

CONSTITUTION OF KENYA REVIEW COMMISSION

(CKRC)

Verbatim Report of

**MEETING BETWEEN CKRC COMMISSONERS AND MEMBERS
OF THE PARLIAMENTARY SELECT COMMITTEE HELD AT**

COUNTY HALL, NAIROBI

ON

16.09.03

VERBATIM REPORT OF PROCEEDINGS OF A MEETING WITH PSC HELD AT COUNTY HALL,
NAIROBI ON 16TH SEPTEMBER, 2003.

Commissioners:

1. Prof. Yash Pal Ghai	-	Chairperson
2. Prof. Ahmed I. Salim	-	First Vice-Chairperson
3. Mrs. Abida Ali Aroni	-	Vice Chairperson
4. Prof. W.H.O. Okoth-Ogendo	-	“
5. John Mutakha Kangu	-	Commissioner
6. Ms. Nancy Baraza	-	“
7. Dr. Charles Maranga	-	“
8. Ms. Salome Wairimu Muigai	-	“
9. Mr. Domiziano Ratanya	-	“
10. Bishop Bernard Kariuki Njoroge	-	“
11. Mr. Riunga Raiji	-	“
12. Pastor Zablon Ayonga	-	“
13. Mr. Githu Muigai	-	“
14. Mr. Ibrahim Lethome Asman	-	“
15. Dr. Abdirizak Arale Nunow	-	“
16. Mr. Paul Wambua	-	“
17. Ms. Kavetsa Adagala	-	“
18. Mr. Ahmed I. Hassan	-	“
19. Prof. Wanjiku Kabira	-	“
20. Hon. Mrs. Phoebe Asiyo	-	“
21. Dr. M.A. Swazuri	-	”
22. Mrs. Alice Yano	-	“
23. Mr. Abubakar Zein Abubakar	-	“
24. Mosonik arap Korir	-	“
25. Dr. Andronico Adede	-	“
26. Mr. Isaac Lenaola	-	“
27. Mr. Keriako Tobiko	-	“
28. Hon. Amos Wako	-	Ex-Officio
29. PLO Lumumba	-	Commission Secretary

Members of Parliament:

Parliamentary Select Committee Members

Hon. Delegate Sultana Fadhi - Vice-Chair, NCC

Meeting was called to order at 12.40 p.m. with Hon. Paul Muite in the Chair.

Hon. Paul Muite: I would like to call the meeting to order, Prof. George Saitoti and Otieno Kajwang, first of all to apologise to our colleagues, the Chairman, CKRC Secretary and all the Members because I know we had agreed that we would have this joint meeting at 12 o’clock and we went over that time. The reason is that the Parliamentary practice and ethics is always to endeavour to reach a consensus on any matter that is controversial and that is what took a little longer that we expected.

We have discussed the issue of the timetable in the event that the Conference is not able to conclude its business by the 26th of September, because we all know that Parliament has to resume in order to dispose all the balance of the Budget work. We

have discussed that issue and we have arrived at a consensus that in the event that the Conference does not finish its business by the 26th, the Conference will resume on November the 17th; Delegates to arrive on the 16th which is a Sunday and we resume business on the 17th of November.

So I do not know what the reaction of the CKRC is to that but I would like to emphasise that this was arrived at after very lengthy consultations and if it is possible to persuade CKRC that that is the logical way of proceeding about this business, it will be a very good thing.

Thank you.

Prof. Yash Ghai.

Prof. Yash Pal Ghai: Thank you very much, Chairman. I think it is really for the Conference to approve, not for us. Under the Regulations of the Conference, questions of adjournment are decisions made by the Conference so all we can do is to report to them and I am sure you will be there too, you could speak to it, but I do not think we, as a Commission, can really commit the Conference to any particular timetable.

Hon. Paul Muite: That position is, of course, the accurate legal position and we went over it but we also agreed here as Members of Parliament that where a consensus is able to be developed – and we took a bit of time as Parliamentarians to agree on that – if we can now extend that consensus to say that, this is after consultations, I think it will go a long way towards persuading the Conference to proceed along those lines rather than re-opening the debate as if there is no consensus between the Parliamentary Select Committee and the CKRC.

Prof. Yash Pal Ghai: So, when we assemble, according to your proposal, on the 17th, then do we go on until we finish the Process?

Hon. Paul Muite: Yes, that is the thinking and one assumes that if then it is not finished by the 30th of November, you will bring a proposal for the extension of the term of the CKRC.

Prof. Yash Pal Ghai: Well, you assure me that you have reached a consensus on this and I hesitate to reopen the question. My own preference would have been to start a little earlier in November so that we really have a good chance of finishing in December.

Hon. Paul Muite: Well, we have gone through it, as I said you know we even kept you out there, take it from me it was not easy developing a consensus. So I would rather that we do not re-open the issue.

Prof. Yash Pal Ghai: It would have been nicer to have developed a consensus with all of us sitting together rather than you deciding and then imposing it on us.

Hon. Paul Muite: We are not really imposing it at all, I am just suggesting that if we re-open the issue we may go on for the rest of the day. But you, yourself, have correctly agreed that it is for the Conference to fix a date and, therefore, we thought that we might make things a little easier. In fact the other option would have been to ask you to come in so that we debate this issue together but in the end we thought that if we can develop a consensus amongst the Parliamentarians, it might be a speedier way of going about it. Otherwise the date is not being imposed on anybody.

Prof. Yash Pal Ghai: Well, thank you very much, Mr. Chairman. I really feel I would like to consult the Commission; maybe if we could have a few minutes to consult and then we will let you know what the Commission thinks about it.

Hon. George Saitoti: Both Chairmen, I think it may very well be useful if the Commission could understand the reasons behind our having agreed the date of the 17th November. When we do resume Parliament after the 26th September, there are quite a number of Ministerial votes which have yet to be deliberated but which, according to the Standing Orders, must be put as near as possible to 31st of October so that a guillotine Motion can then be brought in. Now, once that is done then you are really looking again right into the first week of November. A Bill known as the Appropriation Bill has got to be brought to Parliament and debated to enable the Government to appropriate the money from the Consolidated Fund. Then, there have been on going discussions between the Government and the multinational institutions, the World Bank and IMF, and symmetric has already been drawn and inside there, there are certain time frames which put a limitation by when certain legislations must actually be passed before the release of the money is effected. On top of that there is also The Finance Bill, because once you sort The Appropriation Bill and the Ministerial budget, you are only looking at one side of the coin as far as the budget is concerned as far as the Budget is concerned, but that is expenditure. But then you know The Finance Bill is the one that will then extend the powers for the Minister to levy taxation.

Clearly, your deliberation, as the Chairman said, was extremely difficult but I think it is therefore then agreed whatever is required to be done must be compressed so that everything is finished by the 17th of November. Then of course the deliberation of Bomas can continue all the way to finalisation.

So I just wanted you to know the basis of that.

Prof. Yash Pal Ghai: Thank you very much. So, if maybe there is a room we could adjourn for five or ten minutes—

Hon. Paul Muite: *(To the Clerk)* Could you do that, can you provide a room, Mr. Clerk? There is the other Conference

room at the other end.

Prof. Yash Pal Ghai: We will not keep you waiting long, we will try to get back soon. We have to leave at half past one anyway because we are starting the session at 2.00 p.m. in Bomas.

Hon. Paul Muite: What is the position, Mr. Clerk, you have provided a room? Then you can show them the room.

(Commissioners retire leave the room)

(Recorded without speakers)

Com. Bishop Bernard Njoroge:

(Inaudible). When the Members of Parliament called us I could see all the _____, I could see all the parties and they told us they had discussed this issue for a long time and they had come to a consensus, and reasons have been given.

Mr. Chairman, I would like to point out to you that we have to be _____ (?) otherwise the position that I see can plunge this country into a lot of problems and I want to say this very early because I am getting a little anxious about the position you are holding. These are views of those who are in power and those who are given the responsibility in Parliament to

(Inaudible). They pleaded with us, they said we do things by consensus, they told us the reason is because there are abused, they even said when we start on the 17th we can go on until we finish. I would like to suggest that we agree with that proposal and once we go to Bomas of Kenya we are not going to excite Delegates like has been done so that they can be at war with the Parliamentary Select Committee and Parliamentarians, we are not going to do that. My own feeling is that we can agree with what they have suggested, we come back on the 17th and we go on and on until we finish the work that has been given to us.

But I want to be open here, Mr. Chairman, you have to be very careful—

Prof. Yash Pal Ghai: Stop lecturing me, please, I have heard you.

Com. Riunga Raiji: Thank you, Chair. First of all I think you have hinted that we have no mandate on the issue of adjourning. I remember that issue arose that time we were adjourning. I was not sure the position was that real and I remember one time I asked you and you mentioned that you were not very clear on the position but it appears you are clear now.

But that apart, I think the issue really is two-fold, the MP's

Prof. Yash Pal Ghai: Look at the Regulations, you are a good lawyer, these are the Regulations.

Com. Riunga Raiji: Actually we discussed—

Prof. Yash Pal Ghai: Don't _____ (?) to the Regulations, come to the point.

Com. Riunga Raiji: No, I am just saying that you did tell me that the legal position was not

(?).

Commissioners: (*Inaudible*).

Com. Riunga Raiji: I think let us do this, we are dealing with a very serious issue. Just like we are appealing to the Delegates let us all be self-controlled, from the Chairman to the Commissioners because we have a practical problem and the practical problem I see is this, Chair. Suppose the Conference now says, “no, we are going on with or without MPs” which is a possible scenario, that would precipitate a national crisis.

I see our responsibility as follows, the MPs have been very candid with us, we know that they represent all shades of opinion and this is the more (?). They have come to this decision after lengthy discussion with the position. So basically what we have now is that is, for example, the Conference were to say, “we do not intend to adjourn” what would happen is that the MPs will say that “anyway, you go on with your Conference and we go on with Parliament” and I would assume that is an outcome that nobody in this room would want.

We are talking of a consensus and I think the message these people are passing to us is that, “look, we are giving you this position so that you can also use your position and experience in these matters with the Delegates so that you will arrive at a consensus.”. We have arrived at consensus before in equally difficult positions and I am saying this, Chairman, I am not talking it on you, I think the responsibility lies very heavily on your shoulders because you are the only person who has the mandate to communicate this decision and the style of communication will have a very large bearing on whether the Delegates agree with the position that has been put forward or not.

Com. Okoth Ogendo: Mr. Chairman, mine is purely a procedural point.

(*Inaudible*) that this was not the way to proceed. We have never proceeded with a situation where the PSC summons us and says “this is how you are going to run the Conference.”. So that procedural point I think has to be made and must be made very firmly.

Secondly, I think the PSC has-- Take it that they have given us their view but clearly that view then will have to be taken into account in making decisions about adjourning. If we agree as a Commission that ultimately the adjournment is to be made by the Conference itself, all we can say as a Commission at this stage is that we will not stand in the way of the Conference adjourning in accordance with the advice of the PSC. But I think it would be absolutely wrong to get the PSC to believe that they can now take over the Conference, determine its calendar and adjourn because if they do that the next time around they are going to say that they are running the Conference and I think that is wrong and that ought to be made clear to the PSC.

Com. Charles Maranga: I think, Mr. Chairman, it will come from the point at which we are in our work in the Conference:

how much work we have and how long it is going to take. I think that is critical. The other point is the availability of all the Delegates which means the Members of Parliament, if they are going back to Parliament with effect from October, then technically within that month we are not going to have anybody from Parliament representing that particular constituency and it is a critical constituency.

So, Mr. Chairman, I think this suggested date now should be brought forward to the Steering Committee so that it is approved officially then it is passed on to the general Plenary for approval. We will not do very much when Parliament says it will not be available. Mr. Chairman, we have seen occasions when they say “between this period and this period we will not be available” and as a Conference, including the Commission, we do not have much to do.

So I think what we need to do is to take up that date in a very sober way so that we can now tell Delegates “because Parliament is resuming on such and such a date and we have not finished our work.....”. But then they have also promised that after the 17th of November they will avail themselves continuously so that we move on and we see how far we can do that work. So, my position is that I think now that they have agreed, because I can see all the Parliamentarians from all the political divide are there, that is critical for us and those Delegates, Mr. Chairman, are divided on party lines; they are also on political lines, that is the truth. So, these are the leaders who are going to tell them to accept or to say no. So I think we should take their position but I think you need to communicate the fact that maybe there was a lapse of how we should have handled this matter.

Prof. Yash Pal Ghai: *(Inaudible)* those who support need not say anything for the time being but those who are not very happy with the proposal, maybe they can express themselves. And if nobody does then I shall assume that we accept the date.

Com. Abida Ali-Aroni: Mr. Chairman, I think *(Inaudible)* 17th of November to the 30th of November it is about two weeks so we should also be assured that we will have an extension after the 30th because we do not want to adjourn again on the 30th and wait for PSC to make a decision. I think that should also go on board. They are giving us the 17th up to what time?

Prof. Yash Pal Ghai: They were saying that that should be a problem.

Com. Abida Ali-Aroni: But let it come clear so that we leave with an assurance that 30th will not put us into more problems.

Com. Nancy Baraza: Thank you, Mr. Chairman, I think your legal position is the right position and I agree entirely that they are arrogating to themselves what they ought not to be doing but they have explained why they have arrived at that date. Personally in the circumstances, much as they are wrong and you are right, Mr. Chairman, I do not know what alternative we

have. I think I would agree with Prof. Okoth Ogendo that they should be told in no uncertain terms that there is a limit to which they can go vis a vis the running of the Conference. But what choice do we have? I think they have given us reasons as to why they are not available until 17th of November. I am particularly not very happy but I do not see much choice on my part and I think I would agree with Abida that they need to address the issue of extension after 30th of November.

PLO Lumumba: Chairman, just one point. My view, therefore, is that we should indicate to them that possibly by the end of next week we, ourselves, as a Commission will have met and made our own proposal for extension which they should then take on board immediately they resume.

Lastly, as I agree with my good friend and teacher that we should be firm, the firmness and politeness is very useful particularly with Parliamentarians as we have observed before. Thank you.

Prof. Yash Pal Ghai: Okay. Shall we then go back.

(Commissioners rejoin PSC Members to continue with the meeting after consultation at 1.20 p.m.).

Hon. Paul Muite: I think we can call the meeting to order again, it is going on to half past one and we need to resume the Conference at two o'clock so if we can conclude this matter as soon as possible it will be in the interests of everybody.

Prof. Yash Pal Ghai: Thank you very much. First of all I want to clarify the legal position just for the record and how we proceed and it is for the Conference to decide when it adjourns and when it meets. I would like to present it in a way to the Conference that it is not seen that we are preempting anything. I think that would be politically unwise. So what I would like to do is to bring whatever we agree today to the Steering Committee tomorrow, discuss it there and then we take it to the Plenary.

But I think if the Plenary thinks that things are being imposed on them, there could be quite a strong reaction and I would like as Chair of that Conference to present this in the form of recommendation, clearly understood, that the decision is to be made by the Conference. I am sure if a recommendation is made which has the support of the Committee and the Commission they are likely to accept that but I think we must acknowledge the legal position.

The second point I want to make is that we, of course, want to accommodate the timetable of Parliament in this Process. I personally feel – and I speak only for myself – that this Review Process has been too fragmented. As a professional, my own advice would be, it is not really in the interests of a good process that we meet for three, four weeks, we adjourn, we meet and that is what we have been doing. But we certainly want to accommodate the necessities of Parliamentary timetable and in principle we are happy/willing to – some are happy, some are willing – recommend to the Steering Committee tomorrow that the Conference should adjourn on the 26th and re-assemble on the 17th for business as you have recommended.

The third point I want to make is that as you reminded yourselves before we left, that our mandate, not just our mandate as the Commission but the implication of the whole process ends on the 30th of November and we would like the extension to be resolved by your Committee and by Parliament in good time so that we do not have to interrupt our proceedings on the 30th of November and wait for an extension which may take several weeks to resolve. So we would like the Select Committee - and I guess you were implying that this is what you would do – to resolve on the extension in the next few weeks. We will certainly prepare a request as we have to do under The Review Act and we hope that a decision can be made as soon as possible so that there is no interruption during November of the proceedings.

So, in brief we go along with your proposal and understand the constraints under which Parliamentarians have to work, but what I would like to do is that we jointly make this recommendation to the Steering, let Steering discuss it and then take the recommendation to the Plenary.

Thank you.

Hon. Paul Muite: I beg to respond very briefly on the issue of how to go about it to the Conference, there is no dispute about that. Take it to the Steering Committee and then take it to the Conference by way of recommendation. All we were suggesting

is that if at least there is a consensus between both the PSC and the CKRC and you place it by way of recommendation, it carries better chance of providing a way forward towards a decision rather than leaving it open for debate. That is all we were doing, we were consulting as Members of Parliament.

On the second issue, in fact it featured quite a lot in our discussions; the second issue being that it is not in the interests of the Process for there to be disjointed sessions of the Conference. In fact we were looking at resuming sometimes in January and proceeding because January and February and perhaps March could be free, proceeding on the basis that we continue until we conclude the business because we were anticipating that perhaps if we resume on the 17th of November, December is a holiday month with a lot of interruptions, Jamhuri Day and what have you, we may not be able to conclude and we did not want the Process interrupted again. But the majority of people, towards sort of give and take and developing a consensus, agreed on the 17th. So, even that issue of disruptions, we looked at it.

The other one, of course, is the possibility of the mandate expiring before the business of the Conference is concluded and as soon as we have your request we shall give it fairly speedy deliberation and present it to Parliament.

So we thank you and we hope we can be able to develop more consensus.

In fact the other issue just for your information not for discussing is that it would be very helpful to the Conference if the various political, through this PSC, on the issues of the type of Government they want, Presidential, Executive, Mixed and what-have-you, if they could develop a consensus it would clearly help in moving the Conference forward. So this is another possibility that we are going to be looking into.

So we are consulting in order to make things easier towards making sure that we get a Constitution as early as possible.

Thank you.

Prof. Yash Pal Ghai: Thank you very much.

Meeting adjourned at 1.30 p.m.

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