

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

**NATIONAL CONSTITUTIONAL CONFERENCE
(NCC)**

**VERBATIM REPORT OF
PLENARY PROCEEDINGS
HELD AT BOMAS OF KENYA**

ON

13.01.04

CONSTITUTION OF KENYA REVIEW COMMISSION

**NCC – PLENARY PROCEEDINGS HELD AT BOMAS OF KENYA
ON 13TH JANUARY, 2004.**

The proceedings commenced at 9.20am with Prof. Yash Pal Ghai in the Chair.

Prof. Yash Pal Ghai: I call the meeting to order and we declare this session of the National Constitutional Conference open. The first Item as always on our Agenda are Prayers and there will be 4 prayers today. The first one will be said by Mr. Baldip Rihal. The second one will be by Pastor Zablon Ayonga, the third one by Rosalinda Simiyu and the fourth one by Sheikh Ali Shee. So, could I ask you to stand up please and ask Mr. Rihal to come and say his prayers please?

Honourable Delegate Baldip Rihal: (*Inaudible Hindu Dialect*) Oh Supreme God, absolute yet all pervading the eternal, the creator of the universe, the cause of causes without enmity, without hate; both eminent in your creation and beyond it. You are not the God of one nation but the God of Grace. Oh merciful Lord, the Delegates to the National Constitutional Conference have come back for the third and final sessions of the Conference. Please bless the Delegates so that they can all work in harmony without hatred and enmity for the good of Kenya. We also pray that you give the Delegates wisdom and selfless sense of service to complete the task of writing the new Constitution of Kenya which has been entrusted upon them by this nation.

Oh supreme God, we pray for your mercy and blessings on all people of this *nation*. (*Inaudible Hindu dialect.*)

Com. Zablon Ayonga: Gracious loving Father who art in heaven, this morning we assembled here for a task; a national task. We want to thank you for the blessings of the past. We also want to thank you for having helped us pass through many roadblocks. When we look back to what you have been able to do through us, we have no reason to fear for our future. Dear Lord, you have brought us here for Bomas III - we are told - the end of our task. We know and we trust that you will help us to give the Kenyans the *Katiba* that they have been longing to receive.

We pray that we will all be set towards that goal, just as the needle is set to the pole. We have come here, all of us having different talents. We have come here because the people back there have their trust in us and they want us to finish what they have sent us here to finish. I pray this morning, dear Lord, that you would give us the unity of purpose; that we would work as brothers and sisters and above all as Kenyans for Kenyans. That, those problems that we have had, those things we have read and spoken sometimes without thinking aloud, that you would forgive us where we have wronged others. Help us to know that at the end of the day, we are Kenyans. Help us to know that the *Katiba* we are going to make, is for the good of us all. So, let us work together. May your spirit that makes soft those hardened hearts touch those hearts. Forgive us from our sins of the past. Forgive us from sins committed and sins uncommitted. We pray that we will be true to you to consider our Kenya first and above all, let us do everything that would bring to you glory and honour.

We place this day before your care. Help us to do what is right. For we ask it through Jesus name's sake, Amen.

Honourable Delegate Roselinda Simiyu: Let us pray. In the name of the Father, the Son and the Holy Spirit. Dear Lord, we are gathered here as people of one nation. Lord, we might have come here representing different interests Lord, but let the reason that brought us here be to help Kenyans make it a country of oneness. Lord, also make it possible for us in this Bomas III to be able to talk to each other instead of talking at each other.

Lord you know that there are masses of Kenyans who depend on us to give them a selfless Constitution. Make it possible Lord. Lord, we request that we know we as Kenyans are a most democratized nation. Let us not take the views that were raised by our fellow colleagues to be used against anybody because, Lord, they were only exercising their democratic rights of expression. Lord, let it prevail that the mood that we closed in the last Bomas II, please Lord, help that it may come and take over from now so that we may continue as a people of one nation. In Jesus' name we pray, Amen.

Honourable Delegate Sheikh Ali Shee: *Abdullahi Rahman Rahim. Kwa jina la muumbaji wa mbingu na ardhi na vitu vwote vilivyoko kwenyebingu na ardhi, Eh Mola mkarimu tunakuomba kwa nguvu zako na uwezo wako utubariki sisi sote tulioko hapa na wale ambao walioko nje; waliotupa kazi ya kuitengeneza Katiba ambayo itaongoza nchi hii, ambayo italetu manufaa kwa watu wako. Eh Mola tupe busara sisi sote tulioko hapa tunaoifaya kazi hii ngumu. Utupe uwezo na subira kuweza kuvumilia mabaya na mazuri na mazito ili tuweze kuifanya kazi hii ngumu.*

Mola, pasina kupewa nguvu zako na baraka zako, hatuwezi kufanya jambo likafaulu na kufanikiwa. Tuna haja na nguvu zako. Kuungwa mkono na wewe ndio kufanikiwa kwetu sisi. Eh Mola, waja wako siku zote ni watu wanaokosa. Mwanadamu uliyemuumba ni mkosaji kila siku na anapokosea uwe tayari kumsamehe na kumuelekeza kwenye njia bora ili aondoke kwenye njia ya shetani iliyombovu na ambayo inampeleka kwenye maafa na balaa katika hii ardhi.

Eh Mola, sisi sote tulioko hapa, tuko kwa ajili ya uwezo wako na kuungwa mkono na wewe. Pasi na kuungwa mkono na wewe, nchi hii haiwezi kubarikiwa. Eh Mola umekuwa kwa muda mrefu ukiibariki hii nchi; endelea kutubariki. Usitukoseshe neema zako na baraka zako. Pasina neema na baraka zako, hatuwezi kufaulu. Sisi tunakutegemea wewe na hatuna mwingine wa kumtegemea isipokuwa wewe. Wale ambao wamepotea, eh Mola wasaidie kuwaelekeza warudi kwenye njia iliyosawa. Eh Mungu, tubariki na uibariki nchi yetu na watu wetu. Twakuomba kwa jina lako utubariki, Amina.

(National Anthem)

Prof. Yash Pal Ghai: The next Item is the Administration of Oath. There have been vacancies which have been filled now and we have a formal list of six members to be sworn in today. So, could I please ask the new Delegates to come up in front of me so that I can administer the Oath to you please?

Is Delegate Number 010, Davies Nakitare, here please? If you are sure? Delegate Number 498, Kathini Maloba Caines ?

Could I ask you if you are all going to take the oath or you are to do a solemn affirmation?

Hon. Delegates: Oath.

Prof. Yash Pal Ghai: Oath? You all have that. I am going to ask you to raise your hand and then repeat the oath after me. When I say “I” then you will mention your names and then I will read the rest of the oath and you repeat after me.

Hon. Delegate Katoo Ole Metito	-	MP Kajiado South
Hon. Delegate Naitare Davies	-	MP Saboti
Hon. Delegate Odhiambo O. Mark	-	MP Homa Bay
Hon. Delegate Ajaa Olubayi	-	Teso
Hon. Delegate Beryl Anyango Ouma	-	Professional Bodies
Hon. Delegate Kathini Maloba Caines	-	Women Organizations

Hon. Delegates: I..... being appointed a Delegate to the National Constitutional Conference under the Constitution of the 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.

Prof. Yash Pal Ghai: So, I now welcome you to this distinguished assembly and look forward to your contribution. Welcome.

(Clapping).

I have to make a sad announcement of the death of a Delegate during the recess: Delegate Number 450, James Wangusi, who represented the Trade Unions Sector. Could I please ask you to stand up for one-minute silence as we convey our condolences to his family?

(Delegates observe one minute of silence)

Thank you. Let me once again formally welcome you to this Meeting of the National Constitution Conference. I did take the occasion of our informal Meeting yesterday to welcome you and convey some of my thoughts about the task that is facing Bomas III. I will not repeat those remarks now except to say that I am delighted that we have all assembled again, this time to conclude the heavy responsibility placed upon our shoulders. I want to remind you again of the need to approach our tasks with some greater measure of discipline than in the past. We must keep better time than we have in Bomas I & II. We must be focused in our discussions. We also have to try to finish the work of the Technical Working Committees in the shortest possible time and this requires both that we start our Meetings on time and that we focus on the Articles that belong to your Committees.

We have had several occasions for Detail and General debate on this Articles and Chapters and now the task has come to make decisions. I hope that we can finish the work of Committees in a week or two. Just to encourage you, I have to tell you that some Committees finished their work in the last Bomas. So, it is possible to complete the remaining work of the Technical Committees in one or two weeks. We will have a more formal programme for you during the week but maybe if we had a tentative deadline now of a maximum of two weeks for Committee work so that we can prepare the documentation for presentation to the Plenary. I know there will be distractions from inside and outside Bomas, some of it designed to distract us from our work and to delay our work. So, I would urge Delegates to ignore these; what we used to call side shows provocations and concentrate on your work. The whole country is watching us and we have to behave with dignity and that dignity is best served by ignoring people who try to provoke us or to sabotage our work.

The future of this process lies entirely in our hands. It does not lie with people outside, people who may have any interests in sabotaging this work here; denigrating Bomas. The responsibility is on each and every Delegate and if we focus on our work and work in a determined and disciplined way, we will be able to finish our work and give Kenyans a new Constitution.

If we do not succeed then we shall have to bear the bulk of the responsibility because we have now assembled here, we have the resources, the facilities to do our work. We on our part at the

CKRC will provide every assistance we can to facilitate your work. So, I beseech you to please concentrate on your work and please return to your tents at the appropriate times so that we will conclude the Technical Committee work within two weeks. I do not want to say more at this stage. I think we all know the context in which we are working and the expectations that people have. I do not need to keep reminding you of that. Please keep those factors in your mind.

I am now going to call upon Prof. Okoth-Ogendo, who is the Rapporteur General of the Conference, to present his Report on the proceedings of Bomas II and to do that as briefly as possible. Thank you.

Com. Okoth Ogendo: Thank you, Chairman of the Conference and fellow Delegates. I am appearing here for the second time to present my appreciation, synthesis and analysis of issues that I thought were important and significant during Bomas II. I did present a report on Bomas I and that report was of a very different character because Bomas I was concerned with the General Debate; Bomas II was concerned with more specific questions.

My reports which has been placed in all Committee Tents - and when I finish here and we adjourn you will have copies for every body - is based or compiled from the following sources, and I do want to make this clear from the beginning.

First of all, it is compiled from the verbatim records of Conference proceedings. Secondly, the summaries of Conference Plenary proceedings prepared by the secretariat of the Conference. Thirdly, it is prepared from what was called the Rapporteur General's Daily General Journal entries, which was circulated to Tents every morning. It has also been prepared from the Minutes of the daily evening meetings of Convenors and Rapporteurs, the Minutes of Technical Working Committees, which were prepared by Committee Rapporteurs and the progress reports presented by Convenors at the end of the Conference proceedings on September 26th 2003. The draft of that report was also discussed by Rapporteurs at least three times and their comments have been incorporated in the report.

The report starts by noting that twice during Bomas II, the work of the Conference was interrupted by the sudden and untimely demise of two distinguished Delegates, namely, Delegate

number 002, the late Honourable Michael Christopher Kijana Wamalwa, MP, Vice President and then Minister for Regional Development and Delegate 412, the late Dr. Crispin Odhiambo Mbai, who then was Convenor of the Technical Working Committee G on Devolution

Following the demise of those two distinguished Delegates, the Conference did express its condolences and sadness in an appropriate forum, which was the Plenary of the Conference, which in the case of the Vice President was conveyed to the nation and in the case of Dr. Mbai, especially to his family. Despite these interruptions in multiscosity, Bomas II in my assessment made substantial progress, and it is that progress which I want to present to this Conference.

The first matter or group of matters that I will deal with relate to issues which were left outstanding at the end of Bomas I. The report I had submitted at the end of Bomas I had indicated that there were number of issues which were not resolved or which were passed over for further debate during Bomas II. The most important of these issues were Devolution of Powers, the issue of Culture in the Constitution, Affirmative Action; and Transitional and Consequential Arrangements upon the enactment of the new Constitution.

At the beginning of Bomas II, the Conference debated at least three of these issues at length before passing them over to the appropriate Technical Working Committees for detailed consideration.

The issue of Transitional and Consequential Arrangements was not however revisited by the Conference and I will have something more to say about that. At Paragraph 48 – 50 of my report on Bomas I, I made the observation that, although Devolution of Powers, which is a key foundation principle in section 3 of the Constitution of Kenya Review Act, had been embraced by the Conference. The design of Devolution as presented in Chapter 10 of the Draft Bill, was far from satisfactory. The Conference had in consequence asked the Commission to prepare a new Draft before the Technical Working Committee on Devolution could discuss it.

During the adjournment between June 6th and August 17th 2003, the Commission established an in-house Task Force to examine the issue of Devolution. The Commission set the terms of reference for the Task Force as follows: - That they should identify and examine the issues,

comments and recommendations made on the Devolution Chapter of the Draft Bill during the general debate of the Conference; to make proposals for revision of the Devolution Chapter based on the above-cited findings; to identify other provisions of the Draft Bill that will need revision as a result of such proposed changes to the Devolution Chapter, to revise the Seventh Schedule of the Draft Bill in the light of the above-cited changes; and to prepare a report for consideration at the National Constitutional Conference.

The Task Force did prepare a report which was discussed and approved by the Commission. That report made comprehensive recommendations on the need for, and the principles which should guide the process of Devolution of Powers, the structure of Devolution and the functions and powers of units of Devolution.

The Commission also generated a new Draft replacing the original Chapter 10 and setting out the technical parameters of Devolution, including provisions that would ensure that this issue is effectively mainstreamed in the entire Bill. Both the Reports and the new Draft were presented as Commission Documents and debated by the Conference on August 21st to 22nd and September 16th 2003, thus placing the material on the same footing as the rest of the report and the Draft Bill which had been presented earlier by the Commission.

The Conference was in broad agreement with the goals, principles and structural aspects of Devolution as presented in the new Draft, Chapter 10. That new Draft Chapter 10, which was debated by the Conference, was then referred to the Technical Working Committee on Devolution which was then expected to make detailed provisions for the structure of Devolution and its operational principles. This includes: -

- The creation of legislative institutions at appropriate levels of government below the National Legislature.
- The conferment of executive authority to all levels of government.
- The process of election to legislative institutions at all levels of government.
- The procedure for appointments or constitution of the executive branches of the various levels of government.
- Specification and distribution of powers and functions between the various levels of government, including taxation and spending powers.

- The modalities or equitable sharing of revenue between the various powers of government.
- The staffing of devolved authorities and intergovernmental relations.

On the issue of Culture in the Constitution, I had indicated in my report on Bomas I at Paragraph 91, that the Conference was not satisfied with the manner in which Kenya's rich and diverse cultural heritage had been treated in the Draft Bill. To pursue this matter further, the Conference established an *Ad hoc* Committee with the following terms of reference: -

- To conduct a careful analysis of the Draft Constitution with the view to determining whether, and the extent to which the provisions of Section 3(e) of the Review Act had been reflected therein and in particular, to explore ways of giving Constitutional legitimacy to Kenya's rich cultural diversity and expression.
- To examine Constitutional options for the promotion of the cultural expression and the activities of the people of Kenya; and the protection and promotion of the rights of communities to organize and participate in cultural activities locally or countrywide and explore whether or not certain aspects of culture, custom or tradition should be prohibited or otherwise qualified in specific provisions of the Draft Bill.
- To propose where necessary amendments to any aspect of the Draft Bill with a view to strengthening Kenya's cultural identity in the context of national integration and unity.
- To review the various aspect of the Draft Bill with a view to identifying any aspect that negates our cultural heritage.
- To explore the possibility of establishing an institutional framework for the promotion and development of Kenya's diverse cultural values and heritage.
- To prepare reports for consideration by the Technical Working Committees of the Conference.

Delegates will remember that the *Ad hoc* Committee was not able to do much work because the Conference adjourned fairly soon after. Further, because the Conference had resolved that none of its organs would conduct business during adjournment between June 6th and August 17th 2003, this Committee was unable to proceed with its work during the period of adjournment. Because of the importance of the issue of culture, however, the Commission on its own Motion

established a Task Force with similar terms of reference as that of their *Ad hoc* Committee. The Task Force prepared a report which was discussed and approved by the Commission and was later presented to the Conference.

The Commission also generated Draft Articles setting out the technical parameters of a culture - sensitive Constitution, including provisions that would ensure that culture is effectively mainstreamed in the Draft Bill.

Both that report and the Draft were presented as Commission documents to, and were debated by the Conference on August 19th to 20th 2003 and also on September 16th 2003; and the Conference accepted the main recommendations of the Commission. In addition, the Conference further resolved that a full-fledged Technical Working Committee be formed to consider the issues of culture in the Constitution. The Committee was subsequently established as Technical Committee M and as required by all Committees, it was mandated to focus its deliberations primarily on the report and provisions of the Draft Bill prepared by the Commission and discussed by the Conference in Plenary as I have already indicated.

On the question of Affirmative Action, I had indicated in my report on Bomas I at Paragraph 90, that while Affirmative Action for women was understood and accepted, Affirmative Action for other groups was not fully explored due to uncertainty as to the range and mechanisms required to implement that principle. On resumption of the Conference, the Steering Committee approved for presentation and discussion to Plenary, a Motion that was prepared by Eng. Karue Muriuki, Delegate 121, which was in the following terms: -

That having observed with concern that some groups in our socio-economic setup do suffer and feel disadvantaged due to discrimination and prejudice on the basis of gender, illiteracy, disability, age, geographical area and other unjustified grounds, this Conference resolves that a Chapter be included in the new Constitution devoted to Affirmative Action and requiring Parliament to enact a law that will adequately address the root causes of such unfair imbalances.

The Motion was debated by the Conference on August 22nd 2003 and the Conference agreed that the Commission be asked to critically examine the entire Draft Bill with a view to determining whether and the extent to which provisions of section 3(b) and (f) of the Review Act have been

adequately addressed with particular regard to groups that have been discriminated against on the basis of gender, disability, age, geographical situation and other forms of affliction; and to propose ways and means of mainstreaming intergenerational equity as a principle in the entire Draft Bill, so as to make a Constitution for all ages and all generations and to propose where necessary amendments to any aspect of the Draft Bill with a view to entrenching the principle of the intergenerational and social equity in the Constitution.

Following that debate, the Commission appointed an in-house panel to further reflect on these issues and prepare a position Paper on how this would be mainstreamed in the Draft Bill. That Paper was prepared and circulated to all Technical Working Committees.

On the question of Transitional and Consequential Arrangements, I had indicated in my report on Bomas I at Paragraph 89 that Transitional and Consequential Arrangements had been stood over for further debate pending the adoption of the substantive provisions of the Bill. Citing these notes, the Technical Working Committee on Transitional and Consequential Arrangements at first decided that their work would begin only after the Conference had resolved all issues presented to it by other Committees. The Committee resolved therefore that its members be dispatched to all other Committees until the final text of the Draft Bill was settled by the Conference. Later however, the Committee decided that there were a number of conceptual and operational issues which they would address even as the other Committees went on with their work. They decided therefore, that they would call for expert input on the principles which should guide orderly transition from the old to the new Constitution, the legal and social implications of transition and the financial implications of transition. Accordingly, a number of sessions on these issues were arranged before the Conference adjourned and as I will indicate later, however, other Committees went ahead and made decisions of a Transitional and consequential nature which the Committee will need to harmonize and analyse. That finishes with outstanding issues from Bomas I.

I now go to the question of the deliberations of Technical Working Committees. The core business of Bomas II was the consideration of the report on the Draft Bill presented by the Commission to the Conference during Bomas I. Clause 20 of the Constitution of Kenya Review National Constitutional Conference (Procedure) Regulations provides in part that upon

conclusion of the general debate, the Commission's report on the Draft Bill shall stand committed to the consideration stage which is made up of consideration by Technical Working Groups established under the Regulations and subsequent consideration by the Committee of the whole Conference as provided in those Regulations. At the consideration stage, therefore, the Conference is expected to do two things – one is to finish the work in Technical Working Committees and the second is to come to the Committee of the whole House to examine what those Committees have done.

Twelve Technical Working Committees were established by the Conference and later they became 13 when the Culture Committee was added to it. Now, Clause 49 (3) of the Regulations provides, among other things, that the Committees should consist of not more than 60 Delegates. Because of this limitation on numbers, it was necessary to devise a system which would ensure that various delegate categories were distributed as equitably and evenly across Committees as possible. Those Delegate categories are set out in section 27(2) of the Review Act i.e. members of the National Assembly, Delegates elected from districts, political party representatives and representatives elected or designated by Religious Organizations, Professional Bodies, Women's Organizations, Trade Unions, Non Governmental Organizations and other interest groups identified by the Commission.

The Conference dynamics, however, was rather different. Delegates tended to caucus along provincial, gender and religious lines rather than in terms of those statutory categories. Consequently, the Steering Committee decided that Delegates be organized essentially on a provincial basis and that coordinators be identified for purposes of assigning Delegates evenly to Committees. Several meetings were therefore organized at which provincial coordinators agreed on how the various Convenors of Committees would be identified and on the basis of these arrangements, a preliminary list of Committee memberships was circulated towards the close of Bomas I. But despite several revisions however, a number of Committees still had more than 60 members stipulated in Clause 49(3) and this and other matters relating to the establishment of Committees were therefore left for resolution during Bomas II.

The work of Technical Committees other than Committee M, was supposed to begin on August 25th 2003, but this was interrupted as I have indicated by unfortunate events of the two deaths I have already mentioned.

On resumption of proceedings on September 8th 2003, the Conference spend the day and the next days sorting out the issue membership of the Technical Working Committees which were left outstanding at Bomas I. In addition, a number of Delegates who complained that they had not been placed in Committees of their preference needed to be dealt with and at the direction of the Steering Committee, the matter was again referred for resolution to provincial Delegate caucuses and the coordinators of this caucuses subsequently met and provided the Rapporteur General with revised lists for each Technical Working Committee. That did not fully resolve the issue by September 9th 2003. Nonetheless, deliberations in Committees did commence in earnest on September 10th 2003 and the final list of membership – from where I said I regard the final list of membership of each Committee at the time of adjournment of the Conference on September 26th 2003 – will be found in Appendix B of the report I am presenting now.

Now the operation of those Committees consisted of a number of issues. One was the question of management of Committees, the second, the question of coordination of Committees; the third is the issue of progress and I want to take this as quickly as I can.

On the question of management, the Steering Committee had approved and circulated to all Delegates a set of guidelines intended to assist Working Committees in the speedy processing of issues falling within their various mandates. An important aspect to the guidelines was devoted to management and coordination. All Technical Working Committees operated under the management of a Convenor appointed by the Conference and one or two Rapporteurs appointed by the Commission. The Committees were also assigned an Assistant Program Officer, a Clerk, a verbatim recorder and, except in a few cases, a Draftsperson. In addition, they had access to expert advisers on any matter for which clarification was required.

The powers of the Convenors were set out very clearly in the guidelines. So were the duties of Rapporteurs in those Committees. The guidelines also indicated how resource persons were to

be sourced by those Committees and the extent to which they could be used in the elaboration of issues before those Committees.

In terms of human resources therefore, it is my view that the Committees were clearly well - supplied. What was not done was to organize these personnel into an effective bureau capable of effectively managing the agenda and deliberations of Committees. Besides, Committees were not provided with facilities other than a meeting tent for use by management personnel in negotiations, mediation and review of daily proceedings or conflict resolution outside the formal proceedings. The pace at which Committees worked and the accuracy with which their deliberations were recorded, depended to no small extent on the failure of the Commission to foresee these necessities. And I might add at this stage that the Commissioners have since discussed some of these problems and improvements have been put in place. The work of Committees was to be coordinated at two principle levels. At the first level, the Rapporteur General issued a daily journal containing a summary of the business of each Committee for the previous day and the agenda for that day.

The purpose of the journal was not merely to record the work of Committees on day-to-day basis but also to inform Delegates who may have wished to follow deliberations on particular issues by Committees to which they did not belong. To be able to do so and to facilitate such attendance, the Steering Committee gave authority to Convenors to accept contributions by non-members within the first hour of Committee deliberations. The Second level of coordination was in terms of daily evening meetings of Convenors, Rapporteurs, the Rapporteur General and the Chairperson of the Conference. The purpose of these meetings was to review issues covered during the days deliberations, provide guidance on how cross-cutting issues should be dealt with, rationalize the consideration of overlapping issues and to resolve any conflicts arising from the work of the Committees.

These meetings were supplemented by daily returns from the clerks and programme assistants which were attached to each Committee and it was on the basis of this data that the Rapporteur General's Journal was drawn. Experience during Bomas II indicates that these coordination mechanisms were not adequate. It is doubtful whether most Delegates made full use of the information contained in the Rapporteur General's journal. There was no evidence for example

that Delegates moving from Committee to Committee were attracted by matters highlighted in the Journals for that day. Further, the evening meetings between Convenors, Rapporteurs, the Rapporteur General and the Chairperson of the Conference operated more as a reporting session than a coordination forum. Convenors and Rapporteurs tended to leave the meetings as soon as their respective daily reports were taken. As a result, no serious discussions were possible on those reports. It is also the case that crosscutting issues requiring harmonization or negotiations across Committees were not often flagged out or considered. Bomas III must therefore address the question of coordination on the work of Committees with the seriousness which it deserves.

On the question of progress made in Committees, my report wishes to consider this under five heads. First were procedural problems, the second are operational problems, thirdly the management of contentious issues, four the deferment of certain issues and I have also provided a Committee by Committee analysis of the progress.

On the question of procedure, the guidelines which were issued to Technical Committees had indicate clearly that deliberations needed to conform to clauses 20 and 45 of the regulations. And, these clauses require Committees to consider and where necessary make amendments to the contents of the report and, or, the Draft Bill. They also expect Committees to confine themselves to the subject matter referred to them by the Conference, to seek consensus if a vote is called on any matter and as far as possible to conduct business in accordance with the second schedule of the regulations. In practice, there were not surprisingly significant variations from Committee to Committee in the interpretation and operation of that regulation. While a few Committees went directly to an Article-by-Article consideration of the Draft Bill others chose to first debate or disuses all provisions of the Draft bill falling within their mandate before making decisions on an Article-by-Article basis. Yet, other Committees decided to first debate the reports before considering the relevant provisions of the Draft Bill. There were also Committees who used the period devoted to general comments on the Draft Articles scheduled for discussion each day before getting on to the appropriate work of their own Committees. A number of reasons account for these variations in procedure and this include the following;-

One, there was confusion on how to deal with the report in relation to the Draft Bill. Secondly, there were difficulties in applying the provisions of the second schedule to the regulations.

Thirdly, when and for what purposes input from experts should be requisitioned was not always clearly understood by Committees. Finally, there was inability by some Convenors and Rapporteurs to guide Committees properly.

Although the Review Act of the regulations require Committees to debate, amend and adopt both the report and the Draft Bill, many Committees found this unproductive in relation to the report because the reports in essence is the Commission's assessment of the views of Kenyans as required by the Act and therefore the report cannot logically be amended without fresh collection of public views. Consequently, most Committees decided and in my view correctly so, that unless there was patent errors on the face of the Chapters relevant to their specific mandates, they would use the report primarily to evaluate the technical prescriptions contained in the Draft Bill. There may be need therefore to advice all Committees to take that position. That is, that the report should be used to evaluate the Draft Bill because amending the report implies supplying data, which cannot be supplied at this stage.

The Technical procedures that are set out in the second schedule of the regulations are drawn from parliamentary practice. Whereas this may have worked well with parliament, many Delegates found them complex, repetitive and boring. Besides, there were complaints that Delegates who are used to these procedures were taking advantage of them to frustrate contribution by other Delegates, and because no properly training was accorded to Convenors, Rapporteurs and clerks on the application of these procedures before the commencement of Bomas II, these Committee managers were often as handicapped as the Delegates were. A short training session convened at Lenana Mount Hotel did not fully rectify this difficulty. The general feeling was, that the second schedule should be simplified with a view to making it user friendly to all Delegates.

Under Clause 45 (5) of the regulations, Committees may invite experts to make specialized presentation before them or to provide other information or documentation they may require. Pursuant to Clause 47(2) of the regulations, a panel of experts had been approved by the Commission and the Steering Committee of the Conference for this purpose. The guidelines issued to Committees on the use of experts had stated clearly that they should not participate in the work of any Committee beyond the specific matter in the space for, which their intervention

was required. In practice however, rather than source experts or consultants from the approved list, Committees often generated their own experts. The reason for which experts were summoned were not always properly defined, a good number of such so called experts appeared to have come essentially to prosecute partisan views or positions and no record of contents of presentations made by experts appear to have been kept by Committees which used them.

The rationale of regulation 47(2) of the regulations, is to enable the Conference and its Committees to obtain advise on specific issues pertaining to their work and to assist Delegates on Committees on the preparation of such technical briefs as would enable arrive at sound decisions, on the Report and Draft Bill. Experts may not therefore second-guess the public or the Commission by offering alternative views. Consequently, there is need for caution in the use of expert at Bomas III. A limited number of Delegates and I want to stress a limited number, thought that their Convenors or Rapporteurs were not giving them firm guidance in their respective Committees. In the initial stages of deliberations, confusion was reported in respect of various roles of Convenors, the survey Rapporteurs and Programme Officers vis a vis the Clerks who were attached to those Committees and that tended to slow down the work of Committees. It should be understood that the regulations and the guidelines place the control and the management of Committees primarily on Convenors.

I now come to what I am calling operational problems that beset Bomas II. In addition to those procedural issues which I have set out above, all the Committees at one stage or another were beset by a number of operational problems among which were; Firstly, tardiness in the commencement of proceedings, intermittent lack of quorum during proceedings, frequent adjournments, artificial or engineered stalemates, ineffective use of available documentation and poor record keeping. These questions, I have in my report made detailed assessments why this was the case.

On the question of tardiness in the commencement of proceedings, the primary reason seems to have been inability to realize quorum at the time Committees were supposed to start work, which was normally 8:30 a.m and that was often exacerbated by the decision of the Steering Committee to permit Delegates to visit other Committees within the first hour of commencement of proceedings. As a result, the majority of Committees were not able to commence substantive

work until after 9:30 a.m on each day. It was therefore not unusual for some Committees to start deliberations without an initial quorum.

However, once deliberations were underway, some Committees were unable to maintain quorum due to other factors. Among them, the tendency by some Delegates to flood certain Committees when so called sensitive issues were on the agenda. Secondly, persistent exits or absence of many non resident Delegates from these Committees, thirdly caucusing by Delegates outside Committee tents rather than sitting in their tents discussing their mandates and finally technical appearance by certain categories of Delegates. Since nearly all Committees suffered from these problems, it will require careful monitoring in order to protect the integrity of decisions made by Committees. Convenors are therefore advised to ensure at the very minimum, that decisions on any aspect on the Report of the Draft Bill are taken only when Committees are quorate.

Frequent adjournments, was a common feature although in relatively very few Committees, there does not appear to have been very compelling reasons for some of these adjournments and the fact that this were purportedly being taken under Clause 17, could lead to procedural abuses. Convenors should therefore accept Motions of adjournments with caution.

Proceedings of some Committees were often disrupted by stalemates engineered by some Delegates through a number of tactics, including protracted debates and filibustering over very minor issues, diversionary discourses and side shows, mistrust and suspicions between certain Delegates categories individuals and deliberate attempts in some cases to derail Committee proceedings. These are impediments again which Convenors with the assistance of Rapporteurs will need to look out for and to resolve.

There were a number of Committees which reported that some Delegates were not able to make effective use of documentation provided by the Commission. Quite often issues being raised by some Delegates were taken care of in these documents implying therefore, that these were not being carefully scrutinized. Besides, some Delegates wanted new documentation requisition for purposes of second-guessing the Commission's formulation of specific proposals. Other Delegates thought that the documents are too voluminous to be carried or consulted on a day to

day bases. An effective way of dealing with this problem may well be that the Convenors and the Rapporteurs must be proactive in guiding Delegates through relevant documentation. Although the guidelines, which were, circulated set out clearly how proceedings should be recorded, this was followed in very few instances. There was a great deal of variation in the format, substantive content and languages in which daily reports and Minutes of Committees were presented, and the lack of uniformity in this regard and more importantly the use of ambiguous terminology and inconsistency in the use of the terminology both within each Committee and across Committees, mean that these reports must be read with a great deal of caution.

Indeed, it is difficult in many cases to determine with great deal of certainty the exact decisions that were made by Committees with respect to various Chapters and Articles. The need for uniformity of procedure in Committees and the language of reporting cannot therefore be over emphasized. Attention of reporters, Rapporteurs and clerks has been drawn to this problem.

On the management of contentious issues, we had indicated on the report on Bomas I that there had been a number of contentious issues which were carried over for resolution by Technical Working Committees. Among these, I am not saying this are the only ones, among these were the question of the structure of the Executive branch of government, the structure of the Legislature, the mechanisms for holding legislatures accountable to the electorate, the inclusion of the Kadhis courts in the Constitution, the corpus of Kenyan law and the framework for the devolution of power. The only comment I want to make on this, is that what made these issues contentious was not so much the propriety of the Constitutional value or proposals that were made in the Draft Bill, but rather their implications and consequences in contemporary Kenyan politics. For example, some Delegates were clearly apprehensive about the radical changes proposed in the Draft regarding the overall system of government that is, the Legislature, the Executive and the Judiciary since these had profound implications for existing power arrangements. Others were unable to extricate themselves from deep-seated cultural and religious loyalties when it came to debate on the corpus of the Kenyan law or the structure of the courts. The debate on the Kadhis courts for example, drew partisan loyalties from all religious sectors.

It was also rather obvious to me that the debate on proposals for restructure of the Legislature and the role of legislators was more often hampered by the fears and lose of status and privileges currently enjoyed by sitting members of parliament than by strict Constitutional principals. Clearly, attention to these concerns is inevitable and not in the least surprising because after all, we are dealing with a highly political process. However, it seems to me that many of these issues could have been managed with far less acrimony by the Delegates if we had made a separation between the constitutional value of those proposals and the transitional issues that will have to be dealt with once the Constitution is enacted.

Therefore, part of the problem that arose in the Committee on the Executive was basically a debate about existing power arrangements rather than the merits and demerits of the structure proposed by the Commission and the same goes with the question of the Legislature. On the issue as to whether the Kadhis courts should be in the Constitution, I think considerable progress has been made in Committee 'E' after an extremely partisan debate by protagonists on either sides. The implication of the decision of that Committee was basically that we are moving towards approving the courts as they are in the current Constitution.

The question of the framework of devolution of powers, there was a lot of energy that went into the zoning of the country into viable economic and political units and although the Technical Working Committee 'G' accepted the principle, that the primary units of devolution should be smaller than Provinces but larger than Districts, there were a number issues that remained in contention. These include the absolute number of primary units of devolution, the structure of local government, urban and rural below those units. The governance structure for Nairobi and other special units if there are to be any, the relationship between primary units of devolution and other organs of government and especially the second chamber of parliament if that were to be accepted. The cost of devolution and the transitional arrangements for the operationalisation of a devolved system of government. These are issues which will require more specific attention at Bomas III. The Committee on Devolution however, was able to agree that there should be four levels of government, the national, the sub-national, the county and the location as had been proposed in the new Draft Chapter.

On the management of crosscutting issues, it was clear that in the course of their work, a number of Committees made decisions which had implications on the mandate of other Committees. These decisions will require harmonization and rationalization before proceedings move to consideration of the Draft Bill by the whole Conference. Decisions of cross-cutting, significance are generally of two kinds; namely those that arise from different perceptions of mandate over specific matters and those that are made within mandate but having substantive implications across various Committees. Bomas III will have to identify and pick out these issues and resolve them before they come to the floor of the Conference.

As a general rule, Technical Committees were required to work their way systematically through Articles of the Draft Bill which were assigned to them. However, for a variety of reason a number of Committees found it necessary to defer the conferment of certain issues comprising these Articles until subsequent Articles were resolved. Among the reasons for deferment include the need to obtain expert intervention on certain matters before Delegates could make informed decisions on them, consultations with other Committees in respect of matters in which there were potential or actual overlap, according Delegates time to review or re-think their positions on particular issues and the need to reorganize Articles and Clauses in a more rational or logical sequence. There were occasions however, where deferrals were inevitable because time had simply run out. I have indicated in my report the Articles or issues which were deferred for some or all of these reasons.

As regards the question of deferral of issues to facilitate requisitioning of expert interventions, the Committees were able to receive those inputs and to use them, to resolve them except perhaps Committee D which received tremendous amount expert input but still failed to resolve the question of the structure of the Executive. I must mention at this point therefore that because that Committee spent a lot of time debating, it is the only Committee that did not make decisions on any specific Article that was assigned to them.

On the Committee-by-Committee progress, I have indicated how far Committees went and let me just summarize this very quickly. Committee 'A' was assigned Articles 1 to 15; they were able to deal with Articles 1 to 9. Committee 'B' was given 16 to 75; they dealt with 16 to 39. Committee 'C' was 76 to 100; they dealt with 76 to 81. Committee 'D' was 148 to 183, they

made no decision on any Article. Committee 'E' was given 184 to 212, they dealt with 184 to 187. Committee 'F' was given 101 to 147, they dealt with 101 to 128. Committee 'G' has 213 to 231; they dealt with 213 to 218. Committee 'H' has 258 to 270 and 276 to 277, that Committee dealt with 258 to 270 and 276 to 277, they are yet to deal with 243 to 257 and 261 to 263. Committee 'I' had 271 to 275 they dealt with all those Articles so, one can say that that Committee finished its work (*clapping*). Committee 'J' was given 232 to 242 they dealt with 232 to 236. Committee 'K' on Constitutional Commissions was given 278 to 297, they dealt with 278 to 290 having seven more Articles to go. Committee 'L' on Transition considered no Article for reasons that I have already given and Committee 'M' was basically dealing with cross-cutting issues. My report has a detailed appendix on the decisions that those Committees made in respect to those Articles.

I therefore finish, by drawing what I call the road map for Bomas III. On resumption of the Conference at Bomas III which is where we are now, we should aim at dispensing not only with all the outstanding Technical Working Committee business, but also with the work of the Committee of the whole Conference including the formal adoption of the Draft Bill. For that to happen, we need to agree on a road map along the following lines.

First, the Rapporteurs in consultation of Convenors will ensure that an accurate interim report of decisions made in Bomas II is prepared and they have indeed been prepared. They are ready for review or approval when Bomas III reconvenes which we have done now, those reports will be available in your tents.

Number two, the Rapporteur's reports which are prepared as I have indicated above will need to be reviewed and consolidated for transmission to the Technical drafting team and the Technical drafting team, will then prepare new or amended drafts for further review by each Technical Working Committee. They will also be able to prepare supplementary questions where necessary for further consideration by Committees. They will then also be able to harmonize and consolidate the Draft Bill incorporating the Articles that are already considered by Committees. It is expected that as Committees work through Articles in their respective mandates, a corresponding new or revised Draft Bill will also emerge. In other words, as Committees look at

what they have done and agree and move forward there will also be a corresponding exercise to develop a comprehensive Draft Bill.

Thirdly, the Convenors whose responsibility it is to present Committee reports to the Committee of the whole Conference, are also expected to prepare reports consisting of a short narrative of the work of their respective Committees, a succinct analysis of all issues presented to and addressed by the Committees and a schedule of technical recommendations agreed to by the Committees, a schedule of formal Motions for amendment of the report of the Draft Bill agreed to by the Committee, any minority positions taken by members in the technical recommendations of the committees and any matter which the Committees would want the Conference to address or to resolve. The Convenor's reports therefore, will require to be very carefully prepared.

Fourth, I expect the Technical Committee on Transition and Consequential Arrangements will at Bomas III, begin to pick up issues that are relevant to its mandate as Committees work through them. I have already said that Committees are making decisions of a transition and consequential nature while that Technical Working Committee sits and claims that they have nothing to do. In this way the Committee can take preliminary positions of those issues as and when they are identified without waiting for a final Draft approved by the Conference. Failure to work alongside other Committees could lead to enormous logistical and management problems for that Committee and for the Conference as a whole at the end of Bomas III.

Number five, when the recommendations of all Committees including that of Transition have been considered and decisions therein made by the Committees of the whole Conference, the drafting team is expected to produce a final composite Draft Bill for formal adoption by the Conference. The Conference cannot adopt a Draft Bill without transitional arrangements attached to it because that is going to be important, we have to know not only what the new Constitution will look like but how it is going to be operationalised and therefore should the Transitional Committee not complete its work fairly close to the completion by other Committees, the formal adoption of the Draft Bill may be delayed and I do not think that is desirable.

