

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

**NATIONAL CONSTITUTIONAL CONFERENCE  
(NCC)**

**VERBATIM REPORT OF**

**PLENARY PROCEEDINGS, HELD AT THE PLENARY HALL  
BOMAS OF KENYA**

**ON**

**01.03.04**

**CONSTITUTION OF KENYA REVIEW COMMISSION.**

**NCC – PLENARY PROCEEDINGS HELD AT BOMAS OF KENYA  
ON 1<sup>ST</sup> MARCH. 2004.**

**Present:**

- |                                    |   |                             |
|------------------------------------|---|-----------------------------|
| 1. Hon. Delegate Koitamet Ole Kina | - | Vice Chair of NCC.          |
| 2. Hon. Delegate Dr. Bonaya Godana | - | Vice Chair of NCC.          |
| 3. Hon. Delegate Sultana Fadhil    | - | Vice Chair of NCC.          |
| 4. P LO Lumumba                    | - | Secretary to the Commission |
| 5. Com. Andronico Adede            | - | Commissioner                |

**The proceedings commenced at 9.30am with Hon. Delegate Bonaya Godana in the Chair.**

**Hon. Delegate Bonaya Godana:** May I call you to order? As usual, we start our day with Prayers after the National Anthem. The prayers today will be read by:

1. Kamla Sikand.
2. Sheikh Ali Shee.
3. Somoina Keko.

Can we all stand for Prayers?

**Hon. Delegate Kamla Sikand:** My dear brothers and sisters, I am sure all of you are wondering, “Why has Kamla put these lights in front of us?” In Hindu religion, everything auspicious or anything very important is always started with light. In most of the Hindu Temples and Hindu homes, this light is on all the time. This means that it gives light to us. Another specialty of this particular type of a light is that this one light is not like an electric “city” where you have to go through the wirings blah, blah, blah but this light with one light will light other lights. So, I thought this light is very important for us today because we are all going to light each other in the right direction. As far as I am concerned, this is a historical moment for us today because we

are doing a very, very important thing for our nation today; writing the Constitution of this country and I am sure we are going to work and light each other. Let us today decide that we are not working for ourselves; we are all working for the country, as Kenyans and as one. I do not stand here as an Indian girl, I stand here as Kenyan and so, I hope we all have the same approach. That we all stand here for our country and for all of us as Kenyans together.

Let us pray for a minute. Last time, I said the best form of Hindu prayer is meditation. Let us look within ourselves for a minute. Today, what matters is for each of us to look within ourselves. What are we aiming at? What are we going to do? Who are we going to it with? Am I going to do it as Kamla? I am I going to do it for Rachel or am I going to do it for this country and our children, grandchildren and great-grandchildren? That is what matters to us today. So, let us today pray, let us be tolerant to each other, let us understand and listen to everybody else's view point also but let us get enmities out of us. Let us do it. Please. My request is please let us work in totality and let us work for this country and the people of Kenya. All Kenyans are looking at us today. They know we are starting a very, very important exercise today and they expect us to deliver to them a document which is acceptable to each and every Kenyan. Let us not fight over it. Let us now go in for a minute's meditation and look within ourselves and say to ourselves, "I am going to put my best foot forward." Thank you.

**Hon. Delegate Shekh Ali Shee:** *Bismillahi Rahmani Rahim. Kwa juna lako Mola muumbaji wa mbingu na ardhi, tuko mbele yako tukiwa wanyonge, waja wako wanyenyekevu, tukiwa na haja ya msaada wako. Tunatoa shukrani zetu kwanza kwako kwa kuwa umetuweka katika hali iliyo bora ingawa tumekuwa na mikutano hapa na pale lakini tumekuwa katika hali ya amani na hali ya utulivu. Mola, ni shukrani zetu kwako muumbaji wetu kwa kuwa tumeweza kufika pale ambapo tumefika hapa leo. Yote haya ni kwa sababu ya kuungwa mkono na wewe baada ya kuona waja wako walioko katika nchi hii wengi wanaunga mkono kazi hii ambayo uliyotupa. Mola, Wiki ambazo zilizobakia ni wiki za kazi ngumu zaidi kuliko kazi iliyotangulia mbeleni. Tuna haja zaidi ya kuungwa mkono na wewe. Pasipo na kuungwa mkono na wewe hatuwezi kukamilisha kazi hii kwa njia iliyo bora. Ee Mola, tuondolee chuki baina yetu sisi, tupe uwezo, subira na uvumilivu kwa kuweza kufanya kazi hii ilioko mbele yetu. Ee Mola, hekima na busara zinatakiwa mno katika kipindi hiki ambacho kimebakia.*

*Ee Mola wetu, shetani ni adui wetu mkubwa. Sisi mara nyingi tunakuwa wanyonge mbele ya tamaa na ushawishi wa shetani. Kwa hivyo Mola, ndiwe mwenye nguvu wa kuweza kutusaidia ili tuweze kupambana na maovu hayo ambayo shetani anatusukumia twende tukayafanye. Tunakuomba msamaha vile vile utusamehe watu wetu wote wale ambao wameingia kwenye maovu, uwape nguvu, na mwangaza waweze kurudi washikamane na Wakenya wenzao ili wafanye kazi hii ambayo ni kwa ajili ya taifa hili la Kenya kwa vizazi vilivyoko sasa na vizazi vinavyokuja. Ee Mola, tuunge mkono katika kazi hii ngumu na uwape busara watu wetu wote walioko hapa na uvumilivu. Ee Mola, tunakuomba kwa jina lako Tukufu, hatuna mwingine wa kumuomba isipokuwa ni wewe. Tubariki Yaarabi, Amiin.*

**Hon. Delegate Somoina Keko:** *Tunajua ya kwamba wewe ni yule jana leo na hata milele. Wewe ambaye unaonekana na wewe ambaye unafika wakati unaostahili, Mungu. Tazama tumekuita, tazama tuko mbele ya uso wako, tazama tumenyong'onyea tukilia kwa sababu ya kazi iliyo mbele yetu; tukilia kwa sababu Mungu ulipendezwa nasi kuwa hapa. Ni kwa sababu tulipokuita, Kristo, ulionyesha ya kwamba hakika una imani nasi Mungu. Asante Roho Mtakatifu ni kwa sababu hata asubuhi hii njema unatutanguliza kwa kazi iliyo mbele yetu. Tunakutanguliza kwa sababu, Kristo, umependezwa tuwe viongozi, Kristo. Ninaenda kukuomba asubuhi hii njema, Kristo, ukatende jambo. Baba tazama ukaweke roho ya kila mmoja kazi hii ya kuwa kiongozi lakini sio mtawala. Ninakupenda Baba. Ni kwa sababu una makusudi nasi, unatupenda Baba. Baba ninaomba na ninaenda kutubu kwa ajili ya wengi wetu ambao wamekuwa wasaliti tangu mwanzo wa safari hii lakini Baba, ninajua ya kwamba utaenda kuwaundia moyo safi, utaenda kuwarejesha upya katika njia zako; utaenda kuwaonyesha ya kwamba wamepotoka ili Baba wakaweza kuwa wahudumu na sio watawala, Kristo. Ni kwa sababu wengi tumejifaya watawala;kutawala watu wako na sio kuwaongoza.*

*Una makusudi na kila Mkenya. Una makusudu na huyo ambaye, Kristo, hana mahali popote pa kulala wala kunywa; hana hata kilalio, Kristo. Asubuhi hii njema, ninakuita ukatende; Baba ukaturidishe pamoja, ukatupe kunuia makuu kwa kwa ajili ya Wakenya wenzetu. Ukatupe kufikiria makuu kwa ajili ya wengine , Mungu, ambao tumewaacha hawana lingine, tegemeo ni sisi , Kristo. Ninakupenda kwa sababu utatenda. Ninakupenda kwa sababu ulitutangulia na hata hivi sasa nina imani utakuwa pamoja nasi hata mwisho wa Katiba hii, Mungu. Nina imani nawe Mwokozi. Nina imani nawe Mungu wangu ni kwa sababu hakika hata waliotutangulia*

*haujawaabisha. Walitenda Baba na ukawaonyesha njia ya kweli. Hata hivi sasa niko hapa nikitubu na kulia, Mungu, kwa ajili ya wengi wetu ambao tena wameghairi safari hii. Tazama walikuwa wa kanza kuweka nadhiri zao mbele yako Baba, wakitaka Katiba hii lakini sijui ni kwa nini wameghairi. Sijui ni kwa nini wamerudi kinyume na nia zao za kwanza Mfalme. Ninakuita kwa ajili yao. Ninatubu dhambi zao asubuhi hii. Baba, ukawarejeshe upya. Ukawaonyesha yawapasayo kutenda, Mfalme. Nilikutanguliza tangu nikakuambia ya kwamba wewe ndiwe mtendaji, wewe ndiwe una makusudi na kila mmoja wetu, Baba, ukawapa nguvu tena Kawapa kunuia malengo yao ya kwanza ili wajue litakalofaidi kila mmoja. Ni kwa saabu unatupenda na una makusudi nasi. Asante kwa ajili ya kazi njema Asante kwa ajili ninajua ya kwamba tutaanza Baba na tutamaliza ni kwa sababu umetutangulia. Asante Roho Mtakatifu. Asante ni kwa sababu ninajua hata Wajumbe walioko katika Kongamano hili umewaambia moyo wa nyama ambao Kristo, watatenda kama upendavyo lakini sio kama tupendavyo. Baba tu viumbe dhaifu. Hatufai wala hatustahili lakini tukiwa nawe Baba tutafaa; tutastahili, tutaongoza, Baba, na sio kutawala. Naomba, nakushukuru kwa jina la Yesu aliye Bwana na Mwokozi naomba, Amen*

**Hon. Delegates:** Amen.

**Hon. Delegate Bonaya Godana:** Honourable Delegates, we have one Delegate who will take his oath this morning and that is Mr. Odhiambo Mak'Oloo. May he please come forward in front of the podium? Odhiambo Mak'Oloo, is he here? Yes, I see him coming. Could you please read?

*(Consultation at the "high" table).*

**Hon. Delegate Bonaya Godana:** I think you can read it for yourselves. Could you please read the confirmation with your hand up?

**Hon. Maurice Odhiambo:** I, Maurice Odhiambo Mak'Oloo 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 the 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. (*Clapping*).

**Hon. Delegate Bonaya Godana:** Please sign here. I think I can start. While the Delegate signs, let me welcome all Delegates to this meeting this morning. We start today on a key phase of our business here at Bomas and that is the presentation of the Technical Committee Report by the Convenors. I want to appeal for understanding from all Delegates and to plead that we show the same unity of purpose that has brought us here. The presentations will not be occasions for debate. In other words, we will go through the series of various Committee Reports from A to M. I want to repeat; it will not be the stage for debate. We will then come back to consider the Articles one by one at the stage of decision-making and that is where any debate, if necessary, comments and queries can be raised. I hope therefore that Delegates will not raise issues with the presentations at this stage. The first presentation is by--

*(Consultation at the “high” table).*

**Hon. Delegate Bonaya Godana:** Before we have the first Committee Report, I want to give the floor to Commissioner Honourable Dr. Adede - He is a Commissioner - to brief us on some points of procedure. Commissioner Adede.

**Com. Andronico Adede:** Distinguished Delegates, I stand before you this morning, a citizen of Kenya, united with all of you in the common purpose of getting a good Constitution for the peoples of Kenya, which they are waiting for. I would like to give you this assurance because it has become necessary and if you allow me, I just want to point out the fact that last week and in fact on Friday morning, a paper was circulated with my name on as one of the people who took part in the Task Force of the Commission that produced some suggestions concerning the amendment to Section 47 of the Constitution and Section 27 and 28 of the Review Act. I would like to let you know the following: I was invited as a person who could make contributions to the discussion. I did take part. My intellectual input was heard but the result of the document did not reflect it. From that time, I decided not to be part of that document (*Clapping*). I am saying this to let you know that that there ought not to be any distraction. There is no doubt about my position as a Kenyan who has been out of this country for many years has an experience to share

voted with feet to come back home to participate in such an important occasion and I feel honored particularly that now I am given the chance to do that by going through with you today briefly the procedures that have been laid down to guide us at this very important stage of our deliberations in the Committee of the whole. If you allow me, I will sit down now and do the bit I am supposed to do this morning. May I? (*Clapping*) Thank you.

Once again I thank you and as the Chairman has correctly said, this is a very important stage of our work; the Committee of the whole. For the first time, Delegates will have an opportunity to listen and to get information of what other Committees have been doing towards the common goal namely, that of getting a good Constitution for Kenya at Bomas. If you have some doubt, some distractions in your mind, just keep on the two inseparable words, “Bomas” and “Constitution”. Nowhere else (*Clapping*). Bomas and Constitution. This is our theme and we have to do it right here. Therefore, this morning, the Committee of the whole will begin what is still considered a consideration stage of the Draft Articles emerging. This will be done in two parts. The first part will be the representation of the Reports of the Committee by the Convenors. This means that the Chairman will invite each Convenor from A to M as has been said to present Reports of each of the Technical Working Groups over which they presided.

They will be using their templates which contain the most up-to-date provisions of the Draft Articles that were assigned to them to discuss. In that template will also be, probably the records of the decisions of each Committee which may not have found themselves in the form of Draft Articles. The Convenors will also be able to say and disclose what minority views were and which ones had been reduced as required as alternative Draft Articles appearing against the particular Article adopted by the majority. The Convenors will give you a narrative of the work of the Committee, its mandate, the painstaking procedures they followed in discussing and resolving the issues that led to adoption of the amendments that they will be recommending for you. They might indicate where consultations with other Technical Committees were necessary on the cross-cutting issues and the fact that those consultations led to the actual adoption of the Article involved. If those consultations never achieved agreeable text, they may still result in minority views to be pointed out to be discussed.

So, this first stage involves the Convenors in explaining to the whole Conference what his/her Committee did. He/she will be doing it on behalf of the Committee which did its work on behalf of the Conference. They were your Committees so the Convenor will represent the Report on behalf of the Committee and the Committee which did its work on behalf of the Conference. The result is ours collectively. Once the Convenor has finished the narrative part of the presentation, dealing with all the major decisions of the Committee and pointing out or making any emphasis they see fit to help you understand the basis on which they made the decisions, the Convenor will then read the text of the Articles which have been adopted by that Committee. This reading of the text of the Article is not followed by a debate immediately, it will be the last action by that Convenor after the narrative he/she reads the Draft Articles at the end suggests/completes the presentation of the work of the Committee for the Conference. At that point, the Chairman will call the next Convenor to come and make a presentation in the similar way. Each Convenor has the option of making emphasis the type they only know to bring alive the issues, the important questions and the way they arrived at their decisions on the Articles they adopted.

That will go on as soon as we begin until all Convenors have made their representations of the work of their Committees on behalf of the Conference. Within this period assuming that takes between now and the next few days, the Zero Draft before you is a guide and when you hear the Convenors reading the Articles all of you who never took part in the discussion in that particular Committee may listen carefully and then read the Zero Draft or the templates which we will make available to you later on to begin deciding whether or not you are non-member of that Committee, may have an amendment to make in any of the Articles of that Committee as read out by the Convenor.

I am saying this at this stage because this is to clear one point that other people who did not take part in the discussions of these Committees, still have the right by a way of making their views known on a particular Article through amendments Motions. As Convenor's produce their reports and read the Articles, all of you are asked to pay attention to that and decide whether you need to prepare, or you need to make an amendment or not. It is important also to know that these Motions for making amendments, will be collected and recorded after being submitted and signed so that by Thursday this week, all the Motions seeking amendment or any of the Articles as shall have been read by the Convenors should be in. So that when we go to the next part, part



It now of the decision of the Draft Articles as a whole as you now have them in a composite version, read by each Convenors. The Chairperson, of the Conference now, takes over. He will have all the Articles seriatim as produced on the basis of the representation by the Convenors. He will also have a compendium of all the Motions that have been submitted that seeks to amend certain Articles, then we will begin now to lead the Conference in the second part of the decision on those Articles as presented by the Convenors.

We see it going as follows; the Secretary of the Conference will be the one reading the text of the Articles as they come from Committee A, B, C, D. The Chairman will know already which Articles are subject to proposed amendments through Motions that have been filed. So, what the Chairman does, is to allow the Secretary to call a number of convenient number of Articles. There is Article one and no more reading the text. The text had been read by the Convenor as a representation. Article 1, Article 2, Article 3, Article 4 then arms comes up at that time. That is where perhaps a Delegate is aware of the fact that he or she did submit a Motion seeking for an amendment or something on that particular Article being called.

At that particular times the Chairman will stop reading, calling Articles and will put the question with respect to the ones that had been called out and for which no problem arose and those Articles 1 to 4 for example will be put and the decision made on them. Then he returns to the Article with respect to which a question was raised. Two things might happen, it might be a simple amendment that can be taken care of immediately and disposed of or if it faces a controversial issue, that requires further discussions and may be consultations, the Chairman may wish to defer will defer and at it his discretion, the consideration of that Article and will decide on how to deal with it. If it is controversial and requires further consultations he may put together a team to work on that. In the meantime the Secretary of the Conference will resume the calling out of the remaining Articles seriatim 6, 7, 8, 9, 10, 11 and so on and so forth but each time he arrives at an Article on which there is a Motion then they will be a chance to take that on board and decide on what to do.

This is the procedure that will lead us through until we come to the last Article of the Draft and remember in each stage those amendments which have been deferred, can be called back by the Chairman at an appropriate time when he deems fit or if the results have been achieved in

resolving the issues. One of the benefits for having amendments ahead of time, Chairman can look at all of them and find that may be ten of them or six of them relate to the same issue. So he can call the Movers together to talk about the amendments and see if they can reduce it or they can all agree to present one instead of having ten amendments relating to the same Article. If they are so different that they cannot be consolidated, the rules provides on how the Chairman is supposed to handle those cluster of Motion for amending a particular Clause of the text. The simple rule is, we take the one furthest removed from the Draft and take it fast and deletion on it will make the others relevant. These are a much of details for the Chairman but for you as a participant contributing in the process, know that you have a chance at that particular time to make your views known.

Let me at this time also say that in the course of calling of the Articles, one of you finds a small thing like a typographical error or something which is purely editorial as you read the text, please reserve those for your direct communication to the Secretariat instead of raising them on the floor as an amendment to the Draft because it might unnecessarily interfere with the flow of the discussion. Nobody can be perfect and these texts, will be looked at several times and there are mistakes to be found of an editorial nature. Those ones you are being encouraged to communicate in writing to the Secretariat and I am sure that is a better way of handling them than making them subject to substantive Motions on the floor just to say to change a word that was wrongly spelt.

Ladies and gentlemen, the Chairman will need your help in an orderly presentation of your views at the decision stage and this is why attempt is being made to give you time to really think of the level of your contribution and the nature of the contribution transparently and make sure that whatever you have to contribute. Make it transparent, do it in a Motion, let it have it in advance so that everybody would become aware at that particular sitting what Motions are there to be considered so that everybody is advised. This is the spirit of positive thinking towards a successful conclusion of our work. As discussions go on, perhaps a continuous thought may come to your mind may be legitimately require an amendment. This occurs to you on the spot which was not put in the form of a Motion of course the Chairperson has the discretion to deal with that also according to our rules.

The idea is that all the legitimate concerns of the people participating in this process will be on board. They are already on board as part of our record in the Committees narrative report. They are on board already in terms of the Draft Articles adopted by your participation. They are on board in terms of minority views that has been recorded and produced in the form of alternative Draft Articles subject to decision later and they are on board when you help including the text making it better in terms of avoiding all the errors as he has said.

So, these are the two parts of the work of the consideration stage in the Committee of the whole combining the work of the Convenor on your behalf and your own participation in the adoption stage when the Chairman of the Conference now puts the question of each Draft for adoption to become part of the Bill. If I have left out something may be it will be clarified in the course of the questions you may have but we are appealing for simplicity, we are appealing for positive contribution because our theme is “Bomas and Constitution.” If we fail, then we are the ones to blame. We have done this, we have gone to our Committees, we have argued these things now is the time to think where you begun and where you ended and in the spirit of give and take. Give a little here get a little here the whole document will present a new thing for Kenya. A good Constitution produced nowhere else but the Bomas. Bomas and the Constitution. I thank you. *(Clapping)*.

**Hon. Delegate Bonaya Godana:** I thank Honourable Adede for that working presentation and I think without further ado we divulge into the business of the day. We start with the presentation on the Technical Committee Report starting with Technical Working Group A, which is on Chapters 1 and 3. Sovereignty of the people and the Supremacy of the Constitution, The Republic, National Goals, Values and Principles. May I therefore call on the Convenor in this Technical Working Group, Billy Onwong’a.

*(Consultations at the “high” table).*

**Hon. Delegate Bonaya Godana:** Please come up here.

*(Consultations at the “high” table).*

**Hon. Delegate Bonaya Godana:** What do Delegates feel like? You think you should break for tea at this stage or we go on. Good, thank you, thank you. Bwana Billy Onwonga. Now are they two?

**Hon. Delegate Billy Onwong'a:** I had a talk with the Rapporteurs.

**Hon. Delegate Bonaya Godana:** Okay, you are the Rapporteur. Okay, I see Mr. Billy Onwong'a the Convenor, Commissioner Githu Muigai is the Rapporteur of that committee is also here up at the table. I take that the presentation will be by the Convenor as is on the programme.

**Hon. Delegate Billy Onwong'a:** Yes, there is a co-Convenor.

**Hon. Delegate Bonaya Godana:** I am told there is also a co-Convenor may we recognize him.

**Hon. Delegate Billy Onwong'a:** Ms Florence.

**Hon. Delegate Bonaya Godana:** Ms. Florence, you are recognized. Mr. Onwong'a.

## **PRESENTATION OF REPORT OF TWC A:**

**CHAPTER 1 - PREAMBLE, SUPREMACY OF THE CONSTITUTION**

**CHAPTER 2 - THE REPUBLIC**

**CHAPTER 3 - NATIONAL GOALS AND VALUES**

**Hon. Delegate Billy Onwong'a:** Thank you very much, Mr. Chairman. My name is Billy Nyangau Onwong'a. Delegate number 457, the Convenor of the Committee on Preamble and I would like to take this opportunity on behalf of my Committee to present to you a report to be followed by the Committee decision on our mandate.

First, I would like to make a statement. I want to take little time to thank the Committee members for providing a fountain of ideas in their participation and building of consensus among

themselves and making decisions that have laid a foundation for subsequent Committees. I come before you today to report to you the decisions made by our Committee on Preamble. I feel humble to report that in our struggle to create that democratic republic state, the members of this Committee used all official documents reflected on all our history, experiences and human instincts to arrive at the decisions before you. In our deliberation, we were aware of the heavy responsibility bestowed on us by fellow citizens to give ourselves and future generations a Constitution that shall serve our wishes and aspirations and guide us through mountains and valleys for many years to come.

We were guided by the principles of self-preservation, collective general will, collective responsibility to ourselves and posterity and intergeneration equity in considering each Article within our mandate. In this way we shall not only give ourselves a new Constitution but also want that shall safeguard our well being, serve our best interest in our diversity and that which shall benefit but not disadvantage us. We understood that our mandate was to lay a framework and infrastructure for other Committees to build on. We were aware that we were a Sub-Committee of the Conference, we were also aware that Preamble is the foundation on which all subsequent Chapters shall be based. We recognized that citizens are the sole source of sovereign authority and that they can exercise it directly or donate some of it to their representatives. We also recognize that a Constitution is a social, political and economic contract and the governors where the general will of the people is expressed.

Further we were working towards a new order that was to bring people a new beginning that might free them from evil and wicked men and women. Defend the weak from the oppression of the strong and protect the society. We have set the goals posts and the other Committees may only play within them to bring this process to a logical conclusion. The process has been long and challenging but time has come when we must deliver ourselves from tyrannical dictatorships by taking ownership of our beloved country through this home grown Constitution. We are on homestretch and we cannot allow ourselves to drop the button before the finish lines. We are glad that we shall be counted as those who contribute to this noble political process.

It is in my humble request that you bear with us on any inadequacies that may come forth as our Committee as been privileged to open the path for others to follow. I now ask my co-Convenor to read the report. Thank you.

**Hon. Delegate Florence Mburugu:** Honourable Delegates, ladies and gentlemen. I am Mburugu Florence, a member of the working Technical Committee “A” and I am reading a report of the Committee.

**Introduction:** The Committee has thirty-six members and has had thirty meetings during which it substantively debated the Draft Bills, preamble and Articles 1 to 15 as mandated. Consequently, it has made recommendations to each of these provisions.

**The Committees Mandate:** Under regulation 49 of the Constitution of Kenya Review National Constitutional Conference procedure, regulation 2003, in order to facilitate expeditiously the disposal of matters before the Conference. The regulations provide for the establishment of Technical Working Group A to deal with the Preamble, Supremacy of the Constitution, the Republic and National Goals, Values and Principles. The subject matter in question, is covered under the Preamble in Article 1 through to Article 15 and Schedules 1 to 4 of the Draft and Chapter 7 of the Main Report of the Constitution of Kenya Review Commission. The summary of Committees proceedings.

**Method of work:** The working group in its proceedings was guided by the regulations to the Conference and the guidelines to NCC Ad hoc and Technical Working Groups. In particular, the Committee examined the issues raised during the general debate touching on the subject matters and proposed amendments or changes to the Draft on matters of its specific mandates. In the meetings, all debates and questions were addressed by the Convenor. The Rapporteur to the Committee, would explain to the members the rationale behind the provisions in the Draft and did in a number of cases, make reference to the Main Report and they are Annotated Text of the Constitution of Kenya Review Commission.

The Annotated Text was only, however, made reference to as a working document and where there was feeling that an aspect of Annotated Text needed to be incorporated, members had to

move Motions as though they were independent Motions. The Draftsperson assigned to the Committee was present to take amendments instructions and advise the Committee. The Committee also did get to call an Expert to advise on the theory of Government following a Motion tabled to amend Article 1 to provide that Kenya shall be a Parliamentary democracy.

The Committee began its work by discussing the NCC regulations of the Technical Working Committee during which members were able to deliberate on the method of work and understand the procedure of the working Committee. The Convenor indicated that the Committee would not be too rigid in its deliberations. Upon consideration of the Provisions, members were able to consider them against the Draft prepared by the Draftsperson. The Technical Working Group was able to make decisions on all the Articles that it was mandated to discuss as reflected in the template that the Convenor will read to you. Thank you.

**Hon. Delegate Billy Onwong'a:** The template before me reflects the decisions made by the Committee on Preamble but they may not be-- There are some decisions which are not reflected in your revised Zero Draft, and I begin reading from Preamble.

We, the people of Kenya-

**ACKNOWLEDGING** the supremacy of the Almighty God of all creations:

**HONOURING** the heroic memory of all those who struggled to bring freedom and justice to our land:

**AWARE** of our ethnic, cultural, religious, diversity and determined to live, in peace and unity as one in sovereign nation:

**RECOGNIZING** the aspirations of all Kenyans for a Government based on the essential values of freedom, democracy, social justice, and rule of law:

**RESPECTIVE** of our natural environment, that is our heritage and determined to sustain it for the benefit of future generations.

**COMMITTED** to nurturing and protecting the well-being of the individual, the family and the community within our nation.

**EXERCISING** our sovereign and inalienable rights to determine the form of governance of our country and having fully participated in making this Constitution:

**Adopt** , enact and give this Constitution to ourselves and our future generations.

**GOD BLESS KENYA.**

### **Sovereignty of the people**

- (1) (1) All sovereign authority belongs to the people of Kenya and maybe exercised only in accordance with this Constitution.
- (2) The people shall exercise their sovereign power either directly or through their  
Either directly or through their democratically elected representatives.
- (3) Kenya shall be a Parliamentary democracy in which subject to Clause 1 and 2,  
authority is exercised in the name of the people as represented in Parliament.
- (4) The sovereign authority of the people is allocated separately. The Legislative  
authority of the republic is entrusted:
  - (a) to Parliament and the Legislative structures in the devolved governments;  
to be exercised in accordance with Chapter 12 and Chapter 15 respectively.
  - (b) The Executive authority of the republic is entrusted to the National Executive,  
and to the Executive structures in devolved Governments to be exercised in  
accordance with the Chapter 13 and 15 respectively.



(b) The Judicial authority of the republic is entrusted to the Courts and other Independent and impartial Tribunals. To be exercised in accordance with Chapter 14 and the independent protections of the Constitutional State is entrusted to the Constitutional Commissions and Constitutional offices established by the Constitution, to be secured through the exercise by those bodies of the functions and powers assigned by the Constitution.

(5) The right to exercise sovereignty shall not be delegated to any individual group or class, or no person may purport to exercise any state authority which does not emanate from this Constitution.

*(Inaudible discussions on the floor).*

**Hon. Delegate Billy Onwong'a:** Just hold on you will bring your Order later please.

**Hon. Delegates:** No.

**An Hon. Delegate:** There is no order, he is reading the template report, he is not reading the Report which we have.

**Hon. Delegate Godana Bonaya:** What is the Point of Order about I think I - -

*(Murmurings from the floor).*

**Hon. Delegate Bonaya Godana:** Mr. Mathenge.

**Hon. Delegate James Mathenge:** Chairman. Point of Order? The document which he is reading is not the one in front of us. It is a different document can we have the right document? Thank you.

*(Consultations on the "high" table).*

**Hon. Deegate Bonaya Godana:** I am sorry I took a few minutes out, to answer the call of nature, but I am told there was adequate explanation. He is reading the template and that is not the same as the Draft Constitution.

*(Murmurs from the floor).*

**Hon. Delegate Bonaya Godana:** No, no I do not think we should allow debate. Here he is tying-- the report. The Rapporteur is not the Draftsman. The Convenor is not the Draftsman, he is presenting to you the essence of what they agreed but --

**Hon. Delegates:** Point of Order.

**Hon. Delegate Bonaya Godana:**-- Indeed this matter was also explained by Honourable Adede the Commissioner. I thought that is why we had Honourable Commissioner to give us some preliminary remarks. Right?

Mr. Mathenge are you satisfied?

**Hon. Delegate James Mathenge:** I am not satisfied because, if it were one or two lines difference, I would have skipped it but now the whole reading is not corresponding with what we have. It would have been good to skip the area where he thinks there is a lot of difference until the document is ready and he continue reading the ones that are okay. Thank you.

**Hon. Delegate Bonaya Godana:** Honourable members I said at the beginning a point which was also repeated by Honourable Adede and I am told by the Convenor who is here that this is a stage for the reports from the Technical Working Groups. Every thing that was done there including the recording of the minority positions where this were registered. It cannot be the reading of the Draft, if it is the reading of the Draft in fact the minority positions will not be covered because the Draft which is what you want has to follow does not contain the minority positions.

The Convenors are not the Draftsman. After this presentations, you will be able to reflect on the reasons sometimes even why particular decisions were taken, you will study the Draft and then we come to the next stage where we will go through the Draft Article by Article. This is what was decided also by the Convenors who met yesterday. We think this is the right procedure. Please my I plead for your understanding. Right? Yeah. Thank you.

**Hon. Delegate Billy Onwong'a:** I was reading, Supremacy of the Constitution. I had cautioned you before I started reading these Articles and I said they were apparently going to be different from whatever you have before you.

*(Murmurings from the floor).*

**An Hon. Delegate:** Point of Order please?

**Hon. Delegate Bonaya Godana:** Yes, yes, which is the Point of Order now? Order, order. Kiriro wa Ngugi, 320. Are you from that Committee?

**Hon. Delegate Kiriro wa Ngugi:** I am not from that Committee, you should know I am a Convenor of another one.

**Hon. Delegate Bonaya Godana:** Yes.

**Hon. Delegate Kiriro wa Ngugi:** Thank you very much. I thought the purpose of today henceforth is for the Whole Committee to consider Zero Draft refined. By reading whatever was there a few weeks ago in any Committee, we are going backwards in reverse, the purpose of today (*Clapping*) is to continue this document so that we take it forward the reading that - anything that the Convenor wants to appraise of us, should have come in the report so that we know what he wants to explain, for example. He has just read a Provision declaring Kenya a Parliamentary system, how that position was deleted to the point where we have this document, is something he might have considered to explain in his report, but as far as we are concerned, we have a document here that says Article 1,2,3,4 that has no such mention now we fear Mr.

Chairman. That we are discussing two possible documents, the one before us and the one somebody is forcing down on us. *(Clapping)*.

**Hon. Delegate Kiriro wa Ngugi:** Can you clarify which document is before us. This one or the one three, four weeks old? Thank you.

**Hon. Delegate Bonaya Godana:** I take it that Honourable-- Rapporteur General Professor Okoth Ogendo.

**Com. Okoth Ogendo:** Mr. Chairman. The document before the Conference, the formal document being given to the Conference is the document of the Convenor. The document that Delegates have is an attempt to refine the decisions that Convenors made, now we want to present to you the decisions of the Convenors, so that you know that entire spectrum of the decisions that they made. We will then when we are now going through the Draft, we will be able to explain if necessary why some of the decisions that the Committees made are not reflected either where they appear in the Convenors report or at all, because the refined Zero Draft is a Technical Revision of decisions that Committees have made. But this Conference is entitled to hear what the Committee decided and when the Convenors have completed their presentation their Templates will be made available to the Delegates so they will compare it with the document that they have.

That is how we are proceeding, formally speaking what you have is not yet a document of the Conference what you are hearing from the Convenor is the document of the Conference.

*(Murmurs from the Hon. Delegates).*

**An Hon. Delegate:** Point of Order.

**Hon. Delegate Bonaya Godana:** Order. Order. Honourable Kiriro you know you were in the Steering Committee this morning, I take it that you were also in the Convenors meeting which decided to proceed this way and presented to us your proposal this morning. I think there is only perhaps one drawback, maybe behind this misunderstanding. That is that, Delegates do not have

copies of the Convenors report and perhaps if they had copies of the Convenors report, they will be able to relate it to the refined Zero Draft. The document with the Convenors Report which the Convenor at the “High” table is trying to present, has three columns.

One titled as “Articles as printed in the Draft Bill”. Second column marked “Decisions of the Committee” which means, what they considered and what they decided and the: the third is column “Refined Zero Draft”.

So what I think we do is, we break for tea at this point and ask that the Secretariat supplies copies of these Convenor report to Delegates.

**The meeting adjourned for tea at 10.35 am.**

## **AFTER TEA BREAK.**

**The meeting reconvened at 11.50 am with Hon. Koitamet Ole Kina in the Chair.**

**Hon. Delegate Koitamet Ole Kina:** Hon. Delegates I call this meeting to order, then I will ask the Rapporteur General to make a short statement before we proceed.

**Com. Okoth Ogendo:** Fellow Delegates during the break we have been able to consult so as to reach a common understanding of how we are going to proceed. The Draft has gone through many stages of refinements, we had the original CKRC Draft which was debated in Bomas I, and in Bomas II, we started considering those Drafts and in the Bomas III.

When we completed Committee work in Bomas III, We had decisions of Committees and the decisions of Committees were then reviewed in Mombasa, they were harmonized hopefully contradictions were removed and outstanding crosscutting issues were discussed. We came back, we went back into Committees, we further refined them in Committees then we handled them over to the Draftspeople who are now using the best technical know how to produce a single

comprehensive document and that single comprehensive document is what you have with you as the revised Zero Draft. Therefore, at this stage in time the Conference--The thinking of the Conference the work of the Conference, is with the Revised Zero Draft which you have. The template which is been distributed has three columns.

Columns one tells you what was in the original CKRC Draft. Column two, is telling you the initial decisions of Committees and that column two, corresponds to a document which we came with from Mombasa called the Zero Draft, which is not the same as the document you have there. The document you now have is in Column three, and what the Convenors will present to you, is the state of the document as we have it now, that is to say column three which corresponds with the files that you have.

That is the way we want to proceed. Thank you.

**Hon Delegate Koitamet Ole Kina:** In that case, I will call upon the Convenor to proceed and it will not be a problem now because what he is reading corresponds with what is in your files.

**Hon. Delegate Billy Onwong'a:** Thank you again. Maybe I should have started by asking you whether you all have a copy of what I am going to read and I could start just from the preamble in the third column.

We the people of Kenya-

**ACKNOWLEDGING** the supremacy of the Almighty God of all creations:

**HONOURING** the heroic memory of all those who struggled to bring freedom and justice to our land:

**AWARE** of our ethnic cultural and religious diversity and determined to live in peace and unity as one indivisible sovereign nation.

**RESPECTIVE** of our natural environment, that is our heritage and determined to sustain it for the benefit of future generations:

**COMMITTED** to nurturing and protecting the well-being of the individual, the family and the community.

**RECOGNISING** the aspirations of all Kenyans for a Government based on essential values and freedom, democracy, social justice, and rule of law:

**EXERCISING** our sovereign and inalienable right to determine the form of governance of our country and having fully participated in making--(Excuse me) --recognizing our sovereign and inalienable right to determine the form of governance of our country and having fully participated in the making of this Constitution:

**ADOPT**, and act and give this Constitution to ourselves and to our future generation.

**BLESS KENYA**

*(Comments from the Hon. Delegates).*

**Hon. Delegate Billy Onwong'a: GOD BLESS KENYA.**

**Sovereign Authority.**

- 1** (a) All Sovereign authority belongs to the people of Kenya and may be exercised only in accordance with this Constitution.
- 2** (a) The people may exercise their sovereign power either directly or through their Democratically elected representatives.
- 3** authorities are allocated to the followings State Organs which shall perform their functions in accordance with this Constitution.

- (a) Parliament and the Legislative structure in the Devolved Governments.
- (b) The National Executives and the Executives Structure in the devolved Governments.
- (c) The Judiciary and other independent Tribunals and the Constitutional Commissions, and offices.

### **Supremacy of the Constitution;**

2. (1) The Constitution is the Supreme Law of the republic and binds all organs and all persons throughout the republic.
- (2) The validity or legality of this Constitution is not subject to challenge by or before any Court State organ.
- (3) A law that is inconsistent with these Constitution is void, to the extent of the inconsistency and any action or omission in contravention of this Constitution is invalid.
- (4) A person, or a group of persons, may bring an action in a court for a declaration that any law is inconsistent with, or is in contravention of, this Constitution.
- (5) If a Court makes a declaration under clause (4), it may also make any order necessary to give effect to the declaration.

Below it they have indicated interpretation reflected under Chapter 20, constrain the Constitution under Article, 3,4, 7,

### **Defense of the Constitution;**



3. (1) Every person has an obligation to respect and defend this Constitution and the State organs established under it.
- (2) Any attempt to establish a system of government otherwise than in compliance with this Constitution is unlawful.

### **The Laws of Kenya.**

- 4 (1) The laws of Kenya, comprise this Constitution and each of the following to the extent that it is inconsistent with this Constitution.
  - (a) laws enacted under this Constitution;
  - (b) the Acts of Parliament in force immediately before the effective dates;
  - (c) any other Law that was recognized by the Courts as part of the laws of Kenya immediately before effective dates;
  - (d) personal laws, of the people of Kenya;
  - (e) the rules of laws generally known as the Common Law, or the doctrines of the equity as they relate to the practice and procedures of Courts;
  - (f) The East African Community law; and
  - (g) customary International Law, and international agreements, applicable to Kenya.

### **Declaration of the Republic**

- 5 (1) Kenya is a Sovereign Republic.
- (2) The republic of Kenya is founded on the principles of good governance through multi-party democracy, participatory governance, transparency

and accountability, separation of powers, respect for human rights, fundamental freedoms and the rule of law.

### **Territory**

6. (1) The Republic of Kenya consists of the territory recognized under international law and international agreements.
- (2) The Republic is divided into the regions as districts set out in the First Schedule.
- (3) Each district shall be divided into such locations with such boundaries as are prescribed by an Act of Parliament.

I will skip Devolution and the right Convenor will read it when the time comes.

### **Capital**

8. (1) The Capital of Kenya is Nairobi.
- (2) The state shall decentralize the headquarters of national state organs to all regions equitably.

### **Languages**

9. (1) The national language of Kenya is Kiswahili.
- (2) The official languages of Kenya are Kiswahili and English and all official documents shall be made available in both languages.
- (3) The state shall respect and protect the diversity of language of the people of Kenya and shall promote the development and use of indigenous languages and sign language.
- (4) The state shall promote the development and the use of Braille and other appropriate modes of communication for persons with visual and other impairments.

### **State and religion**

10. (1) State and religion shall be separate.

- (2) There is a small mistake there, that should be Sub-Article (2).
- (3) There shall be no state religion.
- (4) The state shall treat all religions equally.

### **National symbols oaths and affirmations**

11. (1) The following are the national symbols of the Republic of Kenya, and are set out in the Second Schedule-
  - (a) the national flag;
  - (b) the national anthem;
  - (c) the coat of arms; and
  - (d) the Public Seal of Kenya.
- (2) The national oaths and affirmations are as specified in the Third Schedule.

### **National Days.**

12. (1) The following are national days-
  - (a) 1<sup>st</sup> June – Madaraka Day;
  - (b) 20<sup>th</sup> October – Heroes and Heroines Day; and
  - (c) 12<sup>th</sup> December – Jamuhuri Day.

### **National goals, values and principles**

13. (1) The national goals, values and principles contained in this Chapter apply to all state organs and officials, citizens and private bodies whenever any of them-
  - (a) applies and interprets the Constitution or any other law, and applies, makes and implements policy decisions; the state shall promote national unity and develop the commitment of its citizens to the spirit of nationhood and patriotism;
  - (b) recognize the diversity of its people, promote and protect the cultures of its communities;
  - (c) promote the participation of the people in public affairs and facilitate the sharing of devolution of power;

- (d) ensure open and transparent government and the accountability of state officials and public authorities;
- (e) take effective measures to eradicate all forms of corruption;
- (f) ensure access of the people to independent, impartial, competent, timely and affordable institutions of justice;
- (g) recognize the role of civil society in governance and facilitate its role in ensuring the accountability of government;
- (h) protect and promote human rights and fundamental freedoms and enhance the dignity of individuals and communities;
- (i) ensure the fullest participation of women, persons with disabilities, and the marginalized communities and all other citizens in the political, social and economic life of the country;
- (j) implement the principle that at least one-third of the members of all elective and appointive bodies shall be women;
- (k) recognize the special responsibilities that the state, society and parents owe to the children and ensure their material, moral and spiritual well being, and to that end uphold the family as the fundamental unit of society and respect for the institution of marriage;
- (l) be committed to social justice and, shall take progressive measures to ensure the realization of rights to all Kenyans to adequate food, shelter, clean water, sanitation, education, health, a clean environment, and security so that they live a life of dignity and comfort and can fulfill their potential;
- (m) Promote equitable development, recognize and enhance the role of science and technology, eliminate disparities in development between regions of the country and sectors of society, and manage national resources fairly and efficiently for the welfare of the people.
- (n) Recognize its responsibilities to future generations of Kenyans, by pursuing policies for the sustainable management of environment; and

- (o) Be a good citizen of Africa and of the world and commit itself to work for international peace and solidarity.

I think that marks the end of it and thank you very much. (*Clapping*).

**Hon. Delegate Koitamet Ole Kina:** Thank you very much, Honourable Billy Onwong'a. We are going to have the next Presenters of Chapter 4 - I beg your pardon. Bill of rights. So we have the Convenor who is Honourable Cecily Mbarire and assisted by Churchill Suba. 525 what is your Point of Order.

**Hon. Delegate Ibrahim Ahmed:** Thank you, Chair. My names are Ibrahim, Delegate 525. Chair, I think we are going to have the same problems we had in the morning. In that we have not been supplied with the materials on the Chapter that is going to be discussed and there will be an uproar.

**Hon. Delegate Koitamet Ole Kina:** Honourable Delegate, I do not think we are going to have a problem because what the Convenor is going to read to you is what is contained in the Refined Zero Draft. So if you need that template, it will be supplied to you later on to see the progression up to where we have reached today. What she is going to read to you is exactly what is found in your Refined Zero Draft. Welcome and please let us proceed. So the template will come later.

#### **PRESENTATION OF REPORT OF TWC B:**

**CHAPTER 4 - CITIZENSHIP**  
**CHAPTER 5 - THE BILL OF RIGHTS**

**Hon. Delegate Cecily Mbarire:** Thank you very much. On behalf of the Committee on Citizenship and the Bill of Rights, I wish to present the final Articles from the Committee. With me is Suba Churchill, the Co-Convenor of the Committee. We are going to start with Citizenship which is on page 9 of your Zero Draft.

## **CITIZENSHIP.**

### **General principles concerning citizenship.**

**14.** All citizens are –

- (a) equally entitled to the rights, privileges and benefits of citizenship subject only to limits specifically set out in this Constitution;
- (b) equally subject to the duties and responsibilities of citizenship;
- (c) equally entitled to a Kenyan passport and to any document of registration and identification issued by the state to citizens.

### **Retention of existing citizenship**

**15.** Every person who was a citizen of Kenya immediately before the effective date continues to be a citizen by birth, registration or naturalization as the case may be as from that date.

### **Acquisition of citizenship**

**16.** (1) Citizenship may be acquired by-

- (a) birth;
- (b) registration; or
- (c) naturalization

(2) Every person who was not citizen of Kenya immediately before the effective date but who would have been a citizen of Kenya if this Constitution had been in force is entitled on application to be registered as a citizen of Kenya.

### **Citizenship by birth**

**17.** Every person born after the effective date, is a citizen of Kenya if, at the date of the person's birth, either the mother or the father of the person is a citizen of Kenya. If either parent of a person died before that person was born for all the purposes of this Chapter, that parent's citizenship at the time of death applies as if that parent had survived until the birth of that person.

### **Citizenship and marriage**

18. (1) A person who has been married to a citizen of Kenya for a period of at least seven years is entitled, on application, to be registered as a citizen of Kenya.
- (2) Citizenship is not lost through marriage or the dissolution of marriage.

### **Citizenship by naturalization**

19. A person who has been lawfully resident in Kenya for a continuous period of at least seven year and who satisfies the conditions prescribed by an Act of Parliament may apply to be naturalized as a citizen of Kenya.

### **Children found in Kenya and adopted children**

20. (1) A child found in Kenya who appears to be less than eight years of age, and whose nationality and parents are not known, is presumed to be a citizen of Kenya by birth.
- (2) A child who is not a citizen of Kenya and who is adopted by a citizen of Kenya is entitled on application to become a citizen of Kenya.

### **Dual citizenship**

21. (1) A person who is a citizen of Kenya does not lose the citizenship of Kenya by reason only of acquiring the citizenship of another country.
- (2) A person who as a result of acquiring the citizenship of another country lost or loses citizenship of Kenya at any time is entitled on application to regain the citizenship of Kenya.
- (3) Parliament shall enact legislation providing for conditions upon which the citizenship of Kenya may be granted to individuals who are citizens of other countries.

### **Deprivation of citizenship**

22. (1) A person may be deprived of the citizenship of Kenya only if the person acquired citizenship by means of fraud, false representation, or concealment of any material fact.

## **Residence**

- 23.** (1) The following persons may enter and reside in Kenya so long as they comply with the conditions prescribed by Parliament governing entry and residence-
- (a) a former citizen;
  - (b) a foreign wife or widow or foreign husband or widower of a citizen; and
  - (c) a child of a citizen
- (2) Parliament shall enact legislation governing the entry and the residence in Kenya, of other categories of persons and providing for the status of permanent residents.

## **Duties of a citizen**

- 24.** (1) In order to fulfill the national goals, values, and principles, all citizens have a duty to-
- (a) acquire basic understanding of the provisions of this Constitution and promote its ideals and objectives;
  - (b) uphold and defend this Constitution and the law;
  - (c) exercise their democratic rights by voting and being involved in other forms of political participation;
  - (d) engage in work, including home-making, for the support and welfare of themselves and their families, for the common good and to contribute to national development;
  - (e) develop their abilities to the greatest possible extent through acquisition of knowledge, continuous learning and the development of skills;
  - (f) contribute to the welfare and advancement of the community where they live;
  - (g) contribute to the welfare and advancement of the nation by paying all lawful taxes;
  - (h) strive to foster national unity and live in harmony with others;
  - (i) promote democracy, good governance and the rule of law'



- (j) promote family life and act responsibly in the context of the family;
  - (k) protect and safeguard public property from waste and misuse;
  - (l) protect the environment and conserve natural resources;
  - (m) co-operate with law enforcement agencies for the maintenance of law and order;
  - (n) desist from acts of corruption;
  - (o) understand and enhance Kenya's place in the international community.
- (2) The duties set out in Clause (1) apply equally wherever appropriate to non-citizens.

### **Powers of Parliament.**

- 25. (1)** Parliament shall enact legislation-
- (a) prescribing procedures by which a person may become a citizen in terms of this Constitution;
  - (b) relating to the making of applications for citizenship by registration or naturalization;
  - (c) providing for the renunciation of a person of that person's citizenship of Kenya;
  - (d) providing for the deprivation of citizenship; and
  - (e) generally giving effect to the provisions of this Chapter.

*(Consultations at the "high" table).*

**Hon. Delegate Cecily Mbarire:** I have been told to give just a small summary of how we arrived at our decisions as a Committee. We followed the rules that are in the small green book and most of the decisions that we made in our Committee were made based on consensus. However, those that we were not able to decide on, we went to vote we had a division but then most of the Articles that we voted on, for example the Dual citizenship ended up in the Consensus Building Committee. When the proposals were brought back to our Committee, we were able to look through the proposals by the Consensus team and we built a consensus on the

same. So that is how we made our decisions, we also had our Rapporteurs; Commissioners Lethome, Commissioner Nancy Baraza and Commissioner Salome Muigai who helped us in understanding why certain decisions were arrived at by the Commission when they came up with Draft Bill that we were discussing. That is how we made our decisions.*(clapping)*. The Committee is going to come back again on the Bill of Rights after Culture does their presentation. Thank you.

**Hon. Delegate Koitamet Ole Kina:** Let us thank the Convenor for that quick presentation. I will ask the Convenor of Culture to come and do the same. Is Honourable Nakitare around?  
*(Inaudible response from the floor)*.

**Hon. Delegate Koitamet Ole Kina:** Order! 446

**Hon. Delegate Francis Wagara:** Thank you. 446 Francis Wagara. It would be in order Mr. Chairman that the group that is leaving completes its work, to submit all they did and then we come to another group which is Culture. This is because they are there and they have all the material, there is no reason of them leaving. Thank you.

**Hon. Delegate Koitamet Ole Kina:** Well, if we go by that it is fine with me. The problem we had is that we thought we should go through the document the way it is but if we are in agreement, then I think we can proceed and then Culture will take over.

**Hon. Delegates :** Yes.

**Hon. Delegate Koitamet Ole Kina:** So do I have your agreement that we proceed with the Bill of Rights?

**Hon. Delegates:** Yes.

**Hon. Delegate Koitamet Ole Kina:** Okay.

**Hon. Delegate Cecily Mbarire:** Thank you very much. I will now continue with the Bill of Rights. Part one this is on page 20 of your documents.

## **Part One General provisions relating to the Bill of Rights**

### **Fundamental rights and freedoms**

- 34.** (1) This Bill of Rights is the foundation of Kenya's democratic state and is the framework for the adoption of social, economic and cultural policies.
- (2) The purpose of the recognition and protection of human rights is to preserve the dignity of individuals and communities and to promote substantive social justice and realization of the potential of all human beings.
- (3) The rights and freedoms set out in the Bill of Rights-
- (a) belong to each individual and are not granted by the state;
  - (b) do not exclude other rights not mentioned in this chapter recognized or conferred by common law, customary law or legislation unless they are inconsistent with the Bill of Rights; and
  - (c) are subject to the limitations contained in the Bill of Rights.

### **Duty of the state to promote rights and freedoms**

**35.**

- (1) The State shall observe respect, protect, promote and fulfill the Rights and Freedoms in the Bill of Rights.
- (2) It is the primary duty of every State organ to give effect to Clause (1) whenever the State organ:-
- (a) makes policies or enacts laws;
  - (b) implements policy or legislation
  - (c) performs any of its functions; or
  - (d) exercises any of its powers.
- (3) The State shall take legislative policy and other measures to achieve the progressive realization of the rights guaranteed under Article 67, 68, 69, 70, 71, 72 and 73.

- (4) Parliament under Commission Rights and Administrative justice, shall establish standards for the achievement of the rights mentioned in Clause (3).
- (5) The State, through legislative and other instruments, shall recognize and facilitate the role of Civil Society in the promotion and protection of the rights and freedoms in the Bill of Rights.
- (6) The State shall fulfill all its international obligations, in respect of human rights and for that purpose, the state shall:-
  - (a) report on time to the International Human Rights Bodies on the implementation of Human Rights Treaties on the implementation of Human Rights Treaties and other instruments;
  - (b) publish reports intended for submission by the State to International Bodies for a reasonable period, and facilitate public discussion and debate on them before the reports are revised and submitted;
  - (c) facilitate the submission of alternative drafts by Civil Society Organizations to international Human Rights Bodies.
- (7) The comments and recommendations of International Bodies relating to international obligations of the state shall be disseminated to the public and the Government shall make a statement to Parliament, on how it intends to implement these recommendations.

### **Application of the Bill of Rights**

#### **36.**

- (1) The Bill of Rights applies to the interpretation of all laws and binds all state organs and all persons.
- (2) Every natural or juristic person shall enjoy the rights and freedoms in the Bill of Rights to the greatest extent possible.
- (3) The Provisions of the Bill of Rights bind the natural and juristic persons.  
When applying a provision of the Bill of Rights as required by Clause (2) or (3), a court:-

- (a) in order to give effect to a right or freedom in this Bill of Rights, shall apply, and if necessary, develop, the law to the extent that the legislation does not give effect to that right of freedom;
- (b) shall adopt the interpretation that most favours the enforcement of a right or freedom; and
- (c) may develop rules of the common law to the limit that that right or freedom in a manner consistent with the limitations contemplated in Article 40.

### **Enforcement of the Bill of Rights.**

#### **47.**

- (1) A person listed in this Article has the right to complain to the Commission on Human Rights and Administrative Justice, or to approach a court, alleging that a right in the Bill of Rights has been denied, violated, infringed or threatened.
- (2) The person who may complain to the Commission or approach a court are:-
  - (a) a person acting in that person's own interest;
  - (b) a person acting on behalf of another person who cannot act in their own name;
  - (c) a person acting as a member of, or in the interest of, a group or a class or persons;
  - (d) a person acting in the public interest; and
  - (e) an associating acting in the interest of its member.
- (3) The Chief Justice shall make rules providing for court proceedings contemplated in Clause (1), which shall satisfy the following criteria:-
  - (a) the rights of standing provided for in this Article are fully facilitated;
  - (b) that formalities for starting proceedings are kept to the minimum, in particular that the court shall, if necessary, be prepared to entertain proceedings on the basis of informal documentation, such as a letter or newspaper report;
  - (c) the court, while observing the rules of natural justice, shall respond to the justice of the claim and not be unreasonably restricted by technical requirements;
  - (d) that no fee may be charged for commencing proceedings under this Article; and
  - (e) that an organization or individual with particular expertise may appear before the court as a friend of the court.

## **Authority of the court to uphold and enforce the Bill of Rights**

### **38.**

- (1) The High Court has jurisdiction to hear applications for redress for a contravention of the Bill of Rights.
- (2) Parliament shall enact legislation to give original jurisdiction in appropriate cases to lower courts to hear application for redress for a contravention of the Bill of Rights.
- (3) In any matter brought before it under Article 37, a court may grant appropriate relief, including:-
  - (a) a declaration of rights;
  - (b) a declaration of invalidity of any law that infringes the Bill of Rights and is not justified in terms of Article 40;
  - (c) an order of compensation against the State or any person responsible for the violation of rights; and
  - (d) normal orders of judicial review.
- (4) In proceedings against a public authority for a violation of human rights, a Court may not award costs against the plaintiff, or applicant, unless the court determines that the case was frivolous, vexatious or devoid of merit.
- (5) It is the obligation of the State to pass necessary legislation and establish necessary machinery to give full effect to the provisions of the Bill of Rights.

## **Interpretation of the Bill of Rights**

### **39.**

- (1) When interpreting the Bill of Rights, a court, tribunal or forum:-
  - (a) shall promote the values that underlie an open and democratic society based on human dignity, equality, equity and freedom; and
  - (b) shall promote the spirit, purport and objects of the Bill of Rights.
- (2) When interpreting and applying a particular right or freedom in respect of the State, claims that the State does not have the resources to implement the right or freedom, every

State organ, and any court, tribunal or forum, shall be guided by the following principles:-

- (a) it is the responsibility of the State to show that the resources are not available;
- (b) in allocating resources, the State has an obligation to give priority to ensuring the widest possible enjoyment of the right having regard to prevailing circumstances, including the vulnerability of the groups or individuals claiming the violation of their right; and
- (c) a court, tribunal or the Human Rights and Administrative Justice Commission may not interfere with a decision by a State organ concerning the allocation of available resources, solely on the basis that the court, tribunal or forum or the Commission would have reached a different conclusion.

### **Limitation of rights**

#### **40.**

- (1) A right or freedom set out in the Bill of Rights may be limited –
  - a) only by a law of general application; and
  - b) only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all the relevant factors, including:-
    - (i) the nature of the rights;
    - (ii) the importance of the purpose of the limitations;
    - (iii) the nature and extent of the limitation;
    - (iv) the need to ensure that the enjoyment of the rights and freedoms by any individual does not prejudice the rights and freedoms of others; and
    - (v) the relation between the limitation and purpose and whether there are less restrictive means to achieve the purpose.
- (2) Despite Clause (1), a provision in legislation:-

- (a) shall not be construed as limiting a right or freedom set out in the Bill of Rights unless the provision is clear and specific about the right or freedom to be limited and the nature and extent of the limitation; and
  - (b) shall not limit a right or freedom set out in the Bill of Rights so as to derogate from the core or the essential content of the right.
- (3) The State, or another person seeking to justify a particular limitation, is responsible to demonstrate to the court, tribunal or other forum that the requirements of this Article have been satisfied.
- (4) The provisions of this Chapter on equality shall be qualified to the extent strictly necessary for the application of Islamic law to persons who profess the Muslim faith in relation to personal status, marriage, divorce and inheritance.

## **Part II – Fundamental rights and freedoms**

### **Right to life**

#### **41.**

- (1) Every person has the right to life.
- (2) There shall be no death penalty.

### **Equality**

#### **42.**

- (1) Every person is equal before the law and has the right to equal protection and equal benefit of the law.
- (2) Equality includes the full and equal enjoyment of all the rights and freedoms.

### **Freedom from discrimination**

#### **43.**

- (1) The State shall not discriminate directly or indirectly against any person on the ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth.



- (2) A person may not be compelled to indicate or define that persons ethnic or racial affiliation.
- (3) A person shall not discriminate directly or indirectly against another person on the ground in terms of Clause (1).
- (4) Despite Clause (1), the State shall take legislative and other measures including but not limited to affirmative action programmers and policies designed to benefit individuals or groups who are disadvantaged, whether or not as a result of past discrimination, but any such measure shall:-
  - (a) adequately provide for benefits to be on the basis of genuine need; and
  - (b) be permissible in terms of Article 40.

## **Women**

### **44.**

- (1) Women and men have the right to equal treatment including the right to equal opportunities in political, economic, cultural and social activities.
- (2) Women and men have an equal right to inherit, have access to, and control property.
- (3) Any law, culture, custom or tradition that undermines the dignity, welfare, interest or status of women is prohibited.
- (4) The State shall:-
  - (a) protect women and their rights, taking into account their unique status and natural maternal role in society; and
  - (b) provide reasonable facilities and opportunities to enhance the welfare of women to enable them to realize their full potential and advancement.

## **Older members of society**

- (1) Older members of society are entitled to continue to enjoy all the rights and freedoms set out in the Bill of Rights.
- (2) The State shall take legislative and policy measures to ensure that the rights of older persons to:-
  - (a) participate fully in the affairs of society;
  - (b) pursue their personal development;
  - (c) be free from all forms of discrimination and abuse;

- (d) live in dignity and respect;
  - (e) retain their social, economic and political autonomy, and
  - (f) receive reasonable care and assistance of family and State.
- (3) Relevant Ministries and Complaints Bodies, including the Commission on Human Rights and Administrative Justice, shall take special care to equip themselves to understand and deal with issues affecting older persons of society.
- (4) Parliament shall enact legislation to establish a Council to define and advise on policies and programmes for the care and protection of older persons of society.

### **The youth**

#### **46.**

- (1) The youth constitute an integral part of society and are entitled to enjoy all the rights and freedoms set out in the Bill of Rights, taking into account their unique needs.
- (2) The State shall take legislative and other measures, including but not limited to affirmative action policies and programmes, to promote the welfare of youth.
- (3) The measures referred to under Clause (2) shall include measures to ensure for the youth:-
- (a) access to quality and relevant education and training;
  - (b) participation in governance;
  - (c) access to gainful employment;
  - (d) adequate opportunities in the social, political, economic and other spheres of national life;
  - (e) freedom of association to further their legitimate interests;
  - (f) protection from any culture, custom, tradition or practise that could undermine their dignity or quality of life; and
  - (g) a life free from discrimination, exploitation or abuse.
- (4) Relevant Ministries and Complaints Body, including the Commission on Human Rights and Administrative Justice, shall take special care to equip themselves to understand and deal with issues affecting youth.

### **Children**

**47.**

- (1) Children hold a special place in society.
- (2) It is the duty of parents, family, society and the State to nurture, protect and educate children so that they can develop in a safe and stable environment in an atmosphere of happiness, love, respect and understanding and be able to fulfill their potential in all respects, physically, intellectually, psychologically and spiritually, for the benefit of themselves and society as a whole.
- (3) All children whether born within or outside wedlock, are equal before the law and have equal rights under this Constitution.
- (4) A child's best interests shall be of paramount importance in every matter concerning the child.
- (5) A child's mother and father, whether married to each other or not, have an equal duty to protect and provide for the child.
- (6) Every child has a right to:-
  - (a) a name and nationality from birth and to have their birth registered.
  - (b) parental care, or to appropriate alternative care where the child is separated from its parents;
  - (c) free and compulsory basic education;
  - (d) be protected from discrimination, harmful cultural rites and practices, exploitation neglect or abuse;
  - (e) be protected from all forms of exploitation and any work that is likely to be hazardous or adverse to the child's welfare;
  - (f) adequate nutrition, shelter, basic health care services and social services;
  - (g) be free of corporal punishment or other forms of violence or cruel and inhumane treatment in schools and other institutions responsible for the care of children;
  - (h) not take part in hostilities or to be recruited in armed conflicts and to be protected from situations of armed conflict;
  - (i) not be arrested or detained except as a measure of last resort, and when a child is arrested or detained to be treated in a manner that promotes the child's dignity and

self-worth and that pays attention to the child's rights, including but not limited to the right to:-

- (i) be so detained only for the shortest appropriate period of time;
  - (ii) be kept separate from adults in custody;
  - (iii) be accorded legal assistance by the State;
  - (iv) be treated in a manner, and to be kept in conditions that take account of the child's disability, if any, gender and age;
- (j) have a legal practitioner assigned to the child by the State and at State expense in proceedings affecting the child, if injustice would otherwise result; and
- (k) know of decisions affecting the child, to express an opinion and have that opinion taken into account, taking into consideration the age and maturity of the child and the nature of the decision.
- (7) Children with special needs, including girls, orphans, children with disabilities, nomadic children, refugee children, and homeless children, are entitled to the special protection of the State and society.
- (8) The State has the obligation to take steps to implement in law and administration the provisions of this Constitution and for the international instruments and standards on the rights of the child.

### **The family.**

#### **48.**

- (1) The State recognizes and respects the family as the natural fundamental unit of society and the necessary basis of social order.
- (2) Every adult –
  - (a) has the right to marry a person of the opposite sex, based on the free consent of the parties; and
  - (b) has the right to found a family.

- (3) Marriage between persons of the same sex is prohibited.
- (4) Parties to a marriage are entitled to equal rights as to the marriage, during the marriage, and at the dissolution of their marriage.
- (5) Parliament shall enact legislation that recognizes:-
  - (a) marriages concluded under any tradition, or system of religious, personal or family law; and
  - (b) personal and family law under any tradition, or adhered to by persons professing a particular religion to the extent such marriages or systems are consistent with this Constitution.

### **Persons with disabilities**

#### **49.**

- (1) Persons with disabilities are entitled to enjoy all the rights and freedoms set out in the Bill of Rights, and to be full participants in society.
- (2) The State shall take legislative and policy measures to:-
  - (a) recognize the right of persons with disabilities to respect and human dignity;
  - (b) educate communities and society on the causes of disability and the need for respect for the dignity and rights of all;
  - (c) ensure that educational institutions and facilities for persons with disabilities are integrated in society as a whole as is compatible with their interests;
  - (d) ensure access to all places, to houses for use by the public, to public transport and to information and communications to persons with disabilities, sufficient to overcome physical and other barriers to access;
  - (e) develop and ensure the use of sign language, Braille and other appropriate means of communication;
  - (f) remove from official usage in any language, words that are demeaning when applied to persons with disabilities, and encourage the same in private use of language;
  - (g) provide for the inclusion and participation of persons with disabilities in decision-making at all levels;

- (h) facilitate the acquisition of materials, facilities and devices to enable persons with disabilities to overcome constraints arising from the disability;
  - (i) ensure that persons with disabilities have equal rights as other persons to inherit, access and control property; and
  - (j) ensure that persons with disabilities have the right to equal and fair treatment and opportunities in the political, economic and social spheres as the rest of the society.
- (3) Legislation and policy measures provided for in Clause (2), shall make special provision for women with disabilities.

### **Minorities and other marginalized groups**

#### **50.**

- (1) Minorities and other marginalized groups are entitled to enjoy all the rights and freedoms set out in the Bill of Rights, on the basis of equality, taking into account their special circumstances and needs.
- (2) The State shall take legislative and other measures to put in place affirmative action programmes, including equalization measures designed to benefit minorities and other marginalized groups.
- (3) The measures referred to under Clause (2) shall include measures to ensure that minorities and other marginalized groups-
  - (a) participate and are fully represented in governance and in all other spheres of national life;
  - (b) are accorded special opportunities in educational and economic fields;
  - (c) are accorded special opportunities for access to gainful employment;
  - (d) are assisted to develop their cultural values, languages and practices;
  - (e) are assisted to have reasonable access to water, health services and transport infrastructure.
  - (f) are assisted and provided with a reasonable opportunity to meet their basic needs; and
  - (g) live a life free from discrimination, exploitation or abuse.

- (3) Relevant State organs and complaints bodies including the Commission on Human Rights and Administrative justice, shall take special care to equip themselves to understand and deal with issues affecting minorities and other marginalized groups.

## **Human Dignity**

- 51** (1) Every person has inherent dignity and the right to have that dignity respected and protected.
- (2) The inherent dignity of every person:
- (a) includes the right to dispose of the remains of deceased persons in a dignified manner; and
  - (b) extends to their remains after death.

## **Freedom and security of the person**

- 52** (1) Every person has the right to freedom and security of the person, which includes the right-
- (a) not to be deprived of freedom arbitrarily or without just cause;
  - (b) not to be detained without trial, except during a state of emergency in which case the detention is subject to Article 82;
  - (c) to be free from all forms of violence from either public or private sources;
  - (d) not to be tortured in any manner, whether physical or psychological; and
  - (e) not to be subjected to corporal punishment or to be treated or punished in a cruel, inhuman or degrading manner.

## **Slavery, servitude and forced labour**

- 53** (1) a person may not be held in slavery or servitude
- (2) a person may not be required to perform forced labour.

## **Privacy**

- 54** (1) Every person has the right to privacy, which includes the right not to have-
- (c) their person or home searched;
  - (d) their property searched;



- (e) their possessions seized;
- (f) information relating to their family or private affairs unnecessarily required or revealed; or
- (g) the privacy of their communications infringed.

### **Freedom of religion, belief and opinion**

- 55**
- (1) Every person has the right to freedom of conscience, religion, thought, belief and opinion.
  - (2) Every person has a right, either individually or in community with others, in public or in private, to manifest any religion or belief through worship, observance, including observance of a day of worship, practice or teaching.
  - (3) Every religious community is entitled to establish and run places of education at its own expense and to provide religious instructions for persons of that community in the course of providing the education.
  - (4) Religious observances and religious instruction may be conducted at State or State-aided institutions, so long as-
    - (a) they are conducted in an equitable basis so that no religion is privileged; and
    - (b) attendance at such observances or religious instruction is free and voluntary.
  - (5) A person may not be denied access to any institution, employment or facility or the enjoyment of any right for reasons of that person's religious beliefs.
  - (6) A person may not be compelled-
    - (a) to take an oath that is contrary to that person's religion or belief or that involves expressing a belief that the person does not hold;
    - (b) to take an oath in a manner that is contrary to that person's religion or belief or that involves expressing a belief that the person does not hold;
    - (c) to receive religious instruction or to take part in or attend a religious ceremony or to observe a day of rest or other observance that relates to a religion that is not that person's religion;
    - (d) by a public or private body, to disclose that person's religious convictions or beliefs; or
    - (e) to do any other act that is contrary to that person's religion or belief.

**Hon. Delegate Suba Churchill:** We will start on **Article 56** under **Freedom of expression**.

Every person the right to freedom of expression, which includes

- (a) freedom of the press and other media;
- (b) freedom to receive or impart information or ideas
- (c) freedom of artistic creativity including dress; and
- (d) academic freedom and freedom of scientific research.

### **Publication of opinion**

- 57**
- (1) Freedom and independence of electronic, print and other media of all types are guaranteed.
  - (2) The State shall not-
    - (a) exercise control over, or interfere with any person concerned in broadcasting, production or circulation of any publication or in the dissemination of information by any media; or
    - (b) harass or penalize any person for any opinion or view, or the content of any broadcast, publication or dissemination.
  - (3) Broadcasting and other electronic media have freedom of establishment, subject only to licensing procedures that-
    - (a) are designed to ensure the necessary regulation of the airwaves and other forms of signal distribution; and
    - (b) are independent of control by government, political interests or commercial interests.
  - (4) All State-owned media shall be independent and impartial and shall afford fair opportunities and facilities for the presentation of divergent views and dissenting opinion.
  - (5) Despite Article 40, Sub-Article (1), Parliament shall not enact any law-
    - (a) Requiring prior licensing of any form of publication or dissemination of information, comment or opinion; or
    - (b) Permitting censorship of any form of publication or dissemination of information, comment or opinion, except as contemplated in clause (6)

- (6) Parliament shall not enact legislation that-
  - (a) makes reasonable provision of equitable allocation of airtime by state-owned and other specified categories of broadcasting media, to political parties either generally or during election campaigns;
  - (b) regulates freedom to broadcast in order to ensure fair election campaigning;
  - (c) sets media standards; and
  - (d) provides for the establishment of a body independent of government or political control reflective of the interests of all sections of the community, and to regulate and monitor compliance with the media standards referred to under paragraph (c).

### **Access to Information**

- 58** (1) Every citizen has the right of access to-
  - (a) information held by the state; and
  - (b) any information that is held by another person that is required for the exercise or protection of any rights or freedom.
- (2) Every person has the right to demand the correction or deletion of untrue or misleading information that affects that person;
- (3) The State shall publish and publicize any important information affecting the nation.

### **Freedom of association**

- 59** (1) Every person has the right to freedom of association.
- (2) The right extends to the formation, operation and continued existence of organizations.
- (3) A person may not be compelled to join any association of any kind.
- (4) The state shall take legislative and policy measures to promote and encourage civil society participation in decision-making and in the management of public affairs at all levels of government.

- (5) Any legislation that requires civil society organizations to register or otherwise be subjected to control shall adhere to the following principles:
- (a) registration may be required only if there is good reason for it;
  - (b) registration shall be in the hands of a body that is independent of Government or political control;
  - (c) any fee chargeable shall be no more than is necessary to defray essential costs of the procedure;
  - (d) there shall be a right to registration, unless there is good reason to the contrary;
  - (e) any standards of conduct applied to organizations shall be formulated with input from the affected organizations; and
  - (f) de-registration procedures shall provide a fair hearing and for a right of appeal to an independent tribunal.

### **Assembly, demonstration, picketing and petition**

**60** Every person has the right, peaceably, unarmed and without the requirement of prior permission, to assemble, to demonstrate, to picket, and to present petitions to public authorities.

### **Political rights**

- 61** (1) Every citizen is free to make political choices, which includes the right-
- (a) to form, or participate in forming, a political party;
  - (b) to participate in the activities of, or recruit members for, a political party; and
  - (c) to campaign for a political party or cause.
- (2) Every citizen has the right to free, fair and regular elections for-
- (a) any elective public body or office established in terms of this Constitution; and
  - (b) office bearers of any political party of which the citizen is a member.
- (3) Every adult citizen has the right-

- (a) to be registered as a voter and to vote by secret ballot in any election referred to in clause (2); and
- (b) to stand on a condition of equality, for public office, or office within a political party of which they are a member, and if elected, to hold office.

### **Freedom of movement and residence**

- 62**
- (1) Every person has the right to freedom of movement.
  - (2) Every person has the right to leave Kenya.
  - (3) Every citizen has the right to enter into, remain in and reside anywhere in Kenya.

### **Refugees and asylum**

- 63**
- (1) The right of asylum is recognized and shall be granted in accordance with this Constitution.
  - (2) A person who has sought refuge in Kenya has a right not to be returned or taken to another country if that person has a well-founded fear of persecution in that other country, or of other treatment, that will justify that person's being regarded as a refugee.
  - (3) Parliament shall enact legislation in compliance with the international law and practice governing persons who seek refuge or asylum in Kenya.

### **Freedom of trade, occupation and profession**

- 64**
- (1) Every person has the right to choose a trade, occupation or profession.
  - (2) The practice of a trade, occupation or profession may be regulated by legislation.

### **Protection of right to property**

- 65**
- (1) Every person has a right to acquire and own property in any part of Kenya either individually or in association with others.
  - (2) Parliament shall not enact a law that permits the state, or any person, to-

- (a) arbitrarily deprive a person of property of any description;
  - (b) arbitrarily deprive a person of any interest in, or right over, such property; or
  - (c) limit or in any way restrict the enjoyment of any rights under this Article on the basis of any of the grounds set out under Article 43(1).
- (3) The State may not deprive a person of property of any description, or of any interest in, or right over, property, unless that deprivation-
- (a) results from an acquisition of land or an interest in land or a conversion of interest in, or a title to land in accordance with the provisions of Chapter Seven; or
  - (b) is for a public purpose or in the public interest and is carried out in accordance with an Act of Parliament that-
    - (i) requires prompt payment in full, of a just compensation to the person, before the property is taken.
    - (ii) allows any person who has an interest in, or right over, that property a right of access to a court of law.
- (4) The right recognized and protected under this Article does not cover any property that has been unlawfully acquired.

## **Labour relations**

- 66**
- (1) Every person has the right to fair labour practices.
  - (2) Every worker has the right to-
    - (a) fair remuneration;
    - (b) reasonable working conditions;
    - (c) form, join, or participate in the activities and programmes of a trade union; and
    - (d) go on strike.
  - (3) Every employer has the right to-
    - (a) form and join an employers' organization; and
    - (b) to participate in the activities and programmes of an employers' organization.
  - (4) Every trade union and every employers' organization has the right to-

- (a) determine its own administration, programmes and activities;
  - (b) to organize; and
  - (c) to form and join a federation.
- (5) Every trade union, employers' organization and employer has the right to engage in collective bargaining.

### **Social security**

- 67** (1) Every person has the right to social security.
- (2) The State shall provide appropriate social security to persons who are unable to support themselves or their dependants.

### **Health**

- 68** (1) Every person has the right to health, which includes the right to health care services, including reproductive health care.
- (2) No person may be refused emergency medical treatment.

### **Education**

- 69** (1) Every person has the right to education.
- (2) The State shall institute a programme to implement the right of every child to free and compulsory pre-primary and primary education and in so doing shall pay particular attention to children with special needs.
- (3) The State shall take measures to make secondary and post-secondary education progressively available and accessible.
- (4) Every person has the right to establish and maintain at their own expense, independent educational institutions that meet standards laid down in legislation; and comply with the requirements of this Constitution.

### **Housing**

- 70** (1) Every person has the right to have access to adequate housing.

- (2) Parliament may not enact any law that permits or authorizes arbitrary eviction.

## **Food**

- 71** Every person has the right to be free from hunger and to have access to adequate food of adequate quality and cultural acceptability.

## **Water**

- 72** Every person has the right to have access to water in adequate quantities and of satisfactory quality.

## **Sanitation**

- 73** Every person has the right to a reasonable standard of sanitation.

## **Environment**

- 74** (1) Every person has the right-
- (a) to an environment that is safe for life and health;
  - (b) to have the environment protected, for the benefit of present and future generations, through legislative and other measures that-
    - (i) prevent pollution and ecological degradation;
    - (ii) promote conservation; and
    - (iii) secure ecologically sustainable development and use of natural resources while promoting economic and social development;
  - (c) to free access to information about the environmental situation; and
  - (d) to compensation for damage arising from the violation of the rights recognized under this Article.



## **Language and culture**

- 75** (1) Every has the right to use the language and to participate in the cultural life of their choice.
- (2) A person belonging to a cultural, religious or linguistic community may not be denied the rights, with other members of that community-
- (a) to enjoy that person's culture, practice that person's religion and use that person's language; or
- (b) to form, join or maintain cultural, religious and linguistic associations and other organs of civil society.
- (3) No person may compel another person to perform, observe or undergo any cultural or religious practice or rite.

## **Consumer rights**

- 76** (1) Consumers have to the right to-
- (a) goods and services of quality;
- (b) the information necessary for them to gain full benefits from the goods and services.
- (c) the protection of their health, safety, and economic interests; and
- (d) compensation for loss or injury arising from defects in goods or services.
- (2) The principles of this Article apply to goods and services, offered by the State organs, public and private persons or other entities.
- (3) Parliament shall enact legislation to provide for consumer protection and for fair, honest and decent advertising.

## **Fair administration**

- 77** (1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.
- (2) Every person whose rights have been adversely affected by administrative action has the right to be given written reasons for the action.

- (3) Parliament shall enact legislation to give effects to the rights in Clause (1) and such legislation shall provide for the review of administrative action by a court or where appropriate an independent or impartial tribunal.

### **Right not to obey unlawful instructions**

- 78**
- (1) Every person has a right not to obey unlawful instructions.
  - (2) No person is liable to punishment under any law for disobeying unlawful instructions.

### **Access to courts**

- 79** Every person has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent tribunal or forum; and any fee required to be paid by such person shall be reasonable and not serve to impede access to justice.

### **Rights of arrested persons**

- 80**
- (1) Every person who is arrested for allegedly committing an offence has the right –
    - (a) to remain silent;
    - (b) to be inform promptly in a language that person understands-
      - (i) of the right to remain silent; and
      - (ii) of the consequences of not remaining silent;
    - (c) to communicate with that person’s lawyers and other persons whose assistance is necessary
    - (d) not to be compelled to make any confession or admission that could be used in evidence against that person and where any such person freely chooses to make a confession, it shall be made before a court or magistrate;
    - (e) to be held separately from persons who are servicing a sentence;
    - (f) to be brought before a court as soon as reasonably possible, but not later than forty eight hours after being arrested or not later than the end of the first

court day after the expiry of the forty eight hours, if the forty eight hours expire outside ordinary court hours or on a day that is not an ordinary court day;

(g) at the first court appearance after being arrested, to be charged or to be informed of the reason for the detention to continue, or to be released; and

(h) to be released on bond or bail pending a charge or trial on reasonable conditions unless there are compelling reasons to the contrary.

(2) A person shall not be remanded in custody for an offence if that offence is punishable by a fine only or imprisonment for not more than six months.

### **Fair trial**

**81** (1) Every accused person has the right to fair trial, which includes the right-

(a) to be presumed innocent until the contrary is proved;

(b) to be informed of the charge with sufficient detail to answer it;

(c) to have adequate time and facilities to prepare a defence;

(d) to a public trial before a court established under this Constitution.

(e) to have the trial begin and conclude without unreasonable delay;

(f) to be present when being tried;

(g) to choose and be represented by an Advocate and to be informed of this right promptly;

(h) to have an Advocate assigned to the accused person by the State and at State expense if substantial injustice would otherwise result and to be informed of this right promptly;

(i) to remain silent and not to testify during the proceedings;

(j) to adduce challenge evidence;

(k) not to be compelled to give self incriminating evidence and;

(l) to have the assistance of an interpreter without payment if the accused person cannot understand the language used at the trial;

- (m) not to be convicted for an Act or omission that at the time it was committed or omitted was not an offence in Kenya or a crime under general principles of law recognized by the major legal systems;
  - (n) not to be tried for an offence if respect of an Act or omission for which that person has previously been either acquitted or convicted;
  - (o) to the benefit of the least severe of the prescribed punishments if the prescribed punishment for an offence has been changed between the time that the offence was committed and the time of sentencing; and
  - (p) of an appeal to, or review by a higher court.
- (2) Whenever this Article requires information to be given to a person, that information shall be given in language that the person understands.
  - (3) Evidence obtained in a manner that violates any right in the Bill of Rights shall be excluded if admission of that evidence would render the trial unfair or otherwise be detrimental to the administration of justice.
  - (4) An accused person charged with an offence other than offence that the court may try by summary procedures shall be entitled on request to a transcript of the proceedings of the trial.
  - (5) An accused person has the right to a copy of the record of the proceedings within forty days after they are concluded in return for a reasonable fee as prescribed by law.
  - (6) A person convicted of a criminal offence and whose appeal has been dismissed by the highest court to which the person is entitled to appeal may petition the High Court for a new trial if new and compelling evidence has become available.

## **Rights of persons held in Custody**

**82.** (1) A person held in custody under the law, whether sentenced or not, retains all the fundamental rights under this Constitution, except the extent that a right is clearly incompatible with the fact of being in custody.

(2) A person held in custody has the right -

- a) to be treated in a way that respects their human dignity and not to be subject to discrimination on the basis of any prohibited ground;
- b) not to be exploited or abused by staff or fellow prisoners and the State shall take adequate steps to ensure their protection;
- c) to accommodation and facilities that satisfy the standards of decent clothing, housing, food, health and sanitation guaranteed elsewhere in the Bill of Rights;
- d) to reasonable healthcare at public expense and to pay for their own healthcare by their own doctors if necessary;
- e) to exercise and education and to work in return for reasonable remuneration;
- f) to observe their religion and not to be subjected to treatment that violates their religious practices and convictions;
- g) to communicate with their lawyers, religious advisers, spouses, close family and other persons whose assistance is necessary and are entitled to visits of reasonable frequency and duration;

- h) to privacy including the separation of women and men, and children and adults to the extent compatible with the preservation of law, order and discipline;
- i) to be informed by authorized persons of the rules and decisions that affect them;
- j) to a fair hearing in any disciplinary proceedings;
- k) to fair consideration for parole or remission of sentence and for other rehabilitative measures;
- l) to complain to the prison authorities, the Commission on Human Rights and Administrative Justice or any similar institution and to communicate with the press;
- m) to vote; and
- n) in the case of persons with disabilities to facilities modified as necessary to fit the circumstances of such disabilities.

(3) The state shall ensure that the prison system so far as it relates to convicted prisoners, observes the minimum standards laid down under relevant international law and international standards.

### **State of emergency**

**83.** (1) A state of emergency may be declared only in accordance with Article 174 (6) and only when-

- a) the state is threatened by war, inversion, general insurrection, disorder, natural disaster or other public emergency;

- b) the declaration is necessary to restore peace and order.
- (2) A declaration of a state of emergency and any legislation enacted or other action taken in consequence of that declaration may be effective only -
- a) prospectively; and
  - b) for no more than fourteen days from the date of the declaration unless Parliament resolves to extend the declaration.
- (3) Parliament may extend a declaration on a state of emergency-
- a) by resolution adopted following –
    - (i) following a public debate in the National Assembly; and
    - (ii) by the majorities set out in Clause (4); and
  - b) for no more than two months at a time.
- (4) The first extension of a state of emergency shall be adopted with a supportive vote of sixty five percent of the members of the National Assembly and any subsequent extension shall be adopted with a supporting vote of at least seventy five percent of the members of the National Assembly.
- (5) Any competent court may decide on the validity of -
- a) a declaration of a state of emergency;
  - b) any extension of a declaration of a state of emergency; or

- c) any legislation enacted, or other action taken in consequence of a declaration of a state of emergency.
- (6) Any legislation enacted in consequence of a declaration of a state of emergency may derogate from the Bill of Rights only to the extent that -
- a) the derogation is strictly required by the emergency; and
  - b) the legislation –
    - (i) is consistent with Kenya’ obligations under international law applicable to state of emergency; and
    - (ii) conforms to clause 7; and
    - (iii) is published in the Gazette as soon as reasonably practicable after being enacted and does not take effect until it is so published.
- (7) Sub-Article 7 and the last. An Act of Parliament that authorizes a declaration of a state of emergency or legislation enacted or other action taken in consequence of any declaration may not permit or authorize indemnifying the state or any person in respect of any unlawful act.

**Hon. Delegate Cecily Mbarire:** Thank you Suba.

**Hon. Delegate Wilfred Koitamet Ole Kina:** Thank you very much. I think it is a good time to a break and before we do so, Eastern Province meeting in Devolution Tent for lunch, please attend and inform others. So, we will have a lunch break and come back at exactly at 2.30 p.m and when we come we will receive report of culture and other Committees. Thank you very much.



**The meeting adjourned for lunch at 1.15 p.m.**

## **AFTERNOON SESSION.**

**The meeting reconvened at 2.45 p.m. with Hon. Wilfred Koitamet Ole Kina in the Chair.**

**Hon. Delegate Koitamet Ole Kina:** Honourable Delegates, I would like to call upon The Convenor for our Cultural Committee and that is Honourable Paul Nakitare to take us through the Chapter on Culture.

**Hon. Delegate Paul Nakitare:** Good afternoon Honourable Delegates. My responsibility at the moment is to present the report on Committee “M” on Culture and my Committee Honourable Delegates, requested me before I present the report to pay special tribute to all of you for making sure that culture is captured in our present Constitution. So, they are extremely grateful and having said that, the Committee which was established later than others on 16<sup>th</sup> of September, worked extremely hard and by the end of the process they had caught up with other Committees and on my own behalf I want to pay special tribute to all the members of Committee “M”.

Having said that, Honourable Chair, I also wish to refer Delegates to a document that you were given this morning, you can read it in your own time about the background and introduction of our work. Having said that, I will now go straight to present the provisions relating to culture which is on page 13 of the Revised Zero Draft. Entitled:

## **CHAPTER FIVE**

### **CULTURE**

Article 26, the significance of culture.

**26. (1)** This Constitution recognizes culture as the foundation of the nation, the

cumulative civilization of the Kenyan people and communities and the bedrock on which all spheres of individual and collective lives are based and in particular -

- a) affirms the values and principles of the unwritten constitutions of all the communities of Kenya, their past traditions, present struggles and future aspirations;
  - b) recognizes and protects the fundamental goals and values of culture and appreciates culture as the basis for nurturing national pride and identity; and
  - c) reflects and affirms the sovereign uniqueness and distinctiveness of the Kenyans people and community contributing to, and sharing in the global culture.
- (2) (2) which is recorded here as (3). The people and communities of Kenya shall enjoy and practice their culture in a manner consistent with the provisions of this Constitution.
- (3) For the purposes of this Chapter, “culture” includes the dynamic sum total of the spiritual, emotional, intellectual, material features and aspects of a people’s way of life developed, adopted and adapted in, and through the environment, science, technology, language communication, arts and value system of their own welfare.

### **Principles concerning culture**

27. (1) In the performance of their functions State organs shall be guided by the following principles:

- a) the promotion of multiculturalism through cooperation, understanding, appreciation, tolerance and respect for each others customs, traditions, beliefs, languages, religious practices, sagacity and philosophy which enhance the dignity and the well-being of the people;
- b) the development, preservation, promotion and enrichment of the languages of the people; and
- c) the development and respect for the preservation, protection and promotion of
  - 
  - i. cultural, historical, religious and sacred, archeological monuments and other cultural sites of importance for posterity;
  - ii. the spirit of the noble traditions, principles and practices of African socialism;
  - iii. the environment and natural resources which shape and nurture communities; and
  - iv. other cultural heritage of Kenya.

## **Development of culture**

### **28. State Organs shall -**

- a) safeguard and respect cultural, linguistic and religious associations, organizations and institutions the objects of which are consistent with this Constitution;
- b) recognize and appreciate cultural, customary and religious days including philosophical beliefs celebrated by various communities;
- c) promote and expand acceptable cultural reciprocation and exchange programmes and cooperation within and outside Kenya in order to enhance and publicize the cultural heritage of Kenya;

- d) involve the people in the formation and implementation of cultural and development plans to ensure cultural sustainability;
- e) ensure that indigenous communities enjoy and benefit from their historical, religious, sacred and archeological sites as well as other cultural heritages;
- f) encourage religious organizations to adopt, adapt and infuse African cultural values; and
- g) promote and nurture multiculturalism as a vision and mechanism towards tolerance and respect of diverse cultures.

### **Transmission of cultures**

**29.** (1) The State recognizes the culture is an important aspect in the development of the people and therefore the State shall develop and maintain a cultural education policy that enhances culture and cultural values.

(2) The State shall -

- a) take necessary measures to design and develop a cultural education system that will nurture and emphasize creativity and innovativeness;
- b) take appropriate measures to ensure that the cultural education system in Kenya;
  - (i) enables the people to develop strong moral, ethical and spiritual foundations;
  - (ii) ensure the creation of an enabling environment for persons with disabilities and take appropriate measures to design and

develop transformative cultural education that will give positive knowledge on disability to the community.

### **Traditional science and technology, indigenous knowledge and intellectual inventions**

**30.** (1) The State shall recognize the role of indigenous knowledge, traditional science and technology and intellectual creativity in the development of the nation.

(2) The State shall -

- a) support, promote, protect, patent and preserve, artistic, technological and intellectual innovations and inventions and their application to the development of the people of Kenya and combine modern and traditional practices to create viable conditions of living for the people of Kenya;
- b) recognize the significance of, and patent, cultural medicine inherited from centuries on research on flora and fauna, encourage herbal farming and promote contemporary cultural herbal research and alternative medicine;
- c) encourage the people of Kenya to rediscover and apply the value of traditional farming systems, diet and traditional drinks;
- d) ensure that designers adopt and adapt traditional architectural styles, materials and functions taking into consideration the values of an extended family system;
- e) support the utilization of indigenous seed development to enhance the social and economic well being of the people; and
- f) through legislation accord recognition and protection of ownership of the origin of seed, its genetic and diverse characteristics and its product use by communities of Kenya.

## **Cultural expression and conservation.**

32 (1) The State shall-

- (a) Support, promote and protect indigenous knowledge, literature, art, oral traditions, performing arts and other cultural heritage as well as intellectual property rights of the people.
- (b) Encourage and ensure the establishment of museums including live ethnic cultural museums, archives and libraries for preservation and conservation of material culture and historical documents and literature in each distinctive cultural group.
- (c) Encourage all distinctive cultural groups to establish their cultural centers.
- (d) Recognize, conserve, protect, replenish and sustainably manage land and other natural resources and artefacts that have cultural value to the people.
- (e) Encourage every community to adopt, adapt, develop on and use their cultural dress, costumes and ornaments to signify their originality and pride in their rich culture.
- (f) Promote and enhance the traditional system of governance, discipline, respect and integrity through age-sets, age-groups and traditional associations of clans.

Article 32, establishment of a National Commission on culture.

- 1) There is established a National Commission on culture consisting of the Chairperson, two Vice Chairpersons and seven members nominated and appointed in accordance with Chapter 18 of this Constitution.
- 2) The Commission shall establish an office in every district.
- 3) The functions of the Commission are:-
  - (a) To ensure that provisions of this Chapter are implemented.
  - (b) To formulate policies that will advise the state organs on the importance of culture to the people.

- (c) To identify, develop, preserve, promote, protect and document the diverse cultures of Kenya, cultural sites and historical monuments of social and economic value and ensure the return of relics, archeological finds, documents and other expatriated culture to Kenya.
- (d) To strengthen the national identity of Kenya through the promotion, appreciation and interaction of Kenya's diverse cultures.
- (e) To publicize, research and promote investments and marketing in Kenya's cultural industry and creativity.
- (f) To promote, preserve and enrich *Kiswahili*, sign language, Braille and all indigenous languages through education and the media.
- (g) Organizing an annual national forum on culture for people from diverse cultural communities.
- (h) To promote the authentic recording of Kenya's history.
- (i) To ensure that indigenous people receive compensation or royalties for the use of the indigenous cultures and cultural heritage.
- (j) To ensure that a reasonable percentage of the profits accruing to entrepreneurs from the exploitation of a natural resource of a cultural nature in any area in Kenya is used for the development of that area.
- (k) To promote traditional and contemporary Kenyan performing and creative artists and practitioners and ensure that they are recognized, appreciated and supported in Kenya.
- (l) To identify, promote, support and facilitate talented individuals in various sporting activities through the development and management of sports facilities.
- (m) To utilize the electronic and print media to popularize culture.
- (n) To establish the criteria for determining persons to be recognized and honoured as national heroes and heroines and recommend the conferment's of national honours to such heroes and heroines.
- (o) To undertake a systematic codification of the cultures and cultural practices and customary laws of the people and communities of Kenya.
- (p) To promote traditional naming of ecosystems, plants, trees, wildlife, place names and sites in accordance with the Kenyan local cultures.

- (q) To promote cultural systems of identifying, supporting, protecting and caring for the orphans, the disadvantaged, the elderly persons, persons with disability and impoverished members of society through extended families and communities.
- (r) To perform such other functions as maybe prescribed by legislation.

(33) - Cultural day.

The 26<sup>th</sup> day of December in every year is designated as a cultural day entitled “*Utamaduni Day*”. (*Clapping*).

**Hon. Delegate Paul Nakirate:** Accordingly, Honourable Chair and Honourable Delegates, I have great pleasure to present before this August House the work of Committee “M”. Thank you. (*Clapping*).

**Hon. Delegate Koitamet Ole Kina:** Thank you very much, Honorable Nakitare. As we wait for the next Convenor,

(*Consultations at “high” table*).

**Hon. Delegate Koitamet Ole Kina:** Yes, Honourable Nakitare, would like to say something about his Rapporteur who unfortunately was not able to be here with us this afternoon.

**Hon. Delegate Paul Nakitare:** Honourable Chair, I wanted to tender her apology as since she is indisposed, she was unable to be with us to enjoy the presentation of this particular report. Thank you.

**Hon. Delegate Koitamet Ole Kina:** Kavesta Adagala.

**Hon. Delegate Paul Nakitare:** Also Honourable Chair, what is not attached to the report you are reading is a schedule of Kenya communities which I think if you received copies of the document I referred to earlier, you must be having that copy. The Committee is also



recommending that that particular schedule containing all the peoples of Kenya should be part of this particular Bill. Thank you.

**Hon. Delegate Koitamet Ole Kina:** Thank you very much. I will now invite the Convenor of Land.

*(Consultation at “high” table)*

**Hon. Delegate Koitamet Ole Kina:** Dr. Ichang’i is sitting in for Prof. Yahya. He is his Co-Convenor as Prof. Yahya is out of the country, so we are going to get the report from Dr. Ichang’i.

**Hon. Delegate Daniel Ichang’i:** Thank you very much Mr. Chairman. Yes, I am not Prof Saad Yayha, he is abroad but in his absence, during the work of our Committee which is Technical Working Group J, I was elected by the Delegates to stand in occasionally for him and just to allow continuity. I will read and present this report at this stage, I am reliably informed that he should be with you on Wednesday. The Rapporteurs are the Honourable Dr. M. A. Swazuri and also the Honourable Dr. Nunow. Unfortunately both of them have sicknesses within their immediate family and are not with us at this moment but we have consulted. Our Draftsperson is Mrs. Lucy Masua.

Mr. Chairman, our Committee has done quite a lot of work on the two Chapters on Land and Property, that is Chapter 7 and also on Chapter 8, Environment. But I think in the interest of transparency, I wish to point out to this Honourable gathering that there are some issues, minor issues that are still being correctly formulated at this moment and a corrigendum or addendum would be circulated once our Technical Working Group J and the drafting team have completely agreed on these issues. But they do not change the policies. With that qualifier, I also wish to say that occasionally I will point out where these issues are. Chapter 7, Land and Property is presented to you on page 51 and we start with Primacy of land Article 84.

1. Land being Kenya’s primary resource and the basis of livelihood for the people shall be held, used, managed in a manner which is equitable, efficient, productive and sustainable.

2. The state shall define and keep constantly under review a national land policy directed at ensuring among others the following:-
  - (a) Equitable access to land and associated resources.
  - (b) Security of land rights for all *bona fide* land holders, users and occupiers.
  - (c) Sustainable and productive management of land resources.
  - (d) Transparent and cost-effective administration of land.
  - (e) Sound conservation and protection of ecologically sensitive areas.
  - (f) Encouragement of communities to settle land disputes through recognized local community initiatives consistent with this Constitution.
  - (g) Elimination of gender discriminatory laws, regulations, customs and practices related to land and other property. The word “property” is missing at the end of that Clause.

We then go to Ownership of land, 85:-

- (1) All land in Kenya belongs to the people of Kenya collectively as communities and as individuals.
- (2) Subject to this Constitution, no person other than a citizen of Kenya shall have the right to acquire any freehold interest or right in land in Kenya.
- (3) Non-citizens of Kenya may hold or use land on the basis of leasehold tenure only and such leases however granted, shall not exceed 99 years.

I wish to also draw your attention at this point to schedule six on Transition and Consequential provisions specifically to pages 257 and 258, Article 21, Sub-Clauses 1,2, and 3 on the ownership of land. This is a transitional issue that shall be brought to you by the appropriate Committee.

Then we go Classification of land, Article 86:-

1. All land in Kenya is designated public community or private land. The following is private land.
2. (a) Land which at the commencement of this Constitution was held as alienated government land in terms of the government Land Act, Cap 280.

- (b) Land held, used or occupied by any ministry, department or agency of the government or Local authority except where such land is used or occupied on the basis of a private lease or trust. Again two words here “or trust” at the end.
- (c) All land ceded to the people of Kenya by way of reversion or surrender.
- (d) Land in respect of which no individual or community ownership can by process of law be established.
- (e) Land in respect of which no heir can by ordinary process of law be identified.
- (f) All roads and thoroughfares to which the Public Roads and Roads of Access Act Cap 399 apply.
- (g) All rivers, lakes and water bodies as defined in the Rivers and Lakes Act, Cap 409 or in any other law; and
- (h) The territorial sea and sea bed including all beach land between the high and low watermarks.

3. The following is community land:-

- (a) All land currently held as trust land under the Trust Land Act Cap 288.
- (b) All land registered in the name of group representatives in terms of the provisions of the Land (group representatives) Act, Cap 287.
- (c) All land held, managed or use by specific communities as community forests, water sources, grazing areas or shrines and identified by them as such, whether or not such land is but for this provision classified as public land.
- (d) Any land herein after ceded to a specific community by way of any process of alienation, transmission or conversion.
- (e) Land currently held as government forest and is occupied by hunter-gatherer minority communities as their ancestral land.

4. Any unregistered community land shall be held in trust by devolved governments on behalf of the communities.

5. The following is private land:-

- (a) Any land held under freehold tenure and registered under the Registration of Titles Act Cap 281 and the Land Titles Act Cap 282.
- (b) Land held as absolute property under the registered Land Act Cap 300 not being land to which the Land (Group Representative) Act Cap 287 applies; or
- (c) Land the subject of a leasehold grant whether or not the lease is in respect of public or community land and shall hold only as the lease remains in force.

We move to Tenure of land, Article 87:-

1. Public land shall vest and be held by devolved levels of government in trust for the people resident therein and shall be administered on their behalf by the National Land Commission. This is one of the areas we are still trying to harmonize and once we agree on the technical formulation of this, we will circulate the Corrigenda.
2. The Public land shall not be disposed of or otherwise used except in terms of legislation specifying the nature and terms of that disposal or use.
3. Community land shall vest in and be held by communities identified on the basis of ethnicity, culture or community of interest.
4. Community land shall not be disposed of or otherwise used except in terms of legislation specifying the nature and extent of the rights of members of each community individually and collectively.
5. Private land shall vest in and be held by individuals or other jural persons in terms of legislation specifying the nature and extent of rights in respect to private land.
6. Within two years of the coming into force of this Constitution, Parliament shall:-
  - (a) Enact law for:
    - 1) The revision, consolidation and rationalization of the existing land laws.
    - 2) The revision of all sectoral land use law in accordance with the national land policy.
    - 3) The manner in which any land may be converted from one category to another.

- 4) The protection of dependency of deceased persons holding interests in any land including the interests of spouses in actual occupation of land.
- 5) The recognition and protection of matrimonial property and in particular the matrimonial home during and after termination of marriage.
- 6) The establishment of an efficient and cost-effective physical planning and land administration system, including the administration of land courts in the context of devolved authorities.
- 7) The settlement of the landless and squatters including the rehabilitation of spontaneous settlements in urban and rural areas.
- 8) The establishment of land fund to enable Kenyans to gain access to land on an equitable basis.
- 9) The establishment of land bank to facilitate availability and accessibility of land for research and development.
- 10) The ascertainment and adjudication of any land held for the benefit of any community by any person or agency and transfer of such land to communities entitled to it.
- 11) The setting of maximum and minimum sustainable landholding in arable areas, bearing in mind the productive potential and location of the land.
- 12) The protection, conservation and unfettered access to all public lands such as riparian road reserves and beach lands for leisure and enjoyment.
- 13) The review of all grants or dispositions of government and other public land to establish their propriety and legality and to determine whether or not such grants or dispositions should be revoked.
- 14) The review of boundaries and management of national parks and animal sanctuaries with the view to creating opportunities on benefits for the local people in the context of devolved government.
- 15) The review and assessment of all claims to unjust expropriation of land in the Coast, North Eastern and Rift Valley Province, and there is something missing there, as known before the commencement of this Constitution or elsewhere arising from historical or other causes in order to establish their validity and how best they can be justly, peacefully and equitably resolved.

- (b) Parliament in Consultation with devolved authorities shall determine the cut off date with reference to which the review required in paragraph (a)(15), not (b)(3). (a)(15) is to be conducted.

We then move on to Protection of rights in land Article 88:-

- 1) Subject to this Constitution, rights in land and property lawfully acquired shall be protected and may be freely alienated without discrimination on the basis of gender or any other cause.
- 2) The state has the power to take possession or acquire any right or interest in land where the following conditions are satisfied:-
  - (a) The acquisition and/or taking is necessary in the interests of defense public safety, public order, public morality, public health, environmental conservation including conservation of indigenous species, town and country planning or the development or utilization of property so as to promote the public benefit.
  - (b) The acquisition shall not result in hardship to any person or community having an interest or right over the property.
  - (c) Provision is made by a law applicable to that acquisition or taking of possession from the prompt payment prior to occupation of such land of:-
    1. Full and fair compensation in the form of comparable land or equivalent monetary compensation; and
    2. A disturbance allowance equivalent to 80 per cent of the market value of land provided that *bona fide* occupants of the land acquired will also be entitled to compensation even if they do not have title deeds.
    3. The state has the power to:-
      - a) Regulate the use of any land interest or right in land in the interest of defense, public safety, public order, public morality, public health, land use planning or the development or utilization of property so as to provide the mutual benefit as long as such regulation does not amount to acquisition or taking of possession in terms of Clause 2.

- b) Regulate the use of urban land in a more intensive manner according to the principles of sustainable development and sound urban planning and to review the relevant standards and criteria every 10 years in consultation with devolved governments.
  - c) Provide that (not for) surplus land or land no longer needed for public purposes after acquisition, to be offered to the original owner on first refusal basis.
- (4) Any person who owns private land has a right to acquire and hold documents of title for such land and to have an appropriate entry in a land registry.

Now, we move to the section here called “ Regulation of land use”. This is another area that we are discussing. Our original Title was, “ Protection of Rights in property” but we are meeting with the Drafters to see which of the two we will agree upon. So, we go to:

- 89** (1). The State shall encourage and provide conducive, social, economic, political and legal atmosphere for the creation, development (investment) and management of property.
- (2) Property development and management shall take into consideration the requirements of sustainable physical planning and land use including safeguarding of the environment.
- (3) All public properties shall be held, managed and disposed of according to legislation specifying the nature and terms of that holding, management and disposal.
- (4) The State shall regulate the use of any right and interest in property in the public interest is so far as such regulations do not violate the principles set out in this Constitution.

(5) The State shall ensure the following:-

- (i) the establishment of a housing development fund to enable Kenyans gain access to more and better housing;
- (ii) the development and review of a National Housing policy with a view to increasing, regulating and maintaining the national housing stock;
- (iii) the promotion of construction and ownership of both public and private housing in so far as such housing adheres to the principles and standards of sustainable land utilization, physical planning and environmental safeguards as outlined in this Constitution.

(6) The State shall establish a property and housing research organization.

(7) Parliament shall enact laws to:

- (a) requiring the State and relevant organizations including devolved authorities to encourage the use of acceptable, affordable and reasonable technologies--Please delete the word “intermediate”. Affordable and reasonable technologies, building materials, innovations and methods in the property sector provided that such are not harmful and injurious to persons and the physical environment.

Excuse me? I think the word “physical” there also needs to go out but we will agree again with the Drafters.

- (b) Ensuring that major investments in property by foreigners shall be geared to benefiting local Kenyans and their economy.

We then go to **The National Land Commission.**

**90. A (1)** There is established a National Land Commission



- (2) The National Land Commission shall be decentralized to the lowest level of Government.

We had used the word “devolved” to the lowest level of Government. This is an area again we are trying to harmonize because we are told this is the National Land Commission and then it will be decentralized to all other levels of Government. However, this is an area some of us feel a little bit strongly about so we will be meeting to resolve the use of the word “devolved” or “decentralized”

- (3) The functions of the National Land Commission, are:

- (a) Manage public land on behalf of devolved levels of Government.
- (b) Define and keep constantly under review the national land policy.
- (c) Consolidate and from time to time review all laws relating to land;
- (d) Conduct research and make recommendations to improve the functions of Government Ministries and agencies in charge of land.
- (e) Initiate investigations on its own or upon a complaint from other person(s) or institutions on land injustices both present and historical and ensure appropriate redress.
- (f) Facilitate the participation of communities in the enactment of relevant land laws and adherence to customary law in land matters as long as such laws are not inconsistent with this Constitution.
- (g) Monitor and have oversight responsibilities over land use planning throughout the country
- (h) Perform such other functions as may be entrusted to it by law.

There is an area there where we do feel it can also play a part to facilitate the execution of a comprehensive programme of legislation of title, but again we will meet and we are meeting to resolve that one.

(4) Parliament shall enact a law to define the organization and powers of the Commission.

We have two definitions there. In fact they are three. The word “community has been again omitted and I will read it for completion. It is suggested that these definitions will move elsewhere but we have provided for them here.

### **Definitions.**

**91** (1). in this Chapter “Land” means the soil, biodiversity on it, sub-soil, rocks on or beneath it, any river, lake or marine waters in the territorial sea and exclusive economic zone as defined in the First Schedule of this Constitution, and airspace immediately above it.

(2). “Property” means land as defined in Clause (1), permanent fixtures thereon and such rights, interest and restrictions therein, personal properties comprising but not limited to movable chattels, financial instruments, livestock, fisheries, crops, plant and machinery and registered intellectual inventions, innovations and rights.

Community. We had suggested that “Community” in this Chapter means indigenous Kenyan citizens who reside in a specific geographic area irrespective of their ethnicity or culture.

I will repeat.

(3). “Community” means indigenous Kenyan citizens who reside in a specific geographic area irrespective of their ethnicity or culture.

Ladies and gentlemen, that brings us to the end of Chapter Seven. Our Technical Working Group was mandated to look at Land Rights and the Environment and I want similarly to take you

through Chapter Eight if you will bear with me in a similar fashion. Right at the beginning, another area, we did think that the word “Environment” was sufficient for this Chapter but we have been sensitized to the fact that for the sake of *Wanjiku*, we need to call it actually, “Environment and Natural Resources” and we are going to look at those issues again so that we see whether this Chapter needs the inclusion of “and Natural Resources” for completion and ease of reading. We start with:

## **ENVIRONMENTAL AND NATURAL RESOURCES**

### **Principles**

**92** (1) The State shall:

- (a) respect the integrity of natural processes and ecological communities, and the intrinsic value of all forms of life including conservation of habitats and species.
- (b) in consultation with devolved authorities, manage the environment based on principles of good governance to ensure conservation and sustainable utilization of the environment and its natural resources;
- (c) ensure that social and cultural values traditionally applied by communities in Kenya for the sustainable management of the environment and natural resources are observed in so far as they are not repugnant to justice and morality and are not in conflict with this Constitution;

(2) All natural resources shall be vested in the Republic of Kenya on behalf of the people of Kenya and shall sustainably be developed for the benefit of Kenya as a whole and for the benefit of the inhabitants of the regions where these resources occur;

(3) All natural resources under local authorities and communities shall be owned and managed by them for the benefit of the communities and future generations;

- (4) Planning and utilization of the environment shall take into account the needs of the marginalized areas and disadvantaged minority persons including persons with disabilities.

**Obligations** of the State concerning the environment are as follows:

**93** The State shall:

- (a) Develop and enact legislation for the protection and promotion of sustainable development and utilization of our natural resources;
- (b) Domesticated international and bilateral agreements and treaties relating to the protection of the environment;
- (c) Review current international and bilateral treaties and agreements to ensure the sovereignty, integrity and welfare of Kenyans;
- (d) Review contracts entered into with multinational organizations for the utilization of natural resources, to ensure the sovereignty, integrity and welfare of Kenyans and that benefits accrue to the local communities.
- (e) Put in place an urban environmental policy to regulate human settlement;
- (f) Ensure that every landowner maintains a tree cover of at least 10% equivalent to 50 trees per hectare of land held with appropriate trees to ensure land reclamation, rehabilitation and sustainable utilization of natural resources;
- (g) Allocate adequate resources to reclaim and rehabilitate degraded areas and those prone to disasters to make them habitable and productive.

Then we thought it is important to go Environmental Rights and Duties in this Chapter. So, we have these here.

**94** (1) Every person has a right to:

- (a) a clean and healthy environment
- (b) participate in the conservation and protection of the environment;
- (c) access and enjoyment of the environment;
- (d) free access to information on the environment.

(2) Every person has a duty to:

- (a) respect, protect and safeguard the environment for the benefit of present and future generations of humans and other species;
- (b) promote environmentally sustainable development.

We go to **Environmental Protection**.

**95** (1) The State at all levels of Government exercising power or performing a function involving the management and sustainable development of the environment shall be guided by the need to:

- (a) Ensure the participation and involvement of the public.
- (b) Protect genetic resources and biological diversity including wildlife and intellectual property related to them.
- (c) Protect and enhance the intellectual property and indigenous knowledge of communities.
- (d) Practice, encourage and require waste minimization and recycling.
- (e) Establish and ensure the effective functioning of a system of environmental impact assessment that:
  - (i) applies to any project or combination of projects, including government projects;

(ii) is open and gives adequate opportunity for active public participation;

(iii) is scrutinized by a body which is independent of the project proponent and the views of which shall be taken into consideration when deciding whether to grant approval for the project and ensure adequate remedies.

(f) Establish systems of environmental audit and monitoring ; and

(g) Ensure that environmental standards enforced in Kenya are the accepted internationally developing standards.

(2). Parliament shall enact legislation:

(a) protect the intellectual property rights and indigenous knowledge of local communities in biodiversity and genetic resources ensuring prior informed consent of the communities and benefits sharing arrangements through devolved governments;

(b) Ensure equitable sharing of the benefits accruing from public or private utilization of natural resources between the local communities, devolved authorities and the central government.

We come to the **Enforcement of Environmental Rights**. This is another area where we have something that the Drafters and us are working on. We have agreed as a Committee that there shall be established a special court on the environment. That is missing from this refined Zero Draft. We are discussing that one but it was an agreement of our Committee. So, we to 96 (1) but it could be (2).

**96** (1) Every person whose environmental rights are being or are likely to be contravened has the right to seek redress to:

- (a) Prevent, stop or discontinue any act or omission which is harmful to the environment;
- (b) Compel any public office to take measures to prevent or discontinue any act or omission which is harmful to the environment;
- (c) Demand compensation for any victim of such violations of environmental rights and other losses.

(2) which could be (3). Every person bringing an action under this Article has a right to seek redress even if the person cannot show that the act, omission or infringement has caused or is likely to cause that person any personal loss or injury.

We now go to a section discussing **Natural Resources** in Article 97. The introductory Clause there reads.

**97.** The State shall ensure that categories of natural resources are--

This is another one which we are discussing because in our opinion in our Technical Working Group, we had enumerated the more important resources to this country. So, this one tends to summarize it but we have mentioned the categories there and we are discussing. However, let us proceed.

**97.** The State shall ensure that categories of natural resources are:

- (a) Protected, managed, promoted and sustainably developed.
- (b) Subjected to strategic research to ensure enhanced benefits to Kenyans;
- (c) Protected against unfair external trade practices in their production, distribution and marketing;

- (d) Regulated in terms of exportation and importation;
- (e) Regulated in terms of origin, quality, methods of productions, harvesting and processing;
- (f) Protected against processes and activities that are likely to endanger them or curtail their existence altogether;
- (g) Utilized in the interest and benefit of Kenyans.

Then we have **The National Environment Commission**.

- (1) There is established the National Commission.
- (2) The National Environment Commission shall be decentralized to the lowest level of Government.

Remember we said the same thing concerning the National Land Commission. The word “decentralized” versus the word “devolved”. We are discussing that.

- (3) The National Environment Commission shall:
  - (a) Ensure the protection, conservation and management of the environment.
  - (b) monitor and have oversight responsibilities on the administration of the environment”.

Remove the word “and use” and “land use planning”, That is a function of the National Land Commission in the previous Chapter, so it need not appear here.

- (c) “Audit and produce for the public bi-annual reports on the state of the environment;
- (c) promote the integration of environmental considerations into development policies plans, programmes and projects with a view to ensuring proper management and rational utilization of the environment and its natural resources;



- (d) formulate, monitor and evaluate the implementation of the National Environment Policy;
  - (e) examine new and emerging technologies and inventions to determine their impact on the environment and put in place the institutional framework for the operationalization of such functions;
  - (f) conduct research in consultation with other stakeholders and make recommendations to improve the functions of the Government Ministries and Agencies in such of the environment and natural resources;
  - (g) initiate investigations on its own or upon complains from other persons or institutions and ensure appropriate redress;
  - (h) examine resource use patterns and practices to determine their impact on the quality of the environment and take remedial measures;
  - (i) promote environmental education and ensure access to information and public participation;
  - (j) promote peaceful and harmonious co-existence among communities through just, equitable and rational sharing and utilization of the environment and its natural resources taking into account the rights of the local communities;
  - (k) recommend to Parliament effective and efficient policies and programmes to protect sustainable management and utilization of the environment and its natural resources;
  - (l) perform any other functions as provided for by law or are incidental and conducive to the exercise of its duties as provided for in this Constitution”.
- (4) “The Commission shall promote and facilitate public participation, discussion and input before international conventions, treaties and agreements that have consequences on the environment are ratified”.

We move on to environmental legislation, Article 99. “Upon the into coming of force of this Constitution, Parliament shall enact legislation to give effect to the provisions of this Chapter and in particular:-

- (a) for the conservation of forests, wildlife parks, reserves and sanctuaries, beaches and water catchment areas and to promote eco-tourism;

- (b) to stop further excision of conservation areas unless such excision is consistent with the principles that enhance sustainable management and provide benefits to the community;
- (c) to ensure that land use and environmental policies are put in place to protect agricultural and range lands against environmental degradation”.

Again here distinguished Delegates, we have used the word “land use and environmental policies”. There is a feeling that land use should be removed but the view of the Committee was that the two go hand in hand, so that is why you see (c) formulated the way it is.

- (d) “To enforce the polluter pays principle and ensure that the disposal and storage of environmentally undesirable substances including hazardous waste and munitions take into account the requirements for a clean, safe and health environment;
- (e) to ensure that emission of harmful radiation and noise into the environment shall be regulated to meet the requirements for save and healthy environment;
- (f) to minimize human wildlife conflicts; and
- (g) to provide--”

After the word provide, we are discussing whether to say “adequate” or the word “reasonable”.

- (g) “To provide adequate or reasonable compensation for loss of human life, injury to persons, loss and destruction of private property due to human – wildlife conflicts”

So you can include the words “due to human wildlife conflicts” at the end of that Clause.

Then we have definitions. As I said in the previous Chapter, the definitions may be moved elsewhere but for completion we have provided the following definitions.

- (1) Environment is the totality of nature and includes physical and biological components and factors which exist, operate and interact within it. It shapes our cultural diversity and supports all forms of life.
- (2) Natural resources means the biological and physical non human factors and components of the natural environment which includes, but are not limited to, both renewable and non-renewable natural land, river, lake and marine resources comprising but not limited to land,

