

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

**NATIONAL CONSTITUTIONAL CONFERENCE**

**Verbatim Report of**

**PLENARY PROCEEDINGS – PRESENTATION OF DRAFT BILL,  
CHAPTER NINE – JUDICIAL AND LEGAL SYSTEM  
HELD AT THE BOMAS OF KENYA**

**ON**

**19<sup>TH</sup>, 20<sup>TH</sup> & 21<sup>ST</sup> MAY 2003**

**PLENARY PROCEEDINGS, PRESENTATION OF DRAFT BILL, CHAPTER NINE,  
JUDICIAL AND LEGAL SYSTEM, HELD AT THE BOMAS OF KENYA ON 19<sup>TH</sup> MAY  
2003**

**PRESENTATION OF DRAFT BILL:     CHAPTER 9 – JUDICIAL & LEGAL  
SYSTEM**

<b>Presenters:</b>	<b>Com. Paul Musili Wambua Com. Ahmed Issack Hassan</b>
<b>Session Chair:</b>	<b>Prof. Yash Pal Ghai</b>
<b>Co-chair:</b>	<b>Samuel K. Arap Nge'ny</b>
<b>Co-chair:</b>	<b>Wilfred Koitamet Ole Kina Nchoshoi</b>

**Hon. Delegate Sultana Fadhil:** Sasa tutaendelea na mazungumzo juu ya mahakama na namkaribisha mwenzangu Mjumbe kutoka Pwani Mheshimiwa Danson Mungatana ambaye atawakaribisha wale ambao watawaeleza juu ya Mahakama. Karibu Danson.

**Hon. Delegate Danson B. Mungatana:** Ladies and Gentlemen, we are now starting on the Judicial and Legal System section. We shall be chairing this session together with my learned friend Miss Sultana Fadhil, (*noises*) and just before we proceed may be we can take that point of order, 583. There is a point of order there.

**Hon. Delegate Apolo Njonjo:** Thank you very much Mr. Chairman. My name is Apolo Njonjo, representing Political Parties, the Social Democratic Party in particular and I am Delegate number 583. Mr. Chairman, I sympathize a lot, I don't like raising points of orders and this is the very first point of order I am raising; but I'm raising it on account of the gravity of the situation. I rise to raise this point of order under regulation number 38. Honourable Chair, you will recall last Thursday, Delegate number 223 raised a very serious matter to the effect that some Commissioners seem bent to ramp through or to push through their views about the Constitutional proposals down the throats of Honourable Delegates. The Chairperson of the Conference attempted to discount that matter.

Mr. Chairman, I spent a very troubled weekend agonizing over Delegate number 223's concern for that particular Delegate happens to be the Speaker of the National Assembly of Kenya and he is a person who has distinguished himself as one who carefully weighs his words before making them. I examined various documents that the Commission has distributed to us with a view to seeking out what Delegate 223 may have in mind; what he had in mind. And my eyes fell on the 7<sup>th</sup> Schedule of the annotated Draft Bill, one of the red documents that have been circulated to Honourable Delegates.

Article 3 of the Schedule states that last year's elections are deemed to have been held under this Draft Constitution. It's a Constitution that we are discussing; it is obviously not true that we carried last year's elections under the Draft Constitution because it is not even ready. It seems to me that Delegate number 223 was correct in his apprehension and our Chairperson for the Conference was in serious error.

**Hon. Delegate Danson B. Mungatana:** Excuse me.

**Hon. Delegate Apolo Njonjo:** I'm concluding the point of order now.

**Hon. Delegate Danson B. Mungatana:** Excuse me; please get to the point of order.

**Hon. Delegate Apolo Njonjo:** Yes, I'm getting round to it. If this is the state that what we are doing here as a Conference has already been preceded by an acceptance of the Draft, what is our purpose? Why are we here? If the 7<sup>th</sup> Schedule tells us that we have already adopted this Constitution and it is already operational, what is our purpose? What are we doing here as Delegates? Or are we here simply to rubberstamp some of the proposals that have been made by the Commission? My point of order, Mr. Chairman, is to seek your guidance as to whether this Conference has any impact on that 7<sup>th</sup> Schedule where it is assumed that this Constitution is already operational. Thank you very much.

**Hon. Delegate Danson B. Mungatana:** Thank you Mr. Apolo. I can assure you that the purpose of this Conference is to make the new Constitution and what you are referring to as some of the transitional requirements or provisions that we need to have for purposes of making

sure that the Constitution that we are going to come up with here will be effected and please Delegates, I want to re-assure you again, there is nothing like a Constitution or anything that has been drafted before this one. What we are going have, this is the document that will go to Parliament. Thank you. I would request Delegate 296, kwa heshima yako, you give me a chance so that we can start at least one presentation, then I can take another point of order. I ask your indulgence, 296 I will take your point of order after I have one presentation from the gentlemen here who are leading us. I ask your indulgence. Thank you.

So Gentlemen and Honourable Delegates, gentlemen and ladies who are here, we are starting the formal Chapter 9 of the Draft Bill of the Constitution and we are dealing with judicial and legal systems today. We are going to have two Commissioners leading us in this discussion and the first one will be Paul Musili Wambua. Please Mr. Commissioner, thank you. I have just asked for the indulgence of the other Delegate 296, I request you also, to give us that indulgence so that we can get going, thank you

**Com. Paul Musili Wambua:** Thank you, Mr. Chairman and Honourable Delegates. The Chapter we are going to be looking at is the Chapter which deals with the Judiciary and we will be referring to Chapter 11 of the main report and more specifically 11.5 of Volume one. With regards to the Draft Bill, we will be looking at Articles 184 to 207 and before I start taking you through the actual Articles of the Draft, I would like to explain one or two things which are important to understand so that you may be able to appreciate the position the Commission took when it made certain recommendations in the Report.

I would be presenting on the Judiciary proper and the Kadhi's Court, and my colleague Hassan will be dealing with the Part II and III of that particular Chapter and that deals with legal profession and legal system. The Commission took the view that the courts are very important in the Constitutional set up of a country because they are assigned the important task of upholding Constitutionalism and legality. The Commission took the view that the staff of the Courts are the most important part of that particular organ of State. Now, in dealing with the Judiciary, the Commission was addressing the specific mandate which empowered the Commission to examine the organs of State and ensure that there are proper checks and balances between the various organs of State. The Judiciary happens to be the third arm of the government and it plays a very

crucial role. It is required to interpret the law independently, it is required to uphold the supremacy of the Constitution, it is also required to develop Constitutional norms and to ensure that these are adjusted to changing trends which are economic and social. It is also required to protect the rights and freedoms of the people which, as we agreed, is one of the most important provisions of any Constitution.

The Judiciary is also required to settle legal disputes that are referred to it and this must be done in accordance with the law. It also has, of course, the other important function of ensuring that both the Legislature and the Executive are kept within their lawful authority. Now, in order to provide these functions, the Judiciary has to be seen to practice certain values and at the very onset it is important to note that the Judiciary must be seen to be independent both in the decisions which it makes and also as an institution. This institutional and decisional independence have to ensure that in the appointment of Judges and in the dismissal of the same and their terms of office, they enjoy the security of tenure and independence which enables them to perform their functions without interference. Now, these important values and principles are captured in Articles 186, if I may refer you to the specific provision and if you look at, more specifically, Article 184, the Commission has recommended that the Judicial power must derive from the people and shall be exercised in the name of the people, in conformity with the Constitution and in conformity with the values, norms and aspirations of the people.

Sub-section 2 of that Article states that judicial power vests exclusively in the courts and tribunals established under the Constitution. Then the most important sub-Section, that is (3), this is the one which lays down the principles and values which the Judiciary must conform to. You will note under that particular sub-Section of Article 184, that in applying the law of cases of a civil and criminal nature, the courts shall be guided by the following principles and these are listed as:

- Justice shall be done to all irrespective of social or economic status,
- Justice shall not be delayed,
- Adequate compensation shall be awarded to victims of wrongs
- Re-conciliation, mediation and arbitration between parties shall be promoted.
- Justice shall be administered without undue regard to technicalities.

- And lastly, that the protection and promotion of the principles and purpose of the constitution shall be upheld.

Now, sub-Section 4 of that particular Article provides that in the performance of their functions the courts, their officers and persons participating in the administration of justice shall strive to deliver the highest standard of justice to the public and are bound by the Leadership and Integrity Code of Conduct. This is found at the end of that draft and is Schedule Five. Now, if you look at that Schedule you will notice that there are certain values which any judge must subscribe to one of which is that, he shall not place himself or herself in a position in which personal interest conflicts with that of the office which he holds as a judge.

There are also provisions as to the requirements of disclosure of the property and assets which a judge should own and other detailed requirements for all public officers who are named to belong to a particular rank.

Now (c) states that: shall continue to educate themselves in the current development in the laws of Kenya and comparative law, and sub-Section (5): the State shall provide reasonable resources and opportunities shall be made available for members of the judiciary to enable them to deliver the highest standards of service to the public.

Now, in making these proposals, the Commission was guided by the views which Kenyans gave and due to the sensitive nature of this particular topic, the Commission had occasion to engage the services of a panel of experts from the Commonwealth and this panels gave their report and certain recommendations. The Commission also had an opportunity to examine a report which had been prepared by a judicial committee which was headed by a judge of the Court of Appeal, Justice Richard Kwach.

Now in both these reports the Commission noted that the public had lost confidence in the judiciary and that two issues came out very clearly: that there was a general perception among Kenyans that the judiciary was corrupt and that it was alien.

Also, members of the public raised the question of appointment and removal of judges from their offices and they recommended that it was necessary to reinstate the council of elders or the traditional courts because they were not very sure that they trusted the judiciary.

Also others recommended that there should be a new court, which is set up above the current Court of Appeal so that it can enlarge the appeal process. There were proposals that judges should also have, apart from the professional training, university degrees and many also required that the Judicial Service Commission which is the arm or the body which is mandated to appoint judges and remove them from office should be restructured so that it should include people or persons outside the legal system.

The Commission took the view that not all the judges are corrupt, and not all of them are incompetent, but it had to pay attention to the fact that members of the public required that the judiciary be reformed. The Commission also took note of the fact that the judiciary is not composed of judges alone and that there are magistrates, registrars and clerks and some of these people also contribute to the poor performance of the judiciary and therefore in making recommendations for the reform of the judiciary these other aspects have to be addressed.

The Commission also took the view that the legal profession must be included in the reform of the judiciary because the lawyers and professionals who practice law as lawyers are also equally to blame for the poor performance of the judiciary. Now those are the aspects which my colleague will be addressing when he deals with the legal system and the legal profession.

Now, if you look at Article 185, the Commission has recommended a hierarchy of courts and it is stated that the judiciary shall consist of the courts, the judges, the magistrates and other judicial officers of superior courts of records and subordinate courts. Now, the superior courts of records are taken to be the Supreme Court, the Court of Appeal and the High Court, while the subordinate courts are stated to be the Magistrates' Courts and the Kadhis Courts and any other court which may be established by an Act of Parliament or any other tribunal which may exercise a judicial or quasi-judicial function.

Now, Article 186 deals more specifically with the question of independence of the judiciary. Sub-Article (1) of that Article states that in the exercise of the judicial power, the judiciary is subject only to the Constitution and is not subject to the control or direction of any other person or authority and basically this is designed to ensure that the institutional independence of the judiciary is guaranteed.

Sub-Section (2) says that the administrative expenses of the judiciary including the salaries, allowances, gratuities and pensions payable to, or in respect of persons serving in the judiciary are to be charged on the consolidated fund. And again, the purpose of this is to secure the institutional independence of judiciary.

Now sub-Article (3) states that no judicial officer shall be liable in an action or sued in respect of anything done in the performance of a judicial function. But in our report the Commission has noted that this does not extend to cover corruption by a judge while in office.

Sub-Article (4) states that the salaries and allowances, gratuities and pensions payable to, or in respect of persons serving in the judiciary shall not be varied to their disadvantage. Again this is an attempt to secure the independence of the judges and to ensure that there is no interference while they serve in that capacity.

Now sub-Article (5) talks about court fees and provides that fees shall be reasonable and shall not be such as to discourage the use of the court system. I think this would be understood better when we look at the legal system where my colleague will be talking about the public defender and the question of the court process.

Now sub-Article (6) says that the Salaries and Remuneration Commission shall ensure that the emoluments and terms of conditions of service encourage and enhance the integrity and independence of the judiciary. So in Article 186, we have specifically provided in the constitution for the independence of the judiciary.

Now, Article 187 basically provides for the setting up of the new court which we are calling the Supreme Court and this court shall consist of the Chief Justice so he is the head of the judiciary, and shall also consist of not more than six judges.

Now, Article 188 basically provides for the jurisdiction of this court and it vests original jurisdiction in the court with respect of advisory opinions requested by the President, and this is a matter which was addressed by my colleague who spoke on the judiciary. It also vests the original jurisdiction in respect of presidential elections, issues relating to impeachment of the President in respect of any challenge to the constitutionality of any Act of Parliament, in respect of any dispute between the districts or between a district and the national Government, and this will become clearer when you deal with the chapter which touches on devolution where the levels of Government are provided for.

It also has appellate jurisdiction, which may be conferred by an Act of Parliament. Now, sub-Article (2) provides that where a question relating to the original jurisdiction of the Supreme Court arises in any other court, then that court shall stay the proceedings and refer the question to the Supreme Court for determination and the court from which the question arose shall act in accordance with the decision of the Supreme Court.

So basically we are saying that the Supreme Court shall enjoy the highest jurisdiction as far as the supervision of the other courts are concerned. Sub-Article (3) provides that the Supreme Courts may depart from its previous decision in the interest of justice and that all other courts are bound by the decisions of the Supreme Court.

Now, Article 189 is the specific Article which grants supervisory jurisdiction of the Supreme Court to all these other courts to ensure that partly they comply with the rules of natural justice and that they act in conformity with the provisions of the constitution.

Now, the Commission in recommending for the setting up of the Supreme Court was guided by the view that it was necessary to infuse from the top new values to the judiciary and therefore it was shared by the Commission that this particular court, the Supreme Court, would play a crucial law in ensuring that the new values are sent down to the other courts in the lower ranks.

Now, Article 190 provides for the Court of Appeal and it specifically provided that this court shall consist of the President and not less than ten judges. It shall be constituted by three judges and the Court of Appeal is bound by the decisions of the Supreme Court and the High Court and the subordinate courts are bound by the decisions of the Court of Appeal.

Now, the President of the court according to our proposals would be the senior-most judge in terms of the number of years served in that particular court.

Under sub-Article (5) of the Article the President of the court may, in consultation with the Chief Justice, create divisions of the Courts of Appeal consisting of the number of judges assigned to them by the Chief Justice and sitting at the places determined by the President of the Court of Appeal in consultation with the Chief Justice.

Now, the specific jurisdiction of the Court of Appeal is provided for under Article 191, and you will note that the court is vested with appellate jurisdiction, and specifically it should hear appeals from decrees and judgments of the High Courts and any other appellate jurisdiction, which any Act of Parliament may confer upon it. Sub-Article 2 of that particular Article provides that: an appeal to the Court of Appeal (inaudible) from the judgement, decree, or order of the High Court. Article 192 is the Article, which establishes the High Court. It is specifically provided that the High Court shall have a Principle Judge of the court and such a number of judges not less than 50 as may be prescribed by an Act of Parliament. And the Principle Judge may in consultation in the Chief Justice create divisions of the High Court and specify their jurisdiction. Finally, under that Article, the High Court shall sit in such places as the Principle Judge may appoint.

Article 193, provides for the jurisdiction of the High Court and it vests unlimited original jurisdiction in criminal and civil cases and any other jurisdiction, appellate or original conferred on it by an Act of Parliament. Article 194 deals with appointment of judges, and this is important as I noted earlier, the appointment and removal of judges and their tenure of office are crucial elements in ensuring that the Judiciary as an institution and the judge as an arbiter is preserved. So Article 194 provides that: where there is a vacancy in the office of the Chief

Justice, the most senior judge of the Supreme Court - by reference to the date of appointment - shall be appointed the Chief Justice. And this is a theme, which we have put through all the courts so that judges are appointed in order of seniority in reference to the date of their appointment.

Sub-Article (2) of Article 194 provides that: when there is a vacancy in the office of the President or in the Court of Appeal, the most senior judge of the Court of Appeal - by reference to the date of appointment - shall be appointed the President of that Court. And where there is a vacancy in the office of the Principle Judge of the High Court, then the most senior judge in the High Court - by reference to the date of appointment shall be appointed the Principle Judge.

And then Sub-Article 4 provides that the other judges of the superior courts of record and the Chief Kadhi shall be appointed by the President, acting in accordance to the advice of the Judicial Service Commission and with the approval of the National Council. As to the qualifications for appointment of judges, you will note under Article 195 that the Chief Justice and the judges of the Supreme Court shall be appointed from person who possess the following qualifications:

- 15 years of experience either as a judge of the Court of Appeal or the High Court or as a practitioner of law or as a teacher of law in a recognized university, and such a person must have intellectual ability as demonstrated by academic qualifications and legal practice, and must be a person of high moral character and integrity.

Sub-Article (2) provides that; the judges of the Court of Appeal shall be appointed from persons who possess the following: the qualification are more or less the same, except that ten years experience is required either by the judge of the Court of Appeal or the High Court or as a legal practitioner or a law teacher in a recognized university. And again they must demonstrate intellectual ability, and they must be persons of high moral character and integrity.

Sub-Article (3) provides that the judges of the High Courts shall be appointed from persons who possess the following qualifications: again the same except that for judges of the High Court it is

ten years, either as a magistrate or a legal practitioner or a full time law teacher in a recognized university. And similarly, they must have intellectual ability as demonstrated by academic qualifications and legal practice. They must also be persons of high moral character and integrity.

Sub-Article (4) provides that: the office of a judge of the superior courts of record shall not be abolished while there is a substantive order of that office. Again this is a provision, which is designed to ensure that the judge is independent as an arbiter and that he is not influenced either way in giving his judgement. Now for the tenure of judges, Honourable Delegates you look at Article 196 and you will note that under that particular Article we have provided that: a judge and other judicial officers of the subordinate courts shall retire upon attaining the age of 65. And at this point I would like to point out to the Honourable Delegates that the current retirement age of judges is 74, and therefore the Commission felt that, that age should be reduced to 65.

Sub-Article (2) is designed to ensure that there is continuity and gives a judge who is retiring six months to enable that particular judge to deliver judgments, which are pending. Article 197 deals with removal from office. And that Article provides that: a judge of the superior courts of record may be removed from office in accordance to this Article on two specified grounds - either he is unable to perform the functions of his office because of infirmity of body or mind or from a sufficient cause or that he has breached the code of conduct applied in the Judiciary or that he is incompetent and/or due to misconduct. So there are specified grounds on which a judge may be removed from office.

Then sub-Article (3) provides, and I think this is something you need to note, because what the Commission has done is that it has actually provided for any individual, institution or society or group of persons who desire that a particular judge may be removed from office, then a procedure is clearly spelt out. They are required to present their petition to the Judicial Service Commission, which is the body, which is charged with the responsibility of removing judges from the office, and their appointment, and their discipline. And upon receipt of the petition the Judicial Service Commission is required to consider the petition first, and if it is satisfied that it discloses existence of grounds, which are listed in sub-clause (1) of Article 197 - then it shall send the petition to the President.

Sub-Article (4) requires that: upon receipt of and examination of the petition, the President may acting in accordance with the advice of the Judicial Service Commission, suspend the judge and in the case of a judge who is not a Chief Justice, will then appoint a tribunal consisting of the chairperson, four other members from among persons who hold or have held the office of a judge of superior courts of record, who are qualified to be appointed as judges of the superior courts of record, and three other persons with experience in public affairs, at least one of whom shall be a woman.

In the case of Chief Justice, then the President is required to appoint a tribunal consisting of the Speaker of the National Council as the chairperson, and the two judges from the member states of the East African Community, and three persons with experience in public affairs, at least one of whom shall be a woman. Then sub-article (5) of that Article provides that the tribunal shall inquire into the matter and report on the facts and make recommendations to the President of the Republic, who shall act in accordance with the recommendations of the tribunal. So the President will have to follow strictly what the tribunal has recommended. Now you note that Article 198 deals with subordinate courts, and it provides that: Parliament may by an Act of Parliament establish courts subordinate to the High Court, and shall have-subject to the Constitution-the jurisdiction and functions conferred on them by an Act or any other law.

And then sub-Article (2) provides that: no judicial officer in the office of the Magistrate or Kadhi may be removed from office except after determination by judicial... as may be prescribed by an Act of Parliament.

Basically, what those Articles have done is to strengthen the Judicial Service Commission and make sure that it includes people from outside the legal system. We have created a new court, the Supreme Court, and we have more specifically provided for the independence of the Judiciary both as an institution, and we have tried to protect judges - while holding office - who are involved in the judicial functions of determining cases.

Now Honourable Delegates, I want to move on to the next Articles, which now deal with the Kadhi's Courts. Now as you all know this has been a big issue and very emotive, and I do hope

that you are going to let me present the position of the Commission and why we came up with the proposals which are contained in this Draft. Basically, before I go through the specific Articles, which run from 199 to 203, I want to explain the genesis of the Kadhi's Courts in our Constitution. I want just to make some general observations, one of which is that: under the current Constitution, which we are now reviewing, the Kadhi's Court under Section 66 are provided for as constitutional offices.

This Section 66 of the current Constitution establishes the Kadhi's Court, the Chief Kadhi, and Kadhi as constitutional offices. And therefore, it is not true and correct to say that the Commission actually introduced provisions regarding Kadhi's Courts. These provisions have been there, first in the independence Constitution of 1963 and in the current Constitution. What you need to note and what I think is important to understand is that a Kadhi is a judicial officer or magistrate presiding over a Kadhi's Court where Islamic law is applied and where both parties are Muslims. He needs not to be a spiritual leader. He is not an Imam, he is recognized specifically as a judicial officer, and under the current Constitution Kadhis are recognized as occupying positions which are similar to those of magistrates.

The other thing I may need to note is that if one looks at the history of this country one would appreciate that the Kadhi's Court have come along way, and that in fact they are entrenched in our history and in the constitutional development of this country. Now the provisions which we find in the existing Constitution were as a result of an agreement which was entered into in 1963, and that agreement was part and parcel of the package which gave Kenya independence. And one needs to go back to the time when the Portuguese came to the East Coast of Africa to note that, at that stage even before the British came, the Kadhi's Courts had been established as part and parcel of the administration of justice of the East Coast of Africa. They co-existed with the courts, which were referred to as Liwali and Mudir Courts. These courts actually had and exercised jurisdiction of civil and criminal nature. But as the fight or struggle for independence came to an end, there was a concern that since the Coast or the ten mile strip was part of the dominion of the Sultan of Zanzibar, it was necessary that the particular the faith of Islam which was practiced at the Coast, be protected. Honourable Delegates recollect that, Kenya then existed as a protectorate because the British then, gave that status to the coastal strip, whereas the rest of the country was a colony.

The British during their rule recognized the Kadhi's Courts, and due to the concern which was expressed by the Sultan of Zanzibar over the status of his subjects at the Coast in or around 1962. A Commissioner was appointed to study the issue of the Kadhi's Courts along the Ten Mile Coastal Strip, now that Commissioner passed by the name of James Robertson. He made his report to the British Government and the Sultan, and in that report he recommended that there was no need, although his opinion was divided as to whether the Coastal strip should join the rest of Kenya in the newly independent state of Kenya or it should break away. His recommendation was that, the Coastal strip should join the rest of Kenya and form one independent state, but on condition that the Kadhi's Courts and the freedom of the Muslim to practice Islamic faith, be guaranteed.

Following that recommendation the Prime Minister of Kenya, then Mzee Jomo Kenyatta, entered into an agreement with the Prime Minister of Zanzibar, then Shamte, and they agreed that the Kadhi's Courts were to remain, the Muslim were going to be allowed to practice their faith and that, that particular agreement was to be translated into a constitutional guarantee. Hence, that come independence and in the independence Constitution, the Kadhi's Courts were recognized as part of the judicial system of Kenya. So Kadhis are appointed as judicial officers they occupy the same position as magistrates, they are not religious leaders. They are judicial officers and in fact they are appointed presently under the current Constitution in accordance with the provisions of the Constitution relating to the Judicial Service Commission.

Now once we had appreciated that basic history, then the Commission took the view that it would be abrogating this particular agreement, which was part and parcel of the independence of this country, and that this constitutional protection should now be re-negotiated since it has been there. And in fact since the first one to this particular constitutional provision Section 66, Parliament has even passed laws just to make sure that the Kadhi's Courts are protected and that the Islamic faith is guaranteed. We have the Kadhi's Court Act Chapter 11, which was enacted in 1967, and which basically sets up these Kadhi's Courts, their administration and their structure. Then Parliament also passed another law, 'The Mohammedan marriage and divorce registration Act,' which is our current Chapter 155. Parliament again passed another law, 'The Mohammedan Marriage Divorce and succession Act,' which is Chapter 156. In our current law

of succession is Chapter 160; there is also reference to this Kadhi's and the Islamic faith. So we are basically saying that they have come a long way and the Commission took the view that we cannot remove them from the Constitution.

What the Commission did is that, having come to that conclusion to look at what proposals were made by the members of public to restructure these courts, and when we went round to receive views, the Commissioners were told that the Muslims were concerned with certain aspects within the structure of the courts as they existed. The Muslim community asked the Commission to ensure that there were sufficient Kadhi's courts throughout the Republic. They also proposed that their jurisdiction should be extended to cover civil and commercial matters where both parties were Muslim. They also requested or recommended that the qualifications of Kadhis should be raised to ensure that they are competent, and that a separate structure of appeal be established. And the reason they gave was that, once a judgment is delivered by a Kadhi's court, the requirement is that a party who disagrees with that particular judgment should appeal top the High Court; and when that appeal is lodged in the High Court, the Chief Kadhi or Kadhis sit as assessors with the judge who presides.

But their concern, or the concern of the Muslim community is that the opinion of the Kadhi or the Chief Kadhi is not binding on the judge. They just sit, they nay recommend, but the judge is not bound by whatever they say. Therefore, it was the feeling of the Muslim community, that there should a well-structured appeal system to allow Muslims to seek an appeal, where judgments have been delivered by the Kadhi.

The Muslims also proposed that it was necessary to ensure that some Kadhis should be appointed from the Shia community to cater for their needs, and also that they would want to be consulted on the appointment of the Chief Kadhi or other Kadhis.

So, basically those were the proposals, and when it came to analyzing these proposals, we did not as a Commission receive any proposals from any Kenyan that they did not wish to have the Kadhi's Court retained in the current Constitution. Nor did we receive as a Commission from the views, which were received, any proposal that these recommendations by the Muslim Community ought not to be included in the Constitution. Therefore, in view of those proposals,

the Commission came up with this Draft, Articles 199 to 203. If you look at Article 199, what the Commission has proposed is that there should be established Kadhi's Courts, the office of the Chief Kadhi, office of Senior Kadhi and the office of Kadhi. This is not any different from what is currently there in the Constitution, except for the Senior Kadhi. Otherwise, what we proposed as a Commission for inclusion, are Constitutional offices which are already recognized, in the current Constitution.

In sub- article 2, we have provided that there shall be a number being not less than thirty of other Kadhis as may be prescribed by an Act of Parliament. So what basically that sub-article does is to give the minimum number which ought to be there. And that is in accordance with the proposals, which we received. Sub-article 3, provides that a Kadhi is empowered to hold a Kadhi's Court called a District Kadhi's Court, having jurisdiction within the district or districts as may be prescribed by an Act of Parliament. And basically, the proposal which we are making is that at least in each District, there ought to be a Kadhi's Court.

Article 200 deals with jurisdiction of Kadhi's Court. And we have proposed that the jurisdiction of the Kadhi's Court should extend to the determination of questions of Muslim law relating to personal status, marriage, divorce, including matters arising after divorce, and inheritance and succession in proceedings in which all the parties profess Islam. This is not anything different from what we have in the current Constitution.

Sub-article b, now seems to extend that jurisdiction to civil and commercial disputes, but as I said, this must be the same Parties who are Muslim and in the manner of fire claim ...(inaudible) by law established. Now, what the Commission was thinking was that there was this proposal to establish a small claims court. And these courts would be close to the people, they would be more or less like informal tribunals where cases can be heard and determined without undue technicality. And therefore, as Commission we felt that, that provision relating to small claims courts could also be extended to the Muslims. And the reference to the civil and commercial disputes between Parties who are Muslims. But, I think you will note that down there, we have said that this is ...(inaudible) to the right of the parties to go to other courts or tribunals with similar jurisdiction. So we are simply saying that we are not forcing even the Muslims to go to the Kadhi's Court. If they opt to refer the dispute to other courts, those other courts can actually

hear and determine that particular dispute. That whether they opt to refer this matter to a Kadhi's Court, although civil and commercial, then the Constitution has guaranteed that right.

Sub-Article 2 provides that subject to the Constitution and appeal ...(inaudible) rights from the judgment tree of order from the district Kadhi's Court to the Provincial Kadhi's Court presided over by the Senior Kadhi in any matter of course determined by this lower Court. Basically, we are trying to set up a proper appeal structure for the Kadhi's Court, so that we do not have people or persons or judges who are not properly qualified in Islamic law, hearing these disputes. So, we have come up with a parallel system where, an appeal from the district Kadhi's Court goes to a Provincial Kadhi's Court, and then from there, it goes to the Supreme Court.

Sub-Article 3 provides that an appeal lies on the ...(inaudible) of judgment degree order of the Provincial Kadhi's Court to Kadhi's Court of appeal presided over by the Chief Kadhi and two Senior Kadhis. And then 4, an appeal from the Kadhi's Court of Appeal with the Supreme Court only on a point of Islamic law, or on the issue affecting the interpretation of the Constitution or any other Constitutional issue. Basically we are preserving the rights of the Supreme Court to interpret the Constitution. We are saying that that right to interpret the Constitution is preserved, and therefore if any of the disputes in question relates to the interpretation of the Constitution, then it must go to the Supreme Court.

Sub-Article 5 provides that for the purposes of hearing and determining an appeal within the jurisdiction, the Provincial Kadhi's court and the Kadhi's Court of appeal have all the powers, authority and jurisdiction in the Court from which the appeal is brought. And sub-article 6, the Chief Kadhi shall in consultation with the Chief Justice and the Law Society of Kenya, make rules of Court for the practice and procedure to be followed by the Kadhi's Court. I think this is important to understand because one of the problems the Kadhi's Court had was the question of the procedure to be followed. And the Commission noted that there was a complaint that although the evidence Act is excluded in its application to the Kadhi's Court, the Kadhi's Courts have continued to use the Evidence Act in all the proceedings conducted in those Courts. And therefore, we felt that there should be a procedure which is set up and which should be followed when proceedings are conducted in this Court. And we have clearly said that the Chief Justice

and the Law Society shall make the rules for this court, basically acknowledging the fact that the Kadhi and the Chief Kadhi are judicial officers, they are not religious leaders.

To the appointment of Kadhis, we need to look at Article 201, and we have provided that Kadhis shall be appointed by the Judicial Service Commission, basically repeating what is already there in the current Constitution. We have also provided that in the appointment of the Kadhis, the Judicial Service Commission shall take into account the qualifications of the Kadhi in Muslim personal law applicable to the different sects of Islam.

In sub-article 3, the Chief Kadhi shall have the same status, privileges and ... (inaudible) as a High Court Judge. The Senior Kadhi as the chief Magistrate, and the District Kadhi as a District Magistrate in a Magistrate Court. Basically, we are trying to create levels which are similar to those in the Subordinate Courts and the ... (inaudible).

The Chief Kadhi at Sub-Article 4, and other Kadhis shall be full time Judicial Officers. Again this goes to emphasize the fact they are not religious leaders, they are in full time employment, and they are Judicial Officers.

To the qualifications, what the Commission did is that we expanded the qualifications for Kadhis, by requiring that apart from qualification in the personal law applicable to the Muslims, they should also be advocates of the High Court of Kenya. Basically, that they should be qualified to serve in any other Court. So, under Article 202, sub-article 1, we have provided that a person is qualified to be appointed as a Chief Kadhi if:

(a) That person is a Muslim of not less than 35 years of age.

(b) He is an advocate of the High Court of Kenya of at least ten years experience as a legal practitioner and as a ... (inaudible) and obtain a recognized qualification in Muslim personal law applicable to any sect or set of Islam from a recognized University.

(c) Has obtained a degree in Islamic law from a recognized University and has not less than ten experience in the practice of Islamic law, or has held the office of Kadhi for a similar period.

Sub-Article 2, the qualification for appointment as a Kadhi or Senior Kadhi is the same as the qualification for the appointment of the Chief Kadhi, except that the requisite number of years of experience shall be five years.

Article 203 provides for the Rules Committee, and we are saying that there shall be a Rules Committee with authority to make rules or procedures applicable to the various Courts set up under this Constitution. Basically, we are providing for a Rules Committee to provide for rules or procedures, which apply, to all the Courts. In setting up this Rules Committee, we have recommended that the Chief Justice should be a member, the President of the Court of appeal be a member, the Principle Judge of the High Court, the Chief Kadhi, the Registrars of the Supreme Court, the Court of appeal and High Court and two representatives of the Law Society of Kenya, and under Sub- Article 3, we have provided that the Rules Committee shall have authority to determine the fee ... (inaudible) of any matter.

Article 204 is the Article, which sets up the Judicial Service Commission, and Article 205 sets out the functions of the Judicial Service Commission. Under Article 204, and you will note, under Sub- Article 1 (a) to (m) that the Judicial Service Commission has been expanded; it shall be chaired by a full time Chairman, who is a person qualified to be appointed as a Judge of the Supreme Court. It is proposed that there shall be a Muslim woman to represent the ... (inaudible) by the National Muslim Organization, the Attorney General, one Supreme Court Judge, one Judge of the Court of appeal, one Judge of the High Court, The Chief Kadhi, two Magistrates appointed by fellow magistrates, two Advocates of at least fifteen years standing, two law teachers, one of whom should be a woman elected by faculties of law of Public Universities, a member nominated by the Council of Legal education as the chairperson of the Public Service Commission, and three lay members, one of whom is a woman to be nominated by NGO Organizations.

Sub-Article 2 provides for members of the Commission to hold office for a term of five years, but to be eligible for re-appointment. Basically, we have expanded the composition of the Judicial Service Commission to ensure that persons from outside the legal system are made members.

The functions are stated under Article 205, and basically these functions include the appointment of Judges, Sub- Article (a), to review and make recommendations to the terms of service of Judges Magistrates and other judicial officers. They are the same Judicial Service Commission in charge of the responsibility of discipline of Judges and Magistrates and other judicial officers. It is also charged with the responsibility of receiving and investigating complaints, which may be lodged against judicial staff. And also to prepare programmes for the education and training of Judges, and to advise the Government on improving the efficiency of the administration of justice, and to encourage gender equity in the administration of justice, and any other function prescribed at the Constitution or an Act of Parliament.

In performing these functions, sub-Article 2 provides that, the Commission is subject only to the Constitution. Again to emphasize the need for institutional independence of this particular body. Sub- Article 3 provides that the Commission shall regulate its own procedure, just as an addition to the provisions of Sub- Article 2.

Lastly, Article 206 deals with the appointment and removal of certain judicial officers, and Honorable delegates can look through the provisions of sub Article 1(2) and you will note that we have provided that 55 years shall be the retirement age of all judicial officers, and we have also specifically provided that, to remove a judge from office, you can only site certain grounds which are listed under sub Article 3, those include inability to perform the functions of the office, incompetence, breech of the code of conduct applicable to the judiciary, or any other misconduct. So basically, those are the proposals in the Draft regarding the Kadhi's Court and the Judiciary. Now, I will hand over to my colleague Commissioner, Chairman, so that he can give us the directions on how we proceed.

**Hon. Delegate Danson B. Mungatana:** Yes, I think Honorable Delegates we should give him a clap.

*Clapping by Honorable Delegates.*





Holy Spirit, we pray that you control the minds of men and women in this place, that today as we talk we remove all our biases oh God. We remove all our interests Oh God and put the interest of the people who sent us from the whole country.

God we know that the Constitution we are making is not only for us who are here but it is even for our children and children of our children and so God we pray that whatever we do today, will be that which will bring peace, stability and happiness in our country. So God take control in everything. In Jesus Name I pray. Amen.

**Hon. Delegate Danson Mungatana:** Mr. Wandati if you are there can you also say prayers for us. Mr. Wandati, are you there? If you are not there Mr. Abubakar, please come and say a word of prayer for us. Yusuf Abubakar please come and say a word of prayer for us.

**Hon. Delegate Yusuf Aboubakar:** Bismillahi Rahmani Rahiim. In the Name of God, the beneficent, the merciful. Praise be to Allah, Lord of the World, the beneficent, the merciful, the owner of the day of judgment.

Twakuomba Mwenyezi Mungu utuongoze oja wako. Twakuomba Mwenyezi Mungu uliyeumba mbingu na nchi na watu na kila kitu, hakuna mwingine ila ni wewe kutia mapenzi katika roho zetu, kutia imani katika roho zetu. Wewe ndiye ambaye kwamba unaoweza kuokoa na kuziongoza tofauti zetu zozote uzipitishie katika masilahi ya kuweza kusikilizana. Ewe Mwenyezi Mungu, kama ulivyoibariki nchi hii tangu ipate uhuru basi endelea kuibariki kwa amani na usalama na masikilizano, hakuna awezaye kufanya hilo ila ni wewe.

Kenya yasifika kila pahali kwa sababu ya imani uliyotia katika nyoyo za oja wako, basi imani kama hiyo na mapenzi kama hayo uliyoyatia katika mioyo ya watu wako endelea kuyatia na tukae katika kusikilizana pamoja na kuwa tuna tofauti za kirangi, na dini, na mila lakini wewe peke yako ambaye kwamba, utakaoteremsha baraka yako kwetu sisi. Ewe Mola ibariki Kenya. Amina.

**Hon. Delegate Danson Mungatana:** Amin. If there is any Hindu or somebody from another religion who would like to pray for us. Thank you.

Just before we begin the formal proceedings I would like to ask Professor Ghai, our Chairman, to make a few announcements then we shall proceed from there. Thank you.

**Prof. Yash Pal Ghai:** Good morning Honourable Delegates. I would like to first report very briefly on my meeting with his Excellency the President. Yesterday, I took the opportunity to brief the President on the progress that we have made and I showed him that we have made indeed a very considerable progress and that we expect to finish the discussion in Plenary within another few days before we move to Committees. I think there was a general support for moving to Committees and giving enough time to Committees for the detail work that needs to be done.

The President ask his wishes to be conveyed to you, he follows our proceedings very closely and he is regularly briefed. He hopes that we can finish the process as soon as possible as he said in his formal speech when he came to us and he has very kindly agreed to come to another session perhaps just when we have finished our discussion in Plenary and before we move to the Committee stage.

The second point I want to make is to explain a little bit about the procedure that is being followed in the debate on the draft bill and the adoption of the draft bill. I have indeed explained this a few times already and when we explained at the start of the work of the Conference, the rules or procedures, we also then explained the different stages of the process. But I have been asked by several Delegates to explain in particular the role of the Committees and the way in which the Committees will make their decisions. As you know we are now at the first stage of the three fold process, this is a stage where we discuss in Plenary the draft report and the draft Constitution and this debate is intended to focus on the principles of our recommendations and if possible avoid too much discussion of details which will be taken up at the Committee Stage. When we have finished this general debate in Plenary, then the 12 Committees that we have now constituted will begin the detail examination of the draft Constitution. Each Committee will have about one long chapter or perhaps two chapters at the most and their function will be to look in light of the discussion in the Plenary at those particular chapters and at that stage, they could go through that chapter clause by clause, even word by word. There will be enough time

because they will be only 60 members and the rule that you can only speak once on an issue will not apply. So there will be ample opportunity for debate in the Committees.

What we will try to do is to present each Committee, in fact all the Delegates with the summary of the principle points which had been made in the Plenary so that the Committees will be able to remind themselves of the main points made on the Chapters that they are dealing with. This will probably facilitate the discussion and the recommendations of the Committees. The Committees do not have any power to make any decision, it is only this Plenary which will make decisions on the new Constitution but the Committees will be able to make recommendations to the Plenary and if the Committee is agreed on all articles of a chapter, they will say so in a report to the Plenary and the Plenary will then discuss that report. But if a Committee is not able to agree and there are two points of view, both points of view will be reflected in the report and so it may be that there are some articles that all the members of the Committee let's say are agreed upon, there are some on which there are differences, all these will be fully reflected in the report which will be presented to the Plenary. The Plenary will of course have an opportunity to debate the report of the Committees and then eventually, hopefully will be able to make a decision.

So I would like to say that the debate that we are having in the Plenary is not the end of that particular issue, the issue will go to the Committee, will be discussed exhaustively there, will come back to Plenary for further debate and the adoption of the recommendations. So even if you are not able to speak on a particular point in the Plenary, there will be further opportunity for you to intervene and also the decisions will be made by this body. So don't worry that 60 people sitting in a room can bind you, only your yourselves sitting here by a two-thirds vote will be able to make binding decisions and we in the Commission will try to produce documentation that will assist you in both the Committees and when we return to the plenary meeting. So, I am explaining this so that you fully understand the way in which this Conference will be making decisions and the different opportunities that members will have for debate. So, with that, I thank you and pass the floor back to the Chair. Thank you.

**Hon. Delegate Danson Mungatana:** Thank you, Professor Ghai. Fellow delegates, for a moment I was very worried when I saw Prof. Wangari Maathai and I wondered why she decided to demonstrate on the day that I am chairing. I am happy to learn that it was a goodwill gesture.

They have brought the trees inside here to make sure that we protect them in the Constitution and to give us enough oxygen while we are here. Thank you, Professor, and God bless you.

*(Clapping from the Honourable Delegates).*

Fellow delegates, yesterday we heard a presentation from Commissioner Paul Musili Wambua and there has been a feeling amongst some of the delegates that it would be better to clarify some of the issues that he went through yesterday. I would therefore request the Commissioner to go over because some people were not here with us. He will take about ten minutes. He gets over that and then after that we can proceed with any other issues that are before us. There is a point of order, 311.

**Hon. Delegate Fr. Gitonga Joachim:** Thank you, Mr. Chairman. My point of order is this; when we start this Chapter...My name is Fr. Gitonga, Delegate from Murang'a. While we study this Chapter with sober minds, without malice and without prejudice. Mr. Chairman we have observed that your Commissioners have been campaigning and lobbying, both Christian and Muslim Commissioners, have been campaigning in favour of the Kadhi's court. So we don't know what their interests are. I would request that both Muslim and the Christian Commissioners disqualify themselves from chairing this Committee while we are discussing the Kadhi's court.

*Clapping from the Honourable Delegates*

**Hon. Delegate Danson Mungatana:** Thank you, I will come back to you Honourable Delegate. I want to take the point of procedure. There is a point of procedure. 392.

**Hon. Delegate Paul Nakitare:** Thank you, Honourable Chair. My point of procedure.....my name is Paul Nakitare, Delegate 392 from Bungoma. My point of procedure, Honourable Chair, is what has happened to item number 3 on the Order paper?

**Hon. Delegate Danson Mungatana:** Item number?

**Hon. Delegate Paul Nakitare:** Three.

**Hon. Delegate Danson Mungatana:** Yes, I will get back to you in a minute. Before I proceed, I would like to answer the Honourable Delegate here. He has raised a very important issue that there has been a campaign by the Commissioners from both Muslim and Christian for the establishment or against the establishment of the Kadhi's court. Therefore, he has proposed that we should not chair the meetings as Christians or Muslims. Now, I would like to say this; that, first of all, it is a valid issue he has raised. When we came here as Delegates and when we assembled here as such, we did not really come here...we are here almost like MPs. We do not really represent religion, factions or beliefs. We are representing people who chose us. I would want to ask members who are Delegates here to please have confidence in this Chair. I have been elected by both Muslims and Christians from my constituency. Therefore, I will have to be very careful. At the same time, I am a Minister in the Government and therefore I have to be very careful. I am just asking us to realize that the role of the Chair here is just to moderate the proceedings in this place and we cannot in any way facilitate the taking of a certain position. Again, I would like to repeat what Prof. Ghai has been telling us throughout, that we should take away our mistrust and ventilate on the issues. I promise you that I will give a fair chance to everybody who wants to speak so that the issues are taken down. Then they will go to the technical committees. Then we will come back here as Prof. Ghai has explained, back to the plenary and you Delegates will make a final decision on everything that we are going to decide in this Constitution. So, I urge you to be with us.

*Clapping from the Honourable Delegate*

So, thank you very much. I would.....271....I would request your indulgence. There is a Commissioner and so many people have requested that he repeats some issues, which are important for us. If you can just hold on, he has promised to take ten minutes. I will get back to you. Can I get back to you, Sir? Please, understand me. So, Commissioner Wambua, tafadhali tuendeleze for ten minutes. Thank you, Sir.

**Com. Paul Musili Wambua:** Thank you very much, Honourable Chairperson, for giving me this opportunity to clarify a few issues which arose from the presentation I made last evening. The very first issue which I want to clarify to the Honourable Delegates is that as a matter of

fact, we did receive views as a Commission opposing the establishment of the Kadhi's courts in the Constitution. These views were recorded to have been received from various constituencies in Nairobi and Nyanza. Therefore, I wish to state that what I said was a misstatement of fact and not deliberate. So our records do indicate that the establishment of the Kadhi's court in the Constitution was actually opposed by certain sections of the Kenyan population.

The second point I wish to clarify is in regard to Article 199 (3). I said that there was a proposal to establish district Kadhi's courts. What I wish to say is that these district Kadhi's courts will not be modelled on the administrative districts of the country. Two or more districts can be wrapped together for purposes of vesting jurisdiction in a district Kadhi's court. So, it doesn't mean that we will have 70 of them in accordance with the number of districts we have in the country. We are talking of a district which is judicial and not administrative.

While looking at the provisions of the Kadhi's court, I think it is important for Honourable Delegates to make reference to the provisions of Article 5 and Article 10, which had been earlier presented to you by our colleagues and that is to be found in Chapter 1 dealing with Sovereignty of the people and the Supremacy of the Constitution. You will note specifically under Article 5, that when it comes to the sources of law of Kenya, it is stated specifically that the sources of law in the order of importance shall be the Constitution; the Acts of Parliament enacted under the Constitution; African customary law; Islamic and Hindu personal law; and the rules of law generally known as common law, and the rules of law generally known as the doctrines of equity as it relates to the practice and procedures of the courts of Kenya; and lastly, the East African Community Law and Customary International law and International agreements applicable to Kenya.

Then under Sub-Article 2 of that Article, it is provided that Parliament shall within two years of the coming into force of the Constitution by an Act of Parliament make the amendments that are necessary or expedient for bringing the existing law into (inaudible) Constitution. So, basically, what I am pointing out to you is that the Commission did acknowledge that Islamic law, Hindu law and African customary law are indeed sources of law.

The other point I want to clarify with regard to the provisions of Article 10 and under that particular Article, while reading the provisions relating to the Kadhi's court, it is important to understand that State and Religion are separate, that there shall be no State religion and that all religions shall be treated by the State as equal. So if you read the provisions of the Kadhi's court, I think, you need to remind yourselves of those earlier Articles in the Draft Bill.

Then, with regard to the issue of Kadhi's courts, I would want to say that the Commission did consider not only the history of the Kadhi's courts but also the convenience of this court in the sense that they provide for informal settlement of issues and they are relatively cheap. Also, it is important to note that the Commission took account of the fact that the Muslim community is an integral part of the Kenyan society and they equally fought for the change of the Constitution. Therefore, we did not base our recommendation purely on the history of the courts just because they had been earlier provided for. We did look at these other added advantages and a mere fact that this is an important segment of the judicial organ of the State.

The very last point which I wish to bring to the attention of the Honourable Delegates is with regard to what appeared in the report. There is a reference, the transitional provisions regarding the Judiciary, which will be addressed at a later stage together with other transitional arrangements to bring the Constitution into effect. Therefore, I will not make reference to those provisions or that part of the Report, which deals with transitional measures. That is a topic which will be dealt with at a later stage by two of our colleagues who will be presenting on transitional provisions not only with regard to the Judiciary but with regard to four other Constitutional offices. That is why I wish to say, Chairperson, those few points.

**Hon. Delegate Danson Mungatana:** Thank you, Commissioner. To be fair to the gentleman who indulged me, I want to take your point. 271.

**Hon. Delegate Amos Kiumo:** Thank you, Mr. Chairman. My name is Amos Kiumo, number 271. I still want to refer to what happened yesterday. There was a meeting convened in the women's tent whose agenda.....

*Interjection*

**Hon. Delegate Danson Mungatana:** Sorry, in the.....

**Hon. Delegate Amos Kiumo:** .....whose agenda.....women's tent. I don't know which number it was. It was a lunch offered to our Honourable ladies and the agenda was Kadhi's courts. This was planned by some of the Commissioners. So, my question is this: If the Commissioners, who are supposed to lead us to a good conclusion of this topic, are taking part in pre-empting what we are supposed to do here, is it necessary for us to continue when it has already been pre-empted? I say, if this is happening, these Commissioners should directly and promptly disqualify themselves from taking part in this session.

*Clapping from the Honourable Delegates*

**Hon. Delegate Danson Mungatana:** Sorry...I would like to just take one more. Let's hear her and then I will get back to you, Sir.

**Hon. Delegate Kamla Sikand:** My name is Kamla Sikand and I am Delegate number 500. In regard to this meeting in the women's tent, this wasn't the first one we had. We, women are meeting twice a week on the issues which are being discussed in this plenary and we just request the Commissioners to come and explain the issues to us. But the Commissioners do not.....

*Clapping from the Honourable Delegates*

The Commissioners do not incite us in any way. In fact, today, the women have requested me to see if the Chairman of the Conference will come and explain to us the issue of devolution. So there is no influence by anybody, just for the women to understand the issues.

*Clapping from the Honourable Delegates*

**Hon. Delegate Danson Mungatana:** Fellow delegates, fellow Delegates, I want to plead with you. Fellow Delegates, please - Districts I am seeing you ...199 ..I am seeing you - I want to plead with you that it is my intention as the Chair to hear as much as possible from the Delegates

and I would like us to adopt the attitude that once the Commissioner has done a brief presentation, we will have all the time to say what we want to say. So please I would request we minimize our points of order. I also want to answer the gentleman, a fellow Delegate there, that the good thing about this Conference is that the Commissioners have no power whatsoever over us. We are the ones who are going to decide the future of this country. They are only informing or giving the expertise they have. We are the ones, as I have explained and as Prof. Ghai has explained, we are the ones who are going to determine. We will give our views and break into technical committees, which will come back to us and we are the ones who are going to shoot down or accept whatever it is that is being presented. So, let us just be cool and I would invite with your permission, Commissioner Issack. Once he finishes, we will get back to you, Mzee. Thank you.

**Com. Ahmed Issack Hassan:** Thank you Mr. Chairman. Honourable Delegates, my name is Ahmed Issack Hassan, I'm Delegate number 566 from the Constitution of Kenya Review Commission. I will take you through the relevant provisions on the Attorney General, the DPP, the Public Defender and the committee on the prerogative of mercy. These begin from Article 208 of your Draft Constitution.

Now, the Commission's recommendations on the Attorney General were informed by the weaknesses that were seen in the current structure of the office of the Attorney General. When we were collecting views from the people of Kenya and we got the expert views from the Commonwealth experts, a number of issues regarding the Attorney General's office had arisen. If I could kindly ask you to look at page 247 of the report you will see what the people said, in that the Attorney General was wearing several hats under the current Constitution. He was the Chief Prosecutor, he was also an ex-officio Member of Parliament and at the same time a member of the Executive. So he was seen as having several roles which were not really good and that people tell that he should not perform the roles of independent Prosecutor while he is an ex-officio Member of Parliament and a member of the Cabinet. People also said that he was unable to exercise his prosecutorial powers independently because he was part of the Executive. There were also concerns in the way he/she had the power to improperly intervene in privately instituted private prosecutions. Finally, the view was expressed that he could not exercise his

independence since he was a political appointee and a member of the Cabinet that is collectively bound to implement political decisions passed by the Cabinet.

Therefore there was need to de-politicize the office of the Attorney General, and if you look at page 250 of the report, the green book, you will see the recommendations of the Commission as far as the office of the Attorney General is concerned. There was need to give the office an independence that feel we will make it more effective and that should not be subject to the Executive. The Attorney General which is conceived in this Draft is an independent public servant, not a member of the Executive and not a Member of Parliament, and that once he is appointed he enjoys security of tenure as a Constitutional office-holder and that irrespective of elections he will hold his office until he retires or he is moved for a good cause. Therefore unlike the Attorney Generals in Uganda and Ghana where for example they are government Ministers, in the current Draft we conceived the Attorney General to be an independent person outside the Cabinet, who is an independent legal adviser to the government.

Now, the office of the Attorney General will be appointed by the President under Article 208 (2). He will be appointed by the President on the recommendations of the Judicial Service Commission and with approval of the National Council. This is a departure from the current provisions, in that this time there will be approval of sorts for the office of the Attorney General.

Under Article 208 (3) the qualifications for the office of the Attorney General are set out, and again we say that he must have the same qualifications for appointment as a High Court Judge.

Under Article (4) the functions of the Attorney General is that he is the principal legal adviser to the government. In page 250 of the report there are some recommendations of the Commission, which are not captured in this Draft, which also relates to the functions of the Attorney General including for example, to draw agreements and contracts for the government, to represent the government in courts of law, in legal proceedings to which the government is a party, and basically to deal with the Legislation for the government.

Under Article 209 of the Draft provisions we have provided for the Director of Public Prosecutions. Now, this is also an independent office; currently it is an office under the Attorney General's office, the holder now is Philip Murgor. In this new Draft we have divorced this office

from the AG's office and now it is an independent office to deal with criminal prosecutions. You realise that the functions of the AG are now basically the other aspect of the Law, civil, but the criminal aspect is now given exclusively to the Director of Public Prosecutions.

Again, this is also an independent public, constitutional office and the holder enjoys security of tenure. The Director of Public Prosecutions shall be appointed by the President on the recommendations of the Public Service Commission and with approval of the National Council the same way as the AG. Again the qualifications are the same as that of the AG, he must have the same qualifications as a High Court Judge.

Now, the functions of the DPP are captured in Sub-Article 4: the Director of Public Prosecutions shall exercise state powers of prosecutions and in the exercise of that power she or he shall not be subject to the control of any other authority. So he shall be in charge of all criminal prosecutions. He shall also have the powers to direct the police to investigate any information or allegations of criminal conduct. Now if you look at Sub-Article 6, we have made very clear that Parliament may confer powers of prosecution on any other authority. This is meant to, for example, arrest a situation like the KACA where Parliament had passed the law to give Kenya Anti-Corruption Authority powers to prosecute but when they started working the courts of law declared them unconstitutional because they had no powers to prosecute. So in this Section we are trying to address such instances where Parliament now may have authority to confer powers of prosecution on any other authority other than the DPP.

Under Article 7 the Director of Public Prosecutions may not withdraw a prosecution without the permission of the court. This relates to the issue of *nolle prosequi*, where the AG who has the current powers under the Constitution to enter a *nolle prosequi* against any proceedings. There were complaints that these powers were abused and sometimes the hands of the courts are tied because they cannot, even when they would not want to, allow the AG to withdraw the case. They have no powers. Therefore here we have made it clear that the DPP can only withdraw such prosecutions with the permission of the court so that there is no abuse of this power.

Under Article 9 we have given the DPP the direction that he shall have the public interest as the first and foremost importance in deciding prosecutions. If you look at the report of the

Commission on page 250, we have recommended that he should ensure that in all courts in Kenya prosecutions are conducted by legally qualified persons operating under the DPP. Again this is a very important distinction because currently, apart from murder cases and civil cases where the AG's office is supported by State Councils, all other criminal prosecutions are conducted by police inspectors who may not be very fully qualified in the law and sometimes this has led to very poor prosecutions in criminal cases. Therefore we conceived that the DPP should have competent qualified lawyers to act as prosecutors.

Article 210 deals with the Public Defender. The Public Defender is an institution, which is meant to give legal aid to the poor, to the indigent. For this office there were very many complaints we received from the public that access to justice is very expensive and that for people in Kenya, with more than 50% living below the poverty line, some are unable to afford the services of lawyers to either defend them in criminal prosecutions or to sue or defend himself in civil cases. There was need therefore to have an institution to give legal service and legal aid to the poor. In Kenya today we don't have any office, which gives the poor legal advice and legal service. We have institutions like NGOs, like FIDA, which have some limited functions to give for example legal advice and legal services to the women. But these are not very large and that there is need therefore to have proper institutional framework to give the poor people in Kenya access to legal services. This office therefore is meant to address that issue.

Under Article 2 the Public Defender is also appointed by the President on the recommendation of the Judicial Service Commission and with approval of the National Council. Again, the qualifications are like that of the DPP and the AG, which is a High Court Judge. The Public Defender shall provide legal advice and representation to persons who are unable to afford legal services. He or she shall also disseminate information on access to the law and legal institutions. Because of the nature of this office, we have given the Parliament power to make law to make this office properly function, because it will require some more detail as to how this office can function; who can have access to free legal advice? What kind of cases do you give legal services? Is it criminal or civil or commercial? And how do you certify someone to be poor to be able to get free services? And therefore we have left Parliament to pass law to make this office functional.

Under Article 211, which deals with the Committee on the prerogative of mercy. This also is a very capable body which advises the President on the exercise of the power of mercy. The Committee shall consist of the A.G. as the Chairperson and six prominent Kenyans appointed by the President. So, under Article Three, a Member of Parliament or a Member of the District Council or a Judicial Officer is not qualified to be a member of that Committee.

Now, we have given the powers of this Article, the President may grant to any person, a pardon either free or subject to some conditions. He can postpone punishment on any person or he can even substitute some persons to a lesser form of punishment.

Under Article 212, finally, which deals with the profession of law, the legal profession. Of course there were those experts and even members of the Delegates who said that this Draft contains very many provisions which may have to go to legislation and we have had the view that this particular Article is best dealt with under the Advocates Act or the Law Society of Kenya Act. But at the time we were drafting this Draft Bill, the complaints of the public against lawyers was so much. There were a lot of complaints against lawyers for stealing client's money, for dishonesty and for corruption generally. It was felt therefore the need to capture some basic principal which will guide and inform the legal profession because also the new Constitutional dispensation, the proper effective and successful implementation of this new Constitution does not only require an independent, impartial and competent Judiciary but it also requires an independent, impartial and honest legal profession, Members of the Bar. So, therefore it is a two way street. We do not just bash the Judiciary and say that they are incompetent or dishonest or corrupt but also on the other side of the road are the Members of the Bar, the lawyers who are also social engineers, who also practice law and therefore, the feeling was that, although there is the Law Society of Kenya Act and the Advocates Act. The disciplinary mechanisms are not very effective. They are not proper. The complaints of the public needed much more and therefore the reason why that Article is there. Of course Lawyers have complained that they should not have been singled out, out of all the other professions. But I think it is up to the Conference to debate and discuss this section. Honourable Delegates, I thank you very much for listening. That is all.

**Hon. Delegate Danson B. Mungatana:** Please let us clap for him.

*Clapping by the Honourable Delegates*

**Hon. Delegate Danson B. Mungatana:** Thank you. In fairness to the gentleman, the Honourable Delegate who allowed us to proceed, I would like him to say what he wanted to say now. Yes, Mzee, *tafadhali*.

**Hon. Delegate Dr. Lihanda Savai:** My name is Dr. Lihanda Savai, Delegate Number 608.

**Hon. Danson B. Mungatana:** Yes.

**Hon. Delegate Dr. Lihanda Savai:** On Political Parties, and here when the Commission has been talking about the Islam as part of the law of Kenya, does the Commission know that we are now on Second Chapter of liberating Kenyans on joint British, Arab, Islamic, no – Christianity from the Constitution of Kenya. You are now campaigning that Islam is part of the – of Kenya. Please we are writing the law in culture of Kenya, African people who were unable to liberate themselves in the past. The liberation is mistaken. We want to stop to campaign for that. Thank you.

**Hon. Delegate Danson B. Mungatana:** Yes. Please, points of orders should be on specific issues. I appreciate your views but I think, that is not a point of order. I rule you out of order. Ladies and gentlemen, fellow Delegates, I view 366, I view 452, I view 99. Give me a minute. This is how I intend us to proceed. Now, the Members of Parliament and the District Delegates constitute 37 % and 35 % and the Trade Unions and Non-Governmental Organizations, Professional Bodies, Women's Organizations, Religious Organizations, Political Parties and Special Delegates constitute 28 %. Now, this is roughly one third because we have to appreciate that not all the District Delegates are here, not all the Members of Parliament are here. So, this is how I intend us to proceed. That we will go from the left to the right and we will give the chance in three parts. We will have a Member of Parliament, a District Delegate and then we will have one of the other Professional Organizations or the other categories and that is up to eleven o'clock. Yes, up to eleven o'clock. So, between now and well, about half hour or so, with your permission, yes. Let me take, 336 and then we will allow us to start. Just hold on.

**Hon. Delegate Mkawerweren B. Chebii:** Thank you Mr. Chairman. My point is on a point of order.

**Hon. Delegate Danson B. Mungatana:** Yes.

**Hon. Delegate Mkawerweren B. Chebii:** I think we have come here for unity purposes. One thing is this, Mr. Chairman, I am wondering why,

**Hon. Delegate Danson B. Mungatana:** Yes.

**Hon. Delegate Mkawerweren B. Chebii:** My name is Mkawerweren Arap Chebii from Marakwet District. I am a District Delegate. Now, my main point of order is, I wonder why some Delegates when they come in from roaming outside this Conference, they just come in and pour some information that is not necessary for now.

*Clapping by the Honourable Delegates*

Mr. Chairman, on that order also, I think the Commissioners are experts. If I am a Muslim or if I am a Christian, I will go to one of them who is an expert of that area. It is not a question of you measuring how I breath air in this Conference in terms of lobbying and I have even seen the other day, some communities have been meeting outside and nobody has questioned that. So, lobbying is a very important case factor and we need –

*Clapping by the Honourable Delegates*

-- we came here for, I give you, you give me, that is it.

**Hon. Delegate Danson B. Mungatana:** Yes.

**Hon. Delegate Mkarwerweren B. Chebii:** It is not a question of asking. The Commissioners where were you doing this?

**Hon. Delegate Danson B. Mungatana:** Yes.

**Hon. Delegate Mkarwerweren B. Chebii:** It is irrelevant to this Conference.

**Hon. Delegate Danson B. Mungatana:** Thank you. 552 and 99. I see you but I would like to request you to give us time so that we can hear the substantive issues and I will start from this side. Member of Parliament, No. 18. I am going to pick people who have not spoken. So, I would request you to tell us –

*Uproar from the Honourable Delegates*

**Hon. Delegate Moses Kipkemboi Cheboi:** Thank you Mr. Chairman. I am delegate Number 18, Moses Kipkemboi Cheboi, Member of Parliament for Kuresoi.

**Hon. Delegate Danson B. Mungatana:** Sorry. Sorry. 595. 595. I am requesting. Excuse me.

**Hon. Delegate Joseph Martin Shikuku:** Thank you very much.

**Hon. Delegate Danson B. Mungatana:** Excuse Mr. Microphone holder. Before I have given the—please just hold on. Honourable Shikuku, I am requesting that you give us the opportunity to get started and I promise that I will get back to you.

**Hon. Delegate Joseph Martin Shikuku:** I am on a point of order Sir and if it is wrong I will leave this Conference because I understand the meaning of point of order.

*Clapping by the Honourable Delegates*

**Hon. Delegate Joseph Martin Shikuku:** My point of order Mr. Chairman rises from your own statement from the Chair to the effect –

**Hon. Delegate Danson B. Mungatana:** -- yes.

**Hon. Delegate Joseph Martin Shikuku:** -- that you are mentioning the people, groups and so forth.

**Hon. Delegate Danson B. Mungatana:** Yes.

**Hon. Delegate Joseph Martin Shikuku:** Could you confine yourself to Cap 3 (a) and 27 (ii) (d). I told you from the beginning that we should act or conduct our business within these Acts and the rules and here Mr. Chairman, you can see the Constituencies here. But whenever any Chairman sits here, he refers to this group. They do not talk of Political Parties, which is governed under (d).

**Hon. Delegate Danson B. Mungatana:** I apologise.

**Hon. Delegate Joseph Martin Shikuku:** Remember that. Never forget it again.

**Hon. Delegate Danson B. Mungatana:** I apologise for that. As a matter of fact, Honourable Shikuku, it was on my list here. Maybe I need spectacles. I am sorry. May we hear, please gentlemen and ladies, may we hear one substantive presentation and then I will get back to the point of order 452 which I have promised to get back to.

**Hon. Delegate Moses Kipkemboi Cheboi:** Thank you Chairman. Thank you very much for giving me this opportunity to be the first person to contribute today. As I said, my name is Moses Cheboi. I am a Member of Parliament for Kuresoi Constituency.

I would like to contribute to the making of this Constitution and particularly this part in this manner:

Foremost Mr. Chairman, I would like to say that I have seen a tendency in this Conference and in most of the Chapters that we have discussed, where we tend to put too much faith on contents and written bits of the Constitution. I would like to say that many countries and one specific one being Britain, they don't have any written Constitution. They scribed this document in their

hearts and upholding. Why I am saying this Mr. Chairman, is because I realized sometimes we put too much detail in the Constitution.

Be that as it may, I would like to talk on three different areas, that is the appointment of judges, hierarchy of course and the Kadhi's Courts.

Mr. Chairman, on the appointment of judges, I have looked through this document and I realise one issue which I feel should not have been placed there. This is the issue on appointment of judges among others; one qualification to be appointed as a judge in all the three High Courts is that one should be a full time law lecturer in a recognized University. I have a problem with that. Why I have a problem with that is that I know very well being a lawyer myself, that when one is a lecturer, they tend to lean too much on theories and very little on procedure. I would insist that the two other qualifications, that is having practiced as an advocate for a particular time and having been maybe a high Court judge for a particular time would suffice and if we have to come in to the issue of one having been a lecturer, it should be that one has been a lecturer and at the same time being in practice for that particular time.

**Hon. Delegate Danson B. Mungatana:** Yes.

**Hon. Delegate Moses Kipkemboi Cheboi:** In fact if we are to be very practical and look at our High Court at the moment, may be there is only one High Court Judge who was appointed having been a lecturer, and that is Justice Aaron Ringera. Apart from having been a High Court Law School Professor, he also had practiced, he was practicing. So when stick and insist on the fact that they should be full time law lecturers at the university, we feel we will be missing a point and it would be like let say, bringing a Pastor and asking him to be a CRE teacher in a high school. It may be a little difficult.

The second issue is the hierarchy of Courts. When you look at Articles 187, 188, 189, 190 and 192, there are quite a number of issues which are put and in every High Court we have the man heading that particular court. I have a problem with Article 191 that is where we refer to the person in charge of the Court of Appeal as a President of the Court. With institutions like the Chief Justice and others, I feel placing the President of the Court makes it look like it is a bit of

overshadowing the Chief Justice. I would have given my own observation that we could possibly call him a Chief Appellate Judge or any other name but not the President of the Court.

Now, on the issue of the Kadhi's Court, I would want to be very objective in this one because I don't want to be entangled in religious animosity. But while reserving a lot of my comments on this, I would say it would be better if the Kadhi's Court be as brief as possible in the Constitution. One, I would say that in my opinion, I feel that how it was in the old Constitution was sufficient. Definitely Section 200, Article 200 should be fine. The issue of the Kadhi's Court being able to determine civil and commercial disputes, in my opinion, is out of question. We should allow the Kadhi's Court to only deal with personal law. In deed in our own customary laws, we have institutions which I should say could also be recognized, but they could still be recognized on other normal laws, not necessarily in the Constitution.

I would say, lastly, on the issue of Kadhi's Court since this one touches specifically the Muslim community and since, for example, our own customary law as Kalenjin or any other tribes touches on specifics, it should be the Muslim Community to bear the cost of the Kadhi's Court. Thank you very much.

**Hon. Delegate Hon. Danson Mungatana:** To be fair to the other Delegates who have allowed us to take that substantive point, 452, please lets hear your point. Thank you.

**Hon. Delegate Willy Mutunga:** Thank you Chair. My name is Willy Mutunga, I represent the NGOs. I have one point of order, may be two. I would suggest, very respectably that the Chairs also synthesize what the Delegates are saying. Some people come in here and then they go and when they come back they don't know what has been said, and there is a lot of repetitions. The repetition is not bad, but I think at the appropriate point the Chairs should synthesize, direct the discussion. Because I think what I have seen since I have been here is just that Chairs ask people to speak, and that is all. So I think it might not be too late to start.

My other second point of order is the issue of hissing, coughing, shouting.... I come from a human rights background, and I think shouting; hissing and all that reflect the freedom of expression. I think we might, and this I am asking the Delegates, we might allow ourselves, you

know to hiss because we are expressing certain sentiments, certain emotions. But I think after half a minute we should stop and let the person who is on the floor speak and we hear what the person is saying, instead of shouting people down and making sure they don't make their own points. I am making this point because I know the Steering Committee is changing regulations. We might respect rights by having people jump up and down if they want for half a minute, and then we continue. Thank you very much Chair for giving me this opportunity.

**Hon. Delegate Hon. Danson Mungatana:** Thank you so much. I will now request the district Delegates, yes, you are saying? Let me hear the district Delegates and I will hear you. Thank you. District Delegate from this row, 379, I recognize you.

**Hon. Delegate Levy Ahindikha:** Thank you very much Mr. Chairman. My names are Levy Ahindikha , district Delegate number 379, from Kakamega district.

My Chairman Sir, I refer to Chapter 188 (a) (iii). This Chapter, Mr. Chairman, I can see it contradicts Article 163 (i), as regards to the impeachment of the President. Mr. Chairman Sir, this matter should be left as Article 163 (1) (iii) Since the President will be answerable to Parliament and not to the Supreme Court, let us give powers to Parliament as far as this impeachment of the President is concerned. Let Parliament look into the reason why the President should be impeached, then rule whether he should be impeached

**Hon. Delegate Hon. Danson Mungatana:** Excuse me, sorry for interruption. Are you talking about the Judiciary or are you taking us back?

**Hon. Delegate Levy Ahindikha:** I am on the Judiciary.

**Hon. Delegate Hon. Danson Mungatana:** You are on the Judiciary.

**Hon. Delegate Levy Ahindikha:** Article 188.

**Hon. Delegate Hon. Danson Mungatana:** Okay please get there

**Hon. Delegate Levy Ahindukha:** Okay.

**Hon. Delegate Hon. Danson Mungatana:** Yeah.

**Hon. Delegate Levy Ahindukha** Not the Supreme Court. on Article 200 on the jurisdiction of Kadhi's Court. I fully support the sentiments of the Kadhi's Court in the new Constitution, as it now in the current Constitution. We should not extend it to the Supreme Court. Mr. Chairman Sir, the Muslims are our brothers and sisters, and we should therefore not deny them these facilities, as they already had them before. Mr. Chairman Sir, I therefore propose that it should only be limited to laws related to personal status on marriages, divorces and the inheritance of properties, and this will clearly be indicated in the new Constitution. Thank you, Mr. Chairman.

**Hon. Delegate Hon. Danson Mungatana:** Thank you so much. From the same area, there was a point order somewhere, where was it, 377? Then we will come to Political Parties now this time.

**Hon. Delegate Okiya David:** My names are Okiya David, number 377, representing Lugari district. Sir, there is a Honourable Delegate who had indicated to you that item three on the order paper was to be dealt with and you gave a promise, but you are now on item four, forgetting that we should at least deal with three first.

**Hon. Delegate Hon. Danson Mungatana:** Yea' thank you for that. Is that all or you have--- Thank you for your reminder. What we had decided on that item three was, Professor Ghai would later on brief us after the tea. So don't worry, we will come back to that. But I would like to recognize 593, that is for Political Parties? Thank you Sir.

**Hon. Delegate Gervase Akhwabi:** Mr. Chairman, Honourable Delegates, my name is Gervase Akhwabi, political Parties, Ford Kenya.

Mr. Chairman and Honourable Delegates, we are here for a serious task and the task that we are here for is to constitute a new Constitution that binds us in terms of section, sorry Article 14, that will help us realize our inspirations. One of our inspirations is of course, a united Kenya' a

nation out of several nations. Therefore, we should try as much as possible to congregate our ideas so that we emerge with one Constitution.

**Hon. Delegate Hon. Danson Mungatana:** I am sorry, lets get to the point.....

**Hon. Delegate Gervase Akhwabi:** Thank you.

**Hon. Delegate Hon. Danson Mungatana:** Yea.

**Hon. Delegate Gervase Akhwabi:** Mr. Chairman and Honourable Delegates that is how we get to the point and the point.

*Laughter from the Honourable Delegates*

And the point is that we have a nation that must be one. A Constitution that must binds all of us. Consequently, it would be a dangerous a thing to do to create two systems of the Judiciary operating along side one another.

*(Applause)*

It is important that we have only one Judiciary. It is true of course that our Muslim brothers and sisters have had the existence of the Kadhi's Courts in this country for along time. But that is because of history and it is that historical anomaly that we must confront and address, whether we want to be one nation or want to be several nations in one state. I would therefore, suggest that there are principles that should be guiding us. The principle of nationhood.

**Hon. Delegate Hon. Danson Mungatana:** Sorry, I was going to request fellow Delegates with a lot of humility that the rules tell us that we shouldn't clap because then we will get lost in the whatever, let him just speak. That is for Observers, not all the Delegates, for Observers. Observers.

**Hon. Delegate Gervase Akhwabi:** Thank you. Mr. Chairman, you notice that my time is being taken up.

**Hon. Delegate Hon. Danson Mungatana:** We will take care of that.

**Hon. Delegate Gervase Akhwabi:** Thank you. Mr. Chairman, when you look at Article five, Article ten, Article fourteen, they set out certain principles. Now, you go further and you go to Article 202, which discriminates by saying that one cannot be a Kadhi unless you are a Muslim. That is discrimination on account of religion. When we say that the Kadhi's Courts are Judicial Institutions, they are part of the Judiciary, then anybody versed in Islamic Law should be a Kadhis' or a Chief Kadhi. There should be no discrimination. You look at Article 200 which talks about Application of Commercial and Civil law to Muslims. That is creating discrimination and a parallel system in a Constitution. Mr. Chairman, we want to be one people, one nation, by creating a common identity, a common judicial system.

Mr. Chairman, when you look at the qualification of the Judges, there is a whole lot of anomalies, not Judges, but Kadhis'. You have a Kadhi's Court, sorry, Chief Kadhi that is said to be of the rank of a Judge. But he sits on Appeal with Senior Kadhis' who are the rank a Chief Magistrate. Isn't that an anomaly? If a senior Kadhi has sat at the Provincial Kadhi's Court, how is he going to sit on Appeal again? That is an anomaly. The whole thing about Kadhi's Court is personal law and I suggest that it should be taken out of the Constitution and dealt with elsewhere. Because we respect personal laws, we respect that all religions are equal and that the State and religion should be separate. We also have identified the sources of law, and one of the sources of laws in the country is the Islamic law. Just like customary law is, and we are not elevating customary law to the same level.

Lastly, Mr. Chairman, I would have had a few things to say on the Judiciary. We definitely need a Supreme Court in this country. We need an overhaul in the Judiciary, we know what has happened and we need a Supreme Court, because we cannot abolish the existing offices of Judges and we need a Supervisory Court that will deal with that.

Lastly, the Attorney General and the Chief Justice should be people appointed by the regime in power so that they do not have that security of tenure. The Chief Justice is an administrator. He should be appointed for a limited period of time by the government coming in power.

**Hon. Delegate Danson Mungatana:** I will recognize a Member of Parliament from the second row. Yes, I see number fifteen. Thank you very much.

**Hon. Delegate Danson B. Mungatana:** Thank you. I will recognize a Member of Parliament from the second row. Yes, I see number 015.

**Hon. Delegate Adan Billow Kerow:** Thank you Mr. Chairman. My name is Hon. Billow Kerow, a Member of Parliament, Delegate 015. I will contribute on two matters; one Mr. Chairman, on the Judges. Now the Judiciary is one of the most vital institutions in this country. And in terms of ensuring observance of the Constitution that we are preparing, Judiciary is a very important sector. So, when the current Judges that we have, have been accused Mr. Chairman, of corruption and being tainted, I think it is going to be very difficult for this government to sift the chaff from the wheat. So, my whole suggestion is to approve the recommendation by Law Society of Kenya that one of the provisions in the Constitution should be to seek the resignation of the entire Judges that we have in this country at the same time the commencement of this Constitution will start. And that is the recommendation that I would --, because we have a lot of problems with the current Judiciary.

Number two, the Chairman of the Kadhi's Court. Now the preamble of this Constitution Mr. Chairman is very clear. That as a people, as a community of nations, a society that has come together voluntarily, knowing that we come from diverse communities, backgrounds, cultures, and religions, we have voluntarily come together to build one nation, and therefore it is recognizing that all of us must have our rights respected in this Constitution. And one of the fundamental rights which every liberal and every democratic Constitutions in this World respect, is the rights of minority and I think, it is important to note that the majority should always consider both the legal and the psychological factors which affect minority. They should also do that because they have to allay the doubts and fears of minority.

Mr. Chairman, we have seen in many countries where Constitutions have been done, that minorities have gone out of their way, they have to bent backwards in order to accommodate, to protect the right of minority. Now, there is no doubt in my mind and the minds of all of us here that Islam or Muslims are a minority in this country. It has been reported in government issued by our recent church organizations that we are only 7% in this country. Now, it is therefore important to note something that is very important to note Mr. Chairman, is that Muslims is not calling for Islam to be the set religion in this country, neither are the Muslims demanding that their religion be privileged and Muslims are not demanding Mr. Chairman, that Islam or Muslims be favored, and that is not what the Constitution has done. What the Constitution has done, is that under Section 44 of the Bill of Rights, it has given freedom of worship, freedom of religion to all religions and in that context, it also provides under Sub-section 2 of Section 44, the right to all religious groups, individually or communally to manifest their faith, to practice their faith. And what the Muslims are saying then in that context, we wish to be allowed to practice our faith in a manner that we are allowed to practice as personal Law through a Kadhi Court System.

Mr. Chairman, the Kadhi's Court System has been therefore more a hundred years in this country, it is a subordinate court that only addresses legal and judicial matters, it is not a religious office and therefore cannot be operated from a Mosque. Mr. Chairman, the removal of the Kadhi's Court is going to be a gross injustice to the Muslims of this country. It is the last chance if you will, in terms of protecting the rights of Muslims in that country, and Mr. Chairman, what I need to mention again to our brothers who have mentioned that that can be enacted in a Parliament, Parliament as an Act of Law, is that there is very limited power or influence or there is very limited power to influence Parliament if you are a minority. If you a minority and you have only 10% present in a Parliament, you cannot really influence the Legislation in Parliament.

Number two, Constitutional Legislations like this one, Constitutional matters like this one are not legislated in the same manner that we legislate traffic Laws or licensing of similar institutions. Mr. Chairman, such laws which affect the fundamental rights, rights of freedom, rights of religion, rights of worship and so forth, are normally protected within the Constitution, they are

not delegated to Parliament because minority for the same reasons that they need protection, do not also have the influence really in Parliament. Mr. Chairman, we have seen particularly in this country, even fundamental rights, I mean the issues like the powers of the President, have been changed in Parliament, and you are aware that we all know that the Constitution that we have at independence, has been changed thirty four times, and in those thirty four times, the powers of the President have virtually been expanded to the point where this country was literally being run by the President and therefore, it is not adequate for us to have it through an Act of Parliament.

And finally Mr. Chairman, the Chief Kadhi as an office is still answerable to the Chief Justice. It is not an independent or parallel system of law or judiciary that is the way we think, it is subordinate to the High Court, he is answerable to the Chief Justice, you can also appeal from the Chief Kadhi to a Supreme Court. And finally Mr. Chairman, I wish to appeal to my brothers and sisters from the other faiths to look at this as being basically one of the fundamentals that Muslims are really asking for, and it has been there and we are simply asking that we should be allowed to have as it has been. Thank you very much.

**Hon. Delegate Danson B. Mungatana:** Thank you. I also recognize District Delegate from the same row and I recognize 278.

**Hon. Delegate Peter Kangethe Nkoroi:** Thank you Mr. Chairman, Hon. Delegates. Now, today we are in a very important Chapter and my name is Peter Kangethe Nkoroi, Delegate number 278 from Meru South. Now, we are dealing with a very important Chapter, because this Chapter, affects our lives as a nation. Now, we are worried by the history of the World, we are worried by the crisis of Sudan and many other countries, where there has been conflict between Muslims and Christians. Now, in this Chapter, I think this is the most contentious issue and this is where I am going to react.

Now, the first thing is the history of this Kadhi's Court. It is like it was an arrangement of colonial government between the British government and the Arabs who were occupying Zanzibar by that time. I think, why we are here, to deliberate and make this Constitution is to liberate ourselves from the hangovers and restrictions which were placed there by the colonial government and this colonial government, had their own interests. The Arabs who were

occupying the coastal strip and Zanzibar had the interest of marketing or trading with human beings. Now, that we are Kenyans, the Muslims who are in Kenya, are our sisters and brothers, we have no bad feelings about these people, or about ourselves. Even ourselves we are going to convert to Islam others to Muslims others to Christians. But the most important thing here is that, we cannot have, what? –

### **Interruption**

We cannot religious states in Kenya, Islamic State in Kenya, Hindu state in Kenya, Animist State in Kenya. We can only have one country under one judicial system, and this is not because there is anybody against anybody in this country. It is for our own unity, because as we live on, other generations will come and these differences might escalate to fighting, and if we allow these divisive arrangement right here, we are going to be judged very harshly by people to come after that.

Now, Mr. Chairman, religion is a professed thing. It should not be a legal system unless, we make a legal system for each religion and that is what will happen here if we continue entrenching religious courts in this. Now, there is an argument that Kadhi's Court is not religious, but then, if Kadhi's Court is not religious, why don't we go all of us for one common law? If we agree that we all be ruled by the Kadhi's Court laws, then we don't go to any other law, we live with the Kadhi's Court laws, or Islamic laws, the way it is being called. If we agree to be ruled by the law that is common to everybody, then we go for that and we don't go to the other thing. Now, Mr. Chairman, the other thing is, most people in Kenya, they have discussed about this Chapter and I said it is the most contentious issue here. Now, the majority of us, we are pleading with those people are thinking the Kadhi's Court as their religious issues and they could defend them, to understand that here we are here unified Kenya under a real Constitution and not to divide it. Thank you Mr. Chairman.

**Hon. Delegate Danson B. Mungatana:** Thank you. I would like to recognize from the same area the same section 520. This one has not spoken eh?

**Hon. Delegate Fr. James Nthiga Gatiti:** Thank you Mr. Chairman. I am Father James Gatiti from the religious group number 520. I would start by saying that the proposal about Kadhi's Court, which you find in the Draft, according to me, is not the feelings of Kenyans, I think it is the Commission that wants to bulldoze this thing in the Constitution.

*(Honourable Delegates Clapping)*

**Hon. Delegate Fr. James Nthiga Gatiti:** I have these facts from Katiba News January 3<sup>rd</sup>. According to the statistics, availed by the CKRC, the results were as follows:

- Total respondents on all Judiciary Section were 17,010 people
- Total respondents on Kadhi Court from question number 8 to 12 were 2,580 people.
- Total respondents on the law of Kadhi question 8 was 313 people.
- Total respondents for Kadhi Courts under question 8 were 31 people.
- Total respondents against Kadhi Courts under question 8 were 31 people.

So, I think it was a neutral ground that Commission did not need to put that one in the Draft.

*Clapping by the Honourable Delegates.*

**Hon. Delegate Fr. James Nthiga Gatiti:** Number one, Kenya is a secular state according to our Articles No. 10(1). No religion shall be elevated more than the other. So, the Draft Constitution contradicts itself in essence, by giving a whole Chapter to assign the provision of Kadhi Courts, which are religious in nature. Any respected Constitution should treat all religions equally. Kenya is a multi-religious state.

Number three, it is against the Christian conscience to be subject to pay tax in support of religious Court System of the Muslim faith. This provision could open doors and crash gate to the possibility of other faiths seeking to be entrenched in the Constitution. All Articles on the Kadhi Court, should be removed from the Constitution. All religious beliefs and practices should be read to the Mosque, Churches and Temples where they belong, such that this should sponsored and managed by the relevant religious community and not by the government. Kenyans were looking forward to a document that will take into account our rich diversity and

by addressing the anomalies of the old Constitution, unite us as one people of Kenya and not divide us along religious or other lines. Thank you very much.

*Honourable Delegates Clapping*

**Hon. Delegate Danson B. Mungatana:** Thank you. I want to recognize a Member of Parliament from the next row. Member of Parliament. I don't seem to have any so, I will go to a District Delegate.

**Hon. Delegate:** Why not a Member of Parliament?

**Hon. Delegate Danson B. Mungatana:** Sorry, Mheshimiwa Kamotho we have moved from that, we are in the next row.

**Hon. Delegates:** No, no.

**Hon. Delegate Danson B. Mungatana:** By popular demand, Mheshimiwa Kamotho.

*Clapping and applause.*

**Hon. Delegate Danson B. Mungatana:** Na hawa watu wanakupenda Mheshimiwa.

**Hon. Delegate J.J. Kamotho:** Thank you, thank you very much Mr. Chairman. I am sure I have been raising my board for the last three weeks

**Hon. Delegate Danson B. Mungatana:** I am sorry.

--and the Chairman has never seen me,

**Hon. Delegate Danson B. Mungatana:** I am sorry.

**Hon. Delegate J.J. Kamotho:** So, thank you very much. I will be very brief Mr. Chairman, and I will be speaking on the question of Section 195 Qualification for appointments of Judges. But before I come to that, I would like to declare that I fully support, the creation of the Supreme Court of Kenya.

*Honourable Delegates Clapping*

**Hon. Delegate J.J. Kamotho:** The Supreme Court of Kenya, should also be designated as a Constitutional oath, which should be given powers and responsibilities of interpreting any section of the Constitution. Mr. Chairman, I now go straight to that Section 195 (1a) part three, where the Draft is talking of a qualification of a person to be appointed as a Judge as a full-time law lecturer in a recognized University. I would like this to have an addition that such a person must have been a registered Advocate of the High Court of Kenya, because you can be a University Professor, who is not a registered Advocate of the High Court of Kenya. Then in terms of practical exposure, in the laws of the land, I think such a person would be wanting. Therefore, it is necessary that if a person is just a law lecturer or a law teacher, he must also qualify as an advocate of the High Court of Kenya.

The second point I want to speak about is (g), the requirement, that a person to be appointed as a Judge must have a high moral character and integrity. This should cut across every public office, whether a Judge, a Prime Minister, a President, a Civil Servant or even a Member of Parliament. So, I think we must look for a place to fit this particular provision, so that it applies in the appointment or election to any public office.

Thirdly, as I said a little earlier, the Supreme Court of Kenya should also be the Constitutional Court of the Republic of Kenya. Thank you very much, Mr. Chairman.

**Hon. Danson B. Mungatana:** Thank you Mheshimiwa, we will go to the next row, I had asked for Member of Parliament. Mheshimiwa 52, Thank you.

**Hon. Delegate. Khamasi Lyula Daniel:** Thank you very much, Mr. Chairman. My name is Daniel Khamasi, Member of Parliament for Shinyala from Kakamega District. Mr. Chairman,

my general remark is; Judiciary is a very important institution in any country. It is the last resort where people seek to get Justice and if you do not have a proper (Inaudible) Judiciary, then you have got a problem and our country has seen quite a bit of it and no wonder that is why the Law Society of Kenya has brought in an amendment which I think will be supported by many Honourable Delegates.

Mr. Chairman, mine, is just a few issues which I have seen that I think should be tied up. On clause 186, The Administrative expense of Judiciary including the salaries allowances and so forth, are a charge on the consolidated funds. I think that is very important because this is a shaped arm of Government. I think the same should be for Legislature, because I have not seen the same element in the Legislature which is also a separate arm of the Government.

I am not sure Mr. Chairman that we are saying the appointments of Judges should be with approval of the National Council as opposed to Parliament, which I think is more of a representative. I would rather have the approval to be done by Parliament that is much more representative.

Tenure of office for Judges; Mr. Chairman, I can see we are saying that a Judge and other Judicial officers of the supported course, shall retire from the office on attainment of age of 65 years. And I think that caused a lot of problems, that is why a few Judges had to go to Court and then they had to actually adjudicate themselves, saying that they already having a security of tenure, they have already got an attainment age of whatever it is, and I believe if we are going to say the President is going to retire at age 70, therefore we should be looking at this other Constitutional offices retiring at the same age, Mr. Chairman.

I also want to comment on the question of salaries and retirement benefits on clause 207 (1), it says that the salaries, allowances, duties and pension payable to Judges and other staff of the Judiciary are charged on consolidate funds. Mr. Chairman, I have already said that it should be the same with the Legislature.

Now, having commented on that Mr. Chairman, I would like to comment on the important aspect of the Kadhi's Court here. Mr. Chairman, I think we must come here with a very open mind and

the open mind is that we want to make a new Constitution. A new Constitution, which is for all Kenyans, irrespective of our religious beliefs, and of our customs. I am looking at a situation whereby all Religious sects in this country would like to have some recognition in the Constitution. We shall not have a Constitution, all we will have is a very big book which will be relating in that particular section to all beliefs of religious sects, customs etc. I would like to plead with our Muslim brothers and sisters that we have come here to make a Constitution for a Nation and as such, I would like them to pray that we remove all the things that are related to any religious matters from this Constitution, so we will remain a circular society.

*Honourable Delegates Clapping*

**Hon. Delegate Khamasi Lyula Daniel:** Mr. Chairman, because I have got one other issue which I wanted to bring to the attention of Delegates (Inaudible) and that relates to --. I thank you.

**Hon. Delegate Danson B. Mungatana:** Thank you. I would want to recognize Justice Kwach and after this, we will take a break for tea.

**Hon. Delegate Chief Justice Richard Kwach:** Thank you, Mr. Chairman for recognizing me. I have been sitting here since we began but I have not spoken out of my own choice. My name is Richard Kwach, I am a Judge of the Court of Appeal. I have been a Judge for 15 years in that court. Mr. Chairman, how much time do I have?

**Hon. Danson B. Mungatana:** Five Minutes Judge.

**Hon. Delegate Chief Justice Richard Kwach:** Thank you. Mr. Chairman, the presenters on Chapter (9) have said that, the proposals relating to the Judiciary were prompted allegations of corruption and incompetence in the Judiciary. As I have already said, I have been a Judge of Appeal for 15 years and before that, I was an Advocate for 21 years and before that I was taught by Professor Ghai.

In 1998, I chaired a Committee which conducted an Internal Audit of the Judiciary. I found cases of corruption and I told the people of Kenya as much. I want to tell you today and I urge you to listen to this, in every incident of corruption involving a Judge or a Magistrate, there is always an Advocate on the other side. I have heard nothing touching on the Law Society of Kenya, that silence is telling as much of a hidden agenda.

Mr. Chairman, with regard to the Supreme Court, I want to say that it is a good idea. That is section 187, now since a Court of Appeal is constituted by 3 Judges under section 190-sub section (2) the Supreme Court must of necessity be constituted by 5 Judges. You cannot run a Court of that magnitude, if you only have six Judges as proposed.

The Chief Justice, because of his other duties which are mainly administrative he is not likely to be available to sit on a regular basis, so the six Judges would be required to sit virtually everyday. Where will they find the time to write the judgment? Will they not need to go on leave? What about Sickness?

Mr. Chairman, with regard to section 188 sub-section (i), the provision relating to the Advisory Opinions. Mr. Chairman I think it undermines the doctrine of separation of power by unnecessarily involving the Supreme Court in the process of Law making. Section 188, 1, (ii) with regard to Presidential election petition. Giving the Supreme Court original jurisdiction will involve the Supreme Court in the tedious busy (inaudible). But more importantly Mr. Chairman, it will deny the loser a right of Appeal.

I would suggest with respect, that Petitions be heard by a bench of 5 High Court Judges in the first instance and then leapfrog the right of Appeal to the Supreme Court. Mr. Chairman, with regard to section 189, 1 and 2. I do not believe that it is sensible to give supervisory jurisdiction to the Supreme Court. I think we should leave this in the High Court, because that is the Court which is everywhere in Kenya.

Mr. Chairman, With regard to Court of Appeal section 190 sub-section 5, you cannot create viable divisions in a court with a compliment of only 9 Judges. Section 196 (1), retirement of Judges I would propose a mandatory retirement age of 70 and voluntary retirement at 65. I

would also add Mr. Chairman a right that the change should not affect the Judges at the moment in office.

With regard to Kadhis' Court Mr. Chairman, I think that it is totally unnecessary to have the sort of arrangements which are proposed. Mr. Chairman, I regard it Mr. Chairman, as improper because what has been proposed is a separate Judicial structure with a result that the High Court and the Court of Appeal is denied Jurisdiction in matters of Islamic Law, that is wrong.

I would prefer a situation where we have the Kadhi's Court, under the present system it has worked well and no one has suggested any good reason why we should give a whole part of Judiciary special treatment. I think that is morally wrong, religiously wrong and it is wrong in the Law Courts.

Mr. Chairman, with regard to the Rules Committee, section 203 should be deleted. There is no need to entrench the Rules Committee in the Constitution. I have been the Chairman of the Rules Committee since 1992 and all that the Rules Committee deals with is the Civil procedure. The way it is put here would imply that the Rules Committee will also get involved in making rules of criminal procedure. Now, the Rules Committee cannot deal with the Criminal procedures because the Administration of Criminal Justice involves the liberty of the (inaudible).

The Penal Code along with Criminal Procedure Courts are always dealt with by Parliament and that is a right, which you cannot take away.

Finally, Mr. Chairman, with regard to the Judicial Service Commission, I cannot understand why and that is under section 204, 1. I cannot understand why the Chief Justice being the Head of Judiciary, should not be the Chairman of the Judicial Service Commission. It is not right, it cannot be right that the recommendations for appointment and the removal of Judges working under the Chief Justice should be made behind his back. Thank you, Mr. Chairman.

***Honourable Delegates Clapping***

**Hon. Delegate Danson B. Mungatana:** Thank you, Judge Kwach. Now, Honourable Delegates I was going to ask you, we will still come back here and I think we have one more here, but we will break for 30 minutes for tea and let us convene immediately after that. Thank you.

**The meeting was adjourned at 11.20 am for tea break.**

**Hon. Danson B. Mungatana:** My fellow Delegates order. Order, now Hon. Delegates there was a Delegate who had raised an issue about item number 3 on the Order Paper today and I had promised that once we have the tea, Prof. Ghai our Chairman would be able to tackle item number 3 and then we shall proceed from there. So Honourable Delegates I invite Prof. Ghai to talk about item number 3 on the Order Paper. Thank you.

**Pro. Yash Pal Ghai:** Thank you Mr. Chairman, you will remember that I announced yesterday that several delegates had said that we should have an ad-hoc meeting to look at the cultural dimensions of the Constitution and see whether the Constitution sufficiently reflects our culture, our traditions, and I had invited all the groups to give us names to sit on that committee. I had hoped that today I would be able to announce the names of the Committee members, but unfortunately by this morning we had received only four names. So I was asked by the Steering Committee to request you to let us have your names, if you have not given them already by the close of the meeting today, so that tomorrow morning we can bring to you the full list of the members. That is really the only thing I wanted to say on that. But I would like to make one or two points since I have the floor. I noticed that most afternoons, especially after lunch there is a very significant reduction in the number of Delegates in this room. We have a kind of panoramic view and I am very conscious of very many empty seats. When I was interviewed by Nation Media group recently they asked me, “why are there so many empty chairs?” So you can see the whole Nation watches and notices the empty chairs. I do not think that .....some Delegates tell me, “well I made my speech and then I could not see any point staying on.”

You come here to make a speech, but you also come here to listen to others. These whole process is one of listening and reasoning and arguing and persuading and you cannot just say I have made my five minutes speech and I have done my duty.” Your duty is as much to listen as is it to speak. So I hope that we will continue to have a fairly full house throughout the day.

Another point I was asked to make is to remind you that if you do not have an opportunity to speak or not to have sufficient time to make all the points that you want to make, you can send us written notes. We continue to receive these written notes and they are incorporated by our Hansard staff into the report of the Conference, which will be made available to all the Committees. So if you feel you need to make additional points, or you have not been called upon, please use that facility.

Finally, I would just like to request you as indeed you have been good today, please give the co-Chairs your fullest cooperation. It is exceedingly hard to chair an assembly this size and please respect the rulings of the Chair, so that we can have orderly meetings and we can make good progress. Thank you very much indeed.

**Hon. Delegate Danson Mungatana:** Thank you Prof. Ghai. I think we were in this particular row, yes 252 has a Point of Order.

**Hon. Delegate Ali Amey Dubat:** Mr. Chairman Sir, I do not want to look defiant but there are one or two things that need your ruling.

**Hon. Delegate Danson Mungatana:** Yes.

**Hon. Delegate Ali Amey Dubat:** One, there are Political Parties here, we want to know whether their Delegates are actually speaking on behalf of their Political Parties so that as subscribers we can decide what to do with that Political Party.

Mr. Chairman, we have taken Oath that without prejudice, we will contribute to the Conference and (inaudible) of the national importance of this country. Can you rule some people out when they say Khadhi's Court should be thrown out of the Constitution because that is prejudice and violates the national etiquette of this country. Thank you Mr. Chairman.

**Hon. Delegate Danson Mungatana:** Thank you. I should clarify that, that was not a Point of Order. But I hear your sentiments and I should say on the first issue, that Political Parties are

part and parcel of this, as a matter of act we have had one representation from Ford Kenya. And I should also say on the second issue, that we are not going to rule anybody out of order. I think the person who is out of order is yourself, because you should, and I say it with a lot of respect Hon. Delegates, that you should be able to take anything that somebody is saying and when your chance comes, you also say the other thing. With those few remarks I would go, I do not think I have let a lady speak, so I see a lady there. I see a lady, I don't know whether the lights want this affirmative action or not, but let us hear you. Thank you.

*Laughter by the Honourable Delegates*

**Hon. Delegate Martha Koome:** Thank Mr. Chairman. My name is Martha Koome, Delegate No. 495, representing Women's Organizations. Mr. Chairperson, I would like to contribute to this Chapter and I have three general comments to make.

One relates to the General Structure of the Judiciary as proposed in the Draft. I have no problem with the Supreme Court, the Court of Appeal, the High Court and the Subordinate Courts. My problem is that are these Courts really accessible? I will share with you the results of a study we did and found that 70% of Kenyans cannot access the formal justice system and they are accessing justice through other mechanisms that have not thought of the law. In this respect, Mr. Chairperson, the Draft has attempted to devolve power to the village but has made no attempt to establish small claims called, they can be accessible to rural people, to the poor people, to women. The disputes involving these people are solved at the local levels by the community leaders, by the churches, these forums have no thought of the law so that they can be able to enforce their rights. So I will ask that when we are defining the Subordinate Courts, we should take cognizance of the small claims Court. Land is a very sensitive issue in this country and there are so many disputes involving land. We see no tribunals in the Draft that are going to deal with the land issues having the Constitutional protection and also alternative dispute resolutions that deal with a magnitude of problems, but they have no thought of Law to enforce those judgement that are passed in those forums.

Mr. Chairman, the other contribution I would like to make relates to the Khadhi's Court. I have been working in the area of the human life for the last 15 years. And what we believe in is

making space for everybody. In this regard, the Khadhi's Courts that have always existed in the Constitution should continue to enjoy the entrenchment of the Constitution. *(Clapping)* They should have the jurisdiction to deal with the family matters, because the human rights of our brothers and sisters that we have protected in the Bill of Rights cannot be realized in any other way, other than them having access to justice through a forum that they are used to and that looks at their way of life. I would, in this respect, say that the Muslims are a minority in this country and therefore they deserve our tolerance. They deserve us to give them space. And I say this with tremendous humility to my Christian brothers and sisters that we need to tolerate them. When I look at some literatures that have gone round, I feel constrained to ask the question, "would Jesus Christ have circulated some of these literatures?" Because he taught us to be humble, *(Clapping)* to give space to each other, to allow everybody realize their full potential. Therefore I say, the Khadhis' Court should have the entrenchment of the Constitution, which creates the obligation to set up the Khadhis' Court that would give us the other machinery that would deal with their problems.

The other comment Mr. Chairman, is regarding the overall Judiciary and maintaining the integrity of our Judiciary. I support the expanded Judicial Service Commission that should have the power even to discipline, to oversee and monitor what goes on with our Judges. In this respect we are convinced that if we make a drastic decision, like saying all judges resign at once, there will be a gap and if that is the route we are going to follow, I think we must address ourselves to who is going to fill in the gaps. Thank you very much Mr. Chairperson.

**Hon. Delegate Danson Mungatana:** Thank you. Now I move to the next row, before that we will take one Point of Order.

**Hon. Delegate Yusuf Haji:** Thank you very much Mr. Chairman. My Point of Order is a real Point of Order. I want to ask whether, it is in order Mr. Chairperson, for any person contributing to stand up here and equate Islam, with slavery, because Islam is a universal religion, as much as Christian is a universal religion. Mr. Chairman sir, if Arabs were selling slaves, the ones who were buying were the Americans and the Europeans; if the Arab was a Muslim, also the Americans and the Europeans were also Christians. So Mr. Chairman, I think we should avoid, Delegates should avoid touching on matters of religion, hurting other people. It is not right. We

are all here as Kenyans, let us discuss our problems as Kenyans, without equating any religion (interruption) to any faction Mr. Chairman.

**Hon. Delegate Danson Mungatana:** Sorry fellow Delegates, I think if that is the kind of Points of Order we are going to have, I am going to be dictatorial. That is definitely not a Point of Order. I want to say this: here let us have a spirit of accepting, whatever it is you are told, and then you have a chance to react to what you are being told. Let us not... and I do not want this thing to get emotional, because we will then lose the focus. So with those few remarks, I would like to recognize a Member of Parliament in this row. We do not have one, so can I have... There is 84 there.

**Hon. Delegate Dr. Gisuka Machage:** Thank you Mr. Chairman for recognizing the marginalized.

*Laughter by the Honourable Delegates*

I would like us to focus on item one. My name is Dr. Gisuka Machage, Member of Parliament for Kuria Constituency. Item 194, the appointment of Judges. I find 194 Section 1,2,3 with a bit of flaw. Yes it is true, the most senior judge can be appointed, but the most senior judge that might have been there for too many years, but already senile, or might not serve the interests of the country. So I think a little bit of clarification should be made on this. Let it be the most senior judge that reflects the situation of the country at that time, one that will be accepted by other Judges. May be the other judges should be given a chance to choose amongst themselves on who should be appointed.

As you very well know, Kenya as it is, at independence we had a few communities that were a bit favoured by the Colonial Government. So the most senior judge in Kenya might actually come from only two communities. So regional consideration should be taken into focus when actually doing these appointments, otherwise, if I may quote from one judge who has just talked previously, who was at that time a lawyer, he commented, "you can only understand the behaviour and understanding of the laws of a certain community, if you are only one of them,"

and it is true. Judgement is actually subjective and culture comes into play so that Section should be taken note of.

I would also want to comment on the appointment of subordinate courts. It is fortunate or unfortunate that we have only a few people recognized by this Constitutional Review to be Constitutionalised. I am happy the Muslims are getting their court, we support that only if you bite a little, do not bite too much. You might chock. Because what has been in existence I think was fair enough. Otherwise then I raise this point: we have had recognized elders in many communities who make very pivotal judgement in the daily management of those communities. For instance the Njuri Ncheke in Meru, the Iritongo in Kuria, these are recognized courts in our communities. They were put aside by the colonial person when actually giving us the first Constitution and we should recognize them fully. At least a statement of recognition should be included in this Constitution. *(Clapping)* It is just fair to ask, very fair to ask that this is openly and boldly recognized in the Constitution we are making now. Thank you very much.

**Hon. Delegate Danson B.Mungatana:** Thank you. I want to recognize somebody from the Trade Union, 447.

**Hon. Delegate Kennedy Kiliku:** Thank you Chairman, my name is Kennedy Kiliku, 447 from Trade Union. There's a serious omission on this Chapter because I don't know why you did not recognize the workers. We have the industrial court which must be constitutionalised and we have ten million electorate and workers who did form the government because they are the ones who elected members of Parliament and I propose to you Mr. Chairman, that the industrial court should be included in this Chapter.

*(Clapping from the Honourable Delegates)*

**Hon. Delegate Kennedy Kiliku:** There is one thing: the behaviour and the lawyer's fees, must be controlled and regulated.

*(Clapping from the Honourable Delegates)*

**Hon. Delegate Kennedy Kiliku:** I don't know why, yet most of you are lawyers with due respect, you have omitted anything to do with lawyers in this Chapter. So we need the fees charged by lawyers, to be controlled and regulated.

The Kadhi Courts. Chairman, I have been a Member of Parliament in Changamwe where 60% are Muslims I did not even one day witness any problem with the Kadhi Courts. I pray therefore that this Conference should not threaten the Conference by associating us with Sudan and others where we had no strong government; let us debate as Kenyans.

*(Clapping from the Honourable Delegates)*

**Hon. Delegate Kennedy Kiliku:** Only the civil and commercial determination between the two parties, I disagree because that should be omitted. In Mombasa we have joint ventures with Muslims and Christians working together, doing business together. Therefore that one is where we have a problem but as far as a Kadhi courts is concerned as it was before there is no problem in that.

Mr.Chairman, if you meet the Chief Kadhi today in Mombasa, you will sympathize with him. Sometimes he goes bare-footed because there are no terms and good conditions for the Chief Kadhi. We should have clear-cut conditions and service of a Chief Kadhi to be good because he is also serving Kenyans. With those few remarks I beg support. Thank you.

*(Clapping from the Honourable Delegates)*

**Hon. Delegate Danson B. Mungatana:** I would like to recognize a district Delegate and I see a lady there. 512.

**Hon.Delegate Florence Machayo:** Thank you very much. I am Florence Machayo and my number is 512. I am not very versed in judicial but I would like to support Martha Koome on village courts because we are having a lot of problems and therefore Article 184, I hope for tribunals to be established for this will bring us down to the village so that these people can be catered for.

As for the judiciary, I would like one judiciary system. But if we have to have Kadhi courts as the judge has said here, he is experienced and I think you will take his word so that maybe you can cater for the Kadhi courts as they were before.

For the age of judges I had put 74 but since one judge has said 70 let it be between 70 and 74. They have talked about industrial courts, I am a consumer activist and in the long run we would want to ask for consumer courts because all of us here are consumers and we have a lot of problems going on even now, which is why we need small courts for consumers. Thank you very much.

**Hon. Delegate Danson B. Mungatana:** Thank you. I will move to the next row. I would like to recognize a Member of Parliament. I recognize the Honourable J.B. Muturi, 129.

*(Murmur from the Honourable Delegates).*

**Hon. Delegate Justin Bedan Njoki Muturi:** (Inaudible)

**Hon. Delegate Danson B. Mungatana:** No, that is not the point of order.

**Hon. Delegate Justin Bedan Njoki Muturi:** Thank you Mr. Chairman, I will be brief. The Chairman, in my opinion, I think the draft provides sufficiently for the establishment of local tribunals under Article 185, 3 ( c ) and I think it should be retained in the manner that it is, where it says that the hierarchy will include any traditional or local tribunals with limited jurisdiction in issues of local significance that may be established by an Act of Parliament. So I think the issues that my sister Martha Koome has raised will be catered for sufficiently in that provision because indeed it is Parliament that would enact the relevant legislation to create such a tribunal.

Mr. Chairman, with regard the qualifications for appointment of Judges, that is under Article 195, it states that it has to be one who possesses the following qualifications: 15 years experience as a Judge of the Court of Appeal or the High Court, or in practice of as advocate and so on. I associate myself fully with the sentiments expressed earlier on, Mr. Chairman, by the

Honourable J.J. Kamotho, but with regard to sub-Section 2 -- Judges of the Court of Appeal shall be appointed from persons who possess 10 years experience as a Judge of the Court of Appeal.

Mr. Chairman, I wonder if you are going to be appointed as a Judge of the Court of Appeal, then which other Court of Appeal will you have served as a Judge for those 10 years, unless it is proposed. In my view, those who are currently serving through this one I think there is some hidden meaning that they will actually be required to apply afresh. But if we are making it as a Constitution that is going to be there 50 years from now, and you require somebody to have served in the Court of Appeal to apply to be a Judge of the Court of Appeal I see some unnecessary provision with regard to that.

**Hon. Delegate Danson B. Mungatana:** Thank you.

**Hon. Delegate Justin Bedan Njoki Muturi:** Mr. Chairman, the requirement that somebody who has served as a magistrate for ten years may qualify to be appointed either as an Attorney General of the Republic or as a Judge of the High Court is in my view a bit low. Mr. Chairman, as you know we have far too many qualified lawyers that have practiced both law or taught at the universities or been magistrates for periods well in excess of 20 years. Now this requirement opens the floodgates for some funny criteria or consideration for appointment, which we have seen in the past. Since we want to guard against such ill-intended provisions I think we should raise the qualification period to 15 years. After all, the Attorney General really is, if you look by the very definition, supposed to be the principal legal adviser to the government. But I think ten years in my view is too low.

Mr. Chairman, I fully associate myself with the sentiments of a few speakers that have spoken with regard to the existence of the Kadhi courts. The jurisdictions say that the element about the small claims must be removed because it could cause problems. I also think that the provision for the existence of the Rules Committee in the Draft Constitution is unnecessary; this is a fairly simple matter that should be left to honorary legislation like explained by Judge Kwach earlier.

Mr. Chairman, I find it difficult that the proposal here is to have the chairman of the Judicial Service Commission appointed from outside the Judiciary itself. I think that the provision is risky for the same reasons I think were advanced earlier on.

Mr. Chairman, Article 212 seems to place a special responsibility on people who are lawyers to say that.... Mr. Chairman, if you allow me to just read a small portion, that 'assist the courts in the development of the law by presenting well-reasoned innovative and challenging arguments, such as will advance the objects and purpose of the Constitution and the rule of law.' I thought, Mr. Chairman, this kind of responsibility is one that belongs to all Kenyans. It should not just be placed on lawyers alone, and of course regulating in the Constitution about confidentiality between a lawyer and the client, and things like those ...

**Hon. Delegate Danson B. Mungatana:** Kindly wind up.

**Hon. Delegate Justin Bedan Njoki Muturi:** ...that, Mr. Chairman , appears to be a little superfluous. So part three, I will recommend part three to be deleted all together. Thank you.

**Hon. Delegate Danson B. Mungatana:** I would like to recognize district delegates. 378, if you are a lady, I can't see you very well.

**Hon. Delegate Dorcas Mbelersia:** Honorable Chair, my names are Dorcas Mbelersia, district delegate from Kakamega District, my number is 378. My request is to assure our Muslim ladies and gentlemen that we are not against anything. We as Christians also undergo the problems that you feel should be solved in the Kadhi courts. Personally however I think if any other churches can do the same I think they can be applicable and willing also to agree and solve the problems for you because of some income generating programmes.

Two, I see here at Article 204 clause 1 ( b), there is a lady being appointed to the Commission of the Judiciary. If they are not willing to work with us, why are you choosing this lady to go there? You don't force environment.

Lastly, I feel that this issue of the NGOs is too monotonous, and although NGOs are managed by us women they don't recognize women from local places like local districts. It doesn't mean that when they talk about a lady or a woman she should come from NGOs; why specifically NGOs?

Lastly and not least I feel we should not be very much biased. If the Kadhi courts are supposed to be there, then they should remain the way they were; if not, it is not very necessary. Thank you.

**Hon. Delegate Danson Mungatana:** The last person from there will be from the disabled 455.

**Hon. Delegate Lawrence Mute:** Thank Honourable Chair. The lowest common denominator which brings all of us here. My name is Lawrence Mute I come from the NGO sector, also the Disability Caucus. It is the lowest common denominator, which brings us here as Kenyans to this Conference is actually that fact that we are Kenyans. An impression has been given in this Conference relating to cost and how we deal with that. May I say that all of us here I am sure are tax payers, yet there is the impression that if I, a male tax-payer, then I should be unhappy if my money or my taxes are used to subsidize so that Affirmative Action for women may be done.

There is an impression that if I am a Meru and if we in Meru we grow coffee then the taxes which arise from the growth of that coffee can not be used to subsidize our people if there is farming in another part of this country. Fellow Delegates we must not fall into the trap of being told that they only way we must be happy about the usage of our taxes is if I pay taxes and then those taxes are again used for me. Ladies and gentlemen Honourable Delegates sometimes you have paid taxes but instead of those taxes being useful to pay for the school fees or for books for your children, they have been used to pay for books for me who is disabled, because my books cost a little more. I want to urge as a fellow Delegates to realize that because we are here as Kenyans if it is necessary that we subsidize so that we can have Kadhi's court. Then let us do that because it is for the common good of this country. Let us not be cheated ladies and gentlemen Honourable Delegates.

On another issue, we are moving from a position where we have had a compliant Judiciary and now we want to have an independent Judiciary. I think it is very important we should be very

wary about the possibility of having a dictatorship of the Supreme Court. Now, I think what we should do in relation to advisory opinions, I think it has already been pointed out, I would really hesitate to give the Supreme Court a political function of ruling on decisions or on issues which actually are not here as yet law. So let us not have advisory opinions particularly where the court will be asked to give an opinion of something which is not law. Let the politicians deal with that and then afterwards the court can interpret it once it is a law. As similarly particularly because the Supreme Court will be very important I will actually think that we should have specific terms for Judges who are on the Supreme Court. So that we don't have a situation where we could have several Judges staying in office for the next twenty years because we are waiting for them to retire at the age of 65 or 70. If for example we had a fixed term of twelve years I think that would be very useful because this term should be staggered so that we don't have a situation where we have complete new crop of Judges. Again to ensure that we not dictated too much by a Supreme Court.

What I would also want to address in relation to the Public Defender. By the very nature of our disabilities, we are at the bottom of the poverty listing so I think when the proper Legislation for the Public Defender is being put in place. I think we need to make sure that people with disabilities have adequate facilities to ensure that the Public Defender is able to deal with their issues when we need to come to court because we know that accessing court either because of the finances involved, even because of issue of physical access can be very difficult, actually it is very difficult for people with disability. I think we need to make sure that the Public Defender is set out in such a way that he can be or she can be accessible to people with disabilities.

Finally Chair, I think again in relation to the Judges of the Supreme Court, the Court of Appeal and also the High Court. I am not sure that we should simply say that the Chief Justice becomes the most senior judge during a particular time. I think it is possible that will not be a good way of getting the best person to be either the Chief Justice or the Head of the Court of Appeal or the Head of the High Court. Thank you very much Honourable Chair.

**Hon. Delegate Danson Mungatana:** Thank you. It is a request from the Chair here that if you know that you are still on your line please raise your number so that we can help us notice those

who have not spoken and we favour them. May I have a Member of Parliament in that area who has not spoken. 105 I believe. Order please.

**Hon. Delegate Mohamed Abdi Mohamud:** Thank you very much Mr. Chairman. My name is Mohamed Abdi Mohamud MP Wajir East. Mr. Chairman this is my first time to open my mouth in this hall so I thank you very much for recognizing me. First, Mr. Chairman, I think the importance of Judiciary has been said by many Delegates and I will not repeat but Mr. Chairman our legal system has been in shambles for many years. One of the reasons why they were in shambles is because the Executive has been interfering with the Judiciary infact there was no independence of the Judiciary. I will therefore urge Mr. Chairman that the Constitution shall provide adequate powers and shall protect the Judiciary from influences either from the Executive or from the Legislature.

Mr. Chairman, sometimes one of the functions of the Judiciary is to settle disputes between the Government and Individual, between Individuals and Individuals, between Individual and the Judiciary itself. We therefore want the Judiciary to be very impartial.

Secondly, in Article 184(3F) it says one of the functions of the Judiciary is, it shall protect and promote. I would like the word 'interpret' to be added because Mr. Chairman certain times people might want interpretation of a certain Clause or something that should be left to the Judges and the Judiciary in general to interpret where certain laws and the Constitution is ambiguous. So the word 'interpret' should be added. And then the principles and the purpose of the Constitution as provided as in Article 183 (3F).

Thirdly, Mr. Chairman, the Judiciary shall also be given adequate funds. I think that one has been taken care of in Article 184 (5). You realize that most of our Districts courts or courts all over are either understaffed, they have no transport, they have nothing, they have no houses, they have no proper facilities as a result they are accused of all sorts of names. So Mr. Chairman, the Judiciary should actually be supported and protected by the Constitution.

Next I will move to the hierarchy of courts Mr. Chairman. I think some of the new things that have been created or some of the posts that have been created are welcome, especially the village

and this smaller courts and any other court that Parliament shall establish. I think is in the right direction and it is going to solve some of the problems our people are facing all over in the republic. Mr. Chairman the question of the Supreme Court in my view the High Court and the Court of Appeal can take care of all our small disputes all over since we belong to the East African Community Mr. Chairman. We should have instead of the Supreme Court let us have the East African Courts of Appeal.

Mr. Chairman, then from there I will go to the Kadhi's court. Mr. Chairman one of my friends here is laughing. I would like just to speak as an independent Kenyan not necessarily as a Muslim. Mr. Chairman first of all I would like our brother and sisters in this Conference and even all over in Kenya to tolerate one another, the minorities rights, we have talked of the Affirmative Action for women, we have endorsed, we did not talk of Muslim women, Christian women, Hindus, we were all Kenyans, we went all the Chapters including the Executive. We did not say the Executive Prime Minister will be a woman or a man or a Muslim or a Christian. We were very sober. So let us also handle this time when we are discussing the Kadhi's court with sober minds my brothers and sisters.

Now, I will give 12 points not more than 12 to justify the existence and enhancement of the Kadhi's court without interfering with the rights of any other Kenyan. I will start with the first one.

1. It has been said earlier that the Kadhi's court were there for many years before independence and after independence and up to today.
2. Its jurisdiction is limited Mr. Chairman. It is not about Sheria law, it is not about amputating somebody's hand or what, it is restricting itself only to Islamic personal law which is marriage, divorce and inheritance of people of Islamic faith only. If a Muslim marries a none Muslim or a none Muslim marries a Muslim then that one does not apply. So we are not taking any other persons rights.
3. The courts are part of the Judiciary systems.

4. Mr. Chairman just give me one minute to go through. The Constitution guarantees religious freedom
5. The Muslim population has increased and therefore we need to enhance the Kadhi's court.
6. The Muslims are not asking for Sheria law and the courts will not make Kenya an Islamic state and those Ufungamano initiative Mr. Chairman who the members are here they will agree with me that when they were trying to remove KANU from power last year they all said that the Kadhi's court shall remain. They are all here ask them Mr. Chairman.

**Hon. Delegate Danson Mungatano:** Please wind up.

**Hon. Delegate Mohamed Abdi Mohamud:** Mr. Chairman now I will wind up and say that this is not a new thing it was as a result of the views collected from various Kenyans that were presented in the Draft and finally. I wish to appeal to my dear Delegates ladies and gentlemen please endorse this section for us for the purpose of love, unity and brotherhood. Thank you very much.

**Hon. Delegate Danson B. Mungatana:** Thank you. I would like to recognize a lady there, 309. Yes. 579, you have a point of procedure?

**Hon. Delegate Daniel Mokaya Rasugu:** Mr. Chairman, my name is Daniel Rasugu, Delegate number 579, Political Parties. I find it rather cumbersome that for a long time, we are going the way we are. If we could reach a point and mix, try to call some few people from different sitting setups here as we contribute. Political Parties ---

**Hon. Delegate Danson B. Mungatana:** Please let him have his say.

**Hon. Delegate Daniel Mokaya Rasugu:** Political Parties have had only two people since we started this, as we went through all the sectors. Can you consider addressing that sector? It is very important.

**Hon. Delegate Danson B. Mungatana:** Please, let him have his say. I take your point but please, I had already ruled in the morning that we are going to try and have one third, one third. So, that is already ruled on. Let us have the lady number 390.

**Hon. Delegate Kellan Khaoma Wavomba:** Thank you, Mr. Chairman. I would like to just make my points clear on a few items. First, I would like to support--- My names are Kellan Wavomba, District Delegate from Bungoma, number 390. I would like to support Honourable Kaliku for his sentiments that we should have the Industrial Court included in this Draft. This is simply because the workers have always been given a raw deal and you realize that, that is why we have very many strikes, demonstrations in the streets of this country. So, if we have the Industrial Courts, most of these will be solved in the courts and therefore, we will avoid the bad pictures that are being portrayed outside here by the strikes.

Another one is about the Kadhis'' Courts as usual, somebody is helping me. Mr. Chairman, like my colleagues have said, we have no ill motives here but I tend to feel that Section 200 of the same Draft, I think it is also not giving us a proper way forward because if we have the Kadhis'' Courts to remain the way it is in the old Constitution, it is not going to give us a problem. But when we include the Clauses (b) and (c), now that is where the trouble comes from. Mr. Chairman, I would request that these two be deleted from the Draft because if they are included, then I am sure every other person will want to have, Christians will want their civil disputes discussed in their own courts also. Therefore, that one is not going to give us a way forward. And like my other colleagues have said, we are going to have parallel Judiciary which is not proper and personally I would want to say I don't support the removal of the Kadhi Courts. But if that section (b) and (c) are removed, then we have no problem with our Muslim brothers and sisters. Thank you.

**Hon. Delegate Danson B. Mungatana:** Thank you. We move to the next row. I will take a point of information, 528.

**Hon. Delegate James John Mageria:** Mr. Chairman, my name is James Mageria and I am the secretary and co-ordinator of Ufungamano Initiative. The Speaker previous to the one who has just spoken said that you need to ask Ufungamano whether they said that Kadhi Courts should remain. I just wanted to clear that we in Ufungamano which consisted nine different religious groups never discussed sectional matters. We never discussed Kadhi Courts and therefore, we did not support Muslims, Hindus, Christians or anybody. We concentrated on the process, Constitutional Review Process. Thank you.

**Hon. Delegate Danson B. Mungatana:** Thank you for your point of your information. I want to recognize a Member of Parliament in that row. Sorry, I am not ignoring any Political Parties. Sorry, we have moved from there, I will come back in the afternoon. 111, have you spoken? Please clarify. Have you spoken? Okay.

**Hon. Delegate Geoffrey Gachara Muchiri:** Thank you, Mr. Chairman. I would wish to make a few comments on this Chapter on Judiciary.

**Hon. Delegate David Mwenje:** Point of order, Mr. Chairman? Mr. Chairman, my name is Honourable David Mwenje, the MP for the most populous Constituency in the world.

*(Laughter from Honourable Delegates)*

Mr. Chairman, we feel marginalized in Nairobi because despite having the largest number of people in this city and in the country, Mr. Chairman, I have been here and nobody from Nairobi has spoken up to now. We continue feeling that you need to give us more consideration after this due to our number in this country and as you know Mr. Chairman, we are only three in this city. I am not saying that you continue but Mr. Chairman, give that due consideration because together we are also the host of this Conference.

*(Laughter from Honourable Delegates).*

**Hon. Delegate Danson B. Mungatana:** I take your point Mheshimiwa and I will look into that but let us hear the Honourable Delegate.

**Hon. Delegate Geoffrey Gachara Muchiri:** Honourable Delegates, my names are Gachara Muchiri, Member of Parliament for Ndaragua, Nyandarua District. I have a few comments on the Chapter on Judiciary.

First of all, on the hierarchy of courts: To be able to take care of the small claims from the rural areas, there is need to establish courts at Divisional levels. And I appreciate that the Draft recognizes that under 185, 3b that there shall be traditional or local tribunals with limited jurisdiction on issues of local significance. I would imagine that the greatest problem regarding the Judiciary is actually with the rural people. Given that the legal matters are handled with a lot of technicalities and it is expensive, I would recommend that in every Division where there is a police station, there should be a Judicial Court to take care of these small claims and -----  
--(?). Mr. Chairman, I appreciate that there is going to be a Supreme Court. I think that is a very good idea because the Supreme Court is going to have more than three Judges, at least five Judges who can be able to hear cases that have emanated from the Court of Appeal. I think that is a good idea. At the Court of Appeal, Mr. Chairman, I think we should not be saying the President, under 190, we should not be saying the President of the Courts. I think we should be saying the Presiding Judge of the Court, otherwise that word 'President' should be given to the President of the country other than anybody else.

**Hon. Delegate Danson B. Mungatana:** Thank you.

**Hon. Delegate Geoffrey Gachara Muchiri:** I think there is also another issue here, that the Court of Appeal under the Constitution is being bound to respect its own decisions. I think that is not correct. It should not be there, under 193. I think every court should not be bound to adhere to its own decisions because we know the legal profession is growing and they should not be bound by what they had decided previously. Otherwise, they can carry on the mistakes to infinity.

Mr. Chairman, the issue of the age of the Judges, I would agree that since the draft has proposed 65, and the Judges currently are retiring at 74, let us have the average of 70. I think that should be comfortable.

Mr. Chairman, in regard to Kadhi Courts, we were told about the history, I would rather that we only allow them to deal with the personal law under Article 201 and they should not extend themselves to civil matters and commercial matters. That is where the problem is.

The issue of the Judicial Service. There is a lot of mention on a Muslim woman, NGO, I feel let us not start recognizing some sectors of the societies when others are not being recognized. Again, we are creating the AG, we are also creating the Director of Public Prosecutions and the Public Defender offices. I think the role of the AG and the role of the Director of Prosecution are synonymous. I think we should not create the Director of Public Prosecution. Let us create the AG position and also the Public Defender, I think that will be quite okay.

Lastly, Mr. Chairman, why are we recognizing the legal profession under Article 212? This is going to bring problems because all other professions will require to be recognized. Perhaps when we come to the Land and Property Rights Chapter, we might also have people of learned profession require to be recognized. I think let us avoid recognizing any profession in this Constitution. We have the architects, the doctors, the valuers and therefore, I would rather that we delete 212, where we are trying to give a lot of eminence to the legal profession. Mr. Chairman, thank you very much.

**Hon. Delegate Danson B. Mungatana:** Thank you, Mheshimiwa. I want to recognize the District Delegate there, and I see from my list 287 has not spoken.

**Hon. Delegate Nichasius Mugo Njoka:** Thank you, very much Mr. Chairman. My names are Nichasius Mugo Njoka from Mbeere District, representing that community. I would like Bwana Chairman, to give an input on this chapter which is very emotive. First of all I would like, to be very very objective and maybe ask our brothers and sisters who are of the Muslim faith to talk to us. Maybe we are not contributing from an informed position as to what entails personal laws, commercial laws, whatever they are asking to be entrenched in our Constitution. Like I will be

having a question when we come to the personal law as it is put in our current Draft. Because, if you look at that one and you compare a case of the Nigerian girl who almost caused an international uproar when the beauty pageant was to be removed from Nigeria to Europe, just because that girl was pregnant outside marriage. Would that one constitute a personal law and if it is, I believe they are entitled to that. But then in the Kenyan context, it would be contravening our human rights as regards to human life. So, they need to expound on what it is they are calling personal laws as regards divorce, etc. They need to tell us that.

The other aspect, Mr. Chairman, is on the person occupying that office of the Kadhi and the Judicial office in that context. Because I feel in this country, we need also to conserve our resources. If it is possible and it is true and we are all open to one another and we have said the qualification of the Kadhi, the person who is going to occupy that court is going to be an advocate of the High Court, and also have some expertise in Islamic law, why can't we combine that officer? We combine and have--you know, that singular person being posted to the District courts, the current existing courts. So that if there is an Islamic case coming involving two persons of the same faith, that Judicial officer will convert himself/herself into a Kadhi and listen to that personal matter. In the absence of the Islamic case, that officer will continue carrying out other normal cases because we have to conserve the resources. Because if we set a Kadhi in a District or in two, four, five districts, that person, in many cases, might be sitting idle at the expense of our taxes. So, I feel it is important we combine, we have qualified people in both secular law and also Islamic law to be posted into those areas. Thank you very much, Mr. Chairman.

**Hon. Delegate Danson B. Mungatana:** Thank you. Sorry, the point of order, point of information or order? Let me not take the point of order, I would like to take one lady and then we adjourn for lunch. 475, that is from the Professional organization. 475 you are not ready, we go to .. are you ready?

*Yes, from Honourable Delegates*

**Hon. Delegate Danson B. Mungatana:** Okay.

**Hon. Delegate Anne Njogu:** Thank you Mr. Chair.

**Hon. Delegate Danson B. Mungatana:** Please put some voice into that.

**Hon. Delegate Anne Njogu:** Thank you Mr. Chair. My names are Anne Njogu representing the Professional Societies Organizations. My contribution sir basically to in this section:

One, is with regard to section 184 and as it pertains to access to justice ..

**Hon. Delegate Danson B. Mungatana:** Yes.

**Hon. Delegate Anne Njogu:** We know that Mr. Chair, justice in this country is very expensive and it's not even available to most people. My recommendation is that this Constitution, do entrench the need to have free legal aid for those who are not able to afford justice.

Number two, we should demystify the current Courts procedures and laws and processes which remain fairly complex, even sometimes to practicing lawyers.

Number three, we should increase the number of Judges and Magistrates, so that justice is not delayed because we know justice that is delayed, is justice denied. The other contribution in this area, is with regard to the appointment of Judges. We know they have been very many serious allegations vis-à-vis our Judiciary, we know they have been allegations of inefficiency, incompetence and corruption. The people of this country have completely lost faith in the Judiciary and its officers. My recommendation first and foremost not only a recommendation, but my support for the Supreme Court because we know that we are going to ensure that justice is further made accessible, even at a higher level.

Number two, I would like to support the proposal that we have a complete overhaul of the Judiciary, because Mr. Chair, if indeed we are going to root out the corruption that lies therein, then we should be able to have all the Judges currently resigning and this Constitution, should provide for the gap that would of course be eminent, so that we don't have a stop gap and we have these gaps addressed.

Number two, with regard to the appointment of Judges, I think Mr. Chairman we must have a Judiciary code of ethics that is widely known, widely publicized and widely respected. We should also have a very effective complaints procedure, entrenched in this Constitution. In addition to the qualifications for the appointment of Judges, we should have Judges or prospective appointees, whose integrity is impeccable. Those whose integrity, efficiency and issues like that cannot be impeached.

Finally Mr. Chair, all judicial appointees we are least must have a third being women. Thank you very much.

**Hon. Delegate Danson B. Mungatana:** Thank you, we break for lunch Honourable Delegates. Thank you. 2.30 p.m. please let's begin.

**The meeting resumed after lunch at 2.40 p.m.**

**Hon. Delegate Danson B. Mungatana:** Order, order please. We are getting started now and I want to recognize from the professional organization 477.

**Hon. Delegate Rachelle Omamo:** Thank you very much Mr. Chairman, my name is Rachelle Omamo, I am delegate number 477 and I have a number of comments to make on this chapter concerning the Judiciary and the Legal system in Kenya. First of all, I wish us to look at the role of a Chief Justice in our judicial system. As you can see, all the Constitution says, is that the Chief Justice will be the head of the Judiciary and nothing else.

Now in our Constitution, we defined the powers of the President, we defined the powers of our Members of Parliament, but yet we do not define the powers of the Chief Justice. The Chief Justice presides over one of the most powerful institutions in our country and because these powers have never been defined even in the broadest of terms, what has happened is that the Chief Justice has presided over the Judiciary through a process of cronyism, personality cults and sycophancy. We need to define what the Chief Justice is going to do, so that we have some performance indicators for the Chief Justice. And so that he does not operate like a tyrant within our judicial system.

Secondly, we must think about limiting the term of office of a Chief Justice. We limit the term of office of the President of Kenya, we limit the term of office of M.P. Why should we have a Chief Justice who is appointed at the age of 58 and preside over the Judiciary for a period of almost fifteen years. To my mind, that does not lend itself to a Judiciary that is vibrant. I am also concerned about the manner in which the Chief Justice and the President of Courts are appointed in the draft Constitution. It seems to me that it is only in the Judiciary, where people acquire position by a process of natural wastage. You either have to wait for your colleague to die, or to retire. To my mind, those are structures that bring about apathy and mediocrity in our Judiciary. What we are looking for is for a Judiciary where any Judge who feels that he is capable of adding value and direction to the High Court for example, should be able to compete with other Judges for the post of Principal Judge of the High Court, so that what we get are Judges who have the backing of their colleague. And we break down this culture of favourite leading divisions of the High Court, favourite dealing with the Court of Appeal.

We want to be able to make our Judges accountable not to the Chief Justice, but to the people of Kenya and may I suggest to you Mr. Chairman that the positions of the Presidents of all these Courts be elective and that the person who serves, serves for a limited period may be of three years. So that we can establish within our Judiciary a culture where anybody who can add value, people who have the prime of their life to participate in the Judiciary, to add value to it, to make it vibrant and new and fresh.

**Hon. Delegate Danson B. Mungatana:** Okay.

**Hon. Delegate Rachelle Omamo:** I am also concerned about the manner in which the subordinate Courts are treated in our Constitution. We must remember, that the real engine of the Judiciary are the Magistrates. The Magistrate in this country is one of the most mistreated individual in our country. They have some of the work turns of service. Now if we want to be able to pay attention to our Magistrates, if we want to be able to add quality to these tribunals that we want to set up, we must be able to have a Constitutional officer who presides over Magistrate's Courts. So that when members of the Judiciary go and for example campaign for improved turns of service, the Magistrate cannot treat it like second-class citizen. We want to see vibrant at the bottom of the Judiciary, because that is the portion of the Judiciary that touches the ordinary Kenyan.

More than this, may I suggest, that this Judiciary be engendered? As far as I can see, there is a gender glass ceiling in the Judiciary. The majority of women in the Judiciary occupy the positions of Magistrates, when appointment of high judicial office come about, they are suspesently ignored. One way in which we can deal with this, is to create up a position of Deputy Chief Justice, because two heads are better than one and it is a good thing if that head is the head of a woman. And we will then suggest if the total echelon of the Judiciary is engendered, it will force the Judiciary to appoint women into the High Court, into positions of the Court of Appeal, even now in this country, we have about 40 of Judges, how many of them are women? How many of them will be able to lead this Judiciary in our lifetime. I can assure you very few if none at all.

Regarding the Kadhi's Court, I am concerned about the Kadhi's Court. I have no objection in principle to the establishment of a Kadhi's Court but I am concerned about various things. These Kadhi's Court must be mainstreamed. They must be a time when the Kadhi's Court interlocks with the formal judicial system and that must take place at the level of the High Court. The High Court must be able to supervise the Kadhi's Court and all other Magistrate's Courts. More than this, we have to deal with the question of conflict of law. If we look at Article 5 sub-section 1 of this Constitutional draft, you will find that the laws of Kenya are set out but there is no provision made for conflict of law.

Now we are trying to set up a system of legal pluralism, we say that African customary law is relevant in our country, we say that Islamic law is relevant in country, but what happens where there is a conflict between those two laws? Which one will prevail and I think we need to look at this, otherwise we are going to create a situation of chaos within our Courts. More than this, I wonder why in section 199 to section 200, we go into such details as to the rank of the Chief Kadhi, the classes of Courts. We say that the Kadhi's Court is a Magistrate's Court, yet we go on to say that the Chief Kadhi should have the rank and privileges of a Judge. This is sort of a contradiction.

Finally, I would like us to look at the role the Attorney General and the Deputy Public Prosecutor. This Constitution says that the Attorney General would be the Government's Chief Legal Advisor but let me tell you no Cabinet is going to listen to an AG who does not have a stay. The AG must be able to give advice and to ensure that that advice, good legal advice to the people of Kenya, is a payoff because he has the power to prosecute these Cabinet Ministers who misuse their offices. Once you separate those offices, you weaken the office of the Attorney General and what then happens is that if you have a strong Minister of Justice, the legal advisory role of the AG will disappear. That is all that I have to say, but may I also thank the people of Kenya for having brought us this far, so that we are able to talk about the Judiciary in this country freely, without fear, favour or prejudice. I thank you.

**Hon. Delegate Danson B. Mungatana:** Thank you Madam Chair. I would like to recognize a Member of Parliament, who has not spoken in that .. 193.

**Hon. Delegate Aden Sugow Ahmed:** Thank you Honourable Chair, my names are Hon. Aden Sugow Ahmed, M.P. Fafi constituency, Garissa District. First of all, I would like to thank you for this opportunity, this is my first contribution to the Conference and as a general point, I think it's very important everyone knows in this hall that this year is the 40<sup>th</sup> Anniversary of Independence. And there is nothing more important to give to Kenyans at the end of this year, than a new Constitution. So as we deliberate, please let us have that in mind, let us have that target of ensuring that come Jamhuri Day, we do have a new Constitution. Now that is the waking up call for everyone.

Now let me come to the actual issues at hand today, I would like to generally talk about some things that we are discussing regarding the Judiciary not being honest, being corrupt, having being run down over the years. I think that's not a isolated problem to the Judiciary. Over the years and decades, all our institutions have been run down because we have vested all powers in one single person. With now the intention of actually instituting separation of powers in our Constitution, I believe that the Judiciary will improve tremendously. Therefore, the call by some sections of a society for actually a sweep of the Judiciary after enactment of this Constitution, is uncalled for. I do not see any reason why Judges who most of them are very hard working and very honest people, just like the rest of sectors of the society in this country, should actually be victimized and become the first victims of actually a new Constitution in Kenya, instead of celebrating to tell the Judges to be mourning, I don't think that is very right. So I do not stand for those who actually advocate that we actually sweep the boat as far as Judiciary is concerned. If we want to do that, now we sweep every other sector and I don't think that is very feasible.

The other issue about independence, that goes back again to the same thing that I had talked about right now – Independence of the Judiciary. That has not been there and that is why actually corruption went into every sector of our society. The Judiciary was supposed actually to be the organ, that is responsible for ensuring that law and order is actually maintained. But the Executive through it's interference, have made sure that it is toothless and it cannot stand anything. Therefore, independence of the Judiciary should be a very very vital factor, when considering this draft.

Now my points are very short and I am coming now to the controversial issue, which everyone probably would be expecting me to talk about. I think Kenya as far as this country is concerned, unity in diversity has been the foundation of stability in this country and the prosperity that it has attained so far are in Africa. It is that unity in diversity that has brought us up to this actually level. It is not some sort of saviours or some God given good politicians that have actually made this country remain stable, it is Kenya. The ordinary mwananchi trying to tolerate his fellow Kenyan. It is in this spirit of tolerance, unity in diversity that I urge fellow Kenyans to be tolerant of their fellow Muslim brothers and sisters and understand what they are actually asking for. It is not Sharia law, it is not an eye for an eye, it is not cutting your arm if you steal – it is not all that. Personal law does not go beyond family affairs and I don't think it will infringe any other person's rights.

The issue of commercial law, which some of us have mentioned, actually restricts the Constitution - or the Draft restricts that - and says that the parties concerned, even if all be Muslims, have the option of going to other courts. Therefore, it has got limitations in itself. So, I would like my fellow Honourable Delegates and Kenyans at large to be appreciative and understanding. Thank you very much.

**Hon. Delegate Danson B. Mungatana:** Thank you, Mheshimiwa. I just want to find out, 468 have you spoken? Please, let's hear from you.

**Hon. Delegate Hellen Too Yego:** Thank you very much Honourable Chair. My names are Hellen Yego, Delegate number 468 representing, the NGOs. My issue that I want to pick out is on Article 185. I would like to talk about something that I am seeing as a contradiction in the Draft Constitution. When you look at the hierarchy of courts, Article 185 clause 3 (a), we are told that the Subordinate Courts are the Magistrate Courts and the Kadhi's Courts. When you move to Article 200 clauses 2-6, it talks about the hierarchy of Kadhi's Courts and in this hierarchy of Kadhi's Courts, it has been pushed to the High Court yet it is a Subordinate Court. So I suggest that, Mr. Chairman, we have the Kadhi's Court to remain a Subordinate Court, not moving anywhere near the High court. Thank you.

**Hon. Delegate Danson B. Mungatana:** Thank you. I would like to recognize a political party from the same area because they have been very short in their submission. Do we have 444? May I recognize you?

**Hon. Delegate Maero Tindi:** Thank you Mr. Chairman. My names are Maero Tindi, Delegate number 444, representing the Trade Unions.

**Hon. Delegate Danson B. Mungatana:** Go on.

**Hon. Delegates:** Protestations from amongst the Honourable Delegates.

**Hon. Delegate Danson B. Mungatana:** I am sorry...

**Hon. Delegate Maero Tindi:** I have not spoken since I came here, Mr. Chairman.

**Hon. Delegate Danson B. Mungatana:** I hear you. Fellow Delegates I ask you to give him a chance, he has not spoken, please.

**Hon. Delegate Maero Tindi:** Mr. Chairman, I have been listening to all.

**Hon. Delegate Danson B. Mungatana:** I see.....(inaudible)

**Hon. Delegate Maero Tindi:** I have been listening to all deliberations here, especially on the Judiciary. When we started, one of the Commissioners took us through the Judiciary and in particular, the Kadhi's Court. He explained how the Kadhi's Court was established in this country and that it is because we are negotiating to bring the coastal strip into the fold of Kenya – to bring them into Kenya. That was a question for negotiations and I commend the late President because he used all tactics to make sure that the coastal people were accommodated in the Kenyan Republic.

You have also said that this is one of the reasons that it was a question of give and take. When we are negotiating we are ....and we use the word 'give and take'. So the President by that time

said that, 'you come and I will make sure that you have your own court'. Now our fellow Muslims, when we are sitting here we are negotiating and we want a unified country. The Muslims have been with us for all these years – about 40 years and I have not seen where the Commission said that when you went around people said that there are some shortcomings in the Judiciary in that Muslim issues are not handled competently. When we attained independence, we had divisional courts, African courts, which dealt with marriages and divorces, like in Western Province– Luhya land where I come from – we used to have an African courts that dealt with divorces and marriages. If you wanted to divorce you could to go court and say how many cows you paid and their colours before divorcing so that you could have your cows back.

When we attained independence, those courts were abolished. Now that we are talking about a unified Kenya, why should we have another court dealing with other matters because we have talked about marriages? I think our courts are capable of handling marriages and we also have abandoned our courts and gone to the Industrial court that handles everything now. So, I don't see why we should have Kadhi's Courts.

**Hon. Delegate Danson B. Mungatana:** Thank you.

**Hon. Delegate Maero Tindi:** Two, I want to look at Article number 211 (2), where it is said that the Committee of the prerogative of Mercy shall consist of the Attorney General, the chairman of the prominent Kenyans appointed by the President. I am not comfortable with this, Mr. Chairman. On what criteria do you appoint these prominent people? If you get a criterion then I want you to add the number from six to eight to represent all provinces because we must have prominent people from every province to advice the President.

On other courts, I would ask you to add the Industrial courts to deal with matters to deal with matters pertaining to workers. Thank you.

**Hon. Delegate Danson B. Mungatana:** Thank you. On political parties, now we are moving to this section.

**Hon. Delegate:** Point of order.

**Hon. Delegate Danson B. Mungatana:** Yes. Thank you. I get your point of order. 613, I realize you haven't spoken.

**Hon. Delegate Mike Oliewo:** Thank you. Can I now speak, Sir?

**Hon. Delegate Danson B. Mungatana:** No, just hold on and you are from a political party.

**Hon. Delegate Mike Oliewo:** Yes.

**Hon. Delegate Danson B. Mungatana:** What I would say in this stage, because of the shortness of the presentation, we gave four chances. I want to move to this section where we will have a political party also which has not spoken and I will make sure I see you when I come round.

**Hon. Delegate Mike Oliewo:** Mr. Chairman, without fear of contradiction and with all due respect, you called out for a representative from Political Parties from this row, one other Honourable Delegate stood up on the pretext that he was coming from Political Parties. Eventually when he introduced himself, it emerged that he comes from another category. You tolerated that and entertained that as if you are part of the conspiracy to deny Political Parties from this row their due consideration. It is like a jinx, every time you call out, when you reach here you don't pick on us.

**Hon. Delegate Danson B. Mungatana:** I think 613 I would ask you to sit down because I have just said that I am going to recognize a political party representative who has not spoken from this side. Please respect the Chair.

**Hon. Delegate Mike Oliewo:** You have set a dangerous precedent, Sir.

**Hon. Delegate Danson B. Mungatana:** I am sorry but I have made my ruling. 581, Political Parties.

**Hon. Delegate Yusuf Mahmoud Aboubakar:** Thank you Mr. Chairman. My name is Yusuf Mahmoud Aboubakar, representing Shirikisho Party of Kenya. Mr. Chairman, I welcome the establishment of the Supreme Court because the reasons that have been advanced by the Commission as well as the Honourable Delegates who have been contributing on the merits of the Supreme Court are justified. We are having a new document- it is a new Constitution which is establishing the national Government as well as the Regional or District Government. Constitutional interpretation issues will arise and I think it is justified if we have the Supreme Court to interpret Constitutional matters that will deal with the jurisdiction and the powers of these various governments.

Secondly, Mr. Chairman, I would like to contribute on the issue of the Kadhi's Courts and I would like to urge my fellow Delegates – we are making a new Constitution, and what is a Constitution? A Constitution is an agreement between the people in a given polity on how they are going to govern and manage their political, economic and social affairs. That document has to be inclusive, it has to be sensitive to the sensitivities of the minority and we as Muslims are saying – especially when I refer to Article 44 which gives a blanket right of freedom of religion. If that Article is to remain the way it is, then a Muslim has every right to tell any Kenyan and even in the issues of Constitutional interpretation that he has been guaranteed full independence as a Muslim, I can have my own judicial system within this particular provision, I can have my own social system within this particular section and I can have my own economic polity as a Muslim because as we know Islam is a way of life. It is all encompassing but the provisions of the Kadhi's Courts are limiting the broader rights given under Article 44. They are telling the Muslims that although you have been guaranteed the right of religion, it is on certain issues that deal with personal law, inheritance and issues that deal with Muslim works.

So, the Kadhi's Courts are a limiting factor as far as the rights of Muslims are concerned. What is Muslim personal law, Mr. Chairman? People are equating the definition of Muslim personal law with the similarities in definition with other personal laws? The Muslim personal law encompasses three things: The court itself – that is the Kadhi's Court; the law that is to be applied – that is the Islamic Law as far as the personal law is concerned - and the presiding officer. In the absence of any one component then you have guaranteed personal law to the Muslim. If you tell the Muslim we are going to give you the law – the substantive law is going

to be applied – but the preceding officer is going to be non-Muslim, you have not guaranteed the right of personal law to the Muslim. The definition of personal law to the Muslim encompasses three things; the law itself, the court and the presiding officer.

Mr. Chairman, I want to give an example of the United States Constitution. There is an establishment clause in the Constitution that guarantees the right of religion, including Islam, but the contradiction is that the Muslims cannot practice their religion in the United States in very many aspects because there is a practice clause somewhere – an Act of Parliament - that says that it does not allow a Muslim to marry more than one wife. A Muslim in the United States may ask himself or herself, if I have been guaranteed freedom of religion and I am not guaranteed the right to marry a second wife according to the Islamic law, where is that freedom of religion? You know, Kenya has gone a step further than the United States, we have guaranteed freedom of religion and we are also guaranteeing the practice of that religion within that aspect.

Mr. Chairman, to finalize, I want to tell the Delegates that Islam has a political ideology, an economic policy, a legal framework and a social system but the political ideology for those who are lawyers is right in (inaudible) as well as the economic policy. These are rights that are exercised by the State on behalf of the Muslims.

**Hon. Delegate Danson B. Mungatana:** Please wind up.

**Hon. Delegate Yusuf Mahmoud Aboubakar:** So the Muslims are saying that these rights can be guaranteed in the manner in which the Constitution (inaudible) but as far as personal law is concerned it is a right in personable. It has to be given a Constitutional guarantee and Constitutional protection. So we are urging fellow Delegates that it is not a football match where religions are winning the game. It is an issue of protection of these rights. Thank you Mr. Chairman.

*(Honourable Delegates Clapping)*

**Hon. Delegate Danson B. Mungatana :** Thank you. I would like to recognize ‘Special Interest Group’, 620.

**Hon. Delegate R.S.C. Omolo:** Thank you, Mr. Chairman. My names are Riaka Omolo, I represent 'special interest' - the Judiciary. I have not spoken since the Conference opened and as my colleague said in the morning that has been deliberate. We have not wanted to talk about things like the office of Prime Minister, the office of the President because the Judiciary as an institution has no stand on those things. Having said that, I want to make two points before I go to minor details in the Proposed Draft. First, I want to make it absolutely clear to all the Delegates here, that the Judiciary is part of their governance system and as such, they are entitled to discuss it and to pass whatever motions they want upon it, of course subject to the law.

Having said that, I also want to tell the Delegates that in discussing the Judiciary, you should not try to do any injustice to those who are there. I have served in the Judiciary the whole of my life as a working person. I started as a District Magistrate, way back in 1975. Worked as a Magistrate for some ten years, then moved to the High Court in 1985, served there for just under ten years and then moved to the Court of Appeal in 1993 and I am still serving there to date.

I say these things because then this gives you ... at least, I believe it establishes my credibility when I speak on certain issues in the Judiciary. I agree, as my colleague said in the morning that there is corruption in the Judiciary, but I do not agree that because there is corruption in the Judiciary, all the Judicial Officers who are there are corrupt and therefore must go as the Law Society and some delegates have suggested.

To my fellow Christians, there was a time I think when God wanted to destroy a city, Sodom and Gomora and he was arguing with somebody, 'if I find 10 upright men, will you destroy the city? If I find one upright man will you destroy it.?' If the Judiciary is corrupt, do you say that each and every person in the Judiciary is corrupt? And if that is so will you pass collective punishment like the colonial governments did? That if a cow was stolen, as a Masai stole a cow and drove it into a particular area, all the people in that area would be punished for the theft of that cow? We have human rights organizations here, if I am to be punished as a human being, whether as a judge or whatever, do I not have my human right to be told, 'sitting as a judge on this case, you took two million shillings from so and so and therefore you are being punished.' Or must you punish me because, we cannot say who amongst is corrupt, all of us must be corrupt and all of you therefore must be punished. I think, I have made those points.

Now, I go to the technical aspect – I hope, Mr. Chair, if I do not sit down quickly you will not shout at me. But we agreed, I think at the Judiciary, we need certain changes. The Commission proposes the establishment of a Supreme Court, the official stand of the Judiciary on that, of course, I have seen from – we are not fools – we have seen from the attitudes of the Delegates here, that they support that proposition. The official stand of the Judiciary, of course was that, instead of creating new institutions, we improve those which are there. This is because if you create a Supreme Court and you do not provide it with facilities to enable it to work, it will not do better than those courts, which are there. If you do not give them law reports to read, if the advocates do not come prepared to court with ..... I think the Draft Constitution calls them innovative, intellectual and whatever arguments, if they do not come to court prepared for that kind of argument, whether they go to a Supreme Court or whether they go to a Magistrate's Court it will make no difference. But we have seen that the support is for a Supreme Court.

Now, my colleague said in the morning and I would not repeat what he said. We do not think that basing it on our experience, we do not think that it will ....., if it has six judges plus the Chief Justice, it will not do any work reasonably. It must sit five judges, a minimum of five judges to make sense and if they are six, they are sitting like magistrates everyday. They will have no time for research, because writing judgments and all these is a question of research, they must be included. The position of the Judiciary is that, if it is established including the Chief Justice, they must be nine. In that case, if all of them are not sitting on a particular case, five of them will sit and four of them will rest today and look for authorities on what they have decided, what they are to decide and decide so that they also have time to go on leave, time to fall sick, if they want to be sick and so on.

On the qualifications for appointments, I just want to make one slight correction and it is technical. In, I think 195, 187, I think Supreme Court, if the judges of the Supreme Court will qualify if you are a judge, either you are a Chief Justice or you a judge who has served in the High Court or in the Court of Appeal for 15 years, I think that would be.... It is a technical point – it would be unfair to, for example judges in the Court of Appeal. If you serve in the High court for 15 years, then you move to the Court of Appeal and before you serve another 15 years, a vacancy arises in the Supreme Court, the Judge in the Court of Appeal would be barred from

being appointed because he has not served in the Court of Appeal for 15 years. So, I would propose that instead of 15 years, that figure be brought down to 10 years service in the Court of Appeal.

The Judicial Service Commission: I have looked at the list, I am currently a member of the Judicial Service Commission. There must be reform to it, to enlarge it. What the judiciary proposed was that the Commission itself be given power to co-opt those whom it may want to bring in. But the number which is set down here is so large that I do not know that they will be able to function. There is of course the question of whether the Chief Justice should be a member or not. The Draft Constitution removes him totally. I agree with what my brother said in the morning, it is wrong to keep the Chief Justice out of the Judicial Service Commission. When judges are appointed, he has to be there. Mr. Chairman, let me move to the Kadhi's Court then.

On the Kadhi's Court : we say this, they are there. That is the official position of the Judiciary. They are there, they have been there but these other things being added like the Appellate System and all that can be dealt with in a separate Act. Like the Kadhi's Court Act which we have at the moment, which deals with the powers of the Kadhis'. That Act is still there, it can be amended. There is no need to entrench these provisions in the Constitution, if the Kadhi's Courts *Clapping* ..are thought subordinate to the High Court.

Mr. Chairman let me move on to the Kadhi's Court. On these courts we say this, they are there, that is the official position of the Judiciary. They are there, they have been there, but this other things being added like the appellate system and all that, can be dealt with in a separate Act. Like the Kadhi's Courts Act which we have at the moment and which deals will the powers of the Kadhi's. That Act is still there, it can be amended, there is no need to entrench these provisions in the Constitution if the Kadhi's Courts are courts subordinate to the High Court. Thank you very much Mr. Chairman.

**Hon. Delegate Danson B. Mungatana:** Yes, thank you judge. Fellow Delegates I have to explain why I gave him extra time; the Steering Committee had asked the Chair, because there are only two judges here, that they be given more time, so that's why we gave them ten minutes.

So I will pick one more from that section and I want to recognize a Member of Parliament who has not spoken, 185.

**Hon. Delegate Abdi Tari Sasura:** Mr. Chairman, my names are Abdi Tari Sasura, Delegate number 185, Member of Parliament for Saku. Mr. Chairman, I want to begin by making a slight correction to one of the speakers who was referring us to a bulletin called Katiba News. Mr. Chairman I have got only five minutes unlike the judge who spoke. And if you want to say that I have spoken, I have not spoken.

*(Interjection)*

**Hon. Delegate Danson B. Mungatana:** Mheshimiwa sorry, lets hear the Point of Order.

**Hon. Delegate Abdi Tari Sasura:** Mr. Chairman?

**Hon. Delegate Danson B. Mungatana:** Yes.

**Hon. Delegate Abdi Tari Sasura:** Mr. Chairman, with all due fairness and all due respect to the Chair and the rules of this Conference ---

*(Interjection)*

**Hon. Delegate Danson B. Mungatana:** Mheshimiwa just go on, just go on.

**Hon. Delegate Abdi Tari Sasura:** Thank you Mr. Chairman. Mr. Chairman I referring to this Katiba News and I wanted to tell the Honourable Delegate who was referring us to the statistics in this Katiba News, that this very explicitly says, from the Editors, "that views expressed in this newsletter do not necessarily reflect those of the Constitution of Kenya Review Commission". So the statistics we were given were not on the basis of any authority from the Constitution of Kenya Review Commission.

Coming back Mr. Chairman to my contribution, first and foremost Mr. Chairman I would like to add my voice to those who expressed satisfaction with the powers of the Attorney General. There is something that I don't know how to pronounce it but I will try, its to be called *nolle*

*prosequi*. This is a situation where the State withdraws a case against somebody through the Attorney General. These are powers that have been misused previously, and if the State wants to do anything after the person meeting some conditions, the AG just moves to court and enters this *nolle prosequi* and then the person is released regardless of the crime that he has committed. That's a very welcome gesture from the CKRC.

Mr. Chairman, on the issue of judges, it is very clear that the very defensive positions from our judges, insofar as their stay in office is concerned - over the years, why Kenyans are advocates for the review of the Constitution, is to improve their lives and to remedy situations that have been misused or that were bad in the previous Government. The previous Government's removal from power is a testimony to this misuse of the Judiciary to govern in a miserable way. The Judiciary has earned itself, through this and other means, a very bad reputation. And what we are saying is, after the enactment of this new Constitution, we are not saying that all the judges should be sacked. We know all the judges are not corrupt, but if judges themselves have acceded that "yes there is corruption in the Judiciary", what we are saying is, after this Constitution is complete, you step aside, we shall filter you, the good ones remain, the bad ones go home", why are you refusing that? (*Clapping*)

Mr. Chairman, coming to the contribution of the Chapter on the Judiciary, I would like to refer Delegates to page one of the whole Draft and the first paragraph and the Preamble that says, "we the people of Kenya, aware of our ethnic, cultural, and religious diversity and determined to live in peace and unity as one indivisible sovereign Nation". And down there it says, "do adopt, enact and give to ourselves and to our future generations this Constitution. God bless Kenya". I want to refer you to that and read this Chapter in the light of that verse.

Mr. Chairman I would like this Conference to know that in any given situation, if we are going to capitalize on our similarities, we will always succeed. If we are going to capitalize on our differences, we will always fail. I am sure the Muslims and Christians of this country, may be don't realize how similar they are, they are very close, they have lived in peace since independence and even before. They have continued living in peace to-date and I think they should know the similarity and commonality they have in this country. Mr. Chairman, I'm saying that they have a lot of commonality because in the fight for the second liberation, the

most commonly mentioned name insofar as Constitution making is concerned, is the Ufungamano and the Parliamentary Committee. The Ufungamano was basically or mostly the religious groups and they fought together to give us this second liberation. That's one very big commonality that these religious groups have in this country.

I know there are Observers in this Conference and it's very sad that some Observers have converted themselves into lobby groups; I thought Observers are supposed just to observe. And let the Kenyans not be divided by anybody who is outside this Conference, especially non-Kenyans. Mr. Chairman, I want Kenyans at this Conference to know, I saw a bulletin being circulated here and it asked a very ridiculous question. It asked, "How many times is Islam mentioned?" *(Interjection) by Chairman* Mr. Chairman I didn't even begin, *(laughter)*.

Mr. Chairman, just to come to my point, I would like to say that the issue of the Kadhi that is being debated here, has been in the Constitution, is in the Quran, and is even there in the Bible. And I want to refer-- Christians with all kindness, I want you to look at the book of Mathew Chapter 5 verse 25-26, I want you to look at the book of Ezra Chapter 7 verse 25, its talking about the Kadhi; and I want you to read it, or I can read for you? Can I read for you?

**Hon. Delegates:** Yes

**Hon. Delegate Abdi Tari Sasura:** Mr. Chairman they have allowed me to read only one verse. I would like to read to you kitabu cha Matayo,  
*(Interjection)*

**Hon. Delegate Danson B. Mungatana:** Mheshimiwa please wind up.

**Hon. Delegate Abdi Tari Sasura:** I'm just winding up.

**Hon. Delegate Danson B. Mungatana:** Order! Order!

**Hon. Delegate Abdi Tari Sasura:** If you have the Bible you can just look at it. Kitabu cha Mathayo, Chapter 5: 25 kinasema, "patana na mshitaki wako upesi wakati wako pamoja naye

njiani, yule mshitaki asiye akakupeleka kwa Kadhi na Kadhi atakupeleka kwa askari”. *(laughter)*  
Mr. Chairman, Christians and Muslims are brothers in this country, and they should stay as brothers. And lastly Mr. Chairman, I would like to say that:

*(Interjection): the bell rings (more laughter and noises)*

Mr. Chairman, my last point, Mr. Chairman is: that there are views that have been expressed here that, “let the Kadhi’s Courts remain as they were since 1963”. I just want to say this, “that the purpose of this Constitution, is to uplift the standards of living of Kenyans”.

**Hon. Delegate Danson B. Mungatana:** Mheshimiwa, please sit down,

**Hon. Delegate Abdi Tari Sasura:** You cannot say, “let us uplift the standards of living of women, of the disabled, of children” and then you tell the Muslims, “mkae hivyo hivyo”. This went when KANU went out of power. Let us agree and live together in harmony, we are just asking for personal law as pertains two parties who are not Muslims and its not going to affect any other religion. Thank you Mr. Chairman. *(Clapping)*

**Hon. Delegate Danson B. Mungatana:** Thank you. Now, fellow Delegates, I only allowed Mheshimiwa Sasura because of his wonderful hairstyle *(laughter)* otherwise, no more! Now, we will go back to this side, somebody with a Point of Order? Yes, I want to recognize that Point of Order, 295.

**Hon. Delegate Saipstone Ngalaatu Musau:** Thank you Mr. Chairman. My names are Saipstone Ngalaatu Musau, Delegate number 295, Chairman Machakos County Council. Mr. Chairman, the Honourable Delegate tried to confuse us with language, Kadhi in Kiswahili, in English is judge. So, when he is referring to the Bible, he is not referring to a Kadhi Court, he is referring to a judge. Thank you. *(laughter)*

**Hon. Delegate Danson B. Mungatana:** That was a point of information, not a Point of Order. Now, we go back to this other side, I would like to recognize our fellow youth 243.

**Hon. Delegate Aboud Sheik Abdalla:** Thank you Mr. Chairman, at least now you have considered me. My name is Mr. Sheik A. Aboud, Delegate number 243. I would like to take you to Article 200(1b), about commercial disputes. I want to make clarification on commercial. Commercial we say are contracts by their nature, personal documents as they only relate to the parties who entered into contract. In this regard, a commercial contract is as personal as a marriage contract as it involves an agreement which two parties consented to. A contract only affects the parties thereto and not anyone else. Accordingly, it should be up to the said parties to decide how they wish any differences arising out of the contract to be handled. It is in line with this that Muslims decided that they wish to have the option to have disputes arising out of contracts entered into with fellow Muslims settled by Kadhis' courts where the processes is quicker and cheaper.

Then I will take you to Article 200(1a) whereby I support us to have Kadhis' courts. I also want to make an addition that apart from this one, we demand more. I said that, Kadhi's are not amongst those gazetted as Magistrates to hear cases under the Children's Act. So an ----- (inaudible) provision should be made in this Article 200(1a,b) to empower the Kadhis' courts to hear cases concerning the welfare, custody, access, adoption and guardianship of Muslim children.

Also, I would like to take you--- we have to honour this document of the Kenya coastal strip. This one is the agreement, which was made by two Honourable Ministers. As we said that, I would like to take you to the last ----- (inaudible) whereby number 3, 4, and 5---. We all miss these ones: the administrative officers in prominently Muslim areas, we have missed it; in the view of the importance of teaching Arabic in Muslim's schools, we have missed it; the free hold title deeds, we have missed it; and we are not going to agree to miss these Kadhis' courts, we are going to soldier on. (*noises*)

**Hon. Delegate Danson B. Mungatana:** Sorry, excuse me,

**Hon. Delegate Aboud Sheik Abdalla:** Mr. Chairman let me finish, let me finish please, this is the last minute.

**Hon. Delegate Danson B. Mungatana:** Excuse me,

**Hon. Delegate Aboud Sheik Abdalla:** In Article 201, *(noises)*  
*(Interjection)*

**Hon. Delegate Danson B. Mungatana:** *(more noises)* Just hold on, fellow delegates, *(more noises)* just hold on, hold on, okay, I am saying, sorry, just hold on, sorry madam, just hold on, hold on. *(More noises)* Can you sit down 594? 594 can you sit down? Now, fellow Delegates, I want to say something here before the speaker continues. I want to discourage this aggressive kind of presentation; please let's just talk nicely, we are not fighting here, we are trying to reach an agreement so that we have a Constitution. So I am asking the present speaker to just please speak like a gentleman.

**Hon. Delegate Aboud Sheik Abdalla:** Thank you Mr. Chairman, thank you. In Article 201 and Article 202, these ones also show that, the appointments of Kadhis' and qualifications for Kadhis', these ones show that this is not a religious issue, it's a Judiciary issue-whereby the Kadhi is appointed by the Judicial Service Commission. In Article 202 also, the qualification that Chief Kadhis' are not going to be Imams or Sheikhs or Muslims, this is a high qualification. Thank you Mr. Chairman.

**Hon. Delegate Danson B. Mungatana:** Thank you. I would like to now take one Point of Order and I am going to take number 99. *(laughter and noises)*

**Hon. Delegate Boniface Mganga:** Mr. Chairman, right from the beginning when we came here in the morning, we agreed we would like to discuss this particular Chapter just like any other, soberly, as Kenyans. We have tried as much as we can to make sure that we accommodate each other. However, right from early in morning, there have been used words like "tolerate one another". Christians are not being intolerant, no! What we are saying is understanding, we should make contributions to get understanding. *(clapping)* If people have not understood the sanctity of having Kadhis' courts in the Constitution, they just need to be enlightened if there is course for it. Is it in order Mr. Chairman, for the speaker who has just spoken here to threaten the Delegates?

**Hon. Delegate Danson B. Mungatana:** Thank you--

*(Interjection)*

**Hon. Delegate Boniface Mganga:** Mr. Chairman, and you allowed him to continue to speak, and we have a regulation that anybody contributing in the Conference, he must do so in dignity and civility. You must stop such speeches in the Conference!

**Hon. Delegate Danson B. Mungatana:** Thank you, Mr. Delegate number--

**Hon. Delegate Boniface Mganga:** And the young man should be told to withdraw those words. *(Laughter)* now, and apologize. We are trying to create understanding for our brothers-Muslims and Christians, and you want to create trouble. *(noises)*

**Hon. Delegate Danson B. Mungatana:** Sorry, the previous speaker and Mr. 99, Mheshimiwa, what were those particular words because I missed them I'm sorry? *(more noises)*

**Hon. Delegate Boniface Mganga:** Mr. Chairman, if you listened very carefully, the speaker made reference to a number of items starting with the coastal strip. We do know the history of Kadhis' courts; it was actually an agreement between the Sultan of Zanzibar at the time and the late Jomo Kenyatta as Prime Minister. We have decided to take over those gentlemen's agreement, and since our brothers and sisters feel so strongly that we have failed, let's create some understanding. If the personal law of the Muslims can only be guaranteed and ensured by placement in the Constitution, let us understand it. Why does a speaker go angrily and say, "we cannot lose it to anyone and we shall soldier on" Soldier on is the word.

*(Interjection)*

**Hon. Delegate Danson B. Mungatana:** Sorry, I think Mheshimiwa with the due respect yule ni kijana. *(Laughter from the Honourable Delegates).* Na sorry, nitasema namna hii, I will ask him to just withdraw those particular words.

**Hon. Delegate Aboud Sheik Abdalla:** Thank you, thank you, thank you, as Mr. Chairman says I am young, I am sorry for that so I am seeking for apology for using the word soldier on, we need to carry on.

*(Clapping from Honourable Delegates).*

**Hon. Delegate Danson B. Mungatana:** Thank you, fellow Delegates thank you. Thank you for your understanding. Thank you. *(A lot of noise from Honourable Delegates).*

**Hon. Delegate:** Order.

**Hon. Delegate Danson B. Mungatana:** I will take one more point of order. Order, fellow Delegates, lets have some order. I want to take one more, I want to take 132.

**Hon. Delegate:** I am waiting.

**Hon. Delegate Mwangi Onesmus Kihara:** Thank you, Mr. Chairman. I appreciate that the Honourable Delegates have withdrawn those threatening to us. Similarly Mr. Chairman, I think I would demand of humility that the Chairman also withdraws the connotation the Delegate is a young man. We are all Honourable Delegates, there is no young or old and let it be understood Mr. Chairman that we would not stand to be threatened. If it means anything, we are there to defend. Can Mr. Chairman withdraw?

**Hon. Delegate Danson B. Mungatana:** Fellow Delegates, ladies and gentlemen the man who has just spoke is a Member of Parliament, he is also a Bishop, we call him the Bishop of the Archdiocese of Parliament. So if he has requested me to withdraw, Mheshimiwa I withdraw with humility. *(Clapping from Honourable Delegates).* And I would request that we proceed on.

**Hon. Delegate Orié Rogo Manduli:** May I have my point of order, Chairman please? *Hii ni ubaguzi*, why do you ignore a woman *kama ni wanaume mnawapatia* I give me my point of order, yes. *(A lot of noise from the Honourable Delegates).* *Nipatie nafasi please.*

**Hon. Delegate Danson B. Mungatana:** Okay, just hold on.

**Hon. Delegate Orie Rogo Manduli:** Thank you.

**Hon. Delegate Danson B. Mungatana:** Can we make it very brief because we want to hear the others?

**Hon. Delegate Orie Rogo Manduli:** Why be brief? Because its a woman point of order? *(Laughter from Honourable Delegates)*. Thank you Chairman.

**Hon. Delegate Danson B. Mungatana:** Yes.

**Hon. Delegate Orie Rogo Manduli:** I want to talk now, not just as a Delegate, but I am giving a point of order as a Mama and a mother. We are here peacefully, we are here mothers, Christian mothers and Muslim mothers, we are sisters. We are here peacefully to resolve this matter. We are going to give and take, we are going to give and take in a very peaceful manner.

I don't want any Delegate to come out of here beating their chest thinking that Kadhis' Court if it is allowed at the end of the debate, was allowed because of the inflammatory speech they make. It will be because of peace, it will be because of brotherhood and sisterhood, it will be because of give and take. And that is how it is going to be, nobody's religion, nobody's law, nobody's personal laws are more superior to the other. We are just going to do it in a spirit of give and take. And I want from now on..that is a point of order, that whatever we are debating, we do it with dignity and in peace, no threats, no threats from any quarters. Thank you very much.

**Hon. Delegate Danson B. Mungatana:** Thank you very much. Fellow Delegates now I request that we proceed with the District Delegates, and I want to recognize from this side somebody who has never spoken, 224. Order please, 224 has never spoken.

**Hon. Delegate Lung'ahi Nancy Kabeteka:** Thank you very much Mr. Chairman. My name is Nancy Lung'ahi Delegate number 224 from Nairobi. First of all I would like to just seek clarification on a certain issue, while people are still talking on the same issue may be I will start

with that. Honourable Delegate did talk this morning and he raised the issue of Kadhis' Court, if entrenched in the Constitution the way it is in the Draft Bill it's going to be parallel judicial system.

Now because of the source of that information, some of us Delegates would like the issue clarified so that we can understand whether this is indeed the case, that the entrenchment of the Kadhis' Court within the Constitution will mean that we have a parallel judicial system. And with all due respect to the person who actually did say this, some of us don't know whether to question it or not, but we would like to speak clarifications because we think that the source is a good source.

The other issue I would like to say is that, I don't know how to put this but from the background that all Kenyans come from, is there a single public institution that we can say is free from corruption? I think all of them are corrupt, and for us to say that one morning we will wake up and sack all the Judges, I think it will leave a gap. There is already a provision for a Judicial Service Commission which should be independent and that some of these can go through the processes the necessary stages so that if they indeed are found to be corrupt then they will be dealt with accordingly. But I don't think if we say that the whole lot should be gotten rid of, then I think so many other offices would have people being sacked.

And then I would also like to support Article 185 (3) (c) on the hierarchy of courts that any traditional or local tribunals with limited jurisdiction in issues of local significance that may be established by an Act of Parliament. I would like to say that since this local tribunals deal with a very large majority of the people in the rural areas. I think it should not just be established by an Act of Parliament, if these are small claims court that should be recognized because most of the cases that we hear that are not dealt with properly, we only hear the outcome in the news, and I don't think we would like a situation whereby we do not have proper these traditional tribunals not having proper jurisdiction and especially within the Constitution.

And then I would also like to say that on the need for a two ten on the defender, the public defender should be available and accessible to those people who cannot afford the legal fees. I

think they should be placed everywhere where wananchi can be able to access the services of public defenders.

And then also on Article 190, 1 (a) I think I would like to suggest that instead of using the President, we use something like Chief Appellate or may be any other term but not a President. And.....

**Hon. Delegate Danson B. Mungatana:** Thank you.

**Hon. Delegate Lung'ahi Nancy Kabeteka:** Yeah, and as far as LSK is concerned on Article 212 the legal profession and the profession of law has been put there and we are not told who will deal..on Article 212, 1 (c) the conduct one of the requirement is that they will conduct the practice of law with integrity and to be ruthlessly honest in all dealings with clients and other legal practioneers, the court and any other public office or officer. But which body deals with the corrupt advocates? Because we were also told in the morning behind every corrupt judge there is also a corrupt advocate. So I think we should also look at those two and find out which body would deal with the corrupt advocate. Thank you.

**Hon. Delegate Danson B. Mungatana:** Thank you. I would like to recognize special interest groups there 627. There is a point of order 380 let me take it.

**Hon. Delegate Charles Lwanga Lwole:** Chairperson my names Charles Lwanga..

**(Interjection) (Hon. Delegate Danson B. Mungatana):** Chairman.

**Hon. Delegate Charles Lwanga Lwole:** Okay, number 380. I want to say having gone round up to the other end the debate is beginning to repetitive, can you adjourn it we go elsewhere.

*(Noise from Honourable Delegates).*

**Hon. Delegate Danson B. Mungatana:** No, no, no fellow Delegates that is his point, lets hear him. I don't agree so, we proceed, 627.

**Speaker:** Thank you Mr. Chairman.

**Hon. Delegate Danson B. Mungatana:** Madam may I hear him first then I will take your point of order specially.

**Hon. Delegate Dan Irungu:** Thank you Mr. Chair my name is Dan Irungu 627. I will try not to repeat what others have said. Now first to load the drafters for recognizing the special role of civil society in this chapter. And I am thinking we might want to bring on board special interest specifically refereeing to persons with disabilities or such categories in the judicial service commission.

Secondly on article 212, I think there is more less lets say some consensus that we need to expunge this and take to the appropriate Act of Parliament. Section 194 on the senior most judge being the Chief Justice, President of the court and principle judge, I would want to imagine a class where the oldest student always becomes number one, you know and others will not be waiting to be the oldest student at some point in time. So I think we should encourage competition to motivate judges also to be more open.

On qualification of judges, now I am very passionate about this, I think we should include one of the qualification should be a citizen of Kenya, its fairly open now. And I think in Kenya we can manage our own affairs, I come from that school of, though that now we have enough capacity to manage our own affairs, so let there be citizen of Kenya.

Secondly on experience of judges to be promoted, is it possible that experience in the hierarchy of magistracy counts so that it adds to the accumulative number of years that are required. On the Kadhis' Court I think it is more less the consensus, I would however appeal that we look at making it more lean, the principal is good, you know I support it totally. I am imagining that we can work on things like horizontal and vertical relationship so that we have a leaner like it is now in the current Constitution. Justice Kwach in the morning told us that it has been working very well for 40 years so lets see whether that also works.

Concerning costs, I think it is not an issue, Muslims pay tax like anybody else, so that should not even be a debate at this point. (*Clapping from Honourable Delegates*). When I go to the Attorney General for instance I want to wed and I request the good Attorney General to help me wed, the issue of cost does not arise and as a Christian I can walk in there anytime with my sweet heart to be wedded.

The other issue Mr. Chairman, one of the issue on the current court, I think is more less agreed and I think I was consulting with some few brothers of mine from the Muslim community, we might want to take the civil and commercial disputes to a different jurisdiction. Thank you very much.

(*Clapping from Honourable Delegates*).

**Hon. Delegate Danson B. Mungatana:** In fairness to Madam there, I will take your point of order, 396 then we shall move to the next.

**Hon. Delegate Happy Gloria Wabwire:** Mr. Chairman I am called Happy Gloria Wabwire from Busia, district delegate number 396, and I want to inquire from you and I want to do it with a lot of humility, I would like to know if this seating arrangement from where I am to number 504, if this is the marginalized area, because if it is so, we would like to withdraw from this area, we go to a better seating position where we can catch the eye of the Chair of the day. With due respect I heard what the Chairman of the Conference said in the morning, that we are not only supposed to speak, we are supposed also to listen to others. But I am at a loss if I can listen from Chapter one to Chapter nine, not being given a chance at all, despite trying so hard to catch the eye of the Chair, unless the Chair is having a stiff neck, he is having problems seeing this corner.

**Hon. Delegate Danson B. Mungatana:** Thank you Madam, in fact as a matter of fact I noticed 504, and 396, and from the list you had not spoken, but unfortunately in this area we had already taken one lady and three who had spoken had not spoken at all. But I promise you if I would be the Chair tomorrow I will see you thank you. I want to go to the next row, and I want to recognize district delegate 341 who has never spoken also.

**Hon. Delegate Ernest Kaitany:** Thank you very much Mr. Chairman, my name is Ernest Kaitany, Delegate number 341. Mr. Chairman thank you for this opportunity, like the others who have just said right from the beginning they have been rising hands the way we came to this meeting, but I do not want to complain, I want to go straight to the point that I wanted to put. Mr. Chairman as from the others, I have no problem as far as all the other courts are concerned, from Supreme to the Magistrates Courts. But as you know, before independence we used to have what we call the elders courts, that is the tribunals. It is so important that this one is enshrined in the Constitution because it is actually deals exactly with mwananchi, those people who are unable to go to the courts, where by they are very far. The village elders know very well what happens down there. And as such if those ones are enshrined as I just said, will help them a lot instead of going to those higher places.

Secondly Mr. Chairman, because of the poor state of the people in the country, some people have suffered because there unable to hire a lawyer and as such in the Constitution, we have already put in the public defender, but we must actually come up and show exactly how that defender comes in, at what stage. Because it is so important that we get them assisted instead of people just going to court and then they end up there. And as far as that is concerned again, you know the courts charge a lot of court fee, and this court fee are so exorbitant that the people who actually go there and pay for the fines or the fees, we should look into how that one can be controlled. As far as the retirement age for a judge, I am not a judge I would like that one to put in as the people said, that the judge should actually retire at the age of 70, and let him retire voluntarily at the age of 65, that one will come out very clearly.

I have nothing against the Kadhi's court, because if this one for the village elders are established they will also assist because we have got already the Kadhi's court and as such we much follow the way it has been before, instead of having a lot of other things. The disabled persons have been having a problem in getting access into the courts, and that one Mr. Chairman when it comes to that, let it again be looked into. Mr. Chairman as far as other things are concerned, with this I would like to say thank you very much Mr. Chairman.

**Hon. Delegate Danson B. Mungatana:** Thank you district delegate, I would like to recognize religious organization. 524, Madam has never spoken.

**Hon. Delegate Neera Kent Kapila:** Thank you Mr. Chairman my name is Neera Kent Kapila and my number is 524. Now the Kadhi's Court was established and enshrined in our Constitution by our founding father, an extremely shrewd and sharp statesman and I think we all recognize that. And in his wisdom he instituted all aspects of personal law and to himself he recognized the special needs of the Islamic group. He also recognized the need to enshrine minorities in the Constitution because their rights can be manipulated by the majority. We seem to have a lot of anxiety about the running of two parallel systems. I am suggesting that the Kadhi's Courts be improved and the quality in all respects of the kind of personnel or Kadhis' who run it, that these be university graduates, very competent, they operate under the CJ's office and they record everything and we all know what they are doing. The Judicial system keeps an eye on them. But I am suggesting that at provincial level, they merge with the regular court system, that the CJ incorporates at the provincial level right through the hierarchy to the top. Individuals who are competent in Islam Law and requirement here to the Muslim seem to be that this individual must be a Muslim and we are insisting on law graduates and they are also insisting on somebody who is conversant with Islamic law.

Now if these individuals, and we have a lot of Muslims practicing all over the country and if by design the CJ would ensure that these individuals were there in the provincial courts and when required they will handle the Islamic cases and when they were not doing that, they were looking into other cases or other appeals and so forth. Thank you Mr. Chairman.

**Hon. Delegate Danson B. Mungatana:** Thank you, I would like to recognize in that same area, 522.

**Hon. Delegate David Gitari:** Mr. Chairman my name is David Gitari, from religious organizations. I just want to state that the most fundamental thing about this Constitution is that it must not be contradictory. On the issue that we are discussing, it seems to be very contradictory, because Article 10 says that "state and religion shall be separate, there shall be no state religion, the state shall treat all religions equally". And therefore when we come to the Chapter we are discussing now and I think the rest of the Constitution the word Muslim, Islam or Kadhi, appear in the Draft over 60 times. The word Hindu appears once. The word Christian,

Buddhist, Jews, Sikh and all other religious communities in Kenya appear zero times. Though we say clearly that we shall treat all religions equally, I think we, as Christians would feel that we are not been treated equally. For instance, we also have an Act which is called Christian Marriage and Divorce Act, and that is not in the Constitution of 1963, it was an Act of Parliament. If we are going to be treated equally why not have Kadhi's Court dealt with by Parliament in an Act and then there will be equality.

If you look at the Chapter, which we are now discussion, Chapter nine, I just wanted to refer to Judicial Service Commission, 204 it says "to ensure and enhance the independence and Judicial accountability of the Judiciary and efficient effective administration on justice and so on, then we shall appoint a full time person who is qualified to be appointed a judge of the Supreme Courts appointed by the President of the republic and approved by the National Council". That is number one.

Number two, or (b) a Muslim woman; there is no mention of a Christian or other religions. So I am very much in support of affirmative action, this in my taking is a bit too far, because once it becomes discriminatory then it is not fair. And so my strong recommendation, because we live in harmony and we have lived in harmony for these last forty years, the creation of Ufungamano has promoted our understanding, I think we should be willing for the sake of removing this contradiction in the Constitution, let all religions be treated equally and let the question of Kadhi's Court be debated by Parliament and leave the Constitution with a principle as already established on Article 10, that all religions will be equal. Thank you Mr. Chairman.

**Hon. Delegate Danson B. Mungatana:** Thank you. I wish all of us were so brief. And because they were brief there, I would recognize one more there ... (*Noise from the Honorable Delegates*). I want to encourage brevity so, I want to pick one lady Delegate who has not spoken, 384, and I hope you will also be very brief.

**Hon. Delegate Rebecca Evelia Jandeka:** Thank you Mr. Chairman Sir. My names are Rebecca Evelia, Delegate number 384, Vihiga District. I am referring to Article 184. This Article, my reference is this, Courts, the court cases should be solved within a minimum time possible, and the suspect should be produced in court in minimum time. This I mean, there is corruption in this

nation of ours. The country has been impoverished just because of corruption. And this delaying of cases in the cell as a result cause corruption, in the sense that the judges and whoever is responsible in those cells demand money from people, and we end up with some of the victims dying in cells before they are judged.

Secondly, this is Article 200, where the Constitution should empower the Kadhi's Court to handle matters related to Islamic law other than marriage and inheritance. 'Pilipili usiokula, inakuwasha namna gani?' si muwaachie. Let us leave this to remain the way it has been; because this has been there since. And if the Muslims have been having the court and they have been operating the way they have been, yes, let us not deny our brothers and sisters. Let them remain the way they are, but the law should remain on those ones who are Islamic believers. Thank you.

**Hon. Delegate Danson B. Mungatana:** Thank you. I would like to move to the next ... and I would like to recognize 454, which is professional group by the list.

**Hon. Delegate Kathurima M'Inoti:** Thank you very much Mr. Chairman, my name is Kathurima M'Inoti. Delegate Number 454, Non Governmental Organizations. I am very very happy Mr. Chairman that the representatives of the Judiciary have told us very clearly that they support the establishment of the Supreme Court. The initial impression we had gotten was that the Judiciary was going to be opposing the creation of the Supreme Court, and for us the Supreme Court was going to be extremely important because some of those decisions we have heard previously Mr. Chairman, like the one that was holding that in elections petitions, you must serve the President personally with the petition. Those are the kind of decisions really which we would seriously require to be considered by a Supreme Court, and the argument that the Supreme Court was going to cause more delays, it was going to be more expensive, would not have justified the refusal to create the Supreme Court, because we must always be worried of these quick and fast procedures.

Mr. Chairman, if you recall in 1987/88 when we created this queue voting system, the justification was that it was going to be very efficient and it will not waste any time in appeals and petitions. Of course we saw the consequence of adopting that kind of procedure.

The other point is, of course, you can justify the creation of the Supreme Court on the same basis that we are creating other institutions in the Executive, from the President to the Prime Minister, two Chambers of the legislature. And therefore we require seriously the Supreme Court.

On the question of Kadhi's Courts, my understanding is, the Muslims have been saying the reason why we need to have this protected by the Constitution is because it is the only way they will be guaranteed of having their personal laws determined by their own system. If we only let this to an Act of Parliament Mr. Chairman, the consequence is this, every time we hold elections; we are going to have temporary majorities in power. That majority in Parliament by a very simple majority will be able to repeal the Act of Parliament, and the kind of protection that the Muslim brothers and sisters require will be gone in one stroke of the pen. I believe, if people in Parliament today were to vote on the basis of whether they are Christians or Muslims, they would repeal any Act of Parliament that protects the Muslims because the Christians will be the majority. In my view, it is not a sign of weakness to concede the unique position of Muslims and to concede to giving them the Kadhi's Court they are craving for, the unity we are talking about is not unity in terms of applying the same law across the board, we must appreciate and respect our peculiarities.

Some of the argument we are putting forward to justify the rejection of the Kadhi Courts are clearly not fair. The Delegate Lawrence Mute responded very well on the question of taxes. I remember the Honorable Delegates across there from Kajiado, every time we go for lunch; he avoids anything to do with fish. He picks such things which lands in the department of fisheries in this country, he never benefits in any way. There are so many Christian brothers and sisters whose religion does not believe in taking alcohol, but they take that which goes to finance the liquor license in Court. it is not a fair argument. The same thing about the so-called contradictions in the Constitution. They are really not there because, if we look at the provisions on equality and non-discrimination, they treat men and women equally. But because we appreciate the minority status and the disadvantages of women, it is very easy for us to agree on Affirmative Action. And it is on the same basis that really we must perceive this protection of the Muslims... I am really urging my fellow Delegates that we should not allow this to be an issue for the referendum, or an issue for votes because issues of minorities are never resolved that way. Let us try to build as much consensus as possible, and I am sure it would be to our advantage.

*(Clapping by Honorable Delegates).*

**Hon. Delegate Danson B. Mungatana:** Thank you, thank you, thank you. I was going to request those who wish to speak, please keep your papers on, so that I can be able to check who has not spoken. And I notice, ... no. That is not all of you. I notice 600 has not spoken; this is a Political Party representative.

**Hon. Delegate Zakayo Karimi:** Thank you Mr. Chairman. My name is Zakayo Karimi, Delegate number 600, Political Parties. I will start with the issue of the Kadhi's Courts because the last speaker has talked about a lot of things I wanted to raise, and I would say that I fully agree that we should maintain them as they are currently. On a long-term basis, the solution to this issue may be to train more lawyers in the Islamic law, so that in future there are enough judicial officers in the normal system, and then we will not need to have the special Courts.

On Article 184, on delays of justice, I would like some clarification whether this is a Constitutional issue, or whether it is just an institution that became permanent. We have very very long holidays by the judges; we have winter breaks, we have summer breaks, we have Christmas breaks and so on. And all these result in very very long delays, because Courts meet for very very short periods. So I would want to know whether this is just a tradition that became permanent, or whether it is a Constitutional issue, and why it should not be sorted out.

On the delays also we note that there are also a lot of delays in the hearing of suggestions. For instance, up to now, this is May, we have not had any petitions determined; and this is justice that is delayed, and denies thousands of Kenyans proper representation. So this whole question of management of time in the judiciary needs to be looked at carefully.

Article 195 talks about the qualifications of judges; looking through it Mr. Chairman, I do not see anywhere it says that a Judge must have a law degree. We have had sessions in the past where we have people appointed even Chief Justice, because they were supposedly very hard working. We would want these gentlemen, whether they are hard working or not, to have law degrees. Thank you Mr. Chairman.

**Hon. Delegate Danson B. Mungatana:** Thank you. I would like to recognize a Member of Parliament there, in that fourth wing.

**Hon. Delegate Mirugi Kariuki:** Thank you Honorable Chairman. My name is Mirugi Kariuki; I don't see that anybody should be complaining while I talk. Last time I talked was a different subject. Mr. Chairman, I would like to comment on Article 184(1), "judicial power is derived from the people." this particular statement raises a fundamental issue on the legitimacy of the judiciary. Mr. Chairman, we are all aware that there are three arms of Government; there is the legislature, the Executive and the Judiciary. The other two arms of Government by any account directly derive their mandate from the people. The Members of Parliament are elected every five years, and therefore, get the mandate of the people to do what they have to do for five years.

The Chief Executive of this country, who is the President, is regularly elected every five years by popular mandate of the people. The question that begs itself is, where does the judiciary derive its authority to lord over us? In modern day Constitutions which we are creating now, the people have a place in terms of the appointment of judges, Parliament creates vetting Committees which this Draft Constitution has done, but it also expressly feels that the people of the country will be involved at the time of the vetting, their views will be sought, if they have any adverse comments, or any adverse evidence against the appointees of the Constitutional office holder, they are invited to do so. And that way, those persons then obtain the mandate from the people, though indirectly.

I think the reason why Kenyans have lost confidence in our judiciary, is basically the manner of appointments of judges have been based on loyalty, sometimes loyalty to the ruling Party, sometimes loyalty to the head of state, sometimes corruption. So, for that reason, Confidence has waived over the years. It is against this background that we have to look at the transitional mechanism. I know that judges are quite weary that they have to lose their jobs. But what do you do to an institution that has never rendered itself to the legitimacy of the people. If we have to start afresh, then the judges must respect the will of the people. And the way to respect the will of the people is to say, 'we are putting our resignation. But because we are good and honest judges, we know we shall be reappointed.' It happened in Philippines, the people of Philippines

demanding by popular mandate that judges do resign, they did resign. But while the application for reappointment were being reconsidered, they carried on with their duties. And those that were clean were actually reappointed. So, the judges do take courage, if you know you are honest, you are competent, you are a man of integrity or a woman of integrity, please be prepared to offer your resignation and seek the mandate of the people of Kenya, and you will be reappointed. You have no cause to fear.

*(Clapping by Honorable Delegates).*

Article 184 sub-section 3 in roman, also this is a very fundamental issue that “justice must be administered without undue regard to technicalities.” I think one cause of dissatisfaction in our Court of Appeal is the manner in which they threw out litigants who did not comply with this rule. I would have preferred a situation where the Draft Constitution went a bit far, that the judge, who throws out a litigant on mere technicality and ignores this principle duty to do substantial justice, would be liable to impeachment. We are there to do justice for our people, not to play around with the rules. I do agree Mr. Chairman that in fact it is wrong to ask a judge to advise the President on matters of the Constitution that is a section that should go.

The administration of justice has its own system of checks and balances. The bar advises and the bench adjudicates. So, it is actually wrong to assign the Supreme Court the advisory role to tell the President what the law is. After all there is an Attorney General already set up in the Draft Constitution, who is supposed to advise the Government. But I understand the Government, within the meaning of the Draft, that the head of the Government is the Prime Minister, meaning that the President is not part of the Government, which is a very interesting phenomena in this Draft. But if that is the case, then let the President seek his advise from a member of the bar, and that would be quite appropriate. This creates clear conflict in the separation of powers.

Finally before I finish, let me say this of the Kadhi’s Court. That if you remove the provisions where you gave jurisdiction of the Kadhi’s Court Commercial jurisdiction, and then you remove the provision relating to the apparel jurisdiction, I will not have any problem at all, the Kadhi’s Court can remain the way they have been. And let me say this, you don’t have to be a Muslim to adjudicate over a dispute of Muslims. Our Courts have faired so well in the last forty years. I

have represented Muslims myself, at the appellate stage; I have had to argue matters of succession and personal law. I have never been faulted. Judges who are not Muslims have sat over issues in the Court of Appeal and even in the High Court, they have never been faulted. Why has there been need now, in the present stage of our history to empower the Kadhi's Courts? Has there been some mischief? Has there been incidents of incompetence? These are the questions we should be asking ourselves, because we only ask for change when there is need for it. I thank you Chair.

**Hon. Delegate Danson Mungatana:** Thank you Mheshimiwa. I recognize some people here have not spoken but we have to move on and I recognize from this row, District Delegate number 391 who has not spoken. Please let me have the ones who wish to speak to put up their numbers so that I can look.... Not the other side, we are still here.

**Hon. Delegate Oscar Makokha:** Thank you so much Honourable Chairman and my fellow Delegates. I am Oscar Makokha, Delegate number 391 representing Bungoma District. Mr. Chairman, mine will be very brief, I agree almost entirely with the whole document except a few areas, which from the presentation of the views of my people they asked that in the Constituency Report we must also have a Constitutional Court to deal with issues on election petitions.

- ii) The judicial officers appointed by the Judicial Commission should be approved by Parliament.
- iii) There should be provision for legal aid for the poor Kenyans.
- iv) We should have elders who should handle customary laws and they should be paid by the government.
- v) Introduction of the jury system to coincide with the Constitutional Courts.

Mr. Chairman, I would wish to bring to the attention of this House that I am finding it very difficult to reconcile the Constituency Report with the Verbatim Report which are in the Library. The issue of the Kadhi Courts, personally, I could agree with it as the status quo remains. Only one person from Kimilili, that is a case study that I am speaking on, one person from Kimilili Constituency by the name of Abdul Hamid M. talked about the issue of the Appellate Court, I mean to entrench the Kadhi's Court into the Appellate Court.

When we come to the Constituency report, we find that Kadhis' Court should have appellate jurisdiction, eight people contributed to that. I am failing to understand and I am tempted to say that these documents are not genuine. Unless the Library furnishes us with the Verbatim Reports, which I have been asking for for the last three weeks up to now, no single Verbatim Report is there. The one that is there I am being told that it is flawed, so I don't know. The Commission should explain to us how genuine these documents are so that we can put in the correct judgement that represents the views of the people we are representing here. Thank you so much.

**Hon. Delegate Danson Mungatana:** Thank you. There is a lady number 309 she has not spoken.

**Hon. Delegate Jane Kamwaga:** Thank you, Mr. Chairman I must first of all say...My name is Jane Kamwaga, Delegate number 309 from Murang'a District. I must first of all say that CKRC has done a very commendable job in collecting and collating the views of Kenyans on the basis of which it produced a draft of the proposed Constitution and released the same for discussion by the public. I must also echo the sentiments of the Honourable Delegate Justice Kwach who took us through the Judicial and Legal System, which was very understandable and very comprehensive.

I will go to Article 184 on judicial power, Article 184 sub section (iii) (a) which currently reads, "Justice shall be done to all irrespective of social or economic status". I would propose that section (iii) a, to read, "Justice shall be done to all men and women irrespective of social or economic status". Why I am saying men and women, it makes it clear that in all cases both men and women are to receive fair justice and the language has the gender component which is very important in the Constitution and recognizing that historically women have not always been able to secure justice. Mr. Chairman, this is so particularly where the crimes are those that happen primarily to women, for example on domestic violence or in civil cases like property inheritance, that is succession and others of the sort.

I must also take you to Article 194 on appointment of Judges. I propose to add a section (v) which should read that “The State shall ensure a gender balanced bench”. Why I am saying so is that this Article will simply provide that older Judges retire or leave the Judiciary and the next most senior Judge fills the vacancy. This means that new Judges will be appointed as old Judges move out, as the Bench is disproportionately male, so this requires the State to consider for judgeship women lawyers, teachers and judges who meet the qualifications which are outlined in Article 188.

Mr. Chairman, I would also want to take you to Article 205 on the functions of the Judicial Service Commission. Article 205 (g) currently reads, “To encourage gender equity in the administration of justice etc. I would propose that (g) should read, “To encourage gender equity in the administration of justice including formulating guidance in consultation with the Gender Commission and other offices rendering decision making, court processes and the judicial culture and gender fair”. Why I am saying so here again is that, like the Parliamentary Service Commission, the idea is to create a structure or an organ responsible for ensuring gender mainstreaming. The Judicial Service Commission would be responsible for such gender mainstreaming in the Judiciary. Thank you, Mr. Chairman.

**Hon. Delegate Danson Mungatana:** Thank you, Madam. I would like to recognize 86.

**Hon. Delegate James Omingo Magara:** Thank you, Mr. Chairman, for giving me this chance to contribute. Mr. Chairman, this is one of the arms of government that requires serious and clear...sorry, I am Delegate number 86, my names are Omingo Magara, MP, South Mugirango.

This is one arm of government, Mr. Chairman, that requires serious and critical analysis in terms of its executing their mandate. I want to address the issue of the security of tenure of Judges. This was there in the past, unfortunately it used to be abused. From the inner circles I got to understand that you will find a Judge being appointed and at the same time he signs his resignation letters, so he sits on one side of the Bench. We are saying let's practice that security of tenure and let them know that they are independent in terms of length of service.

Two, Mr. Chairman, we are talking about retirement age. In the olden days people could live upto 120 years, they still do depending on where they live, whether they are senior or not. Mr. Chairman, I think life expectancy has reduced dramatically and we recommend, I think whatever is there in the draft Constitution, 65 years retirement age for the Judges is quite appropriate and if it must 70. Even the Bible tells us, excuse me the Muslims, even the Bible mentions that if you live beyond seventy, you are living on bonus and you should be able to live on your bonus and retirement. So, I think 70 is the very maximum we can really go but 65 is appropriate.

Mr. Chairman, also in line with the retirement age we are required to disqualify a Judge or sack a Judge if he has misconduct or incompetence. Now, incompetence will also creep in with age. Sometimes when somebody gets thinner, I think that is part of incompetence and I think beyond 65 we are saying you are really not at your very best.

Mr. Chairman, let me take the issue of the Kadhi Courts. I am as a subscriber and I believe that it was in the Constitution, whatever little that was in the Constitution let us not deny our Muslim brothers. (*Delegates Clapping*) But then, when it comes to Article 200 (b), it talks about arbitration of small civil cases. I don't know, small is a relative term and I am wondering for somebody who is a wealthy man who has got a dispute with somebody in Mombasa, a small claim could be half of Mombasa, that may not be practical, Mr. Chairman. So lets not introduce that element of small civil cases and I believe our Muslim brothers have agreed on this. So we can retain it save for the introduction of these small civil and commercial cases.

Mr. Chairman, in the appointment of Judges we have stated categorically on their qualifications and we did not highlight the issue of a university degree. I believe it is critically important that below the university degree I would not say that we are going to be in business because of the kind of resources we have and capacity to rebuild as a country, Mr. Chairman. Now, we are saying, Mr. Chairman, that there are issues in line with incoming of the Constitution and the retirement of the entire Bench in the Judiciary. Mr. Chairman, I think we will be running into a judicial vacuum at that particular time. I know for sure that there are Judges who are corrupt but we must not tell them to go home en masse because it may create a vacuum Mr. Chairman. What we need to do is to have these Judges apply in advance, vet them in advance, sack them immediately and then retain those who we want to retain because we know them. There are

those who are clean we know and some of them are arbitrarily corrupt, Mr. Chairman. So to say, if these provisions of Judges to resign must be in place, I will recommend strongly that the Attorney General also goes home quickly in line with this particular issue.

*(Delegates Clapping)*

If they were to be looked at independently, that is the line I would have wanted to take but since it may create a judicial vacuum, I would suggest that we have them vetted while still in office and give them credence and points. Of course they can be examined as they are serving and their records are known and we shall sack them as appropriate.

Now, the issue of accessibility to profession of law. Mr. Chairman, legal costs in this country are extremely exorbitant and I think we need to curb this either through a Constitutional provision or a legislation provision through the Act of Parliament to regulate the provision of services from our professional colleagues in the legal sector who are known to defraud and milk the very poor Kenyans who access justice. Thank you, Mr. Chairman.

**Hon. Delegate Danson B. Mungatana:** Thank you. I recognize 460.

**Hon. Delegate Patrick O. Kiage:** Mr. Chairman, my name is Patrick Kiage, Delegate Number 460. Mr. Chairman, on the issue of the Kadhi's Courts, I wish to say for the record that I am a Christian and a lawyer. Mr. Chairman, for all this time we have had Kadhi's Courts in our Constitution and generally there has been no problem with having them there. Mr. Chairman, my view would be that we ought to maintain the Kadhi's Court in the Constitution, because our Muslim brothers are entitled to them. Mr. Chairman, the true test of democracy is not how comfortable and how secure any member of the majority feel but rather how comfortable and how secure a member of the minority feels.

*(Clapping by the Honourable Delegates)*

Mr. Chairman, having said that, I would perhaps opine that the reason why our Christian brothers have a problem with the Kadhi's Courts as proposed in the new Draft Constitution is with the

extension of jurisdiction. Mr. Chairman, perhaps it is going a little too far on the part of the Drafters of this Bill for them to say that the jurisdiction ought to be enhanced to cover appellate cases and also to cover the Civil and Commercial aspect. If, Mr. Chairman, that can be left out, I believe everything else as proposed ought to be maintained.

Now, Mr. Chairman, turning now to the more tricky issue of the judges and what to do with them. Mr. Chairman, it is not an exaggeration neither is it anything new to say, that the Judiciary in Kenya is totally discredited. They, themselves have admitted it over and over again. We have the Kwach report, which was a long litany of all that has gone wrong. But yet Mr. Chairman, several years down the line we do know that nothing has been done to correct this situation. Mr. Chairman, the Judiciary is so sick, it is incapable of correcting itself. Mr. Chairman, I would go further to say that all the arguments that have been made in favour of letting them retain their posts, Mr. Chairman with tremendous respect, are nothing more than an attempt at keeping jobs. Mr. Chairman, the people of Kenya through the representatives gathered here have one historic moment when they can put all things right. Mr. Chairman we will know that even as we speak, there are proceedings in Court, which have been filed by none other than members of the Judiciary intending to stop this process. Mr. Chairman even as we speak, they are not at all remorseful and given a chance they will bring to naught all that we have done here for the last so many days and that which has been done for the last so many years.

Mr. Chairman, the danger that has been spoken of that there would be a judicial lacuna or a judicial vacuum is with respect to the Chairman is neither here nor there. All that will happen is, Mr. Chairman, they will be asked when this Constitution comes into force to resign. Now, those that are truly meriting of being judges will re-apply and Mr. Chairman, we are not saying that they are all sick, no. There are some men and women of integrity, men and women of competence who when they re-apply will definitely be taken on. They have nothing to fear. But the guilty definitely do have a lot to fear and they ought to fear.

Mr. Chairman, before I conclude, I would say this. There have been people who wear badges, which say, 'why would you have to hire a lawyer, when you can buy a judge?' Mr. Chairman, that is an indication of how badly this situation has deteriorated.

Mr. Chairman, I propose with all due respect to those that are judges and with all due respect to judicial officers, that in a time such as this, we must put aside personal considerations and individual considerations and let the people of Kenya finally be in a position to have full faith in the Judiciary. It will not do Mr. Chairman, for any one to say that it takes, whenever there is a corrupt judge, there is a corrupt advocate. Mr. Chairman, if there is an advocate who is trying to be corrupt, it is the duty of the judge to put him in his place, to punish him.

**(Clapping by the Honourable Delegates)**

But Mr. Chairman that has not happened. And I would propose therefore Mr. Chairman, with respect that perhaps it is time that like, Caesar's wife, the Judiciary got to a point where it would be totally above suspicion. Someone very high, very imminent has said that, that used to be the case but that now, that is water under the bridge, and we want to correct that Mr. Chairman. Thank you Mr. Chairman.

**Hon. Delegate Danson B. Mungatana:** Thank you. I want to recognize 446, who has not spoken in that same area. COTU. He has disappeared. 465. Who has also not spoken? A lady.

**Hon. Delegate Nduta Kiarie:** Thank you Mr. Chairman. I represent the NGO sector. My name is Nduta Kiarie. My problem is, and I will restrict myself to two issues. The first problem we have with the Draft in regard to the judicial and --

**Hon. Delegate Danson B. Mungatana:** -- sorry. The current Speaker, I want to see, because when she finishes, I would have to pick somebody there. I want to see those who would wish to speak so that I can look up my list as I prepare. Thank you. Please continue.

**Hon. Delegate Nduta Kiarie:** Now, we have a problem with harmonizing Chapter Nine and Chapter Twelve of the Draft Constitution.

Now, Chapter Twelve for the first time in our Constitution, we are talking about enforcement of environmental rights. Section 241 says you can endorse your rights to a clean and healthy environment in the High Court. But when you look at the Articles on the creation of the High

Court, you find the problems that will be faced if one tries to enforce their right to a clean and healthy environment or to enforce rights to protect our natural resources and environment, because we do not have a system that accommodates sustainable development principals. Let us say like the principal of inter-generational equity, precautionary principal. They are already stated in Chapter Twelve of this section and we will come to that. But we have to harmonize these two Chapters and the only way we can do this is by creating a special Chamber in the High Court for environmental matters where the High Court will have a special writs or a special jurisprudence to accommodate these principals that we have talked about in Chapter Twelve which are not there in our common law jurisprudence. Our common law jurisprudence insists that we have to show harm; you have to show damage before you are even heard. But if sustainable development principals who are in Chapter Twelve say that the harm will be done in future for our future generations, how is this going to be applied by our High Courts? So, we need a special provision under the section on the High Court or the Articles of the High Court that we shall establish a Chamber for environmental matters and with this Chamber shall have its own special writs and special judicial system to deal with the environment.

A case like for example is the recent extinction of our forests, a hundred and sixty-two thousand hectares of land were – by the politicians in the former Government and dished out to individuals. The files are still lying in Court. The case has not been heard. The principals that we were asking the Court to apply were sustainable development principals and this will harm our catchment areas, water resources and yet this does not apply in the common law system. So, unless this section is put there, that we have to have special Courts, we are not going to achieve any environmental protection.

*(Clapping by the Honourable Delegates)*

On another issue and this may not also be part of any Article in the Constitution, we need to modernize our Courts. We have a very archaic system where we are forced to robe in very funny robes belonging to a British system and then we have to address our judges as ‘My Lords’, which is very ridiculous. It is enough to address our judges as ‘ your honour’ and we need to have judges or people who are sensitive and who can modernize our system because it is too archaic. We have perfected the system, which we took after colonization and we have taken it just too far.

We need to reverse and also we need to be allowed to dress properly without dressing in those robes. Thank you.

**Hon. Danson B. Mungatana:** Thank you. I would like to recognize from Political Parties. I see here that 599 has not spoken. 599.

**Hon. Delegate Leslie Mwachiro:** Asante sana Mwenye Kiti. Nimechagua ku zungumuza Kiswahili. Nataka kusema hivi. Sisi, tulipokuwa katika enzi ya ukoloni, na utumwa tulikuwa hatuna haki. Mwafrika alikuwa hana haki. Sasa, tunataka kutengeza haki kwa Mwafrika ili ambayo alikuwa ameipoteza. Kwa hivyo neno ambalo ninataka kutumia hapa ambalo silioni katika hili Draft ni neno Africanizing. To Africanise the Judiciary. Ningetaka katika kusema tunataka ma-judge ama Chief Justice tuseme ni lazima awe mwafrika. Maanake tulipo kuwa na 'mau mau' ilikuwa ni Mzungu aende Uingereza na Mwafrika apate Uhuru. Sasa Uhuru tumeupata tunataka kurudishia Wahindi na Wazungu wazidi kutugandamiza. Hata katika KAU, ilikuwa ni Kenya African Union. Hata katika chama tulicho kipenda cha KANU, ni Kenya African Union. Na hata South Africa ni African National Congress. Kwa hivyo, hii ni nchi ya Wafrika na ni lazima kufanya mambo kwa Wafrika.

Tena ninataka kusema hivi. Kama kutakuwa na farakano kati ya Waaislamu na Wakristo, watakaumia ni watu wa Pwani. Ni Pwani pekee yake ambapo naona kuna sehemu nyingine Muisalamu ndio mwingi na sehemu nyingine Mkristo ndio mwingi. Kwa hivyo mikituchochea hapa, tukirudi nyumbani, watu waanze kukatana mapanga, tutakaoumia ni sisi watu wa Pwani. Kwa hivyo ningetaka kuwaomba ndugu zangu tulioko hapa tufanye tuwezalo tusije tukianzisha moto ambao tutashindwa kuuzima. Tuona ya kwamba sisi watu wa Pwani, tu watu wa Kenya tumekaa sawa, sawa baina ya wa Kristo na Waislamu.

*(Clapping by the Honourable Delegates)*

Kama hii kitu ya Koti za Kadhi zilikuako tangu zamani, hazija kusumbua. Data mmoja pala alituuliza, pili, pili usioila yakuwashiani nini? Na wewe Mkristu ambae hujaenda mbele ya Koti ya Kadhi, kwa nini wawashwa? Tuwaichie waendeleo na mambo yao, na ikiwa ni lazima, kama alivyo sema Bishop Gitari, ile Chapter ya Christian Religious Marriages itiwie katika Katiba.

Ikiwa ni lazima. Lakini kama tumetosheka tuwaache wale waliomba maanake waliomba na wamepewa, na waliomba zamani.

Nasawazisha kitu kimoja. Ule wakati wa Zanzibar na Sultan na Mwingereza na Shamte na Kenyatta, kuandikiana ati maeli kumi za Pwani itakuwa inarudishiwa, ilikuwa imeanzia Tanzania mpaka Kismayu. Lakini Tanzania hii mambo ya Sultan imeisha kabisa. Maanake Sultan alipinduliwa na Shamte alitoraka. Kwamba kule kuna Sheria mpya. Na huku Pwani bado tunashikilia kitu ambacho kilikubaliwa na watu ambao wameondolewa mamlakani. Kwa hivyo ni lazima tuanze kuandika Katiba mpya tulitie katika Katiba yetu ya sasa. Maanake hatuwezi kutumia msingi ati zamani kulikuwa na Sultan na siku hizi hatuna Sultan tena.

Ningetaka pia katika Kifungu cha 195 (1), 195 (2), 201, tutie neno kwamba, wanaoandikiwa wawe ni watu wazuri ama people of high integrity and moral grounds, tuwatie katika hichi kuandika Chief Kadhi. Chief Kadhi tukuangalia 201 (c) haisemi kwamba atakae chaguliwa kuwa Kadhi ni mtu ambae atakuwa ni mtu mungwana, mtu ambae amestahili kupewa kazi ile. Kwa hivyo ile iko katika 195 (1) na 195 (2) itiwie katika 201 (1) na 201 (2).

Nikimalizia, nataka kusema hivi. Pia kuna 206, nafikiri it is in conflict with 203. Hatuwezi kusema Law Society of Kenya na Chief Kadhi na Chief Justice watatengeza rules na hali tumeshafanya Rules Committee ambayo itaandikia rules. Kwa hivyo hii 206 na 203, I think there is some conflict there. Asanteni.

**Hon. Delegate Danson B. Mungatana:** Thank you. I think I will take one lady there and then we can break for tea. So, 530 then we break for tea.

**Hon. Delegate Florence Mburugu:** Thank you very much Honourable Chairman. My name is Florence Mburugu, Delegate Number 530, Religious Organization.

Mr. Chairman, Honourable Delegates, I want to remind ourselves that we have this opportunity as Kenyans. The first opportunity in forty years to look at the Constitution that we never had an opportunity to look at in the past and we want to say that we are coming from a history, a history that got us out of our roots and planted us into another situation that we find ourselves in. I am

therefore saying that we are looking at the Constitution, considering the suffering that we went through under the previous Constitution and in this case therefore, we should not fear to say what was wrong and try to rectify it here in as much peace as possible. I am trying to say that before Christianity, before Islam came into this country, Kenya was, Kenya is and Kenya will be even without us. That our people had their own backgrounds and in those backgrounds, they had their own judicial systems which were disrupted by both the Muslim and the Christians and therefore we are saying that it is going to be unfair if we are going to remain in history and continue to see the under-privileging of some of our people. I am saying in short, that there are societies in this country that have not received any recognition by the Constitution and if we were going to talk of the marginalized and majority, if I am allowed to mention, we should be thinking about the judicial system of the Ogiek whom we are told are the most minority group in this Constitution and entrench them in the Constitution.

Mr. Chairman, I am saying that by all fairness, I do not see any reason why any sect of this country should be entrenched into the Constitution. By all means I am saying and I want to echo the words of Justice Kwach who said that he has been in the justice for many years, that to do so would be doing wrong not to these people, to this Nation but to God Himself.

Another thing that I want to talk about is, is about the use of language that is there on Article Ten. In Article Ten, we are told that we are referring to the laws of African Customary Law. Bagandans are Africans. Are we making this Constitution for the people of Baganda because they are Africans? We have other people like the Ibo who are Africans. I am suggesting that these names, the African, the Hindu, the Muslims were names that were used discriminatively just to put people aside and we should try and change this language so that we say that we are drawing our laws from the Kenyan African not from just any African because this Constitution is not for Africans. It is for Kenyans. If there is anything to do with religion and of course I expect that because Chapter 44 guarantees that there is freedom of worship and that we do not have to involve any religious matters in this Constitution, that our laws remain Kenyan laws and not merely African laws because any other people would perhaps come into this country and claim that, after all African Customary Laws are allowed to be practiced in this country.

I am happy that there is an office of the Public Defender and I hope that measures will be put in place to make them available and accessible to the people.

I am looking at the role of the Judicial Service Commission. One of the laws of the Judicial Service Commission is to educate or to facilitate the education and training of judges, I do not know, those people who work with them. Many people have fallen victim of the judicial system because of ignorance. It is because the public does not know and I am wondering whether it should be also the duty of the Judicial Service Commission to at least publish from time to time issues that will help the public to understand at least the basics of law so that if I have a legal problem, I know what to refer to otherwise the judges have their own language and even if we say that justice is going to be as fair as possible, it is not known because the judges will still come back ---with their legal language and this might not be easy to be interpreted by the common man. So, to finish up I am saying that right from the Preamble, we are saying that we are recognizing our diversity and we should use this diversity by the Constitution remaining neutral to all people and giving everybody an opportunity to practice, which means that no Court, whether Christian or Muslim should be entrenched in the Constitution. Thank you very much.

**Hon. Danson B. Mungatana:** Thank you. Now fellow Delegates, we have four more raws to go and I would ask us to have a break for tea for thirty minutes and if we don't have anybody moving close from the Plenary, we will have to continue this topic tomorrow. So, let us come back at 5.30 and continue. Thank you so much. It has been wonderful.

**(The meeting adjourned for tea break)**

**Hon. Danson B. Mungatana:** Now, if we can take our seats within three minutes, we can get started. Honourable Delegates, we want to get started in three minutes. Honourable Delegates, I think we were in this middle – if I am not wrong -- and I would like to recognize 131. Just hold on. There is a point of order. Just hold on. 323.

**Honourable Delegate Mwandawiro Mganga:** Point of order Mr. Chairman. Point of order. There is no 321.

**Hon. Danson B. Mungatana:** Sorry.

**Honourable Delegate Mwandawiro Mganga:** Point of order Mr. Chairman.

**Hon. Danson B. Mungatana:** Yes 99.

**Hon. Delegate Mwandawiro Mganga:** Well Mr. Chairman, some leaders have been accused in the past for not being able to read either the mood of the country, the mood of the people and they are moving radar-less. In the process, they received what they never expected especially when it came to elections.

Mr. Chairman, it is important that we avoid repeating such mistakes in such an important Conference.

**Hon. Danson B. Mungatana:** Point of order.

**Hon. Delegate Mwandawiro Mganga:** So, there must be something that is not right.

**Hon. Delegate Danson B. Mungatana:** Point of order.

**Hon. Delegate Mwandawiro Mganga:** Mr. Chairman, given the regulations –

**Hon. Delegate Danson B. Mungatana:** Yes.

**Hon. Delegate Mwandawiro Mganga:** About quorum and given the importance of this event. Is it in order for us to continue with less than one-third of the people in the Conference? I move therefore, Mr. Chairman that we adjourn this session and resume tomorrow at nine.

*(Clapping by the Honourable Delegates)*



**PLENARY PROCEEDINGS, PRESENTATION OF DRAFT BILL, CONTINUATION OF**  
**CHAPTER NINE, JUDICIAL AND LEGAL SYSTEM, HELD AT THE BOMAS OF**  
**KENYA ON 21<sup>TH</sup> MAY 2003**

**PRESENTATION OF DRAFT BILL:      CHAPTERS 9, JUDICIAL & LEGAL  
SYSTEMS**

**Presenters:**                      **Com. Ahmed Issack Hassan**  
   **Com. Paul Musili Wambua**

**Session Chair:**                **Prof. Yash Pal Ghai**  
**Co-chair:**                      **Hon. Danson Buya Mungatana**  
**Co-chair:**                      **Hon. Grace Ogot**

**The meeting started at 9. 30 a.m.**

**Hon. Delegate Danson Buya Mungatana:** I now request Mrs. Grace Ogot to say a word of prayer for us. Then after that Honourable Delegate Badawy be ready to pray for us.

**Hon. Delegate Danson Buya Mungatana:** Rise up please.

**Hon. Delegate Grace Ogot:** Let's pray.

Father, we thank you for bringing us here to deliberate on issues that affect us, our families and our children. Father, we know you are with us here, a silent listener but adviser to the Chair and to speakers. For the issues that we will discuss today, Father, let us be fair to the Chair, let us be fair to one another so that at the end of the day, all voices are heard and faces seen. We ask this in the name of Jesus Christ. Amen.

**Ali Sheikh Shee:** Bismillahi, kwa jina la Mwenyezi Mungu, muumbaji wa mbingu na ardhi, wee Mola wetu tuna shukrani nyingi sisi wajawako. Tunakushukuru wewe kwa nguvu na hekima ambayo umetupa. Tunashukuru kwa sisi tuko pamoja, tunaendelea vizuri kwa sababu ya kuungwa mkono na wewe. Endelea Mola wetu kutuunga mkono, endelea kutupa hekima zaidi, tuweze kuwa na uvumilivu, tuweze kuwa na subira, tuweze kufanya kazi hii ngumu ambayo twaifanya kwa jina lako, kwa ajili ya viumbe vyako, kwa ajili ya masilahi ya waja wako.

Twakuomba uzidi kutupa kila busara na kila subira. Sisi hatuna mtu mwingine wa kuomba hila, ni wewe. Utubariki na ubariki nchi yetu. Amen.

**Hon. Delegate Danson Buya Mungatana:** Honourable Delegates, I have been requested by the Privileges, Discipline and Welfare Committee to make this announcement this morning that there will be a meeting during the morning tea break in the Steering Committee tent of all the members of the (Privileges, Discipline and Welfare Committee). So please make sure that you are in that Committee. Make yourself available. Thank you.

Now, fellow Delegates there is another announcement. There was a proposal from the Steering Committee that, from the experience we have had, when we break for tea in the evening, we normally are so tired. We don't have quorum. So, it was proposed, fellow Delegates, that we continue from lunch hour, we continue, we run through until 5.30 pm and when we have the tea break we go home. I don't know whether that is okay with us. Thank you very much.

*Clapping from the Honourable Delegates.*

**Hon. Delegate Danson Buya Mungatana:** Thank you, fellow Delegates. By the way, you have been wonderful people and you've made my work very easy here. Yesterday, if I remember well, we were on this row and as usual I would request again, if you wish to speak and you are in your row, please raise your number so that we can see those who have not spoken from our list and give them preference. As far as I remember, yesterday we had given the floor to the Honourable Delegate number 131 before we were told we did not have a quorum. So you have your five minutes now, please. Thank you.

**Hon. Delegate Mwandawiro Mghanga:** Asante sana mwenyekiti kwa kunipatia fursa hii ya kuchangia kuhusu mfumo wa mahakama na sheria. Jambo la kwanza kabisa ambalo ningeanza kusema ni kuwaomba wajumbe wote Waheshimiwa wakumbuke kwamba tuna mawakili ambao wanaishi mahakamani wametuma, wamekuwa na mapendekezo kwamba katika kutengeneza hii Katiba na kuzingatia mfumo wa haki, mahakama na sheria, ili kuitekeleza yale mambo ambayo tunapitisha yawe ya kweli kabisa, tuhakikishe kwamba tunaanza sura upya. Hawa majaji na mahakimu wengi wamehusiana sana na rushwa, wamehusiana sana na udikteta uliopo na watu

wengi wameumia. Tunaamini, na mimi naamini binafsi, hii kazi yote tunafanya kama hatujavunja hawa majaji tuwaondoe na mahakimu na tuanze upya, hii kazi itakuwa ya bure. Kwa hivyo mimi naunga mkono kwamba majaji na mahakimu wajiuzuru kwanza halafu ndio tuanze sura mpya ya kutekeleza Katiba. Hilo ni la kwanza.

La pili, naomba kwamba katika hiki kifungo chote cha kuzungumzia kuhusu mfumo wa haki, mfumo wa mahakama na sheria, lazima tuangalie sisi kama Wakenya tunaongozwa na itikadi gani kuhusu sheria na kuhusu mahakama. Kwa njia hiyo, ningependa lazima tuwe na kifungu kuhusu sera tulionayo, kuhusu adhabu, filofosofia / falsafa tuliyonayo kuhusu adhabu. Maanake adhabu ni shughuli muhimu sana katika utekelezaji wa haki na sheria. Napendekeza, mpaka sasa tumekuwa tukishirikia falsafa ya nchi za kimagharibi kuhusu adhabu. Hiyo ni kwamba tunasisitiza zaidi kulipiza kisasi kuliko urekebisha na mimi nawaomba tuzingatie sheria na haki ambayo inasifiwa zaidi, kuhusu kurekebisha watu, kuhusu kutenganisha watu, kutengamanisha watu waliokosana badala ya kulipiza kisasi.

Mapendekezo yangu ni kwamba, tuwe na kifungu kuhusu adhabu ambacho kinasema kwamba hukumu zizingatie haki za binadamu. Kisha pia, hukumu zisiwe za kinyama kama vifungo virefu kupindukia au kuchapa watu viboko. Hiyo iondoke. Vile vile, mahakama zihakikishe hakuna mateso gerezani na haki za binadamu zinaheshimiwa.

Vile vile, napendekeza ya kwamba kikatiba hukumu ya kifo iondolewe. Sina wakati wa kujaribu kuthibitisha hiyo. Lakini tukizingatie zaidi tusipoondoa hukumu ya kifo na tunajua ufiisadi ulioko katika magereza yetu na tunajua ya kwamba hiyo hukumu ya kifo ni hukumu ambayo haiwezi kuirudishwa tena na wale haifaidi chochote ila kulipiza kisasi, naona hiyo si kitu ambayo tunaweza kuwa nayo katika hiki kiwango. Hayo mambo naomba tufanye bidii yaingie katika Katiba. Lingine lile lilisemwa, haki sasa inauzwa kwa pesa kwa hivyo hata mawakili, kuwe na utaratibu wa kuhakikisha ghalama zile mawakili wanatoza zinaratabiwa jopo fulani. Ili kuwe kiwango fulani ambacho mawakili wanatoza. Sio vile wanavyotoza mvururu, mtende.

Jambo lingine naweza kupendekeza ni kuhusu korti za Kadhis'. Hilo limezungumziwa na mimi naweza kuomba kwamba wakati tunazungumzia, tunatengeneza Katiba, lengo letu ni kuhakikisha kuwa tunakuwa na umoja wa kitaifa, tunalinda haki za kila mtu na kutoa hofu la

kundi lolote lile ambalo liliopo ili twende pamoja katika taifa. Niliposikiliza tangu jana, nilikuwa nangojea kusikiliza Waislamu wakipinga hukumu, wakipinga korti ya Kadhis'. Lakini kutokana na Waislamu, wamesema kwamba kukiwa na korti ya Kadhis' ndio hofu yao kubwa itaondoka. Kwa hivyo mimi sina budi kusema kwamba korti ya Kadhis' iendelee kama vile ilivyokuwa katika Katiba iliyokuwa hapo awali.

Halafu, jambo la mwisho, naomba kueleza hapa ni kwamba hati zote zilizoko katika mahakama, kwa sababu Kiswahili ni lugha ya kitaifa, zitafsiriwe ama kuandikwa kwa Kiswahili. Hata hukumu zote ambazo zinatolewa na majaji, vile vile zipatikane katika tafsiri ya Kiswahili. Vile vile, mojawapo ya masharti ambayo yanatajikana ili mtu awe jaji mkuu ama hakimu, lazima adhibitishe kwamba ana ufasaha wa Kiswahili na hapo ndio tutaweza kutenda haki kwa wengi.

Halafu, vile vile kuwe na kifungu cha kusema kwamba mtu yeyote akienda mahakamani halafu adai kwamba hawezi kuelewa Kiswahili ama Kiingereza, mtu atafutwe wa kumsaidia kumtafsiria. Nadhani ni hayo tu naweza kuchangia kwa sasa. Asanteni.

**Hon. Delegate Danson Buya Mungatana:** Asante sana.

**Hon. Delegate Fr. James Gatiti:** Point of order.

**Hon. Delegate Danson Buya Mungatana:** Yes.

**Hon. Delegate Fr. James Gatiti:** I am Fr. James from the religious organizations. Mr. Chairman, I am number 520. We have new people who have come today and they have not taken the Oath. So, I am asking the Chair, swear in / administer the Oath to the people who have come today so that they can contribute to this debate. Thank you very much.

**Hon. Delegate Danson Buya Mungatana:** To what? I am sorry I didn't get that one.

**Hon. Delegate Fr. James Gatiti:** Administration of Oath.

**Hon. Delegate Danson Buya Mungatana:** Thank you so much. I am sorry. We would like to interrupt business.

**Prof. Yash Pal Ghai:** Let the Delegates who wish to take the Oath or Affirmation please come down here so that I can see them on the podium, on the floor. Please come so that I can see you. Are there any other Delegates? You have the Oath in front of you. I will ask you...when I say 'I' you say 'I' and mention your names and then you repeat the rest after me as I call you. So, please raise your hands.

**Prof. Yash Pal Ghai:** I.... (then mention your names)

**Response:** I.... (they mention their names)

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

**Response:** being appointed a Delegate to the National Constitutional Conference

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

**Response:** under the Constitution of Kenya Review Commission Act

**Prof. Yash Pal Ghai:** do solemnly swear that I will faithfully and fully

**Response:** do solemnly swear that I will faithfully and fully

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

**Response:** impartially and to the best of my ability

**Prof. Yash Pal Ghai:** discharge the task and perform the functions

**Response:** discharge the task and perform the functions

**Prof. Yash Pal Ghai:** and perform the functions.

**Response:** and perform the functions

**Prof. Yash Pal Ghai:** and exercise the powers devolved upon me by virtue of this appointment.

**Response:** and exercise the powers devolved upon me by virtue of this appointment.

**Prof. Yash Pal Ghai:** without fear,

**Response:** without fear,

**Prof. Yash Pal Ghai:** favour,

**Response:** favour

**Prof. Yash Pal Ghai:** bias,

**Response:** bias,

**Prof Yash Pal Ghai:** affection,

**Response:** affection,

**Prof. Yash Pal Ghai:** ill will,

**Response:** ill will,

**Prof. Yash Pal Ghai:** or prejudice.

**Response:** or prejudice.

**Prof. Yash Pal Ghai:** and to the end.

**Response:** and to the end.

**Prof. Yash Pal Ghai:** That in the exercise of the functions and powers as such Delegate,

**Response:** That in the exercise of the functions and powers as such Delegate,

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

**Response:** I shall at all times, be guided by the national interest.

**Prof. Yash Pal Ghai:** So help me God.

**Response:** So help me God.

**Prof. Yash Pal Ghai:** Welcome. So, please sign the document. Welcome to the Conference.

**Hon. Delegate Danson Buya Mungatana:** Sorry, fellow Delegates, I have to apologise to our new Delegates here. The practice has been that if you are a new person, please bring it to the attention of the Chair so that we can do the affirmations. Thank you. I would like to notice from the row where we are in, District Delegate 408 who has not spoken. Where is the point of order? 425? May I request that we give the lady a chance to speak and then we come back to you. Please. Thank you.

**Hon. Delegate Judith Nam Achieng':** My name is Judith Nam. I am number 408, a Delegate from Nyando district. Mr. Chairman, mine is just an observation. I am referring to Article 204 (1) (b) referring to Muslim women to serving in the Judicial Commission. Mr. Chairman, I appreciate that the post is given to a woman but her qualification was not given. I propose that the qualification should be that of the High Court Judge. Mr. Chairman, I am also referring to number 199 (1) on Kadhis's' court. I am also proposing that a Kadhis' court should remain established and should continue to deal with personal law as it has been since 1953. I am also referring to Article 211 (2) on the Prerogative of Mercy. Here am raising the point that, the Committee on the Prerogative of Mercy shall consist of the Attorney General as Chairman and

six prominent Kenyans appointed by the President. Mr. Chairman, I propose that this number should be increased to eight persons so that each province is represented. They should also be wise persons because there is a difference between being wise and clever. These people should be over sixty years of age and should have knowledge of customary laws. I also propose that 1/3 of this committee should consist of women. Thank you, Mr. Chairman.

**Hon. Delegate Danson Buya Mungatana:** Thank you, Honourable Delegate. Thank you, Madam. In fairness to the person who allowed, the Honourable Delegate who allowed us to proceed, we take his point of order and then we get back there. Thank you. 425.

**Hon. Delegate Sylvanus Onyambu Ogari:** Yes, Mr. Chairman. I am Sylvanus Onyambu Ogari, a Delegate from Kisii Central, number 425. I think it has been a bit unfair because some of us who came here on 28<sup>th</sup> April, we have never had a chance of even holding this microphone. I feel that it is now time that we have those Delegates who have not said anything to have their numbers listed there so that you can use them. Some people have had the opportunity of debating or talking in this Conference more than even five times and remember we are on the ninth Chapter. This is very unfair, Mr. Chairman, please. Thank you.

**Hon. Delegate Danson Buya Mungatana:** Yes, infact what we have done Honourable Delegates is, we have tried to annotate those who have spoken, we are putting stars on the list and I have an updated list as from yesterday. So with those remarks and I take your point. I would call Delegate 295, who has also not spoken according to my list, and then we move to the other side.

**Hon. Delegate Saipstone Ngalaatu Musau:** Thank you, very much, Mr. Chairman. My names are Saipstone Ngalaatu Musau, Delegate number 295, from Machakos. Mr. Chairman, I will go straight to Kadhis's' courts and I will take you to India. Mr. Chairman, wherever religious sentiments take center stage in a country, the end result is chaos and anarchy. India was partitioned because of religious sentiments. Muslims in 1947 started questioning the security they had under the Hindu Government and India had to be partitioned into India and Pakistan. All Muslims went to Pakistan and Hindus remained in India. The problem was not solve and after ten years, India was also partitioned into India and Bangladesh. Muslims were moved to

Bangladesh. Today, India has got the largest Muslim population in the world and still the problem exists. Please let us not have religious sentiments in our Constitution.

*Clapping from the Honourable Delegates.*

Mr. Chairman, you realize that in Article 202 (1), it is indicated that for a person to be qualified to be a Chief Kadhis', he or she must be a Muslim. That is discrimination. If I am very well versed with Islamic law, I must be or rather I must be qualified to be a Chief Kadhis'. So, if I am discriminated against, it is better that we do away with that one, Mr. Chairman. Mr. Chairman, we were informed here that the old Draft has mentioned Muslim, Islam and Kadhis's' more than sixty times whereas others are not mentioned. Mr. Chairman, that is giving special treatment to a certain group in this country. Why don't we have, let's say, the Maasais mentioned about ten times and the Kambas mentioned about.....and I must remind you that we are marginalized although many people don't know. Why can't we be mentioned about three times? Let us not give special treatment to any group in this Draft Bill.

It was said here by some members that Article 204 (1) b, which says that we must have one Muslim woman in the Judicial Service Commission. Why a Muslim woman? Also in the same Article, the Chief Kadhis' is there. If the Chief Kadhis' is there, he can take care of the Muslim community but not a woman. Let us remain with 204 (m) where we have three lay members one of whom may be a woman. The woman might be a Muslim, a Christian, a Hindu, because we are talking of a nation, the Kenyan nation. We are not discriminating in any way...on religion grounds or racial grounds. She can even be a pagan, a person who does not profess any religion and I like those who don't profess any religion because they don't go well with the believers. The problem we have among these hordes of believers, if we can be religious, we cannot have all these problems. If Jesus and Mohammed can sit here they will understand one another very well. Lakini we believers, Christians and Muslims we are fighting all the time. We should avoid that one.

On resignation of Judges Mr. Chairman, I don't see why we are discriminating against one another. In this country in which we have been for the last twenty-four years, from top to bottom, from businessmen to farmers, from politicians to beggars, there is nobody who can throw the

first stone. There is nobody who can say I have been very clean and, or so dirty like this. We have been corrupted for the last twenty-four years and it is better that if the Judges should resign so that we can get a new broom, all civil servants and even the politicians should go. Many of those who are talking about water here are drinking wine at night. It is better that we clean the whole country afresh.

***Clapping from the Honourable Delegates.***

Mr. Chairman, before I sit down, there is one thing here which I would like us to be clear of, that is the issue of the Kenya coastal strip. The treaty which was there in 1895 was to be declared null and void in the event of the following:

1. If Kenya ceased to be a British colony.
2. Should Britain give six months' notice.
3. The day Kenya attains independence.

I think all the three have been attained in this country. We are no longer a British colony and we are independent. Mr. Chairman, it is better that we do away with the issue of the Kenya coastal strip. It was only ten miles and with ten miles you can't even come up to Mazeras and here we are talking about the Kadhis's'' in Nairobi, Kadhis's'' in Eldoret and Kadhis's'' in Kisumu. So, please let us do away with the Kenya coastal strip and build one Kenyan nation. Thank you.

**Hon. Delegate Danson Buya Mungatana:** Thank you. Now we move to the next row. I would like from my list to recognize 302, who has not spoken. Please, the others, if you could just keep your numbers up so that I can be checking for a minute. Thank you. We have had three here, so we go to three here. Go on.

**Hon. Delegate Frederick Rukwaro Nderitu:** Thank you Mr. Chairman. Before I go specifically to Chapter nine, I will mention - my name is Frederick Rukwaro Nderitu, a District Delegate from Nyandarua District - two to three points related to this particular Chapter, and which has cut a cross the other chapters that we have gone through and will also cut a cross other chapters that we are going to go through.

Mr. Chairman, a person has to go to the definition of people of Kenya. I request the Technical Committee when they go to the Preamble to clearly define who are the people of Kenya. Where we include men, women, people with disability and the marginalized so that we don't repeat the same things throughout our Chapters.

Two, the issue related to affirmative action or references, then the morals and integrity of our leaders. Let this also be properly mentioned--

**Hon. Delegate Danson Buya Mungatana:** Excuse me Honourable Delegate; I would request that we speak on Chapter nine.

**Hon. Delegate Frederick Rukwaro Nderitu:** That is what I am doing. I am saying in that particular Chapter, we are talking of people with morals and integrity. So we are saying that we define what is the moral and integrity and affirmative action in the citizen and values of people of Kenya, so that we don't repeat it throughout the Draft Constitution.

Number three, in this particular Chapter and the others, we have talked a lot about issues of legislative in nature and the schedules of implementing the mechanisms and methodologies of implementing what we are going to discuss. I request that we have two documents. One, document on the Constitution principles. The other document, an addendum dealing with legislative issues that we do not lose the mind of the vision of the draft out of this Draft and at the same time the schedules of what are going to be done in so many years. Having said that Mr. Chairman, that will also bring us the transition where one time this Conference will meet as veterans of Bomas to review and brainstorm, is this what we wanted to be done?

Now going straight away to three points in this Chapter specifically, is about what was raised the other by Honourable Delegate Chief Justice Kwach. It is true in corruption there are two parties. We are more concerned with the Judiciary because they get money they get money from our taxes. That is why we are so concerned with them. Don't be deceived; call the enforcement officers if the advocates want to bribe you because they have the capacity.

The other one is about the lawyers. It is good that certain aspects have been introduced in the Constitution related to the lawyers because people out there are suffering because of postponements' adjournments of court cases because the lawyer is not available. Let us inculcate discipline so that the people out there are properly represented. We spend a lot of money when we go to court, and we find the lawyers cannot come.

Number two is about Article 209. I recommend that you put an Article, section number ten, whereby we provide for private prosecution. Because we have had lawyers wanting to institute private prosecution and it is not in the Constitution so they are left at the mercy of Attorney General.

Finally, Mr. Chairman, I come to the Kadhis's' Court. One of the things that in the Kadhis' Court they have talked about two things. We have been told about the history of the Kadhis' Court. I equate the agreement between Kenyatta and Sultan as the others as the famous Memorandum of Understanding that we have referred to which is creeping in with the Constitutional process that we are going through.

Number two, we are told that the Kadhis' Courts have been there, at least, for forty years and more, but how many things are we doing away with, which have been there for forty years? Mr. Chairman, we are transferring the powers of the President to Prime Minister. We are devolving the powers of the President through the Commission, Judiciary, Legislature and the devolution process. We can as well, if anything has been bad, discuss about it. So it is true the issue of religion has been talked of in one of the Chapters to be recognized customary laws. Other churches and other religious and other people have their laws, cannon laws. Let us also have these laws enshrined in the Constitution but managed outside the Constitution.

Finally, Mr. Chairman, Sir, and this is very important. Mr. Chairman Sir

**Hon. Delegate Danson Buya Mungatana:** Please wind up.

**Hon. Delegate Frederick Rukwaro Nderitu:** We have one hundred and twenty five Honourable Delegates here women, who have lobbied us to ensure that the gain that they have

made in the Draft Constitution is maintained. But here we are, we are talking of entrenching Kadhis's' Court, and no woman can become a Kadhis'. So we are therefore, saying Honourable Chairman that we entrenched a Constitution that is contradictory and discriminatory.

**Hon. Delegate Danson Buya Mungatana:** Please take your seat.

**Hon. Delegate Frederick Rukwaro Nderitu:** we either do away with affirmative action in the whole Constitution if the Muslim women cannot be recognized to become Kadhis' and we do away completely with affirmative action in the whole document. Thank you very much.

**Hon. Delegate Danson Buya Mungatana:** You are out of order now, eh, you are out of order. Yes we want to be informed. 525, point of information, then we get back there.

**Hon. Delegate Ibrahim Ahmed:** Thank you Chairman, my names are Ibrahim Ahmed Delegate number 525. I have just heard the speaker who sat down saying that women cannot be Kadhis's'. That is not true. The Kadhis's' are Judicial officers and they can be Kadhis's'. Thank you very much.

**Hon. Delegate Danson Buya Mungatana:** So we have been informed. Now, I would like to recognize, we have a District Delegate, I don't see any MP in this category there. I don't see. 144? Thank you; sorry I was not, sorry. Who has not spoken also?

**Hon. Delegate Ngoyoni Titus Lemusei:** Thank you Mr. Chairman. My name is Ngoyoni, MP. Laisamis, Marsabit. Delegate 144. Mr. Chairman I will be very brief. One, I think the independence of the Judiciary has been said much and I may not take much of my time talking about it. It is quite paramount.

I have a quarrel of a small Article, that is Article 186. If I may read, it says, no Judicial Officer shall be liable in an action in respect of anything done in the performance of Judicial function. Mr. Chairman, this one clause that has grossed been misapplied and I think if we put it again in our Constitution now we may not be trying to rectify things that have been bad in the Judiciary. This is a clause that every magistrate and every Judge has been misapplying. I don't know,

while trying to uphold the independence of the Judiciary, this clause is so much, I am sure it is going to be appealed. So I don't know how we are going to, while upholding the independence of the Judiciary, how we are going to take care of this clause. That is one.

Maybe the other one, Mr. Chairman, is about that Circular from LSK. The Circular is trying to condemn wholly or wholesome all the judges that are now there. I want to agree with one Delegate who said, every one of us who is here, we are all Kenyans and we have lived with Kenyans. None of us could today throw the first stone and say we are just clean. Judges are never clean either. They are quite reformable. I think they can be redeemed. They are also hearing us. They are also reading the mood of Kenya and as for us to subject them to that kind of ridicule, to tell them to resign, and then reapply, to me that is quite ridiculing them. We have very nice competent Judges. Only some of them are corrupt. So that circular if not withdrawn we shall not actually uphold it. Let Judges actually reform. I am sure they will reform.

Mr. Chairman, the other one is about the Kadhis's' Court. My position is, like some of the Delegates have said, we have had the Kadhis's' Court time immemorial, since independence and I think we have never had a single quarrel. Kenyans have lived peacefully together while these Court was there. Let's have it the way it has been in the old Constitution or in the Constitution we are trying to review. Maybe what Kenyans are trying to have a quarrel with is the clause that says the Kadhis's' Court should deal with commercial activities and that kind of thing. We may only remove that one and retain the Kadhis's' Courts the way it has been. Mr. Chairman, that is my point is.

**Hon. Delegate Danson Buya Mungatana:** Thank you Mheshimiwa and I am sorry about that. Now, from the category three, I notice Political Parties, 611 has not spoken.

**Hon. Delegate John P. Nyakundi:** Asante sana kwa kunipa nafasi hii ingawa imechukua Sura ya kwanza mpaka Sura ya tisa, sijapewa nafasi yoyote ya kuongea. Lakini leo nimepewa. Mimi ninashukuru sana kwa sababu sasa hii ni nafasi ambayo imekuja, na imekuja kutokana na wananchi wa Kenya ambao wameteseka sana.

Niwaambie kwa mpangilio, hii Mahakama, mimi nitaongea juu ya upande Mahakama. Mimi mwenyewe ninapendelea hivi, tufuate mambo ambayo wananchi walitoa. Wananchi wameteseka sana na wamekubaliana. Nitawapeleka Sura ya tisa katika aya ya 3 C, Mahakama ya kienyeji. Tusipokuwa na Mahakama ya kienyeji, tuta potesa kila kitu. Sasa kwa hivyo mimi mwenyewe nimependelea, nimeona sasa hapa Kenya tutakuwa na Mahakama zingine, wacha ile Kuu. Tutakuwa Mahakama ya kazi, hiyo mimi nina kubaliana naye, na ya kienyeji, na hii Marshal Courts kama iko, na Industrial Court, na Rent Tribunal. Hizo zote zinataka ziwe pale. Hizo zikiwa hapo zita-rahisisha kazi ya Mahakama Kuu. Kwa sababu Mahakama Kuu, watu wengi hawana amani nao. Hawo ni watu wame panga. Imepangwa kwa lugha ya Kizungu ama kufanyika kwa mtindo wa Kizungu. Hata hizi wigs ma-Judge wanavaa, mimi nimeonelea tutakuja na mavasi yetu ya kienyeji ama watu wavae; ili tuonyeshe kwamba nchi ya Kenya ni nchi ambae inajitegemea ina utamaduni na kila kitu chake.

Kwa hivyo sasa tusiwe tukienda pale kwa Mahakama tunaambiwa, ukiona mtu anaiba million tatu akienda kwa Mahakama, Hakimu na lawyer wanashirikiana. Huyu mtu anawekwa nje. Lakini mtu akiiba shilingi moja, yeye anaandamwa, anaandamwa hata hawezi kuwachiliwa, anabebwa juu juu. Hiyo tumekataa. Na tunakataa, tunasema Mahakama mpaka ifuate sheria. Ile Mahakama ya kienyeji zamani ilikuwa nzuri. Mtu akifanya pale wakijuwa mtu ameiba, anasukumwa ndani. Lakini leo mtu akiiba anawachwa nje. Sasa yule hajafanya makosa ndio anaonekana mwenye makosa, na mwenye makosa yeye ndio anaonekana kwamba hajafanya makosa. Kwa hivyo mimi naonelea hawa Mahakimu, Majudges, wale Mahakimu na ma-lawyers wanashirikiana. Kwa sababu hata tumeona ma-lawyers wanalipwa pesa hata sasa wananchi wanalia. Lawyer ameweka pesa zake nje. Kwa mfano mimi nilikuwa nimesumbuliwa na Polisi. Nikapeleka case kwa lawyer moja. Nikalipa pesa. Ikakaa mwaka moja mzima. Sasa wakati nilienda huko niliambiwa hiyo imeisha wakati wake. Kwa nini mwenyewe hata baruwa nilikuwa nimeandika--singe kubaliwa nifanye hiyo, kama ningekubaliwa nifanye hio case, ningekuwa huko, kwa sababu nimeona ma-lawyer na maatimu wana ushirikiano. Sasa akijua mtu ameiba pesa nyingi ameletwa hapo sasa ni biashara wanafanya. Sasa hatutaki wakati mwingine.

Sasa wananchi wamechoka. Kwa sababu, hizi Sura zimepangwa vibaya. Kama inge pangwa hii Sura ya kumi, inaleta kila kitu iwe raisi. Kwa sababu kule kijijini, tutakuwa na Mahakama, wale watu wamechaguliwa wawe wanaangalia kuna cases zingine pale za kienyeji nyumbani.

Zinatafikana kuangaliwa pale, halafu zikija kuja huko juu zinafanyiwa huko. Sasa kwa mfano, mtu pengine ameowa mtoto wa ndugu yake huko, akija kwa hii Mahakama kuu anakubaliwa anaambiwa-- Lakini ikiwa ni Mahakama ya kienyeji, ataambiwa hii ni makosa. Hii ni laana kubwa sana. Ninashukuru sana. Kwa sababu sita pata nafasi ya kuongea, chai ya saa kumi ndio ninapenda lakini nashukuru sana kwa kunipa hii nafasi. Asante sana.

**Hon. Delegate Danson Buya Mungatana:** Asante Mheshimiwa Delegate. I would like to recognize from category one, a Member of Parliament. Number 187 and 180 who has not spoken ? 180. Thank you, Mheshimiwa.

**Hon. Delegate Sammy Rutto:** Thank you very much, Chairman. My name is Dr. Sammy Rutto, MP for Kipkelion. I would like to add my voice to the debate on the establishment of the Kadhis's' Courts, and I want to make the following observations:

One, Article number 10 of the Constitution declares that the State and Religion shall be separate. I think this fact was alluded to yesterday by Reverend David Gitari and that number (2) says, "There shall be no State Religion." Now to allow a clause in the Constitution that gives a special place to the Muslims is to declare Islam a State Religion. And to me, whether we argue that we are extending this to Muslims because they are a minority, that still is tantamount to declaring Islam a State Religion. My view is we should go by what that Article of the of the Constitution says, and not put anything religious in that manner in the Constitution. (*Clapping*).

**Hon. Delegate Sammy Rutto:** It is better when it is dealt with by an Act of Parliament. Now, we were told yesterday that Muslims fear that an Act of Parliament may be deleted by a simple majority in Parliament. Now, why do they fear? Why should we fear? It can be defensible as an Act of Parliament and not as an Article in the Constitution.

Secondly, I am arguing against that position on the basis of discrimination. If we allow Islam in the Constitution, there is no reason why we shouldn't allow Christianity or Hinduism in the same. Now we will ask for it as Christians, we want Christian Judges also, if that is what will happen. We will ask for it. We will ask the Conference to ratify. Now, by the fact that we have Emmanuel or Samuel as Judges in the High Court, they are not Christians, they are not. We are

saying Christianity is a Religion just like Islam. We as Christians also have issues which touch on personal life. So the argument that Islam has more personal issues than Christianity is not valid. It will be discriminatory, and to discriminate against the majority is just as evil as discriminating against minority. (*Clapping*).

**Hon. Delegate Sammy Rutto:** Thirdly, I am a survivor of the 1998 bomb blast in Nairobi and I saw the ugly face of fundamentalism in religion. (*Uproar from Honourable Delegates*). Wait, let me finish.

**Hon. Delegate Danson Buya Mungatana:** Sorry, just hold on.

**Hon. Delegate Sammy Rutto:** Let me finish.

**Hon. Delegate Danson Buya Mungatana:** Just hold on, I would want to invite a point of order from a lady, 504.

**Hon. Delegate Nasra Awes Abubakar:** Thank you Mr. Chairman, my name is Nasra Awes Abubakar, Delegate number 504. My point of order is on the Speaker who insinuated that the Muslims in Kenya who are asking for Kadhis's' Courts are bringing terrorist action. Yesterday...

*Uproar from Honourable Delegates.*

**Hon. Delegate Nasra Awes Abubakar:** Yesterday ...

**Hon. Delegate Danson Buya Mungatana:** Sorry, sorry...

**Hon. Delegate Nasra Awes Abubakar:** When somebody talks about--

**Hon. Delegate Danson Buya Mungatana:** Sorry, Speaker--

**Hon. Delegate Nasra Awes Abubakar:** Let me finish my point of order.

**Hon. Delegate Danson Buya Mungatana:** Just hold on. Excuse me fellow Delegates, excuse me. Just hold on.

**Hon. Delegate Sammy Rutto:** Allow me to finish.

**Hon. Delegate Danson Buya Mungatana:** Sorry, sorry Mheshimiwa.

**Hon. Delegate Nasra Awes Abubakar:** Let me finish my point of order.

**Hon. Delegate Danson Buya Mungatana:** Sorry, sorry, I am asking us to just be cool. Let her finish her point and then if you want to respond, I will give you a chance. Let's not shout, please. Let her finish and then we'll hear--

**Hon. Delegate Nasra Awes Abubakar:** When any Muslim stands and speaks, you say that he is insinuating something and you ask them to apologise.

**Hon. Delegate Danson Buya Mungatana:** Please make your point.

**Hon. Delegate Nasra Awes Abubakar:** I am making my point. But when you stood up, somebody else also stood up and insinuated that Muslims are terrorists. I would like both of them to withdraw their statements. Thank you, Mr. Chairman.

**Hon. Delegate Sammy Rutto:** Mr Chairman, let me continue.

**Hon. Delegate Danson Buya Mungatana:** Sorry, let me make a ruling from the Chair.

**Hon. Delegate Sammy Rutto:** Allow me to continue, Mr. Chairman.

**Hon. Delegate Danson Buya Mungatana:** Sorry, Mheshimiwa just hold on. I would like to say this, I did not hear the speaker say that Muslims are terrorists.

*Noise from Honourable Delegates.*

**Hon. Delegate Danson Buya Mungatana:** So there is nothing to withdraw, can you proceed and finish your points.

**Hon. Delegate Sammy Rutto:** I have not said that Muslims in Kenya are fundamentalists. So protect me, Sir, from interruptions.

**Hon. Delegate Danson Buya Mungatana:** Sorry 505, can we just let the Speaker finish? I am saying let him finish, I have ruled you out, let him finish. Please, proceed.

**Hon. Delegate. Sammy Rutto:** Now let me continue, thank you, Mr. Chairman. I have not said that Muslims here are fundamentalists. But the fact of the bomb blast is a reality. It's a reality and I am just wondering without insinuating whether by committing ourselves into allowing this issue of State Religion into a Constitution, we are not allowing something that shall be a problem to this nation later, particularly if Kenya in future we have some Muslim fundamentalists. If we have them in future, what are we going to do with them?

**Hon. Delegate Danson Buya Mungatana:** Please, wind up.

**Hon. Delegate Sammy Rutto:** I oppose that Clause on the basis of those three reasons. Thank you.

**Hon. Delegate Danson Buya Mungatana:** Thank you. I want to notice a District Delegate, a lady who has not spoken, 414. 505 can I get back to you when we finish this point?

**Hon. Delegate Elizabeth Okelo:** Thank you the Honourable Chairman, my names are Elizabeth Okelo, a District Delegate from Migori District. I want to raise the points to support the retirement of the Judges, since there are very many Kenyans who are not employed. So I support the retirement of the Judges to be 70 years, because we have very many Kenyans who are retiring without even 'tasting' the job. They are very many.

I am also supporting the Public Defender because the common man now can have somebody who can stand for him/her and help. So let that office be active and let it be in the Constitution so that it helps the common mwananchi and let it be there in reality and be active and be there for the people who are suffering at home with problems and have nobody to defend them.

On the matter of the Kadhis's' Courts, as people have said, let the Kadhis's' Courts remain as it was. Let it be as it was and people in Kenya will have peace and will have no problem. Let the Kadhis's' Courts remain as it was. Those are my points. Thank you.

**Hon. Delegate Danson Buya Mungatana:** Thank you Honourable Delegate, now in fairness to the other lady who let us proceed, I would like her to raise her point of order. Honourable Delegate number 505.

**Hon. Delegate Fatma Ali:** Thank you, Mr. Chairman. I am Fatma Ali, Delegate number 505, and I am rising on a point of order, regarding the comment made by the Speaker who referred to the August bombing. I wanted us to be very cautious of the comments we are making. As much as we are using history to defend our position, please, there is no way the August bombing is related to Chapter 9 on the Judiciary. Let us try to be very sincere and straight to the point as much as we are using history to refer. It is very wrong and very unfair to bring in a Motion and to try and raise the anger of other people. Thank you.

**Hon. Delegate Danson Buya Mungatana:** Thank you. I would like to state that that was not really a point of order. And by the way, this Chair, when we have ruled on any point of order, let us not get back on these issues again. Let us proceed.

Now, I am being frustrated by that particular row, because I am supposed to pick one more. But you have been putting down all your cards, and now you are raising them when .. I want to notice 578. This is Political Parties' category. And please this row, I would like you to raise your cards up so that I can see who hasn't spoken. Two minutes.

**Honourable Delegate Jacob Ochino:** Mr. Chairman, my name is Jacob Ochino, Delegate number 578, Political Parties, and I would like to make a contribution on the proposal

concerning the Kadhis's' Courts first. I would like to appeal to Delegates to be very conscience and let us cool our tempers because on one hand, we are infringing on the current Constitution and on the other hand we are trying to modify what would bring Kenyans together. We would be closing our eyes, Mr. Chairman, in passing some Clauses in this Constitution. The Honourable Speaker of the National Assembly who has just sat down, has mentioned a very fundamental issue. He said that the current Constitution has declared, unreservedly, that Kenya shall not be a Religious state. Unless that is amended, to allow Religious Organizations to be spelt out in the Constitution, Mr. Chairman, then any attempt to pretend that we are either accommodating Christians or Muslims in the Draft Constitution, is an infringement of that particular Clause in the Constitution.

So, my view, Mr. Chairman, it is historical - I am Christian myself and I have no malice against Muslims - we stayed with our Muslim friends for a long time, it is a historical situation and I don't believe that when the late President or Prime Minister for that matter was writing to his counter-parts during the Lancaster Conference, that the late Kenyatta was sober. The man was under imminent pressure and he had stayed in jail for nine years with hard labour. Mr. Chairman, the man was looking at how Kenyans would gain what had made him to be in prison for nine years. And the only Clause that could let the British rule us and allow Kenyatta to get what he was fighting for on behalf of Kenyans, was to put that Clause as a condition. So Kenyatta gave in because of a lot of pressure by the British Government. I don't believe that he was doing it willingly. But all the same, we have inherited that, we have stayed all together, nobody has raised a complaint and even now, the Muslims would wish to extend some Clauses in this Constitution in the absence of mentioning explicitly to what extent they are suffering under the current provision in the Constitution. If there is anything that they feel is a hindrance to them under the present Constitution, let them raise it, it has not been raised. All the same, Mr. Chairman, I am supporting the fact that let the current provision remain what it is in our laws without any extension.

Dr. Gitari also mentioned something very fundamental yesterday, when he said the Christians also have the Marriage Acts, which we could also wish to be extended to this Constitution. If they are giving into it, why don't they give in and we stay as Kenyans as we have stayed before.

Mr. Chairman, I want to talk about the Judges. I think it is wrong to say that our Judges are corrupt. Indeed they are corrupt as I am corrupt, as everybody else is corrupt. Kenya is a country of corruption and one wise man described this country as a country of 'man eat man society', every thing has gone hey wire.

**Hon. Delegate Danson Buya Mungatana:** Sorry, Speaker, are you saying the Chair is also corrupt or what? (*Laughter from Honourable Delegates*).

**Hon. Delegate Danson Buya Mungatana:** I don't think all of us are corrupt, anyway go on.

**Hon. Delegate Jacob Ochino:** Mr. Chairman, with due respect to the Chair, I wanted to say that yesterday, Honourable Minister for Justice and Constitutional Affairs came out in the open and admitted that his office and that of the Attorney General, the Registrar, are all corrupt and in fact as I am talking now, he is holding a meeting in the Attorney General's offices of all Departmental Heads, to see how best they can solve this issue of corruption. I don't believe that in this hall there is shortage of brain capacity, that would create a situation where Kenyans will live under conducive environment, Mr. Chairman. Therefore to single out Judges, that they are corrupt and should therefore retire, is very, very unfair. Everybody is corrupt, let everybody carry his own 'mzigo'.

Mr. Chairman, lastly--

**Hon. Delegate Danson Buya Mungatana:** Sorry, I think you should be winding up.

**Hon. Delegate Jacob Ochino:** Lastly, Mr. Chairman, I would like to appeal that the Constitution, the prosperity of this country will basically depend on the investor and the worker. It will be wrong, Mr. Chairman, that we are making a Constitution which does not take into account how best the Industrial climate in this country will be regulated...

**Hon. Delegate Danson Buya Mungatana:** Okay, I think you are now out of order. Just sit down.

**Honourable Delegate Jacob Ochino:** ---so the establishment of Industrial Court is, I think, necessary. Thank you.

**Hon. Delegate Danson Buya Mungatana:** Thank you. Now, let's take 255, he has a point of order.

**Hon. Delegate Ahmed Maalim:** Thank you, Mr. Chairman, I'm Ahmed Maalim 255 I have two Points of Order.

**Hon Delegate Danson Buya Mungatana:** That is against the rules, you can only raise one.

**Hon. Delegate Ahmed Maalim:** Okay, then I will raise one. And the Point of Order I am making is: the previous speaker when he was opposing the Kadhis's' courts he brought to this house a co-relation between the Kadhis's' Courts and August 1998 bomb blast. Is it in Order for an Honourable Delegate and the co-relation has not been proved?

**Hon Delegate Danson Buya Mungatana:** Sorry I think.... Please sit down, I am not going to allow you to go back on that one. I want to recognize in the next row the category number 1. Yes Honourable Shikuku.

**Hon. Delegate Martin Shikuku:** Mr. Chairman I wish to congratulate you for your ruling. A Point of Order can only be raised when the member speaking is on his sit, in this case he resumes and then he raises the Point of Order. We cannot be taken back when we have gone, if he didn't raise it- finished!

**Hon Delegate Danson Buya Mungatana:** Gentleman, Honourable Delegates I want to recognize from category one-the one of Members of Parliament- number 178.

**Hon. Delegate Philip Ruto Rotino:** Thank you very much Mr. Chairman, my number is 178 Member of Parliament from Sigor. Mr. Chairman I want to thank you for giving me this opportunity to be able to contribute and give my input to Chapter 9. Mr. Chairman I want to start by saying that I represent a rural community and while I do that Mr. Chairman we have a big

problem in getting access to our court. Our court Mr. Chairman has become very very difficult to access because of the costs, and because of the distance from the rural community. When people have problems Mr. Chairman to be able to settle these problems it is very difficult to get access to court. So Mr. Chairman I want that we include what we call the elder's court, elders village councils where courts respect the ruling of those elders when they are taken to court. *(Clapping)*

Mr. Chairman, I want to talk about the tenure office of judges, as some members have said I want to accept 70 years because we also proposed that for the President.

Mr. Chairman, I want to talk about the Kadhis's' Courts. Mr. Chairman we are making a Constitution we are making a country anew, we are trying to solve the mistakes which were made in the previous Constitution. Mr. Chairman Chapter 10 Article number 10 has said, "there is no religion which is superior than the other, all religions are the same". Mr. Chairman we are making a Constitution that is going to guide us for the next 200 years, 300 years. Lets not make a mistake now, because countries that have had problem with religion have entrenched problems of religion in their Constitutions. Mr. Chairman I would say that religion should be kept out of the Constitutions . *(Clapping)* and we take it back to Parliament, Parliament will protect them, Parliament will give an Act of Parliament that is going to protect all religions, so that we don't have problems in the Constitution. This is a document that is going to be supreme, a document that is going to protect us, a document that will ensure everybody in this country is taken care of, a document that we are going to be part and parcel of for many years. So we don't have to put things that are going to bring conflict to our children later on. Let us have an Act of Parliament to deal with the problems that the minorities have, that if Muslims are saying that they are not being taken care of in the Constitution, let's do it in the Act of Parliament. I am not convinced yet, Mr. Chairman, of the reason people said that because it has been there let's keep it there. That is not a reason, it is not convincing. Let the Muslim brothers stand up and convince us why they need to have it in the Constitution, so that we are convinced. With those few remarks Mr. Chairman I say thank you very much.

**Hon Delegate Danson Buya Mungatana:** Thank you. I want to go to category 2, which is the district Delegates and 406 has not spoken according to the list.

**Hon. Delegate Shakeel Shabbir:** I have not spoken for over 2 weeks.

**Hon. Delegate Shakeel Shabbir:** Even then a Point of Order which I brought up. My name is Shakeel Shabbir I represent Kisumu district and I would like to speak about two items please.

The first one is the Kadhis's' Courts. Corruption is an evil, when evil cannot to destroy the truth it tries to divide it. You know the people who drafted this Bill did Muslims and Kenyans no favour. It was a disfavour to all Kenyans the way this Bill was drafted in respect to Kadhis's' Courts, because they went into details that were not necessary, excess was not necessary. I am a Muslim and I want to stand up today and say, that as a Muslim, let Kadhis's' Courts remain as they were in 1963: for no other reason if only that there was a hole that somebody blocked up. You don't know what will happen if that hole is opened up. But I do not, today, wish to endorse the other extension, vertically and horizontally and I m saying so today. As the rest has been verified by my community, that we will not do anybody any favors and as a matter of fact, we will open up a lot of problems.

Let the issue of Kadhis's' Courts remain as it was in 1963 and let every other issue be sorted out through Legislature. We can even do that by having a Kadhis's' family court. Lets tell everybody here- the fear is that we are going to bring in Sharia through the back door. It's the truth, there cannot be smoke without fire. The thing is, us Muslims we never sorted out that fire. That fire was brought by the Commission, and the Muslim Delegates of that Commission they were not sincere to Muslims, they were not sincere to us. They brought up this issue to create enmity between the Christians and the Muslims and we have lived together for hundreds of years, why was it brought now? Why? Because you wanted us not to talk about devolution or what else? So I am not for it and under the present circumstances we are saying let 63 remain as it is and any other issues be sorted out through Legislation. There is a 1967 Kadhis's' Act as Justice Kwach says that as other systems it can be done.

**Honourable Delegate Danson Buya Mungatana:** Thank you.

**Hon. Delegate Shakeel Shabbir:** Finally, one little point sir, about the Judiciary. If, you know these are people of honour, people of ethics most of them. If some of them have had what is termed disease, you don't want to put them all down. Lets suggest an independent body, which

can assess them. Independent- where the people's voice can be heard. If I know of a corrupt Judge I should be able to say so. Let's have an independent body to assess that. Thank you very much.

**Hon Delegate Danson Buya Mungatana:** Thank you. From category 3 I would like to recognize 579.

**Hon. Delegate. Daniel Rasungu:** My name is Daniel Rasungu Delegate number 579 representing Political Parties. Mr. Chairman my contribution would first and foremost relate to the Kadhis's' Courts. I have sworn as a Delegate to deliberate here without fear or favour. I would like to echo the sentiments expressed by one of the Honourable Delegates, a Member of Parliament, Honourable Ruto to the effect that retaining or entrenching the Kadhis's' courts in our Constitution, as it is, is not fair to Kenyans. And what I m saying is that we are not going to be cowed by acclamations or shoutings or any other behaviour, that we don't speak this out because it is the only opportunity that Kenyans have had to discuss the Constitution of this country. Ladies and gentlemen, Mr. Chairman I am saying here and now that the Kadhis's' courts should be placed under Legislation just like other religion, and if not then Kenya be should declared a Christian state.

Allow me Mr. Chairman to contribute to matters pertaining to the Judiciary and how it relates to labour. We have got what we call rural urban influx where labour moves from the rural set up to urban areas. They rent houses, they are accommodated and they pay rent to the landlords or landladies, I am suggesting that matters of rent should not be treated or handled by the tribunal but rather should be brought to operate under the district Magistrate, because there is a tool called a hammer which is closely associated with a carpenter but these days it belongs to an auctioneer. And many of our people have suffered under this tool because matters of arbitration in matters of rent have been subjected to abuse.

There is another part I want to address here in the name of a lender and a borrower. I' m yet to see precedents set in this country but the Court of Appeal favoring the common man. In the year 2002 or 2000 the National Labour Party went to court challenging the Government of the day why Kenyans should be retrenched, even when they are very young, skilful and energetic to

serve their country. A Kenyan who was retrenched and who was a subject of a mortgage agreement between a bank or a housing finance and his employer loses all that he or she has saved for a lifetime and in the hands of a Judge in court of law because he or she is not protected. I'd like to suggest that our Courts of Appeal consider coming up with precedents which are not serving the letter and spirit of capitalism. I would say that our homes that we have for a long time saved to acquire, should not just be auctioned because of a law which was enacted in the year 2000 when we were not in existence, when we even didn't know what was taking place then.

Lastly, Mr. Chairman, let me conclude by saying that our courts of law should protect that which is meant for the family because the family unit is the composition of a Nation, without a family unit there is no nation. Thank you very much.

**Hon Delegate Danson Buya Mungatana:** Thank you very much Honourable Delegate. Now Honourable Delegates many years ago in England, the old England, there used to be a Lord Sandwich he was the fourth earl of Sandwich. He lived between 1718 and 1792. He used to prefer a short quick snack to the long elaborate dinner they used to have so that he could get back to business. So gentlemen as we break for tea let's do it the Sandwich way and come back very quickly, in 20 minutes we resume. Thank you very much.

### **TEA BREAK**

**Hon. Delegate Danson Buya Mungatana:** We now bring the House to order. Please let us have some order. Honourable Delegates, ladies and gentlemen, it is now 11.35 a.m. or thereabouts, I was proposing that in view of the fact that most of the issues have been ventilated, Kadhis's' Courts.

**An Hon. Delegate:** (inaudible).

**Hon. Delegate Danson Buya Mungatana:** Just hold on. Hear me out. The Courts of Appeal, the Supreme Court, the small claims courts and all that, that we try and target between 11.30 a.m. now and 1.00 o'clock, that is 1½ hours. We try and target to use 1½ hours, we use 1 hour for ourselves, and we give the Commissioners at least 30 minutes to respond. Is that alright?

**Hon. Delegates:** Yes.

**Hon. Delegate Danson Buya Mungatana:** Thank you.

**Hon. Delegate:** Point of order.

**Hon. Delegate Danson Buya Mungatana:** Ah, no, these points of orders are the ones that are -- okay let me take the point of order after I have taken one speaker from this side. Who has not spoken here? I think I will give it to a lady, 493.

**Hon. Delegates:** Point of order.

**Hon. Delegate Danson Buya Mungatana:** I will take the points of order after.

**Hon. Delegate Amina H. Soud:** Sasa nini? Asante Bwana Chairman kwa kunipa nafasi hii tukufu —

**Hon. Delegate Danson Buya Mungatana:** Please proceed.

**Hon. Delegate Amina H. Soud:** Niendele, sio? Asanteni sana kwa kunipa nafasi hii na nimeinuka nashukuru pia kwa kupata hii nafasi maanake imekuwa ni ngumu sana. La kwanza nataka kuwashukuru wale wote ambao wameelewa hii Kadhis's' Courts na wamekuwa pamoja na sisi.

**Hon. Delegate Danson Buya Mungatana:** Tafadhali tupe jina na namba.

**Hon. Delegate Amina H. Soud:** Jina langu naitwa Amina Hussein Soud, ni 493, Women Organizations. La pili nataka kuwaeleza vipi inavyoniathiri kama mwanamke hii Kadhis's' Courts. Hii Kadhis's' Courts kwa mwanamke wa Kiislamu, huwa ndiyo inayomshughulikia kuolewa kwake, kuachwa kwake, watoto wake na kutambulikana kama yeye ana baba. Kwa hivyo mkiitoa mtuambie tufanye vipi, tusitoe tu, tueleze solution itakuwa ni kitu gani.

Na la pili, kuna mambo mengi ambayo kama mimi mwanamke wa Kiislamu, nayalipia kwenye nchi hii na ilhali si lazima niyalipie ni ikizidi ni dhambi kwangu kuyalipia. Lakini nayalipia kwa sababu naogopa nisiuvunje ule u-nationhood wangu. Mimi nalipia insurance, mimi nalipia duty, nalipia gambling officers, nalipia duty ambayo yote kwa Muislamu haifai, lakini nimekubali kwa sababu nataka ile kuwa mimi ni Mkenya nibaki kwa Kenya. Kwa hivyo na sisi tunaloliomba siyo mtulipie ma-priests wetu wala mtujengee Miskiti; tunaloliomba, muwatambue wale Majaji wetu ambao kwenye Bible waitwa MaKadhis', ili na mimi nipate kujulikana kama Mkenya. Pia nataka kuwaeleza hawa waliotoa maoni ni Wakenya kama wewe na mimi. Na makaratasi na mabuku na kila kitu kiko hapa, wazi wazi kuonyesha alotoa maoni ni Mkenya, si Muislamu tu, bali ni Mkenya.

Na lingine nataka kuwaomba kama Delegates wale ambao hawakuelewa, nataka tuwaambie jamanini, tusichukuliwe na mtu mgeni akatubabaisha vichwa. Mkikuyu akwambia, 'cia mucie ti como'. Mgeni usimpe ruhusa nyumbani kwako akakutawale kichwa chako hadi ya kuwa mpaka hujitambui wewe ni nani, kiasi cha kuwa tumekuwa kama yule evil man aliyeambiwa, omba kitu chako kimoja, nitampa maskini viwili. Akaomba atolewe jicho ili mwenzake akose kabisa. Tujali kwenye sense zetu, Jesus ametwambia, mpende jirani yako kama unavyojipenda nafsi yako. Je leo tumejisahau? Asanteni. (*Clapping*).

**Hon. Delegate Danson Buya Mungatana:** Asante.

**Hon. Delegates:** Point of order.

**Hon. Delegate Danson Buya Mungatana:** Oh yes, there was a point of order, in fairness to disallowing us to proceed. Let us take the point of order, one, 500 is it a point of order?

**Hon. Delegates:** Yes

**Hon. Delegate Kamla Sikand:** No, no don't worry; I am giving a point of order. Mr. Chairman, I beg to differ with the Hon. Delegate who was accusing the Commission and the Commissioner.

**Hon. Delegate Danson Buya Mungatana:** No, please, take a seat, I will not allow that, that is a long time ago.

**Hon. Delegate Kamla Sikand:** But it is a point of order.

**Hon. Delegate Danson Buya Mungatana:** No.

**Hon. Delegate Kamila Sikand:** It is a point of order.

**Hon. Delegate Danson Buya Mungatana:** No.

**Hon. Delegate Kamla Sikand:** No?

**Hon. Delegate Danson Buya Mungatana:** Yes.

**Hon. Delegate Kamla Sikand:** No, there are lots of issues --

**Hon. Delegate Danson Buya Mungatana:** Excuse me --

**Hon. Delegate Kamla Sikand:** No.

**Hon. Delegate Danson Buya Mungatana:** Please, can you take the microphone from the speaker?

**Hon. Delegate Kamla Sikand:** Pardon? No.

**Hon. Delegate Danson Buya Mungatana:** Please surrender that. Thank you. Please Honourable Delegates, let us agree on something. I want us to have as many of the issues that we want to go into the Technical stage being in our reports, being deliberated here, because as I have reminded us, from here we are going to the Technical Committees. The Technical Committees are going to take the issues we are raising here, not the points of order. I am asking

us if you can indulge me, I go to the next person who will make a contribution, not a point of order.

**Hon. Delegates:** Point of order.

**Hon. Delegate Danson Buya Mungatana:** There is 258 who has not spoken since we came here.

**Hon. Delegate Isaack Derow Ibrahim:** Thank you very much, Bwana Chairm an. Jina langu ni—

**Hon. Delegate Danson Buya Mungatana:** Mheshimiwa, I will get back to you, please.

Hon. Delegate Isaack Derow Ibrahim: Jina langu ni Isaack Derow Ibrahim namba 258 from Mandera. Bwana Chairman, la kwanza nataka kushukuru Tume ya Kurekebisha Katiba kwa kazi ngumu wamefanya. Ni Tume peke yake ambayo imejitokeza na document kama hii. Wameweza kuzunguka kila wilaya, wameweza kuzunguka kila province, wameweza kuzunguka kila division na kuchukua maoni ya wananchi wa Kenya. Hizi documents ziko hapa siyo maoni ya Commissioners, ni maoni ya wananchi wa Kenya. (*Clapping*).

Bwana Chairman, nataka kujua: maoni ya Wanakenya wengine yachukuliwe, yakubaliwe katika Draft hii na ya wengine yakataliwe, ni ungwana? Huo sio ungwana. Wale wameuliza Kadhis's' Courts, ni Waislamu sio Wakristo. Waislamu kote nchini ndio wameuliza enhancement ya Kadhis's' Courts. Na wale walipinga kutoka jana mpaka wa leo, sio Waislamu, ni Wakristo ambao hawajaitisha hiyo Kadhis's' Courts.

**Hon. Delegate Danson Buya Mungatana:** Sorry, nilikuwa nauliza Mheshimiwa mzungumzaji, kwamba tutoe zile points, kama unapinga au una-support, unatoa ile point.

**Hon. Delegate Isaack Derow Ibrahim:** Bwana Chairman, bado ninaendelea, I am coming to that point.

**Hon. Delegate Danson Buya Mungatana:** Yes.

**Hon. Delegate Isaack Derow Ibrahim:** Chapter 9, jurisdiction of Kadhis's' Court of which is Article 200. Hiyo inasema ukweli kabisa na inaonyesha wazi ya kuwa, au it clearly says that the Jurisdiction of a Kadhis's' Court extends to the determination of questions of Muslim Law relating to personal status, marriage, divorce, including matters arising after divorce, inheritance and succession in proceedings in which all the parties profess Islam. Therefore, we as Kenyans, Muslim Kenyans, were not claiming for Islamic Law, Bwana Chairman. Let Kenyans not be misled that we are claiming for Islamic Law in Kenya. Let the Draft Constitution be the views of Kenyans, and we are part of Kenyans, Bwana Chairman. So, the enhancement of Kadhis's' Courts has nothing to do with the bomb blast, which has been mentioned by the speaker.

**Hon. Delegate Danson Buya Mungatana:** I have ruled on that, don't go back there.

**Hon. Delegate Isaack Derow Ibrahim:** So, Bwana Chairman, Uislamu sio rangi. Inajulikana ya kuwa, Bwana Chairman, Christians are known and Muslims were known. Bwana Chairman, nikiendelea kusema, wacha nimaliza hii 5 minutes yangu yote, don't interrupt me ili nisipoteze points zangu. Kwa hivyo Bwana Chairman, Uislamu sio rangi, Wengine wanasimama hapa hajulikana which Party they belong to. Christians are known and Muslims were known, we cannot be cheated by colour. Those who are not Muslims, those who are not Christians, please keep aside, wewe simama kando, usikuje kudanganya sisi ya kuwa wewe ni Muislamu unakuja kupinga jambo ambalo Waislamu kote nchini wamependekeza. Bwana Chairman it is clearly known, Wanakenya, if you have gone through the Constituency reports, wale wamechukua wanajua, kote nchini hakuna constituency ambayo hawajauliza enhancement ya Kadhis's' Courts. Kwa hivyo Bwana Chairman, ninauliza Wakristo wenzetu, Kadhis's' Courts ambayo ilikuweco tangu uhuru, hata mbele ya uhuru, hata Wakoloni walitukubalia. Wenzetu ambao tunaishi pamoja kwa usalama, na haijadhuru mtu yeyote tangu zamani, leo wanakataa enhancement, hata wacha enhancement, wengine wanasema itolewe kabisa. Bwana Chairman, huo ni ungwana? If we ask for self-determination today, what will you say? You have disowned us by now, you have turned yourselves – Christians -- against Muslims.

**Hon. Delegate Isaack Derow Ibrahim:** No. So, if we ask for self-determination today, what will you say? Nasema Bwana Chairman –

**Hon. Delegate Danson Buya Mungatana:** Thank you.

**Hon. Delegate Isaack Derow Ibrahim:** Bwana Chairman, nikimaliza –

**Hon. Delegate Danson Buya Mungatana:** Thank you.

**Hon. Delegate Isaack Derow Ibrahim:** Bwana Chairman ngoja kidogo --

**Hon. Delegate Danson Buya Mungatana:** No. Tafadhali kaa. (*Laughter*).

**Hon. Delegate Isaack Derow Ibrahim:** We have no problems with Christians, Bwana Chairman, lakini hii Draft a hundred percent, ina-support Christian Law. Na kipande kidogo ndicho kinasema which is not even a section, it is a sub-section.

**Hon. Delegate Danson Buya Mungatana:** I think you are out of order now. You are out of order. Please sit down.

**Hon. Delegate Isaack Derow Ibrahim:** Kwa hivyo Bwana Chairman, nasema ikiwa sisi ni wananchi wa Kenya, wananchi wa Kenya wametoa maoni yao--

**Hon. Delegate Danson Buya Mungatana:** Please sit down.

**Hon. Delegate Isaack Derow Ibrahim:** -- na sisi ni Wanakenya tukukubalie hii enhancement ya Kadhis's' Courts.

**Hon. Delegate Danson Buya Mungatana:** I will want to recognize 396 who has not spoken. Oh sorry, in fairness to him, he allowed us to go on, let us hear his point.

**Hon. Delegate Ruto:** Mr. Chairman, I am rising on a point of order, Mr. Chairman.

**Hon. Delegate Danson Buya Mungatana:** Yes.

**Hon. Delegate Ruto:** When we are here in this Conference, every human being who is here is entitled to his own opinion. Whether you come from which party or which party. Mr. Chairman, is it in order for any member to intimidate any member who has given his opinion here, Mr. Chairman? I have been intimidated on what I said, and Mr. Chairman, it is not fair because we are here to give our opinions. So is it in order Mr. Chairman?

**Hon. Delegate Danson Buya Mungatana:** You have made your point, I think I want to plead with you gentlemen and Honourable Gentlemen at that, and Honourable Ladies, please, please, we are just exchanging ideas, and it is not the end of it all. We will come back here after the Technical Committees, we will come and debate on the issues and the final decisions will be made. Please let us not be like that. I would like to recognize this person who has not spoken, can the point of order just hold on. Thank you.

**Hon. Delegate Happy Gloria Wabwire:** Thank you Chairman for keeping your word. Mr. Chairman, I am Happy Gloria Wabwire from Busia. Mr. Chairman, I would like to refer to the Commissioner's Report from what was compiled from Busia and this is specifically on Kadhis's' Courts. They said the Constitution should provide that Kadhis's' Courts should deal with matters related to marriage, divorce and succession. Allow me to make reference to Chapter 3 which talks about National Goals, Values and Principles. Article 3: the Republic shall recognize the diversity of its people and promote the cultures of its communities. Mr. Chairman, we have been told Islam is a way of living and Muslims have integrated their religion into their culture and I think that is why there is a proposal that we have an *ad hoc* committee to look into the cultural views to be enacted in this Constitution. Therefore, what I am saying is that according to Article 200, it should remain as it is, that they should deal with personal law, matters relating to marriage, divorce and succession. I am supporting this simply because we live with Muslims where we come from, and what we know is that our sisters are the most sufferers, widows and orphans. (*Clapping*).

**Hon. Delegate Happy Gloria Wabwire:** According to their religion, or according to the Koran, they are not allowed to go to other courts, the secular courts, on this issue. Therefore, if we did that, we shall be antagonizing them, we don't need to antagonize anybody. I tend to believe we are doing this Constitution not to strip off people of their rights, of the facilities they have been enjoying (*Clapping*) all along and it has never caused any problem in this nation. If anything, I think we need to enhance the Kadhis's' Courts because we have seen most of the Kadhis's--- actually some for them --- are not very conversant with what they normally do. So you will find more often than not, they normally rule in favour of other people and they make widows and orphans live like destitutes. That is why I am saying that they should have a higher court where they can get redress. (*Clapping*).

What I am trying to say with due respect, Mr. Chairman, is that what is going on here between Muslims and Christians - I am a Christian and I am saying this with due respect and with a lot of humility - is like sibling rivalry in a family. So, we don't need to do that for the sake of unity, and therefore, please, what I am requesting our Delegates is that, me being one of them, let us not take this issue to referendum, because there are some people who are already organizing that. It will be tantamount to malice aforethought because Muslims are a minority. So, if this issue is taken for referendum, we know that it will not work. They will lose and we don't want them to lose. Therefore, please, let us have a higher court and I am proposing that the higher courts should be placed or they should be situated at provincial level, so we should have at least 8 higher courts. Thank you.

**Hon. Delegates Danson Buya Mungatana:** Thank you. Let us agree on something, there are so many people who have not spoken here and I would like to give them a chance because they have not been seen or something. So, I want to see somebody here, one more chance, I want to give it to 238. I have not reached your line, I will come to you just hold on.

**Hon. Delegate Abdulrahman Ahmed Badawy:** Mr. Chairman, Honourable Delegates, Ladies and Gentlemen. First of all, I must extend my appreciation to the Chair for giving me this opportunity. Secondly, I must thank all those who have understood why we should have Kadhis's' Courts. Now, I would like to switch to our national language so that I can explain

properly. Mwenyekiti, ningependa kuwafahamisha hapa kwamba jina langu ni Abdulrahman Ahmed Badawy number 238, delegate from Malindi. Thank you.

Kazi ya Kadhis' ni kubwa kabisa, yeye ni officer ana-enforce law. Ikiwa kuna tatizo lolote ambalo kwamba limetokea baina ya mke na mme, au baina ya watu katika kurithi, kuwachana au wanataka kuoana. Ikiwa kumetokea tatizo katika mambo hayo, hawayawezi kutatua, wale ambao kwamba huwatatulia hawayawezi ku-enforce law. Sasa wanakwenda kwa Kadhis', pale Kadhis' ndiye ana-enforce law na kupitisha uamuzi. Kama tunavyofahamu ya kwamba, Kadhis's'Court iko sasa miaka arubaini tangu Uhuru na kabla ya hapo hatuna haja ya kuenda nyuma, twende mbele, imefanya kazi yake vizuri sana, mme ikiwa hakutekeleza wajibu wake wa ndoa kwa mkewe, mke anakwenda kwa Kadhis' anaeleza na Kadhis' anamuita mme pale, "kuna mashtaka kadha hapa yamekuwa filed dhidi yako wewe", na mme anajieleza, Kadhis' anapitisha amri yake na ile amri inatekelezwa sawa sawa.

Mme akiwa na hitilafu yoyote na mkewe, iwe ndoa au juu ya mke kufanya mambo ambayo ni kinyume cha sheria, anakwenda kwa Kadhis' yule mke anaitwa Kadhis' anapitisha hukumu. Kwa hivo ikiwa Kadhis's' Courts haiko hakuna njia ambayo kwamba haki kama hiyo inayopatikana itaweza kufanyika kwa sababu hakuna enforcement. Na kwa sababu Kadhis' ndiye anayeweza kuwaozesha mke na mme, kwa sababu yeye ni Muislamu na kwa sababu ya vitabu vya Kislamu vinasema kwamba ile ndoa inakamilika akiozwa na Muislamu wenzake.

Pili, Kadhis' sio kiongozi wa dini, Kadhis' ni legal officer, ni Judge ambaye unampelekea kesi yako na anakuhudumia. Kiongozi wa watu, ukienda kortini pale kwa Kadhis', huendi kuhubiriwa wala huendi kufundishwa dini, wala pia huendi kufundishwa lolote ambalo kwamba lafungamana na jambo la kindini. Hayo utakwenda kuyapata ndani ya mskiti au pale pengine popote pa mahubiri. Kwa hivo Kadhis' ni muhimu sana, aweko kama alivyokuwako na kama wenzetu walivoelewa umuhimu wake na haya mambo yameendelea kwa mda huu wote, kuku hakuvunjika guu.

Tutazame haki ya kila mtu. Sisi hapa leo tuko Bomas of Kenya, na tuko katika boma ambalo kwamba ndani yake kuna preamble. Inasema "aware of religious diversity, aware of religious and ethnic diversity in trying to live together". Sote tumeamua, watu milioni thelathini kwa

sababu twajua zile hitilafu zetu, hitilafu haziwezi kuondoka, hitilafu ziko. Unakwenda pahali umealikwa, utakuta ya kwamba kuna kuanda kwa aina mbali mbali. Muhindi akimuona ngombe pale, kitoweo cha ngombe yeye hatatumia kwa sababu dini yake inamwambia asitumie. Hiyo ni hitilafu. Mwingine akienda akaona nguruwe pale, hatatumia kwa sababu dini yake imemwambia asitumie. Lakini kwa sababu ya kuishi pamoja ambao kwamba tunaishi pamoja kwa maeleano, bila hitilafu, kwa sifa kubwa kabisa, sioni kwa nini leo minorities wataambiwa “la nyinyi msipate Kadhis’s’Court”. Itakuwa nikuwaondoshea haki yao.

Pili, tunasema katika preamble, “committed to nurture and protect each and every individual”. Kwa hivyo, hii ni nini maana ya kulea? Na nini maana ya ku-protect? unamlea mtoto unajua shida zake, wewe hupati faida yoyote. Kwa hivyo tunaomba kwamba Constitution iwalee walio juu, walioko wengi na wale ambao kwamba ni wachache ambao kwamba wanahaki yao, vile vile wapate ili waendeshe maisha yao kama walivyoendesha tangu Uhuru mpaka kesho kwa uzuri kabisa, Mungu abariki Kenya.

**Hon. Delegate Danson Buya Mungatana:** Asante, Asante. 376, point of order.

**Hon. Delegate Chesmei Wambulwa Mafunga:** Mr. Chairman, Honourable Delegates, it is great that I have got this opportunity. My name is Wambulwa Mafunga, Lugari Delegate or district Delegate from Lugari. Now, my point of order is this, I think that by this way we are not going to have everybody getting a chance to speak. I propose now to the Chairpersons that since you have got the statistics and there are people who have spoken either on a point of order or you have allowed them yourself four to five times. Check all that. Na mimi ninataka twende hivi sasa, everybody is from a district, you have the districts lists, a list of district Delegates, so I want those who have spoken, wawe hapo na wajulikane ni akina nani na yule ambaye hajazungumza, mkisema maneno yakija sasa muwaruhusu wazungumuze kwa maana hakuna wale walikuja kusikiliza ya wenzao tu bila kuchangia hapa. So, I think that if we follow that everybody will get the chance but the way we are going, some people are speaking more often, you should have a list there. You will find some people have spoken about five, ten times na wengine hawajasema lolote. It is not fair, so can you check that one out.

**Hon. Delegate Danson Buya Mungatana:** Thank you--

**Hon. Delegate Chesmei Wambulwa Mafunga:** Sasa--

**Hon. Delegate Danson Buya Mungatana:** No, no, let us finish.

**Chesmei Wambulwa Mafunga:** Now, I have not spoken. I wanted to speak as from the Bill of Rights yet I haven't spoken till now.

**Hon. Delegate Danson Buya Mungatana:** Switch off the mike. Honourable Delegates, I want you to understand that I am trying the best I can to be as fair as we can and it is on that spirit that we are trying to get three, three, three from each place. Some of the people have complained to me that I am pro-Muslim, others are saying I am pro-Christian, so I am very happy that I am both Muslim and Christian. I would like to come to the second one now here and I want to recognize Delegate number 36 who has never spoken according to the lists.

**Hon. Delegate Ramadhan Seif Kajembe:** I have never spoken since I came to this Conference. Mr. Chairman, my name is Ramadhan Seif Kajembe, delegate number 36, the Member of Parliament for Chagamwe Constituency. Mr. Chairman, I would also like to contribute on the Judiciary. To begin with, I would like to touch on the courts especially the Commercial Courts. Mr. Chairman, we have had a problem in this country that the only Commercial Court was in Nairobi, and it is within the discretion of the Chief Justice to appoint any other court in the districts to be a Commercial Court. Kenya has grown economically and needs more Commercial Courts. It is my wish and I do suggest that each Province of this country should have a Commercial Court to sort out business problems among the business community and if possible be entrenched in the Kenyan Constitution..

Mr. Chairman, the other thing which also I wanted to talk about is the Petition Court. In the past, it was very easy for a loser of an election be it Parliamentary or Civic, to go to petition, that time the fees for Parliamentary was 50,000. Today the amount of money has been raised to 250,000 and again you have to pay for the lawyers about 3 million shillings. It is important that this issue, the Petition Court, the fees, should be regulated and that should be entrenched in a

Constitution to protect those contestants who do not have big money and also enable them go to Petition Courts.

With regards to Kadhis's Courts, Mr. Chairman, let us not put Kenya in a situation as if we are at Gaza Strip where the Jews and Palestines are now fighting with a lot of terrorism there. Kenyans have lived together in harmony. I dislike this word of saying minority, you can not call any religious group a minority. Minority in the developed world is only used to minority political parties. We are Kenyans we are one people, let us work together. Mr. Chairman, I salute the Commission because if you want to know more about the Kadhis's Court take the 1963, Lancaster Constitution and with the Draft Bill, if you read the Constitution, the Lancaster House Constitution of 1963 then you are not going to dispute anything about the Kadhis's Court. Let me put it this way Mr. Chairman, let us not mix terrorism and the religion. Today there is war between Ireland and England, the Catholics of Ireland, the Protestant Church of England. We do not blame the Catholics in Ireland, we do not blame the Protestants in UK, we blame the individual people who have committed those sins. The war, terrorism taking place at the Gaza Strip between the Jews and the Arabs, we do not blame the Israelis, we do not blame Islam there, we blame the individual people.

Let me put it this way Mr. Chairman, the Kenyan Muslims are indigenious people of this country, like Kajembe here, we come from the same roots and let us not divide ourselves on those lines. The Kadhis's Courts was entrenched in the Constitution many years ago and even before independence and there was no Sheria law in this country. Let us do these things and for those who do not belong to Kadhis's Courts, if they decide to come up with anything else to be entrenched in the Constitution for their interests, Muslims will be ready to support it. Let us not make Kenya like Nigeria where you have one province with Sheria law----

**Hon. Delegate Danson Buya Mungatana:** Mheshimiwa, please wind up.

**Hon. Delegate Ramadhan Seif Kajumbe:** and the other one with another law. Let us work together, let us support the Kadhis's Court and for those who have lost in other issues they should not take a Kadhis's Court as an issue to derail the deliberations of this Conference. Thank you very much.

**Hon. Danson B. Mungatana:** Thank you, I would like to recognize this category of Professional Organizations. They have never spoken since we came.

**Hon. Delegate James F.T. Foster:** Thank you very, much Mr. Chairman. My name is James Foster and I am here as a Professional. This is my first time to address this Conference. Mr. Chairman I have four points that I would like to make, first of all the Judicial Service Commission. In the 1963 Constitution the Judicial Service Commission was composed of 5 people for members and now it is suggested that they should be 18. This seems to me rather excessive and the cost for the taxpayer will no doubt be considerable. I would like to suggest that the number is reduced to 7. Also I would like to suggest that in the Judicial Service Commission there are fewer Judges, Magistrate and Lawyers and instead I would propose one Judge, one Magistrate, One Advocate to regulate practices in the High Court and the 4 others, one a Chief Executive Officer, selected annually by the Kenya Institute of Management and then 3 Professionals selected for one tour of duty only by their respective Professionals.

Secondly Mr. Chairman, when we look at the Judiciary and the standard set out in the Constitution, we note that for the selection process we need to have something that is more independent more visibly independent and something that stands more on the basis of merits and authority then the independence of the Judiciary may thus be restored to it previous high standard.

Mr. Chairman in the job specifications set out for the charges for the various Courts, there seems only to be emphasize on the years of service and no mention seems to be being made opposed to educational qualifications or claiming. Amongst the Professionals Mr. Chairman, whom I represent, we have a system of continous professional development and unless a member complete this annually, then he/she sizes to be permitted to be a member in good standing. I wonder why the Judiciary and legal Professional in this country does not have a similar system. Computer literacy instead of long hand may help considerably to get Court proceedings completed more rapidly.

Lastly, Mr. Chairman, paragraph 212 on the discipline of the Legal profession perhaps the Commission could consider having a clause encouraging the suspension of any Advocate who is suspected of being guilty of any very serious misconduct, suspending him/her while the matter is investigated. There are I am told several hundred pending complaints against the Advocates, perhaps the possibility of the suspension could act as a deterrant for this pretty poor record. Thank you, Mr. Chairman.

**Hon. Danson Buya Mungatana:** Thank you. 313 or your neighbors there one of you to speak.

**Hon. Delegate Gitau William Kabogo:** Asante sana Mwenyekiti, jina ni William Kabogo MP wa Juja Delegate Number 27. Asante kwa kunipa nafasi, haiji rahisi. I would like to comment Bwans Chairman first and foremost on the Judges. Today we have the Chief Justice sitting in other courts. I propose in the new Constitution that the Chief Justice only sits in the Supreme Court. For example what happens when he sits in a lower court and decides on something that will go eventually to the Supreme Court where he still sits. I propose that he only sits at the Supreme Court similar to Court of Appeal Judges. They should only sit in the Court of Appeal.

Very quickly, I support strongly the creation of the Supreme Court Mr. Chairman. Most judgments given in the Courts of Appeal are wanting and contradictory in nature, we all know that. Supreme Court will allow re-dress for those cases and enhancement of judgment in a proper manner.

Appointment of Judges Mr. Chairman, it seems for the Draft so suggests that the senior age of Judges is coming down from 74 to 68 or 65 I do not see the logic. Let us retain the age of 74 but introduce ways and means of exiting in case a Judge has become senile or incapable of not able to carry out his duties before retirement age. We know that there are many Judges who become incompetent at the age of 65 and we have to wait until they are 74 to remove them. Let us find a different way of combine tenure of office and capacity to operate.

Having said that let us very quickly go to the issue of Kadhis's' Court. Mr. Chairman I believe we have lost direction a little bit. Why I say this is the argument or the debate here is not about

the existence of Kadhis's Courts, it is about entrenching them in the Constitution and that is the point. What I am trying to say Mr. Chairman is if the issue is existence of the Kadhis's' Courts, I Support the existence of Kadhis's Courts till eternity, but on the issue of entrenching Kadhis's Courts in our Constitution, that I do not support and I do give my reasons of not supporting it.

One I want to eliminate one fear, some people are saying Islamic is equal to terrorism. I do not agree. Muslims are not terrorists, not all Muslims are terrorists.

**Hon. Danson B. Mungatana:** Sorry Mheshimwa we have not said that and I have ruled on that.

**Hon. Delegate Gitau William Kabogo:** Thank you Mr. Chairman. Ku-Klax Klan is not muslim, Wakinyiongo is not Muslim, Mungiki is not Muslim. Having that in mind we have tribal Customary Law where Kikuyu are arbitrated by Kikuyu Mzee. Do we want Kikuyu Mzees financed by the Public to arbitrate between marriages between Kikuyus and their fellow Kikuyu? I want to support section 34 fully that says "the State shall not unfairly discriminate or directly or in directly against any one on any ground including race etc and or religion. The State here is trying to discriminate against other religions prior and that is the point.

I want to refer you, Mr. Chairman, to the current Constitution section 78 if you allow me. 78 (2) says every religious Community shall be entitled at it's own expense to establish and maintain places of education and to manage a place of education which is fully maintained and such Communities shall be prevented from providing religious instructions for persons of that community in the course of--- and it continues. That is how we would want to see the Kadhis's Courts. Let them operate let them continue being and let them finance themselves.

I also want to take you to the adjudicator, the last one, where number 2 says the High Court, Court of Appeal and all Subordinate Courts shall be guided by African Customary Law. It is recognized within our laws. Let us find a way, if it must be in the Constitution Mr. Chairman let us say there shall be religious/Customary Law within the country of republic of Kenya, period, and that is my case, Mr. Chairman.

**Hon. Delegate Danson Buya Mungatana:** Thank you. Who has the point of order? I hope it is a point of order to 226.

**Hon. Delegate Samuel Macharia Muchuga:** Mr. Chairman I am number 226. My name is Reverend Muchuga Delegate from Nairobi. I have not spoken, when we came in you warned us that you are going to cartel the debate and call the presenter to respond. I can see we have got another 40 minutes or so. By the rate you are moving, you will not be able to go round to make sure that you apportion the time we have to all of us. By the time you reach here you will close the debate and that will not be fare. We have got points which have not been raised and we are not being given a chance. You have given so many people there, what time are you going to use for these people here, ourselves, and these people? That is my point of order Mr. Chairman.

**Hon. Delegate Danson Buya Mungatana:** Okay I take that point as a matter of fact we wanted to apportion some of the sections to all of us, for the rest of us. So just be patience I am discussing with the Commissioner here to see if they can give us more of there 30 minutes. Having said that, I would like to recognize number 334 who has not spoken.

**Hon. Delegate Moses Kiplangat Keter:** Thank you Mr. Chairman. My names are Moses Keter, Delegate 334 from Uasin Gishu. First of all Mr. Chairman, I would like to comment on the elders and I feel that elders of all tribes and the communities in Kenya should be entrenched in the Constitution. They should have at least one paragraph giving them powers to decide the local cases at home. They are very important people and they decide many cases I think then the Judges at the courts. So I feel we should actually enshrine them in the Constitution.

Secondly when we talk of the Judges that they should all retire, I think we are being unfair. Let them reform let us give everybody a chance to change. Kenya was corrupt and we all know you are all corrupt because if we follow corruption nearly everybody will be in it. Let us give everybody a chance and the paper the LSK gave to us saying that they should all resign, they should also give us a paper showing how they will improve the lawyers because I think more of Kenyans have suffered in the hands of lawyers even more than Judges. Lawyers collude, we know lawyers who (inaudible). We know Lawyers who have done ABCD, which is, not

good so let us give everybody a chance to reform and they should also give us a paper on how the LSK intend to reform the legal fraternity.

I won't take long I want to say very little on the Kadhis's Courts, I support the Muslims but there are few questions I really do not understand. I would like to know in the present position, as it is in the Constitution what is the shortcoming that the Muslims feel is not being covered. Why do they want to be enshrined in the Constitution while the other religions are not enshrined in the Constitution? What are the shortcomings? I think the people who drafted the Constitution did a lot of dis-service to the Muslims.

From Article 191 to 202, it becomes intimidating to other religions and sort of shows that Muslims have an upper hand and that is why we are having these problems while actually we are all brothers and we are together. They should have drafted a very short form and I think we would not have this problem. So I am asking the Muslims why can't you stay the way you are and practice your Kadhis's Courts the way you are practicing, what is the problem? You have not told us that your are just saying less then none but we support you the way it was and I request for heaven sake why can't you remain the way you were and we support you on that and life goes on.

To finish Mr. Chairman, I said mine will not be so long. When you go to the sources of the Kenya Law 5 (B), one of the sources is Islamic and Hindu Personal Law. I feel that we should not have any religion being a source of Kenya Law and I feel that should be removed, that Islamic and Hindu being a source of Kenya Law we are opening an avenue. We might get a President who is a Muslim and who can become a dictator and stick in Sheria Law through that source of Kenya Law.

So I feel such should be removed and we will feel that we are equal and we live like brothers and sisters, without feeling that somebody is trying to do something behind somebody's back. I feel the problem we are having with our Muslims brothers is mostly misunderstanding and I request my Muslims brothers to also be understanding and explain to us and not to shout at us, not try and force it into us. Explain so that we understand your position and we can come into an

agreement because we do not want to derail this Constitution, we do not want to derail anything, we want to make sure that we give Kenyans a very nice Constitution that will last for 200 years.

**Hon. Delegate Danson Buya Mungatana:** Thank you. Hon. Delegates we have agreed that for the next thirty minutes we are apportion it amongst the remaining six rows. So for every row I am going to give five minutes, which means if you take two and half minutes we will have two presenters, if that is okay. Is that all right? Yes? Wait is that okay?

**Hon. Delegates:** No.

**Hon. Delegate Danson Buya Mungatana:** So you would like us to continue until tomorrow?

**Hon. Delegates:** Yes

**Hon. Delegate Danson Buya Mungatana:** Thank you. Let me recognize somebody who has not spoken there. I want to recognize a Member of Parliament No. 47

**Hon. Delegate Kembi Gitura:** Thank you very much Mr. Chairman. My name is Kembi Gitura Member no. 47 Member of Parliament for Kiharu Constituency in Muranga. Now Mr. Chairman, I have looked at Chapter 9 on the Judiciary and in my view Article 103 which falls within Chapter 8 is a very important Article indeed. I think it is one of the most important Articles as pertains to the Judiciary because it has provided for the vetting of Judges. I know that we have not agreed on whether or not to have an Upper or Lower House, but by whatever means called, I think the vetting by Parliament is the most important thing.

Mr. Chairman, you heard the judges talk yesterday, I support what they said in essence. I know as a lawyer practicing in High Court and in the Court of Appeal, that there are a number of extremely good judges in both Courts. But unfortunately Mr. Chairman, a very good number of the judges of the High court and even some in the Court of Appeal are quite incompetent, and corruption like you heard yesterday is rampant. So Mr. Chairman, it is my view and I take it very strongly that Courts have become the legitizers of corruption in our country, and we are not just talking of the High Court Mr. Chairman or the Court of Appeal.

In my humble opinion, the lower courts Mr. Chairman are even more corrupt and that is where corruption is truly perpetuated. It is no wonder to me Mr. Chairman, therefore if I may give a very simple example, you will find that our people continue to die everyday out of traffic accident, our people are dying out of consumption of illicit brew and it is only because they know very well, or the perpetrators know very well that the moment they land in Court they will get a slap on hands and they get away with a very minor fine indeed. Because the perpetrators will already have corrupted the Magistrates in the lower Courts. And that is where justice begins Mr. Chairman. If it cannot be shown in the lower Courts, that there is justice in this country, because they are the Courts that deal everyday day in day out with ordinary mwananchi, then we are going to lose faith in our Judiciary and something very serious must be done. So Mr. Chairman, the vetting aspect of the provision on the vetting of judges in my view is the most important part.

Mr. Chairman, if the Constitution shall provide that the vetting shall be by Parliament, and therefore the seat of who becomes a judge is a matter of (inaudible) consequence, it provides that a Judge should be a person of the highest possible moral character and integrity. Mr. Chairman, this can only be found out through vetting because we shall be able to know and to vet, what kind of person we are bringing on board to be a judge. Most Kenyans will remember the vetting system, like the vetting system that is used in America for the Supreme Court. And I remember the case, very well, of Justice Thomas who went through tremendous rigours and even a full hearing before he could be confirmed to the Supreme Court. So I take this as a very important point Mr. Chairman.

There is Article 184 (5) of the (inaudible) and Mr. Chairman, whereas the Court can be provided with like somebody said Computers, Libraries and things, it will be useless. These things will be useless unless we have judges of high character and calibre. It is common knowledge that some judges do not even read at all, leave alone reasoned judgement and that is why we have so much contradiction in the law reporting in this country today. That should be taken into account. If we have properly vetted judges Mr. Chairman, then Section 184 Sub-section 5 becomes of paramount importance because then we shall have judges who have time to read, judges who are well educated, judges who want to write reasoned judgement and judges

who are not anxious about extraneous matters, whose sole job as they realize it is Mr. Chairman is to write or dispense proper justice. So Mr. Chairman to this extent I support the submissions that were made by the two Judges of Appeal here yesterday, and I would say here that I do not believe that it is all Judges who are corrupt. I do not believe that all Judges should be sacrificed at the altar of a few or the very many corrupt judges. So we might find a system, may be not the one provided in the Constitution, we cannot ask all the judges to resign at once. We must have continuity in our Judiciary Mr. Chairman and I think we should be able to weed out the very many corrupt Judges and Magistrates without having to go to the extent of asking everybody to leave.

Now Mr. Chairman, because you have rang the bell, may be I should mention only one thing about the Khadhis' courts before I sit down. Mr. Chairman I take this view myself, if you look at the Preamble, it says that we are trying to create one nation which takes into account the interests of each and every Kenyan. It is said Mr. Chairman and I take the view myself that Islam is not just a religion, Islam is a way of life, and it has been in our Constitution since independence. I have not seen that Kenya has been divided by the fact that we have had Khadhis' courts for the last 40 years. I do not think we are going to get divisions now. All I would say having read the Section and the existing Constitution Mr. Chairman is to add my voice, "that let us retain the Khadhis' courts the way they are today, but let us make the provisions for the qualifications and all those other things in the Khadhis' Courts Act like we have today, but let us not have unnecessary division over this matter." I am a Christian myself, but I do not see that we cannot co-exist, we have co-existed. Mr. Chairman, I personally support that we should Khadhis' courts but only as they exist in the present Constitution. Thank you very much Mr. Chairman.

**Hon. Delegate Danson Buya Mungatana:** Thank you. The third chance there will go to a lady, who has not spoken 338.

**Hon. Delegate Jane Jebiwott Kiptum:** Thank you Mr. Chairman for giving me this chance. My name is Jane Jebiwott Kiptum, District Delegate from Marakwet District No. 338. Most of what I wanted to say has been said, I only have three points. I want to start by making a comment on Article 210 that is regarding to the office of the Public Defender. I appreciate this effort by the Commissioners to provide this office because I realize many of our Kenyans cannot afford legal services. I only want the Draft Constitution to be made more clear and the provision

should be: legal aid should be given in both civil and criminal matters. My reason for this is because in the current Constitution, legal aid is only given to those people who have committed capital offences and that is only in regard to criminal cases. Because this Article has been left so much to Parliament, I want it to be more specific in the Constitution to provide for those civil and criminal cases, so that Parliamentarians may not only provide legal aid for criminal offenders.

Secondly, I will make a comment on Article 211 Sub-section 2 on Prerogative of Mercy. Those who are members of the committee according to the Draft Constitution, include the Attorney General and six prominent Kenyans. The words “prominent Kenyans” to me are quite ambiguous, I do not know who is a prominent Kenyan and who is not. May be the Commissioners could clarify to us what they had in mind when they were indicating the “prominent Kenyans”, so that when we go to our technical working groups, we shall work on it to make it much far better.

Finally, I shall comment on the Khadhis’ courts. I maintain the spirit of Article 10 of the Draft Constitution, because the issue of religion is so delicate, it is sensitive. I feel that religious matters if put in the Constitution will bring a lot of disunity, a lot of grumbling. So for as to co-exist peacefully, for us to feel we are so equal, I strongly feel that religious matters should be left aside and Kenya remains a secular state. (*Clapping*).

**Hon. Delegate Danson Buya Mungatana:** Thank you. The next row you all put down your placards so I am not able to see but I will recognize 320. Please put them up so that I can be able to know from my list who I should pick on.

**Hon. Delegate Kiriro Wa Ngugi:** Thank you very much Mr. Chairman. I would like to make one point that has not come to light, that has not been mentioned about the Khadhis’ courts. And may it informs the fears and reservations. My name is Kiriro wa Ngugi a Delegate from Kiambu. When you read Chapter 9 on the Khadhis’ courts together with Chapter 10 on devolution, the possibility of a lower level Government at the village, read together with Khadhis’ courts what happens when 99% of the population is Muslim. The linkage to the exchequer is what, in my view, informs the fear amongst the Christians as there is a possibility-

beginning from the lowest levels of devolved power of sneaking in Sharia Law. This is what our Muslim brothers have to bear in mind.

So when you hear voices about linkage to the exchequer be informed that it may be necessary to divert that financial aspect so that you rightly deserve what is granted as Article 44. There is no issue, after you have read the Bill of Rights, that both the spirit and practice of religion is guaranteed. The debate is not about Khadhis' courts. I might also mention that Chapters 150, infact Chapters 147 to 154 of the Laws of Kenya, currently actually provide for what might be generally called African Christian personal law. So there is personal law with respect to the Christians that is already in our existing laws. And in the same manner, personal law in respect to Muslims shall appear in Chapter 11 and shall appear in the future.

What needs to happen in the Constitution is that no law can be passed by Parliament unless it has its foundation in the Constitution. What you seek dear Muslim brothers is Constitutional foundation for the practice of Islam. You must in cognisance of devolution be prepared to assuage the fears of the Christians that linkages at lower level Government is a possible political way of introducing Sharia law. So I will support you on the basis of the Bill of rights as a Constitutional right to have your Khadhis' courts. I would persuade you to give up the linkage, and it is not about money, it is about devolved power. When we get to it you will see the significance of this. Because when you have the exchequer paying for religious taxes, then somebody will say this is state patronage of religion. So bear in mind and do not argue on history, it does not help. When we get to technical committees, do not argue that there was this history. The Coastal strip agreement was about one colonial power paying off another colonial power and it was nothing to do with religion, it was about territory. Again do not argue that it has been here for 40 years. There is a time in this country where the head of Anglican church was, because of that position, a member of the Leg-co and he got money from the state. The day came when Kenyans looked at it and asked, "why are you accessing our money, merely because you are the head of the Anglican church? Stop it." So it will not help your argument to argue the lack of just to argue the (inaudible) the foundation is a Constitutional right I support that there shall be Khadhis' courts as a Constitutional right. Thank you Mr. Chairman.

**Hon. Delegate Joseph Korir:** This section seems to favour the victims of wrongs. My worry is what happens to the wrong doers. In the past we have had cases where by Kenyans have been tortured, and we have several of them. The police infringing the Powers and Priviledges Act went to Parliament frog-matched Honourable Shikuku took him to Nyayo Chambers and tortured him. He came out on clutches and although he was taken for “repairs” (*laughter*), yes Mr. Chairman. Although Honourable Shikuku was taken for “repairs,” he was never compensated and many more other including my classmates Mwandawiro Mghanga. Mr. Chairman, it is my humble submission that, as we recommend that we generously award adequate compensation to the victims of wrongs, there should also be a Clause or a penalty for those who do the wrongs. The wrong doers themselves should be penalized, because those who tortured Shikuku and other many more Kenyans have gone free, they are enjoying in this country and our brothers and sisters are either maimed or disabled for no apparent reason.

Mr. Chairman, many Kenyans in this country particularly the rural areas and urban slums are extremely poor and in this case they cannot access legal services in courts because of the cost. The cost is too deterrent to enable them or to allow them to get legal services in court. My humble submission Mr. Chairman is that, the state should be able to provide free services to those who are unable to meet the cost of court fees in this country.

Finally, Mr. Chairman, is on Kadhis’s’ court. It appears that this issue has been very controversial but Mr. Chairman, Muslims have been living with us before and after independence. Muslims have been living with us they are still living with us and the Kadhis’s’ courts are already in the present Constitution. Therefore, in my view, what is recommended here in this Draft is just an enhancement of what is already in the Constitution. Muslim culture in impended in Islam and therefore for them to ask for Kadhis’s’ Courts, to listen to their disputes in my view is in order and therefore I strongly support this issue. (*Clapping*).

With those few remarks Mr. Chairman, I say thank you very much.

**Hon. Delegate Danson Buya Mungatana:** Thank you. From the same row, I notice 342 according to the list has not spoken.

**Hon. Delegate Irene Magut:** Thank you very much, Honourable Chairperson. My names are Irene Magut Delegate number 342 from Nandi, a District Delegate. I am also happy to also contribute on this Chapter on the Judiciary. So much has been said and I will contribute something which I feel may be would really assist much about the rural, especially the rural women. Judiciary is one department which is very much misunderstood in the rural areas, because most people fear to go to court, because;-

May be most people have never differentiated between the courts and the police and most of the time people tend to pay their fines which are genuine to the police because they even fear appearing in the courts.

Most of our rural women, especially when they are dealing with cases of rape fear to come out in the public to discuss about this.

So what I wanted to contribute is that, in our Constitution we have more of family Courts nearer to the people, so that our people can easily access courts especially at Districts or even divisional level. I would suggest that we have Judges who are mainly women to deal with the women and the young girls who sometimes fear to appear in court and to discuss about what happened to them in the presence or before men.

I also feel that in the rural areas where most of the people come from, we do not really have a lot about what goes on in courts. I suggest that may be within the Judiciary, the resources can be found so that some people who help people at the grassroots, at the villages are trained a little in law as paralegals to be able to assist the people to know a little about the courts and what they can do when they have problems.

I want to thank some of the NGOs who have taken their time to the villages and I have employed some paralegals to be able to assist those people who do not even understand what goes on in courts. My contribution therefore is that, I suggest and say that the Constitution would go much lower. We see the writings they are very good and I am sure even the ones which were there were good but we never got to know about them, and even the rights people are

writing about here might not reach the people. If we do not have people down there who understand these things and are able to translate them to the local people.

I also want to ask that apart from the paralegals these elders the tribunals we are going to have down there, to be trained elders in the law so that when they deal with cases especially touching on the lives of people, they know exactly what to do with what is happening now. At times the Provincial Administration have been bringing in elders to deal with land or to deal with other cases and they normally deal with them, mainly in their cultural ways and sometimes these cultural ways marginalize the women and the children. I want to thank you for giving me this chance to contribute but I want also to believe that all of us here are here for one to unite Kenya. This is a family and inside the family, we need justice to be done to everybody. Thank you very much.

**Hon. Delegate Danson Buya Mungatana:** Thank you Madam. I want to recognize 371 who has also not spoken.

**Hon. Delegate Dr. James Koske Kibii:** Thank you very much Mr. Chairman for giving me this opportunity. I am Dr. Koske, Delegate number 371 from Kericho. Allow me to comment on a number of issues although a lot of it has been dwelt on at length.

First, like the other Delegates, start off by commenting on the Kadhis's' courts. If our Constitution is a way of remaking what we think was either a mistake, then this is the time to do it. If it is a way of including what we think was excluded, then this is the time to do it. Now, on the issues of the Kadhis's' Court, we were questioning here whether this court should really be expanded in the Constitution. If this is done, then of course as we have said other faiths may also want to expand not necessary similar things like courts, but other things perhaps that they normally treasure in their lives. So, I was requesting if perhaps this Conference could consider including the principles that should be outlined, that should be given so that the details of how these principles may be curried as regards institutions like Kadhis's' Courts, may be dealt with or enacted by Parliament. (*Clapping*).

The other thing that I would like to comment on Mr. Chairman, is the inclusion of excessive baggage in the Constitution. We looking for a mini-managed institution, we do not want to talk much, we need freedom. We need people to be free to decide on things as we evolve, we are evolving we are not supposed to be fixed. I am looking at Article 207 for example 201, Article 206 or Article 212. Article 207 discusses things like salaries and benefits and appointments or removal of Judicial Officers or Legal Profession Description. These ones I know are excess baggage and they should not appear in a Constitution like the one we are making.

Mr. Chairman, allow me also to look at one issue and that is on the qualification of the appointees in the Judiciary. The qualifications of Chief Justice, Judges, Kadhis's', extra. We know Mr. Chairman that education is paramount, we know that we need to take value in our education. For a very long time there is an issue in terms of appointing people who are unqualified to jobs that probably would have been done better by people who are qualified.

I want to comment on the narrow approach that you have given us particularly on Article 195 (1, 2, 3), 202 (1B, 1C ) and so on. Here the Commissioners said that university degrees will be recognized and also that there are institutions that must be recognized. Recognized universities, implying that there will be universities which will not be recognized. Should they really be existing then if they will not be recognized.

I want to suggest Mr. Chairman, that only thing that one would need to qualify, we may have other types of qualifications which are not necessary degrees but they may be equivalent to degrees. I think there are quite a number of people here perhaps professionals, who may not necessarily have degrees but have got equivalent qualification to do whatever they are doing. So I am suggesting Mr. Chairman,

**Hon. Delegate Danson Buya Mungatana:** Please wind up.

**Hon. Delegate Dr. James Koske Kibii:** That what we need – just to finish up, is equivalent qualification and alternative institutions to degrees and recognized universities respectively. Thank you very much.

**Hon. Delegate Danson Buya Mungatana:** Thank you. From the following row I am going to take one and then we break for lunch. 200 has not spoken.

**Hon. Delegate Fahim Yasin Twaha:** Thank you very much, Mr. Chairman. First of all, I would like to congratulate all the Delegates who have contributed to this Chapter, especially on the issue of the Kadhis's' court. Both the people have argued for and against have argued persuasively and I am sure the technical committees have a lot of material to work with, there are a lot of issues to flush out. My name is Fahim Twaha MP for Lamu West. I leave it to the technical committees to flush out the various issues. I reserve my comments on the Kadhis's' Courts until after the technical committees have flushed them out and brought them back to the plenary, then I will comment.

What I would like to say at this stage for the benefit of the technical committees, is the need for a High Court in every District in the republic today. This is because our courts are overworked and there are too many cases pending. I personally had an incident where it took me five years to get the date for my case to be heard and this sort of situation cannot go on. For the benefit of the wananchi, we should in addition to talking about elective political office, also consider how to enhance the Judiciary in that way. We should be having High Court in every District in the republic to hear matters that relevant to that jurisdiction or enhance the jurisdiction of the Magistrate.

I would like just to mention something about what the Honourable gentleman from Kiambu said about the (inaudible). I had the opportunity to ask in Parliament the Minister for Justice and Constitution Affairs about how much it costs to maintain the Kadhis's' Courts in Kenya. And he was unable to quantify it, because it is so negligible. I think we have around 13 Kadhis's' earning around ten thousand shillings in a month. So the amount is (inaudible) and insignificant. So the issue over the (inaudible) does not really arise. I suggest to the technical committee when they are considering this matter is that it is very important that we respect the freedom of worship because worship involves obedience and compliant. The many issues on which the Koran is explicit and requires obedience and compliance to those laws. If you interfere with the way in which an individual complies or obeys God's instructions, then you are interfering with the freedom of worship.

You might say that document that we will produce here is supreme, I don't believe so. My believe as a person is that God's scriptures are supreme, whether it is the Koran, the Bible or the Torah, those are supreme. Then what we produce here is a hot (inaudible) of human efforts and endeavours which we respect because they come from consensus. But it is not a point that Parliament or this plenary will ever expect recognition from me, that whatever we produce here is superior to God's law. Thank you very much, Mr. Chairman.

**Hon. Delegate Danson Buya Mungatana:** Thank you. Let us—

**Hon. Delegate Fahim Yasin Twaha:** I would also urge the Chair to give an opportunity to Honourable Rotino to explain to us what problems he foresaw as a result of enhancing the Kadhis's' Court.

**Hon. Delegate Danson Buya Mungatana:** Sorry, that is now beyond your jurisdiction. Honourable gentlemen and ladies let us resume at 2.30 p.m and see if we can finish. Thank you.

### **Afternoon Session**

**Hon. Delegate Danson Buya Mungatana:** I think I will get started and I want to recognize still on the same row, Delegate number 536 from the Religious sector. Thank you.

**Hon. Delegate Tabitha Mwaniki:** Thank you Mr. Chairman for giving me this opportunity, I wish to raise a few issues with regard to the Judiciary. First and foremost, I would like to say. My name is Tabitha Mwaniki representing Religious Organization, I wish to state that in accordance to Article 184 sub-section 3, that the Judiciary is very important when it comes to strengthening and enforcing the provisions that are contained in the Constitution. In my view, it is at the Judiciary where the rubber meets the road, because we have been given very many rights under the Bill of Rights, but unless the Courts that are empowered to enforce those rights without fear or favour, then all those rights, the Bill of Rights as expansive as we have made will not be useful.

And in addressing this issue, I would like to refer to what has happened in the past. In the past we have had situations where despite there being in a current Constitution a provision that everybody has a right to vote, Courts have at one time asked Kenyans to choose between their rights to vote and their rights to worship. At a time when the Electoral Commission had put the by-election for Taita Taveta to be held on a Saturday, their members of the Seventh Day Adventist Church who worship on Saturday, when they presented the provision before the Courts that their right to worship is being infringed by election being held on Saturday, the Court actually told them they have made a choice to go to Church other than go to vote.

And it is in that line that we are now saying, that the Judiciary needs to be strengthened and the draft has done that, by ensuring that the people who go to the Judicial offices are vetted by the National Council and also be ensuring that there shall be people of integrity. People that can adhere to the code of regulations, then we shall have faith that even as the right that we have been given in the draft, we can be able to actually actualize them and have them defended by the Court.

My other point is with regard to the Article 187, we have Article 187 provides for the Supreme Court and given the proposal that there be six Judges. In my view, there are too few, if you want a functional Supreme Court. A Supreme Court that will be able to see and do research and establish precedence in this country, that can be able to lead us into fairness and justice and so we need to increase the number. Then I also want to comment on Article 188 that refers to advisory opinion and also Presidential election. In my view, I think it is not very safe to have the Supreme Court as a Court of original jurisdiction, especially when it comes to Presidential petitions after election and also these advisory opinions because should you differ with what the Supreme Court has said, then you have no other place to go thereafter.

I also feel that some of the things that have been put in the draft, needs to go to subsidiary legislation, to legislation by Parliament. It seems like the Rules Committee, in my view what is provided in the Act is too narrow. The people that are provided to sit in the Rules Committee is too narrow, we need to put it in an Act of Parliament because in my view, one of the problems that we have had with Courts, is that they are not friendly because there regulations are too many

and too complicated. So we need to put more people into the Rules Committee and that will steadily go to an Act of Parliament.

**Hon. Delegate Danson Buya Mungatana:** Thank you.

**Hon. Delegate Tabitha Mwaniki:** Mr. Chairman, I just have one more thing to say, and that is with regard to the Director of Public Prosecution that we have established. It is good that we have established as a Constitutional office. I only have a problem with subjecting him to the supervision of the Court, when it comes to his ending proceedings. If you want it to be effective you know the technicalities that go with criminal prosecution. Criminals are always ahead of you, so he need to have the freedom to end and commence proceedings, as is appropriate. I know there has been many loopholes but let us not overburden, let us not put too many inhibitions, they are going to make it difficult for even the people that we are giving this Honourable offices, to be able to function effectively and for the benefit of this country.

**Hon. Delegate Danson Buya Mungatana:** Thank you. 215.

**Hon. Delegate Mutula Kilonzo:** Thank you Mr. Chairman. My name is Mutula Kilonzo, Delegate number 215. Please allow me Mr. Chairman to raise a point that has been overlooked.

One of them is the resolution of election disputes. Those of us who are here Honourable Delegates who have had anything to do with election petitions, would tell you that they are the most most abused process in this country. And it is time that since we are making a new Constitution, we took notice of this things and made provisions that they should be resolved within 45 days of the election. Mr. Chairman, we have had cases where a petition remains outstanding when a Member of Parliament is representing the people for upto three years sometimes more, before the dispute is resolved. And I afraid that this draft has only addressed this very lightly in section 158 and 188 and I think it is important that we recognize that you cannot hold elections without having disputes, they are extremely expensive and the longer you leave them in the Courts, the more you give rights to the problems that we have had.

On the Supreme Court Mr. Chairman, I agree that we must have a Supreme Court. Time is long overdue since 1977 when the East African Court of Appeal was abolished and I think this time that we had our own Supreme Court. But I do recommend that the number should be either seven or nine, six Judges are not enough for a Court of this nature and contrary to what my Lord Judge Kwach says, I believe that Judges of the Supreme Court should sit only always as one bench, so that you can be able to tell the country how the law is being interpreted.

On the Kadhis's' Courts Mr. Chairman, it is important that this country remembers that it is a contradiction to support Affirmative Action and at the same time, oppose Kadhis's' Courts. And those of us who are committed to Affirmative Action must bear in mind that when the Government of Mzee Jomo Kenyatta negotiated Kadhis's' Courts, it was not addressing Sharia Law, it was merely addressing the problems of widows, orphans and women. And they are the principle users of Kadhis's' Court, because it is restricted to those areas of law. And if you do not allow Kadhis's' Courts, it must also be understood that by doing so you will not amend the Holy Quran nor will you amend the Muslim books of worship that make provisions for these things. (*Clapping by Honourable Delegates*).

**Hon. Delegate Mutula Kilonzo:** And if you don't provide for them you are telling our orphans, our widows and children to go back into the streets to have resolutions of matters relevant to their lives and welfare in circumstances that where standards cannot be ascertained and where you cannot with any certainty say what those resolutions will be like. I urge my fellow Christians, I declare my interest as a committed and very devout Christian, that there is not contradiction of my Christianity by merely accepting that Muslims should be allowed to these basic Courts for family and other personal matters. (*Clapping by Honourable Delegates*)

**Hon. Delegate Mutula Kilonzo:** However, we should not include things like comas or small claims in this jurisdiction, there is room to be considered for enlarging the number of Kadhis's' in order to cater for population growth and other areas. My fellow Christians, Kadhis's' Courts have been here since independence and for a thousand years before then. There is no indigenous religion in this country, the Christianity was brought through the Bible, the Islam was brought through the Quran, let us be magnanimous and accept our cultures.

Now, Mr. Chairman, on the question of Judges resigning or leaving en masse I am totally opposed to that, there are good Judges in our Judiciary and I think we should find a formula for accommodating them. I agree that the Judicial Service Commission should be chaired by the Chief Justice, I agree that the Rules Committee should be left out of the Constitution and I agree that there should be a Judge in every District, in order to bring Justice to the people. Thank you Mr. Chairman. (*Clapping from Honourable Delegates*).

**Hon. Delegate Danson Buya Mungatana:** Thank you, 584.

**Hon. Delegate Prof. Makau Mutua:** Thank you very much Mr. Chairman, my name is Professor Makau Mutua, Delegate number 584. Mr. Chairman I think it is a pity that we have debated and discussed the Chapters on Legislature, the Executive and Judiciary, separately because I believe that they are all undefined and a debate that would have been integrated would have been very useful for this Conference.

Nevertheless, I will make my comments on Judiciary. Mr. Chairman there is no doubt in the minds of Kenyans and the Judiciary itself has admitted this fact and a number of Judges have spoken to me about this matter, that corruption is endemic in our Judiciary. Our Judges are shamelessly corrupt, many of them Mr. Chairman are grossly incompetent and for a long time and at least in the last 24 years, they have been pathologically sycophantic.

Mr. Chairman I believe that the provisions in the draft Constitution which require that upon the enactment of this Constitution, that all Judges be set aside is appropriate. The Judiciary Mr. Chairman is the cornerstone of the rule of law. It is a guardian of legality in every country. You cannot have a democratic state without a Judiciary that is corruption free and that is competent. Our Judges don't read, our Judges have not produced any opinion that is notable for its value in those pages.

I believe that if our transition to democracy is going to bear fruits, we must sweep the board. We have suggested that the Judicial Service Commission be empowered and be enhanced and be reconstituted and that the JSC become the central locus for the cleaning-up of the Judiciary upon the enactment of the Constitution. As other speakers have said before me those Judges who are

clean, who are not corrupt and who are competent, have nothing to fear in a new dispensation. They will be asked to come back.

Secondly, Mr. Chairman I would like to opine on the question of Kadhis's' Courts. I want to remind my fellow Delegates that there are only two types of Constitutions that have ever been written by men. The Liberal Constitution and the Illiberal Constitution. I want to remind Delegates that the Liberal Constitution is a creature of enlightenment and the enlightenment was a period of discos and political activities and academic thoughts that took place in Europe at a particular period. It is the period that gave us the Liberal Constitution. Philosophically, Mr. Chairman and I speak here now as a Professor of Law, philosophically and historically the Liberal Constitution is a euroscentric and a Christian document.

It is not possible Mr. Chairman for Christians to be protected in their own document. And that is why we are saying that Muslims who do not fit in this document of the Liberal Constitution, deserve to be protected in it. *(Clapping from Honourable Delegates)*.

**Hon. Delegate Prof. Makau Mutua:** I agree with most Delegates who have said that the current starters of the Kadhis's' Court ought to be allowed to exist but I also want to point out that in addition to supporting the Kadhis's' Courts, I believe that Muslim Personal Law should be subjected to the Bill of Rights and here I would like to see a revision of section 31 sub-section 4 of the draft Constitution and subject that section to the Bill of Rights as opposed to the other way round. Mr. Chairman I just want to appeal to those people in this room who are Christians and say to them, that if we deny our Muslim brothers and sisters ..

**Hon. Delegate Danson Buya Mungatana:** Please wind up.

**Hon. Delegate Prof. Makau Mutua:** Yes, Mr. Chairman, this right of having their own Courts, we shall be engaging in a dangerous political activity. *(Clapping from Honourable Delegates)*.

We do not want Mr. Chairman to radicalize our brothers and our sisters. We have lived in harmony in this country for a long time, let us continue to do so. Thank you Mr. Chairman.

**Hon. Delegate Danson Buya Mungatana:** Thank you. I am going to take one more from there, then we move to the next row. 132, has been raising his hand for so long I would like to recognize him.

**Hon. Delegate Mwangi Onesmus Kihara:** Thank you very much Mr. Chairman for giving me this chance. First and foremost I could like to assure.... sorry my name is Honourable Kihara Mwangi representing Kigumo Constituency in Parliament, I am delegate number 132.

Mr. Chairman, I could like first and foremost remind those of us who seem not to understand that we are not talking about eliminating the Kadhis's' Courts from the Kenyan scene, what we are saying, is that the Kadhis's' Courts will be there but, let them not be entrenched in the Constitution because, they are (*Clapping by Honourable delegate*) being provided for by an Act of Parliament like any other religion. Mr. Chairman, I know for a truth that no country can afford to have a dual Judicial system. One, it will be very costly financially and two, it will be very bad morally. On the other hand, no country can afford to have a Constitution, which is discriminatory, contradictory and confusing.

Mr. Chairman when I look at this Draft it baffles me because the mere creation of the Kadhis's' Courts section 199 (1) creates contradiction. Why contradiction? Because section 10 (3) provides that no religion shall be accorded special privilege, and in the Kenya state there will be no state religion. The minute you create Kadhis's' Courts on religious basis in the Constitution, I am not saying that we should abolish the Kadhis's' Courts, the minute you create those Courts, you create contradiction.

Two, it is discriminative in the sense; that Section 33 provides for equality for every Kenyan and every person, every human being in the Universe not only in Kenya that has got personal life and personal law that governs that life. Therefore, you cannot say it is special for a Muslim to have personal law. The Hindus have got personal law, Christians have got personal law, Kikuyu's have got personal law, Luo's have personal law, and when you come and tell me that Kadhis's' Courts will be entrenched in the Constitution only to provide for the personal law of a Muslim, that is discrimination.

When you go to section 204, where there is provision for the Judicial Commission, you will realize dear Delegates that, the membership of the Judicial Commission has been defined as per religion in the relation to the Muslim. There is a Chief Kadhis', there is a Muslim woman to care for the Islam community, who will care for the Christian community? Who will care for the Hindu community? Who will care for the Buddhist community?

Therefore, that is why we are saying this need not be entrenched in the Constitution. But let it be provided as it is in section 198 (1) which provides that the Parliament can create any other court. For that matter, Parliament can create Kadhis's' Courts, Canon Law Courts. The document I would like to clarify to the previous speaker that, the Constitution is not a Christian Constitution. The Christians are governed by the Canon Law, and it is entrenched in the Bible as much as the Muslim Law is entrenched in the Koran. (*Clapping from the Honourable Delegates*).

Therefore, if we say that we are going to entrench the Kadhis's' Courts in the Constitution we shall have a discriminative Constitution, which the country can not afford, and which definitely is going to bring in chaos and confusion in this country and we shall not be able to meet the result.

**Hon. Delegate Danson Buya Mungatana:** Kindly wind up.

**Hon. Delegate Mwangi Onesmus Kihara:** Mr. Chairman I noticed that the creation of Kadhis's' Courts is actually a creation of a parallel Judicial system. Why? Look at Article 201 section 3, you will find that it provides that there will be a District Kadhis', a Provincial Kadhis', a Chief Kadhis', and worse still the Chief Kadhis's' decision will only be answerable or subject to the Supreme Court.

**Hon. Delegate Danson Buya Mungatana:** I am sorry, ... now.

**Hon. Delegate Mwangi Onesmus Kihara:** That is completing the hierarchy Mr. Chairman of a Muslim state. Therefore I would recommend Mr. Chairman that the question of any religion be left to Parliament for Legislation and not be entrenched in the Constitution.

**Hon. Delegate Danson Buya Mungatana:** Sorry, Point of Order. 15.

**Hon. Delegate Billow Adan Kerow:** Mr. Chairman. My name is Billow Adan Kerow. My Point of Order is: is the Delegate who just poke Mr. Chairman in order to suggest that creation of Kadhis's' Courts is discrimination, when infact it is very clearly stated in the report by the Commission that it is the question of protection of the rights of minorities, when he is a Member of Parliament , a legislator...

**Hon. Delegate Danson Buya Mungatana:** Sorry.

**Hon. Delegate Billow Adan Kerow:** And he knows the rules.

**Hon. Delegate Danson Buya Mungatana:** Sorry. I have to interject there. That is a Point of Opinion and I think it is not a Point of Order.

**An. Honourable Delegate:** A Point of Order here.

**Hon. Delegate Danson Buya Mungatana:** Gentlemen, I would like to recognize 452.

**An. Honourable Delegate:** Point of Order here. Mr. Chairman.

**An. Honourable Delegate:** Information Mr. Chairman.

**Hon. Delegate Danson Buya Mungatana:** Let me request 284, to let 452 speak and then I will get to your Point of Order. thank you.

**Hon. Delegate Willy Mutunga:** Thank you Chair. I pray that you will be the next speaker after Kaparo retires, because I think you have hallmarks of a great speaker. My name is Willy Mutunga I represent NGOs, number 452. I want to speak on Kadhis's' Courts and before I do that I need to tell the delegates that, I was born to parents who practiced traditional Kamba religion and at some point, we were converted to the African Inland Church and I was baptized.

Afterwards I became a Roman catholic, baptized and confirmed. From 1981, I have been a Muslim. (*Laughter by Honourable delegates*)

**Hon. Delegate Willy Mutunga:** So, I know more about religious bigotry, biases and so on. But I will still make my point. Now I ask Christians to take themselves to Pakistan which is a Muslim state, and where they will be minorities and ask them if they were making a Constitution there, what arguments would they be making as a minority?

*Clapping by the Honourable Delegates.*

**Hon. Delegate Willy Mutunga:** Will you trust the Muslim Parliament to protect your interests in that particular country? The issue of minority has been raised by Kathurima and I don't want to repeat it but it is a very important issue - that is Constitutions are made for minorities. And you have got to protect the minorities. In this case, we have got to give the Muslims that protection, I think it is not right for Muslims to expect a Christian Parliament to basically protect them.

The other point I want to make is --

**Hon. Delegate Danson Buya Mungatana:** (inaudible).

**Hon. Delegate Willy Mutunga:** Constitution making is not about abolishing crystallized rights.

**Hon. Delegate Danson Buya Mungatana:** Sorry, I have to interject. There is somebody who wants to inform us.

**Hon. Delegate Willy Mutunga:** Let me finish. I have got only one point.

*Murmuring from the Honourable Delegates.*

**Hon. Delegate Willy Mutunga:** Okay, let him give you the information.

**Hon. Delegate Danson Buya Mungatana:** Just a minute.

**Hon. Delegate Sammy Chemwey:** Thank you Mr. Chairman. My name is Sammy Chemwey. I want to raise a Point of Information because, I happen to have gone to Pakistan.

**Hon. Delegate Danson Buya Mungatana:** Sorry, excuse me.

**Hon. Delegate Sammy Chemwey:** The Honourable Member is not right to inform the House that if you went to Pakistan ...

**Hon. Delegate Danson Buya Mungatana:** Sorry, excuse me. If you want to answer him back can I allow him to finish and then let you.

**Hon. Delegate Sammy Chemwey:** I am answering you Chairman.

**Hon. Delegate Danson Buya Mungatana:** Sorry! Sorry! Can I finish, I don't want crossfire we are not in television, please go on and finish.

**Hon. Delegate Willy Mutunga:** Thank you. I will finish Chair. The other thing, this point that is being made about history, the people who are..... it, as a human rights activists I have never known of a case where the crystallized rights of people are destroyed. If anything you enhance them. The fact that these rights have been enjoyed by the Muslims since independence, for us too come and argue and say it was a historical mistake and we are talking about rights, those of us who have been fighting for rights in this country you feel pained when this argument is raised. How can you destroy the rights that have been crystallized, it is not right, and on that basis we must protect those crystallized rights.

The last point I want to make on this issue is a warning to Christians and Muslims. This is a Kenyan issue, we have been living in harmony. In the family where I come from, my sister is married to a Muslim and another one to a Kamba who does not believe in any religion and there hasn't been any problem. I think that we are being manipulated by foreign forces on this issue..

*Clapping from the Honourable Delegates.*

**Hon. Delegate Willy Mutunga:** And we must make sure that we make this issue a Kenyan issue and resolve it. There is a consensus emerging and that, consensus is the way forward. Thank you very much. (*Clapping from the Honourable Delegates*).

**Hon. Delegate Danson Buya Mungatana:** Thank you. Now there was a Point of Order, and there was a Point of Information. So, if you can just make a very brief quick one 284.

**Hon. Delegate Munyi John Gitari:** Thank you Mr. Chairman. My Point of Order is; you had said you were moving the next block.

**Hon. Delegate Danson Buya Mungatana:** Yes.

**Hon. Delegate Munyi John Gitari:** And Mr. Chairman, here in this block you skipped it the other time after time only one speaker who had spoken. Right now, three Members of Parliament have spoken from here. (*Clapping from the Honourable Delegates*). We have got two people from special groups and none from the District Delegates. I beg you to give two or one District Delegate and my number is 284. You consider that.

*Laughter by the Honorable Delegates.*

**Hon. Delegate Danson Buya Mungatana:** Thank you. Let's hear the Point of Information, I get your point.

**Hon. Delegate Sammy Chemwey:** Thank you Mr. Chairman. My Point of Information was that while we are here, personal experiences and family whether we have our relatives or that, can not be authoritative in enough for us to bring issues of Constitution to bear in this matter. (*Clapping from the Honourable Delegates*).

The second thing, that quoting issues of Pakistan, when we have said that already we want to make a Kenyan Constitution and those of us who have been to those places know how much

Christians have suffered is to bring about an issue which is contentious. So, I think that in that regard the speaker should have just restricted himself to issues that apply to this nation.

**Hon. Delegate Danson Buya Mungatana:** Thank you. I want to recognize from the next group - Sorry there was a Point of Procedure.

**Hon. Delegate Sasura Abdi Tari:** Mr. Chairman, I am Delegate number 185. My name is Sasura Abdi Tari. Mr. Chairman, with all due respect I realize that we are flouting the rules of procedures that have been set for this conference.

**Hon. Delegate Danson Buya Mungatana:** Yes.

**Hon. Delegate Sasura Abdi Tari:** A very good Mr. Chairman, is when somebody rises on a Point of Information, he is supposed to inform the person who is speaking and it is up to the speaker to allow the person to inform him, but not somebody to stand up just to interrupt the speaker to inform the whole conference or to inform the Chair.

Secondly, Mr. Chairman, another Point of Procedure. When somebody is on a Point of Order and the Chair rules him out of order, it is not fair, for example the speaker who is the MP of Kigumo When a speaker questions the moral authority of a religion, it is immoral Mr. Speaker and the Chair should rule him out first before the person is interrupted by other Point of Order. It is only fair to follow the procedure in such an emotional subject Mr. Chairman.

**Hon. Delegate Danson Buya Mungatana:** Thank you for your point. I think I will move to the next one. I want to recognize 485 who has not spoken.

**Hon. Delegate Raphael G. Mwai:** Thank you Mr. Chairman. My name is Raphael Mwai, number 485 Professional Associations. I would like to associate myself with Clause 187, in which the Supreme Court is provided. I would also want to say in respect to Article 196 that the tenure of Judges should be uplifted to 70 years. Judges like wine mature with age, as they get better as they get more experience.

On the issue of the Judicial Service Commission, you will notice that in Article 204, there has been a provision of predominantly lawyers. The Judicial Service Commission is not necessarily a legal issue, the law is the law for the country, and more important matters of the law is the culture and common sense of the people to prevail. It is a leadership issue. Therefore I am proposing that 50 % of the members of the Judicial Service Commission should be lay people, non- legal people, not the three people that have been provided.

An important issue Mr. Chairman is the issue of tenured offices: Attorney General, Deputy Public Prosecutor, Public Defender etc. We are creating too many bureaucracies. We do not seem to reflect that when we were doing these things we did not have any political situation like the minister for Constitutional affairs. We seem to have recognized the political aspect of the legal systems and having creating that position of a minister in that area, we can afford now to look at the administration in a much more dispassionate manner. The Attorney General should be given free hand to do his job, the Deputy Public Prosecutor, the Public Defender, should be officers under the office of the Attorney General so that we are not having proliferation of structures all over the place and then incurring unnecessary costs.

In terms of this contentious issue of the Kadhis's' Courts. I hold the view that Islam, the way I understand, is a way of life of the people who practice that faith. That in fact is much more fundamental than particular religions, and in some cases it is very difficult to draw the line between culture and religion. A way of life of the people is how we have to see this issue. In that light therefore it is also important to say that, if there are religious connotations, we must recognise that ours is a secular state. But having said that, what has been given over the ages cannot be taken away at this particular time. People have practiced their faith in a certain way for the millennia and taking it away would amount, as was said earlier on, to a breach of human rights. So, we must not do that. However, we must not enhance that position into other issues that have not been there. In other words, commercial law, whatever law, Chief Kadhis' at Provincial levels. I think we need to desist in the interest of sensitivity to the other people and also if we agree that culture is important, as in fact we have agreed and we have agreed to set up a committee on culture, then we must provide in this Constitution that those cultural values that resolve our personal law wherever we are should be recognized as legitimate in this Constitution.

In other words, we must recognize there were personal laws as was said earlier on, there were issues that were resolved and if we look at these issues carefully, we shall see the province of this country breakdown in society, street children and the problem of widows and orphans. These issues are related to the breakdown in the cultural ways of resolving personal law. Let us accept to put this in this document. And let us not bother about the current situation with the Kadhis' Courts. In that respect therefore, the provision of a Muslim Woman in the Judicial Service Commission is an anomaly. Let us provide for a woman, whether a Muslim or Hindu, one woman is enough. Thank you very much.

**Hon. Delegate Danson Buya Mungatana:** Thank you. I want to recognize 612 who has not spoken.

**Hon. Delegate Zulfikos Muli Komu:** Hallo, Mr. Speaker?

**Hon. Delegate Danson Buya Mungatana:** Yes.

**Hon. Delegate David Wakahu:** I want first to congratulate you for the way you are conducting this session, it is very nice and congratulation. I wanted to talk about Section--- I am Delegate 612, from Political Parties. My name is David Wakahu.

**Hon. Danson Buya Mungatana:** Sorry, for the purposes of our record, please give us which Political Party?

**Hon. Delegate David Wakahu:** It is called UMMA Patriotic Party.

**Hon. Danson Buya Mungatana:** Thank you.

**Hon. Delegate David Wakahu:** I wanted us to talk about these qualifications stated in Section 195 of the Draft Constitution, which is related to the issue of Judiciary and this is a very important arm of the government and should be looked at very serious. It says, "The Chief Justice and the Judge of the Supreme Court shall possess 15 years experience". What I want to say is that this qualification stated, clearly and deliberately favours private legal practitioners and

law teachers and discriminates against Judges and Magistrates. It should be appreciated that Judges, Magistrates, Advocates, and State Counsels. all go through the same legal training at the University and the School of Law. As now proposed, it will take a Magistrate at least 10 years to qualify to be appointed as a Judge of the High Court and in reality, to take not less than 20 years before a Magistrate is appointed a Judge of the High Court. It also says, it would take the same Magistrate another 10 years as a Judge of the High Court to be eligible for appointment as a Judge of the Court of Appeal. The same Magistrate will then take another 15 years as a Judge of a Court of Appeal before he/she can be eligible for appointment of the Supreme Court or Chief Justice. It will therefore, take a Magistrate a minimum of 35 years to be eligible for appointment to the Supreme Court or Chief of Justice.

When we come to the appointment of Judges and Magistrates, I probably will say that, all the Judges and the Magistrates should all resign, re-apply and be vetted by the Parliament. Because there are numerous cases taken to Court involving Magistrates over corruption. If you clean up the Judges and leave the Magistrates, you will not have achieved anything, because most of the cases are handled by the Magistrates. Mr. Chairman, there are some people who were saying here that the Magistrates should be left alone and the others were saying that the Judges should left alone, but I think that if they are vetted by the Parliament, if they re-apply and be vetted by Parliament, they will select the ones that are capable.

Mr. Chairman, I would like to remind you of -- because they were saying that there are some Magistrates who are not corrupt-- there is a statement that was read by Honourable Mukhisa Kituyi, the Minister for Trade and Commerce, speaking in Parliament and asking the AG whether he wanted him to name the corrupt Judge. Did not that Judge resign? Again, how many such Judges are still in that Judiciary today? In the most recent incident, we have heard of the Migori Magistrate who has been charged in Court for soliciting a bribe.

On the Kadhis' Courts, I don't understand why our Muslim bothers are demanding extra privileges than others. Because it sounds very ridiculous for Kenyans to be paying for something --- I mean paying for divorces. It is ridiculous and such things should be discouraged unless the law stays the way it is. Thank you.

**Hon. Delegate Danson Buya Mungatana:** Thank you, thank you very much. I want to recognize District Delegate 241 who has not spoken.

**Hon. Delegate Golich Juma Wario:** Asante Mheshimiwa mwenyekiti, ningependa kuwafahamisha ya kwamba sisi tunawaakilisha Wakenya milioni thelathini, na Wakenya hao wana--- Jina ninajulikana kama Juma Wario,

**Hon. Delegate Danson Buya Mungatana:** Excuse me, just hold on Juma Wario. I want to take that point of procedure.

**Hon. Delegate Mkawerweren Chebii:** Thank you Mr. Chairman. I think you have actually listened well. My name is Mkawerweren B. Chebii, a District Delegate. I would like to know which procedure have you used to get a District Delegate here, you have gotten a District Delegate there and there is not District Delegate here and I am worried if this continues you might loose my heart and my sentiments here. Thank you.

**Hon. Delegate Danson Buya Mungatana:** Thank you. Well, I need to explain something to the Honourable member there. You will notice that in some areas, like for example when we were here, I did not mention any Member of Parliament and I called a few more District Delegates than it was correct. But when I came there, you will notice that I called more Members of Parliament than the District Delegates. Now, what I am trying to do is to give those people who have not had a chance, I am doing the best I can to try and balance out. So, just lets' be patient. If we get an opportunity to come back, I will notice you. Thank you. Please continue.

**Hon. Delegate Golich Juma Wario:** Asante Mheshimiwa mwenyekiti. Kwa jina ninajulikana kama Juma Wario, Tana River District Delegate. Ningependa kukufahamisha ya kwamba tunawaakilisha Wakenya Million thelathini na tafadhali kwa heshima yenu Wajumbe walio katika Conference hii, hatukuja tafadhali kubishana kwa mambo ya Kadhis's' Courts. Na ningependa kuwaambia ya kwamba sisi tulitoa maoni yetu tukiwa katika Districts vizuri, na tulisema kuwa tunataka mambo ya Kadhis's' Courts iwe inaendelea na tukawa tumeongeza

kidogo tu hapo mbele na tungependa pia nyinyi mutuunge mkono kwa yale madogo ambayo tuliomba. Hatukuomba mengi, tumeomba kidogo tu.

Pia tungependa kupitisha kidogo tuombe mambo ya watoto pia yaingizwe katika hiyo Kadhis's' Courts mahali ilipofikia. Ningesema hivi; Muislamu hawezi kuishi bila Kadhis's' Courts kwa sababu maisha yetu ya Kiislamu ni kulingana na mambo ya kurithi, mambo ya watoto na mambo ya ndoa ndivyo vile tunaishi katika uislamu. Ukisema mambo ya Kadhis's' Courts hakuna, itakuwa sasa muislamu hawezi kuishi Kenya, pengine aondoke aende sehemu ambayo kuna mambo kama hayo ya Kadhis's' Courts na sisi kutoka hapa Kenya kwenda kupata mambo ya Kadhis's' Courts katika nchi nyingine, munaona kama si kitu rahisi. Kwa hivyo, ningependa kwa wale ambao wanachukulia maswala haya kama mambo rahisi, si mambo rahisi tafadhali. Unajua tende ni tamu na ni nyororo lakini iko na mfupa ndani. Wakati unauma, ujue usiume hiyo tende na huo mfupa wake tafadhali.

Ningependa kuchangia zaidi nikisema, katika mambo ya Kadhis's' Courts, maswala ya Kadhis's' Courts ya ndoa, kurithi na mambo ya watoto, sisi, kama mtakuwa mnaondoa hivyo, hatutasikia raha. Na katika Affirmative Action ambayo wakati huu sisi tunaunga mkono, hatukusema wale wako wengi katika Kenya wameze wale wachache, hapana. Tulisema wale wengi wawe wana-support wale wachache. Hata katika speech ya Rais ilikuwa inasema minorities wapewe haki yao. Minorities ni watu gani? Vile mnavyoona Wakenya kweli Waislamu ni wachache. Nyinyi mkichukuliwa kuwa nyinyi ndio wengi, leo mje msemi mambo ya uislamu tutakuja tuiweke obstacles isipite, basi mjue Waislamu katika maswala hayo hawasikii raha wala hawatakuwa na ule ushirikiano ambao mlikuwa mnapata kwa Waislamu, hamungeweza kupata kwa sababu gani? Nyinyi wenyewe mumekuwa mnawabagua. Tuliishi vizuri, wengi wanasema kuwa, tukiweka maswala ya Kadhis' ndani ya mambo ya sheria ya nchi, mambo mengi tutaharibu. Ni nini tumeharibu kutoka 1964? Tuko pamoja, miaka arobaini sisi tumekaa na nyinyi vizuri na hata Waislamu wanaoana na Wakristo na nchi hii haikuwa na mtetemeko, haikuwa na vita, haikuwa na nini. Lakini leo nyinyi mnatia mguu ndani - just a minute, one minute - nyinyi mnatia mguu ndani mnasema mambo ya uislamu itolewe. Kwa hivyo, ningependa kuwaambia haya sio mambo ambayo yanawadhuru kwa njia moja au nyingine. Asante.

**Hon. Delegate Danson Buya Mungatana:** I want to recognize 146 who has never spoken.

**Hon. Delegate Joseph Nkaiserry:** Thank you very much, Mr. Chairman. I am Delegate number 146, Joseph Nkaiserry from Kajiado Central. I am going to be very specific because, first of all, I think we need to bring respect to this Conference. I will go to the most contentious issue of the Kadhis's' court, which I honestly support on the basis of the status quo. What has been there before should remain. If you look at Article 200, sub paragraph 1, if you remove sub para 1(b) I think the Kadhis's' court can be acceptable to all of us.

Going to the Judiciary, I will go to Article 196; the tenure or the terms of the judges. I support the age limit of 70 years for the Supreme Court judges and also 65 years for the judges of the High Court. I would propose that the Chief Justice, being the senior most judge, should be 72 years.

When it comes to qualifications on appointment, I think it would be very wrong for somebody to come from the university. I think we should have career judicial officers growing up through the system. If one is coming from the university, they can join at the magistrate level and grow and go on until they reach the status of the High Court. I would propose that to be appointed a judge of the High Court, one should have served for 15 years while judges of the Court of Appeal should have served for 20 years and judges of the Supreme Court should have served for 25 years.

The next thing on that is that a judge should be promoted from the Court of Appeal to the Supreme Court or from the High Court to the Court Appeal on merit instead of jumping from somewhere, because he/she has a brother or whoever, straight away to the Supreme Court. That, Mr. Chairman, is my comment and I thank you for giving me the opportunity. Thank you.

**Hon. Delegate Danson Buya Mungatana:** Thank you. I am now looking at this row and I want to recognize 547 who has also not spoken and please lift up your number so that I can recognize you.

**Hon. Delegate Abdulrahman Wandati:** Mr. Chairman, my names are Abdulrahman Wandati, Delegate number 547, representing Religious Organizations. Mr. Chairman, it's emerging to me as though we have three proposals on the floor in respect of the Kadhis's' courts. The first proposal is the one contained in the Draft Bill which proposes a Kadhis's' court within the judicial structures but the Kadhis's' court that has jurisdiction over commercial and small claim matters between Muslims, in addition to having jurisdiction over matters of personal law where the people involved profess the faith of Islam. The second proposal, Mr. Chairman, that I am hearing is that we have the Kadhis's' courts maintained, as they do now exist and established in our Constitution under Section 66. The third proposal Mr. Chairman, is that we do not require the Kadhis's' Courts, that if we have them, then; a) it will be a burden to the ex-chequer, b) we will not be fair with other religions or we will be discriminatory ad infinitum.

Chair, the Delegates will remember that when we were debating the clauses on political parties, we did gain some consensus on the funding of political parties. Mr. Chairman, political parties represent different ideologies. In a way, they represent the political diversity of the people of Kenya. Mr. Chairman, the Kadhis's' court has been unfairly confused with Islam as a religion. The Kadhis's' courts intervene to arbitrate in disputes that involve members who profess who the Muslim religion on matters of their personal law and they require the capacity to enforce their judgement. Mr. Chairman, I am sure all the Delegates know that any decision that is made by a court that is not established in the Constitution is a decision made by a kangaroo court and incapable of being enforced.

Mr. Chairman, we are not talking about structures, we are not asking for a building to be built for us, we are talking about being able to access justice through competent institutions. It is my understanding Mr. Chairman, that we, as the people of Kenya, predate the Constitution we are trying to make, indeed we predate the State we are trying to establish here or to design. Mr. Chairman, my understanding is supported in the Bill of Rights where it said – in clause 44 (2) - 'every person has a right, either individually or in community with others in public or in private, to manifest any religion or belief through worship, observance, practice or teaching'.

Mr. Chairman, Article 44 clause 6 (c) also states that, 'A person may not be compelled' – clause 6 (c) says 'to do any other act that is contrary to that person's religion of belief'. Mr. Chairman,

to ask me to take the matter concerning the succession between my two children to be governed under a law that allows others to either disinherit others or leave their whole inheritance to whatever they want including dogs and cats, Mr. Chairman, is to force me to do an act that is contrary to my religion.

**Clapping by Honourable Delegates.**

Mr. Chairman, we are discussing the sources of law in this country. We are not discussing a building, we are discussing the sources of law. If, for example, in order for me to be a Kenyan so as to be accepted as a citizen of this country, within the Draft Constitution that we are trying to negotiate, Mr. Chairman, I have to forgo all the rights with which I came to the table, then we are being unfair. Mr. Chairman, discrimination can only be seen where you have two people who are equal, who have same opportunities, same needs and you prefer one instead of the other on the basis of things other than merit.

Mr. Chairman, the citizens of this country who profess the faith of Islam have unique judicial needs that cannot be fully satisfied unless the judicial system that we adopt has the capacity to refer to laws and rules through which the citizens of this country that are Muslims can then see justice done for them. Mr. Chairman, we are trying to design a State to which you are giving the rights to poke its nose into matters of our personal law. The alternative to that Mr. Chairman, would be then to say - to amend this Constitution and say – that the State shall not involve itself through its structures or institutions in any way in matters of personal law of any citizens.

Mr. Chairman, there is a saying that, 'if you think education is expensive, try ignorance'. If we think that to maintain the Kadhis's' courts is expensive, let us try the position of alternative laws over the citizens of this country and we will see how expensive it will be. Thank you very much.

**Clapping by Honourable Delegates.**

**Hon. Delegate Danson Buya. Mungatana:** Thank you. I want to notice number 5 who has also not spoken.

**Hon. Delegate Moses Akaranga:** Thank you very much, Mr. Chairman. My names are Moses Akaranga, a Member of Parliament from Sabatia Constituency, Delegate number 5.

First let me contribute on the Kadhis's' Court, I know quite a number of Delegates have given their views, I do not want to repeat. First, personally I do not have any problem with the Kadhis's' Courts at all, at all. The Bible says, "love your neighbour as you love yourself" and therefore we need to love our brothers here. Having said that, I want to put it clearly that even in the previous, I mean in the old days, Christians Courts used to be managed by dedicated Christians. But these days most of our courts are not manned by dedicated Christians. In the Bible, the Book of Judges, majority of those Judges were Christians. And now what the Christians are just saying is, as much as they want to support the Kadhis's' Courts, they also want the matters to be taken to Christians' Court. They do not want to support Christian matters to be sent to Secular Courts as most of you have referred our courts like. Because if I am a born-again Christian, I do not understand how a Judge who does not even understand the Bible, will give a proper decision, therefore our brothers, Muslims, while we are supporting you, we also need or I also beg you to support us Christians to have also a Court for the Christians. *(Clapping)*.

Mr. Chairman, somebody says somewhere that when the Commissioners were going round, where were the Christians? Let me tell you that Christians are led by the powers of the Holy Spirit and therefore, we listen to the powers of the Holy Spirit and now the Holy Spirit has spoken that we bring in the Christians' Court.

Now going to Article 195 and 202: This is the qualifications for the Judges and the Kadhis's and of course for those ones who will be appointed as the Christians' Judges. Mr. Chairman, I do not support the qualification of these people to be constituted. Let is be made by the Act of Parliament. Now the Draft Constitution – if we do that then it is already discriminative, in the sense that where have we left other members of the communities. We have other professionals, we don't want the qualifications to be put in the Constitution, because somebody will actually judge us who are here – say you placed the qualification of Judges, you placed in the Constitution the qualifications of other people, but you left our the qualifications of teachers, you

left out the qualifications for other people and therefore the qualifications of all judges, let them be removed from the Constitution.

Mr. Chairman, also there is a word under the Court of Appeal Article 192, the word the President of the Court. That word is also confusing because if you get Article 197 Clause 4. Clause 4, says on receipt and examination of the petition, the President may ... is that President referring to the President in Article 190(a) or is the President of this Country? Therefore Mr. Chairman, let us delete the word President and be substituted by any other word, I am sure we have our own think tanks, they will give us a good word. With those few remarks I support.

**Hon. Delegate Danson Buya Mungatana :** Thank you. I want to recognize 456 NGO ....

**Hon. Delegate Mohamed Nyaoga:** Mr. Chairman my name is Mohamed Nyaoga, Delegate number 456 from the NGO sector, and I wish to make my contribution but I am not going to repeat or touch on matters that have been deliberated on by the Delegates.

Mr. Chairman, we have three Arms of Government which are supposed to be equal but very unfortunately, there is one Arm which has been longer than the others, that is the Executive. One can no longer talk of the long arm of the law. In fact, the long arm of the Executive has interfered with the Judiciary so much that the kind of rot we have in there, is attributed to the Executive action. We have had cases where Judges are appointed, of very, very dubious credentials. We know of cases where politicians lobby and others lobby for Judges or for people to be appointed as Judges who end up in offering very, very mediocre service.

On the appointment of the Judges Mr. Chairman, we need to strengthen the criteria of appointment of Judges. The Judicial Service Commission, yes, should be a very, very powerful tool and I propose that we reduce the number from the current twenty to twelve, eighteen I think, eighteen to twelve, because eighteen is too large a number but in so doing, we must accommodate every other sector of the country.

Mr. Chairman, I also propose that we ensure that the Judiciary under the Draft Constitution, has budgetary autonomy. We know that whoever presides over your subsistence, presides over your

will. Now the current situation, is such that the Executive can use their financial power to muzzle the Judiciary. Let them have a separate fund which they can access directly so that they can run their affairs. The other point Mr. Chairman, is that we must create administrative autonomy of the Judiciary under the current Constitution and this will deal with matters such as transfer of Judges, allocation of funds and if this is done the Judiciary will have its own independence without interference from the Executive.

Judge Kwach did mention yesterday, that the legal profession or the lawyers are also extremely corrupt. I do agree with him, but I go further, he did not mention that behind every corrupt Judge, we have one corrupt advocate. I think in my view, behind every corrupt Judge we have a long queue of lawyers and others behind him.

The other point Mr. Chairman, that I wish to mention is that we should create a permanent Constitutional Courts which will be separate but within the Judiciary. These Courts, should consist of a President and four other Judges. They will have a non-renewable term of ten years. They will deal with matters of interpretation of Constitutional matters.

Let me now touch on the very, very emotive issue of the Kadhis's' Courts. Mr. Chairman, if you are not careful, this matter will degenerate into competition between religions. I have heard speakers here say that we should not entrench the Kadhis's' Courts into the Constitution, it is quite clear that the speaker is not aware that it exists in the current Constitution. I support the idea of the Kadhis's' Courts as provided for in the Draft Constitution. (*Clapping*). What is happening here is that we are confusing the idea of Kadhis's' Courts with Sharia law. Somebody did say that we are creating a parallel system, no, in fact I remember that speaker equated the Kadhis's' Courts with the problems in Sudan and others. Not at all, it is nowhere near there. So what is happening here is there is mistrust, there is emotion, let the Muslims enjoy their rights.

Mr. Chairman, I wish to mention that we are creating a Constitution here that is going to govern this country for posterity and the Judiciary is a very important organ in ensuring the rights provided for under the Constitution are enjoyed and they are enforced. And therefore, it is important that we create another organ of the Judiciary and that is the Supreme Court as provided for in the Draft Constitution so that we can deal with those Constitutional matters in a more

serious manner. But the Supreme Court should not allowed to deal with matters of interpretation of Constitutional matters that come from Parliament. What happens tomorrow if there is a Constitutional issue that is filed in court and it ends up in Supreme Court? The Supreme Court will be a judge, its own interpretation, its own courts, so that should not happen. Thank you very much Mr. Chairman.

### *Clapping*

**Hon. Delegate Alew Simon:** Thank you. I would want to move to the floor.

**Hon. Delegate Danson Buya Mungatana:** It's on what? Just give him the microphone, sorry.

**Hon. Delegate Alew Simon:** This morning when you wanted to close the debate, I alerted you that you are going to discriminate us and particularly me. I have been raising my hand since the whole of last week, my placard got torn, I went and got a new one, and then now you have come here, even after I brought you a note there to tell you that I have not spoken, you are still bypassing us here. This is not fair Mr. Chairman; it's me who told you let us continue with the debate.

**Hon. Delegate Danson Buya Mungatana:** Thank you. Mr. Samuel Macharia Muchuga, according to the records we have here, you have already spoken, and I'm trying to point at people who have not spoken. So, please I think I'm ruling you out of order (*noises*) and before I come there, I would like to recognize 139 who has not spoken.

**Hon. Delegate Alfred Mwangi Nderitu:** Thank you very much Mr. Chairman. My names are Alfred Mwangi Nderitu, MP Mwea, number 139. Mr. Chairman, first I would like to begin with the hottest Article here which is the issue of Kadhis's' courts. Number one I am a Christian, actually prepared to become a priest by ----- (?) to join other institutions. Let my dear brothers, the Muslims, realize that we also have traditional laws in our country, and every tribe here has a traditional law. The Christians themselves have got the Canonical law, marriage law, all these laws but none of them has been entrenched into the Constitution. (*Clapping*)

If we have to entrench all the laws and all the beliefs and ideals of every community here, or every religion here, then Mr. Chairman we will be forced to have Islam law, Canonical law, and if you may allow me, Bush law, Christian law and any other group which emerges in this country will entrench its law into the Constitution. What am I trying to say? My dear brothers, the Muslims, you are well catered for into the existing Constitution. The laws appertaining to the welfare of how you split the wealth to your children; really, that ought to be in an Act of Parliament.

Mr. Chairman, if I would go over to where we started in terms of having a Supreme Court, yes I'm talking through experience because I am one of those who was a victim of the last Government where judges were used by the existing Government then to make sure that they threw me left and right and center and I had nowhere else to go. The creation of Supreme Court, I tell you, it will take control of any other person (I don't want to use a bad language) any other ruler who comes into this country and has no regard for humanity. But, 184 3(c) talks of adequate compensation should be awarded to victims of wrong. I know the Act will come over and stipulate what you mean by 'adequate compensation'. Strongly here, I would say, 'adequate compensation' directly if the prosecutor has taken a case to court wrongly, and he represents the Government, then 'adequate compensation' especially from the Government has to be 50% of compensation from a person who takes the other one to court.

186(5) – Court fees. Here we are leaving court fees to whom? To the Government to decide, or to the judges to decide? We have a Government of the people and by the people. I don't expect an old lady in Turkana who wants to come to High Court in Nairobi really to even have enough money to pay the High Court fees here. The Government should take over both cases if these are cases of land, if these are cases of maybe theft and if these are cases which have incurred or come into a family because of bad governance; such that this family does not end up selling their property for mitigation fees, etc.

Mr. Chairman, the last one is on appointment of judges. Really, if you are a Judge of the High Court you are required to have a lot of experience and having somebody to come from the university because he was teaching law, and he has not been doing any research on the day to day running of courts, to fit and become a judge of the High Court, here we are wrong.

**Hon. Delegate Danson Buya Mungatana:** Please wind up.

**Hon. Delegate Alfred Mwangi Nderitu:** Mr. Chairman, thank you very much. I don't want you to tell me again to wind up, I will respect you Chair and I say thank you very much for listening to me.

**Hon. Delegate Danson Buya Mungatana:** Thank you Mheshimiwa. Number 361. You have been most consistent in raising that, I had to see you.

**Hon. Delegate William Salaon Ole Yiaile:** Thank you Mr. Chairman for seeing me at last.

**Hon. Delegate Danson Buya Mungatana:** 135, let's take the point of order first.

**Hon. Delegate David Kamau Mwenje:** Mr. Chairman I want to remind you again and I did so yesterday. That you are our guest in this sitting and I do represent the majority of people in this country. Mr. Chairman I have been raising my number and now my paper is also worn out. Mr. Chairman may I now plead with you that you let me put my point across so that Nairobi can also be heard.

**Hon. Delegate Danson Buya Mungatana:** Sorry, Honourable Delegates, I target that we finish this Section which we are just about and then I will leave it free to the people who really feel they have to say, maybe we take two or three, and then we give the Commissioners to reply. So, I will arrest the situation where I have missed out some people, Mheshimiwa. Thank you. Let's go on, I will get back to you, thank you.

**Hon. Delegate William Salaon Ole Yiaile:** Thank very much Mr. Chairman. My name is Ole Yiaile, Delegate number 361 from Narok. From all the previous speakers, it has become evident that the confidence of the courts has been eroded. The Maasai, the pastoralists, hunters and some other minorities have lost their land through that corrupted sort of legal system we call the courts. Mr. Chairman, it is our belief that the review process will compensate us and supply us

with the legal instruments to allow healing of historical injustices perpetuated on us through successive regimes.

I go to Article 187, the Supreme Court. Justice delayed, Mr. Chairman, is justice denied. In Narok we have cases that have been in courts since 1974 and they have never been determined upto today; some of the complainants have even gone to be with the Lord, the judgement seat of Christ. I think we need to do something there Mr. Chairman. The Supreme Court, I don't support the creation of -----(inaudible) because it will continue to delay justice. It is also a duplication of the roles and duties of the East African Court of Appeal and I think we should propagate and allow the East African Court of Appeal to handle such matters as constitutional matters because it is above influence.

I go to Article 194, Sub-section 2 and 3, the appointment of judges should be vetted by both Houses of Parliament. I will also move to say that they should be based on integrity; their promotion should be based on integrity, high moral standards and even regionalization. Seniority alone is not enough because this is simple exploitation of historical injustices based on the false notion of first come, first served. We have suffered in Narok, there was a time we had, from the prosecutor, to the magistrate, anybody, even the court clerks, people coming from one region and one ethnic group, and it was hell and justice was lost in Narok.

Mr. Chairman, I move to 196(1), retirement of judges. I stand by the present Constitution that judges should retire at 74. Article 198 Sub-section 1, the lower courts should be expanded and traditional courts should be created and be empowered to handle land cases, matrimonial and other problems at the locational level. Mr. Chairman, some of us have not lost our culture, we still have it and we still have our laws. In fact it is even easier to administer that kind of justice because it will heal the wounds, because sending somebody to jail or hanging one does not even heal the wounds, it creates more enmity. Article 203 so that I come back to Article 200, Section 4 should be created to create discipline for the rogue lawyers.

And then now, Mr. Chairman, I finally come to Article 200, the Kadhis's' Courts. I want to borrow some words from the American black civil rights fighter Dr. Luther King, when he said and I quote, "it is ironic, yet inescapably proved that the greatest Christian of the modern world

was a man who never embraced Christianity”. He was talking about Mahatma Gandhi. I am a Christian and I want to appeal to my other Christian brothers, to remind them the love and the compassion of Christ. I also want to talk about our failing culture. Culture has failed, and this is why we have found so many street people, this is why we are finding girls at the age of 10 and 12 bearing children because of the collapse of culture. Mr. Chairman, as a pastoralist, hunter and gatherer, I humbly appeal to all the Delegates gathered here to approve and accept the Kadhis’s’ Court because it has been there since the beginning. (*Clapping*)

Finally, in Maasai we don’t scratch a wound that has healed because if you scratch it, it might come back and it will never heal. Those are just words of compassion, rather than to accept that was there because it was neither you nor I who put it. As I sit, philosophically, we need to have one nation--

**Hon. Delegate Danson Buya Mungatana:** Please sit down now--

**Hon. Delegate William Salaon Ole Yiaile:** .....with a diverse majority of people under one culture, Mr. Chairman as I sit ...

*Interjection*

**Hon. Delegate Danson Buya Mungatana:** Please you are out of order now.

**Hon. Delegate William Salaon Ole Yiaile:** Thank you. Sorry, then I am sorry and I bow down and I hand over to your speaker.

**Hon. Delegate Danson Buya Mungatana:** I notice 535 who have also not spoken, NGOs’. Hold on. Just before you speak, I would take the Honourable Delegate lady who wants to give us a point of order.

**Hon. Delegate Katamu Rita Ombito:** Thank you, Chair. I am Rita Katamu, number 381, District Delegate. Mine is a humble request, I have followed you keenly and seen you are totally avoiding ladies. Kindly give ladies a chance to speak. Thank you.

**Hon. Delegate Danson Buya Mungatana:** I am sorry about that and I will take that point. 535.

**Hon. Delegate Ojiambo Fred N'cruba:** Thank you, Mr. Chairman, my name is Fred Ojiambo, Delegate number 535. Mr. Chairman, a lot has been said about the judiciary and I don't wish to repeat it but I do want to address the subject of the Kadhis's' courts. I proceed from the basis, Mr. Chairman that I hope at the end of this exercise we shall have got a Constitution which is just, all-inclusive and which allows all people equal access to law and promotes national unity. I think that is what is intended in Article 14, sub-Article (2). Also, a Constitution which is not discriminatory and which does not give preferential treatment to some people and discriminates against others.

Mr. Chairman, I am a little concerned about this of issue of Kadhis's' Courts, not because of Kadhis' Courts, because the courts have existed and I think those people have said that and they are right. They have existed pursuant to section 66 of the current Constitution. I don't think anybody begrudges anybody that, but what is concerning us now is not just simply the issue of Kadhis's' courts as such, but the attempt as I see it in this Draft Constitution, to bring in a completely new dispensation. My humble view is this, Mr. Chairman, that the provisions regarding the Kadhis's' courts only deal with jurisdiction, but there is this thing in section five or Article 5, which brings in Islamic law. Now the reason I say this, is that there is a misconception in this hall that somehow this law that is now being promulgated by this Constitution only applies to Muslims. It is not true. The law here can apply to non-Muslims just with equal force, and that is if one looks very critically at the sections dealing with Kadhis's' courts as together in conjunction with Article 5. So it is a misconception to think that Islamic law will only apply to Muslims.

Secondly, Mr. Chairman, we are creating a structure of courts which is completely parallel to other courts, and it is a parallel structure, because we are providing a system which all the way up to the Supreme Court, only deals with Islamic law. Now, my humble view would be this, we ought to have a system in this country that is available to all, to which everybody can go, but which is also sufficiently open to deal with all kinds of law, including Islamic law.

Mr. Chairman, there has not been anybody here who has said that somehow because we have Kadhis's' Courts in the way that they are now, there has been any Muslim or anybody professing in the Islamic faith, who has not had access to justice. I think Mr. Chairman, that if we have a situation in this country where certain courts will only deal with certain aspects or a certain section of the society, then we are going to run into deep problems much later. I think we ought to have one system of law which is not discriminatory, which does not provide for inequities and I am afraid that we are discriminating in this case even against the Muslims themselves. I do not understand how in a certain important document as this, we can provide for the levitation of the Bill of Rights.

Under Article 31, sub-Article (4), there is a situation in which you can take away the Bill of Rights. There ought not be a situation in this country, in the State, in this time of our independence and development for us to say that any particular people should be deprived of any Bill of Rights.

So, my humble view, Mr. Chairman, is that we should not legislate for inequities in this legislation.

My other view would be this, Mr. Chairman, that there is a possibility and in fact you can quite easily have a court as it exists now, provide a division in that court to which Muslims could go or any other people with their own particular esoteric kind of law could go. That law, who I ever the judicial officer would be, would be able to determine the issue in accordance with the law that appertains to that particular individual. There is nothing that stops any Muslim from going to court if that provision is made.

My view, therefore Mr. Chairman, is this, that we retain the Kadhis's' courts in the way that they are provided for under section 66 and make provisions in an Act of Parliament just like all the provisions should be made with regard to any other people and not preferentially for any other person. I understand that the Muslims feel very strongly about this but I think it ought to be understood that other people feel just as strongly. So what we do need is to bring a situation where this country moves along as one. Thank you, Mr. Chairman.

*Clapping by Honourable Delegates.*

**Hon. Delegate Danson Buya Mungatana:** Thank you. I want to recognize 546, who has not spoken.

**Hon. Delegate Philip Sulumeti:** Mr. Chairman, I thank you for giving me the chance to speak. I want to address Removal from office.

**Hon. Delegate Danson Buya Mungatana:** Sorry, please give us your name and your...

**Hon. Delegate Philip Sulumeti:** Yes, my name is Bishop Philip Sulumeti and all of you know very well that I started here and I took you to Safari Park and I am back with you here. So I am part of the-- (*Clapping from the Honourable Delegates*). Yeah, those are my credentials and this is my baby.

So, I want to address Article 197, Removal from office, and particularly, number 4 (c), “in the case of the Chief Justice, the President may appoint a tribunal consisting of the Speaker of the National Council and two Judges from the member states of the East African Community.....”

My question there is, we legislate in Article (1) that all sovereign authority belongs to the people of Kenya, and now if we have to invite somebody from Tanzania or Uganda to come and judge our Chief Justice, we are actually surrendering some of our sovereign authority. (*Clapping from Honourable Delegates*). So that one should be corrected. My brothers and sisters, may I say something about the Kadhis’s’ courts. Mine is to appeal, not to our emotions but rather to our heads and to common sense. Let us handle principles and the principles has been stated in Article (10), namely:

- The state and religion will be separate.
- The state will consider all religions equal, and
- the state will not favour one religion.

Now, on the other hand, if you go and legislate particularly for the Kadhis's' Courts, you are having an essential contradiction in law. What we were legislating on one hand you are removing from the other hand.

Number two, you are giving brethrens to one religion and that is going bring chaos to our children 50 years from today. How would the judges of that time interpret this Constitution? They will simply say that we were here to propagate Islam, to make a Constitution that is going to propagate one religion. So my advice is, God is supposed to unite us and not to divide us, He is our loving Father, He is our loving Allah. Please let us remove matters of religion from the Constitution. (*Clapping from Honourable Delegate*).

That is my sincere advice. Let us remove all matters concerning religion from the Constitution. On the other hand, I also want my Muslim brothers and sisters to go home happy. So, I propose that we should legislate in such a way that we authorize Parliament to enact a Kadhis' Act that will satisfy our brothers and sisters who follow the Islamic faith because that is personal law. You cannot bring all the laws of everybody here and put in the Constitution. That Constitution, will have one million pages. Thank you very much.

**Hon. Delegate Danson Buya Mungatana:** Thank you. I want to recognize 505.

**Hon. Delegate Fatma Ali Saman:** Thank you Mr. Chairman for giving me this opportunity to talk on the Judiciary; and I will straight away go to the Kadhis's' Courts, which affects the Muslim women directly, who I happen to represent,. Thank you very much.

The Kadhis's' Court, it is true that they existed, and generally, most people might not understand how they were benefiting the Muslim Community, and generally the Muslim women. I think it is the wearer who knows where the shoe pinches. We Muslim women who advocated for the enhancement of the Kadhis's' Courts understood how well this affected us, and we thought the Muslim woman will be very well protected, and will have access to justice if the Kadhis's' Courts are handled in a more professional way. In fact, the only obstacle, to be sincere with you brothers and sisters, the only obstacle we thought we have to handle was our own Muslim men. I am surprised that a blessing came in disguise, they are supporting us, and we have to stand here

and explain to other Kenyans why these Kadhis's' Courts are very important for the Muslim women, in particular.

The Kadhis's' Courts handle matters on personal law, which affects issues on marriage, divorce and inheritance. As Muslims, everything we do, from birth to death is all about law. So, if we stand here and tell you that it is only personal law, we will be lying to you. But what we have done, having recognized that Kenya is a secular state, that we have people who profess other religions, we sat down and said, "What is it that we cannot practice from our law?" and we settled for the personal law because it is a day to day activity. People marry; we know the technicalities of marriage. In an Islamic setting, a Muslim man and woman can only marry in a description of a proper legal system. We therefore cannot handle it in the Mosque. Allah has prescribed for us the kind of judges who are Kadhis's in Arabic, the word has to be demystified, the word Kadhis' just means a Judge in Arabic. So, in a normal legal setting, there has to be the legal backing for that Kadhis' to be able to function well.

What has happened is, because the structure of the role of the Kadhis', was not defended in the Constitution, was not stipulated in the Constitution, this office was used to abuse and mistreat of Muslim women. If I give you some of the events that happened through these Kadhis's' Courts, most of these Kenyans will be shocked. And you will realize the effect of what you are trying to deprive us of. The consequences are very bad. What used to happen is, most of the Kadhis's were not professional, they were hand picked by Politicians, by other interests and put in office without a proper Islamic training. So what they did, some of them married off young girls. After one year, I remember incidents where I had my own students being married off at the age of thirteen, twelve, and then after one year, you see the same girl divorced with a baby on her back. It is very frustrating. Men and women of this country, please let us keep politics aside. Let us look at things from the human perspective, please. Because these Kadhis's' Courts have been used to suppress Muslim women. I met a colleague of mine who was in marriage for thirty solid years, and was divorced from her husband without any contest, without any property on the corridor. Suddenly after being married off for thirty years, you are thrown out, your parents have died, the existing ones are poor, who is going to take care of you? It is very sad.

Therefore, please I appeal to you as Christian brothers and non-Muslims do not deprive us of this very important, very very important thing. The prophet, when he was introducing Islam in Mecca, when the Muslims were mistreated, when they were treated like animals by the fellow Arabs, it wasn't. Please go and migrate; go to Abyssinia you will find a Christian brother who will protect you and give you access to justice. Muslims footed all the way from Mecca to Abyssinia, the current Ethiopia, to look for protection from Muslim brothers or from Christian brothers. Therefore, I appeal to you as Christians, those of you who preach the true Christianity we know, defend us and give us the protection we need. Thank you.

**Hon. Delegate Danson Buya Mungatana:** Thank you very much madam; thank you very much. before I leave that row, I would like to recognize 343, a district Delegate who has not spoken. 343 ...

**Hon. Delegate Saina Augustine Kibet:** Thank you very much Mr. Chairman. My name is A. Kibet Arap Saina, Delegate from Nandi, number 343. I want to give two points because some have been presented by my brother delegates. I am going straight to article number 195, that says, the President of the Court of appeal may in consultation with the Chief Justice create divisions of Courts of Appeal. And also, in (b) says sitting at places determined by the President of Appeal in consultation with the Chief Justice. I am saying this because right now, when we give the President ...(inaudible) to be in one station like Nairobi, what about people in Lodwar or other places? So, my request is that this Conference indicates and creates the divisions of the Courts of Appeal as per districts.

Number two, Article number 186 section 5, concerning court fees I am requesting this Conference, in drafting this Constitution, that the widows and children, on succession cases to own any other property, should not be charged. Succession of land as at now goes up to a hundred thousand. So what about the children and widows who are poor? We better approve that successions of all kinds be not charged so as to enable the poor to acquire the property of their dead.

I am also going to-- For the purpose of law to exist and to evade corruption, let us take the law to schools as one of the subjects in the school. Right from Primary, we call it 'Primary law,'

secondary we call it 'Secondary Law,' so as we shall not get a lot of thieves in the near future, because of corruption. If students are taught in school, there will not be many thieves, corrupt fellows and so forth.

Finally, you have said that Judges are to be sacked, corrupt judges. What about –because corruption is the giver and the receiver-. not only the giver. You better separate that first and then you come to these corrupt receiving end. It is two-way traffic. With those few remarks Mr. Chairman, I have remained with three minutes for tomorrow, reserve them for me Mr. Chairman.

*Laughter by the Honorable Delegates.*

**Hon. Delegate Danson Buya Mungatana:** Thank you, I will consider that. Thank you. I will straight away go to 614. May I take that point of order after he has spoken please.

**Hon. Delegate Dalmas Anyango Otieno:** Thank you Mr. Chairman for giving me this opportunity, I am Dalmas Otieno, Delegate number 614, Political Parties –The Kenya African National Union. Mr. Chairman I would like to first state the position of KANU over the issue of the Kadhis's' Courts. The Party acknowledges and appreciates the unique role of the Kadhis's' Courts on matters of personal laws, understood to only cover marriage, Divorce and inheritance amongst Muslims. The Party therefore, supports the protection of these Courts in the constitution. The numbers, qualifications and the operating standards in the Kadhis's' Courts may be left to an Act of Parliament.

Mr. Chairman, after stating the official Party position, I want to say that any other member of the Party, who may have given his own personal opinion, it should not be read to mean that either a group or a section of the Party are saying anything different. They were speaking as Honorable Delegates of this Conference. I also therefore, have my own personal observation over this matter. Mr. Chairman, we are all victims of inadequate knowledge of what I would say comparative personal law. The truth is, as Kenyans, the people inhabiting this region, we were ... (inaudible). Christianity came and converted us. Islam came and converted us. And if you are dealing with the converttee, you are dealing with a person who is likely to have different degree of belief in a particular faith he may be advocating.

On the issue of the Kadhis's' Courts, we are seeing it more of protection and guiding to that faith, particularly because of the unique practices as regards marriage, "you can have up to four wives." Divorce, " you can do it up to 20 times," inheritance, " you may not be able to count all the children that you have got up to that time." So we pin you to what the quran says, that to protect those Kenyans that are the subject of your belief. Please follow that law strictly, and make sure the women and children of Kenya are protected according to the quran, and the people should be there.

I want to mention also, that in this Constitution we are establishing the office of the Public Defender. And my brothers the Muslims, be aware that ...(inaudible) will have access to those Kadhis's' Courts to make sure they are conducted strictly in accordance with what the quran says.

My last point Mr. Chairman is, a lot of things we have heard even in the existing Constitution. But the bulk of our problem has been some little abuses, some violation; what I would call 'Acts of Omission and Commission.' Particularly if we are going to allow any vague expression in this document we are making, they may possibly be ignored by the executive as they have done previously. Particularly when we are dealing with appointments, we are saying 'In consultation with, on the advise of, according to the recommendation of...' we should strictly say, 'Acting in accordance with the recommendation of...' so that there is no room for abuse, if that is what has to apply. Thank you very much Mr. Chair.

**Hon. Delegate Danson Buya Mungatana: 542...**

**Hon. Delegate Ibrahim Omondi:** Thank you Mr. Chairman, my name is Ibrahim Omondi, delegate number 542. I will take two minutes and give the rest of my time to the Bishop behind me, since I am only a pastor. I will go straight to the point. Mr. Chairman, I represent the Evangelical Fellowship of Kenya, we have not said that Kadhis's' Courts should be done away with in this country. We are saying that every religion should take care of its court issues within that religion and we recognize that the Kadhis's' Courts have existed for years, we are not advocating for removal of Kadhis's' Courts. Do not take us out of context.

On the issue of minorities and I really thank God for all the human rights people who defend minorities in this Conference. But who are the minorities that we have here? Have we thought that the Buddhists could be less in number than the Muslims? What about the Sings, the Hindus, the Judaists, the Ogieks, Dini ya Msambwa, and many others? If we want to entrench into the Constitution a protection of some minorities, I believe these minorities will come first before Islam. The reason as to why I say this Mr. Chairman, is that Islam has come of age. It is no longer presiding on the Coastal Strip; we have Mosques all the way from Mombasa to Lodwar, at a distance that they can speak to each other. And Luos are Muslims, Kikuyus are Muslims, Turkanas are Muslims, we are saying this religion is very strong, it can cater for itself, it can cater for its courts, it can pay for everything because it is a very big religion in this country. So do not hide behind minorities, because the real minorities are not Muslims. Thank you Mr. Chairman, I will give the microphone to the next person.

**Hon. Delegate Danson Buya Mungatana:** Your two minutes are over.

**Hon. Delegate Ibrahim Omondi:** Okay, I will give it to 226, he was sitting right behind...

**Hon. Delegate Danson Buya Mungatana:** No.

**Hon. Delegate Ibrahim Omondi:** I am allowed to do that, am I not Mr. Chairman?

**Hon. Delegate Danson Buya Mungatana:** Sorry you are not allowed to do that, may I give it to... for professional groups there, 478 who has not spoken. I hope he also takes two minutes.

**Hon. Delegate Sabenzia Wekesa:** I hope so. My name is Sabenzia Wekesa, delegate number 478, from professional...

*Uproar from the floor.*

**Hon. Delegate Danson Buya Mungatana:** Just hold on, 336 can you hold on. Please go on.

**Hon. Delegate Sabenzia Wekesa:** I am delegate number 478 from professional organizations.

**Hon. Delegate:** Point of information.

**Hon. Delegate Danson Buya Mungatana:** May I clarify something fellow delegates, may I clarify on the question of point of information. The procedure is that whoever the speaker is on the floor, if he wishes to be informed, he will allow that. But if he does not, I do not know, do you want to be informed Madam?

**Hon. Delegate Sabenzia Wekesa:** No please.

**Hon. Delegate Danson Buya Mungatana:** So please proceed.

*Uproar from the floor*

**Hon. Delegate Sabenzia Wekesa:** So, I will go straight away to article number 194, on the appointment of the Chief Justice as the longest serving Judge of the Supreme Court. Much as I agree with the fact that experience is the best teacher, I wish to say that we should also consider academic qualifications and ensure professionalism in appointing these categories of people. We should also ensure the fact that good moral character and integrity also counts. I also have in mind the idea of continuous education among the judicial officers; we should also put that into consideration as we appoint these officers. This should also apply to the Article 195 in the appointment of the Judges of the High Courts.

On to Article 196 the retirement age of the Judges, I would like to say that I concur with most of the speakers who suggest that the age of 70 years is appropriate and as much as I appreciate the fact that wisdom increases with age, we should be careful here when we are setting up the upper age limits of these officers. Like when we talked about the president, we said the President can rule to infinity for the Judges we have put them at 70 years as the age where, I think the physiological process starts going down, but I wonder what will happen when it comes to public servants who miserably retire at age 55 when they also have a lot of wisdom and a lot of knowledge in their fields. I have in mind people like medical officers, medical surgeons, accountants, veterinarians, architects and engineers. I hope we shall also consider them when it

comes to that. On to the creation of the office of Public Defender, I fully support that, but my only request is that they should be brought down to the grassroots, to the villagers where access to justice is quite difficult and expensive.

Fourthly, I also wish to state that the small claims courts, the industrial courts and family courts should be constitutionalized and brought down to the village level where the poor person cannot afford to go to the Higher Courts which are far away from the village. On to the Kadhis's' Courts, which is my last and final point, I just wish to say that we should not have two parallel Judiciary systems running together. Much as we appreciate the fact that we have our fellow Muslim brothers and sisters, we leave together with them and we appreciate that. But we do not wish to bring all our personal laws into the Constitution. We just create them under the article which talks about creation of Subordinate Courts, as it has already been created in the Constitution in Article 185, where we have Sub-article (2) that has the list of Superior Courts and Sub-article three has the list of the Subordinate Courts.

I noticed that in the list of Superior Courts, we have given three articles to the Supreme Courts, two articles in the Court of Appeal and two articles to the High Courts. When it came to Subordinate Courts, the Magistrate Courts, the Kadhis's' Courts any other courts and traditional tribunals, it is only the Kadhis's' Courts that have been elaborated very much and been given four articles to themselves. I feel that is not being fair, that is not doing justice to our country and we had sworn that we will put the interest of the nation at heart as we re-write this constitution. In all fairness I support the existence of the Kadhis's' Courts in this country, but I feel that this should be put in the subsidiary legislation. With those few remarks, I beg to resume my seat. Thank you.

**Hon. Delegate Danson Buya Mungatana:** Thank you, fellow delegates I think we have since yesterday done three rounds from the end to the other one. And I was proposing that since all the people have already had opportunities, we are now going...

*Uproar from the floor.*

**Hon. Delegate Danson Buya Mungatana:** Sorry just hold on, I am going to pick as I had said earlier on, about 4 or 5 speakers who feel they must speak and then I will ask the Commissioners to close with a reply. So I want to apologize to those people who will not have an opportunity, but I will like to just take those that I can notice. Starting from this side, I will pick at random all the way. Yes, I want to recognize Hon. Balala number 13.

**Hon. Delegate:** Point of order.

**Hon. Delegate Balala Najib:** Well, thank you very much, Mr. Chairman.

**Hon. Delegate Danson Buya Mungatana:** May I take the point of order after he has spoken. Thank you.

**Hon. Delegate Balala Najib:** I want to come in on the issue of the word President in the Court of Appeal. I think we do not have to delete the word President, it also makes us compatible to the other parts of the world. I think it is high time also that Kenyans with positions in the private sector, organizations, have the word President. So, I do not see any confusion.

The other thing I believe is the purpose of the Constitution making is with the objective of harmonizing, bringing peace and being inclusive. And when I see a lot of controversies about the Kadhis's' Courts, which my dear sister there has removed demystification of the word Kadhis', then it is so sad. I do not think we came here to start arguing for or against, we came here to look collectively at what the wishes of the people on the ground have said and if there was any other need of creating a Christian court or any other court and people feel so, then why not do it. But I think it is not fair to deny the people the chance, they have said they want the Kadhis's' Courts. We will now start trading on dangerous grounds, because this has been there before in the current Constitution and to put something in the Constitution without a thought of what is the interest of the nation, was very critical in 1963. So, it was put there why remove it now? We want to make sure that whoever is here today; we are not just here to be biased on religion or on sectarians, we are here to understand that we are looking at a national interests that bring peace and harmony within us at the end of the day. I totally agree that we do not see

Muslims to be the only minority, but it does not mean that we are bringing this to be entrenched in the Constitution because we are a minority.

I think Islam is a lifestyle, it is not only a religion. So it is very important to be considered entrenched and secured in the Constitution, then the other operational issue can be discussed in the legislative articles. The issues of the expansion of what is in the Draft Constitution should not scare anyone, because talking about civil and commercial law is like already the Kadhis's' Courts Subordinate Courts. At the same time if Subordinate Courts are going to be empowered, including traditional courts and tribunal courts with limited jurisdiction to look at the small cases, then why can't the Kadhis's' Court be given such responsibilities. Because the people that we have wanted to be empowered today to Kadhis's' Court or to be Kadhis's, are people who have to be qualified first and foremost, in the legal practice and then the religion, because it is particular for the Muslims. Therefore, it is very important to understand these elements, which seem to be misunderstood and be objective about them. I think it is important to know that the reason of expansion is to help Judicial systems to move faster in providing justice.

The other issue is on its operations. Yes, may be it is a bit too detailed but if it is a major issue, then it is supposed to be there in the Constitution. I wonder why it should not be entrenched in the Constitution. I wonder why it should not be descriptive because it can create a lot of vacuum when you are not conclusive on it. That is my contribution on the issue of the Kadhis's' Courts. Thank you.

**Hon. Delegate Danson Buya Mungatana:** Thank you, 576.

**Hon. Delegate Simon Mwai Gakuya:** I would thank the Chair for giving me this opportunity, my names are Mwai Gakuya, sometimes they call me rasta, other times they call me Mau Mau. These days they are even starting calling me "*Mungiki*", why they do that I don't know but there is something that they see in me that they recall in me.

I would like to talk about the Kadhis's' Court like my fellow Delegate has just explained. It is not fear to argue about who is supposed to be where in the Constitution and who is not supposed to be where in the Constitution. It is the historical evidence that has brought us here, the

suffering of Kenyans who have been suffering for a long time, for thousands of years and now for the last 40 years. We have realized out of our ignorance that things were not going right. This means that we have to know where we have come from and where we are heading to. This means that we have to bring our brothers and sisters together in religious harmony not in social harmony. If we bring them in religious harmony then social harmony will come in, then I would say that all religions are the same, all people are the same. Religion is the secret of the heart of everyone, it is not a matter of publicizing what we believe in but it is just a matter of knowing who we praise everyday and every night. It is who we praise for what we get that we praise.

So I would like to say that all those people who keep on saying that we should put the Kadhis's Court into the Constitution or remove it from the Constitution that is wrong, we must look back to history because the deeper we go to the history of this country the better future we make for this country. So we should realize that these two religions that is the Christianity and the Islamic religions are like we are saying in Kiswahili "ni dini za masomo". So we should realize that there are also traditional religions that have been put backside and they are always being looked up by those people who are here, who are Kenyans of traditions, people who know their history.

We should realize they themselves do want to be constituted, we should realize that they also have been marginalized. So it is very important that we take them in consideration in whatever we are saying. Also we realize the war that is going on here of words of Christianity and Islam is already in our houses. Let me tell you a story that happened last year, I went to a house there was a family, that family had two brothers who were Muslims, one sister was a Christian. One sister who came back at night from the "kesha" she found her Bible hidden, so she asked for it the Muslim brother said no, we don't have it but if you want something to read we have a Quran here. So you see the war is growing and also when I came in they were still arguing about religion, so I told them because really this religion came through other people, it is a foreign ideology that was brought to us. We should help them in continuity if they want to continue but still we should know that it is not the original religion that has been in Africa for thousands of years. We are here because of the history of this country and we are going to set the pace for Africa. We should know that we are here to show Africa what we want in this continent, not only in Kenya but we should realize that it is a destination that has to be reached. So every time we talk about brothers and sisters fighting about religion this is not fair. The Almighty who has

created everybody, Heaven and Earth knows who is truer than the other, we are equal in the eyes of the Almighty. Thank you

**Hon. Delegate Danson Buya Mungatana:** Let me move to hear 336.

**Hon. Delegate Mkawerweren Chebii:** Thank you. I am very very happy now. Thank you Bwana Chairman. My name is Mkawerweren Chebii, I would like to go to one point. In any society Bwana Chairman it is not democracy when you say that the communities that are larger can be gathered because they are large. Mr. Chairman in a democratic world infact the minorities are supposed to be respected, by the way I am a Christian. I would like to point out that Mr. Chairman could you include that in any society that is small regardless of how small it is, it must be protected in the Constitution.

With that regard, a religion should not be tampered. If a religion is tampered the society is tampered. Mr. Chairman, in Islamic communities I remember one thing that when we are making an agreement with the people of Kenya or other people from outside Kenya you need to go as per the document at that previous day. Somebody has said that the President by that time who was a Prime Minister agreed to sign because of pressure, now if you are told it is pressure what will you say? In that regard Mr. Chairman I would like to read the following:

In a world of democracy Chairman, although the will of the majority often prevails, the voice of the majority must be respected. Mr. Chairman, the essential element of democracy in Constitution includes the protection and entrenchment of the rights of those who are pure. Bwana Chairman, historical background of a country must be discovered and must be known that is why we are making a Constitution. In any Islamic religion it must be considered because it was a fine document and it remains a binding document. We are saying today we are reviewing the Constitution and yet you are saying we want to have a Supreme Court, now you are advancing you want others not to grow so that they remain the way they are. Like a child, a child must grow, as a child I need to grow gradually. (*Honourable Delegates Clapping*).

In my mind I will tell you honestly and sincerely, I am a Christian by birth and by rights and I lived in a Christian family, there you are that the minorities regardless of their religion they must

be respected and the Constitution must gather the interest of everybody in Kenya. I believe that the Coast strip which was not supposed to be in Kenya, today is in Kenya, assume there will be no religion in Kenya, assume there will be no Christianity in Kenya or Islam where would we be. In fact it must be entrenched with courtesy, let us respect the minority.

Mr. Chairman, reforms should be pursued on the Constitution. At Bomas of Kenya today Bwana Chairman we need to make history because the history makes it Conference. It is not a matter of saying, that because I am a Christian, because I am Benedict I don't actually recognize others Constitution. The more important point Bwana Chairman is that we are living in harmony, what is the problem? It is a question of respecting, it is a question of knowing the norms of a community. Like myself I come from the minority tribe where I have never even accessed a tarmac road and they say, the Constitution today must be equal.

Thank you Bwana Chairman but I will say....

**Hon. Delegate Danson Buya Mungatana:** Thank you.

**Hon. Delegate Mkawerweren Chebii:** We need to make history before history makes us to live in this society. Thank you very much.

**Hon. Delegate Danson Buya Mungatana:** I think I will take....and with a lot of apology to all the others whom I am not able to reach I would want to reach you. I will take one more and give the Commissioners time, tomorrow we have a very interesting chapter on devolution and we have kept good records of those who have not been able to speak so that we give you preference. So I will give one more person and then we give the Commissioners chance to respond, 135 please.

**Hon. Delegate David Kamau Mwenje:** Thank you very much Mr. Chairman. Finally despite my age you have seen me.

**Hon. Delegate Danson Buya Mungatana:** Please let me hear the Speaker and then I will go to your point of order.

**Hon. Delegate David Kamau Mwenje:** Mr. Chairman I want to speak from a point of experience because Mr. Chairman when we talk about the Courts, last year and the year before. Mr. Chairman I was taken by the previous regime to court 49 times in different courts. Mr. Chairman it is for this reason that I want to speak about jurisdiction and discretion.

Mr. Chairman we need to put something to do with discretion and jurisdiction because of what I saw. When the Police want to misuse you, when the Police wants to punish you for an offence which is alleged to have been committed in Nairobi, you will be taken to Loitoktok. Where as there are courts in Nairobi where you would have been taken but they take you to Loitoktok to punish you and to report you there for mention. Can we therefore include something to do with jurisdiction so that if an offence is alleged to have been committed in Nairobi you are taken to Nairobi. If an offence is committed in Machakos you are taken to Machakos but the Police should not be allowed to allege that they take you to Kapenguria so that you can be punished even before the case is heard. You can be punished by reporting to Kapenguria when you are supposed to be reporting to Nairobi. So I would want us to entrench something to do with jurisdiction and at the same time we have the discretion.

The Magistrates and most of our people don't even go to Judges anyway, they go to the Magistrate. When it comes to the question of bond, how does a Magistrate gives bond to a person who is charged? We do not need to allow them to leave that discretion to themselves, we need to say clearly that the bond will be so much for a particular offence. Something like that, so that we don't leave it to the Magistrate to decide and if he decides to say, I will make a ruling on Monday and then you sleep inside the cell from Friday to Monday then you suffer. Mr. Chairman, we need to put that and I hope those who are experts should look into this and we put something like that.

Mr. Chairman, at the same time there is a cumbersomeness of President, Chief Justice. We need to be very clear because we know our people, if you have a President of a Court in Kenya and you have a Chief Justice then you are creating war between them. They will keep on fighting who is who, who has got what power. We need to be very very clear and I don't think we need all those titles, we need to have a Chief Justice who will look into these courts. At the same time

I don't see why we need the three Courts. Look at this, from the High Court then you go to the Court of Appeal, then you go to Supreme Court, then you have the East African Court of Justice which is already in existence today.

Mr. Chairman we need to agree to have only two Courts, from the High Court then you can either appeal straight away to the Court of Appeal and then straight away to East African Court where we can include the Supreme Court. It can also be included in the East African Court of Justice where we can have Judges from Uganda, from Tanzania. Somebody suggested that we will be losing our supremacy, no because even us we will sit in their Courts, already in Uganda has put this in place, Tanzania is putting it in place, why not us and we know you expect more justice because now somebody who is not a Kenyan will be listening to your case. So you expect justice even if our people are bought, even if there is corruption you will not be able to corrupt somebody from Kenya and then corrupt from Uganda, corrupt another one from Tanzania.

Since we are now moving to the East African Community Mr. Chairman, I think we need to have one Court among all these Courts and allow Judges from other places to sit so that we can expect justice. After all it used to be there long time ago when the East African Community used to work well and that is why I am saying, whether it is in Kenya we should have only one title of Chief Justice. We don't need the cumbersomeness brought about by these other names.

**Hon. Delegate Danson Buya Mungatana:** Please wind up.

**Hon. Delegate David Kamau Mwenje:** Mr. Chairman one other thing which is very serious which I have seen and we are talking about the common man of this country. Is where again the Police wants to punish you, you are taken to Court on Friday and the case will be heard on Monday. We need to specify and allow our Courts to sit on Saturdays because this question of you being kept there until Monday. We know today our Courts don't sit on Saturday, it becomes a big issue and I remember one case which was heard on Saturday. Two cases which I know of, one is involving me and Mr. Chairman there was a lot hullabaloo and kelele. I think we need to specify clearly that our Courts can sit on Saturday, if necessary even on Sunday but for the sake of Christian faith I don't want to go to Sunday. I want to talk about Saturday's, it is important

we now allow and entrench this in our Constitution so that there is not discretion on which day they should sit so that our Magistrates and Judges can sit on Saturdays and listen to cases.

**Hon. Delegate Danson Buya Mungatana:** I think you should take your seat the Speaker, Honourable Delegate time is over.

**Hon. Delegate David Kamau Mwenje:** Mr. Chairman, I don't want to take much time I agree but just to mention something on the Kadhis'. Everybody here at one time or another has problems. When we talk of cases, if our children and all the rest, there will always be a problem at one time or another. You find your daughter has a friend with somebody else's son and she gets impregnated and the argument continues like that -. Mr. Chairman, I believe --

**Hon. Delegate Danson Buya Mungatana:** No, I think you are out of order now.

**Hon. Delegate David Kamau Mwenje:** Fine. All I am saying and I just want to cut it short Mr. Chairman, is that I do not see the danger in having the Kadhis' Courts. I think they --. But we should never --. We cannot allow them to do it at the expense of the other people. If they want it they would have to pay for them. If not, then let us continue ordinarily and they will be attended in other Courts like everybody else.

**Hon. Delegate Danson Buya Mungatana:** Thank you.

**Hon. Delegate David Kamau Mwenje:** Thank you Mr. Chairman.

**Hon. Delegate Danson Buya Mungatana:** Thank you. Now, fellow Honourable Delegates, you have been a very good audience up to now and I am very happy that you made my work very simple and easy. I was going to request your understanding and your indulgence for just ten minutes because it is now 5.00 o'clock and as we agreed in the morning that we break at 5.30 for tea. I was going to propose with your kind permission that you allow the Commissioners here ten minutes, so that we finish with this topic and then tomorrow-- (*Clapping by the Honourable Delegates*) we can start with Devolution. Thank you very much.

*More Clapping by the Honourable Delegates*

So, I will allow Commissioner Paul Musili Wambua to proceed. Please 587, all the Delegates are saying –

**Interjection by Hon. Delegate No. 587 (from the Labour Party):** Point of order

**Hon. Delegate Danson Buya Mungatana:** -- please give us time. Please I have overruled you and I am asking you to sit down please.

**Hon. Delegate Nio. 587:** (Inaudible)

**Hon. Delegate Danson Buya Mungatana:** Please I am asking you to sit down with a lot of respect. Please sit down 587.

*Clapping by the Honourable Delegates*

**Hon. Delegate Danson Buya Mungatana:** Thank you.

**Com. Paul Musili Wambua:** Mr. Chairman, thank you very much for giving me this opportunity to round up this discussion. I do not want to repeat what we said at the beginning of the presentation and therefore I will be very, very brief.

I think admittedly this Chapter, has been very, very emotive subject and the views have been very robust, frank and very intense and I think for very good reasons. But before I make general observations to enable us close the discussion, I think there are some points which are important to note. The Draft which we presented and in particular Chapter 9 of the Draft Bill, represents the collective position of the Commission. It is not the view of any particular Commissioner or Commissioners. It is the collective position of the Commission having deliberated, collected views from Kenyans, analyse them and compiled them into a report.

The second thing I may want to say, is that what we are discussing is a Draft. The final decision will have to be made by this plenary in accordance with what the Chair of the Conference says. We are merely raising issues which should be subjected to the deliberations by the Committees and then we come back here and make final decisions. So, we should understand that the purpose of this presentation was just to highlight the key issues, which should go to the Committees for deliberation, discussion and then reporting back.

Now, I think it is important to understand that as an organ of the review, the Commission was bound by the principles which are stated in Section Five of the Review Act, Cap. 3 (a) and those are the same principles which should continue to guide this Conference, as an organ of review. We have to be accounted to the people of Kenya. We have to respect diversity, religious, race, ethnicity and we have to ensure that what actually comes out, is a product of the deliberations of this Conference faithfully reflect the wishes of the people of Kenya.

Now, I think it is important to understand that the history, we are all products of history and therefore, it is history which is making us review this Constitution. And therefore, as we deliberate this issues in the Committees, we must understand that the history of the various organs, the history of the various institutions that we want to review, become relevant and therefore, what I said as a basis of the recommendations that we have made with regard to the review and the reform of the various institutions and organs, I think has to be looked at against the history of these organs and the various other reasons which we said at the beginning when we made our presentations.

Now, I think it is important to know with regards specifically to the Judiciary, that what I think Kenyans want and what they demand, are an efficient Judiciary in which they have confidence and in which they have respect. The Judiciary has to be accessible to them. It should not be alien to them and therefore as we deliberate these issues which were ventilated in this Conference, I think we have to understand that the final structure and the final organ which we are calling the Judiciary must be such that, it commands the respect of Kenyans, it has the confidence of the Kenyans and that it is efficient and serves the needs of the Kenyans. And it is on the basis of that, that you have to look also at the other proposals which are contained in the Draft including the proposal, to create the various Courts, the small claims Court as a form of

informal way of arbitration. You also have to consider the proposal to include the Industrial Court as was suggested here and we have also to ensure that the Judiciary, checks the excesses of the Executive and the Legislature.

So, we admit that our Draft is not perfect and the reason why it is called a Draft is to enable the Honourable Delegates in this Conference to polish it up, to clean it up and to remove the creases, iron it out so that where there are contradictions, those one are addressed. Where there are things which are not very clear or terminologies as it was pointed out, which is not very clear, such terminologies should be corrected and should be made more clearer.

So, as a Commission, we do not have a stand except the one we have stated in the Draft and therefore it is now upon the Honourable Delegates to look at the various proposals and positions stated here and to deliberate these proposals in the Committees and finally to take a position or to make final recommendations as to what should be the final Draft of the Constitution of Kenya.

Regarding transitional provisions, I stated earlier on and I think this is important to note that we are not specifically addressing the Judiciary. There is a whole Chapter on transitional provisions or transitional measures which cuts across all Constitutional office holders and therefore as to whether we are going to massacre that organ we are calling the Judiciary or not, I think that is a point which ought to be discussed after we have had presentations, regarding the transitional measures which is a Chapter which will be discussed much later towards the end of the Draft.

I think on the question of the Kadhis's Courts, much has been said, I do not want to say anything except to point out that, I think what we should all target is a win-win situation for everybody. As we listened to the deliberations, I think a sort of consensus would emerge or is likely to emerge and I think a situation where we all accommodate each other and come up with an acceptable Judicial structure which is integrated and which can make sense to the Kenyans and which does justice to all is what I think we require. I do not want to respond to each of the various points raised by the Honourable Delegates. They are all valid, they are important and they will be considered in the Committees.

I think what I require to say is just to make those general observations which I have made. Thank you very much Mr. Chairman.

**Hon. Delegate Danson Buya Mungatana:** Thank you. Commission Ahmed Issack Hassan.

**Com. Ahmed Issack Hassan:** Thank you very much Mr. Chairman. I am happy to report that apart from the very contentious Chapter which touches on the Judiciary, Section 209 to 212 were very much less controversial and I think the Office of the Attorney General, The DPP, the Public Defender and the Committee of the prerogative of mercy, appears to have gotten wise support from the Conference.

Honourable Delegates, I wanted to share with you what one old man told us in Kakamega in June 2001, when he said that when an Athlete wants to jump in a high jump or long jump, he will have to first move backwards and then run so that he can jump very high or very long and therefore as we design this Constitution. I think as a Nation, we cannot forget our history. So we will have to also look backwards, back to our history so that we can be able to move forward for the future of this country and therefore as a National Constitutional Conference, as an organ of the review process, I believe the same rules which apply to the Commission when they were collecting the views and drafting the Constitution, will also apply to you. In fact it applies to you.

Under Section Three and Section Five of the Constitution of Kenya Review Commission Act, applies to the National Conference with equal force. Section Three, sets out the objectives and purpose the review process and there clearly you will find that it is meant to make this country a better country, to have a united country with good governance, a government which respects human rights and democracy and Section Five, sets out the guiding principles of the review process. We said that you must make sure the final document which we prepare, faithfully reflects the wishes of Kenyans. So, I believe as an organ or the review process, the National Constitutional Conference, also has that responsibility to ensure that the final document that they do, reflects the wishes of Kenyans.

