

**CONSTITUTION OF KENYA REVIEW COMMISSION**

**(CKRC)**

**Verbatim Report Of**

**DISSEMINATION OF REPORT AND DRAFT BILL, SHRINE OF MARY  
HELP OF CHRISTIANS, DON BOSCO SHRINE UPPER HILL, HELD**

ON

**6<sup>TH</sup> OCTOBER 2002**

*Transcribed by Lillian Momanyi*

*Final Copy*

**DISSEMINATION OF REPORT AND DRAFT BILL, SHRINE OF MARY HELP OF CHRISTIANS, HELD AT  
DON BOSCO SHRINE, UPPER HILL ON  
6<sup>TH</sup> OCTOBER 2002**

**Present**

1. Com. Riunga Raiji
2. Com. Salome Muigai

**Secretariat Staff in Attendance**

- |                   |   |                   |
|-------------------|---|-------------------|
| 1. Esther Walia   | – | Programme Officer |
| 2. Regina Mwachi  | – | Verbatim Recorder |
| 3. Willy Mutai    | – | Co-ordinator      |
| 4. Reginald Okumu | – | Chairman          |

Meeting was called to order at 11:15 a.m.

**Willy Mutai:** Thank you very much for availing yourselves for this function. We have the privilege of having members of the Constitution of Kenya Review Commission with us. We have Com. Salome Muigai, karibu and Com. Riunga Raiji.

Since we have not settled down, I would like us to start with a song then a word of prayer. So let us rise for a song please.

*(Song): There is something today in the house of the Lord X3 Halleluya today in the House of the Lord. There is something today in the House of the Lord X3, Halleluya today in the House of the Lord. Kuna kitu leo Nyumbani mwa Bwana, X3 Halleluya leo Nyumbani mwa Bwana. There is something today in the House of the Lord X3Halleya today in the House of the Lord.*

*(Prayer):* In the name of the Father, of the Son and of the Holy Spirit Amen. Our Father who art in heaven, hallowed be thy name, thy kingdom come, thy will be done on earth as it is in heaven. Give us this day our daily bread and forgive us our trespasses as we forgive all those who trespass against us. Lead us not into temptation, but deliver us from evil.

Almighty Father, we come to you this morning, we would like to ask you to guide us through this meeting, that what we discuss here Lord, might be of benefit to the greater among and for your greater glory. We ask all this through Christ our Lord, Amen.

In the name of the Father, the Son and the Holy Spirit Amen.

You may now be seated.

**Reginald Okumu:** Good morning once again. Thank you for coming. We are going to discuss or we are going to air our views, to give our reactions to the document that the Constitution of Kenya Review Commission presented. We know that it cannot be done in a few hours but we only have those few hours today.

The session today will basically highlight those issues and there is ample time for us to discuss this document. We are privileged here today to have two Commissioners; Mr Riunga Raiji, who is also an advocate and a Commissioner. A member of the South B Parish, and Salome Muigai who is one of us, she prays with us here.

We have also other experts who we have called to help and guide us. We have Mr B K Terer; he is a Land Economist by training. We have Dr. Wamukoya, an Environmental Lawyer, and we have Mr Nchooro Mmwenda, a principle tax consultant with Deloitte & Touche. We are also expecting Mr. Ndubi, the Executive Director of Kituo Cha Sheria.

Our programme was to go like this, we are to discuss or we were to be taken through the process by Salome but I think Professor Ghai took us through it in the church, so that saves us some time. Mr Ndubi was to highlight the Human Rights aspects as they have been brought out in the new Constitutional Bill. Dr. Wamukoya will discuss or highlight the issues of environment. Mr Terer will talk about land. Mr Nchooro Mmwenda will discuss about finance. Mr Raiji will discuss about the electoral system and governance and basically the devolution of power.

I would like to urge you that when we start speaking, to save time, let us go straight into the issues, okay. Those of us who want to praise the Commission or criticise them, please let us not do it here, go straight into the issue of what you think was left or what you think is not right, and we can have a session that is short and straight to the point.

I think will go since Mr Ndubi is not here, I think I will go straight and invite Dr Wamukoya to start the session and I will give you not more than five minutes to highlight the issues of the environment, okay. Karibu Daktari.

**Dr Wamukoya:** Thank you very much Mr Chairman. Distinguished panellists, ladies and gentlemen, I have been limited to five minutes and I will try to live to it. First I would invite people to look at the national goals, values and principles, which is clause 14.

One important thing that is embodied, for those who have the newspaper, I think it is on page 4, clause 14. One very important aspect of this Constitution is that it defines the goals and values and principles, which kind of underlie the basis of all the other clauses. On the matters related to environment, clause 14 (14) kind of states very clearly that the public shall be committed to social justice and through appropriate policies and measures providing for all Kenyans the basic needs of food, shelter, clean water and more so a clean environment. Therefore, one of the basic principles that is embodied in this draft Constitutional Bill, is a clean environment of which the Republic should be committed to.

The other one is para 16, that is clause 14, para 16 which is... I have been advised that I need to let you know how to read the clause 14 and whatever. Now, if you get to chapter 3, which is on page 4 of the newspaper, there is number 14 there immediately after the heading, National Goals, Values and Principles. Now, that forms what I will call clause, it is a clause. The next one I will use the word 'para' to distinguish it from a clause and a para following it.

The other one is para 16, which is on page 5, immediately after 14 we have 15 then 16. The Republic shall recognize its responsibilities to future generations of Kenyans by pursuing policies for the sustainable management of the environment. To me, that is very, very important. One, is that tends to link the environment and development and tries to look at how we use our environment today in relation to the future generations. That is the concept of sustainable development that emerged from the Earth Summit in Rio, and the subsequent WSSD meeting, which was concluded recently in Jo'burg.

Then quickly, the next important provision in the draft is the duties of a citizen. What is expected of you as a Kenyan citizen in matters relating to the environment? We have been very good at pointing fingers at the government and saying, yes, the government should do this but the Constitution now expects you to take some positive proactive steps to ensure that the Constitution is upheld.

That is provided for in clause 15, 1(b). 1(b) says that in order to fulfil the national goals of which a clean environment is

provided for, the values and principles, all citizens have the duty, (b) to uphold and defend the Constitution and the law. You have a responsibility. You don't sit back and see the Constitution being flouted and say yes, God Bless us. No, you have to take some steps and they will be discussing what you can do.

On the same page, the other important part is (j), protect and safeguard public property from waste and misuse. When you are protecting public property, much of it you will find that to a great extent is under forests for example, or public recreation. If you protect its integrity, it means you are enhancing its use and you are protecting the people to use it in a better environment and therefore that is another part, so that you don't see Uhuru Park going and then you say it is very nice to have a high-rise building.

Then the next one is (k), it is the duty of every Kenyan citizen to protect the environment and conserve natural resources. The steps that have been taken by many Kenyans relating to the degazettement of forests would fall into this category. That people are taking proactive steps to ensure that there will be no more degazetment of forests for example, and there are no more misuse of our resources. Therefore, you have a duty now. If this Constitution goes through, you have a duty to ensure that the environment is protected and the natural resources are conserved. I know the most critical one is mining and I think we will be discussing that at some stage.

Then (n) says that you need to understand. You have a duty to understand and enhance Kenya's place in the international community. You ought to recognize that Kenya is not an island; it has to have some international co-operation. A typical example is that we have trans-boundary resources for example Lake Victoria. If Kenya does not co-operate with Uganda and Tanzania, will Lake Victoria be there? No and therefore you need to know of the international instruments both at the international level and regional. For example the East African community, what does it provide in so far as environment and natural resource management is concerned.

Those are issues that you have a responsibility. Such that if the Kenyan government under its municipal law appears to be violating, then you can seek recourse in international law, and we have the East African Community Court of Appeal, which you can seek redress in respect to that. Quickly, I would like to invite you to chapter 12, which is on page 29. I am specifically moving there because it is a complete chapter dealing with environment and natural resources.

Now, this Bill has two very important provisions. In order to realise the goals and the values, which we have read, it has to put in place mechanisms by which the citizens can enjoy and implement those values. The first lies in clause 63, as read together with clause 239, which is on page 29, but let us go to clause 63 first. Clause 63 is very, very clear on what is expected, clause 63 is on page 9.

It confers the right to an environment every person or everyone has the right to an environment that is safe for life and health,

and to have the environment protected for the benefit of the present and future generation through reasonable legislative and other measures that prevent pollution and ecological degradation, promote conservation, and secure ecological sustainable development. The concept of sustainable development is now enshrined in the Constitution and then free access to information and I will be talking about that, and to compensation for damage which is that the polluter pays principle. If you pollute, you pay up for the clean-up costs and any compensation or injuries arising thereto from that pollution.

Now, if you read this particular provision, it will remove what the courts have always said you lack *locus standi* of which Professor Wangari Mathai has always been locked out of court that what makes you think that you have more right than others.

It liberates the *locus standi* on the environment, and therefore you can go to court and the court will not demand for you to show an interest. No, you have an equal interest.

Otherwise, as the current Constitution stands, you would require. The argument is that the Attorney General is the Public Defender more or less, and therefore he should be the one to go to court in the event of a public interest violation. This particular provision therefore liberates the *locus standi*, the right to go to court, and therefore enables you to use that to apply clause 14 which I have made reference to, the values and the duties that go with it.

For you to do that, there is one thing that comes out very clearly, the right to information. If you go to court without proper information you know you are going to lose. However, now here, it is provided for that you have a right to environmental information, and that must be read together with clause 47, which is on page 8. That must be read together with clause 47, which confers access to information. Every citizen has the right of access to information held by the State. There may be some very important information that is held by the State, which you would require to put before the courts. In the absence of that information, your case may not be sustained and therefore you have to rely on clause 47 for purposes of getting any information that may be held by the State which may not be in your possession and yet you require it to sustain your matter.

The most important thing in this respect is this, that it means that the right to environment has now been included in the Bill of Rights. It equivalent, it is equal to the right to life, right to property and the other rights that are now enjoyed, that is the most critical, and its application and interpretation will mean that it is on the same footing with the other rights unlike what it is today.

Then, what do you do? Let us go back to page 29. What do you do when your right is violated? Every person has a duty, clause 239, every person in Kenya has a duty to safeguard and enhance the environment. Every person. You now have a duty. You remember we talked about the duties of citizens. Now, clause 239 re-emphasises and restates now that you have a duty to safeguard and enhance the environment.

When doing that, when state officials or public servants are executing their duties in relation to the environment, they must bear into mind certain factors. One, public participation, it brings on board the question of citizens participating in the decision

making process. Two, the culture and the social principles applied in the various communities within which we are living. It means it recognizes the diversity of culture and social bearings, and therefore you cannot transfer one management regime to another area unless you have taken into consideration the various factors as far as culture and the social setting is concerned.

Three is that it tends to give the administrative and the other functions relating to protection of wildlife, forests, waste management and minimization, water conservation which has been a bigger issue and all other facets. However the most important is this, that under 3 (i) which is on page 29, the second column. It requires that, applies to any project or combination of projects including government projects likely to have significant impact. It kind of brings on board the question of environmental impact assessment to be done on all projects whether it is by government or individuals.

If you read that together with (g) 2, is that the process of reviewing must be open and gives adequate opportunity for public comment. The document must be scrutinized in a manner that will lead to some independence in the decision-making process. I think many of us have been crying that there are many projects that have been undertaken, there are very good EIAS documents and yet we still have a problem, and we have a typical example like the Pan Paper. It was a World Bank Environmental Impact Assessment Study. Why are people in Western complaining about Pan Paper? This therefore kind of takes care of that.

Now, that would apply for the new projects. For the on-going projects, that is where you need to get a distinction, for on-going activities like Pan Paper, like Unilever, like whatever else, you move into Environmental Audit and Monitoring, which is (h). Therefore, you need to make a distinction between Environmental Impact Assessment which is for new projects and Environmental Audit and Monitoring, which is for on-going activities. Such that if there is an on-going activity what is the orders you would be seeking? They are orders for Environmental Audit so that you know what is being polluted and how it can be remedied. If it is a new project then it means that you need to identify the environmental impact and they need to put in place mitigation measures if the project is to go on.

Then quickly, is that this particular Bill provides for an establishment of a commission, the National Environment Commission. If you look through the general principles surrounding the commissions, it means that it should have between three to not more than ten people that is in chapter 17, which is on page 34, Constitutional Commissions and Constitutional Offices. That is where I have a bit of a problem in that from my experience as a joint secretary to the implementation of the Environmental Management and Coordination Act.

It is my proposal that we many need to have the composition of this particular Commission stipulate other than just saying it shall have a membership of between three to ten. In the sense that because one of the principles embodied in this Bill is equality, I would call that we have eight or nine members, of which one shall come from every province, so that when matters of environment are being discussed at that level, then it means that no province at all is left out. You can address those issues

because you are looking at matters of equality and equity as it were.

I am saying this because we were to establish a board under the National Environment management Authority and we did make recommendations to the Office of the President that because it provides for eight members, we have eight people each one from the provinces and the Council which is chaired by the minister did approve but on the contrary now, we are likely to get a board that has some provinces not represented and with one province having more than three or four members. And what happens to other provinces that may not be represented in terms of decision-making process?

I just want to make a quick reference to chapter 11, which my colleague Terer may be talking about, Land and Property. Now, one of the functions of the National Environment Management Commission is, that is on page 28, which is just opposite is this, it is to provide guidance on land use, examine land use patterns. Whereas the land and property there is a commission established there under, above the environment issue which is on page 29, the establishment of National Land Commission, of which one of the functions is to administer land on behalf of the government and also land policy.

If the function is also to develop land policy and there is a difference of different commissions handling land policy and land use policy, do you see a contradiction there or a likely conflict? Which of these commissions has overriding powers over the other in event of some decisions that are conflicting between these two commissions. I would therefore have liked a statement making reference to the Land Commission, linking it up with the Environment Commission so that the decisions made are in consultation with each other.

This is because we cannot divorce land from the environment, because our environment and knowing our economic development and our survival is based on land. If we have a different regime governing land, it may propose the use of land in a different manner which may be in contradiction with what is proposed for under the environment.

In a nutshell, what I am saying is that this Bill to a large extent does provide a very innovative framework for the management of the environment, and it does provide such framework that would in my view, if used properly empower Kenyans to protect the environment. This is primarily in relation to page 11, whereby we have a provision. Clause 72, which defines the application of the Bill of Rights of which the right to environment is one of those in the Bill of Rights, it means it has that bigger latitude.

Number two, is that it does provide in the form that there is fair administration, which is on page 9, clause 65. Most of the environmental decisions are going to be done through an administrative action. Therefore, it is important to have a framework that ensures the fair administration of justice. In this case clause 65, in my view, would apply in the sense that it does state very clearly that the administrative action must be expeditious, lawful, reasonable and procedurally fair. This gives you an opportunity to examine a decision made by any authority and move there to challenge it through judicial review or any other regime that is there. To crown it all, it provides a framework that parliament should enact an appropriate law, which should



implement the provisions governing the environmental management.

In my view, apart from a few issues here and there, is the fact that it confers a right to a clean environment, and a duty upon which the responsibility is shifted from government to citizenry, and a framework through which you can address in my view, this Bill would bring a new innovation in the administration of environmental matters in Kenya. Thank you.

*Clapping from the audience*

**Reginald Okumu:** Thank you Dr Wamukoya.

**Dr Wamukoya:** The only problem I have, and I hope Commissioner Riunga will address is this. If you look at, I think the seventh schedule which kind of addresses or defines the powers of national and district governments, you would see that it is not very clear other than the district having a few links, it is not very clear which of these government devolution of power would have the sole responsibility in matters of environment. The logic would be the national, but then we have a local implementation and I would invite that the Commissioner or that we look carefully at the question of inter-governmental relationship as provided for here. Such that it must be very clear and there must be a linkage, there should be a statement that the two governments in matters of environment are interrelated, and they need to work synergistically. Otherwise, if you define that one would fall completely under one we will have a problem.

I would request that we look carefully at the South African Constitution, which I have had the privilege to study. One of the things that under inter-governmental for example, it states that under corporate government, because South Africa has the national, provincial and local spheres of government and it proceeds through clause 40 to state that in the Republic, government is considered as national, provincial and local spheres of government which are distinctive, interdependent and interrelated. This means it is encouraging co-operation.

Otherwise, if we just leave open statements, then you will find that you will have a problem to pin down the national government or if you are going to court, do you sue the government, the district government or do you sue the national government? I would therefore like us to fine-tune the inter-governmental relationship. Thank you.

**Reginald Okumu:** Thank you Dr. Wamukoya. We will have our chance to react to all these and give our comments. What we will do is that we will just go through the highlights and then we will have a chance to air our views. Mr Raiji will respond to what Dr Wamukoya has raised at that particular time.

We have been joined by Mr Ndubi, the Executive Director of Kituo Cha Sheria and I will invite him to take us quickly and please in not more than seven and a half minutes, through the Bill of Rights. Karibu Bwana Ndubi.

**Haron M Ndubi:** Thank you very much. I am sorry that I came late this is because of two main reasons. One is that I am not a worshipper in this church so I could not have come earlier and two, that you have very many worshippers so there was a heavy traffic jam as they all were making their way here.

I was requested; let me tell on one of your friends here who is my friend also. I am telling on him on this account that he was requesting me to come here today on Friday at 5:30 pm and as a Kenyan, I agreed for two reasons. One, is the advantage of using an influence which he used upon me, because he was my senior in school and two because I hold dearly this process that we are going through of reforming the Constitution. The only apology that I will make in that regard is that I may not do quite a superb job as he may have expected because of those two reasons I have mentioned.

He asked me to talk about the Bill of Rights as is in the draft Constitution. Looking at the draft Constitution, I wondered why anyone needs to be talked to about the Bill of Rights. You will be surprised why I was wondering why but the thing is, nearly all the provisions in the Bill of Rights are things that we have been craving for all of us. Things that we would wish to have, and therefore there is no one who needs conversion, who needs to be told what the good things about the Bill of Rights are in this draft Constitution.

However, having been given this opportunity and like my colleague, I am paid to talk, let me talk briefly about it. The very attractive thing about this Constitution, even before we come to the Bill of Rights is that it provides a preamble. It seeks to reaffirm our own perception about ourselves as a Kenyan people, to rekindle the spirit of nationhood, to rekindle the spirit of oneness and the spirit of value as people belonging to a nation. Which values, which oneness, which commitments are now kind of discussed fairly well in the Bill of Rights.

Since I have only one minute to say what I have to say, you gave me two and a half? Oh, seven and a half, I will cut them to five because I don't want to take the whole time. I will say this, the Bill of Rights for the first time in terms of comparing this draft Constitution with the current Constitution is that it does one very important thing. It puts in pen and paper or ink and paper, those values that I think have been assumed. Those things that we take for granted that they are there, that you have a right to life, that you have a right to education, that you have a right to water, that you have a right to this and that.

What has previously happened is that we have discussed these rights, but if you sought to litigate and I will recall what my colleague Dr Wamukoya said that this animal called *locus standi*, the right to sue. That every time you went to court even if you are going to litigate on behalf of children of these country and say that they have a right to education. Then the very first thing you are asked by the judge is Mr Ndubi, where is your *locus standi*? Or what is the applicant's *locus standi*? On that account, before you even argue to the court these things you were thinking about, you are asked to pack and go because you do not have a right to stand before that forum to agitate or urge for those points. However, this document has given us that *locus standi*. It has removed that hurdle where everybody would go and fear that I am going to have problems.

If we should quickly look at page 6, chapter 5 that is where the Bill of Rights is. Section 29 provides that there shall be a Bill of Rights founded, which is a foundation stone of Kenya as a democratic State and is the framework for the adoption of social, economic and cultural policies. The purpose of the recognition and protection of human rights is to preserve the dignity of individuals, communities and to promote social justice and realization of the potential of all human beings. This is on sub-section 1 and 2.

I think this really is a nutshell of everything else in the Bill of Rights. For the first time, economic, socio-cultural rights are being written in the Constitution. You are being told that you have a right to them, and therefore what is required of the government, what is required of any State organ is to draft laws, or legislate laws that are going to implement this because it is now a fundamental right given to you under the Constitution, and two, that if there are any laws that have previously derogated from these rights, those laws shall be null and void from the date this Constitution is adopted, of course under the structural framework.

The other thing is that, this Constitution provides very clearly that these laws, these rights are not given to you by the State, and I think it is the most wonderful thing. This is because if you look at the Constitution that we are now operating under, you have I think it is also on chapter or part five of that Constitution where you have a Bill of Rights that is stipulated and each right has an exception clause, a limitation clause which is really a derogation of the same rights. They tell you that these rights shall be enjoyed so long as you do not breach this and this and that. Or, that they shall be abrogated in the event of public order, public security, public health, public morality and all those things.

The catch about that is this, that there is no definition of public morality, there is no definition of public order, there is no definition of what public constitutes, public health, there is no definition of what constitutes public or national security. Many of you will recall that very many people have been hauled before the courts that they were breeching national security and all they were doing possibly is writing an investigative article about a Minister or a Permanent Secretary or even the President. Such that the person of the holders of offices is confused with the institution of that office, such that if you came to investigate Ndubi at Kituo Cha Sheria, I would tell you are interfering with some public order of Kituo if there is such a thing.

Now, this draft Constitution is saying no, no, no that these rights are not given by you the State, they are God given unto us. The State can only comply by stating, by ensuring that a framework of implementation of these rights, of realization of these rights. A framework of facilitating the realisation of these rights is put in place. It goes further to say that it doesn't give you a blanket right such that you can go and spy for Uganda and say I was enjoying my freedom of expression with the Ugandans or something like that.

It says that should there be reason to limit these rights, if you look at section 31, on the same page, there are reasons for which

we may derogate and this shall be clause 2 sub clause (a) that the sub-clause 1 that is in terms of giving you these rights, provision in legislation shall not be a Constitutional limit to this right, except if the derogation from these rights is very clear and specific about the reason why your freedom must be curtailed.

I think that is very important because many times, many of you will know, the police will arrest you and say we had reasonable cause suspecting him/her for (a), (b) (c). Such reasonable cause is only within the Police Officer's mind. Now the Constitution is saying that if the State wishes to derogate from an individual's freedom that intention must be very specific and clear about what it is. Such must be explained before a court or tribunal or any other forum that must guarantee or approve that indeed it was important to derogate from the individual's right.

I think I want to say another important milestone in this draft Bill is that it seeks to abolish the death penalty. It is in debate now whether or not we should have the death penalty in terms of the Constitutional right to life and then we have the death penalty. Just recently I was reading an article in the Nation, I think there was a serialization about the death penalty where in deed people have been convicted erroneously, perhaps because they were not able to defend themselves well enough, or that the evidence was cooked or conjured evidence which was produced before the court, and such persons suffered death erroneously.

Therefore abolishing the death penalty does two things. I think from the moral stand point is that there is no authority on any human being to take the life of another for whatever reason. The other point about it is that and I hope I am not going into an academic debate. That when you allow a court of law to take away somebody's life, a life that already the Constitution provides as a right, you are saying therefore that you are giving this person in the name of the judge authority to derogate from the Constitution for some reason which may be in the evidence as an (inaudible) or not or from the laws, which law is unconstitutional and therefore abolition of the death penalty is a good thing.

The draft Bill seeks to correct that which has been wrong in terms of its qualities. You will see section 34, sub-section 3 and section 35, sub-section 4, and 5 (b) there is some sense in which there is affirmative action. One it is saying that the Constitution outlaws and abhors discrimination. However, it recognises that there has been historical and structural discrimination against certain people particularly women, children and the disabled.

It is saying that despite that there shall be no discrimination, it is giving or allowing an avenue in what you may describe as positive discrimination by giving a responsibility that certain classes of people may enjoy some form of enhanced or enhancing 'discrimination'. That measures will have to be put in place designed to benefit individuals or groups who are disadvantaged. Whether or not it is as a result of past discrimination, and we all know of the discrimination of women even in the current Constitution. (Incomplete)

The husband of this lady does not become a Kenyan by virtue of that marriage. If I being Kenyan marry a foreign lady, she automatically becomes Kenyan by virtue of that marriage, and that is the sense of discrimination on account of being women. I think that is one of the things that are being corrected here.

The other is in terms of property inheritance and I am expecting a very heated debate when the National Constitutional Conference would be held. The draft Constitution is saying that all the people shall be equal before the law in terms of inheritance. When you meet our people from I think nearly all the ethnic communities they will say women do not inherit from their fathers or parents so to speak. If she is married elsewhere she cannot inherit here. I think that is going to create a very interesting debate but I think in my own view, it is important that if we are saying we are equal, let the equality be collective and common to all of us.

About the disabled, some of these discrimination we see, some of the discrimination we hear about the less disabled is rather obvious yet difficult to discern. For instance the construction of buildings, the high-rise buildings in town hardly take care of the disabled persons. Roads do not even have pavements for cyclists let alone for the disabled persons. I am winding up very shortly. I see this as one of the important things.

If you look at sub-section 4 of section 35 where it says that any law, culture, custom or tradition that undermines the dignity, welfare, interest or status of women is prohibited. The State is required to provide reasonable facilities, and opportunities to enhance the welfare of women to enable them to realise their full potential and advancement.

As I said, to end my little presentation is that the economic socio-cultural rights the question of basic rights being enshrined in the Constitution is a very wonderful thing. That now the right to education, the right to health, the right to all these things, the right to water, the right to food, the right to adequate housing which even under the current laws we do not have any law that makes it (inaudible) upon any authority to provide adequate housing for the poor or the urban poor or whatever is now going to be in the Constitution, and therefore it is going to be the responsibility and duty of the State and for the citizens to realize all these rights under the Constitution and hopefully if it is well implemented, we expect to achieve much.

Thank you.

Let me say one more point, this is a comment slightly outside this Bill of Rights. You all know about the debate that is going on about whether or not we shall have the new Constitution adopted, whether the National Constitutional Conference will take place or not, whether parliament will be dissolved tomorrow after Kasarani II and all that debate that is there. People in the civil society are involved.

You may have seen an advert on Friday or Saturday where the civil society is coming together and inviting the members of the public to participate with them in terms of trying to identify and locate the issues that we support that are in this Constitution, and

also to strategize in order that we ensure the Constitution is legislated into law before the elections. If not at least legislated into law. From tomorrow we therefore have a weeklong series of activities called, the week we are dubbing “Constitutional Review Week.”

For tomorrow and Tuesday, there are people who have been invited to attend some forums at Lillian Towers, which will be by invitation. On Wednesday, Friday and Saturday, there are public events, which include forums at Ufungamano, a procession from Freedom Corner to Ufungamano, and the all needed prayers for the wayward judiciary that are going to be held on Saturday. I would like to extend our invitation to all of you to participate in that process because that is how the judiciary and all organs of the current government or State will understand that Kenyans are actually eager to see the Draft Constitution, which is their product finally achieved and acclaimed. I must say I thought I would be alone with my yellow ribbon from home but I am happy everyone of you supports the process. Thank you.

### *Clapping from the audience*

**Reginald Okumu:** Thank you Mr Ndubi. Before we move on to the next speaker, I would invite Salome here, to just tell us how we need to, when the speakers are talking about chapters, clauses and paras we quite exactly know what they are talking about.

**Com. Salome Muigai:** Thank you very Mr Chairman and good morning, is it afternoon already? Good afternoon everybody? Now, most of our speakers are very, very conversant with this document, but I can't say the same for all of us. I would like first of all to start with the speakers to ask you please, whenever you are talking about a certain page, we Kenyans start with pages, please tell us what page you are on. When they speak about clause or a section, they start with the number that is not in brackets. For example if they are talking about, let us go to the women, that is a good one. When they are talking about women they first of all talked about page 6, please also tell us whether you are talking about page 6 column 1 and whether it is at the bottom, top or in the middle of the page, so that it takes us the shortest possible time to be together. I am a teacher so some of these things you learn. That is to the speakers.

To the people checking the pages, once you have been told the page and you have been told the column, when you are given a number, the first number refers to the number without a bracket. For example clause 29, or chapter 29 refers to the number 29 which is not into any brackets.

When these lawyers 'sub' anything, whether it is sub-section or sub article or sub clause, they are into brackets, okay. For the rest of us who are not 'learned' but we are friends. Please know that when they 'sub' everything we go to the brackets. It can be sub(1) and then how do we get to the (b's). So when they 'sub' go to the brackets. Please speakers, be very clear on where we are so that we can be able to join with you, okay. Thank you.

**Reginald Okumu:** Thank you Salome. Now I will invite Mr Terer to take us to the Land and Property section. I would appeal to him that let seven and a half minutes be seven and a half minutes, thank you.

**B K Terer:** Good afternoon everyone. I will try to stick to the seven minutes. Unfortunately I didn't have the papers; I had the copy of the Bill itself which does not have pages. Straight on, I will touch on where the Constitution has mentioned about property, firstly in the Bill of Rights which is just completed, which is section 54, with four sub-sections, that is on page 8, article 54, which is the 4<sup>th</sup> column at the bottom.

The most important highlight there says every person has a right to acquire and own property individually or in association with others. The 2<sup>nd</sup> sub-article says, parliament shall not enact a law that permits the State or any person to arbitrarily deprive a person of property or any description, deprive a person of any interest or right over such property. Having been given that right in the Bill, parliament should not after that enact any other law which takes that right from you.

The substantive part of the issue of property is actually provided for in chapter 11 of the Constitution, which is on page 28, the first column. The highlights of that provision is mainly the Land Policy framework, the ownership of land but the most important of all is actually the classification of land. This is because one of the controversy of the existing problems at the moment, is the definition of different sets of land or uses.

Here, public land has been defined, community land has been defined, private land has been defined. Also, there is an important aspect there of tenure of land. There is also the protection of that property and land. Just like in all the other provisions, there is also a provision of the establishment of the National Land Commission.

Just so as to put you in the correct perspective why there is a requirement for a Land Policy framework and the importance of this is that: one, currently we do not have a centralised Land Policy in this country. The land laws in this country is actually provided for in quite a number of legislations which number more than ten. The leading of it being the Government Land Act, which is the most controversial of law. This is because there is a provision, which empowers the president to be the custodian of land in this country. Some sections of the GLA, and Mr Commissioner there is a correction, actually Government Land Act is Cap 280, not 301.

That power given to the Commissioner of Lands has actually been abused through section 12 of the Government Lands Act, whereby the Commissioner of Lands on his own discretion can actually decide to allocate public land. Whereas in the same Government Land Act, there is a provision that public land should actually be auctioned after the necessary planning has been done. That planning again is currently being governed by a new law, that is the Planning Act, which has repealed previous Land Planning Act.

Now, because of that, all those legislations, and statutes should actually under this Land Policy be brought and governed under one regime. The intention actually at independence time was an introduction of what we call Registered Land Act, Cap 300, which is supposed to now be a new regime in which all the colonial laws, Property or RTA, and (inaudible) Act was supposed to override all those laws. However, we find because of the convenience of those who have the powers to actually be able to use public land to give to so and so. Registered Land Act has never been implemented the way it was intended.

There is also confusion, for example at times you have heard like the Local Authorities, may be Nairobi City Council also allocating land. The authority of the Council comes from the Local Government Act Cap 65. Those confusions should actually be dropped once this Land Policy framework is put into place.

Also, the classification of the land and the importance of that is when we talk about public land, people should be able to understand what it is. Who is the custodian of that public land? Yeah, this is land that maybe is required for militaries, is required for public schools, is required for hospitals, that should be clearly defined. This we hope the Constitution the way it has put it once now this is put in place, the review of those land laws should actually be able to put into place in each legislation what is this public land.

There is also community land and this is very touchy because the essential part of the community land at the moment is held under trust land. This is a Trust Act, that is why there is quite a number of legislation which covers land. Trust land, most parts say like the North Eastern Province which has never had any adjudication in now trust land.

In the past, we have had experiences whereby the custodians, the local Councils there actually give out this land to favoured individuals whereas they are supposed to be custodians of that land for the community. There are also other things like you have heard in the Coast Province, people who have the kayas and all that. Those are community facilities where people, because of their beliefs and all that, would need to use that. That has been defined.

Private land. Once you have been given that title for the land, for example under the Registered Land Act, actually it is absolute proprietorship, which you are given under Registered Land Act. It is so powerful such that even members of your family have actually no right over that land. There are land matters that have been decided in this country which have actually shown that once you own land under the Registered Land Act, it is completely different from community land.

If we go to the protection of property and land, which is on the same page, 236, sub-section (1). We have said subject to this Constitution, property rights and land lawfully acquired shall be protected and may be fully alienated without (inaudible) on the basis of gender or any other post. That means once you have rightfully acquired land, those rights to that property are fully protected.



The acquisition of land in this aspect would be maybe an arm's length transaction if you have purchased property. Once you own that property under whatever law, if it is under government law or whatever other law that will be enacted it will be fully protected.

Just there on sub-section 2, the State has the power to take possession of, or acquire right or interest in land where the following conditions are certified. The acquisition and taking is necessary in the interest of defence and all that is listed. There also, there is an existing legislation called Compulsory Acquisition of Land. Those in the legal profession I think it is Cap 295. That provides for the government to compulsorily acquire land but there are provisions that you have to be compensated.

In the past, we have had this legislation also being amended for the convenience of certain people. This we have heard like of the people complaining at the Coast Province about the Titanium mining. Those provisions are provided for, so that this land is supposed to be valued, it is supposed to be that if you are not satisfied with the valuation, you are supposed to complain to the ..., under the provisions of the law. There are certain provisions to that legislation whereby for example it removes the use of private surveyors to establish say the size of that land, the use of maybe private valuers to represent you. There are land mark cases like even when they were doing the (inaudible) Dam where members of the public were actually represented by private surveyors and private valuers, and I think they got what they wanted but after that lost. Like now when they are doing the Sondu Miriu, that provision had already come into place, and I don't think those people got their fair compensation.

We would therefore expect that would affect. You can see that when it comes to land matters, there are a number of legislations which have to be actually revised, in order to be able to have a proper land policy in this country as so substantial.

Just to beat the issue of time, I will come to the issue of the establishment of the National Land Commission, which is on page 29 the first column. That is a very good and a welcome move, and I can see throughout the Constitution, there are I believe up to nine commissions, which have been established. The only limitation there is that it should actually be able to state who should constitute the members of that Commission. I have seen in many statutory boards like for example the legislation governing the registration of lawyers, it should say may be that board should be represented by one person from the judiciary, may be one person from the Attorney General's chambers etc.

I would therefore expect this Commission to say one member, automatic membership from may be, one person from the lands office, automatic membership from may be LSK, may be from ISK or those people who are knowledgeable in land matters, so that we do not have the government just having their own discretion to nominate members who at the end of the day might not represent or might not equitably deal with matters to do with land.

Also, I would expect one of the Commissioners to clarify to us and that would be very good if the intention of the Commission

was that the National Land Commission is going to replace the Office of the Commissioner of Lands, because the office of the Commissioner of Lands is as controversial as anything in this country. Really, on land matters we can talk much about it, but I think to beat the time, I will leave it there. Ask me as many questions as possible after this, but those questions I have also put across, the Commissioners especially regarding the issue of the office of the Lands Commissioner and his relations with the National Land Commission will be clarified. Thank you.

### *Clapping from the audience*

**Reginald Okumu:** Thank you Mr Terer. We will quickly move on to our next and second last speaker that is Mr Ndubi who will take us through and highlight the mining issues in the Constitution. No, sorry Mr Nchooro Mmwenda. Mr Nchooro Mmwenda is the one who will take us through finance issues. Karibu.

**Nchooro Mmwenda:** Thank you for mistaking my name with that of my colleague next to me. I find that I am even given a very funny chapter, I was just thinking about it, chapter 13. Those of you who are superstitious they think number 13 is a bad one. I am not scaring you, I will say this is the one chapter which has made most of you not to be rich in this country. You are poor because you are heavily taxed, and you are poor because your taxes are not being utilised.

Before I go into the subject matter, it is on page 29. Before I go to the subject matter, I think I would like to thank the organisers of this forum because it is very rare you find that people are told to give their views on matters of national interest, and these are matters of national interest. Other than that, you have been told my name is Nchooro Mmwenda. For those who have a difficulty in pronouncing African names call me Geoffrey.

The other thing is that I am again condemned because I happen to have worked in a government tax-collecting department for some years, I have the practical experience. I also happen to be now working in private sector, I am a Principal Consultant with Deloitte & Touche. I am heading a department called Customs and International Trade. I also had a benefit of having to look at other countries tax legislations and laws. I am saying that one because I want to thank the Commissioners who came up with this objective of the public finance.

If you look on the fourth column, page 29 item 243, they have set out the objectives of this Constitution. In 243 (a) It says to ensure efficient and effective generation of revenue for the purpose of promoting and safeguarding the well being of the people of Kenya. The other objective is to enhance the participation of people, communities and civil society, organisations in public finance management. To ensure equitable sharing of national and local resources throughout the republic, taking into account the special provision for marginalized areas. (d) To ensure the equitable division of revenue raised nationally among national, provincial and districts and local levels of the government.

This is very important because you find like in the last ten years we have been condemned in this country. If you happen to come from the areas not deemed to the right areas, roads are unpalatable, Nairobi being one of them. I am sure that other than Uhuru Highway and a few sections of Nairobi, you can't, this time with your small car cannot go through River Road area. It is very, very, very bad. You cannot drive in some sections of this city simply because well, I will use the word condemned.

Item (b), to ensure that in allocation and distribution national revenue, adequate consultation is conducted, and recommendations from various levels of government and sectors are considered. (f) ensure that the budget and the budgetary process promotes transparency, accountability and the effective financial management of the economy, debts and the public sector.

Given a chance, because I have five minutes I can even settle to those objectives and say this Constitution actually has looked at the Kenyan's plight. On Friday, I had a chance of addressing the captains of industry in this country, Kenya's Association of Manufacturers, and the thing we were discussing is this year's budget which condemned them to extinction, a provision for tax incentives was withdrawn, and another one was brought which if you look at word for word is the same but the application is different. Meaning now, stop operations in this country because we want to collect.

It has become a thorny issue, public finance is a thorny issue. One, it is difficult to be understood, it is very, very difficult. If you look at the Income Tax Act, you try to read page 1 and the next page you feel like you want to sleep. You look at the Customs Act, you want to read it, you read two pages, you dismiss it as rubbish. You look at the VAT Act, you look at them and say "My God, these orders where are they from, heaven or from where?" This Constitution has come up with an objective of tax collection. I would rather say we are somewhere now.

I will look at a few items, the other ones I will just highlight. We have the imposition of taxes. On the imposition of taxes, taxes are imposed to be paid by taxpayers, the citizens of this country. We have gone through the Bill of Rights, what are your rights?

We have seen how the environment needs to be protected by you, but at the end of the day, actually it is the government which is supposed to use the money they collect from you to fulfil some of the obligations that we looked at that are under the environment.

Now, taxes are imposed in this country but in the previous Constitution which I had a chance of down loading from the Internet, somebody was kind enough to put the old constitution in the Internet. You look at it, and you wonder whether there was any document worth of mention. You look at it and you wonder surely, people say we go to wherever with the old Constitution what there is in it. Like on the imposition of taxes, it is just that taxes have to be paid. You have an obligation to pay taxes but they never gave you a right. In fact when I was addressing the KAM on Friday, I told them paying taxes is an obligation, but being taxed is a right, which you have been left with.

**Note: Tape 2 is blank, summary is made from Verbatim Recorder's notes**

We pay taxes without question but there are wavers. Because of time, I will pay special attention to Page 21, Item 247 Economic Social Council. This is what we have been lacking. In 1961 Kenya was at par with Korea, India and Malaysia but now we are far below. You can read about this in Item (c) Page 31 of your Draft Constitution. Your money set up the Parastatals and all we see is abuse of power by those appointed to head those parastatals. I made a special note on taxation and the Economic Council on page 31 Item J, column 4. We are paying tax to receive services but nothing is being done to us. We are suffering, you can see teachers are not in class, and students are at home, is this fair? This is why the Economic Council was constituted to root out these ills and see that the taxes we pay are used properly.

I have an appeal – Harambee page 41. The funds collected at harambees should be audited. Every now and then, parents are asked to contribute to Harambees in their children's schools to build dormitories, more classrooms, laboratories, teachers house etc. and this done on a yearly basis. Do the schools really put up buildings every year? If not so what happens to the funds? We see our leaders contribute big amounts of money to these harambees, be they for building Churches, or hospitals. The question is, where do our leaders get those large sums of money to contribute to Harambees?

Investment Court.

**Com. Riungu Raiji:** The purpose of disseminating this Draft Constitution is to get your reaction on the Draft Constitution, get any more information that you had not given and then have it discussed at National Conference, and pass it on to Parliament for approval.

In the Draft Bill, Article 76 deals with the Electoral system and processes. This is an area where we are making changes because we have received complaints on the Electoral Commission, and we have put down principles that are going to be guiding our Electoral systems and processes, once this new Constitution is finally adopted and enacted. The elections shall be free and fair and the Electoral Commission should ensure fair presentation of the people.

I will move on and talk about representation of the citizens. The new Constitution has put in place a bi-cameral type of Parliament. When talking about governance we mean the three Arms of the government. The Legislature, the Executive and the Judiciary.

Parliament shall consist of the National Council and the National Assembly. The National Assembly shall have 210 Constituency MPs and 90 Party list MPs. These are MPs who will be elected from the list provided by political parties. The National Council shall have 70 members, and these 70 members will come from each district plus 30 women members who will come from the provinces.

The Role of Parliament – The following will be the role of the Parliament. Enacting legislation and consulting on promolocation of regulations. Providing a national forum for deliberation on, and dissolution of issues of concern to the people. Approving expenditure of the State and appropriating funds as required to meet those expenditures. Considering and passing amendments to the Constitution as provided for in Chapter 18 through overseeing actions of National government. Considering and approving international treaties. Confirming the President’s choice of a person to serve in the Cabinet. Advising on, and consenting to appointments to be made by the President as required by the Constitution for legislation. You can see, that is contained in Article 102 Chapter 7 page 32.

The Executive - Authority of the President, that is Article 150. The President is the Head of State, and Commander in Chief of the Defense process. These are what we used to call Armed Forces, the Chairperson of the National Security Council, and the Chairperson of the Defence Council. He is a symbol of the unity of the Nation, and has responsibility to promote and enhance the unity of the Nation. Safeguard the sovereignty of the Republic, promote respect, diversity of the people and protect their human rights and fundamental freedom. Shall uphold, safeguard and respect the Constitution and the rule of law. The President will be directly elected and will have a running mate who is his Vice President. The Vice President will deputise for the President. The President is liable to impeachment for misconduct.

In the new Constitution, Kenya will have a Prime Minister who is the leader of the majority party in Parliament. He will be in charge of running day to day duties of Parliament.

The Ministers will be elected from outside the Parliament, they will not be MPs. There shall be 15 Ministers and 15 Deputy Ministers.

All members of Parliament, Ministers and all persons in leadership positions will be required to adhere to the leadership code which will be enforced by the Ethics and Integrity Commission.

We have proposed to restructure and reconstruct the Judiciary. The Judiciary is very important. If we get a proper Judiciary system in place, it will help us to instil discipline in politics, to instil discipline in economics, and to instil discipline in all other spheres of our social life, so that people behave well. When politicians start thuggery and they are taken to court and the court looks at them in the eye and tells them, so and so, you are a criminal, I have found you guilty, you are going in, they will stop all these non- sense you are seeing around. They are doing what they are doing now because they know, when they are taken to the courts, the courts tremble around and they let them go free. We are therefore saying that the Judiciary is very important to the proposed reforms we are making.

We therefore want to introduce a new court known as the ‘Supreme Court.’ if you look at the Judiciary at article 184, the

Supreme Court will be the highest court in the land. It will have both appellate and original jurisdiction. It will be the final court of appeal. For example, we are saying, when Parliament has passed legislation, it will be required to hand it over to the President, to give his assent. If the President, as the protector of the Constitution is of the view, that the bill does not, or is not consistent with the Constitution, the President may refer such a matter to the Supreme court for an advisory opinion before he can give his assent, to ensure that Parliament is passing laws that are consistent with the Constitution. The Supreme Court will have Seven Judges; one of them will be the Chief Justice. They will be appointed through the Judicial Service Commission.

There will also be a Court of Appeal, which will be headed by the President of the court of appeal. The Chief Justice will sit in the Supreme Court, and some of the administrative powers he had will now be taken to the President of the court of Appeal, who will deal with matters concerning the Court of Appeal. The High Court will be headed by a Principal Judge, who will also share administrative powers.

We are also restructuring the Kadhi's Courts - reconstructing it (Kadhi's courts came into being as a result of the dominion of the Sultan of Zanzibar, who during those days insisted that the Muslims be entitled to their courts – Sharia law) we are going to have Kadhi's Courts at the District level, Kadhi's Courts at the Provincial level and we shall have a Kadhi's Court of Appeal presided over by the Chief Kadhi, and two senior Kadhis. Appeals from that Kadhi's Court will go to the Supreme Court on matters of the Law and the Constitution. The Chief Kadhi will have to be a qualified Judicial officer not religious officer.

That is how we propose to reconstruct the Judiciary.

I am sure some of you are wondering, what do we do with the present Judges. We will continue with them. Their retirement will now be at age 65 instead of 74.

The institutions that supervise these other institutions are quite a number. Some of them have been in existent; we have sought to reconstruct them, the same way we have done with the other organs of State. The others, we are introducing them afresh.

The Electoral Commission. That is the one that deals with the management and administration of elections. We are seeking to reconstruct that particular Commission, so that it can perform its functions well. The Electoral Commission is being reconstructed. We are trying to reduce it from 22 members, to about 11 members. We have set the qualifications they must have; they will hold office for a limited period of time, five years renewable once, and they must be independent, first in terms of their appointment, and second in terms of their operations. They are only answerable to the Constitution. They cannot be controlled by anybody else, except the Constitution. In order to make them more independent, we must give them financial independence, so that they get their finances directly from the consolidated funds. In addition to the management of elections, the Electoral Commission will be the one mandated, to register Political Parties. Political Parties shall be required to satisfy certain conditions. It will also be holding funds for the political parties.

The Judicial Service Commission will be appointed in a way that is not subject to an individual, and it must be given financial independence as well, so that it can be able to operate without interference. It is the one that will be charged with the responsibility of recommending persons who should be appointed Judges of the Supreme Court, of the Court of Appeal, of the High Court, Magistrates, and disciplining, to ensure that they are performing their functions properly. The Judicial Service Commission should have a substantive chairperson. A person of high integrity, a person who qualifies to be appointed as a judge to the Supreme Court. This person shall hold office for a term of five years, renewable once. This Judicial Service Commission will have a Muslim woman to represent the interests of Muslim women, and this person shall be appointed by Muslim women Organizations in the country.

This Commission should have the Attorney General as - Ex-officio, and the Supreme Court will take one of their Judges. They will elect themselves -the Judges of the Supreme Court will elect one of their own to sit on the JSC. The Court of Appeal will also elect one of their own; the High Court will also elect one of their own to sit there. The Magistrates will be allowed to elect two Magistrates to sit there on their behalf. The Law Society will appoint two Advocates to represent them there. The Law faculties, the Universities which teach Law, - currently it is Nairobi and Moi University, they will be allowed, each one of them to produce one person. Therefore two people, Law teachers will sit on that Commission. We shall also have one representative of the Council for Legal education, and then the chairman of the Public Service Commission, and then three laypersons; one of whom shall be a woman appointed by the Civil Society. These are the people who will constitute the Judicial Service Commission. In appointing Judges, they will be able to advertise, so that these things are done in the open.

Public Service Commission; if you look at article 258, we are giving the values that should guide the Public Service Commission in performing its functions. We are reconstructing it to ensure that we get the appointment of public officers done in a fair way, in a manner that pays respect to competence. The functions are provided for under article 160, and it runs through to other articles.

The Police Commissioner will be in charge of the Police Service. We now do not want to have a Police Force; we should have a Police Service. The Police Commissioner shall be a graduate, and shall hold office for a term of five years renewable once.

The other Commission we have proposed - you need to go to article 278 - we have introduced new Commissions there, which have not been existing, and which we have given certain functions. We have stated the rules, on how they are appointed, and how they should be independent financially and all other matters are stated there.

Human Rights and Administrative Justice Commission. This is the first of the proposed commissions. It is supposed to have branches or divisions of others which otherwise would have been independent Commissions; but we decided we don't want to have too many of them. We have put under the Commission on Human Rights and Administrative Justice, a division that deals

with Human Rights, a division with what you would have called Ombudsman, who is supposed to be a person to whom people can seek protection and complain about mal-administration. We will have a division on gender matters, we will have a division on basic needs, we will have a division on Children's matters, and matters of the disabled. That is the Commission on Human Rights and Administrative Justice, and they are supposed to perform certain functions that will ensure that Human Rights are promoted and protected.

The Ethics and Integrity Commission. The Ethics and Integrity Commission will deal with matters of corruption, will deal with matters of ethics in leadership, integrity in leadership, and in the values. When we were talking, I said we are proposing a leadership code of conduct. If you look at your document, you will see a leadership code of conduct. If you look at article 276, we are talking about leadership and integrity. We are setting out those who are the people that fall in the category of leaders, and who must therefore comply with certain values and standards expected from leaders. If you go into the schedules, you will see schedule five, which we have titled leadership and integrity code of conduct. It lays down the standards that we expect from leaders, and if they don't meet those standards, they do not qualify to be leaders. The Ethics and integrity Commission is the Commission that will be the custodian of the leadership code of conduct, and it is to this Commission that all the people that are subject to the leadership code of conduct will be required to go, and make certain declarations when they want to assume office, or when they have already assumed certain leadership offices.

One of the declarations will be about your wealth, and how you acquired it, and your liabilities. This Commission will have power, and if they suspect that you have not made an honest declaration, they will investigate. If they find that you have been lying, they will recommend your removal from office, as being a person who does not have the necessary values that befits the high office you would have been given. We are now saying that we must supervise those who become leaders in certain offices to exercise power on behalf of the people, so that we get the right people exercising power to serve them. The Ethics and Integrity Commission will therefore be there.

Members of Parliament, the President, the Prime Minister, Ministers, Judges, and members of these other Commissions, they will all be required to make declarations to the Ethics and integrity Commission. If that Commission finds that they are not fit to hold office, will be told to go back home. Even Permanent Secretaries, they will have to make declarations to this Commission. Matters of Corruption will be investigated by the Ethics and Integrity Commission to ensure that things are running well.

Salaries and Remunerations Commission; many Kenyans Complained, "why should the MPs decide their own salaries?" We are saying, that surely, it is wrong. There must be someone else to determine that. There will therefore be a Salaries and Remunerations Commission. This one will be a periodic Commission. It will not be permanent. It will be appointed for a certain period, it looks at the salaries, reviews them, and then it gets disbanded. After another period again, we appoint one. We are saying, the salaries of the President, the Prime Minister, MPs, Ministers, and everybody including the Commissioners, will be determined by this Commission, so that people are satisfied.



Teachers' Service Commission; We are proposing to retain the Commission as a Constitutional Commission, to look into problems affecting teachers.

Constitution Commission; We have proposed this Commission to supervise implementation; to ensure that the things provided for in the Constitution are followed and properly done. Initially it was conceived as a Constitution implementation Commission. We said, at independence we got a Constitution, but which was messed up because there was nobody to ensure that Parliament moves to repeal the colonial laws, and replace them with those laws that were consistent with the Constitution. This time round, we do not want to repeat that mistake. We shall have to put in place a Constitution Commission whose main mandate would be to ensure the implementation of the things we are proposing in this Constitution.

They will be supposed to do research, and advise the other organs on what needs to be done. If you look at schedule 6, you will see that we have attempted to provide, to mention some of the sections that require that Parliament must enact laws that will enable what we have provided in this Constitution to be effected. If we were to leave it to Parliament and sit back, nothing may be done. This Commission will have a responsibility to sit down, to look through the documents of the current Commission, to look through our report to see when the Review Commission recommended this, and what they have in mind. We have to propose a law to implement this, how do we put it? How should it look like? They may even draft some of the Bills and hand them over to Parliament to enact into law, so that we get laws that can effect the Constitution we are proposing. If the Constitution has said, within a number of years certain things should be done, it is this Commission that will follow up and keep reminding those who are supposed to do those things, that “ you haven't done a, b, c, d, can you do it to comply with the Constitution”. The Constitution Commission will deal with that.

**Chairman:** Now we are through with most of the topics that we wanted our guest speakers to expand on. May be I should request Commissioner Salome Muigai to say something.

**Com. Muigai:** I only wish to emphasize that now you know more about the Draft Constitution than those who are not present here. I would therefore encourage you to carry the debate from here to your friends, to your family, to your communities and spread the information that you have been given here. When discussing the Draft Constitution with others, please use simple language which they can understand.

**Chairman:** We can now move to the part of firing.

**Margaret Moro:** My first question is, what does the Constitution recommend, should be done with those who abused their office knowingly. Secondly...

**Agutu Sese:** My name is Agutu Sese from Aga Khan Foundation. Bill of Rights. The two houses that form Parliament.

**Christopher Juma :** My name is Christopher Juma. My question is on land issues. As per the recommendation in the Draft Bill, is the Government going to make sure that all indigenous people of Kenya have a piece of land.

**Benedict Kimau –** My name is Benedict Kimau. My first question is on idle land. I know in some countries those who leave their land idle are penalized. What action has our new Constitution taken in regard to that? I also recommend that the Permanent Secretary should be a professional and be posted to the relevant Ministry. Harambee funds become public funds are they audited? I suggest that Political parties be forced to hold elections as often as possible, and they should be communicating clearly to the public on their goals.

**Esther Kahiga:** My name is Esther Kahiga. Do we have a provisional budget in Kenya? Secondly, we have been talking about Human rights. What are we going to do about the killings of suspects that we see on television every time we open, that the police have shot someone?

**Silverious Baraza:** My name is Silverious Baraza. The document you have produced is very good. It should be published and as many people should read. Secondly I was wondering about the case going on in Court about the Commission, what are you going to do about it? Thirdly, transfer of land in Kenya is very slow and costly, is there any section that has removed this and made it automatic?

**Salome Muleyi:** My name is Salome Muleyi from Aga Khan Foundation. Senior people have been killed in this country for example Robert Ouko, and Alexander Muge, and after that, the government has formed Commissions of Inquiry. How shall we ever know who killed those people.

**Dalmas Were:** My name is Dalmas Were from Don Bosco Peace and Justice Committee. One, we have people in this country who are well placed. They have looted banks e.g. National Bank of Kenya, they have run down institutions, they have taken over Government houses, Mayors have converted Council cars to be their own. Is there provision as to how they are going to be dealt with? Street families, and children, what is going to be done to stop this menace?

**David:** My name is David, I am from Don Bosco Peace and Justice Committee. My question is, what issues will be handled by ministers from out. Professional ministers will be a duplicate, as we have already said that the Permanent Secretaries should be professionals.

**Charles Karanja :** My name is Charles Karanja. Our roads are dangerous, matatus have no discipline, and there is road carnage. When shall we hold our government accountable? Secondly the government should be questioned and be asked to account for the income tax which we pay.

**Irene Ng'endo:** My name is Irene Ng'endo from Don Bosco. First, I ask the Constitution to put a law in place to resurrect the Cash Crops like tea, coffee, cotton etc. Secondly, what are we going to do about already grabbed land like School/Church compounds, and play grounds?

**Gabriel Mukwenda:** My name is Gabriel Mukwenda from Don Bosco. My question is if the President does not sign the Draft Constitution, what will happen?

**Eddy Kabue:** My name is Eddy Kabue. My question is on employment. Kenyans have a right to employment. Why are permits for foreigners always renewed?

**Chairman Peace and Justice Committee:**

The rights of an adopted child

Gender parity

Compensation

Citizenship – dual-citizenship what is the benefit?

**Com. Riunga Raiji:** I will start off by answering the Chairman's questions first. Dual citizenship – In two ways, people who are on the border are suffering, so dual citizenship would make them more comfortable. Funding it will be the responsibility of the Government to compensate. Gender parity, if we have two positions they can both be taken by women. The child has a right because he/she does not have biological parents in Kenya.

Margaret has asked about what we shall do to past offenders. We decided not to go so far, but they can be investigated alright. The president must have a degree, and Judges must also have a degree.

Mr. Christopher, the Land Commission will handle the issues.

Esther – the answer to you is yes, we have put in place elaborate provisions. We also have the Director of Public prosecution.

Mr. Were – Looters – will be dealt with. Street children. Every child is legitimate.

Ministers will be outside Parliament' but they will be represented by Deputy Ministers.

Road Carnage – Anti-corruption measures will deal with that.

**Com. Riunga Raiji:** ...it may be audited. This is an issue where we received a lot of submissions. Frankly, I was trying to

see whether there is any provision, but other than the provision, I think that is in the Leadership Code that bars public servants from soliciting provisions, it appears not to have been put.

On the other hand, there was a lot of attraction to the idea that we ban harambees. However, we realized that that is a fairly complex system, because it means that it is not possible for us to congregate and buy seats for this hall if we ban it wholesale. However, I think that is the kind of issues I was saying would best be dealt with by parliament after looking at all angles. What I think we should be worried about is public servants being engaged in harambees, where that they use it as a form of illegal taxation and so forth.

The Electoral Commission, will it supervise the conduct of elections for political parties? I am not sure, I haven't had time to check but I know during discussions, that was our intention. We have said that one of the reasons for it to remain registered it must have practised internal democracy. If for example you party has not held elections for fourteen years and a complaint is raised with the Electoral Commission, it will actually not pass the criteria of having internal democracy, and will have to be deregistered.

The question of means of communication, no we haven't put it as one of the fundamental rights, but we assume that by giving people the right to complain and having put more transparency in the process of allocation of funds, both at the national and at the district levels, it is possible that we will ensure that our taxes are better spent. If not, we can always complain. Remember we have the Human Rights and Administrative Justice Commission. One of the divisions is one that is called the Public Protector, and that is the right body to deal with that. If you find that there is no road and you people have paid taxes and it will have powers to issue the kind of orders you may want.

The next is on the budget, is there provision to follow up? Yes, I think there are very elaborate provisions. Who was dealing with money? Mr Mmwenda. I think the section on budget and the electoral budget, will be able to answer the question whether there is follow up on that.

Extra-judicial killings, those ones are actually the main, they are banned totally, and we now have a Human Rights Commission that will specifically deal with that. For your information, what my colleague Mr Ndubi mentioned, we now have given the right even to NGOs to go and notice that somebody was shot at Upper Hill and follow up that without having to be asked whether they come in. We therefore think that that will probably stop those kinds of abuses of power.

The Draft Constitution may be rejected, judges are attempting to do so. Yes, we are aware of that but our task was to prepare these proposals. This is a political process. As a Commission we cannot do much, but I think the people of Kenya can do more. It is really up to you now that we have produced a document to make sure that it is not hijacked.

Land transmissions, I think that is what we call them. When people die why do we have to go through all this? We received very many proposals of that and I think part of the reason was that the courts were very inaccessible. It appears not to have been properly addressed. One of the problems that you have is that the court itself charges very high fees when you have filed a succession case and then you have to gazette it in the Kenya Gazette. I think we have put somewhere that courts must be accessible and Mr Ndubi you can point out that, and that they should not charge excessive fees. That should probably deal with it.

However, having said that, you see one of the reasons why these procedures are taking long is because every time somebody dies there will always be many people claiming land, including usurpers and other fellows who are trying to steal the land. I therefore think it is necessary sometimes for these procedures to be followed to ensure that the land is not inherited by people who are not entitled to it.

There is a lady, I didn't get her name, but she had asked something about people who have been killed mysteriously. Probably that could be brought in this investigation that I said about past injustices or criminal cases. I think Mr Ndubi can point out that there is no limitation in criminal cases. If we have evidence to prove that so an so committed the offence, a criminal case can now be followed up. By the way, we have now provided for an independent office of the Director of Public Prosecution, the DPP, who is not answerable to the government. It is an independent office, and you can complain to him. If he fails to do his job, we can always impeach him unlike now. That should make sure that if we complain that an offence is committed and no action is taken, that is the person to be held accountable.

Bwana Were, what do we do with looters who have grabbed government houses? I think I have already answered that. Street children, I think we have put a provision somewhere there where these children, even those who are homeless and deemed to be Kenyans and I think there are elaborate provisions on the rights of the child, Bwana Ndubi, maybe you can deal with that. By the way 'the child means', even a street child qualifies as a child, and we make no distinctions between the so-called legitimate or illegitimate. Every child for our purposes is legitimate.

David; what issues will be handled by each house? I think I did mention but I can repeat that each House also has power to initiate legislation on its own. Is there duplication and all that? Yes we did consider that but this is why I am saying that this was a compromise position, and everybody was happy with the outcome, but it is really a compromise position. This is because one of the controversial issues we have had is this devolution of power. There are people who wanted us to have a purely unitary government without all these, and there are others who felt very strongly that we should physically have all power transferred to regions, the majimbo. This is therefore some sort of compromise position, but we think it does take care of everybody there.

Ministers outside parliament to answer questions? Here the problem was, but I think there is another question. The people, you know we were required to write these proposals on the basis of the evidence and (inaudible) or rather

proposals. The complaint was this, most people were complaining that those who are represented by ministers cannot access them. The people of Baringo were saying that they have no way of accessing their MP who is the President, and others were saying that their Minister is always travelling, and if they come to Nairobi they cannot enter the office.

Secondly, others were saying that those who have no ministers don't get any development because the ministers transfer the resources unfairly to their constituencies in order to use it as their campaign strategy. All of them were recommending that if you want to be a minister, forget about parliament, and you specialize. They have that system in the US.

Ministers will be ex-officio members of the National Assembly, so they can answer questions. Ordinarily as it used to be here, they would be represented by deputy ministers who will sit throughout in parliament and answer all questions regarding the ministries. You notice that the deputies will now be part of the cabinet. I think that is taken care of.

Road carnage, how do we address this? Now, this one is really a function of corruption. I think everybody agrees that if the law as it is was properly enforced, most of these things would not be there. There is also an element of having poor roads because the resources are being stolen and looted and so forth. We therefore think that the combination of these anti corruption measures, accountability and distribution of powers will ensure that we reduce this menace, and public education also.

There is also a question I think on taxation, how do we take the government into account? I think Mr Mmwenda will deal that. How do we hold the government accountable for the taxes it collects and the water we pay for and don't receive? I think that is Mr Mmwenda's docket.

Irene Ngendo; about the cash crops. I think this is a function of corruption, and I believe Mr Mmwenda will tell you. Part of the reasons why sugar farmers have collapsed is because imported sugar is brought here, duty wavered or corruptly avoided, and they are able to dump their sugar here at half price, and the farmers in Western who have spent several weeks have nowhere to take their sugar. I think that those are really the issues. I think that is the same case with milk, when we were going round here in Kiambu, we were told that, (that is the time when milk had come from New Zealand or somewhere) and I think the people did a good job and part of it was burnt. Before that, farmers in Central, I think according to (inaudible) had lost some billions because they had to pour milk because there was no where to take it. You can see these issues of governance are interrelated. Corruption impacts very negatively on many sectors.

The process; what happens if parliament does not agree, or the President refuses to sign? The first question, parliament will be part of the National Constitutional Conference which we are going to in November. In fact one way of killing or delaying the process is to dissolve parliament because if there is no parliament, we shall not be able to hold the National Conference in November as we have planned, because parliament is part and parcel of it.

This being a Constitutional Bill, whatever is agreed upon at the National Conference will be submitted as one document for parliament to either accept or refuse. However, since they will have to have been participants in the National Conference, we do not see them refusing. In any event, I doubt that any MP about to face an election will be so courageous as to reject this document, unless he doesn't want to ever come back there.

If the President refuses to sign, I think we now have provisions as we know in the Donde Bill, after the IPPG reforms of 1997; the absolute power of the President to refuse to sign has been removed. It can be sent back under some procedures and then it can be overridden. Incidentally, we have also endorsed that kind of system even now.

The last one now, (inaudible) rights of Kenyan workers, expatriates and all that. Again this is the issue that the, the abuses that I was talking about. It is purely a function of corruption. As a lawyer, I am aware what happens that people are given work permits to come and even act as waiters by being given glorified titles, and this is really because of corruption. I think it is not that there is shortage of law, but the enforcement is interfered with through these unfair practices.

Whether the expatriates (inaudible) workers and all that again is the same thing, these are really questions of corruption. I think I have covered the many questions that were directed to me, and my colleagues will answer the rest.

I would want to be excused because as Salome said, we are starting a similar exercise, basically what we are doing around the rural areas, and we are expected to be there by tomorrow, so that we can discuss with the people there again the same issues and answer their questions and get their views, so that we can fill the gaps which we know inevitably are there, and improve the Bills so that by the time we present it to the National Conference, we shall have taken on board all the views of the people. Thank you.

### *Clapping from the audience*

**Reginald Okumu:** Thank you Mr Raiji. I think I will go to Mr Ndubi. Before I go to him, I would like to first bring out an issue on what Mr Ndubi would call positive discrimination. Men have in the past been brought up not to complain, it is a sign of weakness. We are not supposed to cry and unfortunately, it is being manifested in this Constitution. We are being told that, it is very clear that even Mr Raiji will admit he said 'men have done it and probably now we are telling women to do it.' If there was a wrong about discrimination in the past, I don't think we should say it is now time to turn the other cheek. Discrimination by any other form is discrimination.

I support measures that need to bring parity in all, whatever, but to create, to put in sections in the Constitution that clearly say it is okay to have a 100% of A and not 100% of B is not positive discrimination, we are basically turning the other cheek. Mr

Ndubi you will probably, while I give you the microphone, Terer can be thinking about the sanctity of the title, whether it is taken care of.

**Haron M Ndubi:** Before Raiji goes, I was going to say one thing, in regard to the composition of the National Constitutional Conference. That it is my view, although it is debatable, that it is actually possible to hold the National Constitutional Conference even when parliament has been dissolved. Subject to one thing, that the Members of Parliament now are gazetted as the members of the Constitutional Conference. Well, I think the criteria under the Act is that the Members of Parliament are persons sitting at the time of gazette. Therefore, if they were immediately gazetted, we would still have membership, whether or not parliament has been dissolved and I think that should be a big plus, such that when you meet your Commissioners on the chair possibly appointing, you will need to push before Kasarani II.

### *Laughing and clapping from the audience*

There are a couple of questions that have been raised and I think Mr Raiji was saying that I would clarify but I think in effect he was actually responding to them. Let me begin with the Chair's concern about the positive discrimination, as if it is replicating the discrimination that we have previously suffered.

I will be reluctant to agree, actually I wouldn't agree with that interpretation, because if we are serious about engendering equality and equity, certain things must deliberately be done to change the status quo. Some of those things that must be done to change the status as it is, is to ensure that those who have been disadvantaged are given opportunities to realise their potential such that that equity can be realised. How do we give that opportunity?

First, is to ensure that they have the obligations to take the responsibility in terms of offices, and having facilities that can assist to implement some of these things we talk about. However, you can't be water tight about it, but if you said, let's go to elections on legal footing, we would be happy to see 50% of women in parliament, but if that can't happen because we want all of them equal then too bad. I don't think we can do that. That is why we are saying specifically, let there be a provision made for women who still ought to be elected. Subsequently if there are more others who on their own account of popularity are elected on equal competition with men, I think that is really what we are saying here.

Broadly listening to the questions, I think I need to say this to clarify one point. The Constitution is not law, or applicable law so to speak. I may sound like I am contradictory, or like I am contradicting myself. You see the Constitution is a framework, it is the pillars like when you construct a house, there are those pillars upon which the rest of the building is constructed. Such that when you know that pillar A is there and another pillar is here, then you must do the walling such that it corresponds with that pillar and this pillar, and that walling is now the statutory laws, which must implement the principle or policy directions which are provided for in the Constitution.



Such that issues like corruption, issues like righting past wrongs, issues like infrastructure, are taken into account. If you look at particularly the rights which have been given here, where you have, you know, the right to social security, the right to health, to education, housing, food, water, sanitation, environment, consumer rights and all that. All these rights put together when interpreted, parliament will have to enact several laws to implement these rights. Such laws will have to include the provision for the creation of adequate infrastructure. You are not going to say we must have adequate housing in Kibera, and then you don't provide a road towards or inside Kibera, or water inside Kibera because after all there is even provision for water and sanitation in Kibera, that kind of thing.

Let us therefore see the Constitution, as basically a broad guideline telling us that it is just the beacon, and telling us that that is where we want to go and therefore these other statutory laws are put in place.

Much more specifically, there is the question of the right to life and a clarification. When you the speaker, was it you? Yeah, that gentleman whose name I didn't write. He said that he is a Catholic by faith and this section just states everyone has a right to life and then the death penalty is abolished. I thought in my mind that probably you were looking further and asking when does life begin and therefore whether a foetus which has been conceived has such right and which must be protected. I suspect that is where you were going, but let us deal with this.

This section is really saying that nobody should have an excuse or a reason whatsoever to terminate another person's life. That is why the excuse or reasons that previously existed under the law are now being abolished, so that even when you were previously condemned to die, now we shall remove that such that once you are born, even if you are a criminal and you are convicted for one offence or another, you must remain alive until you die of natural causes.

The question of the adopted children. The definition of child here, if you look at page 7, column 2, the one above the family section 37, sub section 9. It says in this article, a child means a person under the age of eighteen years. If you look at what we may call a preamble or the pre statement about the rights of children section 37 (1) which is the first column, it says children hold a special place in society. It is the duty of their parents, wider family, society and the state of nature to protect and educate them so that they can bla bla bla, whatever, the rest. Parents include guardians, in terms of the... something we call interpretation of statutes and general what is it called. There is a statute, which provides for the interpretation of words, legal terminologies and all.

Therefore, parents will mean legal guardians or adopting parent. Therefore, the interests of children, other than just mentioning the word adopted, the interest of the child whether adopted or not are taken care of by this Act. As I said, it is really a broad framework which is clarified under the Children's Act, for instance. What will happen if this Constitution was passed is to know how to look at the Children's Act as it is, compare it with what is here and see what are the principles in the Constitution

that may have been omitted in the Children's Act because it was passed before the adoption of this Constitution, such that those values may also be uplifted and encouraged in that Constitution.

One more point I have to say as I wind up is the question of extra-judicial or these illegal killings of people by the police particularly. The Police Force is on page 32 I think. Under the Constitution, this Draft, the Police Force which is now being termed under this Draft Constitution as the Police Service is enjoined, is required to observe human rights standards, and is therefore subject to institutions or organs maintaining and upholding human rights. Such that, the killing of people is not really part of or is no longer... that they are duty bound to respect that they must not kill people that is in respect of the right to life.

Therefore, if somebody were or police were to kill anyone, I think that would have to be either a subject or criminal law or subject to other Constitutional sanctions under the various commissions that are established here. In event that I haven't forgotten anything else, I think I would like to stop here and also beg to leave because as I have explained to him, I am required in another meeting just now, not tomorrow.

**Reginald Okumu:** We are about to finish. Thank you Mr Ndubi. I think we will have Mr Terer, respond quickly, five minutes please. We cannot get all the answers but in the meantime probably Mr Ndubi can be thinking about the rights of homosexuals and gays.

**B K Terer:** Thank you. There are several issues which have been asked about land, they are interrelated. I will restate the questions once more. Some of them have been asked by the Commissioner who left.

Regarding people who have misappropriated public land and also somebody raised an issue regarding somebody in West Pokot who was telling Honourable Uhuru Kenyatta that he should not be dealt with in terms of land and whatever happened during the clashes, that will come together. Also, the issue of the transfer of land for those families may be who are deceased and they have to go through the procedure of getting that land to their inheritors.

The first answer would be, under the Bill of Rights and the property which I initially read out was that every person has a right to acquire property and own property either individually or in association in any part of the country. The closing sub section on that right says the right recognized and protected under this article does not cover any property that has been unlawfully acquired. That means if any land or any property that has been unlawfully acquired is not protected under this Bill of Rights. You therefore, have no recourse in this Constitution if you have acquired land illegally.

Now, when it comes to chapter 11, the one that deals with land, two important things have happened in the Constitution. One is the National Land Commission, and secondly immediately, two years after the enactment of this Constitution, parliament will enact law for the following. I will only mention the parts that relate to this question.

One is the protection, that law which will be enacted will be for the protection of dependants of deceased persons holding interest in any land including the interest of persons actually in occupation of the land. There are quite a number of disputes regarding land. People have died, when you die without leaving a will, they say you die in estate. Now, I think more and more people will actually be writing wills for the purposes of the transfers of the property not only land. For those who die in estate and that means they have not given any will, then a law will be enacted that will deal with such matters.

Following that also, is the recognition and the protection of matrimonial property and in particular the matrimonial home during and at the time of termination of marriage. More importantly also is that the law also will establish mechanisms for review of all grants or disposition of government or other public land to establish their propriety, legality and to determine whether or not such grants or dispositions shall be revoked. That means they would be empowered to look into previous government allocations, what we are calling 'grabbing' and to review.

As relates to clashes, it also states that the review and assessment of all claims to unjust expropriation of land in the Coast, North Eastern and Rift valley Provinces or elsewhere, whether arising from historical or other causes in order to establish the validity and how best they can be justly, peacefully and equitably be solved. Parliament shall determine the cut off date in reference to which this Review in paragraph 2 above is to be conducted.

We have to recognize that the whole issue of this allocation of land is historical. One is that right from the colonial days when the colonial government actually demarcated part of the country as reserves and other parts of the country as white highlands. When it came now to independence, part of this, the reserves were dealt with under the land adjudication system while part of the white highlands actually came under the Government Lands Act, which was a successor to the Crown Lands Act. Because of that, now the Central Government was able to allocate land in the White Highlands to Kenyans and that system also right from that time there has been injustice in it. Parliament will therefore have to put in a cut-off date whether it was really on independence time or it was from whatever time.

Also the National Land Commission, its function would be to define and constantly review the National Land Policy. The reasons for the National Land Policy is actually to be able to determine and say which land should be sub divided. For example, if you want to productively produce say staple food like maize, then there should be a limit to subdividing certain parcels of land. Those are the policies.

Somebody also raised a question regarding penalties for land that is not used. Since one of the functions of this National Land Commission will be to review these laws, the existing laws actually on paper are very good. If you look for example at Cap 318, which is the Land Agricultural Act, the Agriculture Act. It provides for, if you have land and you are not using it to produce as is expected, it provides for what we call the Central Agricultural Board to acquire land for the purpose of

somebody else to be able to use it and produce. With this review, we should be able to look into it.

In urban areas, the prevalent tenure system, the leasehold land, actually by paying rates, and ground rates, those are in a way supposed to discourage speculation, all in all for speculative purposes. Therefore if you have to pay rates and ground rent for land that you are not using, you are holding it or speculation. If you have to pay for those things, there has to be an income for it. Also, the Government Land's Act actually provides whereby if you are granted government land within a certain time, I think two years, you should be able to have submitted building plans to develop that land, so that you can justify your original purpose for applying for that piece of land.

We would therefore see that really the Constitution has the right to say it is only providing the framework. The laws as they are as existing, they are there, they are very good, but they need to be reviewed, so that for all these queries we are asking about they may be dealt with under the various statutes. However there are so many of them that they also have to be brought within an acceptable framework where all of them will actually be sort of synchronized and work accordingly. Thank you.

**Reginald Okumu:** Thank you Mr Terer. Now Mr Mmwenda, you have five minutes. I wish you had given me powers to deal with errant facilitators but since you didn't, you will just bear with me. Mr Mmwenda.

**Nchooro Mmwenda:** Always I have the unfortunate task of being the last to talk and to answer the most difficult questions. Before I go directly to the questions, let me go to the observation that was made about harambees.

I remember I said that the issue of harambees is personal, I know it is politically exclusive. With its nature, it is something that has been used in this country for the last thirty or so years to develop this country. Some of us could not be here if it were not for the harambee spirit, harambee schools and the like. However, what I was trying to say is that I have in mind a tax law which was passed this year, which is supposed to be debated by parliament this month, about refunds.

In May's budget it was provided for that if you are an owner of a factory or factories and from your factories to the main road you are able to repair roads, you can claim a refund of your taxes under the Income Tax Act. What I was trying to propose is that I know in this public finance, if you look at it closely you will find even harambees mentioned but indirectly. If you look at item 256, page 31 on Accounts and Audits. Whereas it is talking about any person holding a public office with direct or concurs in the use of public funds contrary to existing institutions shall be accountable for any laws arising from that use and shall be required to make good the laws even if. You see, the Constitution is giving us an accountability of monies owned for the public.

What I was trying to propose is that at least, it should be mentioned and be recognised by the Constitution. I know since we have a Commission for complaints, one can use it to complain then we have an Act of parliament where it is recognized for

refunds. However as it were itself, it is not recognized, has never been mentioned which service. That Act is what I had in mind, I wanted actually to correct the impression. Again you will find it is one function in this country which has been misused by politicians.

In fact a month ago we had a harambee at our place whereby it was purported that we collected Ksh 1.5 million, but what was banked was only Ksh 600,000. The fact of the matter was most of the cheques issued by the politicians bounced. You find they are using these for political gain.

Again, I have in mind somebody who was detained, the author of the Petals of Blood because he asked in one of the paragraphs of the book, "All these money you contribute where do you get it from? Who are those un-named friends of yours who give you the money?" However, if there is a provision whereby you pay, if you give it to me I give you a receipt, so that at the end of the year you can claim in your... because you are developing a school, you specify for a certain project. Like schools, the government is supposed, you look at these provisions under the control of budget, I think I will combine it with Esther's question, whether there is a way of conserving for the budget?

There is a Controller of Budget, who has been introduced by this Draft Constitution. It was not there before, because the budget was under the Fiscal and Monetary Policy department only. It has been separated from the Control and Auditor General. I didn't mention this when I was talking because I thought it was there under the government functions.

If you look under the Controller of Budget, section 253, item 3 the second column on top (a), it is encouraging that the money is spent in, the Controller is supposed to ensure that the money is spent as parliament intended. You therefore find the intention has been taken care of on the follow up of the money.

Again, there is another question, which I think I should tie to this one, on how we can make sure that our taxes that have been paid, and whether (inaudible) find out how it was used. Again, it has been taken into account under the Controller of Budget, because there are various clauses and all of them actually are very well meant and intended for the purpose of developing this country.

There was also another question which, I think all these questions on taxes are more or less the same, which was asked, I think by Charles, that the employed people are the ones who pay more taxes on their businesses. You will find that what has been lacking in this system of ours is that the Auditor General has had a function which was not well defined. Yesterday I looked at the previous Constitution, which people seem to like so much. I thought the Auditor General is just mentioned including his tenure of office, in just two sentences, but here it is well documented now what can be done or what will happen.

Our electricity bills, our water bills that we pay, including for bins which I have not seen for the last ten years or so, which I pay

every month. I think again there is a complaint commission whereby it is the avenue in which things will be cropping up from the citizens. We also have, I am tying it now to what we had discussed in the morning, the Bill of Rights. Under the Bill of Rights, you can use this also to prod on what has happened on the finances. Actually these things are intertwined, it is only that I limited myself to only doing the tax element and look at the tax element as it were.

We also have even now the role of the Central Bank has been strengthened, even the functions specified specifically unlike before, where it was just a place where they keep or print money. However, this time it is specific. The Constitution has recognized the role and it is specific. It is easy now using this draft Constitution at least for even a citizen not even the MPs, to follow up on what is happening on the process.

Again on taxation I don't think that I have omitted anything. On farmers cash crops and the like, you find as Mr Raiji said, the problem with our farmers, the problem with our cash crop and our farming and our investment in this country which I will tie to the expatriates arrival in this country, is just as a result of corruption.

I remember one time somebody just decided to waive taxes on wheat, sugar and rice for three months. The legal estate between April and July. That time he is doing that and the vessels are just waiting in the high seas to dock, and he knows within three months the things will have been removed then it expires. You know, the effect of that sugar actually is the one that when Mumias is talking about not being able to meet their target that is the effect. This is because it comes duty free, and it is sold cheaply. Other people have been importing sugar even if it is for industrial use but we buy it in the supermarkets, you know, that very white sugar which is meant to be for making sweets and biscuits.

These are the kind of things that are all tied to corruption. Again, they are tied to the misuse of the public office. This Draft Constitution, and I think that is why most politicians are jittery about it, it has withdrawn most of their powers for the misuse. Like under the Consolidated Fund, which I didn't go through, it has given (inaudible) to the process in which the money in the Consolidated Fund has to be used.

As we are talking now but don't quote me, I hear, somebody said that there are two accounts to the Consolidated Fund, it is true. There is a tax which is being collected and I don't see it being recognized as tax and it is being paid by most importers. These are things that have been used to benefit a few. When I say to benefit a few actually I have a process in mind which I know but it has been misused but if you look at the withdrawal from the Consolidated Fund also, it has given us a process in which if it is applied, this country would be having better managed resources.

Again if you tie this one to the Controller of budgets and the functions of the Auditor General, these two things if they are applied as the Commissioners have perceived it should be, then even most of your questions have been taken care of. Like for example if you look at, under the Auditor General 254, Item 2(b), he is supposed to certify himself or herself that all monies that

have been appropriated by parliament and disbursed have been applied to the purpose to which they were so appropriated, and that the expenditure conforms to the authority that governs it. Appropriate is a term that looks very ambiguous, but appropriate is allocated. That is allocated for the purpose.

With those few remarks I think I have addressed most of your concerns and if I have not, I have left my email address, you can just write there and then I will reply.

**Reginald Okumu:** Thank you, I think we will conclude. Mr Ndubi said gays and homosexual are minorities so... Okay. This was just a forum for us to start this debate, it is still open for the next thirty days. I would like to thank so much the facilitators who remained all through. As you realised many started the journey but very few of us have remained. I hope in the next thirty days and the days that are left for us to clear this process we will remain standing.

I want to thank Mr Terer for the time and for his participation, Mr Mmwenda and Mr Ndubi and all the others who left, and to thank you for delaying your lunch to be here. I would conclude by inviting Esther to say a concluding prayer. As she walks over I would like to make an announcement that Dr Wamukoya has donated some books on Environmental Management in Kenya, which he authored. These books should be put in our library and will be available for those of us who want to read.

**Esther: (*Prayer*):** In the name of the Father, of the Son and of the Holy Spirit Amen. Our Father who art in heaven, hallowed be thy name, thy kingdom come, thy will be done on earth as it is in heaven. Give us this day our daily bread and forgive us our trespasses as we forgive all those who trespass against us, and lead us not into temptation but deliver us from evil.

Hail Mary, full of grace, the Lord is with you. Blessed are you among women (inaudible).

Almighty Father we come before you this afternoon with thanksgiving for the gift of life and the gift of friendship. God Father we thank you for all what we have deliberated. God we know you are with us, and we leave everything to you Lord because you are the Almighty and you know where we are heading and may it be to your glory. All this we pray in the name of our Lord Jesus Christ, Amen. In the name of the Father, the Son and the Holy spirit, Amen.

**Reginald Okumu:** I forgot to thank Regina Mwachi. She is from the Constitution of Kenya Review Commission. She has been taking notes on what we have been saying. Thank you very much Regina and your helper who left.

Please also know that the people who are here in front of you are paid consultants who have given up their time to do this for free and I hope they will extend this when you call them and you want this and that clarified, that they will be available to do that, okay. Thanks a lot.

