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# THE HANSARD

Parliamentary Select Committee  
on Constitution Review

26<sup>th</sup> January 2009

**RECORD OF PROCEEDINGS TAKEN BEFORE THE PARLIAMENTARY SELECT  
COMMITTEE ON CONSTITUTION REVIEW HELD ON TUESDAY, 26<sup>TH</sup> 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 hawker 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

**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---

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

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.

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

**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?

**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

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. 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

**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.

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---

**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.

**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?

**Mr. Chairman:** We are adopting it.

**The Assistant Minister, Ministry of State for Defence (Mr. Musila):** What about 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

**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. Nkaissery): We want to distinguish. If you are talking of KWS, they will police the national park---

**Mr. Chairman:** Maj.-Gen. Nkaissery, 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

**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.

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:-

**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:** 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.

**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?

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. 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”.

**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.

*(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!

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

**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.

**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.

**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 glossing 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-

**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.

“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

**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.

**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. Orengo): 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.

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.

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. Orenge 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”.

**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.

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.

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 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,

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.

**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

**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.

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:** 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.

**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, 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!

**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?

**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. 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.

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?

- (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.

**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:** 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 questioning 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

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.

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

*(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.

**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

**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?

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

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).

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)*

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)*

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.

**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,

**Mr. Vice-Chairman:** That is carried!

*(Article 171(1) as amended agreed to)*

**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.

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 have 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 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.

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. 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.

**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

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.

**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?

**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. Nkaisserry 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.

**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.

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:** 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. Orengo has the floor.

**The Minister for Lands** (Mr. Orengo): 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. Orengo for your information they are mentioned in 288.

**The Minister for Lands** (Mr. Orengo): 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

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

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 or 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. Orenge 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?

“Parliament may by legislation confer powers of trafficking on authorities other than the Director of Public Prosecution”.

Is that carried?

“The DPP may not 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.

**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:** Seconder! 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!

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

**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 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*.

Now, guide me. Do we move to representation or devolution?

**Hon. Members:** Representation!

**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?

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.

(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:** 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)*

**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.

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.

**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:** 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. 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): 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

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 sub-divided 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!

**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 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?

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

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

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.

## END II

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**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.

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. Orengo 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

**Mr Ruto:** Even as we talk about this level and that second level taking care of these councils I want us to carry on board the other existing devolution to the constituency and the presence of a description called districts which are actually handling resources right now. How will this sit with a devolved government? Will it be direct injection from the central Government from Parliament or what is it? We seem to be arguing about four levels by ignoring the fourth which is a reality and which you will have serious problems if you attempt to abolish.

What do we do with the constituency? Will we continue? Can we agree on four levels then if that is what we are talking about or a minimum of three? Can we look at the constituency?

**The Assistant Minister for Water and Irrigation (Mr. Kiunjuri):** Some of us are not even following the debate because of one reason: I have been trying to raise a Motion here and it will be able to guide us clearly. At the end of the day the argument Mr. Kioni advanced which seems to be giving us direction--- I am not even opposed to what he raised. We should be aware of the fact that the cart is not before the horse. The only way we can do that is that if we are discussing anything to do with regions, we should agree on the number of regions. I am saying this because you have heard the consequences of having those regions. The Israelites demanded for a King. The first thing they were warned about was the dangers of having a King, but they insisted on having that King. God told Samuel to go ahead and appoint the King. What we are discussing here is creation of regions and there will be consequences to that.

We will have to finance those regions and it means direct involvement of those people living there. Then there must be consequences. Therefore, we cannot discuss that further without even knowing for example, which region I belong to from Laikipia. So, the question of delimitation comes in. I must know which region I am discussing. The Bomas draft was very clear. Those delegates who sat in Bomas came up with 14 regions. We discussed those 14 regions for almost a month. We were discussing where they should be. Each delegate was given an opportunity to say where they want to be and which region. So, we are not reinventing the wheel.

The COE came up with proposals of 47 counties and these are attached here. The regions are already attached here. The COE can argue that they are experts but those who sat at the Bomas of Kenya were able to come up with boundaries and regions. This Committee must take it upon itself to do the delimitation. We must come up with the regions so that we know the consequences of those regions that we are working on. This is to make sure that if I am going to be part of the decision we take, I will know what to explain to the people of Laikipia as to why I decided they should go to this region and the consequences.

throughout the country because really, after all, if we are to give service to the people, what the people wanted was services and development closer to the people. Surely, we cannot be here saying that everybody is going to develop their own structures. There is also no system that equalises region 1 with region 2. Are we paying salaries? Who are we paying for? What kind of administration will be there? This is because if we were to go and say everybody do their role, are we then going to have ten devolved public service units because every region has something different?

Mr. Chairman, I am pleading one thing: It is going to midnight and people are tired. I mentioned this to you sometimes back when we were discussing another issue. I think people need to pull back. Let us consult a little bit also informally and even tomorrow morning to see if we can get a way forward otherwise we will agree and we are the same ones who are saying we do not want hon. Isaac Ruto's mongrels and yet here we are here, creating another mongrel that is capable of causing complete confusion. So, I am really pleading. Let us think this thing through because every argument that has been given is valid. Every reason for the different systems is also valid. We must find a way of harmonizing these different positions so that we can get a way out.

**The Minister for Lands** (Mr. Orengo): Mr. Chairman, what I am going to propose here has some bearing to what hon. Kenyatta, Kioni and Wetangula not forgetting hon. Samoei have said. Also on the basis that although we have devolution, the national Government must have some residual authority even if there are devolved units.

**Mr. Chairman:** Like the Provincial Administration?

**The Minister for Lands** (Mr. Orengo): Yes. I know there is a Local Government Act and a new one which has been published but I am saying that instead of arguing about the content and form of this state here, if we had a provision in the draft reading as follows: "Parliament may enact legislation to make provision for the establishment of local spheres of government within and under the regions". Under the regions, that is if you completely want them to be completely under the regions. This is so that even if a region wanted to establish a lower tier of government and whatever you may call it, he will do within enabling legislation so that there is some control.

**Mr. Chairman:** Questions. Hon. Balala!