

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

**NATIONAL CONSTITUTIONAL CONFERENCE
(NCC)**

**VERBATIM REPORT OF
PLENARY PROCEEDINGS HELD IN THE PLENARY HALL
AT BOMAS OF KENYA
ON**

26.09.03

PLENARY PROCEEDINGS HELD IN THE PLENARY H
ALL, BOMAS OF KENYA, ON 26th SEPTEMBER, 2003

The meeting was called to order at 8.10 a.m. with Professor Yash Pal Ghai in the Chair.

Prof. Yash Pal Ghai: Honourable Delegates, may you please take your seats. I intend to start the meeting in two minutes. The prayers this morning will be led by Sheikh Ali Shee, Archbishop David Gitari, Milcah Ajuoga and Neera Kapila. After prayers, the National Anthem will be played and I will now ask you to stand up for the prayers and we resume our seats after the National Anthem. Thank you.

Hon. Delegate Sheikh Ali Shee: (*Maombi*)

Bismillah. Kwa jina la Mwenyezi Mungu, Muumbaji wa mbingu na ardhi na viumbe vyote. Tuko mbele yako Mola tukiwa na shukrani zetu kwako. Twakushukuru sana kwa kutupa nguvu na busara ambazo tumezitumia katika muda huu tuliokuwa hapa. Mola endelea kutuongezea busara na nguvu kama hizo wakati tukifunga fungamano kama hili. Endelea kubariki nchi yetu na wananchi wetu ili tuweze tukirudi kuwa na nguvu zaidi na busara zilizojaa kwenye kichwa chetu na akili iliyopanuka zaidi ili kuwaeza kufanya kazi ambayo tumeiacha na bado hatujakamilisha.

Ewe Mola wape nguvu waraia wako, watu wako uwalinde katika muda wote huu ambao umewalinda, uendeleo kuwalinda tena ili waweze kutumikia nchi hii na kutumikia nchi hii kwa njia iliyo bora zaidi ile ambayo inakuridhisha wewe. Ee Mola utulinde na shetani na fikira mbovu ambazo zilikuwa zimepenya kwenye mkutano huu. Ewe Mola tulinde na utupe nguvu na utubariki. Amin.

Hon. Delegate Archbishop David Gitari: (*Prayers*).

Our Heavenly Father we thank you for giving us great responsibility of reviewing the Constitution of our nation. We thank you for guiding us during the first phase of our deliberation. Also we thank you for this second phase. We thank you for all that we have been able to achieve. We thank you for so much progress we have made. We thank you that we have been able to

speak the truth in our various Tents with love. We pray for forgiveness where we have wronged one another and also wronged you. But we believe that all that has happened, has happened for a reason. Strengthen our resolve to continue with much hope to complete our work. Now we have come to the end of our second phase of our Conference, we pray that as we are going to disperse today, grant the travelling mercies and especially those who are going to travel long distances. Take them home safely; give them rest during this recess so that when we resume again, we shall resume with strength, power and wisdom to carry on our responsibilities until we give this nation a Constitution which is truly democratic. We pray that even when we resume our duties during this Conference, we shall be true to the oaths that we have taken. That is, we perform our duties without fear, favour, bias, faction, ill will or prejudice. That at the end in the exercise of the functions of each Delegate, we shall appropriately be guided by national interests and your help. So Lord be with us as we gather again this morning and bless our deliberations and may it be a blessing to us and many other people who are not here. This we pray through Jesus Christ our Lord. Amen.

Hon. Delegate Neera Kapila: (*Prayers*).

We pay homage to Thee Almighty, Leader of the Universe. We see and feel your presence in all creation on earth. Lead us as we take a recess again, to reconvene soon to complete the task entrusted to us by our people. Guide us bountifully, Almighty, towards a united strong nation that comes together to celebrate its wholesome diversities. Peace to all on Earth, the Heavens and the Universe. Om Shanti, Om Shanti.

THE NATIONAL ANTHEM.

Prof. Yash Pal Ghai: Please take your seats. Honourable Delegates can I have your attention please. Honourable Delegates, can I have your attention please. Will you please stop talking and listen to the Chair. The first thing I would like to do on behalf of the Conference is to send our congratulations to two of our Delegates. Delegate number 010 for being appointed the Vice President of the Republic and to Delegate number 073, Musikari Kombo, on his Ministerial appointment. (*Clapping*). I am sure we all want to send them our best wishes for success in their distinguished appointments and I intend to send a letter today on behalf of all of you.

The programme today is that we will have next presentations from the Convenors of the Technical Working Committees and the progress in those Committees. We will have, when we meet again, a complete and full report of the Committees, which the Secretariat will start preparing next week. But we thought it would be useful if the Convenors could give us an impression of the progress they have made so we all go back from this meeting with some idea or progress made in Committees other than the ones we are sitting in. In order to make sure that we break in time for Muslim prayers, I am going to ask the Convenors to present their reports as briefly as possible, three or four minutes at this stage, as fuller details will be provided later on. I will then later on today allow a Delegate to make a personal statement. Then I will make my own remarks before moving the adjournment Motion. So, I now invite the Convenor of Working Committee A, on the Preamble and Supremacy of the Constitution. Please try to do that in three or four minutes. Thank you.

Hon. Delegate Billy Onwong'a: My name is Billy Onwong'a, I am the Convenor for Technical Group A and I report to you that we managed to finish from Article 1 up to Article 9. There were a few amendments we made, amendments and insertions during the deliberations. Most of our time was spent on Preamble and the Committee members wish to recognize God in the Preamble. The Motion was moved accordingly and it was passed that we shall recognize God in the Preamble, reading as follows: *'Recognizing the supremacy and sovereignty of the Almighty God of all creation.'* (**Clapping**). There was also need to recognize our historic struggle in the Preamble and a Motion was moved accordingly by one of the veterans and the Committee passed the Motion and agreed that we recognize the historic struggle to democracy. The insertion was, *'recognizing all resistance wars against entry into Kenya by the colonial power by heroes struggle for independence and the struggle for democratization, honouring all heroes who died in action liberating Kenya.'*

The other Articles which are part of the Preamble were left intact except we wished to recognize the sectors of human beings or of humanity or of our society in the Preamble by adding the words, *'the elderly, the youth and people with disability.'* The Motion therefore reads, *'recognizing the aspirations of women, men, aged, youth and people with disability for a Government based on the essential values of freedom, democracy, social justice and rule of law.'* The next Article was left intact and we went to the last Article of the Preamble. We felt that it wasn't specific enough, so we added the words, *'our country.'* Which reads, *'God bless our*

country Kenya. We wanted to be specific in that and we moved on to Article 1, which is Sovereignty of the People. There wasn't much that we added. But this is where we moved a Motion. There was a Motion from one of our Honourable Delegates to establish the theory of Government and there was a Motion to this effect, that, '*Kenya shall be a parliamentary democracy.*' It was passed as a way of establishing the various systems of Government.

There was an Article on Supremacy of the Constitution. We didn't have much amendment on that except a few alterations and we went to enforcement of the Constitution. We felt that Article (3) (1) was not inclusive and we indicated that we needed to add, 'groups of persons' because it was saying that only a person may bring action in courts. (*Uproar from the Delegates*).

We put the enforcement and we said that the institutions should be empowered to enforce the Constitution. In the defence of the Constitution, it was said that Parliament and other constitutional offices shall be there to enforce the Constitution. In the laws of Kenya we changed the African customary laws, Hindu, Muslim laws into personal law. In the Republic, we didn't have any alteration. It was left intact. (*Uproar from the Delegates*).

Prof. Yash Pal Ghai: I have asked the Speaker to summarize rather than give all the details so that we can have all the presentations and I think he is trying to do that. Thank you.

Hon. Billy Onwong'a: On the territory we left it intact but we recognized that there will be international agreement--

Prof. Yash Pal Ghai: Please listen to the Speaker.

Hon. Delegate Billy Onwong'a: On the capital of Kenya we agreed that Nairobi remains the capital of Kenya. On languages, we agreed that the national language remains *Kiswahili* and the other language remains English. That was the end of it and we completed yesterday. (*Clapping*). I am taking this opportunity to thank my Committee for commitment, which has helped to get us this far. I am asking them at the end of this Conference to meet in our Tent for a copy of what we have done. Thank you. (*Clapping*).

Prof. Yash Pal Ghai: Thank you very much indeed. I will now call upon the Convenor of Committee B, which is on Citizenship and the Bill of Rights. I would ask the Convenors if they could all be ready with their presentations. Churchill Suba is standing in for the Convenor, Cecily Mbarire and he is moving to the microphone. Please be brief, just give us an indication of the Articles that you have covered and adopted.

Hon. Delegate Suba Churchill: I am Suba Churchill, holding in for Cecily Mbarire who is out of the country. The Committee on the Bill of Rights has since the Committee work began covered from Article 16-40 and as has put a number of Articles pending. We have six Articles pending, Article 17, 23, 25, 27 and 29 and also Article 30, also, the Article touching on Dual Citizenship. The Committee has set up a small Sub-Committee to help research more on the implications of permitting dual citizenship in the Constitution and other issues both local and international and security issues that may arise. There has also been new Articles which have been introduced, maybe touching on group rights and the rights of youth, Articles that will also touch on the rights of minorities and marginalized groups and that in summary is what the Committee on Citizenship and Bill of Rights has covered. (*Clapping*). So there are about thirty-five more Articles left and that is what the Committee will be tackling as soon as we resume.

Prof. Yash Pal Ghai: Thank you very much indeed. The Convenor of Working Group C on Representation of the People.

Hon. Delegate Caroline Ng'ang'a: Thank you very much, Mr. Chairman. My name is Caroline Wambui Ng'ang'a, Delegate number 587 representing political parties and I am a Convenor for Technical Committee C, Representation of the People. I want to give just a small summary of what we have covered. Representation of the People is divided into three parts namely:

1. Electoral systems and process.
2. Electoral Commission
3. Political parties.

The Articles we examined ranged from 76-100 and their total is 25. The Articles so far covered are from 76-81. We have fully covered each Article of that Chapter. We had deferred some Articles, that is (1) (m) of 77 and 77. We have deferred Sub-Article (2) because the area was not clearly understood on proportional representation. We have had to transfer some Articles which we felt could better be handled by other Committees. One of the transferred Articles are 79, Sub-

Article (1) (b) and Sub-Article (t) which is transferred to the Legislature. However there were several crosscutting issues and as you know we are dealing with the ‘Representation of the People’ and a lot of times we had needed to debate on this. But I will give a full report when we reconvene because I bear in mind that we have to release our Muslim brothers and sisters. *(Clapping)*.

Prof. Yash Pal Ghai: Thank you very much indeed. Working Group D, the Executive. I am sure everybody is very anxious to know your progress.

Hon. Delegate John Emukule: Thank you, Chair. My name is Anyara Emukule Convenor for Committee D, the Executive. As you know, Chair, Committee D attracts a lot of interest. Committee D did consider all the Articles dealing with the Executive together, setting out the structure and principles of national Executive, the provisions of the Presidency, Vice Presidency, Prime Minister and Cabinet. After a very, very heated debate, we reached consensus for a mixed system of Government *(Clapping)* and as we completed our debate today, there were still pending three Motions that the consensus didn’t rise for a strong mixed system of Government and when we resume, we will go into crafting the various functions of the various offices under the Executive. Thank you. *(Clapping)*.

Prof. Yash Pal Ghai: Thank you very much indeed. Working Group E, Judiciary.

Hon. Delegate Kivutha Kibwana: Thank you, the Chair. My name is Professor Kibwana almost late Convenor of the Committee on Judiciary. The main issues that we discussed within the Judiciary were, one, that Judicial power should also be exercised not only in the name of the people but for the common good of the people. We thought that it was important that the Chief Justice is the head of the Judiciary and therefore we recommended new provisions, that there shall be the office of the Chief Justice, there shall be the head of the Judiciary, there shall be the office of the Deputy Chief Justice, who shall be the principal assistant to the Chief Justice. There is established an office of the Chief Registrar of the Judiciary and such other officers of Registrars as may be created by the Judicial Service Commission. That the Chief Registrar of the Judiciary shall be the chief administrator and accounting officer of the Judiciary. We thought this would in very clear terms make the Judiciary independent.

Another main highlight of our work regarded very protracted debate on the retention of the Kadhis' courts within the Constitution. It was agreed that this should be so and in the debate which ensued, it was also clear that a majority preferred the status quo situation within the current Constitution to remain but we are yet to discuss the substantive provisions of the jurisdiction and so on of the Kadhis' courts.

We also discussed the question of, no judicial officer shall be liable in any action or suit in respect of anything done in good faith in the lawful performance of a judicial function. So we want to restrict the liability but to be sure that its liability only when they do their duties in good faith and lawfully.

Finally we discussed industrial courts and seeking to make it part of the Constitutional courts within the Constitution but we deferred that until we come back. We had a few problems which were solved and therefore we do not have to report that to the Plenary. Thank you. (*Clapping*).

Prof. Yash Pal Ghai: Thank you very much indeed. Working Committee F, the Legislature.

Hon. Delegate Samuel Arap Nge'ny: Thank you, Mr. Chairman. I am Samuel Arap Nge'ny, Delegate number 538, Convenor of this Legislature Committee. Mr. Chairman, the Committee has made some good progress; altogether about 70% of the work has been completed up to this stage. It is as follows: 28 Articles have been adopted with or without amendments and in that regard the significant Article was 101 where the Committee did agree to establish a bicameral system of Parliament. (*Clapping*). 4 Articles were deferred, 106, 107, 109, and 130 for various reasons and this is where the election of the Senate and the National Assembly will be affected by some other issues which are arising from the 'Representation of the People' and the 'Devolution' who have yet to give us their final arrangements. 130 was deferred because there were some references to another Article we had not reached, 140. So that will be revisited. Three Articles were deleted, 105, 125, 133 again for various reasons. 105 was already merged with 101 because it was defining the kind of Parliament that we were going to have. That is my report Mr. Chairman. (*Clapping*).

Prof. Yash Pal Ghai: Thank you very much indeed. The next Committee E, is on Devolution and I will ask the Convenor to make a report.

Hon. Delegate Adhu Awiti: Thank you very much, Mr. Chairman. My name is Dr. Adhu Awiti, Delegate number 009, the Convenor of Devolution. Mr. Chairman, I start my report by saying that this is the Committee that had a very serious challenge during the time it was deliberating. The challenge was that the sad, tragic and the brutal killing of the Committee's Convenor, the late Dr. Chrispine Odhiambo Mbai interrupted the steadfast and focused Committee progress. Members were deeply touched by the sad loss but reaffirmed their commitment and focus and dedication to hard work. Within such very engaging and yet still mourning, I wish to say that this Committee has held 15 sittings out of which, Article 215, 216, 217, 218 (1) have been concluded. We have made two major progresses, that is the Committee has decided to establish four levels of Government in Kenya namely: National, Sub-National, Counties or Districts and Location.

The Committee-- (*Clapping*). The Committee has further zoned the country into 19 zones and since the time is very short, I had decided to read to the Plenary Committee in which districts these zones are. But since the time is very short, I will not bother with that, that will come in the detailed report. However, Mr. Chairman, this morning the Committee met and the Committee had a very strong feeling about visiting some of the countries that have had Devolution practically well, because Devolution as you know is a very intricate thing and it is new to Kenya and this was a very special feeling and I thought I should share this with the Plenary.

Last but not least, I want to thank the members of the Committee who have given me great cooperation because I was a new Chair who had never gone even for induction courses of how to handle the Committees. But it has gone very well and I thank them. Thank you. (*Clapping*).

Prof. Yash Pal Ghai: Could I call upon the Convenor of the Working Group H on Public Finance, Public Service, Leadership and Integrity.

Hon. Delegate Anne Mululu: Thank you, Chair. My name is Ann Mululu, Delegate number 496 holding in for Mr. Billow who was our Convenor. Mr. Chair, the Committee decided to first leave the question of Public Finance and Revenue management until the issues on Devolution were resolved. So we did not discuss that particular Chapter. Instead we began with the Chapter on Leadership and Integrity in which we decided to incorporate guiding principles and values.

We reviewed Schedule 5 and most of what was in the Schedule was incorporated into the guiding principles and values. We then moved to the Public Service and our major issue was defining who a public officer was and we had expert help from the Public Service Commission and on the definition of a public officer. So we finally resolved that Chapter. The major issue there was also the police who were under the Public Service Commission and we decided to shift them to the Defence and National Security Chapter. Mr. Chairman, we also exhaustively looked at the proposed Kenya Correctional Service and we decided that it was a very important institution in light of the Bill of Rights and the fact that this service deals with prisoners who are still entitled to their human rights. We created structures for them. Particularly the Director General and certain qualifications. We deferred two Articles, 267 (3) and 270 pending a report from the Devolution Committee. Thank you, Mr. Chairman. *(Clapping)*.

Prof. Yash Pal Ghai: Thank you very much. Committee I on Defence and National Security. I see the Convenor is already on his feet.

Hon. Delegate Marsden Madoka: Thank you, Mr. Chairman. I am Delegate 086, Marsden Madoka, Convenor of Chapter 15 which was Defence and National Security. Mr. Chairman, we considered the heading of this particular Chapter and we felt that we needed maybe to change it because it spoke of Defence and National Security and it was felt that Defence was part of an organ of National Security. So we decided that this Chapter should be headed National Security.

Then we went ahead and defined what we considered to be national security and then considered the various organs which are responsible for national security and we put them as the Defence Forces, the Kenya Police, the National Security Intelligence Service which had been omitted from the entire Draft and also with the existing Administration Police Service.

The main feature over these National Security organs is that, it has been stated very clearly now in the Constitution, or we want it stated, that these security organs will be subordinate to civil authority; that if they will come under civil authority at no time should they consider themselves as superior. We went ahead and looked at the National Security Council and the other major feature is that the National Security Council would not approve the deployment of foreign forces in the country or the deployment of Kenyan Forces outside this country without the approval of the Parliament. *(Clapping)*.

Mr. Chairman, we then looked at the various Defence Forces, the Army, the Air Force, the Navy and the Defence Council and looked at their various functions; we were satisfied that we did a reasonable job. So we did finish Chapter 15 as in the existing Draft. Then we took on the National Security Intelligence Service, which has been omitted. We looked at that under various Articles. Again we approved the proposals which have been brought forward for the National Security Intelligence Service.

Then we took on the police. Again the police, as you heard, was debated by Committee H. But when it came to us again, we decided to debate on the various Articles because we felt that Committee H might have looked at the police as a service but we felt we might look at it as an organ of National Security. So we went through the various Articles and the major change on the police Articles, is that we have approved the establishment of a Police Service Commission (*Clapping*) which will be responsible for looking after the terms and conditions of service of the police. Then we decided to take on the question of the Administration Police which had been excluded. There was a heated debate as to whether it should merge with the Kenya Police or whether it should be an independent department. The previous Committee had almost unanimously agreed that it should merge with the Police, but when it came to the Committee, again there was a heated discussion and it was agreed that it should remain as a separate department because of the various functions they have performed and they were closer to the people and they were more friendly. It was felt that they were already devolved and may be when we come to the actual Devolution structures, it may become very useful. (*Clapping*). That is what was agreed but there was a minority view which was recorded and that is, they were concerned that it is dangerous to create a parallel force. So, we have not come to a conclusion on that, it is an issue which we will discuss when we come back to see who will be the employers, whether they should be under the Public Service Commission, whether we set up a separate Commission to look after them or whether they should come under the Police Service Commission. Thank you, Mr. Chairman.

Prof. Yash Pal Ghai: Thank you very much indeed. Working Group J on Land Rights and Environment. The Convenor please come. The Convenor is on my right hand side.

Hon. Delegate Saleh Yahya: I wish to start by thanking my Committee Members and the Secretariat. Through their hard work and dedication, we were able to dispose of the Chapter on Land subject to Amendments and subject to one or two items, which were deferred. So we covered Sections 232 to 237. Section 238 has been brought forward because it deals with definitions. We felt it would be appropriate to define not only land but also national resources. So the Chapter is now headed differently, the heading is Land, Other Natural Resources and Property. *(Clapping)*

There are about six or seven major decisions which we came to. Let me give the highlights. One of them is the establishment of a Land Bank; in addition to a Land Fund, a Land Bank which will enable Kenyans especially those who are poor to gain access to land. We decided on the setting of maximum and minimum land holding, that is, the question of land ceiling was debated extensively and we reached a decision on that.

We also took care of the question of the National Parks. Some National Parks are much too large and they exclude the people living there from using the land. So, we called for a review of National Park boundaries and management.

On the question of the cut-off date for historical injustices, we said Parliament should establish the cut-off date in consultation with the devolved governments and local communities.

In addition we set up a sub-committee to define community; we talk of community, community land, community whatever, who is the community? Who should be a member of the community. So, we thought it would be appropriate to set up a sub-Committee which will report when we come back.

We also managed to do an excursion visit. We went to Ol Karia Geothermal Plant in the Rift Valley and it was a very instructive and educational visit and we thank those people who sponsored us. At the same time, we benefited from one or two experts from the Institute of Surveyors of Kenya and also had Professor Okidi.

So, by and large the Committee proceedings went very well and when we get back we hope to define the functions of the Land Commission. The Land Commission in principle has been

agreed to but we still have to define the functions and then from there we will move on to the Environment. Thank you, Mr. Chairman.

Prof. Yash Pal Ghai: Thank you very much indeed. Working Committee K on Constitutional Commissions and Amendments to the Constitution.

Hon. Delegate Kiriro wa Ngugi: Thank you, Mr. Chairman. My name is Kiriro wa Ngugi, Delegate Number 220 and Convenor of Committee K.

The first thing we did was to set a criteria to use in examining whether or not to form a Commission. Then we examined the recommendations in the Report to each Article. The highlight I suppose is that in the original Bill, the Gender Commission was an integral part of the Human Rights, People's Defender and after debate, we have resolved to form the Gender Commission as a separate Commission. (*Clapping*).

Our major problem is that we stand the risk of forming a government by Commissions. We have a strategy how to stem that problem but in the meantime, Articles 278, 279, 280, 281 and 290 on the Salaries and Remunerations Commission stand in the Bill. Thank you very much.

Prof. Yash Pal Ghai: Thank you. Working Group L on Transitional and Consequential Arrangements.

Hon. Delegate Joyce Majiwa: Thank you very much, Mr. Chairman. I am Joyce Majiwa, Convenor for Committee L, that is, Transitional and Consequential Arrangements.

Our Committee was mandated to look at Chapter 16 (4), Chapter 20, Schedule 6 and Schedule 8 of the Draft Bill. Generally speaking these are issues or Chapters which relate to the implementation of the new Constitution. After the third sitting, the Committee decided that it may be better for them to go into other Committees and look at Transitional issues arising from there and contribute to those Committees and thereafter do the work when the decisions of the other Committees have been made.

Mr. Chairman, after some sittings, the Committees revised this decision and decided to meet at least twice and compare notes. Subsequently, the Committee decided to meet again and call experts to talk to them on the Consequential and Transitional issues.

Mr. Chairman, I am happy to report that after these meetings, the Committee has now had experts talk to them on the principles of Transition, the mechanisms of Transition and financial implications of Transition. The only other aspect which was left was the political aspect of transition which we are going to do when we meet and then start considering Chapters, particularly the ones which have been finished by the other Committees. Thank you very much.

Prof. Yash Pal Ghai: Thank you. Finally, the Working Group on Culture, Group M.

Hon. Delegate Paul Nakitare: Thank you very much, Honourable Chair and all the Honourable Delegates. My name is Paul Nakitare, Delegate Number 392, the Convenor of *Kitinda mimba*, Committee M on Culture.

We are *Kitinda mimba* because of the fact that the Honourable Delegates in this Conference decided wisely that we also have a Technical Working Committee on Culture.

Honourable Chair, we had some difficulties in establishing membership only this week and on Tuesday, I think we were able to achieve about twenty-six members who were extremely enthusiastic and we immediately started our work. We started off with, first, letting members from different communities express their experiences and the type of cultural heritage that they have from their respective places so that from these experiences, we will then be able to draw the general principles arising from the report of culture that we had in the yellow book which was distributed to everybody.

So, the last couple of days, Honourable Chair, we have been broaching the cultural landscape and out of this, we have come to realize the relegated aspects of the Kenyan culture or cultural communities all over the country. Some of the major points which have been raised which will be considered for inclusion in the general principles include, for example, relegated traditional foods, typologies, relegated traditional medicinal dispensation, relegated indigenous languages,

relegated indigenous or original creative and recreational systems, ignored inventions and traditional knowledge and so on.

Then, of course, we also decided that culture is adversely affected by the media and even through educational systems and foreign languages and we were therefore able at the end of yesterday to adopt draft documents which we are going to use to draw up the general principles that we will recommend to this Conference as part of the aspects of Culture which should be reflected. I thank you, Honourable Chair.

Prof. Yash Pal Ghai: Thank you very much. I am grateful to all the Convenors for the succinct way in which they have presented their reports. I now have a request from Delegate 316 for a brief personal statement.

Hon. Delegate Gitu Wakahengeri: My name is Gitu Wakahengeri, Delegate Number 316. I have decided to make the following statement.

On Saturday, the 20th September, 2003, a group of persons authorized by the City Council of Nairobi without any form of notice entered our rented city flat number 17 at Pangani Estate, illegally threw out all our household goods from the flat leaving the two old persons, my wife and I helpless and I know the Honourable Delegates might have seen that in the newspapers.

On Monday, the 22nd September, 2003, the *Taifa Leo* showed our helpless condition in pictures. It is also shown in the Nation newspaper at the back page on Monday. Many Delegates and Commissioners who have read the newspapers expressed sympathy and wanted to know why this would happen. In a short version, I explained the following:

1. The flat was allocated to us on rental basis by the City Council of Nairobi in 1970.
2. For over complete thirty-two years, we have had no problem with the City Council on any matter. As I speak now, we have paid the Council rent in advance up to and including the month of February, 2004. Official receipts prove this statement.

Mr. Chairman, despite all the aforementioned facts, I undersand that the Council is intending to take over the flat for occupation by a Councillor. This is injustice of the first order. Let this

message reach the Minister for Local Government. The purpose of this Statement is to recognize your sympathies from the bottom of my heart, all the sympathies that have been expressed by both the Honourable Delegates and the Commissioners.

My wife and I are freedom fighters and we are used to struggling. We will not collapse. We will fight on. (*Clapping*)

Prof. Yash Pal Ghai: Thank you very much. Now, I am going to give the floor to the Secretary for some announcements.

PLO. Lumumba: Thank you very much, Mr. Chairman.

Announcement Number One: All women Delegates and women Observers are requested to meet on Sunday, the 28th day of September, 2003 at 9.30 a.m. at the Panafric Hotel.

Announcement Number Two: Delegates who are resident in hotels, your last check out date, courtesy of the hotels will be on Sunday, the 28th of September, 2003 at 10.00 a.m.

Announcement Number Three: Immediately after this, you will be facilitated. We may make a few mistakes. Understand and raise them in the decent manner that you have done.

Announcement Number Four: Although like good wine, we believe we are growing better with age, we believe that we still make mistakes and therefore there is a suggestion Box outside for us to improve.

Lastly, permit me to thank you for the general cooperation that you have given us. May God bless you. (*Clapping*)

Prof. Yash Pal Ghai: It is now for me to make some few remarks before we move the Motion for adjournment. Let me read my remarks:

CHAIRMAN'S FAREWELL SPEECH

“As we bring this session of the National Constitutional Conference to an end, I want to thank you for your participation. This is not an occasion for the balance sheet on this session of the National Constitutional Conference. But a brief assessment is in order. We have certainly made some progress. Three weeks ago we were able, at long last, to adjourn to work in committees where we took the first steps towards making decisions on the new constitution. There seemed hope at the start of Bomas II that that we could conclude our task. However, that was not to be. We lost valuable time due to the mourning for the former Vice-President, the Hon. Michael Wamalwa and suffered another setback when Dr. Crispin Odhiambo Mbai was murdered. We lost two key members of the Conference who would have greatly enriched our deliberations and helped us to bridge differences among us.

On the positive side, their deaths inspired us to dedicate ourselves to our tasks with renewed energy and sense of purpose. We all agreed that the best tribute we could pay to them was to finish our task in reasonable time and in a spirit of respect for difference and the search for consensus. I would ask the Honourable Delegates to remember this commitment as we carry on with our task in Bomas III especially when we run into stormy weather.

I believe that we have made considerable progress in this session. In plenary we discussed and adopted new reports and Draft Articles on Devolution, Culture and Affirmative Action and remitted them to Committees for further consideration. These drafts have strengthened the already marked orientation of the Draft Constitution towards Culture and Affirmative Action, and a fair and workable balance of power.

The plenary sessions were useful in developing some consensus on these topics, but one consequence was the delay in the start of work in Committees. When we left the Conference in June the hope was that we could go straight to Committees on its resumption. Consequently we have had just under three weeks for Committee work. Given that the Committees had also to discuss the General Report of the CKRC in addition to the Draft Constitution, we have made good progress. You will have received brief reports from the quick Committees on progress they have achieved. Fuller reports will be prepared by the Secretariat during the recess and will be

available to you when we return. You will learn today that some Committees have completed or almost completed draft chapters assigned to them. All committees have made progress. Most, although not all of the recommendations, were arrived at through consensus after proper deliberations. The progress at this session has taken considerably us closer to our goal of a new constitution. I want to congratulate Honourable Delegates on this progress. It is all the more remarkable since this took place amidst much turbulence emanating from the infighting between political factions. Delegates were able to keep their heads down and focus on the issues in what was often a hostile environment. So congratulations again and thanks!

However, if I were to be perfectly candid with you, I would say that these well-deserved congratulations have to be somewhat tempered. Very frankly, I thought we should have made greater progress, to the point that the Committees would have completed their tasks and reported to the plenary. At the start of this session I had urged delegates to work diligently, keep good time, ensure a quorum throughout the day, and to focus on the articles in the draft constitution. Unfortunately this did not happen with sufficient regularity and we lost valuable time and spent much time in Committees rehashing points that had been well articulated in plenary sessions. Also we did not generate much civility and many debates were ill tempered and neither the rules of procedure nor the authority of presiding officers were observed. We are still in some way, away from developing respect for difference and promoting national unity. I believe the reason for this failure lies in the political differences that have hung over Bomas like a dark cloud throughout our proceedings.

I was afraid of this and made many pleas to faction leaders to lower the temperature and resolve their differences. These differences, which remained unresolved, prevented proper concentration on the business at hand, and perhaps also affected adversely a more principled approach to constitutional rules in favour of some expediency. Let me remind you, as I have on so many occasions and I noticed Arch-Bishop Gitari did that today in his prayers, of our oath of office which requires us to keep the national interest uppermost in our mind and deliberations at all times. It is evident to me that very heavy responsibilities lie on our professional politicians among us in this respect. I hope that they will use the recess to bridge differences and build on the consensus that seemed to have begun to sprout in the last day or two.

I have pleaded several times for stronger support from the Government for the process. I was consequently very pleased to read the statement of the Minister for Justice and Constitutional Affairs, Honourable Murungi, a Delegate of this Conference on September 23rd when he reiterated the commitment of the Government and reminded the Delegates of their responsibility. He mentioned that people expect the Constitution from the Conference by the end of the year and the Government supports this timetable. He urged Delegates to work hard. He mentioned the need to plan our work so that we can keep expenses within our budgetary allocations as State funds are urgently needed for education, roads and other services pledged to the people.

To these arguments for a speedy resolution of our business, we can add others. Because of differences between political factions and the lack of a proper framework of governance that the new Constitution was to provide, investors continue to desert us. Our economy is in a worse shape than 10 months ago. Our foreign friends are turning their back on us because we have become so quarrelsome, devoting greater time and energy to tearing each other apart rather than developing policies for the welfare of the people. The security situation worsens by the day. Coalitions, designed to bring our diverse peoples together, are coming apart at the seams. An important element in the undermining any Constitution is the respect for politics and politicians. We are in the great danger of dissipating that respect as politicians parade daily in Bomas for the whole Nation to behold what seems like their narrow and self-serving interests.

I sincerely believe that we are now in a position to move quickly based on all the work, ideas and debates that have characterised the review process up to any point. The progress made in committee and the consensus building that I hope will go on, on an informal basis during the recess, augurs well for the completion of the task before the end of the year. The programme Committee of the Steering Committee has recommended that when we resume on 17th November, 2003, we go on at least until 19th December, 2003 and complete our task. Kenyans cannot wish for a better New Year's gift. As I thank you for your hard work, let me also urge you to give Kenyans this New Year gift.

God bless you all”.

I have a request from the Minister of Local Government who wishes to respond to the comment made by Delegate 316. (*Clapping*)

Hon. Delegate Karisa Maitha: Mr. Chairman, kwanza ninawashukuru Delegates wote ambao walifanya kazi ya ziada wakati wote huu ambao walikua wanatumikia nchi hii tukufu ya Kenya.

Nimesimama hapa kuthibitisha mbele ya umma wote ulio hapa kwamba Serikali hii itaendelea kuwaheshimu wote wanaoitumikia nchi ya Kenya hasa wale ambao wanatengeneza Katiba kwa sasa. *(Clapping)*

Kama Waziri wa Serikali nahusika na Serikali za Wilaya, nimeshikitizwa kusikiza maneno ya Mzee Gitu Kahengeri ambaye alipigania Uhuru huu ambao sasa sisi vijana tunaofurahikia na sasa tanaanza kumtesa.

Na sasa hivi nimewamuru Assitant Minister ama waziri mdogo, Betty Tett, ambaye *(Clapping)* tuko na yeye hapa amchukue Mzee leo, leo, sio kesho na aregeshewe nyumba yake leo, leo. *(Clapping)*

Naahidi ya kwamba kitendo kama hicho hakitatokea tena kwa mtu yeyote alipigania Uhuru wa nchi hii kwa sababu nchi hii Uhuru ulipatikana kwa taabu na kuna watu walioipigania. Ni vigumu kusahau wale walioteseka kwa sababu ya manufaa yetu binafsi. Na pia nawahidi nyinyi nyote, kama Delegates, ikiwa kuna matatizo yoyote inayohusu maBaraza na unaonewa, na ulikuwa mmoja wa wale uliopigania wa Kenya katika Boma hili, tafadhali usitize kunipitia, tutasuluhisha mambo hayo. Asante sana. *(Clapping)*

Prof. Yash Pal Ghai: May I thank the Minister and may I say that I am glad that this Conference has acted as a kind of Ombudsman to give redress to the citizen. *(Clapping)*

Can I remind you that our Draft Constitution has excellent provisions for Ombudsman, so please ratify quickly so that every Kenyan can have justice. *(Clapping)*

The Secretary has once more announcement before I move the Motion for adjournment.

PLO. Lumumba: Just a belated announcement. All Delegates who desire to travel to Dr. Mbai's funeral are requested to assemble outside of their respective hotels at 8.00 p.m. You will be collected from there and do have a safe journey.

Prof. Yash Pal Ghai: I now want to, at the request-- What is your Point of Order?

Hon. Delegate Liyai H. Luseno: I am Delegate 601, Luseno Liyai Indembukhani, from Political Parties. I am equally aggrieved like Mheshimiwa Gitu Kahengeri and this grief regards a group of us--

Prof. Yash Pal Ghai: It is not a Point of Order, I am afraid.

Hon. Delegate Liyai H. Luseno: Yeah, I just want to put something across so that--

Prof. Yash Pal Ghai: It is not a Point of Order. We are all getting late. Please take your seat.

Hon. Delegate Liyai H. Luseno: There is a Motion regarding Observers in this Conference--

Prof. Yash Pal Ghai: No--

Hon. Delegate Liyai H. Luseno: --who have actually had a very raw deal as regards--

Prof. Yash Pal Ghai: No, no.

Hon. Delegate Liyai H. Luseno: --their welfare.

Prof. Yash Pal Ghai: It is not a Point Order--

Hon. Delegate Liyai H. Luseno: --under regulation 3

Prof. Yash Pal Ghai: Please respect the Chair and sit down.

Hon. Delegate Liyai H. Luseno: Please I wish this Conference to take action and meet their welfare, please; welfare of the local Delegates. They have had a very, very raw deal.

Prof. Yash Pal Ghai: Please, I rule you out of Order.

Hon. Delegate Liyai H. Luseno: Thank you, Mr. Chairman.

Prof. Yash Pal Ghai: Please take your chair. The Steering Committee has approved the Motion of Adjournment. You know under our regulations, the decisions on Adjournment are made by the Conference itself. This is the regulation 17 of our Rules of Procedure. I was asked to move this Motion and after I read it, I shall ask for your approval in the usual way. The Adjournment Motion reads as follows:

“That pursuant to Regulation 17 of the Constitution of Kenya Review, National Constitutional Conference Procedures, Regulation 203, this Conference resolves to adjourn from now, today Friday, 26th of September, 2003 until Monday, the 17th day of November, 2003 at 8.00 a.m. This date of adjournment and the resumption was agreed or was recommended, I should say, more accurately, between the Steering Committee, the Select Committee and the CKRC and it has the approval of the Steering Committee.”

So, those of you who approve of this Adjournment Motion, say “Aye”

Hon. Delegates: “Aye”.

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

Hon. Delegates: None.

Prof. Yash Pal Ghai: So, the “Ayes” have it and I now adjourn the Conference and I wish you a very good break in the recess and look forward to seeing you soon.

(THE NATIONAL ANTHEM)

The meeting closed at 1.00 p.m.

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