

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

NATIONAL CONSTITUTIONAL CONFERENCE

**Verbatim Report of
PLENARY PROCEEDINGS –**

HON. DELEGATE MIRUGI KARIUKI'S MOTION

HELD AT BOMAS OF KENYA

ON

8TH MAY 2003

**VERBATIM REPORT OF PLENARY PROCEEDINGS, MOTION BY HON. DELEGATE
MIRUGI KARIUKI HELD ON 8TH MAY 2003 AT BOMAS OF KENYA**

Meeting was called to order at 9.50 a.m. with Prof. Yash Pal Ghai in the Chair.

Prof. Yash Pal Ghai: Ladies and Gentlemen, will you please take your seats we are about to commence our proceedings in a minute. So please take your seats.

Hon. Delegates:

Prof. Yash Pal Ghai: I shall commence proceedings in 10 seconds, so please take your seat and we shall have prayers.

Honourable Delegate: The chair does normally ask people to stand up for prayers. So it's good to say stand up for prayers.

Prof. Yash Pal Ghai: Okay. Thank you Honourable Delegates, I would like to call the Conference to order. I will request Sheikh Shee Ali to lead us in prayers and I will ask you all to stand up for the prayers.

Hon. Delegate Sheikh Shee Ali: *Ewe Mola wetu muumbaji mbingu na ardhi, nakuomba wewe peke yako hatuna mtu mwingine wa kumuomba. Utupe nguvu na uwezo wa kusimama imara kuweza kufanya kazi ngumu ya kutumikia vyumbe vyako. Utupe busara na hekima ya kuweza kupambana na kila jambo ambalo ni nzito kwetu sisi. Utupe uwezo wa aina hiyo ili tuweze kufanya kazi hii kwa ukamilifu. Ewe mola wetu muumbaji sisi ni wanyonge hatuna uwezo wowote wa kuweza kufanya mambo kwa ukamilifu pasi na nguvu zako na kuungwa mkono na wewe. Tunakuomba ya Rabi, tunakuomba ewe Mola nguvu hizi uziingize kwa kila mmoja wetu. Twakuomba kwa jina lako hatuna mwingine wa kumuomba utubariki zote. Amen.*

Prof. Yash Pal Ghai: Thank you very much. With the leave of the Conference, I would like to administer the oath of office to those Honourable Delegates who have not taken the oath. So could I

please ask those Honourable Delegates who need to take oath of office today to come in front here in the usual manner? Gentlemen, they are already here are they?

Interjection: Yeah.

Prof. Yash Pal Ghai: The way we administer the oath is that I will ask you, you say I and then say your names, and after that you repeat after me from the oath, and then I ask you to raise your hand and repeat after me. So I am now going to ask you to say I and then repeat your names.

(Oath is administered)

I _____ being appointed a Delegate to the National Constitutional Conference under the Constitution of Kenya Review Commission Act, do solemnly swear that I will faithfully and fully, impartially and to the best of my ability discharge the trust and perform the functions and exercise the powers devolving upon me by virtue of this appointment, without fear, favour, bias, affection, ill-will or prejudice and to that end that, in the exercise of the functions and powers as such a Delegate, I shall at all times be guided by the national interest. So help me God.

Prof. Yash Pal Ghai: Will you please then sign this and give it to the Secretariat and I will countersign this. I welcome you to this distinguished assembly and look forward to your contributions. Thank you.

PLO Lumumba: And welcome Hon. Delegate Kalonzo Musyoka who has just come. Just accommodate him.

Prof. Yash Pal Ghai: We have another distinguished Member of the Assembly, Minister Kalonzo, and I am going to administer the oath to him. Mr. Kalonzo I am going to ask you, say I, state your names and then I am going to read from the oath and will you please repeat after me.

Hon. Kalonzo Musyoka: I, **Kalonzo Musyoka**, being appointed a Delegate to the National Constitutional Conference under the Constitution of Kenya Review Act, do solemnly swear that I will

faithfully and fully, impartially and to the best of my ability discharge the trust and perform the functions and exercise the powers devolving upon me by virtue of this appointment, without fear, favour, bias, affection, ill-will or prejudice and to that end that, in the exercise of the functions and powers as such a Delegate, I shall at all times be guided by the national interest. So help me God. Please sign that oath and bring it here and welcome to the assembly.

Applause from the Delegates

Prof. Yash Pal Ghai: Honourable Delegates, I would like, with your leave, to allow a motion to be introduced at this point. The notice of this motion was given to the Secretariat yesterday, and in accordance with regulation 24 we proposed to have this motion introduced today. The Steering Committee met this morning and in accordance with the regulations, agreed that this particular motion be introduced as the first business of the Conference this morning. This motion which you all have now, I think, is introduced by Honourable Mirugi Kariuki. I would like to state the way in which I would like this motion to be debated. In accordance with the rules of this Conference I will ask the proposer to introduce the motion, then I will seek a seconder, and if the motion is seconded, then I would like to give 10 minutes to the proposer to introduce the motion and five minutes to the seconder, and then I will propose the question to the Conference and allow reasonable time for a debate on the motion before I put the question to the Conference.

I would like to remind you that the regulations provide for us to conduct all our business with decorum and civility and we do not allow heckling or booing. We want every Honourable Delegate to be listened to carefully with respect and the Delegates who disagree will have an opportunity to make their own statements. So please listen to all the Delegates in silence and let everybody have a fair opportunity to present their case. I am now going to ask the Honourable Kariuki to move the motion. Yes, please.

Hon. Delegate Gor Sungu: Mr. Chairman, my name is Gor Sungu, M.P. for Kisumu 194. Mr. Chairman according to our procedures this motion ought to have been put in the order paper, it has not been put in the order paper today. So it cannot be discussed until it is put in the order paper. Thank you.

Prof. Yash Pal Ghai: Well I had asked the leave of the house and a supplementary order paper is being prepared.

PLO Lumumba: It is being circulated.

Prof. Yash Pal Ghai: It is being circulated. This motion was given to us yesterday, the first opportunity the Steering Committee had to discuss it was this morning. In view of the extreme importance of the motion and its implications on our work, the Steering Committee thought it was best to dispose of this first. We are also reminded that Kenyans are all very anxious about this motion and the sooner this motion is disposed of, I think the better for everyone concerned. So I hope that the Conference will agree that this motion can be taken now.

Applause from the Delegates

Prof. Yash Pal Ghai: So if you don't mind, I would then ask Mr. Kariuki to introduce his motion.

Hon. Delegate Mirugi Kariuki: Mr. Chairman Sir, and Honourable Delegates it's a great honour for me to move the motion I am about to move. I would like to thank the Chair for the good words of caution that have been made here. Let's give each other a chance to ventilate our views, it doesn't matter how unpalatable you may feel my views are.

One of the reasons why we are trying to create a new Constitution is because our freedom of expression has been stifled for many years. This is an opportunity for us to try and show a difference. Mr. Chairman, Sir, I beg to move the following motion:

That considering the desire of Kenyans for a new and comprehensive Constitution and appreciating that the National Delegates Conference must express the wish of each Kenyan in equal voice, this Conference hereby resolves that: -

- 1) The Honourable the Attorney-General and the National Assembly do move the dispatch to entrench the Constitutional Review Process in the Constitution of Kenya by appropriate amendment to section 47 of the Constitution of Kenya before further proceedings can take place in this Conference.
- 2) That the Honourable Attorney-General and the National Assembly do move the dispatch to make amendment to section 2 and section 27 of the Constitution of Kenya Review Act and to provide for an appropriate definition for the word “districts” and to provide for the principle of equal representation in selection of these Delegates before this Conference can proceed.

Mr. Chairman Sir, I would like to say for the benefit of those who don't know my history, I have been associated with the crusade for a new Constitution for a long time, indeed I am one of those lawyers...

Prof. Yash Pal Ghai: Sorry before you proceed I would like to see if there is a seconder for your motion.

Hon. Delegate Mirugi Kariuki: There is a seconder.

Prof. Yash Pal Ghai: Yes, could I have the name. I think Mr. Koigi Wa Wamwere, has he arrived?

Hon. Delegate Mirugi Kariuki: Yes.

Prof. Yash Pal Ghai: If it is seconded then I would propose the question and then you can make your submission.

Hon. Delegate Mirugi Kariuki: I thought Mr. Chairman the procedure is after the secondment.

Prof. Yash Pal Ghai: Okay.

Hon. Delegate Mirugi Kariuki: The motion is then put to the house for ... (inaudible).

Prof. Yash Pal Ghai: Okay, thank you. So you have ten minutes, please do that if you can.

Hon. Delegate Mirugi Kariuki: Thank you, Sir.

So I was saying that I have been associated with the crusade for a new Constitution as far back as 1994 in the Law Society of Kenya, the ICJ. The Kenya Human Rights Commission did in fact make a draft Constitution for Kenyans because they were trying to press for a new Constitution. And from that moment on, I have been crusading for a new Constitution. I would like to reassure members, because you have heard a lot in the media and since I filed this motion yesterday morning there has been a lot of distortions, a lot of lies, a lot of malicious propaganda taking rounds. I want you to look at this motion closely and urge you to appreciate that this motion seeks to ensure that Kenyans have a safe Constitutional process. It is not intended to derail contrary to some of the media reports. I would also like to assure Delegates that I have not gone to court as the People Newspaper has reported; I haven't I have a lot of respect for this Conference and I believe that Members have the level headedness with which to judge this motion and decide on the way forward.

The first limb of my motion is based on section 47 of the Constitution of Kenya. Those who are not lawyers may not be aware that section 47 is about the alteration of the Constitution and section 47 sub-section 6 defines alteration as amendment and modification of the Constitution. Section 47 does not envisage a situation where a new Constitution will replace the existing one. So my submission here is that at the end of the day, if we were to go on with the deliberations, come up with a draft Constitutional Bill to be tabled before the National Assembly, the National Assembly will be disabled because it does not have the power pursuant to section 47 to enact a new Constitution. The powers of the National Assembly are limited to amendment, alteration, and modification.

If you look at what we are now debating here, clearly this is a new document. When we were debating about citizenship yesterday, one of the provisions is that we have to seek new citizenship and that the existing citizens will in fact be confirmed as the citizens of Kenya. So the premise upon which that is based is of course that we are going to have a new order, a new Constitution. And one of the recommendations put in the draft Constitution is in fact to have a Constitution Day, which means this

is entirely a new document. My problem as a lawyer the way I see it, is in fact that Parliament will not have the capacity to say “*we adopt the report of the National Delegates,*” as the Draft Bill is drawn. So I am trying to urge this particular Conference to see that shortcoming ahead. It is our duty to remove possible barriers to the realization of the dream of Kenyans to have a new Constitution.

And it is against that background that I have said we actually need to have the Attorney-General make an appropriate amendment Bill to amend section 47. And Mr. Chairman, if you can allow me to say as far back as the year 2000, the Law Society of Kenya had a Conference at the Utalii Hotel and among the people who were present in that Conference are some of the Commissioners here. The Honourable Secretary Lumumba, Mutakha Kangu was present, Dr. Githu Muigai among others. And this issue of entrenching the Constitutional process was one of the resolutions that we made. We then went ahead to market our idea to the Ufungamano, that idea was embraced and the Attorney-General proceeded to move a Bill which was published in February 2001 but at the close of that year when Parliament was prorogued the Bill expired and it was not debated. Last year once again, a Bill to entrench the Constitution was published and Parliament was dissolved before it could be passed.

Now, we started a new term and I want to say that what I am saying here is what I said in Parliament, and I said we have to put the process in place by entrenching it in the Constitution before the Delegates are called to the Conference. I think my call fell on deaf years. I am hoping that today the members will appreciate that what I am saying is serious enough. We don’t want someone to rush to court one of these days and tell the court, “I want a Constitutional court to be set up. I want to know whether Parliament has the capacity to create a new Constitution for Kenyans, pursuant to the provisions of section 47”. So I am aware that the desire of Kenyans is to have a new Constitution and I have brought this motion in good faith because I don’t want to see any impediments ahead.

The second limb of my motion is about The Review Act. It’s quite clear for those who are not lawyers that the Constitution is the supreme law of the land. You cannot change the Constitution through a statute. You can only change a Constitution by actually amending it to facilitate the creature – the creation of a new Constitution. We have not done that. What we have is the Review Act that we have here and section 27 of The Review Act – this is the issue that I am quarrelling with I think sub-section 2 (c) talks about the Delegates. It says that district Delegates will be three for each district. The Act

has not defined what a district is, I think it was left for the Commission. The Commission went ahead to conclude that Kenya has 70 districts and went ahead to pick three Delegates from each district. If you look at chapter two of the Laws of Kenya, that is the interpretation section, you will find the definition of a district. And the definition of a district is that the district is a creature of the Constitution. As far back as 1961, a boundaries commission was set up prior to the Lancaster Conference to be able to prepare for the Lancaster debate and that Boundary Commission is the one that set up the provinces and the districts that we had at independence.

My submission is that we have not moved from that position. Whatever abuses have been committed on the Constitution let's not legitimize them here. We are here to correct the wrongs that have been committed since 1963. If boundaries have been created undemocratically, in defiance of the Constitution, let's be bold enough to say so because our mission here as Delegates is to correct the injustices of the past. So I am saying that the Constitution, having set up the number of districts set up, the number of provinces to set up, nobody had the mandate to go round through a statute, The Provinces and The Districts Boundaries Act, because it required the Constitution to be amended to create additional districts. So my submission is the Commission was indeed wrong to conclude that Kenya has 70 districts. I am aware that since they wrote 70, two others have come into creation. We have Ijara, we have Nandi Hills or South Nandi, which were subsequently created.

One of the tasks that we have to undertake here as Delegates is a similar task to that which was done prior to Lancaster House. Let's set our districts and provinces in place, but let's not legitimize the flawed boundaries that have been created as (inaudible) to the abuse of the Constitution that have been committed for forty years. So I am saying, if The Review Act is put back to the House, the House should be able to define what a district means for purposes of this Conference.

The second limb of my argument is that we have to observe the principle of equal representation. Each Kenyan must have an equal vote to the other. He must have an equal voice to the other. The best way to observe this principle is to ensure we don't just pick Delegates on the district basis; we have to look at the population of those respective districts. If a district like Nairobi, a province like Nairobi, which for the purposes of this Conference is in fact a district, has three million people and gets three Delegates, and another district somewhere with less than fifty thousand people gets three Delegates,

then the principle of equal representation has in fact been abused. So I am saying in correcting The Review Act, we should be able to address these injustices. Let's not do a half-baked job. Let's go the whole haul and ensure that any injustices that have been committed on Kenyans, regardless of who committed them, regardless of who is benefiting from that abuse are corrected. Let's put our cards on the table and say this was unjust, this was unconstitutional and it is our duty as Delegates to make sure that we create a just Constitution for Kenya.

Interjection: (Inaudible)

Hon. Delegate Mirugi Kariuki: Well, the bell has not gone. I think we leave it to the Chair.

Prof. Yash Pal Ghai: If you would please wind up, ten minutes have indeed gone. I have been a bit indulgent but now I think you must conclude your speech.

Hon. Delegate Mirugi Kariuki: Just to sum up my motion therefore, I am urging the Delegates to read good faith into this motion. There is too much reading of politics in whatever we do. I mean well for Kenyans and my history will vindicate me, that I have not come here because I have been prompted by anybody. I have come here because I have the welfare of Kenyans at heart. I want a clean Constitution, a Constitution that will not be questioned by a person another day. I want us to spend our time here usefully, so that we don't go into an exercise in futility: where a document is tabled before the house and the house says we have no power to do so. So I am saying with utmost humility, I am making my appeal to all the Delegates to see the sense into this motion and to please support me. I thank you, Mr. Chairman.

Mr. Chairman as it is the procedure in the House, I would have urged that after the conclusion of the debate, the mover be called upon to reply.

Prof. Yash Pal Ghai: I am aware of that, thank you.

Hon. Delegate Mirugi Kariuki: I am now calling upon my seconder to second me, Hon. Delegate Koigi wa Wamwere.

Prof. Yash Pal Ghai: Let me remind you, Honourable Delegate, that you have five minutes and please try to conclude your remarks within that time limit. Thank you.

Hon. Delegate Koigi wa Wamwere: Thank you, Chairman. Before I proceed I just want to point out one thing, that like my friend Mirugi, I have not stood up to oppose the proceedings of this Conference. I have stood up to support the proceedings of this Conference. For 13 years, I was put into detention and prison while fighting precisely that one day this country would have a Conference like this. I would be the last person oppose the proceedings of this Conference.

Second thing, I want to say I have not stood here as somebody who has been sent here by the so-called “Mount Kenya Mafia”.

Laughter from the Delegates

Hon. Delegate Koigi wa Wamwere: I say that and I want the record to speak for me, throughout my life I have been opposed to tribalism. I spoke against tribalism in the time of Kenyatta and for it I was detained for four years. I stood against tribalism in the time of Moi, for it I was put in for nine years. I tell this Conference if there is tribalism under Mwai Kibaki, I will also speak against it and go to jail for it. So I am not here to push a tribal agenda, I am here to seek the truth. We were told here...

An Hon. Delegate: Point of Order Mr. Chairman.

Hon. Delegate Koigi wa Wamwere: Mr. Chairman, I think you should protect my time if I am going to sit down, I hope I will not have lost my five minutes.

Response from the Delegates: (inaudible)

Prof. Yash Pal Ghai: Please let the Secunder complete his statement and then there will be ample opportunity for others to make their statements.

Hon. Delegate Koigi Wa Wamwere: Mr. Speaker, Sir.

Prof. Yash Pal Ghai: Please continue and please do not interrupt the speaker.

Hon. Delegate Koigi Wa Wamwere: Mr. Chairman, what I was going to say is that this Conference is a greater Conference than the Lancaster Conference. Indeed, the Lancaster Conference should have been this Conference. I believe that we are here not just to write a new Constitution but also to write history. Indeed the work that this Conference is doing is holy and I consider the place where we stand now to be equally holy. We are here to do not just the work of our people, but to do the work of God. We cannot do the work of God unless we pursue the truth however bitter that truth is. I stand to raise questions because I don't have answers. If this Conference has answers, I am prepared to hear them.

The Mover of this motion has said that as we are about to build and send a shuttle to Space, to the moon, that the engine of the shuttle has got a crack. All of us are aware that if you send a shuttle with a crack in its engine into Space, it is going to explode and kill everyone in it. All I am asking is, we have enough brains in this Conference, we have enough lawyers in this Conference, we have enough philosophers in this Conference, let them tell us, is there something that we are overlooking, that we are supposed to do in order to make sure that the process of writing our new Constitution is perfect and *unbwogable*? That is the question, because we want to have a Constitution that will not be questioned, you know two months from now, ten years from now, or be criticized a hundred years from now.

And seeking perfection cannot surely be a sin, it cannot be a crime and the least this Conference can do is answer the questions that have been raised. If we want to give our people democracy, perfect democracy because we have suffered too much under dictatorship, can we sacrifice democratic principles? If we are trying to make this country a country of the rule of law, can we...

Prof. Yash Pal Ghai: Can you please wind up now, please? Thank you very much indeed. In accordance with the regulations, I will now propose as follows:-

That considering the desire of Kenyans for a new and comprehensive Constitution and appreciating that the National Delegates Conference must express the wish of every Kenyan in equal voice, this Conference hereby resolves: -

- (1) That the Honourable Attorney General and the National Assembly do move the dispatch to entrench the Constitutional Review process in the Constitution of Kenya by an appropriate amendment to Section 47 of the Constitution of Kenya before further proceedings can take place in this Conference.
- (2) That the Honourable Attorney General and the National Assembly do move the dispatch to make amendments to Section 2 and Section 27 of the Constitution of Kenya Review Act and to provide for an appropriate definition of a district. And to provide for the principle of equal representation in selection of district Delegates before this Conference can proceed further.

Prof. Yash Pal Ghai: I now invite the Delegates to make comments. Number seven (7) please.

Hon. Delegate Jimmy Angwenyi: Thank you, Mr. Chairman, for giving me an opportunity to comment on the motion at hand. Mr. Chairman, my name is Honourable Jimmy Angwenyi, M.P. for Kitutu Chache.

Mr. Chairman, I sympathize with the Mover of this motion. Mr. Chairman, I beg to oppose the motion on these grounds: first, the Mover has brought the motion while we are in the middle of our deliberations in this Conference. It has cost this country so much for us to be assembled here and deliberate on some matters of this process for the last two weeks.

Two, Mr. Chairman, Section 47 of the Constitution of Kenya does not limit as to what extent you can change or amend or rewrite our Constitution.

Applause from the Delegates

Hon. Delegate Jimmy Angwenyi: Mr. Chairman, what we are doing here today as representatives of the people of Kenya is to assemble views of Kenyans. We could have done this in our houses, we could have done this in our churches or we could have even done this in our markets. But we decided to assemble here, all of us, and collectively collate these views and combine them and make proposals for Parliament to enact a change to the Constitution.

Mr. Chairman, we are not amending the Constitution here today, (*Applause from the Delegates*) we are only proposing, making proposals as to how the Constitution could be amended by Parliament. So we have not contravened in any way, shape or manner, Section 47 of our Constitution.

Mr. Chairman, I do know that there is a mistake in not describing what a district is. But Mr. Chairman, the districts which were cited in the Constitutional process of the 70s were cited about two years ago. Why have we not in Parliament as representatives of our people sought a change on this? Why are we seeking the change now, Mr. Chairman?

Applause from the Delegates.

Mr. Chairman, even if we wanted a change of the districts, we can correct that here today so that when we are going to amend the Constitution in Parliament, we can say “this is the proper definition of a district”, and then when the Constitution is amended, it will carry out the message as to what is a proper district.

Mr. Chairman, I would like to beg our Delegates and especially the Members of Parliament who are Delegates here...

Prof. Yash Pal Ghai: Could you please wind up?

Hon. Delegate Jimmy Angwenyi: ...that the day we take our proposals, when we go to Parliament, Mr. Chairman, we make all the corrections that are being sought by the Mover of this motion. Thank you, Mr. Chairman.

Prof. Yash Pal Ghai: 239 please.

Hon. Delegate Halako Fatuma Galgalo: Mr. Chairman, thank you very much...

Prof. Yash Pal Ghai: Okay, there is a point of clarification please. But make sure it is a point of clarification.

Hon. Delegate Alew Simeon: Honourable Chairman, I am a Delegate number 326 from West Pokot.

Through your Chair, I would like to know whether Honourable Mirugi Kariuki, the Delegate from Nakuru Town, has been sworn in and signed the paper? And if so Mr. Chairman, through the Chair, may this House be enlightened as to whether it is procedural for a Delegate to be sworn in and after signing in. Can you also clarify, through you Chair, whether or not it is procedural or a contradiction for such a member. So I am opposing it.

Prof. Yash Pal Ghai: Thank you, it is involving quite a point of procedure but 239, I think I have recognized you, would you please make your point and would you please stick to the time as every Delegate has two minutes. Continue now please.

Hon. Delegate Halako Fatuma Galgalo: Thank you, Mr. Chairman, for giving me this opportunity to strongly oppose this ridiculous motion, Sir. I, from the onset would sympathize with the Movers of this. If they were detained by previous governments and they would like to endear themselves to the current government so they do not face detention again, I am sorry for them.

Applause from the Delegates.

Hon. Delegate Halako Fatuma Galgalo: It was not our fault that they were detained. We are here on serious business to discuss the future of this country, Mr. Chairman, Sir. And we have spent so much money; we have spent so much time as a nation to come to this level where we are today. And if there is a move to disrupt this process, to scuttle this noble process, Mr. Chairman, Sir, it is a disgrace. It is totally a disgrace and we oppose it.

It is ridiculous for a Mover who claims that he talks for each Kenyan in equal voice – to quote him – and wants other districts, wants people who were marginalized by the colonialists who have been given a chance by the Kenyan government-- We want them to be thrown out of this process Mr. Speaker, Sir.

Applause from the Delegates.

Hon. Delegate Halako Fatuma Galgalo: There are marginalized communities that did not contribute to the Lancaster Conference and thank God our independent government gave us an opportunity through creating districts for the convenience of development. We have been given a chance to contribute and now some of our bothers want to throw us out the way the colonialists threw us out. This is a disgrace Mr. Speaker Sir.

Applause from the Delegates.

Hon. Delegate Halako Fatuma Galgalo: If it was right for the colonialists to create districts, it is even more morally right for independent governments to create more districts. What we need is more districts and not throwing away what we have already gained Mr. Speaker Sir.

Mr. Chairman, we strongly oppose this, it smacks of marginalism, we have been marginalized for too long. We thank God that we have been given new districts. We thank God that we are able to contribute here to the future of this country. We strongly oppose this ridiculous motion, Mr. Speaker Sir.

Applause from the Delegates.

Prof. Yash Pal Ghai: Thank you very much. I will ask Delegate 308 now please. (*Noise and murmuring from the Delegates*) We are moving as you can see in this direction, so please be patient.

Hon. Delegate Matenge James: Chairman, Honourable Delegates, I am Delegate 308 from a district called Kirinyaga. I stand here, Honourable Delegates, to state that Constitution making and our assembling here is a very sacred duty. We have been sent here by the people of Kenya to do a job. Therefore, the reasons which have been advanced by the honourable member that further proceedings should not take place is not a valid thing to stop this Conference from continuing. The honourable member is talking of a process and that process can continue. If there are Sections of law to be looked at we are here for several weeks there is nothing stopping anybody from continuing to examine the process of law. But, and very seriously indeed, we have a duty to do. Some of you, most of you, all of you may never get another chance to sit in a hall like this to look at that Constitution.

In fact Mr. Chairman, honourable members, we want a Constitution that will last one thousand years plus. Therefore, I oppose the motion as it is, we proceed with the business and it should be rejected.

Prof. Yash Pal Ghai: 530 please.

Applause from the Delegates

Hon. Delegate Mburugu Florence: Thank you Mr. Speaker Sir, Honourable Delegates. I am Delegate number 530. I want to oppose the motion---

Prof. Yash Pal Ghai: Could you give us your name as well please. The name and number.

Hon. Delegate Mburugu Florence: I am Mburugu Florence, a Delegate for Religious Organizations. I want to say that we had, for a long time, entrusted this country to people who are technocrats in their own ways. And it is amazing that the people we have thought were guarding the Constitution and that they shall continue to protect this Constitution are people that are probably going to punch holes into this Constitution.

I am representing the 'Wanjikus' back at home. We do not have any knowledge of law. And for a long time we have wished to have a Constitution that protects us. I am standing here to request the lawyers to make sure that none of you is going to interfere with the process of this Conference until we

come to the end of it all. (*Applause from the Delegates*) We are protesting against anybody who is going to move any motion to stop this Conference, thank you.

Prof. Yash Pal Ghai: Thank you very much indeed. 386 please.

Hon. Delegate Edward Charles Ohare: I beg to oppose this motion. My names are---

Prof. Yash Pal Ghai: Could you please give us your names?

Hon. Delegate Edward Charles Ohare: My names are Edward Charles Ohare, Delegate from Vihiga---

Prof. Yash Pal Ghai: And number.

Hon. Delegate Edward Charles Ohare: Delegate number 386. I beg to oppose this motion by saying that I think the motion has been put to the wrong forum. The Mover of the motion is a Member of Parliament, and we elected them to go to Parliament to rectify the law that is there for the country. If they did not rectify this and he is a Member of Parliament, he cannot now come and rectify it in this Conference.

We were elected to come and craft the Constitution. That is why we are here and the Mover has been sworn to come and protect and craft this Constitution. Let him go ahead with us, we are in the same boat. If this boat capsizes, he, the Mover, will also capsize. The Mover should wait, when they go back to Parliament then he should go and rectify Chapter 47 of the Constitution as it is. But for now we continue with the task that wananchi have entrusted unto us. Thank you, Mr. Chairman.

Applause from the Delegates.

Prof. Yash Pal Ghai: Okay. 182 please. Please say your name and number.

Hon. Delegate Nick Salat: Thank you, Mr. Chairman. My names are Honourable Nick Salat, Delegate number 182. I stand here to oppose the motion, reasons being, I will actually quote a saying in my Kalenjin tribe which says that “*in every market place, don’t forget there is always a mad man.*”

Laughter and Applause from the Delegates.

Hon. Delegate Nick Salat: So this is a Conference, Mr. Chairman; we should actually be very thankful that we have lived to see this day to renew our country, to right the wrongs that we have gone through over the last forty years. And for it to be derailed by a simple motion is totally wrong.

We will stand to be charged as to what did when we were given the chance to make this country a better place. So Mr. Chairman, we have only been here for seven days and the report which the Kenyans are expecting outside there is nil. What are we going to tell them if we continually bring motions that are actually derailing the whole process? The issue of the creation of districts is to get services closer to the people. And we actually need to create more because I am reading sinister motives here, that some sections of the society in Kenya are feeling that they are losing. So we need to look beyond individuals and we need to make a Constitution that is for the posterity of this nation. Thank you very much. I oppose the motion.

Prof. Yash Pal Ghai: Thank you. 224 please. Sorry, I am going to try to cover everyone so please be patient.

Noise and murmuring from the Delegates.

Hon. Delegate Nancy Lung’ahi: Thank you very much Mr. Chairman. Honourable Delegates, I wish to oppose this motion. My name is Nancy Lung’ahi, Delegate number 224. I wish to oppose this motion on this ground; the Honourable Member of Parliament who is also a Delegate at this Conference, as he reminded us several times, is a lawyer. He has been with us throughout, he knew what was going on. He knew the procedure and all along he did not raise the issues that he is raising this morning. When you went for a retreat with the Members of Parliament to Mombasa, why did you not raise this issue with the Members of Parliament?

Applause from the Delegates.

The second issue, as he and Honourable Koigi Wamwere would like us to understand, is that they are actually supporting the process. When the Conference was scuttled last year, and they knew what happened, why didn't they consult and make sure that they rectify it before we convene again? For the last three months, people have been debating and asking when the Conference is going to take place because everybody is eager to have a new Constitution. Why did they not bring these issues?

I think that the Movers of this motion are putting us on a chess board where they want to make moves for us to think of another move, and another move and the whole process is going to be scuttled. I think that this motion is not being moved in good faith. Thank you.

Applause from the Delegates.

Prof. Yash Pal Ghai: Thank you very much. Seventy-two (72)

Hon. Delegate Musikari Kombo: Thank you Mr. Chairman. My name is Musikari Kombo, Delegate number seventy-two (72). I also stand to oppose the motion.

Applause from the Delegates.

Hon. Delegate Musikari Kombo: Mr. Chairman, the people of Kenya are supreme and we are here representing the people of Kenya.

Applause from the Delegates.

Hon. Delegate Musikari Kombo: And therefore, the decisions that are going to be made here are what we should go by.

The issue of entrenching the process in the Constitution was an issue that was discussed by many Kenyans especially those of us who were in Ufungamano because we did not trust the old regime. Now we have a regime, we have a President who gave a commitment to these Delegates that he wants the process to go ahead.

Applause from the Delegates.

Mr. Chairman, we have a Parliament that is totally committed to the process. Therefore the fear that anybody can come and scuttle the process is unfounded. That fear existed when we had a regime that did not want a new Constitution. We have a regime that wants a new Constitution. What is the fear, my brother? There is absolutely no fear that anybody anywhere will come up to scuttle the process. Kenyans have gone through a long and torturous road in order to arrive where we are today.

We have been placed here by history to be able to help Kenya to stand for one hundred years with a good Constitution. I don't think we should throw that chance that history has bestowed upon us. Mr. Chairman, I also just want to finalize by thanking the Delegates who have been very civil. Nobody has heckled and that is the way the process should go. Everybody is entitled to think but not all those who can think will think correctly. So we should all have our chance. Thank you very much.

Applause from the Delegates.

Prof. Yash Pal Ghai: 390 please.

Hon. Delegate Kellan Wavomba: Honourable Chairperson, Honourable Delegates I am Kellan Wavomba, a Delegate from Bungoma, number 390. Honourable Chairperson, I would like to comment that you are also unfair to us as women because looking at the speakers who have spoken, only two are women.

Applause from the Delegates.

Honourable Chairperson, I would like to oppose the motion that has been moved here for reason that we Kenyans are not going to be punished because of the wrongs that were done by the other government. We are here for a new Constitution and if the Mover and the Seconder of this motion were detained because of the other government, they should not bring in Kenyans. Because these Kenyans are innocent and indeed they need a new Constitution. Thank you very much.

Prof. Yash Pal Ghai: Thank you very much. 114 please.

Hon. Delegate Paul Muite: Mr. Chairman, it is quite clear that the overwhelming majority of Delegates here want us to continue and we must therefore continue.

Applause from the Delegates.

Hon. Delegate Paul Muite: We have up to the 6th of June, I think, to cover as much ground as we can. And I support that position fully that we continue and cover as much ground as we can up to the 6th of June Mr. Chairman.

I want to say this, that when issues are raised here, we should not ascribe ill motives Mr. Chairman on the part of those who are moving it. During the last regime, we were pushing this Review Process in very hostile environment, therefore, even when legitimate issues were raised, they were not accommodated. What we need to do, Mr. Chairman, is to identify any flaws that are there, constitutionally and under the Act so that as soon as we resume Parliament we can rectify them. But for the time being we continue.

I beg, Mr. Chairman, to say that we continue, identify those flaws and we go back to Parliament and rectify them. There are a lot of merit Mr. Speaker, and I am opposing the motion.

Applause from the Delegates.

Hon. Delegate Paul Muite: So, Mr. Chairman, I am saying that although there is a lot of legal merits in the issues that are raised, that is not enough reason for us to scuttle this Conference. We must continue with the Conference and resume Parliament and rectify those flaws. Thank you.

Prof. Yash Pal Ghai: 303 please.

Hon. Delegate Margaret Nyathogora: Honourable Chairperson, my names are Margaret Nyathogora a Delegate from Nyeri. I really sympathise with the Mover of the motion. And I stand here to oppose it.

Applause from the Delegates.

Hon. Delegate Margaret Nyathogora: I think people forget very easily. I want to remind him that he was in the group which was promising Kenyans this Constitution. Why didn't he speak that time?

The other thing, my dear Mover is a lawyer. This draft came out in September last year. Where was he from that time until now that he never raised that? Mr. Chairman Sir, (*Noise and murmuring from the Delegates*) Honorable Chairperson...

Prof. Yash Pal Ghai: Order, order please.

Hon. Delegate Margaret Nyathogora: Honourable Chairperson, my good Mover, I repeat is a lawyer. He is also a Member of Parliament. Why didn't he put whatever he was telling us there? I sympathise with him but it is too late. He has brought this at the wrong time and to the wrong place. I beg to oppose it.

Applause from the Delegates.

Prof. Yash Pal Ghai: 406 please.

Hon. Delegate Shakeel Shabbir:
Delegates)

(inaudible) (*Noise and murmuring from the*

Prof. Yash Pal Ghai: Please can you be quiet and listen to the speaker.

Hon. Delegate Shakeel Shabbir: With your permission I would like to speak to 463 please.

Hon. Delegate Suba Churchill Meshack: Thank you, Chair. I am Mr. Suba Churchill Meshack, Delegate number 463 representing the NGO sector. Mr. Chairman, it is a painful process for me to oppose this motion because Honourable Mirugi Kariuki has been my advocate for several years. But the reason I am opposing this motion Mr. Chairman is because when national duty calls, personal friendship must take a backseat.

Applause from the Delegates.

Mr. Chairman, I want to say that the issue of equal representation is not confined only to districts. And I want to submit to this Conference that even Members of Parliament, even those who are sitting here cannot validly claim to represent an equal number of people. Therefore, to suggest that it is only district Delegates who are not representative enough is a mockery of the notion of representation.

Secondly Mr. Chairman, I want to say that the preamble of this motion reveals very good intention but the timing Mr. Chairman casts doubts on those intentions. I want to say that Mr. Mirugi Kariuki has represented me over the years. My submission is that he did not become a lawyer yesterday. Mr. Chairman, I want to say that what is going on here is a tip of the iceberg. And I want to say Mr. Chairman that what is going on here has similarities with a tradition that goes on every year in Swaziland where young girls, not aware that their rights are being violated, they are made to dance for King Mswati of Swaziland.

Mr. Chairman, I can clearly tell this Conference without fear of contradiction that there are people trying 'to catch the eyes of the king'. But I can still find solace in the fact that unlike King Mswati of Swaziland, our King is not interested in their theatrics. (*Applause from the Delegates.*) Mr. Chairman,

with all reasons and intentions of those people exposed, I dare that this Conference proceeds. Thank you.

Applause from the Delegates.

Prof. Yash Pal Ghai: 562.

Com. Mutakha Kangu: Mr. Chairman, my name is Mutakha Kangu, one of the Commissioners. The Honourable Delegates heard that my name was mentioned as a participant at a Law Society Workshop in the year 2000. I want to say that I don't describe myself as a Constitutional expert but as a student of Constitutional Law. And since that time, my position has changed because I have continued with my research and I have come to find out that amendments under Section 47 of our Constitution can include the introduction of a completely new Constitution (*Applause from the Delegates*) on this issues are available. This country in 1969 through Act number 5, after so many amendments to the independence Constitution, introduced a completely new document which we are operating with today as the current Constitution. That was done through or under Section 47 even though it was introducing a completely new Constitution. Honourable Shikuku is here and several other old people are here and they can confirm that.

Number two, Mr. Chairman, in 1972 in Trinidad and Tobago, completely new Constitutions were introduced to the countries through amendment clauses that are almost similar, word for word, to our Section 47. So I want to state that the argument that has been given by my learned friend whom I have the honour to live with in Nakuru. We cannot introduce a new Constitution through amendment; it cannot stand in law and therefore should be dismissed summarily.

Applause from the Delegates.

Prof. Yash Pal Ghai: Number 3.

An Honourable Delegate: Point of order!

Hon. Delegate Abdirahman Ali Hassan: Thank you, Mr. Chairman.

Prof. Yash Pal Ghai: It had better be a point of Order.

Hon. Delegate Abdirahman Ali Hassan: My names are Abdirahman Ali Hassan, Delegate number 3. I rise to oppose the motion for the following reasons. One, Kenyans vividly remember how the (?) died because of such technical issues which our very good lawyer has raised and we are not prepared once again to face the same kind of a thing, which the new government is already advocating for.

I also tend to disagree with him on the bit of representation. We have not come to share resources here, we have come to share ideas and three people from a district can equally contribute as much as others who may have huge numbers of Delegates. After all many of us had suffered because of those small numbers and we will not agree with him in terms of representation.

The other reason why I will not agree with him is it is costing a lot of money to hold this kind of a program and this issue is being introduced in the wrong forum. I think we have our place where we stay with him day and night and it is important that we sort out those issues there instead of leading Kenyans into the darkness as a result of improper planning. Thank you very much.

Hon. Delegate Khamisi Lyula: Point of order.

Prof. Yash Pal Ghai: But please make sure it is a point of order.

Hon. Delegate Khamasi Daniel Lyula: Thank you Mr. Chairman for giving me an opportunity to raise a Point of Order. Mr. Chairman, we have gone through--- My name is Honourable Daniel Khamasi, Delegate number 52 from Kakamega District. Mr. Chairman you have seen the mood of the House and throughout the deliberations of the Delegates you have seen what they want. Shall I be in order, Mr. Chairman, to request you to call upon the Mover to reply?

Applause from the Delegates.

Prof. Yash Pal Ghai: Before I do that and I agree with you that the sentiment of the House is clear I would like to call upon Delegate 124, Minister Murungi and then I will ask the Proposer to reply. Thank you.

Hon. Delegate Kiraitu Murungi: Thank you Mr. Chairman. I would like to make the following brief statement on behalf of the government. I am the Minister for Justice and Constitutional Affairs, Kiraitu Murungi. Mr. Chairman, this motion seeks to stop further proceedings in this Conference until the process is entrenched in the Constitution and the term 'district' is defined to provide for equal representation. I would like to say, and very outrightly Mr. Chairman, that the government does not support this motion.

Applause from the Delegates.

Thank you. Mr. Chairman, on the 30th of April 2003 when President Mwai Kibaki addressed this Conference, he said that the government will not interfere with this process and that the government will do everything possible to support an early conclusion of this process. (*Applause from the Delegates*) Mr. Chairman this process has to remain a truly people-driven process.

Mr. Chairman, while it is the democratic right of every Delegate to express his or her views, the government will not support any views whose result would be to delay, to derail or to scuttle this process.

Applause from the Delegates.

Mr. Chairman, as regards the entrenchment of the process in the Constitution, I do not think that it can practically be done without derailing or delaying this process. Mr. Chairman with regards to the districts, I know this is a sensitive issue in this Conference but I would like to give the government's position that no new district is going to be scrapped. Thank you, Mr. Chairman.

Applause from the Delegates.

Prof. Yash Pal Ghai: Thank you very much. Order, order please. I am now going to call upon the mover, the Honourable Mirugi to reply before I put the question to the House.

Hon. Delegate Orie Rogo Manduli: Before he replies, it is important Mr. Chairman that before the Mover replies, I, Orie Rogo Manduli...

(Interjection) **Prof. Yash Pal Ghai:** Please sit down, I have not recognized...

Hon Delegate Orie Rogo Manduli: No! No!

Prof. Yash Pal Ghai: I am sorry, please sit down.

Hon. Delegate Orie Rogo Manduli: No!

Prof. Yash Pal Ghai: I have recognized Mr. Mirugi to reply.

Hon. Delegate Orie Rogo Manduli: Chairman, I still have a question to ask.

Prof. Yash Pal Ghai: And please sit down or I will have to have you moved if you don't.

Hon. Delegate Orie Rogo Manduli: Chairman...

Prof. Yash Pal Ghai: Please sit down.

Hon. Delegate Orie Rogo: When do I move it then?

Noise and murmuring from the Delegates.

Prof. Yash Pal Ghai: Please be quiet. Order! Please proceed.

Hon. Delegate Mirugi Kariuki: Thank you Mr. Chairman. First, I would like to thank all Delegates for their very spirited opposition to my motion because it is part of your right to oppose it. But after all is said and done, I stand on an issue of principle. It doesn't matter how overwhelming the opposition is, I believe I am right and that history will vindicate me at some point.

I wish to answer a few matters which have arisen, that where was I, why did I not move it in Parliament? Anybody can raise their hands at me, I have raised these matters. I was asked why did I not raise it in Mombasa? The Secretary can answer that, I raised it in Mombasa. I have been consistent on this matter. I am shocked to learn that people are graduating from students of Constitutionalism to other things. Maybe we are all growing.

But one of the reasons we are here is that Section 47 has been abused by the previous regimes to oppress us. And one of the arguments we have advanced in this Constitution making is to actually say that those regimes were wrong to use up the powers of the people. The power of Parliament was to alter minor features of the Constitution but not to fundamentally change it. I appreciate that Constitutions quite often are created, but we are making a Constitution during a time of peace. And during a time of peace, you must make a Constitution within the framework of the law. If it was a coup, a military coup, or it was an uprising, a revolution, one may well say, it is the popular will of the people and that is all there is to it.

As long as there is a Constitution in place, we need to deal with those things. We need to make the position clear in order to reassure ourselves that we are in fact on course. I appreciate the sentiments expressed and everybody is desirous of completing this process, so am I. My anxiety has been, can we do it with utmost perfection? Can we ensure we do a good job, that the posterity will look back and say these ladies and gentlemen were thorough in their approach. Mr. Chairman, I have two more minutes, and I would like to donate those two minutes to Honourable Munya to conclude my rejoinder. Honourable Munya.

Noise and murmuring from the Delegates.

Hon. Delegate Munya Peter Gatirau: That is the practice...

Prof. Yash Pal Ghai: That is my sphere, please.

Hon. Delegate Munya Peter Gatirau: I also wish to support the motion---

Response from the floor: Who are you?

Hon. Delegate Munya Peter Gatirau:---because I believe the motion is still---

Prof. Yash Pal Ghai: Please give us your name and number.

Hon. Delegate Munya Peter Gatirau: My name, Mr. Chairman, is Honourable Munya, Delegate number 117. I am supporting the motion Mr. Chairman because as a lawyer, I know the motion is based on proper legal reasoning.

Section 47 Mr. Chairman, prohibits Parliament from enacting a new Constitution, it gives Parliament the power to amend the Constitution. Mr. Chairman, the principle of equality that is entrenched in our Constitution and that process is trying also to entrench in the new Constitution, requires, as much as possible to have equal representation. That is the basis of democracy and human rights, Mr. Chairman.

I have no problem with administrative districts when they are created for the purposes of taking resources to the people at the village level, Mr. Chairman. But when those districts are used, Mr. Chairman, for the purposes of representation and we ignore population, the Kenyan population that has a right to be heard I, as a personal principle, have to oppose that. I stand here, Mr. Chairman, to be recorded in history that I supported this motion because I thought it was based on the right thing, and the truth. Thank you Mr. Chairman.

Prof. Yash Pal Ghai: Thank you very much, I would now like to put the question as follows. That considering the desires of Kenyans for a new and comprehensive Constitution, and appreciating that the National Delegates Conference must express the wish of every Kenyan in equal voice, this Conference hereby resolves that the Honourable Attorney General and the National Assembly do move

the dispatch to entrench the Constitutional Review Process in the Constitution of Kenya by an appropriate amendment to Section 47 of the Constitution of Kenya before the proceedings can take place in this Conference.

That the Honourable the Attorney General and the National Assembly, do move with dispatch to make amendment to Section 2 and Section 27 of the Constitution of Kenya Review Act and to provide for an appropriate definition of a district and to provide for the principle of equal representation in selection of district Delegates before this Conference can proceed further.

Those who support the motion say ‘*aye*’.

Response from the Delegates: *Aye*.

Prof. Yash Pal Ghai: Those who oppose the motion say ‘*aye*’

Response from the Delegates: *Aye*.

Prof. Yash pal Ghai: Sorry, I will repeat that. I am going to ask those who support the motion to say ‘*aye*’ and those who oppose to say ‘*nay*’. And so I will start the process again. Those who support the motion say ‘*aye*’

Response from the Delegates: *Aye*.

Prof. Yash Pal Ghai: Those who oppose the motion say ‘*nay*’.

Response from the Delegates: ‘*Nay*’.

Prof. Yash Pal Ghai: The *Ayes* have it.

Applause from the Delegates.

