time you get married what you come with into that marriage becomes matrimonial property, it will be matrimonial property. I mean it is as simple as that. So we cannot use the existing law to urge against new Constitutional principles that we are developing.

(Reaction for the floor)

Prof. Yash Pal Ghai: O.K. Now, let me take charge of my meeting (*laughing*) and I will give you the floor straight away.

Com. Raiji: You see Chair, I think I see the point between it. I agree with *the guru* because I think Dr. Githu is talking on what the law is. *Guru* as he is now called here, his position is that if indeed we understood it to be the wishes of Kenyans, that once you marry whatever you had before becomes common property, we would be within our rights to do so. The question is, are we within our rights? Where is the authority? Where is the evidence? Where are the recommendations that are saying that once you get married, whatever you had before marriage becomes an Estate, which can be divided between the two of you if marriage breaks up? And I was going to support Dr. Githu on that account. I don't think we understood the Kenyans to mean that whatever you bring into a marriage it become joint property at the commencement of the marriage. I think what I understood the women to be recommending at the many sessions we went, was that once a marriage breaks up, you share the property that was acquired during matrimony, according to the degree of every parties contribution. By coincidence, that happens to be the existing law and incidentally and I think this is the point, we were recommending the removal of the reception clause and that might well mean that - - and if we can enact one fast enough, the Marriage Women Property Act, which again if I may use the term with some form of – it is a very protective Statute for women, O.K. It may or may not – we may need to replace something else but I think the position is that Kenyans did not tell us that they wanted to confer property on a man or woman who have not earned that property, they wanted us to ensure that anybody who has earned property goes away with it if the union breaks. Thank you.

Prof. Yash Pal Ghai: O.K. What are we deciding? I mean the formulation here that an equality clause be introduced in the

Constitution recognizing women's equal rights to matrimonial property inheritance. Is that acceptable or not?

Com. Lethome: (*inaudible*) between those who have been exempted by virtue of Section 82, subsection 4, because when it comes to inheritance, the application of the law is quite different.

Prof. Yash Pal Ghai: The women Commissioners, are they happy with this clause on this bullet point or what?

Com. Prof. Wanjiku Kabira: I may not have understood the legal argument which I want to see whether I can make what I thought the women were saying clear building on what Raiji has said and then the issue of inheritance. It is true that the women were saying that this property we have earned together, should be shared between the two of us. That one they were saying. They were also saying, that if you have a second wife, you only divide between the three of them what you have acquired when you were married to the second and third wife. So that you divide what you acquired when you were with the first wife first, then you divide the next one into three, that is what they were saying.

But if we are also saying that you cannot acquire the property that was there before, you know and particular again when you come to the issue of inheritance of land. I don't know whether that would complicate the issues because the argument was that a woman cannot inherit land from her father as a daughter, because you will inherit from you husband when you get married. So we have to make sure that if we say that the property is the piece of land that you had before I married you, then the law must protect my right to inheritance with the father. So I think we need to deal with those complex.

Com Lethome: (*inaudible*) may be here the principle should be, there should be equality and equity in as far as matrimonial property is concerned and inheritance is concerned. Let us not go into those details because when you talk about women been denied inheritance of land from their parents because they will inherit from their husbands, I will tell you that does not affect the Muslim women because they inherit from both their parents and their husbands. So I think let us not go into these issues now, we just come with a principle, the principle that we would like to be here as a recommendation, to make sure that there is equality and equity.

Prof. Yash Pal Ghai: Are the drafts people happy with that? Can we leave it to you in that form and - - Sorry I was enquiring from them if they were - so if you are adding to that we could wait and then ask them. Are you adding to this point?

Com. Kangu: (*Interjection*) Yes. Mr. Chairman, I am a little worried over what we are talking about. We are saying we want to protect certain personal laws. We are also at the same time saying we want the concept or the value of equality to be in our Constitution. This is a question I have raised with my colleagues many times which the South Africans had to deal with and I think in a manner that I think created more problems and so on and maybe George may help us. That if we accept the concept of equality and the South African court in Railand versus Enrose said, then we are saying it is equality as between individuals and also equality as between communities.

So that if a certain community has accepted a system of property, of inheritance, which says that women cannot inherit on an equal basis with men, you cannot bring the values of another community and impose on them and I found that a very problematic way of solving the problems but this is there. So, how do we deal with this? If we are going to adhere to the equality, are we going to restrict it to equality as between individuals or will we also recognize equality as between communities so that we say if this community has its own set of values under their personal property law, or their personal law, we should allow them to follow those values even if they discriminate against women or how do we deal with that?

Com. Prof. Wanjiku Kabira: I think even as we talk about – I can see the dilemma of Kangu. But there is also another perspective to this. What do the women in those communities say? They also have a right and in a lot of cases at least 70% of the presentations we got on the women's right, the women wanted their rights in the communities even where you are talking about inheritance and so on. So I think as we talk about the values of the communities, we want to talk about what is the women's position on those particular issues in that particular community and do they have a right to be protected from cultures that discriminate against them?

Com. Bishop B. Kariuki: They are.

Prof. Yash Pal Ghai: As I read this formulation here, it would introduce a kind of universal norm, so it would not give the cultural or the ethnic community complete freedom to decide on their own internal matters, they would have to accept certain national norms. The question is do we want that to be the case? This is why I wanted to clarify. We are saying that only in relation to - as it all stand, equal rights in matrimonial property and inheritance as we have defined it in an earlier discussion. Other rules of customary law would remain but the question we had to decide is whether we want this concept of gender equality to be dominate norm and therefore qualify existing customary laws. That is the question as I see that.

Com. Kangu: Infact my problem Mr. Chairman is that the South African decision seems not to give us a solution or to lead us to a solution in the international norms because in every given society or country, the national standards the country has agreed on, would be in the Constitution and in South Africa, they put in the Constitution the value of equality and it was in the context of interpreting that Constitutional equality clause, that the court said these Constitutional clause means that we do not allow one community to impose its own values on another community.

The context was the issue of Muslims having their own standards that accept polygamy as a recognized way of marriage and therefore with certain consequences that follow. and someone had gone to court and he was saying "look, we have divorced and we should share property" and the man came and said, "look, this was a Muslim marriage, it was potentially polygamous" and therefore in terms of the existing English authorities, it was not a marriage and the conclusion was that no, you cannot impose English values on the Muslims. Muslims should be free to exercise their own values and my concern with that is that that

therefore carries forward even some of those values in our customs that you may think are contrary to the Constitution because the court was saying this in the context of interpreting the Constitution. It was saying the right of equality in the Constitution allows the Muslims to run their own affairs according to their own values.

When something is discriminatory amongst Muslims, you might be told you have no business questioning it, the Constitution allows that!

Prof. Yash Pal Ghai: Yes, this what I am raising as an issue for us to decide. We could go either way, we could go the South African way or the – I mean if you look at the Constitution of Uganda and Nigeria on this point, they basically say the same thing as South Africa. I have to say I am not familiar with the jurisprudence on this the way you are but if you look at the formulation, it says that customary law will apply expect in so far as the conflict with Constitution provision. They leave it at that. Now, do we want to go that way or do we want to say that personal laws will apply. Not make them subject to Constitutional norms. It is a choice that we have make and I think it is an important choice, it raises very fundamental questions so let us hear your views on that.

Com. Bishop B. Kariuki: Mr. Chairman, all the constituencies which we visited, because we have to do these things in reflection of what we were told.

Prof. Yash Pal Ghai: No, but also I keep remind you that the Review Act talks all the time of gender equity and parity. We cannot forget that.

Com. Bishop B. Kariuki: Yes, many communities had different opinions concerning property rights, concerning women, concerning various other issues and this is one area where we cannot come up with a Constitutional statement that cuts across the board. We must have a Constitutional provision that looks to equality that leaves different communities to apply that in as much as it fits them. Which means we cannot come with a gender provision that cuts across the board. So, my proposal here is, let us put as much a Constitutional provision disallowing discrimination and leave it to the communities to interpret what that means to their respective communities and with that respect I would like to go the South African way where by people have equal rights but what those equal rights means, will have to be defined within their own localities and respective community and traditions.

Com. Nancy Baraza: Mr. Chairman, I hear what my colleagues are saying here, but we have to always go back to our mandate and in this particular case, on the mandate regarding gender equity and equality. I think we will not be fulfilling our mandate if we retain the *status quo* as it pertains to women and we will not have come up with a Constitution which will help bring about equality in this country if we just leave women to the whim's of individual community customary laws.

Mr. Chairman, I think we have been mandated to come up with a progressive Constitution and for us to say we leave women to the whims of customary law, I am imagining myself. I am a Bukusu, one of the most chauvinistic communities and you say, O.K. you recognize my rights but leave the Bukus to decide. My colleagues here, you went to Bukusu land. Can you see the Bukusu giving Nancy a piece of land? I will not get Mr. Chairman and women may have come out in small numbers, but their cry has been "please, get us out of this psycho of poverty imposed on us because of custom". So I think we are going to be broad and adoptive Mr. Chairman.

Also, apart from our mandate, there is the issue - we are talking about rights and one of our basis has been international law to which as a country we are signatory. I think the covenant on economic and social rights guarantees rights to ownership of property and it does not talk about men and women. It talks about the people and I think that should be our guiding principle. Do not leave the women to the finitudes and the whims of custom, we will not have done the Constitution they required us to do.

Com. Dr. Githu Muigai: Mr. Chairman, when I first went to the university I remember listening to a debate between Okoth-Ogendo who is here, and Gibson Kamau Kuria who is not here among others, on the future of African customary law and as a young man, I was not impressed at all by the suggestion then, that there was a future for African customary law. Having been born in Pumwani, I had no business and no sympathy with the fascination that the natives felt for all manner of customs. Now that I am older and wiser, I know that this is a very important body of law for very very many people in this country. I would put it at probably over 70% of the people in this country.

Now that we have gone round the country, I know how much the problem of women in Kenya is also a problem of customary practices and I want to support Nancy and Wanjiku in their suggestion, that the Constitution cannot take a very open ended view of customary practices. Whereas we want to reserve to individuals, the right to regulate their lives in accordance with their customs, I would agree with Mutakha Kangu who is always reminding me that law should be a tool of social engineering. Again that I had rejected many years ago but I am willing to change my mind.

This Constitution must help us to re-engineer our societies because history teaches us one thing Mr. Chairman, power and privilege never concede anything. In the rural areas where these women live, the men in whom power and privilege have reposed authority will never yield anything. It is the Constitution in its majesty that must speak to all of them and tell them those practices are no longer acceptable because we are a community of persons with shared value. Therefore, where there are practices that allow widows to be stripped off their property and they and their children are chased out of the matrimonial home, the law must say, the constitutor must say that will not be done and so on and so forth and I would say Mr. chairman, that section 82(4) as previously drafted, may have had value 40 years ago when it was first drafted. It cannot have value today and our instructions to the drafts woman and her colleagues should be, we want a provision that does not allow practices to be smuggled through the back door of cultural practices, to take away the promises that this Constitution will give to women.

Which is not to say that we want to convert, I don't want to repeat the argument I made, about equality of matrimonial property and equality of inheritance, it is to remove discrimination. Thank you Sir.

Com. Prof. Okoth-Ogendo: (*Interjection*) Mr. Chairman, just to repeat a very simple point. I think in designing a Constitution and creating new Constitutional values, we have to be clear as to what those values are and then subject the legal system to the operation of those values. If we think that equality is an important value, then clearly we cannot argue about equality that has exceptions. We must talk about cultural or other practices that are subjected to the principle of equality. So we may have to be very clear on our own minds about what those fundamental values are. If we think that the right to life is absolute, then we cannot say that the right to life is absolute except for those whose practices allow any Mungiki to chop off the head of anybody they see in the street! We have to take those values and the way I have always wanted to do this, is to make a distinction between not yet fundamental rights, but inherit rights and facilitative rights. Rights that you need to make inherit rights livable and state the inherent rights as fundamental non-derogable and then the facilitative rights can be stated in a manner that vary from culture to culture but subjected to that principle and I am clear in my own mind that equality and equity are fundamental and that therefore, culture cannot be used as an exception to the principle of equality and equity and the Constitution must provide in that effect

Of we thought that marriage *parse* should create property and we thought that those are fundamental value, we will say so and then we will provide that the legal system must comply with this. Now, we are not agreeing necessary on that but I am talking about the principle of doing this but we clear about the value which we think is a clear value and subject the transient and variegated cultural practices of this country to that superior value rather than the other way round.

Prof. Yash Pal Ghai: Raiji then I think I we must move on.

Com. Raiji: Yes Chair, I think on this issue of customary law and the principles of equality of everybody, I think it is very clear that whereas the majority of the men did actually propose that they want to maintain the *status quo* for the reasons set out by Githu, I think we must also consider the fact that by virtue of this lack of equality, very few women were either given the opportunity to make their own contributions and others were not facilitated to do so, by virtue of lack of education and awareness and whereas generally the Constitution in accordance to our mandate must reflect the wishes of Kenyan people, I think there are certain other principles which you have mentioned.

So my preposition clearly is this, there is no doubt that no matter how romantic we might feel about customary law, it has been the major instrument of oppression of women in this country. My preposition is that having set out the principle of equality of everybody, then we probably would apply customary law subject to the other provisions of the Constitution and I would go far as – as I said yesterday, because I want us to re-warn ourselves against the dangers of applying 42 regimes of law in one small

country, many of them are not quantified, they can only be established as facts and so forth and I was going to propose and request my colleagues to consider this because this will keep on coming, to leave that business of agreeing of the quantity and the extent of the application of these customary law, to Statute, which Parliament can then work, look at it and find out all these things because we are going to be bogged down perennially if we are going to start arguing on this point, but clearly we want customary to applause at least part of it, subject to the other principles including this one regarding the gender.

Prof. Yash Pal Ghai: Well, I do think there is a consensus on this, - -

Com. Kangu: (*Interjection*): The point I am making is, I want women to have their share of distinct but I am afraid that the interpretation the South African court gave to the term equality, can very easily be used to deny the women those rights we are saying. So what I am doing is to bring to the attention of this plenary, that that term equality, we must use it in a clearer manner. Infact, it alone will not be solving the problems of women, because someone will pick that judgment and say import all manner of customary law, so in drafting, we must be aware that may be a misleading term and seek to use term that would serve what we are seeking in a better way.

Prof. Yash Pal Ghai: Thank you very much. So, persons with disability? Do you want to speak on that?

Com. Lethome: Mr. Chairman, I am still not comfortable (inaudible) What have we agreed upon in as far as this recommendation is concerned? and I don't want anybody to think that maybe where I come from we are standing for inequality, but I am not comfortable whereby we are generalizing. I would rather we use the term equality and equity. Equality and equity and that will take care of most of the problems that we are having here and if we do not address the problem here, now, we shall have to face it elsewhere, where we shall not have sober heads to address that issue.

Prof. Yash Pal Ghai: I have allowed this discussion to go on because it is a very very important issue and we need to be clear so –

Com. Lethome: (*Interjection*) If we could have both, equality and equity. It is adding even more to the women but I would rather the term equity than equality because in some cases, maybe the woman is entitled to more. Why should you subject her to equality? Why not subject her to equity where she gets what she deserves or where what is rightly has.?

Com. Nancy Baraza: Mr. Chairman I think we have no problem with that.

Prof. Yash Pal Ghai: I think it is a very important issue and you are quite right it is likely to be raised at the conference so let us get our own thinking clear on this.

Com. Nancy Baraza: Thank you Mr. Chairman and just before I go on persons with disabilities. The data run we got, infact most of these views, infact we had to think of what we had ourselves, it is not what came out of the data runs. I was a bit disappointed. So I think we will still go back and see if we can get what women said. What is contained here most of it is what we had at our fingertips and not what we got from the data runs.

Prof. Yash Pal Ghai: What did they say?

Com. Nancy Baraza: What is contained in our report. Much of it, but we still -

Prof. Yash Pal Ghai: (Interjection) You mean this is - no, this is not from the data you said?

Com. Nancy Baraza: The data gave us very little, so most of what we have is what I could think of as I went around the country. The data runs were not extremely useful so we feel probably we shall still go back to our notes and the data runs and bring it up so this is not conclusive, that is what I am just telling you.

Prof. Yash Pal Ghai: But we had many recommendations from the disabled, we had a national workshop on that, and - -

Com. Nancy Baraza: No, no, I am not talking about disabled I just took you back to the women, so what I am saying is - -

Prof. Yash Pal Ghai: (*Interjection*) I thought there were no further points on the matter.

Com. Nancy Baraza: Yes, so I am just saying in our fresh report we shall bring more views on the women.

Prof. Yash Pal Ghai: But you do not want to change any of these?

Com. Nancy Baraza: No, no we are happy with that. Persons with disability Mr. Chairman our recommendations are we are recommending the principles of non-discrimination to disability and any acts or practices attributed wholly or partially to a person with disability should be outlawed. We are recommending Affirmative Action in places of employment whereby persons with disability are employed so as to correct the past imbalance and that was an issue which kept coming out from people with disability and by virtue of been disabled, they never get employed.

They lack representation in decision-making organs and bodies. We are recommending that the Children's Act which provides for special measures to be put in place to afford education for children with disability should be imported into the new Constitution. We are recommending that sign language and Braille should be recognized as a means of communication and facilities put in place to ensure that persons with disability acquire education and all information through this language at all levels

of communication.

Even for our own purposes for communication, it came out from deaf who need sign language. So you can imagine a mother who has never communicated with her child for the rest of her life, so I think we need all these facilities. We are also recommending poverty reduction strategy, which should link economic empowerment of people with disability. We are also recommending that the National Commission for Human Rights, which we have proposed, should have a department of persons with disability. They should be charge with the responsibility of ensuring that State Policy provides for persons with disability.

We are also recommending Mr. Chairman that the new Constitution could provide for parliament to enact relevant laws of persons with disability. Public facilities, buildings and even transport system should allow for persons with disability. They should come out in our Constitutional order to ensure that these things are accessible to people with disability. Those are our recommendations.

Prof. Yash Pal Ghai: Any comments? If we are approving all those, the take us to Children's Rights please.

Com. Lethome: (Inaudible) A lot of people with disability were recommending that there should be either a ministry for persons with disability or a department to take care of their affair. I want that included under what Kenyans said. It came out clearly. They were even talking – maybe Affirmative Action takes care of their representation maybe in policy of decision organs of the state like parliament and Municipal council and the rest. So that is one thing I wanted to add on what people said. Thank you.

Com. Prof. Okoth-Ogendo: Did you have a look at the *Ager Nyanya* Task Force Report?

Com. Nancy Baraza: No, we haven't.

Com. Prof. Okoth-Ogendo: I think you should look at it because was on persons with disabilities.

Prof. Yash Pal Ghai: I did look at it and in the notes that I prepared, (interjection) it is in the Library here yes. But in the notes I prepared I had look at that and there were some quotations from that report there. We have it at the library here.

Com. Nancy Baraza: We shall look at it.

Margaret Nzioka: Thank you, the legal recommendations coming out of that report are summarized in a Bill which we have published, perhaps you can have a lot at that to.

Prof. Yash Pal Ghai: O.K. any other point? Then we move on to the children's rights.

Com. Nancy Baraza: This one Mr. Chairman we are requesting for the entrenchment of the Children's Act of 2001 into the new Constitution and we are also recommending that the rights of children should be non-derogable even during emergency. That is what we are recommending Mr. Chairman.

Com. Prof. Okoth-Ogendo: I would prefer that you go through the Children's Act and list the recommendations that you want to come into the Constitution and then provide that the Act should be amended accordingly rather than simply saying you want to entrench the Act.

Prof. Yash Pal Ghai: I think what we need to do is to have the principles. I think we are drawn in part from the convention of the rights of the child. We would enforce elsewhere an obligation on parliament to legislate and the Act that Margaret mentioned would in fact be that Act that (inaudible) that we will require legislation to implement the Constitution principles.

Com. Prof. Okoth-Ogendo: And the Act is available here.

Com. Nancy Baraza: Yes, I will do that.

Com. Dr. Githu Muigai: Mr. Chairman, a small issue relating to non-derogation. Even during Emergency and even I think we must keep a perspective of what is possible and what is practical. As far as I know but I can be corrected on this, except the right to life, an Emergency puts into questions several other rights that whether they be children's rights or the rights of adults and I think what we want to say is we want to secure in a realistic and meaningful way, the rights of a child. I know for example that under the Geneva convention, a 15 year old is a soldier and he can go to war and again we want to keep the perspective. We don't want an over queue and therefore this whole question of non-derogable I would be a little hesitant myself.

Prof. Yash Pal Ghai: Does anyone know what the Convention on the Rights of the Child says about derogation of Children's Rights.

Com. Nancy Baraza: Mr. Chairman we will look at it.

Prof. Yash Pal Ghai: O.K.

Com. Dr. Githu Muigai: It says he is entitled to school, he is entitled to educationgrant him security because it is a State of Emergency. Whatever the Emergency, the impact of an Emergency is to render ordinary circumstances difficult to maintain. So, I don't think we want to tie ourselves to that principle. We want to tie ourselves I suggest Mr. Chairman with respect to a more achievable goal which is to have a co-set rights of children that can be realistically and meaningfully granted to them.

Com. Nancy Baraza: May I proceed to the elderly people? Our recommendations are that we enshrine the rights of elderly people to education, employment and training. Yes?

Com. Prof. Okoth-Ogendo: Who are the elderly.

Com. Nancy Baraza: Who are the Elderly? According to the US - -

Com. Lethome: (*Interjection*) I happen to chair the session where Pamela Mboya came and presented a paper, and it was 60 and above, so Prof you do not fall under that! So it is 60 years and above and I think she was fighting some certain international instruments on that or Margaret do you have anything to tell us about that? Who is an elderly? Does Professor Crabbe fall under that? (*laughing*)

(Debate on the floor)

Com. Nancy Baraza: I lived with an 80 year old woman in Texas and she was going back to University. She had PhD but she was going back – was she doing French? At 80.

(Debate on the floor)

Com. Prof. Okoth-Ogendo: Mr. Chairman, we should also think in terms of what the U.S. would call age discrimination. In the US you cannot have a retirement age because they regard that as age discrimination. You can have all kinds of mechanisms. When “Mahasman Dughoul” (*Confirm name*) was told he was too old that he was too old to teach he went to court and he won. So apart from saying the elderly are people who need special protection, they also need positive rights.

Com. Nancy Baraza: Ya, we take that.

(Debate on the floor)

Com. Kangu: I don't know whether we are agreeing that we are going to put it or render it on those terms because if it captures retirement age, then we must reason out the submissions of the people because apparently many Kenyans were telling us reduce retirement age to create employment for the other people and so on so we much argue on that and explain why we think they are old.

Com. Prof. Okoth-Ogendo: Also Mr. Chairman I think the Kenyans were concerned about creating employment and they thought you create employment by sacking others so that younger people can get jobs. But that is a completely different issue from the one we are talking about here. Why should we discriminate against somebody by reason only of a particular age? So

if the problem is employment, create employment but you do not create it by discriminating.

Prof. Yash Pal Ghai: I should also mention that the Canadian Courts have taken a different view from the American Courts on retirement age. They have said that they could be good reasons for having retirement age. Anyway I think in broad principle we approve what you have suggested.

Com. Nancy Baraza: Then in between there are the rights of the refugees we shall retrieve them from wherever and the recommendations that will go into them are the recommendations under vulnerable groups.

(Debate from the floor)

Com. Nancy Baraza: The Refugees? We give them directly?

Prof. Yash Pal Ghai: Yes, I would think so, you can circulate it to us to but we may not have the formal session on that next week so - -

Com. Nancy Baraza: We will do that although. But the recommendations would be what appears for other vulnerable and minority groups. May I go to vulnerable groups? We are recommending equality and non discrimination to extend to vulnerable and minority groups. Provision for the rights of the vulnerable and minority groups to maintain and strengthen their distinct political, economic, social and cultural characteristics as we; as their legal systems while restraining their rights to participate fully if they choose in political, economic, social and cultural rights of the State.

(Debate on the floor)

Com. Nancy Baraza: Then we are recommending special rights and special measures whose aim is to achieve a purpose which is legitimate in promoting the rights of vulnerable and minority groups and should not constitute discrimination. Page 6. Provisions that allow the implementation of the rights of the vulnerable and minorities and achievements of conditions which to the degree possible are equivalent to those enjoyable by the majority.

I would urge the implementation of international treaties regarding the rights of minorities. We are also recommending that. Then we had a specific mention of the pastoralists. I think we captured what they said. Whom we described as found in the Northern Districts and the Rift Valley and we thought their concerns were quite unique to them and they were many. Non discrimination is provision of basic needs.

(Debate on the floor)

