

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

**NATIONAL CONSTITUTIONAL CONFERENCE
(NCC)**

Verbatim Report of

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

ON

8.03.04

CONSTITUTION OF KENYA REVIEW COMMISSION

NCC - PLENARY PROCEEDINGS, CONSIDERATION STAGE, HELD AT THE PLENARY HALL, BOMAS OF KENYA ON 08.03.2004.

Present

- | | | |
|-------------------------------------|---|---------------------------|
| (1) Prof. Yash Pal Ghai | - | Chairman |
| (2) Hon. Delegate Koitamet Ole Kina | - | Vice-Chair (NCC) |
| (3) Hon. Delegate Bonaya Godana | - | Vice-Chair (NCC) |
| (4) Com. Okoth Ogendo | - | Rapporteur General |
| (5) P L O Lumumba | - | Secretary |

Draftspersons

1. Mr. Gicheru Ndoria
2. Lucy Masua
3. Ms. Linda Murila
4. Mr. Gad Awuonda
5. Mr. Lawrence Kamungisha
6. Mr. Tom Mboya
7. Mr. Clive Grenyer

Clerk from Parliament

Mr. Kipkemoi Arap Kimi (Clerk Assistant)

Secretariat in attendance

- | | | |
|-----------------------------|---|---------------|
| Assistant Programme Officer | - | Silvia Nyaga |
| Assistant Programme Officer | - | Rozina Mngola |
| Verbatim Recorder | - | Asha Boru |
| Verbatim Recorder | - | Lydia Moraa |

The meeting started at 9.20 a.m. with Prof. Yash Pal Ghai in the chair.

Prof. Yash Pal Ghai: Honourable Delegates, I call this meeting to order and I apologize for the late start of this session, the reason is that I was consulting with the Delegates who are going to move Motions this morning. What I should do in future is to meet with those who are going to move Motions the evening or the afternoon before. So, in future we should aim to start our

proceedings at 8.30 sharp, as I said on Friday. So I do apologize very much for the delay today but I hope this will not happen again because I will meet with the Delegates the evening before.

I have a new Delegate to swear in--

(Consultations at the “high” table).

Prof. Yash Pal Ghai: Margaret Hutchinson, or Doctor, is she here? And if you are, can you please come--

(Consultations at the “high” table).

Prof. Yash Pal Ghai: I am sorry, I am jumping the gun. We start with prayers and then I will call upon you. Thank you. The Prayers this morning will be said by Pastor Ayonga, Neera Kapila, Sheikh Ali Shee and we will have the Anthem afterwards. So, please keep standing until the end of the National Anthem and stand up now for prayers please.

Com. Pastor Zablon Ayonga: Let us pray. Gracious Loving Father who art in Heaven, this morning we want to thank You that You are being so good to each one of us. You have kept us safe during the past weekend and You have brought us here safely to begin this important beginning to finish our work. Dear Lord, we want to thank You for the past days, that this journey which has been rough at times, that this journey which has been having problems at times, that You have seen it fit that we can reach this far. We want to thank You for the Kenyans who have entrusted their faith on us, for the Kenyans who have chosen us to do this important work on their behalf. Dear Lord, we want to ask Thy forgiveness because we know at times we have spoken things we ought not to have spoken, we have said things that are not palatable, we have accused others for sins that they have not committed, we have hurt other people and even ourselves, Dear Lord forgive us, take away pride that sometimes seems to prevail amongst us, to think that we are better than others, to think that ideas of others are not good except our own, we pray that Your love may be seen amongst ourselves that we may love one another and when we do love one another, we would respect one another because we are all Your children. Your love is so great that we cannot embrace it, it is so deep, than the deepest sea, it is so high, than the

highest. We pray that this beginning may be different from other beginnings, that as come to work together, as we come to listen together that we may look for the good of Kenyans, for the good of Your people, help us this morning as we start, that we may start with Thee, that our hard stone hearts may be softened that we may work together and finish together, that Your name may be glorified.

I pray for the Chairman who is going to lead us today, and for his assistants, that You may give them the spirit, the spirit of God which can lead, so that we may finish this day saying, it was good because we have allowed your spirit to mass upon us. And for us those who are going to participate, I pray that we may respect the points of others and finally bring us to consensus, because all that we are doing, we are doing it for our brothers and sisters in this country. May Your spirit govern our hearts because You are God, You are not a human being. May Your grace be sufficient for each one of us and this morning and the whole day, may we feel of Thy presence. For I pray through Jesus' name sake. Amen.

Hon. Delegate Sheikh Ali Shee: *Bismillahi, kwa jina la Muumbaji Mola, mkarimu, Muumbaji wa mbingu na ardhi na vitu vyote vilivyoko kwenye mbingu na ardhi, Muumbaji wetu tuko mbele yako, tukiwa waja wako, Uliotukarimu, Uliotupenda, Uliotutukuza, tukiwa wanyonge mbele Yako wanyenyekevu, tunahaja kubwa na kuungwa mkono na Wewe, tunahaja za busara na hekima ambazo Umekuwa Ukimpa mwanadamu, hekima hizo na busara hizo ni muhimu sana na zinahitajiwa kwenye kazi hii ya kuandika Katiba ambayo itanufaisha vizazi vilivyoko sasa na vizazi vitavyokuja baadaye. Ewe Mola wetu mkarimu, Umekuwa Ukitulinda, Ukituongoza, Ukilinda taifa hili kwa miaka na miaka, endelea kutulinda na kutuhifadhi, na kuunda mapenzi baina yetu sisi, kuondoa chuki na ukosefu wa uvumilivu na mvutano wa ukabila ambao ni mvutano unaosukumwa na matakwa ya Shetani na sehemu ya unyama ya tamaa tulionayo ya mwanadamu. Mola, ukabila ni maradhi makubwa ambayo yameangamiza bara hili la Africa, imeangamiza wazazi wengi na wakaazi wengi wa bara hili, Ewe Mola tupe uwezo wa kupambana na maradhi haya, maradhi ambayo kwa nguvu Zako na busara Zako tunaweza kuyapoza kwenye nchi hii yetu. Mola, tuko katika hali ya mwisho ya kazi ngumu ambayo tumepewa na raia wako, tumepewa na watu wako, kazi hii tunaenda kuimaliza hivi sasa lakini hatuwezi kumaliza kazi hii ikiwa hutakuwa na sisi pamoja. Mola, endelea kuwa na sisi, tunakuomba kwa unyenyekevu tukiwa waja wako wanyonge, Utupe nguvu, Utupe uwezo, Utupe*

amani kwenye vichwa vyetu, amani kwa watu wetu, watu wetu wape utulivu wawe na busara, wawe na subira, wawe na uvumilivu, ili wananchi wa nchi hii wastarehe na wafurahikie matunda ya usalama na amani katika nchi hii. Mola, tubariki, bariki watu wetu wote, Shetani ambaye ni muovu umutenge na sisi, hasa hivi sasa kipindi cha mwisho Shetani ameongeza nguvu zake kwa kila upande, Mola, na Wewe ongeza nguvu Zako kwetu sisi ili tuweze kupambana na Shetani, kama ulivyosema Shetani si mmoja, kuna wanadamu ambao pia na wao wako katika chama cha Shetani. Ewe Mola tulinde, tupe nguvu kupambana na wanachama wa chama hiki cha Shetani ili tuweze kufanya kazi nzuri pamoja na viongozi wetu wote, ili taifa hili lipate Katiba nzuri. Mola tunakuomba kwa jina Lako, Wewe peke Yako ndiye Ambaye wakuombwa, Wewe peke Yako ndiye uwezaye kutulinda na kulinda kazi hii, tubariki Ewe Mola. Amin.

Hon. Delegate Neera Kapila: Om, we pay homage to Thee, supreme and paralleled omnipresent energy, Lord God of the universe, Creator of mankind, we see and feel Your Imperial presence in all creation on earth. Giver of life, remover of pains and sorrows, bestower of happiness, our protector from evil forces, we meditate on Thee and thank Thee for inspiring and guiding our intellect to the committing task we are setting on, of agreeing on the Articles of the new Constitution for our Nation that we have all worked so hard on. Bless us, give us the wisdom and the strength to keep us focused on the task, guide us such that we put aside all individual selfish agendas and focus wholly on our task. Thy will is manifest through the actions of women and men; we honestly thank Thee for giving us the wisdom, not to let insults and implied contrary involvements and views expressed by some in the name of the organizations we represent, drag us into the quagmire that has the purpose of distracting us from the course of work. Now that we are so close to completing our task, show us the way to overcome and bypass these self interested trivialities. Bless us, bless our endeavours and bless our Nation with success, with the choicest of Heaven's blessings, Oh ever gracious, Omnipresent, Heavenly energy. Om Shanti Shanti. Peace to all.

(National Anthem).

Prof. Yash Pal Ghai: Thank you. I would now like to call upon Dr. Margaret Hutchingson so that she can take here oath of office. I,

Hon. Delegate Margaret Hutchingson: I,

Prof. Yash Pal Ghai: And mention your name.

Hon. Delegate Margaret Hutchingson: Dr. Margaret Chesang Hutchingson,

Prof. Yash Pal Ghai: being appointed a Delegate to the National Constitutional Conference,

Hon. Delegate Margaret Hutchingson: being appointed a Delegate to the National Constitutional Conference,

Prof. Yash Pal Ghai: under the Constitution of Kenya Review Commission Act,

Hon. Delegate Margaret Hutchingson: under the Constitution of Kenya Review Commission Act,

Prof. Yash Pal Ghai: do solemnly swear,

Hon. Delegate Margaret Hutchingson: do solemnly swear,

Prof. Yash Pal Ghai: that I will faithfully and fully,

Hon. Delegate Margaret Hutchingson: that I will faithfully and fully,

Prof. Yash Pal Ghai: impartially and to the best of my ability,

Hon. Delegate Margaret Hutchingson: impartially and to the best of my ability,

Prof. Yash Pal Ghai: discharge the trust and perform the functions,

Hon. Delegate Margaret Hutchingson: discharge the trust and perform the functions,

Prof. Yash Pal Ghai: and exercise the powers devolving upon me,

Hon. Delegate Margaret Hutchingson: and exercise the powers devolving upon me,

Prof. Yash Pal Ghai: by virtue of this appointment

Hon. Delegate Margaret Hutchingson: by virtue of this appointment

Prof. Yash Pal Ghai: without fear, favour, bias, affection, ill-will or prejudice

Hon. Delegate Margaret Hutchingson: without fear, favour, bias, affection, ill-will or prejudice

Prof. Yash Pal Ghai: and to that end that, in the exercise of the functions and powers as such a Delegate,

Hon. Delegate Margaret Hutchingson: and to that end that, in the exercise of the functions and powers as such a Delegate,

Prof. Yash Pal Ghai: I shall at all times be guided by the national interest.

Hon. Delegate Margaret Hutchingson: I shall at all times be guided by the national interest.

Prof. Yash Pal Ghai: So help me God.

Hon. Delegate Margaret Hutchingson: So help me God.

Prof. Yash Pal Ghai: I welcome you to this august body and look forward to your contributions. Welcome. (*Clapping*).

Honourable Delegates, we are now as you know about to commence the second stage of the work of the Committee of the Whole Conference, we call this the Consideration Stage and the

purpose of this Consideration Stage is to debate and approve the Draft Articles. As you know, once approved, these Articles become instructions to the Drafting Team to prepare the final text of the Draft Constitution which will come to you as Plenary for final approval. At this present stage, please do not worry too much about the precise language, grammar, or punctuation of the Articles, this will be refined by the Draftspersons and do feel free to point out any ambiguities that you notice.

Please, also remember that the Constitution should contain general principles and the details of the implementation should be left to legislation, regulations or administrative policy or practise. You may find some of your favourite formulations have been altered or moved to another part of the Draft and several statements or objectives have been collapsed into fewer general comprehending principles. In these matters, we have to rely upon the expertise of the Drafting Team who I can assure you have spent many anxious hours agonizing over the wording of the Draft Constitution. You will notice that the Revised Zero Draft is already an improvement upon the Zero Draft and I am confident that the final Draft will be even more readable and concise bringing out the main themes of the Constitution with force and with clarity.

The schedule to the National Constitutional procedure and regulations of 2003 set out the procedure we shall follow in this stage of the work of the Conference. The Secretary will read out the number and heading of each Article in its numerical order. The Preamble itself is to be adopted towards the end of the Consideration Stage. If no amendment is proposed, the next Article will be read out in the same way and after a suitable number of Articles have been read, the Chair will put the question that these Articles be approved and thus stand as part of the Draft Constitution. Some proposed amendments will cover the same ground, in which case they will be consolidated and presented together by one Delegate.

We will allow some debate when amendments are introduced, but this is not the time for lengthy debates. However, sufficient time will be allowed for the airing of views in support or as an opposition to the amendment, expressed perhaps by the Mover of the Motion and one or two others in support and a similar number on the other side. If we cannot resolve the matter through consensus, a Delegate or the Chair will propose that the Article be set aside for later consideration so that we have time to build a consensus on that particular issue. In this way, we

can identify controversial issues and give ourselves opportunity and time for Consensus Building. It is therefore important that we move speedily on those issues which are not contentious. There is no need for speeches and support of, or comments on the Article if there is no contention.

This brings me to timing. In order to keep to our deadline of 19th March, 2004 for the adoption of the Draft Constitution, it is imperative that we finish the consideration of the entire Draft by Thursday or at the latest Friday of this week. That will give the Drafting Team the weekend and one or two days of the next week to complete the final text for scrutiny by the Advisory Committee on Drafting and the Convenors, and then to print and distribute copies to Delegates to read the text before the Plenary meets to adopt it. This will require us to exercise great discipline in time keeping and speech making. We should start promptly at 8.30 a.m every day and be prepared to work until late into the evening. I understand that Parliament may be convened in a few days, well before the end of this month. So, it is critical that we meet our deadline of the 19th March 2004.

Let me remind you that the eyes of all Kenyans will be on us as their expectations rest on our deliberations. In my letter to each of you few days ago, I emphasized the desirability of consensus. I believe that we can achieve consensus if we work in a spirit of tolerance especially towards minorities and are prepared to give and take.

Consensus cannot be achieved unless each party is willing to give up something. No one should expect that all their wishes would be included in the Constitution, but we can expect to find most of what we like in our Constitution for the process has indeed been characterized by a remarkable consensus on a broad spectrum of issues. A consensus document would be fantastic for the morale of all Kenyans, a happy augur for a future as a people and as a State.

Not only because Kenyans are watching us, but also for the good of the process, we should behave with decorum, befitting the gravity of our decisions, we should listen to all with respect avoiding heckling or casting insinuations or questioning the motive of Delegates.

The Minister for Justice, the Honourable Kiraitu Murungi has assured me and asked me to assure you on his behalf that the Government is committed to the Bomas process and profoundly hopes that the Constitution of which all Kenyans can be proud will emerge from our deliberations and decisions. (*Clapping*).

The Government remains firmly committed to the June deadline for the enactment of the new Constitution. We must all work together to ensure that the Constitution that Parliament will adopt, will be the one which we should deliver to the Attorney General in accordance with the review Act.

Mr. Murungi has assured me of the commitment of the Government and his own commitment to facilitate consensus. He and his fellow Ministers intend to attend and to take full part in all the proceedings of this Committee. (*Clapping*).

From my part and on your behalf, I have assured him of warm welcome and have repeated our desire for a consensus. So, when they come tomorrow, today being a Cabinet day, they cannot be with us, please welcome them as valuable colleagues and fellow Kenyans. (*Clapping*).

I wish you all successful deliberations. I now call upon Mr. PLO Lumumba our Secretary, to read the Articles of the Draft Constitution. Thank you.

PLO Lumumba: Thank you, Mr. Chairman. I now read Chapter 1 on page 2 of the Draft of the Twenty Seventh Day of February the year 2004. The title is “Sovereignty of the People and Supremacy of the Constitution”.

Article number 1, Sovereignty of the people.

Article number 2, Supremacy of the Constitution.

Article number 3, Defence of the Constitution.

Article number 4, the Laws of Kenya.

(Consultations at the “high” table).

Prof. Yash Pal Ghai: Since there are no objections to these Articles--

An Hon. Delegate: Point of Order.

Prof. Yash Pal Ghai: I will take the Point of Order in a minute.

(Consultations at the “high” table).

Prof. Yash Pal Ghai: Can't you just wait a minute while we adopt these Articles.

Hon. Delegate Kivutha Kibwana: *(Inaudible).*

Prof. Yash Pal Ghai: Okay, you have the floor.

Hon. Delegate Kivutha Kibwana: Thank you, Chair. I think in the good spirit that you have indicated, it would be polite for all of us to really give each other a chance, because I must have a good reason for drawing the attention of my colleagues here to the Agenda.

The Agenda says Administration of oath, Communication from the Chair, then number 3, Technical Working Committee Reports to Plenary. Have we skipped Agenda, item number 3?

Prof. Yash Pal Ghai: Those were dealt with last week.

Hon. Delegate Kivutha Kibwana: This is what we have in the Agenda, Monday 8th March, 2004. So, I am just looking at the Agenda that has been given to us.

PLO Lumumba: That has been concluded.

Prof. Yash Pal Ghai: That has been concluded, Dr. Kibwana. We spent last week presenting the reports of the Committees and the recommendations in the form of Chapters. As I explained

on Friday, today we are looking at the Articles and adopting them. And in accordance with the Schedule, which governs our proceedings, I would like to put the question that Article 1 to 4-stand part of the Draft Constitution.

(Consultations at the “high” table).

Prof. Yash Pal Ghai: Those in favour say, “**AYE**”.

Hon. Delegates: “**AYE**”.

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

Silence.

Prof. Yash Pal Ghai: So the “**AYES**” have it and we have (*clapping*) just made history by adopting the first four Articles of the Constitution. Thank you.

PLO Lumumba: Mr. Chairman, I now read from page number 4 with the heading corrigendum Article number 5 - Declaration of the Republic.

Article number 6 – The Territory

Article number 7 – Devolution.

Article number 8 – The Capital

Article number--

Prof. Yash Pal Ghai: Perhaps I could clarify the procedures. Some of you have given me notice of Motions. So, when an Article is read on which you intend to move a Motion, please draw my attention and I will give you the floor. I am not going to call on you as such, it is up to you, what you have given me is a list of the issues you want to raise and it would be for you as a particular Article is read, to indicate that you want the floor.

(Consultations at the “high” table).

PLO Lumumba: Article number 5 – Declaration of the Republic.

Article number 6 – the Territory.

Prof. Yash Pal Ghai: Okay, before I ask to put the question on this, I want to take some Point of Order. 320.

Hon. Delegate Kiriro wa Ngugi: Mine is not the Point Order, it is a Motion on Article number 7.

PLO Lumumba: 57 on a Point of Order.

Prof. Yash Pal Ghai: So, he had not catch that, can you repeat?

Hon. Delegate Kiriro wa Ngugi: My name is Kiriro wa Ngugi, Delegate number 320. I have a Motion on Article number 7.

Prof. Yash Pal Ghai: Yes.

Hon. Delegate Kiriro wa Ngugi: I have no Point of Order. It is Delegate number 057, Professor Kivutha Kibwana.

Prof. Yash Pal Ghai: Can we first take Points of Order? And before I give the floor back to Mr. Kiriro, I want to put 5 and 6 to the House. Yes, Dr. Kibwana.

Hon. Delegate Kivutha Kibwana: Thank you, the Chair for clarifying the procedure that when this Articles are called, it is up to those who have proposed Motions to draw your attention to that fact. I think that clarification should have come as we begun because if you look at the list of Motions, there are Motions for Preamble, that is 1, that is 2, that is 3.

Prof. Yash Pal Ghai: As I explained the Preamble is taken at the end of Draft, so we are not taking Preamble.

Hon. Delegate Kivutha Kibwana: Okay, then there are Motions for James Koske for Article 1, Christina for Article 1, a new Article before 2. Therefore what we have already approved, they are Motions and I think it is also important for the Chair sometimes to draw the attention of Delegates so that we do not just go through the amendments without actually being faithful to what has been approved as Motions for debates and inclusion or exclusion. I think we should not just rush as if we are rushing against time and ignore what people have put down, what should be considered. *(Clapping)*.

(Consultation at the “high” table).

Prof. Yash Pal Ghai: I should explain that not everything on the list that you have, would need to be raised as I explained, I met with - not all but several of the Delegates who had put Motions down and with some, we had agreed that these are essentially points of drafting and they have agreed not to raise them here. That I think is true of Motion 5 and then I can tell those were the only issues on the Articles that I have read out and which we have adopted. So, I do not think there is any issue that would have been raised, but from now onwards, we will leave it to the Delegates to raise any Point of Amendments. So, is 212 – is that Point of--

Hon. Delegate Oloo Aringo: Yes. Mr. Chairman, my name is Oloo Aringo, Delegate 212. Let me clarify, after careful study of the Draft, I am satisfied that what we have recommended in this Constitution is a Parliamentary democracy and therefore I decided on that basis to withdraw the notice of the Motion which I had handed over to you. Thank you, Mr. Chairman. *(Clapping)*.

Prof. Yash Pal Ghai: Okay. Secretary had just read Article 5 and 6 on which I believe there are no Motions--

Com. Bishop Bernard Njoroge: There is a Motion on 5.

Prof. Yash Pal Ghai: Is there a Motion on 5?

Com. Bishop Bernard Njoroge: Yes, this one.

(Consultation on the floor).

Prof. Yash Pal Ghai: Yes, I had also discussed that with the Mover and I believe she does not intend to proceed with this Motion, but she would like an opportunity to give an explanation and I now call upon Sophia Noor to make any explanation.

Hon. Delegate Sophia Abdi: Thank you, Mr. Chairman.

Prof. Yash Pal Ghai: Yes, please.

Hon. Delegate Sophia Abdi: I had a Motion on Article 5 where I wanted a new Clause to be inserted and my Clause was reading that, “where fundamental freedoms, respect for human rights and the rules of law is abused and violated by some organ of government any region on community shall have a right to self determination”.

Mr. Chairman, after thorough consultation with the constituency I come from and other respected friends and Delegates in this Hall and for the interest of this country, for the unity of this country; I wish to withdraw my Motion. *(Clapping)*.

PLO Lumumba: 379.

Prof. Yash Pal Ghai: 379, is it a Point of Order?

Hon. Delegate Levi Ahindikha: Mr. Chairman, I am 379. My name is Ahindikha from Kakamega District. Mr. Chairman, for the purpose of convenience, I would propose that you call out the names and the Motions, which have been withdrawn. Thank you, Mr. Chairman.

Prof. Yash Pal Ghai: No, I think it is for the Delegates themselves to stand up if they have any amendment to--

PLO Lumumba: Put the question in respect of 5 and 6.

Prof. Yash Pal Ghai: May I now put the question in respect of Articles 5 and 6 and put the question that the Articles 5 and 6, stand part of the Draft Bill?

Hon. Delegate Joshua Toro: Point of Order.

Prof. Yash Pal Ghai: What is the Point of Order?

PLO Lumumba: 198.

Prof. Yash Pal Ghai: Yes, 198.

Hon. Delegate Joshua Toro: Delegate 198, Honourable Joshua Toro. Would I be in order Mr. Chairman, if I said that the normal procedure on Motions for the Chair to say which Motions he has received as we go Article to Article? It is not for the Movers to declare themselves that they have Motions, but for the Chair to say, I have received this Motion for Article 5, from so and so, so that we all know where the Motions are coming from.

If they are two Motions, you say, I have received two Motion for this Article so that we are able to know from the Chair which Motions he has received and if any Motion has been given to you and you do not mention that you have received a Motion from a Particular person, the Delegate will now rise and asked you what happened to his or her Motion. Thank you.

Prof. Yash Pal Ghai: Well, the rules do not require me to indicate what Motions I have received and I do not know what function will be served by that.

(Consultation at the “high” table).

Prof. Yash Pal Ghai: We are trying to simplify the procedures as much as we can. We have our own rules of procedure, we are not bound and we are not following Parliamentary rules on this matter. Very few of us sitting in the room today, are Parliamentarians and I think it will

complicate a procedure if we try to follow the Parliamentary procedure. We should follow the procedures laid out in Schedule two, of the regulations. (*Clapping*).

(Consolations at the “high” table).

Com. Riunga Raiji: Point of Order.

PLO Lumumba: On a Point of Order.

Prof. Yash Pal Ghai: Yes.

Com. Riunga Raiji: Chair, I just wanted to draw your attention to-- My name is Riunga Raiji, Delegate 567. I wanted to draw your attention to rule 28 of the Conference rules which states that; a Delegate who has made a Motion, may withdraw it by leave of the Conference there being no dissenting voice. We have a book of Motions and the list of Motions, if any Motion is to be withdrawn that Delegate must come forward and withdraw it and get leave from us for it to be withdrawn. Obvious, there maybe somebody else who had wanted to table a similar Motion, but declined after seeing the Motion on paper. I think that is what our rules provide.

Prof. Yash Pal Ghai: I think there is some misunderstanding on the section you have read. Motions are not introduced until they have been introduced on the floor of the House. The fact that somebody may have given me a notice and then withdrawn, is not covered by that particular section, it is only once a Delegate has introduced a Motion in the floor of the House, that it is necessary to get the consent for withdrawal. Once the Motions we are looking at have not been introduced, we will give a notice on that and in consultation with some who have decided that the point have been covered or the Mover did not wish to proceed with that point.

PLO Lumumba: Let us move on Article 5 and 6 then proceed.

Prof. Yash Pal Ghai: Yes, I now want to put Article 5 and 6 and put the question that these Articles stand part of the Draft Bill. Those in favour say, “**AYE**”.

Hon. Delegates: “**AYE**”.

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

Hon. Delegates: “**NAY**”.

Prof. Yash Pal Ghai: The “**AYES**”, have it and 5 and 6 become part of the Constitution.
(Clapping).

PLO Lumumba: There is a Motion by Kiriro Wa Ngugi on Seven.

Prof. Yash Pal Ghai: Mr. Ngugi now you have the opportunity to move your Motion.

(Consultations at the “high” table).

Hon. Delegate Kivutha Kibwana: We have passed, the Chair, we have passed Motion 7 by Honourable Luseno Liyai, Delegate number 601 which is (2) (a), “the people shall have the right to intervene directly in decision making on legislative Constitutional provisions to enable them” and so on. So, the speed with which we are going the Chair, we are not going to really do meaningful work, because if it is--

Prof. Yash Pal Ghai: It is a new one, isn't it?

PLO Lumumba: Yeah.

Hon. Delegate Kivutha Kibwana: Please, this is very serious work and if the Chair, people do not understand exactly what we are doing--

Prof. Yash Pal Ghai: According to the regulations, new Articles are taken after the printed Articles.

Hon. Delegate Kivutha Kibwana: But you have not said that, you have told us that we shall reserve that particular Article. You have not done that. Please let us take time to understand what we are doing, otherwise we will approve something and tomorrow people will be saying, they do not know what they have approved. *(Clapping)*.

Prof. Yash Pal Ghai: Well, Mr. Kibwana, you have missed several sessions of this Conference we--

Hon. Delegate Kivutha Kibwana: Chair, you have said that we are coming in good spirit.

Prof. Yash Pal Ghai: Let me explain, let me explain.

Hon. Delegate Kivutha Kibwana: You have said that we are coming good faith--

Prof. Yash Pal Ghai: Please sit down, let me explain.

Hon. Delegate Kivutha Kibwana: You have said that we should be welcomed.

(Murmurs on the floor)

Prof. Yash Pal Ghai: Please, Order, Order, please sit down and listen to my explanation.

Hon. Kivutha Kibwana: I am not coming here to be shouted again by anybody, because I will not shout at anybody and if we are making a Constitution, we stop shouting at each other, please, please. *(Clapping)*.

(Consultation at the "high" table).

PLO Lumumba: You can call Liyai.

Prof. Yash Pal Ghai: I will call upon Mr. Liyai, if he wishes to move any Motion.

(Murmurs on the floor).

PLO Lumumba: So, get Mutakha.

Prof. Yash Pal Ghai: Mr. Mutakha Kangu.

Com. Mutakha Kangu: Mr. Chairman, ladies and gentlemen, I would like to -- My name is Mutakha Kangu, Delegate number 562. I would like to suggest that in the interest of this process and at this early stage, we need to be a little more orderly and carry everybody on board. *(Clapping).*

Mr. Chairman, the regulations may say what they say, but I want to implore you to simply mention that on this particular Article there is this Motion- *(clapping)* I have discussed with the Mover of this Motion and he intends to withdraw it, can I call him to do so and he does so. This one has not been withdrawn, is the Mover still intends to argue it? If he intends, he will say so, if he does not he will withdraw. I think that way, we will be able to move faster and with everybody on board. *(Clapping).*

Number three Mr. Chairman, so that the people know what they are adopting, I know it maybe costing a little more time, but at the end of the day, if we follow that approach, we are going to move faster. Can we have the Secretary read the whole Article rather than just the title? *(Clapping).*

Let the people listen to what they are adopting and feel it as they adopt it. I know that will cost us a little more time, but at the end of the day, it will save us time. Thank you, Mr. Chairman. *(Clapping).*

Prof. Yash Pal Ghai: Well from your applause I take it that you support that and even though this is not in the rule, the Chair does have a discretion to obey the rule and I will now ask in future the Secretary to read the text as well as the title of the Article.

Now, can I call upon, Delegate 601, in relation to his proposed Motion?

PLO Lumumba: Let us call Delegate 601.

Prof. Yash Pal Ghai: 601.

PLO Lumumba: Delegate 601, Dr. Liyai, are you present please?

Prof. Yash Pal Ghai: In that case I will take Point of Order, 068.

Hon. Delegate Mwangi Kiunjuri: Mr. Chairman, with due respect. My name is Honourable Kiunjuri, Delegate 068. Mr. Chairman, we are now passing these Articles and you are calling for “NAYS” and “AYES”. Mr. Chairman, in this Conference we have Observers, we even have Facilitators and Mr. Chairman, when you ask for “NAYS” and “AYES” some people might be intimidated by the shouts of “NAYS” or “AYES” which might not be coming from the actual Delegates.

Mr. Chairman, I would think that it could have been in order that now that we have actual voting, that we scrutinize everybody who is in attendance and also according to the regulations you tell us who is supposed to be in the hall now because even in Parliament you cannot go ahead and start voting when you have strangers in the Chamber. Already we are voting, this is very serious, we have now to follow the rules. Let us know who is supposed to be voting and who is not supposed to be doing that. Otherwise we shall come here with other people who are not even Delegates and they will shout very big “NAYS” or “AYES” in favour of what they want. Thank you Mr. Chairman. (*Clapping*) I am proposing that you call the Delegates one by one to know whether we have the actual right Delegates voting. (*Uproar*)

Prof. Yash Pal Ghai: The rules are quite clear only the Delegates can vote. The Commissioners cannot vote and I believe the Attorney General cannot vote and the Observers here of course not to--. (*Noise*). Please listen, order. The Observers of course do not have any vote at this Conference, so I intend to proceed with the vote voice as the regulation provides and in case of doubt then we shall proceed to lobbies.

Hon. Delegate Geoffrey Muchiri: Point of Order.

Prof. Yash Pal Ghai: 111.

Hon. Delegate Geoffrey Muchiri: Mr. Chairman, I am Delegate 111, Honourable Muchiri. I want Mr. Chairman, to echo what the Honourable Delegate has said. I think the Conference has a lot of strangers. We are not capable of saying “AYES” and “NAYS”, Mr. Chairman. That scrutiny of who is in this hall is important. We are in a very serious process. I can see a lot of people standing I do not know who they are. Mr. Chairman, if we are going to call for a vote it must only be for the Delegates and I think the hall or the Conference is not all Delegates.

Mr. Chairman, if you are going to avoid sneaking people inside it is important that we scrutinize who is here and who is not. Thank you very much. (*Clapping*).

(Consultation at the “high” table)

Prof. Yash Pal Ghai: Could I explain the procedure, as I understand it on voting? The regulations require the Chair to put the question to a voice vote, if the ruling of the Chair is not accepted to at least 30 Delegates who can then ask for voting on basis of lobbies. So if the Chair makes a ruling on the basis of the voice and 30 Delegates stand for voting in the other method through lobbies then we shall have voting on that basis. These are the procedures laid down in the regulations. Now, I will request 546, please.

Hon. Delegate Philip Sulumeti: Chairman, I am Delegate 546, Bishop Sulumeti. One thing is we must handle our matters here transparently so we cannot send the Observers out. So I propose, instead of saying “AYE” or “NAY” why don’t we lift our – this thing here and then you can see. They lift them up and then count. So let the Observers remain. The thing must be transparent but we can use our voting card like this one here. Thank you.

Prof. Yash Pal Ghai: Thank you very much. That is a good suggestion and I think we should follow that. 010

Hon. Delegate Davis Nakitare: Thank you Mr. Chairman. It is my humble request that the arrangement in this room be rearranged so that we have a gallery for Observers and a gallery for the participants so that you can follow the system as suggested by Honourable Members here

because we are all mixed up, we are seated and even if we raise our placards the counting will not be determined correctly. Thank you.

Prof. Yash Pal Ghai: We do actually have this section reserved for Observers and the rest of the room is reserved for the Delegates to the Conference. 381.

Hon. Delegate Rita Katamu: Thank you Chair. I am 381, District Delegate. I think Mr. Chair, there seem to be strangers among Delegates. We have been here, we have known that Observers sit there, we have known how we sit. We are vetted at the gate to enter with our badges. I think this is a move to slow down the process. Why can't we go ahead the way we have been going ahead, if there is anything new Honourable Delegates we shall find it out otherwise we are losing our time.

Prof. Yash Pal Ghai: 262. 282

Hon. Delegate Lydiah Kimani: Thank you Mr. Chairman. I would wish to support what Honourable Delegate Bishop Sulumeti said. Since we have people who are also on the periphery of the main hall, we have the Observers there, if we go by the "NAYS" and the "AYES" we will not know who has opened his mouth or her mouth. So, I would wish to support the point of Honourable Delegate Bishop Sulumeti. Thank you.

Prof. Yash Pal Ghai: Yes, I thought I had said that we will follow that procedure. Thank you very much. I now would like to move forward please and to clarify that the Secretary will read –

Hon. Delegate Gor Sunguh: Point of Order.

Prof. Yash Pal Ghai: 194.

Hon. Delegate Gor Sunguh: Thank you Honourable Chairman. Honourable Chairman, I am Delegate 194, Gor Sunguh, Parliament. Honourable Chairman, we do not want to delay this process and it is instructive that those who are now creating diversions have been boycotting this Conference. (*Clapping*). Honourable Chair, it is important that they follow the rules as laid

down in the rule book that you have there and Honourable Chair, even in Parliament we vote the same way we do vote. I suggest we have orderlies here who are vetting Delegates and they know the Delegates and non-Delegates. We also know that there are Observers, why don't they sit separately so that they go and vote – because we have got hundreds and hundreds of Clauses to go through. If we were to go through the methods being suggested Honourable Chair we will take here another one year. We will never be able to make it by the deadline that we know we now have. So I would only suggest Honourable Chair, that we proceed as you suggested but the Observers be put aside so that we can vote on and go on and we follow the rules as they are otherwise we will be changing rules as we go and we will never make it. Thank you.

Prof. Yash Pal Ghai: I now would like to make a ruling. I intend to proceed now in the manner that I had indicated in my opening remarks. The qualification that in future the Secretary will actually read the text of the Articles. We shall initially take a vote by Delegates raising their placards and with these ground rules I want to proceed and we were at Article 7 and Mr. Ngugi had wanted the floor to move an amendment and I now call upon him.

Hon. Delegate Kiriro wa Ngugi: Am I on the floor or I am not?

Prof. Yash Pal Ghai: Yes, you have the floor.

Hon. Delegate Kiriro wa Ngugi: Thank you Mr. Chairman. Fellow Delegates, Article number 7 is in respect of Devolution which is otherwise substantially dealt with at Chapter 14.

Hon. Delegate Kivutha Kibwana: Point of Order.

Prof. Yash Pal Ghai: Okay 57.

Hon. Delegate Kivutha Kibwana: I think the Chair, this issue is a very critical issue for this reason. The Constitution of Kenya Review Act says, when we begin to adopt constitutional proposals there is actually a different rule for that which is that anything that we adopt must be adopted by two-thirds of quorum because of that particular rule in the Act itself, not the regulations. It means that we have to determine there is quorum and then we have to count for

each Article so that any Article which goes into the Constitution is supported by two-thirds of Plenary and that is why therefore it is very important that we make sure that is observed otherwise somebody else later can say that we did not adopt the Constitution in accordance with the Constitution of Kenya Review Act. That is all that I wanted to say. (*Clapping*)

Prof. Yash Pal Ghai: Yes, thank you for drawing attention to those. It actually does not require us necessarily to count everybody. I have been looking at the Auditorium, I have discussed with the Secretary and we do indeed have a quorum. We are at least 378 by now so we do have a quorum. So please Mr. Ngugi, please continue I think we have had enough points of order. Please, continue now, let us proceed with this. The Delegates have expressed their wish to proceed, let us do so in orderly fashion. Mr. Ngugi.

Hon. Delegate Kiriro wa Ngugi: Thank you Mr. Chairman. Like I was saying, Article number 7 is what would be termed some directive principles that will find application when we get to the substantive Chapter on Devolution at Chapter 14. So it is extremely important at this point that we examine Article 7 and my Motion says that having recognized there are too many levels of government is the more serious concern by those against Devolution in particular and a new Constitution in general and aware that Devolution is a critical feature in any new Constitution and its purpose is to give our people a chance to have decision made about their lives nearer them and acknowledging the principle of subsidiarity. This principle says we must make our decisions at the lowest point possible. If I can use the analogy of a family; a small child seven years old must be allowed to make those decisions he or she is capable of making. If she wants fruit, let her eat fruit. A little higher up, the mother in the house can make decisions about the balance of the diet and the head of the household and like wise at the head of the house there are decisions he cannot make that requires a clan. That in simple terms is the principle of subsidiarity. Those decisions that can be made at lower levels must be made at those levels and only those that can otherwise only be made at different levels must be made and this principle is important in terms of Devolution and applying the twin concept of Devolution different from decentralization. Up to now we have had only one government decentralized throughout to the village.

Devolution creates a certain element of autonomy at the level you have devolved. That is to say that you can at the level you have devolved, you can use further down the concept of decentralization. Now, therefore, my Motion says that the Article number 7 be amended to read as follows: If you are with me at Article 7. “The sovereign authority of the people is exercised at different levels and forums”. The idea here is that we shall be debating endlessly because there are those who would like a constituency level, a regional level, a village level and any level, so many of them and we must acknowledge that our Constitution must allow for politics, it is not a close down on politicking. If indeed the better place is the region or the village, whatever, can we exhaustively examine it here and if we have not, then we need to recognize all those possible configurations and then make a decision as to one or two of those that shall be levels of government. That is the rationale for saying, “sovereign authority of the people is exercised at different levels and forums”.

- (a). The national level - that would be a level of government with all the trimmings.
- (b). The district level as the principle unit of devolution. Talking to very many Delegates, the District as a principle unit of Devolution has found great favour in a large cross-section of Delegates, so if we zero down on those two levels and then we say at
- (c). Such other forums as prescribed by law which may include regional, constituency, locational or village forums.

What happens when we actually implement a Constitution saying such things? What would happen is that those who passionately want a regional government will play their politics in such a way that it becomes obvious with politics that a regional government is imperative. Those others who think that a constituency is where we should have a government will do like wise and for some of us it is the village that finally because of the principle of subsidiarity, that must find space as a government. What are we therefore saying? I am suggesting that we open the space for all possible configurations and let our lives and our politics dictate where in five, ten years where government finally rests.

Prof. Yash Pal Ghai: You have one more minute please.

Hon. Delegate Kiriro wa Ngugi: Thank you. And so therefore, Clause 2 is to pick out. It is already picked up in this document but the principle of a regional forum is to coordinate the implementation within the districts forming the region of programmes and projects that extend across two or more districts of the region and I have introduced 3 in order to say, “the principle role of the locational forum is to enhance self governance and involvement in the implementation of local programmes and projects”. In other words, the Motion is intended to retain the four levels as proposed by the Committee but determine levels of government immediately here as a direct principle and leave space for those others so that we avoid debate at this point knowing you have 10 days and our lives will determine the same. Mr. Chairman, I beg to move.

Prof. Yash Pal Ghai: I will allow a very brief debate and then we will see how we proceed with that. 599. Order, order, please. Listen to the Speaker.

Hon. Delegate Leslie Mwachiro: Chair, I am Delegate number 599, Leslie Betawa Mwachiro. I am not seconding this Motion so I wonder whether it should be seconded first before I continue or I can just continue.

Prof. Yash Pal Ghai: No, it does not need seconding, not at this stage.

Hon. Delegate Leslie Mwachiro: Okay. Chair, I think this Motion is not genuine. It is trying to undo the work the Devolution Committee basically did for the last Bomas I, Bomas II and Bomas III. Chair, when you really read this Motion we have already determined that we are going to devolve to four different levels of government. Now when you decide to only have two levels or have all the four levels but call two of them forums surely you are not being serious. We have to have consistency in what we are trying to do, in setting up a new Constitution. The regional level is the second level of Devolution. We devolve the national government:

- (a). To the regional level.
- (b). To the district level.
- (c). To the locational level.

I think this is the way the principle of subsidiarity works. Whatever cannot be done at the locational level will be done at the district level. Whatever cannot be done at the district level

will be done at the regional level and whatever the regional level cannot do it will be done at the national level. To me that is common sense of the principle of subsidiarity. Now to say we basically kill the regional level it is actually those who want to make sure this Constitution dies with that Chapter of Devolution, because without Devolution this Constitution will be actually serving a meal with soup and no meat. So I suggest Chair that we basically do away with this Motion altogether and we proceed and adopt what the Committee has done. Thank you Chair. *(Clapping)*.

Prof. Yash Pal Ghai: 463

Hon. Delegate Suba Churchill: Thank you Chair. I am Delegate 463, Suba Churchill and I rise to speak against the Motion moved by my Honourable colleague because in that Motion I see some mischief and the mischief I see Mr. Chair, is the mischief that was at play immediately after independence. *(Clapping)*. The purpose for which the regional level of government was put by that Committee-- I may not have been in that Committee but I see the wisdom of having the regional level is to act as a buffer zone against the forces of national government because if you strip any lower level of government below the regional level of the protection of the regional level, you make those levels more vulnerable to manipulations of the national government.

Secondly, even though the Mover has tried to sugar coat the Motion to look a little bit favourable, the whole purpose of the Motion is to defeat the very objective for which Kenyans demanded for Devolution of powers and government. *(Clapping)* I want us as we will be taking a vote on this Mr. Chairman, to urge that we reject this Motion in total because it seeks to begin the undermining process of Devolution even before we adopt the very concept of Devolution at this stage. I want all of us to be wary of such Motions and try to see beyond the spoken words because in that Motion lies the danger that I have always feared when we began this process. Thank you Mr. Chair. *(Clapping)*.

Prof. Yash Pal Ghai: Thank you. Could I have the hands of those who want to speak in support of the Motion because I want to hear both sides? 057.

Hon. Delegate Kivutha Kibwana: Mr. Chairman, I have to be humoured the fact that it appears there are a few people who are supporting this Motion but I need for purposes of history and record to support this Motion. As matters stand we are hardly able to afford local authorities and that is only one layer of decentralized or devolved government. If we have the regional level, we have the district level including Towns, Municipalities and Cities and we have the locational level, we will have a bloated bureaucracy and many people working in it and most of the money will actually go into salaries not development itself.

Further, despite what Delegate Suba has said, really the regional level is no different from the *Majimbo* of independence. What is being sought by maintaining regional government is to fragment this country particularly on ethnic basis because when you look at the schedule which says what the regions are, we have on the whole put together districts where ethnic groups originate from. Therefore, this Motion is very, very important because it really seeks to maintain Kenya as a united nation. I think we are not really devolving power. We are simply devolving the elite. We are making positions for the elite at lower levels so that that the elite can occupy them and I think it will really be sad if we do not support this very, very important Motion which really will make Devolution meaningful so that at the district levels we have units that make economic sense, that can support themselves and therefore, are economically viable. And we still have provision for fora up to the village level where people can organize on their own, where people can participate, where people can make own decisions so that we do not have a cumbersome devolved unit or rather system. I do hope that the Delegates here will be persuaded that it is necessary to have a devolved system that will work in the long term, that will not decentralize the elite and corruption as happened like in Uganda and other places where the current format in our draft Constitution has been followed. But of course if the idea is to create a system where we all get jobs and this government has said it will make many jobs then obviously I will understand where some of the Delegates are coming from.

Prof. Yash Pal Ghai: Thank you. 198. 198, please.

Hon. Delegate Joshua Toro: Thank Chairman. 198, Honourable Engineer Toro, Parliament. I rise to support the Motion moved by Kiriro wa Ngugi. Why I am supporting the Motion Mr. Chairman, is on the following grounds. We all remember at independence that we had devolution and that devolution did not work. Let us address as Delegates the circumstances that

made that devolution not to work and ask ourselves what has changed now that we think that devolution that was there at independence has changed and now it can work. Mr. Chairman, why I am supporting devolution at the district level is because Mr. Chairman, Kenyans already have an experience with a district over the years.

Region is an unknown animal to them. Mr. Chairman, I would like to give an example, because we are creating bureaucracies that will make even the devolution we want at the district unworkable. If Mr. Chairman you have to leave Nairobi and you are going to Mandera and you have fixed amount of money to take to your family in Mandera because the revenue of Kenya will be fixed, you have an option to decide the means of going to Mandera, you can go by air and maybe spend all the money you might not even reach Mandera and come back, you might choose a Range Rover and put all you money in the guzzler called Range Rover, by the time you reach Mandera all the money you had has been used in fuel consumption and you might not even have money to give to your family when you arrive there. You might choose to go in a Datsun 1200 and when you arrive there you will be able to tell your family here I am, I have five thousand shillings to leave to you to pay school fees and buy food etc. Because Mr. Chairman when we put this bureaucracy we are increasing the cost and at the end of the day the Wananchi will be wanting to see services on the ground. Are their health services functioning? Are their dispensaries functioning? Are schools functioning? Mr. Chairman because if we spend all the money in devolution between the national and the district level then Mr. Chairman we might not be able to achieve our objective.

Lastly Mr. Chairman, because I do not want to stand on a Point of Order, Mr. Chairman the Act says specifically that we adopt any Article when two-thirds have voted and accepted, and it is rejected when one-third has voted against. How are we going to know the number that have voted is two-thirds and the number that has negated is not more than one-third Mr. Chairman? Mr. Chairman, we do not want to have an experience that we had in 1988 KANU *Mlolongo* where the short queue was declared the winner and after that you could not even have legal address. Mr. Chairman, we are going to create a situation in this Conference where somebody can go to court and say that I would like to see the number of Delegates who voted for this Article whether they were two-thirds or not, and you will not be able to produce the figures Mr. Chairman. Thank you. (*Clapping*).

Prof. Yash Pal Ghai: Thank you very much. I would like at this stage to suggest that since this Article deals with the whole question of devolution, which has a Chapter of its own, given differences of view, that we set aside this Article for further consideration. *(Clapping)* Please, please listen to me, I had said when I made my opening remarks today that is the procedure I would like to follow. We have to try to get consensus, if we do not have consensus let us give ourselves a bit more time. The rules provide for Articles to be set aside for further consideration and that is what I propose we do with this proposal of Mr. Ngugi. Thank you.

(Uproar).

An Hon. Delegate: Point of Order.

Prof. Yash Pal Ghai: 212.

Hon. Delegate Oloo Aringo: Thank you, Mr. Chairman. Mr. Chairman you have confused me because I wanted to stand and oppose this Motion and I really think we should dispose of this particular section just at this point in time because it will colour, it blur our further progress. Mr. Chairman, there is some mischief in this Motion. It is intended to undo what we have tried to do since this Conference started. *(Clapping)*.

Prof. Yash Pal Ghai: I thought you had a Point of Order?

Hon. Delegate Oloo Aringo: I do have Mr. Chairman because I quite frankly think that I do not agree with your ruling, allow us to dispose of this particular Motion and then we can proceed. With your permission I would like to proceed on the Motion.

Prof. Yash Pal Ghai: We have been constantly emphasizing the need for consensus. At the very first test of that commitment you want to over rule minority? You do not want us to have time for consensus building? What are we doing here? We have an obligation under the Act to build consensus. Let us give ourselves a day or two to build that consensus.

(Uproar).

Hon. Delegate Oloo Aringo: Mr. Chairman, I feel strongly that we will save time--

Prof. Yash Pal Ghai: You don't--

Hon. Delegate Oloo Aringo: --if we dispose of this particular Motion.

(Uproar).

Hon. Delegate Oloo Aringo: I want your guidance Mr. Chairman.

Prof. Yash Pal Ghai: Okay Mr Aringo since you are on the floor I did not hear you. Can you--

Hon. Delegate Oloo Aringo: Mr. Chairman, I want your guidance in this one that indeed it is in the interest of this Conference that we dispose of this particular Motion at this point in time.
(Clapping).

Prof. Yash Pal Ghai: 068.

Hon. Delegate Mwangi Kiunjuri: Mr. Chairman, I am Delegate 068, Mwangi Kiunjuri. Mr. Chairman I would wish first of all to go by your ruling Mr. Chairman, but would it be really in order for even the time we are supposed to spend to go and look for a way forward while we do not have enough resources materials to be able for every Delegate to come with formed and informed decision on the actual cost of devolution because that is the major, the major *(Uproar)* you give me time, we are giving you time, you should allow me to say whatever I want to say whether it is nonsense or--

Prof. Yash Pal Ghai: Order please, order.

Hon. Delegate Mwangi Kiunjuri: Mr Chairman--

(Consultation at the "high" table).

Hon. Delegate Mwangi Kiunjuri: Mr. Chairman, what we are asking Mr. Chairman is that we still be - the Commission you owe us a duty, a duty of care and whatever we are doing here, it will be blamed on you much as it will be blamed on us. Mr. Chairman, it is important the Commission has spent all its time working and it is working very well. You have all the experts and you have all the resources to go and look for any information the Delegates require. Now that you have called that we first of all stand on this Clause Mr. Chairman, we would like you to go ahead and give us the actual cost of devolution.

(Uproar).

Prof. Yash Pal Ghai: We cannot get into that at this stage, I would like to repeat my plea, please let us set this Article for further consideration *(Uproar)*. When we come to the Chapter on Devolution, order please, order when we come to the Chapter on Devolution, there are many issues to be resolved, I think we should pick up this Article at that time and that is what I would like to suggest and I hope you will support me on that. It is very important for us in consensus building to do this, you clap even as I say we must build consensus, then if it does not suit you, you disregard my advise.

An Hon. Delegate: Point of Order.

Prof. Yash Pal Ghai: Who has a Point of Order? 235.

Hon. Delegate Reuben Tsumah: Mr. Chairman, at some stage I felt so relieved because the debate was one sided. My name is Reuben Tsumah, Delegate number 235 from Kilifi District. Mr. Chairman, you are raising an issue of consensus here and all that had happened prior to you raising that point, it was clear throughout this Plenary that only three people had hands on in support of the Motion of Mr. Kiriro wa Ngugi. The majority of the people were speaking that this particular Motion be dealt with because it has sinister motives, and Mr. Chairman this was almost resolved and now you turn around and say you want consensus. What consensus Mr. Chairman? *(Clapping)*.

Prof. Yash Pal Ghai: 433 please. 433 please and be quiet.

Hon. Delegate David Rakamba: Thank you Mr. Chairman, I am on the floor. Mr. Chairman I am 433. Mr. Chairman, I seek your indulgence first because I am seeing the regulations governing this Conference are being violated by the same Delegates who actually passed these regulations Mr. Chairman, once the Chair is speaking no Delegate should be standing while he is giving his views. I think this is a general understanding. Two Mr. Chairman, once a Delegate has been told you are out of order you sit down until you are given the second chance so that we can proceed. Otherwise those who are insisting speaking are the ones who are derailing the process. Mr. Chairman, on the question of consensus building I am seeing some emerging views that some people are using very funny words that are scaring some Delegates and they are trying to derail the process. That one we cannot field the consensus on that ground. Thank you Mr. Chairman.

Prof. Yash Pal Ghai: Information 562.

Com. Mutakha Kangu: Mr. Chairman this Conference established a Consensus Building Committee. This question was taken to that Committee, the resolution that came from that Committee which our Committee incorporated into the Draft was that the Consensus Building Committee approved the four levels of the government. (*Clapping*). In the circumstances Mr. Chairman I do not think that it would be in order to again refer the question to Consensus Building. (*Clapping*).

(Inaudible discussions on the floor).

Prof. Yash Pal Ghai: 221 please.

Hon. Delegate Ruth Oniang'o: Thank you, Chair. I am Delegate 221, Ruth Oniang'o. Chair, I want you to know that Kenyans including all of us really have prayed for this week. We anticipated a problem and even at the Steering Committee Chair, we have always asked how is this particular stage of the process going to be conducted and we have not received answers. I say this with great humility as a member of the Steering Committee. Right from the word go we have wasted a lot of time because we have not followed procedure properly, and at this stage I want to recommend that we take a break for tea and then we go to the Steering Committee and

we harness the issues of procedure for how we are going to proceed for the rest of the remaining time. (*Clapping*) Thank you.

(Consultation at the “high” table).

Prof. Yash Pal Ghai: Well, we heed that advice, we will break for tea and then we will have a short Steering Committee and assemble here by 11.30 a.m.

(consultation at the “high” table).

Prof. Yash Pal Ghai: We will have a Steering Committee at 11.15 a.m. in the usual Tent.

The meeting adjourned for tea break at 10.52 a.m.

The Meeting reconvened at 12.13 p.m.

Prof. Yash Pal Ghai: I will like to make an announcement on behalf of the Steering Committee as regards how we proceed on Article 7 in the Draft Constitution. The view of the Committee was that since Article 7 is so closely connected with the Chapter on Devolution, that it would be wise to postpone the discussion on Article 7 until we get to the Chapter on Devolution. So, with that I would like to proceed with our business and ask the Secretary to read the Articles including the text as now from Article 8.

An Hon. Delegate: Point of Order.

P LO Lumumba: Point of order, 07.

Prof. Yash Pal Ghai: 007.

Hon. Delegate Jimmy Angwenyi: Thank you Mr. Chairman. Mr. Chairman, would I be asking for too much if the Commission could identify those areas that are common in several Chapters, so we identify them at once so that when we begin dealing with each of these Chapters, we know

the areas that we should not touch the same way we are segregating that aspect that relates to devolution before we can proceed with our business.

Prof. Yash Pal Ghai: Yes, the Secretary says he will do what he can and so let us proceed with Article 8.

Hon. Delegate Daniel Osoi: Point of Order.

Prof. Yash Pal Ghai: What is the Point of Order please, let us proceed, let us not be delayed--

Hon. Delegate Daniel Osoi: Point of Order Mr. Chairman.

Prof. Yash Pal Ghai: Yes, you have the floor.

Hon. Delegate Daniel Osoi: Thank you Mr. Chairman. 364, Ole Osoi. I want to draw the attention of this House to Article 6 on territory. Sub-Clause 2, that one we have already adopted what does that Clause say? So why do we need to suspend Article 7 when we have already said the republic is divided into regions and districts as set out in the First Schedule. So, what are we discussing about Article 7? It means we have already adopted it and again Mr. Chairman if you set the precedence that any Article that generate a little heat is set aside, supposed all the Draft is set aside because you simply cannot take a vote a see whether you are going to get one-third to resist it or what. What precedence are we setting for this Conference? I suggest you should be bold enough to take votes where necessary so that we do not avoid this--. Thank you Mr. Chairman. (*Clapping*).

(Consultation at the "high" table).

Prof. Yash Pal Ghai: I would plead with you to accept the recommendation of the Steering Committee, we had a long debate on this and it was agreed that the best way to proceed forward in an orderly fashion would be to postpone Article 7 until we come to the Devolution Chapter. I beseech you please accept that, otherwise we will not be able to proceed, I make a ruling as Chairman that we postpone Article 7 until we come to the Chapter on Devolution. Thank you.

PLO Lumumba: Mr. Chairman, I now, subject to your guidance proceed to read Article number 8. The Article number 8 deals with the capital of the Republic of Kenya.

(1) The capital of Kenya is Nairobi.

(2) The State shall decentralize the headquarters of the national state organs to all the regions equitably.

Article number 9 deals with languages, Article 9-

(1) --

Prof. Yash Pal Ghai: Sorry, we do have--

An. Hon. Delegate: Point of Order.

Prof. Yash Pal Ghai: --we do have a proposed amendment from Sammy Rutto, I do not know why he is not standing up to-- Yes, please do. This is on Article 8.

An Hon. Delegate: Point of Order.

Hon. Delegate Sammy Rutto: Mr. Chairman, I would like to suggest that we do not fix the capital of Kenya at Nairobi because already we have a lot of problems with the City of Nairobi. Particularly congestion, poor planning and many other factors that make Nairobi a bit uncomfortable for us to operate in a capital city. I suppose that soon it may be necessary to move our capital city elsewhere and fixing it in a Constitutional Clause like this one would not be wise for the Conference. Thank you. So, I am moving that we insert the words "city" immediately after the word "capital" and delete the words "is Nairobi" and substitute therefore the words "shall be determined by legislation". Thank you. I beg to move.

An Hon. Delegate: Point of Order.

Prof. Yash Pal Ghai: 010.

Hon. Delegate Davies Nakitare: Mr. Chairman, sons and daughters of Kenya--

(Inaudible debate on the floor).

Hon. Delegate Davies Nakitare: I would like to point one issue that we are--

PLO Lumumba: Kindly identify yourselves for verbatim record.

Hon. Delegate Davies Nakitare: Delegate number 010, Honourable Nakitare, Saboti MP. I would like to have clarification here. We have put aside devolution which includes the headquarters of administration. Why do we have to deal with or subject ourselves to regional headquarters when we have already suspended the issue?

Prof. Yash Pal Ghai: No, 057 please.

Hon. Delegate Kivutha Kibwana: Thank you, the Chair. I think within the Steering Committee we suggested that the proper rules of procedure in terms of voting should be adhered to. As matter stand we have not legally approved 1, 2, 3, 4, 5, and 6, no 7 we postponed . Because we have to vote so that for each Article two-thirds of those who are present and voting adopt the proposal and I am afraid that if we proceed the way we are proceeding it means number 1 to 6 have not been adopted and therefore Chair, I am pleading that we follow the Constitution of the Kenya Review Act so that what we agree to cannot be jeopardized subsequently, and we adhere to the Constitution of the Kenya Review law.

And secondly within the Steering Committee we did agree to propose to this Plenary that Devolution, the Executive and Transition be postponed as the most contentious issues so that--

Com. Githu Muigai: That was not the argument.

Hon. Delegate Kivutha Kibwana: --this was a proposal which was agreed by the Steering Committee, so this is just information.

(Uproar and discussions on the floor).

Prof. Yash Pal Ghai: We know that-- Just a minute I consult with my colleagues.

(Consultation at the “high” table).

Prof. Yash Pal Ghai: I think that Dr. Kibwana’s proposal is wise we have agreed at the--Order please. We have agreed at the Steering that we would take a vote on every Article and that we have to secure two-thirds of the votes for those present and voting. So I would now ask the Secretary to explain how we will conduct the voting and the counting and then we shall follow those procedures in order to adopt Articles 1 to 5.

PLO Lumumba: Thank you, Mr. Chairman. I reading Section 27 of the Act and specifically reading 27(5) which obligates us to ensure that anything that goes into the Constitution is carried by two-thirds of the members present, voting and (?). This is how the voting will be conducted. At the back we have the tellers with the voting list for those who will vote in the affirmative “**AYE**”. Behind me we have the tellers with the list of Delegates for those who will vote in the negative “**NAY**”. The process by its very nature will involve movement of Delegates. For you to move briskly we ask that you to line up and we ask that the Delegates once your name has been ticked out you will carry your placard if I may, and you will be identified in that fashion. The position as I understand it is this way. I will be requested as I have been by the Chairman to read a single Article or a group of them if there will be no objection and the voting will be carried out in the manner that the Chairman shall direct. Do I need to explain myself a lot more clearly?

(Consultation on the “high” table).

PLO Lumumba: I will now proceed to give legitimacy to what we had done, to start from Article number (1).

(Inaudible discussions on the floor).

Prof. Yash Pal Ghai: 015?

Hon. Delegate Billow Kerrow: Thank you, Mr. Chairman. My name is Honourable Billow Kerrow, Delegate number 015. Mr. Chairman, whilst I appreciate the sections that have been read by the Secretary, my concern is where there is no one who has called for a division, must we go for that process of division? Why can't we vote by acclamation if there is no one who has called for a division and queue? I think that must be followed.

(Consultations at the "high" table).

Prof. Yash Pal Ghai: Just to be on the safe side, I would suggest that we have a voting even if nobody has objected.

(Uproar in the house).

(Consultations at the "high" table).

Prof. Yash Pal Ghai: 368.

Hon. Delegate Joel Sang: Thank you, Honourable Chair. I am afraid we have to be forthright with one another. I am Delegate number 368, Joel Sang, representing Bomet District. We have to be honest with one another. Chair, take your full authority. You are bending backwards too much, to please a small group. *(Clapping)*. The reality is that, in my view, we have to vote on a voice vote and if somebody asks for a division then we go for a division. Why are we wasting time? The Observers have never voted since we came here, why is it that they are going to vote today? The reality is you seem to have an agreement with a small group somewhere. We will not accept. Unacceptable. *(Clapping)*.

(Consultations at the "high" table).

Prof. Yash Pal Ghai: Dr. Godana will explain. What I am proposing is consistent with the Act which supercedes the regulations, so I will ask him to explain.

Hon. Delegate Bonaya Godana: I think it is not fair to accuse the Chair of bending backwards. Let us look at what the Act says, everybody has been saying we follow the Act, we follow the procedure. The Act, Section 27, paragraph 5 proviso, it says and I read, "Provided that:

- (1) In the case of any question, concerning a proposal for inclusion in the Constitution, the decision of the National Constitutional Conference shall be carried by at least two thirds of the members of the Conference present and voting.
- (2) If on taking a vote for the purpose of Sub-Section (5) (1)", (that is the one which I have just read), "the proposal is not supported by a two thirds vote but is not opposed by one third or more of all the members of the Conference (present and voting that is), then subject to such limitations and conditions as may be prescribed by the Commission in the Regulations, a further vote may be taken".

In other words, the first time you have no option. You have no option, but to take a vote.

Hon. Delegates: No.

Hon. Delegate Bonaya Godana: Yes, that is what the Act reads.

(Uproar on the floor).

Prof. Yash Pal Ghai: I would like to rule that the procedure we are required to follow is the one that Dr. Godana has set out, it is clearly stated-- Could I remind you of another rule? You do not raise Points of Order, you do not shout when the Chairman is speaking. It is a well established rule, please respect it. Dr. Godana has correctly stated the position. When we require a vote of two thirds, I do not think it is entirely reliable to rely on the vote voice, and I have made a ruling that when we need to adopt an Article, the voting will then be by show of hands, perhaps, and then we will have our staff count the votes. Therefore, we will have to be satisfied that the two thirds have actually voted in favour of the Article. This is my ruling now and we should proceed on that basis. *(Clapping)*.

PLO Lumumba: I now proceed to read.

CHAPTER ONE.

SOVEREIGNTY OF THE PEOPLE AND SUPREMACY OF THE CONSTITUTION.

Sovereignty of the People.

1. (1) All sovereign authority belongs to the people of Kenya and may be exercised only in accordance with this Constitution.
- (2) The people may exercise their sovereign power either directly or through their democratically elected representatives.
- (3) Authority is allocated to the following State organs which shall perform their functions in accordance with this Constitution:
 - (a) Parliament and the legislative structures in the devolved governments;
 - (b) the National Executive and the executive structures in the devolved governments;
 - (c) the Judiciary and other independent tribunals; and
 - (d) the Constitutional Commissions and Offices.

Supremacy of the Constitution.

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

Defence of the Constitution.

3. (1) Every person has an obligation to respect and defend this Constitution and the State organs established under it.

- (2) Any attempt to establish a system of government otherwise than in compliance with this Constitution is unlawful.

The Laws of Kenya.

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

I beg to pause.

Prof. Yash Pal Ghai: Those who support the inclusion of these Articles in the Constitution, please raise your hands or your placards.

(Consultations at the “high” table).

PLO Lumumba: Ladies and gentlemen, as cumbersome as it is, you will now move in this direction, that your vote may be recorded - kindly so. You will look at my hand, there are Tellers directly in front of us. The Teller for this side will be Suba Churchill. The Teller for the “**AYES**” is Suba Churchill, organize that side. Those who will want to vote “**NAY**”, you turn to my back.

(Consultations at the “high” table).

(Uproar as voting continues).

PLO Lumumba: Right at the entrance, persons with disability at the entrance, we have a booth for you.

(Inaudible discussions on the floor).

PLO Lumumba: Those who are in charge please-- Those who have been marked, please resume your seats. We are receiving very many suggestions on improving this method. I want to confirm to you that we have a proposal after we conclude this exercise, we have enough suggestions and we will read them out to you immediately we conclude this particular session.

(Noise on the floor).

PLO Lumumba: Resume your seats, those who have been marked please resume your seats.

Vice Chairman Koitamet ole Kina, can you go and verify the vote tally please? The process is about to be concluded, let us resume our seats.

(Consultations at the “high” table).

Prof. Yash Pal Ghai: Those who have not voted have one more minute to vote, after that we are closing the counting and I will announce the results immediately after that. So, if you want to vote and have not voted, please do that immediately.

(Consultations at the “high” table).

PLO Lumumba: We are about ready now.

(Consultations at the “high” table).

PLO Lumumba: Waiting for you.

Prof. Yash Pal Ghai: Honourable Delegates, I am now in a position to disclose the results of the vote we have just taken. 345 persons voted, I believe some of you did not. Out of 345, 345 voted for “**AYE**”, there was not a single vote in the negative. So, these Articles are carried. *(Clapping)*.

Prof. Yash Pal Ghai: I would like to make a couple of remarks. One is that I am told and we are investigating, that certain Delegates have brought in crowds to Bomas to disrupt the proceedings. I take a very dim view of this. If this turns out to be the case, then those Delegates are in breach of their oath of office and we shall proceed with disciplinary action against them. So, please make sure that you do not bring any disruptive elements, some of these could cause conflicts between religious or ethnic communities. We are trying to build a consensus but some Delegates seem determined to create conflict when people are living peacefully. So, we shall take very severe action against those Delegates who have brought those people to Bomas. And please desist from this practice in the future. *(Clapping)*.

Prof. Yash Pal Ghai: The second--

(Consultations at the “high” table).

Prof. Yash Pal Ghai: --The second point I want to make is that you will have noticed that the voting method we used is not really viable. It has taken us nearly an hour to conclude the vote and I wish we had adopted the very wise words of Bishop Sulumeti who said we should raise our placards and then the Tellers can count the “**AYES**” first and the “**NAYS**” second. We will have these Tellers, in all the blocks they will have attendance sheets which they can use to tick off those who have voted. I believe that will take no more than a few minutes and that is what we propose to do when we have to take a vote in future.

I would now like to adjourn the meeting for lunch. Our Secretary is very distressed that we have made so little progress today, but I hope after lunch we will make more rapid progress and if necessary we will stay late today, to complete the Agenda for today. Thank you very much.

The meeting adjourned at 1.30 pm for Lunch.

AFTERNOON SESSION.

The meeting reconvened at 2.50 p.m. with Prof. Yash Pal Ghai in the Chair.

PLO Lumumba: Those whose Motions are pending for the remaining Articles, just come to the podium briefly. Those who have Motions, Koske, Ruto, Cheron, Kihara Mwangi, Professor Maathai, John Kiniti, William Yiaile, Winston Ogolla, Erulu, Lawrence Mute, Sammy Rutto, Hezron Manonda, Nyakundi, Rakamba and Mganga. Switch on the main microphone, please.

Prof. Yash Pal Ghai: Thank you. We will continue with adoption of Articles. I think we had disposed of Article 7 for the time being and then the general principle of that Article touching on Devolution will be taken together with relevant Chapter. So, we therefore move to 1-4.

(Consultations at the “high” table).

Prof. Yash Pal Ghai: Okay, I think the next one is Article 9.

PLO Lumumba: It is 8.

(Consultations at the “high” table).

Prof. Yash Pal Ghai: You mean for voting, yes all right. We had discussed 5, there was no dissent but in keeping with our new resolution that each Article will be put to vote, either individually or as a group, I now want to propose that we adopt 5 and it forms part of the Draft Constitution. As many as are of the opinion say, “**AYE.**”

Hon. Delegates: “**AYE.**”

Prof. Yash Pal Ghai: As many as are of the contrary opinion say, “**NAY.**”

Silence.

Prof. Yash Pal Ghai: So, I take it that it is accepted by consensus and we do not need a further vote on this. Thank you. (*Clapping*).

Prof. Yash Pal Ghai: Number 8, we I think we had – number 6 relates to Devolution, so we can certainly take number 6 Clause (1), if you wanted, because that is distinct.

(Noise on the floor).

Prof. Yash Pal Ghai: No, I think to be consistent we had agreed that the Articles touching on Devolution will be taken together along with the Chapters. We look to number 8 then.

PLO Lumumba: Article number 8, we had read, 8 (1), “The capital of Kenya is Nairobi and the State shall decentralize the headquarters of the national State organs to all regions equitably.” That is number 8. Article number 9, the national language of Kenya is Kiswahili.” Article 9 (2), “the official languages of Kenya are Kiswahili and English and all official documents shall be made available in both languages.” Article 9 (3), “The State shall respect and protect the diversity of languages of the people of Kenya and shall promote the development and use of indigenous languages and sign language.” Article 9 (4), “The State shall promote the development and use of Braille and other appropriate modes of communication for persons with visual and other impairments.”

Article 10, State and Religion. Article 10 (1), “State and Religion shall be separate.” Article 10 (2), “There shall be no State religion.” Article 10 (3), “The State shall treat all religions equally.”

“Article 11, National Symbols, Oaths and Affirmations. The following are the National symbols of the Republic of Kenya and are set out in the Second Schedule.

- (a) The National Flag.
- (b) The National Anthem.
- (c) The Court of Arms.
- (d) The Public Seal of Kenya until the National Oaths and Affirmations are specified in the Third Schedule.

Article 12, National Days. The following are National Days:

- (a) The first day of June, Madaraka Day.
- (b) The 20th day of October, Heroes and Heroines Day.
- (c) The 12th day of December, Jamhuri Day.

Thank you.

(Consultations at the “high” table).

Prof. Yash Pal Ghai: I do have a number of Notices of Amendments and as I said before, when an Article is read, to which you have proposed an amendment, you must at that point stand up or request to move your amendment. So, please we follow that in future, but now let us go back to Article 8 because I do have a request from Honourable Sammy Rutto, Delegate 180, who wishes to propose an amendment. So, I will give him now the opportunity to move his Motion. Delegate 180.

Hon. Delegate Sammy Rutto: Mr. Chairman, I still want to move the Motion, not to entrench Nairobi as the capital of Kenya constitutionally because already we are faced with a lot of poor planning of the city, roads, buildings, security, water and so on. In other words, Nairobi as city of this Republic to me is a shame and there is a need to change the city. If we are to wait for an amendment later, I do not see why we should not do it now. So, I would like to insert the word, “city”, immediately after the word “capital” and delete the words, “is Nairobi” and substitute therefore the words, “shall be determined by legislation.” I beg to move.

Prof. Yash Pal Ghai: Thank you very much. Yes, 104.

Hon. Delegate Petkay Miriti: Thank you, Mr. Chairman. I am Delegate number 104, Honourable Petkay Miriti. When I was there, I was told that we are not going to discuss Article 8 today and if I had been allowed, I wanted to move that we delete Article 8 (2) because of various reasons.

Prof. Yash Pal Ghai: Sorry, are you speaking on 8 (1)?

Hon. Delegate Sammy Rutto: 8 (2).

Prof. Yash Pal Ghai: No, we are dealing with 8 (1) at the moment. At the moment we are discussing the proposal by Mr. Rutto on 8 (1).

Hon. Delegate Sammy Rutto: But I am informed from the Chair that we are not discussing it today.

Prof. Yash Pal Ghai: We are not discussing 8 (2) because that is related to Devolution. But the question of capital city is not part of Devolution.

Hon. Delegate Sammy Rutto: Okay.

Prof. Yash Pal Ghai: I am sorry if I was not clear on this point. 057?

Hon. Delegate Kivutha Kibwana: Thank you the Chair. I want to support the amendment that has been proposed that “the capital city of Kenya--

Prof. Yash Pal Ghai: There is some spelling error, it should be “is Nairobi.” Those will be deleted.

Hon. Delegate Kivutha Kibwana: Yes. --“The capital city of Kenya is Nairobi or such other place as shall be determined by legislation.” This is because I think a country might need to change a capital city and therefore it is important to have that leeway so that if a country decides that is necessary, it is done; because the formulation in the present Draft is such that you have to change the Constitution to change the capital city. But if we were to say, “ The capital city of Kenya is Nairobi or such other place as shall be determined by legislation,” then there is leeway to change the capital when it becomes necessary just through legislation. Thank you.

Prof. Yash Pal Ghai: Thank you. 221.

Hon. Delegate Ruth Oniang'o: Thank you, Chair. 221, Ruth Oniang'o. I want to support the amendment Mr. Chairman which does not state the capital of Kenya as being categorically Nairobi. This would be in keeping with trends elsewhere, for example, South Africa and Nigeria, where they have once capital city as a commercial city and then they have another capital city as the seat of Government. Therefore, I think whatever amendments we have should remove these categorical statements of Nairobi as a capital city of Nairobi. Therefore, I wish to support the amendment. Thank you.

Prof. Yash Pal Ghai: 425? No, 427. Okay, 379 then please.

Hon. Delegate Sylvanus Onyambu: Thank you Mr. Chairman. I am Sylvanus Onyambu Ogari, number 425. I am standing here in support of the Motion where I feel that Nairobi should be decentralized. We should have some other capitals that will be actually legislated in future. I have the following reasons: Nairobi now has all the infrastructure, it has all the headquarters of Government, even Parliament itself is there even the new fashion of dress comes from Nairobi. So, I feel that in future, to avoid this concentration of all the facilities in Nairobi, the capital should be moved elsewhere. So, I am totally in support of the Motion.

Prof. Yash Pal Ghai: Thank you. 07?

Hon. Delegate Jimmy Angwenyi: Mr. Chairman, I would like to seek indulgence of the Chair. Mr. Chairman, which Motion are we debating now? Is it the one which says, we just delete Nairobi and say, "as will be determined by legislation", or the one which has been proposed by the Honourable Delegate from that side, which says, "Nairobi city, or as has been determined by legislation? You know we have got two Motions now, Mr. Chairman. I thought you should put a question on either of those Motions so that we can move on.

Prof. Yash Pal Ghai: Well, I think we need some more views and then I am going to put Dr. Kibwana's amendment first, because if that is carried, then I think that will conclude the matter for us, I believe.

PLO Lumumba: You can even ask them to consolidate the Motions.

Prof. Yash Pal Ghai: They may wish in fact to consolidate the Motions. I think Mr. Kibwana's Motion is quite attractive because it keeps Nairobi capital for the time being but it allows to develop another capital later on. Let me just then maybe ask if anybody is opposed to the Motion, because every view so far has been in favour. So, could those who are opposed to the Motion please speak. 086.

Hon. Delegate Marsden Madoka: Delegate 086, Marsden Madoka. Mr. Chairman, I feel it is important that we specifically state which is the capital of the country. If at some stage, we wanted to move a capital elsewhere, it is major issue which should not be left to simple majority, maybe in Parliament, to say, let us move the capital to Mwatate. I think we have to make sure that we make it extremely difficult to move the capital. If it is a question of developing a commercial city, then that is another matter. But for the capital, I think it is important that we state in the Constitution the capital city of the country.

Prof. Yash Pal Ghai: 394.

Hon. Delegate Adungo Asitaluko: 394, Asitaluko Adungo, I stand to oppose the Motion as originally moved and also as amended and support the views expressed by the Delegate that has just sat down, that the capital city's position in future be decided through a referendum by the citizens rather than leaving it to a few in Parliament.

Prof. Yash Pal Ghai: 424.

Hon. Delegate Nyabote Aburi: Mr. Chairman, my name is Nyabote, 424. I stand to oppose the Motion as moved by the first proposer, Mr. Rutto, simply because the matter to decide on the capital city of the country is an important decision which should be decided by the residents of that country. Kenya or Nairobi as such has not reached the status that can affect the capital city as of now. So, I strongly believe that the Motion which has been moved is a bit premature and even the amendment which has been moved by Honourable Kivutha Kibwana. That is because Nairobi has got areas of expansion; there is still room for infrastructural development and we have not reached the status of Lagos or South Africa to warrant such move to amend that Motion. Thank you, Mr. Chairman.

Prof. Yash Pal Ghai: Thank you. 525, please.

Hon. Delegate Ibrahim Yusuf: Thank you, Chair. My names are Ibrahim Ahmed Yusuf, Delegate 525. Chairman, I am standing here to oppose the Motion that was proposed and even the amended one. Chairman, we know Nairobi is centrally located. It has room for expansion and if the only reason that is being given by the Mover is that we want – infrastructure is so bad and what, all these can be improved.

Chairman, I know Nigeria decided to move its capital city to Abuja but it has not taken off. Dar-es-salam decided to move its capital city to Dodoma, it has not taken off. Chairman, we are in a time of devolved Governments. Everybody wants to go and devolve their own regions and have their own capital cities. We do not want to commit extra funds to building another capital city. What will happen to Nairobi? Chairman, we know there are people who are close to Nairobi more than the others. We do not want them annexing Nairobi to be part of theirs because it is not a capital city. Thank you very much. *(Laughter)*.

Prof. Yash Pal Ghai: Could I ask Delegates if they feel that the matter has been sufficiently ventilated and I can proceed to voting or would you a little bit more time to discuss it?

(Noise on the floor and consultations at the “high” table).

Prof. Yash Pal Ghai: I will allow 135 and then I would like to put the question.

Hon. Delegate David Mwenje: Thank you, Mr. Chairman. My number is 135, Honourable David Mwenje, MP, Embakasi. Mr. Chairman, we from Nairobi – I stand to oppose that Motion. The reason being, first of all, the Mover did not give any convincing reason. The question of talking about the infrastructure and the rest, of course these are temporary, we know what was there before and we believe Nairobi, soon or later the infrastructure will be fine. The major thing is, we will be opening, Mr. Chairman, a Pandora’s box here, where literally, even in Parliament, everybody will want to say his area or the capital city should go to a particular place. There will be a lot of argument. The reason why we are here is to try and sort out that problem to make sure that it is in the Constitution so that it does not have to go back again for debate in Parliament. I

believe, Mr. Chairman, that we have developed all the necessary infrastructure that is required in Nairobi. Even the other day, Mr. Chairman, when we tried to create other cities, you know the problem that we are having at the moment.

So, trying to change the question of capital city from Nairobi, Mr. Chairman, will be a burden to all Kenyans, such that if we have to choose and say, we go to another place, then it means a lot of expenditure, a lot of money will be required to move all these head offices which are here in Nairobi. So, I do not think anybody would think of moving the capital city from Nairobi.

Therefore, it should be entrenched at the moment in the Constitution. I want to appeal to all Delegates to support the idea that we leave Nairobi as the capital city of this country. If at one time, one of these days, by the time we think of another one, I think that will be also the time when we need to review another Constitution. (*Laughter*).

Prof. Yash Pal Ghai: Let me now try to sum up very briefly before I put the matter to vote. The choices we have are; one, to retain the Article as it is and the second choice we have is as proposed by Mr. Rutto, that is, to say that the Constitution will say that the capital city is determined by legislation. Then we have Mr. Kibwana's amendment that the capital city is Nairobi or some other place or city as may be determined by legislation. Then I want to remind you of Mr. Madoka's argument that a question of the location of the capital is sufficiently important to be a matter for decision by the people and not just by Parliament.

I think to get a sense of what the Delegates are thinking, I would like to put to vote at this stage Mr. Kibwana's proposal and if that is accepted, then it seems to me that the other options are rejected and if that is rejected, I will put to vote the amendment introduced by Mr. Rutto. Now, I do not have the exact proposal put by Mr. Kibwana. I could ask him to perhaps stand up and read his amendment.

An Honourable Delegate: Point of Order!

Hon. Delegate Raphael Livu: Point of Procedure! (*Laughter*).

Prof. Yash Pal Ghai: Okay, the Point of Order.

PLO Lumumba: Take Procedure on 228.

Prof. Yash Pal Ghai: 228.

Hon. Delegate Raphael Livu: Thank you Chair. My name is Raphael Livu, District Delegate from Mombasa. Mr. Chairman, the Chair is misleading the Conference, in that a few minutes ago, you made a ruling to the effect that matters that are related to Devolution cannot be discussed here. Mr. Chairman, Article 234, Sub-Article 2 of the Zero Draft Bill, which I shall read, says, “The Nairobi region shall be managed as a metropolitan capital city as prescribed by an Act of Parliament.” Mr. Chairman, if you made a ruling to the effect that we cannot discuss issue related to Devolution and this is an issue that relates to region, Mr. Chairman, my argument is that, at this pointing time we are disqualified to discuss this matter.

Prof. Yash Pal Ghai: I had explained earlier, perhaps you did not listen, that the question of capital city is not a matter of Devolution. Livu, we are dealing with 8 (1) but not 8 (2).

Hon. Delegate Raphael Livu: Mr. Chairman, I am not talking of 8 (1), I am talking of Article 234, Sub-Article (2).

Prof. Yash Pal Ghai: We are not there.

Hon. Delegate Raphael Livu: I know we are not there but these are related issues Mr. Chairman.

Prof. Yash Pal Ghai: We cannot anticipate those Articles.

Hon. Delegate Raphael Livu: Mr. Chairman, since the decision rests with you, I hope my point is made, but that is the fact.

Prof. Yash Pal Ghai: Well, I am following the rules laid down as to the order in which we take amendments. Thank you. 010, please.

Hon. Delegate Davis Nakitare: Mr. Chairman, thank you very much. Delegate number 010, Honourable Captain Davis Nakitare, Member of Parliament Saboti Constituency. Mr. Chairman where we deal with the Capital City, when we say we want to destroy Nairobi, are we destroying Kenyan history, did we come here to destroy Kenyan history? Did we? If we did not--

Prof. Yash Pal Ghai: I am sorry you are--

Hon. Delegate Davis Nakitare: If we did not come here to destroy Kenyan history, then we should deal with the Devolution--

Prof. Yash Pal Ghai: Excuse me!

Hon. Delegate Davis Nakitare: --from the grassroots and then come back to the Capital City later on, Nairobi is a Capital City with a history.

Prof. Yash Pal Ghai: You are now making an argument on substance, we have closed the debate and we are now proceeding to a vote. So, Doctor Kibwana will you-- Let us have your amendment.

Hon. Delegate Kivutha Kibwana: The language, the Chair, was, "The Capital City of Kenya is Nairobi or such other place as shall be determined by legislation".

Prof. Yash Pal Ghai: As many as are of the opinion say, "AYE",

Hon. Delegates: "AYE".

Prof. Yash Pal Ghai: As many as are of the contrary opinion say, "NAY".

Hon. Delegates: "NAY".

(Consultations at the “high” table)

Prof. Yash Pal Ghai: I take it that amendment is rejected and therefore I want to ask whether the – to put the question that the Article 8 (1) as it stands is adopted and becomes part of the Draft Constitution. As many as are of the opinion say, “**AYE**”,

Hon. Delegates: “**AYE**”.

Prof. Yash Pal Ghai: As many as are of the contrary opinion say, “**NAY**”.

Hon. Delegates: “**NAY**”.

Prof. Yash Pal Ghai: So it seems to me there is a consensus for retaining the present formulation. Thank you very much.

8 (2) is reserved so we go on to 9 as far as-- Order, order, please. As far as my records show nobody has proposed a motion of amendment to Article 9, so can I put to question – put the question that Article 9 be--

Hon. Delegate Luseno Liyai: Point of Order!

Prof. Yash Pal Ghai: 601.

Hon. Delegate Luseno Liyai: Thank you very much, Madam-- Sorry *Bwana* Mr. Chairman. Luseno Liyai 601, Political Parties. Although I had not indicated some Motion, it is just a small thing. There are people called, the people with disability; the deaf, they are saying that there is Kenyan sign language, not just sign language. Kenyan sign language, there is British sign language, there is American sign language, so they want it to be Kenyan sign language. Thank you very much.

Prof. Yash Pal Ghai: I think my view is that we have taken some advice on this at an earlier stage. So I put the question, do we adopt Article 9, and it stands as part of the Draft Constitution? As many as are of the opinion say, “**AYE**”,

Hon. Delegates: “**AYE**”.

Prof. Yash Pal Ghai: As many as are of the contrary opinion say, “**NAY**”.

Silence.

Prof. Yash Pal Ghai: So, it is carried unanimously. Thank you very much.

We do have however a Motion on Article 10, in fact more than one and the first one is by Kihara Mwangi, Delegate 132.

Hon. Delegate Kihara Mwangi: Thank you, Mr. Chairman. I am Kihara Mwangi, Delegate 132. Mr. Chairman, I beg to move this Motion to amend Article 10 which reads that, “there shall be no-- Kenya shall-- State and religion shall be separate” and that, “there will be no State religion” and that “the State shall treat all religions equally”. My amendments, Mr. Chairman, read as follows, “that Kenya shall be a multi-religious State.” That is a fact, that is what we have on the ground. That we have got multi-religious society, and therefore it will be naïve to assume that there will be – that Kenya will have no religion.

Two, that, “Kenya – Christianity shall be the State religion”.

(Inaudible responses from the floor)

Hon. Delegate Kihara Mwangi: I beg to move this Motion and I beg the Delegates to listen. In fact, I am moving the Motion at the risk of being branded - the Delegates, one of the Delegates who brought demonstrations and what-have-you. I did not and even if I did, if I were, in fact if I knew that there was that demonstration, I would have supported them. Reason being that, Mr.

Chairman, you are the first to lead a demonstration when we opened Bomas III, and therefore I would have had nothing to regret about. But, I did not know about that demonstration.

Three, you will remember that by independence, Kenya was a Christian State and the Archbishop of the ACK Church, the then Anglican Church, was the Chaplain of State House and of Parliament. And the Provost of All Saints Cathedral was the Chaplain to the City Council, and Mr. Chairman--,

(Uproar from the floor)

Hon. Delegate Kihara Mwangi: --therefore Njoka is in the rightful place, because he was Chaplain by virtue of being Provost of All Saints Cathedral.

Number four Mr. Chairman, is that this is to defuse and to remove contradiction and confusion of Articles 209, 222 and 224. We have been talking about not including any religion in the Constitution but we have been overruled and in fact I believe we have been - as Christians been give a raw deal. And we have been told that the question of the Kadhis' Courts must be in the Constitution because they were introduced forty years ago. Christianity as a State Religion was before the Kadhi Courts were introduced. That is why I am saying that if we must retain those, then we must revert therefore to the Christianity being a State religion and what that will mean is that all organs of State will be Christian.

(Uproar from the floor)

Hon. Delegate Kihara Mwangi: The other reason for introducing these amendments Mr. Chairman is that I hope many delegates do know this, that in November 1989 there was an Abuja Conference held in Abuja Nigeria, by the Muslim Council and the Muslim Council passed resolutions, twenty resolutions, Mr. Chairman. And one of the resolutions if I may read, resolution number 12, "was to support the establishment and application of the *Sheria* to all Muslims". In that Conference the resolution was to have Africa as a Muslim Continent by the year 2013, and the objective is to make Africa under *Sheria* Law by 2013. That is by Article 12 of their objectives--

Prof. Yash Pal Ghai: One more minute.

Hon. Delegate Kihara Mwangi: --by Article 15 of the objective, “is to ensure for the appointments of only Muslims into strategic national and international posts of member nations”. Therefore, should Africa become a Muslim State, that will mean all strategic appointments shall have to be Muslims.

Number 16 of the objectives is--,

An Hon. Delegate: Point of Order.

Hon. Delegate Kihara Mwangi: --“to eradicate in all its forms and ramifications all non-Muslim religions in member nations”. Such religions shall include Christianity, (?) and other tribal modes of worship unacceptable to Muslim.

Number 17, is, “to ensure that Muslims are elected to all Political posts of member nations”.

Prof. Yash Pal Ghai: Mr. Mwangi, your time is up.

Hon. Delegate Kihara Mwangi: Mr. Chairman,--

Prof. Yash Pal Ghai: Will you please take your seat?

Hon. Delegate Kihara Mwangi: --my Motion, my Motion Mr. Chairman is to make sure that there is no Sheria Law declared in Kenya and that at no one time that Kenya is going to be a Muslim State, under Sheria Law. And that is why I move this, and that is why I revert to my request that if this is not acceptable, then we cannot have any form of religion in the Draft Constitution because that will mean that that religion is the one which will continue to govern the State of Kenya. Therefore, I beg to move that and pray that the Delegates adopt my Motion. Thank you. (*Clapping*).

Prof. Yash Pal Ghai: 453.

Hon. Delegate Elkanah Odembo: Thank you, Mr. Chairman. Elkanah Odembo 453. Mr. Chairman, I am a bit disappointed that someone can raise at this point to move a Motion, and not only did he not stick to the substance of his Motion, he launched - specifically launched an attack on a Community (*Clapping*), and we allowed him to go on and elaborate, he was trying to make a point, his point is on page 7 of 108 of the Motions and they are listed there very clearly, 1, 2, 3. Mr. Chairman, it would have been fair, if you had allowed the Honourable Delegate to read his proposed amendments and not to proceed to give us a lecture, which was completely in-sensitive to the kinds of things that we are trying to establish to this Constitution - an attitude of tolerance, the principal of accepting other Communities and other religions. He has completely undermined that with the statement that he has just made. (*Clapping*).

I find most despicable, Mr. Chairman, and I think we should not have allowed him to go on and on. That is not the spirit of this Conference.

Prof. Yash Pal Ghai: 433.

Hon. Delegate David Rakamba: Thank you, Mr. Chairman. I am Delegate 433, David Marcos Rakamba. Mr. Chairman, I will not support the sentiments that were added on top of the Motion that was being raised, but I would like to support the amendments with a reason that it could enable us carry the rest, that is the other sections without a lot of problems. Mr. Chairman, if we really recognize that Kenya, we adore and we adore that there are religions and of different nature, then we should not shy off from saying that. However, what I am fearing is that if we declare the second part that Kenya shall be a Christian State, then that one I will not really support it. However, I will support 1 and 3. Thank you Mr. Chairman.

Prof. Yash Pal Ghai: 209, please.

Hon. Delegate Moses Wetangula: Thank you, Mr. Chairman. My name is--

An Hon. Delegate: Point of Order.

Hon. Delegate Moses Wetangula: Do you want to take the Point of Order first?

Prof. Yash Pal Ghai: No, I have given you the floor.

Hon. Delegate Moses Wetangula: Okay. Thank you, Mr. Chairman. My name is Wetangula from Parliament. Mr. Chairman, I oppose the Motion as moved by the Honourable Kihara for a simple reason, (*Clapping*).

One, that it is in fact in - correct for anybody to think that the majority of Kenyans are Christians. We have many Kenyans who practice our traditional religions who form the majority of the population of this county. (*Clapping*) They are neither Christian nor Muslim. Mr. Chairman, the clause as worded is sufficient, it is good enough to hold our country together and we must learn not to live in the fear of the unknown. The fact that some Muslims have sat somewhere and written things that are unpleasant does not make it a matter for us to worry that it is going to creep into the national fabric of this country. We want this country to remain separated religion and State so clearly that if I decamp from my Christianity and go to *Dini Ya Musambua*, I should not be seen to transgress any law, least the constitution. Thank you. (*Clapping*).

Prof. Yash Pal Ghai: 525. Where is the Point of Order? 037, yes please.

Hon. Delegate Otieno Kajwan'g: Thank you. My name is Honourable Otieno Kajwan'g from Parliament, 037. Mine is a Point of Procedure, really. We have already gone through the Draft, we have already gone to our Committees, - Technical, and we have gone through the Zero Draft. If somebody now proposes an amendment - we have also read the amendments because we have them circulated. I do not think that this is the time to allow debate again. So, that Mr. Chairman we have to have very clear direction, that you are going to allow two minutes for somebody to say what he wants to say on top of what is already circulated. And that two minutes should be specific, there is no need for somebody supporting him and we take a vote.

This is because if we go the way we are going, we are going to take a lot of time answering to the words of Honourable Mwangi. In fact, I have a lot of things to tell him which will now make this a big debate, which will take us hours and hours. So, the rules of Committee are very clear. You already circulated it, you raise it and move it and you say one or two things and sit down and that should not be more than two minutes.

Let me also add my voice to the fact that we cannot have a religious State, because these religions, some of them are fanatics and fundamentalists, they can kill us here. *(Laughter)*. So, even Mwangi I am not so sure that if we gave Mr. Mwangi these powers he will not finish us! *(Laughter)*.

Prof. Yash Pal Ghai: Thank you, Honourable Kajwan'g. I have to say that I am required by the rules to allow a small debate, but obviously it is not time for full-scale debate but I think I would like - all of us I know would like to have some people supporting, some opposing before I put the matter to vote. However, I promise you that I am not going to spend a great deal of time on debate on Motions because as you have reminded us, we have debated these issues endlessly over the last two years and time now has come to make decisions.

So, I am going to take two or three more speakers then I am going to put the Motion to vote.

(Inaudible comments from the floor)

487.

An Hon. Delegate: And behind here?

Prof. Yash Pal Ghai: Yes we are calling on you.

Hon. Delegate Rihal Singh: Thank you, Mr. Chairman. This is Rihal, 487 from the Professional Organizations. I thought that we are creating a circular state in Kenya, where all religions will be treated equally and there will be no forceful conversion by any religion of another religion or followers of another faith and try and convert them into their faith. If we specifically write in our Constitution that the State Religion of Kenya is going to be Christianity, in ten, five years time what is going to stop the state from converting forcefully people who follow other faiths? Religion is a very sensitive issue in all Countries of the world. So, I strongly urge that we leave this section as it has been drafted and put in the Draft Bill. We just stick to

that and we do not agree to the amendment proposed by Honourable Mwangi. Thank you.
(Clapping).

Prof. Yash Pal Ghai: 530 please.

Hon. Delegate Florence Mburugu: Thank you, Chair. I am Mburugu Florence, Delegate 530. Chair, I am called to contribute to the amendments that have been proposed by Honourable Kihara to say that in as much as we read Article 10, when we read through the Draft Constitution, we do not see the State not treating all religions equally. When we take a particular religion and put it in the Constitution, that means that it is getting the Constitutional protection, the constitutional favour that it requires to get. If indeed we all agreed that a multi-religious country, why then are we picking one particular religion and enhancing its activities in the Constitution.

I beg to support the Honourable Kihara by saying that since the majority of this country are Christians and they have not been given any space in the Constitution that we embark them there and we call this a Christian state. If that is not possible Mr. Chair then we should not have any religion named in any way in the Constitution because that means giving it State protection. Therefore, I support by saying that we adopt Kihara's Motion. Thank you, Chair.

Prof. Yash Pal Ghai: 311.

Hon. Delegate Fr. Gitonga Joachim: Thank you, Mr. Chairman. My name is Fr. Gitonga, Delegate number 311 from Muranga. I am Christian, I am a Catholic and I am a Kikuyu. We have a Kikuyu religion, but I oppose this Motion categorically - completely, *(Clapping)*, that is should not pass as it is. The reason is that, all of us have read the history of Europe where we had Christianity as a State religion in every country of Europe and people suffered because the religious leaders were imposing on the government what to do and there was no religious freedom in those countries. Until people fought, civil wars were fought, people killed one another until they released themselves from this burden of religion being in the constitution and that is why Europe is free now. If you go to Rome, you find Mosque, you find Protestants, you

find all religions prospering very well because there is freedom of worship and no persecution of one religion.

So, I would oppose that Christianity becomes the State Religion. Now, if we say that Christianity-- We do not want to entrench any religion – we should not entrench any religion directly or indirectly into the Constitution because if we do that, in future we might be fighting people here. In those Countries where we have is state religions today there is no freedom of worship, people are fighting religious wars. Take Nigeria, take Sudan, and many other places for example, people are fighting along different religions because religion is in that Constitution. So, before - I do not support this Motion, but I would warn this Conference that if we are not going to remove this Article 10 today and the other Chapter 9 we introduced, and the people know I have been saying this for a long time and it is not a question of hatred of any religion.

If we let this Article 10 remain there and let the Chapter 9 on Judiciary we insert there Articles about religion, then we shall be passing a contradictory Constitution – one that contradicts itself. That religion is the same - Government treats all religion equally but on the other Chapter we treat one religion differently. Not out of the hatred for one religion but let us be sure we shall be passing a contradictory religion which can be challenged by anybody in a court of law. Thank you.

Prof. Yash Pal Ghai: 084. 84.

Hon. Delegate Wangari Maathai: Thank you very much. I am Delegate 084. Mr. Chairman, mine is 10(3), but it is related to what we are discussing and it is also related to the next Article 15 which is Article 10(3) also, in the sense that if we are trying to look for ways of not saying that all religions shall be treated equally. Mr. Chairman, you know that I talked to you about this. This is because there are very many religions as we have already had and many religions are not even institutionalized. We have many oral-faith traditions. Sometimes I refer to them as “OFT”. These religions are not institutionalized and they are not registered with the Register of Societies. Therefore, sometimes, they can become misused. Take for example, Honorable Wetangula just mentioned *Dini ya Musambwa*. Is that a law? Does the State treat that religion equally as it treats the Catholic Religion or the Anglican Church or Mungiki? Will the State treat that religion the same way it treats the others? I think that this Clause needs to be looked at so that we do not

have discrimination and we do not have the State misusing or sometimes mistreating other religions. I had mentioned to you, Mr. Chairman, the Lords Army in Uganda. Is that a religion? You can claim that it is a religion and to say that the State shall treat all religions equally would be detrimental and therefore, that section needs to be looked at and I had suggested that we register them. However, I am also reminded that there are many that are not registered. Thank you, Mr. Chairman.

Prof. Yash Pal Ghai: Is it time to put the question to vote?

Hon. Delegates: Yes.

Prof. Yash Pal Ghai: Okay. So, I now put the question, basically the amendments proposed by Honourable Mwangi. Those who support the Motion say, “**AYE**”.

Hon. Delegates: “**AYE**”.

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

Hon. Delegates: “**NAY!**”

Prof. Yash Pal Ghai: I think the, “**NAYS**” have it. (*Clapping*) It is very clear indication. Now I put Article 10 as it appears in the Draft. Those who support Article 10 as in the Draft say, “**AYE**”.

Hon. Delegates: “**AYE**”.

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

Silence.

Prof. Yash Pal Ghai: So, again, an unanimously decision. Thank you very much indeed.

(Consultations at the “high” table).

Prof. Yash Pal Ghai: Now, there is a Matter Arising out of Article 10. Actually, we have two Motions on that which are to the same effect. This is one by Professor Maathai. The other is by Honourable John Kiniti. They both would like to qualify religion by saying it should be lawful religion whereas our Professor Maathai’s case registered religion and she has already presented her position. We had agreed that since the two Motions are very similar, perhaps Professor Maathai might speak to it briefly. As I understand, the concern that you have expressed is that under the name of religion practices are carried on which we do not want to protect. The way you suggest is by registering religions or in the case of Mr. Kiniti, by putting the word “lawful” before “religions”. I wonder whether this is something that can be taken care of in the drafting. If you like to say a few words, Professor Maathai, you have the floor.

Hon. Delegate Wangari Maathai: Mr. Chairman and Honourable Delegates, I do not have any problem talking to the Drafters in assisting me to come to terms with the difficulty that I have with this Clause and also be able to feel that those whose religions are Oral-Faith are properly protected and that no State shall persecute people because of their faith or spirituality. So, I would be quite willing to talk to the Drafters.

Prof. Yash Pal Ghai: Yes, I think it is something that we can take of at the Drafting level.

(Consultation at the “high” table).

Prof. Yash Pal Ghai: So, we then turn to Article 11, where there was Notice of Motion from Honourable William Ole Yiaile, Delegate 361 who had wanted to included a new Clause. I believe now he does not wish to proceed with that. Would Delegate 361 like to confirm that?

Hon. Delegate Levi Ahindukha: Point of procedure.

Prof. Yash Pal Ghai: Yes, Point of procedure?

Hon. Delegate William Ole Yiaile: Yes--

Prof. Yash Pal Ghai: Could you please let Delegate 379 make a Point of procedure first?

Hon. Delegate Levi Ahindukha: Mr. Chairman, my number is 379. My name is Ahindukha, a District Delegate from Kakamega District. Mr. Chairman, this morning when you adjourned shortly when we broke for tea, you went in the Steering Committee and brought up the Procedure of voting. Mr. Chairman, there is the issue of two-thirds voting, which we were informed that we have to use that procedure. When we are doing the voting, Mr. Chairman, we have forgotten that procedure. What is the position, Mr. Chairman?

(Consultation at the “high” table).

Prof. Yash Pal Ghai: No, the procedure as under the Regulations and under the Act is that first we have voice vote- we want to see if there is a consensus. If there is no consensus, then we proceed to voting. So, we have been following the procedure as laid down. So, could Delegate 361 please want to clarify?

Hon. Delegate William Ole Yiaile: Yes. Delegate 361. Ole Yiaile is my name. Mr. Chairman, in every African society, there were special songs and dances depicting every aspect of life in times of peace, harvest and even internal and external aggression. In each of these occasions, it was important to celebrate, experience, capture and immortalize the national spirit at that particular moment to attain special psychological and emotional preparedness to face difficulties. However, because I am persuaded by some of my friends to withdraw, I think it was an important Motion, but I have to withdraw because I cannot go against my friends (*Laughter*). So, I withdraw--

Prof. Yash Pal Ghai: Thank you.

Hon. Delegate William Ole Yiaile: --but I would also like to leave it to the legislators because it is very important in every nation. Infact, we sing foreign songs in churches like this one:

(Uproar).

Hon. Delegate William Ole Yiaile: *Kwa hivyo--* Yes! Let me-- Just because-- I knew it was popular but because my friends are telling me, “leave it”, however, we need one for this nation (*laughter*). Thank you.

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

(Consultation at the “high” table).

Hon. Delegate William Ole Yiaile: *One world Christian soldiers* is a very good example. It is a song the French sing in battle. There are so many we sing in church. *Hata ule unasema, “ la, la, la, lah...”* is an American battle song (*Laughter*). *Kwa hivyo, wacha niwache.*

Prof. Yash Pal Ghai: Thank you. On Article 12, there was--

P.L.O Lumumba: Have you put the question on 11?

Prof. Yash Pal Ghai: I think we haven’t done. Let me put the question on Article 11. Article 11 deals with the national symbols, oaths and affirmations.

Hon. Delegate Gacuru wa Kareng: *(inaudible).*

Prof. Yash Pal Ghai: Yes, 314.

Hon. Delegate Gacuru wa Kareng: Thank you, Mr. Chairman. I do not want to raise a lot of issues. However, if you remember, I had indicated that there is a Motion--

Prof. Yash Pal Ghai: Yes, indeed you did. I am sorry, please proceed.

Hon. Delegate Gacuru wa Kareng: Yes. Okay. Thank you, Mr. Chairman. My names are Gacuru wa Kareng, Delegate 314 from Central Province.

Prof. Yash Pal Ghai: Excuse me? I have to take a Point of Order. 457.

Hon. Delegate Gacuru wa Karengi: Okay.

Hon. Delegate Kivutha Kibwana: The Chair, in the morning, I think we had actually agreed that we must vote according to The Constitution of Kenya Review Act. However, we had said that we should simplify the way in which we vote so that it doesn't take time. I want to put it on record, Mr. Chairman, as it has been stated by one of the Delegates that the way in which we have ostensibly passed Article 5 (8) (i), 9 and 10, we have passed them or ostensibly passed them in disregard of The Constitution of Kenya Review Act. If the Conference does not mind, then that is fine. However, I wanted to put on record that actually, we have not passed them according to the Constitution of the Kenya Review Act.

P.L.O Lumumba: What we will do, after we have gone through this--

Prof. Yash Pal Ghai: Well, there is some difference of interpretation here as I read Section 27--

(Consultation at the "high" table).

Prof. Yash Pal Ghai: Yes, so, my understanding was that if we were deciding by consensus, we could have a voice vote. If it is clear that there was no consensus, then we would move to voting. However, the Secretary suggests that maybe we could have concluded this and then take a formal vote, so that we satisfy any doubts that there may be about the procedure. So would that be all right?

Hon. Delegates: Yes.

(Consultation at the "high" table).

Prof. Yash Pal Ghai: No, this particular Chapter?

P.L.O Lumumba: No, on the issues already picked up, he is right.

Prof. Yash Pal Ghai: So, that we combine the two--

P.L.O Lumumba: Yes, and he is right.

Prof. Yash Pal Ghai: What do you want me to do there now?

P.L.O Lumumba: I think let us hear him with his Motion.

Prof. Yash Pal Ghai: Yes, please. Start with your Motion, please.

Hon. Delegate Gacuru wa Kareng'e: Okay. Thank you, Mr. Chairman. Again, for the record, I am Gacuru wa Kareng'e, Delegate 314 from Maragua District. I am moving a Motion on 11(1) that is seeking to add a new Section (c), stating that the national dress code as established by an Act of Parliament. In other words the full Motion, reads, " Notice is hereby given for a Motion to amend Chapter 2, Section 11(1) and the Second Schedule by inserting a new Sub-Section (c) in both Sub-Section 11 and the Second Schedule as follows:

(c). The national dress code as established by an Act of Parliament and renumbering the existing (c) and (d) in both Sub-section 11(1) and the Second Schedule as (d) and (e) respectively.

Mr. Chairman, this Motion is motivated by the resolutions passed by the Committee on Culture. In the Zero Draft, they passed a resolution that there will be a national dress code and I thought, Mr. Chairman, that it would be a good idea that we take it in this Section as a National Symbol. I want to say that taking it as a National Symbol, we also want to be careful that people/Kenyans should be given the freedom to wear whatever they want to wear. However, it is also important Mr. Chairman, that there are those Kenyans who feel patriotic that they want to express their feelings on a National Symbol. One of the vivid occasions that I remember is when, after the last elections, Parliament was being opened. MPs were coming in all sorts of regalia which I thought was quite good. If you look at the National Days, people come with different costumes, in other words, showing that they want to express something in them.

So, Mr. Chairman, I think it is a good idea that we give those people who feel that they want to express their patriotism with a National Symbol such as a national dress code as recommended by the Committee on Culture, that they do so. However, we also ensure that this is not an imposition to people; it is not going to be like a school uniform. The operative word here is to “encourage” those who want to feel that they want to express themselves that way.

So, with those remarks, Mr. Chairman, I hope that the Delegates will support this and I beg to move.

(Consultation at the “high” table).

Prof. Yash Pal Ghai: 394 and then 015.

Hon. Delegate Osili Adungo: My names are Osili Adungo, 394, Teso District. I stand to oppose the Motion on the grounds that when it comes to things like dress and so on, we have seen a very elaborate work that had been done by the Committee on Culture. They have embraces almost everything in life and I stand to say that if there is need for a national dress, that can be taken care of under an Act of Parliament. It should not be a Constitutional matter. Also, when you talk of freedoms, you do not just have to load everything in the Constitution and stop people from dressing the way they would like. I think we are becoming petty. I beg to oppose the Motion.

(Clapping).

Prof. Yash Pal Ghai: 015.

Hon. Delegate Billow Kerrow: Chairman, my concern is that I do not have a copy of the Motion in the file.

P.L.O Lumumba: It is not there in the file.

Prof. Yash Pal Ghai: Is it not there?

Hon. Delegate Billow Kerrow: It is not filed so--

Prof. Yash Pal Ghai: It is no there.

Hon. Delegate Billow Kerrow: It s not sufficed.

(Consultation at the “high” table).

Prof. Yash Pal Ghai: Do you want further debate or shall we put it to vote.

Hon. Delegates: No!

Prof. Yash Pal Ghai: Okay. 368.

(Consultation at the “high” table).

Hon. Delegate Joel Sang: Thank you, Honourable Chair. I am 368, Joel Sang. I will be very brief. Honourable Chair, on the issue of dress, I think normally dress comes with culture and it evolves. We cannot impose it in the Constitution. I like reminding Kenyans that when Nyerere was building a country of love and equality, Kenyans were killing one another and fighting over the resources of this country. They forgot to build the person. I am challenging Kenyans that if they want to evolve a national dress, let it come of its own accord. Those countries that have national dresses, these dresses have evolved and have a message to carry forward. Let us not waste a lot of time on a matter that can come to life on its own. Furthermore, the Constitution is such a serious document, that I think some of the petty things can go to legislation. Thank you.

Prof. Yash Pal Ghai: 182.

Hon. Delegate Nick Salat: Thank you, Mr. Chairman. My name is Honourable Nick Salat, 182. Mine is actually to say that I oppose, the reason being-- However, before I oppose, Mr.

Chairman, I have to say that today is a great day. Great in the sense that the President has sent his entire Cabinet to be amongst us today (*Clapping*)---

Prof. Yash Pal Ghai: What is he saying?

P.L.O Lumumba: That the President has sent his entire Cabinet to be amongst us.

Hon. Delegate Nick Salat: --and on that note, Mr. Chairman, I ask you to put the question. (*Clapping*).

An Hon. Delegate: Good!

Prof. Yash Pal Ghai: All right. I will put the question. That the national dress code as established by an Act of Parliament and renumbering the existing (c) and in both Sub-Section 11(1) and the Second Schedule and (d) and (e) respectively. Basically this means that there will be a national dress which will be a symbol. So, those who support the Amendment say, “**AYE**”.

Hon. Delegates: “**AYE**”.

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

Hon. Delegates: “**NAY!**”.

Prof. Yash Pal Ghai: Well, the “**NAYs**” have it, but we will take a formal vote on this at the end of the Chapter. Now, we come to number 12.

P.L.O Lumumba: We want to preface it by explaining a little about a National Days and Holidays

Prof. Yash Pal Ghai: Yes. There had been some Motions on this, I believe. However, before we proceed to those, let me explain the difference between National Days and Holidays, because some Delegates who have approached me on this seem a little bit confused as to the distinction.

National Days are days that mark some significant event in the history of the country and which we celebrate in different ways. Some countries actually do not have a holiday on the National Day, but they have some ceremonies to mark their Independence or the crowning of the King or whatever it is.

Holidays are governed by separate legislation and holidays are days when we do not work. So, we are not here dealing with Holidays; we are dealing here with days which mark some historic event in our history. Now, I believe there was a Motion from--

(Consultation at the "high" table).

Prof. Yash Pal Ghai: Yes, there was a proposal by Mr. Odhiambo, 603. He had proposed Culture Day as part of the National Days. Clearly, it cannot be a National Day, but you will notice that the Chapter on Culture actually does provide for a Culture Day. So, Mr. Odhiambo's point is taken care of there and he has agreed to withdraw this Motion. Then we have a Motion from Honourable David Erulu, number 397. I now give him the floor. Erulu, 397.

Hon. Delegate Winston Ogola: Thank you very much. Chair, Winston (*Laughter*)--

Prof. Yash Pal Ghai: Go ahead (*laughter*). Oh, take the mike please.

Hon. Delegate Winston Ogola: It is a short one actually. Thank you very much, Chair. I am Winston Ogola Odhiambo. I wish to say, shortly--

Prof. Yash Pal Ghai: No, sorry--

P.L.O Lumumba: Odhiambo is withdrawing, let him say that.

Prof. Yash Pal Ghai: I thought-- Okay. You are formally withdrawing, just please do so quickly because I thought you--

Hon. Delegate Winston Ogola: The purpose of my standing is to withdraw that Motion because it appears in Article 33 of Culture. So, I withdraw that Motion. Thank you, Mr. Chairman (*Clapping*).

Prof. Yash Pal Ghai: David, you have the floor now.

Hon. Delegate Oburu Oginga: Point of Order.

Prof. Yash Pal Ghai: Yes, Point of Order. Is that 611?

Hon. Delegate Oburu Oginga: Mr. Chairman, my number is 157, Oburu Oginga from Parliament. Mr. Chairman, one Delegate from Kakamega stood on a Point of Order and raised the issue of whether we can vote by counting or by consensus. You correctly ruled, Mr. Chairman, that where there is consensus, there is no need to vote. Now, Mr. Chairman, a few minutes later, another Delegate challenged your ruling and said that it is illegal to pass resolutions here by consensus. Mr. Chairman, is it right that you bend the rule or your own ruling, because somebody raises an issue after you have already ruled on it? Are there special Delegates who are given preference when they raise issues, then the Chair bends his own ruling and goes back to a system which he has already passed and we have already passed two or here Articles by consensus?

Prof. Yash Pal Ghai: Well, let me explain. I did say that there could be some difference of interpretation and since we do not want to have someone take us to court saying we did not follow the right procedure, I thought it was safer to put the question to vote by show of hands and I do not think I was necessarily being overruled. I think there could be two interpretations and just for the sake of preventing litigation on this point, the Steering Committee agreed that we will put the question to vote by show of hands. Thank you very much.

Hon. Delegate Erulu David: Thank you very much, Chair. My name is Erulu David, 397 from Busia District. I would like to amend the Motion; 12(b) to read, “Mashujaa Day” because we want to capture the significance of the Day in Kiswahili, especially after Jamhuri Day and

Madaraka Day. Of course this gives us the sense of belonging and a great honour to our living and departed heroes and heroines. Thank you. I beg to move.

Prof. Yash Pal Ghai: 457.

Hon. Delegate Billy Onwang'a: Mr. Chairman I wanted to inform you that the Committee has resolved that we change that Article to *Mashujaa* Day and as you move the votes, let the Delegates be aware that the decision had already been taken at the Committee level.

Prof. Yash Pal Ghai: Well, this is a matter for the Conference at this stage, so could I have some contributions before--

(Uproar from Honourable Delegates)

Prof. Yash Pal Ghai: 111, yes, please.

Hon. Delegate Muchiri Gachara: Thank you Mr. Chairman, Honourable Muchiri, Delegate 111, Member of Parliament, Ndaragwa. Mr. Chairman, I would support the amendments for the day 20th October to be *Mashujaa* Day, but I am aware that Mr. Chairman, that although we are talking of *Mashujaa* Day, if we really want to give the honour to the people who fought for this country, this day should have properly called *Mau Mau* Day.

(Uproar from Honourable Delegates).

Hon. Delegate Muchiri Gachara: In this sense Mr. Chairman, because *Mashujaa* Day and *Mau Mau* day, *Mzungu Aende Ulaya Mwafrika Apate Uhuru*, would actually mean the same thing. Here is a question of semantics Mr. Chairman, but I agree that we can retain *Mashujaa* Day, if *Mau Mau* is not acceptable. Thank You.

(Consultation at the "high" table).

Prof. Yash Pal Ghai: So, shall I put the question, the amendment is that we delete Heroes and Heroines Day and replace it by *Mashujaa* Day. (*Laughter*). Those in favour of the amendment say “**AYE**”

Hon. Delegates: “**AYE**”

Prof. Yash Pal Ghai: Those opposed say “**NAY**”.

Silence

Prof. Yash Pal Ghai: So, it is carried unanimously. There is also another Motion 12(d) from Mr. Sammy Ruto, but I believe he also has withdrawn his Motion. If he is here 180 could you just confirm that please.

Hon. Delegate Sammy Ruto: I wish to confirm that Mr. Chairman, I withdraw the Motion.

Prof. Yash Pal Ghai: Thank you.

(Consultation at the “high” table).

Prof. Yash Pal Ghai: So, what I now propose to do is to have a formal vote on this Articles that we have adopted by voice vote in order to--

PLO Lumumba: Sir, there is a Motion on 12 by Kibwana.

Prof. Yash Pal Ghai: Is there a Motion on 12? Mr. Kibwana what is your point?

Hon. Delegate Kivutha Kibwana: Chair, although of course there has been that voice vote for *Mashujaa* Day, it could have been Freedom Day for Elegance and also there is a problem of 20th October because the more recent also Freedom Day is *Saba Saba* Day, 7th of July--

(Uproar from Honourable Delegates)

Hon. Delegate Kivutha Kibwana: Of course those who say no possibly were not on the streets when the action was happening and they are entitled to say so.

Prof. Yash Pal Ghai: Yes, a Point of Order.

Hon. Delegate Kivutha Kibwana: And I was also making a proposal for--

Prof. Yash Pal Ghai: Excuse, there is a Point of Order. 015.

Hon. Delegate Kivutha Kibwana: Point of Order?

Hon. Delegate Billow Kerrow: Mr. Chairman.

(Uproar from Honourable Delegates).

Prof. Yash Pal Ghai: Yes. Mr. Billow please go on.

Hon. Delegate Billow Kerrow: Mr. Chairman, I think with all due respect and we have a lot of respect for the Chairman, but I think it is becoming increasingly clear to some of us that every time our friend has to raise a Point of Order, it is--

Hon. Delegate Kivutha Kibwana: No, I have a Point of Order.

Hon. Delegate Billow Kerrow: No, but I think honestly that issue was debated, is it in order for the member to raise a question on a matter that has been decided by the members?

Hon. Delegates: No.

Hon. Delegate Billow Kerrow: Frivolous, I think he is trying to bring in frivolous debates on issues which have decided. *Mashujaa* Day was decided if you have a question bring it through a Motion. If you want *Saba Saba* to be a Freedom Day bring it through a Motion.

Prof. Yash Pal Ghai: Thank you very much, I propose now we proceed to vote and the Secretary will explain again the procedure we are going to follow.

PLO Lumumba: Honourable Delegates, drawing from our past experience we have now created 9 points. There will be two tellers; we expect the voting to be very brisk. What we are voting about are from Articles 5, Article 8(1), Article 9, Article 10, Article 11 and Article 12. There will be tellers for “AYES” and tellers for “NAYS”. My people are you on the ground? Be on the ground in one minute please. Be on the ground you were told a while ago, you are disappointing us please. When you vote please you will find that our tellers are sections specific, so please kindly move to your sections they will – just a moment.

(Consultations at the “high” table).

PLO Lumumba: Are we ready on the ground? We are not ready at one point please. We are not ready in booth number 5 please. Booth number 6 we are not ready.

(Consultation at the “high” table).

Prof. Yash Pal Ghai: 525.

Hon. Delegate Ibrahim Yusuf: Thank you Chair, my names are Ibrahim Ahmed Yusuf Delegate 525. Chair, there is a slight problem, you keep on changing your rulings. One time it is by consensus, the other minute is by voting. A lot of people have left knowing that we have passed these things and you have reversed your decision. I do not know what you are going to do about it.

Prof. Yash Pal Ghai: I did explain that we would take a vote by hand for legal reasons and that is what we are about to proceed to do. Thank you.

(Consultations at the “high” table).

Prof. Yash Pal Ghai: Are all the tellers ready? Are the tellers ready?

(Consultations at the “high” table).

PLO Lumumba: The “**AYES**” first, be faithful to your sections please. We are coming to you, persons with disability I am very sorry for this, we are coming to you. Yes, the “**AYES**”, can we now have the “**NAYS**”. The “**NAYS**” please and **Abstentions** move to the front. We are ready. The Chairman has permitted me to read the vote in respect of Articles 5, in respect of Article 8(1), Article 9, Article 10, Article 11 and Article 12. Votes in the Affirmative 320, votes in the negative 2, 1 abstention. One Delegate has voted no in respect of only one Article, Article 10(1). So, as the Chairman will now say, the “**AYES**”, he will say, have it.

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

(Clapping).

Prof. Yash Pal Ghai: I think we do not have a quorum. Yes Mr. Kibwana.

Hon. Delegate Kivutha Kibwana: The Chair, my vote was not announced because I was unable to vote since we were being told to vote ‘yes’ or ‘no’ for all the Articles and there were some I wanted to vote ‘yes for’ and others not to vote ‘yes for’. Therefore, I did not have any opportunity to vote and I indicated so, in the appropriate place.

PLO Lumumba: It is an abstention.

Prof. Yash Pal Ghai: It is an abstention in our reckoning.

PLO Lumumba: A single abstention.

Prof. Yash Pal Ghai: If we do not have a quorum is there any point of proceeding?

An. Hon. Delegate: Do we or do we not have quorum?

Prof. Yash Pal Ghai: I am not that sure. We proceed? Okay we proceed on to the next Chapter, which the Secretary will read.

(Consultation at the “high” table).

Presentation of Chapter Three – National Goals, Values and Principles.

PLO Lumumba: We are now on page number 7, the Chapter is number 3, **National Goals, Values and Principles.**

Article 13

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

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

(n) recognize its responsibilities to future generation of Kenyans, by pursuing policies for the sustainable management of the environment; and

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

Prof. Yash Pal Ghai: 250.

Hon. Delegate Abdullahi Haji: Thank you Chair. I am Abdullahi Haji, Delegate number 250. I have a Motion, an additional article on Article 13(2) to be (P). In the age of globalization which we are in now, I think we have to think ahead and also give our government and parliamentary institution a free hand to incorporate and to guide us. My Motion reads, the State can incorporate or federate with any nation or regional organization as long as Parliament has assented to the arrangement. The mood of my Motion is to give the government and also our institution the Parliament a free hand so that they can be able to look at the interest of the country on economical point of view, so that they can incorporate because at the moment there is the African Community and I think we want to strengthen that corporation. At the same time, there is AU (African Union) which is also in the pipeline to be strengthened further and so I beg to move my Motion as Article 13(2) (p). Thank you.

Prof. Yash Pal Ghai: Mr. Haji, I wonder whether I could ask you the question whether this actually belong here. This Chapter dealing with Values, what you are suggesting is to authorize Parliament to form federations or join Regional Organizations.

Prof. Yash Pal Ghai: Mr. Hajj, I wonder whether I could review the question whether this actually belongs here, this Chapter dealing with values. What you are suggesting is, to authorize Parliament to form federations or joint regional organizations. I think this proposal you have made perhaps belongs elsewhere and not in this particular Chapter.

Hon. Delegate Abdullahi Hajj: I have been advised by the legal group, I think, it belongs on this Chapter and section.

Prof. Yash Pal Ghai: Yes. Did you say some legal team advised you to put it here?

Hon. Delegate Abdullahi Hajj: Yeah, I floated the idea to them and I think this was their proposal. So, I think if there is any anomaly and we can change to another place, then I have no objection so long as my Motion is adopted or debated.

Prof. Yash Pal Ghai: Yes, may be we could discuss this and decide where it belongs properly and then you introduce it at that stage. Would that be acceptable?

Hon. Delegate Abdullahi Hajj: Yes, Chairman, thank you.

Prof. Yash Pal Ghai: Thank you very much, indeed. Professor Wangari, you wish to--

Hon. Delegate Wangari Maathai: Thank you very much, Mr. Chairman. Wangari Maathai, Delegate number 084. Mr. Chairman, that Article is 13 (i) and Honourable Delegates, we are so used to perceiving women and disabled people and other marginalized communities or groups that we often forget the men. So, I think it is very, very important that in this Article we include men, they will soon be a marginalized group at the rate we are going. So, I think they should be included.

(Clapping)

Prof. Yash Pal Ghai: *(Laughter)* That is exceedingly generous of you. *(Laughter)* Well, I think Article 13, (2) (i) was actually meant to be an affirmative measure and of course, if we put men and women, then of course we cover everybody. So, it loses that character of affirmative action but if you would like to add men, I am sure men in this room will have no objection.

(Consultations at the "high" table)

Prof. Yash Pal Ghai: 217.

Hon. Delegate Cecily Mbarire: Thank you, the Chair. My name is Cecily Mbarire, Delegate number 217. While appreciating Professor's Motion, I think the purpose for which we had this (i) was based on some historical backgrounds that certain sectors of the community had lacked

full participation. In my view, it is important that this Article remains as it is because I think personally, the men have over participated and will continue to do so, so, please men, allow us to have that Article as it is. Thank you.

(Consultations at the “high” table)

Prof. Yash Pal Ghai: 185.

PLO Lumumba: 155.

Prof. Yash Pal Ghai: Sorry, 155, yes.

Hon. Delegate Raila Odinga: Thank you, Mr. Chairman. Mr. Chairman, this is Raila Odinga, Parliament. Now, Mr. Chairman, I want to agree with Professor Wangari Maathai not that she has been generous to men but because she is looking ahead. We are not doing the Constitution for today or for yesterday but we are doing the Constitution for posterity. Mr. Chairman, in the future, the opposite may actually quite be the case.

I have been in a country where you walk in to see a Minister, you find the Minister is a woman, the Assistant Minister is a woman, Permanent Secretary is a woman and even the Secretary is a woman. Therefore, Mr. Chairman, I support and in that very same spirit, I wanted to propose on (j), you look at (j), “that implement the principle that at least one third of the members of all elective and appointive bodies shall be members of the opposite sex”, instead of being “women”. Members of the opposite gender, thank you, Mr. Chairman.

(Consultations at the “high” table)

PLO Lumumba: 506

Prof. Yash Pal Ghai: 506, please.

Hon. Delegate Fatuma Ibrahim: Thank you. My name is Fatuma, Delegate number 506 representing Women Organizations. Mr. Chairman, I wish to acknowledge the concern of

Honourable Professor Wangari Maathai and I usually know that she has good intention but I think this one is a slip and I feel this was a deliberate concern that is an affirmative action and it should remain there and should not be removed. If the Honourable 155 says that he has seen many women in different countries, we are waiting to reach that stage. Thank you.

(Consultations at the “high” table)

Prof. Yash Pal Ghai: Is there anybody from the disability fraternity who would like to say something because I do not have a complete list. Lawrence, yes.

PLO Lumumba: Lawrence Mute. 455.

Hon. Delegate Lawrence Mute: Thank you, Chair. My name is Lawrence Mute. Chair, I wish to propose a Motion to this effect in relation to Clause 2.

Prof. Yash Pal Ghai: We are actually discussing this particular amendment introduced by Professor--

Hon. Delegate Lawrence Mute: Yes, Chair, but my name was mentioned when I had not raised my board so I assumed I was being asked to--

Prof. Yash Pal Ghai: Okay.

Hon. Delegate Lawrence Mute: Thank you.

Prof. Yash Pal Ghai: 510.

Hon. Delegate Atsango Chesoni: Thank you, Mr. Chairperson. My name is Atsango Chesoni Delegate number 510, representing Women’s Organization. I would urge the Conference to please look at Article 2 (i) in its entirety; “ensure full participation of women, persons with disabilities and the marginalized communities, and all other citizens”.

I think men come under all other citizens in the political, social and economic life of the country. Mr. Chairperson, the fact of the matter is that women own less than 5% of the titled land in this country. The fact of the matter is that women hold less than 7% of the elected positions in our National Parliament and under 10% in our Councils. In what way therefore, have men been discriminated against? I think the purpose of this particular Section, whereas there are Sections where I think it would be appropriate to speak of each gender, in this particular Section, it applies specifically to people who have been historically marginalized and it seeks to ensure that the State takes measures to ensure that those people have their concerns addressed. So, I oppose the Motion in respect of this particular Article. Thank you.

Prof. Yash Pal Ghai: 451.

Hon. Delegate Millie Odhiambo: Thank you, Chair for giving me this opportunity. My name is Millie Odhiambo Delegate number 451 representing NGOs. Honourable Chair, I just want to plead to Honourable Delegates, especially our brothers and our fathers who are here. You have supported us all along and we are requesting you to support us yet again. We know and we are concerned about our brothers, about our fathers, we do not want to dislodge you, we do not want to dislodge your positions.

However, because of the historical imbalances that persons with disabilities have faced, marginalized communities have faced and women have faced, we are requesting that you consider their situations as special interest groups. If on the other hand, we took the position as suggested by the Motion, then we would actually require that we delete the sections that have to do with Persons with Disabilities and marginalized communities. We were requested in Bomas II, to mainstream Affirmative Action. We are not mainstreaming it by mentioning the word “Affirmative Action” at every sentence but we are mainstreaming by the wording that we use and this is our request to you as our fathers, as our brothers, that you consider the position of marginalized groups. I therefore oppose the Motion. Thank you.

(Clapping)

Prof. Yash Pal Ghai: Yes, 581, 581.

Hon. Delegate Yusuf Mohamud Abubakar: Thank you, Mr. Chairman. My name is Yusuf Mohamud Abubakar, Delegate number 581. Mr. Chairman, what I wanted to say is to oppose the Motion in respect of 13 (i) and I think the explanation has well been captured by Madam Chesoni and I do not want to belabor the position. There is a specific reason why we were including women and not men. So, we should leave it the way it is and we should just put the question and vote. Thank you very much.

(Clapping)

Prof. Yash Pal Ghai: Well, may be we have reached a point where we can take a vote on this. Those who support the Amendment that the word “and men” be placed immediately after the words “participation of women” in Article 13, 2 (i), those who support that please say ‘**AYE**’.

Hon. Delegates: ‘**AYE**’

Prof. Yash Pal Ghai: Those who oppose it, say ‘**NAY**’.

Hon. Delegates: ‘**NAY**’.

Prof. Yash Pal Ghai: It seems to me, ‘**NAYS**’ have it. *(Laughter)*

(Clapping)

Prof. Yash Pal Ghai: We have also 13 (2) from Lawrence Mute. So, you have the floor Mr. Mute.

Hon. Delegate Lawrence Mute: Thank you, Chair. My name again is Lawrence Mute. Chair, on my on behalf and the constituency which I represent which is the constituency of Persons with Disabilities, Chair, first I would like to say that in the course of this whole Bomas process, we as people with disabilities note that we have had very many gains and Chair, of course, it is

up to all of us as Delegates in this Conference to acknowledge that and to pat ourselves because I think we have been doing a good job.

Chair, the Motion which I wish to propose, and which is in relation to Clause (2) involves the addition of a new paragraph. Chair, when a State is seeking to implement rights or issues of development, it is always very important that a yardstick is set in place. It is always very important that the State is provided, is given a standard by which it shall measure whether it is achieving or whether it is not achieving because then it can be rubbed on the knuckles it can be told that it should be doing better.

Chair, I am proposing that in view of the fact that people with disabilities by World Health Organization standards and in deed other standards including our census, are approximatly 10% of the population of the any given society. But in our case Chair, we are proposing the addition of a paragraph which will say that “the State shall progressively implement the principle that 5% of the members of elective and appointive bodies be persons with disabilities”.

Chair, I wish to urge the Delegates to note the word “progressively”. We realize that this is not one of the things which get achieved overnight but we want it to be a target. We want the State to be told that in relation to elective positions for example in Local Authorities where our concerns of access, where our concerns of crossing a road or speaking or reading or hearing are dealt with from one day to the other day Chair, that the State in relation to Local Authorities, in relation to Parliament will progressively implement that principle.

So, Chair, I move that there be added that paragraph which I have just read; “progressively implement the principle that 5% of the members of elective and appointive bodies be persons with disabilities”. I urge that the Conference support this Motion in the same Spirit that they have supported us all along. Thank you.

Prof. Yash Pal Ghai: 252.

Hon. Delegate Dubat Ali Amey: Thank you very much, Mr. Chairman. I would like equally to support what Honourable Mute has said. Mr. Chairman, as the disabled fraternity, we want to

thank the Conference, the Delegates, for what you have done for us by putting several Clauses in the Constitution.

However, Mr. Chairman, unless we word some of these things properly, the implementation might be a problem. Mr. Chairman, I want to take the Conference a little bit back. When 8-4-4 came, the disabled fraternity were disadvantaged. For several years, we did not go to University, creating a gap generation and this is because we did not have representatives both in the Local Authorities and the Parliament. So, that was marginalizing us. Mr. Chairman, we are not asking for much. Mr. Mute said, we want 5% progressively, you know this 'progressively', and he put that word so that it is not meant only for today.

Mr. Chairman, there are more than 1.3 Million disabled people in this country and Mr. Chairman, it is very, very unfortunate in deed that the plight of these people were left to nature. Mr. Chairman, I do not want to bother the Delegates but we are just pleading that this provision be accepted so that in future, we look at the disabled fraternity in totality, the school, everything, we will be able to come out with strategic plans for the disabled children, men and women. Thank you, Mr. Chairman.

Prof. Yash Pal Ghai: Thank you. Is anybody opposed to this proposal? Who would wish to speak? So, I take it that there is support for that so may be I take a formal vote. Those who support the proposal of Mr. Mute that there should be a new paragraph (p) in 13 (2) which says; "progressively implement the principle that 5% of all the members in elective and appointed bodies be persons with disabilities". Those who support say '**AYE**'.

Hon. Delegates: '**AYE**'.

Pro. Yash Pal Ghai: Those who oppose say '**NAY**'.

Silence.

Prof. Yash Pal Ghai: Well, it seems it is again unanimously approved and then we move on. Lawrence Mute had another proposal which we, after discussion, have agreed is sufficiently

covered in other parts of the Draft Constitution and I believe he is withdrawing that. Then there is a proposal by Honourable Winston Adhiambo which I believe he is also withdrawing. Perhaps he could confirm that, that is the case.

Hon. Delegate Winston Adhiambo: Thank you very much, Mr. Chairman. I am also withdrawing that sub-item (p). Thank you very much.

Prof. Yash Pal Ghai: Thank you very much in deed. Then we had Sammy Ruto and we have also agreed that the principles that he wants to introduce were covered elsewhere in the Constitution and he has indicated his wish to withdraw his Motion.

Hon. Delegate Sammy Ruto: Mr. Chairman, I had proposed that we include promotion of the practice of fundamental principles of democracy, governance and the rule of law and that is certainly a repetition. There is this other one, “to promote the practice of the basic principles and attitudes of care in all respects of private and public life and in the management of community and natural resources”. Now, I had a feeling that that principle and value of care was not captured very well in the Chapter particularly, I know the Environment has been captured but where we care for *mali ya umma*, public property, I had a feeling that we do not care much about *mali ya umma*.

There is also the issue of caring for ourselves, Kenyans do not sufficiently care for themselves. You can be mugged on the streets and they just walk by. The issue of the street children, in other words--

Prof. Yash Pal Ghai: Mr. Ruto, I thought you were going to withdraw your Motion on the basis that it is covered elsewhere?

Sammy Ruto: Yes.

Prof. Yash Pal Ghai: Why don't you do that, we do not have time for long speeches I am afraid.

Sammy Ruto: I withdraw it.

Prof. Yash Pal Ghai: Thank you very much in deed. Thank you. You also have the floor because you have recommended an amendment to 13 (2) (g), you were recommending deleting the word “facilitate,” do you want to withdraw that too or?

PLO Lumumba: He agreed that it is a drafting question.

Prof. Yash Pal Ghai: It is a drafting question, is it and in which case we can leave it to Drafters.

Sammy Ruto: It is a drafting issue and I think I withdraw.

Prof. Yash Pal Ghai: Thank you. Thank you very much in deed. The next one from Honourable John Kiniti is identical to the one that Professor Maathai had raised and which had been defeated and we had agreed that Professor Wangari would present this jointly because it covers the same ground. We also, I think, have accepted or may be not Professor Maathai’s proposal to amend 13 (2) (j) by adding the words “either gender”. What that really means is that one third of all appointive and elective must be one third from each gender and I take it that it is acceptable and is there anybody opposed to that proposal? No, thank you. So, we proceed 511.

Hon. Delegate Ruth Kibiti: Thank you, Chairperson. My name is Ruth Kibiti, Delegate number 511 representing Women’s Organizations. Mr. Chair, to substitute the word ‘women’ with ‘either gender’ will be misleading and would not add up to what we are looking for in this particular Clause. Mr. Chair, we have to go back to the definition of the concept gender, which refers to the socially constructed relationships. It is a relational concept Mr. Chair and therefore, here we are talking about power relationships between women and men and Mr. Chair, knowing that women are the experienced suffering from past social, political and economic injustices, Mr. Chair, this particular Clause seeks to bring back women into the main fold of political participation.

Therefore, Mr. Chair, I propose that the Clause should remain as it is and not to be substituted with the word “gender”.

Prof. Yash Pal Ghai: I think may be you have mis-understood Professor Maathai’s proposal. Under her proposal, one-third women are guaranteed, so it is not really scaling it down, it is trying to show some fairness to men as well. So, under her formula at least one-third women will always be there. Yes, Professor Maathai.

Hon. Delegate Wangari Maathai: Thank you, Mr. Chairman. Delegate number 084. In this Clause and even in the previous one, if you read without looking at the Affirmative Action, you would be forced to bring the other gender. If we indeed mean that this is Affirmative Action, well this is a Constitution and therefore we must give it time. We really do not want to put an Affirmative Action that is unlimited in time because then for how long are we going to pursue that. I would have no problem if the Affirmative Action was qualified by a time limit but when it is in a Constitution and it is un-limited then it looks like you could get at a point where the other gender is actually being the one that is disadvantaged.

(Clapping)

Prof. Yash Pal Ghai: On that explanation, Ms. Kibiti, are you satisfied to and accept the Amendment?

(Consultations at the “high” table)

PLO Lumumba: Ruth, you are being asked with that explanation, are you satisfied?

Hon. Delegate Ruth Kibiti: Mr. Chair, I am not satisfied and I can see another member of the Women’s Organization with her number up and I think I am not alone. I know the concept of gender does not refer to men or women, it refers to social relationships, it refers to power relationships and if it is power relationships we are addressing here, we have to bring in the marginalized gender, the gender that has not been participating effectively and those are women, Mr. Chair. There is another hand which is supporting the same position as myself.

(Consultations at the “high” table)

Prof. Yash Pal Ghai: 278

Hon. Delegate Kang’ethe Nkoroi: Thank you, Mr. Chairman. I am Kangethe Nkoroi, Delegate number 278 from Meru South. I think Mr. Chairman, it is not in order for this debate only to be directed to women. We are all Delegates here, we are contributing and we should also be given chances. So, the Honourable Delegate suggesting that there is another woman or Delegate Lady who wants to contribute, I think it is not in order. I have been raising my card and I wanted to contribute on this and I want to say that, it is not only in the National Assembly or the House of Senate where we have this representation.

So, when we are catering for the men or for the opposite gender apart from women, I think it is going to enrich the Constitution because as somebody has already expressed, we are not making a Constitution with a limit. So, one time or in some organization, men are also lesser than the number of women. So, we should take care of this and include either gender or other terms if we think that is not fair, we can use another term which is reflecting both sexes. Thank you, Mr. Chairman.

(Clapping)

Prof. Yash Pal Ghai: 510, sorry, 516. 510, we had listed.

Hon. Delegate Peter Bwana: Peter Bwana, Delegate number 516. Mr. Chairman, I support the Motion because either gender is more forward looking. We are looking at that time when women will catch up with men and even surpass them. Mr. Chairman, for example, we are still promoting about girl-child education but in certain areas, girls have already surpassed boys. So, we should be that forward looking and so, either gender is more inclusive and I think it is the appropriate one to use.

Prof. Yash Pal Ghai: May be on that, I would like to take a vote, those who support the Amendment proposed by Professor Maathai that we replace women by the expression “either gender” in Article 13 (2) (j), please say ‘AYE’.

Hon. Delegates: ‘AYE’.

Prof. Yash Pal Ghai: Those who oppose it, say ‘NAY’.

Hon. Delegates: ‘NAY’.

Prof. Yash Pal Ghai: I think ‘AYES’ have it. (*Laughter*) You tried best but (*Laughter*).

(*Laughter*)

(*Consultations at the “high” table*)

Prof. Yash Pal Ghai: Yeah, and-- Order, order, Dr. Sammy Ruto had also agreed that his proposed Amendment to 13 (2) (k) was essentially a drafting question and he has agreed that we refer it to the Drafters to take care of this point. And finally, the last item on 13 is also from Dr. Sammy Ruto and here again I believe he has agreed to withdraw his proposal and that concludes our discussion of Section 13 and I would now like to proceed to a vote on Section 13 and this time, we are going to try a slightly different way of voting. The Secretary approves, I suggest that when I say those who support Article 13 should raise their boards but remain seated so that the tellers will then take down the numbers and the vote and then I will ask those who oppose to do likewise. So those who support Article 13 and want it part of the Constitution, please raise your placards so that the tellers can take down the numbers.

Those who oppose the Adoption of Article 13, now please register your vote with the tellers. It seems to me there are only two or three.

(*Consultations at the “high” table*)

