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**RECORD OF
PROCEEDINGS OF THE
PARLIAMENTARY
SELECT COMMITTEE ON
CONSTITUTION REVIEW**

**GREAT RIFT VALLEY
LODGE, NAIVASHA**

**TUESDAY, 26TH
JANUARY, 2010**

RECORD OF PROCEEDINGS TAKEN BEFORE THE PARLIAMENTARY
SELECT COMMITTEE ON CONSTITUTION REVIEW HELD ON TUESDAY,
26TH JANUARY, 2010 AT THE GREAT RIFT VALLEY LODGE, NAIVASHA

(Prayers)

(The Committee commenced the session at 9.50 a.m.)

Mr. Chairman: Thank you very much. Mr. Wetangula you will be leading in prayers tomorrow. Let me apologize to those who have been sitting in the room for some time now. There are a number of house-keeping issues, one was you remember last night we rose when we had some issue about reports that have been carried in the 7.00 O'clock news; the Kadhi's Court issue. We had our minutes writing going on and with the help of the gentleman who handles the media in the Secretariat, we were able to arrest that and have the bulletin at 9.00 o'clock.

Some of them were still carrying the scrolling that we had invited religious leaders from both sides to come and help us to solve the problem since we had collided ourselves. It was supposed to be the headline for the Nation today. It was pulled out at 9.00 p.m. last night.

But if you look at headlines today, one says we have removed all referenced community land in the draft. That is *The Daily Nation*. The other one says we have said all judges should go. Both those stories are manifestly untrue. We have not reached the transition mechanism for the judges. We have also certainly not said, all community land should be deleted from the Draft. If anything, those Chapters on the Judiciary and Land went very smoothly. In fact, the issue about the APs and the command structure was far much more heated than either land. We passed the Chapter on land with minimal, in fact, no substantial deviation. The same thing with the Chapter on the Judiciary. Yet, if you read today's newspapers, it says: MPs reject land Clause in the Draft Constitution. Somewhere it says, all referenced community land are said to have been removed from the draft. The other one says: All judges to go. Nowhere did we say all judges to go. We did not even discuss the transitional mechanisms. Unfortunately, these are forces outside the process trying to direct the process to where they think we should be going. But unfortunately, that is not acceptable. I think that is one of the issues we need to handle. This came from the ODM side or the Kadhi's stuff came from the PNU side. That is what our preliminary investigations have revealed.

The Minister for Foreign Affairs (Mr. Wetangula): *Off-Record.*

Mr. Chairman: Well actually, you are the hawk as far as---

Ms. Karua: But that is not--- (*inaudible*).

Mr. Chairman: So, ladies and gentleman that is what we really need to address. That we have people out there for any reason, either maybe, they want to game the process and get

what we think is the best out of it or to derail the process. There are a number of people who would be happier with current Constitution than what we are trying to achieve. I think we have gone very far in the process, now to be derailed. Yet, I think everybody understands how delicate this issue is. If we walk out of those doors or gates without a firm decision, then the process of Constitution making, essentially we can kiss it goodbye. If we kiss the process goodbye then where will we be as a country? All those reforms we are talking about. We are in 2010, next year; election fever for 2012 will start. So, I think we all need to come back and while we are here as political parties, really we are also a Committee of the House. I am really worried about the impact the Secretariats are having on the process.

Often times very hard line positions that are taking by Members, essentially is been pushed by outside forces, whether it is the Secretariat or elsewhere. I would plead with you that nobody would take responsibility for what happens. It is not going to be a Secretariat; it is not going to be a political party leader or any other person outside there. If this thing fails, it will be failure by those of us in this Committee. It will not be a Secretariat gentleman who says I am the one who wrecked it, I am responsible, no. Everybody will say it was the PSC that did not do. Out there, they all are waiting for us to fail because as far as they are concerned they have only seen failure from Members of Parliament. If we do this we would confirm whatever they have been saying before. So, I would plead with us.

Obviously, we have interests to cater for, that is why we are here. Obviously, we should be as candid and as forth right in our arguments and our debates as possible. That is why we are here. But I would plead that we also have in the back of our mind, the interest of the whole of the process so that when we conclude the debate, it will a process that helps the whole country and to understand that this process can be defeated at any time.

So, what we have agreed is that we would be briefing the Press when everybody is here. We have been trying to brief the Press out there; the Vice-Chair and I. From now hence, the small brief we give them, we will do it in the room when everybody is sitting so that anybody who tells a different view, they will know it is not really the view of the Committee.

The Minister for Foreign Affairs (Mr. Wetangula): *(off-Record)*.

Mr. Chairman: Okay can we make some headway and then we call them in because if again we call them, it will take a bit more of our time and it is already 10.00 o'clock. I know it is really a mess. In terms of forward Motion, I am hoping there are too very small Chapters that are not very controversial: Leadership and Integrity and Commissions. Both of them are not very controversial. They are very small chapters and then we have the issue which surprisingly became a bit controversial on national security which we have not concluded. I am hoping we can conclude that and go back to the three key chapters of Executive, Representation and Devolution.

Mr. Vice-Chairman: *(off-record)*

Mr. Vice-Chairman: We did not conclude. We had not left page one. We spent one and half hours on Article 277 and we have not left 277. We were to start with Article 278; there were five or six objections. So, I am wondering whether we really had consensus when we have six objections.

So, we need to conclude that Chapter and then we need to deal with Leadership and Commissions. So, we can go either way; either go back to national security conclude it, do this two conclude them and then now go to Devolution, Executive and --- Do you really want us to revisit Article 277, or we go to Article 278. Article 77, is where we had five objections and we finished that. Article 278 says:

Establishment of the National Security Council

278. (1) There is established a National Security Council consisting of—
- (a) the State President;
 - (b) the Deputy State President;
 - (c) the Prime Minister;
 - (d) the Minister responsible for defence;
 - (e) the Minister responsible for foreign affairs;
 - (f) the Minister responsible for internal security;
 - (g) the Attorney-General;
 - (h) the Chief of Kenya Defence Forces;
 - (i) the Director-General of the National Intelligence Service; and
 - (j) the Inspector-General of the Kenya Police Service.

Let us start from the top. The President is okay. The Deputy President?

The Minister for Higher Education, Science and Technology (Dr. Kosgei): Have we agreed?

Mr. Chairman: No we have not agreed yet. So, Deputy President! The Prime Minister, certainly not. The Minister responsible for Defence. Have we agreed there will be one Ministry for Defence?

The Deputy Prime Minister and Minister for Finance (Mr. Kenyatta): I want to raise an objection.

Mr. Chairman: Okay, can we say the Minister responsible for Defence and then Minister responsible for Internal Security? That will depend on whatever structure. Or can we say the Minister or Ministers responsible for Defence and Internal Security.

Ms. Karua: When in one sentence, Minister or Ministers---

The Minister for Higher Education, Science and Technology (Dr. Kosgei): Mr. Chairman, Sir, if we are talking of national security, I have a feeling that we have

omitted, the Ministry of Immigration because you cannot have security without immigration. I do not know whether the Ministry of Internal Security takes care of Ministry of Home Affairs. I think traditionally we have used internal security to handle what others call homeland security. But I think definitely for immigration, we would be failing if we do not have them here.

Mr. Chairman: So, it agreed that we should have immigration as part of this process.

The Deputy Prime Minister and Minister for Finance (Mr. Kenyatta): Again, this goes back to the same issue I was raising yesterday. I think we had a misunderstanding of what even the South African Constitution actually states. I am continuing my objection on the basis that we are constitutionalising structures which could actually change and which we should allow flexibility depending on the threat from time to time because that changes. If you look at the South African Constitution on all of this, it is actually entitled security services; we may still maintain ours as national security. But for example, they make a very clear distinction between defence and police knowing that two distinct roles that those institutions play while here we are trying to merge the two.

Secondly----

An hon. Member: Mr. Chairman, Sir---

Mr. Chairman: Let hon. Kenyatta speak.

The Deputy Prime Minister and Minister for Finance (Mr. Kenyatta): If you will allow me to finish my argument, what I am saying is that by fusing we are referring to them within the same paragraphs.

Secondly, when it come to structure, the South African one makes very clear, for example, what is the role of defence and it says:-

“The defence force must be structured and managed as a disciplined military force. The primary objective of the defence force is to defend and protect the Republic, its territorial integrity and its people in accordance with the Constitution”

Here the other argument that we are debating yesterday and the principles of international law regulating the use of force. It then goes to talk about political responsibility. It then goes on to talk of command of the defence force. But it does not give for structures. Why are we giving for structures which can change tomorrow? If really, what we want to do is to entrench the forces, why can we not entrench the principles that would guide those forces as opposed to entrenching the structures? This is really where I was coming from yesterday. So, even as we are not going to say, they shall be consisting of, what if that were to change tomorrow, what are we going to do? Are we going to say we cannot because we have said the Attorney-General must a member of the National Security Council? Why are we not allowing for flexibility? That is my problem that we are actually entrenching structures as opposed to allowing for flexibility to defend our borders and population in accordance with the need and time. That is my problem what we are doing currently.

Mr. Chairman: Not as Chair but my personal view is that I actually agree with hon. Kenyatta. I think it will be better if we left this to Statute and not fix any name of any of these guys in the Constitution so that then Statutes can change easily depending on the security environment at any time. But we give the general principles within the Constitution. That is my general view.

The Minister for Lands (Mr. Orengo): I think while we refer to the South African Constitution, it is good to point out that hon. M. Kilonzo, yesterday with respect misled us. He did not want to read the appropriate provisions of the South African Constitution. If we take the formulation that hon. Kenyatta is taking then you need to borrow a little bit about the architecture of the South African Constitution because the Constitution says that security service of the Republic consists of a single defence force; a single police force and intelligence services established in terms of the Constitution. If you go under the provision for the police force, it is a national institution and it is a single unit. So, I think it is important to point out this that while we cite provisions from other Constitution, we should be candid with each other.

Mr. Chairman: I agree with you, Mheshimiwa, but I do not think “misleading” means intention to. I do not think the Minister has that intention. It was the Vice-Chairman who was chairing we had the same access to the same Constitution. Unfortunately, both of thought that way but the Committee was going very heated on that we did not want to---

The Minister for Higher Education, Science and Technology (Dr. Kosgei): Mr. Chairman, Sir, I have sympathy with what the Deputy Prime Minister and Minister for Finance is saying. But I am a little bit uncomfortable if we are writing a Constitution like that of South Africa. Perhaps, we should ask ourselves one simple question: How have we operated in practice in the last few years and therefore, then see whether there is something we can borrow from that? True, maybe we should not write into the Constitution the composition of the Council but is important to have it when we talk of separation all the time that you cannot have the police and the military at the level of assessing intelligence or our security situation, you know that the military operates in Kenya and outside and they have an intelligence system and actually practically as far as I know in the past, it is the intelligence officers from the military who have sat there, sometimes the Chief of General Staff himself. So, maybe, we do not need to write the composition. But I think that we need to have those structures in our Constitution because if somebody is careless and does not want to have those institutions functioning, at least the ones that we consider urgent and important, we could be in a situation where we do not have a mechanism for assessing whatever information we get and also not a command or if you like, an institution that would assess that information and take decisions ahead of time.

Mr. Chairman: Let us hear from Mr. Nkaissery.

The Assistant Minister, Ministry of State for Defence (Maj-Gen. Nkaisserry): Mr. Chairman, Sir, I concur with the sentiments expressed by the Deputy Prime Minister. It is important to put a general principle and leave the details of the participants in the

National Security Council. We need to put a general statement to the effect that there is established a National Security Council to take care of national security issues. A lot of things can change in the future.

Mr. Chairman: Proposer and seconder?

Mr. Kenyatta proposed.

Maj-Gen. Nkaiserry seconded.

Mr. Chairman: We move now to 2. It states:-

“The President shall preside at the meetings of the Council and in the absence of the President, the Deputy President and in the absence of the Deputy President, ---”

So, we remove the Prime Minister. Now, can we agree that it is the President and in his absence, the Vice-President.

Hon. Members: Yes.

Mr. Chachu proposed.

Mr. Ruto seconded.

Mr. Chairman: “The Council shall appoint its secretary.” Is that necessary?

Hon. Members: No.

Mr. Chairman: Can we have that deleted? Can I get a proposer and seconder?

Mr. Kioni proposed.

Mr. Mungatana seconded.

Mr. Chairman: Let us move to Clause 279: Functions of the National Security Council. It states as follows:-

“279. (1) The National Security Council shall—

(a) integrate the domestic, foreign and military policies relating to national security in order to enable the national security organs to co-operate and function effectively;

(b) assess and appraise the objectives, commitments and risks to the Republic in relation to actual and potential national security capabilities; and

(c) initiate and consider policies on matters of common interest to the national security organs and exercise supervisory control over the national security organs.

These are not really for the Constitution.

Mr. Ruto: Mr. Chairman, Sir, even read Clause 279(2). It states that the National Security Council shall report annually to Parliament on the state of security of Kenya. This is ridiculous! Why do you want to bring this to---

Mr. Chairman: We can handle this through an Act of Parliament, in Statute.

Mr. Ruto: Not even that really. Some of these things, the Government should know what to do.

Mr. Chairman: No. But we also want the Government to act within law.

The Minister for Lands (Mr. Orengo): Mr. Chairman, Sir, I agree with most of us that these functions need not be in the Constitution. However, once you have a Constitution---

(off-record)

Mr. Chairman: When we say that there is established a National Security Council, the membership of that Council and its functions need to be in a Statute. So, can I get a proposer and seconder for the deletion?

Mr. Ruto: Mr. Chairman, Sir, Clause 279(3) states as follows:

“(3) The National Security Council may with the approval of Parliament—

(a) deploy national forces outside Kenya for—

(i) United Nations and other peace support operations; or

(ii) other support operations; and

(b) approve the deployment of foreign forces in Kenya.

I do not know what you have to say about that.

Mr. Chairman: I do not think it should be the Council. It should be the President with the approval of Parliament. We can remove the whole of that and leave the functions to Statute.

The Deputy Prime Minister and Minister for Local Government (Mr. Mudavadi): There is a Chapter that deals with the Declaration of State of Emergency. Could we bracket this and then look at it in relation to that one? I think we had not finished something on the issue.

Mr. Chairman: Let us deal with the state of emergency.

The Deputy Prime Minister and Minister for Local Government (Mr. Mudavadi): It can be read in conjunction with the issue of state of emergency when we come to it.

Mr. Chairman: I was hoping that we would leave this out and say that matters of function be handled by Statute. However, as a rider, let our legal officer keep that in mind

when handling the issue of state of emergency and whether anything will touch on the National Security Council.

Can I get a proposer and seconder?

Mr. Kenyatta proposed.

Mrs. Noor seconded.

Mr. Chairman: We move to Clause 280: Establishment of Defence Forces and Defence Council. It states thus:

“280. (1) There is established the Kenya Defence Forces consisting of—

- (a) the Kenya Army;
- (b) the Kenya Air Force; and
- (c) the Kenya Navy.

(2) There is established a Defence Council consisting of—

- (a) the Minister responsible for defence who shall be the chairperson;
 - (b) the Deputy Minister responsible for defence who shall be the vice-chairperson;
 - (c) the Chief of the Kenya Defence Forces;
 - (d) the three commanders of the defence forces; and
 - (e) the Principal Secretary in the Ministry responsible for defence.
- (3) The Defence Council shall appoint its Secretary.
- (4) The Defence Council shall be responsible for the overall policy, control, and supervision of the Kenya Defence Forces and such other functions as Parliament may by legislation prescribe.

The Assistant Minister, Ministry of State for Defence (Mr. Musila): Mr. Chairman, Sir, there are other services. There is an omission here because there is no function of the Kenya Defence Force (KDF). After establishing, we should add a sentence to give the objective of that Force. For example, we could say, “The primary objective of the Kenya Defence Forces is to defend---” If you go to the police, their work, say, intelligence is defined.

So, Mr. Chairman, Sir, I propose:

THAT, there is established the KDF whose function shall be to defend and protect the Republic, its territorial integrity and its people in accordance with the Constitution and the principles of international law regulating the use of force.

That is very important because when they go to serve overseas, they do so under international law.

Mr. Chairman: Can we have that proposal seconded?

Mr. Kioni seconded.

Mr. Chairman: Now, the amendment proposal is that after the establishment of the Kenya Defence Force, its function is stated. I now gather there is an issue about international law.

(Loud consultations)

But Kenya does not live in an island. Kenya is part of the international community.

Ms. Karua: You never put in your Constitution anything to do with any other law.

Mr. Chairman: But we just read the South African Constitution.

Ms. Karua: South Africa went overboard!

Mr. Chairman: One way or the other, this is not a deal breaker. As has been said, whether we write it or not, we are still bound. When we think of international law, let us not see it as something negative. It is really something positive. It is a good thing.

The Assistant Minister, Ministry of State for Defence (Mr. Musila): Mr. Chairman, Sir, can we make progress and put a full stop after Constitution so that it reads: "The primary object of the Defence Force is to defend and protect the Republic, its territorial integrity and its people in accordance with the Constitution."

Ms. Odhiambo: Mr. Chairman, Sir, if we adopt this sort of format then it should go even for the previous one. It is for the purposes of consistency.

The Minister for Justice, National Cohesion and Constitutional Affairs (Mr. M. Kilonzo): Mr. Chairman, Sir, may I read your Article 25 of the German Constitution. It states:-

"The general rules of public international law constitute an integral part of federal law. They take precedence of a Statute and directly create rights and duties for the inhabitants of the federal territory."

So, therefore, I accept what this Committee has decided, but during the next level of discussions in this process, we will, as Ministry, advice that we reconsider this position so that we do not look like we are locking ourselves in an island. We have the East African Community, COMESA, IGAD and so on.

The Minister for Higher Education, Science and Technology (Dr. Kosgei): Mr. Chairman, Sir, I respect, Mr. M. Kilonzo's view, but when you talk of defence and security, we have had cases in past where people will come here, say, foreign forces to train. They normally operate under international law when they are here. The laws in their own countries are conservative. When something happens, they hold us onto the international which they do not practice. So, let us have international law elsewhere. On matters of our defence and national security, let us go by our own laws.

Mr. Chairman: Let us move forward.

Mr. Ethuro: Mr. Chairman, Sir, I served in this Committee in the Bomas Conference. When you do not mention the defence forces, we may be giving opportunity to other people to raise other issues. I want to refer the Committee to Clause 274(1) of the Bomas Draft. I do not want us to mention it that way. It, however, tells you the kind of issues that were informing debate. We stated that no one may raise a defence force or military or paramilitary organization except by or under the authority of an Act Parliament. So, when you say that the Force will be within this Constitution and that the functions of the Force will be defined by the laws, why are we not combining that? That way, we will be providing a cure.

Mr. Chairman: Let us hear from a man who knows more about the Forces than any other person here.

The Assistant Minister, Ministry of State for Defence (Maj-Gen. Nkaisserry): Mr. Chairman, Sir, I was a member of the sub-committee that dealt with this matter. What we must do here, in this clause, is to mention the Defence Force of the Republic. We shall then put the statement read by Mr. Musila as the object of that Force. What is the Kenya Defence Force? It is the Kenya Army, the Kenya Navy and the Kenya Air Force whose object is to defend the Republic. Let us leave it like that.

Mr. Chairman: Yes, go ahead and propose.

Mr. Ethuro: Mr. Chairman, Sir, I wish to propose that there is established the Kenya Defence Force consisting of the Kenya Army, Kenya Navy and Kenya Air Force.

Mr. Chairman: I thought we said that we leave that to the Statute. We said that we have the Kenya Defence Forces in the Constitution, but in an Act of Parliament you mention the Kenya Army, Kenya Air Force, Kenya Navy and so on. That way, if tomorrow you want a Marine Force or a Coast Guard, you can put in that Act.

The Assistant Minister, Ministry of State for Defence (Maj-Gen. Nkaisserry): Mr. Chairman, Sir, let us be strategic here. If we have an army, the rest like the marine force could be a department of the army. There are basically three key defence forces in the country, that is, Kenya Army, Kenya Air Force and the Kenya Navy. Their object is shown there. Let us leave it at that.

Mr. Chairman: This should be a deal breaker. Is that agreed? Do we go by the amendment by Maj-Gen. Nkaisserry?

The Assistant Minister, Ministry of State for Defence (Maj-Gen. Nkaisserry): Mr. Chairman, Sir, for the sake of clarity let us save these forces mention. It does not cost anything. We do not want anything to come and raise a force and it a name. We have to

be specific that we have a Kenya Army, Kenya Air force and Kenya Navy. These are what we call defence forces. If we leave it hanging is dangerous.

Mr. Chairman: Is that carried? That means the Article 281 remains the way it is. I am lost because we had started with a new format and now we are reverting. I am now wondering even for the National Security Council, what are we going to do.

Number 2, there is established a defence council. The advice that I am getting is that we should get something else other than “established”. Even while we are going to put key issues in a Statute, we need at least one statement that talks about it. Like the Assistant Minister, Ministry of State for Defence had said earlier that there is established Kenya Defence Force whose functions are to defend. So, can we say that we recast number 2?

The Minister for Agriculture (Mr. Samoei): Mr. Chairman, Sir, as 228(2) we delete 282 and 283 and instead recast 284 to establish the defence council for purposes of providing overall policy control and supervision of the defence forces. That should be clearly spelt out by an Act of Parliament.

Mr. Chairman: Can I get a seconder? It is seconded by Mr. Ethuro. Is that approved?

Hon. Members: Yes.

Mr. Chairman: Can we then give direction that even for the National Security Council, we get a similar wording.

Let us now move to Command - 281. Is there a proposal for deletion?

The Assistant Minister, Ministry of State for Defence (Maj-Gen. Nkaisserry): We should delete it.

Mr. Chairman: Proposed by Maj-Gen. Nkaisserry and seconded by Mr. Musila. Is that carried?

Hon. Members: Yes.

Mr. Chairman: Part 3 – Establishment of the National Intelligence Service 282(1):-
There is established the National Intelligence Service.

(2)The National Intelligence Service shall be responsible for security intelligence and counter intelligence to enhance national security and defend this Constitution for the interest of the state and the well-being of the people of Kenya and select such other functions as Parliament by in discretion prescribe.

Mr. Chairman: Is that agreed? So, can I get an amendment to that effect?

The Minister for Agriculture (Mr. Samoei): Mr. Chairman, Sir, under this section, let us just adopt 282(1) and (2) and then we delete everything else.

Mr. Chairman: Then it is seconded by the Minister for Justice, National Cohesion and Constitutional Affairs.

Let us move to the Director General of the service – 283(1):-
There is established the office of the Director General of the National Intelligence Service.

Hon. Members: Delete!

Mr. Chairman: Do we delete the whole of it? Can I get a proposal and seconder?

Proposed by the Minister for Agriculture and seconded.

Next is the National Intelligence Council.

The Deputy Prime Minister and Minister for Local Government (Mr. Mudavadi): Mr. Chairman, Sir, there is an issue about tenure here. We need to be very careful here. We must remember that you can quickly amend an Act. God rest his soul in peace, but somebody like Kanyotto became like an institution. Edgar Hoover in the USA was an institution. So, I think if you are looking at the future, there are some safeguards that need to be provided here. The intelligence service have a lot of liquidity and whether you have a Parliament of 300 or 210, if that clause is supposed to be amended, a lot of things can happen. I am pleading with hon. Members that let us provide tenure and let us safeguard. We are not touching other things but I think it is critical.

The Minister for Agriculture (Mr. Samoei): Much as I would want to agree with the DPM, surely, I think to put in the Constitution the security of tenure of the director of NSIS--- It can also become rogue. We have seen what it can do. It can go berserk and we must not have a situation where the country helpless in the hands of an individual or an institution. Tenure is agreed and is a principle that is accepted in this country and it has been factored in the other institutions but in Acts of Parliaments.

Mr. Chairman: Is there any other place where the director of a similar entity enjoys security of tenure?

The Minister for Agriculture (Mr. Samoei): I think we should not put in the Constitution this kind of thing.

Mr. Chairman: Let us go on. In Article 284:-
There is established the National Intelligence Council.
Can I get a proposer and seconder for deletion of Article 284?

Ms. Odhiambo: The whole of it?

Mr. Chairman: Yes, the whole of it. Does it do any harm if we do it in a general form like we did for the other ones?

So, it is proposed by Mr. Musila and seconded by Mr. Mungatana. Is that carried?

Hon. Members: Yes.

Mr. Chairman: Let us go to Part 4 – Police – Establishment of Kenya Internal Security Service. That is Article 285(1):-

1. There is established the Kenya Internal Security Service.
2. The Kenya Internal Security Service is a national service and the division of its functions should be organized, taking into account the country's structure of the Government of Kenya.
3. Parliament shall enact legislation to give full effect to this Article.

Since we had mentioned the three defence forces why not mention the two police services?

Minister for Justice, National Cohesion and Constitutional Affairs (Mr. M. Kilonzo): Mr. Chairman, Sir, I do propose that the Kenya Internal Security Forces shall include the two police units; the Kenya Police and Administration Police.

The Assistant Minister, Ministry of State for Defence (Maj-Gen. Nkaisserry): Mr. Chairman, Sir, I am not opposing what he is saying but I want to suggest a name. Instead of Kenya Internal Security Service, We can call Kenya Home Security Service.

(Loud consultations)

Mr. Chairman: It was just a suggestion.

The Minister for Foreign Affairs (Mr. Wetangula): Mr. Chairman, Sir, first of all, I do not think that we should be operating as if everything we do must be cut and paste from America. We must do our own things. But I wanted to mention that while I agree with Mr. M. Kilonzo, we have in the internal security organs we have two formations that neither police nor AP that also play a very critical role. I do not know whether they deserve any mention or will go to a Statute. These are the forest guards and the wildlife services.

Mr. Chairman: Objects and functions should go to our Statutes. So, can I get a proposal for deletion? If there is anything that is not clear we can clarify.

The Minister for Lands (Mr. Orengo): Mr. Chairman, Sir, I think we should have 1 and 2 – The Kenya Internal Security Services shall consist of the Kenya Police Service and the Administration Police Service and then, we can borrow from South African, that our internal security services must be structured to function in the national provincial and where appropriate in the spheres of the government.

Mr. Chairman: So, it should be structured in a way that it is all over the country?

The Minister for Lands (Mr. Orengo): Let me phrase it: - There is established the Kenya Internal Security Service which must be structured to function in the national, provincial and where appropriate the local spheres of the government. What is important is that we do not each region to have its own police force. The moment we have different police forces in a country like ours, it is going to be extremely difficult. That is what I am trying to cure.

Mr. Chairman: Let us do it as a national service and when we go to the devolved government we indicate that they have no power to set up local police services.

Ms. Karua: Mr. Chairman, Sir, we should that the Kenya Internal Security Service is a national service and will function throughout Kenya and must be structured to function throughout Kenya.

Mr. Chairman: Let have that seconded. It is seconded by Maj-Gen. Nkaisserry. That is carried.

(Loud consultations)

Let us not be too suspicious about each other. It will be redrafted. We need to move forward. It will be done as we go on and we will come back to it.

Let us move to Article 286 – Objects and Functions.

Do you want it here or in the Statutes? Can I get proposals?

There is a proposal from Mrs. Noor that we have a broad statement that caters for the objects. That is seconded by Mr. Kioni and it will be reformatted.

The Minister for Agriculture (Mr. Samoei): Mr. Chairman, Sir, here is where we need to reformulate the whole of Article 286, 287, 288 and 289. What we need to do; the brutality of the police has been an issue in the country and is still an issue. Part of the reason why there has been an issue with the police is because of the way it is structured. You have a situation where one is appointed by the President but he is supposed to report to the Minister. So, to be able to capture the new spirit of how the police should function under civilian authority, we must establish the Kenya Internal Security Service Commission which will have civilians heading it. We must agree on that because the police is a very important instrument in our country and it is subject to abuse sometimes. To remove that abuse and to remove the illegal orders that we accuse the police of doing, it must have at the apex a Commission that has a civilian structure. That was what was being attempted at Article 289. So, we should recast Article 298 because it is a very important component. Once we have the Commission, we find away where between the Executive and Parliament participate in the formation of the Commission and its

members. We also find a way of how the Executive with the approval of Parliament will appoint the Inspector-General of the whole force.

The Minister for Agriculture (Mr. Samoei): Mr. Chairman, Sir, once we do that, we will have captured the whole spirit of 286, 287, 288 and 299.

Ms. Karua: Mr. Vice-Chairman, Sir, I support the idea of having a standards body. Remember that we re-structured it to resemble the army. The Air Force hires for itself. The Navy hires for itself. The Army hired for themselves. Each of the three entities hires for themselves but they have a coordinating mechanism. So, I am proposing that we leave the AP to hire for themselves. We get the Police to hire for themselves. But, borrowing from William's suggestion, there should be an oversight and standards structure from which the co-ordination and standards are set, so that it is not exactly a service Commission in the way we do it. That could have both disciplined and civilians, so that we have that overall oversight body.

Mr. Vice-Chairman: Hon. Members, as we go on, are we retaining the terminology "Police Service Commission"?

The Assistant Minister, Ministry of State for Defence (Mr. Musila): Mr. Vice-Chairman, Sir, hon. Sophia suggested that after establishing the Kenya Internal Security Service, we give a statement on objectives. Just like we have done with the Defence Forces, I want to suggest an object, so that if it is approved, we will have covered a lot of ground.

Mr. Vice-Chairman: Go ahead, please.

The Assistant Minister, Ministry of State for Defence (Mr. Musila): Mr. Vice-Chairman, Sir, this is, again, borrowed from the South African Constitution. It says:- "The objects of the Kenya Internal Security Service shall be to prevent, combat and investigate crime to maintain public order, to protect and secure the inhabitants of the Republic and their property, and to uphold and enforce the law."

Mr. Vice-Chairman: Is that being lifted word for word from the South African Constitution?

The Assistant Minister, Ministry of State for Defence (Mr. Musila): Yes, Mr. Vice-Chairman, Sir. I have only amended it to read "Kenya Internal Security".

Mrs. Noor: Mr. Vice-Chairman, Sir, I second hon. Musila's proposal.

The Assistant Minister, Ministry of State for Defence (Mr. Musila): Mr. Vice-Chairman, Sir, the objects of the Kenya Internal Security Service shall be to prevent, combat and investigate crime, maintain public order, protect and secure the inhabitants of the Republic and their property and to uphold and enforce the law.

Mr. Chairman, Sir, if we adopt this proposal, we shall have the liberty to delete Article 86(1) and (2).

Mr. Chairman: Can we get a seconder for that one?

Ms. Karua: Mr. Chairman, Sir, we cannot delete Article 286. We thought it is something to do with human rights and transparency, and it is being said by both Sophia and William, where we are coming from with our police force. We must have a policy statement that binds them to certain threshold.

Mr. Chairman: So, let us leave 286(1) intact.

The Assistant Minister, Ministry of State for Defence (Mr. Musila): Mr. Chairman, Sir, I then propose deletion of Article 286(2).

Mr. Chairman: Can that one be seconded?

An hon. Member: Article 286(2) is okay!

Mr. Chairman: The Assistant Minister, Ministry of State for Defence (Mr. Musila): Mr. Chairman, Sir, 286(2) is captured by the objects I have just proposed.

Mr. Chairman: So, that proposal is seconded by Ms. Karua. Is it agreed?

Hon. Members: Yes!

Mr. Chairman: Very well! Article 286(2) is deleted!

(Article 286(2) deleted)

(Article 286 as amended agreed to)

Mr. Chairman: We are now on the Inspector-General of the Kenya Internal Security Service.

Article 289 – Police Service Commission

The Minister for Agriculture (Mr. Samoei): Mr. Chairman, Sir, let us go to Article 289 and change “Kenya Police Service” to read “Kenya Internal Security Service Commission”.

Mr. Chairman: My proposal is that we leave that Commission to start it, like we have left with all other Commissions.

The Minister for Agriculture (Mr. Samoei): No! No! No! There is an issue. Even if you look at the task force report, you will see that it recommends that there should be a

service Commission, which can assist in promotion and everything else to do with the police, because it is a very important lot that provides very critical service to the country.

I am proposing that we set up the “Kenya Internal Security Commission” as stipulated in Article 289. Maybe, we can look and see whether that captures the spirit of whether we want the Commission or not.

Mr. Chairman: Even if we set it up in the constitution, we leave the details to Statute.

The Minister for Agriculture (Mr. Samoei): Mr. Chairman, Sir, we can leave the details to Statute. I do not mind.

Ms. Karua: Mr. Chairman, Sir, we can have one Commission to hire members of those two forces. Remember, we are trying to get participation. You can also create a monster. If the Defence Forces have survived by having the Navy hiring their people; the Air Force hiring their people and the Army hires their people. They have a centralized system, but each department hires for itself. We started by saying that we are adopting that structure. I want a situation where the AP hires for themselves and the Police hire for themselves, but we have a standards body. Unlike the Army---

The Minister for Agriculture (Mr. Samoei): Mr. Chairman, Sir, you do not find a situation where there is recruitment for the Navy, or recruitment for the Air Force. The Armed Forces hire their personnel together on the same day, in the same place. So, what we are saying---

Mr. Chairman: Hon. Members, let us hear Maj-Gen. Nkaisserry on this one.

The Assistant Minister, Ministry of State for Defence (Maj-Gen. Nkaisserry): Mr. Chairman, Sir, first of all, I grew in the system for 42 years and became Chief Personnel Officer. I also became the Military Assistant to the Chief of General Staff. So, I was literally running the organization.

What happens is that the Defence Council decides when recruits are required in a particular year and give slots to each service. Recruitment is carried out on the same day, at the same stations. Medical examination on recruits is done but, because of specifics, you require specific qualifications for the Air Force and the Navy. However, the recruitment is based on the same requirement of the Armed Forces.

So, what I propose is that we have a Kenya Internal Security Commission; we give it a broad objects and leave the details to a Statute.

Mr. Chairman: That is proposed by hon. Nkaisserry. Can I get a seconder?

The Minister for Higher Education, Science and Technology (Dr. Kosgei) seconded.

Ms. Karua :---(*off record*).

Mr. Chairman: We are dealing with Article 289. We established the Commission and gave a broad Article that gives the general functions and left the details to Statute.

Ms. Karua: Mr. Chairman, Sir, can I further amend it?

Mr. Chairman: I want us to make progress, hon. Members.

Ms. Karua: Mr. Chairman, Sir, it is only the wording. We are modeling it as a replica of the other. So, let it be a council, and not a Commission. I promptly second him.

Mr. Chairman: Agreed! That is actually helpful. So, Article 289 will read:-
“There is established the Kenya Internal Security Service Council”.

An hon. Member: We now need to establish the Internal Security Service.

Mr. Chairman: We established the Internal Security Service earlier on. This is now the council.

Mr. Ruto: Mr. Chairman, Sir, that sounds very much like the council of the defence.

Mr. Chairman: Yes, we are just replicating it here.

Ms. Karua: Yes, it is for co-ordination, hiring, setting of standards and all those things.

The Assistant Minister for East African Co-operation (Mr. Munya): Mr. Chairman, Sir, how about what hon. Ruto talked about – the one that runs the system?

Mr. Ruto: Mr. Chairman, Sir, the council that hon. Karua is talking of is the Government one. Is it not?

Mr. Chairman: Yes!

Mr. Ruto: Yeah! That is advisory. We are talking about the one that handles recruitment and what not.

Ms. Karua: That is the one, just like in the Defence Forces.

Mr. Ruto: Let us leave it as a Commission. This council is different.

Ms. Karua: If we leave it as a Commission, it will be like the Public Service Commission.

Mr. Ruto: That is what we are asking for.

Ms. Karua: We want centralization of standards.

Mr. Ruto: But you are taking it back to Government – one individual. All the members of the council will be Ministers and other Government officials.

Mr. Chairman: Hon. Members, we are trying to replicate what we did with the Defence Forces. These are essentially internal “defence forces”. We do not have a defence Commission.

Mr. Ruto: Mr. Chairman, Sir, we are worried about the command, where it will be possible to manipulate these groups for reasons other than what is stated in the Constitution, and what is in the national interest. We are talking about a mixture of civilian and uniformed officers to actually take charge, give directions and ensure standards. It is a mixture of the same. But if we are going to peg it away---

Ms. Karua: Mr. Chairman, Sir, let us structure the council to address hon. Ruto’s concerns.

Mr. Ruto: So, let us leave out the word “council” and stick to “Commission”.

Ms. Karua: Let us structure the council.

The Assistant Minister, Ministry of State for Defence (Mr. Musila): Mr. Chairman, Sir, the council is for command.

Mr. Chairman: Yes, but, hon. Musila, the task force we talked about earlier had proposed that we should have not just police officers in that entity. Even the proposal here talks about three persons of integrity, who have served the public with distinction, appointed by the President.

Mr. Ruto: That is a Commission, and not a council!

Ms. Karua: It is a council!

Mr. Chairman: The difference between a Commission and a council is that the council is advisory in nature. We need to make headway, ladies and gentlemen.

The Assistant Minister for Water and Irrigation (Mr. Kiunjuri): Mr. Chairman, Sir, we have established a very different thing from what was there before. The task force carried out its mandate with the police force in mind. We now have the National Intelligence Security Services. We have recognized the Kenya Police, and the Administration Police. We have done that in line with the Kenya Defence Forces. Therefore, just as we have the establishment of the council, this must be there, because it is in this council that the two commanders will be sitting. For example, the Kenya Defence Council consists of the three commanders of the Defence Forces. We agreed as per yesterday that none of the two is inferior to the other.

Mr. Chairman: Hon. Members, let us adopt the format in Article 289. Let us call it a Commission, as is called under Article 289 then, instead of "Inspector-General of the Kenya Internal Services".

Mr. Kioni: Mr. Chairman, Sir, I was going to propose that we have the two commanders of the Kenya Police Service, and Administration Police, and an Inspector-General.

The way I understand it is this way: We have now established a Commission which is the one going to run or kind of oversee the functions of these two entities. Why do we then need an Inspector-General? We have the man in charge of the Police Force and the one in charge of the AP, both of them under the Commission. They will be sitting in that Commission that we will have, so that they can take instructions from the Commission.

The Assistant Minister, Ministry of State for Defence (Maj-Gen. Nkaisserry): Mr. Chairman, Sir, let us look at the status in country. I think my brother, Jeremiah, is misleading the Committee. First and foremost, there is a difference between "Internal Security Service" and the Internal Security Commission. Those are two different things. Under the Internal Security Service we have the Kenya Police and the Administration Police. Within that service, we must have one command. That is why we must have an Inspector-General, just like in the Defence Forces, where we have the Chief of General Staff (CGS), the Army Commander, the Air Force Commander and the Navy Commander. We can have a Police Commandant and an Administration Police Commandant, but the top man should be the Inspector-General.

Mr. Chairman: Let us get a proposal for adoption.

The Assistant Minister, Ministry of State for Defence (Maj-Gen. Nkaisserry): Mr. Chairman, Sir, I propose.

The Assistant Minister, Ministry of State for Defence (Mr. Musila): Mr. Chairman, Sir, hon. Nkaisserry is an expert in military, and I am an expert in administration. So, I do think he can give expert opinion on Administration Police.

Mr. Chairman: We are happy to have both of you in this Committee.

The Assistant Minister, Ministry of State for Defence (Mr. Musila): Mr. Chairman, Sir, why do we have the Administration Police? It is because it is under the Provincial Administration. Now, if you remove the command of AP from the Provincial Administration, then the entity ceases to be Administration Police. This is actually our point of departure. Even the objection I raised earlier on is just on the basis of the command. We do not want the Provincial Commissioners to have to beg the Inspector-General: "Can I have these APs to do this and that"? If you put a higher command above the Provincial Administration, it means that the Provincial Administration will have no access in commanding the Administration Police. Let the Commander of Administration Police be independent, and the Commander of Kenya Police be independent. Both of

them should be at par, but they should be taking their instructions from the Commission we are creating.

If you say that we should have one commander for the two forces, it will not work because one is a completely different force from the other.

The Assistant Minister, Ministry of State for Defence (Maj-Gen. Nkaisserry): Mr. Chairman, Sir, the argument of my brother, former PC, does not hold any water. In fact, with a light touch, he has no business being an Assistant Minister for Defence. He should go to Internal Security.

(Laughter)

That is besides the point. We have created the Internal Security Service because we do not want two police services in the country. I think that is where we come from. We must have one supreme commander. The AP can have their own command, and the Police have their own command, but we must have an Inspector-General. That is really the way forward. When you bring a different command for APs and different command for the Police, the situation is going to be chaotic. If that is going to be the situation, then there would be no point of having the Internal Security Service. The two entities are separate. If we put them both under the Internal Security Service, under the command of the Inspector-General---

Mr. Chairman: The AP have an interesting role. They are in the Provincial Administration and in the police force, and they want to retain both. They want to be a police force, and have the flexibility of the Provincial Administration.

The Assistant Minister, Ministry of State for Defence (Maj-Gen. Nkaisserry): Mr. Chairman, Sir, let us go slowly. Let us get this thing quite clear. I think that is where we get stuck. First and foremost, without going on record, let us get the roles of these entities.

The Assistant Minister, Ministry of State for Defence (Maj-Gen. Nkaisserry): Mr. Chairman, Sir, what will be the APs in reality? We understand that they were helping the administration. The worry my brother has is that if we remove the APs, then what will be the role of the Provincial Administration? This is why they have a problem. We should assure them that we are not destroying the Provincial Administration.

Ms. Karua: I want to support that view and say that we must think outside the box. Why the discussion has been there between the APs and the police is because of lack of coordination. It means that after the new Constitution and after it becoming the Kenya Internal Security Service, the approach and training will be different. Yes, they will be available to the administration, but we want them also to get policing roles. It means that the training of both the police force will be basically the same, but assignment of duties will differ, just like the CID and the police are there. So, I am suggesting that we try to configure an AP Force that is multi tasking and different from the one that is there and to

also see a function state and not a dysfunctional one where when you have two commandants of two different battalions with an overall head, there is no crashing. We have never had the Navy complain that the Chief of General Staff who is from the Military does not understand the Navy or the Air Force. Let us think outside the box and I was going to suggest that the Internal Security Service Commission, I like the word Council, but if Commission it be, let it be, we give it the role to coordinate and share internal policing roles and intelligence, also set standards for hiring and promotion and matters related and incidental thereto or something to that effect. So, you want to think outside the box and configure something slightly different, so that we have a healthy coordination.

Mr. Chairman: You remember this debate was there the whole of yesterday afternoon. Let us be honest with it, the whole of yesterday's debate was about the AP. Let us be straight. The whole of yesterday afternoon the debate was nothing else, but essentially about the APs. Please, no more debate; just proposals on amendments.

The Minister for Agriculture (Mr. Samoei): The proposal that has been made is actually on 289 with the necessary amendments in terms of the Kenya Internal Security Service. If we can take 289 and agree to let the Commission have those people there listed and then the functions are in 289(5) and they are very broad, namely, to recruit, appoint persons to act in offices in the services all the way to disciplinary and (6) is more clear. It says that the details of what that particular Commission will do will be prescribed in an Act of Parliament.

Mr. Chairman: As part of the membership of this Commission, why can we not have the both commandants?

The Minister for Agriculture (Mr. Samoei): That is okay.

Mr. Chairman: Can we get a proposer for that? Proposed by Mrs. Noor and seconded by hon. Karua. Please let us move forward. We have a lot of work waiting. Two commandants plus an Inspector-General.

The Assistant Minister for Water and Irrigation (Mr. Kiunjuri): Mr. Chairman, Sir, it would be easier for us first of all to understand, even if you want to move forward, so that we do not come back to it for re-opening. We want to understand clearly the role of the Inspector-General.

Mr. Chairman: He is like the CGS.

The Assistant Minister for Water and Irrigation (Mr. Kiunjuri): We want to understand clearly that the Police Commandant is there and the AP Commandant is there.

Mr. Chairman: They are there.

The Assistant Minister for Water and Irrigation (Mr. Kiunjuri): That the role of the AP remains the same way and the role of the police the same.

Mr. Chairman: Agreed.

The Assistant Minister for Water and Irrigation (Mr. Kiunjuri): The other one here is that we have come up with a Commission and in this Commission we have the Inspector-General plus the two commandants.

Mr. Chairman: Yes, so can you help us move forward now. Hon. Kiunjuri, are you okay now?

The Assistant Minister for Water and Irrigation (Mr. Kiunjuri): Yes.

Ms. Karua: Maj-Gen. Nkaisserry can also tell us the role of the Army Commandant.

Mr. Vice-Chairman: Mr. Chairman, Sir, we are going to go into the details of the functions.

The Deputy Prime Minister and Minister for Local Government (Mr. Mudavadi): As a matter of procedure, I want to suggest that there are too many discussions in different corners. You should consult privately because it is also distracting you from seeing the people who are raising hands because Members in this corner have been raising their hands for so long and they are not being noticed.

Mr. Chairman: Let me hear them. Let me hear Dr. Kosgei.

The Minister for Higher Education (Dr. Kosgei): The reason I wanted to speak was that I was once PS for Defence and actually ran the administration as well. But I am pleased to say that hon. Nkaisserry has put the matter very clearly. If now we have agreed that we have all of them in the Commission, I still prefer the Commander for the reason that once it is decided there, then the head of the APs and the head of the police can carry on their work and that is where what was proposed by hon. Karua should be carried and I think we carried that. I had so much else that I could have told you before but you did not give me a chance. This is something that I really know something about.

Mr. Chairman: So why do you go one?

The Minister for Higher Education (Dr. Kosgei): To generate the debate again! I think we have reached a point where we move forward.

The Assistant Minister, Ministry of State for Defence (Mr. Musila): In view of the final agreement, I want to go on record having removed my earlier objection.

Mr. Chairman: Thank you. That is your objection on 277. Thank you very much.

Mr. Kioni: I also want to join hon. Musila and withdraw my earlier objection. I know that we are going to discuss 288(5) and I am certain that we are going to agree on how we

are going to remove these persons holding offices and acting in offices but I also want to go on record as having removed my objection to 277 because what I wanted addressed has now been addressed and properly handled.

The Assistant Minister for East African Community (Mr. Munya): I have also removed my objections.

Mr. Ombui: It is now clear and I have also removed my objection.

Mr. Ethuro: Mine has always been very clear.

The Minister for Agriculture (Mr. Samoei): Mr. Chairman, Sir, with that agreement, I do not think it is necessary to have 287 and 288. We can delete those because now the details will go into Statute.

Mr. Chairman: Propose and then we get a seconder.

Mr. Vice-Chairman: But we need to define the office of the Inspector-General.

Mr. Chairman: Can we do one line statement establishing the office and then the functions can be done in an Act? So, can you propose it in that version?

The Minister for agriculture (Mr. Samoei): We recast 287 to establish the office of the Inspector-General and leave the details to Statute.

Mr. Vice-Chairman: Can you change that title please?

Mr. Chairman: Any constitutional office must be approved by Parliament.

The Minister for Agriculture (Mr. Samoei): Even that of the Commission, we have given the President a lot of lee way to appoint almost everybody. It must be vetted by Parliament.

Mr. Chairman: If we have any constitutional office, all constitutional office holders must be approved by Parliament. Hon. Samoei was seconded by hon. Ethuro.

The Assistant Minister for Water and Irrigation (Mr. Kiunjuri): With regard to the Transitional Clause, in America, a President is allowed to come with his team of a few people, so are there some offices, even if they have security of tenure, whereby the President can come with his team, for example, the A-G? Are we going to open that when we come to the Transition Clause?

Mr. Chairman: Let us handle that when we get there. Can we move to the next chapter?

The Deputy Prime Minister and Minister for Finance (Mr. Kenyatta): You may make good progress and so, now that we are winding up, just let us know exactly what it reads so that we are all on the same platform. That is all.

Mr. Chairman: So, there is established the office of the Inspector-General of the Kenya Internal Security Service. The appointment functions of the office to be set up in an Act of Parliament.

The Minister for Agriculture (Mr. Samoei): I propose that we delete 288 because that will go into Statutes.

Mr. Chairman: Seconded by hon. Musila. Is that carried?

Hon. Member: Yes.

Mr. Vice-Chairman: Clause 288(2) is recast.

(Loud consultations)

Mr. Chairman: We are holding so many little meetings that everybody wants to get everything before you get it. Can we be together? It is only one little thing remaining. Can we say that in 287, we are recasting it to that the office can be established? Everything else including appointments go to Statute.

Ms. Odhiambo: I think there is something we are missing out. We have agreed on something and I do not see it somewhere. We must provide some omnibus clause that all constitutional office holders must be vetted by Parliament. Otherwise, when we go into Statute---

Mr. Chairman: That omnibus clause is also there.

Ms. Odhiambo: If it is already here, that is okay. Otherwise, I want to go on record that we have agreed on that.

Mr. Chairman: We have agreed on that. Just to make hon. Kiunjuri comfortable, can we say that their office is appointed by the President and vetted by Parliament? Can it be recast?

Hon. Members: Put it there.

The Minister for Lands (Mr. Orenge): I was thinking that now we have established the office of the Inspector-General, without going to detail, can we establish the offices of the Head of the two services, so that they could be subject to vetting by Parliament?

Mr. Chairman: Okay. Good point. Can we then point out that when we are appointing that, we also get the heads of the two services also appointed by the President with approval from Parliament? Please, let us make headway.

The Minister for Agriculture (Mr. Samoei): For purposes of being orderly, I want to beg you that where we are establishing the two forces, the Kenya Police and the AP, we should have a (c) to say that any other force that will be established by an Act of Parliament, so that---

Mr. Chairman: It is already there. Please, let us make headway.

The Minister for Agriculture (Mr. Samoei): Okay, we have not reached 290. Unless we adopt 290---

Mr. Chairman: We are adopting it.

The Assistant Minister, Ministry of State for Defence (Mr. Musila): What abbot 292?

Mr. Chairman: Hon. Samoei, you know you are the one who made me skip. We would have gone through this one by one. Can you take us now forward? We are at 288 and not 299.

Ms. Karua: We have adopted 290 unanimously now.

Mr. Vice-Chairman: Should (5) then read: "other police service" or "other Internal Security Services"?

Mr. Chairman: "or other Internal Security Services". Can you propose that hon. Munya? Let us start from 287. Is 287 adopted as amended?

Hon. Members: Yes.

Mr. Chairman: Let us go to 288.

The Deputy Prime Minister and Minister for Finance (Mr. Kenyatta): There is an issue raised by hon. Kiunjuri, namely the issue of appointment. You said the President shall appoint. We should also lock here the issue of term because we do not want somebody to come as you were saying and live forever. Is it a five years term or eight years? Here it is eight, but I am proposing five so that it is in tandem with what hon. Kiunjuri was saying that he comes and goes with the President, with a clause that states that once appointed, the President cannot remove him. We need the security of tenure for the five year term.

Mr. Chairman: Hon. Kenyatta, let all those things go to the Statutes. Can we move together, please? On this issue, I am not giving room for any more views. We have closed it. No.287!

Mr. Chairman: Hold on we are proposing only number one and a recasting of number two then we move forward. The rest is gone. We said that the whole of No.288 goes to Statute. Mr. Kioni, do you have any issue with 5?

Mr. Kioni: No.

Mr. Chairman: Then we go to 289. We did it the way we had agreed. Where do you have an issue with?

Mr. Kioni: On No.5 (a) where we are saying that they can recruit or appoint person to hold offices all the way, exercise disciplinary control over and remove persons holding or acting in those offices. I find it too much of a blanket thing. Have we removed it?

Mr. Chairman: We have not removed it yet.

Mr. Kioni: If we removed it to Statute I have no problem with that.

Mr. Chairman: No, we did not remove No.289 to Statute.

Mr. Kioni: Then there is a danger there because when you say remove persons from office then I think there is need for due process to be followed when this is being done.

Mr. Chairman: Okay. Mr. Kioni propose it so that we put "due process".

Mr. Kioni: I propose that Article 289(5) (a) after offices then I propose that "due process" be added.

The Deputy Prime Minister and Minister for Finance (Mr. Kenyatta) seconded.

Mr. Chairman: Is that carried?

Hon. Members: Yes.

The Deputy Prime Minister and Minister for Finance (Mr. Kenyatta): I am sorry to take you back. There is one issue we have sort of left out in both of these. We have not indicated how the two service commanders are appointed and we have also not given how the command of the national defence force will be done. We have left that sort of blank and I think it is necessary to clarify.

Mr. Chairman: Mr. Kenyatta, regarding the first one we said the appointment should follow the same as the Inspector-General appointed by the President and vetted by Parliament. For the defence command there was a proposal to delete it because it is already in an Act. Ms. Karua, propose 290.

The Assistant Minister, Ministry of State for Defence (Maj.-Gen. Nkaisserry): We need to change 290. It should be other policing services and not police.

Mr. Chairman: What about other services?

The Assistant Minister, Ministry of State for Defence (Maj.-Gen. Nkaisserry): Which services?

Mr. Chairman: The Kenya Wildlife Service.

The Assistant Minister, Ministry of State for Defence (Maj.-Gen. Nkaissery): We have to say policing services because they police the forests and the national parks. So, the word should be policing and not police.

Mr. Chairman: Seconded by who?

The Assistant Minister, Ministry of State for Defence (Maj.-Gen. Nkaisserry): We want to distinguish. If you are talking of KWS, they will police the national park---

Mr. Chairman: Maj.-Gen. Nkaisserry, I did not give you the floor.

An hon. Member: He is giving us lessons.

Mr. Chairman: No, we do not want any lessons. Has it been carried?

Hon. Members: Yes.

Mr. Chairman: We have drafters here. Why are you taking five hours on language! Can we get proposals on adoption of the chapter? Proposed by Mr. Kenyatta and seconded by Ms. Odhiambo. Is that carried?

Hon. Members: Yes.

The Assistant Minister for Water and Irrigation (Mr. Kiunjuri): Mr. Chairman, Sir, our deadline is tomorrow and I do not want to pretend that there are issues that have not been agreed on. This small chapter has taken us almost the whole day since day since yesterday and now it is 12.00 o'clock. I am proposing that we first of all go back to the Chapters of devolution. We clear with it, representation and Executive so that we can agree on the others tomorrow even if we do so in a hurry. But we cannot agree on these ones in a hurry. I am proposing---

Mr. Chairman: He has a proposal on the floor. Let me respond. I agree with you that those chapters are very critical and we need to finish them. The two chapters that we were dealing with, one was on Commissions. We have deleted almost all these Commissions. The secretariat does not agree with me for good reason. If it was me, I would have said let us delete it because we are handling everything where they are. But the advice I have got is that that means we will be writing similar things four or five

times over. So, let us handle it in the same chapter. There is nothing controversial about it. It is how do you appoint or delete Commissions.

The second one is on integrity and leadership, if we can promise ourselves 30 minutes we can be through with them so long as everybody does not insist they want to talk. When we finish we will have touched on all the chapters except the ones that are remaining which are those three large chapters and transition. We cannot start on transition until we agree on those three chapters. So, can we finish with those two little chapters? Let us start with Commissions.

If you look at Commissions and independent offices, policy-wise the philosophy these people were working from was to limit the Government by giving a number of the critical functions to Commissions which are established by the Constitution. That is where the philosophy was coming from and. It was also meant to secure a number of very critical functions so that it is not left to the whim of the political government that comes in.

Out of this we have already cleared a number of them. Let us just go with 291(1). This chapter applies to all Commissions mentioned in clause 2 and the independent offices mentioned in clause 3 except where a specific provision is made to the contrary elsewhere in this Constitution.

The Commissions are:

1. The Commission on Review and Allocation. We have not reached that one because it deals with devolution and public finance.
2. Ethics and Anti-Corruption Commission. Regarding that one we already have a Statute. If there is a Statute that was already set up, we do not need to replicate it.
3. The Kenya Human Rights Commission.
- 4.

Ms. Odhiambo: I do not want to open this for debate because we discussed it yesterday but I think we need the Kenya Human Rights and Gender Commission. It is unpopular because it is effective. So, I put my objection.

The Minister for Justice, National Cohesion and Constitutional Affairs (Mr. M. Kilonzo): Mr. Chairman, Sir, I would like to mark my reservation on this. The country has suffered greatly because of accusations on human rights and the least we can do to the world and the country is to show that we respect it enough to put it in the Constitution. I will raise it in the next level of debate.

Mr. Chairman: We have received those two objections. Let us continue.

The Minister for Lands (Mr. Orengo): I also want to register my objection on account of the fact that knowing this Commission very well, it has been very difficult for it to do its work because it is a picture of a Statute which falls under the Constitution. It has been very difficult even when the Statute is clear on their responsibilities. There has always been interference.

Mr. Chairman: Okay, we have three objections. The fourth is the Independent Electoral and Boundary Commission. We should amalgamate two Commissions which we said is okay. Then we formed the JSC. The National Land Commission. Public Service Commission. The Police Service Commission. The Salaries and Remuneration Commission. Let us bracket it, we have not come to it. We deleted the Teachers Service Commission and the Health Service Commission.

Let us go to three independent offices, the Auditor-General and the Commissioner of Political Parties.

Ms. Karua: The Commissioner of Political Parties goes to Statute. He is under the Electoral Commission you cannot create offices any other way.

Mr. Chairman: Agreed. The Controller of Budget is deleted. Can I get a proposer and a seconder for 291 to be carried as amendment? Let me read them out for clarity.

1. The Commission on revenue and allocation. We said we will bracket it until we deal with public finance.
2. Ethics and Anti –Corruption Commission is deleted.
3. Human Rights Commission is deleted but there are three objections.
4. Independent Electoral and Boundaries Commission is in.
5. Judicial Service Commission is in.
6. National Land Commission is in.
7. Public Service Commission is in.
8. The Internal Security Service Commission is in.
9. The Salaries and Remuneration Commission has been bracketed until we reach public finance.
10. The Teachers Service Commission is deleted and there are two objections.
11. Health Service Commission is deleted.
12. The Auditor-General is in.
13. The Commissioner of Political Parties is deleted.
14. The Controller of Budget is deleted
15. The People’s Protector is deleted.

Could I put in the Parliamentary Service Commission?

Mr. Chairman: We have not opened that debate and we are not going in there. Anybody who has an issue should record an objection.

Ms. Odhiambo: I would like to record an objection for the removal of the Teachers Service Commission.

The Minister for Higher Education (Dr. Kosgei): I would like to record an objection for Teachers Service Commission. As a former teacher, I do not see how it will work without a Commission.

Mr. Chairman: I have recorded objections for Ms. Odhiambo, the Deputy Prime Minister, Dr. Kosgei and Mrs. Ngilu. We said earlier that any Commission that has a current Act of Parliament establishing it, we do not need to replicate it in the

Constitution. Parliament is an arm of Government. If anybody has an issue, record your objections, we are moving on.

Let us move to 292 (1) on objectives of Commissions and independent offices. The objectives of Commissions and independent offices are:-

- (a) To protect the sovereignty of the people
- (b) Secure the observance by all State organs of democratic values and principles
- (c) Promote constitutionalism.

In this process, if you want to correct language or Statute, we can handle that later.

The Commissions and holders of independent offices:

- (a) Are subject only to this Constitution and the law
- (b) Are independent and not subject to direction or control by any personal authority.

Can I get a proposer and a seconder?

Ms. Karua proposed.

The Minister for Tourism (Mr. Balala) seconded.

Mr. Chairman: Composition, Appointment and Terms of Office.

293(1) – each Commission shall constitute of at least three and not more than nine members.

2. Unless otherwise specified in this Constitution, the holder of an independent office and each member of a Commission shall be:

- (a) Identified and documented for appointment in a manner prescribed by an Act of Parliament.
- (b) Approved by the National Assembly
- (c) Appointed by the President.

3. To be appointed, a person shall have the specific qualifications required by this Constitution or by an Act of Parliament.

4. Appointment to Commissions and independent offices shall take into account the principles of Article 13 that is to do with equity, equality, gender etc.

5. A member of a Commission may be part time.

7. The holder of an independent office or a member of a Commission is not liable to an action or suit for anything done in good faith and in the performance of the functions of the office.

8. Members of a Commission shall elect a chairperson and a vice-chairperson from among themselves at the first sitting of the Commission.

The Minister for Higher Education (Dr. Kosgei): On 293(2) we have talked of the Commissioners in general. Usually, if you do not appoint secretaries for the Commission all the Commissioners assume they are Executive and that creates chaos. So, I have an amendment to that on Article 293(2) to read that:-

“Unless otherwise specified in this Constitution, there shall be a secretary to each Commission who shall be the chief Executive of the Commission.”

That is just for good order because if you do not have a secretary to mobilise the rest of the professional staff then the Commissioners will come to the office and assume that they are Executives.

Mr. Chairman: Okay. Can I get the seconder for that?

(Secoded by hon. Mungatana)

Mr. Chairman: Is that carried?

Hon. Members: Yes.

Mr. Chairman: Now, then we have to re-formulate (3) so that it caters for a better format. Let us go on.

Mr. Kioni: Mr. Chairman, under Article 289, we did establish the Kenya Internal Security Service Commission which we did not list under---

Mr. Chairman: We did.

Mr. Kioni: In that case, would then the requirement under 292 (b) apply? It reads:-
“An independent and not subject to direction or control by any person or authority”.
How does that sit in with the Kenya Internal Security Commission?

Mr. Chairman: Because it is a Commission as opposed to the Inspector-General. The Inspector-General will be the one that will be directing.

Ms. Karua: On 293(6), I am thinking this term of six years is too long. I am proposing four years because our Parliamentary term is five years. That allows every incoming incumbent a very short time to accede to the Commission.

Mr. Chairman: It is seconded by the Minister for Foreign Affairs, Mr. Wetangula. It is carried. Let us go on.

The Minister for Foreign Affairs (Mr. Wetangula): Mr. Chairman, I want to propose that we are not setting up political Commissions. These are Commissions to serve the people of Kenya and I would propose that we give the tenure five years renewable once other than making it look like---

Mr. Chairman: So, can you withdraw yours, hon. Karua?

Ms. Karua: I withdraw and second his proposal.

The Minister for Foreign Affairs (Mr. Wetangula): Mr. Chairman, we must have continuity in the country. It should be renewable once.

Mr. Chairman: You have a problem with renewable?

Mr. Mungatana: Mr. Chairman, I have the Floor. He is proposing that in the same agreement or conclusion of hon. Wetangula's argument is that these people come in and are given a chance. They do the best they can within the period of time without political interference and once they finish, they go. Why I object to renewable is that those people will then be subservient to the wishes of the appointing political power. So, it is better they are just given a term, we approve them in Parliament, they do their best and after that they go back to their private business.

Mr. Chairman: That is a good point. Anybody who has any issue with (8)? Let us get proposals for amendment of (8) to say the President will appoint the Chair and the Vice-Chair of the Commissions? Hon. Ms. Odhiambo, can you propose that.

Ms. Odhiambo: Mr. Chairman, I wish to propose an amendment that the Chairperson is appointed by the President and the Vice-Chair be elected from the members.

Mr. Chairman: No, let us go the same way. Either they are all appointed or elected.

Ms. Odhiambo: Mr. Chairman, let the President appoint and then the members have a bite so that if they do not like the President's appointee at least they have a person they like to balance.

Mr. Chairman: And can we also say they come from separate genders?

Ms. Odhiambo: Yes. Thank you Chairman. You are a good one. You deserve a hug. Let me move my amendment. I wish to propose an amendment that the Chairperson be appointed by the President and the Vice-Chair person be appointed by the members of the Commission and that the Chair and the Vice-Chair be of either gender.

Mr. Chairman: That is okay. Let us carry it. Is that carried?

Hon. Members: Yes.

Mr. Chairman: First of all, seconded by who?

Mr. Ethuro: seconded.

Mr. Chairman: The secretary will be appointed by competition. We just said there will be a secretary. So, the Act will handle that.

Mr. Ethuro: Mr. Chairman Sir, I thought Sally made a recommendation about a secretary who reports to the chief Executive.

Mr. Chairman: Yes, and by the way, now that the secretary becomes a constitutional officer holder, that means Parliamentary vetting. So, why do we not leave that secretary to Parliament vetting? Okay.

Mr. Ethuro: Mr. Chairman, on 293(8), we proposed that the President must appoint all of these people and vetted by Parliament. So, now we have also added in 29(2) that one of those Commissions will be the Parliamentary Service Commission and it has a way in which we appoint the chair.

Ms. Karua: *(Inaudible)*.

Mr. Chairman: Thank you. Let us go ahead.

Mr. Ethuro: *Wapi hapo?*

Mr. Chairman: 291 (1). It reads: "This Chapter applies to all Commissions mentioned in Clause 2 and the office mentioned in Clause 3 except where a specific provision is made to the contrary elsewhere in the Constitution."

Mr. Ethuro: Now, my concern is allayed.

Mr. Chairman: Hon. Ethuro, propose that we accept.

Mr. Ethuro: Yes.

Ms. Karua seconded.

Mr. Chairman: Let me just read through. If there are not critical issues, it is better we move forward. It states:-

1. The holder of an independent office or a member of a Commission unless ex-officio, may be removed from office only 4(a) inability to perform their function arising from mental or physical ability (b) misconduct or misbehaviour whether in the performance in the office holder's or the member's functions or otherwise (c) bankruptcy (d) incompetence or (e) contravention of Chapter 7". Chapter 7 deals with integrity.

2. A person desiring the removal of a person on any grounds set out in Clause 1 may present a petition to Parliament setting out the alleged facts constituting the ground. This needs some thinking about.

3. The National Assembly shall consider the petition. If it is satisfied that it discloses grounds under Clause 1, shall send the petition to the President. On receiving a petition under Clause 3, the President (a) may suspend the concerned pending the outcome of the complaint (b) shall appoint a tribunal in accordance with Clause 5. Clause 5 reads: "The tribunal; shall consist of (a) A person who holds or has held office in the republic as judge of a superior court who shall be the chairperson. (b) At least two persons who are

qualified to be appointed as high court judges and (c) one other person who is qualified to consider the facts in relation to the particular ground for removal.

6. The tribunal shall investigate the matter expeditiously and report on the facts and make a recommendation to the President who shall act in accordance with recommendation within 30 days.

7. A person suspended under this Article is entitled to continue to receive remuneration benefits of the office while suspended”.

Can I then get two amendments to that effect and we move forward?

The Minister for Foreign Affairs (Mr. Wetangula): Mr. Chairman, in my view, 294(1) (b) we delete the words “or otherwise”.

Mr. Chairman: Can we get a seconder so that we move forward? Can you propose so that it is seconded by hon. Karua? Is that carried?

Hon. Members: Yes.

Mr. Chairman: Go on then!

The Minister for Foreign Affairs (Mr. Wetangula): Then 294(2) to (7).

Mr. Chairman: First of all, the word “senate”, can we say that is “national assembly”?

The Minister for Foreign Affairs (Mr. Wetangula): Mr. Chairman, if you heard me, in my view this clause should end at 1. 2 up to 7 are unnecessary.

Mr. Chairman: No, I disagree.

Ms. Karua: It sets out the whole procedure for removal of all Commissioners.

Mr. Chairman: Can I get that proposal? Give it to hon. Karua.

Ms. Karua: I propose that in Clause 2(1) we remove the word “senate” and substitute it with “national assembly”. Clause 6 between “shall” and “investigate”, we add the word “expeditiously” and on Clause 7, indicate that “suspended persons will receive one-half pay”.

Mr. Chairman: Okay. Can I get a seconder? Seconded by hon. Ruto.

Mr. Ethuro: Mr. Chairman, hon. Karua, when you look at (6) it is within 30 days.

Mr. Chairman: No, it is separate.

Ms. Karua: *(Inaudible)*.

Mr. Ethuro seconded.

Mr. Chairman: We have one that is going on for eight years. Let us move onto General Powers 295. It states: "A Commission and a holder of an independent office (a) may conduct investigations--- Can we approve the Article as amended?"

Hon. Members: Yes.

Mr. Chairman: Hon. Karua proposing and hon. Ethuro seconding. No. 295 reads: "A Commission and the holder of an independent office (a) may conduct investigations on their own initiative or upon a complaint made by the member of the public (b) a Commission and a holder of an independent office may conduct investigations on their own initiative or upon a complaint made by a member of the public. It has the powers of the high court to (a) issue summons (b) compel attendance of witness to give evidence or (30) commit a person to a high court. This is to do with the human rights Commission.

Ms. Karua: No. We need to delete the whole of 295 (1) (b) and also (d). Where Commissions have powers of the courts, let it be specifically stated by that Commission. This is too sweeping.

Mr. Chairman: So, can you propose that?

Ms. Karua: I propose that we delete the whole of 295 (1) (b) and (d). The rest we can leave.

Mr. Chairman: Can we get a seconder? Let us get comments.

The Minister for Lands (Mr. Orengo): Mr. Chairman, these provisions in 295 (1) (b), you find them in a lot of legislation like in the Commissions of Inquiry Act, in the Powers and Privileges Act. That is the power to summon and compel attendance. What probably maybe outside the general provisions is the Commission of passing to the high court for contempt because there must be some kind of due process. However, I think a Commission while undertaking investigations, if it does not have the power to issue summons or to compel the attendance of witnesses--- Under the Police Act, also the police can compel your attendance to a police station. This is a general provision.

Ms. Karua: Mr. Chairman, we have approved the Independent Electoral and Boundaries Commissions. They normally do not summon anyone and if the Registrar of Political Parties will summon, it is in the Political Parties Act.

Mr. Chairman: We have removed the registrar.

Ms. Karua: No, but I am saying that in the ordinary course of things, in the Commissions we have approved, there is nothing like summoning. The National Land Commission, and remember we have acts of Parliament and also the Public Service

Commission. I am saying it is unnecessary to put this in the constitution. Let their mother act set out their powers and extend specified for each Commission. It would be wrong to put it here and to make them the high court.

Ms. Odhiambo: Can we have a clause that is next to that?

Mr. Chairman: We will have it at the end.

Ms. Odhiambo: Mr. Chairman, if we have that, it will be okay because the reason I am saying that is you know how lawyers can be and they will go back and say that it was actually provided, it was removed and, therefore, they do not have powers of summon.

Mr. Chairman: Article 300 says: "Parliament may by legislation provide for the functioning of Commissions and---

Hon. Members: No, it is 295 (b). Can we carry it?

Hon. Members: Yes.

Mr. Chairman: Seconded by hon. Kioni. No.295 has been carried as amended.

The Minister for Agriculture (Mr. Samoei): Mr. Chairman, in fact on these powers, I would really have persuaded us that having done the two critical things of the Commission. That is the objects, composition and removal and all these other things. The general powers, the proceedings. You know, we cannot write proceedings of every Commission here. The incorporation of funds, annual reports and so on. All those should go to Statutes.

Mr. Chairman: So, why do you not propose that 296 to 299?

The Minister for Agriculture (Mr. Samoei): Yes, we delete all that and leave 300.

Mr. Chairman: Is that carried?

Hon. Members: 296 to 299.

Mr. Chairman: Now, can we move the whole chapter? It is moved by hon. Samoei and seconded by hon. Ethuro. Can we get a proposer for the whole chapter? Can we adopt 300 first? 295 was carried with minimum amendments. What we are deleting is 296 dealing with proceedings. 297 deals with incorporation. 298 dealing with funds and 299 dealing with annual reports and we retain 300 and therein all those issues will be catered for. So, can you propose?

Ms. Karua: I propose.

Mr. Chairman: I am being advised that it is probably better to leave 297 incorporation. Can we then get a proposer for 297 first?

Ms. Karua: I propose.

The Minister for Justice, National Cohesion and Constitutional Affairs (Mr. M. Kilonzo) seconded.

Mr. Chairman: Can we get a proposer for 300?

Ms. Odhiambo: I propose.

Mr. Chairman: Can it be seconded?

Mr. Kioni seconded.

Mr. Chairman: Is that carried?

Hon. Members: Yes.

Mr. Chairman: Can we get a proposer for the entire chapter?

Ms. Karua: I propose.

Mr. Chachu seconded.

Mr. Chairman: We have carried the chapter. We need to clear with integrity on Chapter 7.

Mr. Chairman: Chapter 7 page!

Ms. Karua: That is page 54.

Mr. Chairman: Page 54- Leadership and Integrity. Responsibilities for leadership. In view of our history and in view of the fact that very many people will be complaining that we have mutilated the constitution, let us have ---

89 (1) Authority assigned to a state officer (a) is a public trust to be exercised in a manner that one is consistent with the purpose and objects of this constitution; two, demonstrate respect for the people; three, bring honour to the nation and dignity to the office and four, promote public confidence in the existence of the office and; (b) vest in that state officer the responsibility to serve the people rather than the power to rule them.

Ms. Karua: Can we remove the word state and say, the Republic or service of the public? Let us just leave it to the public officer. But I would take all of it including (b) however, how unnecessary it will be. I would retain the whole clause.

Mr. Chairman: Let us for purposes of our history retain it. Can you propose that amendment first to Public Officer Ethics Act.

Ms. Karua: I propose that we retain except the word state we just say public office.

Mr. Chairman: Seconded by Ms. Odhiambo. Is that carried? Let us go on. Two, guiding principles of leadership and integrity include, (a) selection on the basis of integrity, competence and sustainability or election in free and fair elections, (b) objectivity and impartiality in decision making and ensuring that decisions are not influenced by nepotism, separatism or other improper motives, (c) selfless service based solely on the public interests demonstrated by ones honesty in execution of public duties and ; two, the declaration of any person interests that may conflict with public duties, (d) accountability to the public for decisions and actions and, (e) discipline, commitment and service.

This Article has remained the same throughout the draft.

(Proposed by Mr. Orengo and seconded by Ms. Odhiambo)

That is carried.

90- Oath of office –

“Before assuming office or performing any functions of office, each person elected or appointed to a state office shall take and subscribe to the oath or permission in a manner and form prescribed by Statutes”.

Ms. Karua: *(off record)*

Mr. Chairman: Ms. Karua, the only problem is when you say office. Even the clerical officers or messenger’s office is an office.

Ms. Karua: I do not know how we can frame it but let us make this thing very serious. We have been---

Mr. Chairman: Proposed for adoption.

Ms. Karua: Yes I propose.

Mr. Chairman: Seconded by Mr. M. Kilonzo. Is that carried? Let us continue please!

Mr. Kioni: I was going to suggest that we have the way the oath has been prescribed with the third schedule, and that may not be the way we want to carry it through, so I am going to say in a manner as prescribed in this constitution or by an Act of Parliament.

Mr. Chairman: Conduct of state officers, but can I say that the officers who are being talked about here are identified. So it is not the messengers in the officer.

91 (a) state officer shall be behave whether in public right, official right or private right or in association with other persons in such a manner as to avoid any conflict between

personal interests and public or official duties, (b) compromising any public or official interests in favour of a personal interests or (d) demeaning the office or position the officer holds. Two, a person who contravenes this chapter this chapter shall in accordance with the applicable disciplinary procedure, be dismissed or removed from office or disqualified from---

(Loud consultations)

No I do not want anybody to say we have watered down the issues of integrity

Ms. Karua: It must be in relation to your---

Ms. Odhiambo: Mr. Chairman, I have the floor. I would want to suggest that we recap it and put it such that the way you behave in private needs to be in consonance with your public duties, so that if you behave in a private in a manner that compromises your public duties only to the extent that it compromises your public duties then we should put it here. The reason is that now if you look at the way the public treats the leadership, there is contempt on the leadership because of the way we make our private life with our public in a negative manner. Let us recap it in a manner that we do not lose that.

Mr. Chairman: Let me hear Mr. Orengo and then I will hear Mr. Kioni thereafter.

The Minister for Lands (Mr. Orengo): The only reason why I would want that Article to stay is so that we are not seen to be mutilating this section because it is very important.

Mr. Chairman: Yes, the rights are protected. Please let us move on.

The Minister for Lands (Mr. Orengo): But having said that, I am strongly for retention. If you look at 2 (b) (c) and (d) and even (e) there is a lot of repetition. I am saying if you read them they are just repeated in 91.

Mr. Chairman: Can we recap it?

Mr. Kioni: I support the recapping but also 91 (2) to punish you for life. I think it is important that we have some period out of which one should have the opportunity to serve again. But as it is now, you are doomed after that. Even at the age of 28 then you are done until you are 80. I was going to suggest maybe for a period of about 15 years.

Ms. Karua: May I say something about recapping because we have to be very specific about how we recap. May I propose that in 91, we recap 91(1) to read, a public officer shall conduct themselves whether alone or in association with others in a manner to avoid--- I do not mind (a), I do not mind (b) My recapping is avoiding the word whether in public or official life or private life, that should be condensed into conducting themselves whether alone or in association with others to remove what is provided for in (a), (b) and then you cancel (d) because it is unwieldy and it is not--- I have proposed amendment to 91 (1)

Mr. Chairman: 91 does not have (d) so I was wondering where that (C) was coming from.

Ms. Karua: It is C I have said (a) and (b) are okay after recapping clause (1) before you go to (a) and (b) and then we delete (c).

Mr. Chairman: So that we can make progress can we say 91 the whole of it be recapped with our views merged.

Ms. Karua: But I wanted you to know that we must the words 'whether in public and official life or private to just condense them to 'conduct themselves'. And then we delete the whole of (c).

Mr. Chairman: I am very strongly against deleting. Please let us not delete anything on this. Let me give it to Mr. Musila. Mr. Samoei give me a minute please.

The Assistant Minister for Defence (Mr. Musila): Mr. Chairman I respect your suggestion, I do not want to call it a ruling that we should not delete, but honestly this whole chapter is what we covered in public ethics Act and it is like we are putting code of regulations in the constitution. The Public Officer Ethics Act is very elaborate on these issues so how are we going to make a constitution, in this manner, we will be laughed at, how we allowed personal behaviour to go in the constitution. I have a lot of reservations for this.

Mr. Chairman: I have heard! I know everybody whose hands are up will follow exactly what Mr. Musila has said. I know there is a very strong view for good reason that all of this looks like it belongs elsewhere, but I can assure you that the perception that will be created is not---

Number 91, can we say it should be recapped so that it is public life. And in any event we shall deal with them one after the other, so there is no deleting the whole chapter. So number 91, let us deal with number 91.

The Minister for Agriculture (Mr. Samoei): Mr. Chairman, we have to be reasonable. We do not have to carry everything just because we want to look good. What we are saying here is let us be practical. And what we have done so far is okay but 91 is obnoxious. You are criminalizing serving in the government, that if you serve in government, you cannot have a life. I think let us just delete 91 first.

Mr. Chairman: No! No! I disagree because what you have just said now is that we should be addressing public life. What is the problem with saying people should not be---

The Minister for Agriculture (Mr. Samoei): No! But we have addressed ourselves to that. So, I propose that we delete 91.

The Deputy Prime Minister and Minister for Finance (Mr. Kenyatta): Mr. Chairman, first and foremost I want to second Mr. Samoei but I want to go a step further and say you have captured the principles of the responsibilities of leadership in No.89 and you have given all the guiding principles including of integrity.

“No. 90: Before assuming oath of office or performing any functions each person elected or appointed shall take and subscribe to the oath of affirmation of office in a manner and form prescribed by the third schedule or by or under an Act of Parliament”.

That is all you need if at all you are to retain anything. The rest of that chapter is completely unnecessary. And to appease the general public, which is what you want us to do we have appeased them by capturing the principles of leadership and integrity.

Mr. Chairman: Let me see whether I can appeal to your very strong nationalistic views. Even citizenship and leadership, No.94 deals with citizenship, let me appeal to--- Ms. A. Abdalla, you have not been here, but there has been a very conservative streak, so I want to appeal to that.

(Loud consultations)

DO the Standing Orders allow for the chair to take an objection? So can we then say 96, Legislation and leadership. Can you at least let us try recasting and you have a look at it.

Okay! This is my ruling that 91, 92, 93 we will have a look at one general principle as recast by the--- do not worry, we will look at it when we are dealing with the cleaning up then we do just two sentences, then we delete 95. 91, 92, 93, and 94 we see whether we can get one statement that captures that. 95 we delete 96 remains. So can I get a proposal to that effect? Mr. Samoei proposes and Mr. Ombui seconds, is that carried? Now can I get a proposer for the entire chapter as amended?

(Loud consultations)

Seconded by who? Seconded by Mr. Samoei. Is that carried? Thank you very much.

The Minister for Foreign Affairs (Mr. Wetangula): *(off record)*

Mr. Chairman: I knew your conservative streaks would bring you closer to that, that is why I was pushing on 94 but even that could not take me anywhere. No! No! We are recasting all of them to cater for that. We have closed discussion on that. Let us close the discussion. We have agreed 95 all the way to 96 we will discuss; you will look at it before it goes. Thank you very much. We are recasting all of them. Now at this point we can have one hour break we meet here at 1.30 pm.

Members: Let us go on for another half an hour.

Mr. Chairman: Yes Mrs. Ngilu!

The Minister for Water and Irrigation (Mrs. Ngilu): Mr. Chairman, just before we go to the next chapter, I am very much disturbed by our leaving out the Teachers Service Commission in the constitution. I say this because in 2005 when we went for the referendum---

Mr. Chairman: You need to re-open because we have left---

The Minister for Water and Irrigation (Mrs. Ngilu): Mr. Chairman, no it is already past. I would like to request that we re-open the chapter under Commission so that I can then talk about it. Can somebody support this?

Mr. Chairman: I rule that we do not re-open and we have taken official stand on this. I have already said I will not re-open and we have taken objections on the same.

The Minister for Water and Irrigation (Mrs. Ngilu): But somebody seconded!

Mr. Chairman: The proposal was so that I could make a ruling.

The Minister for Water and Irrigation (Mrs. Ngilu): I wanted this re-opened because I know that we do not want too many Commissions. TSC has been in place for a long time.

Mr. Chairman: Probably for clarity, we are not removing them from the Act they were in.

The Minister for Water and Irrigation (Mrs. Ngilu): I am aware it is under an Act of Parliament but teachers have always wanted to be in the constitution not to be under an Act of Parliament. I know that all of us here know how much they fought during the 2005 Referendum. We are not going to get favour with the teachers if we do not really get them into the Constitution. So, I want to propose that if we are leaving everything out, we, at least, have the Teachers Service Commission (TSC) for another---

(Loud consultations)

Mr. Chairman: Order! Hold on! Mrs. Noor?

Mrs. Noor: Mr. Chairman, Sir, thank you for giving me this chance. It is specifically why I raised the objection, not today, but yesterday. I was the first one to raise this objection. The principle reason of doing this was that we have the Public Service Commission where all the other workers fall in; and we have the TSC for the teachers. I was hearing people saying that the nurses as well as the other groups will similarly demand for their bodies; all these other groups are in the Public Service Commission and they have been put in the Constitution; they are a constitutional Commission! For a long time, we are discussing and we are saying let us hear what the people of this country are saying; what they demand from us, and every issue we raise here is subject to what we heard from the people! The TSC, to me, should be a constitutional Commission.

Mr. Chairman: Hon. Wetangula, you had a point of order.

The Minister for Foreign Affairs (Mr. Wetangula): Mr. Chairman, Sir, you must give us direction. This argument being pursued by Mrs. Ngilu and Mrs. Noor were very ably articulated by the Deputy Prime Minister, Mr. Mudavadi yesterday!

Mr. Chairman: And the Minister for Higher Education.

The Minister for Foreign Affairs (Mr. Wetangula): And the Minister for Higher Education. And you made a ruling that this tedious repetition is, in fact, against Standing Orders of Parliament! I think you better make a ruling and we move on!

Mr. Chairman: And this is my ruling; we are not reopening debate! We have taken objections and recorded them.

Thank you very much!

(Loud consultations)

Order! Order! Now, we have a break---

(Loud consultations)

The Assistant Minister for Defence (Mr. Musila): I am sorry, Mr. Chairman, Sir, after your ruling that you are not going to reopen anything----

(Loud consultations)

Yeah, but what I have to say, really, is almost about reopening. Page 162, we have already passed, I am told. But, Mr. Chairman, Sir, this Committee is going to hurt itself.

Mr. Chairman: What does it deal with, hon. Musila? Just say what it is and what you want done.

The Assistant Minister for Defence (Mr. Musila): Mr. Chairman, Sir, it is the Parliamentary Service Commission (PARLSCOM). The funds of the Commission and it says:-

“298. (1) The funds of a Commission and an independent office include---“
Because you know, what we have done is that we have deleted that, and that is what gives Parliament the independence of using funds. According to records, Article 298 has been deleted.

(Loud consultations)

Ms. Karua: Mr. Chairman, Sir, it is true we deleted it when we were in the spirit of deletion. We just did it.

The Assistant Minister for Defence (Mr. Musila): Is it deleted? If it is not deleted, I will be happy. But if we have, we should know that we are hurting ourselves.

Hon. Members: We deleted it!

(Loud consultations)

The Assistant Minister for Defence (Mr. Musila): But that is where Parliament gets its autonomy from.

Mr. Chairman: Thank you, hon. Musila. But will this help; this chapter applies to all Commissions in Clause 2 and the independent office mentioned in Clause 3 except where specific provisions made to the contrary elsewhere in the Constitution. So, since we will make specific provisions for the PARLSCOM, this will not count---

The Assistant Minister for Defence (Mr. Musila): When we reach there.

Mr. Chairman: When we reach there.

The Deputy Prime Minister and Minister for Finance (Mr. Kenyatta): It should not be a blank--- It is not a blank cheque!

Mr. Chairman: These blanket ones are for the ones we have not mentioned. For the issues we will mention specifically---

The Assistant Minister for Defence (Mr. Musila): Funds of Commissions. Not PARLSCOM.

Ms. Karua: But, Mr. Chairman, Sir, this spirit of deletion--- *(Off record)*

Mr. Chairman: I agree with you! I need us to agree on the way forward.

(Loud consultations)

Order! Can we hear hon. Ethuro and then I need us to agree on the way forward?

Mr. Ethuro: Mr. Chairman, Sir, I am attempting to reopen the gender debate because I have the Floor and the ladies are talking; two of them!

Mr. Chairman: Just go ahead!

Mr. Ethuro: Mr. Chairman, Sir, I want to agree with your ruling to the extent that the PARLSCOM and the Judicial Service Commission comply with the requirements of

making the provisions within the particular Constitution, because that is the qualification. If it is in the Act, as you will see now, it is not provided for the PARLSCOM in terms of the appointment of the Chair. So, I am just saying that what you have suggested is good, but we will make sure that it is there in the Constitution before we finish. If it is within the Act, it will not apply.

Mr. Chairman: No, no! I agree with you that if there is an issue, it cannot be amended by an Act.

Mr. Ethuro: Yes.

Mr. Chairman: Now, way forward; we need to start now on the Executive!

The Minister for Foreign Affairs (Mr. Wetangula): Mr. Chairman, Sir, what is your ruling on PARLSCOM?

Mr. Chairman: We said that for PARLSCOM there is a specific Article that will handle it; and Clause 1 of this gives a general exception, then that will cater for it.

We are now going to the Executive. Now, I have a proposal. The Executive we generally agreed on was proposed in the 2002 CKRC Draft. Instead of going through the current Draft and then changing everything, why do we not have a look at the CKRC Draft on the chapter on the Executive and see what in that chapter we can change, because that had an Executive that was presidential?

Ms. Karua: Mr. Chairman, Sir, did they have a pure presidential system?

Mr. Chairman: They had a strong presidential system, but it will be easier to change that one---

Ms. Karua: *(Off record)*

Mr. Chairman: No, no, no! CKRC 2002; not Bomas! This is advice from somebody who has read it. So, just give him the benefit of doubt.

Ms. Karua: *(Off record)*

Mr. Chairman: Why do you not have a look at it, the CKRC 2002 Report?

Ms. Karua: Number 8?

Mr. Chairman: Yes, number 8. Can you read it over lunch and we meet one hour from now? It is 12.30 p.m. now; so we meet at 1.30 p.m.!

Ms. Karua: *(Off record)*

Mr. Chairman: Yes, I agree with you. So, we meet here at 2.00 p.m. sharp! Then, have a look at the issues we had agreed the last time when we were dealing with the Executive. They are being distributed now.

(The Committee adjourned at 12.30 p.m.)

(The Committee resumed from lunch at 2.10 p.m.)

Mr. Chairman: We will assume this is the continuation of the earlier session. We will circulate a chapter on the Executive. I want you to look at it as a template. We can throw the whole of it out but there is a draft chapter that we will circulate, essentially as a template because this is the closest to an Executive like the one we are thinking of. Look at it as a template only, it is not to say that they any of those views we agree with, disagree with or like. It is just to help us with a framework to support us go through the process. We can add, deduct or change anything and everything there. That is just a working document I want us to look at to give us a framework to work with. You can kick out everything. It is not any view we are supporting but instead of now building from this point all the way to drafting, I am hoping that we can use that template to help us with the work.

Let me start with the issues that we had, at least said should be in the Executive. Do we have a copy of the list?

Hon. Members: We have it!

Mr. Chairman: So, those are the issues we had said we should have, therefore, let us have those in mind while we go together. The arrangement of the chapters will generally follow the same form but, of course, there will be certain things that definitely will not be there and others that we have to add. So, you will forgive for using this because this is the closest to what we had suggested.

Do not worry about the numbering of the Articles but let us start with the first one; principles of Executive authority. Part 1 says principles and structure of national Executive:-

- (i) The powers of the Executive are to be exercised for the well being and benefit of the people and the Republic of Kenya.
- (ii) Executive authority assigned to an office bearing by or in terms of this Constitution (a) vests in that office bearer the power to serve the people rather than the power to rule. Of course we can change that (b) shall be exercised in a manner consist with the purpose and objects of the Constitution.

149 - Structure of the National Executive: The National Executive of the Republic of Kenya comprises the President, Deputy President and the Cabinet appointed under Article 1(5)(1). Now there, typically would you consider the Cabinet in a pure Presidential system to be part of the Executive or as the Executive authority? So let us start from 1 then. Does anybody have any problem with 148 up there: That the powers of the Executive are to be exercised for the well being and benefit of the people and the

Republic of Kenya? If you do not like that format, then we can also look at what we have in the current---

(Off record)

We can recast it but the principle is okay. The second one which is most critical is the National Executive of the Republic of Kenya comprises the President, Deputy President and the Cabinet---

Ms. Karua: Let us put a full stop after the word "people" in 2(a).

Mr. Chairman: Is that agreed?

Hon. Members: Yes!

Mr. Chairman: So can you cancel that? 149 - The National Executive of the Republic of Kenya comprises the President, Deputy President and the Cabinet appointed under Article--- Well, we will agree on the Article, the President, the Deputy President and the Cabinet. Is that all agreed?

Hon. Members: Yes!

Mr. Chairman: Okay! President and Vice-President or Deputy President! The President:-

(a) is the head of state, head of government, commander-in-chief of the defence forces, the Chairperson of the national Security Council and the chairperson of the Defence Council.

Let me hear from Ms. Karua!

Ms. Karua: The theory in Government is that all the Ministries actually belong to the President. He then donates his power; that is why he can hire and fire. So when you say he chairs, if you are the Minister for Defence, although he is recognized as the overall head, you steer that Ministry and it is the theory in every Ministry. That is why the mandate can be recalled on behalf of the President!

The Assistant Minister, Ministry of State for Defence (Maj-Gen. Nkaisserry): Mr. Chairman, Sir, the National Security Council (NSC) is a superior body which supervises the national security overall for the country and you realize that the President is the Commander-in-Chief but the Defence Council is chaired by the Minister of State for Defence because all these other councils are junior to the NSC.

The Minister for Agriculture (Mr. Samoei): Mr. Chairman, Sir, I would propose for purposes of being neat, we should just stop at Commander-in-Chief of the Armed Forces. These other things will be in Statutes and other places.

Mr. Chairman: Is that agreed?

Hon. Members: Yes!

Mr. Chairman: So can you propose and we agree on that?

(Mr. Samoei proposed and Mr. Chachu seconded)

Mr. Chairman: (b) is a symbol of the unity of the nation and has responsibility to promote and enhance the unity of the nation, to safeguard the sovereignty of the Republic, promote and respect the diversity of the people and protect their human rights and fundamental freedoms. Does anybody have any issue with that?

Hon. Members: No!

Mr. Chairman: (c) Shall uphold, safeguard and respect the Constitution and the rule of law. Can I get a proposer and seconder for those three Articles?

Mr. Mungatana: Mr. Chairman, Sir, I propose that we adopt 148, 149 and 150 with amendments.

(Maj-Gen. Nkaisserry seconded)

Mr. Chairman: Is that carried?

Hon. Members: Yes!

Mr. Chairman: The powers of the President shall be exercised in accordance with the Constitution and the laws. (3) The President shall not hold any other public office including any elected or appointed office within a political party.

Hon. Members: Yes!

Mr. Chairman: Is that carried?

Hon. Members: Yes!

Mr. Chairman: 151(1): The President (a) shall address the opening of each newly elected Parliament in accordance with Article--- (b) shall address a special sitting of Parliament once each year as provided for; (c) may address Parliament at any other time; and, (d) may dissolve Parliament only in circumstances---

(Loud consultations)

The point is these are state addresses so do you want the--- So (d) may dissolve Parliament only in circumstances contemplated?

Hon. Members: No!

Ms. Karua: Parliament can only impeach him; no vote of no confidence; only impeachment.

Mr. Chairman: Proposal for deletion!

(Mr. Balala proposed and Ms. Karua seconded)

Mr. Chairman: (2) The President shall appoint and may, in accordance with this Constitution, dismiss the Cabinet consisting of not more than 25 Ministers. Did we say 25? This is just the dismissals; these are still state functions of the President.

Ms. Karua: You see he is implementing the report of a tribunal so if you put it simply like he is hiring and dismissing like Ministers, it sounds political. It cannot come that way.

The Minister for Agriculture (Mr. Samoei): I think we should delete (c) because it gives the wrong impression that the President can dismiss judicial officers.

Mr. Chairman: Okay! It does not break any bone! Any public officer who the Constitution requires the President to appoint, subject to the applicable provisions of the Constitution or legislation.

Ms. Karua: Mr. Chairman, Sir, the process is elaborate. Let us not live in the past where the President could appoint and dismiss. Now we can have an elaborate way, for all constitutional office holders, of appointing and dismissing. When you put it this way, you are taking us back where we are coming from.

The Minister for Lands (Mr. Orengo): Mr. Chairman, Sir, the problem is the design of the Constitution that we are discussing, that the Presidential powers are scattered and spread all over the Constitution. Now you either lump it all together here which may be unwieldy because when you come to appointment and removal of judicial officers, the process is very elaborate. So, I think it would be inappropriate to lump the Presidential powers of appointment and dismissal just in one. Because like this Article 151(2), the President shall appoint and may, in accordance, with this Constitution, dismiss, that can bring a lot of conflict keeping in mind the other provisions about the appointment of other officers who are appointed by the President or constitutional offices which are established by the President and there is an elaborate process. I think this may be a little bit in the wrong place and it may bring a lot of conflict.

Ms. Karua: I want to propose a way forward; that when it comes to the powers of the President, what we need is a pullout of the US one. Then we can adopt with modification because we have nothing in this country or in our draft that can inform us on the format on Presidential appointments, if you want a quick check list. But this cannot be a good checklist. This is designed for Parliamentary.

The Minister for Lands (Mr. Orengo): If you look at the current Constitution - and particularly when you have said the Executive, it is really the President and the Cabinet Ministers - on the part dealing with the Executive, you would find that powers to the President are found in that part but they only relate to specific offices in the Executive. But then there are additional powers which are found elsewhere in the Constitution. I think if we lump them all like it is being done here, I do not think that is neat. I am not averse to the US Constitution but when you are dealing with the Executive, I think we just deal with the Executive because the appointment of judicial officers is something quite different.

Mr. Chairman: Because I have limited time, why do we not go on so that if there are any issues we can remove them? That will have, at least, guided whoever we are going to give instructions for the drafting. All the drafts we have an element of Parliamentary in them. Actually the basis for almost all of them is Parliamentary so we need to work from some draft to be able to unless you want us to re-draft each of these things which is really very difficult. So, can we just go through and probably take what Mr. Orengo has said?

The Minister for Agriculture (Mr. Samoei): (*off-record*) ---that (d) is unwieldy here because whatever other officials the President will appoint in whatever other section, will be provided in those sections. So, let this section specifically deal with the appointment and dismissal of the Executive.

The Deputy Prime Minister and Minister for Finance (Mr. Kenyatta): Mr. Chairman, Sir, there are other officers of the Executive, so how do we deal with that?

Mr. Chairman: They are provided for later, for example, ambassadors and permanent secretaries are provided for. Let us just go through and see what is left out. So let us delete (c) and bracket (d).

(3) The President may (a) appoint Commissioners of inquiry. Really that does not have to be in the Constitution because there is already the Commission of Inquiries Act.

(b) sign instruments of consent by Kenya to be bound by international agreements.

So, we will delete (3) (a) and (b) and go to (4). I am just moving forward because this is a working document. (4) After consultations with the Cabinet and the NDC, the President may (a) declare a state of emergency subject to Article 71; (b) declare war---

Ms. Karua: Mr. Chairman, Sir, I want to propose an amendment to (4) that for the President to declare war, he must get approval by Parliament or state of emergency.

Mr. Chairman: Agreed!

(*Mr. Wetangula seconded*)

That is carried!

The Minister for Agriculture (Mr. Samoei): Mr. Chairman, Sir, events might be too fast that it may be difficult to summon Parliament but I am saying for declaration of war, then maybe we can say with the approval of Parliament. But the state of emergency---

The Deputy Prime Minister and Minister for Finance (Mr. Kenyatta): The South African one reads as follows:- The President as head of the national Executive may declare a state of national defence and must inform Parliament promptly. So, it is not that you cannot do it but you must inform Parliament promptly.

(Loud consultations)

Mr. Chairman: Can we first of all agree that for us to listen to each other, those hon. Members who like either immediately reacting to somebody with the next neighbour--- Please let us listen to each other. We have heard from Mr. Kenyatta, let us now hear from Mr. Wetangula.

The Minister for Foreign Affairs (Mr. Wetangula): Mr. Chairman, Sir, while the role of Parliament is critical, I do not think we should make the Constitution so rigid as to make things difficult. For example, take the earthquake in Haiti. After such a devastating calamity, the normal natural reaction is for the Head of State to declare a state of emergency. He can inform Parliament. We can put a requirement for Parliament to be promptly informed. If there is a tsunami like what we had in Indonesia, you cannot wait for Parliament to declare a state of emergency.

Mr. Chairman: Mr. Wetangula, please address the Chair so that you do not have to get responses from the side.

The Minister for Foreign Affairs (Mr. Wetangula): Mr. Chairman, Sir, I am saying that while the Parliamentary role is important, I think we should take that clause from South Africa that he must promptly inform Parliament. If Parliament is away, they can recall a special session and be informed.

Mr. Chairman: My question, when you say be informed, supposing you declare an emergency and I am not talking about the emergency of Haiti, but the emergency that was there in Northern Kenya and you inform Parliament, what can it do about it?

The Minister for Foreign Affairs (Mr. Wetangula): We can classify!

The Deputy Prime Minister and Minister for Finance (Mr. Kenyatta): Let me continue with the rest of the Article: Promptly, in appropriate detail of the reason for the declaration, any place for the defence forces and the number of people involved. (2) If Parliament is not sitting when a state of national defence is declared – the President must summon Parliament to an extraordinary sitting within seven days of the declaration; and (3) a declaration of a state of national defence lapses unless it is approved by Parliament within seven days of the declaration. So it is there!

Mr. Chairman: That is acceptable! That is certainly a much more acceptable version.

Mr. Mungatana: Mr. Chairman, Sir, I was saying that the declaration in accordance with Section 70 of the new Harmonized Draft, there is a very clear procedure.

Mr. Mungatana: If you look at the procedure there, it is very elaborate. Look at page 44. You see the President is given leeway to move but then he has to go to Parliament. If he wants to extend that State of Emergency, he has to get from Parliament. If we have given this guy powers, let him rule.

Mr. Chairman: Agreed. Or if we have given this girl powers, let her rule

Ms. Karua: Without worry about these guys or those ones, I want to say that we are making a fundamental error. In a Presidential system, the Presidency is a strong Presidency. It is only checked by Parliament. So, working with a Draft that was essentially for a Parliamentary system or citing from a Parliamentary System like South Africa is wrong. We should check from a Presidential system because people were talking of strong checks and balances. Now because we are tired and time is moving, we are grossing over things and saying seven days later. In the US and I would keep on citing it because it is the presidential system that is best known by exposure through the Press, for the President to declare a State emergency or war, the Congress has to approve it. Therefore, I am saying that we are going on with----

(Interruption from the Floor)

Some of them but war--- I did not say that I am an authority. I am saying of what I can remember. We need to follow a draft that is following one system to get checks and balances right. There is a distinction between natural disasters and a state of emergency leading to war. So, if we want to get the correct wording, let us, please be a little be patient and go to see what we are doing. Otherwise, we keep on mixing Parliamentary and presidential system.

The Deputy Prime Minister and Minister for Finance (Mr. Kenyatta): On a point of order, Mr. Chairman, Sir. In that case, then may I then suggest we go back to hon. Karua's proposal. Otherwise, we would just be towing and frowning. Let us have something in front of us that guides us. Otherwise, this was we are not going to make headway. So, can I make that proposal that we actually go back to the proposal that we have something in front of us that acts as a guide because we are not going to make much headway.

Mr. Chairman: The problem with the US, Congress one is that it is a very old document.

The Minister for Lands (Mr. Orengo): I think if we look at the American Constitution we are not going to get sufficient details. It is a very short document. On matters of declaration of war, or emergencies, you are going to find most of that in ordinary

Statutes. But the thing about emergency or where it required preserving public security, the thing about it is that people may have to surrender their fundamental right or they may curtailed or breached. So, it is important that the National Assembly is involved. I want to say that we can always improve it. Sometimes it is better to improve on what you have than go out hunting in other jurisdictions. Section 85 of the current Constitution has some provisions which I think are very good. But previously they have been abused and the President did not comply with them. But if we may just cite Section 85(2), after an order has been made by the President in circumstances of emergency it reads as follows- "An order made under this Section which is made by the President shall cease to have effect on the expiration of the period of 28 days commencing on the day which the order is made unless before the expiration of that period, it has been approved by the resolution of the National Assembly. But in reckoning any period of 28 days for the purpose of this subsection no account shall be taken of anytime during is dissolved"

This can be improved. But I think not to involve the National Assembly--- It is an improvement of this but what I am saying is that we should not do anything that looks like we are going back on what we have. The South African is an improvement. But if you look at the Section 85 and the South African provisions and what hon. Mungatana referred to, we can be able to build a much better provisions.

Mr. Chairman: Ms. Karua, using the American one will not in any way improve the problems we have. For example, Section one of Article 2: The Executive power shall be vested in a President of the United States. He shall hold his office during the term of four years and together with the Vice-President chosen for the same term is elected as follows"

Then when it comes to this issue we are dealing with now in terms of emergency, it says: "He shall have the power by and with the advice of and consent of the Senate to make treaties, provide two-thirds of the Senators present concur and he shall nominate by and with the advice of and consent of the Senate appoint ambassadors, other public Ministers, Consuls, Judges of the Supreme Court and other officers of the United States whose appointment are not herein, otherwise provided for and which shall be established by law. But the Congress may by law vest the appointment of such inferior officers as they think proper, in the President alone, in the courts of law or in the heads of departments"

But this is certainly a better formatting than this.

Mr. Chairman: Absolutely. I think we agree that. But we must also agree that the President has to have the powers. It is only after that he can be checked. But if you do not give the President the powers in the first place ---

The Minister for Agriculture (Mr. Samoei): Mr. Chairman, Sir, we have agreed that let the President declare the state of emergency or war---

Mr. Chairman: Why do you not tie to the earlier—declare state of emergency in the----

The Minister for Agriculture (Mr. Samoei): No! It is reasonable to say: Within this, if it is not approved by Parliament then it lapses. I think that gives the President the leverage to act but also time to get Parliament to approve it.

Mr. Chairman: That process for state of emergency is already elaborately covered in page 44. So, why do we not just link to page 44, Article 70 of the Draft?

The Minister for Agriculture (Mr. Samoei): But even the one on page 44 is too complex. It very wieldy, if you look at it. It has too much detail in it. It is going all the way---

Mr. Chairman: A state of emergency is a very important thing. We really need to be very clear about what happens. It is very unique and it is not going to be every day.

The Minister for Agriculture (Mr. Samoei): It is even telling us that the first extension of the state of emergency requires a supporting vote of at least two-thirds of members of the National Assembly.

Mr. Chairman: On the process, can we agree that we continue with this. It will be redrafted properly.

The Assistant Minister, Ministry of State for Defence (Maj-Gen. Nkaisserry): Mr. Chairman, Sir, we are talking about emergencies. Hon. Munya, please, listen to me because it is important we get clarity.

Mr. Chairman, Sir, emergencies have different forms. There are natural disasters which we cannot tie the President's approval. But war, there are indicators. There is the National Security Intelligence Service which must brief. There is the National Security Council which must sit. There is the Ministry of Foreign Affairs and international organizations. Before, you declare war, there are several indicators you go through. Therefore, when it comes to declaration of war, Parliament must approve it for sure.

Mr. Chairman: Okay, mean while can I ask the Minister for Justice, National Cohesion and Constitutional Affairs, any modern Constitution that has a Presidential system other than the US . Something recent!

The Minister for Justice, National Cohesion and Constitutional Affairs (Mr. M. Kilonzo): Mr. Chairman, Sir, let me have a look and then I will get back to you. The German one certainly does not have.

Mr. Chairman: Can we move forward?

The Minister for Agriculture (Mr. Samoei): When we get to Article 70 we can see how to--- Let us proceed, Mr. Chairman.

Mr. Chairman: Let us proceed. Declare war, again in the same manner. Article 70(1a), covers both war and emergency.

Ms. Karua: Mr. Chairman, allow for the declaration of war whether he convenes a midnight session or day time session, let the war be declared knowingly by the country with the approval of Parliament.

Mr. Chairman: But what happens if the country is attacked and you do not wait for Parliament to convene?

Ms. Karua: But if we are attacked, he is not declaring war. We are defending ourselves. But when we declare---

Mr. Chairman: We are following the same procedure, let us go on Mheshimiwa.

The Assistant Minister, Ministry of State for Defence (Maj-Gen. Nkaisserry): Can we sit here and imagine another country will attack this country? Where are the indicators?

Mr. Chairman: Let me tell you how. That is for the security apparatus. But for Parliament, you do not just go to Parliament and say---

The Assistant Minister, Ministry of State for Defence (Maj-Gen. Nkaisserry): You will never get a country attacking another one without knowing.

Mr. Chairman: Minister, we have already agreed. That is the procedure we will follow. Maj-Gen. Nkaisserry, we are on the same page.

The Minister for Justice, National Cohesion and Constitutional Affairs (Mr. M. Kilonzo): Mr. Chairman, Sir, I have found one Constitution of a country which is also African and has been to war. It has Executive presidency and that is the Republic of Egypt. In Article 148 it says:

“The President of the Republic shall proclaim a State of emergency in the manner prescribed by the law. Such proclamation must be submitted to the people’s Assembly within the subsequent 15 days in order that the Assembly may take a decision therein. In case, the people’s Assembly is dissolved, the matter should be submitted to the new Assembly at its first meeting. In all, cases, the proclamation of the state of emergency shall be for a limited period which may not be extended unless by the approval of the Assembly”.

Article 149: _

“The President of the Republic shall have the right of granting amnesty” That is not relevant. Article 150:

“The President of the Republic shall be the Supreme Commander of the Armed Forces. He shall be the authority who declares war after the approval of the people’s Assembly”.

Mr. Chairman: Can we then adopt the whole of that to use as our template. Even though---

The Minister for Justice, National Cohesion and Constitutional Affairs (Mr. M. Kilonzo): They have fought wars with---

Mr. Chairman: No! No! Minister for Justice, we are not just interested in war but the whole template. Anyway, we have agreed that war declared subject to approval by Parliament in the general format of Article 70. Let us go to No.5 "The President may:-

- (a) Appoint persons to represent the Republic as High Commissioners, Ambassadors, or Diplomatic or Consular representatives with the approval of the National Assembly and may dismiss them.
- (b) Receive---

The Minister for Agriculture (Mr. Samoei): You know in Consular, there are people going to small station. I think hon. Wetangula should help us so that we do not subject the President to Parliament approval for junior officers who are going to do some---

Mr. Chairman: The hon. Wetangula is very conservative, so let us hear from Dr. Kosgei, with a light touch.

The Minister for Foreign Affairs (Mr. Wetangula): That is very unkind of you.

Mr. Chairman: I apologize, let us hear from Mr. Wetangula.

The Minister for Higher Education, Science and Technology (Dr. Kosgei): Hon. Wetangula, I just wanted to inform my friend over there, hon. Samoei that ambassadors cannot present credentials unless they are appointed by a Head of State. He is the one who has to do it officially. That is not to say he selects them because they are selected by another process. It is the Ministry itself.

Mr. Chairman: His view was the Consular.

The Minister for Higher Education, Science and Technology (Dr. Kosgei): No. But they are not junior. You appoint the High Commissioners and also Ambassadors. In the case of Consular officers, they act as Ambassadors or High Commissioners because they act in situations where the High Commissioner is not present. Anyone else called Consular one, Consular two, in a diplomatic mission, those are hon. Wetangula's people not the President.

Mr. Chairman: I think there is no problem with that .So, let us move on

Ms. Karua: Off record.

Mr. Chairman: Let us go to see (c) now and could we have one meeting, please.

- (c) Seek an advisory opinion from Supreme Court of Kenya on any matter concerning the interpretation, protection or enforcement of the Constitution.
- (d) Pardon or reprieve offenders and remit fines, penalties or forfeitures---

Could we get somebody to raise so that we can formally listen to them. Is there anybody who wants a bite at this?

Ms. Karua: Yes, in accordance with an Act of Parliament.

Mr. Chairman: Because we have to be on record, if you could kindly wait for the microphone before you speak.

Ms. Karua: Mr. Chairman, Sir, I propose that we put a full stop in Clause 151(4)(d) after the word “penalties” and then indicate that Parliament will make legislation to give effect to this Clause so that it is not just about pardoning anyone.

An hon. Member: There is an Article on that.

Mr. Chairman: I am informed that there is a full Article on that.

Ms. Karua: Then we just end at “penalties” and delete the rest.

Mr. Chairman: We have a proposal from Ms. Karua. Let us have a seconder.

Ms. Karua: I am proposing that in Clause 151(5) (d), we end at the word “offenders” and we delete all the rest.

Mr. Samoei seconded.

Mr. Chairman: Is that carried?

Hon. Members: Yes.

Ms. Odhiambo: Mr. Chairman, Sir, I have not looked at Clause 211, but---

Mr. Chairman: Do not worry about Clause 211. The Draft we are using is completely different. Do not worry about the Articles. There is an Article that deals with pardon.

Ms. Odhiambo: I understand you, Mr. Chairman, Sir. We are taking records and I am checking there. It is pardon or reprieve to offenders and then a full stop. It has to be in accordance to something, that is, either Statute or another Article. So, can we not provide for that? Otherwise we will have people out even those who do not deserve any pardon.

Mr. Chairman: From the Draft we are using, that Article 211 is the prerogative of mercy. So, we will link it to the prerogative of mercy here also.

Ms. Odhiambo: That is okay with me for as long as we provide there. It is in accordance with the relevant Article.

Mr. Chairman: That is noted. Could we move forward?

Mr. Mungatana: Mr. Chairman, Sir, it is important to state the correct Clause which is Clause 168. This is because the whole thing about presidential power of mercy is in Clause 168.

Mr. Chairman: Propose then that we amend to that effect.

Mr. Mungatana: Mr. Chairman, Sir, I propose that we further amend Clause 151(4)(d) in accordance with Clause 168.

Mr. Chairman: Is that carried?

Hon. Members: Yes.

Mr. Chairman: Clause 151(4)(e) states: "confer honours in the name of the people and the Republic of Kenya." Can we then have---

"(6) The President shall ensure that: (a) the international obligations of the Republic are fulfilled and submit a progress report to Parliament annually; and (b) courts and constitutional Commissions and officers are able to secure their independence, impartiality, dignity, accessibility, effectiveness as contemplated in the Constitution."
Is there anybody with issues?

The Assistant Minister, Ministry of State for Defence (Mr. Musila): It has no meaning!

Mr. Chairman: It has quite a bit of meaning. It is linking the Presidency to the Judiciary.

The Assistant Minister, Ministry of State for Defence (Mr. Musila): My contention is that these are really functions and I do not find their role in this Constitution. They should not be here.

I, therefore, propose the deletion of (6).

Mr. Chairman: Who is seconding?

Mr. Kazungu seconded.

Mr. Mungatana: Mr. Chairman, Sir, the international obligations of the President are very serious and they must be written in the Constitution. I want to plead with the Committee to understand that we are creating a very powerful presidency. Nobody is going to force him or her to do anything except the Constitution. In fact, you cannot, even in Parliament, rise to question whether we are complying with the East African protocol if it is not specifically provided for in Parliament. I want to plead with the Committee that since we will never be able to tell him anything, let his responsibility be stated. So, I propose that we do not delete this.

The Minister for East African Community (Mr. Munya): Mr. Chairman, Sir, international obligations is an extremely wide statement that covers any obligation under any Ministry or international organization. It is extremely wide. To put it here and say that the President should be able to do it while most of it is done by Ministers---

Mr. Chairman: If I was to ask, what was the problem with that wide mandate since the President already has that obligation as a country to give reports to Parliament?

The Minister for East African Community (Mr. Munya): Mr. Chairman, Sir, in my opinion this is extremely wide. Some things are done by ambassadors and other junior staff. I do not think we need to put this extremely wide in the Constitution. I would rather we look at it critically and do a Statute.

We need to completely delete (b). For this other one, we need a Statute.

Ms. Odhiambo: Mr. Chairman, Sir, I support Mr. Mungatana. What (a) states is not necessarily that when the President gives his report that it contains every nitty-gritty detail. It only gives Parliament an overview picture of what is going on. Also it gives a window if Parliament needs to interrogate some of the issues. This is much more so because we are now creating a very powerful presidency.

I do not mind if we delete (b) because it is already provided elsewhere.

Mr. Ethuro: Mr. Chairman, Sir, I propose that we carry 6(a) and delete 6(b).

Mr. Samoei: Mr. Chairman, Sir, I second what Mr. Ethuro has said.

Mr. Chairman: So, can we then say that format is carried?

An hon. Member: He has been sleeping!

The Minister for Lands (Mr. Orenge): No! I have not been sleeping. I do not shout like you.

(Laughter)

Mr. Chairman, Sir, in any system of Government there is always contestation between the various centres of power even if they are legislative or judicial. I think since we are creating a presidency that is very powerful, and one which does not sit in Parliament, the requirement that the President secures the independence and impartiality of these constitutional bodies we have created sets up a basis upon which if the President makes any attempt to invade the territories of these institutions, then there would be a flag to show that there is something in the Constitution speaking against that. You cannot only invade, but you are required to protect the independence of these institutions.

The Minister for Foreign Affairs (Mr. Wetangula): Mr. Chairman, Sir, the independence, impartiality, dignity, and effectiveness of the institutions named here, the courts and the Commissions, is not a matter for the President. It is a matter for the Constitution and we have provided for it. Why do we want to repeat it? It is not a gift from the President. It is not him to ensure, rather it is ensured by the Constitution itself.

The Minister for Agriculture (Mr. Samoei): Let me persuade, Mr. Orengo to look at the flip side. We are telling the President to ensure impartiality, but he can actually use it as leverage to say that he was trying to ensure that these things are independent. By so doing, he could undermine--- The flip side of Mr. Orengo's argument is that we should keep the impartiality and independence guaranteed by the Constitution. Let us keep away the President.

Mr. Chairman: Now, Mr. Samoei's proposal is that we delete (b) and carry (a). Is that carried?

Hon. Members: Yes.

Mr. Chairman: Can I get a proposal and seconder for the entire Article 151 as amended?

Ms. Odhiambo proposed.

Mr. Mungatana seconded.

Mr. Chairman: Is that carried?

Hon. Members: Carried.

Mr. Chairman: Let us go to Clause 152: The Legislative Functions of the President. Clause 152(1) states:

"The President may initiate a proposed legislation and (a) refer it to the Cabinet with a request that the Cabinet approves submission of that Bill by legislation as a Government Bill."

This is under a Parliamentary system so keep that in mind.

"(b) refer it to a Committee of Parliament with a request that the Committee introduces the Bill as a Committee Bill."

This is really under a Parliamentary format.

"(2) When presented with a Bill enacted by Parliament, the President shall do one of the following: (a) refer the Bill back to Parliament for reconsideration in accordance with Article 136; and (b) refer the Bill to the Supreme Court of Kenya for an opinion on the constitutionality of the Bill in accordance with Articles 124 and 125."

We will look for the equivalent in the Draft. Finally, the President shall be required assent to and sign and the Bill.

"(3) The President shall assent to and sign any regulation authorized in terms of an Act of Parliament.

(4) The President shall (a) ensure that public participation requirement concerning the enactment of legislation and regulations have been satisfied and, (b) assigns responsibilities for the implementation and administration of every Act of Parliament to a particular Ministry or Minister.”

Keep in mind that this format is general a Parliamentary one. Could we refer to Clause 136 of the Draft we were looking at? It could have a better formatting.

Let me read that. It is on page 76. It is on presidential assent and referral and states as follows:

“136. (1) Within fourteen days after receipt of a Bill presented under Article 133(3),

the State President shall—

(a) assent to the Bill; or

(b) refer the Bill back to Parliament for reconsideration by Parliament, noting any reservations that the State President has concerning the Bill.

(2) If the State President refers a Bill back for reconsideration by Parliament, Parliament may—

(a) amend the Bill in light of the State President’s reservations; or

(b) pass the Bill a second time without amendment.

(3) If Parliament has amended the Bill, the appropriate Speaker shall re-submit it to the State President for assent.

(4) If Parliament, after considering the State President’s reservations, passes the Bill a second time, by a vote supported in each House by half of all members of the House, without amending it—

(a) the appropriate Speaker shall within seven days re-submit it to the State President; and

(b) the State President shall within seven days assent to the Bill.

(5) If the State President refuses or fails to assent to a Bill within the period prescribed in clause (1) or (4)(b), the Bill shall be taken to have been assented to upon the expiry of that period.”

You need to note that is is a 50 per cent approval and not a super majority. I think a super majority is required for better--- Also note that there are two Houses and not one. Secondly, the assent must be after a two-thirds majority.

Can I get proposals for adoption of this Article plus those two amendments? Let us have proposals for amendments first.

The Minister for Justice, National Cohesion, and Constitutional Affairs (Mr. M. Kilonzo): Mr. Chairman, Sir, I propose that we amend Article 136 in the main draft so that it reflects one Chamber of Parliament. I am talking about 136(4) and 136(5).

Mr. Chachu seconded.

Mr. Kioni: Mr. Chairman, Sir, I propose an amendment to Clause 136(3) which states that (3) If Parliament has amended the Bill, the appropriate Speaker shall re-submit it to the State President for assent. I propose that we remove the word, “appropriate” and wherever else it appears.

Mr. Musila seconded.

Mr. Chairman: Is that carried?

Hon. Members: Yes.

Mr. Chairman: So, can we say that instead of Article 152 here, we adopt Article 136 of the main draft?

Hon. Members: Yes.

Ms. A. Abdalla: Mr. Chairman, Sir, Clause 136 is in relation to the assenting to a Bill while the entire Clause 152 begins with the initiation of a Bill. So, you cannot say that Clause 136 will replace Clause 152.

Mr. Chairman: Please tell us which issues we have not dealt with.

Ms. A. Abdalla: Mr. Chairman, Sir, the issues stipulated in Clause 136 are also in Clause 152(2) with regard to the President assenting to a Bill. However, Clause 152(1) deals with who initiates legislation. You cannot have an equivalent of that in the current draft because in the Presidential System, it is only the President and the Cabinet that initiates. We need to have the drafting taking that into account.

Mr. Chairman: Most of the legislation is Parliamentary. Rarely does the President initiate legislation. So, both will have to be catered for.

Minister for Lands (Mr. Orengo): Mr. Chairman, Sir, on page 84, of the Revised Harmonized Draft---

Mr. Chairman: I know because of the format we are using we are going to fairly disorganized.

Ms. A. Abdalla: Mr. Chairman, Sir, I propose that the current Article 152 be replaced by the wordings in 155 in the Revised Harmonized Draft. We also need to flag the initiation of Bills from Committees and private Members because there is a provision.

Mr. Chairman: Let us have that clarified, Ms. A. Abdalla?

Ms. A. Abdalla: Mr. Chairman, Sir, let us bracket that Article 132 and include it when we are talking about Bills in the legislature and not here. Here we should just replace 152 with 155 of the Revised Harmonized Draft.

Mr. Chairman: I was thinking that you said that we bracket Article 152 to put in all those for redrafting because there are too many issues like the one for assent and so on.

Ms. A. Abdalla: Mr. Chairman, Sir, I am agreeing with Mr. Ruto that we replace the current Article 152 with Article 155 with Revised Harmonized Draft and the Article 132 that Mr. Mudavadi has mentioned will be put in the chapter on legislature for Bills initiated without the move of the Cabinet.

Mr. Chairman: Can that be seconded so that we can move on.

The Minister for Agriculture (Mr. Samoei): Mr. Chairman, Sir, for clarity we are saying that 152(1) in the document we are working on be replaced by Article 155 in the Revised Harmonized Draft and 152(2) be replaced by 136. That is it.

That is carried. Next we go to the decisions of the President in Article 153. Are we agreed? Do not worry about the disorganization, we will clean it up.

“A decision by the President under the authority of the Constitution or any law shall be in writing and shall bear the signature of the President”.

Is that agreed? Can I get a proposer and seconder?

Mr. Kazungu: Mr. Chairman, Sir, I am proposing.

Mr. Chairman: It is seconded so it is carried. We move to Article 154(1):-

This Article applies to a person who holds the Office of the President and who is authorized in terms of the Constitution to exercise the powers of President.

(a) during a period commencing on the date of the first vote in a Presidential election and ending when the newly elected President assumes office or

(b) while the President is temporarily absent or incapacitated as contemplated in Article 167.

The issue here is; those two instances, the President's powers are being limited:-

During a period referred to in clause 1, a person whom this Article applies may not exercise any power of the President referred to or contemplated in the following Articles:-

(a) Articles 151 and 194 relating to nomination or appointment of judicial officers.

(b) Article 197 relating to a complaint leading to a removal of a judicial officer

(c) Article 151 relating to the nomination or appointment of any other public officer who the Constitution legislation requires the President to appoint.

(d) Article 151 relating to appointment or dismissal of a person to represent the Republic of Kenya as High Commissioners ambassadors, diplomatic or consular representatives.

(e) Article 211 relating to the authority to grant a pardon, reprieve offenders or remit fines and penalties

(f) Article 200 relating to authority to confer honors in the name of the people of Kenya.

This is the temporary time between the elections.

Mr. Orengo is proposing and Mr. Ombui is seconding.

Let us move to the Right to Vote and Timing of Presidential Elections.

Article 155, reads:-

“1. The election of the President shall be direct by adult suffrage through a secret ballot and shall be conducted in accordance with this part and with an Act of Parliament regulating Presidential election.

2. An election of the President shall be held-

(a) on the second Tuesday in August and thereafter on the second Tuesday in August every fifth year or be in the circumstances contemplated in Article 164”.

Anybody who has issues with this. We need to bring in the issue of 50 plus one. Does anybody have any amendment to this?

Mr. Mungatana: Mr. Chairman, Sir, I just wanted to invite political thought here. I thought that we should time the Presidential elections after our Parliamentary and not before for the simple reason that we will need the Presidential elections not to influence what happens in the Parliamentary elections. I do not know whether other people think differently. It seems the national assembly elections will be in October and I thought it should be the other way round. The tradition has been December there.

The Deputy Prime Minister and Minister for Finance (Mr. Kenyatta): Mr. Chairman, Sir, I think it is actually important to have the Presidential election first. In fact, it would be a good idea if the Presidential election were to influence--- Why should the Parliamentary election influence the Presidential election?

Mr. Chairman: Let me alert you that in the agreement that we had on number 10 that the Presidential and Parliamentary elections will be held separately but it was flagged for later discussions. So, that is a decision that we have not made. Probably this is the best time. So, can we have a very brief discussion on that so that we can take a decision? Let me hear from Mr. Kioni.

Mr. Kioni: Mr. Chairman, Sir, I would want to propose that elections of the President and those of members of Parliament be held at the same time for two reasons: There is the aspect of the cost to the Exchequer. It would be less if they are held at the same time. Secondly, whichever way whether the Presidential election comes before or after one would be influencing the other. If we do not want to influence the election of the President or otherwise then we do not have a choice other than to hold them at the same time.

Mr. Chairman: Anybody else with a contrary view? By the way the draft also provides for both to be held at the same time.

The Assistant Minister for East African Community (Mr. Munya): Mr. Chairman, Sir, separating the Executive and Parliament completely, I do not agree with it but if that is the direction then it is better to do so.

The Minister for Foreign Affairs (Mr. Wetangula): Mr. Chairman, Sir, I am of the same as Mr. Munya but I want to point out that if this separation is going to hold, there will be

a time where the President will be impeached and his impeached or will die on office or pushed out of office and elections will be held away from the Parliamentary elections. So, we can as well face the reality and provide for separation.

Mr. Chairman: But in the normal course when it is not a special election, what Mr. Kioni said makes a lot of sense.

The Deputy Prime Minister and Minister for Finance (Mr. Kenyatta): Mr. Chairman, Sir, even if a President is impeached or dies in office under the new arrangement the deputy President, vice-President the remainder of the term so there still no election *per se*.

The Minister for Agriculture (Mr. Samoei): Mr. Chairman, Sir, if you are really borrowing a pure system, in the USA, the reason why they are separated is to allow a Senator who is in Parliament and wants to run for President to be able to run and if he loses he retains his senate seat but if you stick to that then no Senator or Member of Parliament will ever run for President because you cannot run for President and Parliament at the same time.

Mr. Chairman: I thought that now they do it. I thought that in the current circumstance that is what they do. Mr. Kibaki was running for Othaya and the presidency at the same time.

We are handling the holding the elections. I just want to confirm that it is indeed possible. The decision is for us to decide whether to hold the elections at the same time or separately. We heard very good ideas from Mr. Kioni. Anybody who has a contrary view let us hear the reasons.

Mr. Mungatana: Mr. Chairman, Sir, let us realize that this Constitution is not just being made for us. There are elite people who understand these things. I am telling you that if we are not going to separate this two elections they will just think that we are electing the same President as before, I am talking for constituents. Let us go out there and be very clear that for the first time in this country we are choosing a chief Executive officer who is going to appoint his own Cabinet and do his own things but not all is lost. If you lost there you are still going to have another chance to choose and check him. It would also be very good for the country if we have one political party nominating a candidate then takes it over. It would help and inform the populace that they need to choose the opposite party as a majority to check effectively on this new power that is enthroned on the State House. I think we need to separate those two so that it can help the nation as a whole.

The Minister for Agriculture (Mr. Balala): Mr. Chairman, Sir, I want to second the proposal by Mr. Mungatana on the separation of the Presidential elections. We should hold the Parliamentary elections prior to the Presidential elections.

The Assistant Minister for Water and Irrigation (Mr. Kiunjuri): Mr. Chairman, Sir, I believe this country is too young for what we are trying to do. We are already

experiencing a type of democracy that has been tried in America for over two hundred years. In fact, most of the countries in African are running away from it. You now want to put cost up and yet we will need Kshs10 billion to do a lot of irrigation in this country for food security. It is a realization that cost alone should be taken care so that in future we can be able to amend. It is not cast in stone that we cannot come back to the Constitution and amend it.

Lastly, we are trying to run away from ethnicity. That will still be another cost of people separating. For example if we go for an election today and depending on how the parties have formed, by the time Kenyans are going to vote for their President, the Parliamentary election will determine the outcome of the Presidential election. So, the people still come up together for a purpose of removing somebody or a particular community. So, I propose due to cost that we hold elections together.

Mr. Chairman: Surely the cost element is very persuasive. It is very expensive to hold elections separately.

The Minister for Water and Irrigation (Mrs. Ngilu): Mr. Chairman, Sir, these elections take place only after five years. It is not every two years like in America. Therefore the country can afford bearing in mind that some of the problems we have gone through in the country are as a result of elections. Even if you went back to 1963 the cost that we incur cannot be compared to what we incurred with the post-election violence. It is much more than having to do to make sure that the country is stable.

Therefore, I propose that we have Parliamentary elections first in February, and have Presidential elections in August.

Mr. Chairman: Hon. Members, we need to take a decision and move forward.

The Minister for Foreign Affairs (Mr. Wetangula): Mr. Chairman, Sir, I want to convince my team leader, Mr. Kenyatta, that the reason as to why we are doing this is to avoid unnecessary and costly conflicts in the country. The convoluted manner in which we held a joint election in 2007 was a wake-up call. We need some clarity in the direction we are going. I want to support hon. Mungatana; that we hold Parliamentary elections, first. We can define the time. Then thereafter, we hold presidential elections. There is no doubt that it is costly, but peace for this country has no cost.

Mr. Chairman: Go ahead and propose, so that we can get a seconder.

Mr. Samoei: Mr. Chairman, Sir, I want to propose that we have two elections. It does two things: It makes an election an election. What precipitate clashes in an election is because it is an all or nothing affair. It is a life and death thing. So, let us remove the life and death element in the election. Let it be about the election of people. You know, it is not a one-time thing.

Kenyans must be used to elections, so that this election fever, which creates a crisis in the country, also disappears.

I am proposing the following: Let us hold the presidential elections alongside the legislature elections of the devolved units. We can then hold the election of Parliament together with the election of the chief Executive of the devolved units, so that there is a balance.

Secondly, let us have the elections in intervals of two years. Let us have the Parliamentary elections first, then after two years, let us have the presidential elections; so that it not all in one year, and we give ourselves time to settle. That is what happens all over the world.

Mr. Chairman: Hon. Samoei, for purposes of clarity, can you separate the devolved units?

The Minister for Agriculture (Mr. Samoei): Mr. Chairman, Sir, let us have the elections of the Legislature separate from the elections of the President.

Mr. Chairman: Since we may be in constant campaign, is it possible to do them separately, but in the same year?

The Minister for Agriculture (Mr. Samoei): Mr. Chairman, Sir, it will be a whole wasted year for no reason. Let us demystify elections. The way to demystify elections is to have them as often as is practically possible.

Mr. Ethuro: Mr. Chairman, Sir, I really want to plead with my colleague. An election in this country is an election. It does not matter whether it is an election for councillors. The MPs, the President and everybody else is in it, and it consumes. So, when you talk about separate these elections, I see a situation where we are going to expend a lot of time and resources every year on electioneering. Hon. Musila told us that when the Armed Forces recruit, they do so at the same time the recruits go to different units. We are "recruiting" both the President and MPs to go to separate places. So, I want to do elections once and for all.

Mr. Ruto: Mr. Chairman, Sir, I want to concur with my friend, Mr. Ethuro. Even when there are by-elections, even councillors get involved. Even currently, in the election of a councillor in Bungoma, or in very far flung areas, we cannot separate this business. Politics is politics. The point I want to put across is: Let us do elections once and move on. There is nothing that kills us in elections. The issues that kill us in elections are the election nonsense that we normally sell across the country.

We can choose to have a peaceful country, but we are not going to say "let us have separate elections, so that we can have a peaceful country." I suggest that we stagger these elections and use Kshs10 billion in every election.

Ms. Karua: Mr. Chairman, Sir, currently, through leakage, we probably lose upwards of Kshs50 billion every year. Talking about the cost of democracy is totally out of place. Our security and continuity as a nation is more important than money. I am proposing two separate elections. This is a new beginning. I would begin with the Presidential election in August. I would go to December for the other elections. Why December? You are picking February. You are forgetting that our polling stations are the schools. Therefore, you need a school holiday.

Secondly, we are nurturing democracy in the parties for the first time. We are trying to institutionalize our parties. The momentum that the presidential election will have built in August will not have completely dissipated if we are going towards elections in December. I want to draw hon. Members' attention to the fact that we will be having not less than four elections: The elections of the President, Members of the National Assembly, Devolved Governments, and Women Seats. They are going to be four ballots. We can separate those ones to be in two lots. We can have the Presidential elections plus something else, or three of them to go together later; that would be a good thing. We can also separate them to be sworn in after a month or two months, to give way to any litigation that may be there.

That would be about six months. So, by the time you are doing the second election, you are through with the mark of the past. That is easy, and it will help us.

The Assistant Minister, Ministry of State for Defence (Maj-Gen. Nkaisserry): Mr. Chairman, Sir, what hon. Karua and hon. Samoei said is very important. We should not bring the issue of cost here. We have separated Parliament and the Presidency. Therefore, we should separate the two in totality. The issue of presidential elections taking in August will save time. In the presidential elections, only a few people will be campaigning, and whoever wins will be sworn in a month thereafter. We could have the presidential and senate elections together, or the devolved units, or whichever. The Parliamentary and regional elections can go on together in one day, and there will be no problem.

The Deputy Prime Minister and Minister for Finance (Mr. Kenyatta): Mr. Chairman, Sir, I am still not convinced. I still think we should hold on the basis of having one election. Even if we were to say that we are going to have two elections, we should have the national election and election for the devolved governments. We should have an election at the national level, and then an election for the devolved units, because those two go together. We must also be sensitive about costs.

We must also understand, as we move towards strengthening democracy, that what is important is to also strengthen political parties. Political parties must ride beyond an individual. As a political party, you must be going to an election because you have a manifesto – a set of beliefs, principles and policies that you are selling to the people. If we are going to try and separate the elections, what is going to happen? We must be realistic. What are we trying to move away from in this country? We are trying to move away from the politics of personalization, because that is what brings a lot of the problems that we have. Another thing is the so-called “euphoria”. We need to come to a position where we stabilize our political environment where people vote more or less on

political lines based on some concrete principles. That is not going to be possible with the system that we are now proposing. We will continue to have the personality culture. It is the personality culture that has actually not done very good for this country, and we have seen it.

So, if we have to have two elections, let us deal with the devolved elections, and deal with the national elections, so that we can be able to campaign on programmes, and not on personalities.

Mr. Kioni: Mr. Chairman, Sir, I do not agree with the argument that we should not pay attention to cost. If there is no money to help us move on with these elections, we will not even have an election. So, the issue of cost is very important. Again, I do not think it is fair for us to base the argument on the fact that we have money that is being stolen or lost in this country – that since we have money being lost, we should not become prudent in the way we spend the little money that is not being lost. I know that democracy is expensive. It is important that we be careful about the aspect of costs.

We are also talking about devolution and issues of devolving resources down to the people. I do not know how much money we would be expecting to get to the devolved units in a particular year. We need to pay attention to this aspect. I am told that every election takes about Kshs10 billion. So, this will require twice as much. A sum of Kshs20 billion is not little money.

Another important thing that is in my mind is this: When we have an election of the President after that of Members of Parliament, what would happen? It is very easy for Members of Parliament to just sit and say: "This is the President." That will be the person you will move out and campaign for. It is democracy. One may not be denied that, but I think it is also a form of rigging. You can actually plan to rig elections through the legislature.

Finally, there is the aspect of a bit of selfishness. If you are running in an election, you still want another opportunity to run in the event that you lose on the other forum. I would want you to make up your mind. You are running in the presidential elections, because you have confidence in what you are doing, and not because you want to keep trying and treating us to some games.

So, I am still persuaded that the elections should be held at the same time.

Mr. Chairman: Hon. Members, let us limit ourselves to what has not been said.

Mr. Mungatana: Mr. Chairman, Sir, in this presidential system that we are trying to adopt, we are also not inventing the wheel. Let us look at other systems that have presidential systems, or even systems that have married presidential systems with Parliamentary system, but they are electing their presidents directly.

In our own neighbourhood of Rwanda, they hold it differently. In Sri Lanka and in the USA, and every other place where the president is the CEO in the manner in which we are creating, they hold the presidential elections separately from Parliamentary elections. I want to persuade the Committee that if we have decided that we are creating this president, who is going to be the CEO of this country, and giving him those powers, we may have understood the matter here; but let us now, practically, give it to the people, so that they can also understand that these are different elections. In fact, we are creating two separate institutions.

Mr. Kazungu: Mr. Chairman, Sir, I think we are moving in the wrong direction, because Kenya is a young democracy. It is true that democracy is expensive, but we cannot start walking before we crawl. Let us crawl first. So, I am urging my colleagues. We have adopted the presidential system, but it is important that we also adopt a system of election that ties with the presidential election.

As we speak, we do not have money for the referendum. We are just beggars. The Americans have come forward to help us. So, we need to have the two elections together. By doing so, we will be reducing the cost to the taxpayer.

The Assistant Minister for Water and Irrigation (Mr. Kiunjuri): Mr. Chairman, Sir, let us not apply democracy selectively. If it is true that we want to do the elections separately, let us look for those countries with systems of governments similar to the one we have adopted, like the USA, and see how far they separate the elections and what informed that decision. There must be a basis for separating the elections. Otherwise, elections are elections. Kenyans must be anxious.

The Assistant Minister for Water and Irrigation (Mr. Kiunjuri): It is an election. Every time we get to an election mood, Kenyans will be anxious and we are talking of a situation where when we start campaign, because if a Parliamentary election takes place in August, we are talking of three months then we start campaigning again. In every election year, we start campaigning six months earlier and the country is in a campaign mood and when we stop after electing the Members of Parliament, we start another six months to go for Presidential. That is one year when Kenyans are anxious. If you remember what happens, first of all, tourism is affected, the stock market is affected and other issues. These things are here with us.

When we talk about the cost that we go through, it is not only the Kshs10 billion that we shall use for the campaigns. It is also other costs. You can imagine where there is tension that can be noted internationally and therefore investors and everybody else keeps off. It is important that if we are separating these elections, either we do them in the same months; we look at other democracies whereby we shall go hon. Samoei's way and separate them for over two years. That depends on whether we are going to change the term of the President, so that we can also look at the Transition Clause, so that we do not have those tensions when the President takes over and another one comes in. So, I propose that we look at other democracies.

The Deputy Prime Minister and Minister for Local Government (Mr. Mudavadi): I think we have made a very critical decision in this. A gap of one month makes more sense because even for transitional arrangements, if we are going to have these elections whether 2012, for the transitional, the gap of one month makes sense. Then the logistics of that is something that can now be worked out by the Independent Electoral Commission. One month is logical. Even then, that is the process under which we can now allow all the concerns that Martha had about schools and even get the election mood of a country ventilated within a month and then everybody calms down. Petitions will still come whether the Presidential petition or whether the Parliament or the devolved units petitions, they will still arise because they are not going to be heard in seven days apart from the exclusive one that is being made for the Presidential. So, I think we could find some meeting point by sticking to a one month separate elections.

The Minister for Lands (Mr. Orengo): Mr. Chairman, Sir, first I want to give an explanation as to why in our current system, these elections are held together although the President has got tenure for five years, but you will notice that whenever Parliament is dissolved, the presidential election ensue automatically. So, this is always a need to have a general election because if Parliament is dissolved, then a Presidential election ensues. Secondly, the president forms his government from Parliament and therefore, it is necessary that whenever there is a presidential election, if he wants to form the government, he will want to form government with the group that has been through an election at about the same time. But if you are going for a pure presidential system, I do not see any worries about staggering these elections.

The one year or two year gap, I would be a little bit opposed to it because if you look at the American system, the tenure for the Senate for the House of Representatives and for the President are very different. The President is four years and the House of Representatives is two years and the Senate six years. So, it is actually justifiable to have those gaps. But if the elections can be held within a period of not more than two months, I think that will be good in the sense that, and I think this is a practical point that the tendency in Kenya is that during an election it is almost that life comes to a standstill. So, if we are holding them two years apart, you will have to give one year of campaign period for the President elections and one year for the Parliamentary elections. In that period, even an elected president will lose an year to concentrate on Parliament elections because he wants MPs who are elected to be people from his party. He cannot run away from those elections. Similarly, MPs would want to participate to make sure that the person elected President is from their party. So, for all practical reasons, you are going to lose two years in which you are carrying out campaigns. So, a separation of two months would be justifiable.

Mr. Chairman: So, propose it then so that we can close it.

The Minister for Lands (Mr. Orengo): I am proposing two months separation.

Ms. Abdalla: Although I support one month, if we are going to move to having separate elections, you must take into consideration the fact that if we are saying that our problem

with the current system is that the winner takes it all and having issues when the margins are so short, we must incorporate the issues of run-off and all that and those who would require more than one or two months. So, the minimum you can have is to have the issues of not only run-off included in that grace period but also the 30 days period where if anybody has a petition to present against the President, they have to present. So, I then propose three months grace.

The Minister for Agriculture (Mr. Samoei): I really want us to be persuaded.

Mr. Chairman: So, let us close it. We are very close.

The Minister for Agriculture (Mr. Samoei): I really want us to be persuaded that if we are going for a separation of two months, there is absolutely no reason for us to separate the two because my reasons for separating these elections are as follows: forget about the costs. We want to institutionalize democracy with a system of checks and balances. We have separated the Legislature from the Executive and we want to avoid issues of one party creating euphoria and running away with everything. Let me give you an example. When I was elected for the first time as an MP for Eldoret North, some councillor in my ward was elected and people were surprised after the elections that they had elected somebody because they did not even notice that she had won because she just came and stood behind my portrait and she was elected. That is how many people get to Parliament through euphoria. We must get the people coming to Parliament on their own right and campaign for themselves. So for purposes of accountability, the people of Kenya must also have time.

If they elect Parliament and the majority is in party X, let them be given a year or two to show, and if Kenyans are not happy with what they are doing, they demonstrate their anger in the presidential candidate that they are going to elect. That way, you will have a balanced system and every party will be striving to do what is good because they know that two years done the road, we will be forced to go to an election and we must demonstrate to Kenyans that we are actually up to the job. So, I am saying that there must be a reason why we separate two. I would go for what was being recommended here, but let us look at other democracies. What is the reasoning behind this separation? I want to persuade us that we are having a new beginning. Let us not be nostalgic about what we have been doing all along. We want to do it differently and let us persuade ourselves that in the interest of having a balanced society and good systems of checks and balances, let us have separate elections and let us go for one or two years and let us have a clear system.

Ms. Karua: But there is one thing we are forgetting. Our own situation and in what kind place we are going to elections in 2012. To begin with, we have a coalition government and a Parliament that has come in through a disputed election. So, what is going to happen is that even the implementation of this constitution and the bringing forth of a new constitution is a renewal of our nation. There is therefore, a serious need to have a Parliamentary election as well as a presidential election. That is why I would go with hon. Mudavadi's suggestion of elections one month apart then whatever mix that comes

thereafter, whether it will be majority from the President's party or from the opposing party, it will now set the stage for our renewed democracy. I am suggesting that if you have the presidential elections the first week of December, then you can have Parliamentary or vice versa because it is the month of December. It will take care of two things.

The fever of elections and the electioneering period will be the same. It will help the parties to unite in their push to take control of the leadership and yet, it will help us separate the balloting and counting of the presidential vote away from the other vote. If we count them together, the perceptions created about rigging will never go away in this country. But if they are separated and the electioneering is together, we are laying a foundation for two separate institutions in the people's minds. Please remember that we do not have a Parliament with which we can go on for another two years. If you say another two years, are you suggesting, because even if we passed the constitution today, we cannot go to elections. We need time to delineate the areas that we are talking about. Are you suggesting that we extend our life? People would come for us physically in that House. So, if we check the reality today, we will see that we need to modify what happens elsewhere by having elections no more than one month apart, the way it was suggested by hon. Mudavadi.

Mr. Chairman: I want us to take a decision.

The Minister for Tourism (Mr. Balala): Mr. Chairman, Sir, you should appreciate the fact that we have to share our experiences and opinions to you. We are seeing prisoners of the past. We do not want to make changes. We want to make cosmetic change. We have magnificent changes and revolutionary changes over the system of Government and here we want to be stuck to the events of 2007. Let us make it very clear that we have changed the system of Government and we should accept that it will be healthy to make sure that there are balances of the system. I agree with hon. Samoei that we separate the two for two years or I propose one year at least so that it gives the incubation of the situation. What is current as Ms. Karua has just said about Kibaki and the coalition government, I do not see it being a problem to extend one more year to Kibaki and lead and then make the situation appropriate.

Mr. Chairman: Two proposals: Let me know which one we will go with. One the issue raised by hon. Karua about extending time, if we are going to adopt any different period of elections, it will have to come in after the other elections and not these elections because I do not think it is tenable to say that we extend the life of Parliament or of the Executive. Let us have that in mind. Secondly, we either adopt hon. Samoei's suggestion of very different years but say that it will come into effect in the other elections and not the coming ones. In other words, 2012, we cannot change the times of the elections. They are set and we are not going to extend the life of Parliament. If we are going to change for 2012, then we have to get the proposal for one month, in which case we can agree on the first week of December and the first week of January as the two dates. The reason why we are looking for the holiday is because we use classrooms as our voting rooms. The other reason is because the five years are ending at that time instead of removing four

months. I want us to make a decision now. We have done the debate and everybody has spoken. Can we agree on separation first? Is separation agreed?

Hon. Members: Yes.

Mr. Chairman: So, can we agree on a one month separation? We will take objections from hon. Samoei and hon. Balala. Ladies and gentlemen, we have to make progress.

The Minister for Foreign Affairs (Mr. Wetangula): If you have one month separation, it is not practical. At the very least, if you want to economical one time, take six months.

Mr. Chairman: Six months is too far.

The Minister for Foreign Affairs (Mr. Wetangula): August December is tenable, but not one month.

Mr. Chairman: Why do you not propose that? Propose that.

The Minister for Foreign Affairs (Mr. Wetangula): Parliamentary in August and Presidential in December.

Mr. Chairman: Is that carried? Hon. Wetangula, can I get a seconder for you?

Mr. Ethuro: I wish to second the proposal by hon. Wetangula that we have Parliamentary elections in August followed by Presidential elections in December of the same year.

Mr. Chairman: Is that carried?

Hon. Members: No.

Mr. Chairman: Ladies and gentlemen, please, we have to take a decision on this matter. We have debated it for close to a hour and we have a lot of work waiting for us. If we fail to convince each other, we must be able to go with the majority. We have agreed to separate them. The first proposal was one month and the second proposal is three months, namely, in August and December. We have to agree to move forward.

The Minister for Agriculture (Mr. Samoei): With a lot of humility, I want to persuade these hon. Members. We have done a tremendous job to separate. I want to persuade us to let me amend hon. Wetangula's Motion and he has given me permission to amend. Let us have the Parliamentary elections in August and the presidential elections in April the next year.

It is necessary for us to institutionalise the separation. It is important for us to listen to each other. There is a lot of merit in separating these two. Once we have separated the Executive from the Legislature, let us institutionalise that separation and make sure that

the elections for Legislature are held separate from those of the Executive. Since we have already gone that direction, it is not too much to ask that we take the elections of the President to April.

Ms. Karua: If we have to have Parliamentary elections first is it that there will be no Cabinet or what will happen? Do not put the chicken before the eggs. We have changed the system. For us to revolutionarize this system, this time round, we have to begin with the Presidential so that that President immediately appoints his Cabinet. As you go to Parliamentary elections, you will have a Government that is separate from Parliament.

Since this is a transitional period—

(Loud consultations)

Ms. Karua: Let me finish. Those in Government have been heard to say, no. They want to have their cake and eat it. They want a Parliament elected. They continue holding as government as we have Presidential elections. This would be so horrible. Mr. Chairman, take us through the sequence. You elect Parliament in August, all goes well. In the meantime, because you must have a government, the old government is serving and purportedly a new system has come in. Then you go all the way to April the next year which is nine months with the old system working. It is therefore, neater to have the reversed sequence. You have appointed a President. He has taken over and has a Cabinet and Parliament comes immediately thereafter. That is why I am sticking to what Mr. Mudavadi suggested that just a difference of no more than a month because this is transition time.

Mr. Chairman: Surely, you must agree that if we have a Parliamentary election in August, then this Cabinet cannot be reappointed because we will go to a different system. So, if we have the Presidential elections before, it would be better. The alternative is that we change these time but they take effect the next election not in 2012 but the next elections. So, they go together this time. You can even separate them for one year.

The Deputy Prime Minister and Minister for Finance (Mr. Kenyatta): You put a proposal on the Table. I do not see why you re-opened that proposal and it--- Currently Cabinet Ministers are also Members of Parliament so they will be subjected to the same election. There is nothing that prevents clauses to start operating within that particular election.

Secondly, even the President himself is actually only there for less than three months. So, we are actually talking about a transitional period. The Ministers can be appointed by the President for his three months to conclude the term. There is nothing that stops that from happening because those provisions are legally there.

Consequently, I want to go to the proposal which had already passed that we have our Parliamentary elections in August and then our Presidential election in December. I think that is quite clear.

Mr. Chachu: Ms. Karua made a proposal which was quite convincing. I have not heard from the other side. She clearly stated that since we have separated the Executive and Legislature, let us have Presidential elections, the President forms his own Cabinet, there is a Government in place and later on Parliamentary elections are held. If we have a situation whereby we have Parliamentary elections, the President is only there for three months, who will vet his Executive. I strongly support Ms. Karua's proposal.

Mr. Chairman: Everybody has given his/her view and we will not hear anything new. So, no more debate. We need to take a decision together. Can we go with the decision we have already taken? What we need to agree on is whether to hold these elections together or separately. Both of them are workable. When you say separately, three or six months are all workable. It is just that we need to agree on one. I will make two proposals: If it is this heated, we can put in our transition mechanisms that that issue of holding them separately does not come into effect until the election in 2017.

Hon. Members: No!

Mr. Chairman: Listen, it is just a proposal! Mr. Balala, you have one view. You do not want to accept other people's views. Why should we accept yours. We need to move forward. We have two proposals. We have agreed on the separation. Have we agreed on the three months?

Hon. Members: Yes.

The Minister for Agriculture (Mr. Samoei): No!

Mr. Chairman: Mr. Samoei, you are the only one who is saying no, not everybody.

Ms. Karua: I am also saying, no.

Mr. Chairman: We can take objections. Do we agree on three months or one month? We have to take a decision.

Ms. Karua: Let us have some time out.

Mr. Chairman: No time out. That is running away from a decision.

The Deputy Prime Minister and Minister for Local Government (Mr. Mudavadi): I do not know what simpler language I can put it in, but I am pleading with the Committee that for purposes of where we are going, because it is a transition, let the first election be within a space of one month. It will be practical. Then the subsequent one, we shall take into account the fact that it is staggered on the three month basis.

I wish to propose that for purposes of the transition, the next immediate election should be held within a space of one month. The subsequent elections then should take into account the three month differential that has been proposed by the Committee.

The reason---

Mr. Chairman: You do not need to add the reasons. The reasons are what we heard all of us. We have to move in one direction please.

The Deputy Prime Minister and Minister for Local Government (Mr. Mudavadi): Mr. Chairman, Sir, I want to be a little bit more pragmatic. If I were the President today and I come from ODM and you are suggesting that I shall be there for an extra three months before we go for the elections, obviously you are creating immediately, that as an incumbent, I will try to do everything possible to facilitate the succession by somebody from my party. Surely, we should not allow any such move.

Mr. Chairman: Could we get a seconder?

Ms. Karua: I second that proposal, Mr. Chairman, Sir.

Mr. Chairman: Is that carried?

Hon. Member: Yes.

Mr. Chairman: Anybody who has a different objection will record the objection. Could I get a proposer for Article 145 as amended?

Ms. Karua: I propose adoption of Article 145.

Mr. Kioni: I second.

Mr. Chairman: That is carried as amended. Let us have a ten minutes break then we will come back to deal with qualifications of election of the President.

(The Committee adjourned briefly at 4.25 p.m.)

(The Committee resumed at 4.50 p.m)

Mr. Chairman: We need 12. Anyway, on the house keeping matters, I am thinking that why do we now transfer to the Revised Harmonised Draft because generally they seem to be the same and this one is not helping us that much also. So, from 159, "Qualifications and Disqualifications for Election as President", page 85. Are we together? Can I first of all alert you that at almost 5 o'clock we have to finalise all the other key chapters and they are all very emotive and we only have tomorrow's half day which has already has transitional mechanism and everything that we have been bracketing. So, I need your support. If somebody has spoken on it, we need decisions. Let us kindly move forward.

159 (1) states: "A person qualifies for nomination as a presidential candidate if that person---

The Minister for Water and Irrigation (Mrs. Ngilu): Mr. Chairman, I really wanted to bring a motion to re-open the previous chapter that we have been discussing. The one of Elections, Separation of Parliamentary and Presidential Powers. This is because it would appear that we have not quite agreed or reached a consensus on it. I am saying that it is very important that we build a consensus on this.

Mr. Chairman: Can we then do that tomorrow? This is so that we move forward together.

The Minister for Water and Irrigation (Mrs. Ngilu): Okay. Fine.

Mr. Chairman: So, Chapter 159 (1) states: "A person qualifies for nomination as a presidential candidate if (a) is a citizen by birth (b) is qualified to stand for election as a member of the national assembly and (c) is nominated by not fewer than 10,000 voters from each of the majority of the counties". Minister for Justice!

The Minister for Justice, National Cohesion and Constitutional Affairs (Mr. M. Kilonzo): Mr. Chairman, I would like to propose with your permission that 159(1) (c) be deleted and be replaced by "he is nominated by a political party".

Mr. Chairman: It is seconded by hon. Kioni. Is that carried?

Hon. Members: Yes.

Mr. Chachu: Since you have agreed that we are going to have independent candidates, would that not be limiting?

Mr. Chairman: No! First of all, did we agree that an independent candidate was for MPs or for both MPs and the President?

Mr. Chachu: It can be for any elective position.

Mr. Chairman: Fine. So, can you propose in that fashion?

The Minister for Justice, National Cohesion and Constitutional Affairs (Mr. M. Kilonzo): Mr. Chairman, I would like to propose that (c) be deleted and replaced by "is nominated by a political party" and new (d) "or he is an independent candidate".

Mr. Chairman: Now, if you say that and one million people say they want to run for President, the Interim Independent Electoral Commission (IIEC) might be bound to print all their ballots. What happens? How do you stop them?

Ms. Abdalla: Mr. Chairman, I am worried about the independent candidate being allowed to be Presidential candidates. The reason why we can delete the 10,000 votes from each county is that our current Political Parties Act requires that for you to exist as a political party you must show proof that you have a certain threshold in each district. So, you can delete that for persons nominated by a political party but you must have a threshold for the independent candidate. Then the next question you must ask yourself is: As an independent Presidential candidate, what platform are you selling to run your Government?

Mr. Chairman: That is between you and the voters but the threshold is important.

Ms. Karua: Mr. Chairman, let me suggest "or an independent candidate nominated but not fewer than 1,000 voters in a majority of the counties".

Mr. Chairman: Thank you. Or whatever unit you will use?

Ms. Karua: Whatever the unit will be called? Can we make it then 2,000 from each region like 18,000?

The Minister for Agriculture (Mr. Samoei): Mr. Chairman, I think if we can take (c) to be nominated by a political party or is an independent candidate but then (d) I think we need a threshold for even persons nominated by political parties. This is because we now have almost 100 political parties and some of them are briefcase ones. We do not want a situation where somebody goes and gets a briefcase party. So, I think if we put a threshold of 2,000 in a majority of the counties, I think that is fine.

Mr. Chairman: So, can you propose formally?

The Minister for Agriculture (Mr. Samoei): Mr. Chairman, I am proposing that we have (d) which is going to read "Nominated by not fewer than 2,000 voters from each of a majority of the regions or counties". That is all of them.

Mr. Chairman: That is seconded by hon. Chachu. Is that carried?

Hon. Members: Yes.

Mr. Chairman: Yes.

The Minister for Lands (Mr. Orengo): Mr. Chairman, I may not have a problem with that formulation but I am just worried that we started by declaring that Kenya is a multi-party democratic state and if you have independent candidates and there are places where the consequences of having an independent candidate being President and I am not talking about the National Assembly--- I think if you want Kenya to be truly a multi-party democracy, then I think we have independent candidates for the National Assembly, the regional assemblies, if we are going to have them but for the Presidential

candidate, I think he should be nominated by a political party and that would go a long way in strengthening political parties.

Mr. Chachu: Mr. Chairman, we have made a decision to allow for independent candidates at all levels. First of all, it was not bad to weaken political parties if we feel they are not serving the interests of this country. Actually, I wish we had that clause during KANU's time. There is nothing wrong with that all. If at a certain time, people feel that that party is not serving them, let it be so. When ---- was in the US and at that time independent arose because of --- when he was for the first time and at that time, Americans have moved to the centre. They are no longer interested in right wing kind of politics that the political parties were more or less adapting at that particular time and it has served them very well since then. So, there is nothing wrong weakening political parties if it is necessary for this country to move on.

Mr. Chairman: Can we proceed then?

The Assistant Minister of State for Defence (Mr. Musila): On a point of order, Mr. Chairman. I am just wondering. Is that all with qualifications?

Mr. Chairman: No, we are continuing.

The Assistant Minister of State for Defence (Mr. Musila): No, but I thought you said we go to (2) because we have not provided for (h).

Mr. Chairman: We said that a person is qualified to stand for election in the National Assembly. So, anybody who is qualified to stand for election in the National Assembly. So, age, bankruptcy and all those as per---

The Assistant Minister of State for Defence (Mr. Musila): So, we can get an 18 year old?

Hon. Members: Yes.

The Assistant Minister of State for Defence (Mr. Musila): Not 35?

Hon. Members: Why not?

Mr. Chairman: So long as people elect you. No.2 states: "A person is not qualified for nomination as a presidential candidate is that person (a) owes allegiance to a foreign state (b) holds or is acting in any office as a state officer or in a public office and (c) is a Member of Parliament."

Mrs. Abdalla: Mr. Chairman, I thought that the agreement was that a president cannot serve in another office that is a MP but you can be a MP, run for presidency and if you win, you resign your seat.

Mr. Chairman: Can you propose to delete?

Mrs. Abdalla: I, therefore, propose the deletion of (c).

Mr. Chairman: seconder? Seconded by hon. Musila. Is that carried?

Hon. Members: Yes.

Mr. Chairman: Okay. Three. Clause 2(b) shall not apply to (a) The president and (b) the Deputy-President". Anybody with a problem?

The Minister for Agriculture (Mr. Samoei): Mr. Chairman, I think this (b) has to be clarified. We want a situation where the Ministers who will be serving in the government at that time also have an opportunity to run. This is like if we have heads of regions who want to run, they should also have an opportunity to run. We should not make running for presidency such an impossible task. So, we should have a category of either that or we say that if you are in a certain office, you resign that office just the way like a MP so that we do not give special treatment to a few people and leave the rest hanging. Two, on 159 (2) (b), we should delete (b).

Mr. Vice-Chairman: Is that a motion to delete?

The Minister for Agriculture (Mr. Samoei): Yes. I am moving a motion that we delete 2(b).

The Minister for Foreign Affairs (Mr. Wetangula): Mr. Vice-Chairman, having removed (c), you may recall that under the Public Ethics Act, even a MP is described as a public officer. So, we should delete it and I support the motion since it contradicts.

Mr. Chairman: Yes but maybe you need to look at page 170 of the draft to see what state offices we are talking about. So, anybody serving in those offices are state officers.

Mr. Vice-Chairman: When you hold those offices, you become a state officer.

Mr. Chairman: State officer is defined as a person hold a state office established by this constitution established and designated by such legislation. So, the effect I am told would be that a judge would be running for---

The Minister for Agriculture (Mr. Samoei): Mr. Chairman, I think let us keep the 2(b) if the state officer has been defined but now 2 (c), we should exempt MPs because they are politicians and any other category we think should be exempted and that is the state president, deputy president and MP. In fact, all the way to MP under the definition. We can then exempt (a) to (e).

Ms. Karua: But a Minister should not be exempted. Remember now they are outside Parliament.

The Minister for Agriculture (Mr. Samoei): Okay.

The Minister for Tourism (Mr. Balala): And governors?

The Minister for Agriculture (Mr. Samoei): Even governors should be given an opportunity to run but they are not listed here as state officers. The state officers are defined and it does not include governors. So, I think they are out. So, let me propose the following. That, I withdraw my earlier suggestion that we delete 2(b) but I then propose that we delete (c) and go to (3) Clause 2(b) shall not apply to the president, the deputy president and (c) MP.

Mr. Chairman: Is that carried?

Hon. Members: Yes.

Mr. Vice-Chairman: Have we carried 159 (2) then?

Hon. Members: Yes.

Mr. Vice-Chairman: Can I get a proposer for that to carry 159 (2) as amended? (3) has been subsumed.

The Minister for Foreign Affairs (Mr. Wetangula): Mr. Vice-Chairman, what was the philosophy in setting the age limit in our independence constitution? Secondly, what is obtaining in other similar jurisdictions? Are we saying that on attaining the age of majority at 18, you are eligible to run for presidency or at 90, you can still run for presidency? Upper limit is not a problem. What was the philosophy behind the 35 years in the independence constitution?

Mr. Vice-Chairman: Minister, am I hearing you making a proposal from a distance?

The Minister for Foreign Affairs (Mr. Wetangula): Mr. Vice-Chairman, I am not making a proposal. I want to rest my mind on this.

Mr. Vice-Chairman: Okay, Isaac has an answer.

Mr. Ruto: It was meant to protect that office from the importunity (youthful exuberance) of the youth.

Mr. Mungatana: Mr. Chairman, during independence, there were some potential young people who could have been president and this clause of 35 years was put specifically to block these people. I think if we are going to write a new constitution now, let us leave it. If someone is able to elect you and they think you can win, let them be locked by natural elimination process. Let us not revisit that.

Mr. Vice-Chairman: Thank you. That was not a motion on the floor. Anyway, can I get a proposer for adoption of 159 as amended? Can we move on? Hon. Samoei proposes and hon. Noor seconds. Is that carried?

Hon. Members: Yes.

Mr. Chairman: I have just invited the press briefly. They say they need to meet their deadlines. It is basically a brief statement to tell them the chapters we have covered. We told them this morning that we will meet here and we indicated to them all the things we covered this morning.

Mr. Vice-Chairman: Meanwhile, let us go on. We are moving to 160. The procedure is that if one candidate for president is nominated that candidate shall be declared elected as president. 160, page 86. As soon as we finish this business then we will move on.

(Press Conference)

(The Committee resumed proceedings)

Mr. Vice Chairman: So, okay, that is carried then. Is part “c” is fine? 8 (c)? Can I get a proposer for the adoption of 8 as amended?

Yes, hon. Samoei proposes and hon. Mungatana seconds. That is carried!

Part 9 – A new Presidential Election under Clause 5 “b” shall be held within 60 days – that is two months – of the date set for the previous Presidential Election. Am I hearing a proposal for amendment? 5 (b) is the one for the run-off.

Ms. Karua: Mr. Vice Chairman, Sir, for the run-off, two months is okay.

Mr. Vice Chairman: 5 is on run-off.

(Loud consultations)

“(5) If no candidate is elected, a fresh election shall be held within thirty days of the previous election and in that fresh election, the only candidates shall be---“
Yeah, so there is a drafting incoherence there. So, we get rid of 9.

The Minister for Justice, National Cohesion and Constitutional Affairs (Mr. M. Kilonzo): Mr. Vice Chairman, Sir, I propose the deletion of Article 160 (9).

The Assistant Minister for Defence (Maj-Gen. Nkaisserry) Seconded

Mr. Vice Chairman: Thank you very much. Is that carried?

Hon. Members: Yes.

“(10) Within seven days of the presidential election, the chairperson of the Independent Electoral and Boundaries Commission shall—

(a) declare the result of the election; and

(b) deliver a written notification of the result to the Chief Justice and the incumbent State President.”

Mr. Vice Chairman: Thank you very much. Is that carried?

Ms. A. Abdalla: It is carried.

Mr. Vice Chairman: Am I hearing Ms. A. Abdalla proposing?

Ms. A. Abdalla: Yes.

Mr. Vice Chairman: Secunder?

Hon. Munya seconds.

Ms. Odhiambo: Mr. Mungatana is there seconding.

Mr. Vice Chairman: Hon. Mungatana seconds.

Thank you.

Yes, William?

The Minister for Agriculture (Mr. Samoei): Mr. Vice Chairman, Sir, I do not know--- Well, this may be trivial. But why the incumbent President; why not the Speaker on that particular part “b”?

Mr. Vice Chairman: The fellow deserves to be notified.

The Minister for Agriculture (Mr. Samoei): Okay. What about the Chief Justice?

Mr. Vice Chairman: And the Chief Justice for purposes of swearing; the incumbent for purposes of preparing to exit.

Let me get a proposal to adopt Article 160 as amended.

Ms. A. Abdalla: I propose.

The Minister for Foreign Affairs (Mr. Wetangula): Mr. Vice Chairman, Sir, if the incumbent is running for a second term, what is the rationale of delivering the result to him? I think it should be delivered to the Chief Justice and the Speaker.

Mr. Vice Chairman: But whether he is running or not, he is still the President of the Republic! He has to be notified formally!

The Minister for Foreign Affairs (Mr. Wetangula): Telling him that---

Ms. A. Abdalla: I propose.

You have just lost an election. You could add the Speaker there, if you so desire.
Proposal for adoption of Article 160?

Ms. A. Abdalla: I wish to propose for the adoption of Article 160 with the replacement where the word "State".

Mr. Vice Chairman: Thank you. A Secunder?

Hon. Mungatana seconds.

Questions as to validity of presidential election

"161. (1) A person may file a petition in the Supreme Court to challenge the election of the State President-elect.

(2) The petition shall be filed within seven days after the date of the declaration of the results of the presidential election.

(3) The Supreme Court shall, within fourteen days of the filing, hear and determine the petition and its decision shall be final.

(4) If the Supreme Court determines the election of the State President-elect to be invalid a fresh election shall be held within sixty days of the determination."

Yes, hon. Mungatana?

Mr. Mungatana: Mr. Vice Chairman, Sir, I was thinking that for purposes of consistency, if we suspended the election for a period of one month, why then do we, after the Presidential Elections have been declared invalid by the Supreme Court, wait for 60 days? I think that is too long; it will create anxiety.

So, Mr. Vice Chairman, Sir, I propose that Article 161 (4) is amended to read 30 days.

Mr. Vice Chairman: Thank you. A Secunder?

Ms. Karua seconded. Is it carried?

Hon. Members: Yes.

Mr. Vice Chairman: That is carried.

The Minister for Lands (Mr. Orenge): Mr. Vice Chairman, Sir, there is an issue that Dr. Kosgei brought up about preparation for an election; this is one election coming after

another. Now, if you are going to prepare ballot papers and prepare the election machinery and all that, do you think 30 days will be enough? I do not think it will be enough!

Mr. Vice Chairman: And the official campaign period, because this will be a fresh election?

Yes, hon. Wetangula?

The Minister for Foreign Affairs (Mr. Wetangula): I agree that 30 days will not be enough because this is different from where a candidate dies. Because you then only give the aggrieved part time to organize and get another candidate. But here, once the election is annulled, you will go through the whole process of nomination up to elections, and I think 30 days is inadequate. Let us just take 60 days.

Ms. Karua: Mr. Vice Chairman, Sir, I have no quarrel with all that. My problem is, an election has been annulled and remember there was a purported winner; that is why there is a challenge in court. Therefore, there is uncertainty; the term of the incumbent has ended. We will need to provide what happens in the meantime. You see? What is going to happen in the meantime? And there is need to get on over with this business. So, you may need to treat it specially and to give it the 60 days. If not 30, we give it no more than the 60 days because it is a repeat.

Mr. Vice Chairman, Sir, I am proposing that it be within 60 days.

Mr. Vice Chairman: Do you then propose the adoption of Article 161?

Ms. Karua: I propose the adoption of Article 161 and for us to think about what happens.

(Seconded by Mrs. Noor)

Mr. Vice Chairman: Article 161 is carried.

Ms. Karua: (Off record)

Mr. Vice Chairman: That is the presumed. That is a constitutional abeyance; it is a constitutional silence.

I think we are good, as it is.

Mr. Mungatana: Mr. Vice Chairman, Sir, that lacuna is already taken care of under 163 (2) where the period that the State President serves after an election of a new State President and before the swearing in of the new State President is not part of the term of the outgoing State President. So, he will still continue.

Mr. Vice Chairman: Thank you, hon. Mungatana.

We move to Article 162 - Assumption of office of State President.

“162. (1) The swearing in of the State President-elect shall be in public before the Chief Justice, or, in the absence of the Chief Justice, the Deputy Chief Justice.”

We removed the Deputy Chief Justice. So, we will do that amendment.

“(2) The State President-elect shall be sworn in on the first Tuesday following the fourteenth day after the date of the declaration of the result of the presidential election unless the result is challenged under Article 161.

(3) If the result of a presidential election is challenged under Article 161 but the Supreme Court upholds the result of the election, the State President-elect shall be sworn in on the first Tuesday following the seventh day after the Court’s determination.

(4) The State President-elect assumes office by taking and subscribing—

(a) the oath or affirmation of allegiance; and

(b) the oath or affirmation for the execution of the functions of office, as prescribed in the Third Schedule.

Yes. Ms. A. Abdalla?

Ms. A. Abdalla: (Off record) I refer you to Article 162 (2). I would like to suggest that we condense Article 162 (2) and (3) so as to have the swearing in taking place on the first Tuesday following the 28 days instead of seven because that 28 days would have taken into consideration the seven days for petition, the 14 days for the judges to make their ruling and then you give them another 7 days for preparation for the swearing in. So, that means that you do not need part 3 if you put 28 days.

Mr. Vice Chairman: Can I get a seconder?

Hon. Balala seconds.

Okay, is that carried? That Articles 163 (2) and (3) be collapsed into one and the period be raised to 28 days.

Mr. Mungatana: Mr. Vice Chairman, Sir, just for--- I do not know, it is just a thought. Do you not think we should include there a provision for Parliament to prescribe or to put an Act of Parliament to describe that ceremony properly so that there is no doubt? Or should we just leave it to the Cabinet Office? Because it just cannot be that the President goes there and he is sworn in by the Chief Justice; there must be a---

Mr. Vice Chairman: Just the Motion, let the proposal for us to add a clause.

Mr. Mungatana: I propose, Mr. Vice Chairman, Sir, that we add to Article 162 (5) that:
“Parliament shall enact legislation to provide for a proper coronation ceremony”

Mr. Vice Chairman: Ascension to office!

The Minister for Tourism (Mr. Balala): Mr. Vice Chairman, Sir, I want to second hon. Mungatana's legislation aspect of the ceremony. We have been actually very poor in ceremonies. And when you talk about the presidential ceremony of swearing in, Ministers and not only that, even ambassadorial ceremonies! If you look at the ambassadorial ceremonies when they present their credentials in Kenya, they go three or four of them, lined up. But when you go to other countries, it is actually with a proper arrangement of horses and--- Yes, it is a whole process and ceremony! I support the legislation so that it becomes a ceremony of its own.

Mr. Vice Chairman: Okay. Thank you.

Ms. Karua?

Ms. Karua: Mr. Vice Chairman, Sir, I do not see how we can legislate for a ceremony of swearing in. The office holder who is coming in is the one now to determine the proportions of the ceremony.

Mr. Vice Chairman: But is that not a State Function?

Ms. Karua: It is a State Function, but I doubt that you could legislate that on this and this date, even in legislation, these are the guests you will invite, *et cetera*.

Mr. Vice Chairman: You do not have to go into the number of *sufurias*.

Ms. Karua: I have serious doubts and I am yet to see where it is prescribed.

The Minister for Agriculture (Mr. Samoei): Mr. Vice Chairman, Sir, we should have the benefit of the past. You will remember in 2002, those of us who were in KANU tried to come to Uhuru Park for the swearing in ceremony and it was impossible! In fact, it was a mess in Uhuru Park! There was clear mechanism of doing that particular exercise. In 2007, again, Mr. Vice Chairman, Sir, it was also---

(Loud consultations)

Mr. Vice Chairman: Order, please! Order, Ms. Odhiambo!

The Minister for Agriculture (Mr. Samoei): So, I think to eliminate this guess work in terms of how this happens, let us go by what hon. Mungatana has proposed so that it is a State Ceremony that is not about individuals; and it is not for me to decide what should happen in those kind of things.

Mr. Vice Chairman: Let us listen to Dr. Kosgei on this one before I give hon. Mungatana a chance.

The Minister for Higher Education (Dr. Kosgei): Mr. Vice Chairman, Sir, in 2002, had a specific plan borrowed from other countries and, by the way, almost every country I

know of has a ceremony for swearing in a president. In 2002, the excitement of the people plus the suspicion that the power may not be handed over caused the chaos that we saw. But, as a country, we really ought to have a proper ceremony so that people know exactly what is going to happen and that will eliminate a lot of things. That, really, for a lot of countries and it is part of what we prepared in 2002 but could not take place, was a proper handing over of the baton for the Commander of the Armed Forces. That needs to be done properly.

But for the other one of the ambassadors, Mr. Vice Chairman, Sir, it is not true that we are the only country that swears in ambassadors or accepts credentials in this manner. I will tell you; the United Kingdom is done--- It is true, there is a horse-drawn carriage, but you only see the Queen almost alone with your staff and just the Chief of Protocol; even the Foreign and Commonwealth Office is absent. If you are in Dublin, you inspect a Guard of Honor and you have outriders. If you are in Switzerland, they do it almost the way we do. If you are in the US, actually, they would accept credentials from 8 or 10 people all at once without even an individual handing over their papers. So, we might want to design ours, but let us not say that Kenya does not have one; we do!

Mr. Vice Chairman: Okay, this is not a contentious issue; I want us to move forward. Do we provide for legislation?

Hon. Members: Yes.

Mr. Vice Chairman: Okay, that is carried then.

We had not adopted part 4;

“(4) The State President-elect assumes office by taking and subscribing—

(a) the oath or affirmation of allegiance; and

(b) the oath or affirmation for the execution of the functions of office, as prescribed in the Third Schedule.”

Is that carried? Can I get a proposer? Hon. Wetangula proposes. Hon. Kioni seconds.

I want someone to propose adoption of Article 162 as amended.

proposes; hon. Wetangula Seconds.

Article 162, as amended, is carried.

Article 163 - Term of office of State President

“163. (1) The State President shall hold office for a term not exceeding five years beginning with the date of assumption of office.

The Deputy Prime Minister and Minister for Local Government (Mr. Mudavadi): Mr. Vice Chairman, Sir, on Article 162 (1), we just said that in the absence of the Chief Justice and we said we shall amend, but we are not clear on what. We deleted “deputy”, but the question still remains, in the absence of the Chief Justice.

Ms. Karua: If he is absent, there will be someone acting.

Mr. Vice Chairman: So, that is one of those constitutional abeyances.

So, let us move forward to Article 163.

Article 163 - Term of office of State President

“163. (1) The State President shall hold office for a term not exceeding five years beginning with the date of assumption of office.

(2) For the purposes of clause (1), the period that the State President serves as State President after an election of a new State President and before the swearing in of the new State President is not part of the term of the outgoing State President.

(3) A person shall not hold office as State President for more than an aggregate of ten years.”

The Minister for Agriculture (Mr. Samoei): Mr. Vice Chairman, Sir, I propose that we delete part 2. I think part 2 is really meaningless. It is talking about some period there which is neither here nor there. In fact, it is just saying: “is not part of the term of the outgoing State President.” What is that? I think that is just a convolution!

Mr. Vice Chairman: Do you want to explain that?

Proceed, Mr. Mungatana!

Mr. Mungatana: Mr. Vice Chairman, Sir, when you look at that one, it is not there for nothing. Legally, it is like trying to fill a lacuna without saying so, because the thing of saying that it is not part of the term of the outgoing State President is to try to cure anything that says “You are only holding office beyond the ten years” if you were doing ten years or five years, as the case might be. But, at the same time, it is providing for a situation where there is, maybe, an appeal or something has happened and we need a caretaker situation. So, the President can hold that office in a caretaker capacity.

Mr. Vice Chairman: Okay, thank you!

Proceed, Mr. Wetangula; Article 163 (3)!

The Minister for Foreign Affairs (Mr. Wetangula): Thank you, Mr. Vice Chairman, Sir. The correct formulation here should be: “A person shall not hold office as President for more than two terms.” And a term is defined as five years. In the event a President dies in office, and this is in many constitutions, the Deputy President, if he takes over before the first half of the term is over, what he serves is presumed to be a term.

Mr. Vice Chairman: One of the principles we adopted on the running mate is that if the President vacates office, the running mate will serve the remainder of the term. If he serves more than one half of the original term, it will be construed to mean a full term.

The Minister for Foreign Affairs (Mr. Wetangula): Then we should be talking of terms; not 10 years! Because if the running mate was to serve three years of the first term after his boss dies, then he is re-elected---

Mr. Vice Chairman: Propose the amendment, please?

The Minister for Foreign Affairs (Mr. Wetangula): I propose that we amend just to read "two terms."

Mr. Vice Chairman: A seconder for that?

Hon. Ruto seconds. Can we get a proposer for the adoption of Article 163 as amended?

Mr. Mungatana: Mr. Vice Chairman, Sir, in view of the East African situation that we have, and we will probably be moving towards a federation and, probably, in future, we might have a direct election of the President and most likely, the sitting President might be a candidate for the East African Federation. I am just hazarding. Would it not be better for us to give our President, probably, a longer term limit than the ones who are there strategically to plan for that, so that he goes for six years instead of five years?

Mr. Vice-Chairman: Do you have a seconder for that? I am reliably informed the queue is inordinately long and so we could even reduce it to three years to deal with it.

The Assistant Minister for Water and Irrigation (Mr. Kiunjuri): I am wondering where do we then fix the proposal we had - and the one we have right now - mentioned that if the president vacates office--- Is it not supposed to be inserted in 163?

Mr. Vice-Chairman: Vacancy in the office of the president is Article 167(3). Both (a) and (b) address themselves to that possibility so we go back and proceed, we will get to that. Can I get a proposer for adoption of 163?

(Mr. Balala proposed and Ms. Karua seconded)

Thank you very much, 163 is adopted as amended!

Article 164; protection from legal proceedings: Criminal proceedings:-

(1) Criminal proceedings shall not be instituted or continues in any court against the president or a person performing functions of that office during their tenure of office.

(2) Civil proceedings shall not be instituted in any court against the president or the person performing functions of that office during their tenure of office in respect of anything done or not done in exercise of their powers under this Constitution.

(3) Where provision is made in law limiting the time within which proceedings may be brought against a person, a period of time during which that person holds or performs the functions of the office of the president shall not be taken into account in calculating the period of time prescribed by that law.

(4) The immunity of the president under this Article shall not extend to a crime for which the president may be prosecuted under any treaty to which Kenya is party and which prohibits such immunity.

Ms. Karua: Mr. Vice-Chairman, Sir, delete (4) because we have an impeachment process now and, therefore, it will serve for this purpose. Impeachment is for crimes also.

The criminal proceedings shall not be instituted but if the situation is envisaged here--- If it is for an offence which is under international law because we do not want to legislate for international law here - let us assume he has committed a crime against humanity - he will be impeached by Parliament and thrown out and then he can be prosecuted. Do you really need to legislate here for international law? It is the consistency of what we have been doing.

(Mr. Mungatana seconded)

Mr. Vice-Chairman: Is that carried?

Hon. Members: Yes!

Mr. Vice-Chairman: It is carried! Is there any other clause in that Article 164? Can I get proposal for adoption of 164 as amended?

(Ms. A. Abdalla proposed and Mr. Mungatana seconded)

Article 164 as amended is carried!

Article 165 – Removal of president on grounds of incapacity.

(1) A member of the National Assembly, supported by, at least, a quarter of all the members may at any sitting of the Assembly move a Motion for the investigation of the president's physical or mental capacity to perform functions of office.

(2) If it is resolved by more than half of all the members of the National Assembly that the question of the physical or mental capacity of the president to perform the function of the office ought to be investigated, the Speaker shall within two days of the resolution inform the Chief Justice of that resolution.

(3) Where the National Assembly resolves that question of the physical or mental capacity of the president to perform the functions of the office be investigated, the president shall until (a) another person assumes the office or president or (b) the tribunal appointed under clause (4) or (6) reports that the president is incapable of performing the functions of the office, whichever is earlier continue to perform the functions of the office.

(4) The Chief Justice shall, within 7 days of receiving notice of the resolution from the Speaker, appoint a tribunal of five persons of whom three shall be persons qualified to practice medicine under the laws of Kenya; one shall be an advocate of the High Court and one shall be a person nominated by the president.

(5) If the president is unable to nominate the fifth person, that person shall be nominated by (1) a member of the family of the president or (2) where no such member is willing or unable to make the nomination by a close relative of the president.

(6) If the Chief Justice does not appoint a tribunal within the period specified in clause 3, the Speaker of the National Assembly shall appoint the tribunal within 7 days.

(7) The tribunal shall inquire into the matter and within 14 days of the appointment report (a) to the Chief Justice and to the Speaker of the National Assembly if it is appointed by

the Chief Justice and (b) to the Speaker of the National Assembly if it is appointed by the Speaker.

(8) The Speaker shall table the report of the tribunal before the National Assembly within 7 days of receiving it.

(9) The report of the tribunal shall be final and not subject to appeal and if the tribunal reports that the president is capable of performing the function of the office, the Speaker of the National Assembly shall so announce in the National Assembly.

(10) If the tribunal reports that the president is incapable of performing the functions of that office, Parliament shall, if supported by the votes of more than half of all the members of the National Assembly ratify the decision of the tribunal and on ratification, the president shall cease to hold office.

Ms. Karua: This was designed with a Parliamentary system in mind where the Executive is sitting in Parliament. In a presidential system, it is the Speaker who should be appointing the tribunal because these are two separate organs but because it is initiated by Parliament then the Chief Justice should chair. So, we should remove references of the Chief Justice – that is my proposal – in appointment. It is the Speaker who should appoint but because it is Parliament discussing the alleged incapacity, then the other arm, the CJ, should chair to give semblance of a fair process; otherwise I have no other issue.

Mr. Vice-Chairman: Can I get a seconder for that?

(Mr. Wetangula seconded)

Is that Motion carried: That we amend Article 165 to remove any references to the CJ in terms of appointment of the tribunal and that the CJ be a member and chair of that tribunal?

Hon. Members: Yes!

Mr. Vice-Chairman: Is that carried?

Hon. Members: Yes!

Mr. Vice-Chairman: Is there any other issue with that Article?

The Minister for Agriculture (Mr. Samoei): If the process is being initiated by Parliament, we should get another institution so that Parliament does not collude to knock down the president. The issue here is: Supposing the president is actually mad and you have a CJ who wants to protect the president and because he appoints the three doctors, medical practitioners, he can appoint who are compliant, who will come and say the president is okay. How do we cure that?

Mr. Vice-Chairman: Let us look at this a little further before we make this decision.

The Deputy Prime Minister and Minister for Local Government (Mr. Mudavadi): Mr. Vice-Chairman, Sir, I think we can find a cure because we have created a Supreme Court and it is the only court that has the jurisdiction over the petition of the president. So we can develop some synergy here where this process then if, indeed, these people are appointed, perhaps a good mind can be able to marry the situation of the Supreme Court in dealing with this process. The CJ sits there---

Mr. Vice-Chairman: He is the president of the Supreme Court!

The Deputy Prime Minister and Minister for Local Government (Mr. Mudavadi): Mr. Vice-Chairman, Sir, but maybe in that context, I still believe that the Supreme Court, if crafted well, might be the avenue to find an exit point for this.

Mr. Vice-Chairman: Do you want to lead us there Ms. Karua?

Ms. Karua: We again move to the CJ to appoint a tribunal to be chaired by a judge of the Supreme Court, the three doctors to be appointed by the Medical Practitioners Board, you are trying to make it---

Mr. Vice-Chairman: May I just remind us to draw this distinction that this is an examination of the president's capacity and not an impeachment?

Ms. Karua: Yes, that is why I am saying to avoid any collusion because what we are all talking about here is a situation where people collude so when you let the CJ get you what he considers his best judge in the Supreme Court, you do not let him appoint the doctors for you because he has no knowledge of the doctors. You get the Medical Practitioners Board – an outside body – because it is the one which knows all the doctors, to get you three of their best. That process becomes participatory and remember the president's family or himself will appoint one doctor.

Mr. Vice-Chairman: And this advocate?

Mr. Karua: The advocate by the lawyers body; you make it participatory.

Mr. Vice-Chairman: But the appointment is done by the CJ.

Ms. Karua: The CJ because we have now agreed that Parliament should not initiate and then appoint.

Mr. Vice-Chairman: So, let us get this clear: The process is initiated by the National Assembly, the tribunal is appointed by the CJ but the appointees and nominees; one of the MPB, three of them, and then the body responsible for legal practitioners, one nominee and a nominee of the president or his family. And the CJ appoints the chair from amongst judges of the Supreme Court. Ms. Karua, please place that Motion properly now in those terms!

Ms. Karua: I propose that Article 165(4) be amended by providing that the CJ will appoint a member of the Supreme Court as a chairman of the tribunal and he will appoint doctors recommended to him by the MPB, a lawyer recommended to him by the legal practitioners body and the report thereof---

Mr. Vice-Chairman: I just want to alert you that that sums up to (6).

Ms. Karua: And the family so it is the whole of Article 165.

Mr. Vice-Chairman: (3) shall be persons qualified to practice medicine under the laws of Kenya appointed by the MPB. One shall be an advocate of the High Court nominated by---

Ms. Karua: ---the body responsible for the legal profession. And one person nominated by the state president and if he is unable, by his family.

Mr. Vice-Chairman: So that we subsume (5) in (4) (c).

(Off record)

Ms. Karua: That is a family lawyer or doctor or whatever!

Mr. Vice-Chairman: It can be a family shrink, spin doctor or whatever, it is up to the family. The chair appointed from the Supreme Court by the CJ. That rests there! Who chairs?

Ms. Karua: It is better the Supreme Court judge because that---

Mr. Vice-Chairman: If we add the Supreme Court judge that number comes to six. Do you want an even number?

Ms. Karua: It should be an odd number!

Mr. Vice-Chairman: Three doctors, one advocate, one family representative and one judge of the Supreme Court. I want to believe the drafters arrange it in such a way---

Ms. Karua: The judge needs another legal mind, not to be alone.

Mr. Vice-Chairman: The numbers were such as to make it not possible for the doctors to be outvoted, I agree, so you want the doctors as a majority there.

Ms. Karua: Actually seven would be better!

Mr. Vice-Chairman: Mr. Mungatana, please get us out of this rut!

Ms. Karua: Can the family have two people?

Mr. Mungatana: Mr. Vice-Chairman, Sir, I propose that we have an advocate of the High Court and one judge of the Court of Appeal---

Mr. Vice-Chairman: Instead of the advocate?

Mr. Mungatana: No, we are increasing one so that we can have an odd number so that we have one advocate of the High Court and we add one Court of Appeal judge.

Ms. Karua: I think we remove the Court of Appeal because the president's petition goes to the Supreme Court. You can increase the judges of the Supreme Court to be two; one a chair and one a member.

Mr. Mungatana: I am okay with that!

Mr. Vice-Chairman: Two judges of the Supreme Court, one of whom shall be the chair and representing either gender, three medical practitioners--- I want us to make a decision on this one and move on!

Hon. Members: We have made a decision!

Mr. Vice-Chairman: Are you properly instructed, Mr. Nyegenye?

Mr. Nyegenye: Yes!

Mr. Vice-Chairman: Those judges are nominated by the CJ. Now I want a proposal to adopt Article 165 as amended!

Mr. Mungatana: Mr. Vice-Chairman, Sir, this member of Parliament who is supposed to move this Motion, I thought we should put a minimum qualification and I was proposing we formulate it in this manner; that in the absence of the president, in the office of the president for a period of 30 days or an unreasonably long time---

Mr. Vice-Chairman: Where are you? Just carry me with you! Article 165(1), page 88!

Mr. Mungatana: Mr. Vice-Chairman, Sir, I am saying that we just add at the beginning and say: In the absence of the president in the office of the president for a period of 30 days or an unreasonably long time, a member of the National Assembly---

The Minister for Foreign Affairs (Mr. Wetangula): A person could be a lunatic and be everywhere. Just leave it as it is.

Mr. Vice-Chairman: The Clerk has kindly brought to my attention Clause 8, it is just the wording, the Speaker cannot table, and the Speaker can only cause to be tabled. So, the Speaker shall cause to be tabled, that should be part of the amendment. So, do we carry, Article 165?

Hon. Members: Yes!

Mr. Vice-Chairman: Article 165 is carried.

The Minister for Agriculture (Mr. Samoei): If the report of this professional body comes to Parliament and says that the President is mad and Parliament does not vote. What is there to vote for or against, if doctors have the President is mad? Whether Parliament votes this way or the other the man is mad. So, I was questing whether Parliament should actually take a vote. If the report says the President is physically unfit and Parliament comes and votes against that report---

Mr. Vice-Chairman: Hon. Samoei, what are you proposing? The report should bring to Parliament and it should be it.

Mr. Vice-Chairman: Can I read you No.10.

“(10) If the tribunal reports that the State President is incapable of performing the functions of the office, Parliament shall, if supported by the votes of more than half of all the members of the National Assembly, ratify the decision of the tribunal and, on the ratification, the State President shall cease to hold office”.

Parliament only votes if the decision of the tribunal is that the President is incapable but the drafters presume that---

The Minister for Agriculture (Mr. Samoei): How does the voting – the incapability?

Mr. Vice-Chairman: Parliament has to ratify the decision and that vote is the ratification of the report.

The Minister for Agriculture (Mr. Samoei): I have a problem with that.

The Minister for Lands (Mr. Orengo): I think although the doctors may come up with a report declaring the President to be mad or incapable, Parliament has got many ways of receiving information because medical doctors are always not very accurate. There are instances when they have been interrogated and you find that what they are saying or what they are reporting is not quite correct. So, during this process of adoption and action, if there is any other information that may have reached Parliament, it can be placed on the table. It is just a security measure. Removing a President who has been elected by the popular vote, maybe he was elected because he was mad. You never know. Most of the time people who are totally sane never really interest the electorate. You have to be a little mad.

Mr. Vice-Chairman: The fellow may even overcome his insanity in the intervening period. Article 165 is therefore adopted. Let us move on to Article 166:

Removal of State President by impeachment

166. (1) A member of the National Assembly, supported by at least a third of all the Members, may, at any sitting of the National Assembly, propose a motion for the impeachment of the State President—
- (a) on the ground of a serious violation of a provision of this Constitution or of any other law;
 - (b) because there are serious reasons for believing that the President has committed a crime under national or international law; or
 - (c) for gross misconduct.
- (2) If at least two-thirds of all the members of the National Assembly approve a motion under clause (1), the Speaker of the National Assembly shall within seven days convene a meeting of the Senate to hear charges against the State President.
- (3) Upon hearing the charges under clause (2), the National Assembly may, by resolution, appoint a special committee comprising eleven of its members to investigate the matter.
- (4) The special committee shall investigate the matter and shall, within ten days, report to the National Assembly whether it finds the particulars of the allegations against the President to have been substantiated.
- (5) President shall have the right to appear and be represented before the special committee during its investigations.
- (6) If the special committee reports that the particulars of any allegation against the State President have not been substantiated, further proceedings shall not be taken under this Article in respect of that allegation.
- (7) If the special committee reports that the particulars of any allegation against the President have been substantiated, the National Assembly shall, after according the State President an opportunity to be heard, vote on the impeachment charges and the President shall cease to hold office, if at least two-thirds of all the members vote to uphold the impeachment charges.

Okay, can we look at Article 166. DPM first and then we come to Ms. Karua.

The Deputy Prime Minister and Minister for Local Government (Mr. Mudavadi): Mr. Chairman, Sir, there is a very important principle we have just adopted in connect with the question of the tribunal, that the House cannot originate a Motion and then at the same be judge in that thing. So, I think this now begins to bring to fore the importance of a Senate. If we go by the same principle, it now becomes clear that the National Assembly cannot originate a Motion of impeachment where they are the prosecutors and then they are the judges. So, I would really recommend that in this proposal, before we

even talk about the amendment, I think let us agree on the philosophy of the Senate because it is very important, at least on this.

Mr. Vice-Chairman: Do you want us to stop and sort the principle and the Senate or do we move forward and we would deal with the Senate later.

Ms. Karua: You see, it is with respect to the DPM, it cannot be reasonable to suggest that merely for impeachment we can bring a Senate. Yes, the House can be accuser and judge. Impeachment is more of a political and process. It is quasi-judicial and quasi-political. I want to state that in impeachment the Committee investigates just whether that Motion should actually be tabled. Then, the Motion is tabled and the political decision lies with the House. Remember the President is nominated by a political party. So, there are safeguards within that whatever. It is true. But an independent has never any won anywhere. So, I am suggesting that we leave it as it is with the National Assembly. I am proposing all we delete all references to the Senate. We also delete the word "serious" in clause A and substitute it with gross which is what we have been using for the other.

The Deputy Prime Minister and Minister for Finance (Mr. Kenyatta): I want to second Ms. Karua. But on top of it please request, for the sake of making progress, let any issues to do with the Senate be discussed when we get to that particular Chapter. Otherwise, we would stall the process.

Mr. Vice-Chairman: Chair, you had something to say on this.

Mr. Chairman: (*Off record*).

The Minister for Lands (Mr. Orengo): In the past the Congress and Houses of Parliament were considered to be a court. Indeed, cases like election petitions used to be done by these houses.

But I would agree with the Chairman, here that looking at Article 166(1) the violations of the Constitution or any other law, or whether a crime has been committed. Most of the time really, You would not impeach a President unless there are some crime involved. It may be gross misconduct. But most of the time it is because some crime has been committed or a Constitution has been violated. So, I think the presence of the Chief Justice is crucial. Look at Article 166, this proceeding are brought by away of a Motion. A Motion maybe political but when it comes to establishing the evidence as to whether or not somebody has committed serious violation, you need some judicial officers who is a bit temperate to guide the House. I know as a matter of fact, one time when I moved a Motion of no confidence, the debate was nothing to do with the facts. It was really numbers. So, if you have somebody who can remind the House that you may be doing in urging your Motion, but it do not amount to any breach of violation. I think that is important.

Mr. Vice-Chairman: Now, question, where does the Chief Justice preside. Is it in the Committee or in the whole House at the point of voting?

The Minister for Lands (Mr. Orengo): Actual impeachment proceedings.

Mr. Vice-Chairman: I am with you. But there are two levels here. There is the special Committee that does the investigation and then the whole House sits to vote.

The Minister for Lands (Mr. Orengo): You know the special Committee is like they are preparing the case.

Mr. Vice-Chairman: So, the Chief Justice will preside over the House when it is taking the vote. Okay, we need to tie it up and move on.

The Minister for Justice, National Cohesion and Constitution Affairs (Mr. M. Kilonzo): Why you do not need a Senate is that --- leave it out completely because even where they operate they actually keep silent. They are only a jury. So, therefore, I agree that we have the Chief Justice presiding over the actual trial and the Committee is the prosecutor. They are the ones to produce the evidence.

Mr. Vice-Chairman: It is brought to my attention that Article 166(4), whether you want to call a special committee or a select Committee of the House just in terms of the Standing Orders.

The Minister for Justice, National Cohesion and Constitution Affairs (Mr. M. Kilonzo): You can call it an impeachment Committee.

Mr. Vice-Chairman: It seems when you read through the whole Article, impression is created that the actual trying takes place in the Committee. You know, the President is even appearing before the Committee.

The Minister for Agriculture (Mr. Samoei): If we are talking about the President having grossly violated provisions of the Constitution or he has committed crime under international law, I do not think Parliament has the necessary competence to adjudicate on that matter. I think after Article 166(2), if Parliament passes that vote, I think we should then the whole process should now move to the Supreme Court, for the Supreme Court to adjudicate and find out whether the President has actually violated the Constitution. That is where you have the expertise. I am saying that the same way we said that if Parliament decides there is an issue of incapability of the President or his capacity of mind, then we establish a tribunal by the Chief Justice to adjudicate that particular matter. The same way here, once Parliament after Article 166(2), votes saying there is indeed an issue of gross violation of the Constitution or International crime, and then we should send that particular decision and the charges to the Chief Justice for the Supreme Court to decide. They have the necessary competent.

Mr. Vice-Chairman: Hon. Samoei, we hear only that the fundamental distinction here is that the other is the question of incapacity. This one is an impeachment. An impeachment is a tool of the National Assembly to check the Executive. So, I do not know whether you want to rob Parliament of that power.

The Minister for Lands (Mr. Orengo): You know impeachment is also to deal with the issues of immunity. The President could have killed me or shot me in broad day light. But he cannot be tried because he got this immunity provisions. He cannot be tried for a criminal offence. So, if he is impeached and ceases to be President then he can be tried for that particular offence. If he is tried, he has the right to go through the full panoply of courts, from the beginning to the Supreme Court.

Mr. Vice-Chairman: I want us to move forward. Mr. Wetangula you can have the last bite.

The Minister for Foreign Affairs (Mr. Wetangula): Mr. Chairman, Sir, we also leave the President very vulnerable when you have such clauses in the Constitution. If you say he has a crime under national law, what crime? Supposing, a President goes hunting with is friend like Dick Cheney and fires a bullet at ricochets and hits his hunting mate, does that lead to impeachment? I think we should define properly what crimes we are talking about because even a traffic offence is a crime.

Mr. Vice-Chairman: It is "serious" which will be---

The Minister for Foreign Affairs (Mr. Wetangula): In (b) we are only talking of serious reasons for believing, but the crime is not defined. Even crime should be defined.

The Minister for Lands (Mr. Orengo): I was moving towards supporting Moses Wetangula, but I am now retreating from that position. For example, if as a Member of Parliament you are charged with a criminal offence and sentenced more than six months in prison, then you lose your seat unless you succeed in your appeal. Now, six months imprisonment is not even a misdemeanor. It is the lowest of misdemeanors!

As Mr. Samoei is saying, 65 per cent of Parliament will not be mad to pass the impeachment proceedings if there was no serious matter before it. So, I think we better leave it. There is a lot of sanity.

Mr. Wetangula, have a little faith in Parliament. If you do not have faith, then you should not be there.

Mr. Vice-Chairman: I would like someone to propose the adoption of Clause 166 with the following amendments that we have agreed on:

- (1) That "National Assembly" replaces "Senate" wherever it appears.
- (2) That the Chief Justice will preside over the sitting of the National Assembly when prosecuting this matter.
- (3) That the impeachment vote is 65 per cent

An hon. Member: That is already there.

Mr. Chairman: Yes. That is already there.

(4) That 166(1)(a) be amended by replacing the words “serious violation” with “gross violation”

(5) That “Special Committee” be styled as “Select Committee”

Could we get a proposer on record?

(Mr. M. Kilonzo proposed)

(Maj-Gen. Nkaiserry seconded)

Mr. Vice-Chairman: So, Clause 166 is adopted as amended. We now move to Clause 167: Vacancy in the Office of the President. It states:

“167.(1) The office of State President shall become vacant if the holder of the office—

(a) dies;

(b) resigns in writing addressed to the Speaker of the National Assembly; or

(c) is removed from office under this Constitution.

(2) Where a vacancy occurs in the office of State President, the Deputy State President shall assume office as State President and—

(a) where the vacancy has occurred with less than two and a half years left before the date of the next presidential election under Article 158, the Deputy State President shall assume office as State President for the remainder of the term of the State President;

(b) where the vacancy has occurred with more than two and a half years left before the date of the next election under Article 158, a fresh election for the office of State President shall be held within sixty days of the office of State President falling vacant.

(3) Where a vacancy occurs in the office of State President and that of Deputy State President or where the Deputy State President is unable to act, the Speaker of the National Assembly shall act as State President or, if for any reason the Speaker of the National Assembly is unable to act, the Speaker of the Senate shall act as State President.

(4) Where a vacancy occurs in the circumstances contemplated by clause (3), an election to the office of State President shall be held within sixty days of a Speaker assuming the office of State President.

(5) A person who assumes the office of State President under this Article shall, unless otherwise removed from office under this Constitution, act in that office until a fresh election is held and the newly elected State President assumes office.”

Yes, Ms. Karua.

Ms. Karua: Mr. Vice-Chairman, I think the Speaker should get out of this clause. We leave it to the President and the Deputy President. I do not know what happens in other areas in the unlikely event of both perishing all at once. It is the most unlikely event. We would like to see in others what happens.

We remove the Speaker from here. We agreed that this is total separation of powers. It is in Parliamentary System where normally you would bring the Speaker into it.

Mr. Vice-Chairman: We adopted the principle of the running mate taking office and serving for the remainder of the term.

Ms. Karua: It is okay, but could we find out what happens in other jurisdictions? This is because I am proposing that we remove the Speaker completely from this equation.

Hon. Members: The Chief Justice!

Ms. Karua: Let us not move the Chief Justice so easily.

Mr. Chairman: I think in the American system it is the Speaker. The President, the Vice-President and then the Speaker comes third. It is the Speaker of the House of Representatives.

Ms. Karua: So, we leave the Speaker.

The Minister for Foreign Affairs (Mr. Wetangula): Mr. Chairman, Sir, on Clause 167(2)(b), a running mate is a running mate and in the even the President leaves, he takes over. It does not matter what remained of the period. If it is less than half, what he serves as a remainder is counted as a term. If it is more than half, then it is a bonus for him. If he is lucky then he can do other two terms. It is his luck.

Mr. Chairman: We had agreed on that last time.

The Minister for Foreign Affairs (Mr. Wetangula): Mr. Chairman, Sir, so I propose that we delete Clause 167(2) (b).

Mr. Chairman: Can I get someone to second?

Mr. M. Kilonzo seconded.

Mr. Chairman: Is that carried?

Hon. Members: Yes.

Mr. Chairman: We move on to Clause 167(3). It states as follows:
“(3) Where a vacancy occurs in the office of State President and that of Deputy State President or where the Deputy State President is unable to act, the Speaker of the National Assembly shall act as State President or, if for any reason the Speaker of the National Assembly is unable to act, the Speaker of the Senate shall act as State President”

The Minister for Agriculture (Mr. Samoei): Mr. Chairman, Sir, I beg to move an amendment that all the words after “the National Assembly shall act as State President” be deleted.

Mr. Kioni seconded.

Mr. Chairman: Is that carried?

Hon. Members: Yes.

Mr. Chairman: We move to Clause 167(4). It reads:

“(4) Where a vacancy occurs in the circumstances contemplated by clause (3), an election to the office of State President shall be held within sixty days of a Speaker assuming the office of State President.”

Mr. M. Kilonzo has proposed that.

Mr. Kioni: Mr. Chairman, Sir, this number of days may not be enough to prepare for an election.

(Loud consultations)

I withdraw, Mr. Chairman, Sir.

Mr. Musila seconded.

Mr. Chairman: Is that carried?

Hon. Members: Yes.

Mr. Chairman: We move on to Clause 167(5). It states thus:

“(5) A person who assumes the office of State President under this Article shall, unless otherwise removed from office under this Constitution, act in that office until a fresh election is held and the newly elected State President assumes office.”

Mr. Mungatana proposed.

Mr. M. Kilonzo seconded.

The Minister for Foreign Affairs (Mr. Wetangula): Mr. Chairman, Sir, that of the Deputy President will then run the term and that of the Speaker, in case the President and Deputy President leave office. We cannot have an Article styled like this.

Mr. Chairman: It talks about a fresh election.

The Minister for Foreign Affairs (Mr. Wetangula): The Speaker will act. The Deputy President will not act because he will be a President. So, we are not using correct terminology.

The Assistant Minister for Water and Irrigation (Mr. Kiunjuri): Mr. Chairman, Sir, we are assuming too much. First of all, we assumed that the three of them cannot die at the same time. That is why we put a full stop after the words, "National Assembly Speaker". We are talking of a period of sixty days within which anything can happen to the Speaker of the National Assembly. These things can happen! Can you imagine even Al Qaeda bombing the House? I propose that we put enough safeguards in the Constitution.

Mr. Chairman: I am correctly reminded that the office of the Speaker can be replaced very quickly.

The Minister for Lands (Mr. Orengo): I just wanted to remind you about the situation in the USA if it can help. You remember when Kennedy died and Johnson became President, he appointed a Vice-President. He was not a running mate, but because he was going to serve the rest of the term, he appointed a Vice-President. In those circumstances, if Johnson had died in office, the Vice-President would have taken over office. I do not know if that formulation is much better than---

At any time, even if the President dies, the Deputy President can take over. We cannot afford to be careless. You will never find a situation where the President are travelling in the same---

(Loud consultations)

They do it here, but in other places, they take particular caution. In fact, in the USA, the most important thing about the Vice-Presidency is to provide for that. So, he has to be kept away from trouble.

Mr. Chairman: Can I get a proposer for the entire Clause 167?

Mr. Samoei proposed.

Mrs. Noor seconded.

Mr. Chairman: Is that carried?

Hon. Members: Yes.

Mr. Chairman: We move to Clause 168: Presidential Power of Mercy. We had mentioned this earlier.

The Minister for Foreign Affairs (Mr. Wetangula): Mr. Chairman, Sir, did you just bracket the point I raised on Clause 167(5)?

Mr. Chairman: Yes.

The Minister for Foreign Affairs (Mr. Wetangula): Why did you do that?

Mr. Chairman: I thought we had been convinced by---

The Minister for Foreign Affairs (Mr. Wetangula): Mr. Chairman, Sir, Clause 167(5) states:

“A person who assumes the office of State President under this Article shall, unless otherwise removed from office under this Constitution, act in that office until a fresh election is held and the newly elected State President assumes office.”

This whole Article is meaningless! It is only the Speaker who will hold office until a fresh election is held. If it is the Vice-President, he will run a full term. He will not be acting. He is substantively---

(Loud consultations)

We need to formulate.

Mr. Chairman: Clause 168 states:

“(1) There shall be a power of mercy which shall be exercised on the petition of any person by the State President in accordance with the advice of the Advisory Committee referred to in clause (2).

(2) There shall be an Advisory Committee on the Presidential Power of Mercy, which shall consist of—

(a) the Attorney-General;

(b) the Minister responsible for correctional services; and

(c) at least five other members, not being persons in public service or holding state office, as may be prescribed by an Act of Parliament.

(3) An Act of Parliament shall provide for—

(a) the tenure of the members of the Advisory Committee;

(b) the procedure of the Advisory Committee; and

(c) criteria that shall be applied by the Advisory Committee in formulating its advice.

(4) In exercise of the powers conferred by clause (1), the State President may—

(a) grant to a person convicted of an offence a pardon, either free or subject to conditions;

(b) postpone, either for a specified period or indefinitely, the

carrying out of a punishment;

(c) substitute a less severe form of punishment for a punishment;

or

(d) remit the whole or part of a punishment.

(5) The Advisory Committee may take into account the views of the victims of the offence in respect of which it is considering recommending the exercise of the power of mercy by the State President.”

Can I get a proposer and seconder?

Ms. Karua proposed.

Mr. Mudavadi seconded.

The Deputy Prime Minister and Minister for Local Government (Mr. Mudavadi): Mr. Chairman, Sir, if you look at Clause 158(2) (b), it refers to the wrong Article. It refers to the election of the State President and also Clause 168 which actually deals with the power of mercy. There is need to correct that.

Mr. Vice-Chairman: Please mention the right Article.

The Deputy Prime Minister and Minister for Local Government (Mr. Mudavadi): It should be Article 167.

Mr. Vice-Chairman: That has been noted. Let us get a proposal to adopt Clause 168 as amended.

The Minister for Lands (Mr. Orengo): I always say that if God speaks in English, he speaks in the language of King James Version. This power of mercy, do you think there is really a reason to characterize as “power of mercy” rather than “prerogative of mercy”? It is a small point, but---

Mr. Vice-Chairman: It has always been “prerogative”. Even in legal terms, the word is “prerogative”. So, please, propose that amendment.

The Minister for Lands (Mr. Orengo): I propose that the title to Article 168, the words, “Presidential power of mercy” be deleted and replaced by the words, “prerogative of mercy” and any reference to “power of mercy” be accordingly deleted.

Mr. Vice-Chairman: And Mr. Wetangula seconds *mutatis mutandis*. That is now adopted. Who will propose adoption of Clause 168 as amended?

Mhe. Waziri proposes and Maj-Gen. Nkaisserry seconds.

We move on to Clause 169: Office of Deputy President. It states thus:-

“(1) There shall be a Deputy State President of the Republic.

(2) Each candidate in a presidential election shall nominate a person, duly

qualified for election as State President, as a candidate for Deputy State President.

(3) The Independent Electoral and Boundaries Commission shall not conduct a separate election for the Deputy State President but shall declare the candidate nominated by the person who is elected as the State President to be elected as the Deputy State President.

(4) The swearing in of the Deputy State President-elect shall be before the Chief Justice or in the absence of the Chief Justice, the Deputy Chief Justice and in public.

(5) The Deputy State President-elect assumes office by taking and subscribing—

(a) the oath or affirmation of allegiance; and

(b) the oath or affirmation for the execution of the functions of office,

as prescribed in the Third Schedule.

(6) The term of office of the Deputy State President shall run from the date the State President assumes office and shall terminate—

(a) when the person next elected State President assumes office;

(b) upon the Deputy State President assuming the office of State President; or

(c) on resignation, death or removal from office.

(7) The Deputy State President may, at any time, resign from office by notice in writing addressed to the State President and the resignation shall take effect on the date and at the time specified in the notice, if any, or if a date is not specified, at noon on the day after the notice is delivered.

(8) A person shall not hold office as Deputy State President for more than an aggregate of ten years.”

Do we have any proposal for an amendment? Yes, Ms. Karua!

Ms. Karua: Mr. Chairman, Sir, I propose the adoption of Article 169 with amendments.

The Minister for Lands (Mr. Orengo): Mr. Chairman, Sir, you remember that in Article 159, the qualifications and disqualifications for election as state President are spelt out and one of them is nomination by not more than 2000. I think that is what we said. Do you need that qualification for a Deputy President if he qualifies to run as President?

Mr. Vice-Chairman: I think it is presumed that the nomination of the President is shared by the deputy or the running mate.

The Minister for Agriculture (Mr. Orengo): What I am saying that once qualifications are set out, you will say that it is a package for two candidates but if they are not designated as a package then he can be disqualified.

Mr. Vice-Chairman: Just put that on record.

Ministry of Foreign Affairs (Mr. Wetangula): He can be disqualified if he does not meet the expectation of the Constitution of being a registered voter of sound mind, bankrupt, a citizen and all those. But for the issue of what Mr. Orengo is raising, he comes as a package of the Presidential candidate.

Mr. Vice-Chairman: Article 169(2) says that each candidate in a Presidential election shall nominate a person duly qualified for election as President as candidate for Deputy President. So, the qualifications have to be met before you are nominated.

The Assistant Minister, Ministry of State for Defence (Maj-Gen. Nkaisserry): Mr. Vice-Chairman, Sir, I agree with what in two but this nominated running must be of the same political party with the President.

Mr. Vice-Chairman: That is presumed.

The Assistant Minister, Ministry of State for Defence (Maj-Gen. Nkaisserry): No it is no presumed because when you look at each candidate in a Presidential election to nominate a person duly qualified. It is very important to state otherwise somebody can nominate his friend who is not in the same political party with him.

Ms. Karua: Mr. Vice-Chairman, Sir, I was just proposing that we tighten what Mr. Orengo pointed out since Article 169(2) is bringing that in. We should find a way of saying that the presentation of the nomination by the President will be together with the Deputy President. That will avoid later he being told that he does not qualify because he does not have those 2000 supporters. So, it should come as a package.

Mr. Vice-Chairman: Mr. Orengo, is that acceptable? Then place the Motion.

Ms. Karua: Mr. Vice-Chairman, Sir, I am proposing that in Article 169(2) it be clearly indicated that in presenting the nomination when a Presidential candidate is presenting his or her nomination it be together with the person nominated to run as vice. So, it be done jointly. That is at the government level and not at the party level.

The Assistant Minister for East African Community (Mr. Munya): Mr. Vice-Chairman, Sir, I was just asking what is fundamentally wrong with a President nominating a running mate from another party? What is wrong with that?

(Consultations)

Mr. Vice-Chairman: Can we get a seconder for that? Mr. Musila has seconded. That is carried.

Let us now attend to Mr. Munya's concern.

May I get a proposal to adopt Article 169 as amended?

Ms. A. Abdalla: Mr. Chairman, Sir, on 169(8) we say that a person shall not hold office as deputy state President for than two terms. Let us assume that Hillary Clinton was to win the Democratic Party nominations after the two terms of Obama and decides to choose Joe Biden as her running, would that person be stopped? Let us assume that Mr. Mudavadi served two terms as a Vice-President then the political dispensation changes and a political Presidential candidate decides to nominate him again to be a deputy would you stop him from holding office.

Mr. Vice-Chairman: Yes, and for good reasons. Can I get a proposer for adoption of Article 169? Ms. A. Abdalla proposes and Mrs. Noor seconds. Is that carried? For the record, clause 8 will also be amended for the aggregate to read “two terms”.

Let us move to Article 170:-

“1.If there is vacancy in the office of Deputy President, the President shall within 14 days of the vacancy nominate a person for approval by the National Assembly to fill the vacancy.

2. The National Assembly shall vote on the nomination within 60 days”.

Is there a proposal for amendment?

The Minister for Agriculture (Mr. Wetangula): Mr. Vice-Chairman, Sir, we should delete National Assembly if the Deputy President leaves office then the President will nominate somebody else to become the Deputy President. Mr. Orengo just gave us the case of Johnson in the USA.

Minister for Lands (Mr. Orengo): Mr. Vice-Chairman, Sir, the reason why I am saying that Parliament should be involved is that at the initial election the public are involved for both the President and the Deputy President. Now we have a situation where somebody who was elected directly brings somebody else who has not been interrogated by the public and simply assumes office. Since the two offices are elective, we should not have the President taking away that power on his own.

Minister for Tourism (Mr. Balala): Mr. Vice-Chairman, Sir, the good example that Mr. Orengo has given us in the USA, when Johnson got to the presidency and nominated somebody else as deputy he did not go to the public or congress. So, he just picked somebody who he thought is appropriate to run the government.

The Assistant Minister, Ministry of State for Defence (Maj-Gen. Nkaisserry): Mr. Chairman, Sir, in fact the example of Johnson is not even clear. The example of Nixon is clearer because he nominated Gerald Ford. So, when Nixon was pushed out of office, Ford without being elected became the President of USA. So, I think we should remove Parliament.

Minister for Lands (Mr. Orengo): It should be remember that just because the public had no time to interrogate the Vice-President, the nominations by the President, Mr. Ford, at that time was disastrous. So, I still think that Parliament should have a role. I am not

pressing the point but we should not in any case have a chief Executive of the country if he has not gone through any kind of elective process.

Mr. Kioni: Mr. Vice-Chairman, Sir, I just wanted to second the proposal by Mr. Wetangula that we delete Article 170(1) and (2).

Mr. Vice-Chairman: Are we carrying the Motion to amend Article 170(1) and (2) to remove any reference to the National Assembly?

That Motion is carried. Let us move to 171- Functions of the Deputy President.

“The Deputy President shall be the principle assistant of the President and shall deputise for the President in the execution of the President’s functions.

The Deputy President shall perform the functions conferred by this Constitution and any other functions of the President as the President may assign.

When the President is temporarily incapacitated or absent from the republic, the Deputy President shall act as the President.

The Deputy President shall not hold any other state or public office”.

Is that good?

Minister for Lands (Mr. Orengo): Mr. Vice-Chairman, Sir, when the President is absent from the Republic is that a basis for having the Deputy President acting as President. Now with technology and communication, it is not necessary.

The Assistant Minister for East African Community (Mr. Munya): Mr. Vice-Chairman, Sir, if the President is incapacitated it is just fair that the Deputy President acts as President but when the President is absent, unless he has appointed him to act, because even Mandela was appointing people, he cannot on his own volition start acting just because the President has gone his counterpart in Uganda or Tanzania for a few hours.

Mr. Vice-Chairman: Are you proposing an amendment? Please, put it on record.

The Assistant Minister for East African Community (Mr. Munya): I am proposing the deletion or “absent from the Republic” so that it reads: “When the state President is temporarily incapacitated, the Deputy President shall act as the President or at any other time when the President appoints him.”

Mr. Vice-Chairman: Is that carried?

Hon. Members: Yes!

Mr. Vice-Chairman: That is carried. We shall listen to a clarification from Mr. Kiunjuri and then the DPM.

The Assistant Minister for Water and Irrigation (Mr. Kiunjuri): When he is acting, does he have all the powers of the President?

The Deputy Prime Minister and Minister for Local Government (Mr. Mudavadi): Mr. Vice-Chairman, Sir, I just want to be informed. There is all these saga in Nigeria and the need to go to court and get a decision to facilitate the vice-President. Do we envisage a scenario of that nature now that we have a practical example in Nigeria? When you say that the President shall give written authority, the President there went into a coma before he could do that. I just want us to be clear because we have seen an example. Are we sure that we have taken care of that kind of scenario? Suppose the court had ruled otherwise and yet we know that the President is still where he is.

Mr. Vice-Chairman: Bwana DPM, do you want to make some definite recommendations?

The Deputy Prime Minister and Minister for Local Government (Mr. Mudavadi): Mr. Vice-Chairman, Sir, this is where I am throwing in the rabbit so that we can think about it and see if we can catch it.

The Assistant Minister for East African Community (Mr. Munya): Mr. Vice-Chairman, Sir, the difference between what we have put here and the Nigerian situation is that there it provides that the President has to appoint the vice-President to act under whatever circumstances. Here we are saying if he is incapacitated temporarily then the Deputy President acts. So, if the Nigerian Constitution read like this the vice-President would be acting and would not need the President's permission.

Mr. Vice-Chairman: Right now the Nigerian Vice-President is not acting. Can we move on? Can someone propose an adoption of Article 171 as amended?

Mr. Kioni: Mr. Vice-Chairman, Sir, I propose the adoption of Article 171 as amended.

The Assistant Minister, Ministry of State for Defence (Maj-Gen. Nkaisserry): I second.

Mr. Vice-Chairman: That is carried.

Let us move to Article 172 – Death before assuming office.

“If a President elects dies before assuming office, the Deputy President elect shall act as President and an election to the office of President shall be held within 60 days of the death of the President.”

If the Deputy President elects dies before assuming office, the office of Deputy President shall be declared vacant on the assumption of office by the person declared elected as the President.

If both the person declared elected as President and Deputy President die before assuming office, the Speaker of the National Assembly shall act as President and a fresh Presidential election shall be conducted within 60 days of the second death.”

(Consultations)

Mr. Vice-Chairman: Can we have those thoughts on record if there are any? Can I get a proposer for adoption? *Bwana Waziri* proposes and Mr. Munya seconds. That is carried.

Let us move on to Article 173 – Removal of Deputy President.

Ms. Odhiambo, do you have issues with Article 172? As we look at it we shall proceed to Article 173 which says:-

- (a) The Deputy President may be removed from office on the ground of physical, mental incapacity to perform the functions of office;
- (b) On impeachment on the ground of a serious violation of the provisions of this Constitution and any other law.
- (c) There are serious reasons to believe that the Deputy President has committed a crime under national or international law.
- (d) gross misconduct.

The provisions of Article 165 and 166 relating to the removal of the President shall with the necessary alterations apply to the removal of the Deputy President.

The Assistant Minister, Ministry of State for Defence (Mr. Musila): Mr. Chairman, Sir, I just want to look at Article 173(2) which say that provisions of Article 165 and 166 relating to the removal of President shall apply to the removal of the Deputy President. I move therefore that “with the necessary alterations” be deleted.

Mr. Vice-Chairman: Appropriate!

The Assistant Minister, Ministry of State for Defence (Mr. Musila): Could we leave it to the effect, with the necessary alterations? If there are any, why do you put them?

Mr. Vice-Chairman: *Mutatis mutandis!*

The Assistant Minister, Ministry of State for Defence (Mr. Musila): Therefore, it should be amended by replacing it with “*mutatis mutandis*”.

Mr. Vice-Chairman: Hon. Members, I am reliably advised that “*mutatis mutandis*” may impute a different meaning. Therefore, let us have it reading:-

“shall apply to the removal of the Deputy President as appropriate”

With necessary modifications, the drafters will get the right formulation.

Mr. Vice-Chairman: Hon. Members, I want a proposal for adoption of Article 173 as amended.

Hon. Sophia proposes, and *Waziri* seconds.

The question is carried!

(Article 173 as amended agreed to)

REMUNERATION AND BENEFITS OF STATE PRESIDENT,
DEPUTY STATE PRESIDENT AND PRIME MINISTER

174. (1) The remuneration and benefits payable to the State President, the Deputy State President and Prime Minister shall be a charge on the Consolidated Fund.

(2) The remuneration, benefits and privileges of the State President, Deputy State President and Prime Minister shall not be varied to their disadvantage while in office or on retirement.

(3) The retirement benefits payable to a former State President, a former Deputy State President and a former Prime Minister the facilities available to, and privileges enjoyed by, them shall not be varied to their disadvantage during their lifetime.

Mr. Vice-Chairman: We have deleted “and Prime Minister” wherever it appears in this Article. Who moves that we adopt Article 174?

The Deputy Prime Minister and Minister for Local Government (Mr. Vice-Chairman, Sir, I just want to get some clarification, although this is for the future. We have had this debate in the House Business Committee. Once we pass this, and it becomes the new constitution, how would we deal with the scenario where we have an outgoing Prime Minister? This is something we need to think through.

Mr. Vice-Chairman: There will be transitional mechanisms in place.

The Deputy Prime Minister and Minister for Local Government (Mr. Mudavadi): So, may be, we need to flag it for the transitional section?

Mr. Vice-Chairman: That is okay.

Hon. Members, Articles 175, 176, 177 and 178 refer to the Office of the Prime Minister.

Ms. Karua: Mr. Vice-Chairman, Sir, what is the fate of Article 174?

Mr. Vice-Chairman: We have adopted Article 174, unless you have an issue with it.

Ms. Karua: We have not yet adopted it, Mr. Vice-Chairman, Sir.

Mr. Vice-Chairman: We have adopted it.

(Article 174 as amended agreed to)

(Part 2 as amended agreed to)

PART 3—THE PRIME MINISTER AND THE CABINET PRIME MINISTER

175. (1) There shall be a Prime Minister of the Republic, who shall be the Head of Government.

(2) The Prime Minister –

(a) shall direct and co-ordinate the work of the Ministries; and

(b) shall direct the preparation of legislation; and

(c) is responsible to Parliament.

(3) The Prime Minister shall preside at meetings of the Cabinet.

(4) In the absence of the Prime Minister, the Deputy Prime Minister shall perform the functions of the Prime Minister.

(5) The Deputy Prime Minister, when performing the functions of the Prime Minister under clause (4) shall not exercise a power of the Prime Minister in relation to—

(a) nomination or recommendation for appointment to a public office; or

(b) the allocation of functions to or the transfer of functions from the Deputy Prime Minister, a Minister or a Deputy Minister.

APPOINTMENT OF PRIME MINISTER

176. (1) Within seven days following the summoning of the National Assembly after a general election, or whenever necessary to fill a vacancy in the office of Prime Minister, other than on the occasion of a vote of no confidence, the State President shall appoint as Prime Minister—

(a) the member of the National Assembly who is the leader of the political party or coalition of parties, with the highest number of seats in the Assembly; or

(b) if the leader of the party or coalition of parties with the highest number of seats in the Assembly has been unable to command the confidence of the National Assembly, the member of the National Assembly who is the leader of the political party or coalition of parties with the second highest number of seats in the Assembly.

(2) Each party participating in a general election of the National Assembly shall designate a person as the leader of that party for purposes of clause (1).

(3) Where neither of the persons contemplated in clause (1)(a) or (b) has been able to command or retain the confidence of the National Assembly, the State President shall propose to the National Assembly the name of a member who, in the State President's opinion, may be able to command the confidence of the National Assembly.

(4) On receiving a proposal from the State President under clause (3), the Speaker shall summon the National Assembly and introduce the proposal from the State President.

(5) Within seven days of the Speaker receiving a proposal from the State President, the Speaker shall call a vote in the National Assembly to confirm the appointment of the person proposed by the State President.

(6) A vote contemplated in clause (5) passes if it is supported by more than half of all the members of the National Assembly.

(7) If the National Assembly fails to confirm the appointment of the person proposed by the State President, the National Assembly shall by a vote supported by a majority of members present and voting nominate a member of the National Assembly for appointment as the Prime Minister.

(8) If, within sixty days of the State President first appointing a person to be Prime Minister, no person has been confirmed or nominated for appointment, the National Assembly shall stand dissolved and the Independent Electoral and Boundaries Commission shall conduct a fresh general election for the National Assembly.

TERM OF OFFICE

177. (1) A person whose appointment as Prime Minister has been confirmed, or who has been nominated for appointment, by the National Assembly shall assume the office by taking and subscribing to the oath or affirmation for the due execution of the functions of the office prescribed in the Third Schedule, before the Speakers and members of Parliament.

(2) The term of office of the Prime Minister continues until—

(a) the Prime Minister dies, resigns or is dismissed from office; or

(b) the next person appointed Prime Minister following an election assumes office.

(3) A person shall not serve as Prime Minister for an aggregate of more than ten years.

RESIGNATION OF PRIME MINISTER

178. (1) The Prime Minister may resign from office by delivering a written notice of resignation to the State President.

(2) The resignation of the Prime Minister takes effect—

(a) at noon on the day after it is delivered;

(b) if the notice specifies a date on which resignation takes effect, at noon on that date.

Mr. Vice-Chairman: Hon. Members, I was saying that the whole of Part 3, which comprises of Articles 175-178, makes reference to the institution of the Premiership. So, I rule that we shall skip those Articles and move straight.

I actually need a proposal to delete those Articles. You can vary that proposal to take care of what you want to say, hon. Karua.

Ms. Karua: Mr. Vice-Chairman, Sir, I am proposing that Articles 175-178 be deleted.

Mr. Vice-Chairman: Who seconds?

An hon. Member: seconded.

Mr. Vice-Chairman: That Motion is carried. Articles 175-178 stand deleted.

(Articles 175, 176, 177 and 178 deleted)

(Office of Prime Minister abolished)

CABINET AND DEPUTY MINISTERS

Mr. Vice-Chairman: Hon. Members, Article 179 provides as follows:-

(1) The Cabinet shall consist of—

(a) the Prime Minister;

(b) the Deputy Prime Minister;

(c) not fewer than fifteen and not more than twenty are

Ministers; and

The Vice-Chairman: In sub-Article (1), we delete parts (a) and (b).

(Article 197(1)(a & b) deleted)

Ms. Karua :---*(off record)*

Mr. Vice-Chairman: You will suggest that once we have gone through the whole Article.

Hon. Members, let us go step by step. Article (1)(c) is amended to provide for a fixed number of 25 Ministers, and not more than 25; and the Attorney-General, who shall be an *ex-officio* Member.

Ms. Karua: Mr. Vice-Chairman, Sir, we need to confirm with your permission whether in a presidential system, the Attorney-General becomes a Member of the Cabinet. I am saying that because, even in our current system, he was never a Member of the Cabinet until amendments to the Constitution were effected, because it is assumed that all civil servants are at the disposal of the Government, whenever they are needed. So, we need to know this very clearly, so that we do not make the Office of the Attorney-General part of the political establishment.

The Assistant Minister for East African Co-operation (Mr. Munya): Mr. Vice-Chairman, Sir, in a presidential system where the Cabinet is from outside Parliament, the Attorney-General is a Cabinet Minister. Janet Linor was a Cabinet Minister in Clinton's Cabinet. The Attorney-General is a Cabinet Member because there is no Minister for Justice in the USA. It is the Attorney-General.

The Assistant Minister, Ministry of State for Defence (Maj-Gen. Nkaisserry): Mr. Vice-Chairman, Sir, I think hon. Munya has a point. If we are talking---

Ms. Karua :---(Off-record)

(Several hon. Members spoke off-record)

Mr. Vice-Chairman: Is that adopted?

Hon. Members: Yes!

Mr. Vice-Chairman: Can we then have someone proposing adoption of Article 179(1) with that variation?

Mr. Kioni: Mr. Chairman, Sir, if we say “not fewer than 15 and not more than 25, including the Attorney-General” it means that the Attorney-General takes one of the slots of the Ministers. So, in essence, what we will have allowed is 24 Ministers. I would have proposed that we have “not fewer than 15 and not more than 25 other Ministers” and then have part (d), allowing the Attorney-General to be part of the Cabinet.

Mr. Vice Chairman: Okay! Can I get a seconder for adoption of that amendment?

Ms. Karua: seconded.

Mr. Vice-Chairman: Is question for adoption of Article 179 with Mr. Kioni’s amendment carried?

Hon. Members: Yes, Mr. Chairman, Sir.

(Clause 179 as amended agreed to)

Mr. Vice-Chairman: Now, when you look at---

The Minister for Lands (Mr. Orengo): Mr. Vice-Chairman, Sir, we have just deleted “the Prime Minister” and “the Deputy Prime Minister” but we are saying “the Cabinet shall consist of the President, the Deputy President and not fewer that 15 and not more than 25 other Ministers, including the Attorney-General”.

Mr. Vice-Chairman: Hon. Orengo, can you, please, propose something that can take us forward.

The Minister for Lands (Mr. Orengo): Mr. Vice-Chairman, Sir, I am saying that Article 171(1) should read as follows:-

171.(1)The Cabinet shall consist of-

(a)the President;

(b)the Deputy President; and,

(c)not fewer than 15 and not more than 25 other Ministers, including the Attorney-General.

Mr. Vice-Chairman: Hon. Members, when you look at the rest of Article 179(2), (3), (6) and (10), you will see that they make reference to the Prime Minister.

Ms. Odhiambo: Mr. Vice-Chairman, Sir, I agree with you that the sub-Articles you have referred to make reference to the Prime Minister but, so that we do not lose what the Prime Minister was supposed to do, which should be done by someone else, we need to look at them.

Mr. Vice-Chairman: You have cut me short. I was going to suggest that someone looks at all those sections, in terms of the principles we adopted on the Presidential system – principles like Ministers being from outside Parliament, and being vetted by Parliament, and then propose an amendment to all those sections.

Oh, the drafters have already made some suggestions. Perhaps we should look at them together. This document has been circulated. Look at Article 175 on page 19 of the document that was circulated to you. It is titled “Cabinet”. If you are there, let us go over it together. If you are armed with that document, after hon. Munya seeks clarification, we will move on and look at those suggestions together.

The Assistant Minister for East African Co-operation (Mr. Munya): Mr. Vice-Chairman, Sir, I just wanted to ask: Since we have decided that the Cabinet will be coming from outside Parliament – I said that I was opposed to that decision – why are we continuing referring to them as Ministers? I thought we needed to get the appropriate description. They are supposed to be secretaries. They are not supposed to be Ministers any more. They are now secretaries.

Mr. Vice-Chairman: Can you make a proposal that we can consider, Mr. Munya?

Substitution of “Minister” with “Secretary”

The Assistant Minister for East African Co-operation (Mr. Munya): Mr. Vice-Chairman, Sir, I propose that wherever the term “Minister” appears in this draft constitution be deleted and replaced with the term “Secretary”.

Mr. Vice-Chairman: We could also consider “killing” Permanent Secretaries.

The Minister for Foreign Affairs (Mr. Wetangula): Mr. Vice-Chairman, Sir, I have a different view. Let us look at what obtains within our sub-region and the region. Even in Nigeria, where they have a pure presidential system, the Ministers are called “Ministers”. In Tanzania, there are Ministers. We should be tandem with the East African Community, where we are members of the same organization. Let us just call them “Ministers”. I do not see any problem.

The Assistant Minister for East African Co-operation (Mr. Munya): No, we cannot call them Ministers.

Ms. Karua: Mr. Vice-Chairman, Sir, that will leave us with 27 Ministers. If we are intent of having 25 Ministers as the upper limit, let us say “the President and the Deputy President; and not fewer than 15 and not more than 23 other Ministers” to come to the total of 25 Ministers. Otherwise, they will be 27 Ministers. We are moving towards a bloated Cabinet.

Mr. Vice-Chairman: Then move that amendment, bringing together all those amendments.

Ms. Karua: Mr. Vice-Chairman, Sir, I beg to move:-

THAT, Article 179(1) be amended to read as follows:-

“171.(1)The Cabinet shall consist of-

(a) the President;

(b) the Deputy President; and,

(c) not fewer than 15 and not more than 23 other Ministers.”

An hon. Member: What about the Attorney-General?

Ms. Karua: Mr. Vice-Chairman, Sir, the President can have even a Minister for Justice and leave the Attorney-General out there.

The Minister for Lands (Mr. Orengo): Mr. Vice-Chairman, Sir, since we have the Attorney-General, whose job description is that principle legal advisor to the Government, and all the people who have been appointed are not politicians, we would not want the President create another Ministry as it were, responsible for matters of justice. That would not be proper. I think the Attorney-General should be included in the 23 Ministers. We can either have the Attorney-General or we do not have.

The other formulation is that we do not mention the Attorney-General and then the President can choose freehand, but so long as we have mentioned him---

A lot of people who have been in Government are Ministers. Sometimes there are conflicts that emerge, which should not be brought here. The most important thing is that the Attorney-General should be part of the Cabinet.

Mr. Vice-Chairman: So, are we saying “23 other Ministers, including the Attorney-General? Really, this is not a contentious issue. We need to move forward. Is it carried?

Hon. Members: Yes!

Mr. Vice-Chairman: That is carried!

(Article 171(1) as amended agreed to)

The Minister for Foreign Affairs (Mr. Wetangula): Why not?

The Assistant Minister for East African Co-operation (Mr. Munya): They are secretaries!

The Assistant Minister for Water and Irrigation (Mr. Kiunjuiri): Mr. Vice-Chairman, Sir, I also believe that, now that we are going to have a presidential system, even the costs of retaining both the Minister and Permanent Secretary should be cut. One of those offices must be abolished. The rationale is that since the President will be appointing his Cabinet from outside Parliament, he will be appointing professionals, who will be CEOs of the Ministries. One will be there full time. I have had opportunities to attend conferences in countries with a presidential system of governance, and I know that Cabinet Ministers are the CEOs of their Ministries. The situation there is not like ours, where you find an educationist being appointed to head the Ministry of Energy. That is what we are assuming – that the President will have Cabinet Ministers who are CEOs of the various Ministries.

The Deputy Prime Minister and Minister for Finance (Mr. Kenyatta): We need to still be able to distinguish the different roles that are played by Ministers and PSs. Because there are still policy issues brought to Cabinet, but there are also administrative issues that pertain to individual Ministries. We need not to destabilize the structures that we have because to say that we have brought in an Economist and then say that he is also responsible for the day to day administration, you are actually taking away from him the role that he is supposed to be doing.

Ms. Karua: Change means moving from where you are standing. It is not going to be the same and it is a little difficult for us to configure. Yes, the Minister has gone back to Parliament where they belong. These are civil servants. So, where there is a secretary, there will be deputy and a senior deputy. Even in a company, the CEO is responsible for policy. Why Naikuni is able to go and sit in the police reforms is because although he is the CEO, he has so many other assistants that he even has time to go and drive another process. There will be no destabilization. Let us think outside the box.

The Minister for Agriculture (Mr. Samoei): I do not mind whether they are called Ministers or Secretaries, but the issue here is that we must abolish the office of the Minister because practically, even in my own Ministry, there is usually a conflict between what I do as a Minister and what is done by the PS and it just depends on goodwill if you can perform as a Minister because the real running of the Ministry is in the hands of the PS. This Minister was just an imposition. Practically, it is not cost effective to run two offices one of a Minister and one of a PS, especially that both of them are going to be civil servants. So, the office of the Minister should be abolished and the office of the PS should now be recognized as it is in the constitution that they will be responsible for running the Ministries. What can be done to cure what hon. Kenyatta has said, even in my own Ministry, we have a senior deputy secretary, who is in charge of administration. We have one who is in charge of policy. We have others who are in charge of the various departments, but they are all answerable to the PS. Let the PS in my

Ministry have agricultural expertise and let the administration be given to one of the deputies to run it. But let us professionalize the Ministries. Let us abolish this thing about the Minister and install the PS as the CEO and let the ball end there.

Mr. Chairman: I agree with both and I do not think they are mutual exclusive. There is still going to be a Cabinet and in the US, they are called Cabinet Secretaries or even in the UK, which is a Parliamentary system. But we have to differentiate between Cabinet Members and Civil Servants. So, to call Cabinet Ministers or cabinet secretaries civil servants might not be totally accurate. We need to differentiate between the two.

Mr. Kioni: I just want to pick it up from where the Chair left. We have a set of officers in the Ministries appointed by the PSC and we have provided for the PSC and the way it is supposed to go about its business and then we have political appointees. If we are looking at the PSC, which must run and will run in whichever government is in power, it is important to try as much as we can to have some thin line between the two, so that the civil service does not quite operate within just the political thinking of the government in power at a given time.

The Minister for Higher Education (Dr. Kosgei): I would like to think out of the box as my sister Ms. Karua says. But I do not know of any country which does not a permanent civil service, whatever they call it. The whole point of having that line of civil servants is for continuity. Every ten years, if we are lucky, we will have a new government, but we need to have the civil servants who have to have a boss in the Ministry. I just do not see how see how it can work. The Americans that you are talking about also have a civil service and the British have a civil service. Their PSs are called Permanent Under Secretaries. I really just want to think out of the box, but I want my sister to persuade me as to how we are going to work.

The Minister for Foreign Affairs (Mr. Wetangula): I want to urge ourselves to avoid this rejectionist philosophy that because we are writing a constitution, everything that has been there is bad even a name. Even the America that we so gravely quote all the time, as Dr. Kosgei says, has a civil service. When President Obama leaves, he will leave with Hillary Clinton and Johnny Carson and the civil service will remain there. Whether we are now appointing Cabinet from outside or not, they are people appointed through a political agenda of the president who is elected and will leave when the president leaves. We should have a Cabinet, the Ministers should be Ministers in tandem with what goes on in the whole of Africa. It looks so awkward for Kenya to turn up in a meeting, every country has a Minister and Kenya says that we have Senior Secretary. It does not just make sense.

Mr. Vice-Chairman: Let me just clarify that listening to the proposal, really it is not about getting rid of the civil service. It is actually harmonizing it. If you are going to have a CEO running a Ministry from outside Parliament, you will still have the bureaucracy but the bureaucracy then changes.

The Assistant Minister for East African Community (Mr. Munya): My point is that line that you have taken. I do not know why people are concluding that we are abolishing the civil service. We are following the pure presidential system and the best example of the pure presidential system is the USA where cabinet Ministers do not come from Parliament and therefore, they are not politicians. They are technocrats qualified in the various jobs that they are given and that is why they are called secretaries. That is what we are proposing, the renaming of the new Cabinet to be Secretaries. That is why, to show the difference from the Cabinet Ministers that we had to the Cabinet Ministers that we will have now, we will have to rename them because we do not want to re-confuse them with the politicians. These are technical people appointed for their expertise in those fields that they are handling. Secondly, we are merging the previous Cabinet which was for politicians, there was a separation between the office of the PS and the office of the Minister. The office of the Minister was dealing with policy while the office of the PS was dealing with the day to day running of the Ministry. We are merging the two because the Cabinet Minister who is being appointed now is a civil servant and he has no political business of going to rallies and going to Parliament. So, he will be in charge of policy and of running the Ministry. So, when he is dealing with policy, that is when they sit in the Cabinet to formulate policy with the president, but the day to day running of the Ministry, he has deputies to assist him in running the Ministry. Any other formulation will be confusing and he would rather retain the Members of Parliament in the Ministries if there will be no change.

The Minister for Tourism (Mr. Balala): Mr. Vice-Chairman, Sir, you have ignored my hand for a long time. I have seen in other countries, for instance, France and Spain, they have Parliament systems but their Ministers come from outside Parliament and they have this small Cabinet of about 15 to 20 Ministers with big titles, namely, the Minister for Trade, Tourism and Innovation. Then they have deputies who are called secretaries who are responsible for specific jurisdiction or responsibilities of those big Ministries. Then we have that overall Minister, but their title is Ministers. The others are deputies who are called Secretaries and they still have a structure that manages the day to day affairs of the office. But also the Minister has a Cabinet they called a five man cabinet which run the affairs of the entire Ministry.

Mr. Vice-Chairman: This issue is not such a big thing. I want us to move forward. Ms. Karua, please take us to the conclusion of this matter.

Ms. Karua: I seek to convince Dr. Kosgei and the others. I want us to just check what happens here so that you can see the civil service will be unaffected. Over the last 15 to 20 years, PSs have been dropped and appointed anyhow every time there is an election change. That does not kill the civil service. In fact, PSs have been coming in with Ministers and leaving at will. Therefore, the real civil service even in Kenya that sustains is below the PS from the Senior Deputy Secretary. Therefore, let us not be afraid of change. A CEO can come in, in a company and he can be removed any time and a new one put and that company does not go down. So, our new person, just like has been said by hon. Munya, his name or her name will change to Secretary. It will help us to change our mind set so that this fear that we have is excised and so that the public also knows

that the Ministers are gone and the incoming crop will not behave the way the Ministers behave. They will know they are a working team. They will stop expanding like an umbrella. I am therefore, proposing that we change the name.

Mr. Chairman: Can we agree on this. I think this is being made an issue by those who want to have MPs still holding Ministries. Really this is not an issue. We will definitely have a Cabinet not of civil servant because the civil service has to be none political. The Cabinet Secretaries are political appointees who come with an administration and go with it to enforce a political agenda. Whether we call them Ministers or secretaries is irrelevant. If we call them Ministers, I have no problem and if we call them secretaries, I have no problem. Can I get a proposer so that we move forward? We have a lot of work ladies and gentlemen. Hon. Munya we have very critical decisions to make other than the name of the Cabinet Ministers.

The Minister for Lands (Mr. Orengo): I think we are going to get a lot of confusion. We are going to deal with principle secretaries and now we are going to have secretaries. I think really, by whichever name, let us have them called Ministers and I have so moved.

Mr. Chairman: Can I get a seconder to that? Hon. Musila, can you second that?

The Assistant Minister, Ministry of State for Defence (Mr. Musila): I second that they be called Ministers.

Mr. Chairman: Can that be carried?

Ms. Karua: No! I have a counter proposal. They be called Cabinet Secretaries. I need a seconder.

Mr. Chairman: Seconded by Munya. Surely, the name of that office cannot be holding--

The Assistant Minister for East African Community (Mr. Munya): I am seconding this fundamental change of Ministers to Cabinet Secretaries.

Mr. Chairman: Is that proposal carried?

Hon. Members: No!

Hon. Members: Yes.

Mr. Chairman: Then I rule that we bracket this matter until we have handled transitional mechanisms so that we can move forward.

Mr. Vice-Chairman: Is Cabinet Secretary carried?

Hon. Members: Yes.

Mr. Vice-Chairman: We will record the objections of Ms. Odhiambo, hon. Wetangula and hon. Musila.

Mr. Chairman: Ladies and gentlemen, we can take this decision when we are handling the transition matters. Let us move forward.

Mr. Vice-Chairman: We are looking at the document that was prepared for us by our drafting team. Can we please have some order? Ms. Odhiambo, you are becoming disorderly! We are going to Article 175 and we are using the document prepared by the drafting team which has already prepared changes that we had discussed earlier.

Mr. Vice-Chairman: The President with the approval of the majority of the members of the National Assembly. If the National Assembly supported by a vote of more than 50 per cent of its members passes a Motion of no confidence in a Member of the Cabinet the President shall remove that hon. Member. The President shall not appoint:

- (a) A Member of Parliament to the office of Minister, Cabinet Secretary or Deputy Minister. Each person appointed as Minister or deputy Minister assumes office by swearing or affirming faithfulness to the people and republic of Kenya and obedience to the Constitution in accordance with the fourth schedule before the Speaker and Members of Parliament. They may resign by delivering a written statement of resignation to the President and continues in office until the person dies, resigns or is dismissed from office or until the next person appointed to that office, following a general election for Parliament assumes office.

- (b) **Mr. Chachu:** Why should they swear in before the speaker? We need to change that.

Mr. Vice-Chairman: Are you proposing an amendment?

Mr. Chachu: Yes. I think it should be changed.

Mr. Vice-Chairman: Mention the specific Articles. Can we go one by one. 175(1), is that carried?

Hon. Members: Yes.

Mr. Vice-Chairman: Is 175(2) is that carried?

Ms. Karua: I am suggesting that this is not in consonant with the presidential system. Remember Parliament has more powers than the Parliamentary one. Therefore, if they are dissatisfied with any office and the President is not acting, they will be able to hold him in either budget allocation or any other. So, this is unnecessary. I move to delete.

Mr. Kazungu seconded.

Mr. Vice-Chairman: Is that carried?

Hon. Members: Yes.

The Minister for Tourism (Mr. Balala): What happens if you have a rogue Minister? He is not answerable to the people or sensitive to Parliament.

Mr. Vice-Chairman: The buck stops with the President.

The Minister for Agriculture (Mr. Samoei): We will have a bite by approving. These people will be vetted by Parliament once they are appointed. It will amount to us intimidating the Executive to appoint who we want. So, let us remove the vote of no confidence.

Mr. Vice-Chairman: Is 2 deleted? Motion carried?

Hon. Members: Yes.

Mr. Vice-Chairman: 3, the President shall not appoint a Member of Parliament to the office of Minister of Deputy Minister. Is that carried?

Hon. Members: Yes.

Mr. Vice-Chairman: Each person appointed---

Ms. Odhiambo: I do not know where we provided for the President to appoint a Member of Parliament but then the hon. Member resigns?

Mr. Vice-Chairman: I have our document of principles. If an MP is appointed to the Cabinet he relinquishes his Parliamentary seat. So, that should be added as 3(b).

Ms. Odhiambo: I propose that we add 175(3)(b) that once an MP is appointed as a Minister he relinquishes his seat. I want a seconder for that.

Mrs. Noor: I second that.

Mr. Vice-Chairman: That is carried.

Mrs. Noor: I want to seek a clarification. In number 2 of the broader principles we have said that the Minister should come outside Parliament. Where is it captured here in this Article?

Mr. Vice-Chairman: That is what you seconded. You have just seconded the same thing.

Mrs. Noor: Where?

(Laughter)

Mr. Vice-Chairman: 175(3). Could we move on please to 175(4)? Each person appointed as Minister or Deputy Minister assumes office by swearing or affirming faithfully to the people and republic and obedience to the Constitution in accordance with the fourth schedule--- That is where you had an issue. Mr. Chachu please go ahead and make the proposal for amendment.

Mr. Chachu: After the words "constitution should be a period" all the sentences appearing after that should be deleted. The words to be deleted are: "In accordance to the fourth schedule before the speaker and the Member of Parliament."

Mrs. Noor: I have an amendment. I want us to mention " is sworn before the President".

The Minister for Tourism (Mr. Balala) seconded.

Mr. Vice-Chairman: That is carried. Is the rest in four okay?

The Minister for Foreign Affairs (Mr. Wetangula): Death in office is an accident. Resignation is a deliberate act. If one chooses to resign it should not even be provided for. What we should provide for is departure from office on dismissal. These are appointees, they can be disappointed by dismissal. We cannot say they leave office when they die. They are not permanent. They have no security of tenure.

Mr. Vice-Chairman: Each person appointed continues in office until?

The Minister for Foreign Affairs (Mr. Wetangula): Until they resign or are dismissed.

Mr. Vice-Chairman: Is number II okay?

The Minister for Foreign Affairs (Mr. Wetangula): That is okay. It does not have to be stated.

Mr. Vice-Chairman: So, we also delete II?

The Minister for Foreign Affairs (Mr. Wetangula): Yes.

Mr. Vice-Chairman: We retain number II. So the amendment there is deletion of "the person dies." The rest of it stays.

The Minister for Tourism (Mr. Balala): the wording of number II is an issue here because of the question of election of the presidency and Parliament. Here they are talking about following a general election for Parliament which we need to correct.

Mr. Vice-Chairman: What do you propose?

The Minister for Tourism (Mr. Balala): I propose general election for the presidency.

Mr. Vice-Chairman: Dismissal is there.

The Minister for Tourism (Mr. Balala): Here we are saying that the person will depart the position in the next general election for Parliament. We need to make it consistent for presidency?

Mr. Vice-Chairman: Is that seconded?

The Minister for Justice, National Cohesion and Constitutional Affairs (Mr. M. Kilonzo) seconded.

The Assistant Minister, Ministry of State for Defence (Maj.-Gen. Nkaisserry): I am reading this thing quite differently. It seems to me that these people who have been appointed by the President are Members of Parliament.

Mr. Vice-Chairman: Where are you reading that?

The Assistant Minister, Ministry of State for Defence (Maj.-Gen. Nkaisserry): When you look at 175(2) it is flowing and you see the words: "Until the next person appointed".

Mr. Vice-Chairman: 175(2) has been deleted.

The Assistant Minister, Ministry of State for Defence (Maj.-Gen. Nkaisserry): Then you should delete Article 4(c)(II).

Mr. Vice-Chairman: We have just changed it to election of the president. It has been amended.

The Minister for Foreign Affairs (Mr. Wetangula): We did provide that the president can appoint and dismiss Cabinet. So, why are we providing for the manner in which Cabinet leaves office? It does not make any constitutional sense at all. The President appoints Cabinet and he can sack them. We leave it there. I think we should say what Cabinet can or cannot do other than how they come in and leave office because they are appointed and dissatisfied by dismissal.

Mr. Vice-Chairman: Are you moving for deletion of (c)?

The Minister for Foreign Affairs (Mr. Wetangula): Yes.

Mr. Vice-Chairman: And who seconds that.

The Minister for Agriculture (Mr. Samoei) seconded.

Mr. Vice-Chairman: Is that carried?

Hon. Members: Yes.

Mr. Munya: Since we are discussing about exiting Cabinet, can you be appointed to Cabinet at whatever age even if you are 90 or 18?

Mr. Vice-Chairman: I want a proposal to adopt that Article as amended.

Mr. Kazungu seconded.

Mr. Vice-Chairman: May we now revert back to the original document. We are moving back to the revised harmonized draft. We are moving to Article 180, Assignment of Functions. Ms. Odhiambo, go ahead and propose deletion of all those Articles and replacement with a new Article 175.

Ms. Odhiambo: I propose that we delete Article 179(2) to (10) and replace with a new Article that we have adopted.

The Minister for Justice, National Cohesion and Constitutional Affairs (Mr. M. Kilonzo) seconded.

Mr. Vice-Chairman: That is carried. Let us go back to Article 180, Assignment of Functions. We will ignore references to the Prime Minister. It reads as follows: "To the extent not inconsistent with any Act of Parliament." Article 180 is relevant in as far as the President assigns functions.

Ms. Karua: I am proposing that we delete Articles 180, 181 and 182 if anything in them has any bearing on the responsibilities of Cabinet, it should then be recast with the system we have adopted in mind.

Mr. Vice-Chairman: That is carried. Let us move to 183. We will look at the recast Articles as amended when we look at the complete document. Article 183, Decisions, Responsibilities and Accountability of the Cabinet. The Cabinet shall meet at least once a month. The quorum at a meeting of the Cabinet shall be half of all the Members of the Cabinet. A decision by the Cabinet shall be in writing and shall be communicated to the President. A decision of the Cabinet is not valid and shall not be implemented unless it is signed by the Prime Minister. Let us deal with them one by one. The Cabinet shall meet at least once a month. Is that carried?

Let us go back to the revised document by the experts. Page 20 Decisions, Responsibilities and Accountability of Cabinet. A decision by the Cabinet shall be in writing. Members of the Cabinet are accountable collectively and individually to Parliament. For:

- (a) Exercise of their powers and performance of their functions.
- (b) The administration and implementation of legislation assigned to them
- (c) Ministers and Deputy Ministers and individually accountable to the President for the exercise of the powers and performance of the functions assigned to each of them respectively.

- (d) A Minister shall attend a committee of Parliament when required to do so, answer any question concerning a matter assigned to that Minister.
- (e) Ministers of the Cabinet shall act in accordance with the Constitution and provide Parliament with full and regular reports concerning matters under their control.
- 176(1) a decision by the Cabinet shall be in writing. Is that carried?

The Minister for Agriculture (Mr. Samoei): How is the Cabinet supposed to record its decision?

Mr. Vice-Chairman: In writing.

The Minister for Agriculture (Mr. Samoei): To who?

Mr. Vice-Chairman: The Cabinet keeps the records. Do you not keep minutes of your proceedings?

The Minister for Agriculture (Mr. Samoei): So, do you want us to write here that the minutes of the Cabinet will be kept? That is a procedural thing. We cannot write in the Constitution that so and so will write the minutes and they will be kept in that box. We are being trivial. Delete that!

Mr. Vice-Chairman: Dr. Kosgei, could you give us some advice here?

The Minister for Higher Education (Dr. Kosgei): We do not have a lot of time but if you do not communicate them in writing, how do the people in the Ministries know and they do not attend Cabinet. By the way, I wish I had time to tell you that the fact that they are put in writing saved me from going to jail, but we do not have time for that. I really do not see how the Permanent Secretaries or the civil servants will actually know what has been decided at Cabinet meetings.

Mr. Vice-Chairman: Is Article 176(1) carried?

Hon. Members: Yes.

Mr. Vice-Chairman: 2. Members of the Cabinet are accountable collectively and individually to Parliament. Can I get a proposal to amend?

Hon. Members: It is in clause 3.

Mr. Vice-Chairman: So, we delete 2. Ministers and Deputy Ministers. Members of the Cabinet are accountable collectively and individually to Parliament for the exercise of their powers and the performance of their functions, the administration and implementation of the legislation assigned to them.

Mr. Vice-Chairman: Can we have the views on record?

Ms. Odhiambo: Mr. Vice-Chairman, I propose that we amend 176(2) by providing that members of the cabinet are accountable collectively and individually to the president. (4) then we leave the (a) and (b).

Mr. Vice-Chairman: But how do you follow deviations made in Parliament? How do you link that to the Implementation Committee of Parliament?

Hon. Members: It in (4).

Mr. Vice-Chairman: Okay. So, can I get a seconder for hon. Odhiambo's motion? Hon. Balala is seconding. Are we carrying (2) as amended?

Hon. Members: Yes.

Mr. Vice-Chairman: (3) "Ministers and deputy ministers are individually accountable to the president for the exercise of the powers and functions". However, that is exactly--- So, that is okay. (4) we deleted (2). We only amended "Parliament" and replaced it with "President" but the rest remained. So, hon. Balala, can you propose deletion of (3)?

The Minister for Tourism (Mr. Balala): Mr. Vice-Chairman (a) is talking about exercising the powers and performance and (b) is administration and implementation of the legislation. You see (3) talks about individual accountability to the president, exercise of powers, performance, functions of each of them.

Mr. Vice-Chairman: Thank you. Any seconder? We are deleting (3). Can we just be a little attentive? You are seconding and hon. Odhiambo is seconding. (4) states:- "A Minister shall attend before Parliament or a committee of Parliament when required to do so and answer any question concerning a matter assigned to that Minister". Now, how is this Cabinet taking responsibility before Parliament?

The Minister for Foreign Affairs (Mr. Wetangula): Mr. Chairman, there are strangers in the Chamber. You wanted a pure system. They can go to the committees but not in the Chamber. They cannot come to Parliament to answer questions.

Mr. Vice-Chairman: As we move on, guide me on this. It is now 8.30 p.m. After we complete these two pages which we should do in the next ten to 15 minutes, do we take a break or we move on to another chapter? This is because we need to guide them for dinner.

Mr. Chairman: Or refreshments because there are a number of people who asked for refreshments and they are wondering whether they can bring a whole paraphernalia or are we going up there?

Mr. Vice-Chairman: Do we break after these two pages for dinner and then come back?

Hon. Members: Let us continue.

Mr. Vice-Chairman: So, do we say we eat dinner at 11 but they bring refreshments?

Hon. Members: Yes.

Mr. Vice-Chairman: Excellent. Let us continue. We need everybody here for decision making. So, we cannot dinner in shifts. Moving on we are on Clause (4) and we are linking these cabinet secretaries to Parliament. Hon. Wetangula, you were giving us some guidance in that direction.

The Minister for Foreign Affairs (Mr. Wetangula): Mr. Chairman, I was proposing that (4) be amended to delete attendance before Parliament and leave it to committees. The formulation can be found.

Mr. Vice-Chairman: Who seconds? Ms. Karua seconds.

The Minister for Tourism (Mr. Balala): What we are saying here is that they can be answerable to committees but they can also be *ex-officio* to be addressed by the President and all the ceremonies.

Mr. Vice-Chairman: Then they will just come as civil servants. Are we adopting (4) as amended so that cabinet secretaries will only attend before committees of the House? That should be crafted in a manner that captures--- How do they move bills? They do not move any bills? Let me provide some guidance here. On the question of the linkage between cabinet secretaries and Parliament, do you want to look at other jurisdictions and see how that happens especially in the US?

The Minister for Foreign Affairs (Mr. Wetangula): Mr. Vice-Chairman, I heard Mrs. Munga asking you: How do they move Bills? In this structure and you can look at other jurisdictions like Nigeria, Ghana and others, it is the majority leader or minority leader who will then move government bills in the House depending on who is bringing the bills. These ministers are total strangers to the House.

Mr. Vice-Chairman: Okay. Thank you for that guidance. May we then move on. (4) is carried.

The Deputy Prime Minister and Minister for Local Government (Mr. Mudavadi): On a point of order, Mr. Vice-Chairman. You know we talked of clauses about originating bills.

Mr. Vice-Chairman: We will come to the Legislature to look at that.

The Deputy Prime Minister and Minister for Local Government (Mr. Mudavadi): Okay but I was looking in the context of the interface between the Executive and Legislature.

Mr. Vice-Chairman: Can we handle that when we look at legislation? We will look at the Legislature and then we can link this. Just note that so that we look at it when we get to the Legislature.

The Deputy Prime Minister and Minister for Local Government (Mr. Mudavadi): Now, one more thing. 176 (4) because I think they are discussing that. It states:- "A Minister shall attend before a committee of Parliament when required to do so and answer any question concerning a matter assigned to that Minister". I was suggesting that in (4), the wording can be improved because you have been raising an issue about the element of accountability and what have you and (4) in my view, does not quite capture it. So, I do not know how we can blend 176 (b) with (4) because then you tend to really bring out the fact that you can interrogate that committee.

Mr. Vice Chairman: Make that motion so that we can have it formally.

The Deputy Prime Minister and Minister for Local Government (Mr. Mudavadi): Mr. Vice-Chairman, I would like to propose that Article 176(4) be strengthened so that we can clearly bring out the fact that the issue is not just to discuss and answer a question about a matter but to really get the committee of Parliament to interrogate that Minister to strengthen accountability.

Mr. Vice-Chairman: Who seconds that? Mr. M. Kilonzo, Minister for Justice, National Cohesion and Constitutional Affairs seconds that. Is that carried?

Hon. Members: Yes.

Mr. Vice-Chairman: I am moving to (5). Hon. Members, this is a radical shake-up in the whole system. It reads: "Members of the Cabinet shall (a) act in accordance with the constitution (b) provide Parliament with full and regular reports concerning matters under their control through committees". Can I get a proposal for that? Hon. Ms. Odhiambo proposes and Maj.Gen. Nkaiserry seconds. Is that carried?

Hon. Members: Yes.

Mr. Vice-Chairman: Moving on, 178 on Conduct of Members of the Cabinet. It states:- "A member of the cabinet shall (a) avoid any situation involving a risk of conflict between the member's private interest and official responsibilities".

I want a proposer to amend 176 as amended. Hon. Ms. Odhiambo proposes and the Deputy Prime Minister, Mr. Mudavadi seconds. That is carried as amended. 177 has been deleted in its entirety. 178 states: "A member of cabinet shall avoid any situation involving a risk of conflict between the member's private interests and official responsibilities (b) not act in a way that is inconsistent with the member's official responsibilities (c) not use the member's office, authority of that office or any information entrusted to the member to enrich the member or improperly benefit another person.

2. Each member of cabinet shall comply with the provision set out in Chapter 7.

3. The members of the cabinet may not hold any other employment or any other public office during their respective terms of office.

Hon. Samoei proposes adoption and hon. Balala seconds. Is that carried?

Hon. Members: Yes.

Mr. Vice-Chairman: Now, we jump to Article 184 of our main document. This is because everything else above 184 is what we have been looking at as amended, our drafters had already done the adjustments. They have not worked on the other bit. So, we move to the Secretary to the Cabinet on 184. It states:- "There is established the office of the Secretary to the Cabinet. The Office of the Secretary to the Cabinet shall be an office in the public service. The Secretary to the Cabinet shall be appointed and dismissed by the President. The Secretary of the Cabinet shall be dismissed by the President. The Secretary to the Cabinet shall have charge of the Cabinet office, be responsible---". Can I hear Mr. Orengo recommend that amendment?

The Minister for Lands (Mr. Orengo): Mr. Vice-Chairman, I am saying that 184(3), we can collapse (a) and (b). The Secretary to the Cabinet and maybe removed by the President.

Mrs. Odhiambo: Yes, with a rider. The rider is that it has "the appointment" and that is why I am wondering how we are putting in the dismissal. The appointment must be approved by the National Assembly. I stand guided and the reason for this is that we said that every constitutional office must be vetted by the National Assembly.

Mr. Vice-Chairman: That is already enshrined.

Ms. Odhiambo: So, it basically follows?

Mr. Vice-Chairman: Yes.

Ms. Odhiambo: And we had said that either we provide it this way or through an omnibus clause.

Mr. Vice-Chairman: Then bring up that omnibus clause already. We have that omnibus clause already.

Ms. Odhiambo: Could I request that by the end of night, the drafter could tell us where that omnibus clause is because it keeps coming up?

Mr. Vice-Chairman: Could we get that omnibus clause on Parliament vetting and approving all constitutional offices?

Ms. Odhiambo: Then in that case, I second the proposal by hon. Orengo.

Mr. Vice-Chairman: Thank you. Is that carried?

Hon. Members: Yes.

Mr. Chairman: Before you carry it, I think it might be better to leave that to a Statute so that it does not cover constitutional office and it does not require vetting. This is because surely the President should have the free way without even going through Parliament to get his staff in his office.

The Minister for Agriculture (Mr. Samoei): Mr. Vice-Chairman, I propose that these issues of Secretary to the Cabinet or even the principal secretaries, they should not be here. Once we are vetting the---

Mr. Vice-Chairman: Propose that Articles 184, 185 and 186 be deleted?

The Minister for Agriculture (Mr. Samoei): Mr. Vice-Chairman, I propose that Articles 184, 185 and 186 be deleted in its entirety.

Mr. Vice-Chairman: Hon. Ombui seconds that. Is that carried?

Hon. Members: Yes.

Mr. Vice-Chairman: Will be provided for in an Act of Parliament. Do you want us to have a clause to say that?

Hon. Members: Then they will become constitutional offices.

The Assistant Minister for Water and Irrigation (Mr. Kiunjuri): Mr. Vice-Chairman, we are guided by Dr. Kosgei on what you said about keeping of the records. The cabinet must keep its records. A person who is keeping the records of the Cabinet should not be provided for.

Hon. Members: *Ni karani wa Rais!*

The Vice-Chairman: Can we move on please? Article 187 states: "There is established the office of the Attorney-General. Is that carried?"

Hon. Members: Yes.

The Vice-Chairman: "The Attorney-General shall be appointed by the President with approval of the National Assembly". Is that carried?

Hon. Members: Yes.

Mr. Vice-Chairman: "The qualifications for appointment of the Attorney-General are the same as for the appointment to the office of the Chief Justice". Is that carried?

Hon. Members: Yes.

Mr. Vice-Chairman: “The Attorney-General shall be the principal legal advisor to the national government and shall be responsible for (a) drawing, perusing and recommending approval or otherwise of such agreements, contracts, treaties, conventions and documents by whatever name called to which—“. So, can you please propose an amendment to (4)?

Ms. Karua: Mr. Vice-Chairman, I propose amendment to Clause 4 by putting full stop after the word “the principal adviser to government”.

Mr. Vice-Chairman: Hon. Kenyatta seconds. Is that carried?

Hon. Members: Yes.

Mr. Vice-Chairman: Clause 4 stops at Government with deletion of the word “national”. It is carried. (5) states:-

“The Attorney-General shall have authority with leave of the court to appear as a friend of the court in any civil proceedings to which the National Assembly--- The Attorney-General shall promote, protect and uphold the rule of law and defend the public interest”. Is 5 carried?

Ms. Karua: Let the work of the Attorney-General be set out.

Mr. Vice-Chairman: So, if 5 carried?

Hon. Members: Yes.

Mr. Vice-Chairman: 6 states: “The Attorney-General shall promote, protect and uphold the rule of law and defend the public”. Is that carried?

Hon. Members: Yes.

Mr. Vice-Chairman: “The powers of the Attorney-General may be exercised in person by subordinate officers acting in accordance with (?)”. Is that carried?

Hon. Members: Yes.

Mr. Vice-Chairman: “The Attorney-General shall not be under the direction or control of any personal authority in the exercise of the functions of the office”. Is that carried?

Hon. Members: Yes.

Mr. Vice-Chairman: “The Attorney-General shall hold office for a term of eight years and shall not be---

Hon. Members: Let us go back to 8.

Mr. Vice-Chairman: Okay. Let me hear any proposal to amend 8.

Mr. Kioni: Mr. Vice-Chairman, I propose the deletion of 77(8).

Mr. Vice-Chairman: Hon. Balala seconds. Is that carried?

Hon. Members: Yes.

Mr. Vice-Chairman: 9 states: "The Attorney-General shall hold office for a term of eight years and shall not be eligible for re-appointment". Can I hear a definite proposal from hon. Ethuro?

Mr. Ethuro: Mr. Vice-Chairman, I propose that the Attorney-General has five years so that the President can come with his Attorney-General and eligible for reappointment.

Mr. Vice-Chairman: Any seconder for that? Hon. Balala seconds. Let us move to hon. Kenyatta.

The Deputy Prime Minister and Minister for Finance (Mr. Kenyatta): Mr. Vice-Chairman, we have taken care of that when we said the Cabinet shall consist of the Attorney-General and we have also taken care of how Ministers are appointed and dismissed.

Mr. Vice-Chairman: So, we remove 9?

The Deputy Prime Minister and Minister for Finance (Mr. Kenyatta): Yes, it is not relevant.

Mr. Vice-Chairman: Propose deletion of 9?

The Deputy Prime Minister and Minister for Finance (Mr. Kenyatta): I propose deletion because the President should be able to appoint and fire his Attorney-General.

The Assistant Minister for Defence (Maj-Gen. Nkaisserry): As it stands now, you cannot have an AP station anywhere in the country because really they have no mandate. They can only arrest if the chief tells them to do this and progressively the monster called imperial presidency continues to create an army of its own without really any mandate. As we speak today, there is no mandate in our laws except there is an Act. But what is their law?

What I want to propose is that we have to have these organs as per 277. I will even go further and propose if we want to help, because I have nothing against APs, it is only that I do not know their role. To uplift part 5 bring to (d) and make it other policing services

where you can group all these; KWS, Forest Service guards, and if you want to put APs there I have no problem. The alternative is we can have a police service with the regular police, with the CID, the GSU, the APs and the ASTU. This is now if you want to put them like the Armed Forces because I think that is an area you people want to go. But we cannot have two police services in this country because this is going to bring conflict.

Mr. Vice-Chairman: Dr. Kosgei! The motion as placed by Mr. Ruto is exactly in the terms of what you have touched on last.

The Minister for Higher education (Dr. Kosgei): I think Maj-General Nkaisserry has actually said what I wanted to say. There is a bit of suspicion on the APs because of the antecedent. There was no recognition for them and I feel that if we let them remain hanging without adding them on the list, the suspicion will remain. That is not to say that I have the experiences that Mr. M. Kilonzo has with APs. I have exactly the opposite as a matter of fact. I do not know where we place the GSU because I have found them more useful than the APs. So, that is my experience. The APs are all over the country, they are doing a fine job, there is conflict as we keep saying because there has been no way in which they have been recognized as being legitimate in the system. Therefore, we should add them on that list if under one command with the police or whatever but they have to be there so that the suspicion is removed.

Mr. Vice-Chairman: Okay Mr. Ruto! Point of order first!

The Minister for Lands (Mr. Orengo): I thought Mr. M. Kilonzo read to us the structures in South Africa and Germany. What he denied us are the specific provisions in Germany. Does it give a blanket provision for the creation of defence forces and the police and other services or it is limited? I am just talking about the two examples he gave.

The Minister for Agriculture (Mr. Samoei): I think we need to move forward. I do not think anybody here is denying the existence of the AP. I do not think anybody here is saying the AP should be deleted or anything untoward done to them. I think what we are trying to do here is, we need to recognize this process. We have said here clearly that they need to submit to civilian authority. I think for the defence forces, their chain of command is clear and their mandate is clear; to defend our territorial boundaries. For all forms of police, because they are forces that deal with security within the country, and we have had issues with the police, that is why we are talking of reforming the police. We must agree on at least the basics. That one, there must be a Police Service Commission with civilians in there to provide for how they will operate and to provide an interface between the populace and the force. These people can hire the Inspector-General of the police. I do not mind if we are going to say let the AP exist, let the other police formations exist, but let all of them be under one Inspector-General of police. That will be fine so that in legislation, we can then provide, if need be, for the individual formations including the police, the traffic police, including all the other formations.

The Minister for Tourism (Mr. Balala): Moving forward, I want to second the motion which was provided by Mr. Ruto.

Mr. Vice-Chairman: Which has been seconded!

The Minister for Tourism (Mr. Balala): But with the same structure of the Inspector-General with the formations of other policing.

Mr. Vice-Chairman: Mr. Orenge did you have further information or you requested for further information? As we wait for this information, I just want remind us that we have three two motions. We have one by Mr. Kenyatta which was to delete the Article 277 (1) and (2) and merge the rest of that Article with 276. That motion is properly on the floor it was moved, it was seconded, we have debated it.

Then there is the counter motion by Mr. Ruto, which is to retain that structure as proposed with amendments that the Kenya Police Service be structured in the same manner as the Kenya Defence Forces where various formations of the police force are placed under a single command, which has also been properly recorded. We need to make a choice between those two motions.

The Assistant Minister for Water and Irrigation (Mr. Kiunjuri): First of all Ms Karua amended (c) where it reads now "Kenya Police and Administration---"

Mr. Vice-Chairman: Her proposal is merged in the---

The Assistant Minister for Water and Irrigation (Mr. Kiunjuri): But what I want to say, the way you have placed it is that, it is the Kenya Police Service when it should be Kenya Police and Administration Police.

Mr. Vice-Chairman: But the principle is essentially the motion by Mr. Ruto.

The Assistant Minister for Water and Irrigation (Mr. Kiunjuri): That is the area of conflict, Chair. Not the details. We will get into those details Mr. Kiunjuri. Mr. Orenge has the floor.

The Minister for Lands (Mr. Orenge): I am proposing, if you are to put the APs in Article 277, then let us look at the formulation of the constitution as it is, the design, because you can see into 277 (1) (a) (b) and (c). Then if it is not mentioned, there are---

Mr. Vice-Chairman: Mr. Orenge for your information they are mentioned in 288.

The Minister for Lands (Mr. Orenge): That is what I am saying. You can look for a generic name, and use that name under the Kenya Police Service. Then part 2, you can create 280 Sub-Article 5 or a substantive Article saying the Kenya Police Service, whatever generic name you use shall consist of the traffic police, the CID---

(Loud consultations)

Mr. Vice-Chairman: Order! Let us listen to this.

The Minister for Lands (Mr. Orengo): That is one of the complaints. Mr. Mudavadi cited a case here.

Mr. Vice-Chairman: Mr. Ruto let us listen to this. We need to make a decision here.

The Minister for Lands (Mr. Orengo): The CID with some people in Government raided KTN and the Police Commissioner said he had nothing to do with it because there was no unified command. So I am saying when it comes to issues of policing, let us have a generic name and mention them because when we go to court, a lot of the CID are not doing their work because they were completely emasculated particularly under the previous Police Commissioner. The Police Commissioner decided what that formation has to do. So we want to create some synergies between all these forces and then they can become even the Kenya Internal Security Forces or the Public Safety Police. I think that is borrowed from South Africa. They use the title “public safety” and then they have those names.

Finally, I want to say that the formation of the AP, the motivating factor was that the chief had Executive authority. You know actually there was forced labour and for this they needed a force. In fact there was a time when this was being debated when we were trying to amend the Chief’s Authority Act. Even the PCs were saying in order to enforce their lawful orders; it has to come out as an order from a chief. That is the history and finally, under the police structure if they arrest you for anything, there must be an entry in the Occurrence Book. Evidence must be reported in a certain way. I want to say in a petition I was doing in Western Province, it was to succeed if the police had been in command, but the APs, everything that is recorded did not fall under the auspices of the APs and if you look at the APs Act even now it does not explain in length as opposed to the Kenya Police what are their core duties, their relation to the general police.

Something else that Mr. Kenyatta said and indeed I support him, there is this thing called national interest. Like the Americans will tell you, they went to Afghanistan to secure American national interests. I think you need some broad objective saying that one of the objects of the security organs is to secure the national interests and this is a theory in governance, a political theory, and it exists in many countries, which the duty of the security forces is to secure national interest. Under (c), I am sure we can have a generic name, either the Kenya Internal Security Services or the Kenya Public Safety Services and then under (2) you dig in the question of protecting national interests and then when you go beyond, you define which ones those are.

Mr. Vice-Chairman: Like it has been done for the National Defence Forces in Article 280. Mr. Kenyatta for purposes of compromise, for purposes of moving to the middle, would you withdraw your motion so that we focus on Mr. Ruto’s motion?

The Deputy Prime Minister and Minister for Finance (Mr. Kenyatta): I have no problem. But I want this put on record.

Mr. Vice-Chairman: Put that on record!

The Deputy Prime Minister and Minister for Finance (Mr. Kenyatta): I honestly believe that we are not doing the right thing and I just want to say that in the interest of compromise, yes, I will withdraw but I want to object. I do not believe that in this Constitution we should be dealing with structures. We should leave that to Statutes and I want to maintain that position.

Mr. Vice-Chairman: Thank you, you can object after the mongrel is born, it is not born yet. Now please give us the information and then we need to make a decision on this.

The Minister for Justice, National Cohesion and Constitutional Affairs (Mr. M. Kilonzo): Let me start with South Africa, title (2) Police Section 205, 206 refer to 7, refer to even municipal police services, their establishment leave alone the national police. The German one, Article 87 (a) starts with Armed Forces, their establishment, then the administration of the armed forces, it goes on to refer to the police forces themselves and also federal border guards and then further on Article 115 (a) it makes specific references to the state defence also using the police. So what Mr. Orengo is saying is right.

The German one is very elaborate on this. The South African one is; title one chapter 7 says the defence force must be structured and managed as a disciplined military force.

Mr. Vice-Chairman: But it does not break it down? Can you pass this paper to Mr. Kenyatta please just for his information. Now for purposes of moving forward I want to request a motion, your motion has been varied severally especially with further amendments by Mr. Orengo. Mr. Orengo would you offer to move that motion attracting all the composites. Mr. Orengo please! We are crafting something uniquely Kenyan. The German that is more explicit that is what he said. Let us move forward. Order! We are making progress, one motion has pulled off the floor, we have one motion by Mr. Ruto. It has been modified by Mr. Orengo. Can we have some order please! We are building a compromise and a compromise will include modifications. I want a motion that can bring us together.

Yes Please Mr. Ruto!

Mr. Ruto: I want that to propose that (C) be reversed to read the Kenya Administration and Police Services or alternatively the Kenya Internal Security Services.

Mr. Vice-Chairman: Then complete that motion. Order please! Let us make a decision here. Mr. Ruto please make that motion in its entirety.

Mr. Ruto: That we add to 277 1 (c) that we re-word it as the Kenya Internal Security Services---

Mr. Vice-Chairman: To be structured in like manner as the National Defence Forces.

Mr. Ruto: Those are details now. Those will be details.

Mr. Vice-Chairman: But is that principle. That is the principle I want us to adopt. I want it seconded. Ms Karua seconds.

Ms. Karua: I second and then we specify the two below that.

Mr. Vice-Chairman: Is that motion carried? That motion is carried. Let us move forward then. Then that means that when we come to Article 285 sub Article 2--- you had something on sub Article 2. Please pass the microphone to Mr. Orengo. You had something on national interests?

The Minister for Lands (Mr. Orengo): I wanted a phrase there, it can come in the beginning, in the middle or the end but one of the objects should be to secure national interests. That gives the government some leeway if there is a conflict that is not purely military or civilian, that it can use all the military and police formations for purposes of securing national interests.

Mr. Vice-Chairman: Mr. Musila Seconded. Is that carried? Can I hear a proposal to adopt 187 as amended? Mr. Balala proposes and Ms. Karua seconds, is that carried? We move on.

188- Director of Public Prosecutions. There is established the office of the Director of Public Prosecutions is that carried. The Director of Public Prosecutions shall be appointed by the president with the approval of the National Assembly is that carried.

Qualifications for appointment as Director of Public Prosecutions are the same as for appointment of the judge of the high court. The Director of Public Prosecutions shall have power to direct the Inspector-General of the Kenya Police Service to investigate any information or allegations of criminal conduct. Is that carried? Can I hear proposal to amend? Mr. Kioni!

Mr. Kioni: Mr. Vice-Chairman I cannot remember what we called that internal thing.

Mr. Vice-Chairman: Kenya National Security Service! Can I get a seconder for that? Ms. Noor seconds. Is that carried with amendments?

The Minister for Lands (Mr. Orengo): If you talk to the Attorney General he will tell you that although he can direct, that is as far as it goes. The police or whoever is directed will just ignore because it is just a direction to investigate. Can we put some provisions that compel the police to carry out such directives and if there no such compulsion, then it should not be there in the first place?

Mr. Vice-Chairman: Then propose some compulsive provision.

The Minister for Lands (Mr. Orengo): I will propose something to the effect that the Inspector of the Kenya Internal Security Service shall report the result of the investigation from the date of such a direction.

Mr. Vice-Chairman: Can I get a seconder for that? A provision to compel the Inspector-General to be accountable.

The Assistant Minister for East African Community (Mr. Munya): I was just wondering whether if you put provisions for compelling if it is not desirable to have separation between prosecutorial and investigative powers, because if you say now you can compel it means that separation is no longer there. I am just asking advice from the senior counsel here.

The Minister for Lands (Mr. Orengo): Like in the US, prosecutors work with the investigative organs of the Government. For example, the FBI is directly under the Attorney-General but in Kenya we created a situation where these offices are distinct and separate. It is for that particular reason that it is necessary to have that rider. Otherwise the AG will tell you that every time he gives a directive like that, nothing happens.

Mr. Vice-Chairman: I think that is a good proposal, can we second that? Mr. M. Kilonzo has seconded. Is that carried? That is carried. Did we get it, Mr. Nyegenye?

Okay we move on. Clause 5:-

“The Director of Public Prosecutions shall exercise state powers of prosecution and may (a) institute and undertake criminal proceedings against any person before any court other than a court martial in respect of offence alleged to have been committed, (b) take over and continue any criminal proceedings commenced in any court other than a court martial, that have been instituted or undertaken by another person or authority with the permission of that person of authority and (c) subject to clause 8 discontinue any ---“

Is that clause 5 carried?

Ms. Karua: I am just wondering---

Mr. Vice-Chairman: Yes. Take the microphone and wonder on record.

Ms. Karua: I am just wondering the practice of giving the Director of Public Prosecutions the right to withdraw proceedings before judgment after people have gone through a hearing. Should we not only allow it before the conclusion of the trial but not before judgment?

Mr. Vice-Chairman: Please propose a very specific amendment.

Ms. Karua: I am proposing that 5 (c) be amended to read subject to clause 8 discontinue at any stage before the conclusion of the taking of evidence. Because if we say conclusion of the trial it could also mean before judgement but we should say before the evidence is concluded, before the witnesses, the trial is closed.

Mr. Vice-Chairman: I want a seconder to this first before we move on.

Ms. Karua: I want my colleagues to give me ideas before we ---

Mr. Vice-Chairman: Let us listen to Mr. Orengo a bit. I will come back to you.

The Assistant Minister Defence (Mr. Musila): I wanted to seek clarification particularly from the proposer, are these not details contained in the criminal procedure code?

Ms. Karua: You see if we put in the constitution, we cannot take it away later. And I think the intention of writing this is if an accused person (off record).

The Minister for Lands (Mr. Orengo): I think you find in most cases the courts have been moving towards not allowing the AG to enter a *nolle* anyhow, they must put a case before the court. More so they will not allow a *nolle* to be entered where the case has gone beyond the conclusion of the prosecution case because you find that the prosecution is withdrawing the case fearing the consequences of failure.

Mr. Vice-Chairman: Can we look at clause 6. Where discontinuance referred to clause 5 takes place after the defendant has completed the delivery of his or her evidence, the defendant shall be acquitted.

The Minister for Lands (Mr. Orengo): That is where I was going to.

Mr. Vice-Chairman: Please propose.

The Minister for Lands (Mr. Orengo): I propose that clause 6 be amended to read subject to clause 8, discontinue at any stage, where discontinuance referred to in clause 5 (c) takes place after the defendant has completed the delivery of his or her defence. It should be on 5 (c).

Mr. Vice-Chairman: Clause 6 is qualifying 5 (c).

The Minister for Lands (Mr. Orengo): But I was saying that we must deal with 5 (c) because it is saying subject to clause 8 discontinue at any stage before judgment is delivered, I would rather have it the other way that subject to clause 8, discontinue at any stage before putting the accused person on his defence.

Mr. Vice-Chairman: Look at 6 Mr. Orengo.

The Minister for Lands (Mr. Orengo): But you know 6 comes after the defendant has completed his or her defence!

Mr. Vice-Chairman: I want a definite amendment so that we can move forward.

Ms. Karua: I will explain. I propose that clause 6 be amended to read where discontinuance referred to in clause 5 (c) takes place after the close of the prosecution case, the defendant shall be acquitted. The import of that will be that if the prosecutor is withdrawing because he has seen his case will be insufficient, you get away.

Mr. Vice-Chairman: Secunder for that. Mr. Orengo seconds, is that carried?

Thank you. We are moving on. Is clause 6 carried?

Clause 7-

“Parliament may by legislation confer powers of trafficking on authorities other than the Director of Public Prosecution”.

Is that carried?

“The DPP may no discontinue a prosecution without the permission of the court”.

The powers of the DPP may be exercised in person by subordinates in accordance with the general--- The DPP shall not require the consent of any person or authority for commencement of criminal proceedings and the exercise of his or her powers or functions shall not be under the direction or control of any person or authority. In exercise of the powers prescribed by this Article the DPP shall have regard to the public interests, the interests of the administration of justice, and the need to prevent and avoid abuse of the legal process. The DPP shall hold office for a term of 8 years and shall not be eligible for re-appointment”.

Ms. Karua: *(Off record)*

Ms. Karua: May I propose that tenure of the DPP be 6 years.

Mr. Vice-Chairman: Mr. Balala are you seconding? Is that carried? Can we have 5 to coincide with the Presidential term? Mr. Orengo!

The Minister for Lands (Mr. Orengo): I think it should be not more than two terms. of four years each. The reason being that the DPP is a professional and if he is doing his job well, he should be thoroughly read and if he quits that office there is no other job he can do. If you look at some of the good prosecutors we have had. When they are pushed out of the job they do not know where to go. But I think four---

Mr. Vice-Chairman: Let us hear Mr. Wetangula and make a decision on this.

The Minister for Foreign Affairs (Mr. Wetangula): I thought the philosophy behind giving constitutional recognition and protection of the DPP, is to separate the prosecutorial powers from the AG. My understanding is that the DPP is an office in the

public service except they are enjoying constitutional protection. And if the professional who is hired for that job takes his office, there should be a provision for retirement other than what looks like a contract. This is a professional working in Government but only enjoying constitutional protection like the judges.

Mr. Vice-Chairman: So Mr. Wetangula what are you proposing, the 8 year period?

The Minister for Lands (Mr. Orengo): Mr. Vice-Chairman, I think let us stick to the 8 years, because we do it once and it is done.

Mr. Vice-Chairman: With no eligibility for re-appointment?

The Minister for Lands (Mr. Orengo): With no eligibility for re-appointment.

The Deputy Prime Minister and Minister for Local Government (Mr. Mudavadi): No! No! Mr. Wetangula. To me you give him 8 straight years and then he gets out. Because the argument is if we start this renewal process we will fall into the Ringera arrangement. We will fall into the arrangement of having to approve these guys. So let us do it once.

The Minister for Foreign Affairs (Mr. Wetangula): That is a departure from my proposal. My proposal is that the DPP is an office in the public service that must have entry qualifications and retirement, other than the 8 years. He is only enjoying constitutional protection by virtue of the work that he does. It is like a judge once appointed will work until retirement. That is my proposal.

Mr. Chairman: While I agree with the Minister for Foreign Affairs, this gentleman or this lady will be at the apex of the profession. In other words he or she would have taken a long time to reach the DPP's point. To have somebody then stick there for more than 8 years it is not even fair to that line itself. So while I agree with him that he or she will be like a judge but the difference is as opposed to somebody who has entered judgeship at 40, this one will have gone through that process for already 20 or so years to reach the DPP's post. If on the other hand you come straight for contracting then there is no problem with you getting a contract of 8 years. So whichever I think 8 years is reasonable.

Mr. Vice-Chairman: A single term of 8 years, can I hear a proposal to--- Mr. Kiunjuri!

The Assistant Minister for East African Community (Mr. Kiunjuri): We are also assuming that you can be appointed at the age of 65. What is the age? I thought we should have a clause just like you have for CGS and others whereby you are appointed for a term of 8 years or 70 years whichever comes first so that you do not have a person appointed there because you can be appointed at 69 and you are there up to 76. So that we have the limit whichever comes first, or the age of this whichever comes first.

The Minister for Foreign Affairs (Mr. Wetangula): *(off record)*

Mr. Vice-Chairman: I want a solid proposal to move us forward. Can I get a proposal to take this forward? Ms. Karua help us please!

Ms. Karua: propose that we retain the 8 years one term. That is seconded by who? Mr. Samoei? Is that carried? The objection is recorded by Mr. Wetangula. Let us move forward. I want a proposal to adopt 188 as amended. Mr. Samoei, Mr. Kioni seconds! Hon. DPM seconds! Is that carried? We move on please to 189.
Clause 189- Public Defender. Ms. Odhiambo please propose deletion of the office of Public Defender.

Ms. Odhiambo: I propose the deletion of the office of Public Defender and therefore deletion of 189 and 190.

Mr. Vice Chairman: No 190 refers to removal and resignation of the AG and the DPP.

Ms. Odhiambo: Sorry, then only 189 should be deleted.

Mr. Vice-Chairman: Secunder! Mrs. Ngilu seconds. Is that carried?

Hon. Members: Even the Attorney-General!

Mr. Vice-Chairman: Okay. Now this is the first; removal and resignation of the DPP. That should even be the new designation there.

Removal and resignation

“190. (1) The Director of Public Prosecutions may be removed from office only on the grounds of—

- (a) inability to perform the functions of office arising from mental or physical incapacity;
- (b) non-compliance with Chapter Seven;
- (c) bankruptcy;
- (d) incompetence; or
- (e) misconduct or misbehavior whether in the performance of the office-holder’s duties or otherwise.

Is Article 190 (1) carried?

An hon. Member: What does “otherwise” mean?

Mr. Vice-Chairman: Chapter 7 is on Leadership and Integrity.

Mr. Kioni: Mr. Vice-Chairman, Sir, under part “e”, I propose that again we carry the issue of gross misconduct and we delete “otherwise” at the end.

Mr. Vice-Chairman: So, that, that Clause ends at the word “duties”. Can we get a seconder for that?

The Minister for Foreign Affairs (Mr. Wetangula): Mr. Vice-Chairman, Sir, how do you gauge incompetence, because if---

Mr. Vice-Chairman: But I think it will be reasonably judged if you have consistently established a streak of not winning any case; I mean!

Who seconds? *Waziri* Mutula seconded by hon. Kioni. Is Article 191 as amended carried? Amended "gross misconduct" and deletion of "otherwise" and "Attorney-General" and "the Public Defender"

"(2) A person desiring the removal of the Director of Public Prosecutions may present a petition to the Public Service Commission which, despite Article 295(2) (b), shall be in writing, setting out the alleged facts constituting the grounds for the removal of the office-holder in question."

That should be removal of the DPP.

Is that carried? Let us just make reference to Article 295(2) (b). Was that deleted? Was it deleted in its entirety? I do not think so.

Mr. Nyegenye, what did you do with Article 295(2) (b)? Did we delete that Article? I do not think we did!

(Mr. Vice-Chairman went through the Draft)

There is actually no such provision!

The Deputy Prime Minister and Minister for Finance (Mr. Kenyatta): There was before, for general powers!

Mr. Vice-Chairman: No, no, no! But in the original document, there is no Article 295(2) (b); because sabbatical (ii) has no (b)! so, it was an erroneous cross-referencing. So, the drafters, please, look at that. If we are carrying it, we may need to re-craft that, despite Article 295.

But that notwithstanding, is that Article okay? Can I get a proposer for that? *Waziri*, are you proposing?

Waziri Ngilu seconds with that adjustment.

"(3) The Public Service Commission shall consider the petition and, if it is satisfied that it discloses the existence of a ground under clause (1), it shall send the petition to the State President."

Is that carried? Mr. Balala, do you propose?

Mr. Kioni seconds.

"(4) On receipt and examination of the petition, the State President shall within fourteen days suspend the office holder in question---

That really should be the DPP.

"---from office pending action by the State President in accordance with clause (5) and, acting in accordance with the advice of the Public Service Commission, shall—

(a) in the case of---

Just delete that up to the DPP.

“(b) in the case of the Director of Public Prosecutions---“
That should just be a direct reference to the DPP.

“---appoint a tribunal consisting of—

(i) four members from among persons who hold or have held office as a judge of a superior court, or who are qualified to be appointed as such;

(ii) one advocate of at least fifteen years’ standing nominated by the statutory body responsible for the professional regulation of advocates; and

(iii) two other persons with experience in public affairs.”

Are we carrying part 4?

(Loud consultations)

The Minister for Tourism (Mr. Balala): No.

But, Mr. Vice-Chairman, Sir, part 4(a) is in reference only to the Attorney-General.

Mr. Vice-Chairman: I even skipped it, if you were listening! I did not even read it and when I read part “b”, I skipped the reference to “public defender”.

The Minister for Tourism (Mr. Balala): Thank you, Mr. Vice-Chairman, Sir.

The Minister for Foreign Affairs (Mr. Wetangula): Mr. Vice-Chairman, Sir, I think we can give protection to this office without going through the stretch of a tribunal to remove the DPP from office. I propose that we get a formulation that you have already cited somewhere---

In fact, we have already said that he can be removed from office under Article 191. If those are satisfied, why do you need a tribunal, surely? We are loading the State with so many layers of---

Mr. Vice-Chairman: Can you make a proposal where you leave the removal to the President?

The Minister for Foreign Affairs (Mr. Wetangula): In fact, Mr. Vice-Chairman, Sir, it is provided under part 3:-

“(3) The Public Service Commission shall consider the petition and, if it is satisfied that it discloses the existence of a ground under clause (1), it shall send the petition to the State President.”

That is not good enough!

The Minister for Justice, National Cohesion and Constitutional Affairs (Mr. M. Kilonzo): Mr. Vice-Chairman, Sir, this is a very critical office that will be prosecuting the high and mighty, and they can manipulate. The same problem we have had in this country for many years. I think if you really think that you want to remove this man and you have given him eight years, then you must be prepared to go through this process of a tribunal.

Mr. Vice-Chairman: Thank you.

The Deputy Prime Minister and Minister for Finance (Mr. Kenyatta): Just a question: Who appoints the Public Service Commission?

The Minister for Justice, National Cohesion and Constitutional Affairs (Mr. M. Kilonzo): The President.

The Deputy Prime Minister and Minister for Finance (Mr. Kenyatta): The President and they must be approved by Parliament. So, that means that this is already a vetted office. It is already vetted by Parliament. So, consequently, it should have adequate independence to be able to deal with the issue of the removal of this officer without necessarily going for a tribunal.

Ms. Odhiambo: Mr. Vice-Chairman, Sir, I want to agree with the Minister for Justice, National Cohesion and Constitutional Affairs that if you actually look at one of the reasons that we are sort-of stuck with some of those cases is because if you have seen the dramatic way that we have been replacing the DPPs in the past. So, I would suggest that if we make it constitutional, with security of tenure, then the removal should be equally as vigorous.

Mr. Vice-Chairman: Can we move on, please? Can we adopt part 4 as amended? Who proposes? Ms. Odhiambo, do you want to propose? Can that be seconded?

Waziri seconds. That is carried!

The tribunal really--- Part 5 makes reference to the tribunal still. The rest of those clauses is the work of the tribunal. Let me jump to part 8.

“(8) Tribunals appointed under clause (4) (a) and (b) ---“

It should actually be part (b) now.

“---shall in all other respects be responsible for the regulation of their proceedings.

(9) The Director of Public Prosecutions or Public Defender may resign from office by giving notice to the State President.”

Mr. Kioni: Mr. Vice-Chairman, Sir, did we provide for--- To ensure that these tribunals are not there endlessly, I know we talked about it in other areas. Do we need to provide for the same here or we were covered? We talked about the speed within which they should do their work.

Ms. Karua: *(Off record)*

Mr. Vice-Chairman: So, can I hear that proposal very specifically? Yes, Ms. Odhiambo, please? The expedition

Ms. Odhiambo: *(Off record)*

Mr. Vice-Chairman: No, no! Any clause that contains a tribunal. So, hon. Kioni, can you propose this?

Mr. Kioni: Mr. Vice-Chairman, Sir, the tribunal shall inquire into the matter and report on the facts expeditiously.

Mr. Vice-Chairman: Expeditiously.

Mr. Kioni: Yes. Somewhere there.

Mr. Vice-Chairman: Could you recommend further that any place where we have established a tribunal, that term "expeditious" be---

Ms. Odhiambo: *(Off record)*

Mr. Vice-Chairman: That is drafting. Yeah, that is a drafting detail.

Ms. Odhiambo: *(Off record)*

Mr. Vice-Chairman: Ms. Odhiambo, can you second that?

Ms. Odhiambo: I second.

Mr. Vice-Chairman: Is that carried? Can I hear a proposal to adopt Article 190 as amended?

Mheshimiwa Karua proposes.

Secunder?

Mheshimiwa Kazungu seconds.

Now, I want a proposal to adopt Chapter 10 on the Executive as amended.

The Deputy Prime Minister and Minister for Local Government (Mr. Mudavadi):

Mr. Vice-Chairman, Sir, we got rid of the Public Defender. But I would just want to figure out in which clause, you know, there are these proper briefs that are normally---
(off record) ---in which clause, if any?

Ms. Karua: *(Off record)*

The Deputy Prime Minister and Minister for Local Government (Mr. Mudavadi): I just wanted to understand how it been handled; how do you get the proper briefs and---

An hon. Member: *(Off record)* It is not a constitutional requirement.

The Deputy Prime Minister and Minister for Local Government (Mr. Mudavadi): So, I was just trying to figure out because---

(Loud consultations)

Mr. Vice-Chairman: Can he ask, and then we can have someone to respond to him?

The Deputy Prime Minister and Minister for Local Government (Mr. Mudavadi): Because in the whole, I am just looking at the philosophical issue behind this Public Defender. But we have removed it. So, I am not going to ask us to bring it back or whatever. But I just wanted to ask; the philosophy behind it is that, to be able to provide access to legal services by all people, including those who cannot afford. Now, how have we covered it?

Mr. Vice-Chairman: Yes, Mr. Chairman, Sir, do you want to respond to that?

Mr. Chairman: Yes. I think the D--- (*Off record*) earlier on in the Bill of Rights, we had said that access to legal services is one of the rights when you are dealing with some of the offenses in the Bill of Rights, the rights of the accused---

(Loud consultations)

Now, one of the other ways we could deal with it is, instead of having a civil servant do it and the bureaucracy, it is to provide a legal scheme. Some of the countries have free aid scheme where then you actually get to hire lawyers, and that could be covering---

(Loud consultations)

Mr. Vice-Chairman: Now, can we get a proposal because, first of all, I wanted us to adopt the whole chapter. Chapter 10.

The Minister for Agriculture (Mr. Samoei): Just for clarity, On page 102, Mr. Vice-Chairman, Sir, Clause 187 (8), it says:

“(8) The Attorney-General shall not be under the direction or control of any person or authority in the exercise of the functions of office.”

Mr. Vice-Chairman: That whole clause was deleted.

The Minister for Agriculture (Mr. Samoei): I just wanted to confirm that it was deleted.

Mr. Vice-Chairman: It was

The Minister for Agriculture (Mr. Samoei): Because the Attorney-General in this particular--- is just a Minister. So, the DPP is the one we should give that immunity.

Mr. Vice-Chairman: Can I get a proposal to---?

The Minister for Agriculture (Mr. Samoei): I can propose the adoption of the chapter.

Mr. Vice-Chairman: Hon. Samoei has proposed adoption of the chapter 10 on the Executive.

Hon. Kiunjuri seconds.

Is Chapter 10 on the Executive carried?

Hon. Members: Yes!

Mr. Vice-Chairman: *Tupige makofi*, we have adopted one of the key chapters on the Executive!

(Applause)

Can we now deal with this matter of proper briefs?

Ms. Karua, you were responding to the right to access justice, which we have enshrined in the Bill of Rights?

Ms. Karua: Yes, Mr. Vice-Chairman, Sir. I was saying that, that enshrining is aspirational. Now, policy and legislation deals with those aspirational issues. The Minister here will tell you that there is a pilot legal aid scheme going on now, which this particular Government had pledged to make room for. If they do not, each party campaigns on its platforms and these are issues that can be implemented. It is never a constitutional issue!

Mr. Vice-Chairman: So, *Bwana* DPM, can you live with that?

The Deputy Prime Minister and Minister for Local Government (Mr. Mudavadi) *(Off record)*

Mr. Vice-Chairman: Okay.

I want to suggest that we take a ten-minute refreshment break---

Hon. Members: No!

Mr. Vice-Chairman: So, we move on?

(Loud consultations)

An hon. Member: (Off record)

Mr. Vice-Chairman: We finish the chapter and then we take--- Refreshments are available. You can walk out; *unaweza punga upepo*, catch a cup of tea; *iko mahamri na mambo mengine*.

Nqw, guide me. Do we move to representation or devolution?

Hon. Members: Representation!

Hon. Members: Devolution!

Mr. Vice-Chairman: So, we move on to devolution. Chapter 12 – Devolved Government. That is on page 117.

[Mr. Vice-Chairman left the Chair]

[Mr. Chairman took the Chair]

Mr. Chairman: Okay. Can I commend everybody for the industriousness in which we are moving?

“Part 1—Objects and principles of devolved government

Objects of devolution

We are done with the Executive.

207. The objects of the devolution of government are to—

(a) ensure the democratic and accountable exercise of sovereign power;

(b) foster national unity by recognizing diversity;

(c) give powers of self-governance to the people and enhance the participation of the people in the exercise of the powers of the State and in making decisions affecting them;

(d) recognize the right of local communities to manage their own local affairs and to form networks and associations to assist in that management and to further their development;

(e) protect and promote the interests and rights of minorities and marginalized groups;

(f) promote social and economic development and the provision of proximate, easily-accessed services throughout Kenya;

(g) ensure equitable sharing of national and local resources throughout Kenya;

(h) facilitate the decentralization of State organs, their functions or services from the capital of Kenya; and

(i) enhance checks and balances and the separation of powers.

Does anybody have issues?

Ms. Karua: Mr. Chairman, Sir, I have issues, not with many of them, but particularly with part (c). When you talk of self governance, it seems to go beyond the devolution. So, since we agreed that one of the principles of--- Before we went to devolution, we agreed on unitary. When you talk of self governance, it seems as if you are going beyond unitary and, therefore, what I am thinking part (c) wanted to capture or should capture in this situation is enhancing the participation.

Mr. Vice-Chairman: So, why do you not start from there?

Ms. Karua: So, shall we say:

“enhancing the participation of the people in the exercise of the powers of the State and in making decisions affecting them;”

Mr. Vice-Chairman: So, can that be seconded?

Mr. Ethuro: Yes.

Mr. Vice-Chairman: In other words, she is amending part (c) to delete the words “give powers of self-governance to the people and” so that it just starts from the word “enhance.”

Is that seconded?

Mr. Ethuro: Yes, Mr. Chairman, Sir. I second.

Mr. Vice-Chairman: Can we carry?

Ms. Karua: --- of state is in making decisions that affect them: In making decisions that affect them”.

Mr. Chairman: Is that the general feeling?

Ms. Karua: Because (d) goes a little bit further and it is good it enhances (c) because it is talking of managing their local affairs.

Mr. Chairman: So, can you then propose those amendments so that we now have them as a whole?

The Deputy Prime Minister and Minister for Finance (Mr. Kenyatta): I just want to add onto what Ms. Karua has said because I have a similar problem with (a) Ensure the democratic and accountable exercise of sovereign power. What do we mean by “sovereign”? The word “sovereign” should not be there because it is not a sovereign power.

Mr. Chairman: And state power?

The Deputy Prime Minister and Minister for Finance (Mr. Kenyatta): So we if we can say “ensure the democratic--- or delete the whole of (a).

Mr. Chairman: Let us not be too happy with deleting.

The Deputy Prime Minister and Minister for Finance (Mr. Kenyatta): I am just saying that the problem I had is the word “sovereign power”.

Mr. Chairman: Exercise of power then?

The Deputy Prime Minister and Minister for Finance (Mr. Kenyatta): Yes!

Mr. Chairman: So can you make that proposal for that amendment?

Mr. Ruto: I want to propose deletion of (a) because we are misleading ourselves. “Ensure the democratic and accountable exercise of sovereign power.” What are we talking about here? This is under legislation and other areas where you exercise these democratic rights and elections. I do not think a devolved structure exists for that purpose.

Mr. Chairman: I have heard you! Let us here from Mr. Ethuro

Mr. Ethuro: Mr. Chairman, Sir, I think we are not reading this properly. The object of that devolution of government is so that it is the sovereign power held by the state, a bit of it is being chipped through this other mechanisms. So, it is not that we are exercising the sovereign power in the devolved units themselves. It is already that power exercised by the national state---

Mr. Chairman: *Ni kunusa tu kidogo!*

Mr. Ethuro: *Ni kunusa kidogo!* I think we are misunderstanding it.

The Minister for Agriculture (Mr. Samoei): Mr. Chairman, Sir, I agree with Mr. Ethuro only that remove any doubt, then we should delete the word “sovereign” and say “exercise of power”.

Mr. Chairman: So that is the proposal from Mr. Kenyatta. Can you then second that?

(Mr. Samoei seconded)

Is that carried?

The Assistant Minister for East African Community (Mr. Munya): When you say “the object of devolution to ensure the democratic and accountable exercise of power” you are giving devolution almost like it is a Supreme Court because it is the court that ensures that power is exercised properly. So, it is dangerous to put it in the Constitution unless we are clear about what it is.

Mr. Chairman: Mr. Munya, we are talking about the people. This term “dangerous” has become very popular. Can we say why it is dangerous? What danger does it have?

The Assistant Minister, Ministry of State for Defence (Maj-Gen. Nkaissery): Mr. Chairman, Sir, if look at it from the positive point of view--- Instead of ensure, you can say promote the democratic and accountable exercise of power.

(Ms. Karua seconded)

Mr. Chairman: Thank you! That is positive thinking now, no longer “dangerous”. What about (b)? Foster national unity by recognizing diversity.

Hon. Members: That is okay!

Mr. Chairman: Okay!

The Deputy Prime Minister and Minister for Finance (Mr. Kenyatta): Mr. Chairman, Sir, let us say “foster national unity while - instead of by recognizing – recognizing diversity.

Mr. Chairman: That is okay! Can I get a seconder?

(Mr. Ethuro seconded)

What about (c)?

Ms. Karua: The language can be modified.

Mr. Chairman: So could you do it on record now?

Ms. Karua: That (c) should be amended to read: “Enhance the participation of the people in making decisions that affect them.”

(Mr. M. Kilonzo seconded)

Mr. Chairman: Is that carried?

Hon. Members: Yes!

Mr. Chairman: (e) protect and promote the interests and rights of minorities and marginalized groups.

Hon. Members: It should be (d)!

Mr. Chairman: Okay!

Mr. Ethuro: My proposal is that I delete the word “local”. It is already local communities why do you localized everything? And also to form networks and associations – delete!

Mr. Chairman: Seconder? Delete the whole (d)?

Hon. Members: No!

Mr. Chairman: Actually I do not see a lot of use for it. My view is that it really does not have much use. It is too much here!

Mr. Ethuro: I think to recognize the right of communities to manage is a good principle.

Mr. Chairman: Okay! Seconder?

(Mrs. Noor seconded)

Is that carried that way?

Hon. Members: Yes!

Mr. Chairman: (e) protect and promote the interests and rights of minorities and marginalized groups.

(Mrs. Noor proposed and Mr. Ethuro seconded)

(f) Promote social and economic development and the provision of proximate, easily accessed services throughout Kenya.

(Ms. Karua proposed and Mr. M. Kilonzo. seconded)

(g) Ensure equitable sharing of national and local resources throughout Kenya.

(Mrs. Noor proposed and Maj-Gen. Nkaisserry seconded)

(h) Facilitate the decentralization of state organs, their functions and services from the capital of Kenya. Why do you want to mention the capital of Kenya? Do you propose for deletion?

(Mr. Ethuro proposed and Maj-Gen. Nkaisserry seconded)

(i) Enhance checks and balances and the separation of power. How will this ensure separation of powers?

The Assistant Minister for East African Community (Mr. Munya): Mr. Chairman, Sir, I propose the deletion of (i).

(Mr. Ruto seconded)

Mr. Ruto: I would also like to amend (d) to recognize the right of communities to manage their own affairs and to further their development.

(Mr. Balala seconded)

Mr. Chairman: Is that carried?

Hon. Members: Yes!

Mr. Kioni: I propose that we delete the word “ensure” and provide for “promote equitable sharing of national and local resources throughout the country”.

(Mr. M. Kilonzo seconded)

Mr. Chairman: That is carried! Can we then get somebody to whole Article?

The Minister for Water and Irrigation (Mrs. Ngilu): Mr. Chairman, Sir, if we use the word “promote” and delete “ensure”, we are not going to be committal to ensuring that the sharing of the national and local resources are spread throughout Kenya and this is what we want to achieve by devolution. So, I would like to propose that we leave the word “ensure”.

Mr. Chairman: Does anybody have very strong feelings against that? Really it is more principle!

Mr. Kioni: Mr. Chairman, Sir, there is no bone that is being broken by this and we can still allow the word “ensure” to remain but ideally there is no way that you are going to ensure it.

Mr. Chairman: Can you then withdraw that? Mr. Kenyatta is proposing inclusion!

(Mr. Kenyatta proposed and Mrs. Noor seconded)

That means the word “ensure” is back to (g). Can we then carry the entire Article?

Hon. Members: Yes!

(Mr. Ruto proposed and Mr. Ethuro seconded)

Mr. Chairman: Principles of devolved government; Article 208 - County governments established by this Constitution---

Hon. Members: What counties?

Mr. Chairman: We sort out counties?

The Minister for Tourism (Mr. Balala): Mr. Chairman, Sir, I do not think there is another name. I want to propose that Article 208 – regional governments established by this Constitution reflect the following principles:-

Mr. Chairman: Can we say this: Devolved governments because I am sure we will discuss the issue of regions so that we do not go into a debate now.

The Minister for Tourism (Mr. Balala): So let us agree!

Mr. Kioni: Let us call them devolved governments so that it does not hold us!

Mr. Chairman: I know that when we come to the numbers, we are going to go into those discussions.

Mr. Kioni: We say devolved governments as it will help move quickly and then we can sort out---

The Minister for Tourism (Mr. Balala): When we come to the division and boundaries, then what do you call them?

Mr. Chairman: We have to then decide!

The Minister for Tourism (Mr. Balala): Then let us decide now; it will be easier and it will be flowing!

Mr. Chairman: The problem is that we are going to take a long time doing that and we better do that when we have done some work.

The Assistant Minister for East African Community (Mr. Munya): Mr. Chairman, Sir, we have to be clear from the beginning and I do not think it will take us a long time as you think whether it is regional government or county governments because if we just say devolved governments, it is referring to many of them. They could be regional including counties and any other governments and so we cannot amend it that way.

Mr. Chairman: Obviously we are not going to leave it as devolved governments. We will take that decision!

The Minister for Foreign Affairs (Mr. Wetangula): (*Off record*)

Mr. Chairman: Thank you! So the only thing is that I do not want us to take that decision now because I want to make some progress. If you, however, insist the next part is called county governments, we can take that decision at that point. So Article 208 – county governments or devolved governments or regional government or whatever we agree on established by this Constitution reflect the following principles—

(a) County governments shall be based on democratic principles and the separation of powers;

(b) County governments shall have reliable sources of revenue and autonomy to govern and deliver services effectively; and

(c) No more than two thirds of the members of representative bodies in each county government shall be of the same gender.

In terms of the principle and not the name of the entity, does anybody have any issue?

Mr. Kioni: Mr. Chairman, Sir, one is that I would want somebody to help me with separation of power but I have an amendment that I will propose to 208(b) that the county

government shall have reliable sources of revenue to enable them deliver services effectively. The word “autonomy” I think is a little bit not where it should be.

The Minister for Agriculture (Mr. Samoei): While I agree with Mr. Kioni that autonomy is too strong but they will have a government so govern and deliver services – “govern” must be there because we will have a government at that level.

Mr. Chairman: Yes, because even county councils are governments.

The Minister for Agriculture (Mr. Samoei): It is a local government anyway!

Mr. Chairman: So can you then make that proposal, Mr. Samoei?

The Minister for Agriculture (Mr. Samoei): I think autonomy stretches a bit far and we are trying to create a middle ground.

Mr. Chairman: The fact that we remove autonomy does not mean they will not have it.

The Minister for Agriculture (Mr. Samoei): And mechanisms to govern and deliver services effectively.

Mr. Chairman: The very fact that the chapter is entitled ‘devolved’ says that! Mr. Munya, you obviously know we are not creating so why would you want to start with that point? Everybody has said 20 times we are not creating federal units.

Mr. Ethuro: (*Off record*)

Mr. Chairman: I just want us to be positive! We have all agreed no *majimbo*, no federalism!

Hon. Members: Yes!

Mr. Chairman: So anybody who from now refers to the fact that we are creating federalism will really have to give us the basis for saying that.

Mr. Ethuro: We could use the word “independence”!

Ms. Odhiambo: Mr. Chairman, Sir, I cannot immediately think of a word and I had no problem absolutely with “autonomy” because autonomy has nothing to do with separation. It basically means that they have a level of control over the work that they do. But if we are removing “autonomy”---

Mr. Chairman: If you have Thesaurus on the computer, you could just see what other terms---

Ms. Odhiambo: I have Thesaurus; maybe they can do it there.

The Minister for Lands (Mr. Orengo): What if we still use the word “autonomy”? It does not reflect on the status of those governments as it were---

The Minister for Lands (Mr. Orengo): What about if I qualify it and say autonomy to govern and deliver services effectively in accordance with this Constitution.

Mr. Chairman: Can we then leave this term, it will not harm; reliable source of revenue and latitude to govern. Really, “latitude will not help.

Mr. Kioni: Mr. Chairman, Sir, when I made proposal for amendment it was improved by hon. Samoei. He actually said that the County Government shall have reliable sources of revenue to enable them govern and deliver services effectively. I thought that was still getting home.

The Assistant Minister, Ministry of State for Defence (Maj-Gen. Nkaisserry): Mr. Chairman, Sir, let us go systematically. When you appoint somebody give him the chance. Let the rest of us listen.

Mr. Kioni: But we have not talked without being given an opportunity to listen. I think it is clear in your mind as you contribute.

The Assistant Minister, Ministry of State for Defence (Maj-Gen. Nkaisserry): You know, hon. Kioni is my brother. In fact, we pray together. I pray for him. We must be clear so that we do not lose the way we are going. When you look at Article 208, the title is the principle of devolved government. Therefore, we should continue because we have designated. As you remember, we designated the level. So, instead of saying County Government, you say Devolved Government and you continue removing anything called County and call it devolved.

Mr. Chairman: You are taking us back, Mheshimiwa. We have moved from there. We are at the point of autonomy, D.

The Assistant Minister, Ministry of State for Defence (Maj-Gen. Nkaisserry): We just delete autonomy because it would have a connotation of federalism.

Mr. Chairman: Is that agreed?

Hon. Members: Yes.

Mr. Chairman: Let us now move Article 209(1):

County governments

209. (1) There shall be, whatever Government a county or regional government, whatever we agree on, for each county or region, consisting of a county assembly and a county Executive.

(2) Every county government—do not worry whenever I say County, whatever we agree on we would replace with it shall decentralize its functions and the provision of its services to the extent that it is efficient and practicable to do so.

An hon. Member: It is misplaced.

Mr. Chairman: It is not. That particular County Government must have separation of powers.

The Assistant Minister for East African Community (Mr. Munya): There is separation of powers between its own arms.

Mr. Chairman: (2) Every county government shall decentralize its functions and the provision of its services to the extent that it is efficient and practicable to do so.

(3) Despite the provisions of this Chapter, the counties in the Nairobi City shall not perform any other function, nor exercise any power, of a county government except as is provided in an Act of Parliament.

So, Article 209, does anybody have any issues. Can I get a proposer and Seconder.

Proposed hon. Kenyatta and seconded by Mheshimiwa I.Ruto.

Ms. Karua: Is there any chance that Nairobi may also have devolved Government just like others but that the name of the Chief Executive will be Mayor or something like so that if we cast this way, we are passing it can never be this. So, we tying it to an Act of Parliament that you never provide for this way. I am therefore suggesting this way. The Counties in Nairobi and any other City maybe provided for in Act of Parliament. Why may, so that if we want them function just like the others, they can function but otherwise we can provide separately.

Mr. Ruto: We do not have to mention Nairobi specifically. We can say Cities.

Mr. Chairman: Seconder for that.

Mrs. Noor: Mr. Chairman, I want to add that the role of the devolved Government is to co-ordinate implementation of programmes and projects that extend across different units.

The Deputy Prime Minister and Minister for Local Government (Mr. Mudavadi): I would propose that Nairobi be the unique one by virtue of being the Capital City. This is because virtually all the other Cities or Municipalities extend to a rural area, but Nairobi

is unique. So, I would say that that exception that we are looking for let it be confined to Nairobi. The moment you move to other municipalities, let me take Eldoret---

You see the logic here as earlier designed was that Nairobi was the capital City and therefore it is unique. So, in looking at this, because it is devolved—already what envisages in the context of Nairobi in terms of the proposed local Government Bill is very different in the sense that Nairobi will have sub-councils or boroughs. So, the structure of Nairobi by virtue of its size and importance is being handled differently even within the context of the Act. Therefore, I would strongly recommend we consider leaving it as the unique entity but not the others.

The Minister for Public Health and Sanitation (Ms. Mugo): Mr. Chairman, Sir, I really want to support what had been said earlier. I believe it was hon. Karua. This is a Constitution which we expect to go on for a long time and not to be edited every few years. Kisumu is a City and will be growing. So, is Mombasa. So, we do not want these tags which are been put on Nairobi because in representation, Nairobi was discriminated upon. Nairobi must be treated like Mombasa, Kisumu and any other City that might become a City. So, let us not come up with special organization just for Nairobi.

Ms. Karua: I want to marry what hon. Mugo has said and what the DPM has said, that there is need to treat Nairobi equally with us. So, if it is the way the counties are being created, Nairobi must get a share of counties just like any other part of Kenya. But because of management of a capital City and of any other City, we can word this Article in away that allow the latitude of an Act of Parliament providing a different style of management of that county. You can even baptize it and call it borough but they must have their share of counties because representation is very important.

Mr. Chairman: Can you propose.

Ms. Karua: I have already proposed and I said that---

Mr. Chairman: Let us hear contrary views then, Mheshimiwa Munya, Minister for Lands and then---

The Assistant Minister for East African Community (Mr. Munya): Whatever you will call, whether we would settle at County Government or regional Government, Nairobi having a population of eight million people will require a Government of its own. That we cannot deny it.

Mr. Chairman: Which is really not contrary to what Mheshimiwa Karua was saying?

The Minister for Agriculture (Mr. Samoei): Mr. Chairman, I actually want to agree with what Hon. Mugo and Karua have said. To marry also with what the DPM have said, these Cities are growing. There would be a time Eldoret will the size of Nairobi. We want at that to do an Act of Parliament to take care of Eldoret with the boroughs and everything else. So, I think what we should we do is that we say: Except where it is

provided for by an Act Parliament, this is how the devolved Government will operate so that for Nairobi we will immediately provide an Act of Parliament for Nairobi, how it is going to be governed. It is along the same principle, only that there will be differences here and there to give it the uniqueness of a City. So, I think we should not belabor the point.

Mr. Chairman: So, let us get to Mheshimiwa Karua's formulation so that we move.

Ms. Karua: We are saying provided that for Cities that an Act Parliament for the style of management for their devolved Government.

Mr. Chairman: If I could invite to look at Article 216. "National legislation shall provide for the governance and management of urban areas and cities. Let us hear Mheshimiwa Kioni.

Mr. Kioni: Mr. Chairman, Sir, I think here we should not lose the principle or the objective of devolvement. Devolvement to us means that you want the resources to get nearer the people. If that principle is carried through and through, those people in Nairobi also need the resources nearer them. Through any form of legislation, we should not be seen to denying them that. We would allow to be guided by that through and through.

Mr. Chairman: We had agreed to that. That is why we are asking for Mheshimiwa to formulate for that.

Ms. Karua: The drafters must this correctly. We are not setting a part the Cities from having devolved Government. But we saying provided in case of Cities, an Act of Parliament may provide for the style of management of their devolved structures.

Mr. Chairman: We will handle the language. It is seconded by Mheshimiwa Samoei.

210. (1) Parliament shall by legislation make provision for ensuring that county Governments –

- (a) are given adequate support to enable them to carry out their functions; and
- (b) have in place systems of financial management that comply with the regulations made by the national government.

(2) Parliament shall also by legislation make provision for intervention by the National government where a county government—

- (a) is unable or unwilling to carry out its functions; or
- (b) has failed to operate satisfactorily a system of financial management that complies with the regulations.

(3) The legislation may, in particular, authorize the national government—

- (a) to take appropriate steps to ensure that the county government's functions are carried out and that it operates a system of financial management that complies with prescribed requirements; and
- (b) where necessary, to assume responsibility for the relevant functions.

- (4) The legislation shall –
- (a) require notice to be given to a county government of any measures that the national government intends to take;
 - (b) require the national government to take only measures that are necessary;
 - (c) require the national government, where it intervenes, to take measures that will assist the county government to resume full responsibility; and
 - (d) provide for a process by which Parliament may bring the intervention to an end.

The Minister for Tourism (Mr. Balala): I think No.2 Parliament, there is where we are talking either Senate or House of Regions. There is where they are specifically they doing legislation for their regions and their management.

Mr. Chairman: Can we say that anywhere we see reference to Senate, means the National Assembly. The drafting will be corrected.

Mr. Ruto: Mr. Chairman, Sir, I have a document here which we passed and we said in a pure Presidential system meant that we would then have a strong devolved system complete with a Senate.

Mr. Chairman: No. That was not agreed. If you remember it was bracketed.

The Minister for Lands (Mr. Orengo): Mr. Chairman, Sir, I think we should leave the references to the Senate until we deal with the issue of Parliament. I know there were a lot of issues which we left pending.

Mr. Chairman: So, we deal with one after the other as come along.

Ms. Karua: Having clearly agreed that we are for unitary and that is how we are going and removed Senate and even created a creature called the House of regions, on what basis would we leave references to Senate unless if there is a Motion to do the contrary.

The Minister for Agriculture (Mr. Samoei): I think we should leave this Article because it is unnecessarily controversial. We can come back to it. Let us bracket it and go ahead to 211. Once we formulate the way it is going to look, it will help us to come backwards and look at how it will work. So, we can leave Article 210 and come back.

Mr. Chairman: Who would second that? Mheshimiwa Orengo seconding.

Members of County Assembly

211. (1) A county assembly consists of—

- (a) members elected one each by the wards in accordance with the law;

The Minister for Tourism (Mr. Balala): Off record!

Mr. Chairman: Mheshimiwa Balala whatever we agree on, are we not going to follow the whole same thing again. The problem is if we go into that discussion, it will take us a long time. Then, we would have to go through the whole process again. If we go through the process and then decide on region and County we just fit in. We really need to conclude this. If you look at this from here to Public Finance is 20 pages. Mr. Vice-Chairman, let us not go into that. Let us just continue with the principles.

(1) A county assembly consists of—

(a) members elected one each by the wards in accordance with the law;

(b) such number of special seat members, in proportion to the votes received by each political party under paragraph (a), as to ensure that no more than two-thirds of the membership of the assembly are of the same gender; and

(c) such number of members of marginalized groups, including persons with disabilities--- This we have changed. We would all go voting, is it not. Mixed member proportion, we really did not want to go that way. Whatever we adopt later. You see we can go two ways, either define it now which will take us a long debate or let us agree on these things and come to definition.

Ms. Karua: By the way there is something which will actually lessen elections so that you finish your elections for Parliament and President and then the Region or Counties, whatever you call them only votes to be shared among parties and then you bring in your guys. That is what Article 211 is suggesting.

Mr. Chairman: What is wrong with that hon. I. Ruto.

Mr. Ruto: Mr. Chairman, Sir, elections are elections and we have said we should give them reasonable latitude for lack of a better word. So, they should not be seen to handpicked. We have talked of participation. So, let the local know what they are doing.

Mr. Chairman: So, can we say that Article 211 will be reformatted or can we do the reformatting. Let us hear proposals, Mheshimiwa Odhiambo. Does anybody have any ideas on how to reformulate? Okay, let us go one by one. Does anybody have any problem with Clause 211(1) (a)? Do not worry about the wording. Let me have somebody proposing and another one seconding.

Mr. Kenyatta proposed.

Mr. Orengo seconded.

Mr. Chairman: We move on the (b). It states thus:-

“Such number of special seat members in proportion to the votes received---”

The Deputy Prime Minister and Minister for Local Government (Mr. Mudavadi): Mr. Chairman, Sir, the worst thing is to do something and then find that we are reopening

the whole package. I think there is need for clarity on the issue of the 18 regions. We need to deal with that first and then we can come back to those other issues. If we just say, "approved", let us know we are approving for the counties, but counties and cities are going to units in the regions.

Mr. Chairman: We had agreed about 18 regions. We also said that there will be two levels of Government. One will be the national one, that is, House of Regions, but we also said that we would agree on any other name we shall propose. We agreed that about the demarcations of the regions, we will leave it to the Independent Interim Boundaries Review Commission (IIBRC).

Mr. Kioni: Mr. Chairman, Sir, I want to get it clear how many levels of Government we have proposed to have. You have mentioned the House of Regions as a level of Government and then you mentioned something else. I thought we had proposed to have two-tier Government. When you were speaking, I thought that was confusion.

Mr. Chairman: No, I said that there are two levels: The House of Region, which is a national level---

Ms. Karua: That is a coordinating mechanism!

(Loud consultations)

Mr. Chairman: Listen to me! There are two levels of Government, that is, national and regional. The national for this one is not the Parliament; it is the House of Regions.

Ms. Karua: Mr. Chairman, Sir, interpret that one now.

The Assistant Minister for East African Community (Mr. Munya): Mr. Chairman, Sir, we agreed to have two levels of Government: The national level which includes the normal Parliament that we have and the House of Regions and the Executive. The other level is the Regional Government. We said that we are merging the Regional Government with the counties. This is because we said we want to have two regions. That is the position we agreed on.

Mr. Chairman: I stand corrected.

Mr. Ruto: Mr. Chairman, Sir, we also agreed that those counties will be units of that regional Government. They will design which ones. It is a unit and not a level of devolution. It is under the regional Government. The only level I want to introduce now is the constituency.

(Laughter)

Mr. Chairman: Mr. Ruto, you are causing more problems now. We agreed on two.

Ms. Karua: I have the village and I want to introduce it.

The Assistant Minister for East African Community (Mr. Munya): Mr. Chairman, Sir, for the regional Government, they will go to the Regional Assembly. Are you saying that there will be other assemblies at the county level that build up to the Regional Government?

Mr. Chairman: We have only one assembly at the regional level.

The Assistant Minister for East African Community (Mr. Munya): Mr. Chairman, Sir, that is exactly what we are saying: One Assembly at the regional level! It means people are being elected in units to go to the Regional Assembly. There is no problem.

Mr. Chairman: Whatever we call them, the point is that we have one level which is the region.

Mr. Kioni: Mr. Chairman, Sir, these counties that we have talked about that it will send people to the region, I look at where I come from, which is a fairly marginalized area and I realize that we have more than 20 councilors. Are we saying that these people will fuse in one and then form the Regional Assembly?

Mr. Chairman: Why are you connecting the councilors and the county? They have no relation!

Ms. Karua: Mr. Chairman, Sir, let me show you the connection. In order to be clear in our minds, since we may be arguing about something that we have not even concretized, let us even without stating the number of counties, state the work of the regional government; the counties; and Member of Parliament. You must see it is one. We should then determine whether it is feasible.

I think a county will be less than a Parliamentary seat. This is because if you elect me in Gichugu to come to Parliament, I will be in the National Assembly. If you make one MP for, say, Kirinyaga, which is a county or it could be joined with Embu, by them going to a regional government, they will be representing a larger area than me. So, it will be like a glass that is upside down. We need to be clear about what we are doing because National Assembly is overall. I would imagine that my constituency will have two or three regional MPs. So, they are just super councillor as such.

Mr. Chairman: We are mixing two things. Before we agree on what size they are, let us agree that right now we have the national Government and the local government. What does the local government have? Local government has wards.

Ms. Karua: It is a smaller unit!

Mr. Chairman: Those wards are not at a different level of government. They are how you get to the local government. So, if we have regional government and national government, the wards the regional government uses for election purposes are not a third

tier. So, can we agree on the levels first? We are talking about national level and regional level.

Hon. Members: Yes.

The Minister for Tourism (Mr. Balala): Mr. Chairman, Sir, I want clarity.

(off-record)

---because that is an internal issue of that council. For me, I look at the council as the county.

Mr. Chairman: No! The council is the region now. The regional government is the county council, that is, Mombasa County Council or Municipal Council. We know that a municipal council has wards. We do not care about those wards. We are only interested in---

The Minister for Tourism (Mr. Balala): Just repeat that, Mr. Chairman, Sir.

Mr. Chairman: The level of the county council is what we have as a region now. The local government we will have is the regional government and not the county government. We have no county. Now, the regional government, the units it has at a smaller level that will be internal now.

The Minister for Lands (Mr. Orengo): Mr. Chairman, Sir, I think we are not rediscovering the wheel. In 1963, there were members of the regional assembly. They were quite distinct from the councillors in the county councils. In a place like Kisumu, or Nakuru where there was the seat of the regional government, you had members of the regional assembly whose areas of representation were quite distinct from those who represented wards in the county councils. For example, in Nyanza, there was the Kisumu County Council. There was also the South Nyanza County Council, which at one time included Kisii and what is now South Nyanza. They were subsequently separated.

So, there were two units within the region and they consisted of county councils and then the regional entities. If you look at the Constitution as it was in 1963, the local government was not really regarded as a tier of government. It was at the regional level and then at a national level. However, the county councils were like the urban councils and all that.

Mr. Ethuro: Mr. Chairman, Sir, we started by agreeing on the two tiers. You elucidated our agreement by then. What Mr. Orengo is doing now is giving us more tiers of Government and that is not what we were really talking about. Unless he wants us to revisit the subject, his is a different proposition.

The Minister for Agriculture (Mr. Samoei): For purposes of clarity, let us deal with the regional government first. Thereafter, we will know what will happen further down. Let us do it like this: The unit which is going to be the electoral area for electing a

representative to the region must be slightly smaller than a constituency so that we do not create a conflict between a person elected to the national assembly and that one elected to the regional assembly. I am proposing that the current divisions--- I have three divisions in my constituency while others have four.

Mr. Chairman: Can I amend that? Can we say half of every constituency so that every constituency has two?

The Minister for Agriculture (Mr. Samoei): No. We need at least, three or four divisions. We have to be careful so that it does not become unwieldy. We do not need too many people in the regional assembly. So, we have to balance those two, that is, the numbers in the region and how we want to subdivide every constituency.

For arguments sake, let us assume that we have three people from every constituency. That will make three electoral areas within a constituency demarcated either alongside the divisions that we have or by the Electoral Commission. Those will become the electoral units to the regional assembly.

Mr. Chairman: Whatever name we call them.

The Minister for Agriculture (Mr. Samoei): Let us conceptualize one thing at a time. So, if that is the case, since we have proposed to have 18 regions, the constituencies that form those regions will each give three electoral areas for the election of people to the regional assembly. If we can agree to that, it will be a step forward.

Mr. Chairman: That is very reasonable.

Ms. Odhiambo: Mr. Chairman, Sir, I am seeking clarification. Mr. Samoei, we have 18 regions and you have talked about constituencies forming, say, two divisions. I wonder how you connect that to the regions and the numbers we agreed on. It might go beyond the numbers we had agreed on.

Mr. Chairman: The regions will remain the same. People will be elected to the regions. Those electoral units---

Hon. Members: Let us use a chart!

The Deputy Prime Minister and Minister for Finance (Mr. Kenyatta): Mr. Chairman, Sir, before he draws the chart and so that we can get this clear, I have understood what Mr. Samoei has said. However, there is disconnect between what Mr. Samoei said and what Mr. Orengo was expounding on.

Mr. Orengo told us that we have the national government. He mentioned that we will also have councils to which people will be elected. When we went through the chapter on devolution, we agreed about the region and the county. We now have the electoral units as he is now describing them.

Mr. Chairman: That is a reasonable point.

(Mr. Samoei used the board for illustration)

The Minister for Agriculture (Mr. Samoei): Mr. Chairman, Sir, there are former districts which have become constituencies like Isiolo South and Isiolo North, Marsabit, Saku, North Horr and Moyale. So, this is a total of six constituencies and we are saying that approximately, we have three electoral areas per constituency. That will give us a regional assembly of 18 for what is proposed in the Bomas Draft. These 18 members of the regional assembly will form a legislature for region five. If you read in the objects that we just passed, it says clearly that the devolved unit will cause its services to be taken all the way down. That is Article 209(2) can take care of the units below the regional government. Using that particular provision there, we can then provide for the other units that will be below but they will not necessarily be units of devolution. But for purposes of making sure that these devolution actually functions, then those units below here will be necessary.

The Deputy Prime Minister and Minister for Finance (Mr. Kenyatta): Mr. Chairman, Sir, I have understood what he has said so far and it brings back. When we are talking about delivery of effects is there another electoral unit below this?

Mr. Chairman: No.

The Deputy Prime Minister and Minister for Finance (Mr. Kenyatta): Allow me to get clarity. Are there other elected units below this?

Mr. Chairman: As far as our agreement is concerned, no, because we have two levels of government.

The Deputy Prime Minister and Minister for Finance (Mr. Kenyatta): So that is what I am saying that in his understanding---

(Consultations)

If you allow me to continue then you will understand where I am coming from. Is there another elected unit?

Mr. Chairman: No.

The Deputy Prime Minister and Minister for Finance (Mr. Kenyatta): So, in short, what Mr. Samoei is saying negates what Mr. Orengo said. There are no other elected units below that region. In that instance---

(Consultations)

Mr. Chairman, Sir, can I be heard.

Mr. Chairman: Let Mr. Kenyatta finish!

The Deputy Prime Minister and Minister for Finance (Mr. Kenyatta): If then we have another elected unit, what we have not done, if we have not collapsed then we must acknowledge that we are talking about three tier and take discussion from there.

Mr. Chairman: Even when we are open to discussions we must agree on what we agree on. So, let us just go through it.

The Minister for Foreign Affairs (Wetangula): Mr. Chairman, Sir, I was going to draw our attention to what we agreed that there will be devolution, two levels of devolution; national and regions and we agreed on that, House of Regions, also agreed on; lock in resources in the Constitution, also agreed upon; membership of House of Regions, number of regions fixed at 18 to be delineated by IIBRC and criteria to be developed agreed upon with one objection recorded; an equalization formulae and fund. This is also consisted with the Revised Harmonized Draft that recommended two levels but they went for the county. If we did agree on the region then we are opening new avenues of arguments and debate that will take us nowhere. Why can we not concentrate on what we agreed and see how we can better it. If we are uncomfortable with numbers or any other issues we can reopen. But let us follow what we agreed so that we see which direction to go.

The Minister for Agriculture (Mr. Samoei): Mr. Chairman, Sir, while I agree with what Mr. Wetangula has said, we also said, and I remember that Mr. I. Ruto put it so well that anything below the region, which was accepted as a devolution unit, anything below would be considered a unit of the regional. Even in answering Mr. Kenyatta, the election of councillors is going to be the same thing as the election of the people who will be in the House of Regions. The House of Regions is not a devolution unit. We have agreed to its existence. We will still have to find the electoral unit for the people who will be in the House of Regions. Even if they will be nominated by counties, there will be some elections there. That is the reality. Even if we still retain some election of councillors down here, it does not necessarily make it a level of devolution.

Ms. Karua: Mr. Chairman, Sir, we can argue and not be sure what we are arguing about. Let us assume that there can be other regions the way Mr. Samoei is arguing because we want to take that to the logical conclusion. He has already divided into three electoral units. It means that if you were having 12 councillors, there are three units. If you are going to create other units below that, to get the councils again we could do ourselves a favour, having got that devolved unit which is the Regional Assembly, let us check the functions and then see whether there is anything left for anybody else to do whether below or above because there would be nothing else anyway. We shall stop arguing when we find that there is no more work remaining.

The Assistant Minister, Ministry of State for Defence (Maj-Gen. Nkaisserry): Mr. Chairman, Sir, so that we can move forward, first and foremost, we agreed on two levels

of devolution; national and regional. The membership of the Regional Assembly is what we never agreed on because we realized that regions are not the same in size. So, what we need to do ourselves is to say the number of the representatives in the Regional Assemblies; how many members each regional assembly is going to have. Is it going to be uniform or other factors? That is one thing that we need to agree. We should not mix these issues. I can see my colleagues bringing in the issue of councillors. Even as we speak now, council is not a unit of devolution. So, we should not sneak it and pretend that if we are talking of regions then councils are a devolved unit as a third level. Let us be clear so that we do not go in circles. I am talking of two levels but you do not kill councils.

The Minister for Agriculture (Mr. Samoei): Let me clarify one more thing so that we move. What is going to happen for the House of Regions which we have already agreed on, what is going to happen now is that these 18 members of the Regional Assembly will meet and elect three members amongst themselves who will now go to the House of Regions one of them being either a man or woman. So, I think we have cleared on these two issues; how we are going to the Regional Assembly here and how we are going to get the membership to the House of Regions. Since the House of Regions is not a full-time thing, they will be meeting four times a year, I do not think it is fair for us to say that they are another level of devolution. They are not? The only thing that is remaining now---

Mr. Ruto: Mr. Chairman, Sir, I want to suggest that we say that for ease and to comply with the rest of the provisions that we have put on gender equality, each constituency produce two representatives to the House of Regions and then they elect one of the other gender that is missing so that we have one-third of that representation. I am saying that each constituency will send three but you must bear in mind that we have another rule that we must comply to. I want to point out that--- For example when you come to Rift Valley you will be having about 70 and if you start talking along that line then you will add another 70. So, you will have another 210.

The Minister for Agriculture (Mr. Samoei): There is nothing to add. What Mr. Ruto is saying is good but it is detail. If we agree on the principle that every constituency is subdivided into two or three, and let us leave that particular mathematics to the ECK. We have also agreed that the people elected there will form the regional assembly and elected three people out of 18 to go to the House of Regions. That is for purposes of the four meetings that they will meet every year. So, if we are clear so far there let us now go to the problem we have. What do we do with the arrangement below here?

Mr. Chairman: I want us to move forward. I will give you a chance but can you tell us below here---

Ms. Odhiambo: Mr. Chairman, Sir, I want to say that we agreed on two levels. I am taking us forward by answering a question; how many units of devolution do we have currently?

Hon. Members: One!

Ms. Odhiambo: No, we do not have a devolved system. We have one system of government. Local government is a unit of the national. It is actually a Ministry. I am saying that we have national and regional. Let us go to Article 209(3) which Mr. Samoei has referred to and which we have passed.

Mr. Chairman, Sir, we have two levels; national and regional. Then we have Article 209(3) that talks about those units that can be centralized to enable the units to reach. For me, if a lower level is created, it is not created as a unit of devolution, but as a unit that allows that regional to effect its services.

Mr. Chairman: For clarity. Is that not what Mr. Samoei was talking about in terms of dividing each to three so that they are three units that relate to the region?

Ms. Odhiambo: That is not my understanding. It is not necessarily for me. It could be councils or something else but Article 209, which we have already passed, allows these regional units to create a unit by whatever name called.

Mr. Chairman: I will give a chance to Mr. Mudavadi, Mr. Kiunjuri then Mr. Kazungu.

The Deputy Prime Minister and Minister for Local Government (Mr. Mudavadi): Mr. Chairman, Sir, I want to emphasize one thing. I think it was Mr. Wetangula in the process of the discussion who brought in the right framing when he said that local authorities, as they are currently constituted, shall become units within those devolved regions. Alright, that was the wording. He crafted it very well.

Mr. Chairman, we may want to refer a little to the Independence Constitution as referred to by hon. Orendo because, at the end of the day, there were regional assemblies, and the counties existed. What became of those regional assemblies? Are they not the ones that became the provinces? So, what we are saying is that we have 18 regions. That becomes a leaner outfit, as proposed by hon. Ruto, but the right to have representation at the lowest level, which is what the councillors provide today, should remain. So, in reality, we will be talking of the regional, the local authorities, and the national levels. It is actually a three-tier system of representation.

What we are saying is that, in coming up with a devolved formula, we want situation where we recognize the regions, the national government and see how it will have an overriding parameters across the board, but we should have the ventilation and functions of the regional government to help in coordinating that entire region; and then the local authorities must be there to allow the smallest representation to be dealt with.

Mr. Chairman, Sir, if we agree to the three-tier system, and we talk about how to re-structure it, we will find a solution. So, I want to propose that we be clear that we want to talk about a three-tier government system comprising of the national, regional and local authorities levels.

The Assistant Minister for Water and Irrigation (Mr. Kiunjuri): Mr. Chairman, Sir, at least, we have made progress, now that we are admitting that we want to adopt a three tier government.

Mr. Chairman: But we have not re-opened it. You know, we had taken a decision. That is just a proposal. We have not put it on the Floor.

The Assistant Minister for Water and Irrigation (Mr. Kiunjuri): Mr. Chairman, Sir, what I am saying is that, at least, at the end of the day, we are calling a spade a spade, and not a big spoon, in the way we have all along been calling it. If you look at the objects and the principles of a devolved government, they are very clear. The third object seeks to give powers of self-governance to the people and enhance the participation of the people in the exercise of the powers of the State and in making decisions affecting them. The fourth object, (d), is to recognize the right of local communities to manage their own local affairs and to form networks and associations to assist in that management and to further their development.

Mr. Vice-Chairman, Sir, there is another object, (f), which I do not know whether we deleted. It seeks to promote social and economic development and the provision of proximate, easily-accessed services throughout Kenya.

If we go for 18 regions and divide the 210 constituencies that we have by 18, that gives each region over 14 constituencies. Once we have 14 constituencies forming one region, we will have lost the original ideas, first as captured under object (f), of promoting social and economic development, and the provision of proximate, easily accessed services throughout Kenya. At the same time, if we are not going to have the three tiers, which include the ward, we will also lose the other object of recognizing the right of the local communities to manage their own local affairs.

So, we we will be defeating our own principles if we go to the level of having four people from every constituency coming here to represent them. That is why cannot burry our heads in the sand. If we are discussing this, it must be three tiers of government. As we may take on the third tier of government, we cannot accept regions that are also not representative. We cannot talk of 14 constituencies forming a region. That is why I gave the example of Laikipia.

Mr. Chairman: That is just your example. We are not saying the number of constituencies forming a region will be 14. The 14 constituencies is just your calculation. Nobody has said we will go that way.

The Assistant Minister for Water and Irrigation (Mr. Kiunjuri): Mr. Chairman, Sir, that is the average.

Mr. Chairman: No, no! We are not agreed on that formula. So, do not use it as basis for making further arguments.

The Assistant Minister for Water and Irrigation (Mr. Kiunjuri): Even right now, we have the 47 counties, which are recognized. Each of the devolved unit of the 47 counties carries constituencies. So, by the end of the day, the object stated under (f) will not be captured.

Lastly, there must not be exclusion, because we are talking of diversity everywhere in this draft constitution. Before we agree even on the 18 regions, we must sit here and agree---

Mr. Chairman: We did agree on the 18 regions.

The Assistant Minister for Water and Irrigation (Mr. Kiunjuri): That is what I am saying. We are already re-opening this debate. The moment we started talking of the three tier devolved system, we have reached another---

Mr. Chairman: No, we have not re-opened it.

The Assistant Minister for Water and Irrigation (Mr. Kiunjuri): Mr. Chairman, Sir, at the end of the day, that is what I wanted to say – that even if you want to have those regional assemblies, they cannot be 18. So, if the question is carried that we have the regions, I will be moving that we re-open this debate, so that the principles stated under paragraph (f) can be represented.

Mr. Chairman: I agree with you, hon. Kiunjuri! I apologize for the interruption.

Mr. Chairman: Can we agree that we have already agreed on 18 regions? If you want to re-open debate, that is a different matter, but we had agreed.

The Assistant Minister for Water and Irrigation (Mr. Kiunjuri): Mr. Chairman, Sir, I am saying that we had agreed. If you refer to the HANSARD, you will see that I said clearly that “on condition that we come again but the other structures on whether we are not having another tier of government.” That is why I have re-opened it now, now that you realize that there cannot be two levels of government, but three levels of government.

Mr. Chairman: Okay, I have heard you.

The Deputy Prime Minister and Minister for Finance (Mr. Kenyatta): Mr. Chairman, Sir, I want to go back to what Mr. Mudavadi said. We have had this discussion. We need to argue from the same page. Unfortunately, I do not think we are arguing from the same page. The person who has actually brought us closer is hon. Mudavadi. When we agreed on the broad principles, we agreed on two very fundamental issues. The one that was broken by hon. William Ruto with the argument that, was agreed, because we had a lengthy debate on the issue under (3). Mr. Ruto broke it by saying: “Okay, let us agree on two, but rather than agree on the national and the counties, we agree that we have the national and the region, in essence having two units – the national, and the counties collapsing into the region. That is basically what we agreed. We then went from there. I

am stating my understanding and the understanding of quite a number of people. If it was not that way, we need to understand each other.

From there, the next debate was how many regions we are talking about on the basis of that collapsing. We then came to a number of 18. There was an issue that was raised by hon. Mudavadi, where he said that these would not be in themselves units of devolution, but they would be units within the region. To that, if you are talking about a unit of the region, it is like saying you have the national government, you then have the province, which is a unit of the national government; you then have a district, which is a unit of the national government; you then have a division and a location. Those are not elective units. They represent the national government from the central government all the way down to the grassroots.

My understanding is that, if we then have units, of which I have no problem, it should be units that just help manage the region. If we are talking of those units being elective, then we are back to three tiers. We are back to opening what we had already agreed upon. If so, we need to be able to deliberate on this issue a little further, because this is now bringing a completely different picture from what people had in mind. This also has a great bearing on even the regions themselves and how they are constituted, and the bases on which they are constituted. As hon. Mudavadi has said, let us be honest with each other. If we do not have this clear understanding, we will seem to have agreed only for us to go out there tomorrow and completely disagree. Then the people will wonder why we changed and yet we had wrong understanding.

Three units of devolution are what we are talking about, and that has a bearing on some of the other issues that we have. So, maybe, we need to actually look at this and re-think it, so that we can move together.

Mr. Chairman: Hon. Kazungu, before you speak, can I just ask this: I know that we want to develop our arguments but, please, note that we have not agreed on three tiers. We agreed on two tiers. There is a proposal from the Deputy Prime Minister and Minister for Local Government for us to go for three tier devolution. Do not use that proposal to make another proposal.

The Deputy Prime Minister and Minister for Finance (Mr. Kenyatta): On a point of order, Mr. Chairman, Sir. I am saying that they are actually talking about three tiers.

Mr. Chairman: No, no, Mr. Kenyatta! My understanding is that Mr. Musalia is of the view that we should go for a three tier system. Hon. Mudavadi, did we agree on two levels of devolution? Could we just get clarification, so that we can make progress?

Mr. Kazungu: Mr. Chairman, Sir, he has already said. We are now discussing three levels of government. That is not what we had agreed earlier only. May be, hon. Ruto will be sincere enough to explain this to us. If out of the 18 people who will be elected, three will be selected to go to the regional assembly, what about the remaining 15? Where will they go?

The Minister for Agriculture (Mr. Samoei): They will go to the House of Region. They will not go to the regional assembly. They will go to the House of Region. Otherwise, they will be permanent members of the regional assemblies.

Mr. Kazungu: What about the 18 people who will have been elected from each constituency? We will have 18 people who will have been elected from the constituencies. That is the assumption.

The Minister for Agriculture (Mr. Samoei) :---(*Off record*)

Mr. Kazungu: How many people will go to the regional assembly? Three! So, what about the remaining 15?

The Minister for Agriculture (Mr. Samoei): Not regional assemblies. All the 18 will be permanent members of the regional assembly. Three of them will be selected to represent the regional assembly in the House of Region.

Mr. Kazungu: Then it is a three level system.

Ms. Karua: Mr. Chairman, Sir, hon. Samoei has already explained. What I am saying is this: We will have 356 Members of Parliament. We will be electing 18 people from each constituency to form the regional assemblies. So, 356 times three is 1,668.

An hon. Member: It is not true! It is 290!

Ms. Karua: Even if we take 290, it will still become over 900. Somebody wants us to retain the current local authorities. So, there will be about 3,000 councilors. Add them with the 54 that hon. Samoei has merged with the regions. So, the total number will come to something in the region of 4,424. If you remove the 56, it will be slightly over 4,300. So, until we understand that, we will not stop rooting for a three tier government. We talked about lessening Members of Parliament, because we did not want to use too much money. We are now making a government which will, instead of taking the services nearer to the people, will be providing jobs to a few individuals and initiating little development.

Devolution must make sense to all of us. To access government services, I have been going to Nyeri, from Kirinyaga, which is very far. If we are going to get a number of regions that will take me to Nyeri, my people will have been short-changed. If hon. Ethuro, who has been going to Nakuru for government services, will be going to Eldoret for the services, may be, it may not be so worth the while. So, if we are going to do this properly and fulfill those objectives, the viability and closeness of the service of the regions we are creating must not be something we can fix without someone showing us how it will configure. These are the things we must bear in mind. It has come to 870. If we remove something like 200, it will still be more than 4,200. We need to get that in our minds. We know that it is going to cost money.

Mr. Chairman: Hon. Karua, just to clarify the matter, you know, you are mixing two arguments. On one hand, you are saying we should have two levels. On the other, you are pushing for more regions.

Ms. Karua: Yeah!

Mr. Chairman: I want us to be very clear. We have agreed that the regions will be 18. The levels---

Ms. Karua: I have not pushed. It is who delineates them. They have to make sense to all of us.

Mr. Chairman: We had agreed on that one also. It is the Boundaries Review Commission that will delineate the boundaries.

The Deputy Prime Minister and Minister for Local Government (Mr. Mudavadi): We are also stretching so that blood circulation can improve. The revised harmonized draft did a lot of disservice to the harmonized draft proposition on devolution. It really did a lot of damage to that chapter. I will be moving somewhere that it may be necessary for us to look at the provisions of the harmonized draft vis-à-vis the revised and perhaps find a solution to this. This harmonized draft has three tiers and this revised draft brought it down to two tiers. Secondly, I want to let us know that even as we speak now, the number of councillors is already such that even the numbers that matter does not change anything. Those councillors are already there. In fact, what we are proposing in the context of the Local Government Bill, which has been published, is that out of the smaller units, we want to eliminate all the things that we call town councils so that we shall be consolidating those small town councils either to a municipality or to a county or a city depending on the logic. So, somewhere along the line, there is already provision to scheme the bulk of the councillors within the provisions of the Local Government Act.

The Regional Government then comes in and we are now talking of the Regional Governments being another level of democratic representation which needs to be supported and nurtured. We can pay the DCs and the PCs, the Provincial Water Officer, we do, the Central Government pays them. We are saying that for a democratically elected person who will be playing the role of coordinating there. We have no money. So, let us look at this issue of regions very carefully. It makes sense. We have it as a unit. We do not destroy the representation at that level and the boundaries Commission can systematically, as we wean out some of the very weak local authorities, rationalize the representation at that level so that we can cut down on some of the numbers. By the way, if we close in on the issue of harmonizing these local authorities, we are eliminating very easily about 80 local authorities.

Mr. Chairman: The Local Government right now has an elected structure which is the councillors and then the councils. That is the Local Government.

The Deputy Prime and Minister for Local Government (Mr. Mudavadi): Yes, and it will remain there.

Mr. Chairman: Then we have the Regional Governments. That is another tier of the Government. Then we have the national?

The Deputy Prime and Minister for Local Government (Mr. Mudavadi): Correct!

Mr. Chairman: Is that not what principally we agreed?

The Deputy Prime and Minister for Local Government (Mr. Mudavadi): We are talking about Three-Tier here. I am not running away from that.

Mr. Chairman: For purposes of the Committee, we agree on Two-Tier.

The Deputy Prime and Minister for Local Government (Mr. Mudavadi): The agreement on the two tier here is what I must say and confess that we did not elaborate because when hon. Wetangula said that there shall be units within the region and I assumed that it was an acceptance that we are dealing with a three tier.

Mr. Chairman: If you mean that we did agree on two tier, you would then be requesting that we reopen that so that we can go to three tier.

The Deputy Prime and Minister for Local Government (Mr. Mudavadi): We reopen, so that we go to three-tier so that we recognize local authorities and then we can debate---

Mr. Chairman: So that then we can debate that now, first of all, that proposal comes and then we handle that point. It is better that way so that we agree to what we agreed last time on Friday. Then if there is anybody who wants to reopen, there is a proposal to reopen.

The Deputy Prime and Minister for Local Government (Mr. Mudavadi): I propose that we re-open the agreement that was there, so that the clarification or the misrepresentation that may have appeared as two regions, namely, national and regional only, be broken down so that we discuss on the basis of a three tier devolved system.

Mr. Chairman: Seconded. We took a long time to come to this agreement. We agreed on seven issues, namely, on devolution being there, two levels of devolution, house of regions, we locked in resources in the constitution and we were to agree on the membership of the house of regions. We agreed on 18 as the number of regions to be delineated by the IIBEC and the criteria to be developed. We agreed on an equalization fund. These are our agreements. If we re-open this, which took us a whole day, we almost collapsed here at five when we made this agreement, I would very strongly urge against not re-opening this. These are agreements that we reached---

Hon. Member, were you with us on that day? I know you also want to re-open something else but I am not for this idea of opening this.

The Assistant Minister for East African Community (Mr. Munya): I do not want to go to the debate of re-opening because I am persuaded by you that we should restrain ourselves from re-opening this whole issue. If you remember, we went to the Presidential system because we followed the views that overwhelmingly the people gave. That is why we shifted from naturally what has been proposed for many years. We went presidential because it was very clear the views given by the people were in favour of a Presidential system. The same people gave views that they wanted two levels of devolution and that is what made the CoE delete one level and leave two levels of government. Now, what justification are we going to give that on this fundamental issue, we have also gone against the grain of what the majority of the people say?

The Minister for Water and Irrigation (Mrs. Ngilu): From the Harmonized Draft, we had three tier and this came from the people. This was not made up by the CoE. When we spoke here about this and what we say we agreed, it is true we may have agreed but we never had the Regional Government before, yet county councils and municipal councils existed. So that was automatic that it is going to be part of devolution and the tiers that we are going to have. I really do not see how we are saying that we did not know that county councils were going to be there.

Mr. Chairman: Let us not say that anybody is being dishonest. I want somebody to take us closer to forward movement.

The Minister for Agriculture (Mr. Samoei): Here, we are saying what the people said, but we have to juxtapose what people said with the reality and what makes sense. Even if we were to go by the national and regional, we realize that the people also wanted devolution to the grassroots. So, we must leave up to that reality and it demands that we establish another unit. Even as we discuss, we must balance between the county and the constituency. Already, there is established now a structure at the constituency, complete with a DC in every constituency and we have devolved funds, namely, the CDF already in every constituency. Already we are beginning a formulation of a structure around the constituency. We cannot have the county and then have the constituency as a unit which already exists. You know how difficult it will be to try and demolish the constituency as a devolution unit because already there are devolved funds going to the constituency. So, even as we argue on this third level, should it be at the county where you have three constituencies together or sometimes four or five or should it be at the constituency? So that it is a level which does not duplicate. We need to balance whether it should be at the country or at the constituency because the constituency is a reality and it is a unit with devolved funds at the moment. Already we have a structure here where you have the DC, the water officer and the agricultural officer. For us to be practical, much as we said two levels of devolution, the reality is that the constituency at the moment, and we can have a level here, for example, in my constituency, I have 11 councillors who are elected. So, we can consolidate the 11 councillors and the devolved funds are already there at the constituency and form a unit there, then we will have three units but they will make sense because it will not be difficult for us to explain to anybody why we need to have those

three. It will take into account the fact that you will be moving closer to the grassroots to the constituency than to the county.

The Minister for Lands (Mr. Orengo): I am sorry I was wondering why you are not seeing me. I am not dosing at all. I have been listening throughout. I just wanted to refer you to the report by the CoE because an impression may be created that there was a majority preference for a two tier system although in my view Local Governments are not necessarily in their present form and shape, a tie of government. This is what they said on devolution on page 12(i) – The Levels of Government. Whereas the three level system provided by the harmonized draft constitution is widely supported, a strong sentiment in favour of a two level system is discernable. Even from those words, it is quite clearly that it is not a big deal.

As they comb through some of the reports that they were receiving, they were getting comments on the issues like the cost of the three tier level of government. Then they were talking about the 74 counties in the first schedule which was in the harmonized draft as small units. Mark you, in the Ministry of Local Government and also in the current draft, the counties are being reduced. So, the impression should not be created that the two tier system was a popular demand by the Kenyan people. In fact, the whole constitution making process is people driven. If you are looking for a basis to enact this constitution, it is on the basis of what the people said. But having said that, I am at pains, because if you go to the US, there is basically the federal governments and the State governments, but in those various states, there are counties and I do not think that they are considered as a tier of government. If you go to the UK, the systems are a little different. If you go to Scotland, the devolution there is much stronger than it is in Walls. The counties as they exist in Scotland are very different as they exist in Walls, but they are still counties in both systems. The very basis of having these councils is to take representation of the people as low down as possible especially when you are dealing with the affairs and the demands and the needs of people at the local level. Some people may be so un-contacted even by the regional assemblies that they may not feel that they are fully represented. So, I would really urge ourselves that the introduction of this third tier, which as far as I am concerned is not really a tier, but for argument sake, I will accept that it is a tier of government. But in order to take government closer to the people, we need Local Governments. The South African constitution talks about provincial governments and local spheres of government and the municipal councils and other governments are in those local spheres of government. So, I do not know. Even in Uganda, you find those counties. In many places, you find these counties. If we are going to adopt a system of government in which we do not have representation closer to the people and the management of the local affairs closer to the people, then we are running away from very process of constitution making. The regional assemblies and the Regional Governments are necessary in the sense that you need some reasonable autonomy, and I am using the word autonomy advisedly, so that they can belong to an entity where they can be self sustaining in terms of resources. In fact, in the long run, you may find that in terms of those Regional Governments, they may be even doing better than the national governments if they run their affairs well.

So, I would urge us that this should not be a deal breaker, particularly when we are saying that we are not giving responsibilities to these Local Governments or counties that are going to interfere with the authority of the Central Government or with the authority of the regional assemblies. I would have gone by what hon. Samoei suggested about taking counties in the constituencies, but it may be a good case for him in Eldoret, because they may have sufficient resources and manage together with the devolved funds, but there are certain areas where constituencies are on their own. I have two county councils, which can barely manage. In fact, the Deputy Prime Minister and Minister for Local Government has said that he is going to scrap them out. Even if a county council has to be created at that level, I think we may not survive. So, if a county council was created in the older Siaya, that would be a better unit to represent people at the local level. Then at the regional level, even at the Coast, if you go to Kwale and Lamu, you find some issues that really affect the Coast as an area generally. Even Central Province as a whole, although my friend, hon. Kioni, belongs to the most marginalized, so he must be in the wrong province. I think we are not being mischievous by talking about this third level. I ask that we support this.

Kioni: Just a quick thing. One of the other things that was said by the people--- There is a lot of noise, Mr. Chairman, Sir.

Mr. Kioni: There is the issue of the necessity of the Government and the regional level. I said this with due respect of what Mr. Orengo has said. We need to know the role of each and every level that we are creating. One of the reasons why it became necessary to end up with a two tier is that there is no clear role and may become irrelevant because the regional government as proposed have no clear--- They have not been assigned with functions and so on. If we are going to reopen this we will need to know what the functions are and how distinct they are. Are we duplicating or just creating levels that will not be there. It would be important to do that perhaps early in the morning.

The third level was created by Mr. Samoei. Since we have regions that will manage their local affairs it may not be our "headache" to get worried about how they will manage the other level. We can handle the regional level. The number of other units that you want to create within your region, we will leave it to you to do it because of your management, ability and capacity and size. This is to ensure that you still handle the two tier system and leave the third one with the local arrangement. That may help us to move on.

Mr. Chairman: Mr. Kioni's proposal sounds very good but that is obviously a proposal to try and re-look at the two tier. Is there anybody else who has an issue with anything else?

The Assistant Minister for Water and Irrigation (Mr. Kiunjuri): Mr. Chairman, Sir, even before this issue of the third tier came in I had already put up my case that these regions must be opened. I want to propose a Motion on the proposal made earlier of having 18 regions. I have given my reasons and I do not want to repeat them again. One of the reasons I have given is according to the principles set up here which I do not want to repeat again---

Mr. Chairman: Do you want to increase or reduce them?

The Assistant Minister for Water and Irrigation (Mr. Kiunjuri): I want to increase them. So, the Motion should be as follows: If at all the regions are adopted now as the second tier of Government that they be opened to additional regions.

Mr. Chairman: How many are you thinking of?

The Assistant Minister for Water and Irrigation (Mr. Kiunjuri): I was to propose 30 of them so that they are representative and so that we are able to adhere to the principles set in the chapter on devolution.

Ms. Odhiambo: On a point of order, Mr. Chairman, Sir.

The Assistant Minister for Water and Irrigation (Mr. Kiunjuri): Do you want us to argue the Motion now because I have put the Motion to be proposed and seconded then we can discuss it?

Ms. Odhiambo: On a point of order, Mr. Chairman, Sir.

Mr. Chairman: Just hold on, Ms. Odhiambo.

The Assistant Minister for Water and Irrigation (Mr. Kiunjuri): When the Motion was put by the Deputy Prime Minister we looked for a (Inaudible). So, this Motion must first of all get a seconder then we start discussing it.

Mr. Chairman: Yes, let us get a seconder.

Mr. Munya seconded.

Mr. Chairman: Now we have those two Motions. If we were to reopen these things, surely it is 11.30 p.m. and tomorrow is our final day in this issue.

Hon. Member: Mr. Kioni has given us a way out of this issue!

The Minister for Foreign Affairs (Mr. Wetangula): First we must honour what we agreed on. We agreed on two levels. We are now hearing arguments driving us towards three levels. I want start from where Mr. Orenge left by quoting the Committee of experts and in my view misrepresenting what they said. The COE said that whereas the three level system provided by the harmonized draft constitution is widely supported a strong sentiment in favour of the two level system is discernible from the suggestions and comments. So, it is not conclusive that the view supported three levels. He said it was conclusive but they moved away because of cost. It is not true. They came out from the first draft where they had three to the revised draft where they have two. Here we agreed on two. We have had a very rich debate in my view. I did propose the other day that we have two levels, the national and the regional. I think Mr. Kioni has amplified what I said

and what Mr. Mudavadi has repeated that once we have agreed on two levels, the national and the regional then what the region does below it first should not be mistaken for another level of devolution. It should be a structure within the region that the region can do what it wants for better organisation of its region. That is what Mr. Kioni said. If we agree on that we can make progress. If we do not, then we will just go round and round and we will get nowhere.

Mr. Chairman: Could you propose that then so that we move forward.

The Minister for Foreign Affairs (Mr. Wetangula): Let me consult with my team then I come and make a proposal.

The Minister for Agriculture (Mr. Samoei): Let me buttress the argument in this way. What Mr. Wetangula has said now is actually what broke the stalemate the last time and it is what Mr. Kioni has repeated. If you juxtapose it with what Mr. Orengo said earlier that let us leave it such that for the regions which want to go and continue to have the county councils let it be their formulation of how to get to the grassroot as much as is practically possible. It will not be as units of devolution. We will have agreed that the units of devolution are national and regional. For me in Eldoret, I would go straight to the constituency because it makes sense. I would go and form a unit around the constituency where we can elect some councillors and run our show there. For Mr. Orengo, he would want to go and do it at the greater Siaya because it makes sense. All these will be county councils. The size does not matter. I will have a county of 10 councillors. Mr. Orengo will have a county of 30 councillors and that is how they have decided to formulate it. We will lock in the resources for all these governments from the central Government to look into how they will be funded.

Mr. Chairman: Let us hear from Mr. Kioni. Mr. Kioni, I hope you will take us closer to agreement.

Mr. Kioni: We have agreed on two levels of devolution, we have the national and the regional levels. There is excess baggage below and this varies from one region to another. Some regions may not even want to deal with that baggage. Others do not want to part ways with the baggage. We will leave the regions to manage it but at their own cost. They will not load it to the Exchequer because you are the one who is managing your area and you know how you will produce the best results. If you think that by having a heavier bottom the resources are best distributed then we leave that. I still have my constituency. In terms of the weight to the Exchequer it will stop at the regional level. You will even have to determine yourself the number of employees that you have within your area. We will not load it to the Exchequer nor will it be a basis of calculating the amount of money that we must lock in the Constitution.

The Deputy Prime Minister and Minister for Local Government (Mr. Mudavadi): Cap.265 that is the Local Government Act as it stands now and even when amended will allow for either the amalgamation, scrapping or merger of local authorities. They are already in some areas and Mr. Orengo gave an example of his; he has Ukwala and