

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

**NATIONAL CONSTITUTIONAL CONFERENCE
(NCC)**

Verbatim Report of

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

ON

23.03.2004

CONSTITUTION OF KENYA REVIEW COMMISSION

NCC - PLENARY PROCEEDINGS HELD AT THE PLENARY HALL

BOMAS OF KENYA ON 23.03.2004

Present

Prof. Yash Pal Ghai	-	NCC Chair
PLO Lumumba	-	NCC Secretary
Hon. Delegate Koitamet Ole Kina	-	NCC Vice Chair
Hon. Delegate Sultana Fadhil	-	NCC Vice Chair
Hon. Delegate Bonaya Godana	-	NCC Vice Chair

In Attendance

Amos Wako	-	Attorney General
------------------	---	-------------------------

Secretariat Staff in attendance

Patricia Mwangi	-	Verbatim Recorder
Linah Amimo	-	Verbatim Recorder

The meeting started at 9.45 a.m with Prof. Yash Pal Ghai in the Chair.

Prof. Yash Pal Ghai: We now commence our proceedings. I welcome you all to this session. We are going, as usual, to start with prayers and I am going to ask Delegate Chemwey, Sheikh Ali Shee and Rihal to say prayers for us this morning. There will be the National Anthem, as usual, but I hope today you will all join in singing the National Anthem with the music. Thank you. (*Clapping*).

PLO Lumumba: Delegate Chemwey, you are to say prayers, please.

Hon. Delegate Sammy Chemwey: Let us pray. Our God and our Father in heaven, what a joy to come and stand before Your presence at the end of our time such as this. We lift our eyes to heaven and we say blessed be the name of our God, Jehovah, who alone is worthy of praise and honour and glory and adoration for unto him belongs all beings, belongs all things and to You we

acknowledge Almighty God, that without You, we can do nothing. Lord, You began with us, You have walked with us. The journey has been long. We have crossed the Red Sea with You. We fought battles in the wilderness. We have come to the brink of River Jordan. We are crossing oh Almighty God, aware that there are giants before us but comforted in Your words Almighty God that the Lord who began with us will walk with us to the end because You have said, “fear not, for I am with You unto the end of the world”.

What a Mighty God we serve. With You, all things are possible. Nothing is too hard and we can trust our faith in You today, Almighty God, that no machination, no amount of intimidation, no amount of infighting, no amount of dissuasion will take us away from the focus because Christ is our hope of glory and that Lord, we are focused on Him and our destiny is assured because our battles are not ours but they are fought of the Lord. Fight our enemies, Almighty God. Let them be confused and be caught in the net of their enmeshment, oh Jehovah. Grant that Jehovah Almighty God, Your people shall be victorious, oh Mighty God.

The people have cried and their cry has come to Your ears and You have come down to deliver them. What a Mighty God we serve, that even when You come down oh God, there are people with hard hearts. There are people that want to take us back to backslide but the Lord is on our side and You have encouraged us to say, “be strong and see the salvation of the hand of the living God” and this is what You are telling us today, that stand still and see the goodness of God. We will wait upon You oh Jehovah, because You are our God, You are our salvation. You have been our Ebenezer and Jehovah You will continue with us.

You have provided counsel in times of need. You have provided direction in times of need. You have led us in the paths of righteousness. You have granted us hope in times of despair. You have been here Lord, when we needed You. In times when we were confused and did not know what to do, You became our hope. Halleluyah. We thank You today. We appreciate You Mighty God. We give You glory. Receive all the praise, oh God.

I want to thank You for every Delegate that was registered here, Almighty God. We remember that the army of Israel began together but there were some that were backsliders but Lord You dealt with them Yourself. But there were those You brought to the end, oh Jehovah. These are

Your people standing before thee this day and they are acknowledging that the Lord has been with us this far. We give You praise, we give You thanks, be glorified Lord. Halleluyah.

This morning Almighty God, we want to thank You for the Chairman. We want to thank You for those that have assisted our Vice Chairmen. We want to thank You for the Secretariat. We thank You for Lumumba, Almighty God. We give You praise for the Commissioners, for each one of them Almighty Redeemer. We thank You for every Delegate, You have named them and we give You thanks. We appreciate Lord, that as You engrave their names in the palm of Your hand, You can look at them and say, "Yea, I can number the days of Your life and I know who You are and I call You by name" and because You are God who knows the numbers of our hairs, who is hid in Your presence?

This morning I pray, Almighty God, that You will grant us that we shall be resolute in what the Lord has granted to do and to perform that we bring glory to Your name and the people of Kenya shall rejoice because they are looking to us today. They desire Almighty God that they who are sent to war shall fight valiantly, they shall be men of courage, they shall be men of hope, that as we go from here oh God, we shall carry a message of hope that the Lord is on our side. Fear not. If the Lord brought us, what are the giants before us? They will dissipate before our Mighty God, as we wage war against them.

So, Lord, thank You for today. Thank You for the Government that has given us peace. We have worked as we continue under their leadership, Lord. I pray today for wisdom. Blessed is the nation that feareth God and this is Your word, oh God. We want to pray for the President today. I want to ask that the wisdom of God will prevail upon him and that the grace of God will be upon him and the counsellors around him will be counsellors of good and not of evil because Lord You have said that the King who is surrounded by counsellors that are of wise counsel shall be blessed, Halleluyah. We ask that that wisdom shall prevail in their counsel, oh God.

We thank You today that as we come to the conclusion, oh God, grant us that we shall walk out of here saying, "Yea, it was good that You brought us together, that Yea You have bonded us as a nation, oh God", that the small isms that have been there will not create fissures that will destroy this nation but will be a reason for us to desire to be one even forever more that out of this Constitution, Almighty God, a nation that is great and mighty upon this land shall be born

and the day shall come Lord, when others shall look to us and say, “we will go to Kenya and get an example from them” because God, You have raised us, that we may be a beacon and we may be a light in Africa and to the entire world. Be glorified, be exalted forever, for we pray in Jesus’ Name, Amen.

Hon. Delegate Sheikh Ali Shee: *Bismillahi Rahman Rahim. Kwa jina lako muumbaji wa mbingu na ardi na viumbe vyote vilivyoko kwenye mbingu na ardhi. Mola Mkarimu, Mtukufu, tuko mbele yako tukitoa shukrani zetu kwako kwa kutulinda na kutupa hekima na busara na uwezo wa kufanya kazi ambayo ilikuwa ngumu mbele yetu, lakini kazi hii tumeweza kuimaliza kwa sababu ya wewe kuwa pamoja na sisi.*

Mola, shukrani zetu kwako hazina mfano wala hazina kipimo kwa sababu umetufanyia mengi ambayo yametuwzesha kufika hapa tulipofika. Mola, ni mengi ambayo tumekuwa nayo katika fungamano hili, mvutano hapa na pale, shetani na wasi wasi wake ameingia lakini mwishowe tumemshinda shetani na wananchi wa Kenya wamekuwa katika hali iliyo bora. Tunajua shetani ataendelea na kazi yake, wala hata koma, lakini tunajua sisi tunakutegemea Wewe, nguvu za shetani zimalizike kama vile zilivyomalizika tukaweza kumaliza kazi hii kwa njia iliyo bora.

Mola, tupe nguvu tuweze kuulinda Katiba ambayo tumeitolea majasho, tumeisumbukia mchana na usiku. Mola, tupe nguvu tuilinde baada ya kuondoka hapa kwenye Boma ya Kenya. Mola, ni Wewe tu peke yako ambaye utaweza kuulinda taifa hili liepuke na mvutano wa ukabila, mvutano ambao shetani yuko kati anasukuma kwa nguvu, ili wananchi wa nchi hii wapate kupigana na kumwaga damu. Ewe Mola tulinde na ushetani huo na uwalinde ndugu zetu wote wale ambao wamejitenga na sisi, waje na sisi ili tuweze kulijenga taifa hili na kuenda mbele.

Tunatoa shukrani kwa Commissioners wote ambao wamefanya kazi ngumu na kusumbuliwa hapa na pale. Frustrations nyingi ambazo wamekuwa nazo, lakini uvumilivu ambao wamekuwa nao kwa sababu ya busara ambazo ulizowapa na uwezo ambao uliowapa wa kuvumilia, wameweza kuwa na Wajumbe mpaka dakika hii ya mwisho. Mola, umpe nguvu Mwenyekiti wetu, Chairman wetu ambaye amekuwa katika hali ngumu mpaka kufikia hapa alipofikia. Na Wajumbe wetu wote ambao wako hapa Ewe Mola, wamekuwa na kazi ngumu, frustrations nyingi hapa na pale, lakini nguvu ambazo ulizowapa, waliweza kuvumilia na kufikia hapo walipofikia.

Mola, endelea kulinda taifa hili. Tukiondoka hapa utupe nguvu zaidi, tuweze kulinda taifa hili letu liwe taifa bora na Katiba hii iwe ni Katiba bora ambayo itaigizwa katika Bara la Afrika nzima ili Kenya iongoze, iwe ni taifa bora katika Bara la Afrika. Mola linda nchi hii. Walinde wananchi wetu, utupe baraka, ubariki nchi hii mpaka siku ile ambayo tutaondoka na kumalizika wanadamu wote katika ulimwengu. Tubariki Ewe Mola wetu, Amin.

Hon. Delegate Baldip Rihal: *Ek Onkar Satnam!* 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 one nation but the God of Grace. Oh Supreme God, we thank thee that the National Constitutional Conference that was entrusted with the task of drafting and adopting a new Constitution for Kenya is completing its task this morning.

Delegates to the Conference from all sectors of Kenyan society have worked tirelessly and with devotion to complete the monumental task entrusted to them. Oh Supreme God, the object and purpose of the review of the Constitution is to guarantee peace, national unity and integrity of the Republic of Kenya by establishing a free and democratic system of Government that enshrines good governance, constitutionalism, the rule of law, human rights and gender equality.

Oh merciful Lord, majority of the Delegates present here this morning feel that they have achieved the objectives of the review and hope that the country will be run in a democratic and transparent manner for the well being of all communities of Kenya. Oh Supreme Lord, some Delegates are unhappy with the changes that will come with the new order. Their egoism and bondage to power is hampering human understanding. Their egoism and self concern is creating a wall around them and separating them from reality.

Oh Supreme Lord, we pray You remove their spiritual blindness and show them light. We pray Almighty God to give President Kibaki the wisdom, good counsel to make wise decisions that will keep Kenya a united and stable nation. Oh God, give us light, give us understanding so that we know what pleaseth thee. May all mankind prosper by Thy grace. Oh Supreme Lord, we pray for Your mercy and blessings on all people of this nation. *Waheguru Ji Ka Khalsa, Waheguru Ji Ka Fateh.*

(The National Anthem is played).

(Clapping).

Prof. Yash Pal Ghai: Honourable Delegates, please take your seats. *(Noise)*. Honourable Delegates, Observers, Distinguished Guests, Ladies and Gentlemen. Today we come to the end of the most critical phase of the Review of the Constitution. The National Constitutional Conference is the body charged with the adoption of the new Constitution. On 15th of May, the Conference, voting by two-thirds of the members present and voting, adopted all the Articles of the Constitution. *(Clapping)*. The refined text of these decisions, including the corrections made yesterday, are now tabled and I will later formally ask you to endorse this document.

Through its text, the people have spoken. *(Clapping)*. Many Kenyans have made sacrifices, some of limbs and lives in their attempt to give us a better instrument of governance. These people were driven by the love of the country and the passion for social justice and the dignity of individuals and of communities. Their long struggle for Constitutional Reform has now borne fruit. *(Clapping)*. However, since some persons goaded by powerful state officials are bent on scuttling the Review Process in various ways including through the courts, it is necessary to remind ourselves of the background to the reform movement. Very briefly, the background lies in a history of the last forty years, in the dismantling of freedom and democracy following independence. The establishment over one party rule. Enactment of draconian laws like preventive detention and the intimidation of those who dare to criticize the Government, like our friend Shikuku here. *(Clapping)*.

The emergence of a highly personalized system of rule, with heavy reliance on patronage, the corruption and the plunder of the State, the decline of the rule of law, the transformation of the police from being protectors of the people to becoming their oppressors. The subordination of the Judiciary to the Executive. The marginalization of social roots and communities and the sufferings of extreme poverty. In this environment it became irrelevant whether the elect of the President was based on legal authority or not. Presidential word substituted for the law. Predictability, which depends on clear rules of law became dependent on the ability to read the whims of the President. There was massive misappropriation of State resources, unbelievable greed in which the concerns of the nation, of present and future generations, was sacrificed to personal accumulation.

The Democratic Party and the National Alliance of Kenya, speaking in the year 2000 to the CKRC, through the then Shadow Attorney General, who is now the Minister of Justice, correctly diagnosed our Constitution melody when he said that the fundamental cause of our difficulties was an imperial Presidency, above the law. *(Clapping)*. The institutions of the government and the economy decayed under the shadow of a powerful President and its inner circle. Power was centralized at the national level, principally in the hands of the President. There was no effective separation of powers. Parliament became ineffective. There were few institutions for accountability and such institutions as existed, like the Auditor General, were rendered toothless. There was no easy access to public service or other state agencies. Merit as a criteria for appointment or promotion was replaced by political or ethnic connections for monetary payments. There was a sharp decline in economy and the breakdown of the infrastructure. Decreasing levels of production and exports. Illegal acquisitions of huge tracts of land without productivity and massive unemployment. People increasingly lost access to the most basic necessities of life, their lives scourged by poverty, while a few lived in unimaginable affluence.

Guarantees of the security of person and of business disappeared. Consequently, there was a massive retreat from public life and inward lookingness, the lack of openness and trust, pervasive fear, that drove many into exile. The movement for reform was a response to this state of affairs. The arbitrariness of the exercise of state power, the refusal of the Government to respect limits on its power or authority. The disregard of the rights of people. The absence of checks and balances and the consequent lack of the separation of powers. The movement took the form of Constitutional Reform because the problems of the country were seen to arise from bad and oppressive governance and the lack of respect for constitutionalism, symbolized by the overwhelming powers of the Presidency. The process which the people adopted for the review and reform of the Constitution was heavy, now call it “people driven”. This meant no more than the primary agent of reform would be the people not Parliament, which people trusted little. *(Clapping)*.

So the process was designed to give a central role to the people at all stages of the process and this Conference was constituted to represent the people, for the purposes of final scrutiny and the adoption of the recommendations for the new Constitution. A Constitution is many things. First and foremost, it is a manifestation of the sovereignty of the people. The Review Process has given voice to all Kenyans, including groups hitherto ignored in public discourse and organs of

state; women, religious minorities, the disabled, pastoralists, forest people and hunters and gatherers. The exercise of the sovereignty of the people is the compact and agreement amongst them, on how the country will be governed. It is not, as is frequently stated, a compact between the rulers and the ruled. The rulers remain always, subject to the ultimate authority of the people. The Draft Constitution represents the first time in Kenya's pre or post colonial history, that the people have designed and adopted such a compact. It reflects the widest consensus among them on the values by which they want to live and the institutions and the procedures for the achievement of these values.

The Draft Constitution that we now have is a negotiated instrument, to extensive consultations with all the communities and people of our country and the intense and protected negotiations in Bomas. It provides a basis for the co-existence of the people and shows us the way forward for us, as a people and as a state. Let us seize, consolidate and build on this consensus. Let no one be deluded by the petty but expensive squabbles among political factions, into thinking that the Draft Constitution does not represent the National Consensus. (*Clapping*). The task of the CKRC, in preparing the original Draft Constitution, was easy precisely because there were such a high degree of unanimity on the Constitution for way forward as expressed to us during the consultation period. Professional, gender and other social groups gave us very similar proposals and so did the political parties. I would venture to say that over ninety percent of the Draft Constitution reproduces proposals made to us by KANU, LDP on the one hand and the various parties that constituted NARC. These fox squabbles among the political factions have little to do with fundamental values or problems of the nation. (*Clapping*). They represent no principle discourse on vital issues, like the future of our society or economy or the myriad choices on policy. For example about agriculture, industry, education, social justice, the relief of poverty or the challenges facing a multi-ethnic and diverse people.

The squabbles are about power without purpose or responsibility (*clapping*) and thus have little to do with constitutional engineering. People, fortunately and the Delegates here, have been able to rise above these petty pre-occupations and have developed a nation consensus on our values and approaches which we have tried to reflect in the Draft Constitution. That surely, is the way forward for this country. (*Clapping*). And note the purpose of a Constitution is to delineate its vision of the country, or the people's vision of the country and a statement of the values of the people. Kenyans and foreigners alike have observed how Kenyans have lost a sense of their

identity, particularly their national identity and the sense of the common national purpose. Kenya is like a ship without a chart or a radar, lurching from one crisis to another.

The starting point in designing the Constitution was thus to define our collective and individual identities. This in turn depended on the choice of values. What is the vision of Kenya that is manifested in the Draft Constitution? The Draft Constitution envisages a public which is at peace with itself and its neighbours. The welfare of the people is its primary goal. This goal is to be attained through national unity and consensual basis of authority and decision-making. However, the concept of the welfare of the people does not mean that people are passive recipients of state largesse.

Kenyans are no longer subjects dominated to external authorities but citizens who control their own destiny (*Clapping*). They control their destiny and organize state and society through the values and procedures of democracy. The democracy through which Kenyans decide their destiny is not majoritarianism, the democracy arises from and protects the rights of individuals and communities. Rights constitute the fundamentals of democracy because it protects the legitimate space of the autonomy of individuals and communities and compels the state to respect basic entitlements and procedures. Nor is it a democracy envisaged in the Draft Constitution merely representative in which people wake up to vote every five years and then become powerless and go back to sleep. Instead, it envisages (*Clapping*) our citizenry actively engaged in public affairs. Citizens participate continuously in the governance of the country through the devolution and exercise of power. They keep a constant vigil over those who claim to act on their behalf, politicians and government. It is a democracy in which the free exchange of ideas is actively promoted particularly by giving people information and resources.

The Draft Constitution also has a vision of Kenya as a Nation of great diversity, ethnic origins, religion, culture, traditions and geography, living in peace and harmony. The Preamble of the Constitution says that we must respect and cherish this diversity for we are the richer as a result of diversity. Recommendation of this diversity is not easy, total recognition of diversity in all its manifestations will make us a patch work of its communities, not a Nation, but little to hold us together and of values of procedures to mediate relations between communities. Yet to force us all into a common mold is to deny individuals and communities the deepest impulses that define their identity and to lay the foundations of conflict.

The Draft has struck in my view a balance assisted by a core set of National Values and aspirations without unnecessarily jeopardizing the legitimate interest of minorities. It was evident to the Commission as it toured the country and people in all Provinces that they do subscribe to a common core of values, and that the differences between the various communities pose no threat to our unity of common purpose, especially when the differences can be accommodated in various ways as the Draft does. It is this frame work which has been used to resolve the controversy about Kadhi Courts and the limited application of Sheria to Muslims and many other inter-community and inter-regional issues.

Another component of the vision of the Country that the Draft reflects is that our caring society in which the basic needs of all its members are provided for. That is no reason why any Kenyan should be without shelter or go hungry or be deprived of opportunities of education and employment. *(Clapping)*. Society bears special responsibilities for the welfare of its vulnerable members; the aged, the children, the disabled and women. Through the Draft, Kenyans have committed themselves to an equitable framework for economic growth and equitable access to national resources in which the basic needs of Kenyans will be met. I believe this formula captures very well the nature of our obligations to the disadvantaged. It is not charity that the disadvantaged ask of us but fair policies and opportunities. The enormous disparities that exist in our society between the rich and the poor, the privileged and the disadvantaged, are not the natural order of things. They are man-made by the plunder of state and communal resources and by policies, *(Clapping)* that favour particular groups and classes.

Kenyans want, and the Draft will give them the proper and honest management of our national resources and they want equal opportunities for all. *(Clapping)*. They want a caring, humane and just society. No country can be proud of itself if over sixty percent of people suffer in extreme poverty while the ten percent live in great affluence. *(Clapping)*. The notion of a caring society in the Draft extends beyond our present predicaments and extends to their concern for future generations. The Draft constitution seeks to promote sustainable development and the conservation of the environment.

We also have a vision in the Draft of Kenya as a responsible member of Africa and the International Community. We want to play a proper role in the emerging global politics and

institutions. We want to promote and facilitate regional and international cooperation to ensure economic development, peace and stability and to support democracy and human rights and this role is spelt out in the Draft Constitution.

In developing our vision and values the Conference has been guided by our African Culture and Traditions. In the support of Culture and Traditions, it is mandated in the Draft Constitution, which lists the goals to be achieved, and sets up a Commission for the conservation and development of various aspects of our Culture and our Arts.

The Draft also places special obligations on the State to promote local languages. Thus there is a great deal that unites Kenyans in the views on where the Nation is now, and what went wrong in the past and what the future should be. We have emphatically rejected the reality of Kenya, as they perceive it now; corrupt, uncaring, exclusionary, numerous communities held in contempt and mired in poverty. People want a Kenya which respects human dignity and shows social justices, provides for the disabled, does not marginalize communities or minorities, has proper respect for the cultural groups who want to preserve their traditional lifestyles and treats nature with greater consideration of present and future generations. People want more control over decisions which affect the lives and they want government brought closer to them. They want leaders who are honest, responsive and accountable. The Draft Constitution reflects all these concerns and aspirations.

The Constitution is also a legal instrument. The fundamental law of the Country which governs the validity of all other laws, regulations and policies. The drafting task was one of ensuring that the document met high standards of legal technique and accuracy. With the help of our distinguished and able Drafting Team, we have been able to do so.

We have been mindful of the fact that every comma, every word, indeed every comma may become the subject of interpretation and even litigation. At the same time in a people centered democracy, the ordinary people must be able to read and understand the Constitution without the help of lawyers. We have therefore drafted the Constitution in as simple language as possible avoiding legal jargon throughout the document. This need to meet these two objectives of accuracy and accessibility means that not all the words, formulations and procedures in the Conference's decisions have been retained. However, I can assure you that all the policy issues

have been preserved. The search for precision however, has not resulted in the elimination of all poetry from the Draft Constitution. We have many wriggling statements and aspirations and have tried to manifest the will of the people and the direction of change through broad principles.

Let me give you an example, the Chapter on Leadership and Integrity, in describing the responsibilities of leaders says, “that holding a state or public Office, vests the Officer with the obligation to serve the people rather than the power to rule them.” (*Clapping*). With the view, towards the easy accessibility of all Kenyans to the Constitution, we shall soon be publishing a Kiswahili version of the Constitution. (*Clapping*).

Let me now briefly turn to specific aspects of the Draft Constitution: -

1. Structure of Government.

The Conference has been guided by the need to establish a system which respects democracy, the rule of law, the separation of powers and accountability. We propose to deal with the massive concentration of power in the national executive particularly, the President by three principal methods;

- Moving away from highly centralized Presidential system to one in which there is a Prime Minister, accountable to Parliament, but also a President with a high degree of moral legitimacy and a clearly defined role in maintaining constitutionalism. We do not intend to replace the imperial presidency with the Presidential Prime Minister. The disposal of National Executive powers principally between the President and the Prime Minister, seeks to provide a balance.
- The Devolution of Power to regions and districts with adequate guarantees of powers and resources.
- A number of controls over the exercise of Executive power at all levels.

We have proposed the strengthening of Legislative bodies, both by making them truly representative of all Kenyans and the Communities or Social Groups through where necessary

and appropriate separate representation for marginalized groups or Communities. And giving the Legislatures new instruments and resources to discharge their functions for participation and accountability.

The Draft requires that the composition of governments and organs of State should reflect National and local diversities. Devolution is central to the reorganization of State power. There are several provisions running through the Draft Constitution aimed at getting Devolution off the ground and sustaining it. Equally, there is a recognition that Devolution must be the due deliberation, due speed so that powers are transferred to low levels as governments at that level demonstrate the capacity to handle them. The Draft emphasizes corporative rather than adversarial relations among governments at different levels. It is impossible in modern times for democracy to operate with out without political parties. But, equally political parties must be organized and operate to strengthen national unity, practice internal democracy and be accountable, offer people choices, avoid violence and corruption. (*Clapping*).

The Draft sets out important principles for the governance of political parties. They will now come under a strict regime of control and accountability. In return they will receive state subsidies so that they can become more effective mechanisms of representation and policy formulation, moving away from the present preoccupations with ethnic and personal politics.

Accountability is central to the Draft Constitution as it was to the concerns of the people. Corruption is a major cause of our poverty of irrational decision-making and of sinicism about the government on the part of citizens. The Draft provides various mechanisms to fight corruption including a set principals, a kind of code and a powerful commission to implement and oversee these provisions.

The Draft Constitution seeks to set up an independent, impartial and competent judiciary. A framework under which the Judiciary would not be under pressure to collude with the Executive not to sell justice to the highest bidder. (*Clapping*).

We all know that in the past doors of the courts have been open to all only in the way the doors of the New Stanley Hotel are open to all. (*Clapping*). And unfortunately, that many of those

who had come to the courts do not come through the front entrance but obtain their judgments by backdoor methods. (*Clapping*).

The Draft opens the doors of justice to the poor and to the disadvantaged in many ways by setting up institutions to provide legal services to the poor and by expanding the scope of those who are entitled to come to court, the issues of the environment, constitutionalism, or human rights are concerned. And the appointment process has been strengthened better to ensure that people, the right people are appointed in the first place than to have to invoke dismissal procedures.

Prevention is better cure in other ways too. The machinery for the management of natural and financial resources has been greatly strengthened in the Draft. There is to be better control in advance of spending for example through the creation of the separate office of the Controller of Budget.

The nation budget process is to be more transparent and Parliament is to have a greater role in it. A number of independent Commissions are proposed both for accountability and to insulate sensitive tasks from partisan politics.

Notably among these, is the Ethics and Integrity Commission which has a role in appointments to other Commissions and bodies as well as being the Commission with the responsibility for codes of leadership and corruption investigation.

Civil Society has played a prominent role in the whole campaign for a new Constitution and in the process leading up to today. (*Clapping*). In response to the wishes of Kenyans, the draft Constitution lays emphasis on the need to involve civil society in decision-making and in holding public officials accountable.

At the heart of the Constitution lies the Bill of Rights. Politicians perhaps believe that the heart of a Constitution is the system of government. That part they hope will get them into power and not constraining them too much once they are there.

But for the people in the everyday lives, whether in interactions with officialdom or with each other, human dignity is a fundamental issue-- (*Clapping*) --and rights are the embodiment of human dignity. Dignity lies in being able to make ones own decisions, in being treated as a full member of society regardless of gender, disability, age, religion, ethnicity and other factors that are so often used to divide rather than unite people.

The deep dignity is equally impaired by having to live in a miserable house or drinking dirty water collected after a long trek with the bucket or being unable to learn to read. This often called economic, social and cultural rights have a central position in the Bill of Rights and they are not separated out or treated as mere aspirations. They constitute binding obligations on the State and on all of us.

The provisions about equality and non-discrimination are concerned with real equality, not just technical equality and we have all spent many hours in this Conference debating from directions that is something I am very proud of. (*Clapping*).

The Constitution makes provision for active achievements of equality for all including for members of marginalized communities and the disadvantaged and they are carefully and they are carefully thought out, educational and enforcement functions for the various bodies that are charged with making the rights a reality, notably the Commission on Human Rights and Administrative Justice and the Gender Commission.

It will no longer be possible to change the Constitution made by the people through the celebrate process without full prior consultation and in the case of important provisions, the consent of the people directly through Referenda. (*Clapping*).

Older Kenyans will remember only too well the Independence Constitution that was emasculated by an all too wiling Parliament. Therefore, an important area this Constitution will require a referendum and there is even an innovative provision for the popular initiatives to amend the Constitution.

I now come to the implementation and enforcement of the Constitution and I have often said in my academic statements that the word is a graveyard for excellent Constitution. It is easy to

make a good Constitution, very hard to implement it. Our Draft is innovative and aspirational looking to the future. It aims to change things, patterns of authority and the distribution of power in vested interests.

It is for these reasons that the Draft Constitution is likely to be resisted by the establishment. *(Clapping)*. Therefore, there is need for special attention to implementation. The Draft deals with these first, through a rather detailed transitional provisions, timetable is set out to achieve the change in an orderly but in a desirable, inevitable version.

Another important innovative is the establishment of the Commission on the implementation of the Constitution with the mandate to keep the process under constant review and the publicity, pressure and if by legal action, to ensure that transition happens and happens on time. *(Clapping)*.

Again this is something that will also require a constant vigilance of society. The most wonderful, protective and participatory mechanisms will achieve nothing if the people are not watching and not just watching but taking action when needed.

It is my great pleasure now to express my most heartfelt thanks. I fear that it is impossible to do justice to the enormous number of people who have contributed in so many ways. In a sense, I express these thanks from half of the people of Kenya. But the first thanks must go to those very people, for the courage, engagement and commitment. If I may be personal for a moment, it has been those qualities of Kenyans that have kept me going for the last three and a half years. *(Clapping)*. And I am sure this is also true of other people involved in the process, I have very great gratitude to the people. I must also thank, that cross-section of the people of Kenya, the Delegates to the NCC, or *watu wa Bomas*, for their great commitment in the face of great difficulties. I have already on earlier occasion expressed my great admiration of the Delegates and the wonderful contributions they have made to the development of the Draft Constitution.

To my fellow Commissioners of the CKRC and the Staff of the Commission I say, thank you very much and I have noted the great *(Clapping)* –work you have put in throughout the three years. *(Clapping)*. To the wide variety of consultants who had prepared papers and attending workshops, people who have come from Kenya and from a variety of other countries and they

have enriched our intellectual rich on the Constitution. To the donors who have paid for Airs, fares, and fees of Consultants, for Workshops, for Delegates, for publications and civic education and to the Bomas, management and Staff who have been welcoming and efficient. If an army matches on your stomach, a Constitution Conference must deliberate with satisfied stomachs and the contribution of Bomas caterers has been splendid. *(Clapping)*.

A special place is reserved for my thanks to the indefatigable Secretary to the Commission Patrick Lumumba or PLO, as you call him. *(Clapping)*.

When one says on occasions like this, that such and such could not have been achieved without the help of certain persons or people, it is often a formal word. Let me say that it is no formal words to say that without PLO, we would never have got anywhere near today. A splendid organizer, an excellent lawyer, a public face of the Commission in many situations, always able to speak fluently, forcefully and colorfully. Thank you, PLO. *(Clapping)*.

Now, let me conclude on the way forward. It seems to me that the way forward is very clearly defined and elaborated in the Review Act. The Conference has completed its mandate to scrutinize the documentation of the Commission to satisfy that our records represent the views of the people, to make sure that the Draft we prepared reflects the recommendations given to us by the various groups that addressed us and then to make sure that the document that you adopt does the same, that it reflects peoples views.

That Draft has been discharged and under the Review Act, the responsibility will soon pass to the Parliament to adopt this document. I will urge all those who are now concerned with the remaining task of the process to observe the procedure laid down in the Review Act. We believe in the rule of law, we have followed the Review Act in its latter and its spirit up to now and I believe it provides as a short guide for the conclusion of this Conference.

The Commission-- The CKRC met yesterday and resolved that the Commission has no authority to change the Draft that you have produced. *(Clapping)*. And I have no reason to believe that, that interpretation of the law will not be honoured by the Commission. It will be honoured and the Attorney General will receive formally from the Commission in a short while the document from us as an advance copy and in due course the Attorney General will receive the formal copy

fully in accordance with the Review Act. The Draft copy will enable the Attorney General to acquaint himself with the Draft and then when the final version will be given to him, he will have to move with speed to gazette it and table it in Parliament because that is what the Review Act provides. *(Clapping)*.

Let me say in closing, that the document that you have adopted is a good Constitution. I can say, it is a very good Constitution. *(Clapping)*. It represents an investment not only of money of which as we all know, it has been a considerable amount but more importantly of effort, of thought, of prayers, of hopes for the future. Visitors to this country have often commented that the people of this country are astonishingly well informed about, and interested in the whole constitutional question. To those who must now take over this task, I say, please do not let them down. *(Clapping)*. And you Delegates when you return to your homes can do that in good conscious, you have worked hard, diligently and you have made us all proud. Thank you. *(Clapping)*.

(Consultations at the “high” table).

PLO Lumumba: With the Chair’s permission, I now ask all of us holding our document as a way of formal endorsement, we can sing a song led by Kazungu as we for two minutes, Kazungu lead us in the song. *Twasema Asante, Kazungu.*

Hon. Delegate Kazungu: Okay. *(Leads in singing)*.

Prof. Yash Pal Ghai: The Vice Chairs of the Conference who have been of great assistance to me will now hand over the document to me symbolizing the transmission of the Constitution from the Conference to the Commission in accordance with the law.

The Vice Chairs; Hon. Delegate Bonaya Godana, Hon. Delegate Koitamet ole Kina and Hon. Delegate Fadhil Sultana handing over the document to the Chair.

(Chanting and clapping by the Honourable Delegates):

Prof. Yash Pal Ghai: Thank you very much indeed. Now, following the Act, I am going to give the Attorney General an advanced copy of the Constitution. The final version will be given to him in the very next few days. I have assured you that there will not be any change to the document that he receives in terms of the decisions that we have made. However, we also have to give the Attorney General a report of the Conference which is nearly complete and when the two documents are ready, they will be given to him. But I want to symbolize the passing of the responsibility to Parliament by handing him a copy now in front of you all.

(Applause and ululation by the Honourable Delegates)

(Consultations at the “High” table)

Prof. Yash Pal Ghai: Please sit down. The Honourable Attorney General would like to say a few words.

(Consultations at the “High” table)

Hon. Delegate Amos Wako: I pray. Silence. This is Amos Wako, Delegate number 575.

(Applause and ululation by the Honourable Delegates)

Hon. Delegate Amos Wako: Professor Yash Pal Ghai, Chairman of the National Constitutional Conference, Members of the National Constitution of Kenya Review Commission, Distinguished Delegates of the National Constitutional Conference, I wish first of all to thank you, Mr. Chairman, for giving me this opportunity to speak to my fellow Distinguished Delegates on this historic occasion--

(Clapping by the Honourable Delegates).

Hon. Delegate Amos Wako: --when the Draft Constitution Bill which was adopted by the National Constitutional Conference on Monday, 15th March, 2004 (*clapping*), is handed over to the Constitution of Kenya Review Commission. As you have rightly stated, this is to confirm that I have received this as an advanced copy. (*Clapping*) But I have also received it as a

member of the Constitution of Kenya Review Commission and as Delegate number 575 to the National Constitutional Conference. Indeed, all Delegates will be receiving, if they have not already received a copy of the Draft Bill and I can assure Delegates that there is nothing in the order that was obtained in the Court yesterday to stop (*applause and shouting by the Honourable Delegates*) Delegate number 575 from receiving this advance copy. (*Laughter*).

I congratulate all the Delegates to this National Constitutional Conference for having effectively discharged their mandate under the Constitution of Kenya Review Act. (*Clapping*).

As the Attorney General of the Republic of Kenya, (*Clapping*), I am conscious of my duty to promote, protect and uphold the rule of law (*Clapping*), and to defend the public interest (*Clapping*). My role in the next stage of the Constitutional Review process is clear. Section 28 of the Act provides, as you have rightly stated, that the Commission shall, on the basis of the decision of the people at the Referendum and Draft Bill as adopted by the National Constitutional Conference, prepare the final Report and Draft Bill.

The Commission shall then submit the final Report and the Draft Bill to the Attorney General for presentation to the National Assembly. (*Clapping*).

The next stage in the process is for the Constitution of Kenya Review Commission to draft and finalize the Draft Report and in terms of Section 28 (2) of the Act, the Commission will then submit the final Report and Draft Bill to the Attorney General and on the day they submit that final Report and the Draft Bill to the Attorney-General, the period of 14 days as stipulated under Section 28 (3) of the Act, will start to run. (*Clapping*).

I want to assure the Distinguished Delegates and Kenyans that when I receive the final Report and Draft Bill, the same will be dealt with in accordance with the law. (*Clapping*). And here I speak as the Attorney General and I speak as a Member of the Cabinet and repeat what His Excellency the President has stated and repeat and reiterate what His Excellency the Vice-President has stated, that the Government is fully committed to ensuring and facilitating the completion of this process in accordance with the law. (*Clapping*).

I therefore take this opportunity to appeal to all Kenyans and in particular to the Members of Parliament who are the elected representatives of the people and on whose shoulders the responsibility of the remaining phase of the Constitutional Review process falls, that they should adhere to the letter and spirit of a democratic and secure process for the Review of the Constitution as stipulated in the Third Schedule of the Act and in particular to recognize the importance of a national consensus that meets the aspirations of the people of Kenya. *(Clapping)*.

In particular, to avoid violence, threats of violence or other acts of provocation during the Review Process.

In particular, to desist from any political or administrative action that will adversely affect the operation or success of the Review process and with that, I am quite sure the Kenyans will have a new Constitution within and as pledged by the Government.

I thank you. *(Clapping)*

(Consultations at the “High” table).

Prof. Yash Pal Ghai: Thank you very much, Attorney General for the clarification of the legal position and we count on you to make sure that the Review Act is observed to its letter and spirit. Thank you very much.

We are now reaching the concluding stages of our meeting. I am going to-- I have been requested by Gitu wa Kahengeri to make a statement. Then we will have a vote of thanks from Dennis Akumu who is a veteran of Lancaster House. It is appropriate that he should give the vote of thanks and then our veteran expert on procedures, the Honourable Martin Shikuku, will move the Motion of adjournment. *(Clapping)*.

Hon. Delegate Gitu wa Kahengeri: *Nataka kusema ya kwamba wajumbe wa kongomano hili, wamefanya kazi ya kuunganisha watu wa nchi hii ambayo hawatakiwi, hata ni Mungu aliyetuumba kukwama katika juhudi hizo.*

Dear Honourable Delegates, I love to address you as leaders of our country Kenya. As an elderly man, I have set among you in this National Constitutional Conference from day one to the last day of the Conference. *(Clapping)*.

I wish to convey my gratitude, which I here do to all the Delegates, all the Commissioners, and all the support staff for all the sincere support you accorded me, which made my stay and participation in the Conference a success. I pray God that God bless you all that you maintain that spirit of helping one another, for each one of us is a condition to the others existence. Play your part; unite the people in the villages where you live. As a leader, never get tired to unite people. Never dare to disunite people for whatever purpose. Disunited people bring dangerous environment. The business of a leader is to lead by example, if there is anything beneficial to the people you need, you do not hold it at any time for yourself. Spread it to other people because knowledge as you know better than I do is power. The knowledge you have learnt from other persons is not your personal property. Spread it to your village and beyond. Our target is a united Kenya. *(Clapping)*.

In September 2003, my wife and I were thrown out of a city council house maliciously. We were grateful of the sincere sympathies, many of you personally expressed on seeing us in the newspapers in that disgraceful situation. We were reinstated into the same house by the Local Government's Minister's decisive order that he made in this Conference hall. We are very grateful to the Minister for this quick resolve of the matter. God bless you all that you safely reach your destinations. Thank you. *(Clapping)*.

PLO Lumumba: Honourable Dennis Akumu. Vote of thanks, Honourable Dennis Akumu.

Hon. Delegate Dennis Akumu: Yes, I may have changed attire. *(Laughter)*.

This is what we are advocating our cultural group should begin to make for our society. Of course, this was a gift from Cameroon. I want to thank you very, very sincerely Yash Pal Ghai. Thank you for your patience, you have been abused, intimidated, sometimes, I was worried that you might just walk away, this is because this was not a job, you have other jobs elsewhere, you could do better even elsewhere. Thank you for being patient and seeing this through. *(Clapping)*.

Prof. Yash Pal Ghai: Thank you.

Hon. Delegate Dennis Akumu: I also want to thank you PLO Lumumba, they may think you are short and small but your voice answered them very well and thank you. (*Clapping*).

Hon. Delegate Dennis Akumu: I want to thank your staff and everybody, they worked and they did everything. If this country has any morality after the adoption of this Conference, they are the people that should be decorated, given the highest honour that Kenya can give today. (*Clapping*). This, Chairman, in the greatest day I will be brief, for those who fought for independence and as Gitu Kahengeri has spoken, many would have really moved. People like Muliro, Ngala, Jaramogi and others and of course Kiano you were here with them, I am sure all of them will be in peace wherever they are resting with the ancestors to see this Constitution. I, myself, Bwana Attorney General do your best and keep your word. You have a repetition at the United Nation. Keep your word and table this in the Parliament. (*Clapping*).

I want to thank all the Delegates, the way you have acted, in spite of intimidation, attempt to induce you, to make life difficult for you and so on. Thank you very much all the Delegates. But more so also now that we are passing this to Members of Parliament, you have acted well, I am very happy with those who attended here, who never abused the Conference. But even those who did not join us, the child is now born, do not disown it. (*Clapping*).

The greatest chapter is where we were chased away; told Africans had no culture, that we were primitive from Lancaster. We now have a chapter on Culture. (*Clapping*). We have an *Utamaduni* day on the 26th December, the Boxing Day when the British people are opening boxes for gifts, ours would be a Cultural day. (*Clapping*).

Finally, please allow me, I think something that this Conference should do, to the living Lancaster and to the living Kapenguria. They are few. I am asking this Conference to ask Chairman, Yash Pal Ghai and PLO Lumumba to write a letter to these people on behalf of this Conference, to the living Lancaster. They are few.

1. Hon. J.B. Otiende.
2. Jeremiah Nyaga
3. Taiti arap Towett

4. Robert Matano
5. John Keen
6. Ngala Mwendwa and of course you may have forgotten,
7. Ole Temeno.

Among the living and of course, do not forget, you may not have – but he is, His Excellency Daniel Toroitich Arap Moi, former President. *(Clapping)*.

The living Kapenguria:

1. Ramogi Achieng Oneko
2. Bildad Kaggia and,
3. Paul Ngei.

Yours will be two, three lined letter. “We the Delegates to the National Constitutional Conference, very sincerely regret that due to circumstances beyond our control, we have not been able to invite you to witness the heroic adoption of this Constitution. *(Clapping)*. A Constitution which is Kenya people’s driven. Which was always your wishes, fought for, some of our people died for. While wishing you success and thanking you for your inspiration, all we can do, is to send you copies of this heroic document. May God bless you and give you long life.” *(Clapping)*.

We had planned this with an Observer in Lancaster like myself, Shikuku who is going to speak and Gitu Kahengeri, to (?) and stop our heroic people coming here to witness this. I want to thank you once again Chairman, I am very proud of this. That you are bequeathing to our youth a better Kenya and Attorney General please, do that for us. *(Clapping)*. God bless you all and when you go home, preach unity. Unity, that Kenya is a united nation. God bless you. *(Clapping)*.

Prof. Yash Pal Ghai: Thank you very much Mr. Okumu. There are a couple of announcements before Martin Shikuku adjourns the Conference. You notice that there are a number of certificates of appreciation, these are meant for the Delegates and please collect them when we adjourn. We are also giving certificates to journalists who have covered the events throughout the process. Sometimes dramatically, controversially but you had been a main link to the public, to Kenyans and we thank you most sincerely for the way in which you have performed your task. You will receive your certificates at the Press control office, you know where that is. We also

have certificates for appreciation for the Observers and those certificates will be distributed in the staff tent after lunch, starting from 2 p.m.

In conclusion, I want to thank once again my fellow Commissioners, we have been together on this long journey, we have had our differences but we have also had good comradeship and we have been able to work together to deliver to this Conference what I think has been a good working Draft and I notice it has survived your scrutiny and I want to thank in particular Rapporteur General, Okoth Ogendo-- (*Clapping*).

Prof Yash Pal Ghai: --who has organized the extremely difficult task of documentation, research, technical services, particularly in relation to drafting and he has been a tower of strength and I want to thank him for that. So, Mr. Martin Shikuku, I will now invite you to move your Motion.

Hon. Delegate Daniel Ole Osoi: Order! Order!

Prof. Yash Pal Ghai: No, no Order. Sorry. No, Martin Shikuku you have the floor.

Hon. Delegate Martin Shikuku: Thank you, Mr. Chairman. *Wananchi wote ambao mmekuja hapa, ni furaha kubwa kwangu. Sasa ni miaka hamsini na mbili nikipigania kupata Katiba. Tulienda Lancaster, wengi wamekwenda, wachache wamebaki. Leo nashukuru Mwenyezi Mungu ambaye amewaleta hapa nyote na akawalinda mpaka saa hii. Leo, mtoto alizaliwa juzi, tarehe kumi na tano. Sisi tumemaliza kazi yetu.*

Mimi Bwana Chairman, sitakuwa kwa Katiba ingine tena. (Laughter). Hii ndiyo yangu ya mwisho. Ikiwa nitakuwa kwa ingine, haiwezekani. Sasa nina miaka sabini na moja. Ukiongeza arobaine, itakuwa mia moja na kumi na moja. Mia moja kumi na moja naweza kuja katika kongamano? (Murmuring). Haiwezekani. Mimi nina furaha kubwa kuona kwamba nimefika wakati huu na pia kushuhudia Katiba ya wananchi ikizaliwa. Sasa sina kazi, Mheshimiwa.

Mimi ningependa kuwashukuru wote. Yale mengine tulisema ambayo yaliwaudhi wengine, na wengine wakasema yakatuudhi, tusameheane. (Clapping). Mtoto amezaliza, tunaweza kukasirikiana tena? Zile kelele zilikuwako ni zile za mama saa ile mtoto karibu kutoka hufanya.

(Laughter and clapping). Sasa amepiga kelele na mtoto ametoka, sasa mimi nafurahi. Nataka kutoa shukrani kubwa kwa wale wote waliokufa tukipambana kupata Katiba hii. (Clapping). Nataka muwakumbuke kila siku. Kama wao hawangekufa, hatungefika hapa.

Leo tuko hapa kwa sababu wengine walikufa na hata hapa, hapa katika kongamano hili, mmoja wetu, mwenyekiti wa Devolution (clapping) Bwana Daktari Mbai alipoteza maisha yake. Tunataka tumkumbuke. “Bwana Mbai, we have not let you down, you did not die in vain, we have now achieved what you were after”. (Clapping).

Kwa vile nimeulizwa tu nitoe yale mambo ya Kikatiba kuhusiana na sheria, sisi tulikuwa tukiendesha mambo yetu kufuatana na Section 3, Cap. 3 ya Sheria za Kenya, that is, Constitutional Review Act. Katika hiyo Katiba inasema, hiyo Sheria inasema kwamba Commissioners, District foras and CNC, Conference hii tuliyo, kongamano hili-- CKRC ni ile ya wale Commissioners na hii Constitutional Conference yetu tumekaa hapa, haziwezi kuisha mpaka kufuatana na Kifungu cha thelathini na thatu na nne hapo, inasema kwamba tungali kazini, mpaka Katiba hii itakapomalizwa na kupitishwa na Bunge. (Clapping). Kwa hivyo, kwa kiingereza nasema, Mr. Chairman, Sir, I wish to move that his Conference do hereby adjourn sine die. (Clapping). Yaani, tungalipo na kama kuna jambo, na ninajua hakutakuwa na jambo, tungali kazini, tunaweza kuitwa mpaka Katiba hiyo ipitishwe katika Bunge. Asante sana, Bwana Chairman. (Clapping).

Prof. Yash Pal Ghai: Those who approve the Motion say, “**AYE**”.

Hon. Delegates: “**AYE**”.

Prof. Yash Pal Ghai: Those who oppose say, “**NAY**”.

Silence.

Prof. Yash Pal Ghai: The “**AYES**” have it. Thank you.

