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ANNEX JLA 1

2011

COMMUNICATION FROM THE CHAIR ON CONSTITUTIONALITY OF NOMINATION OF CERTAIN CONSTITUTIONAL OFFICE HOLDERS

Honourable Members, on Tuesday 1st February 2011, the member for Imenti Central rose on a point of order to seek the assurance, guidance and direction of the Chair on what members of the National Assembly should do where incidents of gross violation of the Constitution occur instigated by either members of this House, the executive or the judiciary. Honourable Imanyara drew the attention of the Speaker to the provisions of Article 3(1) of the Constitution enjoining every person to respect, uphold and defend the Constitution.

Mr. Imanyara further drew the attention of the Chair to, and tabled a statement attributed to the Judicial Service Commission, among other things "expressing grave concern and misgivings about the nomination of the Chief Justice made by the President" and calling for a re-think of the matter putting the country first that would entail a withdrawal of the nominations and a fresh start. Mr. Imanyara went on to cite the Judicial Service Commission as having held the view that in order to give the process of appointing judicial officers legitimacy, public confidence, ownership and acceptance by the people of Kenya, the Judicial Service Commission must play an integral role in the process as contemplated in Article 172 as read with Article 166(1) and section 24 of the Sixth Schedule to the Constitution.

The Honourable Imanyara also cited and tabled a statement by the Commission for the Implementation of the Constitution which stated, *inter alia*, that the process of appointment of the Chief Justice should commence with recommendations by the Judicial Service Commission to the President who in turn should consult the Prime Minister after which the President should forward the name of the nominee to the National Assembly for approval before final appointment by the President. It was the further position of that Commission that the role of the Judicial Service Commission should be respected and the

Judicial Service Commission should be allowed to undertake the function reserved to it by the Constitution.

Mr. Imanyara claimed to be aware that the Right Honourable Prime Minister had written to the Speaker and he tabled a copy of the said letter in which the Prime Minister disassociated himself from the nomination process. In the member's view, there was a clear attempt to undermine the Constitution creating a dangerous trend which to his mind would lead back to the old days defeating the essence of the long crusade for a new Constitution in this Republic. Mr. Imanyara concluded by seeking the directions and guidance of the Chair on how the House should proceed bearing in mind the provisions of standing order no. 47 which empowers the Speaker to direct that any proposed Motion that is contrary to the Constitution without expressly proposing appropriate amendment of the Constitution to be inadmissible.

What followed were a number of interventions by seventeen members rising on substantive points of order and providing various perspectives on the matter of the nomination of certain constitutional office holders by His Excellency, the President. Honourable members, I permitted considerable ventilation on this matter and I am glad that I did because deep and profound reflections on the nature, character, letter and spirit of our Constitution were proffered. From these submissions, which are too numerous and varied to be cited and attributed individually, I have filtered the following issues-

1. Whether or not the Speaker is competent to make a pronouncement or determination on the matter of the constitutionality of the nominations and their propriety for transmission to and disposal by this House or whether conversely, this would be a matter for other constitutional organs and in particular, the Judiciary;
2. Is Parliament properly seized of the matter of the nominations;

3. What is the status, import and weight to be attached to the opinion of the Commission on the Implementation of the Constitution on a matter such as this;
4. Do the provisions of the Constitution require the involvement of the Judicial Service Commission in the nomination process and going hand in hand, if the Constitution dictates that the process be participatory, competitive and transparent;
5. Were there consultations between the President and the Prime Minister as contemplated by section 29(2) of the Sixth Schedule to the Constitution; tied to this point, are a number of other questions including what the minimum threshold of consultation should be and if consultation denotes concurrence, consensus or other measure of agreement. Additionally there is the further point of what was intended by the drafters of the Constitution in providing for consultation as they did;
6. What is the import of making the consultations subject to the National Accord and Reconciliation Act ;
7. Is a serving member of the judiciary constitutionally eligible to be nominated and appointed as Chief Justice;
8. Do the nominations meet the constitutional requirements of regional balance and gender parity;
9. Do the questions raised on the nomination of office-holders amount to a dispute within the meaning of the Political Parties Act;
10. And finally, whether or not the correct approach to the questions raised on the propriety of the nominations can be resolved by a vote in this House to approve or disapprove the nominees?

I undertook to give a ruling today, Thursday 3rd February 2011.

Honourable Members, I wish to begin by pronouncing myself on the matter of the jurisdiction of the Speaker to determine the questions raised as the answer to this question

is a pre-requisite to proceeding with the other issues raised. Honourable Members will recall that I indicated at the onset on Tuesday 1st February 2011 in promising to give this ruling that I had no doubt in my mind that the Speaker has jurisdiction to rule on this matter. Indeed I have previously ruled on various occasions that it is settled law in the Commonwealth and beyond that every independent legislature is the sole judge as to how it shall conduct its own affairs. The Speaker as the leader of the House and the manifestation of the authority of the House is mandated and obligated to safeguard and jealously protect its sovereignty within the Government to determine what it shall or shall not do and when and in what manner it shall do those things without interference from any other person or authority.

This position is recognized in parliamentary practice and traditions and in both the former and the present Constitutions. This is what the Constitution means when it vests the legislative authority of the Republic in Parliament and provides that Parliament manifests the diversity of the nation, represents the will of the people and exercises their sovereignty. This is also the essence of the separation of powers that I have every so often pronounced myself upon from this Chair.

The view that it can fall to another organ whether the executive or the judiciary to determine for Parliament a matter before Parliament is, to my mind, constitutional heresy, which I would urge that every person in this country and more so, in this House, completely purges and disabuses themselves of. This disposes also of the question whether or not the Speaker can properly interpret the Constitution or that this function belongs to the judiciary. The answer, of course, is that in so far as a constitutional question arises before the House, within the conduct of the business of the House, it is the constitutional duty of the Speaker to interpret the Constitution to that extent and for that purpose alone so as to enable the House to proceed with its constitutional functions. ***It is not fathomable and it would be a grave negation of the Constitution that the House***

should adjourn or otherwise suspend its business and seek the directions of another body or organ before it can proceed.

Honourable Members, I think that it is time to debunk and demystify, for all time, the question of the interpretation of the Constitution. It is not the intention of our Constitution and indeed the Constitution does itself make it clear in various Articles including Article 10(1) and Article 20(4), among others, that the interpretation of the Constitution is not the exclusive property or preserve of any particular organ, person or authority. Article 10(1) in particular, binds every State organ, State officer, public officer and all persons to the national values and principles of governance when they apply or interpret the Constitution, enact, apply or interpret any law or make or implement public policy decisions. It is clear that the interpretation of the Constitution is as much the mandate and obligation, in their respective capacities, of a forestry officer, a labour officer, a magistrate, the Board of a public school, a police officer, the Director of Public Prosecutions or the President of the Republic. Each of these is bound to administratively interpret and apply the Constitution in their actions and functions. To do so, they must interrogate and understand what the Constitution means and how it applies to any particular situation in which they find themselves.

Article 3(1) of the Constitution to which Mr. Imanyara referred this House, in obligating every person to respect, uphold and defend the Constitution, would have no meaning if the individual is not permitted to interpret the meaning and application of the Constitution. This is of course not to say that the Courts no longer have jurisdiction to interpret the Constitution, it is to say that it is not a jurisdiction exclusive to the Courts. It is important that interpretation of the Constitution for the purpose of its application be distinguished from the exercise of judicial authority as provided for in Article 159(1) of the Constitution.

There is probably no way that this House could possibly function if the Speaker could not interpret the Constitution. Standing order no. 47, in particular, in requiring the Speaker to rule to be inadmissible a Motion which, in the Speaker's opinion is unconstitutional would naturally be unconstitutional because the Speaker would be prevented from forming that opinion. In forming that opinion and in all other interpretations of the Constitution, the Speaker is not acting in a judicial capacity within the meaning of the Constitution. Judicial interpretation is the preserve of the judiciary.

Honourable Members, having settled the question of jurisdiction, I now move to address myself to the issues raised. As will become apparent presently, it may not be necessary to pronounce myself on all of the issues which I have set out as having been raised. In this regard, it is important at the outset to emphasize that the primary question, the mother of all the points of order, as it were, in respect of which the guidance and directions of the Speaker were sought and promised, was the point of order by Mr. Imanyara, the essence of which was to invoke standing order no. 47 to urge the Speaker to find that the nomination process having been done contrary to the Constitution, was not admissible before this House or any of its organs and could not properly be considered by either this House or any of its Committees.

Before I make this determination, I think it is important to consider the provisions of standing order no. 47. Standing order no. 47(3) which is the relevant provision presupposes the existence of a Motion or a proposed Motion in respect of which the Speaker can form an opinion that it is contrary to the Constitution. In the present case, clearly, we are not at the point where there is either a Motion or a proposed Motion. I think that it is quite clear that standing order no. 47 is inapplicable in the present circumstances and cannot be relied on by the Speaker for the guidance sought by Mr. Imanyara.

A related issue, therefore, must be the question whether the House is properly seized of the matter in respect of which Mr. Imanyara sought guidance. Is there a matter before the House in respect of which the Speaker is being invited to find that there has been contravention of the Constitution? To answer this question, I wish to call the attention of Honourable Members to the procedure and practice that have evolved in this House in relation to the vetting of persons for approval by the National Assembly. One of two procedures is available.

In the first case, the responsible Minister tables a list of names proposed for appointment as a paper laid and the Speaker thereupon commits the matter to the relevant committee for deliberation and report to the House. The Committee is then responsible for considering all aspects related to the suitability of the candidates proposed as well as the constitutionality or legality of the processes by which the nominees have been arrived at. The matter is thereafter brought to the House on a Motion by the chairperson of the relevant committee asking the House to resolve that it approves or does not approve the nominees or some of them. It is then open to the House to approve or disapprove the Motion. It is also open to any member of the House to raise any objection, including an objection under standing order no. 47(3) that the Motion is a contravention of the Constitution.

Honourable Members, in recent times, the more prevalent practice and procedure has been for the Minister or other nominating authority to write a letter to the office of the Speaker forwarding the proposed names of persons to be vetted for approval and requesting the Speaker to transmit the communication to the House for vetting and approval through its recognized organs, namely, the relevant departmental committees. This is the procedure that has been adopted in respect of a long list of recent nominees, including the Commission for the Implementation of the Constitution, the Commission on Revenue Allocation, the Judicial Service Commission, the Privatization Commission, and the Advisory Board of the Kenya Anti-Corruption Commission, among others.

By this procedure, the role of the Speaker usually consists of receiving and transmitting to the relevant committee the names of the nominees received for the Committee to exercise its mind on behalf of the House to determine if the law has been complied with in all respects and whether or not additionally the persons nominated are suitable for recommendation to the House for approval. To reach this determination, the committee may call for evidence in the usual manner, including summoning the nominees to physically appear before it for vetting, summoning witnesses to assist it in making findings both of fact and of law and receiving representations from the public on the legality of the process or the suitability or otherwise of particular nominees.

Honourable Members, from the foregoing synthesis, the question whether or not this House is properly seized of the matter of the nominees for the purpose of enabling the Speaker to make the determinations he has been called upon to do becomes central and key to this matter. The question at hand is as follows: When a nominating authority sends the names of nominees to the Speaker, what is the legitimate role of the Speaker in respect of the correspondence transmitting the names? Is the correspondence addressed to the Speaker as Speaker or as a conduit to the House? What role does the Speaker have in regard to that correspondence before it goes to the House in plenary or to a committee of the House? Is the Speaker permitted to process the correspondence and form a judgment and make a determination as to whether or not it should get to the House? Is it permissible for the Speaker, administratively in his Chambers, to determine for example that the nominees do not qualify for appointment and that therefore the relevant statute or the Constitution has been contravened and decline to transmit the correspondence to the House or its committees?

Honourable Members, these questions are relevant because in the present case the Speaker received a letter from the Office of His Excellency, the President, on 31st January, 2011, averring that he was forwarding the names of nominees in accordance

with the Constitution for processing by the House. At the point at which the Honourable Imanyara sought the guidance of the Chair, the letter had neither been tabled before the House nor been received by a committee of the House. Subsequent to the receipt of the letter from the Office of the President, the Speaker did also receive on 1st February, 2011 a letter from the Right Honourable Prime Minister making certain representations as to the validity and constitutionality of the earlier correspondence received. Two important questions arise: firstly, whether the Speaker could rule that nominations were unconstitutional before the House had formally become aware of the nominations and secondly whether it would be proper for the House to deal with the correspondence of the Prime Minister before the preceding correspondence from the Office of the President, to which it related, had been formally brought to the attention of the House.

Honourable Members, before I pronounce myself on whether the House is properly seized of this matter, I wish to indicate that I have not been able to find any precedents of this House in which the Speaker intercepted correspondence addressed to the House and unilaterally made a determination as to its legality or validity, and returned it to the nominating authority. I further wish to urge the House to recollect that in the course of the points of order that were raised on Tuesday 1st February 2011 in this House, the Speaker, this House and the nation at large was taken through the elaborate detail of the events preceding the submission of the names of the nominees to the Speaker. I would think that some members of this House may have had questions they would have liked to ask of both the Vice-President and of the Prime Minister.

Possibly, some members may have had information relating to those events which they would have liked to bring to the attention of the House. Members of the public may have had their own thoughts which they would have liked to share with this House on these matters. Constitutional organs like the Judicial Service Commission and the Commission on the Implementation of the Constitution were mentioned and certain claims made in relation to them. Certain statements were attributed to these bodies. I have no doubt in

my mind that these bodies would have had something to say in relation to those claims. Bodies like the Law Society of Kenya, the International Commission of Jurists and the Federation of Women Lawyers (FIDA) have come out in the public domain asserting certain positions which they contend would assist the country in arriving at a lawful and fair determination of the matters in issue. These are important matters to note, because, as Honourable Members are no doubt aware, if there is any matter relating to the conduct of public affairs in general and to the Legislature in particular that the Constitution has comprehensively addressed, it is the matter of the centrality of the rule of law, democracy, transparency, accountability, inclusiveness and the participation of the people.

Honourable Members, as I have indicated the issues I have set out as requiring determination entail both matters of law as well as matters of fact. I acknowledge and appreciate the learned interventions made in the House in support or opposition of an array of propositions. The importance of questions posed and the critical ramifications that they have to the overall implementation of the New Constitution are such that a more collegiate and participatory process is required not only as a matter of natural justice and sound conduct of public affairs but also as a requirement of the Constitution. As your Speaker I do not feel that the points of order raised and the forum at which they were raised afforded me adequate opportunity to make a summary determination, without a full hearing, either that the Constitution was contravened or that it was complied with. If I were a judge sitting on the bench in a court of law, I would rule that the matter proceeds to hearing and that the objections raised be heard and determined at that stage.

In parliamentary parlance, the forum for a full hearing entailing adducing and rebuttal of evidence, examination and cross-examination of witnesses is the committee of the House. The Standing Orders, recognizing that the plenary is unsuitable for a detailed examination of important matters, has made provision for committees to precede plenary consideration of such matters.

I do recognize, of course, that the point has been made that the matters complained of, being unconstitutional, they do not merit even transmittal to the committee. With respect, in the present case, I disagree. The role of a committee in the vetting process is to consider all aspects of the proposed nominations, including compliance with the Constitution and all relevant, enabling and incidental laws. In answer to the question I have previously posed, I do find, and I therefore so rule, that in conformity and consonance with the precedents and practice developed and embraced by this House, the proper role of the Speaker when he receives nominations, and particularly those made pursuant to the provisions of the Constitution, is that, the minimum he will do, as a mandatory first step, is to convey these to the relevant organs of the House. It is also the role of the Speaker to see to it that the committees of the House do consider any forwarded nominations, observing constitutional requirements as to public participation and due process and report to the House their findings both as to the constitutionality and other propriety of the nominations as well as their recommendations for action by the House. If this is not done, I am of the considered opinion that the legislature shall not meet the requirements of the Constitution.

Honourable Members, let me hasten to clarify, that reference of the correspondence so far received both from the Office of His Excellency, the President and the Right Honourable Prime Minister to the relevant committees of the House does not amount to a finding or determination that these nominations were or were not constitutionally made. Nothing can be further from the truth. It is merely a pronouncement that it is inopportune at this stage for the Speaker to make such a determination because the House is not yet substantively seized of the matter, and further that other players whom the Constitution recognizes as having a role in the matter have not had opportunity to formally participate in the process in a manner that would enable the Speaker or indeed the House to make that determination from a point of full knowledge. In a manner of speaking, these stakeholders have not been consulted. It may very well be, that at the end of this

exercise, the relevant parliamentary committees, as they are obligated to, having delved into the matter, there will be a Motion or proposed Motion as presumed by standing order no. 47 that the House shall deal with.

Honourable Members, from my pronouncements above, it should become apparent that all the other issues raised requiring determinations of fact or law have not crystallized because of my finding that from a constitutional, legal and procedural point of view, a summary and preliminary determination of the matter is neither possible nor desirable. I therefore rule that as at where we are it is not appropriate, and I accordingly decline to make a determination as to whether or not the nominations transmitted to my office by the Office of His Excellency, the President, were or were not constitutionally arrived nor whether there was or was not consultation within the meaning of the Constitution, nor whether or not ethnic diversity and gender equality were observed. It follows, that I accordingly withhold any determination or comment on the veracity and weight to be accorded to the letter received from the Right Honourable Prime Minister. I further direct that the two letters be forwarded to the departmental committees on Justice and Legal Affairs and Finance, Planning and Trade according to their respective mandates for disposal as provided for in the Standing Orders and the law. Given the urgency of the matter and the constitutional deadlines, I direct that the committees shall carry out the requisite inquiries and table their Reports in the House on or before Thursday, 10th February 2011. This is particularly important because, as Members shall recall, the House is in special sittings convened to discharge this business.

As Honourable Members are aware, a committee of the House collects evidence and makes findings to help the House arrive at an informed decision. A committee does not of itself finally determine a matter for the House. Additionally, it must be noted that questions of constitutionality and observance of the law are not matters to be determined only by the vote of either the committee or indeed of the House. To this end, without pre-empting the findings of any of the committees of the House or any action of the House, it

is important that the House remains alive to the Speaker's mandate, when timeously obligated to, to give the guidance and directions sought by Mr. Imanyara. Needless to say, the window remains open, and it is to be hoped, that developments may occur that make this important nomination process uncontested on the basis either of constitutionality or otherwise and thereby render such guidance and directions unnecessary.

Honourable Members, permit me to make a few concluding observations on this matter. I wish to echo the observations of Mr. Abdikadir Mohamed, member for Mandera Central who called for the cultivation of a culture of constitutionalism without which culture the Constitution becomes a mere paper. Constitutionalism can be broadly defined as the bundle of ideas, attitudes and patterns of societal behaviour which shows a subscription by that society to, and a belief by it, in the principle that all authority of Government derives from and is limited by the Constitution and exists to advance the common good and welfare of that society. I want to plead with all of us, the leadership and the people of this country, that we all imbibe from the fountains of constitutionalism so that it becomes part of our life and our adherence to the Constitution ceases to be laboured, legalistic and minimalist.

Honourable Members, painful as the memories may be, I think that it bears reminding that three years ago, almost to the day, this country was at war with itself in circumstances not so dissimilar. We were on the brink of the precipice because a dispute relating to an election was not referred to the judiciary because of a lack of faith in the judiciary. It is this very judiciary whose head is now sought to be appointed by a process, entrenched by the New Constitution resoundingly enacted by the people of Kenya for themselves. It is nothing short of heart-breaking to the people of this country that this process, that should herald a new beginning and inspire new confidence and legitimacy in this crucial organ of state should get off to such a rough start. It is the kind of process

that the Honourable Mohamed Abdikadir has described as a "zero-sum" game. A process in which I must not only win but you must lose.

Honourable Members, few countries have had the opportunity of a second chance as we have. Events around the world in recent days are testimony to how situations that may have been easily avoided or acted upon while there was opportunity can rapidly deteriorate and become unmanageable. To my mind, it will be a pity and a severe indictment of our collective leadership if in time to come, history shall record of our country in general and of our leadership in particular that we learnt nothing from history.

Thank you.

Hon. Kenneth Marende, M.P.
Speaker of the National Assembly.
Thursday 3rd February 2011.

ANNEX JLA 2

(3)

PRESS STATEMENT BY THE JUDICIAL SERVICE COMMISSION ON 31.1.2011

WE Members of the Judicial Ser vice Commission (J SC) express our grave concern and misgivings about the nomination for the Chief Justice that was made by the President last week. We note that the President states that he consulted the Prime Minister prior to the nomination. We have also noted the views expressed by the Prime Minister that he was not consulted prior to the nomination.

As we implement and internalize the new Constitution, we the Judicial Service Commission is of the view that both the Judiciary and Kenyan People must start the new era heralded by the Constitution on the right footing. Both the letter and the spirit of the new constitution must be adhered, to in our view.

In light of the divergent views coming from the Principals, we are of the view that the Principals need to reconsider their respective positions. There is an urgent need for a rethink of the matter and to put the country first. That entails a withdrawal of the nominations and a fresh start. On our part, it is our view that in order to give the process of appointing Judicial Officers legitimacy, public confidence, ownership and acceptance by the People of Kenya, the JSC must play an integral role in the process.

It is our view that Articles 171 (1) (e) and (2) read together with Article 166 (1) and Schedule 6 section 24 gives the J.S.C powers to play that important role.

Such a process, in our view will depolitisise and provide the much needed legitimacy and acceptance of the nominees.

Signed by:	Name	Signature
1.	J.E. GICHERU	Ichumi C.J.
2.	S. AMOS WAKO	
3.	R.S.C OMOLO	
4.	EMILY OMINDE	
5.	TITUS J-K. Gateere	
6.	ISAAC LENAOLA	
7.	FLORENCE MUAMBAMU	
8.	AHMED NASIR ABDULLAHI	
9.	PROF. CHRISTIANE A. OKONGO	
10.		

(2)
(3)

Paper Laid
by Mr. Imanyara on Tuesday, 1st February, 2011
while seeking a Ministerial Statement

1/2/11

ANNEX JLA 3

OPINION OF THE COMMISSION FOR THE IMPLEMENTATION OF THE CONSTITUTION (CIC)- ON THE PROCESS RELATING TO THE APPOINTMENT OF THE CHIEF JUSTICE OF THE REPUBLIC OF KENYA, THE ATTORNEY GENERAL , THE DIRECTOR OF PUBLIC PROSECUTIONS AND THE CONTROLLER OF BUDGET

Introduction

Following the ruling by the Speaker of the National Assembly Hon Kenneth Marende on the 3rd of February 2011, in which the matter of nominations to the offices of Chief Justice, the Attorney General, the Director of Public Prosecutions and the Controller of Budget, were forwarded to the Parliamentary Committee of Justice and Legal Affairs and the Committee of Finance Planning and Trade, the Commission for the Implementation of the Constitution (CIC) would like to give the following opinion on the Constitutional provisions relating to the said nominations.

CIC is giving this opinion in pursuance of its general mandate contained in Article 249 (1) of the constitution to

a) protect the sovereignty of the people;

b) secure the observance by all State organs of democratic values and principles including those articulated in Article 10 and Chapter 6 of the Constitution particularly respect for the rule of law, participation of the people, integrity, good governance , transparency and accountability;

c) promote constitutionalism.

With respect to the appointment of the Chief Justice CIC is mandated to work with each constitutional commission (of which the Judicial Service Commission is one) to ensure that the letter and spirit of the constitution is respected.

A. Provisions relating to the Appointment of the Chief Justice

Article 166(1) (a) of the constitution provides that

the President shall appoint the Chief Justice and the Deputy Chief Justice, in accordance with the recommendation of the Judicial Service Commission, and subject to the approval of the National Assembly; and

Section 24 (2) of the Sixth Schedule provides that:

A new Chief Justice shall be appointed by the President, subject to the National Accord and Reconciliation Act, and after consultation with the Prime Minister and with the approval of the National Assembly.

Section 29 (2) reinforces this provision by providing that all appointments that will be made prior to the first elections under the constitution and that require approval by the National Assembly shall, be made by the President after consultation with the Prime Minister.

It is the opinion of CIC that before the first elections under the constitution, these three provisions should be read and construed together when dealing with the appointment of the Chief Justice. This position is based on the following grounds:-

(i) Article 166 is not suspended under Section 2 of the Sixth schedule.

(ii) Article 24 (2) which deals with the appointment of the first Chief Justice under the Constitution does not expressly exclude the application of Article 166.

(iii) The Judicial Service Commission is already established and is operational. One its primary roles is to recommend persons to be appointed as Chief Justice.

In view of the above and pursuant to its mandate, CIC would like to submit as follows:

(a) That Article 166 (1) contemplates that the appointment of the Chief Justice of the Republic of Kenya shall be a shared responsibility among the three arms of government namely the Judiciary (through the Judicial Service Commission -JSC), the Executive (through the President) and the Legislature (through the National Assembly).

(b) That in carrying out the mandate of appointing the new Chief Justice prior to the first elections under the constitution, the President shall consult the Prime Minister.

In view of the above, it is the position of CIC that the letter of the Constitution as provided for in Article 166 read together with Sections 24 and 29 of the Sixth schedule require that the appointment of the Chief Justice by the appointing authorities should be as follows:

I. That the process of appointment should commence with recommendations by the Judicial Service Commission to the President who in turn should consult the Prime Minister, after which the President forwards the name of the nominee to the National Assembly for approval before final appointment by the President.

II. That the role of the Judicial Service Commission in the appointment of the Chief Justice should be respected and that Commission allowed to undertake the function reserved to it by the constitution.

It is important to note the High Court of Kenya in HCPET (Nbi) No 16 of 2011 has restated this position and declared any process that excludes the Judicial Service Commission in the appointment of the Chief Justice to be unconstitutional.

B. Provisions relating to the appointment of the Attorney General, the Director of Public Prosecutions and the Controller of Budget.

The offices of the Attorney General, the Director of Public Prosecutions and the Controller of Budget and the process of their appointment is set out in Articles 156, 157 and 228 of the constitution respectively. In the case of these offices the appointment of the office holders is shared by the Executive and the Legislature

Under the aforesaid Articles the three Constitutional office holders are to be nominated and eventually appointed by the President subject to the approval of the National Assembly.

In the period before the first election this section must be read together with the provisions of Section 29 of the Sixth Schedule, which provides as follows:

(1) *The process of appointment of persons to fill new offices and vacancies arising in consequence of the coming into force of this Constitution shall begin on the effective date and be finalised within one year.*

(2) *Unless this Schedule prescribes otherwise, when this Constitution requires an appointment to be made by the President with the approval of the National Assembly, until after the first elections under this Constitution, the President shall, subject to the National Accord and Reconciliation Act, appoint a person after consultation with the Prime Minister and with the approval of the National Assembly.*

Consequently, such appointments being made prior to the first elections, require the President to consult the Prime Minister prior to appointment, subject to the National Accord and Reconciliation Act. The process of appointment should also reflect the letter and spirit of the constitution.

We trust that this opinion will help in clarifying the issues in contention. We remain available to discuss and/or clarify any of the issues raised herein.

DATED THIS 8th **DAY OF** February **2011**

COMMISSION FOR THE IMPLEMENTATION OF THE CONSTITUTION.

COMMISSION FOR THE IMPLEMENTATION OF THE NEW CONSTITUTION

File Ref: CIC/3/1. VOL. 1(65) 30 January 2011

See Distribution.

PROCEEDINGS OF THE COMMISSIONERS' MEETING HELD AT DELTA HOUSE CONFERENCE ROOM ON 30 JANUARY 2011 STARTING 1730 HRS

PRESENT:

Mr Charles Nyachae	-	Chairman
Dr. Elizabeth Muli	-	Vice Chairman
Ms. Catherine Mumma	-	Commissioner
Mr Kamotho Waiganjo	-	Commissioner
Mr Philemon Mwaisaka	-	Commissioner
Mr. Kibaya Laibuta	-	Commissioner
Mr. Philomen Mwaisaka	-	Commissioner
Dr. Florence Omosa	-	Commissioner

APOLOGIES

Prof. Peter Wanyande	-	Commissioner

AGENDA

1. Opening Remarks
2. Recent appointment of CJ, AG, DPP and Controller of Budget
3. AOB

OPENING REMARKS

The meeting commenced with prayers from the Chairman. He thanked Commissioners for attending at very short notice and noted that the meeting was prompted by the fast pace at which debate on the appointment of persons to the positions of Chief Justice, Attorney General, Director of Public Prosecutions and Controller of Budget was moving. He reminded the meeting that CIC was scheduled to meet the Judicial Service Commission the following day though that meeting had been set prior to the recent appointments.

The agenda of the meeting with the JSC was to discuss the manner by which the CIC would work together with the JSC to enable the CIC fulfill its mandate under Section 6(d) of the Sixth Schedule. In particular the CIC would discuss with the JSC the latter's role in the matter of appointment of the CJ in view of Articles 166 and Section 24 of the Sixth Schedule of the constitution. It was also noted that Parliament was set to resume its sittings on Tuesday 01 February 2011 and its agenda would definitely include the matter of appointments. He concluded that in the premises the Commission ought to deliberate the matter and develop an opinion that may inform the national discourse on the matter and shed light on the way forward. He then invited proposals on the meeting's agenda.

DELIBERATIONS ON AGENDA

The meeting was agreed on the urgency of deliberating the matter of appointments and cited the possibility of Kenyans being divided sharply on the issues as a factor to consider. The Commissioners were agreed on the need to act in a manner that does not polarise the nation or unduly antagonise the various implementers of the constitution. They underscored the need to uphold both the letter and spirit of the constitution in the discussions and hoped that the matter will be concluded in good time. They then resolved to discuss the procedure on appointment of Chief Justice first followed by a concurrent deliberation on the other appointments since they have similar procedural requirements.

APPOINTMENT OF CHIEF JUSTICE

In deliberating the subject of appointment of the Chief Justice the Commissioners made reference to Articles 166 of the Constitution and Sections 24 and 29 of the Sixth Schedule of the Constitution as well as the First Schedule to the National Accord and Reconciliation Act. They particularly noted that under Article 166(1) (a) the President is empowered to appoint the Chief Justice and the Deputy Chief Justice, in accordance with the recommendation of the Judicial Service Commission, and subject to the approval of the National Assembly. Consideration was also given to Section 24 (2) of the Sixth Schedule which the Commissioners felt imported the requirement of consultations between the President and the Prime Minister in the manner provided for under the National Accord and Reconciliation Act.

The meeting wrapped up the applicable process as follows:

I. Recommendations by the Judicial Service Commission to the President.

II. Consultations between the President and the Prime Minister.

III. Submission of the nominee to the National Assembly for approval.

IV. Formal appointment by the president.

APPOINTMENT OF ATTORNEY GENERAL, DIRECTOR OF PUBLIC PROSECUTIONS AND CONTROLLER OF BUDGET

The meeting identified the provisions relating to the appointment of the Attorney General, the Director of Public Prosecutions and the Controller of Budget to be Articles 156, 157 and 228 of the constitution respectively. They also considered section 29 of the Sixth Schedule of the Constitution as bearing relevance to the filling of vacancies created under the new constitution in accordance with the National Accord and Reconciliation Act.

It was agreed that the applicable process with respect to these positions was:

I. Consultations between the President and the Prime Minister.

II. Nomination by the President and presentation of nominees to Parliament.

III. Approval by Parliament.

IV. Formal appointment by the President.

The Commissioners noted that this procedure just like that of appointing the Chief Justice was mandatory under the constitution.

WAY FORWARD

The commissioners deliberated and came to the conclusion that:

1. It is not the place of the Commission to establish the facts relating to the process that was used to airrive at the nominees announced for the positions CJ,AG,DPP and the Controller General.
2. The commission should write its opinion,based on the provisions of the Constitution, on the process that should be followed the appointment of the CJ,AG,DPP and the controller Of Budget. This opinion should be published for the information of all Kenyans.
3. The Commission should urgently seek audience with both Principals to request them to consult further and speak in one voice on the issue of nomination to avoid the posible polarization of the nation and any negative effect on the Constitutional implementation process.

The Commissioners considered the matters at hand to be potentially contentious and capable of harming the delicate process of implementing the constitution. They felt that there was need for CIC to build public confidence in the implementation process and to account to the public on performance of its mandate. The meeting thus resolved to:

a. Meet the following day and draw a Press Statement for Publication in the dailies.
b. Seek to meet the President and the Prime Minister – preferably jointly – to explain the Commission's position.
c. Meet the Judicial Service Commission as earlier scheduled to transact the set agenda.

ADJOURNMENT

There being no other business to transact, the meeting adjourned at 2000 Hrs to convene on 31 January 2010 at 0700 Hrs.

CONFIRMATION

Signed by:

Chairman: .....

CHARLES NYACHAE

Date: 3rd February 2011

Distribution.

Chairperson
Vice-Chairperson
All Commissioners
CEO

ANNEX JLA 4

CONFIDENTIAL

RECEIVED
31 JAN 2011
CLERK'S OFFICE

OFFICE OF THE PRESIDENT

PERMANENT SECRETARY, SECRETARY TO THE CABINET
AND HEAD OF THE PUBLIC SERVICE

Telegraphic Address: "Rais"
Telephone: +254-20-2227411

P.O. Box 62345-00200
NAIROBI, KENYA

When replying please quote

Ref. No. OP/CAB.17/84A
and date
31st January 2011

URGENT

URGENT. 20

Mr. Patrick G. Gichohi, CBS
Clerk
National Assembly
Parliament Buildings
NAIROBI

D/comm:
pls forward the first three names to the D/comm, on Legal Affairs and No. 4 to D/Com on Financ
CA
01/2

Dear Patrick,

RE: PARLIAMENTARY APPROVAL FOR NOMINATIONS FOR STATE OFFICERS BY HIS EXCELLENCY THE PRESIDENT

Following consultations with the Rt. Hon. Amolo Raila Odinga, EGH, MP, the Prime Minister of the Republic of Kenya and in accordance with the Constitution, His Excellency President Mwai Kibaki has made the following nominations of persons to fill the respective state offices for approval by the National Assembly.

1. Chief Justice: The Hon. Justice Alnashir Ramazanali Magan Visram
2. Attorney General: Professor Githu Muigai
3. Director of Public Prosecutions: Mr. Kioko Kilukumi, and
4. Controller of Budget: Mr. William Kipkemboi Kirwa

Accordingly, I have been directed by His Excellency the President to forward these nominations to the National Assembly. I am therefore requesting you to facilitate the consideration of the nominations by the National Assembly.

Florence Abonyo -
Please inform the Committee on Finance on name No. 4 urgently
Munga
1/2/2011

CONFIDENTIAL

George Abiero or Wanyiri Ndindiri
Please inform the Committee on Legal Affairs on name No. 1 to 3 as advised by CA urgently
Munga
1/2/2011

C.V.s of the nominees are attached herewith.

Yours

AMB. FRANCIS K. MUTHAURA, EGH
PERMANENT SECRETARY, SECRETARY TO THE CABINET AND HEAD OF THE PUBLIC SERVICE

Encl.

CURRICULUM VITAE
HON. MR JUSTICE ALNASHIR VISRAM

Position: Judge of the High Court
Date of Appointment: March 2001

Justice Alnashir Visram was born in Kisii on 30th August, 1949.
He is a third Generation Kenyan, his grandfather having come to Kenya from India at the end of the 19th Century at the age of fifteen.

Justic Visram went to Kisumu Boys High School, where he completed his 'A' Levels before joining the University of Nairobi.

He was part of the first graduating class of the newly established Faculty of Law of the University of Nairobi in 1972, and was admitted to practice law in Kenya in 1973.

In 1978 he graduated with a second degree in Law from University of British Columbia, Canada and was among the first Kenyans to be admitted as a Barrister & Solicitor in Canada. In 2006 he graduated with a Master of Laws degree in International Law from the University of Nairobi.

While in practice he specialized in commercial, corporate and civil law, during which time he represented several insurance companies, banks and multi-nationals.

In June 1999 President Moi appointed Justice Visram Commissioner of Assize, and in March 2001 he as sworn in as a Judge of the High Court of Kenya.

Justice Visram has established himself as a creative judge with a flare for innovative approaches to judicial resolution. During his tenure, he has presided over several landmark cases that broke new ground in legal jurisprudence in Kenya. In the Olympic cases of Eric Keter, Justice Visram found that the Kenya Amateur Athletics (KAAA) had unlawfully excluded the 400 metres hurdler from the Olympic team thereby violating his fundamental rights and ordered that Keter be included in the Kenyan team.

Soon thereafter, he ordered Kenya Power & Lighting Company (KPLC), to restore electric power to a business consumer. Justice Visram laid down the rule that a monopoly like KPLC had a greater duty of care to its customers and could not disconnect power supply at its whim. His decision in Unilever Kenya Ltd. V Commissioner of Income Tax involving "transfer taxation" across borders was among the first Kenyan cases to be reported in the Commonwealth Law Reports.

Presently he is a member of the **Judiciary's Training Committee, the Curriculum Development Committee** and the Vice chair of the **Strategic Planning Committee**. He has presented papers at various international and local colloguia, including a paper on "Prerequisites for Introduction and Application of ICT in the administration of Commercial justice: Evidence from emerging Economies", at the Conference on the role on Information Communication and Technology (ICT) held in Arusha, Tanzania in September 2007; "Alternative Dispute Resolution" at the LSK seminars in 2005 and 2006; Environmental Law" at the Judicial Officers' seminar in 2006.

Justice Visram has held various leadership positions with the Ismail Community and the Aga Khan Foundation.

He is married with two children, one of whom recently graduated as a lawyer from the University of Kent, U.K.

CURRICULUM -VITAE

NAMES: Githu Muigai.

NATIONALITY: Kenyan.

DATE OF BIRTH: 31st January 1960

MARITAL STATUS: Married with Three children.

CURRENT EMPLOYMENT:

- Associate Professor , Department of Public Law, Faculty of Law, University of Nairobi (On leave of absence).
- Senior Partner, Mohammed Muigai, Advocates

EDUCATIONAL BACKGROUND:

PRIMARY SCHOOL:
St. James,
Kiambu Primary School:
1967-1973.

SECONDARY SCHOOL:
Githiga Secondary School:
1974-1977.

HIGH SCHOOL:
Meru School:
1978-1979.

COLLEGES AND UNIVERSITIES:

University of Nairobi. (1980-1984).

Kenya School of Law. (1984-1985).

Columbia University Law School, New York (1985-1986).

University of Nairobi (1995-2001).

ACADEMIC CERTIFICATES AND DEGREES:

1. Certificate of Primary Education - 1973
2. East African Certificate of Education -1977
3. East African Advanced Certificate of Education -1979
4. Bachelor of Laws. (LLB, Hons)-1984.
5. Diploma in Legal Practice (Dip Law)-1985.
6. Master of Laws (LLM)-1986
7. Doctor of Philosophy (PhD)-2001

PROFESSIONAL QUALIFICATIONS AND AFFILIATIONS

1. Advocate, High Court of Kenya.
2. Commissioner for Oaths (Kenya).
3. Certified Public Secretary (Kenya).
4. Chartered Arbitrator, (Kenya)
5. Ex-Member of Council, Law Society of Kenya.
6. Ex-Chairman, International Commission of Jurists (Kenya Section).
7. Ex-Member, Executive Board, Legal Advice Centre (Nairobi, Kenya).
8. Member, Third World Legal Studies Association (U.S.A).
9. Member, International Advisory Board, Journal of Human Rights law and Practice.
10. Member Publications and Law Reporting Committee, Law Society of Kenya.
11. Associate Professor, Widener University Law School, Annual Summer, International Law Institute, Nairobi, Kenya.
12. Ex-Chancellor to the Bishop, Diocese of Mount Kenya South, Church of the Province of Kenya.
13. Member Association of American law Schools.
14. Member International Bar Association.
15. Member Institute of Certified Public Secretaries of Kenya.
16. Member Law Society of Kenya
17. Member International Commission of Jurists
18. Chairman and Director ,Institute of Education in Democracy
19. Ex-Member, Ethics committee Institute of Certified Public Accountants.
20. Ex-Member, Ethics and professional conduct committee Institute of certified public Secretaries.
21. Fellow Chartered Institute of Arbitrators (United Kingdom).
22. Member, East African Law Society.
23. Member, Association of American trial Lawyers.

24. Chairman, Advocates Disciplinary Committee

ACADEMIC DISTINCTIONS AND AWARDS:

1. Best Student E.A.A.C.E. Class of 1979-Meru School.
2. Best Student, First Year Law Class, University of Nairobi - 1980.
3. Winner, the Hamilton, Harrison and Mathews Advocates Prize for best Law Student: 1981.
4. Best Student ,Third Year law Class, University of Nairobi-1984
5. Winner of the Hamilton, Harrison and Mathews prize for best graduating Student: 1984.
6. Winner of the Kaplan & Stratton Advocates, prize for the best final year Student. 1984
7. Winner of the Gandhi Smarak prize for best final year student, University of Nairobi: 1984.
8. Fulbright Scholar: 1985 - 1986 (U.S.A.)
9. Ford Foundation Fellow: - 1991 - 1992.
10. Visiting Associate Professor of Law, Widener University Law School, Delaware USA. Fall Semester 1995.

CONFERENCE-SEMINAR AND OTHER PAPERS.

1. "The Future of Customary Land Law in Kenya" (A paper presented at the Law Reform Commission of Kenya's seminar on Land Law in Kenya, Nairobi, November 1986).

2. "Women and Property Rights in Kenya" (A paper presented at the International Federation of Women Lawyers (F.I.D.A.)Conference on, Women and the Law ,Nairobi, August 1987.)

3. "Joint Ventures and the Transfer of Technology in Kenya" (A paper presented at the East Africa Technology Studies Network Seminar, Arusha Tanzania, December 1987).

4. "The Rule of Law and the Challenge of Democracy": (A paper presented at the International Commission of Jurists, Kenya Section seminar on Law and Society Nyeri February 1988).

5. "Constitutional Government and Human Rights in Kenya" (A paper resented at a conference on Constitutional Government and Human Rights in Africa , Maseru, Lesotho, October 1989).

6. "The Judiciary in Kenya and the Search for a Philosophy of Law" (a paper presented at an International Commission of Jurists, Seminar, on Law and the Administration of Justice in Kenya. Nairobi 1990).

7. "International Relations and Democratic Pluralism" (A paper presented at a conference on Democracy in Africa, Dakar, Senegal, November 1990).

8. "Preventive Detention and the Politics of Law" (A paper presented at the International Commission of Jurists seminar on Human Rights, Justice and Peace - Naivasha, May 1991).

9. "The Changing Governance Patterns in Africa and the Challenge to African Diplomacy" (A paper presented at the university of Nairobi's, Diplomacy training programs conference on 30 years of African Diplomacy Mombasa, December 1991.)

10. "Law and Ethics in Dentistry" (A paper presented at the 5th International Association for Dental Research, Conference Nairobi, November 1990)

11. "From the Governor to the Imperial President : Constitutional Transformation and the Crises of Governance in Kenya "(A paper presented at the Ford foundation workshop on Governance in East Africa - Nairobi, April 1992)

12. "Amending the Constitution : The Lessons from History" (A paper presented at an International Commission of Jurists conference on Freedom of Association, Expression and Assembly, Mombasa, May 1992).

13. "The Opposition and the Crisis of Governance in Kenya" (A paper presented at the Annual Conference of the African Studies Association, Seattle Washington, November 1992).

14. (With Wachira Maina Esq., "Contempt of Court Law as a Limitation on Press Freedom" (A paper presented at a seminar on Press freedom in Kenya, Nairobi September 1993).

15. (With Dr.Frank Njenga,"Ethical and Legal Issues in the end of Life Debate" (A paper presented at the Kenya medical association conference on Health and the Law, Nairobi, September 1993).

16. "**Constitutional-Legal reforms necessary to facilitate multi-party democracy in East Africa**" (paper presented at the conference on law, politics and multiparty democracy in East Africa. Dar-es-salaam Tanzania, October 1993).

17. "**30 years of Litigating the Bill of Rights in Kenya**"(A paper presented at Judicial Conference of the Tanzanian Judiciary Arusha Tanzania 18th-19th June 1996.)

18. "**Reforming executive power in Kenya**" (paper presented at the Law Society of Kenya annual seminar, February 1997)

19. "**Public Interest Law and Public Interest Litigation In East Africa**" (paper presented at a regional workshop on Public Interest Law in East Africa, Entebbe Uganda June 1998)

20. "**Case Flow and Case Load Management in the Criminal Justice System**", paper presented at a work shop on the criminal justice system at Lake Bogoria club 24th – 27th September 1998.

21. "**Jomo Kenyattaa and the Rise of the Ethno-nationalist State in Kenya**", a paper presented at the Workshop on Ethnicity and Democracy in Africa, Queens University, Ontario, Canada, and 17-21 March 2000.)

22. "**Constitutional Amendment and the Constitutional Amendment process in Kenya 1964-1992: A Study in the Politics of the Constitution**" (PhD Thesis, University of Nairobi 2001).

23. **The Challenge of Addressing both Economic Crimes and Gross Human Rights Violations in Truth Commission Process**" Paper presented at the conference on Truth Commissions and political Transitions, Nairobi August 15th 2003.

ACADEMIC PUBLICATIONS:

1. "**Intervention in International Law: The case of Grenada**": 1984, volume 2, *University of Nairobi Law Journal*

2. "**The Future of Customary Land law in Kenya**" 1987 volume 4, *University of Nairobi law Journal*

3. "The Rule of Law and the challenge of Democracy" in Law and Society (International Commission of Jurists, Kenya Section, Nairobi 1989).

4. "Women and Property Rights in Kenya" in Ooko Ombaka and Mary Mbeo Women and the Law in Kenya (P.L.I.Nairobi 1989.)

5. "Constitutional Government and Human Rights in Kenya" in, 1990 *University of Lesotho Law Journal.*

6. "The Judiciary in Kenya and the search for a Philosophy of Law" in 1991 *Journal of Human Rights Law and Practice.*

7. "Law and Ethics in Dentistry" in volume 10, Number 2, February 1991, *Medicus Journal of the Kenya Medical Association.*

8. "Amending the Constitution: The Lessons from History". In *The Advocate,* Journal of the Law Society of Kenya, February 1993.

9. "The Opposition and the Crisis of Governance in Kenya" in *Issue: Journal of the African Studies Association,* April, 1993

10. "Ethnicity and the renewal of Competitive Politics in Kenya" in Harvey Glickman (editor) Ethnic Conflict and Democratization in Africa: (Ass Press 1995).

11. "Legal Constitutional Reforms to Facilitate Multi-Party Democracy: The case of Kenya" .In Law and the Struggle for Democracy in East Africa. (Onyango,Kibwana and Peter EDS,Clari Press1996.)

12. "Jomo Kenyatta and the Rise of the Ethno-nationalist State in Kenya" in Bruce Berman(ED) Ethnicity and Democracy in Africa (Ohio University Press,2003)

13. "Political Jurisprudence or Neutral Principles. Another look at the Problem of Constitutional interpretation" *East Africa Law Journal,2003*

14. Towards a theory of Constitutional Amendments" *East African Journal of Human Rights,2004*

15. The Law of Contempt of Court in Kenya" *The Advocate, Journal of the Law Society of Kenya*(February 2006)

FORTHCOMING PUBLICATIONS

1. The Courts and Human Right in Kenya (Editor)2007.
2. Cases and Materials on Constitutional Litigation in Kenya (2006)

AREAS OF TEACHING AND RESEARCH INTEREST:

1. Constitutional Theory
2. Constitutional Law
3. International human rights law
4. International Humanitarian law.
5. Transnational Legal problems.
6. Civil liberties.
7. Gender & the law
8. Jurisprudence and legal philosophy.
9. Arbitration.

AREAS OF SPECIALISATION IN THE PRACTICE OF LAW:

1. Constitutional litigation
2. Media Law
3. Criminal Defence
4. Appellate practice
5. Commercial Arbitration

CONSULTANCIES:

1. Consultant, Legal aspects of Low cost Housing in Kenya. (a Government of Kenya -World Bank Project. 1987)

2. Consultant, Foreign Technology and Management Contracts in Joint Ventures. (A Government of Kenya and United Nations Centre for Transnational Corporations Study - June 1987 to June 1988).

3. Consultant, Performance Review of Institutions of Science and Technology in Kenya (an Economic Commission for Africa Project - June 1989).

4. Consultant, Joint Ventures and Technology Transfer in Kenya. (An I.D.R.C. Project, July 1989 - June 1990)

5. Consultant, Election Law in Kenya, National Election monitoring unit, Kenya.(June 1992 -December 1993).

6. Consultant ,Friedrich-Naumann-Stiftung Foundation, Constitutional Changes in a Multiparty Kenya, September 1992)

7. Consultant, Kenya Law Reform Commission and office of the Attorney General, Task Force to Review Penal Laws and Procedures in Kenya (July 1993- November, 1995).

8. Regional Consultant, Teaching of International Humanitarian Law in East Africa, the International committee of the Red Cross.- (1998-99).

9. Consultant, International Federation of women lawyers – The Management of Legal Aid Clinics (1998).

10. Consultant, INTERIGHTS (London) - Public interest Law and Public Interest Litigation in East Africa (1998).

11. Consultant, Judicary | UNDP - Case Flow and Case load Management in Kenyan Courts (1998)

12. Consultant, UNDP\AG ,Task Force on Laws Affecting Women – Proposals for and Draft Bill on the reform of Family Law in Kenya (1998-99).

13. Legal Expert-Draftsman- **The Transitional Charter of the Federal Republic of Somalia(IGAAD-2003)**

14. Facilitator, Workshop on Judicial Reform in Africa-A world Bank distance learning programme.(Nairobi, Sep-Dec 2003)

15. Commissioner, Constitution of Kenya Review Commission-2001-2005, Review of the Constitution of the Republic of Kenya.

16. Consultant, DPP's Office . Developing a prosecutors training curriculum & manual, code of conduct and national prosecution policy (January -March 2006)

REFEREES

1. Prof Patrick Kelly
   Widener University School of Law
   Widener University, Wolmington, Delaware
   U S A

2. Mr Justice Aaron Ringera
   Kenya Anti-Corruption Commission
   Integrity Centre
   NAIROBI

CURRICULUM VITAE

NAME:	Kioko Kilukumi
DATE OF BIRTH:	30th September 1964
NATIONALITY:	Kenyan
LANGUAGES:	English and Kiswahili
SEX:	Male
MARITAL STATUS:	Married
ADDRESS:	Kilukumi & Co. Advocates Ukulima Co-operative House, 11th Floor Haile Selassie Avenue P. O. Box 48588 - 00100 NAIROBI Tel. No. 254(2) - 2244982/2251756 Fax. No. 254(2) - 2220045 E-mail: kilukumi@gmail.com, kilukumi1@yahoo.com Mobile: 0733 - 732049 0720 - 716151
PROFESSION:	Legal Profession - Advocate of the High Court of Kenya. Admitted on 15th November, 1990 [P/105/2051/90]. Certified Public Secretary [CPS(K)] Registration No. R/483
EDUCATION:	LL.B (Hons) Second Class (Upper Division) University of Nairobi (1986 -1989) Kenya School of Law, Diploma in Law (1989 - 1990) Kagumo High School 4 Principal passes and 1 Subsidiary (1983 -1984) History-A, Economics-A, Geography-B, Kiswahili C Mwala Secondary School Division 1 (13 Points) (1979 - 1982) Kyuluni Primary School C.P.E. Certificate (1972 -1978)
AWARDS:	Gandhi Smarak Award Best 'A' Level Student's Award, 1984 Nyunge wa Mungai Award Best Economics Student's Award, 1984, Kagumo High School
TRAINING:	National Youth Service Pre-University Training Scheme (May - August 1986)
PUPILLAGE:	Kaplan & Stratton Advocates (1989-1990)

WORKING EXPERIENCE

*** Kilukumi & Co. Advocates:**

A partner in the law firm offering wide ranging legal services including civil and criminal litigation; conveyancing; debt collection; corporate, banking and financial legal transactions; incorporation and restructuring of companies; commercial law transactions; property law; family law and succession matters; drafting of contractual agreements and security documents; agreements of various descriptions; advising clients on intellectual property law; trademarks; trade names and copyright matters; and generally advising clients on legal matters.

*** Kenya School of Law** (2008 – to 2010)

Part time lecturer in Criminal Litigation for the Advocates Training Programme (ATP) undertaken by the Council of Legal Education at the Kenya School of Law.

*** Swaziland Government:**
Title: Senior Crown Counsel
(1993 - June 1996)
Represented the Government in litigation in the High Court and the Court of Appeal. Prosecuted all manner of criminal cases at all levels of the court system. In charge of criminal prosecutions in the entire Hhoho Region. Gave Lectures on a regular basis to police investigators on methods of gathering evidence for purposes of criminal prosecutions at the Police College, Manzini, Swaziland.

*** Kaplan & Stratton Advocates:**
Title: Legal Assistant (1990-1993)
Attached to the Commercial Law Department dealing with incorporation and restructuring of companies, mergers and acquisitions, drafting commercial agreements, management agreements, security documents of all kinds, advising clients on commercial transactions, intellectual property law, trademarks, trade names, copyright and generally carrying out duties of Company Secretaries.

*** School of Professional Studies:**
Lecturer - Commercial Law
(1992 - 1993)

*** Mwala Secondary School**
Temporary employment (1985 - 1986)
Title: Untrained Teacher

SEMINARS ATTENDED:

*** Association of Professional Societies in East Africa (APSEA)**
(8th – 10th March, 2003)

Participated in a workshop on Integration of Trade in Professional Services held in Nairobi as a representative of the Law Society of Kenya.

*** Law Reform Commission of Tanzania:**
ESAMI – Review & Research Methodology Programme
(25th March – 5th April, 2002)

Resource person in a programme designed to train legal research assistants working in the Law Reform Commission of Tanzania. The programme included writing and evaluating research proposals, research concepts, types of data collection, guidelines and criteria for evaluation and assessment of articles among other related issues.

* Law Reform Commission of Tanzania:
ESAMI - Legislative Drafting Programme
(23rd July – 3rd August, 2001)

Resource person in a programme designed to train lawyers working in the Law Reform Commission of Tanzania in legislative drafting and report writing.

* Copyright Law Seminar organized by the World Intellectual Property Office (W.I.P.O.) held at Nairobi, Kenya.

* Copyright Law Seminar organized by the World Intellectual Property Office (W.I.P.O.) held at Mbabane, Swaziland.

INTERESTS: Reading, Theatre, Games

PUBLISHED ARTICLES:

1. Preliminary election: The High Court of Kenya commits error of the decade by eroding its own jurisdiction (Nairobi Law Monthly)
2. Judges and their independence in Kenya (Nairobi Law monthly)
3. Kanu Nomination Rules 1990: No legal base for double nomination (Nairobi Law Monthly)
4. The right of Private Prosecution in Kenya. Did the Court of Appeal err?
   A commentary on the case of Jopley Constantine Oyieng' v Republic, Criminal Appeal No. 45 of 1988 (Nairobi Law Monthly)
5. The revocation of the appointment of Justice R.S.C. Omolo is unconstitutional (Nairobi Law Monthly)
6. Problems encountered by Prosecutors during pre-trial stage. A paper presented to Public Prosecutors and Police at Mbabane, Swaziland)

REFEREES:

1. Peter Julian Hime
   Kaplan & Stratton Advocates
   P. O. Box 40111 - 00100
   Nairobi, Kenya
   Tel. No. (00 254 2) 32085000

2. Professor Githu Muigai
   Mohammed & Muigai Advocates
   K-Rep Centre
   Wood Avenue off Lenana Road
   P.O Box 613323-00200
   Nairobi

3. Fred Ngatia
   Ngatia & Associates Advocates
   Bishops Garden Towers
   1st Ngong Ave
   P.O Box 56688-00200
   Nairobi

CURRICULUM VITAE

WILLIAM KIPKEMBOI KIRWA

Date of Birth 17th December 1967

Nationality Kenyan

Marital Status Married

CAREER ACHIEVEMENTS/ASPIRATIONS

- *A career Banker with an Agricultural Background and wide experience in Banking operations in a Branch set up and a strong leaning towards Corporate Lending, Microfinance, Investment Banking and total product propositions to High Net worth Personal clients.*

- *A wide experience in corporate leadership roles in large organisations, including setting the strategic vision and corporate strategic plan. Also an efficient manager in establishing and building successful and effective teams.*

- *Believes in establishing leading organisations whose vision and values are synonymous to World Class, where the Customer comes first and members are a team in purpose and service delivery.*

- *Demonstrated abilities and leadership in Corporate Directorship/Chairman.*

KEY SKILLS AND IMPERATIVES

- A proven team leader and excellent net-worker with strong business management skills.
- A results oriented and committed worker and planner, with a track record of success
- An effective communicator and team organizer, with strong interpersonal skills
- A strong believer in Performance Development and Results Based Management
- A straight talker and a strong inspiration to colleagues
- An intelligent team builder and achiever who strongly believes in Team Development
- Has a working knowledge of the Balanced Scorecard process in business management
- Has a strong ability to spot and convert opportunities into successful business ventures
- An excellent sales person with a strong personal drive to always exceed performance targets
- Has experience in strategy formulation and successful implementation
- Strong numeracy and sound IT proficiency and working knowledge of MS Office (Word, Excel, Powerpoint), Quadro Pro, Harvard graphics and SPSS

EDUCATION AND QUALIFICATIONS

Currently	Edinburgh Business School Heriot-Watt University – U.K.	DBA (Doctorate in Business Administration) in Strategic Focus – Private Study.
2000-01	The Birmingham Business School, University of Birmingham, *UK*	MBA (International Banking and Finance), with special emphasis on Strategic and Risk Management, Microfinance, Investment Markets, Marketing and Finance.
1996-98	Chartered Institute of Bankers, London, *UK*	ACIB (Associate of the Chartered Institute of Bankers)
1991-93	University of Nairobi, *Kenya*	MSc (Agriculture – Plant Breeding)
1988-91	University of Nairobi, *Kenya*	BSc *(1st Class Honours)* in Agriculture
1993	Federal Agricultural Research Institute Braunschweig, *Germany*	Training on ***In vitro*** techniques in plant tissue culture and micro-propagation
1986-87	Moi High School – Kabarak, Nakuru	A-Levels: 3 Principals, 1 sub. In Mathematics, Chemistry, Biology and General Paper
1981-85	Kituro High School – Baringo District	O-Levels: (KCE); Division 1, 14 Points.

SPECIAL ACHIEVEMENTS AND MEMBERSHIP

1989/90	Achieved the Dean's list Certificates for exemplary performance in the undergraduate class at the University of Nairobi.
1991	Awarded the German Exchange Academic Service (DAAD) Scholarship to undertake a Masters Degree at the University of Nairobi
1993	Awarded a short term Scholarship by DAAD to undertake a specialized training in plant tissue culture, electrophoresis and micro-propagation in Braunschweig, Germany
2000	Awarded the prestigious Chevening Scholarship by the British Council for showing exemplary performance, leadership and good track record, to undertake MBA studies at Birmingham University, UK
2007	Awarded the honour of The Order of the Grand Warrior of Kenya (OGW) by the President of The Republic of Kenya in recognition of dedicated service to the Country

Membership

- Associate, Chartered Institute of Bankers (ACIB), London
- Full member, Management Forum, East and Central Africa
- Chairman, Kipkarren Farmers' Cooperative Society

WORKING EXPERIENCE

JUNE 2003 - TO DATE: MANAGING DIRECTOR, *AGRICULTURAL DEVELOPMENT CORPORATION (ADC)*

- Leading a large Government Institution (Parastatal) of the Government of Kenya mandated to promote Agricultural Development in the country. With a total workforce of over 800 permanent and over 1,000 temporary staff, ADC runs several large scale mixed farms and ranches spread all over the country – total land assets of over 1.8m acres.
- ADC majors in provision of quality seeds and livestock breeds to the Kenyan farmer as well as setting exemplary standards in agricultural activities across the country. The Corporation also runs an animal feed manufacturing plant as well as a milk processing unit apart from running a unique orchard producing quality oranges in Kitale region.
- The Corporation was in a serious financial crisis but managed to turn it round by setting a clear vision and putting in place a proper strategic plan and sound financial management.
- As the CEO, I am responsible for all the operational management of the Corporation and report to both the Board of Directors and the Minister for Agriculture for policy guidelines.
- Added to this immense responsibility I am also a Director of other Companies where the Government Shareholding is through ADC. I am thus a major shareholder and effectively take part in policy directions and decisions affecting these large Corporates. These are:-
- **Kenya Seed Company** – Director
  This is a leading processor and supplier of certified seed within the Great Lakes region. Kenya Seed Co. has three subsidiaries, which I also play a leading role in their management. These are.
  i) Kibo Seed Company (Tanzania) – **Director**
  ii) Mt. Elgon Seed Company (Uganda) – **Chairman**
  iii) Simlaw Seed Company (Kenya) – **Director**
- **Agrochemical and Food Company** (ACFC) – **Chairman, Board of Directors**
  ACFC is leading manufacturer of spirits and bakers yeast in the EA region. As Board Chairman, I chair all the Board meetings and give regular guidance to the MD and his management team.
- **Chemelil Sugar Company** – Director, Chairman Board Audit Committee
  CSC is one of leading manufacturers of sugar in Kenya. As Chairman of Audit committee I have been instrumental in establishing proper corporate Governance principles in the company. I have acted as Board Chairman for 14 months.

FEB 2003 – JUNE 2003 : INDEPENDENT FINANCIAL ADVISOR, INTER-ALLIANCE INTERNATIONAL – KENYA

- A financial consultant advising on personal/Corporate financial planning and recommendation of appropriate offshore Investments based on attitude towards risk.
- Working with International Financial Institutions and product providers in order to arrive at various products that invest in international stock markets and currencies. Creating and advising investment portfolios spread across the asset classes for maximum returns.
- Building client portfolio compost of both corporate and high networth personal clients through aggressive sales and excellent professional service

1994-2003: BARCLAYS BANK OF KENYA LTD

1999-Jan 2003: Premier Manager & Team Leader, Barclays Premier Banking

- Leading and setting the direction of a Barclays Premier Centre in Kenya, I helped set up to address the needs of the top segment within the Personal Sector Banking.
- Was involved in the Business Concept, Center design and layout and piloting of the Premier banking brochures and other relevant materials, as well as product development.
- Providing personalized services to High Networth Clients
- Financial appraisals, Lending, mortgage finance and monitoring and control of client portfolio.
- Giving Personal Investment Advice to this Clientele
- Leading a team of frontline bankers in Service delivery
- Training and coaching under the company's internal group training programmes

1997-1999: Corporate Analyst/Corporate Manager's Assistant, Corporate Banking

- Responsible for analysis, appraisals, lending and monitoring and control of a Lending Portfolio in Excess of Sh.2.2 Billion.
- Assisted and stood in for the Corporate Manager in all aspects relating to the portfolio.
- Pioneered the Piloting of Electronic appraisal System (The International Lending Adviser – ICA) within the Corporate team
- Participated in Customer Visits and was key in evaluation of lending proposals Agricultural concerns among the Banks portfolio.
- Assisted other team members and trained new team members on the procedures and operations of corporate advances.
- Ensured that all securities were in place before any draw down of advances
- Liased closely with the Risk Management team to ensure prudent lending procedures are adhered to at all times.

1996-1997: Departmental Head, Advances and Securities Dept. Haile Selassie Branch, Nairobi

- Leading a team of securities and advances staff, coaching and training them and cultivating a spirit of team work to achieve performance targets.
- The greatest achievement was that I managed to turn a persistent poor audit rating of advances and securities into a **satisfactory** rating within a record six months!
- Responsible to all appraisals and preparation of Proposal Forms and submissions to the Sanctioning unit (Risk Management) of the Bank; for both personal, retail and corporate businesses
- To ensure all sanction conditions including perfection of securities have been done.
- Liaising with the Bank's appointed lawyers to ensure proper and speedy documentation of securities.
- Monitoring and control of a portfolio of all the borrowing accounts
- Preparation of monthly and quarterly returns for CBK on liabilities and advances within the Branch.
- Assisting the Branch operations Manager to ensure smooth operations of the Branch.

*1994-1996: **Management Trainee**, Nakuru East Branch*

- As a trainee under the Bank's Management Development Programme, underwent a rigorous training and exposure in all the departments of the Bank.
- Assisted the Branch accountant in ensuring all Branch operations are up to standard hence obtained a **good** audit rating from the Banks internal audit team.
- Assisted the Lecturer in organizing training modules for undergraduate students.

1993-1994: TECHNICAL ASSISTANT, FACULTY OF AGRICULTURE, UNIVERSITY OF NAIROBI

- Responsible for a Plant Biotechnology lab which I helped set up, specifically for research and training.
- Trained several students on attachment on the procedures of plant tissue culture, micropropagation and starch gel electrophoresis.
- Assisted the Lecturer in organising training modules for undergraduate students.

1988: SCIENCE TEACHER, KUINET SECONDARY SCHOOL, ELDORET, KENYA

- Responsible for teaching Mathematics, Chemistry, Biology and Agriculture in Forms 1-3 in the School.
- Also a careers and counselling teacher as well as deputy head of sports
- Assisted the Headmaster in preparation of financial projection and disbursements for the school

ADDITIONAL INFORMATION

OTHER RELEVANT CAREER TRAINING

- Barclays Bank Management Development Programe.
- Outward Bound, Leadership Management training, Kenya
- Special training on Prestige Banking, in Lusaka, Zambia
- Premier Relationship Managers Training in London, UK
- Attachment to Birmingham Group Branches of Premier Banking, UK
- Attended various Performance Management Course, Achieving Market Leadership, Leading Winning Teams Skills, Principles of Lending and Advanced Lending Courses, Trade Finance and Negotiation skills in sales.
- Attended a course in communication across sectors in London, UK organised by British Association for Literacy in Development (BALID)
- Attended a course on Policy Decisions in the Agricultural Sector, held in Kibuttz Shefayim, CINADCO – Israel
- Attended a months course on Plant Breeding and Seed Production, in Lund, Sweden

SPECIAL ACHIEVEMENTS

- Turning round an ailing state corporation, ADC, to profitability and stability, for which I obtained a presidential award, OGW.
- Setting up and Piloting Premier Banking in Kenya.
- Always elected and appointed a team leader in all my career placements, both in student and corporate leaderships

INTERESTS

- Reading Novels, Travelling and a motivational speaking
- Community development programmes
- Church Missions and Charity

LANGUAGES

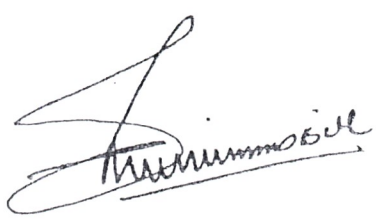
- English (III), Kiswahili (III), Nandi (IV) and German (I)

MAIL ADDRESS

- C/o Agricultural Development Corporation (ADC), Development House, P.O. Box 47101 – 00100 NAIROBI, KENYA
  williamkirwa@yahoo.com

REFEREES

- **Lee Waruingi**, Chairman, ADC, Tel: +254-722-323 972
- **Bishop Thomas Kogo**, ACK Diocesan Bishop, Diocese of Eldoret. Tel. 254-724- 307 860



(1)

AGENDA

CONSULTATION BETWEEN HIS EXCELLENCY THE PRESIDENT AND THE RT. HON. PRIME MINISTER

1. Fast tracking of appointments necessary for the establishment of a Local mechanism for the trial of post-election violence suspects.
    - Gazette Notice advertising the Post of Director of Public Prosecutions;
    - Identification of a nomination for the post of Chief Justice;
    - Deputy Chief Justice to be recommended by the Judicial Service Commission which is already in place.
2. Advertisement for the post of Controller of Budget
    - Gazette Notice
3. Renewal of contract for the Director General, NSIS.
    - Contract ends on 16th January, 2011.
    - Being recommended for renewal to ensure continuity as it will run for the remaining period of the current President and end in two years of the successor President.
4. To attend to urgent legislation and vet and approve nominations of persons to fill State offices.
5. Draught crisis (funds to be made available)
6. ID Cards & E-Visa Project
7. Any other Business.

6 January 2011

RELEVANT MINUTES ON CONSULTATION BETWEEN HIS EXCELLENCY THE PRESIDENT AND THE RT. HON. PRIME MINISTER ON AGENDA ITEMS 1 AND 2 OF THE MEETING OF 6TH JANUARY, 2011

The two Principals considered the fast tracking of appointments necessary for the establishment of a local mechanism for the trial of post-election violence suspects.

These nominations were:

- Post of Chief Justice;
- Director of Public Prosecutions;
- Controller of Budget; and
- Deputy Chief Justice

The two Principals agreed that the nomination of the Deputy Chief Justice was to be done through the Judicial Service commission but the others were to be done directly by the Principals through consultations as provided for in the Constitution.

The technical team was authorized to facilitate identification of the persons through Consultations.

(1) February 1st 2011 hansard report what you have said with the only exception of the PM ~~Statement~~ having said the meeting @ 16th December 2010 as opposed to 6th January 2011

(2) Involvement of the AG. specifically on the Chief Justice.

(3) Do you believe that consultation is ~~Concurrence~~ Consultation = Conc

(2)

LEGAL OPINION ON NOMINATION PROCEDURES FOR THE POSITIONS OF CHIEF JUSTICE (CJ), ATTORNEY GENERAL (AG) AND DIRECTOR OF PUBLIC PROSECUTION (DPP)

1. Section 24 (2) Sixth Schedule (p. 201 of the Constitution) provides:

> *"A new Chief Justice shall be appointed by the President, subject to the National Accord and Reconciliation Act, and after consultation with the Prime Minister and with the approval of the National Assembly."*

2. Clearly the transitional provisions have established a procedure for appointing the Chief Justice in the interim period before the next general election. This is a procedure that ensures the participation of the Prime Minister in a consultative capacity and vetting by the National Assembly. In the wisdom of the drafters of the Constitution, they did not include a role for the Judicial Service Commission in Section 24 (2) Sixth Schedule. Because the drafters of the constitution wanted the Deputy Chief Justice to be processed by the Judicial Service Commission, that office was not included in Section 24(2) Sixth Schedule.

3. Even if a Successor Chief Justice was to be appointed before the next elections, he or she would be appointed still under Section 24(2) Sixth Schedule.

4. If the intention of the Constitution was that the First Chief Justice after the promulgation of the Constitution was to be appointed Under Section 166, there would have been no need of providing for the appointment of the Chief Justice Under Section 24 Sixth Schedule whatsoever.

5. The above argument does not lead to the conclusion that Article 166 is not operative because it provides for:

   - appointment of Chief Justice when a vacancy arises after the first general election
   - appointment of Deputy Chief Justice and other judges
   - qualifications of Chief Justice, Deputy Chief Justice and all other judges

6. The President and Prime Minister have a duty to ensure that in their consultations and the final nomination to the position of Chief Justice under Section 24(2) Sixth Schedule, all requisite constitutional provisions are adhered to.

7. Article 172 of the constitution is specific about its application to "Judicial officers and other staff of the judiciary" as described in Article 260.

8. After the transition period, the CJ will be appointed according to Article 166(a) which provides:

   "The President shall appoint the Chief Justice and the Deputy Chief Justice, in accordance with the recommendation of the Judicial Service Commission and subject to the approval of the National Assembly..."

9. Article 259 (11) is critical in relation to the appointments of the CJ, AG and DPP. It states:

   *"If a function or power conferred on a person under this constitution is exercisable by the person only on the **advice** or **recommendation,** with the **approval** or **consent** of, or on*

*consultation with, another person, the function may be performed or the power exercised only on that **advice**, **recommendation**, with that **approval** or **consent**, or after the **consultation**, except to the extent that this constitution provides otherwise. (Emphasis added)*

10. Approval or consent of the National Assembly is mandatory. Consultation by H.E. the President with the Prime Minister is mandatory. The President, as is common practice in presidential systems the world over, originates the names of the nominees, he then proceeds, according to the Kenyan Constitution to consult with the Prime Minister regarding the President's nominees. Consultation cannot mean the Prime Minister must concur or approve or consent, otherwise in Article 259 (11) the language of consultation would have been excluded and replaced with only the language of approval or consent.

11. A strict reading of Section 4(2) of the National Accord and Reconciliation Act, 2008 defines the composition of the coalition government as "the persons to be appointed as ministers and assistant ministers" for which "shall at all times reflect the relative parliamentary strength of the respective parties and shall at all times take into account the principle of portfolio (ministries) balance". These provisions do not expand the positions to be captured by the National Accord law to cover non-cabinet positions.

12. The transition provisions of the Constitution do not materially change the above position. Within them, it is not indicated how the National Accord and Reconciliation Act will affect public service appointments beyond Section 4 (2) and (3) of the Act.

13. Articles 156 (on AG), 157 & 158 (on DPP) were not suspended as was Article 132. The appointment of these is subject to **nomination** by the

President, **consultation** with the Prime Minister and **approval** by the National Assembly.

14. Although the AG's departure is provided for in the transition clauses, his replacement procedure is in the main body of the constitution in Article 156(2) which provides:

> *"The Attorney-General shall be nominated by the President and, with the approval of the National Assembly, appointed by the President."*

This is to be contrasted with the specific provision on the replacement of the Chief Justice in the transition provisions.

15. The reason chief executives are constitutionally mandated to source their Attorney General is that this officer is their chief legal advisor and that of the government they are presiding over.

16. The DPP appointment procedure is to be found in Article 15792) which provides:

> *"The Director of Public Prosecutions shall be nominated and, with the approval of the National Assembly, appointed by the President."*

17. The DPP is a constitutional office and he/she cannot be removed without a tribunal being established for that purpose. Once appointed he or she is independent and has security of tenure. The appointment of DPP cannot be processed by the Judicial Service Commission or Public Service Commission.

18. The DPP's office is equivalent to that of a judge of the High Court.

19. For all the above offices, the Constitution is clear that it is the President who nominates the potential appointees subject to consultations under Article 259(11), Section 29 (2) Sixth Schedule and any other relevant constitutional provisions during the transition period.

20. Informally the President can seek to source his eventual nominations from any quarter he wishes.

21. In my opinion, Parliament should expedite the passage of an omnibus legislation anticipated under Article 250(2) (a) which provides:

> *"The chairperson and each member of a commission, and the holder of an independent office shall be- identified and recommended for appointment in a manner prescribed by national legislation."*

22. Further Parliament should consider expeditiously passing a law which lays down the procedure of approval of nominees by the National Assembly."

Prof. Kivutha Kibwana
Advisor, Constitutional Review
Office of the President

Nairobi, Kenya
7th February, 2011

(3)

CONSULTATIONS BETWEEN H.E. THE PRESIDENT AND THE RT. HON. PRIME MINISTER

Proposed Agenda

1. Updates by the Rt. Hon. Prime Minister

   (i) Update on measures being taken to counter effects of drought.

   (ii) AU Mediation on Cote D'Ivoire

2. Update on H.E.'s Special Envoys to selected regional Heads of State on the ICC Process.

3. Exchange of views on AU Summit.

5. Constitutional appointments:

   (i) Chief Justice

   (ii) Deputy Chief Justice

   (iii) Director of Prosecutions

   (iv) Attorney General

   (v) Controller of Budget

5. Any Other Business

Thursday, January 27, 2011

MINUTES ON AGENDA ITEM NO. 5 ON CONSULTATIONS BETWEEN THE PRESIDENT AND THE PRIME MINISTER – THURSDAY, JANUARY 27TH, 2011

His Excellency the President presented the attached list on appointments to various positions which had been compiled out of consultations between the Office of the President and the Office of the Prime Minister.

After consultations the Principals referred the list to the technical team comprising Amb. Francis Muthaura, Dr. Mohamed Isahakia, Prof. Nick Wanjohi and Mr. Caroli Omondi to scrutinize the list and prepare a harmonized position.

His Excellency the President indicted that he needed to make the nominations by the following day before his departure for the AU meeting in Addis Ababa. Therefore, the technical team was directed by the Principals that they should present the harmonized list later in the afternoon.

APPOINTMENTS TO VARIOUS POSITIONS

PROPOSALS

Following wide consultations, the following are the persons have been identified for nomination to various constitutional positions toward implementation of the Constitution:

POSITION	PROPOSED PERSON FOR NOMINATION	CURRENT POSITION	COUNTY
CHIEF JUSTICE	Justice Paul Kihara Kariuki	High Court Judge	Kiambu
DEPUTY CHIEF JUSTICE	Justice Hannah Okwengu	High Court Judge	Homah Bay
ATTORNEY GENERAL	Mr. Fred Ojiambo	Private Practice	
DIRECTOR OF PUBLIC PROSECUTIONS	Mr. Kioko Kirukumi	Private Practice	
CONTROLLER OF BUDGET	Mr. William Kirwa	MD ADC	
KENYA ANTI-CORRUPTION COMMISSION	Dr. PLO Lumumba	Director, KACC	

27th January, 201

Technical Team made of:-
Amb. Francis Muthaura
Dr. Mohamed Isahakia
Prof. Nick G. Wanjohi
Mr. Calori Omondi

The Technical Team met to harmonise the attached list as directed by the principals.
The team agreed on all other names except the proposals for the Chief Justice.

Agreed

To forward separately to the principals three names for the Chief Justice with request that the principals assist in selecting one name for nomination. The names were Justice Paul Kihara Kariuki, Justice Riaga Omolo and Justice Magan Visram.

PS/SC
8/2/011

(4)

OFFICE OF THE PRESIDENT

PERMANENT SECRETARY, SECRETARY TO THE CABINET
AND HEAD OF THE PUBLIC SERVICE

Telegraphic Address: "RAIS"
Telephone: +254-20-2227411

P.O. Box 62345-00200
NAIROBI, KENYA

When replying please quote

Ref. No. ..... Date 31st January, 2011 ..... 20.....

H.E. Hon. Stephen Kalonzo Musyoka, EGH, MP
Vice President and Minister for Home Affairs
NAIROBI

Your Excellency,

REPORT ON THE CONSULTATIVE PROCESS BETWEEN HIS EXCELLENCY PRESIDENT MWAI KIBAKI AND THE RIGHT HONOURABLE PRIME MINISTER RAILA ODINGA ON THE NOMINATIONS TO FILL STATE OFFICES

1. The subject of Judicial appointments was first discussed at a meeting between the President and the Prime Minister held before Christmas, on December 16th 2010. During the meeting, the President felt that it would be better if the issue was revisited after the New Year.

2. The item of the appointments was subsequently placed in the agenda and discussed on January 6, 2011, at Harambee House between H.E. the President and The Rt. Hon. Prime Minister. The meeting agreed on the procedure to be followed in the appointments:

    a) The identification and consultations on the nominations by the two principals and submission to parliament by H.E. the President for approval.
    b) It was agreed that the law did not require the selection of the candidates by either the Judicial Service Commission or Public Service Commission.
    c) The technical team was instructed to identify suitable candidates to facilitate further consultations. In the technical meetings it was observed that:
        i. The Prime Minister had expressed the view that we should have a foreign Chief Justice.
        ii. However, His Excellency the President insisted that at close to 50 years of independence we have very qualified Kenyans and to search for a Chief Justice outside Kenya would be improper and would send

imperative that the proposals were made before the African Union's Heads of State meeting in Addis Ababa. This was made clear to the Prime Minister.

9. On Friday morning, January 28, 2011, the Prime Minister sent a letter signed by Mr. Caroli Omondi addressed to Amb. Muthaura saying that the Prime Minister had left for Addis Ababa and that consultation should be held the following week.

10. The Prime Minister was informed that because the matter needed to be concluded before the President left for Addis Ababa, consultations could be facilitated through the phone. The President then made the proposal of having Justice Visram as Chief Justice, who hails from a minority community to accommodate the Prime Minister's concerns of neutrality. The proposal was communicated to the Prime Minister. In response, the Prime Minister said he had no problem with Prof. Githu Muigai as Attorney General but insisted on Justice Omollo being nominated as Chief Justice.

11. The Prime Minister was asked to call the President from Addis Ababa so that they could finalize. The Prime Minister said he would call the President. The President waited at Harambee House from 12:30 pm until 3 pm but the Prime Minister did not call.

12. The President left for Statehouse for lunch at 3 pm, and a telephone number to reach the President at Statehouse was communicated to the Prime Minister so that he could call the President. The Prime Minister did not call.

13. At 6pm, the Statehouse Comptroller called the Prime Minister for the President to speak to him. Mr. Caroli Omondi answered the Prime Minister's phone. After consulting, Mr. Caroli Omondi said the
Prime Minister was busy and would call back after one and a half hours.

14. The President then felt that he had consulted extensively and had accommodated the Prime Minister and had fulfilled the constitutional requirements and therefore, made the announcement on Friday, January 28th 2011 at 8.30pm.

Yours

AMB. FRANCIS K. MUTHAURA, EGH
PERMANENT SECRETARY, SECRETRY TO THE CABINET AND HEAD OF THE PUBLIC SERVICE

ANNEX JLA 5

Republic of Kenya

The Prime Minister

PMO/NEW.CONST/112/VOL.II

January 31st, 2011

Hon. Kenneth O. Marende, EGH, MP
Speaker of the National Assembly
Parliament Buildings
NAIROBI

Dear Nyebana,

RE: NOMINEES TO THE CONSTITUTIONAL OFFICES OF THE CHIEF JUSTICE, ATTORNEY GENERAL, DIRECTOR OF PUBLIC PROSECUTIONS AND CONTROLLER OF BUDGET

On January 28th, 2011, while attending the 259th Meeting of the Peace and Security Council of the African Union held in Addis Ababa, Ethiopia, I learnt from the media that H.E. Mwai Kibaki, President and Commander-in-Chief of the Armed Forces of the Republic of Kenya, had issued a Press Release (a copy of which is attached hereto) announcing the nomination of the following persons to the positions against their names:

Hon. Justice Alnashir Ramazanadi Magan Visram – Chief Justice

Prof. Githu Muigai – Attorney General

Mr. Kioko Kilukumi – Director of Public Prosecutions

Mr. William Kirwa – Controller of Budget

The nominations, according to the said Press Release, were purportedly made *"after consultation with the RT Hon Prime Minister of the Republic of Kenya Raila Odinga and in accordance with the Constitution"*.

I regret to hereby confirm that I was neither consulted on these nominees nor were the nominations made jointly by the President and myself. Indeed, on January 27th, 2011, my Chief of Staff did write to the Permanent Secretary, Secretary to the Cabinet and Head of the Public Service informing the latter that I would be travelling to Ethiopia in the morning of January 28th, 2011 and as such *"the consultations between H.E. Mwai Kibaki, C.G.H., M.P., President and Commander-in-Chief of the Armed Forces of the Republic of Kenya, and the Prime Minister on the appointments of the Chief Justice, the Attorney General, the Director of Public Prosecutions and the Controller of Budget should be held*

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sometime next week on a date convenient to both Principals". A copy of this letter is attached hereto.

Position of the Chief Justice

Article 262 of the Constitution of Kenya provides that *"the transitional and consequential provisions set out in the Sixth Schedule shall take effect on the effective date".*

Section 24 of the Sixth Schedule to the Constitution of Kenya entitled *"Transitional and Consequential Provisions"* provides as follows:

(1) The Chief Justice in office immediately before the effective date shall, within six months after the effective date, vacate office and may choose either –

(a) to retire from the judiciary; or

(b) subject to the process of vetting under section 23, to continue to serve on the Court of Appeal.

(2) A new Chief Justice shall be appointed by the President, subject to the National Accord and Reconciliation Act, and after consultation with the Prime Minister and with the approval of the National Assembly.

(3) Subsection (2) also applies if there are further vacancies in the office of Chief Justice before the first general elections under this Constitution.

Section 24(2) therefore (i) makes the appointment of the new Chief Justice subject to the National Accord and Reconciliation Act as an integral part of the Constitution and (ii) establishes a three stage process for the nomination, vetting and appointment of any Chief Justice before the first General Elections under the New Constitution. The Constitutional stages in this respect are as follows:

Stage 1: The Nomination Process: The Nomination Process is regulated by the National Accord and Reconciliation Act, as entrenched in, and forming an integral part of the Constitution, and other relevant provisions of the Constitution on qualifications. The identification and nomination of a candidate for the position of Chief Justice is to be done jointly by the President and the Prime Minister by way of consultation under the National Accord and Reconciliation Act.

The Agreement on the Principles of Partnership of the Coalition Government (known as the National Accord in common parlance) commits the President and the Prime Minister *"as partners in a coalition*

government, ...to work together in good faith as true partners, through constant consultation and willingness to compromise." The President and the Prime Minister are *"to work together in the spirit of partnership"* and *"to build mutual trust and confidence".*

The nomination of a candidate for the new Chief Justice is to be made jointly by the President and the Prime Minister following consultation between them. Neither Principal may make a unilateral nomination of a candidate for the position of a new Chief Justice as the Constitution does not grant such power or confer such authority to any one of them.

Indeed, Article 2(2) of the Constitution provides that:

> *"No person may claim or exercise State authority except as authorized under this Constitution".*

Article 3(1) of the Constitution provides that:

> *"Every person has an obligation to respect, uphold and defend this Constitution".*

Stage 2: Approval by the National Assembly: The National Assembly shall consider, vet, approve or reject a candidate for the position of the new Chief Justice as nominated jointly by the President and the Prime Minister on the basis of consultations between them. But the National Assembly shall not consider, vet, approve or reject any such candidate where the nomination is not made jointly by the President and the Prime Minister. A candidate unilaterally nominated by the President without consultation with the Prime Minister shall not be a candidate validly nominated under the Constitution. The National Assembly shall not therefore consider, vet, approve or reject such candidate.

State 3: Appointment by the President: Upon the approval by the National Assembly of a candidate nominated jointly by the President and the Prime Minister, the President shall formally appoint such candidate to the position of Chief Justice.

In the event that the candidate nominated to the position of Chief Justice is serving as a judge or magistrate at the time of such nomination, then the candidate must be subjected to *"Stage 4: "Vetting under Section 23 of the Sixth Schedule to the Constitution to determine his/her suitability to continue to serve in the judiciary".* As a matter of constitutional provision, even if the retiring Chief Justice chooses to continue to serve in the Court of Appeal, he will only be eligible to assume that position once he has been vetted and found suitable to continue to serve in the judiciary.

Under Section 24(1)(b) of the Sixth Schedule to the Constitution, it is not automatic that the retiring Chief Justice may immediately, upon retirement but without vetting, assume a position in the Court of Appeal. Similarly, a serving judge may only be nominated as a candidate for the position of Chief Justice after being vetted. Until and unless such vetting determines the suitability of a sitting judge to continue serving in the judiciary, a serving judge is not eligible for nomination to the position of Chief Justice under Sections 23 and 24 of the Sixth Schedule to the Constitution. These two sections eliminate the possibility of the current Chief Justice continuing as Chief Justice or joining the Supreme Court. With such high standard, it therefore follows in the circumstances that no other sitting judge, whether vetted or not, may be appointed as Chief Justice or to the Supreme Court. The intention of the Constitution is to establish new order in the highest echelons of the Judiciary.

Section 29(2) of the Sixth Schedule to the Constitution provides as follows:

> *"Unless this Schedule prescribes otherwise, when this Constitution requires an appointment to be made by the President with the approval of the National Assembly, until after the first elections under this Constitution, the President shall, subject to the National Accord and Reconciliation Act, appoint a person after consultation with the Prime Minister and with the approval of the National Assembly".*

Article 259(11) of the Constitution provides as follows:

> *"If a function or power conferred on a person under this Constitution is exercisable by the person only on the advice or recommendation, with the approval or consent of, or on consultation with, another person, the function may be performed or the power exercised only on that advice, recommendation, with that approval or consent, or after that consultation, except to the extent that this Constitution provides otherwise".*

All new appointments under the New Constitution between the effective date and the next General Elections are therefore subject to:

(1) joint nomination by the President and the Prime Minister based on consultation between them under the National Accord and Reconciliation Act;

(2) approval by the National Assembly; and

(3) national values and principles of fair competition, equal opportunity to men and women, personal integrity, transparency, merit, etc as enshrined in the Constitution.

In view of the foregoing, it is therefore imperative that the National Assembly does not proceed to consider, vet, approve or reject Hon. Justice Alnashir Ramazanadi Magan Visram as a nominee for the position of the new Chief Justice. The National Assembly should await a nominee jointly made by the President and the Prime Minister following consultation between them and in compliance with our national values and principles.

Position of the Attorney General

Section 31(7) of the Sixth Schedule to the Constitution provides as follows:

> *"Despite subsection (1), the Attorney-General and the Auditor-General shall continue in office for a period of no more than twelve months after the effective date and the subsequent appointments to those offices shall be made under this Constitution".*

Section 29(2) of the Sixth Schedule aforementioned equally applies to the nomination, vetting and appointment of the new Attorney General.

Article 156(2) of the Constitution, as read together with Section 29(2) of the Sixth Schedule, provides as follows:

> *"The Attorney-General shall be nominated by the President and, with the approval of the National Assembly, appointed by the President".*

Consequently, any nomination of a candidate to the position of Attorney General must be made jointly by the President and the Prime Minister after consultation between them in the First Stage. The Second Stage would be the vetting and approval by the National Assembly of such nominee. The Third Stage would be the appointment of such candidate by the President after approval by the National Assembly.

In view of the foregoing, it is therefore imperative that the National Assembly does not proceed to consider, vet, approve or reject Prof. Githu Muigai as a nominee for the position of the new Attorney General. The National Assembly should await a nominee jointly made by the President and the Prime Minister following consultation between them and in compliance with our national values and principles.

Position of Director of Public Prosecutions

Section 31(5) of the Sixth Schedule to the Constitution, provides that:

> *"The functions of the Director of Public Prosecutions shall be performed by the Attorney-General until a Director of Public Prosecutions is appointed under this Constitution".*

Section 29(2) of the Sixth Schedule aforementioned equally applies to the nomination, vetting and appointment of the new Director of Public Prosecutions.

Article 157(2) of the Constitution, as read together with Section 29(2) of the Sixth Schedule, provides as follows:

> *"The Director of Public Prosecutions shall be nominated by the President and, with the approval of the National Assembly, appointed by the President".*

Consequently, any nomination of a candidate to the position of Director of Public Prosecutions must be made jointly by the President and the Prime Minister after consultation between them in the First Stage. The Second Stage would be the vetting and approval by the National Assembly of such nominee. The Third Stage would be the appointment of such candidate by the President after approval by the National Assembly.

In view of the foregoing, it is therefore imperative that the National Assembly does not proceed to consider, vet, approve or reject Mr. Kioko Kilukumi as a nominee for the position of the new Director of Public Prosecutions. The National Assembly should await a nominee jointly made by the President and the Prime Minister following consultation between them and in compliance with our national values and principles.

Position of Controller of Budget

Section 31(6) of the Sixth Schedule provides that:

> *"The functions of the Controller of Budget shall be performed by the Auditor-General until a Controller of Budget is appointed under this Constitution".*

Section 29(2) of the Sixth Schedule aforementioned equally applies to the nomination, vetting and appointment of the new Controller of Budget.

Article 228(1) of the Constitution, as read together with Section 29(2) of the Sixth Schedule, provides as follows:

> *"There shall be a Controller of Budget who shall be nominated by the President and, with the approval of the National Assembly, appointed by the President".*

Consequently, any nomination of a candidate to the position of Controller of Budget must be made jointly by the President and the Prime Minister after consultation between them in the First Stage. The Second Stage would be the vetting and approval by the National Assembly of such nominee. The Third

Stage would be the appointment of such candidate by the President after approval by the National Assembly.

In view of the foregoing, it is therefore imperative that the National Assembly does not proceed to consider, vet, approve or reject Mr. William Kirwa as a nominee for the position of the new Controller of Budget. The National Assembly should await a nominee jointly made by the President and the Prime Minister following consultation between them and in compliance with our national values and principles.

Other Relevant Constitutional Provisions

Article 10 of the Constitution establishes our national values and principles of governance. Such values and principles of governance include transparency and accountability.

Article 73(2)(a) and (b) of the Constitution establish, as guiding principles of leadership and integrity, selection to public office on the basis of personal integrity, competence and suitability, objectivity and impartiality in decision making, and ensuring that decisions are not influenced by nepotism, favouritism and other improper motives.

Article 232(1)(g) of the Constitution establish, as the values and principles of public service, fair competition and merit as the basis of appointments and promotions.

Article 232(1)(i) of the Constitution establish, as the values and principles of public service, affording adequate and equal opportunities to appointment of men and women.

I respectfully urge the National Assembly not to receive, consider, vet, approve or reject Hon. Justice Alnashir Ramazanadi Magan Visram as nominee for the position of Chief Justice, Prof. Githu Muigai as nominee for the position of Attorney General, Mr. Kioko Kilukumi as nominee for the position of Director of Public Prosecutions and Mr. William Kirwa as nominee for the position of Controller of Budget on the following grounds:

(1) These nominations were made without consultation with the Prime Minister as required under Sections 24(2) and 29(2) of the Sixth Schedule to the Constitution, as read together with Article 259(11) of the Constitution;

(2) These nominations were not made jointly by the President and the Prime Minister as required under the National Accord and Reconciliation Act; and

(3) These nominations violate the national values and principles established under Articles 10, 73 and 232 of the Constitution of Kenya, particularly those requiring equal opportunity for women and regional balance.

It is my intention to consult with the President on this matter with a view to asking the Judicial Service Commission to proceed under Article 166 of the Constitution to advertise, interview and recommend to the President and the Prime Minister suitable candidates for consideration for nomination to the position of Chief Justice. The Executive, I will further propose to the President, should adopt competitive and merit based recruitment process for nominating candidates jointly by the President and the Prime Minister to the positions of Attorney General, Director of Public Prosecutions, Controller of Budget and Auditor General in compliance with our national values and principles as enshrined in the Constitution.

Yours



Rt. Hon. Raila A. Odinga, EGH, MP

OFFICE OF THE PRIME MINISTER

PRIME MINISTER'S MEETING WITH H.E. THE PRESIDENT

27.1.2011

Issues to raise

1. **Drought situation in North Eastern (Marsabit, North Horr, Moyale, Wajir, Garissa):**
   - Water shortage
   - Livestock
   - Insecurity
   - School fees waiver

2. **Implementation of Constitution**
   - Appointments – Chief Justice, Key Positions and need for agreement

3. **Ivory Coast/Au Mission**

4. **A.O.B.**

OFFICE OF THE PRESIDENT

AGENDA

CONSULTATION BETWEEN HIS EXCELLENCY THE PRESIDENT AND THE RT. HON. PRIME MINISTER

1. Fast tracking of appointments necessary for the establishment of a Local mechanism for the trial of post-election violence suspects.
    - Gazette Notice advertising the Post of Director of Public Prosecutions;
    - Identification of a nomination for the post of Chief Justice;
    - Deputy Chief Justice to be recommended by the Judicial Service Commission which is already in place.
2. Advertisement for the post of Controller of Budget
    - Gazette Notice
3. Renewal of contract for the Director General, NSIS.
    - Contract ends on 16th January, 2011.
    - Being recommended for renewal to ensure continuity as it will run for the remaining period of the current President and end in two years of the successor President.
4. To attend to urgent legislation and vet and approve nominations of persons to fill State offices.
5. Draught crisis (funds to be made available)
6. ID Cards & E-Visa Project
7. Any other Business.

6 January 2011

BRIEF TO THE RT. HON. PRIME MINISTER

MEETING WITH H.E. THE PRESIDENT – 12.10.2010

Issues to raise

1. **Implementation of the Constitution - Concerns:**
   - Role of Committee on Implementation
   - Parliament's reluctance to begin debate on legislation
   - Retreat for Cabinet Ministers
   - Joint Civic Education

2. **IDPs**

   Quick resettlement for:

   - PEV victims
   - Embobut - 5,000 households
   - MAU - 3,500 households

3. **Assistant Ministers**
   - Bishop Wanjiru - Housing

4. **A.O.B. – Bashir Visit?**

MEETING WITH THE PRESIDENT – 4TH MAY 2009

ISSUES TO RAISE

1. The National Accord

- Lack of consultation on government matters/policy is root cause of difficulties
- Need for regular Wednesdays meetings
- Need for regular Coalition Committee meetings
- Parliamentary Affairs – Leader of Government Business

2. Security in the Country

- Police Reform – Task Force
- Judiciary Reform

3. Visit to South Africa

JLA
Submission by
Mr Caroli Omondi on 10/2/11

REPUBLIC OF KENYA

THE NATIONAL ASSEMBLY OF KENYA

DEPARTMENTAL COMMITTEE ON LEGAL AND CONSTITUTIONAL AFFAIRS

NOMINATION TO CONSTITUTIONAL OFFICES

1. *Role of the Speaker*

Since the constitutionality of the nominations has been challenged within and outside the House, the Speaker has the duty, competence and exclusive jurisdiction to rule on the constitutionality of the nominations.

Determination of the constitutionality of the nominations is not a matter for the House to vote upon. It is a matter of constitutional interpretation by the Speaker. Constitutional interpretation is not to be rendered through voting by the Members. In other words, whether or not a matter before the House is constitutional or otherwise is not to be determined by division in the House.

2. *Role of the Committees*

The first question to be determined by the Committees is the "constitutionality of the nominations". This question must be determined by the competent Committee first before any other Committee may proceed with any business regarding the nominations.

3. *Role of CIC and the Courts*

The CIC has a duty "to ensure that the letter and spirit of [the] Constitution is respected". CIC must report to the House on "progress" and "any impediments" in the implementation of the Constitution.

Consequently, its opinion on the constitutionality of the nominations carries the weight of its responsibilities. Its opinion is not just persuasive but binding.

4. *Role of Judicial Service Commission*

While the Constitution does not require the Judicial Service Commission (JSC) to participate in the nomination process for new Chief Justice pending the next general elections, nothing precludes the Executive from engaging the JSC to help with the identification of candidates through a competitive process for purposes of nomination. Indeed, engaging the JSC in this process will be in consonance with, and in furtherance of our national values and principles of transparency, merit and competitiveness in making appointments to public offices.

5. *Consultations*

Appointments, under the Constitution, are subject to the National Accord, which is premised upon "real power-sharing", "consultations", and "willingness to compromise". "Real power-sharing" connotes equality and parity in making the appointments.

"Consultations" require that the parties consulting:

(i) "offer each other sufficient opportunity to exchange views",
(ii) "share sufficient information available on each nominee on the basis of full disclosure of accurate information",
(iii) "act reasonably",
(iv) "must be free and frank in exchanging their views",
(v) "must receive views exchanged with an open mind",
(vi) "Consultation must be undertaken when the proposals are still in their formative stages without any fixed views all through to the end"
(vii) "Consultation must not be treated "perfunctorily or as a mere formality",
(viii) "Consultation is not an act of notification",
(ix) "In specific circumstances consultation means agreement",
(x) "Consultation must be practical i.e conducted within a time period sufficient for views to be exchanged fully and matters to be thoroughly interrogated. The time required depends on the seriousness of the matter", and
(xi) "Urgency is no substitute to sufficient time for practical consultations".

"Consultations", within the framework of the National Accord therefore mean "compromise" between the Principals as the basis of any decisions. This implies "consensus ad idem" or the "meeting of the minds" on a matter under consideration.

Further, the appointments are to be made subject to the provisions of the National Accord which establishes a Grand Coalition Government based on shared power. Consequently, any nomination must be made jointly, i.e. by both coalition partners.

Consultations under the Constitution during the transitional period is therefore an act of power sharing, an act of compromise, and an act that requires good faith.

It is not consultation in its ordinary meaning.

6. *Serving Judge*

No serving Judge, until vetted and found to be fit to continue serving in the Judiciary, is eligible to be nominated and appointed as Chief Justice. A serving Judge who fails the suitability test under vetting is to be removed from the Judiciary.

7. *National Values and Principles*

The nominations breach the constitutional requirements of regional balance and gender parity. No woman was nominated. The nominee for the Office of the Attorney-General, if accepted, will put majority of all the senior positions within State Law Office under one ethnic group. Further, the nominee for the position of Director of Public Prosecutions, if accepted, will undermine the Independence of the Prosecution Service in prosecuting pending cases of grand corruption in which the nominee has been defence counsel.

Caroli Omondi
Chief of Staff
OFFICE OF THE PRIME MINISTER

9th February, 2011

REPUBLIC OF KENYA

THE NATIONAL ASSEMBLY OF KENYA

DEPARTMENTAL COMMITTEE ON LEGAL AND CONSTITUTIONAL AFFAIRS

Clarifications to the Statement made by Vice President and Minister for Home Affairs

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On Tuesday, 1st February, 2011, the Vice President and Minister for Home Affairs issued a Statement in the House regarding consultations over the nominations made by the President to the positions of Chief Justice, Attorney-General, Direction of Public Prosecutions and Controller of Budget. In this Statement, the Vice President and Minister for Home Affairs:

Alluded to "technical meetings" and "technical teams": The correct position is that there was only one technical team which held only one meeting.

Mentioned that the Prime Minister expressed the view that we should have a foreign Chief Justice: The correct position is that the Prime Minister suggested that a transitional Chief Justice be appointed from the Commonwealth on a fixed non-renewable term of three (3) years for the following reasons:

1. That it was important to get a new Chief Justice from a functioning Judiciary. Such Chief Justice would be able to identify the shortcomings of our Judiciary and offer best international practices in reforming our Judiciary.

2. That a Commonwealth Chief Justice would bring the credibility needed in establishing a local mechanism to deal with post-election violence matters and to negotiate with ICC a referral of the pending cases.
3. That such Chief Justice would not be seen as bias or partisan or beholden to any interests in the country.
4. That the transition period would allow the country to assess newly appointed or promoted judges and identify a suitable successor.
5. That a local candidate appointed from outside the judiciary was likely to experience resistance within the judiciary and thus undermine the reform process.
6. That the current serving judges had not been vetted as required by the New Constitution and were thus ineligible for appointment.

Mentioned that the Prime Minister would insist on Justice Omolo to be nominated to the position of Chief Justice: The correct position is that at no time did the Prime Minister propose the name of Justice Omolo. The Honourable Judge is ranked the senior most judge after the Chief Justice. It is in this respect that his name came under consideration. He had also been subjected to vetting by the National Assembly as a Member of the Judicial Service Commission.

Referred to a team comprising Ambassador Muthaura, Mr. Mohammed Isahakia, Prof. Nick Wanjohi and Mr. Caroli Omondi as "the technical team": The correct position is that the technical team in this matter comprised Ambassador Muthaura, Prof. Wanjohi, Permanent Secretary for Justice, Permanent Secretary for Internal Security, Solicitor-General and the undersigned. The other members of this team who were to be drawn from Law Reform Commission, Judicial Service Commission, Law Society of Kenya and Public Service Commission were never invited to join the team. This team met only once.

It did not produce a report. It never presented any report to the Principals. It never discussed any nominees.

Mentioned that Mr. Fred Ojiambo was replaced by Prof. Githu Muigai because the former did not have higher post-graduate qualifications: The correct position is that this was not a consideration before the Committee.

Mentioned that the Prime Minister left for Addis Ababa on January 28th, 2011: This trip was known to Amb. Muthaura and Prof. Wanjohi well in advance as it was discussed in the consultative meeting of January 27th, 2011, it was on the Agenda of the AU's Peace and Security Council of which they had notice, and the undersigned had discussed with them the clearance of the plane that would transport the Prime Minister to Addis Ababa.

It is true as stated by the Vice President under point No.8 that as at January 27th, 2011 the matter had not been finalized and further consultations were planned by the parties. But at no time did the parties agree that Friday, January 28th, 2011 would be the final date for the consultations.

That the Prime Minister would be consulted by phone while in Addis: The correct position is that at no time was there an agreement that consultations would be by way of phone. Indeed the Prime Minister had proposed in writing that the consultations be held face to face the following week.

That the proposal to nominate Justice Visram to the position of Chief Justice was communicated to the Prime Minister: The correct position is that at no time was this proposal communicated to the Prime Minister and at no time was this proposal discussed by the technical team.

That when the Prime Minister was called by the State House Comptroller, Mr. Caroli Omondi answered the Prime Minister's phone and after consulting said that the Prime Minister was busy and would call back after one and half hours: The correct position is that the Comptroller of State House called on Mr. Omondi's phone at around 6.30 p.m. While he said that the President wished to talk to the Prime Minister, he did not divulge the subject matter. At this point the Prime Minister was attending the AU's Peace and Security Council Meeting with other Heads of State and Government, a meeting that started at around 4.00 p.m. and ended shortly before 11.00 p.m. in the night. No aide was allowed into the meeting. By the time the Prime Minister took a break from the meeting for refreshments, the media were announcing that nominations had been made to these positions. It was not until around 11.30 p.m. back at the hotel that I had the opportunity to inform the Prime Minister that the President had wished to talk to him but I was not aware of the subject matter.

Caroli Omondi
Chief of Staff
OFFICE OF THE PRIME MINISTER

9th February, 2011

JLA (5)
Paper laid by Mr Carole Omondi on 9.2.11

CONFIDENTIAL

Republic of Kenya

Office of The Prime Minister

Ref. No OPM 1/30

Date 4th July 2008

Amb. Francis K. Muthaura, EGH,
Permanent Secretary, Secretary to the Cabinet and
Head of Public Service,
Harambee House,
NAIROBI

Carole Omondi
9/2/2011.

Dear Francis,

RE: COORDINATION OF COALITION GOVERNMENT BUSINESS

The mandate of coordinating government business as enshrined in the National Accord requires timely sharing of information, consultations and coordination between my office and that of the office of the President. Therefore without open and honest consultations there is the real danger of undermining the functions and integrity of the coalition government. As the principal assistant to H.E. the President it is incumbent upon you to ensure that adequate consultations take place between my office and that of the President before any major coalition government decisions are made and approved.

In this regard I wish to point out the following:

1. That the convening of Cabinet meetings or cancellations of such meetings must be done in consultation with my office, rather than simply notifying me along with Junior Ministers through a fax signed by your assistant. I take great exception to this mode of communicating and demand that in future my office be notified of such important engagements in a formal and respectful manner so as to avoid any embarrassments as was the case of yesterday's meeting.

2. Mr. Alfred Mutua as government spokesman cannot purport to make an announcement on important decisions in the name of the coalition government when my office has not been consulted on such decisions. If I am to be held accountable to any coalition government decisions then it is

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only proper that sufficient effort be made by the Office of the President to have prior consultations with my office on such matters before any announcements are made. I note with concern that too often my role and participation in such important government decisions are ignored. A case in point is yesterday's announcement by the Government Spokesman that the government had decided to stop the transfer of Grand Regency Hotel. My office was neither consulted nor informed of this important decision yet your office was aware that a government Cabinet Committee of which I am the Chair was deliberating on this matter. Should there have been any issue to warrant the last minute cancellation of the Cabinet meeting then I should have been informed. The unfortunate political consequences of such casual announcements is that the public are left to wonder which side of the government made the decision. At the same time such unilateral actions remove ownership of such decisions from my office.

I therefore expect that in future your office will make every effort to arrest these serious oversights which if not rectified will only undermine the spirit of the coalition partnership that is so vital to the post-election recovery of our country.

Yours

Rt. Hon. Raila Odinga E.G.H MP.
PRIME MINISTER

(i) JLA submission to JLA Committee on 10.2.11 by Mr Gardi Omondi

REPUBLIC OF KENYA

CHRONOLOGY OF EVENTS

December 16, 2010: A Meeting of the two Principals agree to discuss new appointments to Constitutional Offices in the New Year.

January 6, 2010: A Meeting of the two Principals agree that the positions of Chief Justice, Director of Public Prosecutions and Controller of Budget will not be advertised. A Panel to be constituted comprising representatives of Office of the President, Office of the Prime Minister, Law Society of Kenya, Law Reform Commission, Public Service Commission and Judicial Service Commission to help develop a criteria, process and identify and recommend suitable candidates to the Principals. Position of Attorney-General is to be dealt with later.

January 10, 2011: A section of Members of the Panel, namely: Prof. Wanjohi, Solicitor-General, Permanent Secretary for Internal Security, Permanent Secretary for Justice and Prime Minister's Chief of Staff meet. They agree that the criteria for selecting a new Chief Justice and Director of Public Prosecutions are seniority, competence, personal integrity and reform mindedness. They agree that candidates for a new Chief Justice may come from the Commonwealth, Kenyan Judiciary or Private Practice. They further agree that candidates for position of the Director of Public Prosecutions will be identified from the Prosecution Service, Private Practice or Judiciary, all within Kenya. The Team does not discuss the position of Attorney-General or Controller of Budget. No candidates are discussed.

January 27, 2011: At a Meeting of the two Principals, the President presents a list to the Prime Minister with Justice Kihara's name for Chief Justice, Justice Okwengu for Deputy Chief Justice, Mr. Ojiambo for Attorney-General, Mr. Kirwa for Director of Budget, Mr. Kilukumi for Director of Public Prosecutions and Mr. Lumumba

for ED of KACC. The Prime Minister proposes that since he is seeing the list for the first time, the matter be referred to a team of Amb. Muthaura/Wanjohi/Isahakia/Caroli. The Team meets in the afternoon. After protracted discussions without agreement on the position of Chief Justice, Muthaura/Wanjohi ask for adjournment to consult with the President. The other positions are not discussed but proposals for DCJ and ED/KACC are deleted from the list.

No further meetings are held between the Principals on this matter. The team of four also does not meet again.

January 28, 2011: While the Prime Minister is in Ethiopia, the President announces the nomination of Justice Visram for Chief Justice, Prof. Muigai for Attorney-General, Mr. Kilukumi for Director for Public Prosecutions and Mr. Kirwa for Controller of Budget.

Caroli Omondi
CHIEF OF STAFF
OFFICE OF THE PRIME MINISTER

10th February, 2011

JLA (2)
Written Submission by Mr Carol Omondi on 10.2.2011

Carol Omondi
Carol Omondi
10/2/2011

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ERRATA

[1986] 1 W.L.R.

Page 215G, line 40: *for* "summons directions" *read* "summons for directions"

Page 281E, line 29: *before* "had happened" *insert* "what"

Page 525G, line 40: *for* "allowed" *read* "dismissed"

Page 526C, lines 9–11 should read "In proceedings to determine the construction of charitable trust deeds drafted by experienced tax counsel and executed by the settlors in 1968, the plaintiffs sought to refer"

Page 599E, line 37: *for* "[1986] 1 W.L.R. Case no. 130" *read* "[1986] 1 W.L.R. 615"

Page 637F, line 33: *for* "the relevant bank" *read* "the defendant bank"

Page 638B, line 8: *for* "article 1" *read* "article 11"

Page 649F, line 34: *after* "that a" *insert* "limited"

Page 653F, line 34: *after* "taxpayer" *insert* "as"

Page 674E, line 24: *for* "section 48" *read* "section 2"

Page 677F, line 37: *for* "[permitted]" *read* "[permitting]"

Page 678E, line 28: *for* "section 48" *read* "section 2"

Page 678F, line 31: *for* "Section 48" *read* "Section 2"

Page 680B, line 10: *for* "section 48" *read* "section 2"

Page 763C, lines 15 and 16: *for* "Argyle" *read* "Argyll"

Page 851H, line 53: *for* "by him" *read* "by it"

Page 935F, line 34: *for* "Stuart Barker" *read* "Stuart Barber"

Page 1055G, line 46 should read: "tolls on the Severn Bridge in order to recover the full cost of"

Page 1098G, line 44: *for* "under that age" *read* "under such age"

Page 1508H, line 44 after "words" insert "*" and add the following as a footnote after line 51"**The Oxford Dictionary of Quotations*, 2nd ed. (1953), p. 541"

CORRIGENDUM

[1986] 1 W.L.R.

Page 746F, line 35: should read:
The following additional case was cited in argument:
Rex v. Spokes, Ex parte Buckley (1912) 76 J.P. 354, D.C.

The Weekly Law Reports

Volume 1

Containing those cases of value to practitioners which are not intended to be included in The Law Reports, together with practice notes and directions.

[QUEEN'S BENCH DIVISION]

*REGINA v. SECRETARY OF STATE FOR SOCIAL SERVICES, *Ex parte* ASSOCIATION OF METROPOLITAN AUTHORITIES

1985 May 15, 16, 17; 21

Webster J.

Crown—Minister—Duty of consultation—Statutory power to make regulations after consultation—Request for advice made to relevant organisation—Whether form of request and limit on time sufficient consultation—Whether duty to consult mandatory—Whether amending regulations to be quashed—Social Security and Housing Benefits Act 1982 (c. 24), s. 36 (1)

The Secretary of State had power under section 28(1) of the Social Security and Housing Benefits Act 1982 to make regulations constituting the housing benefits scheme but, by section 36(1), he had to consult with organisations that appeared to him to represent the housing authorities concerned with the scheme before making such regulations. The applicant association were such an organisation. In pursuance of that duty, the Department of Health and Social Security wrote to the association on 16 November 1984 on behalf of the Secretary of State requesting their views on proposals to make certain amendments to the Social Security and Housing Benefits Regulations 1982. The association received the letter on 22 November and were asked to give their response by 30 November. The association replied requesting an extension of time so as to enable them to consult with their advisers but the department did not respond to that request. On 4 December the department, having been advised that further amendments to the regulations were desirable, wrote again to the association asking for their response to the revised proposals, and stipulating that a response should be given by 12 December. The letter contained no draft of the proposed amendments and no mention of a material feature of the amendments which would require local authorities to investigate the background to the creation of joint tenancies by housing benefit claimants so as to satisfy themselves that such tenancies had not been contrived in order to take advantage of the housing benefits scheme. The association replied on 13 December with brief comments on the new proposals. The Housing Benefits Amendment (No. 4) Regulations 1984 were made on 17 December and became law on 19 December. On the association's application for, inter alia, an order of certiorari to quash the regulations on the ground that the Secretary of State had failed to consult the association with

regard to the making of the regulations before making them; and a declaration that the Secretary of State had failed to exercise his duty under section 36(1) of the Act of 1982:—

Held, granting the declaration but refusing an order of certiorari to quash the regulations, (1) that taking into account the scope and purpose of the Social Security and Housing Benefits Act 1982 and the fact that local housing authorities were responsible for its day-to-day administration, the provision in section 36(1) for consultation was mandatory and for there to be consultation within the meaning of the subsection, there had to be a genuine request for advice and a genuine desire to receive that advice; that the amount of information given with the request for advice and the time limit within which the advice was to be given depended on the circumstances but there could be no degree of urgency which absolved the Secretary of State from his duty to consult; that, since the urgency of the need for the amending regulations as seen by the Secretary of State was not such that the department was entitled to require the association to express its views without having time to obtain and consider sufficient information on which to be able to tender proper advice, the Secretary of State had failed in his duty to consult the association (post, pp. 4G–H, 6B–D, 7E, 14A–D, 15H—16A).

(2) That, although it was usual for a ministerial decision held to be ultra vires to be quashed, in the case of delegated legislation it was not necessarily to be regarded, in the absence of special circumstances, as the normal practice to revoke the instrument; that, since the association's principal objection was the lack of consultation rather than to the substance of the regulations that had been acted upon by local authorities and had since been consolidated into regulations which were not challenged, it was inappropriate for the court in the exercise of its discretion to revoke the instrument (post, pp. 14G, 15A–F).

Dictum of Lord Diplock in *Grunwick Processing Laboratories Ltd. v. Advisory, Conciliation and Arbitration Service* [1978] A.C. 655, 695, H.L.(E.) considered.

The following cases are referred to in the judgment:

Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation [1948] 1 K.B. 223; [1947] 2 All E.R. 680, C.A.

Coney v. Choyce [1975] 1 W.L.R. 422; [1975] 1 All E.R. 979

Grunwick Processing Laboratories Ltd. v. Advisory, Conciliation and Arbitration Service [1978] A.C. 655; [1978] 2 W.L.R. 277; [1978] 1 All E.R. 338, C.A. and H.L.(E.)

Port Louis Corporation v. Attorney-General of Mauritius [1965] A.C. 1111; [1965] 3 W.L.R. 67, P.C.

Rollo v. Minister of Town and Country Planning [1948] 1 All E.R. 13, C.A.

Union of the Benefices of Whippingham and East Cowes, St. James, In re [1954] A.C. 245; [1954] 2 W.L.R. 804; [1954] 2 All E.R. 22, P.C.

The following additional cases were cited in argument:

Agricultural, Horticultural and Forestry Industry Training Board v. Aylesbury Mushrooms Ltd. [1972] 1 W.L.R. 190; [1972] 1 All E.R. 280

Bates v. Lord Hailsham of St. Marylebone [1972] 1 W.L.R. 1373; [1972] 3 All E.R. 1019

Reg. v. Brent London Borough Council, Ex parte Gunning (unreported), 26 April 1985, Hodgson J.

Reg. v. Secretary of State for the Environment, Ex parte Brent London Borough Council [1982] Q.B. 593; [1982] 2 W.L.R. 693, D.C.

Reg. v. Secretary of State for Social Services, Ex parte Child Poverty Action Group (unreported), 30 July 1984, Woolf J.

Reg. v. Secretary of State for Transport, Ex parte Greater London Council [1985] 3 W.L.R. 574

Steeples v. Derbyshire County Council [1985] 1 W.L.R. 256; [1984] 3 All E.R. 468

Street v. Mountford [1985] A.C. 809; [1985] 2 W.L.R. 877; [1985] 2 All E.R. 289, H.L.(E.)

APPLICATION for judicial review.

The applicants, the Association of Metropolitan Authorities, by notice of application dated 7 March 1985, sought judicial review by way of (1) an order of certiorari to quash the decisions of the Secretary of State for Social Services contained in letters to the association dated 16 November 1984 and 4 December 1984 requiring that the consultations that the Secretary of State was obliged to seek with the association pursuant to section 36(1) of the Social Security and Housing Benefits Act 1982 take place by 30 November and 12 December 1984 respectively; (2) an order of certiorari to quash the Housing Benefits Amendment (No. 4) Regulations 1984, alternatively, regulation 2(3), (4), (5), (6) and (7) thereof; (3) a declaration that before making and/or laying before Parliament the amending regulations, the Secretary of State had failed to comply with the duty imposed upon him by section 36(1) of the Act of 1982; (4) a declaration that by virtue of the failure to comply with section 36(1) of the Act of 1982 the regulations were null and void and/or ultra vires the powers contained in section 28(1) of the Act.

The facts are stated in the judgment.

Roger Henderson Q.C. and *David Holgate* for the association.

Michael Beloff Q.C. and *Christopher Symons* for the Secretary of State.

Cur. adv. vult.

21 May. WEBSTER J. read the following judgment. In this matter of judicial review the Association of Metropolitan Authorities applies to quash the Housing Benefits Amendment (No. 4) Regulations 1984, made by the Secretary of State for Social Services under the Social Security and Housing Benefits Act 1982, on the ground that the Secretary of State failed to consult the applicant association properly or at all with regard to the making of the regulations before making them. Alternatively, the association applies for a declaration that the Secretary of State failed to comply with the duty of consultation imposed upon him by section 36(1) of that Act.

Section 28(1) of the Act gives the Secretary of State power to make regulations which, when made, constitute the housing benefits scheme. The original scheme made under that section was contained in the Housing Benefits Regulations 1982 (S.I. 1982 No. 1124); but before the making of the Housing Benefits Amendment (No. 4) Regulations 1984, the subject matter of this application, there had been, as the title of those regulations suggests, three earlier amending regulations made under that section.

Section 36(1) of the Act of 1982 provides that before making regulations, including the regulations in question in this case, "the Secretary of State shall consult with organisations appearing to him to be representative of the authorities concerned." It is common ground

that the applicant association, often referred to as A.M.A., is an organisation appearing to the Secretary of State to be representative of authorities concerned.

The association was formed in 1974 as successor to the Association of Municipal Corporations. The association comprises and represents 77 metropolitan local authorities in England and Wales having in membership all metropolitan district councils, all metropolitan county councils, all except one of the London boroughs, the Greater London Council, and the Inner London Education Authority.

The Secretary of State also habitually consults other organisations before making regulations to which section 36(1) applies. They are the Association of District Councils, sometimes referred to as the A.D.C., the London Boroughs Association, sometimes referred to as the L.B.A., the Association of London Authorities, sometimes referred to as the A.L.A., the New Towns Association, sometimes referred to as the N.T.A., and the Convention of Scottish Local Authorites, the C.O.S.L.A. The association and the A.D.C. between them represent the vast majority of local authorities, and the local authorities which the association represents cover approximately 50 per cent. of the population. Neither the association nor any of the other organisations have any particular political colouring or affiliation.

It is common ground that the Secretary of State communicated with the association before making the regulations, giving some information about the proposed amendments and asking for their comments. The issue, however, is whether the Secretary of State thereby consulted the association within the meaning of that word in section 36(1). The association contends that the Secretary of State failed to comply with his obligation to consult within the meaning of that subsection, because the time allowed to them within which to comment on the proposals was insufficient and because the information provided was inadequate or misleading with the effect that they were unable sufficiently or properly to comment on the proposals. The Secretary of State contends that, in the light of the need to amend the regulations urgently, the time allowed and the information provided were each sufficient to enable the association to make sufficiently considered comments.

There is no general principle to be extracted from the case law as to what kind or amount of consultation is required before delegated legislation, of which consultation is a precondition, can validly be made. But in any context the essence of consultation is the communication of a genuine invitation to give advice and a genuine receipt of that advice. In my view it must go without saying that to achieve consultation sufficient information must be supplied by the consulting to the consulted party to enable it to render helpful advice. Sufficient time must be given by the consulting to the consulted party to enable it to do that, and sufficient time must be available for such advice to be considered by the consulting party. Sufficient, in that context, does not mean ample, but at least enough to enable the relevant purpose to be fulfilled. By helpful advice in this context, I mean sufficiently informed and considered information or advice about aspects of the form or substance of the proposals, or their implications for the consulted party, being aspects material to the implementation of the proposal as to which the Secretary of State might not be fully informed or advised and as to which the party consulted might have relevant information or advice to offer.

These propositions, as it seems to me, can partly be derived from, and are wholly consistent with, the decisions and various dicta, which I need not enumerate, in *Rollo v. Minister of Town and Country Planning* [1948] 1 All E.R. 13 and *Port Louis Corporation v. Attorney-General of Mauritius* [1965] A.C. 1111.

Mr. Beloff, on behalf of the Secretary of State, tentatively submits that the obligation laid upon the Secretary of State to consult under section 36(1) is directory, not mandatory. He relies upon a passage in the judgment of Templeman J. in *Coney v. Choyce* [1975] 1 W.L.R. 422, where the judge, in turn, cited and applied a passage from a highly respected academic source. Considering the question whether the particular statutory provision before him was directory or mandatory, Templeman J. said, at pp. 433–434:

> "Now in those circumstances a suggested test, which Mr. Harvey adopted and put forward, and with which, as a test, Mr. Hames did not quarrel—although of course he disputed the consequence of applying the test—is to be found in *de Smith, Judicial Review of Administrative Action*, 3rd ed. (1973), p. 122. After hinting that the law might have been in a bit of a mess, he continues: 'When Parliament prescribes the manner or form in which a duty is to be performed or a power exercised, it seldom lays down what will be the legal consequences of failure to observe its prescriptions.' That describes the present case. Parliament has prescribed the manner in which the duty of giving public notices is to be performed, but it has not specified the consequences of failure. It has not said if the regulations are not carried out then the approval is invalid. It has left the result unspecified and in those circumstances I go back to *de Smith*, who says at p. 123: 'The courts must therefore formulate their own criteria for determining whether the procedural rules are to be regarded as mandatory, in which case disobedience will render void or voidable what has been done, or as directory, in which case disobedience will be treated as an irregularity not affecting the validity of what has been done (though in some cases it has been said that there must be "substantial compliance" with the statutory provisions if the deviation is to be excused as a mere irregularity). Judges have often stressed the impracticability of specifying exact rules for the assignment of a procedural provision to the appropriate category. The whole scope and purpose of the enactment must be considered, and one must assess "the importance of the provision that has been disregarded, and the relation of that provision to the general object intended to be secured by the Act." Furthermore, much may depend upon the particular circumstances of the case in hand. Although "nullification is the natural and usual consequence of disobedience", breach of procedural or formal rules is likely to be treated as a mere irregularity if the departure from the terms of the Act is of a trivial nature, or if no substantial prejudice has been suffered by those for whose benefit the requirements were introduced, or if serious public inconvenience would be caused by holding them to be mandatory, or if the court is for any reason disinclined to interfere with the act or decision that is impugned.' I accept that test, and applying it, here is an Act, which is concerned with the administration of education in which, as has been seen in

the present case, the ramifications can be considerable as regards different areas and as regards a host of children."

With the very greatest respect to the judge, as it seems to me and indeed as Mr. Beloff frankly pointed out during his submissions might be the case, the last paragraph of the author's test, reading from the words "breach of procedural or formal rules," should go in principle, not so much to the question whether the statutory obligation itself is mandatory or directory, as to the question, if it is mandatory, of the nature of the relief to be granted by the court if the obligation is not fulfilled.

In the present case, looking at the "whole scope and purpose" of the Act of 1982, one matter which stands out is that its day-to-day administration is in the hands of local housing authorities who bear 10 per cent. of the cost of the scheme. It is common ground that in them resides the direct expertise necessary to administer schemes made under the Act on a day-to-day basis. For these reasons, if for no other, I conclude that the obligation laid on the Secretary of State to consult organisations representative of those authorities is mandatory, not directory.

The last question of principle to be decided before turning to the facts is the test to be applied to the facts as I find them for the purposes of judicial review. Two overlapping questions arise: first, to what extent is it for the Secretary of State, not the court, to judge how much consultation is necessary and how long is to be given for it? The answer to that question may qualify the word "sufficient" in the requirements of consultation which I have set out above. The second question is whether, on the one hand, the regulations may be set aside if in the court's judgment the consultation did not comply with the section or whether, on the other hand, they may only be set aside if consultation fails to satisfy the test now known as that of "rationality," formerly the "*Wednesbury* unreasonable test": see *Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation* [1948] 1 K.B. 223.

Answering the second question first, it became clear during argument, if it was not already clear, that what is being challenged by the association is not the validity of a ministerial decision, but the vires of subordinate legislation, which in turn depends upon the question whether section 36(1) of the Act of 1982 was complied with. "Rationality," in my view, is irrelevant to that question, which is one for the court to determine yea or nay, although in determining that question yea or nay I will consider simply whether the substance of the requirement of consultation has been complied with: see *In re Union of the Benefices of Whippingham and East Cowes, St. James* [1954] A.C. 245. That is not to say, however, that the Secretary of State's attitude to the making of the regulations is irrelevant.

I now turn to the first question. Before answering that question the first point to note is that the power to make the regulations is conferred on the Secretary of State and that his is the duty to consult. Save for those consulted, no one else is involved in the making of the regulations. Secondly, both the form or substance of new regulations and the time allowed for consulting, before making them, may well depend in whole or in part on matters of a political nature, as to the force and implications of which it would be reasonable to expect the Secretary of State, rather than the court, to be the best judge. Thirdly, issues may

well be raised after the making of the regulations as to the detailed merits of one or other reason for making them, or as to the precise degree of urgency required in their making, issues which have been raised on this application. Those issues cannot be said to be wholly irrelevant to a challenge to the vires of the regulations, and Mr. Beloff has not submitted that they are irrelevant; but at the same time it would seem to me to be inherently improbable that the question of the vires of the regulations should depend upon precise findings of fact on issues such as those. In my view, therefore, the court, when considering the question whether the consultation required by section 36(1) was in substance carried out, should have regard not so much to the actual facts which preceded the making of the regulations as to the material before the Secretary of State when he made the regulations, that material including facts or information as it appeared or must have appeared to him acting in good faith, and any judgments made or opinions expressed to him before the making of the regulations about those facts which appeared or could have appeared to him to be reasonable. The department's good faith is not challenged on this application.

The effect of treating as material the facts as they appeared to the Secretary of State, and not necessarily as they were, is to give a certain flexibility to the notions of sufficiency, sufficient information, sufficient time and sufficiently informed and considered information and advice in my homespun attempt to define proper consultation. Thus, it can have the effect that what would be sufficient information or time in one case might be more or less than sufficient in another, depending on the relative degrees of urgency and the nature of the proposed regulation. There is no degree of urgency, however, which absolves the Secretary of State from the obligation to consult at all.

I now turn to the circumstances which give rise to this application, beginning with the scheme itself. For the purposes of this application the material features of the housing benefits scheme, established by the Housing Benefits Regulations 1982, can be described as follows. Housing benefit consists of rent allowance (paid to a "private" landlord), rent rebate (allowed by a local authority to its tenants) and rate rebate (paid or allowed to private and public tenants). The scheme provides, in the first place, for certain persons to be "eligible" for housing benefit. These include persons receiving supplementary benefit ("certificated cases"), where the eligibility depends prima facie on the issue of a certificate by the department. Eligible persons are "assessed" for the amount of each benefit to which they are entitled, but deductions from those amounts are to be made for non-dependants, meaning generally persons living with the family other than dependent children. Finally, despite being eligible for benefits, and being assessed to an amount to which he is entitled, a person may be disentitled to a benefit, in particular by virtue of regulation 23 which I will set out in full hereafter. Save for the issue of certificates, all other relevant parts of the scheme are administered by local authorities.

Although this application is only concerned with the making and validity of one set of regulations, the Housing Benefits Amendment (No. 4) Regulations 1984, the consultations which preceded the making of those regulations were carried out in two stages which I will call the November amendment and the December amendment respectively. I will ignore one amendment which has been non-controversial—the

amendment of the definition of rent in regulation 2 so as to make licensees eligible for housing benefit in the same way as tenants.

The object of the November amendment was to prevent a non-dependant, in respect of whom a deduction would be made from benefit paid or allowed to the head of the household, from himself becoming eligible for and entitled to an allowance or rebate if he made a payment to the head of the household for board and lodging.

It seems to me that this loophole ought to have been apparent to the department by March 1984 when it was raised by the Association of District Councils in almost the same terms but, as there is no challenge to the department's good faith, I accept for the purpose of this application that it, and therefore the Secretary of State, first had occasion to consider this loophole in October 1984 when they were alerted to it by an opinion of counsel which they were shown. The department then concluded that this was a loophole in the regulations which should be closed.

The department adduced evidence that within a very short time after receiving that opinion it received calls from one authority stating that that authority was getting a large number of claims for benefits from people living with their families, that before December a total of seven authorities said they had received such claims, that by early December the number had increased to 26 and that by 19 December, when the regulations were made, the number of authorities receiving such claims had increased to 50. By mid-December the department estimated that the cost of permitting the loophole to continue could have amounted to up to £200 million per annum and that by that date, that is to say about 19 December, about £200,000 per week was being paid to people living with their families.

With a view to closing this loophole, therefore, on 16 November 1984 (a Friday) the department wrote to the association, and all but one of the other organisations which I have mentioned, a letter in the following terms. Headed "Housing Benefit Amendment Regulations," the first three paragraphs read:

> "I am writing on behalf of the Secretary of State formally to request the views of your associations and other relevant associations on proposals to make regulations under Part II of the Social Security and Housing Benefits Act 1982.
>
> "As you know it is our intention to avoid inessential legislative changes while the Housing Benefit Review is in progress. But a small number of changes need to be made urgently: none involve changes in policy or practice. One group of amendments closes a loophole in the regulations which would allow a non-dependant to qualify for housing benefit if he makes a payment for board and lodging which includes an amount for rent. The other amends the definition of rent to ensure that former licensees as well as former tenants can get benefit. At present because of a defect in the regulations help can only be given on payments made in the latter case. Details of the proposed amendments are contained in the annex to this letter.
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> "To allow time for ministers to consider your comments, and for the final preparation of the draft regulations, I must ask for any response by 30 November 1984. If you would like to discuss the proposed amendments before that date please let me know."

A Parliamentary question and answer were attached to the letter, as were the draft amending regulations.

The material amendment was to regulation 23. Unamended it had read:

> "(1) Except in a certificated case, a person shall not be entitled to rent allowance where (*a*) he resides with the person to whom he is liable to pay rent in respect of the dwelling; or (*b*) the person to whom he is liable to pay rent in respect of the dwelling is a member of his family, and in either case it appears to the local authority that the tenancy or other agreement was created in order to take advantage of the rent allowance scheme."

I need not set out the provisions of paragraph (2) which are in the same terms but apply to rate rebates.

The draft amendment substituted the following regulation 23 for the whole of the pre-existing regulation, and I shall set all of this out:

> "(1) A person shall not be entitled to a rent allowance or, as the case may be, a rate rebate where it appears to the appropriate authority that the tenancy or other agreement to pay rent or, as the case may be, to make payments by way of rates was created to take advantage of the rent allowance scheme, or insofar as the tenancy or other agreement relates to payments by way of rates, the rate rebate scheme . . . (2) A person shall not be entitled to a rent allowance or, as the case may be, a rate rebate where (*a*) he resides with the person to whom he is liable to pay rent or, as the case may be, to make payments by way of rates in respect of the dwelling; and (*b*) either that person is a close relative or the tenancy or other agreement between them is other than on a commercial basis. (3) For the purposes of paragraph (2), 'close relative' means a parent, son, daughter, step-parent, step-son, step-daughter, father-in-law, mother-in-law, son-in-law, daughter-in-law, brother, sister, brother-in-law or sister-in-law."

There are also amendments to regulation 6(2) and regulation 8(3) dealing with certificated cases.

The more material features of the amendments to regulation 23 are, first, that it was now to apply in all cases, not only to non-certificated cases; secondly, that it disentitled to benefit not only those who had entered into a "contrived" tenancy designed to take advantage of the scheme but also certain categories of those living with others; thirdly, that it defined a family for the first time (by defining a "close relative") and, fourthly, that it introduced the notion of payment of rent or rates "other than on a commercial basis."

Probably because the letter of 16 November was not posted until the following Monday or Tuesday, it was not received by any of the interested organisations until 21, 22 or 23 November. The association received their letter on 22 November, a Thursday. They replied by Mr. Cantle, their under-secretary, Housing and Public Works, by a letter dated 22 November, in which, having referred to the department's letter of 16 November, he wrote:

> "I regret that I must once again complain about the quite inadequate period which you are allowing for consultation. It is quite impossible for the association to provide a considered response by 30 November. Effectively, this will allow ourselves and our advisers only five

working days to consider these proposals. Having complained previously about the short timescale which your department imposes, I would have hoped that this could have been avoided on this occasion. I must therefore ask you to extend the period for consultation and I would have thought that a period of several weeks would not have been unreasonable."

The five working days, that is to say the Monday to Friday mentioned in that letter, excluded Thursday, the day of receipt, and Friday 30 November, the day by which the reply was required.

The staff of the applicant association are not authorised to express views on behalf of the association without committee authority, or at least consultation with elected representatives. According to Mr. Cantle's evidence there are a number of committees, including the housing and public works committee. Each committee appoints advisers who are officers of member local authorities and whose functions are to respond to and assist the association's officers and to advise the appointed committees. These advisers generally hold chief officer status in member local authorities and are able to provide an input which takes account of their expertise and experience both as professional officers and as administrators. However, advisers do not simply assist in the formulation of policy by committees, but also are concerned in policy implementation in two ways, assisting the association's officers in carrying out their duties and representing the association at meetings with government departments. The relevant committee, the housing committee, is currently advised, Mr. Cantle says, by seven directors of housing, three chief executives, four directors of finance, one chief architect and two chief legal officers. These advisers are drawn from 11 metropolitan district councils, six London boroughs and a number of other regions. To assist at a more detailed level the association also consults specialist advisers with particular day-to-day working knowledge and experience in their area of work. On housing benefit matters the association consults directly five specialist advisers with specialised knowledge and experience of administering the housing benefits scheme. These advisers are officers below chief officer level in their employing local authorities. They head housing benefit sections and have considerable expertise in operating the scheme.

The department never expressly answered the association's request for an extension of time, nor indeed did it answer their letter at all. Mr. Cantle in his affidavit has deposed to the fact, which has not been challenged, that the association were unable within the time allowed to respond to the department, meaning by that, I take it, that there was no time for a formal response to be considered by the housing committee.

Mr. Cantle did, however, consult advisers and specialist advisers. Then on 7 December 1984 he wrote a letter to the department which included:

"Housing Benefit Amendment Regulations. Generally, we are not happy with these proposals as we have argued that there is a need to encourage more efficient use of the housing stock, whereas the approach to non-dependants and the high level of deductions does exactly the opposite. I can understand your concern, but rather than plug what you see as a loophole, we would prefer a more fundamental appraisal of the position of non-dependants. This is all the more relevant in view of your proposals to deal with joint tenancies. Is the intention of your proposed amendment to regulations 6(2) and 8(3) to prevent the payment of housing benefit to some non-householders on supplementary benefit who have acquired a tenancy but not yet moved in? If this is the case, we could not agree and would prefer to see amendments permitting certification in these circumstances. The proposals to extend the 'contrived tenancy' provisions are badly thought through and could create some problems in practice (e.g. where a young person leaves home and takes up lodgings nearby) . . . I have had the advantage of seeing the L.B.A.'s and the A.D.C.'s comments and would generally support them. In particular, I would agree with the L.B.A.'s comment that this group of amendments is neither essential or desirable and should be properly put before the Housing Benefit Review."

So much for the history of the November amendment.

Meanwhile the department had decided to make, or at least to consult about the making of, the December amendment. Press articles in mid-November had suggested that non-dependants and their tenants might avoid deductions from the tenants' benefit and might procure an entitlement for non-dependants in their own right to a benefit by tenants and non-dependants entering into joint tenancies.

By the end of November the department had been advised that further amendments to the regulations were desirable. Accordingly, on 4 December 1984 it wrote the following letter to the association and other interested bodies:

"I am writing on behalf of the Secretary of State formally to request the views of your association and other relevant associations on proposals to make regulations under Part II of the Social Security and Housing Benefits Act 1982.

"As you may know there have recently been a number of press articles suggesting that housing benefit claimants should avoid a non-dependant deduction being made from their benefit by taking out a joint tenancy agreement with the non-dependant. The draft amendment regulations 23(1), which I sent to you on 16 November, would prevent private tenants from abusing the scheme in this way since it would apply to any new tenancy created in order to take advantage of the scheme. However, in considering the application of the amendment to joint tenants, we have found that it would have a harsher effect in these cases than was intended. The amendment would disentitle to benefit not only the non-dependant, but also the former tenant if the new joint tenancy was created in order to take advantage of the scheme.

"We therefore propose to make further amendments to regulation 23 to provide that where a joint occupier was previously a non-dependant of one or more of the joint occupiers, that person will not be eligible for housing benefit unless the local authority is satisfied that the joint tenancy was not created in order to take advantage of the scheme. Secondly, if the authority is satisfied that a new joint tenancy was created in order to take advantage of the scheme, the housing benefit payable to the other joint occupier(s) will be restricted to the amount which would have been payable had the joint tenancy not been created. These provisions will apply to rent and rate rebate cases as well as to rent allowance cases.

"The proposed amendments are currently being drafted and I will let you have copies as soon as they are available.

"Ministers wish to make the proposed amendments at the same time as the amendments which were referred to you with my letter of 16 November. I must therefore ask for any response on these new proposals by 12 December. If you would like to discuss the proposals before that date please let me know."

4 December was a Tuesday and 12 December, as a matter of arithmetic, was eight days away.

The proposed amendments were never sent to the association or to any of the other organisations before the regulations were made. But the December amendments included the following: first, a new paragraph (3) was added to regulation 11 under the heading "Joint occupiers" in the following terms:

"If a joint occupier of his dwelling was, at any time during the period of eight weeks prior to the creation of the joint tenancy or other agreement giving rise to the joint liability to pay rent or, as the case may be, to make payments by way of rates, a non-dependant of one or more of the other joint occupiers of that dwelling, he shall not be eligible for housing benefit in respect of that dwelling unless the appropriate authority is satisfied that that joint tenancy or other agreement was not created to take advantage of the rate rebate scheme, the rent rebate scheme or the rent allowance scheme, as the case may be."

Secondly, words were added at the end of paragraph (1) of regulation 23 after the words "the rate rebate scheme", the added words being

"so however that this provision shall not apply to a person who was, for any period within the eight weeks prior to the creation of the tenancy or other agreement to pay rent or, as the case may be, to make payments by way of rates, otherwise liable to pay rent in respect of the same dwelling."

The material feature from a practical point of view of these amendments, when they came into force, was that they would require local authorities to inform themselves about, and to consider, the relationship between joint tenants during the period of eight weeks immediately preceding the creation of the joint tenancy and then decide, if one had been a non-dependant of the other during that period, whether they were satisfied that the joint tenancy was not created to take advantage of the scheme.

On 5 December, when he received the letter, Mr. Cantle copied the letter and sent it by first-class post to all advisers to the committee and specialist advisers. In his affidavit he says that although the importance of the matter warranted consulting all member authorities, or at the very least reporting to the housing committee, this could not be done due to the timescale imposed by the department. If the department's deadline was to have been met it would, in effect, have required the advisers and specialist advisers to consider these complicated proposals, without draft regulations, consult with colleagues within their own local authorities and respond to him by return of post. He would then have had to collate a response, discuss this with advisers and specialist advisers, consult with elected members if necessary and reply to the department

by 12 December 1984. In spite of the advisory system the association uses, which is generally well-tested and well-oiled, the timescale imposed by the department was quite impossible.

On 13 December Mr. Cantle wrote his second letter to the department. He referred to the department's letter of 4 December, and continued:

"I think you will accept that this is a rather hasty and ill-considered response to your proposals which also seem rather hasty and ill-considered. Time and time again we make the point that changes in the housing benefit scheme should be avoided at all costs unless they are essential, and should always be based on a properly thought out approach. When will the D.H.S.S. take notice of this view?

"With regard to your proposals in respect of joint tenancies, I have only had time to take a number of quick telephone calls from advisers, and the following points have arisen which I think you should consider."

He then went on to make a number of comments, but of course he was unable to make any comment on the proposal that an authority would have to investigate the period of eight weeks immediately preceding the date of the creation of any joint tenancy, because the association had no knowledge of any such proposal.

Mr. Cantle in his evidence says that he considered taking up the department's offers of discussion, but that he had nothing to discuss at that stage. In relation to the 4 December letter, he had neither received a copy of the amendment proposed, nor had he received, or was likely to receive within this timescale, any detailed comments from advisers or specialist advisers.

The regulations were made on 17 December. They were laid before Parliament on 18 December and they came into operation on 19 December.

The first issue which I have to decide, therefore, is whether in all the circumstances the association have satisfied me that the Secretary of State failed to consult with the association before making the regulations in accordance with his duty under section 36(1) of the Act.

The association rely only on the contention that the Secretary of State failed to consult them. They do not rely on his failure to consult any of the other organisations. But conversely Mr. Beloff, on behalf of the Secretary of State, has not contended that it is not enough for the association to show only that the Secretary of State failed to consult them, and in my view he is right in not having sought to make that contention. By not making that contention, however, he is not to be taken as making any very significant concession, because the evidence shows that the terms and timetable of consultation were essentially the same for all the representative bodies.

As I am to consider the question in substance, rather than in detail, a detailed analysis of the facts or arguments will not assist me or anyone. It is not even in my view necessary or helpful to consider separately the November and December amendments, since there is only one set of regulations under challenge and since I do not propose to say anything, if I can help it, which could be taken as a code or set of minimum requirements for application to future cases.

Considering the matter as one of substance, I arrive at the following conclusions. First, the urgency of the need for the amending regulations as seen by the Secretary of State was such, taking into account the nature of the amendments proposed, that the department was entitled to require that views in response to its invitation for comments should be expressed quickly. Secondly, the urgency of the need for the amending regulations, as seen by the Secretary of State, taking into account the nature of the amendments proposed, was not such that the department was entitled to require views to be expressed within such a short period that those views would or might be insufficiently informed or insufficiently considered so that the applicants would or might be unable to tender helpful advice. Thirdly, taking into account both the urgency of the matter, as seen by the department, and the material features of the amendments which I have mentioned, and bearing in mind in particular that the association had no knowledge until after the regulations were made of the last of those features, namely the provision requiring authorities to inform themselves about and consider the relationship between joint tenants during the period of eight weeks immediately preceding the creation of the tenancy, I am satisfied that the Secretary of State failed to fulfil his obligation to consult before making the regulations. All those features of the regulations were matters with respect to which the applicant association, on behalf of those responsible for administering the scheme on a day-to-day basis, might have been able to offer informed and considered information and advice if they had been given an opportunity to obtain the relevant information from a sufficient number of authorities or their advisers and to consider it collectively in some way. There was, and in my view still is, plenty of scope for such assistance. As I have said, it was reasonable in my view to require the assistance to be given quickly, but the time allowed was so short and the failure to provide the December amendments to regulations 11 and 23 was such that, as the department must have known even without imputing to it precise knowledge of the association's internal arrangements, only piecemeal, and then only partial, assistance could be given.

Having decided that the provisions of section 36(1) are mandatory and that they were not complied with before the regulations were made, I now have to consider the relief which I should give to the association. They ask me to quash the regulations. I do not think that I should do so.

I acknowledge, with respect, that in the ordinary case a decision—I emphasize the word "decision"—made ultra vires is likely to be set aside in accordance with the dictum of Lord Diplock in *Grunwick Processing Laboratories Ltd. v. Advisory, Conciliation and Arbitration Service* [1978] A.C. 655, 695, where he said:

> "My Lords, where a statutory authority has acted ultra vires any person who would be affected by its act if it were valid is normally entitled ex debito justiciae to have it set aside, if he has proceeded by way of certiorari, or to have it declared void. If he has proceeded by way of an action for a declaration the court may exercise its discretion to refuse the remedy on grounds of laches or of acquiescence or maybe, though there appears to be no reported case of this, where the ultra vires act of the authority was induced by the unlawful acts of the complainant himself."

But whereas the ordinary case is that of a ministerial departmental decision, which adversely affects the rights of one person or of a class of persons, and which can be struck down without, usually, more than individual or local implications, in this case the association seeks to strike down regulations which have become part of the public law of the land. Although I have been shown and have found no authority to support the proposition, I suspect that it is not necessarily to be regarded as the normal practice, where delegated legislation is held to be ultra vires, to revoke the instrument, but that the inclination would be the other way, in the absence of special circumstances making it desirable to revoke that instrument. But in principle I treat the matter as one of pure discretion and so treating it decline to revoke the instrument for the following reasons, no particular significance being attached to the order in which I state them.

Although six organisations were and are habitually consulted in this context, only one of them has applied for revocation of the instrument and that one applies only on the ground that it was not properly consulted. It makes no formal complaint that the other organisations were not consulted. Although the association complains about the substance of the regulations, it is apparent that its principal complaint throughout is, and has been, the absence of proper consultation and it and other organisations were able to express some, albeit in a sense piecemeal, views about the proposal which apparently the department took into account before making the regulations, but without, be it noted, any effort whatsoever on the November or December amendments. The regulations have been in force for about six months and, although their implementation creates difficulties for some at least of the housing authorities who have to administer them, those authorities must by now have adapted themselves as best they can to those difficulties. If, however, the regulations were to be revoked all applicants who had been refused benefit because of the new regulations would be entitled to make fresh claims, and all authorities would be required to consider each such claim.

Finally, the Housing Benefits Amendment (No. 4) Regulations 1984 have been consolidated into the Housing Benefits Regulations 1985 (S.I. 1985 No. 677), which were made on 29 April 1985, laid before Parliament on 30 April and came into operation and indeed have come into operation for the most part, today, 21 May. Those regulations are not at present challenged. If, therefore, the Housing Benefits Amendment (No. 4) Regulations 1984 were to be revoked, and so long as the Regulations of 1985 remain valid, any person entitled to reconsideration of his claim to benefit would, if successful, at best be entitled to benefits for about six months. For all these reasons, I refuse, in the exercise of my discretion, to revoke the Housing Benefits Amendment (No. 4) Regulations 1984.

I can see no reason whatsoever, however, for refusing the association the declaration for which they ask; namely, a declaration that before making and/or laying before Parliament the Housing Benefits Amendment (No. 4) Regulations, or regulations 2(3), (4), (5), (6) and (7) of the aforesaid regulations, the Secretary of State for Social Services failed to comply with the duty imposed upon him by section 36(1) of the Social

Security and Housing Benefits Act 1982. I accordingly grant the application to the extent that I make that declaration.

Declaration accordingly.
Application for order of certiorari refused.
Secretary of State to pay four-fifths of association's costs.

Solicitors: Solicitor, Greenwich London Borough Council; Solicitor, Department of Health and Social Security.

[Reported by SIMON CASSELL, ESQ., Barrister-at-Law]

[COURT OF APPEAL]

*THOMPSON v. FRASER

PRACTICE NOTE

1985 Oct. 2

Sir John Donaldson M.R., Parker and Croom-Johnson L.JJ.

Costs—Appeal, Court of—Jurisdiction—Appeal against order that solicitor pay party's costs personally—Whether leave of judge necessary for appeal—Whether order "relating only to costs"—Supreme Court Act 1981 (c. 54), s. 18(1)(f)—R.S.C., Ord. 62, r. 8

An order that a solicitor pay a party's costs personally is not an order "relating only to costs" within section 18(1)(*f*) of the Supreme Court Act 1981 since it relates primarily to the conduct of the solicitor, and, accordingly, the leave of the judge making the order is not a necessary prerequisite of an appeal against such an order.

No cases are referred to in the judgment or were cited in argument.

APPEAL from Judge Pickles sitting at Otley County Court.

The plaintiff, Emmanuel William Thompson, brought an action against the defendant, Barbara Hope Fraser, which was heard by Judge Pickles at Otley County Court. He found for the defendant and reserved to himself the question of costs to consider whether he should make an order that the defendant's former solicitor, Joseph Anthony Dunford, should be the subject of an order under R.S.C., Ord. 62, r. 8. An appeal brought by the plaintiff against the substantive judgment was successful, but the Court of Appeal left to Judge Pickles the question whether the plaintiff's costs of the trial should be paid by the defendant or her former solicitor. On 13 February 1985 Judge Pickles made an order that the solicitor should pay the plaintiff's costs of the action in the county court, and refused leave to appeal.

The solicitor appealed on the ground, inter alia, that the judge, having found fault with the conduct of the solicitor, failed sufficiently to consider whether such conduct could properly be said to come within the jurisdiction conferred by R.S.C., Ord. 62, r. 8.

Simon Lawler for the solicitor.

SIR JOHN DONALDSON M.R. giving the judgment of the court. We are prepared to allow the appeal. The only thing which is of any general interest in this appeal is the suggestion that where it is held by a court that a solicitor is or is not to be personally responsible for costs and the aggrieved party wishes to appeal, section 18(1)(*f*) of the Supreme Court Act 1981 bars an appeal without the leave of the judge concerned. That section reads:

> "No appeal shall lie to the Court of Appeal . . . (*f*) without the leave of the court or tribunal in question, from any order of the High Court or any other court or tribunal made with the consent of the parties or relating only to costs which are by law left to the discretion of the court or tribunal; . . ."

We are unanimously of the view that an appeal in such circumstances does not relate only to costs or, indeed, primarily to costs; it relates to the conduct of the solicitor. In those circumstances, section 18(1)(*f*) has no application.

As to the facts of this particular case, suffice it to say—as, indeed, is very clearly set out in the defendant's solicitor's letter—that there is a claim for negligence in relation to failure to issue a counter-notice under the Landlord and

JLA (3)
Written submissions by Mr Caroli Omondi on 10.2.2011

Caroli Omondi

10/2/2011

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with which he was provided) was about £340. The main duties of the porter are downstairs, where he has many things to do throughout the day as the servant of the landlord. The carrying of coal up to the tenants and the removing of refuse can only be an incident in his main work. Nevertheless, the evidence offered to LORD GODDARD, C.J., by the appellant sought to divide the total remuneration received by the porter among the 24 flats and to treat the respondent as paying for one twenty-fourth of the whole. This cannot be right, for it would be regarding the engagement of the porter by the appellant as solely for the benefit of the tenants, and as though he had nothing to do except to carry up coals and remove refuse. Counsel for the respondent argued that no more than £100 out of the £340 could be attributed to the duties in question. Assuming this, and dividing the £100 among the tenants in the same proportion as the rateable value of the block of flats bears to the rateable value of the flat in question, he arrived at something like £2 as the share fairly included in the respondent's rent. Even if the £100 were equally spread among all the flats, the respondent's share would be little more than £4. On either of these calculations the figure cannot be regarded as a substantial portion of the total rent. Even if £14 was the correct proportion, I should still support the view of LORD GODDARD, C.J., that this was not enough to be a "substantial portion." The LORD CHIEF JUSTICE recognised that the services of the porter were not solely for the tenants' advantage, but he put this on the limited ground that the removal of refuse is also to the advantage of the landlord. A broader view is fully justified, *viz.*, that the greater part of the services of the porter were services rendered to the landlord which did not involve any attendance on the tenants at all. On the other hand, the LORD CHIEF JUSTICE, following *Engvall* v. *Ideal Flats Ltd.* (3), held that, inasmuch as the respondent did not require the services of the porter for carrying up coals because she was not using coal fires, the portion of the whole rent which was fairly attributable to the porter's attendance for this purpose would be reduced. This does not seem to be the case, for the tenant who has contracted to pay rent for attendance which the landlord covenants to supply cannot reduce the proportion of the rent fairly attributable to such attendance by saying that though he is entitled to have it he does not want it. The result in *Palser's* case is that the attendance provided by the appellant and paid for in the total rent was not such as to make the figure which may be fairly attributable to it a substantial portion of the whole rent. The appeal therefore fails, and the respondent's counterclaim succeeds.

PROPERTY HOLDING CO., LTD. *v.* MISCHEFF

In *Property Holding Co. Ltd.* v. *Mischeff* the various items claimed to be attendance are not "attendance" as above defined at all. They are either services rendered voluntarily by the porter, or else services under the lessor's covenant which do not involve personal attendance. There remains the question of furniture, as to which some detail is necessary. Applying the principles which which have been set out above to the situation disclosed in the evidence, it appears that the kitchen cabinet was built into the fabric and constituted part of the flat itself. The refrigerator got its necessary electric current through a plug in the wall which could be withdrawn without injury. It could thus be moved out of the flat, when the electric plug was withdrawn, as a loose article, and the trial judge was justified in regarding it as furniture. The judge has taken the same view about the linoleum and rubber floor covering, and though the evidence is not entirely clear whether in the present case these were detachable (as they often are), there seems no reason to reject the judge's view. He also treated the fitted medicine chest as coming within the category of furniture; there is not much evidence about it and the decision depends, of course, on the facts. In the circumstances there is no reason to over-rule this view. This leaves in the category of furniture articles to which the judge attributed the value of £155 in June, 1942. Even if the method followed by the trial judge be accepted, 15 per cent. of this is approximately £23, and there is no reason to disturb the judge's conclusion that this does not amount to a substantial proportion of the total yearly rent of £280 5s. 0d. The result is that the appeal in *Property Holding Co. Ltd.* v. *Mischeff* should also be dismissed.

My Lords, my noble and learned friend, LORD UTHWATT, who is unable to be here today, authorises me to say that he concurs in this opinion.

LORD THANKERTON: My Lords, I desire to express my concurrence in the reasoning and the conclusions of the opinion just delivered by my noble and learned friend on the Woolsack.

LORD PORTER: My Lords, I also concur.

LORD MACDERMOTT: My Lords, I also agree.

Appeals dismissed.

Solicitors: *Griffinhoofe & Brewster* (for the appellant Palser); *Lipton & Jefferies* (for the respondent Grinling); *Markby, Stewart & Wadesons* (for the appellants Property Holding Co., Ltd.); *J. M. Menasse & Co.* (for the respondent Mischeff).

[*Reported by* C. ST.J. NICHOLSON, ESQ., *Barrister-at-Law.*]

Observations of BUCKNILL, L.J., at p. 17, *applied*. *Re* UNION OF THE BENEFICES OF WHIPPINGHAM AND EAST COWES. [1954] 2 All E.R. 22.

Applied in AGRICULTURAL, ETC. v. ALLESBURY MUSHROOMS [1972] 1 All ER 280

ROLLO AND ANOTHER *v.* MINISTER OF TOWN AND COUNTRY PLANNING.

[COURT OF APPEAL (Lord Greene, M.R., Bucknill and Asquith, L.JJ.), December 11, 12, 1947.]

Town and Country Planning—New town—Duties of Minister—Consultation—New Towns Act, 1946 (c. 68), *s.* 1 (1).

By the New Towns Act, 1946, s. 1 (1): "If the Minister [of Town and Country Planning] is satisfied, after consultation with any local authorities who appear to him to be concerned, that it is expedient in the national interest that any area of land should be developed as a new town by a corporation established under this Act, he may make an order designating that area as the site of the proposed new town."

On July 10, 1946, three weeks before the Act received the royal assent, a meeting took place between the Minister and his assistants and the local authorities who appeared to him to be concerned at which the Minister proposed to "outline the main factors which . . . led him to consider the Crawley-Three Bridges area especially suitable to be the site of a new town . . ." The local authorities were informed at that meeting of the general nature of the proposal, the area, the size of the proposed town, and what the Minister wished and intended to bring about. Discussion was invited and a number of questions was put by the representatives of the authorities and answered by the Minister and his assistants, a minute was prepared, and a Press notice was issued stating what had happened. On Oct. 7, 1946, a second meeting was held between representatives of the Minister and the local authorities, at the latter's request, "to explain the considerations which the Minister had in mind in arriving at the boundaries of the area." Objections were raised to the proposed order and on Nov. 4, 5 and 6, 1946, a public inquiry was held:—

HELD: regarding as a whole the events which occurred between July 10 and the holding of the public inquiry in November, the local authorities throughout were aware of the effect of the provisions of the Act and had full opportunity to put forward any criticism or suggestion which they wished, and, therefore, the requirements of s. 1 (1) of the Act had been complied with.

Per LORD GREENE, M.R.: there was no need for the Minister to complete his "consultation" with local authorities before he published the draft order.

Per BUCKNILL, L.J.: Consultation in the sub-section means that, on the one hand, the Minister must supply sufficient information to the local authority to enable them to tender advice, and, on the other hand, a sufficient opportunity must be given to the local authority to tender that advice.

Decision of MORRIS, J., ([1947] 2 All E.R. 488), *affirmed*.

[FOR THE NEW TOWNS ACT, 1946, s. 1 (1), see HALSBURY'S STATUTES, Vol. 39, p. 664.]

APPEAL by the applicants, two residents of Crawley, from an order of MORRIS, J., dated July 30, 1947, and reported [1947] 2 All E.R. 488, refusing to quash the Crawley New Town (Designation) Order, 1947, made by the Minister of Town and Country Planning under the New Towns Act, 1946, s. 1 (1). The original notice of motion set out several grounds, but the only one relevant in the present appeal was whether the requirements of s. 1 (1) as to consultation had been complied with. The Court of Appeal, affirming MORRIS, J., held that they had.

Rees-Davies for the applicants.

The Attorney-General (*Sir Hartley Shawcross, K.C.*) and *H. L. Parker* for the Minister.

LORD GREENE, M.R.: This appeal relates to a proposal to set up a new town in the district of Crawley and Three Bridges under the New Towns Act, 1946. The applicants, who are private individuals, seek to bring themselves within the limited range of matters in respect of which complaints may be made against Orders made under the Act. These matters are to be found in s. 16 (1) (*b*) of the Town and Country Planning Act, 1944, which for this purpose is incorporated in the Act of 1946. Counsel for the applicants asserts that a requirement of the Act has not been complied with, and he, therefore, seeks from the court an order to quash the New Town Order against which he is fighting. That he may have a *locus standi* under that limb of the section, he has to show that he has been substantially prejudiced. That is a matter which would require going into in a much more elaborate way than that in which it has been canvassed in argument, but I am prepared to assume in favour of counsel that, if a matter that he calls attention to is properly called a requirement and that requirement has not been complied with, he has been substantially prejudiced. It may be, as the ATTORNEY-GENERAL pointed out, that this is not a requirement, but something not within the powers of the Act, in which case substantial prejudice would not require to be shown. I do not think, myself, it is necessary to go into these matters, but I will assume in counsel's favour all the necessary matters except the one point of substance which he has argued before us. There were a number of points taken in his original notice of motion, but only one of them is relevant to this appeal. It turns on s. 1 (1) of the New Towns Act, 1946, which is in the following terms:

> If the Minister is satisfied, after consultation with any local authorities who appear to him to be concerned, that it is expedient in the national interest that any area of land should be developed as a new town by a corporation established under this Act, he may make an order designating that area as the site of the proposed new town.

The whole point in this appeal turns on the meaning, in relation to the facts of the case, to be placed on the word "consultation." It is said that the Order which the Minister made can be attacked, and ought to be quashed, because it was not made after consultation, there having been no such consultation as the Act requires. It is to be noticed that local authorities, under the machinery of this Act, are to be consulted at two quite distinct stages. One is the stage referred to in the sub-section which I have just read, *i.e.*, the stage before the Order designating the area has been actually made. The other stage at which consultation is required by the Act is a much later one and arises when the Order has been made and the development corporation which is to be charged with the development of the new town has been established and is setting about its work, placing proposals before the Minister who has, at that stage, to approve of those proposals, or not approve of them, after consultation with the local authorities. It is important to keep those two stages apart, because they are not only different in point of time, but they are quite different in point of subject-matter. At the later stage, the subject-matter on which the authorities are to be consulted are proposals for development of the land: under sub-s. (1) the Minister is required, before he can make an Order, to satisfy himself that it is expedient in the national interest that an area of land should be developed as a new town by a corporation established under the Act. In other words, he has to satisfy himself as to the expediency in the national interest, he has to satisfy himself as to a particular area in respect of which the expediency arises, and he has to satisfy himself that it is an area that should be developed as a new town by a corporation. In respect of all

those matters, before he can finally make up his mind to make the Order, consultation with the local authorities is prescribed by the sub-section as a step or element in the process, but it is to be observed that the object of the consultation, which must affect and define its nature, is to be found in the object which, at that stage, the Minister has in mind, and that is not detailed matters of development, but the question whether or not a particular area should be developed in the national interest as a new town. It is to be observed also that under the sub-section the ultimate judge of what is or is not in the national interest is the Minister. It is not the local authorities. It is not the court. It is the Minister who is responsible to Parliament if he administers the Act badly and comes to conclusions which are open to criticism as not being in the national interest.

The next point I would call attention to is that the Minister, in performing that task of directing his mind to the question of the national interest, must survey the problem from a totally different angle from that from which a local authority would normally approach such a question. Local authorities, no doubt, have very useful knowledge and information about local conditions, but it is no part of their function to regard their areas from the point of view of the national interest and the development of new towns. That is essentially a matter which is not merely within the competence of the Minister, but is one in respect of which the Minister must have sources of information and assistance which are not open in any sense to any particular local authority or any group of local authorities. For instance, in deciding on the national interest in relation to a particular area, he has the advantage of consultation with a number of government departments. The Minister of Transport can advise him on the question of roads and railways, and the Minister of Health can advise him on the question of housing, the possibilities of housing, water, drainage, and matters of that kind. He has sources of information not merely within his own department, but in the other government departments, all of which must be of vital importance in enabling him to make up his mind on the question of national interest in regard to any particular area which he has in mind. Bearing that in mind, when he comes to consult with the local authorities in the district, he would, I venture to think, be, or might be, wasting a great deal of time if he were expressly to ask their opinion on matters of which they could know very little. It would not be much use his asking them whether they thought that something which he had obtained from the Minister of Health or the Ministry of Transport on a subject about which they could not know anything was in accordance with their ideas. In other words, in consulting the local authorities, he must have present to his mind the realities of the situation and the necessity and desirability of making a practical, working scheme.

In the present case, there were six local authorities which the Minister considered to be concerned, and no question arises that he failed to communicate with them. The sole question is: Did he or did he not consult them? I do not propose to go through the facts of the case, which are very carefully and fully dealt with by MORRIS, J. Broadly speaking, the contact—I will use a neutral phrase at the moment—was made with the local authorities at a conference on July 10. At that conference, which was summoned on the invitation of the Minister, all the six local authorities were represented. It is true that that took place on July 10 when the Bill was on its way through the House of Lords. There was no substantial alteration made in the terms of the Bill on these points after that date. The point immediately arises whether that interview alone could be a consultation within the meaning of the sub-section, having regard to the fact that the Bill had not, at that stage, become an Act? I do not think that that question requires an answer in this case, nor do I see any necessity for going into the question whether, assuming nothing else had happened, that could be described as a consultation contemplated by the sub-section. I can see various considerations which would have to be taken into account before we could lay down a proposition that that would satisfy the sub-section by itself, and I prefer myself to leave that matter undecided. On July 10, however, the local authorities clearly were informed of the general nature of the proposal, the area suggested, its size, and what the Minister wished and intended to bring about. Discussion was invited, and a large number of questions were put by those attending

representatives of the local authorities, which were answered by the Minister and his assistants. A minute was prepared, and there was a Press notice stating what had happened. It seems to me that, leaving on one side the question whether that was technically a consultation, the effect of what took place on July 10 was this. The Minister, in anticipation of an action which he would take when the Bill became an Act, was sounding the local authorities, informing them at the earliest stage of what was being considered and finding out what their views were on the proposal. It is true that, according to the minute, the discussion took the form principally of question and answer, but the local authorities were obviously raising points which they were anxious the Minister should consider and which appeared to them to be relevant to the principal matters on which he had to make up his mind.

There the matter remained until a later date, after the Bill had received the royal assent. MORRIS, J., took the view that the giving of advice or the making of suggestions remained open throughout to these local authorities. I should have thought myself that under the Act the Minister, in fulfilling his duty of consultation, would naturally, and, indeed, ought to, put to the local authorities any point on which in his honest opinion he considered they could assist him in the task which he had in hand, *viz.*, of deciding whether or not it was in the national interest to do what he was proposing to do, *viz.*, to designate that particular area. If he thought of something on which he felt a local authority could help him, I cannot think that he would keep it up his sleeve. I venture to think that, if he did so, he would be acting wrongly. So far as the side of the local authority is concerned, he must allow any authority who has a point which it considers will help him to put it forward. He is not entitled to say: "I will not listen to any suggestion that you make." In the present case, it seems to me that MORRIS, J., was perfectly right in the inference which he drew—that from beginning to end the local authorities had every opportunity of putting forward any point they thought relevant, that they knew that they do it, and, subject to what I am going to say in a moment, that they did not.

Confronted with that situation, the answer of counsel for the applicants is simple. He says: "Of course, there must be an invitation to the the local authorities to put forward any points that they deem useful and relevant, but it is not sufficient that that should be an open invitation. There should be an express invitation. They should, in terms and in so many words, be invited by the Minister to put forward any points that they think ought to be put forward to him." That seems to me to shut one's eyes to practical considerations. These local authorities were aware on July 10 that this area in their district was going to be brought under the new Act, and I have not the slightest doubt that they knew perfectly well what was happening in Parliament and what the terms of the Bill were. It was a matter of vital importance to these local authorities, and I refuse to accept the view that all the time the Bill was going through Parliament, they had not taken the trouble to inform themselves what was happening. It was clear on the minutes of July 10 that they knew all about the matter, and they certainly must have known all about it when the Bill became an Act. To imagine the contrary is, it seems to me, to shut one's eyes to common sense and to attribute to these local authorities an obscurantism and a disregard of the matters affecting them and their ratepayers which I should hesitate to ascribe to any local authority.

In these circumstances, regarding what happened from July 10 down to the date of the local inquiry on Nov. 4, 5, and 6, the local authorities well knew that they were entitled to, were allowed to, and were expected to, put forward anything that crossed their minds as being relevant to the matter with which at that stage the Minister was concerned. The broad inference which I draw from the evidence, without going into it, is that the local authorities, subject to one or two points, were only interested in the details which would come to be settled at the later stage after the Order had been made, the new corporation set up, its proposals for development submitted to the Minister, and when the Minister was in consultation with the local authorities thereon. These were the things which they were really interested in. If they had an interest in something antecedent to that, I entirely refuse to believe that they would have been so lacki[illegible] sense of duty as to avoid or decline or

refrain from bringing it forward. Counsel suggested that they were afraid that the Minister, unless they were ostensibly fully co-operative, might at some later stage treat them in a cavalier fashion and not give weight to their opinions and objections. I am afraid I cannot accept such a suggestion. The reason why the local authorities did not, at this consultative stage, put forward matters of advice was, in my view, that they realised that there was nothing on the broad questions which then fell to be decided on which they could help. At the later meeting on Oct. 7, they put this very important question: Why was it decided that the site of the new town should be at Crawley rather than elsewhere? That question suggests that the Minister was wrong in the public interest in picking on Crawley. That second interview, at which representatives of the Ministry attended, was summoned in response to a request by the authorities to deal with a matter principally, if not entirely, of boundaries, but questions were asked, and it is clear that those present did not think, from the question I have just quoted, that they were limited to boundary questions. Manifestly, they knew quite well they could raise any questions they pleased.

The substance of the matter, in my view, is that, so far as putting questions to the local authorities is concerned and asking their advice on specific matters, the Minister may well properly have taken the view, and I infer that he did take it, that he had brought to his mind and had present in his mind when he was deciding what to do, the views of the local authorities obtained on July 10 and later on Oct. 7, and he must have had in his mind the fact that the local authorities could and would, if they so thought fit, invite his attention to any matter which they thought of importance. They had not done so. Taking all those facts together, including the knowledge of the local authorities of what was proposed and their knowledge of what their powers and functions were under the Act, I come to the conclusion that MORRIS, J., was perfectly right, and that the requirements of s. 1 (1) as to consultation at the stage to which that sub-section is directed were complied with.

It was suggested, although not pressed, that the Minister ought to carry the consultation stage through before he publishes the draft order. On examination of the sub-section, it is found that that argument cannot be maintained, because the consultation stage can persist down to the very last minute when the Order is made, and, therefore, even after the public inquiry has been held. If it had not been for the obvious importance of the case to the applicants and the skill and tenacity with which their counsel presented his case, I should have been content to accept the conclusions of MORRIS, J., in a judgment with which, on all points which fall for consideration here, I entirely agree. The appeal must be dismissed.

BUCKNILL, L.J.: I agree that the appeal should be dismissed, and for the reasons given by the MASTER OF THE ROLLS. I would only add a very few words of my own. Counsel for the applicants conceded that the learned Judge had applied the right principle to this case, but he said the facts did not fit the principle. I would like to read a few lines at the end of the judgment of MORRIS, J., which appear to me to sum the whole thing up so well. He says this ([1947] 2 All E.R. 496):

> The holding of consultation with such local authorities as appear to the Minister to be concerned is, in my judgment, an important statutory obligation. The Minister, with receptive mind, must by such consultation seek and welcome the aid and advice which those with local knowledge may be in a position to proffer in regard to a plan which the Minister has tentatively evolved. For the reasons which I have given, I consider that on the facts of this particular case, consultation did take place so as to be a compliance with the statute.

It is said by counsel for the applicants that the evidence does not support that last finding of fact as to the consultation. In my view, the evidence does support it. [illegible] has said as to what consultation means. In my view, as [illegible] counsel for the Minister said, it means that, on the one side, the Minister must supply sufficient information to the local authority to enable them to tender advice, and, on the other hand, a sufficient opportunity must be given to the local authority to tender that advice. The rather difficult question arises whether the discussion on July 10 was a consultation within the meaning of s. 1. Even assuming for the moment it was not because it took

place three weeks before the Bill actually became law, it seems to me unreal to say that when the Bill did become law the Minister must shut out of his mind all the information that he had received from the local authorities at that consultation on July 10. He had then learned what the general attitude of the authorities was to this proposal. No doubt, some of their constituents welcomed it and others did not welcome it. They had to look at the matter from all points of view, and they had been asked their views, and expressed their doubts, and asked questions at that meeting. Although the minute may not contain all the questions that were asked, I see no reason why the representatives of the county council and district councils could not deal fully and courageously with any doubts they might have had. That being so, I think that the further meeting which the representative of the Minister had with the local authorities on Oct. 7, coupled with the information which the Minister had already received, did amount to a sufficient consultation to comply with the provisions of the Act. For these reasons, as well as for the reasons which my Lord has given, I think the appeal should be dismissed.

ASQUITH, L.J.: I agree entirely with the judgment delivered by my Lord.

Appeal dismissed, with costs.

Solicitors: *Syrett & Sons* (for the applicants); *Treasury Solicitor* (for the Minister).

[*Reported by* F. GUTTMAN, ESQ., *Barrister-at-Law.*]

Re GINGER.

[COURT OF APPEAL (Tucker and Bucknill, L.JJ., and Jenkins, J.), December 10, 1947.]

Emergency Legislation—Liabilities adjustment—Mortgage deed—Variation—Power of court to reopen past payments—Liabilities (War-Time Adjustment) Act, 1941 (*c.* 24), *s.* 7 (3) (*a*), *as amended by Liabilities (War-Time Adjustment) Act*, 1944 (*c.* 40), *s.* 7 (1).

The Liabilities (War-Time Adjustment) Act, 1941, s. 7 (3), as amended by the Liabilities (War-Time Adjustment) Act, 1944, s. 7 (1) provides: "If and so long as any mortgagee is not permitted to realise his security and does not surrender his security, the debtor shall, subject to . . . the following provisions of this sub-section, remain personally liable to pay interest and to repay the amount secured by the mortgage in accordance with the instrument creating the mortgage: Provided that the court may direct in the liabilities adjustment order that (*a*) interest in respect of any period whether before or after the making of the order shall either not be payable or be reduced to such rate or amount as may be specified in the order . . . and the instrument creating the mortgage shall have effect subject to the provisions of the order."

Under the terms of a mortgage deed the debtor was to pay to the creditors monthly instalments which included principal and interest. At the date of the liabilities adjustment order, she had paid all instalments then due. The county court judge, in making the order on Oct. 31, 1946, directed that the mortgage deed should be varied by eliminating therefrom the provision for the payment of interest from Sept. 30, 1940 (when the debtor's house which was subject to the mortgage was destroyed) and by applying the total sum which the debtor had paid to the creditors since that date to the reduction of the principal due under the deed:—

HELD: the court had no power under s. 7 (3) (*a*) (as amended) to vary a mortgage deed so as to affect payments already properly made under the deed.

[FOR THE LIABILITIES (WAR-TIME ADJUSTMENT) ACT, 1941, s. 7 (3) (*a*), AS AMENDED BY s. 7 (1) OF THE ACT OF 1944, see HALSBURY'S STATUTES, Vol. 34, pp. 32, 33, and Vol. 37, p. 19].

APPEAL by the creditors, the Abbey National Building Society, from an order made by His Honour JUDGE NEAL, at Brentford County Court on Oct. 31, 1946, under the Liabilities (War-Time Adjustment) Acts, 1941 and 1944.

The debtor owned a freehold dwelling-house subject to a mortgage to the creditors under the terms of which monthly instalments of principal and interest were payable. On Sept. 30, 1940, the house was completely destroyed, but the debtor continued to pay the monthly instalments. On Aug. 26, 1946, she obtained a protection order, and on Oct. 31, 1946, the county court judge made an order varying the terms of the mortgage deed by eliminating therefrom the provision for the payment of interest as from Sept. 30, 1940, until such time as the property was re-erected, and providing that the total sum paid after Sept. 30, 1940, should be applied in reduction of the principal due under the mortgage on that date. The Court of Appeal held that s. 7 (3) (*a*) of the Act of 1941 (as amended by s. 7 (1) of the Act of 1944) did not give the court power to vary a mortgage deed in such a way as to affect payments already properly made under the deed.

McGougan for the creditors.

Aronson for the liabilities adjustment officer.

The debtor did not appear.

TUCKER, L.J.: This is an appeal by the Abbey National Building Society from an order made by His Honour JUDGE NEAL at Brentford County Court under the Liabilities (War-Time Adjustment) Acts. The debtor whose affairs were being dealt with was a Mrs. Daisy Mabel Ginger. Two reports have been made in the matter. The protection order was on Aug. 26, 1946, and in his report of Aug. 21 the adjustment officer reported that the total liabilities of the debtor were £264 2*s.* 6*d.* with assets estimated to produce £350. He stated that the debtor was aged 53 and the widow of Mr. L. C. Ginger, who had died on June 16, 1946, leaving no estate. In a subsequent report he said that the debtor's sole means now consisted of a widow's pension of 10*s.* a week, but she was in receipt of a sum of £3 10*s.* a week given her by her sons, who were in employment, but were liable for military service. In October, 1929, the debtor had purchased for £600 the freehold house No. 64 Mornington Road, Greenford, towards the purchase price of which she had obtained an advance of £565, on mortgage of the property, from the Abbey National Building Society, repayable as to principal and interest by monthly instalments of £4. These instalments were paid regularly until Sept. 30, 1940, on which date the property and part of the contents of the house were entirely destroyed. At that date the balance due under the mortgage was approximately £340. The adjustment officer said that there was some irregularity in the payments after that date, but there is no dispute that at the time the matter came before the county court judge all past payments of instalments under the mortgage had been paid—payments which were to go partly in repayment of capital and partly in payment of interest. There were other liabilities, being £9 for the hospital treatment of the deceased husband and £10 2*s.* 6*d.* for arrears of rent of a flat or house which the debtor was occupying as the result of her own residence having been destroyed by enemy action. The adjustment officer goes on to report that the debtor is at present residing at 102, Costins Lane, a requisitioned house for which she is paying 7*s.* a week inclusive, but the rent of that property was raised by the local council on Apr. 1, 1946, from 7*s.* a week to 19*s.* a week, and, as a result of the increase, she found herself indebted to the local authority for the sum of £10 2*s.* 6*d.* to which I have referred. The liabilities adjustment officer goes on to say that, in his opinion, the debtor's financial difficulties are owing to war circumstances and that she had been advised to apply to the court, which she did, to obtain a protection order. Subsequently, the adjustment officer made some further observations in a report dated Sept. 7, in which he states that the debtor has submitted a proposal for the adjustment of her liabilities in the following terms: (i) that the terms of the deed of mortgage granted her by the building society should be varied by the elimination of the interest payable by her to the said mortgagees from Sept. 30, 1940, until the date when the property is re-erected and ready for occupation; (ii) that the total sum which she had paid to the said mortgagees since Sept. 30, 1940, should be applied in the reduction of the principal due under the mortgage deed on Sept. 30, 1940. The adjustment officer in a still further report recommended that the court should act accordingly. He says that he considers the proposal reasonable and equitable

JLA

Written submission to Committee by Mr Caroli Omondi on 10.2.11

Caroli Omondi

10/2/2011

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Judicial Committee of the Privy Council

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54. It is not the natural meaning of the words "on sale." These words are, moreover, found followed by the words "is transferred "to or vested in a purchaser" and at the moment of execution of these transfers there was no purchaser. Again, the absence of any provision for repaying the stamp duty should a probable sale fall through, tells against the Crown's contention, particularly when contrasted with the provision to that effect in section 59.

I think the words "on sale" should receive their more natural construction so that section 54 applies on the occasion when a sale occurs and the transfers vest the property in a purchaser on that occasion. Neither proposition is true here if one tests the matter, as one must, at the time these transfers were executed. I find myself on this part of the case in entire agreement with Diplock L.J.

As regards the Crown's alternative claim, it is true that the word "agreement" is used in section 59 in apparent contradistinction to the word "contract," though the possibility exists that this is mere tautology. The phraseology has, however, enabled the Crown to argue, in relation to the option agreement, that the shareholders agreed to sell, although the appellants did not (in that agreement) agree to buy. I doubt if this is the right way to construe the words "agreement" in section 59—in other words, as though it includes a mere offer—for the section goes on to speak of "the purchaser" being liable to stamp duty both in the case of "property contracted or agreed to be sold." But in any event, the answer to this claim is that the option agreement was not for the sale of an equitable interest. It was simply an agreement for the acquisition of an option.

I agree that the appeal must be allowed.

This means that the Crown must repay to the appellants the sum of £8,000 odd in stamp duty which it has now held without right for the better part of seven years. Clearly some recompense ought in justice to be made to the appellants for being kept out of their money all this time: but the Crown takes the view that in the absence of statutory authority to pay interest on overpaid stamp duty it can do nothing. I agree that if there is to be legislation amending the Stamp Acts this matter ought to receive attention.

Appeal allowed.

Solicitors: *Ingledew, Brown, Bennison & Garrett; Solicitor of Inland Revenue.*

J. A. G.

[PRIVY COUNCIL.]

PORT LOUIS CORPORATION . . . . . APPELLANTS;

AND

ATTORNEY-GENERAL OF MAURITIUS . RESPONDENT.

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Mar. 1, 2, 3, 4;
Apr. 27.

ON APPEAL FROM THE SUPREME COURT OF MAURITIUS.

Mauritius—Local government—Alteration of boundaries—Notification to local authority of proposal to enlarge boundaries—Information sought by authority "before being in a position to express . . . views"—Questions as to Government policy, grants-in-aid and local administration in new areas—Further request for views of authority—Insistence by authority on information—Proclamation made in accordance with proposals—Whether sufficient "consultation" with local authority—Validity of proclamation—Local Government Ordinance, 1962 (*Ordinance No.* 16 *of* 1962), *s.* 73 (1).

Local Government—Consultation with local authority—Duty of Minister—Alteration of boundaries—Mauritius.

By section 73 (1) of the Local Government Ordinance, 1962, of Mauritius: "The Governor in Council may by Proclamation alter "the boundaries of any town, district or village, after consultation "with the local authority concerned."

In May, 1963, the Governor in Council of Mauritius had it in mind to alter the boundaries of Port Louis so that the villages surrounding Port Louis Township (which were within the Port Louis District) would be embraced within and would enlarge the area of the town of Port Louis. On May 2, 1963, the Minister of Local Government by a letter to the Town Clerk asked for the views of the local authority by May 13, sending with the letter details of the proposed alterations and a map. On May 11, eleven of the 16 elected councillors resigned, giving as their reason that they had no mandate to express any views. On June 11 six councillors were appointed by express enactment so as to ensure that there would be a quorum. By a letter of June 18, the Minister called for a reply by July 6 to his letter of May 2. On July 8 the local authority wrote to the Minister seeking information on 54 points before the authority would be in a position "to start giving to your proposal "the . . . thorough study which it calls . . . for"; many of the points asked for information as to the intentions of the Government, or as to future policy on grants-in-aid, or on various matters of local administration in the areas proposed to be included within the new boundaries. On July 10 the Minister wrote calling for the views of

* *Present*: LORD MORRIS OF BORTH-Y-GEST, LORD PEARCE AND LORD PEARSON.

[Reported by S. P. KHAMBATTA, Esq., Q.C.]

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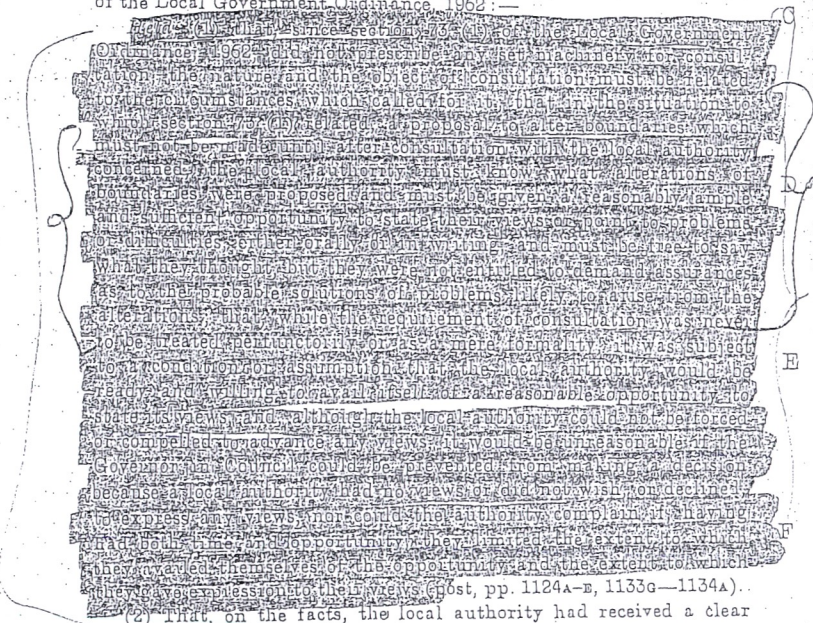
the local authority by July 18. On the following day the Minister replied to the letter of July 8, requesting the views of the authority and stating that the points raised in that letter would be considered by the Government. The authority insisted on the information asked for by its letter of July 8 "before being in a position to "express its views," but the Minister refused a further extension of time and on August 13 informed the local authority that after careful consideration the Governor in Council had decided to issue a Proclamation extending the boundaries of Port Louis. The Proclamation was issued on August 14.

The local authority claimed a declaration that the Proclamation was ultra vires and null and void in so far as it related to the extension of the boundaries of the town of Port Louis, contending that there had been no consultation as required by section 73 (1) of the Local Government Ordinance, 1962:—



(2) That, on the facts, the local authority had received a clear invitation to express their views on a clear proposal; that, it being reasonably practicable for the authority to express their views without detailed answers to their questions, they were in a position, and had time and opportunity, to do so; and that, accordingly, the Proclamation was valid (post, pp. 1131c, 1134A).

Judgment of the Supreme Court of Mauritius affirmed.

APPEAL (No. 21 of 1964) from a judgment of the Supreme Court of Mauritius (Neerunjun C.J., Rivalland and Glover JJ.) (December 9, 1963) dismissing an action in which the appellants,

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the Mayor and Corporation of Port Louis, claimed a declaration that Proclamation No. 12 of 1963 issued by the Governor in Council on August 14, 1963, was ultra vires and null and void to all intents and purposes in so far as it related to the extension of the boundaries of the town of Port Louis.

On May 2, 1963, the Ministry of Local Government wrote to the Town Clerk of the Municipality of Port Louis informing him that the Government proposed to alter the boundaries of the town of Port Louis and requested the Municipal Council to submit their views to the Minister on the Government proposal by May 13. Eleven of the sixteen municipal councillors were members of the majority party, Parti Mauricien, and resigned their membership, leaving the Municipal Council without a quorum for the transaction of business. The Mayor of Port Louis stated in evidence that his colleagues resigned because they thought they had no mandate from the electorate to decide upon the major issue involved in the proposed extension of the boundaries and that the decision to resign was arrived at before May 11. The Mayor who was also a member of the majority party remained in office as he felt it was his duty to do his best, after looking at all the facts of the question, to try and express his views on the matter. He said "Even though I have no mandate, I consider "it my civic duty as Mayor of Port Louis to study the question." On May 13, the Town Clerk informed the Ministry that he was unable to give the views of the Municipal Council as the matter could not be discussed before May 11. On June 11, the Governor, in pursuance of powers conferred upon him by section 46 of the Local Government Ordinance, 1962, as amended by the Local Government (Transitional Provisions) Ordinance, 1963, appointed six municipal councillors to fill six of the eleven vacancies, thereby, restoring the quorum of the council. On June 18, the Ministry wrote a further letter to the Municipal Council referring to the discrepancy in the letter of May 2 by the omission of two areas which it was proposed to include in the new boundaries of the town of Port Louis in accordance of the intention of the Governor to make the new boundaries of the town coincide with those of the district of Port Louis. This letter requested an expression of views by July 6. Thereupon the Town Clerk prepared a memorandum on the procedure obtaining in the United Kingdom for the alteration of local government areas and submitted it to the Mayor. On July 9, a committee of the whole council discussed the Minister's letters and, as a result, the

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Mayor on July 8 wrote to the Minister and quoted an extract from the United Kingdom Local Government Commission Regulations, 1958, which he said could help to give the Minister an idea of what was considered in the United Kingdom to be a normal and responsible approach to the important question of local government administrative areas. He listed the main points on which the Municipal Council would wish to be enlightened before being in a position to consider the proposal. The list covered 54 items on subjects connected with the administration of the township, including, inter alia, staff, town planning, housing, slum clearance, legislation, sanitation, water, planning, revenue, expenditure and grants-in-aid, rating, sale of meat, industry, education, transport, shops and restaurants, and sundry services. On July 10, the Minister wrote "So far, I have not "been favoured with such views and I shall be grateful if they "could be submitted early for consideration by the Governor-"in-Council. It will not be possible to wait later than July 18, "1963, and I accordingly request that the views of your council "be submitted by that date at latest." On July 15, the Mayor wrote "I thought my letter made it very clear—but in case it "does not I am going to repeat—that the committee of the whole "council, at its meeting of July 3, decided that, before being in "a position to express its views on the matter of the extension "of the municipal boundaries, it was essential that it should "have the information I have listed in pages 8 to 9 of my letter "TC63/982 of July 8. I am therefore looking forward to receiving "that information at your earliest convenience to convey it to the "committee." On July 19 the Minister informed the Mayor in writing that no further extension of the delay could be granted and by letter of July 29 the Mayor on behalf of the council recorded their strong objection to any action being taken by Government before the Municipal Council had expressed their views and again urged the Minister to supply the information required. On August 13 the Minister informed the Mayor that the Governor-in-Council had decided to issue a Proclamation extending the boundaries of the town of Port Louis. On August 14 the Proclamation was issued.

The Supreme Court (Neerunjun C.J., Rivalland and Glover JJ.) delivered judgment (December 9, 1963) dismissing the action brought by the appellants, the Mayor and Corporation of Port Louis, against the respondent, the Attorney-General of Mauritius, claiming a declaration that Proclamation No. 12 of 1963 issued by the Governor in Council on August 14, 1963, was ultra vires

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and null and void to all intents and purposes in so far as it related to the extension of the boundaries of the town of Port Louis.

The Supreme Court held: (1) that "consultation with the "local authority" in section 73 (1) of the Local Government Ordinance, 1962, of Mauritius must be read subject to the assumption that the authority was ready and willing to co-operate in such consultation; (2) that the Mayor and the 11 councillors belonging to the same party, had decided to evade the issue; (3) that in the circumstances the condition precedent requiring consultation with the local authority had been complied with; (4) that recourse to English procedure in order to determine how consultation should be effected involved a laborious task which the legislature had neither commanded nor envisaged; and (5) that it was for the legislature and not for the court to question the sufficiency of information on which the Governor in Council acted.

The municipality appealed.

1965. March 1, 2, 3 and 4. *André Raffray Q.C.* (Mauritius) and *David Trustram Eve* for the appellants. The Municipal Council is a wholly elected body and not partly nominated and partly elected like other local bodies in Mauritius. It has been in existence for a hundred years. The boundaries of the town of Port Louis were fixed by legislative enactment (Municipality Ordinance, 1903) and could be altered only by amending enactment. A change was made by the Municipality (Amendment) Ordinance, 1960, and after 1960 alteration of boundaries could be effected by the Governor in Council only on the recommendation of the Municipal Council, so that the initiative lay with the Municipal Council followed by a Proclamation by the Governor in Council. The final stage was the Local Government Ordinance, 1962, which was amending and consolidating legislation dealing with local authorities in Mauritius and repealing all previous legislation on local government. By section 73 (1) of that ordinance the initiative lay with the Governor in Council but only after consultation with the local authority.

The impugned proclamation (No. 12 of 1963) brings in all the outlying area of the District of Port Louis within the town of Port Louis on a scale which necessarily involves far reaching repercussions saddling the Municipal Council with all the responsibilities of the district council and the village councils of the outlying areas, whose powers and responsibilities are now to be

taken over by the Municipal Council. The impugned proclamation saddles the Municipal Council with liabilities over a wide field, such as, sanitation, lighting, roads, schools, water supply, public beaches, slaughter houses, markets, the sale of meat and food, and the like over an area of 8,000 acres as against the present area of 1,500 acres. The Municipal Council is an important body vested with considerable power and authority for the good government and management of the capital of the island. The question for the courts is not whether the Governor in Council had sufficient grounds on the merits to decide on the extension of the boundaries, that is, on the merits of the decision but whether the [illegible] Governor in Council of his executive power, namely, consultation with the local authority, had been fulfilled. The English authorities may be relied on to determine the legal approach to the question what true consultation should be. The authorities indicate that while the nature and extent of the communications between the consulting parties which are sufficient for a consultation to have taken place will vary in each case, even under the same current, sufficient information must be supplied to the local authority to enable it to tender advice and, on the other hand, sufficient opportunity must be given to the local authority to tender that advice. The statutory obligation is not fulfilled unless sufficient opportunity is given to the local authority to ask the right question and to put forward its representations in relation to the matter in hand. Sufficient information must be supplied and sufficient opportunity must be given to enable proper representations to be made and to be considered before the local authority's decision is arrived at. That is the foundation stone of the appellants' case.

Whether there must be some essential factor without which no consultation can be said to have taken place—it is not sufficient for the executive to inform the local authority of its intentions but the local authority must be given an opportunity to make representations and to tender advice—it is essential that the executive, to approach that advice with an open mind, that is, to be open to persuasion and open to appreciate the advice tendered. A consultation connotes an exchange of ideas, information and views at which each side has a full opportunity of contributing to such an exchange. It is not a one-way process but a two-way process. *Robinson* v. *Minister of Town and Country Planning* [1]; *Fletcher* v. *Minister of Town and Country Planning* [2]; *Rollo* v. *Minister of Town and Country Planning* [3]; *In re Union of Benefices of Whippingham and East Cowes.* [4]

[1] [1947] K.B. 702; 63 T.L.R. 374; [1947] 1 All E.R. 851.

[2] [1947] 2 All E.R. 496.

The questionnaire put forward by the Municipal Council was not based on a misconception of the law. Admitting that English procedure under the Local Government Commission Regulations, 1958, did not apply to the present case, it was a guide to the Municipal Council and each one of the questions of the questionnaire was essential to enlighten them before they could give their considered views. It was not meant to be and was not a substitute for the expression of their views but was to enable them to obtain sufficient information to be able to express such views. Not one of the 54 questions can be deemed irrelevant, frivolous or vexatious but they are all essential to be considered and dealt with before making submissions to the Minister on the advisability of the proposed alteration of the boundaries. The Minister proposed without any previous intimation to multiply the area administered by the Municipal Council by five and a half times, subsequently increased to over six times. Whether the Governor in Council was fully informed or not from other sources available to him of the merits of the proposal, "consultation with the local authority concerned" can in no sense be regarded as a mere formality.

The Municipal Council has to raise money by way of rates and taxes, to manage and administer new areas satisfactorily to make the Minister's scheme work and it is therefore directly and vitally concerned in the whole scheme; accordingly the consultations between the consulting parties should afford the Municipal Council every opportunity to express its approval or disapproval of the Minister's intention, though the final decision has been left by the legislature to the Minister. It is inconceivable that the Municipal Council should be expected to express its views within the time given to it, when it was faced with such a major operation imposing upon it additional burdens, commitments and liabilities. The Minister's letter of May 2, 1963, gave no reason for the urgency, no indication as to the financial effects of the proposal, or of the why and wherefor of the proposal. No reason was given by the Minister for the urgency of the reply from the Municipal Council. Apart from the correspondence, there was no communication or exchange whether verbal or written on the subject between the consulting parties.

[3] [1947] 2 All E.R. 488; (1948) 64 T.L.R. 25; [1948] 1 All E.R. 13, C.A.

[4] [1954] A.C. 245; [1954] 2 W.L.R. 804; [1954] 2 All E.R. 22, P.C.

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Regarding the interpretation to be placed on the resignation of the 11 councillors and the attitude of the Mayor and the consequences to be drawn therefrom, the letter of May 2, 1963, cannot be construed as an invitation to "consult" in any reasonable and useful sense; it stated only the area involved, and even that was not stated completely and accurately; it made no mention or reference to any consequential matters arising therefrom, and, without giving any reason for the urgency, it gave only 11 days for a considered reply. Accordingly, no "consultation" had occurred and no reasonable opportunity for "consultation" had been offered by the time that the 11 councillors resigned. Their resignation was reaction to the way they were being treated by the Minister. It may have been unwise, foolish and hasty, but it was an emotional reaction to the unsatisfactory manner of the approach of the Minister. The resignation might have had a political complexion and background and could not fairly be construed as an unambiguous and final expression of opinion regarding the merits of the proposals. The question of political background does not enter into the legal considerations of the case. The Supreme Court wrongly held that the resignation and the attitude of the Mayor could only be construed as an emphatic "no." The Governor in Council did not place such a construction either on the resignation or on the attitude of the Mayor. Nor is it so pleaded. The respondent never raised in his pleadings the plea of obstructiveness or dilatoriness on the part of the 11 councillors or of the Mayor. There was no evidence that the Municipal Council had decided to evade the issue, but only, if at all, that the individual councillors might have done so. The ordinance by which the Governor appointed six new councillors on June 11, 1963, to make a quorum was given retrospective effect and made applicable only for the year. Both sides were jockeying for political position. The Minister by his letter of June 18, referred to his previous letter of May 2, and asked the new council for a reply by July 6. The consultations were started from scratch. The council replied by their letter of July 8. Further correspondence continued right up to August 13. After putting the proposal to the new Municipal Council on June 18, the statutory obligation to fulfil the condition precedent remained to be carried out.

As no "consultation" had taken place, the Governor in Council did not acquire any right to proceed with the proposals made by the Minister. In any event, whatever "consultation" may be said to have taken place only concerned 7,088 acres and

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not 8,004 acres, which was the final proclaimed area. Such incomplete "consultation" could have no effect. The extent of any further inquiry by the Governor in Council was not within his discretion, unless and until "consultation" had taken place. It was never pleaded that the "consultation" was completed at the time of the resignation of the 11 councillors and that the subsequent inquiry was in the discretion of the Governor in Council.

David Trustram Eve followed.

J. G. Le Quesne Q.C. and *Mervyn Heald* for the respondent. It is the Governor in Council who has the responsibility of deciding the alteration of boundaries. The Local Government Ordinance, 1962, transferred the initiative in altering the boundaries of local authorities' areas from the local authority to the Governor in Council; the intention of the legislature must have been that the Governor in Council in fixing the boundaries would consider the interests of the island as a whole. The Governor in Council would have to consider local interests in the light of wider interests with which the Governor in Council would be more familiar that the local authority. The object of providing for "consultation" is not to ascertain whether the local authority thinks the alteration of boundaries ought or ought not to be made but to enable the Governor in Council to be informed of the sort of relevant matters with which the local authority is familiar and which may affect the consideration of the alteration of the boundaries. It is not possible to frame any simple test.

The information asked for by the questionnaire was not vital to the local authority to form its views. The local authority was already looking after a population of 90,000 and the proposed alteration brought in not more than another 10,000. The additional territory was rural area and did not make any great demands upon the local authority, which was perfectly familiar with the administration needed to meet the additional requirements. These are not really matters of significance to the issue of the nature of "consultation." The local authority had sufficient information available to express its views, if it wanted to. There is nothing in the evidence to suggest that the Minister was not prepared to consider seriously any opinion suggested to him. Particulars of the proposed alterations were given substantially by the letter of May 2, and precisely stated on June 18. There was a complete proposal on June 18, and the time for an answer was extended to July 18, and no more was necessary to satisfy the statutory obligation to have "consultation." In all

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the circumstances the Minister gave the local authority a fair and proper opportunity to express its views, had it wanted to do so.

The evidence establishes that over the relevant period (May 2–July 18) "consultation" had taken place. It was not necessary that the appellants should have answers to any of the questions enumerated in the questionnaire, as those questions were irrelevant and unnecessary to constitute "consultation": they might have been necessary under English procedure but not under the local procedure as required by section 73. The Minister could read the letter of July 8 as approval or disapproval, it did not matter, because the decision rested solely with the Governor in Council under section 73. The Minister was made aware of the difficulties and of the problems arising from the proposed alterations and his decision not to answer the questionnaire was reasonable: thus there had been "consultation" sufficient to meet the requirements of section 73.

Alternatively, the Governor in Council was under no obligation to do anything more than was done for "consultation" because the conduct of the local authority showed not merely that they intended to evade any expression of their views, but that they were opposed to any proposal for the extension of the boundaries of the town and that they did not intend to co-operate in any "consultation." Section 73 is based on the assumption that the local authority is willing to be consulted and willing to answer. The resignation of the 11 councillors made it impossible for the local authority to make an answer. It could never be the intention of the legislature that an obstructive local authority could frustrate the operation of section 73 by refusing to state its views. The Governor in Council had the right to issue the proclamation after the resignation of the 11 councillors and that position continued thereafter: the attempt of the Governor in Council to try again to consult the local authority was purely a matter of the exercise of his discretion and the court has no power to pronounce upon the sufficiency of the consultation. In the circumstances of the present case "consultation" had in fact taken place on two occasions; it is for the legislature and not for the court to question the sufficiency of the information on which the Governor in Council decides whether or not to act.

April 27. The judgment of their Lordships was delivered by LORD MORRIS OF BORTH-Y-GEST. This is an appeal by leave from a judgment of the Supreme Court of Mauritius (Neerunjun C.J., Rivalland and Glover JJ.) dated December 9, 1963, which dismissed with costs an action in which the appellants claimed a declaration that Proclamation No. 12 of 1963 issued by the Governor in Council on August 14, 1963, was ultra vires and null and void to all intents and purposes in so far as it related to the extension of the boundaries of the town of Port Louis.

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By section 73 (1) of the Local Government Ordinance, 1962, it is provided as follows: "(1) The Governor in Council may by "Proclamation alter the boundaries of any town, district or "village, after consultation with the local authority concerned."

The question which is raised in the appeal is whether before Proclamation No. 12 of 1963 was made there had been consultation with the appellants as required by section 73 (1).

By Proclamation No. 12 of 1963 the boundaries of certain towns (including the town of Port Louis, the capital of the Island of Mauritius) were extended. The appellants contended that there had been no consultation which satisfied the requirement of section 73 (1) and for that reason they moved for a declaration that so far as it related to the extension of the boundaries of the town of Port Louis the Proclamation (No. 12 of 1963) was ultra vires and null and void.

In Ordinance No. 23 of 1903 (The Municipality Ordinance, 1903) section 6 (1) referred to the district of Port Louis and section 6 (2) referred to the town of Port Louis, the limits of which were defined in Schedule A, No. 1. That Ordinance was amended by the Municipality (Amendment) Ordinance, 1960, Ordinance No. 10 of 1960, by which to section 6 (2) of the Municipality Ordinance, 1903, there was added a proviso to the effect that the Governor in Council might, on the recommendation of the Municipal Council, by Proclamation, amend the Schedule. Some time prior to May 11, 1960, the Municipal Council passed a resolution to the effect that the then limits of the municipal area should be extended. The extension then proposed was apparently only a minor one but apart from this their Lordships are in no way concerned with any of the events or proposals of that time. When the Local Government Ordinance, 1962 (Ordinance No. 16 of 1962), was enacted the boundaries of Port Louis were those defined by section 3 and Schedule 1. The boundaries were substantially the same as those in Schedule A of the 1903 Ordinance. The new enactment as to the alteration of existing areas was that which is contained in section 73. The Governor in Council may alter the boundaries "after consultation with the local authority

"concerned." The sole question arising in this case is whether the condition of consultation was satisfied.

In May, 1963, the Governor in Council had it in mind to alter the boundaries of Port Louis. Shortly stated the idea was to include within the boundaries of Port Louis the areas within Port Louis District: under the proposal the villages surrounding Port Louis Township (which were within the district) would be embraced within and would enlarge the area of the town of Port Louis.

On May 2, 1963, the appropriate Ministry addressed a letter to the Town Clerk of Port Louis. The letter was in the following terms:

"MLG/22 Ministry of Local Government
" and Co-operative Development,
" Port Louis.

" 2nd May, 1963.

"Sir,

"I am directed to inform you that it is proposed to alter the "existing boundaries of your town, by the addition of the follow- "ing areas as indicated on the attached map:—

"Tonnelier Island	80 acres shaded Mauve
"Roche Bois Village Council " Area	678 acres shaded Orange
"Ste. Croix Village Council " Area	1396 acres shaded Blue
"Vallee des Pretres Village " Council Area	2480 acres shaded Yellow
"Tranquebar V/Council Area ...	1400 acres shaded Green
"Part of Grand River N.W. " V/C. Area (within the dis- " trict of P/Louis)	752 acres shaded Brown
"Cassis Village Council Area ...	294 acres shaded Blue
"Fort William & Barkly Island	8 acres shaded Black
" TOTAL	7088 acres

"2. I am to ask you to let me have your views on the pro- "posed alteration by the 13th May.

" I am,
" Sir,
" Your obedient servant,
" (sd.) F. M. Lassemillante,
" Principal Assistant Secretary.

"The Town Clerk,
"Municipality,
"Port Louis."

The map which was sent clearly set out the boundaries of the district and of the villages within the district area: the villages surrounded the town of Port Louis on the land side. There were, however, two areas which the map did not show as to be included within the proposed extension. That must have appeared surprising. If not included those two areas would be isolated land areas completely contained within the proposed enlarged area. An inquiry would probably have elicited the information that the omissions were inadvertent. Such they were. At a later date the mistake was corrected. At the time, however, the letter of May 2 was a request for views on the alteration as proposed and as defined in the letter.

Subject to the relatively minor matter as to the fate of the omitted isolated pockets of land the proposal was a clear and definite one. So far as area was concerned the township would be very considerably enlarged. So far as population was concerned the increase would be no more than from about 90,000 to about 100,000. To the councillors responsible for the local government of Port Louis the nature and extent of the surrounding villages would be well known. The councillors would also have the requisite knowledge and experience of local government affairs to enable them to appreciate the nature of the changes that an extension of boundaries would involve. But the making of a decision as to whether there should be an alteration of boundaries lay with the Governor in Council and not with the Municipal Council. If the proposal raised difficulties or presented problems it was for the Governor in Council to solve them. If the Municipal Council had expressed their views or had raised such matters as they desired to raise it would then have been for the Governor in Council to consider such views and matters before deciding whether or not to proceed with the proposal.

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Section 73 (1) of the Local Government Ordinance, 1962, does not prescribe any set machinery for consultation. No formalities are laid down which must be followed. Their Lordships were referred to observations made in regard to consultation in certain decided cases (*Fletcher* v. *Minister of Town & Country Planning* [1]; *Rollo* v. *Minister of Town and Country Planning* [2]; *In re Union of Benefices of Whippingham and E. Cowes.* [3]) Helpful as the citations were, the nature and the object of consultation must be related to the circumstances which call for it. The situation to which section 73 (1) relates is clear. If there is a proposal to alter the boundaries of a town, or the boundaries of a district, or the boundaries of a village, such alteration must not be made until after consultation with the local authority concerned. It follows that the local authority must know what is proposed before they can be expected to give their views. This does not however involve that the local authority are entitled to demand assurances as to the probable form of the solutions of the problems that may be likely to arise in the event of there being an alteration of boundaries. The local authority must be told what alterations of boundaries are proposed. They must be given a reasonable opportunity to state their views. They might wish to state them in writing or they might wish to state them orally. The local authority cannot be forced or compelled to advance any views but it would be unreasonable if the Governor in Council could be prevented from making a decision because a local authority had no views or did not wish to express or declined to express any views. The requirement of consultation is never to be treated perfunctorily or as a mere formality. The local authority must know what is proposed: they must be given a reasonably ample and sufficient opportunity to express their views or to point to problems or difficulties: they must be free to say what they think.

The letter of May 2 asked for the views of the local authority by May 13. It would not have been surprising if the Municipal Council had sent a reply to the effect that they wished to have a longer period within which to express their views. Events however took a different turn. The council is a wholly elected body. There were 16 elected councillors. Eleven of them (who were all members of one political party) decided to resign and they did resign on May 11. They gave as their reason that they had no

[1] [1947] 2 All E.R. 496.
[2] [1947] 2 All E.R. 488; (1948) 64 T.L.R. 25; [1948] 1 All E.R. 13, C.A.
[3] [1954] A.C. 245; [1954] 2 W.L.R. 804; [1954] 2 All E.R. 22, P.C.

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mandate to express any views. That meant that the council could not function. There could not be a quorum unless seven were present. A situation of difficulty for the Governor in Council was therefore created. Elections to fill the vacancies could not take place until after an interval of time. Had the resignations been within six months of the day when elections would next have been held, the Governor could have made appointments so as to ensure that there would be a quorum. (See section 46 of the Local Government Ordinance, 1962.) The resignations were not within such six months' period. An Ordinance was then enacted by the Legislature of Mauritius to make special provision for the constitution of local authorities in the year 1963. That was the Local Government (Transitional Provisions) Ordinance, 1963, which was enacted on May 18, 1963. A period of eight months was substituted for six months in the provisions of section 46 in respect of the year 1963 and the Ordinance was deemed to have had effect from May 1, 1963. It became possible therefore to appoint persons to be members of the local authority and on June 11, six were so appointed. The Municipal Council was then in a position to operate.

As these were the events that happened their Lordships do not find it necessary to consider certain questions which otherwise would have been posed. Was there at that time in effect a refusal of the local authority to express any views? Was there an implied intimation of disapproval of the proposal that had been set out in the letter of May 2? Was there a situation which compelled the Governor in Council to wait until the Municipal Council could function? These questions need not be answered. As a result of making the appointments to the council the way was clear for the views of the council to be conveyed. Previously the town clerk in a letter of May 13 acknowledging the receipt of the letter of May 2 had said that he regretted "being unable to "give you the views of my council on the matter as it could not "be discussed before the eleven councillors resigned on the 11th "instant."

At a meeting of the Legislative Council on May 17 the Minister of Local Government and Co-operative Development made a statement that so far as the town of Port Louis was concerned the proposal of the Government was to make the limits coincide with those of Port Louis District.

On June 18, 1963, a further letter was addressed to the town clerk. It was in the following terms:

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"MLG/22/V.2 Ministry of Local Government
" and Co-operative Development,
" Port Louis.
" 18th June, 1963.

"Sir,

"With reference to my letter (MLG/22) of the 2nd May, "about a proposal to alter the boundaries of your town, it is "regretted that the map accompanying the letter contained a few "inaccuracies and that it was not stated that consideration was "also being given to the advisability of including Vallee Pitot and "Bell Village area within the boundaries of the town of Port "Louis. As my Minister said in the Legislative Council on the "17th May, the proposal, as far as your town is concerned, is to "make its limits coincide with those of Port Louis District. "Another map is enclosed for your information.

"2. I should be grateful if you would let me have a reply to "my above-quoted letter on or before the 6th July.

" I am,
" Sir,
" Your obedient servant,
" (sd.) F. M. Lassemillante,
" Principal Assistant Secretary.

"The Town Clerk,
"Municipality,
"Port Louis."

The Vallee Pitot and Bell Village areas were the two isolated and previously omitted land areas lying within the central part of the whole area of the district. The position at that date (June 18, 1963) was that it was made clear that the proposal set out in the letter of May 2 should have referred additionally to these two areas and that it was requested that the Municipal Council would give their views on or before July 6.

At a special meeting of the Municipal Council on June 28 the council were informed that the letter of June 18 had been received and that the question raised was to be considered by the committee of the whole council on July 3. The minutes of the meeting of that committee held on July 3 record that the mayor "drew a "parallel between the local and English laws concerning the "alteration of local government areas and enumerated the factors "which were taken into account in England to assess the

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"convenience of reviewing local government areas." The mayor read out certain notes which described the procedure in England for the alteration of local government areas and which referred to the various matters which are considered by the commissions appointed in England under the Local Government Act, 1958.

Although the Municipal Council knew that they had originally been requested to give their views by May 13 and that by the letter of June 18 their views on or before July 6 were sought, it was decided on July 3 that prior to submitting "a recommenda-"tion one way or the other" the Ministry should be approached with a view to obtaining certain information. The letter requesting information was not sent until July 8. A certain contrast is to be noted between the expectations at this date and those of an earlier date. In May, after the receipt of the letter of May 2, a meeting was convened for May 8 but it had to be postponed until May 13. That was the very day by which the views of the Municipal Council had been requested: when it was appreciated that the meeting could not be held until that day a message was sent "to inform the Minister that the meeting would be held on "the 13.5.63 and that the views of the committee would be con-"veyed as soon as possible afterwards—perhaps on the 14.5.63." The holding of that meeting was made impossible as a result of the resignations on May 11 of 11 councillors.

The letter which was written by the Mayor to the Minister on July 8 was a lengthy one. The first part contained a protest against the time limit which had been imposed on the Municipal Council. A number of instances were cited of "matters of far "greater urgency and of far less complexity" which had taken months to be dealt with by the Government "without having in "the end been given adequate and complete consideration." The next part of the letter consisted of an extract from the United Kingdom Local Government Commission Regulations, 1958, in regard to matters to which such commissions are to have regard in all areas in general. The next part of the letter listed certain "main points" on which information was sought before the Municipal Council would be in a position "to start giving to your "proposal the unbiased, comprehensive and thorough study which "it calls for." There followed some 54 points. Most of them were raised in the form of questions. Many of them asked for information as to the intentions of the Government—including its intentions as to legislation. Many asked for information as to future policy or as to future grants-in-aid. Many asked for

detailed information on a variety of matters of local administration in the areas which were proposed for inclusion within the enlarged boundary of Port Louis. There was also a question as to whether the Government intended to set up a Commission of Enquiry to ascertain the wishes of the inhabitants.

Before that long letter reached the Ministry a further letter had been sent by the Ministry. It was in these terms:

"MLG/22/V.2 Ministry of Local Government and Co-operative Development, Port Louis.

10th July, 1963.

"Sir,

"I am directed to refer to my letter of the 18th June in which "I requested the views of the Municipal Council of alterations to "the boundaries of the town of Port Louis. My request was that "those views should be submitted by the 6th July, 1963. So far, "I have not been favoured with such views and I shall be grateful "if they could be submitted early for consideration by the "Governor in Council. It will not be possible to wait later than "the 18th July, 1963, and I accordingly request that the views of "your Council be submitted by that date at latest.

I am,
Sir,
Your obedient servant,
(sd.) F. M. Lassemillante,
Principal Assistant Secretary.

"The Town Clerk,
"Municipality,
"Port Louis."

After the receipt of the long letter the Ministry wrote again. Their letter of July 11 was as follows:

"MLG/22 V.2 Ministry of Local Government and Co-operative Development, Port Louis.

11th July, 1963.

"Sir,

"I am directed to refer to your letter TC63/982 of the 8th July "concerning the proposal to alter the boundaries of the town of

"Port Louis and to inform you that it is requested that the views "of the Municipal Council on the proposed alteration of the "boundaries be submitted. In this connection, I would refer you "to my letter of even number of yesterday's date on the subject.

"2. As to the points raised in your above mentioned letter, "they will be considered by Government.

I am,
Sir,
Your obedient servant,
(sd.) F. M. Lassemillante,
Principal Assistant Secretary.

"His Worship the Mayor of Port Louis,
"Port Louis."

The Mayor wrote again to the Minister on July 15. He expressed regret that there had been no personal reply by the Minister and in the course of his letter he said:

"I thought my letter made it very clear—but in case it does "not I am going to repeat—that the committee of the whole "council, at its meeting of July the 3rd last, decided that, before "being in a position to express its views on the matter of the "extension of the municipal boundaries, it was essential that it "should have the information I have listed in pages 3 to 9 of my "letter TC63/982 of July 8th last.

"I am therefore looking forward to receiving that information "at your earliest convenience to convey it to the committee."

The Ministry sent a letter on July 19 in the following terms:

"MLG/22 V.2. Ministry of Local Government and Co-operative Development, Port Louis.

19th July, 1963.

"Dear Sir,

"I am directed to refer to your letter (TC63/1017) of the 15th "July about the proposal to alter the boundaries of the town of

" Port Louis and to inform you that it is regretted that no further " extension of time can be given.

" I am,
" Sir,
" Your obedient servant,
" (sd.) F. M. Lassemillante,
" Principal Assistant Secretary.

" His Worship the Mayor of Port Louis,
" Port Louis."

The Mayor wrote again to the Minister on July 29. The letter was as follows:

" TC68/1100 29th July, 1968.

" Dear Sir;

" *Extension of Town Boundaries*

" With reference to letter MLG/22 V.2 of the 19th instant " from your Principal Assistant Secretary on the above subject I " beg to inform you that, having been requested by the com- " mittee of the whole council to correspond with you, on the " matter, I feel it my duty to record my strong objection to any " action being taken by Government in connection with the pro- " posed extension of town limits before the Municipal Council has " expressed its views on the proposal, I therefore urge you to " supply us with the information asked for in my letter TC68/982 " of the 8th instant so that a comprehensive study of your pro- " posal can be started as early as possible.

" Yours faithfully,
" (sd.) J. Raymond Hein,
" Mayor of Port Louis.

" The Honourable
" The Minister of Local Government and Co-operative
" Development,
" Port Louis."

In the following month, by a letter dated August 13, the Ministry informed the town clerk that after careful consideration the Governor in Council had decided to issue a Proclamation extending the boundaries of Port Louis. The Proclamation was issued on August 14, 1968. The boundaries of other towns were also altered but their Lordships are only concerned with the town of Port Louis.

In their statement of claim the Mayor and Corporation as plaintiffs averred that the information requested by them in the letter of July 8 was not available to them and that such information was essential in order to enable them properly to study the proposal and to express their views on it, and that as the requested information was not imparted " no effective discussions of the " aforesaid proposals could take place or ever did take place." They further pleaded that " they were not given sufficient time " and a reasonable opportunity to express their views on the said " proposal."

Their Lordships have thought it desirable to refer somewhat fully to the sequence of events in order to give careful consideration to the claim of the plaintiffs and to the judgment of the Supreme Court. Their Lordships consider that the letter of May 2 was a clear invitation to the council to express their views upon a proposal which was itself quite clear. There is no reason to conclude that the views of the council were not genuinely sought nor that if proffered such views would not have been reasonably and fairly considered. The time within which the views were originally requested does seem to their Lordships to have been remarkably short and particularly so in the absence of stated reasons which pointed to a measure of urgency. Even, however, if this was so it does not alter the fact that the proposal itself was clearly stated and would at once be readily understood. This would be so whether the Municipal Council considered that the areas of Vallee Pitot and Bell Village were intentionally or were inadvertently omitted. It might have been unreasonable to refuse a request on the part of the Municipal Council, if it had been made, for a longer period of time within which to express their views. There was however no such request. The period available for the expression of views was tacitly prolonged. The Ministry probably considered that the resignation of the 11 councillors compelled delay. The remaining councillors knew that views had been sought by the letter of May 2 and the six new councillors probably knew (because of the statement that had been made in the Legislative Council on May 17) that a proposal for the extension of boundaries had been put forward. The new councillors were appointed on June 11. The letter from the Ministry of June 18 was a clear renewal of the request to have the views of the council. The date of July 6 mentioned in the letter was a date over two months later than the initiation of the matter by the letter of May 2.

The events in the period after June 18 call for particular consideration. As recounted above the request for information was not despatched until July 8—which was after the new date by which the views were sought. The elaborate and detailed interrogatories were stated to be presented in order to enable the Municipal Council "to start giving" study to the proposal. In all the circumstances and having in mind the fact of the resignations in the earlier period the Ministry may well have thought that the Municipal Council were employing delaying tactics in order to create difficulties. There is no reason to suppose that the Government did not genuinely consider that the Municipal Council were in a position to give their views. The Governor in Council doubtless thought that the Municipal Council had at their disposal or could themselves readily and speedily secure all necessary information to enable them to express their views. But as to all these matters their Lordships must be guided only by the facts. Their Lordships are in no way concerned to impugn or in any way to question the good intentions of any of the parties. Certain misunderstandings do, however, seem to have arisen. The Municipal Council were in effect considering that they had to work out how certain problems which could arise would be solved. Accordingly they sought to ascertain Government policies and intentions. Many of the denoted problems would, however, be in the first place and primarily the concern of the Government and not of the Municipality. The elaborate letter of July 8 did, however, constitute a helpful appreciation and valuable review of the situation. It stated problems that would or might arise. It directed attention to a variety of considerations. As to much of it the letter was in effect saying that certain matters should be considered before a decision was reached and that if a decision to extend was reached those or other or additional matters would later have to be further considered. The letter was a useful statement of the view of the council that attention should be directed to various topics.

When asked for their views the Municipal Council might have expressed their approval of the plan and given their reasons: they might have expressed disapproval of the plan and given their reasons: they might have recorded that if the plan was adopted certain problems would arise or that in such event the enlarged municipality would require assistance, financial or otherwise, in certain ways. They were not, however, either required or expected to formulate detailed plans for the future administration

of an enlarged area or to point the way to the future solution of all new problems that would or might arise.

The value of the letter of July 8 was recognised by the Ministry. In their letter of July 11 it was stated that the points raised would be considered by the Government. It was still open to the Municipal Council, if they so wished, to state their views in positive terms. They were again invited to give them. Had they sent some further communication it would doubtless have been carefully considered and it would have been open to the Ministry to invite elaboration or clarification of any view expressed. The difference between an ability to express a view as to a proposed extension of boundaries and an ability to express a view as to how to deal with all the problems that an extension would create must be a matter of degree, but their Lordships are unable to accept the submission that it was not reasonably practicable for the Municipal Council to express their views without having detailed answers to all the questions raised in the letter of July 8. The implications of that letter must also be considered. The Government (for reasons which must have seemed right to them) had it in mind to make a decision whether or not to enlarge the boundaries. The views of the Municipal Council were first sought by May 13 and later were sought by the much later date of July 6. The long letter, which was only sent on July 8, made answers to the questions a condition of the "start" of the council's study of the proposals. If the Government (despite its belief that the council were in a position to state its views) had sent a long letter in reply it might well have been that further questions would be asked, with the result that matters would be held up. It would not be reasonable to allow a situation to develop in which all initiative and all control of timing would pass from the Government. Nor would it be reasonable if their desire to reach the moment for decision could be frustrated. The course adopted by the Government was to acknowledge that points were raised in the letter of July 8 which the Government would consider, to request that any views of the council should be submitted, but to say that the Government could not wait beyond the further extended date of July 18. In fact a decision was not notified until August 13. In all the circumstances their Lordships are unable to accede to the submission that the Municipal Council were not in a position to express views. They could not be compelled to express views but they cannot complain if, having had both time and opportunity, they limited the extent to which they availed themselves of the opportunity and the extent to which

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they gave expression to their views. The requirement of consultation with the local authority concerned must be subject to a condition or assumption that the local authority will be ready and willing to avail itself of a reasonable opportunity to state its views. The recital of the dates and events shows that there was time and that there was opportunity. Despite the most helpful and cogent submissions of Mr. Raffray their Lordships consider that the result reached by the Supreme Court was correct.

Their Lordships will humbly advise Her Majesty that the appeal be dismissed. The appellants must pay the costs of the appeal.

Solicitors: *Slaughter & May; Charles Russell & Co.*

Applied in WESTMINSTER BANK *v.* BEVERLEY B.C. [1965] 2 All E.R. 191.

[HOUSE OF LORDS.]

H. L. (E.)*
1964
Dec. 1, 2, 3, 7, 8.
1965
Feb. 3.

MINISTER OF HOUSING AND LOCAL GOVERNMENT . . . . . APPELLANT;

AND

HARTNELL . . . . . RESPONDENT.

[ON APPEAL FROM HARTNELL *v.* MINISTER OF HOUSING AND LOCAL GOVERNMENT.]

Town Planning — Caravan site — Conditions of licence — Existing use rights — Application for site licence — Permission subject to conditions specifically limiting number of caravans on site — Whether derogating from existing rights — Meaning of "caravan site" — Dismissal by Minister of appeal against conditions — Effect of order quashing Minister's decision — Town and Country Planning Act, 1959 (7 & 8 *Eliz.* 2, *c.* 53), *s.* 31 (6) — *Caravan Sites and Control of Development Act*, 1960 (8 & 9 *Eliz.* 2, *c.* 62), *ss.* 1 (4), 17 (2).

Statute — Construction — Confiscation — Act not to be construed as taking away private rights without compensation — Planning permission — Condition imposed in derogation of existing rights.

By section 1 (4) of the Caravan Sites and Control of Development Act, 1960: "In this Part of this Act the expression 'caravan' 'site' means the land on which a caravan is stationed for the "purposes of human habitation and land which is used in conjunction with land on which a caravan is so stationed."

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* *Present:* LORD REID, LORD EVERSHED, LORD HODSON, LORD GUEST and LORD WILBERFORCE.

Distinguished in KINGSTON, LDC. v SEC. OF STATE [1974] 1 All ER 193

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By section 17 (2): "On the making of an application to which "this section applies, the local authority to whom the application "is made shall take any steps required for transmitting the application to the local planning authority and the local planning "authority may grant permission for the use of the existing site "as a caravan site under Part III of the [Town and Country "Planning Act, 1947,] as if the application for the site licence "were an application for such permission (and as if compliance "with sections 36 and 37 of the Town and Country Planning Act, "1959 (which impose requirements to be complied with before "certain applications for planning permission are entertained), "were not required)."

The applicant was the owner of a field of a total area of 4·7 acres which was divided into two sections by a temporary wire fence running from east to west. For upwards of four years before the commencement of the Act of 1960 he had stationed six caravans on the northern section, which consisted of ·78 acre, so that by 1960 he had acquired existing use rights for the stationing of residential caravans on that section. Some holiday caravans had occasionally been stationed on the southern section.

On October 28, 1960, the applicant applied to the appropriate licensing authority for a site licence for 94 caravans under Part I of the Act of 1960, claiming existing use rights for the whole field, and, pursuant to section 17 (2) of the Act, the licensing authority transmitted the application to the local planning authority (themselves, acting under delegated powers). On April 11, 1961, the planning authority issued a "permission to develop land subject to "conditions," granting permission to develop the field as a caravan site, subject, inter alia, to the following conditions: "(1) Not more "than six caravans shall be stationed on the land at any time. "(2) Caravans shall be stationed only within the area hatched in "black on the plan attached." The area hatched in black was the northern section. The applicant appealed against the conditions to the Minister of Housing and Local Government, who caused an inquiry to be held. The inspector in his report assumed that, even if the whole of the field was an existing site, that would not necessarily confer the right to increase the number of caravans, and concluded that it had not been established that there were existing use rights for more than the six residential caravans recognised by the planning authority on the northern section of the field; he recommended, on the planning merits, that the appeal be dismissed. The Minister adopted the inspector's report as regarded the two conditions and dismissed the appeal relating to them.

The applicant by motion under section 31 of the Town and Country Planning Act, 1959, asked that the Minister's decision should be reversed and the conditions set aside. Sachs J., whose decision was upheld by the Court of Appeal, quashed the Minister's decision as respected both conditions on the ground that they were ultra vires. On appeal to the House of Lords: —

Held, that the planning authority could not under section 17 of the Act of 1960 impose conditions which, though not so onerous as

CONSOLIDATED BANK OF KENYA .

Mr. David Ndegwa Wachira– Chief Executive

Mr. Joseph Njuguna -Head of Finance

Mrs. Terry Maina - Head of Human Resources

Mr. Charles Kamari - Head of Credit

Mr. Rameck Njiruh– Head of Operations

Mrs. Leah Waichungo - Head of Sales and Marketing

Mrs. Wakonyo Igeria - Company Secretary

Mr. Edward Nthuli, - Risk & Compliance Manager

Mr. Erastus Gachoya, - Business Development Manager

KENYA REVENUE AUTHORITY **the most absurd**

1. Commisssioner General; Michael Waweru -
2. Board Secretary: Mrs Ngang'a
3. ~~Senior Deputy~~ Commissioner, Investigation and Enforcement:Mr Joseph Nduati
4. ~~Deputy~~ Commissioner, ~~Investigation and Enforcement~~ Customs: Mr Namu Nguru ~~[illegible]~~
5. Deputy Commissioner, Administration: Mr Karimi
6. Deputy Commissioner Procurement: Ms Murichu.
7. 16. Commissioner for customs services: Mrs. Wambui Namu
8. Senior Deputy Commissioner (Customs): Ms Githinji. (Left) Dr. Ruth Wachira
9. Deputy Commissioner, Finance: Ms Wachira
10. Commissioner Domestic Taxes (LTO)-Mr Njiraini
11. Deputy Commissioner: Mrs Mwangi
12. Senior Deputy Commissioner, Finance: Mrs King'ori
13. Senior Assistant Commissioner, Security: Major Kariuki.
14. Senior Deputy Commissioner, Southern Region: Wagachira.
15. Commissioner of Investigation & Enforcement; Joseph Nduati

KENYA AIRPORTS AUTHORITY

MD; Stephen Gichuki

General Manager Finance; John Thumbi

General Manager Marketing & Business Development; Lucy Mbugua

General Manager Information & Communication Technology; Anthony Wachira

General Manager Security Services; Stanley Mutungi

Head of Corporate Communications / PA to the MD: Dominic Ngigi

Head of Procurement & Logistics: Allan Muturi

STATE LAW OFFICE

Solicitor General, Muchemi Wanjuki,
Deputy Solicitor General, Muthoni Kimani,
Registrar of Political Parties Lucy Ndung'u,
Deputy registrar-general, F M Ng'ang'a,
Registrar General Bernice Gachegu,

MINISTRY OF INTERNAL SECURITY & PROV. ADM
Minister, George Saitoti
Permanent secretary - Kimemia
CID Director – Ndegwa Muhoro
AP Commandant - K. Mbugua
Commissioner of Police Matthew Iteere,
GSU boss Munga Nyale
Police spokesman Eric Kiraithe
NSC - Peace and Conflict Management Mr. S.K. Maina
Government Printer: Andrew Rukaria
Senior Director Administration/Internal Security: E. Mutea

DC's 38/71 are GEMA with most concentrated in; Rift Valley (19), Eastern (8), Coast & Western (3 each)

FINANCE MINISTRY (Controls Finance, Banking, & Economy in general)
Minister – Uhuru Muigai
Permanent Secretary - Joseph Kinyua -
Pensions secretary - Anne Mugo
ERD director - Kenneth Mwangi
D/Finance secretary - Mwirichia
Controller and Auditor – General; Priscilla Njeri Komora

CENTRAL BANK OF KENYA .
---------- --------- -
Governor- Prof. Ndungu
Dep. Governor - John Gikonyo

ANNEX JLA 6

Telegrams : "COURT", NAIROBI
Telephone: Nairobi 2221221
Email : reghck@nbnet.co.ke

When replying please quote:

REPUBLIC OF KENYA

THE REGISTRAR'S CHAMBERS
HIGH COURT OF KENYA
LAW COURTS
P.O. Box 30041-00100
NAIROBI

Ref. No.15/1.

4th February, 2011.

The Clerk of the National Assembly,
Clerk's Chambers,
National Assembly,
Parliament Buildings,
P.O. Box 41842 – 00100 GPO,
NAIROBI - (**Att: Mr. C.W. Munga**).

RE: COURT RULING BY THE HON. MR. JUSTICE D.K. MUSINGA ON THE CONSTITUTIONALITY OF THE PRESIDENT'S NOMINATIONS TO THE OFFICES OF CHIEF JUSTICE, ATTORNEY GENERAL, DIRECTOR OF PUBLIC PROSECUTIONS AND CONTROLLER OF BUDGET.

I acknowledge receipt of your letter Ref: NA/DCH/JLA/2011/2 dated 4th February, 2011 on the above subject.

Attached herewith is copy of the Court Ruling by the Hon. Mr. Justice D.K. Musinga as per your request.

L.A. Achode, (Mrs.),
REGISTRAR.

Enclosure.

/mjw.

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

PETITION NUMBER 16 OF 2011

IN THE MATTER OF ARTICLES 22 AND 23 OF THE CONSTITUTION OF THE REPUBLIC OF KENYA

AND

IN THE MATTER OF ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLES 3, 10, 27, 73(1) (A), 129, 131, 156, 166, 228 OF THE CONSTITUTION OF THE REPUBLIC OF KENYA AND SECTIONS 12, 24 OF THE SIXTH SCHEDULE OF THE CONSTITUTION OF THE REPUBLIC OF KENYA

AND

IN THE MATTER OF THE NOMINATIONS FOR APPROVAL AND EVENTUAL APPOINTMENTS TO THE OFFICES OF THE CHIEF JUSTICE, THE ATTORNEY GENERAL, THE DIRECTOR OF PUBLIC PROSECUTIONS AND THE CONTROLLER OF BUDGET UNDER THE CONSTITUTION OF THE REPUBLIC OF KENYA

BETWEEN

1. CENTRE FOR RIGHTS EDUCATION AND AWARENESS (CREAW)..... 1ST PETITIONER
2. CAUCUS FOR WOMEN'S LEADERSHIP (CAUCUS) ..... 2ND PETITIONER
3. TOMORROWS CHILD INITIATIVE (TCI) ..... 3RD PETITIONER
4. WOMEN IN LAW AND DEVELOPMENT (K) ..... 4TH PETITIONER
5. DEVELOPMENT THROUGH MEDIA (DTM) ..... 5TH PETITIONER
6. COALITION OF VIOLENCE AGAINST WOMEN (COVAW) ..... 6TH PETITIONER
7. YOUNG WOMEN LEADERSHIP INSTITUTE (YWLI) .... 7TH PETITIONER
8. THE LEAGUE OF KENYA WOMEN VOTERS ..... 8TH PETITIONER

VERSUS

THE HON. ATTORNEY GENERAL ..... RESPONDENT

RULING

The petitioners are non Governmental Organizations and Associations incorporated and registered as such under the Laws of Kenya. They are also members of the Gender 10 and Gender Plus coalitions which are networks of Civil Society Organizations advancing and advocating for gender considerations in all spheres of development. They brought a petition as groups and associations acting on behalf of their members, on behalf of the women of Kenya and in the public interest.

The petitioners moved this court by way of a petition dated 2nd February, 2011 where they sought the following orders:

> "(a) **A declaration that the office of the President is an institution bound by the Constitution and that is under a duty to respect, uphold and defend the Constitution in terms of Article 2(1), 3(1), 129 and 131 of the Constitution of the Republic of Kenya.**
>
> (b) **A declaration that the nomination of only people of the male gender for approval by Parliament is gender insensitive, discriminatory against women, disrespectful of women and contrary to Articles 27, 129 and 131 of the Constitution of the Republic of Kenya and is therefore null and void.**
>
> (c) **A declaration that the nominations for purposes of**

approval and eventual appointment to the offices of the Chief Justice, Attorney General, Director of Public Prosecutions and Controller of Budget made by the Office of the President on 28.01.2011 were in violations of Articles 3, 10, 27, 129, 131 and 166 of the Constitution and Sections 12 and 24 of the Sixth Schedule of the Constitution hence are unconstitutional, null and void.

(d) A declaration that any appointments that may be made in like manner as the appointments to the office of the Chief Justice, Attorney General, Director of Public Prosecutions and Controller of Budget made by the Office of the President on 28.01.2011 would be in violation of Articles 3, 10, 27, 129, 131 and 166 of the Constitution and Sections 12 and 24 of the Sixth Schedule of the Constitution hence are unconstitutional, null and void.

(e) An order restraining any further purported approval and eventual appointment of the nominations made by the Office of the President on 28.01.2011 or any other nominations that may be made in like manner without compliance with the letter and majesty of the Constitution of the Republic of Kenya.

(f) Or that such other orders as this honourable court shall deem just."

It is important that the court highlights various contents of the petition so that the context in which the aforesaid prayers were made can be grasped. I can do no better than cite a portion of the petition as hereunder:

"THE LEGAL FOUNDATIONS OF THE PETITION.

3. The Constitution of Kenya 2010 was promulgated and came into force on 27.08.2010.

4. Article 2(1) of the Constitution of Kenya pronounces the supremacy of the Constitution and provides that the Constitution binds all State organs at both levels of government.

5. Article 2(5) of the Constitution of the Republic of Kenya provides among other things that any act or omission in contravention of the Constitution is invalid.

6. Article 3 of the Constitution of the Republic of Kenya obligates every person to respect, uphold and defend the Constitution.

7. Article 10 of the Constitution of the Republic of Kenya sets out the national values and principles of governance that bind all state officers, state organs, public officers and all persons whenever they apply or interpret the Constitution, enact, apply or interpret any law, make or implement public policy decisions.

8. Among the national values and principles of governance are, national unity, the rule of law, participation of the people, equity, inclusiveness, equality, human rights, non-discrimination, good governance, transparency and accountability.

9. Article 27 of the Constitution of the Republic of Kenya provides for equality and freedom from discrimination and in particular provides that:

(a) every person is equal before the law and has the right to equal protection and equal benefit of the law.

(b) Women and men have the right to equal treatment including the right to equal opportunities in political, economic, cultural and social spheres.

(c) The state shall not discriminate directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth.

10. Article 73 of the Constitution of the Republic of Kenya provides that authority assigned to a state officer is a public trust to be exercised in a manner that is consistent with the purposes and objects of the Constitution, demonstrates respect for the people, brings honor and dignity to the office and promotes public confidence in the integrity of the office.

11. Under Article 129 of the Constitution of the Republic of Kenya, the Executive Authority of the Republic should be exercised in accordance with the Constitution and in a manner compatible with the principle of service to the people of Kenya and for their well being and benefit.

12. Under Article 131 of the Constitution the President of the Republic of Kenya is under a duty to respect, uphold and safeguard the Constitution,

promote and enhance the unity of the nation and ensure the protection of human rights and fundamental freedoms and the rule of law.

13. Article 166 of the Constitution of the Republic of Kenya provides for the process of appointment of the Chief Justice, which is, appointment by the President in accordance with the recommendation of the Judicial Service Commission and subject to the approval of the National Assembly.

14. Article 156 of the Constitution of the Republic of Kenya provides for the appointment of the Attorney General which is nomination and appointment by the President subject to approval by the National Assembly.

15. Article 157 of the Constitution of the Republic of Kenya provides for the process of appointment of the Director of Public Prosecutions which is nomination and appointment by the President subject to approval by the National Assembly.

16. Article 228 provides for the appointment of the Controller of Budget which is nomination and appointment by the President subject to approval by the National Assembly.

17. Section 12 of the Sixth Schedule of the Constitution of the Republic of Kenya saves the persons occupying the offices of the President and

the Prime Minister immediately before the effective date (27.8.2010) in accordance with the National Accord and Reconciliation Act, 2008, until the first General Election held under the Constitution.

18. **Section 24 of the Sixth Schedule of the Constitution of the Republic of Kenya provides for the termination of the term of office for the person serving as the Chief Justice on the effective date and provides that such person shall vacate office within six months from the effective date and the successor in office shall be appointed by the President subject to the National Accord and Reconciliation Act, and after consultation with the Prime Minister and with the approval of the National Assembly.**

19. **Article 259 of the Constitution of the Republic of Kenya provides that the Constitution must be interpreted in a manner that promotes its purposes, values and principles, advances the rule of law, human rights and fundamental freedoms in the Bill of Rights, permits the development of the law and contributes to good governance."**

The petitioners complained that on 28th January, 2011 the Office of the President announced the nomination for approval and eventual appointment of persons to the offices of

the Chief Justice, Attorney General, Director of Public Prosecutions and Controller of Budget in a manner that is unconstitutional. They stated that all the persons so nominated are of the male gender. They further stated that the Office of the Prime Minister has claimed that it was not consulted before the said nominations were done. They further stated that the Judicial Service Commission has also claimed that it did not make recommendations for nomination to the Office of the Chief Justice. The petitioners further stated that the aforesaid positions were never advertised in order to give every eligible Kenyan an equal opportunity to apply for consideration. That process of nomination has generated heat, controversy and tension in a manner that threatens national unity, the petitioners added.

Together with the petition, the petitioners filed an application by way of chamber summons brought under **Articles 23 (3) (c)** of the **Constitution**, **Section 19** of the **Sixth Schedule** of the **Constitution** and **Rules 20** and **21** of the **Constitution of Kenya (Supervisory Jurisdiction and Protection of Fundamental Rights of the Individual) High**

Court Practice and Procedure Rules, 2006. They sought the following relief:

> **"That pending the hearing and determination of the substantive Constitutional petition a conservatory order be issued restraining the Respondent and any state officer or organ of State from carrying on with the process of approval and eventual appointment to the offices of Chief Justice, Attorney General, Director of Public Prosecutions and Controller of Budget on the strength of the nominations made by the Office of the President on 28.01.2011 or other nominations that may be done in disregard of the Constitutional provisions relating to gender, equity and equality, equal opportunities for all, transparency and accountability and consultations."**

The application was supported by an affidavit sworn by **Ann Wairimu Njogu,** the Executive Chairperson of the 1st petitioner. The affidavit reiterates the contents of an affidavit sworn by the same deponent in support of the petition. That affidavit amplifies the issues raised in the petition as summarized hereinabove and refers to the various provisions of the Constitution that were alleged to have been violated in making the four nominations as aforesaid. The application seeking the conservatory orders was argued this morning. The petitioners were represented by Mrs. Judy Thongori, Mrs. Alice Wahome and Mr. Ongoya. The respondent was represented by

Miss Wanjiku Mbiyu, Mr. Antony Ombwayo and Mr. Kefa Onyiso. The Party of National Unity was represented by Mr. C.N. Kihara and Dr. Stephen Njiru.

The main arguments of the petitioners in seeking the conservatory orders may be summarized as hereunder:

- **The averments in the petition and the depositions in the affidavit sworn by Ann Njogu clearly demonstrate that the petitioners have a prima *facie case* with a likelihood of success.**

- **The manner in which the four nominations were done violate the following Articles of the Constitution:**

  (i) **Article 27(3) of the Constitution that guarantees the fundamental right and freedom of women and men to equal treatment.**

  (ii) **Article 27(4) & (5) which prohibits the State and/or person from discriminating directly or indirectly against any person on any ground including sex.**

  (iii) **Article 3 that obligates every person to respect, uphold and defend the Constitution.**

  (iv) **Article 10(2) (a) that guarantees the rule of law as one of the national values and principles that bind all State officers, public officers and all persons whenever they apply or interpret the Constitution.**

  (v) **Article 10(2) (b) that guarantees equity, inclusiveness, equality and non-discrimination as national values that**

bind all State officers, public officers and all persons whenever they apply or interpret the Constitution.

(vi) **Article 10(2) (c) of the Constitution that guarantees good governance, transparency and accountability as national values and principles that bind all State officers, public officers and all persons whenever they apply or interpret the Constitution.**

- **The nomination for the appointment of the person to the office of the Chief Justice was done without involving the Judicial Service Commission contrary to the provisions of Article 166 of the Constitution. They referred to a statement that was issued by the Judicial Service Commission on 31st January, 2011. The statement was duly signed by the Chief Justice, the Attorney General and other members of the Judicial Service Commission.**

- **The Office of the Prime Minister alleged that it was not consulted before the nominations were announced. The petitioners' Counsel referred to various newspaper cuttings annexed to the petitioners' affidavit.**

In support of the argument that the nominations infringed the right to equality, the petitioners cited a decision of the Constitutional Court of South Africa, **JACQUES CHARL HOFFMANN vs. SOUTH AFRICAN AIRWAYS, CCT 17 OF 2000** where the court stated:

> **"This court has previously dealt with challenges to statutory provisions and government conduct alleged to infringe the right to equality. Its approach to such matters involves three basic enquiries: first, whether the**

provision under attack makes a differentiation that bears a rational connection to a legitimate government purpose. If the differentiation bears no such rational connection, there is a violation of Section 9(1). If it bears such a rational connection, the second enquiry arises. That enquiry is whether the differentiation amounts to unfair discrimination. If the differentiation does not amount to unfair discrimination, the enquiry ends there and there is no violation of Section 9(3). If the discrimination is found to be unfair, this will trigger the third enquiry, namely, whether it can be justified under the limitations provision. Whether the third stage, however, arises will further be dependent on whether the measure complained of is contained in a law of general application."

The petitioners urged the court to interpret the provisions of the Constitution as required under **Article 259(1)** and grant the orders sought in the application.

Miss Mbiyu for the Attorney General submitted that there is no material evidence, other than media reports, that there was no consultation between the President and the Prime Minister. In the circumstances, she stated, the court cannot determine whether there was consultation or not.

Regarding nomination of a new Chief Justice, she urged the court to apply liberal interpretation of the Constitution. Counsel stated that **Sections 23(1)** and **24(2)** of Schedule Six should be read together with the provisions of **Article 166(1).**

To that extent, she stated, the Attorney General concedes that the Judicial Service Commission was entitled to make a recommendation to the President before he nominated the new Chief Justice, in consultation with the Prime Minister, for approval by the National Assembly.

As to whether the provisions of **Article 27(3)** was violated by virtue of the four nominations aforesaid, all of them being of the male gender, counsel conceded, not without some hesitation, that indeed there was discrimination against women.

Mr. Kihara for the Party of National Unity submitted regarding appointment of the Chief Justice during this transition period, the only applicable provision of the Constitution is **Section 24(2)** of Schedule Six which states as follows:

> **"A Chief Justice shall be appointed by the President, subject to the National Accord and Reconciliation Act, and after consultation with the Prime Minister and with the approval of the National Assembly."**

Counsel further submitted that **Article 166** is of no relevance to the appointment of the Chief Justice before the first General Elections under this Constitution.

As to whether there were consultations between the President and the Prime Minister, Mr. Kihara submitted that in the absence of any affidavit sworn by the two Principals, there is no sufficient evidence for stating that there were no consultations. He said that the court should not rely on media reports on the issue. Counsel discredited the positions taken by both the Judicial Service Commission and the Commission on the Implementation of the Constitution (CIC) to the effect that the nominations were not done in accordance with the provisions of the Constitution.

Regarding the provisions of **Article 27(3)** of the Constitution, Mr. Kihara's view was that the fact that the four nominees were all men did not necessarily imply that there was discrimination without taking into consideration the full statistics of personnel in those four public offices.

Counsel urged the court no to grant the conservatory orders as sought because, given the nature of the relief sought, there is likelihood of infringement on the doctrine of separation of powers. By granting the conservatory orders the court will be stopping the National Assembly from performing

its statutory duties, counsel submitted. He however, conceded that the court has power to make an appropriate declaratory order.

I have anxiously considered the petition and the affidavit sworn in support thereof and all the submissions made by counsel. My determination of this application for conservatory orders starts with a consideration of **Article 1** of the Constitution which states as hereunder:

> **"(1) All sovereign power belongs to the people of Kenya and shall be exercised only in accordance with this Constitution.**
>
> **(2) The people may exercise the sovereign power either directly or through their democratically elected representatives.**
>
> **(3) Sovereign power under this Constitution is delegated to the following state organs, which shall perform their functions in accordance with this Constitution –**
>
> **(a) Parliament and the legislative assemblies in the county governments;**
>
> **(b) the national executive and the executive structures in the county governments; and**
>
> **(c) the Judiciary and independent tribunals."**

The supremacy of the Constitution is expressly declared by **Article 2** which states, *inter alia*, that the Constitution is the

supreme law of this Republic and binds all people and all state organs at both levels of government. Every person has an obligation to respect, uphold and defend the Constitution.

Article 10 sets out the national values and principles of governance which bind all state organs, state officers, public officers and all persons whenever any of them applies or interprets the Constitution, enacts, applies or interprets any law or makes or implements public policy decisions. Those national values and principles include:

> **"(a) patriotism, national unity, sharing and devolution of power, the rule of law, democracy and participation of the people.**
>
> **(b) human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalized;**
>
> **(c) good governance, integrity, transparency and accountability; and**
>
> **(d) sustainable development."**

In interpreting the Constitution, this court is bound by the provisions of **Section 259** which requires that the Constitution be interpreted in a manner that promotes its purposes, values and principles, advances the rule of law and the human rights and fundamental freedoms in the bill of

rights, permits the development of the law and contributes to good governance. **Article 259(3)** states that:

> **"Every provision of this Constitution shall be construed according to the doctrine of interpretation that the law is always speaking ....."**

Article 259(11) states that:

> **"If a function or power conferred on a person under this Constitution is exercisable by the person only on the advice or recommendation, with the approval or consent of, or on consultation with, another person, the function may be performed or the power exercised only on that advice, recommendation, with the approval or consent, or after that consultation, except to the extent that this Constitution provides otherwise."**

In interpreting the Constitution, the letter and the spirit of the supreme law must be respected. Various provisions of the Constitution must be read together in order to get a proper interpretation. In the Ugandan case of **TINYEFUZA vs. ATTORNEY GENARAL, CONSTITUTIONAL APPEAL NO. 1 OF 1997,** the court held as follows:

> **"The entire Constitution has be read as an integrated whole and no one particular provision destroying the other but each sustaining the other. This is the rule of harmony, rule of completeness and exhaustiveness and the rule of paramountancy of the written Constitution."**

A similar principle was enunciated by the United States Supreme Court in **SMITH DAKOTA vs. NORTH CAROLINA 192 U.S. 268 [1940]**. The court stated:

> **"It is an elementary rule of Constitutional construction that no one provision of the Constitution is to be segregated from the others and to be considered alone but that all the provisions bearing upon a particular subject are to be brought into view and to be interpreted as to effectuate the great purpose of the instrument."**

In **NDYNABO vs. ATTORNEY GENERAL [2001] 2 E.A. 485** the court held as follows:

> **"The Constitution is a living instrument, having a soul and consciousness of its own ..... it must be construed in line with the lofty purpose for which its makers framed it. ..... A timorous and unimaginative exercise of the judicial power of Constitutional interpretation leaves the Constitution a stale and sterile document."**

It is in the background of the foregoing principle of harmonization that I will interpret the various Articles of the Constitution that were cited before this court.

It is important to point out that the arguments that were advanced by counsel and that I will take into account in this ruling relate to the prayer for a conservatory order in terms of prayer 3 of the petitioner's application and not the petition. I will not therefore delve into a detailed analysis of facts and

law. At this stage, a party seeking a conservatory order only requires to demonstrate that he has a *prima facie* case with a likelihood of success and that unless the court grants the conservatory order there is real danger that he will suffer prejudice as a result of the violation or threatened violation of the Constitution.

What are the major violations of the Constitution complained of by the petitioners?

(i) That the nomination of the Chief Justice was unconstitutional.

I have already highlighted the provisions of **Article 166** of the Constitution as well as **Section 24(2)** of Schedule Six of the Constitution. Although Mr. Kihara for the **Party of National Unity** submitted that the Judicial Service Commission has no role in the nomination of a new Chief Justice before the first General Elections under the new Constitution are held, the position taken by the petitioners and the Attorney General is different. Miss Mbiyu on behalf of the Attorney General conceded that the President ought to have received recommendations from the Judicial Service

Commission before he made the aforesaid nomination. It is in the public domain that the Attorney General, who is a member of the Judicial Service Commission, signed a joint statement of the Commission to that effect. That was done just about four days ago. Under **Article 156(1)** of the Constitution, the Attorney General is the principal legal advisor to the government. The qualifications for appointment as an Attorney General, are very high, they are the same as four appointments of a Chief Justice. He is a person who is highly learned and experienced in law. The President is therefore supposed to take his advice seriously.

On the basis of the concession made by the Attorney General, who is the respondent in this petition, it must be accepted that the said nomination did not comply with the constitutional requirements of **Article 166(1) (a)** as read together with **Section 24(2)** of **Schedule Six** of the Constitution. To that extent, the petitioners have proved that the nomination was unconstitutional. The rule of harmony in interpreting the Constitution as earlier stated has to be borne in mind.

The second issue relating to the constitutionality of the nomination to the office of the Chief Justice is whether it was done after consultation between the President and the Prime Minister in accordance with the **National Accord and Reconciliation Act**. The Constitution does not define the word "**consultation**". Other than media reports that were annexed to the petitioners' affidavit, there is no other evidence relating to the consultations. What does the word "consultation" therefore mean? The **Shorter Oxford English Dictionary** defines "consult" as, *inter alia*, "**take counsel together, deliberate, confer.** "Consultation" is said to mean, *inter alia*, **"the action of consulting or taking counsel together, deliberation, conference." Websters New Universal Unabridged Dictionary** suggests that it means "**consulting, a meeting of persons to discuss, decide, or plan something**", while **'consult'**, in the relevant context means **"to ask advice of, to seek the opinion of as a guide to one's judgment".** In the **Readers Digest Universal Dictionary**, 'consult' is rendered in such context as **"to exchange views, confer,** and 'consultation' as **"the act or**

procedure of consulting, a conference at which advice is given or views are exchanged."

In the South African case of **MAQOMA vs. SEBE & ANOTHER 1987 (1) SA 483** the meaning of consultation was considered in the context of the Administrative Authorities Act 37 of 1984, which like our Constitution, does not define 'consultation'. Pickard J observed:

> **"It seems that 'consultation' in its normal sense without reference to the context in which it is used, denotes a deliberate getting together of more than one person or party ..... in a situation of conferring with each other where minds are applied to weigh and consider together the pros and cons of a matter by discussion or debate. The word "consultation" in itself does not presuppose or suggest a particular forum, procedure or duration for such discussion or debate. Nor does it imply that any particular formalities should be complied with. Nor does it draw any distinction between communications conveyed orally or in writing. What it does suggest is a communication of ideas on a reciprocal basis."**

In **AGRICULTURAL, HORTICULTURAL AND FOREST INDUSTRY TRAINING BOARD vs. AYLESBURY MUSHROOMS LTD [1972] 1 All ER 280** at 284 it was held that:

> **"The essence of consultation is the communication of a genuine invitation, extended with a receptive mind, to give advice. If the invitation is once received, it matters not that it is not accepted and no advice is proffered. Were it otherwise organizations with a right to be**

consulted could, in effect, veto the making of any order by simply failing to respond to the invitation. But without communication and the consequent opportunity of responding there can be no consultation."

From the definitions of the word '**consultation**' as hereinabove stated and from the authorities cited and from the annextures to the petitioner's affidavit, it appears to me that there was some consultation between the President and the Prime Minister. However, there was no consensus or agreement between the two principals, which I must state, is not a requirement under the provisions of **Section 24(2)** of Schedule Six of the Constitution. That notwithstanding, the values and principles stated under **Article 10** and the spirit of the National Accord and Reconciliation Act ought to have been borne in mind in making the nominations.

(ii) Violation of Article 27(3) regarding equal treatment of men and women.

To the extent that all the nominees to the offices of the Chief Justice, Attorney General, Director of Public Prosecutions and Controller of Budget were all men, the spirit of equality and freedom from discrimination was not given due

consideration. While it may be argued that in future appointments to public offices women were likely to be included as submitted by Mr. Kihara, no reasonable explanation was given by the respondent why none of the four appointees was a woman.

In view of the violations to the letter and spirit of the Constitution as shown hereinabove, even without considering other relevant provisions of the Constitution, like **Article 10,** which spells out national values and principles of governance, I am satisfied that the petitioners have demonstrated that they have a *prima facie* case with a likelihood of success.

Article 22(1) states that:

> **"Every person has the right to institute court proceedings claiming that a right or fundamental freedom in the bill of rights has been denied, violated or infringed, or is threatened."**

Under **Article 23** the High Court has jurisdiction, in accordance with **Article 165**, to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the bill of rights. In proceedings brought under **Article 22**, this court

may grant appropriate relief including a declaration of rights, an injunction, or a conservatory order.

Article 165(3) (d) grants this court jurisdiction to hear any question respecting the interpretation of this Constitution including the determination of the question whether anything said to be done under the authority of the Constitution or of any law is inconsistent with or in contravention of the Constitution.

Should this court grant the conservatory order as sought by the petitioners? The court acknowledges that the National Assembly represents the people of Kenya and **Article 95(2)** states that:

> **"The National Assembly deliberates on and resolves issues of concern to the people."**

The National Assembly must also approve the appointment of each of the four nominees to the offices of the Chief Justice, the Attorney General, Director of Public Prosecutions and Controller of Budget. The court cannot restrain the National Assembly from performing its constitutional duty. But where it is demonstrated that in giving its approval, the National

Assembly will be perpetuating an unconstitutional act, unless the Speaker of the National Assembly points out the unconstitutionality of the intended action and thus disallows the process of approval, this court is under an obligation to make an appropriate declaration and bring it to the attention of the National Assembly. The oath of office which all judges took on the 27th of August, 2010 was to the effect that they will individually:

> **"diligently serve the people and the Republic of Kenya and to impartially do justice in accordance with this Constitution as by law established, and the laws and customs of the Republic, without any fear, favour, bias, affection, ill will, prejudice, or any political, religious or other influence."**

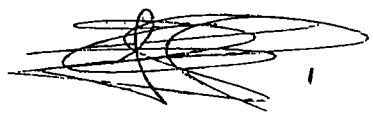
We further solemnly swore that:

> **"In the exercise of the judicial functions entrusted to me, I will at all times, and to the best of my knowledge and ability, protect, administer and defend this Constitution with a view to upholding the dignity and the respect of the Judiciary and the Judicial System of Kenya and promoting fairness, independence, competence and integrity within it."**

In light of that, this court must uphold the twin principles of constitutionalism and the rule of law in its decisions. Consequently, and in view of the court's findings regarding

constitutionality of the manner in which the aforesaid nominations were done, I make a declaration that it will be unconstitutional for any State officer or organ of the State to carry on with the process of approval and eventual appointment to the offices of the Chief Justice, Attorney General, Director of Public Prosecutions and Controller of Budget based on the nominations made by the President on 28th January, 2011. That will have to await the hearing of the petition or further orders of this court. The petitioners will have the costs of the application.

DATED, SIGNED and DELIVERED at NAIROBI this 3rd day of February, 2011.



D. MUSINGA

JUDGE

In the presence of:

Nazi – court clerk
Mr. Ongoya, Mrs. Judy Thongori, Mrs. Alice Wahome, Mrs. Judith Sijeny, Mr. Chigiti, Miss Victoria Wambua, Mr. Timothy Mwaura - for the petitioners
Miss Wanjiku Mbiyu, Mr. Ombwayo, Mr. Onyiso – for the respondent
Mr. C. Kihara and Dr. Stephen Njiru – for the Party of National Unity.

ANNEX JLA 7

05 B

COMMUNICATION FROM THE CHAIR HOUSE ON WHETHER CONSIDERATION OF NOMINEES TO CERTAIN CONSTITUTIONAL OFFICES IS SUB JUDICE

Honourable Members, On Tuesday 8th February, 2011 the Member Kisumu Town West, the Honourable John Olago Aluoch rose on a point of order to seek the direction and guidance of the Chair on what he described as an issue "galvanizing the attention, not just of the House but also of the country. Mr. Olago sought to know how the twin doctrines of sub judice and injunction apply to the proceedings in the Committees of the House dealing with the nominations to Judicial and Finance Offices by His Excellency the President.

Mr. Olago drew the attention of the Chair to and tabled a Ruling of the High Court delivered by the Honourable Justice Musinga on 3rd February, 2011 in Nairobi High Court Petition No.16 0f 2011, Centre for Rights Education and Awareness (CREAW) & Others Vs. the Attorney-General. He similarly tabled an Order extracted on 7th February, 2011 from that Ruling and a letter addressed to the Deputy Registrar of the High Court in Nairobi by the counsel for the respondent. In the letter, the counsel requests the Deputy Registrar to place the matter before the judge for directions on a hearing date for the petition and suggests 9th February, 2011 if that date is convenient to the Court.

It was the assertion of Mr. Olago that arising from the documents tabled, he had established that High Court petition No. 16 of 2011 was active. Mr. Olago claimed that at the time the Speaker delivered his Ruling on 3rd

February, 2011, referring the matter of certain constitutional nominations to Committees of the House, his attention had not been drawn to the Ruling of the High Court on the same matter and that the Speaker's attention now having been drawn it was appropriate that the Speaker determines whether or not it will be proper for the Committees to proceed to consider nominations to those offices in view of the Orders of the Court.

The Chair allowed a number of interventions on the point of order raised by Mr. Olago. The Honourable James Orengo, Minister for Lands and the Member for Imenti Central, Mr. Gitobu Imanyara urged the Speaker to find that the matter was sub judice while the the Honourable Mutula Kilonzo, Minister for Justice, National Cohesion and Constitutional Affairs, and the Honourable, Amos Kimunya, Minister for Transport were of the opposite view. The Minister for State for National Heritage, the Honourable Ntimama also spoke on the matter. He was concerned at the manner in which the relevant Committees were going about their work decrying certain statements from members of those committees indicating the pursuit of an ethnic and or partisan agenda.

Honourable members, as I was undertaking to make a ruling on the point of order raised by the Honourable Olago Aluoch, the Honourable George Nyamweya rose on another point seeking guidance on whether it was in order for a member of a committee to raise in the House an issue which he could raise in Committee and thereby leave other members of the Committee unable to respond or deal with it. I also undertook to give directions on this.

Honourable Members, aside from the point of order raised by Mr. Nyamweya, the issues I have to determine are two, namely:

a) Whether the matter of the consideration of the nominees for the positions of Chief Justice, Attorney-General, Director of Public Prosecutions and Controller of Budget is sub judice and whether therefore the House should suspend all action on it until it is finally determined by the Court;

b) What effect, if any, the Ruling of the Court and its Orders have on the proceedings of this House and its relevant Committees in the consideration of the matter of the nominees.

As Hon. Olago Aluoch pointed out in canvassing his point of order the Chair has previously, on 27th November, 2008, ruled on a matter which was almost identical to the present one. On that occasion the same Member sought a Ruling as to whether or not conservatory orders issued by the High Court in Judicial Review Petition No. 689 of 2008 (Samuel Mutua Kivuitu & 22 others –versus- The Hon. Attorney General) amounted to a derogation of the constitutional principle of separation of powers by the Judiciary. In that case, The High Court had on 11th November 2008 issued an order restraining the Government of Kenya from taking or commencing any executive or legislative action or process to disband or abolish the Electoral Commission of Kenya and/or remove its members from office, pending the hearing and determination of the application. Mr. Olago in fact asserted that that ruling of the High Court contravened section 30 of the Constitution and amounted to a subjugation of Parliament by the Judiciary.

Honourable Members, looking at the point of order raised on that occasion and the arguments made and my Ruling then, I have been struck at how amazingly identical the issues are. On that occasion as on this, my Ruling identified the issues for determination as the applicability of the rule on sub judice as well as the effect of a purported injunction on Parliament. I have read with some amusement, if not disbelief, and members may wish to re-visit the Hansard of the time and read the arguments made in support of or in opposition of the various positions advanced. The arguments are virtually the same as those made here on Tuesday, 8th February, 2011....with one major difference: that some members have advanced completely opposite arguments on the issues on this occasion from the positions they took in November, 2008! Of course, a member or indeed any other person has the right to change their minds. And it may very well be that three years is a long time.

Honourable Members, I must caution that the conduct of parliamentary business requires a respect for the procedure, traditions, practice and precedents established by the House. The Chair represents the institutional memory of the House to ensure this. The Chair therefore does not enjoy the luxury of changing positions and departing from practice and precedents unless the circumstances can be shown to be distinctly different.

Honourable Members the subject of the rule of sub judice in the context of the business of the National Assembly is one upon which the Speaker has ruled severally in recent times and is now firmly established in this House. It does not appear to me that the matter merits a lengthy discussion on this occasion because all the precedents are available both to the Members of this

House, and also to the country at large. The rule of sub judice is one which the House has imposed on itself and which is espoused in standing order number 80 (1) of our standing orders. The essence of this rule is that subject to the Speaker's discretion to allow reference to any matter before the House or a Committee of the House, it is not permitted for a Member to refer to a matter which is the subject of active criminal or civil proceedings if the discussion of such a matter is likely to prejudice its fair determination. Standing Order 80(4) makes it clear that the onus of showing that a matter is sub judice lies on the Member alleging so. Such member is required to produce evidence that paragraphs (2) and (3) of Standing Order 80 are applicable.

On the matter of sub judice in the present case therefore, the role of the Chair is to determine:

(a) whether or not there are active court proceedings,

(b) whether or not there is likelihood of prejudice to their fair determination; and

(c) whether or not if the answer to (a) and (b) is in the affirmative, the Speaker will nonetheless exercise his discretion in favour of allowing references to those matters.

If the answer to (a) or (b) is in the negative, it will not be necessary for the Speaker to exercise his discretion.

Standing order 80 (3)(c) provides inter alia that "civil proceedings shall be deemed to be active when arrangements for hearing, such as setting down a case for trial, have been made, until the proceedings are ended by judgment or discontinuance." In order to show that this provision is applicable,

Honourable Olago, as I indicated earlier tabled a letter addressed to the Deputy Registrar of the High Court in Nairobi by the counsel for the respondent requesting the Deputy Registrar to place the matter before the judge for directions on a hearing date for the petition and suggests 9th February, 2011 if that date is convenient to the Court. A request for a hearing date is clearly not the same thing as the setting down of a hearing date. It follows that as at when Mr. Olago sought to rely on the sub judice rule, a hearing date had not be set down. This requirement is important as it ensures that the House does not suspend business without proof that the matter will proceed on a known future date. For this reason, Mr. Olago did not establish that the proceedings were active. I therefore find and rule that on this score, the matter is not sub judice within the meaning of standing order no. 80(3) (c).

As I have previously ruled, the *sub judice* rule is not one to be invoked lightly. A claim of likelihood of prejudice of the fair determination of a matter is similarly not to be invoked without circumspection. I have ruled before and I reiterate that gagging this house and preventing it from discharging its constitutional mandate requires tangible reasons to be advanced. The danger of prejudice to the due administration of justice must be clearly shown. Speaker Snedden of the Australian House of Representatives held similar views when in 1976, he stated, "there is a long line of authority from the courts which indicates that the courts and judges of the courts do not regard themselves as such delicate flowers that they are likely to be prejudiced in their decisions by a debate that goes on in the House."

Honourable members, even if it had been shown, which it wasn't, that the proceedings were active within the meaning of our rules, I am not prepared to find that in the present circumstances, there was, or is, a likelihood that the debate in this House would prejudice the fair determination of the matter. The Ruling of the high Court was in fact rendered after a fairly robust debate in this House in which all the questions which the Court was to determine had been argued. Additionally, I have perused the Ruling of the Court and the Order extracted therefrom and find that I agree with the Hon. Mutula Kilonzo that there is a finality to the declaration of unconstitutionality of the nominations that leaves very little in respect of which the court or the parties can be prejudiced by the actions of this House.

Having found that the matter is not sub judice, it is almost an academic exercise to consider how I would have exercised my discretion whether or not to allow reference to the matter in the House and in the Committees if the matter had qualified as being sub judice. I do think however that it will aid the House to know that in a matter such as this, a matter that has occupied newspaper headlines and editorials, extensive television coverage and topical discussion in the streets and in places of refreshment, it would be very odd indeed and hardly in keeping with our Constitution if some rule in our standing orders could be construed as making the National Assembly the only place where the matter could not be discussed. Nor could a rule in the standing orders be construed as preventing the National Assembly from proceeding with an approval process ordained by the Constitution. It is my position that where, as in the present case, the public interest is for an open and detailed discussion of a matter, the Speaker will invoke standing order 80 (5) to overrule any objections founded on the sub judice rule.

Honourable Members on the matter of the effect of the Orders of the High Court on this House and the Committees, I again find that I addressed this matter adequately on 27th November, 2008 and again just last week, on 3rd February, 2011.

Honourable Members, Article 1 of the Constitution provides that all sovereign power belongs to the people of Kenya and shall be exercised only in accordance with the Constitution. It further provides that the people may exercise their sovereign power either directly or through their democratically elected representatives. Chapter III of the former Constitution which is preserved by the New Constitution and is still in force, enacts Parliament. Section 30 of the Constitution stipulates that the legislative power of the Republic vests in the Parliament of Kenya. Section 46 of the Constitution provides for the exercise of legislative power of Parliament. Section 56 of the Constitution provides that the National Assembly may make standing orders regulating its procedure while section 57 allows for the provision of the powers, privileges and immunities of the Assembly and its committees and members. Section 12 of the National Assembly (Powers & Privileges) Act, chapter 6 of the Laws of Kenya states as follows:

> "4. Immunity from legal proceedings
>
> No civil or criminal proceedings shall be instituted against any Member for words spoken before, or written in a report to, the Assembly or a committee, or by reason of any matter or thing brought by him therein by petition, Bill, resolution, motion or otherwise."

Section 12 of the National Assembly (Powers & Privileges) Act, states as follows:

"No proceedings or decision of the Assembly or the Committee of Privileges acting in accordance with this Act shall be questioned in any court."

Section 29 of the same Act in fact removes from the jurisdiction of the courts the acts of the Speaker and officers of the Assembly by providing that:

Neither the Speaker nor any officer of the Assembly shall be subject to the jurisdiction of any court in respect of the exercise of any power conferred on or vested in the Speaker or such officer by or under this Act or the Standing Orders.

Chapter Ten of the Constitution establishes the Judiciary and provides at Article 159 that judicial authority is derived from the people and vests in, and shall be exercised by, the courts and tribunals established by or under this Constitution. The Article requires that judicial authority be exercised in a manner that promotes and protects the purpose and principles of the Constitution.

These provisions emphasize the constitutional basis for the principle of separation of powers that is a prerequisite for a functioning democracy. The operation of the principle, as I have had occasion to hold, both separates and blends the powers so that each branch serves as a check and balance on the powers of the other. It ensures the protection of the rule of law and secures the fundamental rights of the individual. Each branch of Government must exercise its powers in a fine balancing act to ensure that it properly and effectively carries out its functions while at the same time does not infringe

on the powers and responsibilities of the other branches of Government. Thus, this House is the assembly of the people. It represents their will. It enacts laws and deliberates on and resolves issues of concern to the people. The judiciary can review the constitutionality of legislation or other actions taken by the National Assembly if challenged and can indeed declare a law or other action taken by the House to be unconstitutional and to be a nullity. In my understanding, which I have stated severally before from this Chair, what the Judiciary cannot do, under our Constitution, is to stop or prevent the National Assembly from undertaking its constitutional functions. Neither can the Judiciary compel any action to be undertaken by Parliament. The principle ensures that Parliament as the representatives of the people is not prevented from giving voice to the will of the people. An attack on this principle is an attack on the sovereignty of the people, and in my estimation a grave attack on the Constitution. No one outside Parliament, not the Executive and not the Judiciary, tells Parliament, ***in a compulsive manner***, what to do or not to do, when to do it or how to do it.

This is not new jurisprudence. Our courts are themselves well aware of the respective spheres of operation of Parliament and the Judiciary as evidenced by a number of decisions of the superior courts of this country which I have had the opportunity to read. The courts have recognized that next only to the privilege and immunity of free speech within the House, the most important privilege of the House is the right of the House to regulate its own procedure free from intervention by the Executive or the courts. The Courts recognize that this privilege of the House can visit no harm on their authority or on the administration of justice because the Courts retain the residual constitutional

judicial authority to declare any act or omission of any person to be unconstitutional.

Honourable Members for the reasons I have advanced, The orders of the High Court or of any other Court, in whatever form they may be worded must be construed to have been made with the intention to abide by the Constitution and will be so interpreted by the Speaker, for the purposes of this House. That is the essence of the oath of office of the Speaker. I therefore rule, in answer to the Honourable Olago Aluoch that the Orders of the court made in Nairobi High Court Petition No.16 0f 2011, Centre for Rights Education and Awareness (CREAW) & Others Vs. the Attorney-General on 7th February, 2011 are not addressed to this House and were not intended to, and have no effect on the exercise by this House of any of its constitutional functions. The orders, have no effect on the work of this House or it Committees and the same will proceed as I have previously directed. It must however be noted that it is a binding decision of the court and unless varied by the court or by an appellate court it may have a bearing on ***the outcome*** of the processes undertaken in this House.

Mr. Olago thought that it was an omission on the part of the Chair not to consider the effect of the Ruling of the Court after delivering his Ruling. It was not. In fact, it was a celebration of the doctrine of separation of powers that both the High Court's Ruling and that of the Speaker were made on the same day and within hours or minutes of each other, without either the learned judge of the High Court or the Speaker finding any need to wait and see what the other will rule. This is as it should be. The two institutions are

distinct and separate and have separate constitutional mandates. None is beholden to the other.

The final matter which I must address is the point of order raised by Mr. Nyamweya. In answer, to Mr. Nyamweya, I wish to advise that it is courteous and good practice which the Chair will encourage, that any matters arising in Committees be raised, handled and disposed of in the Committees. In fact, to this end standing order 78 prevents reference in the House to the substance of matters in Committees. Committees are however agents of the House and a member does not lose the right of audience in House if he or she has a matter which can properly be addressed in the House. I note that in the present case, the guidance sought by Mr. Olago was a matter applying to more than one Committee and occasioning anxiety in the broader membership of the House. I am therefore prepared to find that the action of Honourable Olago was in order but hasten to add that it should not be seen to create a precedent.

I thank you.

Hon. Kenneth Marende, E.G.H., M.P.,
Speaker of the National Assembly.
10th September, 2011.

ANNEX JLA 8

RECORD OF PROCEEDINGS OF THE DEPARTMENTAL COMMITTEE ON JUSTICE AND LEGAL AFFAIRS HELD ON WEDNESDAY, 9TH FEBRUARY, 2011, AT THE MAIN CONFERENCE HALL, COUNTY HALL, PARLIAMENT BUILDINGS

[The Hon. Ababu Namwamba – Chairman]

[The Hon. N. Baiya – Vice-Chairman]

MEMBERS PRESENT

The Hon. Abdikadir Mohamed, MP
The Hon. (Rev.) Mutava Musyimi, MP
The Hon. Sophia Noor, MP
The Hon. Olago Aluoch, MP
The Hon. G. Nyamweya, MP
The Hon. M. Odhiambo-Mabaona, MP
The Hon. Amina Abdalla, MP
The Hon. Isaac Ruto, MP
The Hon. E. Wamalwa, MP
The Hon. J. Kioni, MP

IN ATTENDANCE

KENYA NATIONAL ASSEMBLY

Mrs. Consolata Munga	-	Deputy Director, Committee Services
Ms. Wanjiru Ndindirui	-	Third Clerk Assistant
Mr. George Otieno	-	Third Clerk Assistant
Mr. Jacob Ngwele	-	Third Clerk Assistant

OFFICE OF THE PRESIDENT

Amb. F. Muthaura	-	Head of Civil Service & Secretary to the Cabinet
Prof. K. Kibwana	-	Advisor
Prof. Wanjohi	-	Advisor
Mr. K. Kihara	-	Liason Officer

Mr. Chairman: Amb. Muthaura together with your team, Prof. Kibwana, Prof. Wanjohi and Mr. Kihara, you are welcome to this session. This is the Parliamentary Committee on Justice and Legal Affairs. I will quickly introduce you to Members of this Committee before we get into the business before us.

(Mr. Chairman introduced Members of the Committee)

You are most welcome and we really are grateful that you have found the time to come to meet us at a fairly short notice. The notice inviting you here went out yesterday. So, thank you very much for finding the time.

You are of course aware that the reason we have invited you here is a matter of grave national importance. A matter that goes to the very heart of the Coalition Government; a matter that goes to the very heart of the implementation of the new Constitution. You could easily say it is a matter that even touches on the stability of this country that we all love so much. This is a matter relating to nominations for appointment to four Constitutional offices. For purposes of this Committee, our concern relates directly to three of those four appointments.

Ambassador, this matter is contained in a letter authored and signed by yourself dated the 31st day of January 2011, Ref.No.OP/CAB17/84A in which you say:-

"Following consultations with the Right hon. Amollo Raila Odinga, EGH, MP, Prime Minister of the Republic of Kenya and in accordance with the Constitutions, His Excellency the President Mwai Kibaki has made the following nominations of persons to fill the respective State offices for approval by the National Assembly:-

1. Chief Justice – Hon. Justice Alnashir Ramazanali Magan Vishram
2. Attorney-General – Prof. Githu Muigai.
3. Director of Public Prosecutions – Mr. Kioko Kilukumi.
4. Controller of Budget – Mr. William Kipkemboi Kirwa.

Accordingly, I have been directed by His Excellency the President to forward these nominations to the National Assembly. I am therefore requesting you to facilitate the consideration of the nominations by the National Assembly".

You have attached the Curriculum Vitas of all the nominees to that correspondence.

Amb. Muthaura, you are aware that following this communication another communication came to the National Assembly from the Office of the Prime Minister. That communication is dated the same day; 31st day of January 2010. It is addressed to the hon. Speaker. I will not go through that letter because of its detail which I want to believe is in your knowledge and possession. It has been signed by the Right hon. Raila Amollo Odinga himself.

Just for purposes of the record, I will invite you consider the first page of that letter and I quote:-

"On January 28th 2011 while attending the 259th meeting of the Peace and Security Council of the African Union (AU) held in Addis Ababa Ethiopia, I learnt from the media that His Excellency Mwai Kibaki, President and Commander in Chief of the Armed Forces of the Republic of Kenya had issued a press release a copy of which is attached hereto announcing the nominations of the following persons to the positions against their names:-

1. Chief Justice – Hon. Justice Almashir Ramazanali Magan Vishram
2. Attorney-General – Prof. Githu Muigai.

3. Director of Public Prosecutions – Mr. Kioko Kilukumi.
4. Controller of Budget – Mr. William Kipkemboi Kirwa.

The nominations according to the said press release were purportedly made "after consultation with the Right hon. Prime Minister of the Republic of Kenya Raila Odinga and in accordance with the Constitution". I regret to hereby confirm that I was neither consulted on these nominees nor were the nominations made jointly by the President and myself".

In the interest of time, I would like to stop there because that sufficiently speaks to the matter we will be interacting with you over. Therefore, the purpose of this meeting which relates to the contents of those two communications is to get clarification from the Office of the President through you as to this question in contention that is the question of the manner in which these nominations were made and whether these nominations were made with and after consultations and whether indeed they are in accordance with the Constitution as you say in your letter when you say, "following consultations and in accordance with the Constitution" as stated in the first paragraph of your letter which I have made reference to.

The two questions that this Committee would be grateful to get your clarifications on are:-

What in your view is consultation in light of the constitution and in light of the National Accord which, again as you are aware, is the source of this term "consultation" in our legislative lexicon?

Just for purposes of jogging our memory allow me to refer you to the National Accord and Reconciliation Act of 2008. The preamble to that Act says:-

> "Given the current situation neither side can realistically govern the country without the other. There must be real power sharing to move the country forward and begin the healing and reconciliation process. With the agreement we are stepping forward together as political leaders to overcome the current crisis and set the country on a new path. As partners in a coalition Government we commit ourselves to work together in good faith as true partners through constant consultation and willingness to compromise. This Agreement is designed to create an environment conducive to such a partnership and to build mutual trust and confidence. It is not about creating positions that reward individuals. It seeks to enable Kenya's political leaders to look beyond partisan considerations with a view to promoting the greater interest of the nation as a whole. It provides the means to implement a coherent and far reaching reform agenda to address the fundamental root causes of recurrent conflict and to create a better, more secure, more prosperous Kenya for all".

Ambassador, that briefly is what you could consider as the source of this word "consultation" in our legal purloins and specifically with regard to appointments.

Let me refer you to Article 29(2). It reads:-

"Unless this Schedule prescribes otherwise, when this Constitution requires an appointment to be made, either President, with the approval of the National Assembly, until after the first elections under this Constitution, the President shall, subject to the National Accord and Reconciliation Act, appoint a person after consultation with the Prime Minister and with the approval of the National Assembly."

Mr. Ambassador, it is in that context of the National Accord, the Constitution and your own letter which makes reference to the Constitution which provides the basis of our understanding of consultation. This Committee would be most grateful to know what you perceive to be consultation and whether, indeed, consultations did take place between the Rt. hon. Raila Amolo Odinga, the Prime Minister of the Republic and His Excellency, hon. Mwai Kibaki, the President of the Republic on the matter of these appointments. In answering the second limb of that question, the Committee would be grateful to receive any documentary evidence as proof of that consultation.

Welcome, Sir!

Amb. Muthaura: Mr. Chairman, Sir, again, I am sorry that we were not able to come at 10.00 a.m as you had requested. This is because we took a bit of time to organize our documentation, but now we are ready.

On my right is Prof. Kivutha Kibwana, who is the advisor in the Office of the President on Constitutional matters. Sometimes it is good for us to say something about these people so that they are better appreciated. Prof. Kivutha Kibwana holds a first Degree from the University of Nairobi. He also holds a Masters (LLM) on Constitutions and Public Policy from the University of London and a second LLM from Harvard University on Constitutional Law and Public Policy. He is also a PhD holder in Constitutional Law and Public Policy from George Washington University in the USA. I think you cannot get a better qualified person. These are one of the best universities globally.

On my right is Prof. Wanjohi, who is also a professor of Political Science and previously, the Vice-Chancellor of Jomo Kenyatta University.

On the far left is Mr. Kennedy Kihara, who is a Secretary in our office, responsible for liaison with Parliament and Commissions on the issues that we have to liaise with. That is the team I have.

Turning to that subject that you have called us here for, I think the first thing for us to establish is whether there were consultations between the Prime Minister and the President on this appointment. My submission is that there were serious consultations in a series of meetings, and I will present documentary evidence to show that.

In the meeting of 6th January, in the consultations between the two Principals, we had an agenda. The first agenda item is fast-tracking of appointments necessary for the

establishment of local mechanism for the trial of post-election violence suspects. What was proposed there were gazette notices for advertising the three jobs; the posts of Director of Public Prosecutions, Chief Justice and Deputy Chief Justice, which, however, was noted was to be done by the Judicial Service Commission. That was noted as a job where recruitment was to be done through the Judicial Service Commission.
The second agenda item was Advertisement of the Post of Controller of Budget. There was a gazette notice for that purpose.

The third item was Renewal of Contract for the Director-General of NSIS. I want to tell you that consultations are based on an agreed agenda. These are some of the relevant agenda items that were considered in that meeting.

At the end of the consultations, there was a decision especially relating to the appointment.

Mr. Chairman: Could you, please, favour the Committee with just details of the persons present at that meeting of 6th January, 2011, at which that agenda was considered before you go to the resolutions?

Amb. Muthaura: Mr. Chairman, Sir, in that meeting of 6th January, apart from the Prime Minister there was Caroli Omondi, Prof. Wanjohi and I.

Mr. Chairman: Who were present exactly from the Prime Minister's office?

Amb. Muthaura: Mr. Caroli Omondi and the Prime Minister.

Mr. Chairman: Proceed, please!

Amb. Muthaura: Mr. Chairman, Sir, I am going to get this document circulated. Our proposal was to have the jobs advertised. Caroli Omondi raised an issue as to why we were actually taking away powers from the Principals, because the law as it is now, limits itself to authorizing the Principals through consultations to identify and then the President submits the nominations after consultations. The law does not go beyond that. So, the power as far as the post of Chief Justice, during this transition period before the next election--- He argued very convincingly, and that was supported by our Constitutional Advisor; that the Chief Justice before the next election, all that the law required was the two Principal to identify through consultations and then the President does the nomination. The same applied to the post of Director of Public Prosecution. The Constitution as it is now, according to the specific provisions of the Schedule – and he is going to make that explanation – indicates that there was no requirement for advertisement. The Principals, through consultations, are empowered by the Constitution to identify and then submit the nomination to Parliament. The same applies to the post of Controller of Budget. It was also agreed that the nomination of the Deputy Chief Justice was to be done through the process of the Judicial Service Commission.
These are the minutes which we have here and we are going to circulate to you, so that you know exactly how we did it.

Mr. Chairman: We will have the Secretariat make copies of that for the Members as we move on to the next---

Amb. Muthaura: We have enough copies.

Mr. Chairman: You could just circulate that to the Members. Meanwhile, I will allow an interjection from hon. Musyimi.

Mr. Musyimi: Mr. Chairman, Sir, for the avoidance of the doubt, we need clarity. What position did you take regarding the Judicial Service Commision *vis-à-vis* the Chief Justice and Deputy Chief Justice? I am hearing different positions.

Amb. Muthaura: Mr. Chairman, Sir, the Chief Justice, according to the current Constitution, during this time of transition, is to be identified by the President in consultation with the Prime Minister and submit the name to Parliament for approval. So, there is no issue of the Chief Justice being recruited through the Judicial Service Commission during the transition time. That will be done after and that is very clear in law. That is the situation. But the Deputy Chief Justice has to go through the Judicial Service Commission. Perhaps, Prof. Kivutha Kibwana can elaborate on that.

Mr. Chairman: Go ahead, please, professor.

Prof. Kibwana: Mr. Chairman, Sir, as Amb. Muthaura has indicated, there was initial advice that although the law does not require advertising of some of these jobs, if the Principals so wished, they could also go through that route. So, I think it is important to emphasize again, as Amb. Muthaura has said, that in the meeting of 6th January, in which I was not present, it was actually Caroli Omondi who advised the two Principals that it was not necessary to go the route of advertising as we had earlier said that was a possibility, whatever the law did say.

In terms of the Chief Justice, I think it is very important for purposes of this Committee, to see the reasoning that we followed in terms of what is the legal position, let alone what is it that we could also recommend. We looked at Section 24(2) of the Sixth Schedule. There it says clearly that a new Chief Justice shall be appointed by the President subject to the National Accord and Reconciliation Act and after consultation with the Prime Minister, and with approval of the National Assembly. So, it was clear to us that the transitional provisions had established a procedure for appointing the Chief Justice in the interim period before the next elections. It was a procedure in which the Prime Minister has a consultative capacity and then there would be vetting by the National Assembly. It was clear to us that in the wisdom of the drafters of the Constitution, they did not include a role for the Judicial Service Commission in Section 24(2) of the Sixth Schedule. This is because if they had wanted to do so it would have been easy for a specific role of the Judicial Service Commission to be included therein. Since the drafters of the Constitution wanted the Deputy Chief Justice to be processed by the Judicial Service Commision, that is why that particular office of the Deputy was not included in Section 24(2). Again,

Section 24(3) of the Sixth Schedule clearly says that even if a second or successor Chief Justice was to be appointed before the next elections, he or she would have to be appointed still under Section 24(2) of the Sixth Schedule. If the intention of the Constitution was that the first Chief Justice after the promulgation of the Constitution was to be appointed under Section 166, there would have been no need of providing for the appointment of the Chief Justice under Section 24 of the Sixth Schedule. That transitional provision would have been excluded completely. But I think it is also important to emphasize that this argument that we were pursuing did not lead to the conclusion that Article 166 of the Constitution is not operative. This is because that article provides for the appointment of the Chief Justice when a vacancy arises after the first general elections. Also, it provides for the appointment of the Deputy Chief Justice as well as other Judges. Also, it provides for the qualifications of the Chief Justice, Deputy Chief Justice and all other Judges.

We also knew that both the President and Prime Minister had a duty to ensure that when they are consulting – and when the final nomination comes through – the nominee for the position of the Chief Justice under Section 24(2) would meet all requisite Constitutional provisions. If any were not met then, obviously, Parliament would be able to say that, that was a problem.

We also looked at Article 172 of the Constitution, because it also talks about qualifications, but that was specific to judicial officers and other staff of the Judiciary as described in Article 260. After the transition it is also very clear that both the Chief Justice and Deputy Chief Justice will be appointed in accordance with the recommendations of the Judicial Service Commission and subject to the approval of the National Assembly.

Mr. Chairman, Sir, regarding the question that you focused on in terms of consultation, this is, of course, in Article 259(11) of the Constitution. This is the Article which differentiates between advice, recommendation, approval, consent and consultation. It was clear also to us that because the Constitution is superior to all other laws, you are first of all guided by what the Constitution says in terms of what is consultation. Obviously, consultation does not mean concurrence, but it means there must be consultation. If there is no consultation, then it means that a nomination cannot come through the National Assembly. So, if the President does not consult, that nomination would not be a nomination for purposes of bringing it to the National Assembly. But, of course, another thing that the Constitution did not consider was what happens if a party does not make themselves available for consultation. That is something that the Constitution did not anticipate. So, for us, it was clear that approval or consent of the National Assembly is mandatory. Also, consultation of His Excellency the President and the Prime Minister is mandatory.

Since we are now in a Presidential system, there are offices where the President originates names of nominees and then he consults with the Prime Minister. The consultation does not mean that there is concurrence, approval or consent. This is because if that was the case, then it would have been very clear, that in terms of appointing the

Chief Justice, Attorney-General and Director of Public Prosecutions (DPP) there must be concurrence. So, the Constitution, which is the superior law of the land, did not talk about that. Now, if you look at the Section 4(2) of the National Accord and Reconciliation Act, the definition of the composition of the Coalition Government is "the persons to be appointed as Ministers and Assistant Ministers." For those people, there shall at all times reflect the relative Parliamentary strength of the respective parties and shall at all times take into account the principle of portfolio balance. The history of the National Accord in our country, of course, has been rocky. This is because in those negotiations, after it was agreed that there would be sharing of Cabinet positions on the basis of Parliamentary strength, because that is really the substantive part of the National Accord--- You have, of course, read the preamble. The preamble is realized within the substantive part of the Constitution. In the wisdom of those who were negotiating and Parliament, Parliament targeted the Cabinet positions. Of course, if you can change that through the Constitution or if you can amend the National Accord to change that, then there would be a difference. Indeed, you would not even talk about consultations. You would simply say that these positions must be shared from the Ministers up to all public positions on a 50/50 basis. Of course, even within the current negotiations and consultations, one of the difficulties that has arisen is that it is no longer even clear in terms of when political parties fragment and, therefore, you have several fragments which are also asking to be incorporated in the consultations and have positions also ascribed to them. That also has introduced---

Mr. Chairman: Professor, sorry to cut you short. Hon. Musyimi, go ahead with your interjection.

Mr. Musyimi: Mr. Chairman, Sir, I have one subsidiary question. We note that earlier on you were talking about a meeting between the Prime Minister, Mr. Omondi and yourselves. Then, you were quick to point out that Mr. Omondi did not feel that it was necessary to advertise these positions. Were the meetings at that stage adversarial or they were held in good faith? It is important for us to hear what you would say.

Secondly, the learned professor has spent quite a bit of time going into the definition of the word "consultation", but I wonder whether the advisors to the Principals and the Principals themselves also coming back to the mother law, considered the weightier matters that go beyond the definitions. I quote from Article 259. It reads:

"This Constitution shall be interpreted in a manner that promotes its purposes, values and principles, advances the rule of law and the human rights and fundamental freedoms in the Bill of Rights, permits the development of the law and contributes to good governance."

Mr. Chairman, Sir, if you go to Article 10 with regard to Purposes, Values and Principles, it says:

"National values and principles of governance in this Article bind all state organs, state officers, public officers and all persons whenever any of them:-

a. applies or interpret this Constitution;
b. enacts, applies or interprets any law or;
c. makes or implements public policy decisions;

The national values and principles of governance include; patriotism, national unity, sharing and devolution of power, rule of law, democracy and participation of the people,

human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalized, good governance, integrity, transparency and accountability and sustainable development."
We have spent a lot of time on the Floor of the House and I fear that if we are not careful going that direction, will begin to define and over-define the word "consultation." It is important, but I think if we ignore what I would call the weightier matters of the law (the provisions that I have referred to) we might, perhaps, if we are not careful, begin to lose the general drift of the purposes of the drafters of this Constitution.

Mr. Chairman: Let me add to that a little bit. You say that at this meeting of the 6th, it took one person, one Caroli Omondi to change the whole initial intention of advertising these positions, visions for which gazette notices had already been prepared. Unfortunately, the gazette notices are not annexed to these minutes. It could have been useful for the Committee to have had a view of the draft gazette notices. So, even after the Office of the President had clear intentions that these positions be advertised - and I believe, Professor was right in saying that even though there are not express requirements to advertise - but in the interest of the new dispensation, and in line with the provisions of the Constitution that hon. Musyimi had referred us to, which you should also put together with Article 27 of the Constitution, on Equality and Freedom Discrimination, which among other things entitles every person equality before the law, equality includes the full and equal enjoyments of all rights and fundamental freedoms; "The State shall not discriminate directly or indirectly against any person and really the interest of affording every Kenyan the opportunity to compete for these positions, which competition will not anyway have infringed on this Constitution." After all that intention, it took one interjection from one Caroli Omondi to change the original intent from advertising to head hunting. That is something which I would appreciate a clarification.

Secondly, Ambassador, I do not know whether there is a standard format of minutes for meetings between the President and the Prime Minister, and whether in that format, the minutes are never signed. There is never a list of person(s) attending the meeting and that the minutes never indicated details of discussion at the meeting, because then some of the details you tell us about proposal for advertisement and counter proposal against advertisement from Caroli Omondi as you have said would be details that would be obvious from these records. So, I would also be interested to know, what exactly is the form of record keeping for meetings of this nature, and whether there is a way to authenticate because this document, you have shared with us, has no signature of anybody, has no list of those present at this meeting and, therefore, raises questions as to exactly what nature of document it is.

Mr. Ruto: On a point of order, Mr. Chairman. I think we should restrict ourselves to issues of getting information and some matters can be prosecuted, while we have let the gentlemen conclude. I do not think we can go beyond seeking information that has been availed, and as to several other issues, I think we better handle them ourselves.

Amb. Muthaura: If you look at the heading of the agenda, it is a meeting between the President and the hon. Prime Minister. Quite often in these meetings we are kept--- They discuss and tell us what they have agreed. Sometimes we are in. We are facilitators. We are not really party to the meeting. The meeting was between the President and the Rt. Hon. Prime Minister. The decisions which they arrive at are announced quite often through the PPS. The details of the discussions are not there. Sometimes those details are not some of the best things that we want to have. Somebody asked whether these meetings are adversarial or are friendly. Actually, they are very warm meetings. The meetings between the President and the Prime Minister are normally warm meetings. When they deal with a problem, they deal it with it as a problem. If they cannot agree, they put it off for the next meeting or for further consultation. If they agree then they announce what they gave agreed. So, that is really the position. That is why you see the decisions are normally very specific. We do not give an account of the discussions and it is not the right way of doing minutes. Minutes are basically the decision of what has taken place. We may make a reference to the discussions. We do not go to details, and then we record the decisions. Even with the Cabinet, that is the normal way we do things.

The other point, which I did not mention, in this first meeting it was decided once the principals decided on that by law, they are empowered to identify. They are not required by law to advertise, otherwise if they are required by law, they would have advertised. But the law does not go beyond the requirement that they consult and identify. That is what the Constitution--- Anything beyond that is not provided for by law and really to try to go beyond what is by law, then that would be subject to a lot of interpretation and generality. That is why we cannot agree, because a lot of us are going beyond the law. We have to sticking to the law. If we have to manage this country in an orderly manner--- Once, you start going beyond the law, then you get a million interpretations and that puts you into very dangerous water.

So, in that meeting it was also agreed that the technical team that is comprising Caroli Omondi, PS Isahakia and myself and the Personal Secretary to the President, Prof. Wanjohi try to facilitate identifications of the persons so that, that list can be submitted to the principals for consideration and that is what we did. Then, after that we had another meeting on 27th and I think we should go to that other meeting so that --- because here is the process of consultations. At that meeting of 6th, we have been told that since we are not going the advertisement route, now try to identify the names and bring them to us for consideration. So, we had another meeting. That is a meeting of 27th January, and in the meeting of 27th January, agenda item No.5 was again constitutional affairs targeting the Office of the Chief Justice, Deputy Chief Justice, Director of Public Prosecutions, Attorney-General and Controller of Budget.

In that meeting, we the technical team, which was in the meeting comprised myself, Mohamed Isahakia, Nick Wanjohi and Caroli Omondi, although I excused myself in the meeting because there was an agenda of ICC. But I was brief after the meeting. In that meeting His Excellency the President gave a list of nominations, which had been compiled from the technical group consultations. That list is attached to document, which I am going to give you had pronounced Justice Paul Kihara, Chief Justice. Deputy Chief

Justice was proposed to be Justice Lady Justice Okwengo; although that was known to go through the JSC. Attorney-General, there as Fred Ojiambo, who is a lawyer in private practice and Kioko Kilukumi, also a lawyer in private practise was also proposed for Director of Public Prosecutions and William Kirwa was proposed as Controller of Budget. PLO Lumumba was also in that list not necessarily for appointment because he is already occupying the office, but in terms of looking at the list. That is why even the Deputy Chief Justice was there, to look at the broader equation in the judicial sector, administration of justice to find out how they spread. That is why these names were put there, but it was not supposed to be for appointment because he is already in the office.

So, in that meeting the principals agreed that, because there were issues that were raised in the discussions, the principals agreed that there was need for the technical to go and try to harmonize the differences, which had arisen; to harmonize some of the issues that had been raised, and then report back to the principals that afternoon.

It was very important, and the President emphasized that he needed to have these appointments before he left for Addis Ababa. That was on Thursday, and he was to leave for Addis Ababa on Saturday. So, we had that afternoon and the morning of Friday within which to facilitate the agreement on these appointments. So, when the technical team met after the Principals left, they actually agreed on all the other names except for the post of Chief Justice because, at that time, the President's team insisted on Justice Kariuki while the Prime Minister's team insisted on Justice Omolo.

Because we did not want to go back to the Principals with a situation which could not facilitate a solution---

Mr. Chairman: Was there any particular reason for insisting on those two? Was there any particular rationale?

Amb. Muthaura: Mr. Chairman, Sir, during the consultations, the Prime Minister had said that he preferred a foreign judge from the Common Wealth to be the Chief Justice during this period of transition, so that we can be able to overcome the ethnic prejudices during this critical time.

On his part, the President argued that after 50 years of Independence, we have in our judicial system, people with integrity; from whom we can get a person to fill the post of Chief Justice.

The Prime Minister also said that in the event that we do not opt for a person from outside, then it is good for us to get the senior-most judge from the Judiciary.

The President, on his part, had argued that he had consulted extensively and that he had identified Justice Paul Kariuki as one of the judges who can carry out the reforms in the Judiciary, and he insisted on that one.

So, the technical team said that, because we could not agree, the best thing was for us to propose a third name to see whether it could assist in resolving the differences. That is why we proposed the name of Justice Visram. What happened is that we put the names thus "Omolo/Kariuki/Visram" and reported in the afternoon to the Principals separately.

We went and told the President that we had agreed on these other appointments except on that of the Chief Justice. For the appointment of the Attorney-General, there were serious reservations during the meeting, on Ojiambo. He is a good lawyer, but it was pointed out that he had a serious weakness, because he did not have a post-graduate degree. Somebody who is to be the chief advisor of the Government and the lead counsel in the country, in terms of academic credentials, he needs to have very high credentials. So, that is an issue we were to raise with the Principals also.

So, we reported separately, and the two Principals insisted on their positions. So, I called Ishakia and told him: "Please, try to see whether the Prime Minister can be flexible and meet the President somewhere." On my part, I also asked the President to see whether he could be flexible and meet the Prime Minister somewhere. After two hours or so, I called Ishakia. That was in the evening of Thursday. I told him: "The President is insisting on Justice Kariuki, but he has said he would propose that the Prime Minister proposes an Attorney-General of his choice." This was an attempt to see whether he could break the deadlock.

Ishakia came back to me and told me that the Prime Minister was still insisting on Justice Omolo as Chief Justice. So, I conveyed this matter to the President, who said: "In that case, could you ask the Prime Minister to make sure that we are able to solve this problem by mid-day tomorrow?" That was to be Friday. It was on Thursday when we talked. That is the message I conveyed to Mr. Ishakia to convey to the Prime Minister, and I am sure he did.

So, we went to sleep and came back to the office the following morning. In the morning, I found a note in my office from Mr. Caroli Omondi, saying that the Prime Minister had left at 8.00 a.m. for Addis Ababa and that he was proposing that the discussion on the appointments be continued sometime next week. I called Ishakia and told him: "This type of message will not be received well by His Excellency the President, because of the deadline and because he wanted this decision taken before he goes to the AU Summit." The Prime Minister was still accessible via telephone. So, I asked him: "Why can they not continue with negotiations to see whether they can have an agreement?"

He told me that he was going to convey that message to the Prime Minister. I told him: "It is very important that there is an agreement", because if there was an agreement, there would not have been all these things we are talking about; constitutionality and all that. We wanted an agreement. I told him: "Try to make sure that you reach the Prime Minister and tell him that it is important that we have a way out of this deadlock. On my part, I am going to convey the same message to the President; to tell him that we have to find a way out of this deadlock."

So, I went to see the President and told him where we were, and that it was important that we had a solution. Ishakia did the same. I have no doubt to believe that he did not do the same. We were now talking about between 9.30 a.m. and 10.00 a.m.

At around noon, I went back to Ishakia and asked him whether he had gotten any feedback from the Prime Minister, and he told me that the Prime Minister did not change his position. I told him that the President had made a final offer, which was very important in terms of getting us out of the situation we were in. I told him that since the Prime Minister wanted us to get out of tribal prejudices, the President had proposed that we have Justice Visram as the Chief Justice, because he was qualified, and we have Githu Muigai as the Attorney-General. Muigai is also an eminently qualified lawyer.

I am saying this because it is very important. If you go back to why we are talking of a broader equation of the people in this system, there is always need to make sure that there is a wider representation. I told Ishakia: "It is very important that we have a reaction on this matter quickly." So, at around 12.30 p.m. Ishakia called and told me: "The Prime Minister has no problem with Githu Muigai, but he is still insisting on Justice Omolo."

Mr. Chairman, Sir, I am a diplomat. We had such negotiations even during the formation of all the other Commissions. It is not like this one is special. We try to facilitate solutions. I told Ishakia: "I will not tell the President about the reaction of the Prime Minister on this one because we are almost moving towards an agreement. I will not tell him because I do not want to prejudice the process, but I recommend that the Prime Minister conveys this message himself to the President, so that they see whether they can come to an agreement."

Ishakia came back to me and told me: "Give us the number, and the Prime Minister is going to call the President." I gave them the number. At that time, the President was in Harambee House. So, I just walked across and told him: "The Prime Minister is going to call any time now." So, I alerted even the President's Secretary to facilitate. The President waited until 3.00 p.m. There was no call. I called Ishakia again. I asked him what was happening. He told me: "The Prime Minister is going to call. He is about to call." I told him: "If he is going to call now, the President has gone to State House. So, you have to use a different number." I gave him the number so that they could talk.

The President waited up to 6.00 p.m. and then asked me what was happening. I told him: "Let me check." I asked the Comptroller of State House to call the Prime Minister himself and try to connect them, because Ishakia told me that there was a problem in connection. I asked the State House Comptroller to call the Prime Minister, so that he could facilitate connection. At that time, the Comptroller of State House called and talked to Caroli Omondi, who said that the Prime Minister was not available until after one-and-half hours, because he was engaged. That was 6.00 p.m.

At that point, the President said: "I have made my effort. I tried to compromise and address the points raised by the Prime Minister. So, go ahead and prepare a Press

Release", which we did. He said he consulted enough, and that he had fulfilled his constitutional mandate. So, that was the time we made the announcement.

What I have said is, of course, contained in a note, which is here. First of all, the agenda of the meeting is here. With it is the report which I prepared for the Vice-President and Minister for Home Affairs when he was coming to address Parliament on these consultations. All that I have said to this Committee is captured in the report I sent to the Vice-President and Minister for Home Affairs. A copy is here.

I also have the minutes and the decisions of the meeting of 27th. We have the list of the names which were being proposed and the minutes of the meeting of the technical team.

Mr. Chairman: Amb. Muthaura, as you pass them over, please, sign and date them for purposes of authenticity. Also, include the record of the meeting of the technical committee, where the initial list was first made.

Prof. Kibwana: Mr. Chairman, Sir, there is a question by hon. Mutava Musyimi, which we have not answered. Could we do that, please?

Mr. Chairman: Could you take some questions from hon. Abdikadir and hon. Millie Odhiambo-Mabona, so that you can answer them at once?

Mr. Abdikadir: Mr. Chairman, Sir, first, I would like to welcome the gentlemen; Amb. Muthaura, the two professors and Mr. Kihara. It is very nice to see my old teacher.

Amb. Muthaura, you said that the man is very well qualified in law. I can assure you that he taught me law in my first year in university, and I can attest to that fact. It is the same issue that hon. Mutava Musyimi pointed out, which I was hoping to follow up. We have dealt with the Executive either through this Committee or the other Committees for quite some time now, particularly during the formation of the Commission on Implementation of the Constitution (CIC). I know that there is the view within the Executive that Parliament might have encroached on the role of the Executive and the Executive is fairly jealous of its mandate when it comes to some of these nominations and appointments.

I know this because when we were handling the CIC, there was a proposal in the first Bill to have these positions advertised and then have a committee to be made of civil society organisations representatives. The Executive, at every level, very strongly made representations to the other Committee: "We really want to play the Executive role. Parliament should play Parliament's role. Public participation ought to be at the parliamentary level."

So, I understand, whether it is Caroli Omondi or the other members of the Executive Committee. That has been a general view on that point.

Hon. Musyimi also talked about "consultation" and dissecting the term "consultation". Again, we heard that yesterday for several hours. Even within the National Accord, there

are three different mentions of consultations. There is "consultation"; there is "extensive consultations" when it comes to appointment of Ministers; and there is "consultation and consensus in writing" when it comes to firing Ministers. So, even the National Accord has quite a number of ways attended to there.

Assuming that we move across this particular problem and move forward, we will have two years of this Executive, assuming that everything will hold, making very many such appointments and taking us forward as far as implementation of the Constitution is concerned. The National Accord talks of the two sides of the Executive "committing themselves to work together in good faith as true partners through constant consultations and willingness to compromise."

It is possible to hear from you, gentlemen, on whatever you feel we should propose to the country as the way forward, to enable the country move forward , so that we are not constantly getting back to define what "consultation" means. Are there any ideas you have in moving us forward?

Finally, in terms of women representation, I know that that was the position of both sides of the Executive on the appointment of members to the JSC. On the issue of women, was there a deliberate agenda item where representation of women was discussed as a separate item?

Mrs. Odhiambo-Mabona: Mr. Chairman, Sir, before I raise my issues, I just wanted to add on what Mr. Abdikadir has raised. In giving us the answer could he consider, because now we have an impasse between the President and the Prime Minister and in future, it is likely to come with the Judicial Service Commission (JSC) under Article 166 when we will start defining what recommendation amounts to. Could you also think through it? We have seen in the Bill that has come before Parliament the court process about recommendation and consensus. If that the information what do you speak to it given that when we came up with an Executive President, we did so on the understanding that there would be public participation, openness and democracy in the process as provided for under Article 10.

Also on the issue of gender representation, I just wanted to ask, because it looks it was an after-thought, when you are looking at the overall representation because the Constitution says that you look at the totality of regional and gender representation. Of all the key bodies that have been picked, please, let us know how many have chairs that are women and whether when the Constitution says gender it means the man.

The other question that I wanted to ask is; you have talked about Fred Ojiambo and you say that you were advised that he was not qualified, and if you look at Article 166, what is provided? You need to be clear on this because sometimes you seem to imply that Article 166 is suspended, yet on some things you refer to it. Article 166 says that one should hold a law degree from a recognized university, an advocate of the High of Kenya. Why does he not qualify? On the same issue of qualification, you have also said

that the reason that Justice Omollo was being considered was because he is the senior most Judge. What was the reason for his disqualification?

Finally, I want you to talk about the issue of advertisement. You seem to have started on the right path by advising the Principals that they need to advertise as provided for under Article 10 because you cannot look at parts of the Constitution in isolation. The Constitution must be looked at in whole. Article 10 talks about issues of openness, democratic and public participation when dealing with issues of governance. Could you, please, tell us why you departed from the good process other than Caroli's advice? What is the Government with due respect, I would want the professor to read Article 4(3) of the National Accord and Reconciliation Act which says that the composition of the Coalition Government shall at all times reflect the relative parliamentary strength. Hon. Ambassador, you are not part of the Government.

Mr. Baiya: Mr. Chairman, Sir, I wanted to point out that we have other Members waiting. We have not even taken the Office of the Prime Minister. We also have our own schedule which we had allocated time although we are running out of time. Could we restrict ourselves to questions?

Ms. A. Abdalla: Mr. Chairman, Sir, I only have two issues; whereas the presentation from the ambassador is similar and reinforces the explanation given by the Prime Minister on the 1st February, 2011 with only one variation namely that the Prime Minister's date of a meeting was 16th December, 2010. I would like the ambassador to clarify if there was another meeting or probably that was just a mistake that the meeting actually took place on 6th January, 2011 and not 16th December, 2010. The other items that you have presented have been corroborated by the Prime Minister. My question is with regard to what has happened after these nominations have been presented. It is your presentation that Mr. Carol is the one who provided the advice and I am more specific on the appointment of the Chief Justice. Considering the subsequent action by the Attorney-General through the state counsel at the court case that was ruled by Daniel Musinga, why did you, as the technical team seek advice from the official Government Chief Legal advisor? I would understand that you would not ask somebody who is losing a job to give you advice on how to fill his job but what about the one of the Chief Justice. It is my understanding that it would be your word against word on why you accepted his advice.

Mr. Olago: Mr. Chairman, Sir, I agree with Mr. Baiya that we need to be brief but let us not sacrifice probity.

Mr. Muthaura, you seem to be satisfied with the way you record proceedings of minutes and that is quite in order. You do not need to have minutes for routine Government meetings but where you have called a meeting to execute a constitutional mandate, do you not think you need to have minutes? The way I see it, if we had minutes of these meetings then probably we would not be having these meetings that we are having now. You will now have to consider if it will be necessary to be having minutes of meetings.

Towards the end of these consultations there was pressure because His Excellency was supposed to attend the African Union (AU) meeting. Suppose there was no pressure of the AU meeting, would you have considered pushing these consultations to the week after? I am saying that because it appears to me that you acting in a rush. You were desperate because of pressure. If there was pressure like that, would you not have carried out further consultations?

Lastly, I am sure you are familiar with the transitional provisions of the Constitution. I am specifically referring to Clause 24 about the appointment of the Chief Justice and the process that is initiated by His Excellency after consultations with the Prime Minister and approval of Parliament. This is a process that is mandated by the Constitution and the word used is "shall". The communication that we are dealing with is signed by yourself and not His Excellency. In your view, do you think that makes any real legal significance that the communication is signed by you and not His Excellency when the Constitution gives that mandate to him and nobody else?

Mr. Nyamweya: Mr. Chairman, Sir, what the ambassador said is actually corroborated in the answer by the Prime Minister. I just wanted to know whether you or the President have been served with any court order or proceedings relating to this matter. Have you or the President been served with any court order? Has the President or the Prime Minister received any legal opinion in respect of these court proceedings from the Attorney-General? Has any one of them instructed the Attorney-General to represent this particular position in any of these court proceedings?

Mr. Chairman: I invite Mr. Muthaura to respond. Many of the issues that the hon. Members have raised are actually inter-connected. Allow me to add that as you respond to Mrs. Odhiambo-Mabona's question on judiciary appointments, kindly also clarify whether there was any particular criteria that was informing some of these choices. When the technical committee met and identified Justice Kihara, was it based on any particular criteria. When the name of Justice Riaga Omollo comes up, I know you have mentioned that he is the most senior among all the judges, but confirm for us whether those choices were based on any logical criteria.

Finally, I want to go back to the issue that Mr. Abdikadir addressed himself to and I had mentioned it earlier. It would be very good for this country and the stability of the Coalition Government and smooth implementation of the Constitution if we had some working constitutional threshold of these consultations so that when we say "consultations" then we can quickly say that is an acceptable irreducible minimum standard consultation one that you could call a constitutional threshold. I hardly use the words and I am quoting you verbatim, "we wanted an agreement" Those are your words verbatim as you were recounting the efforts of the President to reach some kind of agreement with the Prime Minister. As you answer that question of constitutional threshold, you may want to tell us whether that reflects the thinking that consultations could reflect some kind of agreement or some level of consensus of a meeting of the minds.

Amb. Muthaura: Mr Chairman, Sir, I think I will be assisted by my colleagues here to answer some of the questions especially the details relating to constitutional requirement on some of the issues that have been raised. The professor here will assist me on the issue of public participation in this process because it is very important. I will try to give the initial response to some of these issues.

Mr. Chairman, Sir, the issue of gender is a very serious constitutional obligation to make sure that either gender is adequately represented. Gender here does not mean women. It means that either gender is represented in these state offices and the public service as a whole. There is a 30 per cent threshold requirement and we have an obligation to make sure that it happens. Here we are talking about no discrimination on gender basis as to who becomes the chair, the vice, the chief or the deputy. Women are not condemned and I am sure that is the concern of our sister there. Not only women will be considered as deputies or leaders. In this appointments, our view was that representation should be looked at in terms of institutions because these are heads of institutions. For example, in the judiciary, if you have a Chief Justice who is a man at least you need to have a deputy who is a woman or vice-versa. That is the rule that we are using. These also applies with the other institutions like the Controller of Budget. The same applies to other jobs like the Attorney-General. If you go to the Attorney-General's office women actually reign.

Mrs. Odhiambo-Mabona: On a point of order, Mr. Chairman, Sir. I want to thank the ambassador for raising the issue that he has raised. I would want him to explain because he has said that in the Attorney-General's office women are in senior positions. I can give you by name because I worked there. There is Alice Ondiek is the most senior, Dorcas Oduor and Muthoni Kimani. Are you in order to imply that when you looked all over you could only see men from outside and ignore women who are already very senior within those set ups?

Amb. Muthaura: Mr. Chairman, Sir, I note that but the issue is that people are looking at it in the specialties that we were calling to question and consensus. There was no discrimination against women but within consultations, among the people who were consulted, this is what we arrived at. It was not intended to down grade the women or their capacity.

Ms. A. Abdalla: On a point of order, Mr. Chairman, Sir. Could the ambassador explain that in the names that they were considering whether there were any women so that we know from the start that the crop that you were looking at was only male and if you could name the persons that you were considering?

Mr. Chairman: The names that the technical committee was looking at initially would be useful.

Mr. Musyimi: Mr. Chairman, Sir, the ambassador said that the considerations were institutional. The concern from this side is how come that when you look at different institutions, there was not a single lady seen to be fit to be considered for the position.

Amb. Muthaura: Mr. Chairman, Sir, that is an important consideration because we have filled several positions like the Commissioner of Revenue, the JSC and the Commission on Implementation of the Constitution. We still have many other commissions remaining.

Mr. Chairman: Mr. Muthaura, I would be happy if you responded to the direct question by Ms. A. Abdalla that from the initial list that was prepared by the technical committee. Would you share with the hon. Member whether there were any women on that initial list, so that we can know whether there was consideration at all.

Amb. Muthaura: We have two others. One of them is Justice Ang'awa and Justice Okengo.

Mr. Chairman: And they were being considered for which position?

Amb. Muthaura: They were being considered for those top jobs.

Mr. Chairman: were they in consideration for Chief Justice?

Mr. Baiya: Mr. Chairman, Sir, he has not attempted to respond to my question. As hon. Abdikadir was asking, we wanted to hear what the Office of the President says should be the way forward and how we should assist as the Committee.

Amb. Muthaura: We will do that at the end. Prof. Kibwana will go into the details of the law and then Prof. Wanjohi will go into the issue of public participation.

Mr. G. Nyamweya: Before he does that, I have a specific question which should be answered by the Secretary to the Cabinet. Has the President or the Prime Minister been served with any court orders? Has the President, the Prime Minister or the Cabinet consulted with the Attorney-General instructing him one way or another to participate in the proceedings, consent to them or pause them?

Amb. Muthaura: The Executive, definitely, had a bit of upset on those proceedings in view of the position which the Attorney-General took during the case. For that reason, things got complicated a bit. According to the Executive, the Attorney-General became partisan in that case. That brought a bit of problems. So far, we have not been served by the court. I have not seen anything.

Prof. Kibwana: I just wanted to talk about the very wide question raised by hon. Musyimi and hon. Abdikadir. What we have provided and we shall circulate the legal opinion, is what the law says in terms of positions which the Executive, like happens everywhere in the world will make nominations. Parliament, through an approval process, in which there is public participation, can question those nominations. There are also other nominations where the Public Service Commission will be involved. When there are consultations, the question is: What will you do to make sure that at all times you are careful about Articles 10, 27 and 259 and even Article 73 which has not been

mentioned. The President, as well as the Prime Minister, for those positions which they are supposed to offer nominees before Parliament, they are supposed to make sure, as they give those names, that they have followed all those articles of the Constitution. If they do not, then Parliament is supposed to tell them that they have not. As we have consistently indicated, because we knew that there is the legal position, which is clear, but from the Office of the President, it had been suggested that the offices of the DPP and the Controller of Budget could be advertised. Ambassador has said that there were even preparations of the relevant gazette notices. We have even suggested that the Judicial Service Commission could assist in the derivation of the nominations. On the meeting of 6th January, Caroli Omondi provided advice to the contrary. It was thought that, that obviously was the position of the Prime Minister and there was deferring that particular position. That is why the earlier position was abandoned. Example, for the Chief Justice, some of the reasons that we had for saying that, let there be some participation of the Judicial Service Commission, we knew that there was the question of vetting of judges. We knew that also the Chief Justice, when appointed, will be there for ten years. We knew that we wanted a robust Judiciary. There were issues that we advised despite the legal opinion which squarely mandates some of these positions to be in the preview of the President and he consults with the Prime Minister. Of course, this is not an endless consultation because one cannot do that. "Consultation", as it is in the Constitution, does not amount to concurrence. If that is required, then obviously, the law will have to be changed so that it is actually consultation and concurrence. For example, for the National Assembly, it must consent. It must approve. If it does not, the matter is dead. All these issues have been very important, in my understanding to the Office of the President.

Mr. Chairman: Prof. Kibwana, is there some working threshold or do you just do it case by case and as dictated by circumstances? Is there some threshold that guides the relations between the Office of the President and the Office of the Prime Minister on the question of consultation?

Prof. Kibwana: Just before that, there is actually the issue which falls squarely on the door of the National Assembly. If you look at Article 252 of the Constitution, it says that the Chairperson and each member of a Commission and holder of an independent office shall be identified and recommended for appointment in a manner prescribed by national legislation. When this matter was brought up, the National Assembly decided to go piecemeal like the Judicial Service Commission, but there was not perhaps thought given to this omnibus law which would have sorted out many of the issues that are arising and finally, Parliament was supposed to pass a law which lays down the procedure for approval of nominees so that one Committee does not do one thing and another Committee does another thing. Those are matters which are in the purview of the National Assembly.

Amb. Muthaura: Before I hand over the floor to my colleague, on the issue of "consultation", if we do a lot of prescriptions about consultations, we make consultations difficult, in my view. Consultations, normally for people who are working together are really consultations. You consult through the telephone, somebody going across the office and somebody asking somebody to convey the message. Consultation in the setting

of the President and the Prime Minister is a daily affair. If you structure it too much, you make it too rigid and sometimes you create more conflict. Until now, as I said, we do not even do a lot of recording of detailed minutes which they sign at the end. They approve a decision and we make it public. It is easier, but if you make it too regimented, there is always a danger that you create unnecessary areas of conflict. This is the first time this type of system is taking place.

Mr. Chairman: I understand. So, basically we do not have what you can call an established threshold? It is case by case as dictated by circumstances.

Prof. Wanjohi: Just to add to what Ambassador has said, "consultation", in many cases also refers to search for an opinion. People asking what do you think of this and that? It is an opinion being sought. That kind of consultation is the most frequent in many departments of Governments. We are always asking ourselves: What do you think of that? We consult on a daily basis. That is the usual practice of seeking an opinion in order to improve or enhance decision making. Coming to public participation and democracy, it is within the democratic practice that the institution of Parliament interrogates decision making by the Executive. That in itself, is hitched on democratic election of Members of Parliament. Therefore, one can say that the public is adequately represented through that kind of interrogation. Secondly, the openness that was created by bringing in the media into this kind of interrogation, which never used to happen was also intended to bring the public to participate in the debate in questioning and interrogation of the public officers when they have made decisions or assisted in decision making, so that the public knows that this is how this was done. As far as we have listened, then we understand. Many times is not even the question of we agree, but usually the question of we understand how the decision was made. We are satisfied that in this respect, public participation has been met and even democracy has been met in accordance with the Constitution. I know that many people would have wanted advertisements in order to apply and therefore, say that they have participated through applications. That is one way of it, but the higher the office, the more care is required in order to minimize even canvassing and many other evils. That is why even delayed announcement of the decision is also very dangerous because it brings in a lot of bad blood and so on. We are convinced that public participation has been satisfied.

Mr. Chairman: Despite the fact that Kenyans did not have an opportunity to compete for these opportunities?

Mrs. Odhiambo-Mabona: On a point of order, Mr. Chairman, Sir. Other than the issue of gender, none of my questions have been answered.

Mr. Olago: On a point of order, Mr. Chairman, Sir. There are two issues that I raised which Ambassador or anybody else has not referred to. One, if there would have been a need to hold further consultations if it was not for the pressure of Addis Ababa. Then, power under Article 24 is given to the President and he cannot delegate it. How come the nomination exercise was done by Amb. Muthaura and not the President?

Mrs. Odhiambo-Mabona: Could I, please, remind you of my questions?

Mr. Chairman: Quickly because we have ran out of time for this session. We need to bring it to a close.

Mrs. Odhiambo-Mabona: One, on Justice Omollo. You have said that he was the most senior. Please, let us have the reason why he was not considered. Two, Ojiambo. Under 166, he qualifies. Please let me know why you did not consider him. Finally, you have spoken very well. If consultations were done the way we have spoken now, we would not be in this problem.

Mr. Musyimi: Mr. Chairman, Sir, I just wonder why we did not think of a woman for Chief Justice because if there is a gender that is not ethnicized in the way they approach life, it is the ladies.

Amb. Muthaura: As to whether if the Addis Ababa meeting was not there, whether the consultations would have taken a bit longer, I tend to think that would have happened. The deadline was based on the Addis Ababa meeting. Still, these consultations were urgent because as you know, we have the constitutional deadlines, especially for the Chief Justice. So, I think Addis Ababa was a factor. The other is with regard to the procedure of communication. Until now, all the other commissions have communicated just the same way I communicated. I just communicate on behalf of the President. I normally say: I have been directed. It is not Muthaura communicating---

Mr. Olago: It is a new Kenya now Ambassador.

Amb. Muthaura: I have been directed, but if Parliament wants the President himself to communicate to the Speaker, there should be no problem. I do not think there would be any problem with that. What is in the Constitution is the minimum, but the Executive, knowing the demands on the Attorney-General, feels that this is just a minimum requirement. If you can get somebody who is much better qualified, then it is at your discretion. What you cannot have is somebody who is less qualified than a graduate and a member of the advocates of the High Court of Kenya.

Prof. Wanjohi: On Omollo, the fact that Omollo appeared as one of the three who were considered means that he was considered.

Mr. Chairman: Ambassador, as we conclude, please, benefit the Committee by telling us what President expects of us. What is his expectation of this process, so that this whole matter can be brought to a logical conclusion in a manner that moves the country forward amicably? What are the expectations of the two Principals because we have learnt from media reports that when they met, they decided that they will respect the outcome of this process? What are the expectations of the Principals of us and of this process?

Amb. Muthaura: Definitely, the President would like you to approve these names and that would push the agenda for the reform forward. This is very important.

Mr. Chairman: Thank you, Ambassador, Prof. Wanjohi and Prof. Kibwana. We are most grateful for the information you have shared with us. We hope that this certainly will lead to some amicable resolution of this matter, so that we can move on with the implementation of the Constitution and allow the country to move forward with other issues. Thank you very much. You are at liberty to take your leave.

(Amb. Muthaura, Prof. Wanjohi, Prof. Kibwana and Mr. Kihara withdrew from the Committee Room)

(Mr. Caroli Omondi (Office of the Prime Minister) and his team entered the Committee Room)

OFFICE OF THE PRIME MINISTER

Mr. Caroli Omondi	-	Chief of Staff
Mr. Mugambi Imanyara	-	Advocate and Special Advisor on Legal Affairs
Mr. Miguna Miguna	-	Permanent Secretary for Coalition Affairs

(Mr. Chairman introduced himself and Members of the Committee)

Mr. Chairman: Let me call the meeting to order! We apologize because we rushed you here. Our notice inviting you here was very short. We also apologize for keeping you. Everybody came in at the same time and that is why we are trying to expedite this process as fast as we can.

For your information, we have just been interacting with the Office of the President represented by a team led by Amb. Muthaura. Very quickly, you are well familiar with the very weighty matter touching on the Coalition Government and the smooth implementation of the Constitution. Those issues go to the heart of the stability of our country. I have in mind the nominations to the four Constitutional offices of Chief Justice, Attorney-General, Director of Public Prosecutions and Controller of Budget. This matter has raised controversy because of two communications from the Office of the President and the Office of the Prime Minister, respectively. One transmitting names of the nominees to the National Assembly and the other one from the Prime Minister indicating that those nominations did not meet the test of constitutionality including on the ground of consultation.

We have invited you, on behalf of the Prime Minister, to shed light on two crucial matters which are closely linked. One is what the Office of the Prime Minister considers to be consultation and that, in light of the National Accord and Reconciliation Act (2008) that the word "consultation" becomes a legal term in our jurisprudence. So, that is the

question we will invite you to consider in light of the National Accord and also in light of the Constitution which makes wide reference to the word.

For the record, we have brought to the Office of the President's attention the text of the National Accord including the preamble which basically summarized the situation of the country and called upon the partners in the Coalition Government to commit themselves to work together in good faith, as true partners through constant consultation and willingness to compromise. We have put that on record and I am not going to repeat it now because I have already put it on record. We have also brought to their attention provisions of the Constitution that speak to the necessity to consult including Article 29(2) of the Sixth Schedule to the Constitution, Article 24 of the same Sixth Schedule and other provisions of the Constitution that speak to good governance, public participation, the rule of law and like principles as well reflected in the Constitution. So, as you tell us what the Office of the Prime Minister considers to be consultation, bear in mind that we consider it useful to understand whether there is anything we can regard as a constitutional threshold in this business of consultation; something that you can test a process and say it meets this threshold.

The second limb of the question that we invite you to answer is whether there were consultations in the process that led to the nomination of the four persons to the four offices. In the letter from the Office of the President that I have referred to and signed by Amb. Muthaura, he says:-

"Following consultations with the Right hon. Amolo Raila Odinga, EGH, MP, Prime Minister of the Republic of Kenya and in accordance with the Constitution, His Excellency, President Mwai Kibaki has made the following nominations." Which are then listed!

So reference is made to consultation between the President and the Prime Minister and reference is also made to the Constitution. I believe, in recognition of the requirements of the Constitution with regard to consultation and other matters.

In the letter from the Prime Minister, I will just quote the little bit in the third paragraph that says:-

"I regret to hereby confirm that I was neither consulted on these nominees nor were the nominations made jointly by the President and myself."

So, in light of that information, we would also wish to benefit from yourself as to whether, indeed, there were or there were no consultations for purposes of these four nominations.

Mr. Caroli Omondi: Mr. Chairman, Sir, we received your letter last evening and communication from the Clerk's Office and so we are very happy to be here to deal with this important issue and to try and find a solution that is beneficial to this country.

You have asked us to basically deal with the two concepts of consultations; what we understand it to be within the framework of our constitutional order and then to give you

a sort of a flavor of whether there were consultations in respect of this particular matter. But I will beg your indulgence and address two other issues related to this in our presentation. One, which is in respect of the broader concerns about the Constitutionality of the nominations beyond the concept of consultations and in terms of what the Speaker set out as the ten major issues of concern. I will also try to provide some clarifications in respect of the statement made by the Vice-President sometime last week on this matter because we think there are some issues that require re-statement from our side.

Mr. Nyamweya: Mr. Chairman, Sir, I am not sure whether the Permanent Secretary, Mr. Isahakia at one stage or other will come because it seems he was involved in these things. Are we expecting him?

Mr. Chairman: No! of course, you are fully and sufficiently instructed by the Office of the Prime Minister for this.

Mr. Caroli Omondi: And I am fully involved in these matters! Your letter asked of us three things; documents, agenda and minutes of the consultations between the President and the Prime Minister on this issue, the minutes and report of the technical committee that reviewed the nominees, the legislative history, records and minutes of the meetings that led to the signing of the National Accord and Reconciliation Act.

At a personal level I am very happy to be in this Hall. I think when we were dealing with the National Accord we had a very stormy meeting here with the two principals and Dr. Kofi Annan at some point. In order of priority, I think it is important to appreciate what the National Accord; to understand what type of Government we have in Kenya today and to understand what the Constitutional order is.

I just want to draw the attention of this Committee to observations made by the Independent Review Commission (IIRC) on the last General Elections famously known as the Kriegler Report. In their Executive summary they say: "During the preparation and conduct of the 2007 elections the ECK (now disbanded) lacked the necessary independence, capacity and functionality because of weaknesses in its organizational structure, composition, and management systems. The institutional legitimacy of the ECK and public confidence in the professional credibility of its commissioners and staff have been gravely and arguably irreversibly impaired. It lacks functional efficiency and is incapable of properly discharging its mandate. There were serious defects in the voter register which impaired the integrity of the 2007elections even before polling started: It excluded nearly one-third of eligible voters, with a bias against women and young people and it included the names of some 1.2 million dead people. There was generalized abuse of polling, characterized by widespread bribery, vote buying, intimidation and ballot-stuffing. This was followed by grossly defective data collation, transmission and tallying, and ultimately the electoral process failed for lack of adequate planning, staffs election/training, public relations and dispute resolution. The integrity of the process and the credibility of the results were so gravely impaired by these manifold irregularities and defects that it is irrelevant whether or not there was actual rigging at the national tally centre. The results are irretrievably polluted."

They go further on page 136 which I quote verbatim:

"IREC's analysis of tallying etc. in nineteen sample constituencies demonstrates convincingly that there are so many more or less erroneous constituency results. The second reason one should not conduct any statistical analysis of results from these elections is that the official ECK election results (published on the website and elsewhere) have not been cleaned of mistakes of a purely arithmetical nature." Then it goes further to say: The deplorable conclusion is thus that ECK turnout data and election results for individual candidates are so error-infected that they should not be used for any kind of statistical analysis. IREC's analysis has led it to the irrefutable conclusion that the ECK was not able to manage the counting, tallying and results announcement processes in such a way that it secured the integrity of the electoral process at either the presidential or the parliamentary level. It is not IREC's mandate to attempt to establish who won the presidential election, and it would in any case be extremely difficult."

With that background, it is important to understand that he current Executive authority in this country is a function not of the 2007 Elections but a function of something we call the National Accord. That is where the legitimacy of the present Coalition Government comes from.

I know you are familiar with the National Accord but I would like to mention a few things for the purposes of my contribution. I did not bring the Act but I brought what was signed on 28th by the two principals and witnessed by His Excellency, Kofi Annan and His Excellence Jakaya Kikwete. What they call the agreement on the principles of partnership of the Coalition Government. They say: "Given the current situation, neither side can realistically govern the country without the other. There must be real power sharing to move the country forward and begin the healing and reconciliation process. As partners, this is both the President and the Prime Minister, in a Coalition Government, we commit ourselves to work together in good faith as true partners through constant consultation and willingness to compromise. This agreement is designed to create an environment conducive to such partnership and to build mutual trust and confidence. A coalition must be a partnership with commitment on both sides to govern together and push through a reform agenda for the benefit of all Kenyans." That is the National Accord which was enacted by this august House which is part of our constitutional order and which enjoys the status of a constitutional document.

So with that in mind, we have a Coalition Government with two principals who share Executive authority. That particular point is further re-emphasized in the new Constitution in Schedule Six where they are describing what the Executive is, Section 12, page 197, of the new Constitution where they are describing the Executive: "The persons occupying the offices of President and Prime Minister immediately before the effective date shall continue to serve as President and Prime Minister, respectively in accordance with the former Constitution and the National Accord and Reconciliation Act, 2008 until the first General Elections held under this Constitution unless they vacate office in terms of the former Constitution and the Accord." The first two part offices or persons identified within the Executive are the President and the Prime Minister. Then they go

further to name the other persons who are within the Executive; the Vice-President, Deputy Prime Minister and Cabinet. Why am I trying to elaborate this? It is because before we even go into consultations, we need to understand very clearly why we have a Coalition Government and what is this partnership? What is this consultation?

With that, I could now begin to address myself to the issue of consultations. Appointments under the Constitution today are subject to the National Accord first. All new appointments under the new Constitution and you have rightly talked about Section 29 of the Sixth Schedule. All those appointments are regulated by the National Accord. The National Accord sets this partnership; it sets this power sharing. It sets shared Executive responsibility and that is why the Constitution starts by saying all those new appointments are subject to the National Accord because there is a framework. It then goes further to say "after consultation with the Prime Minister." That is the second tier! So there are two tests that consultation or appointments have to pass. One, within the framework of the Coalition Government which is defined in the National Accord on the premise of real power sharing which means parity and equality of Executive authority then in consultation with the Prime Minister.

The Accord talks about real power sharing, consultations, willingness to compromise. Real power sharing connotes equality as I have said and parity in making the appointments. In other words, not one principal can unilaterally make those appointments. It has to be joint! So the nomination process has to be joint; it cannot be done by one principal. Consultations specifically to the question you asked me as we understand it, it is not so much as we understand it but it is how the law defines consultations. That is we would rather take that path than what we understand it to be. The various issues that I will quote are things that we have picked from case law and other decisions of various judicial bodies. Consultations require that the parties consulting, first, offer each other sufficient opportunity to exchange views.

1. That is the first test that each party had sufficient opportunity to exchange views. That is a test when you want to make a determination based on facts whether or not there were sufficient consultations. Did the parties have sufficient opportunity to exchange their views?

2. It requires that the parties who are consulting share sufficient information available on each nominee in this particular case on the basis of full disclosure of accurate information. So the information exchange must be sufficient as a second test. That is anchored on full disclosure of accurate information and material information.

3. The parties consulting, as a further test, must act reasonably and not with caprice or in a manner that undermines the very process they are trying to engage in.

4. The forth test is that the parties must be free and frank in exchanging their views.

5. The parties engaging in consultation must receive views exchanged with an open mind; not closed mind. They must receive the views of the other party with an open mind.

6. The consultations must be undertaken when the proposal under consideration are still in their formative stages. Then it must continue all through to the end without the parties having fixed positions. You must come to the consultations with an open mind and they must begin at the very formative stages; at the very preliminary point and then continue up to the point when the decision is made.
7. The consultations must not be treated perfunctorily or as a mere formality. It is not that we had a cup of tea, I made a phone call or I send an SMS that we consulted. It must not be treated perfunctorily or as a merely formality.

8. Consultation is not an act of notification. You are not communicating your decision to the other party and saying this is what we have decided, we have consulted you. It is not an act of notification. In some specific circumstances, consultation means agreement and I believe that is the position under the National Accord.

9. In some specific circumstances, the phraseology consultation means agreement. If you look at even the definition they have in *MacMillan Dictionary*, in consultation with someone, they define it to mean after discussion and agreement with someone and they give an example. "Any decision to send troops will be in consultation with Parliament. We will not just do it by notifying Parliament that you are going to send troops." You must have the concurrence of Parliament.

10. Consultations also must also be practical. It must be conducted within a time period sufficient for views to be exchanged fully and for matters to be thoroughly interrogated. That is when it is practical. The time required, of course, will depend on various circumstances and the seriousness of the matter under consideration.

11. Urgency is no substitute to sufficient time for practical consultation. You cannot say that it is so urgent, we do not have sufficient time. If the matter is of such a serious nature that it requires thorough ventilation and interrogation of the matters under consideration.

Consultations within the framework of the National Accord, if you apply all these tests, therefore, mean compromise. That is what the Accord talks about; compromise between the principals as a basis of any decision that they make.

This is a matter that concerns us and even for them, a meeting of their minds; a matter under consideration. Their minds must meet and lock on an issue. Further, as I have said earlier, the appointments must be made jointly by the Coalition partners. Consultations under the Constitution under the transitional period are, therefore, an act of power sharing, compromise and one that requires good faith. This consultation, as we

understand it today, is not confrontation in its ordinary meaning. It cannot be the ordinary meaning of the word consultations. Still, dwelling on the point of consultations, under the National Accord and Reconciliation Act, the first act of consultation was in the composition of the Cabinet. That was done on the basis that there would be 20 Cabinet slots for each side. There are consultations that went on for a month and a half. After those consultations, a Cabinet was formed. During those consultations, each side proposed who their nominees would be but no one determined for the other who the nominees would be. Questions were raised on both sides such as we do not think so and so are qualified because of this issue or that. However, eventually, they agreed. So, when we talk about consultations, it is important that we recollect the first act of consultations which was on the Cabinet and how it transpired.

If you go further to the Constitution, Article 259(3) (a) which deals with the interpretation of the Constitution, page 169 says:-

"Every provision of this Constitution shall be construed according to the doctrine of interpretation that the law is always speaking."

Therefore, among other things;
1(a)." A function of power conferred by this Constitution by an office may be performed or exercised as occasion required by the office holding the office."

So, the consultation that is contemplated for the purposes of these nominees is that between the President and the Prime Minister. It is not between Caroli Omondi and Ambassador Francis Muthaura. Those cannot be consultations. These are consultations between the persons holding the offices of the president and the Prime Minister. If you look at page 169 of the same Article, you will see in paragraph 11 it says:-

"If a function of power conferred on a person under this Constitution is exercised only by the person on the advice or recommendation with the approval or consent of or on consultation with another person, the function may be performed or the power exercised only on that advise, recommendation without approval or consent or after that consultation except to the extent that this Constitution provides otherwise."

On this point, our submission is that before the consultation, whatever happens must be in compliance to the National Accord and Reconciliation Act. The consultation is between the two Principals and no one else. They have to agree and there has to be a meeting of the mind between them. They then have to make joint nominations because that is what the accord says. They are to govern together. It is a partnership.

Mr. Nyamweya: Mr. Chairman, I have repeatedly heard him talk about joint nominations. Where exactly, in this Constitution or in the Accord, does it require that the nominations be done jointly? Are you suggesting that there is a core-Presidency? Is that what you are saying? I would be happy to see in the National Accord and Reconciliation Act, where it says that the President and the Prime Minister must, jointly, sign together or do whatever they have to do together.

Mr. Chairman: Mr. Omondi, you will take note of that question and then proceed to conclude your submission. You will respond to it later.

Mr. Caroli Omondi: Thank you. I was ready but I will hold my breath.

I think that deals with our understanding and our legal position as we see it on the concept of consultations. Let me go to what happened, whether there were consultations or no consultations.

Sometime, late last year, the two Principals admitted that the idea of filling the Constitutional Offices was discussed but not in detail. It was then deferred to the following year.

Mr. Chairman: When was that meeting held?

Mr. Caroli Omondi: I think sometime in December last year. I do not have the exact date.

Mr. Chairman: Do you have a record of that meeting?

Mr. Caroli Omondi: I will come back to the records because I have to look for the minutes.

This matter was deferred to the following year which was this year. An understanding was reached that people like the Chief Justice would serve their full term and the Attorney-General too. Early in the year, it was revisited, around 6th January, 2011. I attended that meeting and the issue came up. It was agreed that a panel be established. That panel was to consist of a representative of the Office of the President, Office of the Prime Minister, a representative of the Law Society of Kenya, a representative of the Judicial Service Commission, a representative of the Law Reform Commission and a representative of the Public Service Commission. There were three Commissions and one society. Under that panel, working with these offices would then undertake their identifications and recommendations of names of those who would then be nominated to Parliament, jointly, by the two Principals for consideration for appointment to these positions.

That Committee was to be convened by the Head of Public Service, Ambassador Muthaura. He convened it and he invited us for a meeting. I went to his office and when I got there, he informed me that he was not in a position to chair the meeting on that day and that either Prof. Wanjohi or myself would chair it. Prof. Wanjohi is much more senior to me in age and so I deferred to him to chair the meeting. At that meeting, we had the Permanent Secretary, Ministry of State for Provincial Administration and Internal Security; we had the Solicitor-General; Permanent Secretary for Justice, National

Cohesion and Constitutional Affairs; Prof. Wanjohi and I. We did not have any representatives from the three Commissions and the Law Society of Kenya.
With that understanding, that Committee did some work and adopted a four-step criteria for the purposes of adopting the right candidate for Chief Justice, Attorney-General and the Director of Public Prosecution. We agreed that the key considerations would be seniority, competence, integrity and reform-mindedness. We agreed on those four things. Specifically for the Chief Justice, we said that we had three options to source a new Chief Justice. One would be the Commonwealth, which was our proposal as the Office of the Prime Minister. And I will come back to why we wanted a judge from the Commonwealth. There was also a proposal that we should look into the Judiciary in Kenya.

The fourth and final proposal was that we should look at those who are involved in private practice of law in Kenya. We said that we would source from those three areas. However, these things were to be reported back to the Principals so that they could guide us on whether we had identified the right criteria; whether we were right to source a Chief Justice from the Commonwealth; the Judiciary in Kenya or the private sector. With regard to the position of Director of Public Prosecution, we agreed that we would look at lawyers who were already in the prosecution service of the country to see if we could get a candidate. We looked at lawyers who were in private practice but who specialized in criminal law. We also agreed that we would look at magistrates who had been handling criminal cases to become Directors of Public Prosecution.

At that meeting on the issue of seniority in the Judiciary, we agreed that we needed some information as to how the pecking order was at the Judiciary. At that point, the PS in charge of Justice, National Cohesion and Constitutional Affairs, Amina Mohammed, made a call to the Registrar and asked for that list. That list was eventually sent to the Office of the President and eventually found its way back to our discussions. We did not, at that meeting, discuss the position of the Attorney-General. It was our understanding that the Principals had agreed that he would serve his full term. So, that Committee did not discuss the position of the Attorney-General. That Committee also did not discuss the position of the Controller of Budget because there was no representative from the Treasury. So, those two positions were never discussed in that Committee. This Committee met only once. We never had another meeting. We only met once and that was it. We never prepared any minutes but left with our notes. We never produced any report and we never reported, jointly, back to the Principals. The presumption was that at some point, we would convene and discuss further and then go back to the Principals. However, that was not the case.

On 27th January, last month, there was further consultation between the President and the Prime Minister, their usual weekly consultation. You have asked me for the agenda as well as the minutes of that meeting. Normally, what happens is that both sides go with their agenda item. One is prepared in the Office of the President while the other is prepared in the Office of the Prime Minister. We share it and agree on what is to be discussed. Today, I brought samples. For example, during the meeting of 6th January, we have a sample of what was prepared by the Office of the President and the one that was

prepared by the Office of the Prime Minister on 27th. Ambassador Muthaura already gave the Committee the one for 27th. I have the ones for ones for 6th and 7th.

I also brought some samples for 2009 and 2010 so that you can see the way it works. So, normally, an agenda is generated by both sides. We meet, go through it, harmonize and then agree on what should be discussed. Specifically to the question that you have asked, whether we have minutes of 27th January, 2011, between the President and the Prime Minister, let me put it this way, there are no minutes of that meeting. For the time I have attended those meetings, I have never seen minutes of the meetings; never. If you look at all the agenda items that I have circulated, you will notice that there are three standard things under the law of any meetings. You have to start with the adoption of the agenda then you go to adoption of minutes of the previous meetings and then you move to matters arising. You will never see those things in the draft items. There is nothing like confirmation of minutes because they have never been confirmed. So, my answer to your first question is that there are no minutes of the meeting of 27th January, 2011, between the President and the Prime Minister.

Mr. Chairman: Mr. Omondi, just as you address yourself to the question of minutes, one of the documents that Ambassador Muthaura shared with us was dated 6th January, 2011. It is a two leaf document. The first page is marked agenda and it is entitled consultations between the President and the Right hon. Prime Minister. It goes on to make a list of agenda items. The second page is titles; Relevant Minutes on Consultations between His Excellency the President and the Right hon. Prime Minister on Agendas 1 and 2 of the meeting of 6th January, 2011. It has information that fills half of that page. Are you familiar with this document?

Mr. Caroli Omondi: Mr. Chairman, I suspect that it is one of the things that I saw yesterday in the other Committee. However, if you give it to me here, I will respond exhaustively like we did yesterday.

Mr. Chairman: Mr. Caroli, go ahead.

Ms. Abdalla: Before he goes ahead, I have a clarification at this point. When Ambassador Muthaura was here, he said that that is the way they keep the decisions that they make. That meant that was his documents. How do you keep the decisions that you make in those minutes given that you do not have minutes or do the two of you operate on good faith and the good faith has just ended in these appointments?

Mr. Baiya: On a point of order, Mr. Chairman, Sir. I am afraid that we are losing track. Would we not be safer to allow them to present? After all, that is what you told hon. Nyamweya. If we allow interruptions at this point, we are likely to spend more time.

Mr. Chairman: You saved the clarification sought by hon. Nyamweya. Could you also save that one we seek on this particular record? Please, tie it with the point made by hon. Amina Abdalla on the records as kept by you.

Mr. Ruto: Mr. Chairman, Sir, I think also we should conduct this meeting in a way that we get the information that we need to get from every party. Thereafter, we will deliberate, as a Committee, on the various issues that we have been given. We can then ask one party questions regarding documents presented by the other party. I do not think we are doing any cross examination which is unnecessary. I would rather if we got the information he has. Let him narrate and we will form our opinion thereafter.

Mr. Chairman: Clarifications are, certainly, in order and especially if there is information that would help to clarify some of these issues. That is, certainly, not out of order.

Please, proceed but take note of the clarifications that Members have sought which you will revisit at the end of your submission.

Mr. Caroli Omondi: Thank you, Mr. Chairman, Sir. As I have said, at that meeting of the 27th there were no minutes, in answer to your question.

The second question was whether there were minutes or a report of the Technical Committee on this matter. As I have also said, there were no minutes of the meetings of the Technical Committee and there was no joint report.

Now let us go specifically to what happened at that meeting of 27th. At that meeting of 27th His Excellency the President presented a list to the Prime Minister proposing certain names to the four positions that we are discussing here. It was the first time that the Prime Minister or our side saw that list.

Remember what I said, the committee never agreed on any names; the committee never recommended anybody for any position. So, on 27th this list was presented to the Prime Minister. His first reaction was that he did not understand where it was coming from because he had not received a report from the panel that had been constituted.

Secondly, he said that his representative who is myself, who was in that committee was not in the room at that time because I was preparing the report on Ivory Coast to be taken to Addis Ababa. So, he then suggested that another team be convened to now discuss this list and to meet that afternoon. That team comprised of Amb. Muthaura, Prof. Wanjohi, Dr. Isahakia and myself.

So, the Prime Minister came back and gave me instructions to go back to the Office of the President and have these discussions. When we saw this list, it says:

"Following wide consultations the following are the persons who have been identified for nominations to various constitutional positions towards implementation of the Constitution:

Position Chief Justice – person proposed -- Justice Paul Kihara Kariuki – High Court Judge – Kiambu County.

Deputy Chief Justice – Justice Anna Okwengu – High Court Judge – Homa Bay County.

Attorney-General – Fred Ojiambo – private practice – county not provided. D

Director of Public Prosecutions – Kioko Kilukumu – private practice – county not provided.

Controller of Budget – Mr. William Kirwa – Managing Director ADC – county not provided.

Kenya Anti-Corruption Commission – Dr. P.L.O. Lumumba – Director KACC – county not provided."

The first problem we had with the list was in respect of two positions; one was that of the Deputy Chief Justice. The Constitution is very clear that this position shall be filled by a person identified by the Judicial Service Commission. So, I asked the question there under nominee and Prof. Wanjohi informed me that they are aware that what I am saying is the correct position but that when the Judicial Service Commission begins its work, they would talk to them and they will appoint this lady.

I said that we did not wish to go that path and that we did not feel that we should even discuss that position. So, it was taken out. Then I went further to ask about P.L.O. Lumumba because as far as we were concerned, by 27th January, 2011 Lumumba had been in office for months. He had already been appointed. So, we did not understand why his name was again on this list. So, again that was removed.

When we went back to the position of Chief Justice and we asked the question that it was the first time we were hearing about Justice Paul Kihara Kariuki; could we get more information about him, his qualifications and how they arrived at him? This is because it was the first time we were seeing his name.

Prof. Wanjohi said that Justice Paul Kariuki had been nominated by the President after a lot of consultation and those consultations obviously were not with the Prime Minister. He said this particular candidate had been proposed by His Excellency and that he was a reformer.

So, I informed Prof. Wanjohi that I had two problems with this particular issue. One, we had agreed on a criteria and the first item on that criteria was seniority. He is the one who chaired that meeting. I then asked that they make available the list of members of the Judiciary which we had asked for from the registrar. This list was produced. In that list, senior most of course, is the Chief Justice Evan Gicheru. There are 11 Judges in the Court of Appeal and the senior-most Judge is Justice Riaga Omollo followed by Justice Tonui, followed by Justice Bosire, Justice O'Kubasu, Justice Ole Keiuwa, Justice Githinji, Justice Waki, Justice Onyango-Otieno and Justice Aganyanya. Justice Visram is number 10 and number 11 is Justice Justice Nyamu.

If you go to the High Court where Justice Kihara is, in terms of seniority, Justice Kihara is actually number 21. So, I want you to know why we were taking somebody who was actually number 32 in terms of seniority within the Judiciary and jumping everybody else and putting him as the Chief Justice. This obviously did not show us merit. We did not understand what the capabilities were. So, we objected. We said: "It is your choice that you pick from the Judiciary of Kenya, then there are two issues you have to deal with. One is seniority. The second one is vetting. The Constitution is very clear. Section 23 of the Sixth Schedule of the Constitution states as follows:-

"Within one year after the effective date Parliament shall enact legislation which shall operate despite Articles 167 and 168 establishing mechanisms and procedures for vetting within a time frame to be determined in the legislation, the suitability of all Judges and magistrates who are in office on the effective date to continue to serve in accordance with the values and principles set out in Articles 10 and 159.

A removal or process leading to the removal of a Judge from office by virtue of the operation of legislation contemplated under sub-section 1 shall not be subject to question in or review by any court."

So, I said with this you could not appoint a sitting Judge from the Judiciary to the position of Chief Justice unless that Judge had been vetted.

Mr. Nyamweya: Was this in the presence of the President and Prime Minister when you were discussing this or was it just between yourselves and Prof. Wanjohi?

Mr. Caroli Omondi: I think you missed something, Mr. Nyamweya. I said in the morning the two Principles met. The President presented that list to the Prime Minister. Their meeting ended. They instructed that the four of us meet in the afternoon. Now we were meeting in the afternoon. So, this is now the second committee. We are having technical discussions.
I again told them that if you look at Section 24 that deals with the Chief Justice, it states as follows:-

"The Chief Justice in office immediately before the effective date shall within six months after the effective date, vacate office and may chose either to retire from the Judiciary, but most importantly or subject to the process of vetting under Section 23, to continue to serve on the Court of Appeal."

If he is not vetted, he cannot continue to serve. The new Chief Justice shall be appointed by the President subject to the National Accord and Reconciliation Act and after consultation with the Prime Minister and with the approval of the National Assembly. I told them on this basis alone it was not feasible to nominate a sitting Judge who had not been vetted to become a new Chief Justice.

So, we had the problem of seniority because we did not understand why they were jumping Justice Omollo. We asked them specifically if they had any issues with him so

that we could take out his name and go to Justice Tonui. They had no issues. We asked them if they had any issues on Tunoi we could go to Bosire. They had no issues with Tonui.

So, I told them that I did not see any justification whatsoever. They said he is a reformer. I told them that in 1996 I started a programme with the World Bank here when I was in the State Law Office to assist with reform of constitutional offices. It later evolved into what now is called GJ Laws. I kept track a bit but I know Justice Lenaola was involved. I know Justice Ouko was involved. I know Justice Omollo was involved but I have never heard of the involvement of Justice Kariuki in this reform programme. So, if you could give us the material and specific cases of reform activities that he has undertaken, then we could probably consider. No information was forthcoming.

So, those discussions ended there. They said since this name had come from the President and since we have objected, then they had to go back and consult with the President. So, that is how the meeting ended. Nothing was concluded. We said we would not discuss the other positions until we finished on the Chief Justice. So, the meeting ended. That was on 27th of January. We went to report back to our Principles.

The Prime Minister then instructed me to write to Amb. Muthaura and inform him that he would be traveling the following day early in the morning to Addis Ababa and that there would be no further consultations until we came back. So, I did write to him the same night. I faxed it and the physical copy was delivered the next morning. The letter is here where we told him: "I have been instructed to advise you that the Prime Minister will be travelling to Addis Ababa tomorrow to present his report on the Ivory Coast crisis to the AU Peace and Security Council. Consequently, the consultations between His Excellency the President and the Prime Minister, on the appointments of the Chief Justice, the Attorney-General, the Director of Public Prosecutions and the Controller of Budget should be held sometime next week on a date convenient to both Principles. So, that is how we left the matter. We then travelled to Addis Ababa. We got there around midday and went to a meeting straight from the airport with Jan Ping. That took two hours. Mr. Dalmas Otieno and Prof. Saitoti were present in that meeting.

That meeting took place at the Hilton. From the Hilton we went straight to AU headquarters where again we had another one hour meeting with Jan Ping. From there, we went to the peace and security council meeting at the Heads of State level which started shortly before 4.00 p.m. and that meeting went on until 11.00 p.m.

In that meeting each head of delegation was allowed one aid. The Kenyan delegation opted to have our ambassador accompany the Prime Minister because in any event she is the one more versed with the issues under consideration there. No Minister even went in with him. So, I stayed outside.

At 6.30 p.m. that evening, I received a call from the Controller of State House on my phone and not on the Prime Minister's phone as the Vice-President had said in the House. He told me the President wished to talk to the Prime Minister but he did not tell me the

subject matter of the discussion neither did I ask. I simply said, give me a few minutes I check with one of the AU officials here. I asked the person who stands to keep guard at the entrance there how long he thought the meeting would take. He laughed and said: "These meetings normally go even up to midnight." He told me there was one that went up to 2.00 p.m. he said he could not tell but said maybe an hour and a half.

I went back to the Controller and told him to give us another one hour and a half then we will call you back and that was it. The Prime Minister came out after 9.00 o'clock Addis Ababa time to have some refreshments and a commercial break. When he came out the journalists who were there rushed to him and asked him: "Were you consulted on these appointments?" and he did not say anything. He went back to his meeting.

After the meeting he came out. Now we had gathered more facts. He then gave a short statement that he was not consulted and he was not aware. Then he left the matter there and we came back and wrote to the Speaker on this particular issue.

So, we believe that what took place within the Technical Committee were preliminary discussions on criteria and procedure. Nothing conclusive was ever determined in that committee. The committee met once. It was never even convened fully as per the instructions of the principles. They never made a report. They never recommended anything jointly as a committee. The meeting that was then subsequently convened between Amb. Muthaura, myself, Prof. Wanjohi and Dr. Isahakia never agreed on anything. We were presented with a list but we never agreed on the first name.

The two processes, however much we discussed within the committees, those in terms of the law, are not consultations as we have read under Section 259(3)(a). most fundamentally, if you apply the 11 tests on what consultations is in law that we have provided, whatever took place does not qualify as consultations. So, we are convinced that no consultations took place. There were some preliminary discussions but the process was rushed. At that time, we did not know what was happening. We later realized – and this was not shared with us – that the reason why this thing was being pushed was because of this process in Addis Ababa to have a resolution on deferral of the ICC cases adopted. So this was why this was being pushed so hurriedly. But that information was not shared with us. As you know the shuttle diplomacy was being done by one side of the coalition and the other side was in the dark. That is rather obvious.

That brings us to the end of what exactly happened. With your permission, I would then like to address the other issues. As I said, there was the communication from the Chair that talked about some 10 issues. With your permission, we want to express our suggestions on some of those issues he raised.

One of them was the issue of consultation which we have dealt with. So, the others are fairly short. Then we will respond to the Statement by the Vice-President.

Mr. Chairman, Sir, in the Communication from the Chair one of the issues raised was the role of the Speaker in this particular matter. We think what is at issue here is the

constitutionality of these nominations. The constitutionality of these nominations is not just a function of consultations. We think it is a function that goes beyond consultations. That is just one aspect. Today, our Constitution talks of transparent, competitive processes, merit-based of appointment to public offices as one of our national values. This is contained in Article 10. Were these respected?

That we believe is a very fundamental issue. If you look at Article 73(2)9a) and (b) of the Constitution we have guiding principles of integrity, selection to public office on the basis of personal integrity, competence and suitability, objectivity and impartiality in decision-making and ensuring that decisions are not influenced by nepotism, favoritism and other improper motives.

We are not satisfied that the present nominations meet that particular criteria. Article 232(1)(g) of the Constitution lists "fair competition and merit" as the basis of appointments and promotions in public service. We do not believe that has been met. Article 232(1)(i) "values of affording adequate and equal opportunities to both women and men". We do not think that has been justified.

Now, worse, while the list that we had been provided with at that meeting had the names of Kioko Kilukumi and William Kirwa, that list did not have the name of Justice Visram. His name was not there. So, at no point was there communication or notification from the other side that Justice Visram was going to be nominated as Chief Justice. At no time. The list we have and which is the only list that was presented to us had Justice Paul Kihara Kariuki for Chief Justice and not Justice Visram. That list had Fred Ojiambo for Attorney-General. It never had Prof. Githu Muigai. So, at no time were those names shared with us.

Mr. Chairman, Sir, again we believe this particular process does not meet our national values and principles as established under Articles 10, 73 and 232.

What are we proposing as the way forward? I would just want to read the letter by the Right hon. Prime Minister to the National Assembly. It states as follows:-

"It is my intention to consult with the President on this matter with a view to asking the Judicial Service Commission to proceed under Article 166 of the Constitution to advertise, interview and recommend to the President and the Prime Minister suitable candidates for consideration for nomination to the position of Chief Justice.

The Executive, I will further propose to the President, should adopt competitive and merit-based recruitment process for nominating candidates jointly by the President and the Prime Minister to the positions of Attorney-General, Director of Public Prosecutions, Controller of Budget and Auditor-General in compliance with our national values and principles as enshrined in the Constitution."

That is what we are proposing to be the way forward.

I mean the Speaker raised in his communication which I will now deal with. Now, in terms or the role of the Speaker, we think he has the duty, competence and jurisdiction to rule on the constitutionality of the nominations. That is the call of the National Assembly. We think a question that evolves around determination of the constitutionality of nominations is a matter of constitutional interpretation. It is not a matter for the House to vote upon. We do not think constitutional interpretation can be rendered through voting in any organ. I think it is a matter to be determined by interpretation. The interpretation of the Constitution within the Executive is for the Attorney-General; within the Judiciary, it is for the Supreme Court and within the House, it is for the Speaker. So, we think that there should be a determination on the constitutionality of these nominations on the grounds that I have raised.

Mr. Chairman, Sir, we also think, in terms of what the communication from the Chair said, that it is before any issue of the nominations is dealt with further, the relevant and competent Committee, which I think is this one, should offer guidance on the constitutionality of the nominations. I think we cannot go further and even try to vet or try to interrogate the suitability of competence of the nominees before the question of constitutionality is determined.

Mr. Chairman, Sir, there is also the issue of the Commission on the Implementation of the Constitution (CIC) raised in the Communication of the Speaker. The CIC has a duty, and I quote from the Constitution:

"To ensure that the letter and spirit of the Constitution is respected. The CIC has a duty to report progress and any impediments in the implementation of the Constitution to this House."

Consequently, Mr. Chairman, Sir, our position is that the opinion of the CIC on the constitutionality of these nominations carries equal weight to its responsibilities. In this respect, its opinion is not just persuasive but, we believe, binding.

Mr. Chairman, Sir, the role of the Judicial Service Commission (JSC); while in the specific case of the Chief Justice, the Constitution does not require the JSC to participate in the nomination process before the next general elections, it is our position that nothing stops the Executive from engaging the JSC to help with the identification of candidates through a competitive process for purposes of nomination. Indeed, engaging the JSC in this process will be in consonance with and in furtherance of our national values and principles of transparency, merit and competitiveness in making appointments to public offices; and there is precedent already. The Executive did ask the Public Service Commission to provide leadership in the identification of the members of the CIC and the Revenue Allocation Commission.

Mr. Chairman, Sir, on the issue of the serving judge, again this was raised from the Communication from the Chair. It is our position, as I have said that no serving judge –

until vetted and found to be fit to continue serving in the Judiciary – is eligible to be nominated and appointed as Chief Justice. That is our position.

Finally, Mr. Chairman, Sir, as I have said, the nominations breach the constitutional requirements of regional balance and gender parity. There is no woman who has been nominated. But we have also noticed some other very disturbing possibilities and, in this respect, I would like to draw the attention of the House to the National Cohesion and Integration Act, Act No. 12 of 2008, in particular Section 7 (2). I shall read.

"No public establishment shall have more than one-third of its staff from the same ethnic community."

Mr. Chairman, Sir, for purposes of the proposed nominee to the State Law Office, I shall submit here what the composition today is of the five top positions in that office. I shall not read them out, but I will ask the Committee to take notice of what the composition is.

Mr. Chairman, Sir, there is the further problem with the nomination for the Director of Public Prosecutions (DPP) and, here, because we are not in a court of law, I will just invite the Committee to look at the Advocates Act, Chapter 16; to look at the Evidence Act, Chapter 80; to look at the Criminal Procedure Act, Chapter 75 and ask yourselves this question. Would the present nominee, if accepted, enhance or undermine the independence of the prosecution service in prosecuting pending cases of grand corruption in which this particular nominee has been the defense counsel?

Ms. A. Abdalla: Mr. Chairman, Sir, I think that the presenter is actually vetting the nominee of Kilukumi; and if that is part of the process, then we should say that we have answered the questions of constitutionality because his presentation is actually based on the competence of the individual and what legal work he has done in the past.

So, Mr. Chairman, Sir, I would like to urge you to order that contribution from the presenter to be expunged from the record, unless we are vetting the candidate.

Mr. Chairman: We are not vetting the candidate, but I think what Mr. Omondi is doing is expressing the opinion on each of the nominees. I do not believe that amounts to vetting.

Please, proceed!

Mr. Caroli Omondi: Mr. Chairman, Sir, what I am trying to do is re-emphasizing the issue of constitutionality. I am saying that the nominations are in breach of the National Cohesion and Integration Act, and they are in breach of the established norms and practices of the legal profession and rules of evidence in those Statutes. That is what I am saying; I am not discussing the suitability or competence or integrity of anyone of them.

Ms. A. Abdalla: But you have just mentioned the cases that they have dealt with and his ability to prosecute grand corruption. That is not what is in the Evidence Act. The ability

of an individual is not in the Evidence Act. You have said that "his ability to prosecute grand corruption;" that is what you said!

Mr. Wamalwa: On a point of order, Mr. Chairman, Sir. I think what we are really looking at was the constitutionality and the procedure; we should not go into the candidates. I think we have not gotten there yet. The gentlemen before us were really to address us on the issues that you have set out in the preamble before we started. I think to go into the list and the individuals will be overstepping.

Mr. Chairman: Mr. Omondi, you have done well up to this stage. Would you keep in the stream, please? Confine yourself to broad question of constitutionality without going into the details of the specific proposed nominees.

Mr. Caroli Omondi: Mr. Chairman, Sir, I will proceed. It is only that we thought that constitutionality in (?) compliance with statutory provisions and laws that exists. But let us leave it like that.

Mr. Chairman, Sir, before I go into providing clarifications on the statements made by the Vice President, I would like, just because we have mentioned the Attorney-General – I am sure you have this – but I would like to present to the Committee the press statement by the JSC issued on 31st January, 2011, on these nominations. It was signed by the Chief Justice and the Attorney-General and they expressed their positions on the constitutionality of these nominations.

Again, Mr. Chairman, Sir, I would like to present the statement by the CIC because that was part of what the Speaker said. And, finally, I would like to present a decision of the High Court in Petition No. 16 of 2011, where these nominations were declared unconstitutional.

Then, Mr. Chairman, Sir, on Tuesday, 1st February, 2011, the Vice President and Minister for Home Affairs issued a statement in the House regarding consultations over the nominations for these positions. In this statement, the Vice President and Minister for Home Affairs first alluded to technical meetings and technical teams. From what we have presented here, the correct position is that there was only one technical team which met once, never produced a report, only agreed on the criteria and agreed on where to source the candidates for Chief Justice and the other position of DPP.

Mr. Chairman, Sir, in that statement, the Vice President mentioned that the Prime Minister expressed the view that we should have a foreign Chief Justice. The correct position is that the Prime Minister suggested that we should have a transitional Chief Justice from the Commonwealth on a fixed non-renewable term of three years. And at no time – I want this to come out very clearly – did the Prime Minister propose Justice Omollo; at no time! Justice Omollo's name came up on the basis of the list of seniority. When it was presented and we were discussing the nomination of Justice Kihara, that is when we asked "But if this is the senior most Judge, why are we not considering him?" and we got the attention of the other people that the tradition is that, Justice Gicheru was

the senior most Judge and he was made a Chief Justice; Justice Madan was the senior most Judge and he was made the Chief Justice and many others before. And we said that when Justice Chunga was parachuted from prosecution to Chief Justice, there was such tremendous resistance from the Judiciary that he was not able to be effective as a Chief Justice. So, we said let us look at Justice Omollo; but at no time did the Prime Minister propose Justice Omollo. His position was that we should get a transitional Chief Justice from the Commonwealth on a fixed non-renewable term of three years. We even went further to try and identify the countries; we thought of Singapore, Australia, Canada, India and Ghana.

Now, Mr. Chairman, Sir, I think it is important to inform the country and the House why the Prime Minister wanted a Chief Justice from the Commonwealth; it is not that Kenyans cannot do it. But he had valid reasons – we believe and we still think are valid – as to why he was recommending this. Number one, that it was important to get a new Chief Justice from a functioning judiciary. Our Judiciary is not functioning. If you want to reform it, you better bring somebody from a functioning judiciary. Such Chief Justice would be able to identify the shortcomings of our Judiciary and offer best international practices in reforming our Judiciary. He will walk in and from day one, he will tell you what is not working in our Judiciary because he will see it and he can reform it. He or she will be coming from---

Mr. Nyamweya: Mr. Omondi, you have said that our Judiciary is not functioning. Therefore, should we disregard this particular order or ruling that you, yourself, has given us from Justice Musinga?

Mr. Olago: On a point of order, Mr. Chairman, Sir. I think we had said earlier on that these interventions we can keep for later so that we can move faster, even if we have seen---

Mr. Chairman: Please, proceed! But, take note; can we just limit those interventions; we will place them after this submission.

Mr. Nyamweya: Okay, Mr. Chairman, Sir.

Mr. Chairman: Go ahead and conclude, but I call your attention to the limitation of time.

Mr. Caroli Omondi: Number two, Mr. Chairman, Sir, that a Commonwealth Chief Justice will bring the credibility needed in establishing a local mechanism to deal with post election violence matters and to negotiate with the International Criminal Court (ICC) a referral of the pending cases.

Number three, Mr. Chairman, Sir, that such Chief Justice will not be seen as biased or partisan or beholden into any interest in the country. Number four, that the transition period will allow the country to assess newly appointed or promoted judges and identify a suitable successor. Number five, that a local candidate appointed from outside the

Judiciary was likely to experience resistance from within the Judiciary and, thus, undermine the reform momentum. Number six and finally, that the current serving judges have not been vetted as required by the new Constitution and were, thus, ineligible for appointment.

Mr. Chairman, Sir, the statement by the Vice President also mentioned that the Prime Minister would insist on Justice Omollo to be nominated to the position of Chief Justice. As I have said, this was not the correct position. The same statement referred to a team comprising Amb. Muthaura, Mohamed Isahakia, Prof. Nick Wanjohi and Caroli Omondi as a technical team. This was not the technical team. The technical team is the one that had Solicitor-General; the PS, National Cohesion; PS, Internal Security and the other members from the three Commissions and the Law Society, which was never convened. Our meeting on the afternoon on the afternoon of the 27th, we did not meet as a technical team. It also mentioned that Fred Ojiambo was replaced by Prof. Githu Muigai because the former did not have higher post graduate qualifications. The correct position is that, this was never a consideration. It mentioned that the prime Minster left for Addis on 28th January, 2011, as if he was in flight, avoiding to make a decision.

Mr. Chairman, Sir, this trip was known both to Amb. Muthaura and Prof. Wanjohi well in advance, as I discussed it with them on the consultative meeting of 27th. That particular trip was on the agenda of the African Union (AU) Peace and Security Council, of which the Office of the President had notice and we had even discussed the logistics of travel and everything with them. So, this was well known.

Mr. Chairman, Sir, the statement by the Vice President states that consultations had not been finalized and that further consultations were planned by the parties. That is factual. It says:

"It is true, as stated by the Vice President under point No. 8 – if you look at his Statement as at 27th January, 2011 – the matter had not been finalized and further consultations were planned by the parties."

But, Mr. Chairman, Sir, at no time did the parties agree that Friday was the deadline for those consultations. It also says: "The Prime Minister will be consulted by phone while in Addis."

Mr. Chairman, Sir, at no time was the Prime Minister advised that while he will be away, there will be consultations by phone. Indeed, the Prime Minister had instructed me to write a letter to say that the consultations should resume the following week. That the proposal to nominate Justice Visram to the position of Chief Justice was communicated to the Prime Minister, the correct position is that at no time was this proposal communicated at all. We just heard of it when the media were announcing it and, of course, I have explained what happened with the telephone conversation between me and the Comptroller of State House.

Mr. Chairman, Sir, with your permission, I would like to present those clarifications as well as our position on the issues raised by the Communication from the Chair and those clarifications for your records. I come to the end, but I will ask my colleagues if they have anything to add very briefly, and then we can take your questions.

Mr. Chairman: Mr. Miguna? Mr. Mugambi, you are invited to supplement; kindly be conscious of time because we are quite pressed for time. But go ahead, Mr. Miguna!

Mr. Miguna Miguna: Thank you very much, Mr. Chairman, Sir. There was an issue that was raised with respect to a two-page minutes that had been submitted by Amb. Muthaura before we came. I was going to ask that, that copy be availed to us so that we can respond to the issues that you wanted responded to on that issue. Because, otherwise, we do not want to talk about an issue or a document that we have not seen. It would not be fair.

Mr. Chairman, Sir, I just want to go to a few salient sections of the Constitution, and I will be very brief. If we go to the Supremacy provision in the Constitution at Article 2 Chapter One, which is on page 13, it says:-

"This Constitution is the supreme law of the Republic and binds all persons and all State organs at both levels of Government."

The emphasis is on Constitutionalism. It has been a tradition in this country before the promulgation of this Constitution and in governance that the President was viewed as being above the law; and that whatever the President did said was not questioned. That, really, has been a tragic experience that has not been excavated (?) from the minds of Kenyans, even though we have a new Constitution. It is imperative that we always remind ourselves that with the promulgation of this Constitution, there is no one in this Republic that is above the law; and that when anyone – the Prime Minister and the President included – takes any action that contravenes, violates or contradicts the Constitution, no one; no state organ or individual should think that there should be a deference to whatever decision has been taken. So that, whatever decision this Committee makes, it is our submission, the question should be, was the decision consistent with this Constitution? And if we find that the decision or the action was inconsistent with the Constitution, then you must reject the decision that was made, whether or not anyone wants to quibble with the preliminary discussions that have been couched as consultations becomes irrelevant.

The second point I want to make is with respect to the primary role Parliament plays in a constitutional democracy such as ours. That is captured in Article 94 of this Constitution:

"Parliament shall protect this Constitution and promote the democratic governance of the Republic."

I respectfully submit that anyone who argues that Parliament or this Committee or the Speaker has no role in interpreting the Constitution and determining whether or not a State actor has violated the Constitution would be wrong.

In the analysis of this Committee we have to start from the basis that this is a coalition Government as my friend has submitted.

Mr. Wamalwa: On a point of order, Mr. Chairman, Sir. Would I be in order to suggest that, perhaps, the rest of the team could respond--- I am very sure that many of the issues that we are going to raise are what Mr. Miguna is talking about. Could we be allowed to put the Question then the rest of the team, in their response, deal with them? We need not have three presentations. This is because of the constraint of time.

Mr. Chairman: I think that is reasonable.

Mr. Miguna Miguna: It is, Mr. Chairman, Sir. Could I finish my submission? I have two points to make and then I will be more than happy to allow questions.

Mr. Chairman: Granted. Please, proceed!

Mr. Miguna Miguna: Mr. Chairman, Sir, had the Prime Minister submitted names for this nominations would this Committee have considered them? That is a very important question. As Mr. Caroli Omondi has stated, this is a coalition Government with two principals. Now, either Principal could have decided to act in the manner the President has acted. If the answer is no, then I have to ask: On what basis would this list be processed forward? What is good for the goose, must definitely be good for the gander. In the Constitution, you do not pick and choose. In this case we have a partnership and if one partner provides to you something that the other partner objects to and you process it and you say you could not do otherwise, then you must find that your act violates the Constitution. Indeed, that is the case if we go with the principles of power sharing, partnership, respect for the accord, and constitutionalism.

If you look at Section 29 on New Appointments, Section 29(2) is very instructive:

"Unless this Schedule prescribes otherwise, when this Constitution requires an appointment to be made by the President with the approval of the National Assembly until after the first elections under this Constitution the President shall (it is not may, or can) subject to the National Accord and Reconciliation Act appoint a person after consultation with the Prime Minister."

Let me take you to the Accord.

Mr. Chairman: I want you to conclude so that part of your submission could be in response to the issues that hon. Members are going to raise.

Mr. Miguna Miguna: Mr. Chairman, Sir, this is actually in response to hon. Nyamweya's question.

Mr. Chairman: Would you then take all the other questions and respond to all of them?

You may do a composite response. Some of the issues you are raising could be subject of the questions hon. Members are going to put to you. Please, with your indulgence, do that together with Mr. Mugambi.

Allow me to invite hon. Members to place whatever issues they may have and then you can respond together.

Mr. Musyimi: Mr. Chairman, Sir, I find it intriguing that with regard to the names presented, women are not featuring prominently and you are talking about the Prime Minister going to the Commonwealth for what you call "transitional Chief Justice". I wonder why you did not go to the commonwealth of women in Kenya and get a permanent Chief Justice? I am not being cheeky though. We know that women are rather transcendental because they are not bound by ethnic problems in the same way that men tend to be.

Secondly, Mr. Omondi, I find it rather odd that you would be standing somewhere in Addis Ababa and then somebody rings you saying that the President would like to talk to the Prime Minister. Then you go to the entrance and you ask: "How long do these meetings last?" Was that the question to ask? I would have that you would have made it very clear that you have to see the Prime Minister and vice versa.

Mr. Ruto: Mr. Chairman, Sir, we are in Committee and I want to draw the attention of the participants that the Committee of the House is governed by Standing Orders. I want to bring to your attention Standing Order No.96:

"The Speaker or the Chairperson of a Committee after having called attention to the conduct of a Member who persists in irrelevance or tedious repetition either of the Member's own arguments or the argument used by other Members in debates, may, after having first warned him or her direct that the Member to discontinue his or her speech."

Mr. Chairman, Sir, we do not expect anyone to repeat any arguments or anything that any other person has mentioned.

Mr. Chairman: Point taken. I think the point has been made.

Mr. Wamalwa: Mr. Chairman, Sir, just to seek further clarification from what Mr. Musyimi asked of Mr. Omondi. He indicated that at some point the Prime Minister would come out for refreshments, but he could not come out to speak to the President of the Republic? I would like a clarification over that.

Looking at the minutes of your meeting of 27th, you have indicated that there were earlier consultations. After the consultations the principals referred the list to the technical team which comprised of Mr. Muthaura, Prof. Nick Wanjohi, Dr. Mohammed Isahakia and yourself. In this team, I think you are the only lawyer. There was an earlier procedure proposed of going by way of the JSC advertising. As a lawyer, you advised that that route might not be necessary and that it could be done through consultations between the two

principals. Please, confirm whether that position is correct. If it is, I would like you to give us the reasons that informed that advice. Were you guided by Section 12 on the Executive? It provides that the persons occupying the offices of President and Prime Minister immediately before the effective date shall continue to serve as President and Prime Minister respectively in accordance with the former Constitution and the National Accord. Remember it is not the new Constitution under Article 166. Was that your interpretation?

Lastly, on Sections 24 and 29, is it your interpretation that, indeed, it was not necessary to go through the JSC route before the first election?

Mrs. Odhiambo-Mabona: You said that for the position of the DPP, you advised as the technical team that you should go to private practice and not people who are already within the structures. I would like to know whether this was a way of avoiding the women who are already qualified and are within those structures. There seems to be some allergic reaction to women from both sides. Did you take into consideration Article 27(3), (5) and (8) including the Article you have cited on gender representation. Also, in the same vein, with regard to the criteria that you have indicated that you have developed, I noticed a very glaring omission that you did not think of gender representation.

Ms. A. Abdalla: Mr. Chairman, Sir, I wish to remind them about my question on their nature of record keeping. Is this the first time that the goodwill that has existed between them has been a problem? What lessons have they learnt and how would they do it differently?

You said that the panel comprised the Permanent Secretaries in the Ministry of Justice, National Cohesion, and Constitutional Affairs; Ministry of State for Provincial Administration and Internal Security and others. All the institutions you have mentioned, apart from the Solicitor-General and the Permanent Secretary in the Ministry of State for Provincial Administration and Internal Security, are represented in the JSC. Why were you running away from the JSC? What legal basis did you have to not use the JSC whereas you have invited members from all the Commissions in relation to the three judicial-related appointments?

You said that the Treasury was not represented with regard to the position of Director of Budget. I am curious to know what informed your decision to call people from bodies that are already represented in the JSC.

In your presentation, you said that it was your view that members of the Judiciary who have not been vetted should not be considered until they are vetted. It is very clear that the Constitution intends to replace the Chief Justice by 28th February, 2011. There is no vetting law and there is no hope of having that law in the next two weeks. It means that you are giving us one week for vetting. You have also said that urgency is not a reason for making a hurried decision on the nominees. Parliament has been convened for the sole purpose of vetting the Judicial nominees, especially the Chief Justice. Do you not consider that your actions appear to be an impediment to facilitating that vetting process?

You also, in your list of consideration, have said that no decision should be made based on urgency. On 28th February, 2011 we will be having a potential constitutional crisis in that we will not have a Chief Justice--- You have said that the people who are already in the Judiciary should not serve. Would you consider your actions to be impeding the process of vetting and especially so for this Committee which took two months to vet one member of the JSC?

Mr. Olago: On a point of order, Mr. Chairman, Sir. A proper reading of the Constitution would reveal that although the current Chief Justice must cease and vacate office by 27th February, 2011, there is no requirement that a new Chief Justice must be appointed by that period. That should be understood.

Mr. Caroli Omondi: Mr. Chairman, Sir, if I may add, there is already precedence. When we lost Justice Chesoni, from the time he died to the time Mr. Chunga was appointed there was a gap. It is not mandatory that there must be a Chief Justice at any point in time.

Mr. Nyamweya: Mr. Chairman, Sir, the JSC is chaired by the Chief Justice. Without the Chief Justice that JSC does not functions.

The letter of the Prime Minister to the Speaker of the Kenya National Assembly states in part:-

"I regret to hereby confirm that I was neither consulted on these nominees nor was the nomination made jointly by the President and myself."

This is one of the questions I raised when you were giving your submission. Is it the position, presumably of the Prime Minister that there is a co-presidency in Kenya and, therefore, whatever has to be done must be done jointly? You have continuously and repeatedly said that this thing must be done jointly. Is that the understanding of the Prime Minister? If we know that, perhaps, we will understand why there is a problem here.

Secondly, when we look at the National Accord with regard to consultations, removal of any Minister nominated by a Parliamentary Party of the Coalition shall be made only after prior consultation and concurrence in writing with the leader of that Party. How do you describe consultation? If, indeed, the writers of the National Accord were very clear that they wanted this consultation and concurrence to be together, why would it have been so difficult not to import the same into the Constitution itself? As you ably put it, Mr. Omondi, when you were talking of Article 259(11), it has a list of all things such as approval, consent, advice, concurrence, and consult. They have some sort of different meanings. My understanding of your reading and, therefore, presumably, the Prime Ministers reading is that consultation includes concurrenc.

Still on the same subject, if you go to the ruling of the High Court where there is quite an elaborate interpretation of the word "consult" you will find that the judge refers to the National Accord and Reconciliation Act. He says that the Constitution does not define the

word "consultation". He, however, goes through the dictionary which says, among other things, "take counsel together; deliberate, conference, and so on. Ultimately it all suggests that consultation does not necessarily include concurrence. You do not necessarily have to agree. In fact, the judge finds that there was consultation between the President and the Prime Minister and then there was no consensus.

You have invited us to say that our Judiciary is not functional. Should we take it that from the Prime Minister that we should also ignore this ruling since it is not a functioning Judiciary?

I would like to refer to the HANSARD on the proceedings which have led to this particular situation where the Prime Minister gave us a very elaborate view of what transpired between himself and the President on 27th February. I will read you part of the HANSARD on what Mr. Raila said:

"Yes, that is also a good idea. However, we can also look at the people we have locally and maybe we can also have somebody who has got near it. That way, we will be seen to have rewarded merit locally. I told him, Mr. President, I have no serious objection about that if we can get somebody who is acceptable. Do you have any suggestions? The President told me that he had made some consultations and he has names. I asked the President that we look at the names. He produced a list of names which I have here, that is, Justice Paul Kihara; Justice Anne Okwengu; Fred Ojiambo; Kioko Kilukumi; William Kirwa; and so on.

The Prime Minister even says that he suggested Mr. Pheroze Nowrojee as the Chief Justice. It was suggested that he is an activist.

Further on it says that the Prime Minister said, "If they insist that then I will say that Justice Omolo is a serving Judge and he does not qualify because he has not been vetted. If they insist they must have people from the bench, then let them go by seniority."
To my mind, this letter to the Speaker, Mr. Raila has no idea really by saying, "I have not been consulted." I have also read what the Court said. Unless of course we go to the first thing we said that "consultation" means joint concurrence, then I will understand what you are saying. However, if we read the law clearly and from the Prime Minister's own mouth, he said that there was a technical committee which did all these things. It issued a list of names which they discussed with the President.

Finally, there is Dr. Isahakia and Mr. Muthaura. Now, Mr. Muthaura was here and he gave us information about communication between himself and Dr. Isahakia which he understood to mean that they were communicating and consulting with the Prime Minister. That is why I asked if Dr. Isahakia was going to appear here. We would ask him whether he communicated with Mr. Muthaura and that he said that the Prime Minister had no objection with this. You said that you were quite competent to answer all those things and they are the same things that were troubling the principals. They knew they were recalling Parliament for purposes of this situation. By 27th February, we must have

the Chief Justice in place. The issue could as well have been motivated by the issue of the local tribunal. Anyway that is not the point we are concerned with.

Do you say that all these things, in their totality, do not amount to consultation? Is that the view of the Prime Minister?

Mr. Chairman: Mr. Omondi, as you respond to the question of the list that is referred to both in the correspondence of the Prime Minister to the Speaker and in the statement the Minister makes on the Floor, you want to clarify a point which I heard you make earlier; that the names of Visram, the proposed candidate for Chief Justice and the name of the name of Prof. Muigai, the proposed name for Attorney-General were not on the list. Perhaps you want to clarify to the Committee at what point those two names get in the picture. Just take note of that.

Mr. Nyamweya: Mr. Chairman, Sir, I did mention that they are in the HANSARD report, raised by the Prime Minister himself. He says he has no problem with Prof. Muigai and Visram. Really, it is there.

Mr. Chairman: That is why I am seeking a clarification on the same. Mr. Kioni, though not a Member of this Committee, but he is an hon. Member of the House, I believe it is perfectly in order for you to be part of this and then I will come to hon. Odhiambo-Mabona.

Mr. Kioni: Thank you Mr. Chairman, Sir. When Mr. Omondi was presenting his brief he mentioned that the Constitution can be interpreted by three people; the Attorney-General for the Executive, the Speaker for the National Assembly and the Chief Justice for the Judiciary or the Supreme Court. What becomes of the country if there are three interpretations on the same issue? Which direction do we go?

Secondly, in his presentation you have strongly advised that the Speaker should be allowed to make a ruling on this issue of the interpretation of the Constitution. It is not a matter that should be left to Members of Parliament to debate and perhaps vote on it. Why is it that you have that strong feeling that the peoples' representatives should not be allowed to talk on matters of the Constitution?

Finally, there is the issue that the persons who have been nominated have not been vetted. We have also received your thinking on the opinion that was given by the Judicial Service Commission. Some of those sitting in the Judicial Service Commission have not been vetted. Should we then also disregard their opinion, now that they have not gone through the vetting process?

Mrs. Odhiambo-Mabona: Mr. Chairman, Sir, there has been reference to some court proceedings. The court has made conservatory orders which give certain conclusions *prima facie,* and the main hearing of the matter is still forthcoming. Did you have an

opportunity to present your preliminary views or are you a party to that suit? Are your views taken into account?

Secondly, you have made reference to certain authorities when you are trying to give us an interpretation of the word "consultation". Could we please have copies of those authorities?

Thirdly, when Amb. Muthaura was here he said that consultations are real consultations. By their very nature, they are ongoing. He was referring to the way you normally conduct them and that they should not be structured too much because in his view if you structure them too much, it hinders reaching a conclusion. Then he said that what the Principals approve after back and forth telephone meetings is a decision and that decision is made public. Do you agree with him?

Mr. Caroli Omondi: Mr. Chairman, Sir, I beg the indulgence of the Committee, because I think I was asked too many questions. Some of them may fall through the cracks. If you do not capture them, please, feel free to remind us, and then my colleague will chip in if and whenever necessary.

Let me start with hon. Nyamweya. He has posed the question of core presidency; whether we have a core-presidency. I would like to draw his attention to the Sixth Schedule of the Constitution, Page 192 if you have it. Section two titled "Suspension of Provisions of this Constitution" Section 2(c) Articles 129 to 155 of Chapter nine of the Constitution. Let me read the chapeau:-

> "The following provisions of this Constitution are suspended until the final announcement of all the results"

Mr. Kioni: Mr. Chairman, Sir, what is *chapo*? He is reading *chapo*.

Mr. Caroli Omondi: I said chapeau not *chapo*.

Mr. Chairman: Could you clarify what that is, for the benefit of the hon. Members, please?

Mr. Caroli Omondi: You see that section---

Mr. Chairman: Members have---

Mr. Caroli Omondi: In simple terms, it is a Constitution that is up and applies to all. You have to read it with whatever follows next. 2(1) states:-

> "The following provisions of the Constitution are suspended until the final announcement of the results of the first elections to Parliament under this Constitution".

Section 2(c) Articles 129 to 155 of the Chapter nine:-

> "Except that the provisions of the chapter relating to the election of the President shall apply to the first general elections under this Constitution".

Now, if you go to that Chapter nine, it is the one that deals with the Executive. It is the one that deals with a full Presidential system as now contemplated in the new Constitution. Those provisions are suspended.

If you again read the same Sixth Schedule under Section titled "Extension of application of provisions of the former Constitution".

Under two, Sections 30 to 40, 43 to 46, 48 to 58 of the former Constitution, the provisions of the former Constitution concerning the Executive and the National Accord shall continue to operate until the first general elections under this Constitution. But the provisions of this Constitution concerning the systems of election, eligibility for election and electoral process shall apply to that election.

Mr. Chairman, Sir, what I am trying to say is what I began with; that Executive authority today in this country is exercised on the basis of the National Accord. You can see very clearly that it is reserved. It is a Coalition Government. No one side can realistically govern. This is the principle. On that basis alone, the issue of core-Presidency or core-Prime Minister does not arise. What exists is a Coalition Government with two Principals exercising Executive authority on the basis of compromise, real power sharing and consultation. I hope that explains it.

Mr. Nyamweya: I have no quarrel and I know it is talking about that one. All I did ask from the beginning and even now; I would like to see which particular section of either the National Accord itself or the Constitution says: "Jointly" and that certain functions must be exercised continuously or jointly or concurrently. If it is there, it is there. If it is not there, nobody has a big quarrel with it. If it says that you must consult the Prime Minister, that is what it says. We are not quarrelling about who is superior to who. That is not the issue at all. I just want to understand as a matter of law where it says that a function which is to be done by the President must be done jointly with the Prime Minister. If there is such a place, I have no problem with it. If there is not, I also have no problem with it. It will help me discharge my duties here.

Mr. Caroli Omondi: Hon. Nyamweya, let me give you an example; the old Constitution says that the Cabinet is appointed by the President. But in reality, what happened?

Mr. Chairman: Could Mr. Nyamweya respond to that first? Even though I believe that you had actually sufficiently responded to that concern.

Mr. Nyamweya: Mr. Chairman, Sir, if we cite the National Accord itself, like where it requires Ministerial appointments and Ministers, it says quite clearly in the National Accord that removal of any Minister nominated by Parliamentary parties or Coalition shall be made only after prior consultations and concurrence in writing with the leader of that party. Nobody is quarrelling with it.

If the nomination of the Chief Justice was to be in the Constitution, it would say, in concurrence or jointly. If there is such a provision somewhere, just point it out to us.

Mr. Caroli Omondi: Mr. Chairman, Sir, that provision is in the Constitution that hon. Nyamweya very ably passed in this House. Section 24 states:-

> "A new Chief Justice shall be appointed by the President, subject to the National Accord and Reconciliation Act."

So, you must first have a very clear grasp of what the National Accord and Reconciliation Act stipulates in terms of power sharing, Coalition Government and how the Executive authority is exercised.

If you go further to the section that deals with the Executive under the current Constitution, it recognizes in Subsection One, both the Prime Minister and the President. Unless we want to be perfunctory. I do not see the value of that question.

Mr. Chairman: That matter is sufficiently responded to.

Mr. Nyamweya: On a point of order, Mr. Chairman, Sir. I do not think it is in order for somebody who has been sent here to give us information to speak to the House; that he does not think that what we are doing is valuable. I really do not think that is in order. It is not for him or anybody else to decide whether it is of value or not.

Mr. Chairman: I do believe that everything that is raised in this room on this matter is valuable and useful to the conclusion of the task at hand. I consider that that matter has been sufficiently responded to. I beg that we move on to the next matter.

Mr. Caroli Omondi: Mr. Chairman, Sir, hon. Nyamweya's second question was in relation to the concept of a functioning Judiciary. One does not have to be a rocket scientist. If under the new Constitution you are removing the Chief Justice of the Judiciary, you are vetting all the judges and magistrates who are in that judiciary to determine their suitability to continue to serve, surely, there is something wrong. If it was functioning, we would not do that. The Constitution itself says: From the head to the bottom. Some are removed, some are to be vetted. We live in this country and we know that there is a problem.

His other question was in respect of Justice Visram. At no time was the name of Justice Visram mentioned. When he says that from the HANSARD, the Prime Minister said that he had no problem with Justice Visram or Prof. Muigai's nomination, he was not saying that he was consulted. He was just saying that he had seen their names and he had no problem with them. That is very different from consultation.

I want it to be made very clear that under the Constitution, as I read Article 259(3) (a), consultation can only take place under the Constitution between the President and the Prime Minister. It is not when other people are doing any other thing. Not when we are exercising the ordinary functions of Government. Civil servants can consult at that level. But under the Constitution, for this particular purpose, it can only be between the two Principals.

I am submitting to this Committee of the House that there have not been any consultations. Consultation is not when a list is given to you and you say, my team will study it and I will bring it back, then we can talk about it. There was no subsequent meeting between the Principals to discuss that list. There was no meeting at all to discuss Justice Visram or Prof. Muigai. Even the mere fact that the list had Kilukumi's and Kirwa's names. Unless we take consultation to be notification or to be a perfunctory exercise, we cannot say that, that was consultation. If I walked in here today and said that I am with so and so here and I announce that I have appointed him to a certain post without telling you even what I am thinking, that is not consultation. So, between the two Principals, I would like to tell this Committee that there has never been any consultation on these nominations.

Hon. Amina Abdalla asked the nature of recordings of our meetings. There are different levels at which consultations are done. In the ordinary course of Government business, there are different levels at which consultations are done. When we used to have the Committee on Management of Coalition Affairs, there used to be formal minutes. But this particular consultations; weekly meetings between the President and the Prime Minister, have not been formalized. We normally take our notes and sometimes we issue joint statements and sometimes we do not. Sometimes when we agree, we move out and exchange letters. Sometimes one calls the other back and informs him what he wants to do, he has done or is going to do. They remind each other to send letters to people who would execute particular tasks. That is how it has been happening.

You talked about goodwill in consultations; whether this is the end. I do not think this is the end. To the contrary, I think from this experience, probably both sides have learnt something; that going forward, maybe things need to be more structured. On our side, we have always tried to make them more structured, but that has not been possible.

I would like to give the Committee two letters; one we wrote on 4th July 2008 and the subject is "Co-ordination of Government Business" where again we are expressing problems with consultations.

Mr. Wamalwa: On a point of order, Mr. Chairman, Sir. I think it would greatly help the Committee if we had a bundle of all the correspondences relating to this matter and perhaps, as Mr. Omondi has said, they were not keeping minutes, but they were keeping notes of the minutes. So, perhaps what we have received from Amb. Muthaura are his notes. Is it possible to also receive notes from the Office of the Prime Minister? It might greatly assist us. Will it also be possible for the Office of the Prime Minister to avail Ps, Isahakia, because at some point or some stage of consultations, I think the final communication was made through him on the issue of the Chief Justice. Whatever you are telling us goes on record. Whatever you are giving us is like evidence on oath and you cannot perhaps speak on his behalf. We would like the PS, Isahakia to appear before us so that he can also go on record as to the final bit of these consultations before the Prime Minister departed to Addis Ababa.

Mr. Caroli Omondi: Mr. Chairman, Sir, of course it is up to the Committee to decide whom they call. If you ask him to come I am sure he will comply.

I think we are mixing issues. There is discussion at the technical level. I think we need to have this very clearly, in law under this Constitution those are not consultations. What I discuss with Prof. Wanjohi or Amb. Muthaura frankly is not consultation. The Constitution is very clear consultation is when whatever we have prepared is then presented to the two principals jointly and then they take a decision. That is consultation.

Mr. Baiya: On a point of clarification, Mr. Chairman, Sir. Would you consider communication such as the telephone call that was being made from State House to the PM in Addis Ababa as consultation?

Mr. Caroli Omondi: I would not. First, when they made the call they did not tell me what the subject matter of the discussion was. I do not know whether it was a call to---

Mr. Musyimi: On a point of order, Mr. Chairman, Sir. I came here under PNU, for good or ill, if I was told that the Prime Minister wants to talk to me I would leave this room as a matter of respect to the Prime Minister and the Office of the Prime Minister. I still find it very odd that you would be told that there is a call from State House and somehow it does not raise you.

Mr. Caroli Omondi:: Mr. Chairman, Sir, I am coming to that question.

Mr. Chairman: We are running out of time now.

Mr. Caroli Omondi: Mr. Chairman, Sir, Mr. Musyimi I have a lot of respect for you. I know your fights to make this new Constitution possible.

Mr. Chairman, Sir, your first question was on commonwealth of women to get a new Chief Justice. The Prime Minister never had the opportunity because when we suggested Commonwealth and a panel was to be set up to try and get names, probably, I am sure there are very many qualified Kenyan women. I know many of them who would been interested in this position. That opportunity never arose. Instead he was presented with a list as a *feita comple* and told this is what has been generated.

If you see the Statement by the Vice-President and Minister for Home Affairs to this House he says very clearly that the list was generated by the President. This is in the HANSARD a copy of which I believe you have. So, the Prime Minister never had the opportunity to even give the women of this country a chance to participate in this process. That is why we are here so that we can start this process again so that the women of this country can have the opportunity to have a go at this position through competition.

On the question on the call, I am in a meeting at 6.30 p.m. then I receive a call from Nelson Githinji. He tells me H.E wants to talk to the Prime Minister. Immediately I try to

figure out, how do I get the messenger in there? How do I even tell the PM to come out? I tried. That is why I went to speak to the AU official. I asked him how long he thinks the meeting would take. No one was coming out of the meeting. He told me it would take one hour and a half. I was holding the phone, it was not that I disconnected and would call again.

Mr. Baiya: *(off record)*

Mr. Caroli Omondi: By what means if we are not allowed in the same room?

Mr. Baiya: Even here by the way we receive these messages and we even know how these meetings take place in halls. There are always messengers. What is not allowed is for you to do any communication but you can leave and pass a note. Even right now, if you received a message right now that there is an important message from the Prime Minister himself it would be the height of irresponsibility for you to ignore that kind of message.

Mr. Caroli Omondi: You know, frankly when you are in the middle of that meeting with the heads of States for those who have attended, I do not know, but there are protocol issues. You do not just send a messenger. Even the person who is sitting at the door, it is not his job to enter the meeting. His job is to block the people from entering. That is precisely why he is at the door. His job is not to pass messages in and out.

Mr. Chairman: Mr. Omondi, please, conclude. I invite you to bring this matter to a close.

Mr. Caroli Omondi: Those of us who have the privilege to be engaged in these issues sometimes you go to these meetings with your principle and the whole day he is next to you but you are not able to talk to him. He is with other Heads of States and dignitaries.

Mrs. Odhiambo-Mabona: On a point of order, Mr. Chairman, Sir. I think we need to put things into perspective. When I worked with the civil society I was lobbying AU and the UN, from what Caroli is saying leave alone the President and the Prime Minister even a Minister once they go and sit at the Government position if you are not a delegation you will not enter. When it is the Presidents you will not go anywhere near or close.

Mr. Chairman: Hon. Member, I believe Mr. Omondi has made it clear that he did not have opportunity to communicate with the Prime Minister. Had he that opportunity he would have certainly communicated with the Prime Minister. Please, go ahead and bring that matter to a close.

Mr. Nyamweya: Mr. Chairman, Sir, before you bring that matter to a close, I am most reluctant to even offer this but I think in the light of what my colleague Mrs. Millie Odhiambo-Mabona has said I myself was in Addis Ababa the other day at that particular meeting. I can tell you that it is possible to access any of the people in there whether a

Head of State or Head of Government. That is a fact I can now put on record. You cannot be excluded if you want to communicate with your delegation.

Mr. Olago: On a point of order, Mr. Chairman, Sir.

Mrs. Odhiambo-Mabona: On a point of order, Mr. Chairman, Sir.

Mr. Chairman: Hon. Members, let us be orderly please!

Mr. Ruto: Mr. Omondi, it is on record that you also asked when you got the State House message that you wanted to know the agenda. Is it possible that you ask the President tells you the details he wants to convey to the Prime Minister before you can actually allow him to speak to him?

Mr. Caroli Omondi: Mr. Chairman, Sir, it is not my responsibility---

Mr. Chairman: I will take Mr. Olago's and then kindly invite you to conclude.

Mr. Olago: Mr. Chairman, Sir, my point of order is this; we have been listening. I do not think this is the right time to draw conclusions on whether we believe what we have been told or not. These interventions should not be as if to imply that we believe you or we do not believe you. That we will come to later.

Mr. Chairman: Allow me to invite Mr. Omondi to conclude, whether or not the effect of the information you are giving us is something the Committee is going to have an opportunity to synthesize and make a decision on. So, I invite you to bring that question to a close and move on.

Mr. Omondi: In answer to what Mr. Ruto has said, in this kind of business there is a level of sophistication that is required!

(Laughter)

If Nelson Githinji calls and he does not tell me what the President wants to discuss with the Prime Minister I get the cue that is why I do not ask. I know I can also call him and tell him the principle wants to talk with H.E and would not tell him what I it is. Maybe I have been told not to say. I do not know. It is on a need-to-know basis. That is how the business is conducted here.

Mr. Chairman: Please, go ahead and conclude.

Mr. Caroli Omondi: The fact that they called my phone means they know they can always reach the principle through my phone.

The other question by Mr. Wamalwa on the earlier consultations, I think I should make it absolutely clear that this particular issue appeared in the discussions between the

President and Prime Minister three times. It first appeared sometime in December when it was agreed that the matter be deferred to the following year. Therefore no substantive discussions took place. Those are not consultations. It was then discussed on the 6th of January when it was agreed that those positions be speeded up. What the two principles agreed at that point in time was to set up a committee to assist them with identification. That is not consultation.

It was then discussed more substantively on the 27th of January when the names were presented to the Prime Minister. That is the first time the names were being discussed. The names were presented in the morning. A small group of four discussed them in the afternoon of that and could not agree. The Prime Minister then left. With those facts even to ask there were earlier or later consultations--- there were none. There were no consultations! You cannot describe those events to be consultations in law or in fact.

Then you asked what informed the earlier decision not to advertise the positions. Amb. Muthaura yesterday informed the other Committee that they received a legal opinion from Prof. Kibwana that those positions should not be advertised. If you read the Constitution---

Mr. Chairman: Mr. Omondi, the information we have from Amb. Muthaura is that the proposal not to advertise was actually yours and it was on the basis of your proposal that the earlier intention to advertise was deferred. In fact, at the meeting where you first discussed these names Amb. Muthaura informed us that they already had a draft gazette notice for advertisement. It was the basis of your proposal that it was set aside.

Mr. Caroli Omondi: I am coming to that.

No! No! If you get the records of the other Committee he did say yesterday that this is the legal opinion of Prof. Kibwana that there should be no advertisement. However, the point is this, Judicial Service Commission (JSC) in the present appointments until the next elections of the Chief Justice have no role. It is actually a role of the Executive. That is the true position. They have a role for the Deputy Chief Justice and the other judges who come thereafter.

I think that is what Article 166 of the Constitution says if you read it together with Section 24 of the Sixth Schedule. However, when this issue came up, we wanted to have a competitive process, merit based and that is why we were struggling with the criteria and the process. We also wanted, because we had had this problem in previous appointments where the Executive on both sides say in terms of nomination, vetting by Parliament and appointment the Executive was losing its role. This is because Parliament had tended to do the actual recruitment, vetting and then just sent it to the Executive for appointment. In this case, it was agreed by both sides that for this one we have an internal process. In fact, the model we wanted to use was the one used in White House in the US where there is a very elaborate system where people are head hunted, identified and interviewed within the Executive through a competitive process and names forwarded to the House. So we were trying to experiment with something new. However, now when

we look back probably it was the wrong decision and we have no problem to change course on that.

Now, Mr. Wamalwa also asked that some Members of the JSC have not been vetted. I think there is a Clause in the Constitution that says the JSC will function provided it has five members. It does not have to be full House. So I do not think it is a question of how many people should be in the Commission. As long as they are five they can convene and transact business. Those who have not been vetted may as well be asked to step aside and the process conducted. However, that is an administrative matter for other organs to deal with.

Mrs. Odhiambo-Mabona asked about sources of candidates for Director of Public Prosecutions. I think you misunderstood me. We did not pick one source. The Committee said we should look for candidates from prosecution service meaning those who are already in prosecution at the Attorney-General's office or those who are contracted by the Attorney-General to prosecution. We said the other crop of candidates would come from the magistrates across the country. We then said the final one would be from private practice. Of course, I am sure this was going to give us a pool of qualified women. It was not defined to one area.

The Government of course is a party to the suite that is in court. The Attorney-General is a party he already appeared in that suite. He admitted the appointments were unconstitutional. I believe that is the position of the Government because he is the chief legal advisor of the Government under the Constitution.

Mr. Nyamweya: I need some clarification there, we did ask Amb. Muthaura whether indeed a list that generates from the Presidents side, they had given any instructions to the Attorney-General to represent the Government in this matter. Perhaps it is a question we can ask you on your side whether the Prime Minister's office gave the Attorney-General's office to represent the Government in this particular suite.

Mrs. Odhiambo-Mabona: Mr. Chairman, Sir, let me just ask something in relation to that---

Mr. Chairman: Order! Mr. Olago, please, proceed!

Mr. Olago: Mr. Chairman, Sir, we must make headway. An Attorney-General is not the one given advice by the State. He gives advice to the State! It is the other way round not the way Mr. Nyamweya is saying.

Mr. Nyamweya: Mr. Chairman, Sir, my question is directed to the office of the Prime Minister not to my colleague.

Mrs. Odhiambo-Mabona: Mr. Chairman, Sir, I think I want to agree with Mr. Nyamweya that he can ask that question. I wish I were the Chair I would have said Mr. Olago is out of order. Unfortunately, I am not.

Mr. Chairman: You are not! I am and he is not out of order.

Mrs. Odhiambo-Mabona: Further to what Mr. Nyamweya is asking, could you clarify whether the Attorney-General is the chief legal advisor of the Government or the Government is the chief legal advisor of the Attorney-General?

Mr. Caroli Omondi: Mr. Chairman, Sir, I will read the Constitution. Article 156(4) says:-

"The Attorney-General is the principle---

Mr. Nyamweya: Mr. Chairman, Sir, I asked a very specific question and if my friends would allow this; I asked Amb. Muthaura on behalf of the President whether they---

Mr. Chairman: Mr. Nyamweya, I invite Mr. Omondi to respond to your question which I believe he is going to do.

Mr. Caroli Omondi: Mr. Chairman, Sir, I want to answer him by referring by the Constitution. Article 156(4) says:-

"The Attorney-General is the principle legal advisor to the Government"

So in my answer to Millie it is not the other way round. The Attorney-General advices the Government. The Government does not advice the Attorney-General.

Mr. Nyamweya: Mr. Chairman, Sir, my question is very simple one of yes or no. Did the Prime Minister instruct the Attorney-General to represent the Government? That is answered with a yes or no. If he did, fine! If he did not, fine!

Mr. Chairman: Let us have order. We are going to allow Mr. Omondi to answer the questions. We are not going to dictate Mr. Omondi on how he will answer the questions. We will allow him to answer the question the way he knows best. I will plead with you to be as brief as possible. The time we had allocated for this session has run out. We have more people to talk to.

Please, conclude.

Mr. Caroli Omondi: Mr. Chairman, Sir, it also says:-

"The Attorney-General shall represent the national Government in court or in any other legal proceedings to which the national Government is a party other than criminal proceedings'

He has statutory instructions. He does not need instructions from anybody. That is my answer to you.

Mr. Nyamweya: Mr. Chairman, Sir, it is such a simple thing, if the Prime Minister instructed the Attorney-General through you or whoever he acts through instructed the

Attorney-General and said we want you to represent the Government. Did anything like that take place? Yes or no?

It is such a simple thing. If Mr. Olago works for the Prime Minister, perhaps, we can get an answer from him.

Mr. Caroli Omondi: Mr. Chairman, Sir, let me answer hon. Nyamweya. I have read the law. He does not want to understand that the Attorney-General has statutory obligation. Now, I have the proceeding and this is the petition. This petition is between the Center for Rights, the League of Women versus the hon. Attorney-General as respondent. Are you saying that he should not have gone to court?

Mrs. Odhiambo-Mabona: On a point of order, Mr. Chairman, Sir. I asked the question: "Is the Attorney-General the Chief Legal Advisor of the Government or vice-versa? What you are being told is: "Did the Government advise the Attorney-General on legal matters, so that he represents?"

Mr. Chairman: That question has been answered. I do not know what that point of order is about. Mr. Omondi, please, move on and conclude.

Mr. Nyamweya: Mr. Chairman, Sir, from you I would like, perhaps, to understand the answer to that question. I am not quite sure I have got an equivocal answer from the person giving us information. I do not mind when we retire to deliberations, for us to consult between ourselves and give various opinions, but from the witness or person giving the view of--- It is just a simple one. Could you, perhaps, for my sake tell me what the direct answer to the question is?

Mr. Chairman: I understand Mr. Omondi to be making two fundamental points. First, the Attorney-General statutorily instructed that by dint of his position as Chief Government Legal Advisor and by way of mandate constitutionally and statutorily granted, he already holds inherent instructions. Secondly, he is mentioned as a party to the suit and by the very nature of the suit, he had to appear. That is what I hear Mr. Omondi saying, unless I did not hear him.

Mr. Nyamweya: Mr. Chairman, Sir, I understand you and Mr. Omondi equally well. When I asked Amb. Muthaura this question in the morning, there was not all this fuss about it anyway. My simple question was: Did the President instruct the Attorney-General in respect of this suit; yes or no? He said the answer was "no." I am asking the Prime Minister through his representatives: Did he instruct; yes or no? I also know what the Constitution says, but we are talking about the factual position. Did he or did he not? If he did or did not it is fine. Why must there be a war over it?

Mr. Ruto: Was there consultation with the Attorney-General towards this end?

Chairman: Mr. Omondi, I want this matter to come to a close. If you consider that you have answered that question, please, move on. If you have not sufficiently answered that

question, please, go ahead and do so briefly and move on. We wish to bring this to a close.

Mr. Caroli Omondi: Mr. Chairman, Sir, I will move on. Hon. A. Abdalla asked why we are running away from the Judicial Service Commission (JSC). As I have said, the JSC had no role. I think I have answered that question constitutionally. But maybe in retrospect, I think that is the route we should go. Regarding the unvetted Judges and the deadline of 27th, I believe the country can proceed for a short period of time without a Chief Justice, but I am sure there will be adequate administrative arrangement within the Judiciary to fill that vacuum.
The Chair asked whether the names of Visram and Githu were on the original list. The answer is that they were never on the original list. There was no time when they were ever presented to the Prime Minister. We were just surprised when they were mentioned.
Hon. Kioni asked who between the Attorney-General, Speaker and Supreme Court is final on matters of interpreting the Constitution. It is the Supreme Court. He also asked why Members could not vote on the issue. I do not think a question of interpretation of law is a function of vote or division in the House. I think the Constitution already answered that question. If it is a matter of interpretation of the Constitution within the Executive, that is the work of the Attorney-General and not a vote in Cabinet. If it is a function of interpreting the Constitution within the Judiciary, that is a function of a decision of the Supreme Court. If it is within the House, that is a function of the Speaker.

Mr. Kioni: Where is it provided for?

Mr. Caroli Omondi: If you give me time I will furnish you with all of them from your Standing Orders to Commonwealth Practice and everything.

Mr. Chairman: I will take that as your view, one that we certainly will interrogate when we consider your submissions.

Mr. Caroli Omondi: I think the Speaker has agreed as well.

Mr. Musyimi: Mr. Chairman, Sir, we have a report to give to Parliament tomorrow and we have two more groups to listen to at the very least. We have a report to write. Can you, please, help us conclude this session?

Mr. Chairman: Please, I invite you to conclude in exactly two minutes.

Mr. Caroli Omondi: Mr. Chairman, Sir, I will answer the last question and then give you the documents that you asked for in your letter.
Hon. Kioni asked about the JSC members who are not vetting. I have said that under the Constitution the quorum is five for JSC and we can deal with that problem. So, it is not a big issue.

Now, finally, you asked the Office of the Prime Minister the legislative history, records and minutes of the meetings leading to the signing of the National Accord and

Reconciliation Act. I am very happy because we spent quite a lot of time dealing with this issue. I want to present to you, in no particular order, first, the four-item agenda of the Serena process, that is: –

1. immediate action to stop violence and restore fundamental rights and liberties;
2. immediate measures to address humanitarian crisis, promote reconciliation, healing and restoration;
3. how to overcome the current political crisis; and,
4. long-term issues and solutions.

I want to present to you the agreement that was signed in Serena that established the Waki Commission. Maybe people may learn how the secret envelope came into being. Main findings of the Report will be made public within 14 days of submission, although certain aspects of the Report or annexes may be kept confidential in order to protect the identity of witnesses of persons accused. So, nobody invented it except the Serena team. It is signed by all the eight Serena representatives.

I want to give you the one agreement we signed on Truth, Justice and Reconciliation Commission; also signed by all the eight. I also want to give you the one we signed on the Kriegler Report on the Review of the Election, also signed by all the eight. I also want to give you the one that was signed by all on Agenda Four; the long-term issues including the new Constitution, reform of the Judiciary and everything we are discussing here. That is also here.

Then, I want to give you a compendium of all the documents of the Serena process. They are all here. I would also like to refer you to a website where you can get verbatim what every Member said and what we agreed everyday from Day 1 to the last day. It is **www.kenyadialogue.com.**

Mr. Ruto: Mr. Omondi, in your own opinion together with your office, would this all saga be sorted out if we actually went ahead to appoint the senior most Judge, Justice Omollo and also Ojiambo as Attorney-General? Would all these problems be okay because you will have been consulted?

Mr. Caroli Omondi: Mr. Chairman, Sir, I read what the Prime Minister is offering as a solution. I could read it again. Do you want me to read it?

Mr. Chairman: No, it is on record.

Mr. Olago: On a point of order, Mr. Chairman, Sir. Let us confine ourselves to the mandate that the Committee has and not outside the mandate. That issue that has been asked by hon. Ruto is outside the mandate that we have.

Mr. Chairman: Mr. Omondi, Mr. Miguna and Mr. Mugambi, we are most grateful for this interaction. It has certainly been useful. You have helped clarify a number of

fundamental issues that will be useful as the Committee grapples with finding answers to the questions we have here.

Thank you very much. Should you find anything else that is in your possession useful, please, feel at liberty to convey the same to us.

Thank you and you are at liberty to take your leave.

(Messrs. Caroli Omondi,Miguna Miguna and Mugambi Imanyara withdrew from the Committee Room)

(The Chairman, Constitution Implementation Commission (Mr. Charles Nyachae) and members of his team entered the Committee Room)

Mr. Chairman: May, I call the meeting to order. Mr. Chairman together with Commissioners, first of all our sincerest apology for the time it has taken for you o be ushered in. We are really running a crash programme and unfortunately, everybody who was invited seemed to have arrived here at the same. Please, accept our most sincere apology.

Secondly congratulations are in order from ourselves. This is the first time we are interacting with you as the Committee of Justice. But still congratulations are in order. Congratulation on your appointment to this very important Commission. Of course, this is the Committee on Justice and Legal Affairs. I am made to understand that you have already interacted with the Committee on Finance, Planning, Trade and Tourism. Therefore, you familiar with this very weighty matter that the two Committees have been invited to grapple with and be able to advise the House on how to handle.

We have invited you here and we are going to take the briefest time with you, having already kept you for so long. We have invited you here by reason of an opinion from the Commission, which is contained in a statement released by the Commission. That statement is signed for the Commission, appropriately so by the Chairperson of the Commission, in which you expressed an opinion on this matter; the matter of nominations to the four Constitutional Office; Chief Justice, Attorney-General, Director of Public Prosecutions and Controller of Budget. So, we have invited you here to benefit from a little more information in terms of, what informed this particular position taken by the Commission and how being the custodians of the Constitution, in every sense of the word given you Constitutional mandate to oversee the smooth implementation of this Constitution. We would also wish to benefit from your wisdom in terms of how you see this matter---

Mr. Wamalwa: On a point of order, Mr. Chairman, Sir. I think because of the constraint of time there had been a suggestion that probably, if we allow a joint with the JSC. We have been unfair to all of them.

Mr. Chairman: I am informed that the JSC is not here anyway. So, really it does not matter. So, we proceed.

We have the LSK, FIDA, ICJ, Transparency International and the National Muslim Leaders Forum, who were are seeing together after this. I was explaining that given your Constitutional mandate, which properly designates you as the custodian of this Constitution and ensuring that of course the implementation of this Constitution proceeds smoothly and on time. We would wish to benefit from your wisdom, how you see this matter being resolved amicably and in a manner that will facilitate the implementation process to go on and in manner that will guarantee continued stability of the State, which is essential for the implementation process to move.

Welcome Bw. Chairman.

Mr. Nyachae Hon. Chairman, I thank you very much on behalf of the Commissioners of the CIC. I thank you for the opportunity for the Commissioners to appear before this hon. Committee.

Apart from the public communication that you referred to, we did formally send an opinion to yourself and the Chair of the Finance, Planning, Trade and Tourism Committee. I trust that you would have received this. We sent this through the Office of the Clerk. My understanding is that what the Committee would like to do really is to give that opinion verbally to the Committee and thereafter take any issues of clarification that the Committee may have; any question or anything that you would needs us to discuss further with yourselves.

I want to start by referring to the entry point of CIC into this matter. In doing so, I want to refer to the mandate of the CIC, which with specific reference to the discussion that we are having today, I want to start off by referring to the in addition to the mandate as set out in Section 5(6) of the Sixth Schedule, I want to refer the Committee to the provisions of Article 249 of the Constitution, which deals with objects and authority. Okay, there is also the issue of funding but basically it is the objects that we are concerned with, of Commissions and Independent Office. In particular Article 249 (1)(a,b, and c), which with your permission, I would read with your permission.

"The objects of the commissions and the independent offices are to—

(a) Protect the sovereignty of the people;

(b) Secure the observance by all State organs of democratic values and principles; and,

(c) Promote constitutionalism".

So, that hon. Members is the entry point of the CIC in so far as this public discourse on the subject nominations and appointments is concerned.

In historical terms or in terms of sequence, I think I would take you back to before the nominations were actually done, and what view the CIC had taken in terms of its mandate, relative to the matters that have now subsequently become part of this public discourse. The starting point will be a letter that the CIC addressed to the hon. Chief of

Justice on 18th January, 2011, pursuant to the CIC' s mandate to be found in Section 5(6)(D) of the Sixth Schedule. I would to read that letter and it reads as follows:-

" My Lord Chief Justice, and the subject is Appointment of Chief Justice under Article 166 of the Constitution of Kenya. On behalf of the Commission for the Implementation of the Constitution, I address your lordship in your capacity as the Chair of the Judicial Service Commission. As your lordship will be aware, the CIC has a Constitutional mandate under Section 5(6)(D) of the Sixth Schedule to the Constitution to do and I quote: "Work with each Constitutional Commission to ensure that the letter and spirit of this Constitution is respected". In this regard, the CIC seeks an early an opportunity to meet with the JSC to enable the CIC appreciate how the JSC is discharging its functions under Article 166 of the Constitution. Your lordship and the JSC will appreciate the Constitutional importance of the consultation we seek and we would therefore appreciate if the meeting can be accorded priority".

We addressed that letter to the Chief Justice on 18th January and he responded on 21st January and the letter is brief it says:

" I hereby agree to your request for your Commission to meet with the JSC and have set aside the 31st of January, 2011 at 11.00 a.m. for the meeting to take place at the High Court Boardroom, Room 74 on the Second Floor of the High Court building".

We then confirmed that meeting by a letter the following day, the 22nd of January. So, as at the time the nominations were made public on 28th January, the CIC already had this planned meeting with JSC to discuss the work of the JSC relative to the appointment of the Chief Justice, in accordance with the CIC's mandate as set out in Section 5(6)(D) of the Sixth Schedule.

Hon. Chair as it public knowledge, the announcements regarding the nominations were made on Friday, 28th January, and as also would common knowledge, at least it is the public arena, almost immediately following the public release of the names of the nominations, there was a public reaction from one side of the Executive, which suggested that the information that had accompanied the nominations was not correct and they therefore ensued public debate on the matter, which within hardly two days had become fairly acrimonious and the public discourse of the weekend was becoming more and more acrimonious and seemed to be focusing not so much on the Constitution, but on what appeared to be polarized positions that had been taken by various political leaders. The CIC felt that in view of the views that were being expressed and the direction that the public debate was taking, and since it is touched on matters of implementing the Constitution, the CIC had a duty and it was within its mandate to meet and consider the matter that was now in the public arena. In view of that, I convened a meeting of the CIC on Sunday, 30th January, at 5.30 p.m. at the office of the CIC. Upon request from your Committee through the Office of the Clerk, we have submitted to Parliament, the minutes of the meeting of that day. With your permission, so that it may assist me in taking the hon. Members through the process that led, where we now are from the CIC's perspective, I would quickly go through the minutes, because that will inform the Committee on what the thinking of the CIC was and the basis on which, certain decisions were made. I want to refer, firstly, to the opening remarks as in recorded in those minutes.

Mr. Musyimi: On a point of order, Mr. Chairman, Sir. I think it is very helpful, what Mr. Nyachae is seeking to do. But given the constraint of time, I just wonder whether it would be perhaps not more helpful. Just go directly to the substance of the matter, as it is communicated in the letter that they wrote to ourselves. Just highlight those things, because we have another four groups to see.

Mr. Chairman: Chairman, could you go to the resolution that meeting made and then of course, Members may seek clarifications on exactly, what informed that resolution, just in the interest of that. We do apologies because of this really strict time constraint.

Mr. Baiya: Mr. Chairman, Sir, maybe, he can confirm the attendance in the meeting in terms of number, whether there was any dissent.

Mr. Chairman: Those clarifications we can seek after we know the resolution and what informed that resolution.

Mr. Nyachae: Hon. Chair, if there something that I miss hon. Members can point it out and I would be happy to clarify. Since hon. Baiya has asked about the attendance. All the Commissioners except one, who was up country, remember this was a Sunday, Commissioner, Professor Wayande was out of Nairobi and could not make it on time for the meeting. All the other Commissioners were present in that meeting.

Following the deliberations, the Commission looked specifically at the issue of Constitutional provisions relating to the appointments in two categories. We first looked at the provisions that relate to the appointment of the Chief Justice. We then looked at the provisions that relate to the other three appointments together; the appointment of Attorney-General, Director of Public Prosecutions and Controller of Budget. The reason for that was that in the view of the Commission, the Constitutional provisions that touch on the process of appointment of the latter three Constitutional offices are the same and we therefore we deliberated on those three Constitutional offices together.

On the first one, appointment of the Chief Justice, after deliberations, the Commission concluded that the applicable process was as follows:-

1. Recommendations by the JSC to the President.
2. Consultations between the President and the Prime Minister
3. Submission of the nominee to the National Assembly for approval and,
4. Formal appointment by the President.

As regards the other three,--- Sorry, if I can just go back to put that in context, the process that I have just outlined in respect of the Chief Justice is based on the Commission's reading of both Article 166 of the Constitution and Section 24 of the Sixth Schedule, both of which, in the view of the Commission are applicable in the appointment of the Chief Justice. As regards the other three, whose substantive provisions in the Constitution are Articles 156, 157 and 228. That is for the Attorney-General, DPP and Controller of

Budget respectively. The Commission concluded that the applicable process with respect to these Constitutional offices is as follows:-

1. Consultations between the President and the Prime Minister.
2. Nomination by the President and presentation of the nominees to Parliament
3. Approval by Parliament.
4. Formal appointment by the President.

The Commissioners, therefore, noted that the latter procedure, just like that of appointing of the CJ in the manner in which we have setted out was equally mandatory, if the Constitution was to be complied with.

In terms of what the Commission then decided at this meeting, the Commission came to the following conclusions:-

First, that it was not the place of the Commission to establish the fact relating to the process that was used to arrive at the nominees announced for the positions of CJ, AG, DPP and Controller of Budget.

Secondly, the Commission should right its opinion based on the provisions of the Constitution on the process that should be followed for the appointment of those Constitutional offices and that this opinion should be published for the information of all Kenyans.

Thirdly, the Commission would urgently seek audience with both the Principals to request them to consult further and speak in one voice on the issue of nomination to avoid the possible polarization of the nation and any negative effect on the Constitutional implementation process.

The Commissioners considered the matters at hand to be potentially contentious and capable of harming the delicate process of implementing the Constitution. The Commission, therefore, felt there was need for the CIC to build public confidence in the implementation process and to account to the public on the performance of its mandate.

Thus the meeting resolved as follows:-

1. To meet the following day and prepare a Press Statement for publication in the Dailies.
2. Seek to meet the President and Prime Minister preferably jointly to explain the Commission's position.
3. Meet the JSC as we had already scheduled. That meeting would be to transact the agenda that was stated in my letter to the JSC.

These were the resolutions that were made at that meeting. As I have said, all the Commission's Bar 1(?) were present at that meeting. These resolutions were unanimous at that particular meeting. For the record, there was no dissent on these resolutions.

Mr. Chairman, Sir, that was the meeting that the Commission had on Sunday, 30th January, 2011. In the following morning, the Commission, as had been agreed, had another early morning meeting. At that meeting, it was agreed on the modalities of how the Commission would divide itself for purposes of crafting the statement, which would then be considered in plenary after the various teams had done different parts of the statement. It was also agreed in that meeting that letters would be written to the President and the Prime Minister, seeking to meet them at the earliest opportunity, so that we could explain our position.

So, that is the background to the statement, which was crafted, put together and brought to plenary later in the day. The statement was adopted by all the nine Commissioners. All the Commissioners were present on Monday. Again, the statement was adopted unanimously. It was resolved to publish the statement in the English daily newspaper that had the largest circulation as well as in Kiswahili daily newspaper that had the largest circulation.

Mr. Chairman, Sir, since that gives the background, and since hon. Members are in possession of the contents of that communication to the public, I do not know whether you want me to pause there.

Mr. Chairman: You can pause there and then I will ask hon. Members, if they have any clarifications to seek, to do so at this stage. You can then pick it up from there. You can also invite your colleagues to chip in, if any of them would wish to do so, depending on your own procedure of how you want to handle this.

Mr. Ruto: Thank you, Mr. Chairman, Sir. Commissioners, I want to find out how in that short span of time you were able to determine that there were no consultations. What methodology did you use?

Mr. Chairman: Let us take a set of questions and then you could respond composite, Mr. Nyachae.

Mr. Nyamweya: Mr. Chairman, Sir, I am going to, first, ask questions on behalf of hon. Amina Abdala and then proceed to ask my own questions. For the record, the following questions are from her to the Commission: (1) What is the reporting mechanism to the CIOC, and why did you decide to communicate through the Press? (2) Did you review the HANSARD of Naivasha and COC to check the intentions of the drafters to establish whether Article 166 applies or not? (3) Do you believe that the Judicial Service Commission (JSC) is properly constituted with five unvetted members of the JSC? (4) Despite 29(4), why was "24" included in this? Was this a mistake?

I think that is Sections 24 and 29(4).

Mr. Chairman, Sir, having done that, I would now like to ask my own question.

Mr. Nyachae, after listening to the method you have described, really, as you said, the first impression is that one would proceed, particularly in terms of the nominations and the subsequent appointment of the Chief Justice. Probably, there are now two schools of thought on this one. The first one is exactly what you said. The second one is that the National Accord excluding the Judicial Service Commission in the first instance or even in the subsequent one until after the first election.

If that is so, and this is really what we are grappling with, the suggestion you seem to have come up with is that the Executive seems to have taken this route but you do not need to go this direction.

To add a little bit of what hon. A. Abdala has asked, in your role as the Constitution Implementation Commission, do you think it is prudent that where there was a clear division in this process, the best way was to give a public opinion as opposed to a more quiet way of getting to answer these questions? Your first move would have to go to the CIOC.

Mr. Wamalwa: Mr. Chairman, Sir, the mandate of the Commission, as set out in their statement, is to monitor, facilitate and oversee the development of legislation and administrative procedures required to implement the Constitution, and to report regularly to the CIOC. I just want to find out how many meetings they have had and how many reports they have made to the CIOC since their appointment. From what they have explained, there was correspondence with the Chief Justice and other offices. Was there any correspondence between them and the CIOC before issuing the statement?

Secondly, I would like to find out what informed their decision, and particularly their interpretation of Article 166; whether they had the guidance of legal advice on the interpretation of Article 166, and whether, in arriving at their decision to interpret the relevance of Article 166 to this procedure, they considered the provisions of Section 12?

Mr. Chairman: You may respond, Mr. Nyachae.

Mr. Nyachae: Mr. Chairman, Sir, may I seek clarification? I did not quite follow hon. Isaac Ruto's question on the issue of consultation.

Mr. Chairman: Member for Chepalungu, would you want to re-cast your question?

Mr. Ruto: Yes, Mr. Chairman, Sir. Mr. Nyachae, I noted that one of the issues you emphasized is that there may not have been consultations between the two Principals. So, I want to find out how, at that stage, you came to the conclusion that there may not have been consultations. You emphasized it in your statement. To me, you had not meant anything in the statement without that emphasis, considering that your statement was quit brief. So, did you in any way suspect that the Principals did not appropriately consult or were you just stating it as a requirement? Unless I am reading a different thing.

Mr. Nyachae: Mr. Chairman, Sir, that is an important point. We would appreciate if you could refer us specifically to the part of the statement you wish us to clarify.

Mr. Ruto: Mr. Chairman, Sir, the statement I was just going through is titled "Opinion of the Commission for the Implementation of the Constitution". Is that statement yours?

Mr. Nyachae: Yes, it is, Mr. Chairman, Sir.

Mr. Ruto: Mr. Chairman, Sir, towards the end, the statement says:-

"Consequently, such appointments being made prior to the first elections require the President to consult the Prime Minister prior to appointment, subject to the National Accord and Reconciliation Act. The process of appointment should also reflect the later and spirit of the Constitution."

To me, there is a suggestion here that probably you feel that way, although you mention that that is part of what you have dwelt on down there under "b"(i) and (ii). So, I just want to know whether you are putting emphasis on the question of consultation.

Mr. Nyachae: Mr. Chairman, Sir, we did not, and we still do not, take any position as regards the question of consultations other than to state that it is a requirement, under Section 24 of the Sixth Schedule which, in our plain reading, does require consultations. As to the factual issue of whether there were consultations, you will agree with us, whether explicitly or by implications, suggested whether there were or there were no consultations.

Mr. Chairman: Please, proceed to respond to the other requests for clarification.

Mr. Nyachae: Mr. Chairman, Sir, there is a couple of questions from hon. Members. We have been asked why we communicated with the public as opposed to any other mode of communication. In this respect, I would invite hon. Members to look at Article 10 of the Constitution. In fact, we could begin by looking at Article 1 of the Constitution, which reads as follows:-

"1. (1) All sovereign power belongs to the people of Kenya and shall be exercised only in accordance with this Constitution---"

Mr. Chairman, Sir, Article 2(1) of the Constitution says as follows:-

"2. (1) This Constitution is the supreme law of the Republic and binds all persons and all State organs at both levels of government.

(2) No person may claim or exercise State authority except as authorised under this Constitution."

Mr. Chairman, Sir, if we go to Article 10, which sets out the National Values and Principles of Governance, you will see that it says as follows:-

"10. (1) The national values and principles of governance in this Article bind all State organs, State officers, public officers and all persons whenever any of them—

(a) applies or interprets this Constitution;

(b) enacts, applies or interprets any law; or

(c) makes or implements public policy decisions.

(2) The national values and principles of governance include—

(a) patriotism, national unity, sharing and devolution of power, the rule of law, democracy and participation of the people;

(b) human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalised;

(c) good governance, integrity, transparency and accountability; and

(d) sustainable development."

Mr. Chairman, Sir, you will see that Article 10(2)(c) sets out what these national values and principles of governance are, and in particular, under 10(2)(a), one of those national values is participation of the people.

Under Article 10(2)(c) is set out as national values; transparency and accountability.

Mr. Chairman, Sir, looking at all this, as a Commission, we are convinced that in carrying out our work, we have an obligation to keep the public fully informed and give the public the opportunity to participate in this process. We do so to enable them to do this from an informed perspective.

Mr. Chairman, Sir, on the question about the CIOC, yes, this is a fundamental function of this Commission; to report regularly to the CIOC on two issues: (i) progress in the implementation of this Constitution; and (ii) any impediments to its implementation.

As we sit here today, from the perspective of this Commission, what is happening, including our appearance before this Committee today, is just part of the process. We are not yet in a position to say to the CIOC that there has been any difficulty or any impediment to the process. We are participating in the process.

Under Section 4(d) of the Constitution Implementation Commission Act, we are specifically required to report to the CIOC at least once every three months. So, in answer to hon. Wamalwa's question, we have not yet had occasion to make a report to the CIOC. Firstly, we are within the three months period, and we fully intend to comply within that period. Secondly, in the intervening period, if there was a reason for us to report to the CIOC, we would have done so but it was our conviction that the need had not yet arisen for us to make any specific report to the CIOC.

Mr. Chairman, Sir, I will allow my colleagues to assist me in answering some of the other questions.

Mr. Chairman: Go ahead.

Mr. Wamalwa: Mr. Chairman, Sir, before you hand over the Floor, I would like to seek clarification on the same issue of reporting to the CIOC. I suppose that impediments would include any danger that could derail the process or threaten the implementation process. In your letter, you are saying that what is happening can really endanger the implementation process, and you are urging the Principals to work together and embrace the spirit of the National Accord. Our concern really is whether you deemed it necessary that you could have consulted with the CIOC on this matter, which is quite sensitive and which is polarising the nation; before you went public. This is really what we want to know. Did you not deem it necessary to consult the CIOC?

Mr. Nyachae: Mr. Chairman, Sir, the short answer to the hon. Member's question is "No, we did not deem it necessary". What we were warning against is that if the public discourse continued as it started, the CIC was concerned that it may degenerate into a situation where we would then be looking at an impediment. The very fact of our statement was intended to avoid the nation heading in that direction. This is the same message we communicated to the Principals when we got the opportunity to see them.

I also want to stress that from the view point of the Commission, informing the public is not intended in any way to contradict the intentions of the Principals or the Legislature or anybody else who is involved in the process. It is the view of the Commission that just like all the other participants, the public is an important stakeholder in this process and, therefore, by informing the public, the CIC sought to discharge that mandate without compromising the constitutional responsibilities of any of the other actors in the process.

Mr. Wamalwa: Mr. Chairman, Sir, just allow me to quote from their letter. On page two, they say: "---it is our considered view that the nature of the ongoing public debate on the legitimacy of the nominations can only do harm to the delicate process of implementing the Constitution---"

So, you appreciate the delicate process and the danger of this public debate in terms of polarising the nation. Now, being the very important institution that you are, you were joining the public debate and taking a very strong position in the same debate that you were saying was likely to endanger the process. Could you not have handled it in another way before going public, maybe, by way of consultation as we urge the Principals to consult?

Mr. Nyachae: Mr. Chairman, Sir, the hon. Member is suggesting that we ought not to have gone out to the public whereas the Constitution specifically requires public participation. I think we would be failing in our duty if we fail to involve the public. I do not think we would agree with Mr. Wamalwa's view that in issuing this statement we were getting into the debate at the level which we were trying to get away from. Our communication to the public was intended to do two things; first of all it was intended to set out the constitutional position on this appointment so that if there is going to be a debate then it should be about the law or the constitution. Secondly, we wanted to protect

the implementation process by appealing to all leaders. If you read our statement, our appeal was not just to the Principals but all leaders both in the Executive and the legislature. We were not appealing to them to stop the debate but to avoid the debate in such a manner that would endanger the implementation process.

Mr. Chairman: I do believe that you have sufficiently responded even though Ms. Muli can add to that if she wishes to. My own view is that you are an independent Constitutional Commission and you have the full mandate to interact with the public. Indeed, it is a constitutional duty for you to interact with the public even though we look forward and we do expect interaction between the commission and other organs of implementation. I honestly believe that you have sufficiently responded to that issue. Ms. Muli, you are welcome to add anything further that may be useful for purposes of the hon. Member's question.

Ms. Muli: Mr. Chairman, Sir, I will be very brief. I want to highlight Section 249(2) which states that as an independent Commission we are subject only to the Constitution and the law and that we are not subject to the direction or control of any person or authority. So, before we issue any public statements, we are actually not required not to get any direction or authority from any office. However, we do believe that we have a Constitutional relationship with the Constitutional Implementation and Oversight Committee (CIOC) which we are looking forward to work with. However, when we look at the mandate of the CIOC and Section 4 of the Sixth schedule it does not require the CIOC to require us as a Commission to consult before we issue any public statement. We are supposed to report and it is very clearly set out what we should be doing and what the CIOC is doing. Nevertheless, we take note of your concerns.

Mr. Chairman: I hope it does not come across as if this Committee is seeking to direct the Commission in any way because that is certainly not the intention. We respect the independence of this Commission.

Mr. Nyachae: Mr. Chairman, Sir, our concern is that by the statement and the statement by the Judicial Service Commission (JSC) seems to have triggered the debate. Rather than calming down the situation, it seems to have added fuel to the matter. Even what brought us to this position was your statement itself and what was tabled in the House. Also the statement by the JSC giving credence that the whole process was not done constitutionally. Our concern was that you as the Commission on implementation and that you are actually required to manage the country so that you do not appear to leaning this way or that way, as Mr. I. Ruto was saying that when you suggested that consultations should be there, in the eyes of the public it appears that you suggesting that there were not consultation so the whole thing is unconstitutional. Nobody is directing you on what to do but we are just raising our concerns of how it arises. We are going to be together for a very long time and we may want to learn from this particular incidence on how to handle very delicate situations.

Mr. Chairman, Sir, I remember that I came to Naivasha and hinted that the management of this implementation when you have a very competitive situation in the country can be

very difficult if it is not handled judicially but I do not think there is any intention of anybody telling you how to conduct your business in any manner.

Mr. Nyachae: I want to invite my colleague, Commissioner Waiganjo to say something.

Mr. I. Ruto: Mr. Chairman, Sir, I want to clarify one thing in relation to what Mr. Nyamweya has mentioned. I did indicate to you that the press did not put to us exactly the way the statement was. The press indicated that even you wanted to be consulted. That was the press but reading your statement now it is not exactly the way it appeared.

Mr. Chairman: Fortunately, that is why the Standing Orders of Parliament preclude us from taking any action or making any decisions based on media reports. That is why we are now engaging the Commission directly which is neater and more prudent way of conducting business.

Mr. Musyimi: Mr. Chairman, Sir, I do not know why Mr. I. Ruto is not giving full disclosure. At some point, he wondered whether we had a third principal in the person of Mr. Charles Nyachae.

Mrs. Odhiambo-Mabona: That is a clever way of apologizing.

Mr. I. Ruto: Mr. Chairman, Sir, I now withdraw that allusion in the press that you are a third principal now that I have read the true statement here.

Mr. Abdikadir: Mr. Chairman, Sir, we are happy with the actions of CIC because there is no problem with the Commission discussing anything in public. I think the action of the Commission to a large extent helped this process. I am also happy that the hon. Member for Chepalungu has now withdrawn his threat that he considers you, the chairman, as one of the principals and not in very good light. I think we can now move forward.

Mr. Nyachae: Mr. Chairman, Sir, I just wanted to emphasized because when I made the previous presentation, I said that it was a deliberate commission that notwithstanding the expense and because of the importance and delicate nature of this matter, we will publish the statement as is rather than leaving it for interpretation. We were trying to avoid that difficult. I am happy that the Member has now seen what exactly it is that we said.

Mr. Chairman: Karibu Commissioner!

Mr. Waiganjo: Mr. Chairman, Sir, I want to move to some of the other questions that were raised by Mr. Nyamweya. The question of the press has been debated. The issue that was raised by the two hon. Members was about our understanding of the application of Article 166 as to whether we do not think or do not hold the opinion that is held by certain persons that the only applicable provisions when it comes to the appointment of the Chief Justice is Article 24(2). Our understanding of these provisions is that you must read them together. We have many reasons why we felt that way. Among others is that

Article 166 is not among the suspended articles if you read Section 2 of the Transitional provisions. It does not exclude the application of Section 166. Article 24(2) as read does not oust the JSC. It is silent but it does not oust it. It does include or exclude it. Which means that if Article 166 is not suspended then the most natural way of interpreting those provisions is to read them together. In our own view, we also took cognizance of the fact that the JSC was now in operation and we found it very difficult to justify a situation where a constitutional office is in existence and it has a constitutional mandate which has not been suspended and it is not allowed to carry out that mandate. It was more natural both in terms of the letter of the Constitution and the spirit of the Constitution to find a meaning that allowed its involvement. For us, we were even surprised that there seems to be a controversy on that issue. Therefore, we did not feel that there was a need to go to the HANSARD discussions, not because we do not think that they have value but because we do not think there was sufficient doubt on the interpretation of these sections as to find out what the parties meant. Our own understanding is that as the people of Kenya voted for this Constitution, their understanding was that as long as there was a JSC given the mandate of recommending the Chief Justice of the Republic of Kenya who is going to be there for the next ten years, post the next election, then that institution should be allowed to participate for the credibility and legitimacy of that office. That was the basis on which we understood that Article 29, Article 24(2) and Article 166 should be read together.

Mr. Nyamweya: Mr. Chairman, Sir, what Ms. A. Abdalla was asking about was on your view of the JSC where most of its members have not even been vetted and if they are in a position to carry out the functions of the JSC. She mentioned about five members of the JSC who have not been vetted.

Mr. Waiganjo: Mr. Chairman, Sir, our view is that what the Constitution requires in terms of vetting is the suitability of judges to continue to serve as judges. The question of suitability to serve as a member of the JSC requires vetting by Parliament. Those members had been vetted. The other two members, the Chief Justice and the Attorney-General occupy those offices by virtue of their office and the Constitution has not expressly excluded the sitting Chief Justice and the sitting Attorney-General from being member of the JSC. If that has been the intention of the Constitution, they would exclude them. To them that we have a Chief Justice and he is a substantive Chief Justice of the Republic of Kenya and the chair of the JSC it would be very difficult to interpret for ourselves that he cannot sit in the JSC if the Constitution expressly excludes him. That was the reading of that provision.

Mr. Abdikadir: Mr. Chairman, Sir, everybody holds a different view in terms of interpretation. You have just said one of the key points which is that if the Constitution wanted to exclude them it would have said so. It is my point that if the Constitution in the transition wanted to include them in JSC it would have said so also. In terms of the ouster, Article 168 deals with the exit of the Chief Justice. That is in force now just like Article 166 yet when Article 168 comes, none of us has any doubt that the current Chief Justice will not exit through a tribunal. Article 168 which is not ousted says that a chief justice will go out office in this fashion. Obvious, Article 166 is not ousted because the

issues of qualification are current. The question is; if the President and the Prime Minister, unfortunately we had both them this morning and both agree that in their opinion the issue is not what is best, but would it be held unconstitutional if the President and the Prime Minister consulted and nominated a party and send it to Parliament. Would it be better if they went through JSC? I respect your opinion and your reasons for holding it, and there are very many lawyers including in this Committee and I respect that but where a person holds a different view, then in the event that the two Principals consulted and nominates a qualified person, could we hold that decision as unconstitutional purely on the ground that the JSC was not consulted when the transitional clauses says otherwise. That is where the departure is.

Mr. Waiganjo: Mr. Chairman, Sir, this is a point where lawyers could argue until the rest of the nation gets very exhausted. Our view is that it is important that this Constitution be read as a whole. The intention of doing a Constitution is not to find the meaning that expressly one thing or includes the other but to read it in terms of its intent. If you read Article 259, what does it say? If you are reading this Constitution then you must interpret it in a manner that promotes its purposes, values and principles. In a sense that is our understanding as to why we read it together. The question of the oust of the Chief Justice is provided for in Article 24. Our reading of Article 24(2), that is why I said that it does not include or exclude the JSC. If it does not say anything about it then you go back to the question whether Article 166 is applicable and the article has not been excluded. So, on what basis would you find that you exclude the involvement of JSC. In our mind we found it very difficult to argue for exclusion on the basis of the silence of Article 24(2). This position covered adequately and we were all of unanimous opinion that that is the most progress reading in Article 259 of promoting the object and values of the Constitution.

Mr. Chairman: Let us have some order so that we do not make this an exchange. That is the position of the Commission canvass and taken unanimously as you have stated. If this Committee has any contrary view, then we will have an opportunity to debate that because we are not here to convince you away from a position that you canvass and took after consideration. I think we can let it rest and have it on record as the position taken by the Commission and considered opinion. Let us move on so that we can conclude this.

Mr. Wamalwa: I had asked how they arrived at that position and whether they had the benefit of legal counsel. I had also asked about the interpretation of the provisions of Section 12 of Schedule 6. They have not responded to that. It was found that probably they had misinterpreted the law.

Mr. Chairman: That is valid. I see that your team is full of eminent attorneys of considerable repute, please, respond to that specific question.

Mr. Nyachae: I will let my colleague, Commission Omosa respond on Article 12. On the more general question, what we have said about the applicability of Article 166 to be read together with Article 24, is in our unanimous view as a Commission is on the plain

reading of the Constitution. On that basis therefore, at that level, we would not have found it necessary to seek independent legal counsel. I will let Commissioner Omosa.

Ms. Omosa: I thought I can give a Wanjiku view, and starting by a repetition of what has been said that we need to read the Constitution together all articles, specifically Articles 73 and 232. Section 12 of the Sixth Schedule, I would suggest that we read it together with Section 7 that talks about existing laws and if they are in contradiction of the Constitution, the Constitution takes the day.

Mr. Chairman: Hon. Millie, you were seeking another clarification.

Mrs. Odhiambo-Mabona: I was not actually seeking a clarification. I was just going to say that when you are interpreting the constitution, you look at the letter and the law. On this issue, I disagree with the Prime Minister and the President. I agree with the Commission.

Mr. Baiya: Just to confirm, you are not saying that you are supposed to be consulted as such. There is no requirement of that, but in view of the mandate given to you, anybody seeking to exercise a constitutional mandate under the new Constitution risk finding himself with the challenge of having to deal with the kind of position that you took. Was there any attempt at the time when these decisions were made to seek your input on the legality of that process?

Mr. Nyachae: The short answer is no, there was no attempt. We had had no discussions or consultations with any person outside the Commission either prior to the nominations or the appointments being public or any other time other than the point at which we sought the opportunity to meet with the Principal. In the interest of transparency, the very point that Baiya has made is a point that we recommended to both His Excellency the President and the Prime Minister when we met them that in order to assist the process on any matter which may touch on implementation, they may wish to consider. We may not insist on it. They have responsibilities and mandate under the constitution but it would help the process if the matter is going to touch on implementation, if there was some level of consultation with the CIC prior to any step being taken. Again, it is just a recommendation and we think it would help the process. I am told that Prof. Wanyande and Catherine Muma, if they are given the opportunity to speak, they are likely to oust me as Chairman.

Mr. Chairman: Before they do so, let put this across so that they could pull them together as they conclude for us because we should really be closing this. You have brought us directly to Justice Musinga's ruling in your opinion. Have you taken any position in view of that ruling, the exact effect of that ruling and how we should regard it? Secondly, whether the Commission has taken any position as to how you wish this matter to be brought to a conclusion. If you have, we would wish to benefit from that. If you have not, so be it.

Ms. Muma: I would like to array the fears that hon. Nyamweya that should we have gone public at the time we went public. The Principals themselves went public and the publicity was not because of het CIC, but because of the Principals. We felt that in the circumstances, it was important for the CIC which has a mandate around this issue to pronounce itself in order to guide all those who are participating.

Mr. Chairman: There is really nothing that precludes you from going public.

Ms. Muma: But just to show that it was not in bad faith. We were not going out there because of bad faith. Secondly, we made the decision to actually meet the Principals. We have never asked just directly to meet the Principals because we felt that we would hope to give them opportunity to persuade them to retreat and lead the nation by speaking in one voice. That still remains our way forward. We sincerely hope and wish that the leaders in this country will retreat, relook at the issue and speak with one voice while at the same time realizing that they cannot circumvent the Constitution. They must actually respect the Constitution. Justice Musinga ruling came long after we had pronounced ourselves. The courts, as you are aware, have the mandate of enforcing and interpreting any matters relating to the Constitution. I believe that those who feel that the ruling may not be okay can appeal that ruling and I would hope that the ruling may not be trashed because even if it is trashed at the level of Parliament, I am sure under Section 3(1) some Kenyans, acting under that responsibility might see the need to go back to the Supreme Court when it is set up or the court of appeal to pronounce a clear position on this.

Prof. Wanyande: The CIC is determined to stick to its mandate and will not do anything outside its mandate. We only hope that all institutions and actors in this country will respect the institutions that have been created legitimately to carry out specific functions. If we do that, then we will be moving this country forward. This matter is so critical because if we do not start implementing this Constitution rightly from the beginning, we are likely to run into a lot of problem. We would like to see this matter resolved by adhering to the Constitution.

Mr. Nyachae: By way of closing, the view of the CIC on the way forward, simply put, the Commission would like to see nothing else other than compliance with the Constitution as set out. If the Constitution means something different, then there are those organs that are provided for in terms of interpreting it. But if the Constitution is clear, the way forward is compliance with the provisions of the Constitution. As we all comply with the provisions of the Constitution, other than the primary provisions that relate to the appointments, it is important that we bear in mind the values in this constitution and I would specifically refer to Articles 10, 73 and 232 of the Constitution. If we do that, the implementation process will be on track and we will have done ourselves, as a country, a huge favor.

Mr. Chairman: Thank you very much. This has been useful certainly. I must say that in this era of divisions and factions, it is so refreshing to see a Commission sitting before me reflecting the face of Kenya and speaking with such unanimity and conviction around the Constitution in the manner that you are doing. It is an inspiration to those of us who

really hope that we can say this more often. That compliment is also a challenge that we wish to see them that way because then it gives us hope. Of course, it will give hope to the Committee Chairman, hon. Abdikadir that with this kind of unanimity, this commonality of purpose, then the implementation of the Constitution is in safe hands.

We wish you well and we hope that soon, we will see an amicable end to this. You are at liberty to take your leave.

(The Chairman, Constitution Implementation Commission (Mr. Charles Nyachae) and members of his team withdrew from the Committee Room)

RECORD OF PROCEEDINGS OF THE DEPARTMENTAL COMMITTEE ON JUSTICE AND LEGAL AFFAIRS HELD ON WEDNESDAY, 9TH FEBRUARY, 2011, AT THE MAIN CONFERENCE HALL, COUNTY HALL, PARLIAMENT BUILDINGS

[The Hon. Ababu Namwamba – Chairman]

[The Hon. N. Baiya – Vice-Chairman]

MEMBERS PRESENT

The Hon. Abdikadir Mohamed, MP
The Hon. (Rev.) Mutava Musyimi, MP
The Hon. Sophia Noor, MP
The Hon. Olago Aluoch, MP
The Hon. G. Nyamweya, MP
The Hon. M. Odhiambo-Mabaona, MP
The Hon. Amina Abdalla, MP
The Hon. Isaac Ruto, MP
The Hon. E. Wamalwa, MP
The Hon. J. Kioni, MP

IN ATTENDANCE

KENYA NATIONAL ASSEMBLY

Mrs. Consolata Munga	-	Deputy Director, Committee Services
Ms. Wanjiru Ndindirui	-	Third Clerk Assistant
Mr. George Otieno	-	Third Clerk Assistant
Mr. Jacob Ngwele	-	Third Clerk Assistant

OFFICE OF THE PRESIDENT

Amb. F. Muthaura	-	Head of Civil Service & Secretary to the Cabinet
Prof. K. Kibwana	-	Advisor
Prof. Wanjohi	-	Advisor
Mr. K. Kihara	-	Liason Officer

Mr. Chairman: Amb. Muthaura together with your team, Prof. Kibwana, Prof. Wanjohi and Mr. Kihara, you are welcome to this session. This is the Parliamentary Committee on Justice and Legal Affairs. I will quickly introduce you to Members of this Committee before we get into the business before us.

(Mr. Chairman introduced Members of the Committee)

You are most welcome and we really are grateful that you have found the time to come to meet us at a fairly short notice. The notice inviting you here went out yesterday. So, thank you very much for finding the time.

You are of course aware that the reason we have invited you here is a matter of grave national importance. A matter that goes to the very heart of the Coalition Government; a matter that goes to the very heart of the implementation of the new Constitution. You could easily say it is a matter that even touches on the stability of this country that we all love so much. This is a matter relating to nominations for appointment to four Constitutional offices. For purposes of this Committee, our concern relates directly to three of those four appointments.

Ambassador, this matter is contained in a letter authored and signed by yourself dated the 31st day of January 2011, Ref.No.OP/CAB17/84A in which you say:-

"Following consultations with the Right hon. Amollo Raila Odinga, EGH, MP, Prime Minister of the Republic of Kenya and in accordance with the Constitutions, His Excellency the President Mwai Kibaki has made the following nominations of persons to fill the respective State offices for approval by the National Assembly:-

1. Chief Justice – Hon. Justice Alnashir Ramazanali Magan Vishram
2. Attorney-General – Prof. Githu Muigai.
3. Director of Public Prosecutions – Mr. Kioko Kilukumi.
4. Controller of Budget – Mr. William Kipkemboi Kirwa.

Accordingly, I have been directed by His Excellency the President to forward these nominations to the National Assembly. I am therefore requesting you to facilitate the consideration of the nominations by the National Assembly".

You have attached the Curriculum Vitas of all the nominees to that correspondence.

Amb. Muthaura, you are aware that following this communication another communication came to the National Assembly from the Office of the Prime Minister. That communication is dated the same day; 31st day of January 2010. It is addressed to the hon. Speaker. I will not go through that letter because of its detail which I want to believe is in your knowledge and possession. It has been signed by the Right hon. Raila Amollo Odinga himself.

Just for purposes of the record, I will invite you consider the first page of that letter and I quote:-

"On January 28th 2011 while attending the 259th meeting of the Peace and Security Council of the African Union (AU) held in Addis Ababa Ethiopia, I learnt from the media that His Excellency Mwai Kibaki, President and Commander in Chief of the Armed Forces of the Republic of Kenya had issued a press release a copy of which is attached hereto announcing the nominations of the following persons to the positions against their names:-

1. Chief Justice – Hon. Justice Almashir Ramazanali Magan Vishram
2. Attorney-General – Prof. Githu Muigai.

3. Director of Public Prosecutions – Mr. Kioko Kilukumi.
4. Controller of Budget – Mr. William Kipkemboi Kirwa.

The nominations according to the said press release were purportedly made "after consultation with the Right hon. Prime Minister of the Republic of Kenya Raila Odinga and in accordance with the Constitution". I regret to hereby confirm that I was neither consulted on these nominees nor were the nominations made jointly by the President and myself'.

In the interest of time, I would like to stop there because that sufficiently speaks to the matter we will be interacting with you over. Therefore, the purpose of this meeting which relates to the contents of those two communications is to get clarification from the Office of the President through you as to this question in contention that is the question of the manner in which these nominations were made and whether these nominations were made with and after consultations and whether indeed they are in accordance with the Constitution as you say in your letter when you say, "following consultations and in accordance with the Constitution" as stated in the first paragraph of your letter which I have made reference to.

The two questions that this Committee would be grateful to get your clarifications on are:-

What in your view is consultation in light of the constitution and in light of the National Accord which, again as you are aware, is the source of this term "consultation" in our legislative lexicon?

Just for purposes of jogging our memory allow me to refer you to the National Accord and Reconciliation Act of 2008. The preamble to that Act says:-

> "Given the current situation neither side can realistically govern the country without the other. There must be real power sharing to move the country forward and begin the healing and reconciliation process. With the agreement we are stepping forward together as political leaders to overcome the current crisis and set the country on a new path. As partners in a coalition Government we commit ourselves to work together in good faith as true partners through constant consultation and willingness to compromise. This Agreement is designed to create an environment conducive to such a partnership and to build mutual trust and confidence. It is not about creating positions that reward individuals. It seeks to enable Kenya's political leaders to look beyond partisan considerations with a view to promoting the greater interest of the nation as a whole. It provides the means to implement a coherent and far reaching reform agenda to address the fundamental root causes of recurrent conflict and to create a better, more secure, more prosperous Kenya for all".

Ambassador, that briefly is what you could consider as the source of this word "consultation" in our legal purloins and specifically with regard to appointments.

Let me refer you to Article 29(2). It reads:-

"Unless this Schedule prescribes otherwise, when this Constitution requires an appointment to be made, either President, with the approval of the National Assembly, until after the first elections under this Constitution, the President shall, subject to the National Accord and Reconciliation Act, appoint a person after consultation with the Prime Minister and with the approval of the National Assembly."

Mr. Ambassador, it is in that context of the National Accord, the Constitution and your own letter which makes reference to the Constitution which provides the basis of our understanding of consultation. This Committee would be most grateful to know what you perceive to be consultation and whether, indeed, consultations did take place between the Rt. hon. Raila Amolo Odinga, the Prime Minister of the Republic and His Excellency, hon. Mwai Kibaki, the President of the Republic on the matter of these appointments. In answering the second limb of that question, the Committee would be grateful to receive any documentary evidence as proof of that consultation.

Welcome, Sir!

Amb. Muthaura: Mr. Chairman, Sir, again, I am sorry that we were not able to come at 10.00 a.m as you had requested. This is because we took a bit of time to organize our documentation, but now we are ready.

On my right is Prof. Kivutha Kibwana, who is the advisor in the Office of the President on Constitutional matters. Sometimes it is good for us to say something about these people so that they are better appreciated. Prof. Kivutha Kibwana holds a first Degree from the University of Nairobi. He also holds a Masters (LLM) on Constitutions and Public Policy from the University of London and a second LLM from Harvard University on Constitutional Law and Public Policy. He is also a PhD holder in Constitutional Law and Public Policy from George Washington University in the USA. I think you cannot get a better qualified person. These are one of the best universities globally.

On my right is Prof. Wanjohi, who is also a professor of Political Science and previously, the Vice-Chancellor of Jomo Kenyatta University.

On the far left is Mr. Kennedy Kihara, who is a Secretary in our office, responsible for liaison with Parliament and Commissions on the issues that we have to liaise with. That is the team I have.

Turning to that subject that you have called us here for, I think the first thing for us to establish is whether there were consultations between the Prime Minister and the President on this appointment. My submission is that there were serious consultations in a series of meetings, and I will present documentary evidence to show that.

In the meeting of 6th January, in the consultations between the two Principals, we had an agenda. The first agenda item is fast-tracking of appointments necessary for the

establishment of local mechanism for the trial of post-election violence suspects. What was proposed there were gazette notices for advertising the three jobs; the posts of Director of Public Prosecutions, Chief Justice and Deputy Chief Justice, which, however, was noted was to be done by the Judicial Service Commission. That was noted as a job where recruitment was to be done through the Judicial Service Commission.
The second agenda item was Advertisement of the Post of Controller of Budget. There was a gazette notice for that purpose.

The third item was Renewal of Contract for the Director-General of NSIS. I want to tell you that consultations are based on an agreed agenda. These are some of the relevant agenda items that were considered in that meeting.

At the end of the consultations, there was a decision especially relating to the appointment.

Mr. Chairman: Could you, please, favour the Committee with just details of the persons present at that meeting of 6th January, 2011, at which that agenda was considered before you go to the resolutions?

Amb. Muthaura: Mr. Chairman, Sir, in that meeting of 6th January, apart from the Prime Minister there was Caroli Omondi, Prof. Wanjohi and I.

Mr. Chairman: Who were present exactly from the Prime Minister's office?

Amb. Muthaura: Mr. Caroli Omondi and the Prime Minister.

Mr. Chairman: Proceed, please!

Amb. Muthaura: Mr. Chairman, Sir, I am going to get this document circulated. Our proposal was to have the jobs advertised. Caroli Omondi raised an issue as to why we were actually taking away powers from the Principals, because the law as it is now, limits itself to authorizing the Principals through consultations to identify and then the President submits the nominations after consultations. The law does not go beyond that. So, the power as far as the post of Chief Justice, during this transition period before the next election--- He argued very convincingly, and that was supported by our Constitutional Advisor; that the Chief Justice before the next election, all that the law required was the two Principal to identify through consultations and then the President does the nomination. The same applied to the post of Director of Public Prosecution. The Constitution as it is now, according to the specific provisions of the Schedule – and he is going to make that explanation – indicates that there was no requirement for advertisement. The Principals, through consultations, are empowered by the Constitution to identify and then submit the nomination to Parliament. The same applies to the post of Controller of Budget. It was also agreed that the nomination of the Deputy Chief Justice was to be done through the process of the Judicial Service Commission.
These are the minutes which we have here and we are going to circulate to you, so that you know exactly how we did it.

Mr. Chairman: We will have the Secretariat make copies of that for the Members as we move on to the next---

Amb. Muthaura: We have enough copies.

Mr. Chairman: You could just circulate that to the Members. Meanwhile, I will allow an interjection from hon. Musyimi.

Mr. Musyimi: Mr. Chairman, Sir, for the avoidance of the doubt, we need clarity. What position did you take regarding the Judicial Service Commision *vis-à-vis* the Chief Justice and Deputy Chief Justice? I am hearing different positions.

Amb. Muthaura: Mr. Chairman, Sir, the Chief Justice, according to the current Constitution, during this time of transition, is to be identified by the President in consultation with the Prime Minister and submit the name to Parliament for approval. So, there is no issue of the Chief Justice being recruited through the Judicial Service Commission during the transition time. That will be done after and that is very clear in law. That is the situation. But the Deputy Chief Justice has to go through the Judicial Service Commission. Perhaps, Prof. Kivutha Kibwana can elaborate on that.

Mr. Chairman: Go ahead, please, professor.

Prof. Kibwana: Mr. Chairman, Sir, as Amb. Muthaura has indicated, there was initial advice that although the law does not require advertising of some of these jobs, if the Principals so wished, they could also go through that route. So, I think it is important to emphasize again, as Amb. Muthaura has said, that in the meeting of 6th January, in which I was not present, it was actually Caroli Omondi who advised the two Principals that it was not necessary to go the route of advertising as we had earlier said that was a possibility, whatever the law did say.

In terms of the Chief Justice, I think it is very important for purposes of this Committee, to see the reasoning that we followed in terms of what is the legal position, let alone what is it that we could also recommend. We looked at Section 24(2) of the Sixth Schedule. There it says clearly that a new Chief Justice shall be appointed by the President subject to the National Accord and Reconciliation Act and after consultation with the Prime Minister, and with approval of the National Assembly. So, it was clear to us that the transitional provisions had established a procedure for appointing the Chief Justice in the interim period before the next elections. It was a procedure in which the Prime Minister has a consultative capacity and then there would be vetting by the National Assembly. It was clear to us that in the wisdom of the drafters of the Constitution, they did not include a role for the Judicial Service Commission in Section 24(2) of the Sixth Schedule. This is because if they had wanted to do so it would have been easy for a specific role of the Judicial Service Commission to be included therein. Since the drafters of the Constitution wanted the Deputy Chief Justice to be processed by the Judicial Service Commision, that is why that particular office of the Deputy was not included in Section 24(2). Again,

Section 24(3) of the Sixth Schedule clearly says that even if a second or successor Chief Justice was to be appointed before the next elections, he or she would have to be appointed still under Section 24(2) of the Sixth Schedule. If the intention of the Constitution was that the first Chief Justice after the promulgation of the Constitution was to be appointed under Section 166, there would have been no need of providing for the appointment of the Chief Justice under Section 24 of the Sixth Schedule. That transitional provision would have been excluded completely. But I think it is also important to emphasize that this argument that we were pursuing did not lead to the conclusion that Article 166 of the Constitution is not operative. This is because that article provides for the appointment of the Chief Justice when a vacancy arises after the first general elections. Also, it provides for the appointment of the Deputy Chief Justice as well as other Judges. Also, it provides for the qualifications of the Chief Justice, Deputy Chief Justice and all other Judges.

We also knew that both the President and Prime Minister had a duty to ensure that when they are consulting – and when the final nomination comes through – the nominee for the position of the Chief Justice under Section 24(2) would meet all requisite Constitutional provisions. If any were not met then, obviously, Parliament would be able to say that, that was a problem.

We also looked at Article 172 of the Constitution, because it also talks about qualifications, but that was specific to judicial officers and other staff of the Judiciary as described in Article 260. After the transition it is also very clear that both the Chief Justice and Deputy Chief Justice will be appointed in accordance with the recommendations of the Judicial Service Commission and subject to the approval of the National Assembly.

Mr. Chairman, Sir, regarding the question that you focused on in terms of consultation, this is, of course, in Article 259(11) of the Constitution. This is the Article which differentiates between advice, recommendation, approval, consent and consultation. It was clear also to us that because the Constitution is superior to all other laws, you are first of all guided by what the Constitution says in terms of what is consultation. Obviously, consultation does not mean concurrence, but it means there must be consultation. If there is no consultation, then it means that a nomination cannot come through the National Assembly. So, if the President does not consult, that nomination would not be a nomination for purposes of bringing it to the National Assembly. But, of course, another thing that the Constitution did not consider was what happens if a party does not make themselves available for consultation. That is something that the Constitution did not anticipate. So, for us, it was clear that approval or consent of the National Assembly is mandatory. Also, consultation of His Excellency the President and the Prime Minister is mandatory.

Since we are now in a Presidential system, there are offices where the President originates names of nominees and then he consults with the Prime Minister. The consultation does not mean that there is concurrence, approval or consent. This is because if that was the case, then it would have been very clear, that in terms of appointing the

Chief Justice, Attorney-General and Director of Public Prosecutions (DPP) there must be concurrence. So, the Constitution, which is the superior law of the land, did not talk about that. Now, if you look at the Section 4(2) of the National Accord and Reconciliation Act, the definition of the composition of the Coalition Government is "the persons to be appointed as Ministers and Assistant Ministers." For those people, there shall at all times reflect the relative Parliamentary strength of the respective parties and shall at all times take into account the principle of portfolio balance. The history of the National Accord in our country, of course, has been rocky. This is because in those negotiations, after it was agreed that there would be sharing of Cabinet positions on the basis of Parliamentary strength, because that is really the substantive part of the National Accord--- You have, of course, read the preamble. The preamble is realized within the substantive part of the Constitution. In the wisdom of those who were negotiating and Parliament, Parliament targeted the Cabinet positions. Of course, if you can change that through the Constitution or if you can amend the National Accord to change that, then there would be a difference. Indeed, you would not even talk about consultations. You would simply say that these positions must be shared from the Ministers up to all public positions on a 50/50 basis. Of course, even within the current negotiations and consultations, one of the difficulties that has arisen is that it is no longer even clear in terms of when political parties fragment and, therefore, you have several fragments which are also asking to be incorporated in the consultations and have positions also ascribed to them. That also has introduced---

Mr. Chairman: Professor, sorry to cut you short. Hon. Musyimi, go ahead with your interjection.

Mr. Musyimi: Mr. Chairman, Sir, I have one subsidiary question. We note that earlier on you were talking about a meeting between the Prime Minister, Mr. Omondi and yourselves. Then, you were quick to point out that Mr. Omondi did not feel that it was necessary to advertise these positions. Were the meetings at that stage adversarial or they were held in good faith? It is important for us to hear what you would say.

Secondly, the learned professor has spent quite a bit of time going into the definition of the word "consultation", but I wonder whether the advisors to the Principals and the Principals themselves also coming back to the mother law, considered the weightier matters that go beyond the definitions. I quote from Article 259. It reads:

"This Constitution shall be interpreted in a manner that promotes its purposes, values and principles, advances the rule of law and the human rights and fundamental freedoms in the Bill of Rights, permits the development of the law and contributes to good governance."

Mr. Chairman, Sir, if you go to Article 10 with regard to Purposes, Values and Principles, it says:

"National values and principles of governance in this Article bind all state organs, state officers, public officers and all persons whenever any of them:-

a. applies or interpret this Constitution;
b. enacts, applies or interprets any law or;
c. makes or implements public policy decisions;

The national values and principles of governance include; patriotism, national unity, sharing and devolution of power, rule of law, democracy and participation of the people,

human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalized, good governance, integrity, transparency and accountability and sustainable development."
We have spent a lot of time on the Floor of the House and I fear that if we are not careful going that direction, will begin to define and over-define the word "consultation." It is important, but I think if we ignore what I would call the weightier matters of the law (the provisions that I have referred to) we might, perhaps, if we are not careful, begin to lose the general drift of the purposes of the drafters of this Constitution.

Mr. Chairman: Let me add to that a little bit. You say that at this meeting of the 6th, it took one person, one Caroli Omondi to change the whole initial intention of advertising these positions, visions for which gazette notices had already been prepared. Unfortunately, the gazette notices are not annexed to these minutes. It could have been useful for the Committee to have had a view of the draft gazette notices. So, even after the Office of the President had clear intentions that these positions be advertised - and I believe, Professor was right in saying that even though there are not express requirements to advertise - but in the interest of the new dispensation, and in line with the provisions of the Constitution that hon. Musyimi had referred us to, which you should also put together with Article 27 of the Constitution, on Equality and Freedom Discrimination, which among other things entitles every person equality before the law, equality includes the full and equal enjoyments of all rights and fundamental freedoms; "The State shall not discriminate directly or indirectly against any person and really the interest of affording every Kenyan the opportunity to compete for these positions, which competition will not anyway have infringed on this Constitution." After all that intention, it took one interjection from one Caroli Omondi to change the original intent from advertising to head hunting. That is something which I would appreciate a clarification.

Secondly, Ambassador, I do not know whether there is a standard format of minutes for meetings between the President and the Prime Minister, and whether in that format, the minutes are never signed. There is never a list of person(s) attending the meeting and that the minutes never indicated details of discussion at the meeting, because then some of the details you tell us about proposal for advertisement and counter proposal against advertisement from Caroli Omondi as you have said would be details that would be obvious from these records. So, I would also be interested to know, what exactly is the form of record keeping for meetings of this nature, and whether there is a way to authenticate because this document, you have shared with us, has no signature of anybody, has no list of those present at this meeting and, therefore, raises questions as to exactly what nature of document it is.

Mr. Ruto: On a point of order, Mr. Chairman. I think we should restrict ourselves to issues of getting information and some matters can be prosecuted, while we have let the gentlemen conclude. I do not think we can go beyond seeking information that has been availed, and as to several other issues, I think we better handle them ourselves.

Amb. Muthaura: If you look at the heading of the agenda, it is a meeting between the President and the hon. Prime Minister. Quite often in these meetings we are kept--- They discuss and tell us what they have agreed. Sometimes we are in. We are facilitators. We are not really party to the meeting. The meeting was between the President and the Rt. Hon. Prime Minister. The decisions which they arrive at are announced quite often through the PPS. The details of the discussions are not there. Sometimes those details are not some of the best things that we want to have. Somebody asked whether these meetings are adversarial or are friendly. Actually, they are very warm meetings. The meetings between the President and the Prime Minister are normally warm meetings. When they deal with a problem, they deal it with it as a problem. If they cannot agree, they put it off for the next meeting or for further consultation. If they agree then they announce what they gave agreed. So, that is really the position. That is why you see the decisions are normally very specific. We do not give an account of the discussions and it is not the right way of doing minutes. Minutes are basically the decision of what has taken place. We may make a reference to the discussions. We do not go to details, and then we record the decisions. Even with the Cabinet, that is the normal way we do things.

The other point, which I did not mention, in this first meeting it was decided once the principals decided on that by law, they are empowered to identify. They are not required by law to advertise, otherwise if they are required by law, they would have advertised. But the law does not go beyond the requirement that they consult and identify. That is what the Constitution--- Anything beyond that is not provided for by law and really to try to go beyond what is by law, then that would be subject to a lot of interpretation and generality. That is why we cannot agree, because a lot of us are going beyond the law. We have to sticking to the law. If we have to manage this country in an orderly manner--- Once, you start going beyond the law, then you get a million interpretations and that puts you into very dangerous water.

So, in that meeting it was also agreed that the technical team that is comprising Caroli Omondi, PS Isahakia and myself and the Personal Secretary to the President, Prof. Wanjohi try to facilitate identifications of the persons so that, that list can be submitted to the principals for consideration and that is what we did. Then, after that we had another meeting on 27th and I think we should go to that other meeting so that --- because here is the process of consultations. At that meeting of 6th, we have been told that since we are not going the advertisement route, now try to identify the names and bring them to us for consideration. So, we had another meeting. That is a meeting of 27th January, and in the meeting of 27th January, agenda item No.5 was again constitutional affairs targeting the Office of the Chief Justice, Deputy Chief Justice, Director of Public Prosecutions, Attorney-General and Controller of Budget.

In that meeting, we the technical team, which was in the meeting comprised myself, Mohamed Isahakia, Nick Wanjohi and Caroli Omondi, although I excused myself in the meeting because there was an agenda of ICC. But I was brief after the meeting. In that meeting His Excellency the President gave a list of nominations, which had been compiled from the technical group consultations. That list is attached to document, which I am going to give you had pronounced Justice Paul Kihara, Chief Justice. Deputy Chief

Justice was proposed to be Justice Lady Justice Okwengo; although that was known to go through the JSC. Attorney-General, there as Fred Ojiambo, who is a lawyer in private practice and Kioko Kilukumi, also a lawyer in private practise was also proposed for Director of Public Prosecutions and William Kirwa was proposed as Controller of Budget. PLO Lumumba was also in that list not necessarily for appointment because he is already occupying the office, but in terms of looking at the list. That is why even the Deputy Chief Justice was there, to look at the broader equation in the judicial sector, administration of justice to find out how they spread. That is why these names were put there, but it was not supposed to be for appointment because he is already in the office.

So, in that meeting the principals agreed that, because there were issues that were raised in the discussions, the principals agreed that there was need for the technical to go and try to harmonize the differences, which had arisen; to harmonize some of the issues that had been raised, and then report back to the principals that afternoon.

It was very important, and the President emphasized that he needed to have these appointments before he left for Addis Ababa. That was on Thursday, and he was to leave for Addis Ababa on Saturday. So, we had that afternoon and the morning of Friday within which to facilitate the agreement on these appointments. So, when the technical team met after the Principals left, they actually agreed on all the other names except for the post of Chief Justice because, at that time, the President's team insisted on Justice Kariuki while the Prime Minister's team insisted on Justice Omolo.

Because we did not want to go back to the Principals with a situation which could not facilitate a solution---

Mr. Chairman: Was there any particular reason for insisting on those two? Was there any particular rationale?

Amb. Muthaura: Mr. Chairman, Sir, during the consultations, the Prime Minister had said that he preferred a foreign judge from the Common Wealth to be the Chief Justice during this period of transition, so that we can be able to overcome the ethnic prejudices during this critical time.

On his part, the President argued that after 50 years of Independence, we have in our judicial system, people with integrity; from whom we can get a person to fill the post of Chief Justice.

The Prime Minister also said that in the event that we do not opt for a person from outside, then it is good for us to get the senior-most judge from the Judiciary.

The President, on his part, had argued that he had consulted extensively and that he had identified Justice Paul Kariuki as one of the judges who can carry out the reforms in the Judiciary, and he insisted on that one.

So, the technical team said that, because we could not agree, the best thing was for us to propose a third name to see whether it could assist in resolving the differences. That is why we proposed the name of Justice Visram. What happened is that we put the names thus "Omolo/Kariuki/Visram" and reported in the afternoon to the Principals separately.

We went and told the President that we had agreed on these other appointments except on that of the Chief Justice. For the appointment of the Attorney-General, there were serious reservations during the meeting, on Ojiambo. He is a good lawyer, but it was pointed out that he had a serious weakness, because he did not have a post-graduate degree. Somebody who is to be the chief advisor of the Government and the lead counsel in the country, in terms of academic credentials, he needs to have very high credentials. So, that is an issue we were to raise with the Principals also.

So, we reported separately, and the two Principals insisted on their positions. So, I called Ishakia and told him: "Please, try to see whether the Prime Minister can be flexible and meet the President somewhere." On my part, I also asked the President to see whether he could be flexible and meet the Prime Minister somewhere. After two hours or so, I called Ishakia. That was in the evening of Thursday. I told him: "The President is insisting on Justice Kariuki, but he has said he would propose that the Prime Minister proposes an Attorney-General of his choice." This was an attempt to see whether he could break the deadlock.

Ishakia came back to me and told me that the Prime Minister was still insisting on Justice Omolo as Chief Justice. So, I conveyed this matter to the President, who said: "In that case, could you ask the Prime Minister to make sure that we are able to solve this problem by mid-day tomorrow?" That was to be Friday. It was on Thursday when we talked. That is the message I conveyed to Mr. Ishakia to convey to the Prime Minister, and I am sure he did.

So, we went to sleep and came back to the office the following morning. In the morning, I found a note in my office from Mr. Caroli Omondi, saying that the Prime Minister had left at 8.00 a.m. for Addis Ababa and that he was proposing that the discussion on the appointments be continued sometime next week. I called Ishakia and told him: "This type of message will not be received well by His Excellency the President, because of the deadline and because he wanted this decision taken before he goes to the AU Summit." The Prime Minister was still accessible via telephone. So, I asked him: "Why can they not continue with negotiations to see whether they can have an agreement?"

He told me that he was going to convey that message to the Prime Minister. I told him: "It is very important that there is an agreement", because if there was an agreement, there would not have been all these things we are talking about; constitutionality and all that. We wanted an agreement. I told him: "Try to make sure that you reach the Prime Minister and tell him that it is important that we have a way out of this deadlock. On my part, I am going to convey the same message to the President; to tell him that we have to find a way out of this deadlock."

So, I went to see the President and told him where we were, and that it was important that we had a solution. Ishakia did the same. I have no doubt to believe that he did not do the same. We were now talking about between 9.30 a.m. and 10.00 a.m.

At around noon, I went back to Ishakia and asked him whether he had gotten any feedback from the Prime Minister, and he told me that the Prime Minister did not change his position. I told him that the President had made a final offer, which was very important in terms of getting us out of the situation we were in. I told him that since the Prime Minister wanted us to get out of tribal prejudices, the President had proposed that we have Justice Visram as the Chief Justice, because he was qualified, and we have Githu Muigai as the Attorney-General. Muigai is also an eminently qualified lawyer.

I am saying this because it is very important. If you go back to why we are talking of a broader equation of the people in this system, there is always need to make sure that there is a wider representation. I told Ishakia: "It is very important that we have a reaction on this matter quickly." So, at around 12.30 p.m. Ishakia called and told me: "The Prime Minister has no problem with Githu Muigai, but he is still insisting on Justice Omolo."

Mr. Chairman, Sir, I am a diplomat. We had such negotiations even during the formation of all the other Commissions. It is not like this one is special. We try to facilitate solutions. I told Ishakia: "I will not tell the President about the reaction of the Prime Minister on this one because we are almost moving towards an agreement. I will not tell him because I do not want to prejudice the process, but I recommend that the Prime Minister conveys this message himself to the President, so that they see whether they can come to an agreement."

Ishakia came back to me and told me: "Give us the number, and the Prime Minister is going to call the President." I gave them the number. At that time, the President was in Harambee House. So, I just walked across and told him: "The Prime Minister is going to call any time now." So, I alerted even the President's Secretary to facilitate. The President waited until 3.00 p.m. There was no call. I called Ishakia again. I asked him what was happening. He told me: "The Prime Minister is going to call. He is about to call." I told him: "If he is going to call now, the President has gone to State House. So, you have to use a different number." I gave him the number so that they could talk.

The President waited up to 6.00 p.m. and then asked me what was happening. I told him: "Let me check." I asked the Comptroller of State House to call the Prime Minister himself and try to connect them, because Ishakia told me that there was a problem in connection. I asked the State House Comptroller to call the Prime Minister, so that he could facilitate connection. At that time, the Comptroller of State House called and talked to Caroli Omondi, who said that the Prime Minister was not available until after one-and-half hours, because he was engaged. That was 6.00 p.m.

At that point, the President said: "I have made my effort. I tried to compromise and address the points raised by the Prime Minister. So, go ahead and prepare a Press

Release", which we did. He said he consulted enough, and that he had fulfilled his constitutional mandate. So, that was the time we made the announcement.

What I have said is, of course, contained in a note, which is here. First of all, the agenda of the meeting is here. With it is the report which I prepared for the Vice-President and Minister for Home Affairs when he was coming to address Parliament on these consultations. All that I have said to this Committee is captured in the report I sent to the Vice-President and Minister for Home Affairs. A copy is here.

I also have the minutes and the decisions of the meeting of 27th. We have the list of the names which were being proposed and the minutes of the meeting of the technical team.

Mr. Chairman: Amb. Muthaura, as you pass them over, please, sign and date them for purposes of authenticity. Also, include the record of the meeting of the technical committee, where the initial list was first made.

Prof. Kibwana: Mr. Chairman, Sir, there is a question by hon. Mutava Musyimi, which we have not answered. Could we do that, please?

Mr. Chairman: Could you take some questions from hon. Abdikadir and hon. Millie Odhiambo-Mabona, so that you can answer them at once?

Mr. Abdikadir: Mr. Chairman, Sir, first, I would like to welcome the gentlemen; Amb. Muthaura, the two professors and Mr. Kihara. It is very nice to see my old teacher.

Amb. Muthaura, you said that the man is very well qualified in law. I can assure you that he taught me law in my first year in university, and I can attest to that fact. It is the same issue that hon. Mutava Musyimi pointed out, which I was hoping to follow up. We have dealt with the Executive either through this Committee or the other Committees for quite some time now, particularly during the formation of the Commission on Implementation of the Constitution (CIC). I know that there is the view within the Executive that Parliament might have encroached on the role of the Executive and the Executive is fairly jealous of its mandate when it comes to some of these nominations and appointments.

I know this because when we were handling the CIC, there was a proposal in the first Bill to have these positions advertised and then have a committee to be made of civil society organisations representatives. The Executive, at every level, very strongly made representations to the other Committee: "We really want to play the Executive role. Parliament should play Parliament's role. Public participation ought to be at the parliamentary level."

So, I understand, whether it is Caroli Omondi or the other members of the Executive Committee. That has been a general view on that point.

Hon. Musyimi also talked about "consultation" and dissecting the term "consultation". Again, we heard that yesterday for several hours. Even within the National Accord, there

are three different mentions of consultations. There is "consultation"; there is "extensive consultations" when it comes to appointment of Ministers; and there is "consultation and consensus in writing" when it comes to firing Ministers. So, even the National Accord has quite a number of ways attended to there.

Assuming that we move across this particular problem and move forward, we will have two years of this Executive, assuming that everything will hold, making very many such appointments and taking us forward as far as implementation of the Constitution is concerned. The National Accord talks of the two sides of the Executive "committing themselves to work together in good faith as true partners through constant consultations and willingness to compromise."

It is possible to hear from you, gentlemen, on whatever you feel we should propose to the country as the way forward, to enable the country move forward , so that we are not constantly getting back to define what "consultation" means. Are there any ideas you have in moving us forward?

Finally, in terms of women representation, I know that that was the position of both sides of the Executive on the appointment of members to the JSC. On the issue of women, was there a deliberate agenda item where representation of women was discussed as a separate item?

Mrs. Odhiambo-Mabona: Mr. Chairman, Sir, before I raise my issues, I just wanted to add on what Mr. Abdikadir has raised. In giving us the answer could he consider, because now we have an impasse between the President and the Prime Minister and in future, it is likely to come with the Judicial Service Commission (JSC) under Article 166 when we will start defining what recommendation amounts to. Could you also think through it? We have seen in the Bill that has come before Parliament the court process about recommendation and consensus. If that the information what do you speak to it given that when we came up with an Executive President, we did so on the understanding that there would be public participation, openness and democracy in the process as provided for under Article 10.

Also on the issue of gender representation, I just wanted to ask, because it looks it was an after-thought, when you are looking at the overall representation because the Constitution says that you look at the totality of regional and gender representation. Of all the key bodies that have been picked, please, let us know how many have chairs that are women and whether when the Constitution says gender it means the man.

The other question that I wanted to ask is; you have talked about Fred Ojiambo and you say that you were advised that he was not qualified, and if you look at Article 166, what is provided? You need to be clear on this because sometimes you seem to imply that Article 166 is suspended, yet on some things you refer to it. Article 166 says that one should hold a law degree from a recognized university, an advocate of the High of Kenya. Why does he not qualify? On the same issue of qualification, you have also said

that the reason that Justice Omollo was being considered was because he is the senior most Judge. What was the reason for his disqualification?

Finally, I want you to talk about the issue of advertisement. You seem to have started on the right path by advising the Principals that they need to advertise as provided for under Article 10 because you cannot look at parts of the Constitution in isolation. The Constitution must be looked at in whole. Article 10 talks about issues of openness, democratic and public participation when dealing with issues of governance. Could you, please, tell us why you departed from the good process other than Caroli's advice? What is the Government with due respect, I would want the professor to read Article 4(3) of the National Accord and Reconciliation Act which says that the composition of the Coalition Government shall at all times reflect the relative parliamentary strength. Hon. Ambassador, you are not part of the Government.

Mr. Baiya: Mr. Chairman, Sir, I wanted to point out that we have other Members waiting. We have not even taken the Office of the Prime Minister. We also have our own schedule which we had allocated time although we are running out of time. Could we restrict ourselves to questions?

Ms. A. Abdalla: Mr. Chairman, Sir, I only have two issues; whereas the presentation from the ambassador is similar and reinforces the explanation given by the Prime Minister on the 1st February, 2011 with only one variation namely that the Prime Minister's date of a meeting was 16th December, 2010. I would like the ambassador to clarify if there was another meeting or probably that was just a mistake that the meeting actually took place on 6th January, 2011 and not 16th December, 2010. The other items that you have presented have been corroborated by the Prime Minister. My question is with regard to what has happened after these nominations have been presented. It is your presentation that Mr. Carol is the one who provided the advice and I am more specific on the appointment of the Chief Justice. Considering the subsequent action by the Attorney-General through the state counsel at the court case that was ruled by Daniel Musinga, why did you, as the technical team seek advice from the official Government Chief Legal advisor? I would understand that you would not ask somebody who is losing a job to give you advice on how to fill his job but what about the one of the Chief Justice. It is my understanding that it would be your word against word on why you accepted his advice.

Mr. Olago: Mr. Chairman, Sir, I agree with Mr. Baiya that we need to be brief but let us not sacrifice probity.

Mr. Muthaura, you seem to be satisfied with the way you record proceedings of minutes and that is quite in order. You do not need to have minutes for routine Government meetings but where you have called a meeting to execute a constitutional mandate, do you not think you need to have minutes? The way I see it, if we had minutes of these meetings then probably we would not be having these meetings that we are having now. You will now have to consider if it will be necessary to be having minutes of meetings.

Towards the end of these consultations there was pressure because His Excellency was supposed to attend the African Union (AU) meeting. Suppose there was no pressure of the AU meeting, would you have considered pushing these consultations to the week after? I am saying that because it appears to me that you acting in a rush. You were desperate because of pressure. If there was pressure like that, would you not have carried out further consultations?

Lastly, I am sure you are familiar with the transitional provisions of the Constitution. I am specifically referring to Clause 24 about the appointment of the Chief Justice and the process that is initiated by His Excellency after consultations with the Prime Minister and approval of Parliament. This is a process that is mandated by the Constitution and the word used is "shall". The communication that we are dealing with is signed by yourself and not His Excellency. In your view, do you think that makes any real legal significance that the communication is signed by you and not His Excellency when the Constitution gives that mandate to him and nobody else?

Mr. Nyamweya: Mr. Chairman, Sir, what the ambassador said is actually corroborated in the answer by the Prime Minister. I just wanted to know whether you or the President have been served with any court order or proceedings relating to this matter. Have you or the President been served with any court order? Has the President or the Prime Minister received any legal opinion in respect of these court proceedings from the Attorney-General? Has any one of them instructed the Attorney-General to represent this particular position in any of these court proceedings?

Mr. Chairman: I invite Mr. Muthaura to respond. Many of the issues that the hon. Members have raised are actually inter-connected. Allow me to add that as you respond to Mrs. Odhiambo-Mabona's question on judiciary appointments, kindly also clarify whether there was any particular criteria that was informing some of these choices. When the technical committee met and identified Justice Kihara, was it based on any particular criteria. When the name of Justice Riaga Omollo comes up, I know you have mentioned that he is the most senior among all the judges, but confirm for us whether those choices were based on any logical criteria.

Finally, I want to go back to the issue that Mr. Abdikadir addressed himself to and I had mentioned it earlier. It would be very good for this country and the stability of the Coalition Government and smooth implementation of the Constitution if we had some working constitutional threshold of these consultations so that when we say "consultations" then we can quickly say that is an acceptable irreducible minimum standard consultation one that you could call a constitutional threshold. I hardly use the words and I am quoting you verbatim, "we wanted an agreement" Those are your words verbatim as you were recounting the efforts of the President to reach some kind of agreement with the Prime Minister. As you answer that question of constitutional threshold, you may want to tell us whether that reflects the thinking that consultations could reflect some kind of agreement or some level of consensus of a meeting of the minds.

Amb. Muthaura: Mr. Chairman, Sir, I think I will be assisted by my colleagues here to answer some of the questions especially the details relating to constitutional requirement on some of the issues that have been raised. The professor here will assist me on the issue of public participation in this process because it is very important. I will try to give the initial response to some of these issues.

Mr. Chairman, Sir, the issue of gender is a very serious constitutional obligation to make sure that either gender is adequately represented. Gender here does not mean women. It means that either gender is represented in these state offices and the public service as a whole. There is a 30 per cent threshold requirement and we have an obligation to make sure that it happens. Here we are talking about no discrimination on gender basis as to who becomes the chair, the vice, the chief or the deputy. Women are not condemned and I am sure that is the concern of our sister there. Not only women will be considered as deputies or leaders. In this appointments, our view was that representation should be looked at in terms of institutions because these are heads of institutions. For example, in the judiciary, if you have a Chief Justice who is a man at least you need to have a deputy who is a woman or vice-versa. That is the rule that we are using. These also applies with the other institutions like the Controller of Budget. The same applies to other jobs like the Attorney-General. If you go to the Attorney-General's office women actually reign.

Mrs. Odhiambo-Mabona: On a point of order, Mr. Chairman, Sir. I want to thank the ambassador for raising the issue that he has raised. I would want him to explain because he has said that in the Attorney-General's office women are in senior positions. I can give you by name because I worked there. There is Alice Ondiek is the most senior, Dorcas Oduor and Muthoni Kimani. Are you in order to imply that when you looked all over you could only see men from outside and ignore women who are already very senior within those set ups?

Amb. Muthaura: Mr. Chairman, Sir, I note that but the issue is that people are looking at it in the specialties that we were calling to question and consensus. There was no discrimination against women but within consultations, among the people who were consulted, this is what we arrived at. It was not intended to down grade the women or their capacity.

Ms. A. Abdalla: On a point of order, Mr. Chairman, Sir. Could the ambassador explain that in the names that they were considering whether there were any women so that we know from the start that the crop that you were looking at was only male and if you could name the persons that you were considering?

Mr. Chairman: The names that the technical committee was looking at initially would be useful.

Mr. Musyimi: Mr. Chairman, Sir, the ambassador said that the considerations were institutional. The concern from this side is how come that when you look at different institutions, there was not a single lady seen to be fit to be considered for the position.

Amb. Muthaura: Mr. Chairman, Sir, that is an important consideration because we have filled several positions like the Commissioner of Revenue, the JSC and the Commission on Implementation of the Constitution. We still have many other commissions remaining.

Mr. Chairman: Mr. Muthaura, I would be happy if you responded to the direct question by Ms. A. Abdalla that from the initial list that was prepared by the technical committee. Would you share with the hon. Member whether there were any women on that initial list, so that we can know whether there was consideration at all.

Amb. Muthaura: We have two others. One of them is Justice Ang'awa and Justice Okengo.

Mr. Chairman: And they were being considered for which position?

Amb. Muthaura: They were being considered for those top jobs.

Mr. Chairman: were they in consideration for Chief Justice?

Mr. Baiya: Mr. Chairman, Sir, he has not attempted to respond to my question. As hon. Abdikadir was asking, we wanted to hear what the Office of the President says should be the way forward and how we should assist as the Committee.

Amb. Muthaura: We will do that at the end. Prof. Kibwana will go into the details of the law and then Prof. Wanjohi will go into the issue of public participation.

Mr. G. Nyamweya: Before he does that, I have a specific question which should be answered by the Secretary to the Cabinet. Has the President or the Prime Minister been served with any court orders? Has the President, the Prime Minister or the Cabinet consulted with the Attorney-General instructing him one way or another to participate in the proceedings, consent to them or pause them?

Amb. Muthaura: The Executive, definitely, had a bit of upset on those proceedings in view of the position which the Attorney-General took during the case. For that reason, things got complicated a bit. According to the Executive, the Attorney-General became partisan in that case. That brought a bit of problems. So far, we have not been served by the court. I have not seen anything.

Prof. Kibwana: I just wanted to talk about the very wide question raised by hon. Musyimi and hon. Abdikadir. What we have provided and we shall circulate the legal opinion, is what the law says in terms of positions which the Executive, like happens everywhere in the world will make nominations. Parliament, through an approval process, in which there is public participation, can question those nominations. There are also other nominations where the Public Service Commission will be involved. When there are consultations, the question is: What will you do to make sure that at all times you are careful about Articles 10, 27 and 259 and even Article 73 which has not been

mentioned. The President, as well as the Prime Minister, for those positions which they are supposed to offer nominees before Parliament, they are supposed to make sure, as they give those names, that they have followed all those articles of the Constitution. If they do not, then Parliament is supposed to tell them that they have not. As we have consistently indicated, because we knew that there is the legal position, which is clear, but from the Office of the President, it had been suggested that the offices of the DPP and the Controller of Budget could be advertised. Ambassador has said that there were even preparations of the relevant gazette notices. We have even suggested that the Judicial Service Commission could assist in the derivation of the nominations. On the meeting of 6th January, Caroli Omondi provided advice to the contrary. It was thought that, that obviously was the position of the Prime Minister and there was deferring that particular position. That is why the earlier position was abandoned. Example, for the Chief Justice, some of the reasons that we had for saying that, let there be some participation of the Judicial Service Commission, we knew that there was the question of vetting of judges. We knew that also the Chief Justice, when appointed, will be there for ten years. We knew that we wanted a robust Judiciary. There were issues that we advised despite the legal opinion which squarely mandates some of these positions to be in the preview of the President and he consults with the Prime Minister. Of course, this is not an endless consultation because one cannot do that. "Consultation", as it is in the Constitution, does not amount to concurrence. If that is required, then obviously, the law will have to be changed so that it is actually consultation and concurrence. For example, for the National Assembly, it must consent. It must approve. If it does not, the matter is dead. All these issues have been very important, in my understanding to the Office of the President.

Mr. Chairman: Prof. Kibwana, is there some working threshold or do you just do it case by case and as dictated by circumstances? Is there some threshold that guides the relations between the Office of the President and the Office of the Prime Minister on the question of consultation?

Prof. Kibwana: Just before that, there is actually the issue which falls squarely on the door of the National Assembly. If you look at Article 252 of the Constitution, it says that the Chairperson and each member of a Commission and holder of an independent office shall be identified and recommended for appointment in a manner prescribed by national legislation. When this matter was brought up, the National Assembly decided to go piecemeal like the Judicial Service Commission, but there was not perhaps thought given to this omnibus law which would have sorted out many of the issues that are arising and finally, Parliament was supposed to pass a law which lays down the procedure for approval of nominees so that one Committee does not do one thing and another Committee does another thing. Those are matters which are in the purview of the National Assembly.

Amb. Muthaura: Before I hand over the floor to my colleague, on the issue of "consultation", if we do a lot of prescriptions about consultations, we make consultations difficult, in my view. Consultations, normally for people who are working together are really consultations. You consult through the telephone, somebody going across the office and somebody asking somebody to convey the message. Consultation in the setting

of the President and the Prime Minister is a daily affair. If you structure it too much, you make it too rigid and sometimes you create more conflict. Until now, as I said, we do not even do a lot of recording of detailed minutes which they sign at the end. They approve a decision and we make it public. It is easier, but if you make it too regimented, there is always a danger that you create unnecessary areas of conflict. This is the first time this type of system is taking place.

Mr. Chairman: I understand. So, basically we do not have what you can call an established threshold? It is case by case as dictated by circumstances.

Prof. Wanjohi: Just to add to what Ambassador has said, "consultation", in many cases also refers to search for an opinion. People asking what do you think of this and that? It is an opinion being sought. That kind of consultation is the most frequent in many departments of Governments. We are always asking ourselves: What do you think of that? We consult on a daily basis. That is the usual practice of seeking an opinion in order to improve or enhance decision making. Coming to public participation and democracy, it is within the democratic practice that the institution of Parliament interrogates decision making by the Executive. That in itself, is hitched on democratic election of Members of Parliament. Therefore, one can say that the public is adequately represented through that kind of interrogation. Secondly, the openness that was created by bringing in the media into this kind of interrogation, which never used to happen was also intended to bring the public to participate in the debate in questioning and interrogation of the public officers when they have made decisions or assisted in decision making, so that the public knows that this is how this was done. As far as we have listened, then we understand. Many times is not even the question of we agree, but usually the question of we understand how the decision was made. We are satisfied that in this respect, public participation has been met and even democracy has been met in accordance with the Constitution. I know that many people would have wanted advertisements in order to apply and therefore, say that they have participated through applications. That is one way of it, but the higher the office, the more care is required in order to minimize even canvassing and many other evils. That is why even delayed announcement of the decision is also very dangerous because it brings in a lot of bad blood and so on. We are convinced that public participation has been satisfied.

Mr. Chairman: Despite the fact that Kenyans did not have an opportunity to compete for these opportunities?

Mrs. Odhiambo-Mabona: On a point of order, Mr. Chairman, Sir. Other than the issue of gender, none of my questions have been answered.

Mr. Olago: On a point of order, Mr. Chairman, Sir. There are two issues that I raised which Ambassador or anybody else has not referred to. One, if there would have been a need to hold further consultations if it was not for the pressure of Addis Ababa. Then, power under Article 24 is given to the President and he cannot delegate it. How come the nomination exercise was done by Amb. Muthaura and not the President?

Mrs. Odhiambo-Mabona: Could I, please, remind you of my questions?

Mr. Chairman: Quickly because we have ran out of time for this session. We need to bring it to a close.

Mrs. Odhiambo-Mabona: One, on Justice Omollo. You have said that he was the most senior. Please, let us have the reason why he was not considered. Two, Ojiambo. Under 166, he qualifies. Please let me know why you did not consider him. Finally, you have spoken very well. If consultations were done the way we have spoken now, we would not be in this problem.

Mr. Musyimi: Mr. Chairman, Sir, I just wonder why we did not think of a woman for Chief Justice because if there is a gender that is not ethnicized in the way they approach life, it is the ladies.

Amb. Muthaura: As to whether if the Addis Ababa meeting was not there, whether the consultations would have taken a bit longer, I tend to think that would have happened. The deadline was based on the Addis Ababa meeting. Still, these consultations were urgent because as you know, we have the constitutional deadlines, especially for the Chief Justice. So, I think Addis Ababa was a factor. The other is with regard to the procedure of communication. Until now, all the other commissions have communicated just the same way I communicated. I just communicate on behalf of the President. I normally say: I have been directed. It is not Muthaura communicating---

Mr. Olago: It is a new Kenya now Ambassador.

Amb. Muthaura: I have been directed, but if Parliament wants the President himself to communicate to the Speaker, there should be no problem. I do not think there would be any problem with that. What is in the Constitution is the minimum, but the Executive, knowing the demands on the Attorney-General, feels that this is just a minimum requirement. If you can get somebody who is much better qualified, then it is at your discretion. What you cannot have is somebody who is less qualified than a graduate and a member of the advocates of the High Court of Kenya.

Prof. Wanjohi: On Omollo, the fact that Omollo appeared as one of the three who were considered means that he was considered.

Mr. Chairman: Ambassador, as we conclude, please, benefit the Committee by telling us what President expects of us. What is his expectation of this process, so that this whole matter can be brought to a logical conclusion in a manner that moves the country forward amicably? What are the expectations of the two Principals because we have learnt from media reports that when they met, they decided that they will respect the outcome of this process? What are the expectations of the Principals of us and of this process?

Amb. Muthaura: Definitely, the President would like you to approve these names and that would push the agenda for the reform forward. This is very important.

Mr. Chairman: Thank you, Ambassador, Prof. Wanjohi and Prof. Kibwana. We are most grateful for the information you have shared with us. We hope that this certainly will lead to some amicable resolution of this matter, so that we can move on with the implementation of the Constitution and allow the country to move forward with other issues. Thank you very much. You are at liberty to take your leave.

(Amb. Muthaura, Prof. Wanjohi, Prof. Kibwana and Mr. Kihara withdrew from the Committee Room)

(Mr. Caroli Omondi (Office of the Prime Minister) and his team entered the Committee Room)

OFFICE OF THE PRIME MINISTER

Mr. Caroli Omondi	-	Chief of Staff
Mr. Mugambi Imanyara	-	Advocate and Special Advisor on Legal Affairs
Mr. Miguna Miguna	-	Permanent Secretary for Coalition Affairs

(Mr. Chairman introduced himself and Members of the Committee)

Mr. Chairman: Let me call the meeting to order! We apologize because we rushed you here. Our notice inviting you here was very short. We also apologize for keeping you. Everybody came in at the same time and that is why we are trying to expedite this process as fast as we can.

For your information, we have just been interacting with the Office of the President represented by a team led by Amb. Muthaura. Very quickly, you are well familiar with the very weighty matter touching on the Coalition Government and the smooth implementation of the Constitution. Those issues go to the heart of the stability of our country. I have in mind the nominations to the four Constitutional offices of Chief Justice, Attorney-General, Director of Public Prosecutions and Controller of Budget. This matter has raised controversy because of two communications from the Office of the President and the Office of the Prime Minister, respectively. One transmitting names of the nominees to the National Assembly and the other one from the Prime Minister indicating that those nominations did not meet the test of constitutionality including on the ground of consultation.

We have invited you, on behalf of the Prime Minister, to shed light on two crucial matters which are closely linked. One is what the Office of the Prime Minister considers to be consultation and that, in light of the National Accord and Reconciliation Act (2008) that the word "consultation" becomes a legal term in our jurisprudence. So, that is the

question we will invite you to consider in light of the National Accord and also in light of the Constitution which makes wide reference to the word.

For the record, we have brought to the Office of the President's attention the text of the National Accord including the preamble which basically summarized the situation of the country and called upon the partners in the Coalition Government to commit themselves to work together in good faith, as true partners through constant consultation and willingness to compromise. We have put that on record and I am not going to repeat it now because I have already put it on record. We have also brought to their attention provisions of the Constitution that speak to the necessity to consult including Article 29(2) of the Sixth Schedule to the Constitution, Article 24 of the same Sixth Schedule and other provisions of the Constitution that speak to good governance, public participation, the rule of law and like principles as well reflected in the Constitution. So, as you tell us what the Office of the Prime Minister considers to be consultation, bear in mind that we consider it useful to understand whether there is anything we can regard as a constitutional threshold in this business of consultation; something that you can test a process and say it meets this threshold.

The second limb of the question that we invite you to answer is whether there were consultations in the process that led to the nomination of the four persons to the four offices. In the letter from the Office of the President that I have referred to and signed by Amb. Muthaura, he says:-

"Following consultations with the Right hon. Amolo Raila Odinga, EGH, MP, Prime Minister of the Republic of Kenya and in accordance with the Constitution, His Excellency, President Mwai Kibaki has made the following nominations." Which are then listed!

So reference is made to consultation between the President and the Prime Minister and reference is also made to the Constitution. I believe, in recognition of the requirements of the Constitution with regard to consultation and other matters.

In the letter from the Prime Minister, I will just quote the little bit in the third paragraph that says:-

"I regret to hereby confirm that I was neither consulted on these nominees nor were the nominations made jointly by the President and myself."

So, in light of that information, we would also wish to benefit from yourself as to whether, indeed, there were or there were no consultations for purposes of these four nominations.

Mr. Caroli Omondi: Mr. Chairman, Sir, we received your letter last evening and communication from the Clerk's Office and so we are very happy to be here to deal with this important issue and to try and find a solution that is beneficial to this country.

You have asked us to basically deal with the two concepts of consultations; what we understand it to be within the framework of our constitutional order and then to give you

a sort of a flavor of whether there were consultations in respect of this particular matter. But I will beg your indulgence and address two other issues related to this in our presentation. One, which is in respect of the broader concerns about the Constitutionality of the nominations beyond the concept of consultations and in terms of what the Speaker set out as the ten major issues of concern. I will also try to provide some clarifications in respect of the statement made by the Vice-President sometime last week on this matter because we think there are some issues that require re-statement from our side.

Mr. Nyamweya: Mr. Chairman, Sir, I am not sure whether the Permanent Secretary, Mr. Isahakia at one stage or other will come because it seems he was involved in these things. Are we expecting him?

Mr. Chairman: No! of course, you are fully and sufficiently instructed by the Office of the Prime Minister for this.

Mr. Caroli Omondi: And I am fully involved in these matters! Your letter asked of us three things; documents, agenda and minutes of the consultations between the President and the Prime Minister on this issue, the minutes and report of the technical committee that reviewed the nominees, the legislative history, records and minutes of the meetings that led to the signing of the National Accord and Reconciliation Act.

At a personal level I am very happy to be in this Hall. I think when we were dealing with the National Accord we had a very stormy meeting here with the two principals and Dr. Kofi Annan at some point. In order of priority, I think it is important to appreciate what the National Accord; to understand what type of Government we have in Kenya today and to understand what the Constitutional order is.

I just want to draw the attention of this Committee to observations made by the Independent Review Commission (IIRC) on the last General Elections famously known as the Kriegler Report. In their Executive summary they say: "During the preparation and conduct of the 2007 elections the ECK (now disbanded) lacked the necessary independence, capacity and functionality because of weaknesses in its organizational structure, composition, and management systems. The institutional legitimacy of the ECK and public confidence in the professional credibility of its commissioners and staff have been gravely and arguably irreversibly impaired. It lacks functional efficiency and is incapable of properly discharging its mandate. There were serious defects in the voter register which impaired the integrity of the 2007elections even before polling started: It excluded nearly one-third of eligible voters, with a bias against women and young people and it included the names of some 1.2 million dead people. There was generalized abuse of polling, characterized by widespread bribery, vote buying, intimidation and ballot-stuffing. This was followed by grossly defective data collation, transmission and tallying, and ultimately the electoral process failed for lack of adequate planning, staffs election/training, public relations and dispute resolution. The integrity of the process and the credibility of the results were so gravely impaired by these manifold irregularities and defects that it is irrelevant whether or not there was actual rigging at the national tally centre. The results are irretrievably polluted."

They go further on page 136 which I quote verbatim:

"IREC's analysis of tallying etc. in nineteen sample constituencies demonstrates convincingly that there are so many more or less erroneous constituency results. The second reason one should not conduct any statistical analysis of results from these elections is that the official ECK election results (published on the website and elsewhere) have not been cleaned of mistakes of a purely arithmetical nature." Then it goes further to say: The deplorable conclusion is thus that ECK turnout data and election results for individual candidates are so error-infected that they should not be used for any kind of statistical analysis. IREC's analysis has led it to the irrefutable conclusion that the ECK was not able to manage the counting, tallying and results announcement processes in such a way that it secured the integrity of the electoral process at either the presidential or the parliamentary level. It is not IREC's mandate to attempt to establish who won the presidential election, and it would in any case be extremely difficult."

With that background, it is important to understand that he current Executive authority in this country is a function not of the 2007 Elections but a function of something we call the National Accord. That is where the legitimacy of the present Coalition Government comes from.

I know you are familiar with the National Accord but I would like to mention a few things for the purposes of my contribution. I did not bring the Act but I brought what was signed on 28th by the two principals and witnessed by His Excellency, Kofi Annan and His Excellence Jakaya Kikwete. What they call the agreement on the principles of partnership of the Coalition Government. They say: "Given the current situation, neither side can realistically govern the country without the other. There must be real power sharing to move the country forward and begin the healing and reconciliation process. As partners, this is both the President and the Prime Minister, in a Coalition Government, we commit ourselves to work together in good faith as true partners through constant consultation and willingness to compromise. This agreement is designed to create an environment conducive to such partnership and to build mutual trust and confidence. A coalition must be a partnership with commitment on both sides to govern together and push through a reform agenda for the benefit of all Kenyans." That is the National Accord which was enacted by this august House which is part of our constitutional order and which enjoys the status of a constitutional document.

So with that in mind, we have a Coalition Government with two principals who share Executive authority. That particular point is further re-emphasized in the new Constitution in Schedule Six where they are describing what the Executive is, Section 12, page 197, of the new Constitution where they are describing the Executive: "The persons occupying the offices of President and Prime Minister immediately before the effective date shall continue to serve as President and Prime Minister, respectively in accordance with the former Constitution and the National Accord and Reconciliation Act, 2008 until the first General Elections held under this Constitution unless they vacate office in terms of the former Constitution and the Accord." The first two part offices or persons identified within the Executive are the President and the Prime Minister. Then they go

further to name the other persons who are within the Executive; the Vice-President, Deputy Prime Minister and Cabinet. Why am I trying to elaborate this? It is because before we even go into consultations, we need to understand very clearly why we have a Coalition Government and what is this partnership? What is this consultation?

With that, I could now begin to address myself to the issue of consultations. Appointments under the Constitution today are subject to the National Accord first. All new appointments under the new Constitution and you have rightly talked about Section 29 of the Sixth Schedule. All those appointments are regulated by the National Accord. The National Accord sets this partnership; it sets this power sharing. It sets shared Executive responsibility and that is why the Constitution starts by saying all those new appointments are subject to the National Accord because there is a framework. It then goes further to say "after consultation with the Prime Minister." That is the second tier! So there are two tests that consultation or appointments have to pass. One, within the framework of the Coalition Government which is defined in the National Accord on the premise of real power sharing which means parity and equality of Executive authority then in consultation with the Prime Minister.

The Accord talks about real power sharing, consultations, willingness to compromise. Real power sharing connotes equality as I have said and parity in making the appointments. In other words, not one principal can unilaterally make those appointments. It has to be joint! So the nomination process has to be joint; it cannot be done by one principal. Consultations specifically to the question you asked me as we understand it, it is not so much as we understand it but it is how the law defines consultations. That is we would rather take that path than what we understand it to be. The various issues that I will quote are things that we have picked from case law and other decisions of various judicial bodies. Consultations require that the parties consulting, first, offer each other sufficient opportunity to exchange views.

1. That is the first test that each party had sufficient opportunity to exchange views. That is a test when you want to make a determination based on facts whether or not there were sufficient consultations. Did the parties have sufficient opportunity to exchange their views?

2. It requires that the parties who are consulting share sufficient information available on each nominee in this particular case on the basis of full disclosure of accurate information. So the information exchange must be sufficient as a second test. That is anchored on full disclosure of accurate information and material information.

3. The parties consulting, as a further test, must act reasonably and not with caprice or in a manner that undermines the very process they are trying to engage in.

4. The forth test is that the parties must be free and frank in exchanging their views.

5. The parties engaging in consultation must receive views exchanged with an open mind; not closed mind. They must receive the views of the other party with an open mind.

6. The consultations must be undertaken when the proposal under consideration are still in their formative stages. Then it must continue all through to the end without the parties having fixed positions. You must come to the consultations with an open mind and they must begin at the very formative stages; at the very preliminary point and then continue up to the point when the decision is made.
7. The consultations must not be treated perfunctorily or as a mere formality. It is not that we had a cup of tea, I made a phone call or I send an SMS that we consulted. It must not be treated perfunctorily or as a merely formality.

8. Consultation is not an act of notification. You are not communicating your decision to the other party and saying this is what we have decided, we have consulted you. It is not an act of notification. In some specific circumstances, consultation means agreement and I believe that is the position under the National Accord.

9. In some specific circumstances, the phraseology consultation means agreement. If you look at even the definition they have in *MacMillan Dictionary*, in consultation with someone, they define it to mean after discussion and agreement with someone and they give an example. "Any decision to send troops will be in consultation with Parliament. We will not just do it by notifying Parliament that you are going to send troops." You must have the concurrence of Parliament.

10. Consultations also must also be practical. It must be conducted within a time period sufficient for views to be exchanged fully and for matters to be thoroughly interrogated. That is when it is practical. The time required, of course, will depend on various circumstances and the seriousness of the matter under consideration.

11. Urgency is no substitute to sufficient time for practical consultation. You cannot say that it is so urgent, we do not have sufficient time. If the matter is of such a serious nature that it requires thorough ventilation and interrogation of the matters under consideration.

Consultations within the framework of the National Accord, if you apply all these tests, therefore, mean compromise. That is what the Accord talks about; compromise between the principals as a basis of any decision that they make.

This is a matter that concerns us and even for them, a meeting of their minds; a matter under consideration. Their minds must meet and lock on an issue. Further, as I have said earlier, the appointments must be made jointly by the Coalition partners. Consultations under the Constitution under the transitional period are, therefore, an act of power sharing, compromise and one that requires good faith. This consultation, as we

understand it today, is not confrontation in its ordinary meaning. It cannot be the ordinary meaning of the word consultations. Still, dwelling on the point of consultations, under the National Accord and Reconciliation Act, the first act of consultation was in the composition of the Cabinet. That was done on the basis that there would be 20 Cabinet slots for each side. There are consultations that went on for a month and a half. After those consultations, a Cabinet was formed. During those consultations, each side proposed who their nominees would be but no one determined for the other who the nominees would be. Questions were raised on both sides such as we do not think so and so are qualified because of this issue or that. However, eventually, they agreed. So, when we talk about consultations, it is important that we recollect the first act of consultations which was on the Cabinet and how it transpired.

If you go further to the Constitution, Article 259(3) (a) which deals with the interpretation of the Constitution, page 169 says:-

"Every provision of this Constitution shall be construed according to the doctrine of interpretation that the law is always speaking."

Therefore, among other things;
1(a)." A function of power conferred by this Constitution by an office may be performed or exercised as occasion required by the office holding the office."

So, the consultation that is contemplated for the purposes of these nominees is that between the President and the Prime Minister. It is not between Caroli Omondi and Ambassador Francis Muthaura. Those cannot be consultations. These are consultations between the persons holding the offices of the president and the Prime Minister. If you look at page 169 of the same Article, you will see in paragraph 11 it says:-

"If a function of power conferred on a person under this Constitution is exercised only by the person on the advice or recommendation with the approval or consent of or on consultation with another person, the function may be performed or the power exercised only on that advise, recommendation without approval or consent or after that consultation except to the extent that this Constitution provides otherwise."

On this point, our submission is that before the consultation, whatever happens must be in compliance to the National Accord and Reconciliation Act. The consultation is between the two Principals and no one else. They have to agree and there has to be a meeting of the mind between them. They then have to make joint nominations because that is what the accord says. They are to govern together. It is a partnership.

Mr. Nyamweya: Mr. Chairman, I have repeatedly heard him talk about joint nominations. Where exactly, in this Constitution or in the Accord, does it require that the nominations be done jointly? Are you suggesting that there is a core-Presidency? Is that what you are saying? I would be happy to see in the National Accord and Reconciliation Act, where it says that the President and the Prime Minister must, jointly, sign together or do whatever they have to do together.

Mr. Chairman: Mr. Omondi, you will take note of that question and then proceed to conclude your submission. You will respond to it later.

Mr. Caroli Omondi: Thank you. I was ready but I will hold my breath.

I think that deals with our understanding and our legal position as we see it on the concept of consultations. Let me go to what happened, whether there were consultations or no consultations.

Sometime, late last year, the two Principals admitted that the idea of filling the Constitutional Offices was discussed but not in detail. It was then deferred to the following year.

Mr. Chairman: When was that meeting held?

Mr. Caroli Omondi: I think sometime in December last year. I do not have the exact date.

Mr. Chairman. Do you have a record of that meeting?

Mr. Caroli Omondi: I will come back to the records because I have to look for the minutes.

This matter was deferred to the following year which was this year. An understanding was reached that people like the Chief Justice would serve their full term and the Attorney-General too. Early in the year, it was revisited, around 6th January, 2011. I attended that meeting and the issue came up. It was agreed that a panel be established. That panel was to consist of a representative of the Office of the President, Office of the Prime Minister, a representative of the Law Society of Kenya, a representative of the Judicial Service Commission, a representative of the Law Reform Commission and a representative of the Public Service Commission. There were three Commissions and one society. Under that panel, working with these offices would then undertake their identifications and recommendations of names of those who would then be nominated to Parliament, jointly, by the two Principals for consideration for appointment to these positions.

That Committee was to be convened by the Head of Public Service, Ambassador Muthaura. He convened it and he invited us for a meeting. I went to his office and when I got there, he informed me that he was not in a position to chair the meeting on that day and that either Prof. Wanjohi or myself would chair it. Prof. Wanjohi is much more senior to me in age and so I deferred to him to chair the meeting. At that meeting, we had the Permanent Secretary, Ministry of State for Provincial Administration and Internal Security; we had the Solicitor-General; Permanent Secretary for Justice, National

Cohesion and Constitutional Affairs; Prof. Wanjohi and I. We did not have any representatives from the three Commissions and the Law Society of Kenya.
With that understanding, that Committee did some work and adopted a four-step criteria for the purposes of adopting the right candidate for Chief Justice, Attorney-General and the Director of Public Prosecution. We agreed that the key considerations would be seniority, competence, integrity and reform-mindedness. We agreed on those four things. Specifically for the Chief Justice, we said that we had three options to source a new Chief Justice. One would be the Commonwealth, which was our proposal as the Office of the Prime Minister. And I will come back to why we wanted a judge from the Commonwealth. There was also a proposal that we should look into the Judiciary in Kenya.

The fourth and final proposal was that we should look at those who are involved in private practice of law in Kenya. We said that we would source from those three areas. However, these things were to be reported back to the Principals so that they could guide us on whether we had identified the right criteria; whether we were right to source a Chief Justice from the Commonwealth; the Judiciary in Kenya or the private sector. With regard to the position of Director of Public Prosecution, we agreed that we would look at lawyers who were already in the prosecution service of the country to see if we could get a candidate. We looked at lawyers who were in private practice but who specialized in criminal law. We also agreed that we would look at magistrates who had been handling criminal cases to become Directors of Public Prosecution.

At that meeting on the issue of seniority in the Judiciary, we agreed that we needed some information as to how the pecking order was at the Judiciary. At that point, the PS in charge of Justice, National Cohesion and Constitutional Affairs, Amina Mohammed, made a call to the Registrar and asked for that list. That list was eventually sent to the Office of the President and eventually found its way back to our discussions. We did not, at that meeting, discuss the position of the Attorney-General. It was our understanding that the Principals had agreed that he would serve his full term. So, that Committee did not discuss the position of the Attorney-General. That Committee also did not discuss the position of the Controller of Budget because there was no representative from the Treasury. So, those two positions were never discussed in that Committee. This Committee met only once. We never had another meeting. We only met once and that was it. We never prepared any minutes but left with our notes. We never produced any report and we never reported, jointly, back to the Principals. The presumption was that at some point, we would convene and discuss further and then go back to the Principals. However, that was not the case.

On 27th January, last month, there was further consultation between the President and the Prime Minister, their usual weekly consultation. You have asked me for the agenda as well as the minutes of that meeting. Normally, what happens is that both sides go with their agenda item. One is prepared in the Office of the President while the other is prepared in the Office of the Prime Minister. We share it and agree on what is to be discussed. Today, I brought samples. For example, during the meeting of 6th January, we have a sample of what was prepared by the Office of the President and the one that was

prepared by the Office of the Prime Minister on 27th. Ambassador Muthaura already gave the Committee the one for 27th. I have the ones for ones for 6th and 7th.

I also brought some samples for 2009 and 2010 so that you can see the way it works. So, normally, an agenda is generated by both sides. We meet, go through it, harmonize and then agree on what should be discussed. Specifically to the question that you have asked, whether we have minutes of 27th January, 2011, between the President and the Prime Minister, let me put it this way, there are no minutes of that meeting. For the time I have attended those meetings, I have never seen minutes of the meetings; never. If you look at all the agenda items that I have circulated, you will notice that there are three standard things under the law of any meetings. You have to start with the adoption of the agenda then you go to adoption of minutes of the previous meetings and then you move to matters arising. You will never see those things in the draft items. There is nothing like confirmation of minutes because they have never been confirmed. So, my answer to your first question is that there are no minutes of the meeting of 27th January, 2011, between the President and the Prime Minister.

Mr. Chairman: Mr. Omondi, just as you address yourself to the question of minutes, one of the documents that Ambassador Muthaura shared with us was dated 6th January, 2011. It is a two leaf document. The first page is marked agenda and it is entitled consultations between the President and the Right hon. Prime Minister. It goes on to make a list of agenda items. The second page is titles; Relevant Minutes on Consultations between His Excellency the President and the Right hon. Prime Minister on Agendas 1 and 2 of the meeting of 6th January, 2011. It has information that fills half of that page. Are you familiar with this document?

Mr. Caroli Omondi: Mr. Chairman, I suspect that it is one of the things that I saw yesterday in the other Committee. However, if you give it to me here, I will respond exhaustively like we did yesterday.

Mr. Chairman: Mr. Caroli, go ahead.

Ms. Abdalla: Before he goes ahead, I have a clarification at this point. When Ambassador Muthaura was here, he said that that is the way they keep the decisions that they make. That meant that was his documents. How do you keep the decisions that you make in those minutes given that you do not have minutes or do the two of you operate on good faith and the good faith has just ended in these appointments?

Mr. Baiya: On a point of order, Mr. Chairman, Sir. I am afraid that we are losing track. Would we not be safer to allow them to present? After all, that is what you told hon. Nyamweya. If we allow interruptions at this point, we are likely to spend more time.

Mr. Chairman: You saved the clarification sought by hon. Nyamweya. Could you also save that one we seek on this particular record? Please, tie it with the point made by hon. Amina Abdalla on the records as kept by you.

Mr. Ruto: Mr. Chairman, Sir, I think also we should conduct this meeting in a way that we get the information that we need to get from every party. Thereafter, we will deliberate, as a Committee, on the various issues that we have been given. We can then ask one party questions regarding documents presented by the other party. I do not think we are doing any cross examination which is unnecessary. I would rather if we got the information he has. Let him narrate and we will form our opinion thereafter.

Mr. Chairman: Clarifications are, certainly, in order and especially if there is information that would help to clarify some of these issues. That is, certainly, not out of order.

Please, proceed but take note of the clarifications that Members have sought which you will revisit at the end of your submission.

Mr. Caroli Omondi: Thank you, Mr. Chairman, Sir. As I have said, at that meeting of the 27th there were no minutes, in answer to your question.

The second question was whether there were minutes or a report of the Technical Committee on this matter. As I have also said, there were no minutes of the meetings of the Technical Committee and there was no joint report.

Now let us go specifically to what happened at that meeting of 27th. At that meeting of 27th His Excellency the President presented a list to the Prime Minister proposing certain names to the four positions that we are discussing here. It was the first time that the Prime Minister or our side saw that list.

Remember what I said, the committee never agreed on any names; the committee never recommended anybody for any position. So, on 27th this list was presented to the Prime Minister. His first reaction was that he did not understand where it was coming from because he had not received a report from the panel that had been constituted.

Secondly, he said that his representative who is myself, who was in that committee was not in the room at that time because I was preparing the report on Ivory Coast to be taken to Addis Ababa. So, he then suggested that another team be convened to now discuss this list and to meet that afternoon. That team comprised of Amb. Muthaura, Prof. Wanjohi, Dr. Isahakia and myself.

So, the Prime Minister came back and gave me instructions to go back to the Office of the President and have these discussions. When we saw this list, it says:

"Following wide consultations the following are the persons who have been identified for nominations to various constitutional positions towards implementation of the Constitution:

Position Chief Justice – person proposed – Justice Paul Kihara Kariuki – High Court Judge – Kiambu County.

Deputy Chief Justice – Justice Anna Okwengu – High Court Judge - Homa Bay County.

Attorney-General – Fred Ojiambo – private practice – county not provided. D

Director of Public Prosecutions – Kioko Kilukumu – private practice – county not provided.

Controller of Budget – Mr. William Kirwa – Managing Director ADC – county not provided.

Kenya Anti-Corruption Commission – Dr. P.L.O. Lumumba – Director KACC – county not provided."

The first problem we had with the list was in respect of two positions; one was that of the Deputy Chief Justice. The Constitution is very clear that this position shall be filled by a person identified by the Judicial Service Commission. So, I asked the question there under nominee and Prof. Wanjohi informed me that they are aware that what I am saying is the correct position but that when the Judicial Service Commission begins its work, they would talk to them and they will appoint this lady.

I said that we did not wish to go that path and that we did not feel that we should even discuss that position. So, it was taken out. Then I went further to ask about P.L.O. Lumumba because as far as we were concerned, by 27th January, 2011 Lumumba had been in office for months. He had already been appointed. So, we did not understand why his name was again on this list. So, again that was removed.

When we went back to the position of Chief Justice and we asked the question that it was the first time we were hearing about Justice Paul Kihara Kariuki; could we get more information about him, his qualifications and how they arrived at him? This is because it was the first time we were seeing his name.

Prof. Wanjohi said that Justice Paul Kariuki had been nominated by the President after a lot of consultation and those consultations obviously were not with the Prime Minister. He said this particular candidate had been proposed by His Excellency and that he was a reformer.

So, I informed Prof. Wanjohi that I had two problems with this particular issue. One, we had agreed on a criteria and the first item on that criteria was seniority. He is the one who chaired that meeting. I then asked that they make available the list of members of the Judiciary which we had asked for from the registrar. This list was produced. In that list, senior most of course, is the Chief Justice Evan Gicheru. There are 11 Judges in the Court of Appeal and the senior-most Judge is Justice Riaga Omollo followed by Justice Tonui, followed by Justice Bosire, Justice O'Kubasu, Justice Ole Keiuwa, Justice Githinji, Justice Waki, Justice Onyango-Otieno and Justice Aganyanya. Justice Visram is number 10 and number 11 is Justice Justice Nyamu.

If you go to the High Court where Justice Kihara is, in terms of seniority, Justice Kihara is actually number 21. So, I want you to know why we were taking somebody who was actually number 32 in terms of seniority within the Judiciary and jumping everybody else and putting him as the Chief Justice. This obviously did not show us merit. We did not understand what the capabilities were. So, we objected. We said: "It is your choice that you pick from the Judiciary of Kenya, then there are two issues you have to deal with. One is seniority. The second one is vetting. The Constitution is very clear. Section 23 of the Sixth Schedule of the Constitution states as follows:-

"Within one year after the effective date Parliament shall enact legislation which shall operate despite Articles 167 and 168 establishing mechanisms and procedures for vetting within a time frame to be determined in the legislation, the suitability of all Judges and magistrates who are in office on the effective date to continue to serve in accordance with the values and principles set out in Articles 10 and 159.

A removal or process leading to the removal of a Judge from office by virtue of the operation of legislation contemplated under sub-section 1 shall not be subject to question in or review by any court."

So, I said with this you could not appoint a sitting Judge from the Judiciary to the position of Chief Justice unless that Judge had been vetted.

Mr. Nyamweya: Was this in the presence of the President and Prime Minister when you were discussing this or was it just between yourselves and Prof. Wanjohi?

Mr. Caroli Omondi: I think you missed something, Mr. Nyamweya. I said in the morning the two Principles met. The President presented that list to the Prime Minister. Their meeting ended. They instructed that the four of us meet in the afternoon. Now we were meeting in the afternoon. So, this is now the second committee. We are having technical discussions.
I again told them that if you look at Section 24 that deals with the Chief Justice, it states as follows:-

"The Chief Justice in office immediately before the effective date shall within six months after the effective date, vacate office and may chose either to retire from the Judiciary, but most importantly or subject to the process of vetting under Section 23, to continue to serve on the Court of Appeal."

If he is not vetted, he cannot continue to serve. The new Chief Justice shall be appointed by the President subject to the National Accord and Reconciliation Act and after consultation with the Prime Minister and with the approval of the National Assembly. I told them on this basis alone it was not feasible to nominate a sitting Judge who had not been vetted to become a new Chief Justice.

So, we had the problem of seniority because we did not understand why they were jumping Justice Omollo. We asked them specifically if they had any issues with him so

that we could take out his name and go to Justice Tonui. They had no issues. We asked them if they had any issues on Tunoi we could go to Bosire. They had no issues with Tonui.

So, I told them that I did not see any justification whatsoever. They said he is a reformer. I told them that in 1996 I started a programme with the World Bank here when I was in the State Law Office to assist with reform of constitutional offices. It later evolved into what now is called GJ Laws. I kept track a bit but I know Justice Lenaola was involved. I know Justice Ouko was involved. I know Justice Omollo was involved but I have never heard of the involvement of Justice Kariuki in this reform programme. So, if you could give us the material and specific cases of reform activities that he has undertaken, then we could probably consider. No information was forthcoming.

So, those discussions ended there. They said since this name had come from the President and since we have objected, then they had to go back and consult with the President. So, that is how the meeting ended. Nothing was concluded. We said we would not discuss the other positions until we finished on the Chief Justice. So, the meeting ended. That was on 27th of January. We went to report back to our Principles.

The Prime Minister then instructed me to write to Amb. Muthaura and inform him that he would be traveling the following day early in the morning to Addis Ababa and that there would be no further consultations until we came back. So, I did write to him the same night. I faxed it and the physical copy was delivered the next morning. The letter is here where we told him: "I have been instructed to advise you that the Prime Minister will be travelling to Addis Ababa tomorrow to present his report on the Ivory Coast crisis to the AU Peace and Security Council. Consequently, the consultations between His Excellency the President and the Prime Minister, on the appointments of the Chief Justice, the Attorney-General, the Director of Public Prosecutions and the Controller of Budget should be held sometime next week on a date convenient to both Principles. So, that is how we left the matter. We then travelled to Addis Ababa. We got there around midday and went to a meeting straight from the airport with Jan Ping. That took two hours. Mr. Dalmas Otieno and Prof. Saitoti were present in that meeting.

That meeting took place at the Hilton. From the Hilton we went straight to AU headquarters where again we had another one hour meeting with Jan Ping. From there, we went to the peace and security council meeting at the Heads of State level which started shortly before 4.00 p.m. and that meeting went on until 11.00 p.m.

In that meeting each head of delegation was allowed one aid. The Kenyan delegation opted to have our ambassador accompany the Prime Minister because in any event she is the one more versed with the issues under consideration there. No Minister even went in with him. So, I stayed outside.

At 6.30 p.m. that evening, I received a call from the Controller of State House on my phone and not on the Prime Minister's phone as the Vice-President had said in the House. He told me the President wished to talk to the Prime Minister but he did not tell me the

subject matter of the discussion neither did I ask. I simply said, give me a few minutes I check with one of the AU officials here. I asked the person who stands to keep guard at the entrance there how long he thought the meeting would take. He laughed and said: "These meetings normally go even up to midnight." He told me there was one that went up to 2.00 p.m. he said he could not tell but said maybe an hour and a half.

I went back to the Controller and told him to give us another one hour and a half then we will call you back and that was it. The Prime Minister came out after 9.00 o'clock Addis Ababa time to have some refreshments and a commercial break. When he came out the journalists who were there rushed to him and asked him: "Were you consulted on these appointments?" and he did not say anything. He went back to his meeting.

After the meeting he came out. Now we had gathered more facts. He then gave a short statement that he was not consulted and he was not aware. Then he left the matter there and we came back and wrote to the Speaker on this particular issue.

So, we believe that what took place within the Technical Committee were preliminary discussions on criteria and procedure. Nothing conclusive was ever determined in that committee. The committee met once. It was never even convened fully as per the instructions of the principles. They never made a report. They never recommended anything jointly as a committee. The meeting that was then subsequently convened between Amb. Muthaura, myself, Prof. Wanjohi and Dr. Isahakia never agreed on anything. We were presented with a list but we never agreed on the first name.

The two processes, however much we discussed within the committees, those in terms of the law, are not consultations as we have read under Section 259(3)(a). most fundamentally, if you apply the 11 tests on what consultations is in law that we have provided, whatever took place does not qualify as consultations. So, we are convinced that no consultations took place. There were some preliminary discussions but the process was rushed. At that time, we did not know what was happening. We later realized – and this was not shared with us – that the reason why this thing was being pushed was because of this process in Addis Ababa to have a resolution on deferral of the ICC cases adopted. So this was why this was being pushed so hurriedly. But that information was not shared with us. As you know the shuttle diplomacy was being done by one side of the coalition and the other side was in the dark. That is rather obvious.

That brings us to the end of what exactly happened. With your permission, I would then like to address the other issues. As I said, there was the communication from the Chair that talked about some 10 issues. With your permission, we want to express our suggestions on some of those issues he raised.

One of them was the issue of consultation which we have dealt with. So, the others are fairly short. Then we will respond to the Statement by the Vice-President.

Mr. Chairman, Sir, in the Communication from the Chair one of the issues raised was the role of the Speaker in this particular matter. We think what is at issue here is the

constitutionality of these nominations. The constitutionality of these nominations is not just a function of consultations. We think it is a function that goes beyond consultations. That is just one aspect. Today, our Constitution talks of transparent, competitive processes, merit-based of appointment to public offices as one of our national values. This is contained in Article 10. Were these respected?

That we believe is a very fundamental issue. If you look at Article 73(2)9a) and (b) of the Constitution we have guiding principles of integrity, selection to public office on the basis of personal integrity, competence and suitability, objectivity and impartiality in decision-making and ensuring that decisions are not influenced by nepotism, favoritism and other improper motives.

We are not satisfied that the present nominations meet that particular criteria. Article 232(1)(g) of the Constitution lists "fair competition and merit" as the basis of appointments and promotions in public service. We do not believe that has been met. Article 232(1)(i) "values of affording adequate and equal opportunities to both women and men". We do not think that has been justified.

Now, worse, while the list that we had been provided with at that meeting had the names of Kioko Kilukumi and William Kirwa, that list did not have the name of Justice Visram. His name was not there. So, at no point was there communication or notification from the other side that Justice Visram was going to be nominated as Chief Justice. At no time. The list we have and which is the only list that was presented to us had Justice Paul Kihara Kariuki for Chief Justice and not Justice Visram. That list had Fred Ojiambo for Attorney-General. It never had Prof. Githu Muigai. So, at no time were those names shared with us.

Mr. Chairman, Sir, again we believe this particular process does not meet our national values and principles as established under Articles 10, 73 and 232.

What are we proposing as the way forward? I would just want to read the letter by the Right hon. Prime Minister to the National Assembly. It states as follows:-

"It is my intention to consult with the President on this matter with a view to asking the Judicial Service Commission to proceed under Article 166 of the Constitution to advertise, interview and recommend to the President and the Prime Minister suitable candidates for consideration for nomination to the position of Chief Justice.

The Executive, I will further propose to the President, should adopt competitive and merit-based recruitment process for nominating candidates jointly by the President and the Prime Minister to the positions of Attorney-General, Director of Public Prosecutions, Controller of Budget and Auditor-General in compliance with our national values and principles as enshrined in the Constitution."

That is what we are proposing to be the way forward.

I mean the Speaker raised in his communication which I will now deal with. Now, in terms or the role of the Speaker, we think he has the duty, competence and jurisdiction to rule on the constitutionality of the nominations. That is the call of the National Assembly. We think a question that evolves around determination of the constitutionality of nominations is a matter of constitutional interpretation. It is not a matter for the House to vote upon. We do not think constitutional interpretation can be rendered through voting in any organ. I think it is a matter to be determined by interpretation. The interpretation of the Constitution within the Executive is for the Attorney-General; within the Judiciary, it is for the Supreme Court and within the House, it is for the Speaker. So, we think that there should be a determination on the constitutionality of these nominations on the grounds that I have raised.

Mr. Chairman, Sir, we also think, in terms of what the communication from the Chair said, that it is before any issue of the nominations is dealt with further, the relevant and competent Committee, which I think is this one, should offer guidance on the constitutionality of the nominations. I think we cannot go further and even try to vet or try to interrogate the suitability of competence of the nominees before the question of constitutionality is determined.

Mr. Chairman, Sir, there is also the issue of the Commission on the Implementation of the Constitution (CIC) raised in the Communication of the Speaker. The CIC has a duty, and I quote from the Constitution:

"To ensure that the letter and spirit of the Constitution is respected. The CIC has a duty to report progress and any impediments in the implementation of the Constitution to this House."

Consequently, Mr. Chairman, Sir, our position is that the opinion of the CIC on the constitutionality of these nominations carries equal weight to its responsibilities. In this respect, its opinion is not just persuasive but, we believe, binding.

Mr. Chairman, Sir, the role of the Judicial Service Commission (JSC); while in the specific case of the Chief Justice, the Constitution does not require the JSC to participate in the nomination process before the next general elections, it is our position that nothing stops the Executive from engaging the JSC to help with the identification of candidates through a competitive process for purposes of nomination. Indeed, engaging the JSC in this process will be in consonance with and in furtherance of our national values and principles of transparency, merit and competitiveness in making appointments to public offices; and there is precedent already. The Executive did ask the Public Service Commission to provide leadership in the identification of the members of the CIC and the Revenue Allocation Commission.

Mr. Chairman, Sir, on the issue of the serving judge, again this was raised from the Communication from the Chair. It is our position, as I have said that no serving judge –

until vetted and found to be fit to continue serving in the Judiciary -- is eligible to be nominated and appointed as Chief Justice. That is our position.

Finally, Mr. Chairman, Sir, as I have said, the nominations breach the constitutional requirements of regional balance and gender parity. There is no woman who has been nominated. But we have also noticed some other very disturbing possibilities and, in this respect, I would like to draw the attention of the House to the National Cohesion and Integration Act, Act No. 12 of 2008, in particular Section 7 (2). I shall read.

"No public establishment shall have more than one-third of its staff from the same ethnic community."

Mr. Chairman, Sir, for purposes of the proposed nominee to the State Law Office, I shall submit here what the composition today is of the five top positions in that office. I shall not read them out, but I will ask the Committee to take notice of what the composition is.

Mr. Chairman, Sir, there is the further problem with the nomination for the Director of Public Prosecutions (DPP) and, here, because we are not in a court of law, I will just invite the Committee to look at the Advocates Act, Chapter 16; to look at the Evidence Act, Chapter 80; to look at the Criminal Procedure Act, Chapter 75 and ask yourselves this question. Would the present nominee, if accepted, enhance or undermine the independence of the prosecution service in prosecuting pending cases of grand corruption in which this particular nominee has been the defense counsel?

Ms. A. Abdalla: Mr. Chairman, Sir, I think that the presenter is actually vetting the nominee of Kilukumi; and if that is part of the process, then we should say that we have answered the questions of constitutionality because his presentation is actually based on the competence of the individual and what legal work he has done in the past.

So, Mr. Chairman, Sir, I would like to urge you to order that contribution from the presenter to be expunged from the record, unless we are vetting the candidate.

Mr. Chairman: We are not vetting the candidate, but I think what Mr. Omondi is doing is expressing the opinion on each of the nominees. I do not believe that amounts to vetting.

Please, proceed!

Mr. Caroli Omondi: Mr. Chairman, Sir, what I am trying to do is re-emphasizing the issue of constitutionality. I am saying that the nominations are in breach of the National Cohesion and Integration Act, and they are in breach of the established norms and practices of the legal profession and rules of evidence in those Statutes. That is what I am saying; I am not discussing the suitability or competence or integrity of anyone of them.

Ms. A. Abdalla: But you have just mentioned the cases that they have dealt with and his ability to prosecute grand corruption. That is not what is in the Evidence Act. The ability

of an individual is not in the Evidence Act. You have said that "his ability to prosecute grand corruption;" that is what you said!

Mr. Wamalwa: On a point of order, Mr. Chairman, Sir. I think what we are really looking at was the constitutionality and the procedure; we should not go into the candidates. I think we have not gotten there yet. The gentlemen before us were really to address us on the issues that you have set out in the preamble before we started. I think to go into the list and the individuals will be overstepping.

Mr. Chairman: Mr. Omondi, you have done well up to this stage. Would you keep in the stream, please? Confine yourself to broad question of constitutionality without going into the details of the specific proposed nominees.

Mr. Caroli Omondi: Mr. Chairman, Sir, I will proceed. It is only that we thought that constitutionality in (?) compliance with statutory provisions and laws that exists. But let us leave it like that.

Mr. Chairman, Sir, before I go into providing clarifications on the statements made by the Vice President, I would like, just because we have mentioned the Attorney-General – I am sure you have this – but I would like to present to the Committee the press statement by the JSC issued on 31st January, 2011, on these nominations. It was signed by the Chief Justice and the Attorney-General and they expressed their positions on the constitutionality of these nominations.

Again, Mr. Chairman, Sir, I would like to present the statement by the CIC because that was part of what the Speaker said. And, finally, I would like to present a decision of the High Court in Petition No. 16 of 2011, where these nominations were declared unconstitutional.

Then, Mr. Chairman, Sir, on Tuesday, 1st February, 2011, the Vice President and Minister for Home Affairs issued a statement in the House regarding consultations over the nominations for these positions. In this statement, the Vice President and Minister for Home Affairs first alluded to technical meetings and technical teams. From what we have presented here, the correct position is that there was only one technical team which met once, never produced a report, only agreed on the criteria and agreed on where to source the candidates for Chief Justice and the other position of DPP.

Mr. Chairman, Sir, in that statement, the Vice President mentioned that the Prime Minister expressed the view that we should have a foreign Chief Justice. The correct position is that the Prime Minister suggested that we should have a transitional Chief Justice from the Commonwealth on a fixed non-renewable term of three years. And at no time – I want this to come out very clearly – did the Prime Minister propose Justice Omollo; at no time! Justice Omollo's name came up on the basis of the list of seniority. When it was presented and we were discussing the nomination of Justice Kihara, that is when we asked "But if this is the senior most Judge, why are we not considering him?" and we got the attention of the other people that the tradition is that, Justice Gicheru was

the senior most Judge and he was made a Chief Justice; Justice Madan was the senior most Judge and he was made the Chief Justice and many others before. And we said that when Justice Chunga was parachuted from prosecution to Chief Justice, there was such tremendous resistance from the Judiciary that he was not able to be effective as a Chief Justice. So, we said let us look at Justice Omollo; but at no time did the Prime Minister propose Justice Omollo. His position was that we should get a transitional Chief Justice from the Commonwealth on a fixed non-renewable term of three years. We even went further to try and identify the countries; we thought of Singapore, Australia, Canada, India and Ghana.

Now, Mr. Chairman, Sir, I think it is important to inform the country and the House why the Prime Minister wanted a Chief Justice from the Commonwealth; it is not that Kenyans cannot do it. But he had valid reasons – we believe and we still think are valid -- as to why he was recommending this. Number one, that it was important to get a new Chief Justice from a functioning judiciary. Our Judiciary is not functioning. If you want to reform it, you better bring somebody from a functioning judiciary. Such Chief Justice would be able to identify the shortcomings of our Judiciary and offer best international practices in reforming our Judiciary. He will walk in and from day one, he will tell you what is not working in our Judiciary because he will see it and he can reform it. He or she will be coming from---

Mr. Nyamweya: Mr. Omondi, you have said that our Judiciary is not functioning. Therefore, should we disregard this particular order or ruling that you, yourself, has given us from Justice Musinga?

Mr. Olago: On a point of order, Mr. Chairman, Sir. I think we had said earlier on that these interventions we can keep for later so that we can move faster, even if we have seen---

Mr. Chairman: Please, proceed! But, take note; can we just limit those interventions; we will place them after this submission.

Mr. Nyamweya: Okay, Mr. Chairman, Sir.

Mr. Chairman: Go ahead and conclude, but I call your attention to the limitation of time.

Mr. Caroli Omondi: Number two, Mr. Chairman, Sir, that a Commonwealth Chief Justice will bring the credibility needed in establishing a local mechanism to deal with post election violence matters and to negotiate with the International Criminal Court (ICC) a referral of the pending cases.

Number three, Mr. Chairman, Sir, that such Chief Justice will not be seen as biased or partisan or beholden into any interest in the country. Number four, that the transition period will allow the country to assess newly appointed or promoted judges and identify a suitable successor. Number five, that a local candidate appointed from outside the

Judiciary was likely to experience resistance from within the Judiciary and, thus, undermine the reform momentum. Number six and finally, that the current serving judges have not been vetted as required by the new Constitution and were, thus, ineligible for appointment.

Mr. Chairman, Sir, the statement by the Vice President also mentioned that the Prime Minister would insist on Justice Omollo to be nominated to the position of Chief Justice. As I have said, this was not the correct position. The same statement referred to a team comprising Amb. Muthaura, Mohamed Isahakia, Prof. Nick Wanjohi and Caroli Omondi as a technical team. This was not the technical team. The technical team is the one that had Solicitor-General; the PS, National Cohesion; PS, Internal Security and the other members from the three Commissions and the Law Society, which was never convened. Our meeting on the afternoon on the afternoon of the 27th, we did not meet as a technical team. It also mentioned that Fred Ojiambo was replaced by Prof. Githu Muigai because the former did not have higher post graduate qualifications. The correct position is that, this was never a consideration. It mentioned that the prime Minster left for Addis on 28th January, 2011, as if he was in flight, avoiding to make a decision.

Mr. Chairman, Sir, this trip was known both to Amb. Muthaura and Prof. Wanjohi well in advance, as I discussed it with them on the consultative meeting of 27th. That particular trip was on the agenda of the African Union (AU) Peace and Security Council, of which the Office of the President had notice and we had even discussed the logistics of travel and everything with them. So, this was well known.

Mr. Chairman, Sir, the statement by the Vice President states that consultations had not been finalized and that further consultations were planned by the parties. That is factual. It says:

"It is true, as stated by the Vice President under point No. 8 – if you look at his Statement as at 27th January, 2011 – the matter had not been finalized and further consultations were planned by the parties."

But, Mr. Chairman, Sir, at no time did the parties agree that Friday was the deadline for those consultations. It also says: "The Prime Minister will be consulted by phone while in Addis."

Mr. Chairman, Sir, at no time was the Prime Minister advised that while he will be away, there will be consultations by phone. Indeed, the Prime Minister had instructed me to write a letter to say that the consultations should resume the following week. That the proposal to nominate Justice Visram to the position of Chief Justice was communicated to the Prime Minister, the correct position is that at no time was this proposal communicated at all. We just heard of it when the media were announcing it and, of course, I have explained what happened with the telephone conversation between me and the Comptroller of State House.

Mr. Chairman, Sir, with your permission, I would like to present those clarifications as well as our position on the issues raised by the Communication from the Chair and those clarifications for your records. I come to the end, but I will ask my colleagues if they have anything to add very briefly, and then we can take your questions.

Mr. Chairman: Mr. Miguna? Mr. Mugambi, you are invited to supplement; kindly be conscious of time because we are quite pressed for time. But go ahead, Mr. Miguna!

Mr. Miguna Miguna: Thank you very much, Mr. Chairman, Sir. There was an issue that was raised with respect to a two-page minutes that had been submitted by Amb. Muthaura before we came. I was going to ask that, that copy be availed to us so that we can respond to the issues that you wanted responded to on that issue. Because, otherwise, we do not want to talk about an issue or a document that we have not seen. It would not be fair.
Mr. Chairman, Sir, I just want to go to a few salient sections of the Constitution, and I will be very brief. If we go to the Supremacy provision in the Constitution at Article 2 Chapter One, which is on page 13, it says:-

"This Constitution is the supreme law of the Republic and binds all persons and all State organs at both levels of Government."

The emphasis is on Constitutionalism. It has been a tradition in this country before the promulgation of this Constitution and in governance that the President was viewed as being above the law; and that whatever the President did said was not questioned. That, really, has been a tragic experience that has not been excavated (?) from the minds of Kenyans, even though we have a new Constitution. It is imperative that we always remind ourselves that with the promulgation of this Constitution, there is no one in this Republic that is above the law; and that when anyone – the Prime Minister and the President included – takes any action that contravenes, violates or contradicts the Constitution, no one; no state organ or individual should think that there should be a deference to whatever decision has been taken. So that, whatever decision this Committee makes, it is our submission, the question should be, was the decision consistent with this Constitution? And if we find that the decision or the action was inconsistent with the Constitution, then you must reject the decision that was made, whether or not anyone wants to quibble with the preliminary discussions that have been couched as consultations becomes irrelevant.

The second point I want to make is with respect to the primary role Parliament plays in a constitutional democracy such as ours. That is captured in Article 94 of this Constitution:

"Parliament shall protect this Constitution and promote the democratic governance of the Republic."

I respectfully submit that anyone who argues that Parliament or this Committee or the Speaker has no role in interpreting the Constitution and determining whether or not a State actor has violated the Constitution would be wrong.

In the analysis of this Committee we have to start from the basis that this is a coalition Government as my friend has submitted.

Mr. Wamalwa: On a point of order, Mr. Chairman, Sir. Would I be in order to suggest that, perhaps, the rest of the team could respond--- I am very sure that many of the issues that we are going to raise are what Mr. Miguna is talking about. Could we be allowed to put the Question then the rest of the team, in their response, deal with them? We need not have three presentations. This is because of the constraint of time.

Mr. Chairman: I think that is reasonable.

Mr. Miguna Miguna: It is, Mr. Chairman, Sir. Could I finish my submission? I have two points to make and then I will be more than happy to allow questions.

Mr. Chairman: Granted. Please, proceed!

Mr. Miguna Miguna: Mr. Chairman, Sir, had the Prime Minister submitted names for this nominations would this Committee have considered them? That is a very important question. As Mr. Caroli Omondi has stated, this is a coalition Government with two principals. Now, either Principal could have decided to act in the manner the President has acted. If the answer is no, then I have to ask: On what basis would this list be processed forward? What is good for the goose, must definitely be good for the gander. In the Constitution, you do not pick and choose. In this case we have a partnership and if one partner provides to you something that the other partner objects to and you process it and you say you could not do otherwise, then you must find that your act violates the Constitution. Indeed, that is the case if we go with the principles of power sharing, partnership, respect for the accord, and constitutionalism.

If you look at Section 29 on New Appointments, Section 29(2) is very instructive:

"Unless this Schedule prescribes otherwise, when this Constitution requires an appointment to be made by the President with the approval of the National Assembly until after the first elections under this Constitution the President shall (it is not may, or can) subject to the National Accord and Reconciliation Act appoint a person after consultation with the Prime Minister."

Let me take you to the Accord.

Mr. Chairman: I want you to conclude so that part of your submission could be in response to the issues that hon. Members are going to raise.

Mr. Miguna Miguna: Mr. Chairman, Sir, this is actually in response to hon. Nyamweya's question.

Mr. Chairman: Would you then take all the other questions and respond to all of them?

You may do a composite response. Some of the issues you are raising could be subject of the questions hon. Members are going to put to you. Please, with your indulgence, do that together with Mr. Muganbi.

Allow me to invite hon. Members to place whatever issues they may have and then you can respond together.

Mr. Musyimi: Mr. Chairman, Sir, I find it intriguing that with regard to the names presented, women are not featuring prominently and you are talking about the Prime Minister going to the Commonwealth for what you call "transitional Chief Justice". I wonder why you did not go to the commonwealth of women in Kenya and get a permanent Chief Justice? I am not being cheeky though. We know that women are rather transcendental because they are not bound by ethnic problems in the same way that men tend to be.

Secondly, Mr. Omondi, I find it rather odd that you would be standing somewhere in Addis Ababa and then somebody rings you saying that the President would like to talk to the Prime Minister. Then you go to the entrance and you ask: "How long do these meetings last?" Was that the question to ask? I would have that you would have made it very clear that you have to see the Prime Minister and vice versa.

Mr. Ruto: Mr. Chairman, Sir, we are in Committee and I want to draw the attention of the participants that the Committee of the House is governed by Standing Orders. I want to bring to your attention Standing Order No.96:

"The Speaker or the Chairperson of a Committee after having called attention to the conduct of a Member who persists in irrelevance or tedious repetition either of the Member's own arguments or the argument used by other Members in debates, may, after having first warned him or her direct that the Member to discontinue his or her speech."

Mr. Chairman, Sir, we do not expect anyone to repeat any arguments or anything that any other person has mentioned.

Mr. Chairman: Point taken. I think the point has been made.

Mr. Wamalwa: Mr. Chairman, Sir, just to seek further clarification from what Mr. Musyimi asked of Mr. Omondi. He indicated that at some point the Prime Minister would come out for refreshments, but he could not come out to speak to the President of the Republic? I would like a clarification over that.

Looking at the minutes of your meeting of 27th, you have indicated that there were earlier consultations. After the consultations the principals referred the list to the technical team which comprised of Mr. Muthaura, Prof. Nick Wanjohi, Dr. Mohammed Isahakia and yourself. In this team, I think you are the only lawyer. There was an earlier procedure proposed of going by way of the JSC advertising. As a lawyer, you advised that that route might not be necessary and that it could be done through consultations between the two

principals. Please, confirm whether that position is correct. If it is, I would like you to give us the reasons that informed that advice. Were you guided by Section 12 on the Executive? It provides that the persons occupying the offices of President and Prime Minister immediately before the effective date shall continue to serve as President and Prime Minister respectively in accordance with the former Constitution and the National Accord. Remember it is not the new Constitution under Article 166. Was that your interpretation?

Lastly, on Sections 24 and 29, is it your interpretation that, indeed, it was not necessary to go through the JSC route before the first election?

Mrs. Odhiambo-Mabona: You said that for the position of the DPP, you advised as the technical team that you should go to private practice and not people who are already within the structures. I would like to know whether this was a way of avoiding the women who are already qualified and are within those structures. There seems to be some allergic reaction to women from both sides. Did you take into consideration Article 27(3), (5) and (8) including the Article you have cited on gender representation. Also, in the same vein, with regard to the criteria that you have indicated that you have developed, I noticed a very glaring omission that you did not think of gender representation.

Ms. A. Abdalla: Mr. Chairman, Sir, I wish to remind them about my question on their nature of record keeping. Is this the first time that the goodwill that has existed between them has been a problem? What lessons have they learnt and how would they do it differently?

You said that the panel comprised the Permanent Secretaries in the Ministry of Justice, National Cohesion, and Constitutional Affairs; Ministry of State for Provincial Administration and Internal Security and others. All the institutions you have mentioned, apart from the Solicitor-General and the Permanent Secretary in the Ministry of State for Provincial Administration and Internal Security, are represented in the JSC. Why were you running away from the JSC? What legal basis did you have to not use the JSC whereas you have invited members from all the Commissions in relation to the three judicial-related appointments?

You said that the Treasury was not represented with regard to the position of Director of Budget. I am curious to know what informed your decision to call people from bodies that are already represented in the JSC.

In your presentation, you said that it was your view that members of the Judiciary who have not been vetted should not be considered until they are vetted. It is very clear that the Constitution intends to replace the Chief Justice by 28th February, 2011. There is no vetting law and there is no hope of having that law in the next two weeks. It means that you are giving us one week for vetting. You have also said that urgency is not a reason for making a hurried decision on the nominees. Parliament has been convened for the sole purpose of vetting the Judicial nominees, especially the Chief Justice. Do you not consider that your actions appear to be an impediment to facilitating that vetting process?

You also, in your list of consideration, have said that no decision should be made based on urgency. On 28th February, 2011 we will be having a potential constitutional crisis in that we will not have a Chief Justice--- You have said that the people who are already in the Judiciary should not serve. Would you consider your actions to be impeding the process of vetting and especially so for this Committee which took two months to vet one member of the JSC?

Mr. Olago: On a point of order, Mr. Chairman, Sir. A proper reading of the Constitution would reveal that although the current Chief Justice must cease and vacate office by 27th February, 2011, there is no requirement that a new Chief Justice must be appointed by that period. That should be understood.

Mr. Caroli Omondi: Mr. Chairman, Sir, if I may add, there is already precedence. When we lost Justice Chesoni, from the time he died to the time Mr. Chunga was appointed there was a gap. It is not mandatory that there must be a Chief Justice at any point in time.

Mr. Nyamweya: Mr. Chairman, Sir, the JSC is chaired by the Chief Justice. Without the Chief Justice that JSC does not functions.

The letter of the Prime Minister to the Speaker of the Kenya National Assembly states in part:-

"I regret to hereby confirm that I was neither consulted on these nominees nor was the nomination made jointly by the President and myself."

This is one of the questions I raised when you were giving your submission. Is it the position, presumably of the Prime Minister that there is a co-presidency in Kenya and, therefore, whatever has to be done must be done jointly? You have continuously and repeatedly said that this thing must be done jointly. Is that the understanding of the Prime Minister? If we know that, perhaps, we will understand why there is a problem here.

Secondly, when we look at the National Accord with regard to consultations, removal of any Minister nominated by a Parliamentary Party of the Coalition shall be made only after prior consultation and concurrence in writing with the leader of that Party. How do you describe consultation? If, indeed, the writers of the National Accord were very clear that they wanted this consultation and concurrence to be together, why would it have been so difficult not to import the same into the Constitution itself? As you ably put it, Mr. Omondi, when you were talking of Article 259(11), it has a list of all things such as approval, consent, advice, concurrence, and consult. They have some sort of different meanings. My understanding of your reading and, therefore, presumably, the Prime Ministers reading is that consultation includes concurrenc.

Still on the same subject, if you go to the ruling of the High Court where there is quite an elaborate interpretation of the word "consult" you will find that the judge refers to the National Accord and Reconciliation Act. He says that the Constitution does not define the

word "consultation". He, however, goes through the dictionary which says, among other things, "take counsel together; deliberate, conference, and so on. Ultimately it all suggests that consultation does not necessarily include concurrence. You do not necessarily have to agree. In fact, the judge finds that there was consultation between the President and the Prime Minister and then there was no consensus.

You have invited us to say that our Judiciary is not functional. Should we take it that from the Prime Minister that we should also ignore this ruling since it is not a functioning Judiciary?

I would like to refer to the HANSARD on the proceedings which have led to this particular situation where the Prime Minister gave us a very elaborate view of what transpired between himself and the President on 27th February. I will read you part of the HANSARD on what Mr. Raila said:

"Yes, that is also a good idea. However, we can also look at the people we have locally and maybe we can also have somebody who has got near it. That way, we will be seen to have rewarded merit locally. I told him, Mr. President, I have no serious objection about that if we can get somebody who is acceptable. Do you have any suggestions? The President told me that he had made some consultations and he has names. I asked the President that we look at the names. He produced a list of names which I have here, that is, Justice Paul Kihara; Justice Anne Okwengu; Fred Ojiambo; Kioko Kilukumi; William Kirwa; and so on.

The Prime Minister even says that he suggested Mr. Pheroze Nowrojee as the Chief Justice. It was suggested that he is an activist.

Further on it says that the Prime Minister said, "If they insist that then I will say that Justice Omolo is a serving Judge and he does not qualify because he has not been vetted. If they insist they must have people from the bench, then let them go by seniority."
To my mind, this letter to the Speaker, Mr. Raila has no idea really by saying, "I have not been consulted." I have also read what the Court said. Unless of course we go to the first thing we said that "consultation" means joint concurrence, then I will understand what you are saying. However, if we read the law clearly and from the Prime Minister's own mouth, he said that there was a technical committee which did all these things. It issued a list of names which they discussed with the President.

Finally, there is Dr. Isahakia and Mr. Muthaura. Now, Mr. Muthaura was here and he gave us information about communication between himself and Dr. Isahakia which he understood to mean that they were communicating and consulting with the Prime Minister. That is why I asked if Dr. Isahakia was going to appear here. We would ask him whether he communicated with Mr. Muthaura and that he said that the Prime Minister had no objection with this. You said that you were quite competent to answer all those things and they are the same things that were troubling the principals. They knew they were recalling Parliament for purposes of this situation. By 27th February, we must have

the Chief Justice in place. The issue could as well have been motivated by the issue of the local tribunal. Anyway that is not the point we are concerned with.

Do you say that all these things, in their totality, do not amount to consultation? Is that the view of the Prime Minister?

Mr. Chairman: Mr. Omondi, as you respond to the question of the list that is referred to both in the correspondence of the Prime Minister to the Speaker and in the statement the Minister makes on the Floor, you want to clarify a point which I heard you make earlier; that the names of Visram, the proposed candidate for Chief Justice and the name of the name of Prof. Muigai, the proposed name for Attorney-General were not on the list. Perhaps you want to clarify to the Committee at what point those two names get in the picture. Just take note of that.

Mr. Nyamweya: Mr. Chairman, Sir, I did mention that they are in the HANSARD report, raised by the Prime Minister himself. He says he has no problem with Prof. Muigai and Visram. Really, it is there.

Mr. Chairman: That is why I am seeking a clarification on the same. Mr. Kioni, though not a Member of this Committee, but he is an hon. Member of the House, I believe it is perfectly in order for you to be part of this and then I will come to hon. Odhiambo-Mabona.

Mr. Kioni: Thank you Mr Chairman, Sir. When Mr. Omondi was presenting his brief he mentioned that the Constitution can be interpreted by three people; the Attorney-General for the Executive, the Speaker for the National Assembly and the Chief Justice for the Judiciary or the Supreme Court. What becomes of the country if there are three interpretations on the same issue? Which direction do we go?

Secondly, in his presentation you have strongly advised that the Speaker should be allowed to make a ruling on this issue of the interpretation of the Constitution. It is not a matter that should be left to Members of Parliament to debate and perhaps vote on it. Why is it that you have that strong feeling that the peoples' representatives should not be allowed to talk on matters of the Constitution?

Finally, there is the issue that the persons who have been nominated have not been vetted. We have also received your thinking on the opinion that was given by the Judicial Service Commission. Some of those sitting in the Judicial Service Commission have not been vetted. Should we then also disregard their opinion, now that they have not gone through the vetting process?

Mrs. Odhiambo-Mabona: Mr. Chairman, Sir, there has been reference to some court proceedings. The court has made conservatory orders which give certain conclusions *prima facie,* and the main hearing of the matter is still forthcoming. Did you have an

opportunity to present your preliminary views or are you a party to that suit? Are your views taken into account?

Secondly, you have made reference to certain authorities when you are trying to give us an interpretation of the word "consultation". Could we please have copies of those authorities?

Thirdly, when Amb. Muthaura was here he said that consultations are real consultations. By their very nature, they are ongoing. He was referring to the way you normally conduct them and that they should not be structured too much because in his view if you structure them too much, it hinders reaching a conclusion. Then he said that what the Principals approve after back and forth telephone meetings is a decision and that decision is made public. Do you agree with him?

Mr. Caroli Omondi: Mr. Chairman, Sir, I beg the indulgence of the Committee, because I think I was asked too many questions. Some of them may fall through the cracks. If you do not capture them, please, feel free to remind us, and then my colleague will chip in if and whenever necessary.

Let me start with hon. Nyamweya. He has posed the question of core presidency; whether we have a core-presidency. I would like to draw his attention to the Sixth Schedule of the Constitution, Page 192 if you have it. Section two titled "Suspension of Provisions of this Constitution" Section 2(c) Articles 129 to 155 of Chapter nine of the Constitution. Let me read the chapeau:-

> "The following provisions of this Constitution are suspended until the final announcement of all the results"

Mr. Kioni: Mr. Chairman, Sir, what is *chapo*? He is reading *chapo.*

Mr. Caroli Omondi: I said chapeau not *chapo.*

Mr. Chairman: Could you clarify what that is, for the benefit of the hon. Members, please?

Mr. Caroli Omondi: You see that section---

Mr. Chairman: Members have---

Mr. Caroli Omondi: In simple terms, it is a Constitution that is up and applies to all. You have to read it with whatever follows next. 2(1) states:-

> "The following provisions of the Constitution are suspended until the final announcement of the results of the first elections to Parliament under this Constitution".

Section 2(c) Articles 129 to 155 of the Chapter nine:-

> "Except that the provisions of the chapter relating to the election of the President shall apply to the first general elections under this Constitution".

Now, if you go to that Chapter nine, it is the one that deals with the Executive. It is the one that deals with a full Presidential system as now contemplated in the new Constitution. Those provisions are suspended.

If you again read the same Sixth Schedule under Section titled "Extension of application of provisions of the former Constitution".

Under two, Sections 30 to 40, 43 to 46, 48 to 58 of the former Constitution, the provisions of the former Constitution concerning the Executive and the National Accord shall continue to operate until the first general elections under this Constitution. But the provisions of this Constitution concerning the systems of election, eligibility for election and electoral process shall apply to that election.

Mr. Chairman, Sir, what I am trying to say is what I began with; that Executive authority today in this country is exercised on the basis of the National Accord. You can see very clearly that it is reserved. It is a Coalition Government. No one side can realistically govern. This is the principle. On that basis alone, the issue of core-Presidency or core-Prime Minister does not arise. What exists is a Coalition Government with two Principals exercising Executive authority on the basis of compromise, real power sharing and consultation. I hope that explains it.

Mr. Nyamweya: I have no quarrel and I know it is talking about that one. All I did ask from the beginning and even now; I would like to see which particular section of either the National Accord itself or the Constitution says: "Jointly" and that certain functions must be exercised continuously or jointly or concurrently. If it is there, it is there. If it is not there, nobody has a big quarrel with it. If it says that you must consult the Prime Minister, that is what it says. We are not quarrelling about who is superior to who. That is not the issue at all. I just want to understand as a matter of law where it says that a function which is to be done by the President must be done jointly with the Prime Minister. If there is such a place, I have no problem with it. If there is not, I also have no problem with it. It will help me discharge my duties here.

Mr. Caroli Omondi: Hon. Nyamweya, let me give you an example; the old Constitution says that the Cabinet is appointed by the President. But in reality, what happened?

Mr. Chairman: Could Mr. Nyamweya respond to that first? Even though I believe that you had actually sufficiently responded to that concern.

Mr. Nyamweya: Mr. Chairman, Sir, if we cite the National Accord itself, like where it requires Ministerial appointments and Ministers, it says quite clearly in the National Accord that removal of any Minister nominated by Parliamentary parties or Coalition shall be made only after prior consultations and concurrence in writing with the leader of that party. Nobody is quarrelling with it.

If the nomination of the Chief Justice was to be in the Constitution, it would say, in concurrence or jointly. If there is such a provision somewhere, just point it out to us.

Mr. Caroli Omondi: Mr. Chairman, Sir, that provision is in the Constitution that hon. Nyamweya very ably passed in this House. Section 24 states:-

> "A new Chief Justice shall be appointed by the President, subject to the National Accord and Reconciliation Act."

So, you must first have a very clear grasp of what the National Accord and Reconciliation Act stipulates in terms of power sharing, Coalition Government and how the Executive authority is exercised.

If you go further to the section that deals with the Executive under the current Constitution, it recognizes in Subsection One, both the Prime Minister and the President. Unless we want to be perfunctory. I do not see the value of that question.

Mr. Chairman: That matter is sufficiently responded to.

Mr. Nyamweya: On a point of order, Mr. Chairman, Sir. I do not think it is in order for somebody who has been sent here to give us information to speak to the House; that he does not think that what we are doing is valuable. I really do not think that is in order. It is not for him or anybody else to decide whether it is of value or not.

Mr. Chairman: I do believe that everything that is raised in this room on this matter is valuable and useful to the conclusion of the task at hand. I consider that that matter has been sufficiently responded to. I beg that we move on to the next matter.

Mr. Caroli Omondi: Mr. Chairman, Sir, hon. Nyamweya's second question was in relation to the concept of a functioning Judiciary. One does not have to be a rocket scientist. If under the new Constitution you are removing the Chief Justice of the Judiciary, you are vetting all the judges and magistrates who are in that judiciary to determine their suitability to continue to serve, surely, there is something wrong. If it was functioning, we would not do that. The Constitution itself says: From the head to the bottom. Some are removed, some are to be vetted. We live in this country and we know that there is a problem.

His other question was in respect of Justice Visram. At no time was the name of Justice Visram mentioned. When he says that from the HANSARD, the Prime Minister said that he had no problem with Justice Visram or Prof. Muigai's nomination, he was not saying that he was consulted. He was just saying that he had seen their names and he had no problem with them. That is very different from consultation.

I want it to be made very clear that under the Constitution, as I read Article 259(3) (a), consultation can only take place under the Constitution between the President and the Prime Minister. It is not when other people are doing any other thing. Not when we are exercising the ordinary functions of Government. Civil servants can consult at that level. But under the Constitution, for this particular purpose, it can only be between the two Principals.

I am submitting to this Committee of the House that there have not been any consultations. Consultation is not when a list is given to you and you say, my team will study it and I will bring it back, then we can talk about it. There was no subsequent meeting between the Principals to discuss that list. There was no meeting at all to discuss Justice Visram or Prof. Muigai. Even the mere fact that the list had Kilukumi's and Kirwa's names. Unless we take consultation to be notification or to be a perfunctory exercise, we cannot say that, that was consultation. If I walked in here today and said that I am with so and so here and I announce that I have appointed him to a certain post without telling you even what I am thinking, that is not consultation. So, between the two Principals, I would like to tell this Committee that there has never been any consultation on these nominations.

Hon. Amina Abdalla asked the nature of recordings of our meetings. There are different levels at which consultations are done. In the ordinary course of Government business, there are different levels at which consultations are done. When we used to have the Committee on Management of Coalition Affairs, there used to be formal minutes. But this particular consultations; weekly meetings between the President and the Prime Minister, have not been formalized. We normally take our notes and sometimes we issue joint statements and sometimes we do not. Sometimes when we agree, we move out and exchange letters. Sometimes one calls the other back and informs him what he wants to do, he has done or is going to do. They remind each other to send letters to people who would execute particular tasks. That is how it has been happening.

You talked about goodwill in consultations; whether this is the end. I do not think this is the end. To the contrary, I think from this experience, probably both sides have learnt something; that going forward, maybe things need to be more structured. On our side, we have always tried to make them more structured, but that has not been possible.

I would like to give the Committee two letters; one we wrote on 4th July 2008 and the subject is "Co-ordination of Government Business" where again we are expressing problems with consultations.

Mr. Wamalwa: On a point of order, Mr. Chairman, Sir. I think it would greatly help the Committee if we had a bundle of all the correspondences relating to this matter and perhaps, as Mr. Omondi has said, they were not keeping minutes, but they were keeping notes of the minutes. So, perhaps what we have received from Amb. Muthaura are his notes. Is it possible to also receive notes from the Office of the Prime Minister? It might greatly assist us. Will it also be possible for the Office of the Prime Minister to avail Ps, Isahakia, because at some point or some stage of consultations, I think the final communication was made through him on the issue of the Chief Justice. Whatever you are telling us goes on record. Whatever you are giving us is like evidence on oath and you cannot perhaps speak on his behalf. We would like the PS, Isahakia to appear before us so that he can also go on record as to the final bit of these consultations before the Prime Minister departed to Addis Ababa.

Mr. Caroli Omondi: Mr. Chairman, Sir, of course it is up to the Committee to decide whom they call. If you ask him to come I am sure he will comply.

I think we are mixing issues. There is discussion at the technical level. I think we need to have this very clearly, in law under this Constitution those are not consultations. What I discuss with Prof. Wanjohi or Amb. Muthaura frankly is not consultation. The Constitution is very clear consultation is when whatever we have prepared is then presented to the two principals jointly and then they take a decision. That is consultation.

Mr. Baiya: On a point of clarification, Mr. Chairman, Sir. Would you consider communication such as the telephone call that was being made from State House to the PM in Addis Ababa as consultation?

Mr. Caroli Omondi: I would not. First, when they made the call they did not tell me what the subject matter of the discussion was. I do not know whether it was a call to---

Mr. Musyimi: On a point of order, Mr. Chairman, Sir. I came here under PNU, for good or ill, if I was told that the Prime Minister wants to talk to me I would leave this room as a matter of respect to the Prime Minister and the Office of the Prime Minister. I still find it very odd that you would be told that there is a call from State House and somehow it does not raise you.

Mr. Caroli Omondi:: Mr. Chairman, Sir, I am coming to that question.

Mr. Chairman: We are running out of time now.

Mr. Caroli Omondi: Mr. Chairman, Sir, Mr. Musyimi I have a lot of respect for you. I know your fights to make this new Constitution possible.

Mr. Chairman, Sir, your first question was on commonwealth of women to get a new Chief Justice. The Prime Minister never had the opportunity because when we suggested Commonwealth and a panel was to be set up to try and get names, probably, I am sure there are very many qualified Kenyan women. I know many of them who would been interested in this position. That opportunity never arose. Instead he was presented with a list as a *feita comple* and told this is what has been generated.

If you see the Statement by the Vice-President and Minister for Home Affairs to this House he says very clearly that the list was generated by the President. This is in the HANSARD a copy of which I believe you have. So, the Prime Minister never had the opportunity to even give the women of this country a chance to participate in this process. That is why we are here so that we can start this process again so that the women of this country can have the opportunity to have a go at this position through competition.

On the question on the call, I am in a meeting at 6.30 p.m. then I receive a call from Nelson Githinji. He tells me H.E wants to talk to the Prime Minister. Immediately I try to

figure out, how do I get the messenger in there? How do I even tell the PM to come out? I tried. That is why I went to speak to the AU official. I asked him how long he thinks the meeting would take. No one was coming out of the meeting. He told me it would take one hour and a half. I was holding the phone, it was not that I disconnected and would call again.

Mr. Baiya: *(off record)*

Mr. Caroli Omondi: By what means if we are not allowed in the same room?

Mr. Baiya: Even here by the way we receive these messages and we even know how these meetings take place in halls. There are always messengers. What is not allowed is for you to do any communication but you can leave and pass a note. Even right now, if you received a message right now that there is an important message from the Prime Minister himself it would be the height of irresponsibility for you to ignore that kind of message.

Mr. Caroli Omondi: You know, frankly when you are in the middle of that meeting with the heads of States for those who have attended, I do not know, but there are protocol issues. You do not just send a messenger. Even the person who is sitting at the door, it is not his job to enter the meeting. His job is to block the people from entering. That is precisely why he is at the door. His job is not to pass messages in and out.

Mr. Chairman: Mr. Omondi, please, conclude. I invite you to bring this matter to a close.

Mr. Caroli Omondi: Those of us who have the privilege to be engaged in these issues sometimes you go to these meetings with your principle and the whole day he is next to you but you are not able to talk to him. He is with other Heads of States and dignitaries.

Mrs. Odhiambo-Mabona: On a point of order, Mr. Chairman, Sir. I think we need to put things into perspective. When I worked with the civil society I was lobbying AU and the UN, from what Caroli is saying leave alone the President and the Prime Minister even a Minister once they go and sit at the Government position if you are not a delegation you will not enter. When it is the Presidents you will not go anywhere near or close.

Mr. Chairman: Hon. Member, I believe Mr. Omondi has made it clear that he did not have opportunity to communicate with the Prime Minister. Had he that opportunity he would have certainly communicated with the Prime Minister. Please, go ahead and bring that matter to a close.

Mr. Nyamweya: Mr. Chairman, Sir, before you bring that matter to a close, I am most reluctant to even offer this but I think in the light of what my colleague Mrs. Millie Odhiambo-Mabona has said I myself was in Addis Ababa the other day at that particular meeting. I can tell you that it is possible to access any of the people in there whether a

Head of State or Head of Government. That is a fact I can now put on record. You cannot be excluded if you want to communicate with your delegation.

Mr. Olago: On a point of order, Mr. Chairman, Sir.

Mrs. Odhiambo-Mabona: On a point of order, Mr. Chairman, Sir.

Mr. Chairman: Hon. Members, let us be orderly please!

Mr. Ruto: Mr. Omondi, it is on record that you also asked when you got the State House message that you wanted to know the agenda. Is it possible that you ask the President tells you the details he wants to convey to the Prime Minister before you can actually allow him to speak to him?

Mr. Caroli Omondi: Mr. Chairman, Sir, it is not my responsibility---

Mr. Chairman: I will take Mr. Olago's and then kindly invite you to conclude.

Mr. Olago: Mr. Chairman, Sir, my point of order is this; we have been listening. I do not think this is the right time to draw conclusions on whether we believe what we have been told or not. These interventions should not be as if to imply that we believe you or we do not believe you. That we will come to later.

Mr. Chairman: Allow me to invite Mr. Omondi to conclude, whether or not the effect of the information you are giving us is something the Committee is going to have an opportunity to synthesize and make a decision on. So, I invite you to bring that question to a close and move on.

Mr. Omondi: In answer to what Mr. Ruto has said, in this kind of business there is a level of sophistication that is required!

(Laughter)

If Nelson Githinji calls and he does not tell me what the President wants to discuss with the Prime Minister I get the cue that is why I do not ask. I know I can also call him and tell him the principle wants to talk with H.E and would not tell him what I it is. Maybe I have been told not to say. I do not know. It is on a need-to-know basis. That is how the business is conducted here.

Mr. Chairman: Please, go ahead and conclude.

Mr. Caroli Omondi: The fact that they called my phone means they know they can always reach the principle through my phone.

The other question by Mr. Wamalwa on the earlier consultations, I think I should make it absolutely clear that this particular issue appeared in the discussions between the

President and Prime Minister three times. It first appeared sometime in December when it was agreed that the matter be deferred to the following year. Therefore no substantive discussions took place. Those are not consultations. It was then discussed on the 6th of January when it was agreed that those positions be speeded up. What the two principles agreed at that point in time was to set up a committee to assist them with identification. That is not consultation.

It was then discussed more substantively on the 27th of January when the names were presented to the Prime Minister. That is the first time the names were being discussed. The names were presented in the morning. A small group of four discussed them in the afternoon of that and could not agree. The Prime Minister then left. With those facts even to ask there were earlier or later consultations--- there were none. There were no consultations! You cannot describe those events to be consultations in law or in fact.

Then you asked what informed the earlier decision not to advertise the positions. Amb. Muthaura yesterday informed the other Committee that they received a legal opinion from Prof. Kibwana that those positions should not be advertised. If you read the Constitution---

Mr. Chairman: Mr. Omondi, the information we have from Amb. Muthaura is that the proposal not to advertise was actually yours and it was on the basis of your proposal that the earlier intention to advertise was deferred. In fact, at the meeting where you first discussed these names Amb. Muthaura informed us that they already had a draft gazette notice for advertisement. It was the basis of your proposal that it was set aside.

Mr. Caroli Omondi: I am coming to that.

No! No! If you get the records of the other Committee he did say yesterday that this is the legal opinion of Prof. Kibwana that there should be no advertisement. However, the point is this, Judicial Service Commission (JSC) in the present appointments until the next elections of the Chief Justice have no role. It is actually a role of the Executive. That is the true position. They have a role for the Deputy Chief Justice and the other judges who come thereafter.

I think that is what Article 166 of the Constitution says if you read it together with Section 24 of the Sixth Schedule. However, when this issue came up, we wanted to have a competitive process, merit based and that is why we were struggling with the criteria and the process. We also wanted, because we had had this problem in previous appointments where the Executive on both sides say in terms of nomination, vetting by Parliament and appointment the Executive was losing its role. This is because Parliament had tended to do the actual recruitment, vetting and then just sent it to the Executive for appointment. In this case, it was agreed by both sides that for this one we have an internal process. In fact, the model we wanted to use was the one used in White House in the US where there is a very elaborate system where people are head hunted, identified and interviewed within the Executive through a competitive process and names forwarded to the House. So we were trying to experiment with something new. However, now when

we look back probably it was the wrong decision and we have no problem to change course on that.

Now, Mr. Wamalwa also asked that some Members of the JSC have not been vetted. I think there is a Clause in the Constitution that says the JSC will function provided it has five members. It does not have to be full House. So I do not think it is a question of how many people should be in the Commission. As long as they are five they can convene and transact business. Those who have not been vetted may as well be asked to step aside and the process conducted. However, that is an administrative matter for other organs to deal with.

Mrs. Odhiambo-Mabona asked about sources of candidates for Director of Public Prosecutions. I think you misunderstood me. We did not pick one source. The Committee said we should look for candidates from prosecution service meaning those who are already in prosecution at the Attorney-General's office or those who are contracted by the Attorney-General to prosecution. We said the other crop of candidates would come from the magistrates across the country. We then said the final one would be from private practice. Of course, I am sure this was going to give us a pool of qualified women. It was not defined to one area.

The Government of course is a party to the suite that is in court. The Attorney-General is a party he already appeared in that suite. He admitted the appointments were unconstitutional. I believe that is the position of the Government because he is the chief legal advisor of the Government under the Constitution.

Mr. Nyamweya: I need some clarification there, we did ask Amb. Muthaura whether indeed a list that generates from the Presidents side, they had given any instructions to the Attorney-General to represent the Government in this matter. Perhaps it is a question we can ask you on your side whether the Prime Minister's office gave the Attorney-General's office to represent the Government in this particular suite.

Mrs. Odhiambo-Mabona: Mr. Chairman, Sir, let me just ask something in relation to that---

Mr. Chairman: Order! Mr. Olago, please, proceed!

Mr. Olago: Mr. Chairman, Sir, we must make headway. An Attorney-General is not the one given advice by the State. He gives advice to the State! It is the other way round not the way Mr. Nyamweya is saying.

Mr. Nyamweya: Mr. Chairman, Sir, my question is directed to the office of the Prime Minister not to my colleague.

Mrs. Odhiambo-Mabona: Mr. Chairman, Sir, I think I want to agree with Mr. Nyamweya that he can ask that question. I wish I were the Chair I would have said Mr. Olago is out of order. Unfortunately, I am not.

Mr. Chairman: You are not! I am and he is not out of order.

Mrs. Odhiambo-Mabona: Further to what Mr. Nyamweya is asking, could you clarify whether the Attorney-General is the chief legal advisor of the Government or the Government is the chief legal advisor of the Attorney-General?

Mr. Caroli Omondi: Mr. Chairman, Sir, I will read the Constitution. Article 156(4) says:-

"The Attorney-General is the principle---

Mr. Nyamweya: Mr. Chairman, Sir, I asked a very specific question and if my friends would allow this; I asked Amb. Muthaura on behalf of the President whether they---

Mr. Chairman: Mr. Nyamweya, I invite Mr. Omondi to respond to your question which I believe he is going to do.

Mr. Caroli Omondi: Mr. Chairman, Sir, I want to answer him by referring by the Constitution. Article 156(4) says:-

"The Attorney-General is the principle legal advisor to the Government"

So in my answer to Millie it is not the other way round. The Attorney-General advices the Government. The Government does not advice the Attorney-General.

Mr. Nyamweya: Mr. Chairman, Sir, my question is very simple one of yes or no. Did the Prime Minister instruct the Attorney-General to represent the Government? That is answered with a yes or no. If he did, fine! If he did not, fine!

Mr. Chairman: Let us have order. We are going to allow Mr. Omondi to answer the questions. We are not going to dictate Mr. Omondi on how he will answer the questions. We will allow him to answer the question the way he knows best. I will plead with you to be as brief as possible. The time we had allocated for this session has run out. We have more people to talk to.

Please, conclude.

Mr. Caroli Omondi: Mr. Chairman, Sir, it also says:-

"The Attorney-General shall represent the national Government in court or in any other legal proceedings to which the national Government is a party other than criminal proceedings'

He has statutory instructions. He does not need instructions from anybody. That is my answer to you.

Mr. Nyamweya: Mr. Chairman, Sir, it is such a simple thing, if the Prime Minister instructed the Attorney-General through you or whoever he acts through instructed the

Attorney-General and said we want you to represent the Government. Did anything like that take place? Yes or no?

It is such a simple thing. If Mr. Olago works for the Prime Minister, perhaps, we can get an answer from him.

Mr. Caroli Omondi: Mr. Chairman, Sir, let me answer hon. Nyamweya. I have read the law. He does not want to understand that the Attorney-General has statutory obligation. Now, I have the proceeding and this is the petition. This petition is between the Center for Rights, the League of Women versus the hon. Attorney-General as respondent. Are you saying that he should not have gone to court?

Mrs. Odhiambo-Mabona: On a point of order, Mr. Chairman, Sir. I asked the question: "Is the Attorney-General the Chief Legal Advisor of the Government or vice-versa? What you are being told is: "Did the Government advise the Attorney-General on legal matters, so that he represents?"

Mr. Chairman: That question has been answered. I do not know what that point of order is about. Mr. Omondi, please, move on and conclude.

Mr. Nyamweya: Mr. Chairman, Sir, from you I would like, perhaps, to understand the answer to that question. I am not quite sure I have got an equivocal answer from the person giving us information. I do not mind when we retire to deliberations, for us to consult between ourselves and give various opinions, but from the witness or person giving the view of--- It is just a simple one. Could you, perhaps, for my sake tell me what the direct answer to the question is?

Mr. Chairman: I understand Mr. Omondi to be making two fundamental points. First, the Attorney-General statutorily instructed that by dint of his position as Chief Government Legal Advisor and by way of mandate constitutionally and statutorily granted, he already holds inherent instructions. Secondly, he is mentioned as a party to the suit and by the very nature of the suit, he had to appear. That is what I hear Mr. Omondi saying, unless I did not hear him.

Mr. Nyamweya: Mr. Chairman, Sir, I understand you and Mr. Omondi equally well. When I asked Amb. Muthaura this question in the morning, there was not all this fuss about it anyway. My simple question was: Did the President instruct the Attorney-General in respect of this suit; yes or no? He said the answer was "no." I am asking the Prime Minister through his representatives: Did he instruct; yes or no? I also know what the Constitution says, but we are talking about the factual position. Did he or did he not? If he did or did not it is fine. Why must there be a war over it?

Mr. Ruto: Was there consultation with the Attorney-General towards this end?

Chairman: Mr. Omondi, I want this matter to come to a close. If you consider that you have answered that question, please, move on. If you have not sufficiently answered that

question, please, go ahead and do so briefly and move on. We wish to bring this to a close.

Mr. Caroli Omondi: Mr. Chairman, Sir, I will move on. Hon. A. Abdalla asked why we are running away from the Judicial Service Commission (JSC). As I have said, the JSC had no role. I think I have answered that question constitutionally. But maybe in retrospect, I think that is the route we should go. Regarding the unvetted Judges and the deadline of 27th, I believe the country can proceed for a short period of time without a Chief Justice, but I am sure there will be adequate administrative arrangement within the Judiciary to fill that vacuum.
The Chair asked whether the names of Visram and Githu were on the original list. The answer is that they were never on the original list. There was no time when they were ever presented to the Prime Minister. We were just surprised when they were mentioned.
Hon. Kioni asked who between the Attorney-General, Speaker and Supreme Court is final on matters of interpreting the Constitution. It is the Supreme Court. He also asked why Members could not vote on the issue. I do not think a question of interpretation of law is a function of vote or division in the House. I think the Constitution already answered that question. If it is a matter of interpretation of the Constitution within the Executive, that is the work of the Attorney-General and not a vote in Cabinet. If it is a function of interpreting the Constitution within the Judiciary, that is a function of a decision of the Supreme Court. If it is within the House, that is a function of the Speaker.

Mr. Kioni: Where is it provided for?

Mr. Caroli Omondi: If you give me time I will furnish you with all of them from your Standing Orders to Commonwealth Practice and everything.

Mr. Chairman: I will take that as your view, one that we certainly will interrogate when we consider your submissions.

Mr. Caroli Omondi: I think the Speaker has agreed as well.

Mr. Musyimi: Mr. Chairman, Sir, we have a report to give to Parliament tomorrow and we have two more groups to listen to at the very least. We have a report to write. Can you, please, help us conclude this session?

Mr. Chairman: Please, I invite you to conclude in exactly two minutes.

Mr. Caroli Omondi: Mr. Chairman, Sir, I will answer the last question and then give you the documents that you asked for in your letter.
Hon. Kioni asked about the JSC members who are not vetting. I have said that under the Constitution the quorum is five for JSC and we can deal with that problem. So, it is not a big issue.

Now, finally, you asked the Office of the Prime Minister the legislative history, records and minutes of the meetings leading to the signing of the National Accord and

Reconciliation Act. I am very happy because we spent quite a lot of time dealing with this issue. I want to present to you, in no particular order, first, the four-item agenda of the Serena process, that is: –

1. immediate action to stop violence and restore fundamental rights and liberties;
2. immediate measures to address humanitarian crisis, promote reconciliation, healing and restoration;
3. how to overcome the current political crisis; and,
4. long-term issues and solutions.

I want to present to you the agreement that was signed in Serena that established the Waki Commission. Maybe people may learn how the secret envelope came into being. Main findings of the Report will be made public within 14 days of submission, although certain aspects of the Report or annexes may be kept confidential in order to protect the identity of witnesses of persons accused. So, nobody invented it except the Serena team. It is signed by all the eight Serena representatives.

I want to give you the one agreement we signed on Truth, Justice and Reconciliation Commission; also signed by all the eight. I also want to give you the one we signed on the Kriegler Report on the Review of the Election, also signed by all the eight. I also want to give you the one that was signed by all on Agenda Four; the long-term issues including the new Constitution, reform of the Judiciary and everything we are discussing here. That is also here.

Then, I want to give you a compendium of all the documents of the Serena process. They are all here. I would also like to refer you to a website where you can get verbatim what every Member said and what we agreed everyday from Day 1 to the last day. It is **www.kenyadialogue.com.**

Mr. Ruto: Mr. Omondi, in your own opinion together with your office, would this all saga be sorted out if we actually went ahead to appoint the senior most Judge, Justice Omollo and also Ojiambo as Attorney-General? Would all these problems be okay because you will have been consulted?

Mr. Caroli Omondi: Mr. Chairman, Sir, I read what the Prime Minister is offering as a solution. I could read it again. Do you want me to read it?

Mr. Chairman: No, it is on record.

Mr. Olago: On a point of order, Mr. Chairman, Sir. Let us confine ourselves to the mandate that the Committee has and not outside the mandate. That issue that has been asked by hon. Ruto is outside the mandate that we have.

Mr. Chairman: Mr. Omondi, Mr. Miguna and Mr. Mugambi, we are most grateful for this interaction. It has certainly been useful. You have helped clarify a number of

fundamental issues that will be useful as the Committee grapples with finding answers to the questions we have here.

Thank you very much. Should you find anything else that is in your possession useful, please, feel at liberty to convey the same to us.

Thank you and you are at liberty to take your leave.

(Messrs. Caroli Omondi, Miguna Miguna and Mugambi Imanyara withdrew from the Committee Room)

(The Chairman, Constitution Implementation Commission (Mr. Charles Nyachae) and members of his team entered the Committee Room)

Mr. Chairman: May, I call the meeting to order. Mr. Chairman together with Commissioners, first of all our sincerest apology for the time it has taken for you o be ushered in. We are really running a crash programme and unfortunately, everybody who was invited seemed to have arrived here at the same. Please, accept our most sincere apology.

Secondly congratulations are in order from ourselves. This is the first time we are interacting with you as the Committee of Justice. But still congratulations are in order. Congratulation on your appointment to this very important Commission. Of course, this is the Committee on Justice and Legal Affairs. I am made to understand that you have already interacted with the Committee on Finance, Planning, Trade and Tourism. Therefore, you familiar with this very weighty matter that the two Committees have been invited to grapple with and be able to advise the House on how to handle.

We have invited you here and we are going to take the briefest time with you, having already kept you for so long. We have invited you here by reason of an opinion from the Commission, which is contained in a statement released by the Commission. That statement is signed for the Commission, appropriately so by the Chairperson of the Commission, in which you expressed an opinion on this matter; the matter of nominations to the four Constitutional Office; Chief Justice, Attorney-General, Director of Public Prosecutions and Controller of Budget. So, we have invited you here to benefit from a little more information in terms of, what informed this particular position taken by the Commission and how being the custodians of the Constitution, in every sense of the word given you Constitutional mandate to oversee the smooth implementation of this Constitution. We would also wish to benefit from your wisdom in terms of how you see this matter---

Mr. Wamalwa: On a point of order, Mr. Chairman, Sir. I think because of the constraint of time there had been a suggestion that probably, if we allow a joint with the JSC. We have been unfair to all of them.

Mr. Chairman: I am informed that the JSC is not here anyway. So, really it does not matter. So, we proceed.

We have the LSK, FIDA, ICJ, Transparency International and the National Muslim Leaders Forum, who were are seeing together after this. I was explaining that given your Constitutional mandate, which properly designates you as the custodian of this Constitution and ensuring that of course the implementation of this Constitution proceeds smoothly and on time. We would wish to benefit from your wisdom, how you see this matter being resolved amicably and in a manner that will facilitate the implementation process to go on and in manner that will guarantee continued stability of the State, which is essential for the implementation process to move.

Welcome Bw. Chairman.

Mr. Nyachae Hon. Chairman, I thank you very much on behalf of the Commissioners of the CIC. I thank you for the opportunity for the Commissioners to appear before this hon. Committee.

Apart from the public communication that you referred to, we did formally send an opinion to yourself and the Chair of the Finance, Planning, Trade and Tourism Committee. I trust that you would have received this. We sent this through the Office of the Clerk. My understanding is that what the Committee would like to do really is to give that opinion verbally to the Committee and thereafter take any issues of clarification that the Committee may have; any question or anything that you would needs us to discuss further with yourselves.

I want to start by referring to the entry point of CIC into this matter. In doing so, I want to refer to the mandate of the CIC, which with specific reference to the discussion that we are having today, I want to start off by referring to the in addition to the mandate as set out in Section 5(6) of the Sixth Schedule, I want to refer the Committee to the provisions of Article 249 of the Constitution, which deals with objects and authority. Okay, there is also the issue of funding but basically it is the objects that we are concerned with, of Commissions and Independent Office. In particular Article 249 (1)(a,b, and c), which with your permission, I would read with your permission.

"The objects of the commissions and the independent offices are to—

(a) Protect the sovereignty of the people;

(b) Secure the observance by all State organs of democratic values and principles; and,

(c) Promote constitutionalism".

So, that hon. Members is the entry point of the CIC in so far as this public discourse on the subject nominations and appointments is concerned.

In historical terms or in terms of sequence, I think I would take you back to before the nominations were actually done, and what view the CIC had taken in terms of its mandate, relative to the matters that have now subsequently become part of this public discourse. The starting point will be a letter that the CIC addressed to the hon. Chief of

Justice on 18th January, 2011, pursuant to the CIC' s mandate to be found in Section 5(6)(D) of the Sixth Schedule. I would to read that letter and it reads as follows:-

" My Lord Chief Justice, and the subject is Appointment of Chief Justice under Article 166 of the Constitution of Kenya. On behalf of the Commission for the Implementation of the Constitution, I address your lordship in your capacity as the Chair of the Judicial Service Commission. As your lordship will be aware, the CIC has a Constitutional mandate under Section 5(6)(D) of the Sixth Schedule to the Constitution to do and I quote: "Work with each Constitutional Commission to ensure that the letter and spirit of this Constitution is respected". In this regard, the CIC seeks an early an opportunity to meet with the JSC to enable the CIC appreciate how the JSC is discharging its functions under Article 166 of the Constitution. Your lordship and the JSC will appreciate the Constitutional importance of the consultation we seek and we would therefore appreciate if the meeting can be accorded priority".

We addressed that letter to the Chief Justice on 18th January and he responded on 21st January and the letter is brief it says:

" I hereby agree to your request for your Commission to meet with the JSC and have set aside the 31st of January, 2011 at 11.00 a.m. for the meeting to take place at the High Court Boardroom, Room 74 on the Second Floor of the High Court building".

We then confirmed that meeting by a letter the following day, the 22nd of January. So, as at the time the nominations were made public on 28th January, the CIC already had this planned meeting with JSC to discuss the work of the JSC relative to the appointment of the Chief Justice, in accordance with the CIC's mandate as set out in Section 5(6)(D) of the Sixth Schedule.

Hon. Chair as it public knowledge, the announcements regarding the nominations were made on Friday, 28th January, and as also would common knowledge, at least it is the public arena, almost immediately following the public release of the names of the nominations, there was a public reaction from one side of the Executive, which suggested that the information that had accompanied the nominations was not correct and they therefore ensued public debate on the matter, which within hardly two days had become fairly acrimonious and the public discourse of the weekend was becoming more and more acrimonious and seemed to be focusing not so much on the Constitution, but on what appeared to be polarized positions that had been taken by various political leaders. The CIC felt that in view of the views that were being expressed and the direction that the public debate was taking, and since it is touched on matters of implementing the Constitution, the CIC had a duty and it was within its mandate to meet and consider the matter that was now in the public arena. In view of that, I convened a meeting of the CIC on Sunday, 30th January, at 5.30 p.m. at the office of the CIC. Upon request from your Committee through the Office of the Clerk, we have submitted to Parliament, the minutes of the meeting of that day. With your permission, so that it may assist me in taking the hon. Members through the process that led, where we now are from the CIC's perspective, I would quickly go through the minutes, because that will inform the Committee on what the thinking of the CIC was and the basis on which, certain decisions were made. I want to refer, firstly, to the opening remarks as in recorded in those minutes.

Mr. Musyimi: On a point of order, Mr. Chairman, Sir. I think it is very helpful, what Mr. Nyachae is seeking to do. But given the constraint of time, I just wonder whether it would be perhaps not more helpful. Just go directly to the substance of the matter, as it is communicated in the letter that they wrote to ourselves. Just highlight those things, because we have another four groups to see.

Mr. Chairman: Chairman, could you go to the resolution that meeting made and then of course, Members may seek clarifications on exactly, what informed that resolution, just in the interest of that. We do apologies because of this really strict time constraint.

Mr. Baiya: Mr. Chairman, Sir, maybe, he can confirm the attendance in the meeting in terms of number, whether there was any dissent.

Mr. Chairman: Those clarifications we can seek after we know the resolution and what informed that resolution.

Mr. Nyachae: Hon. Chair, if there something that I miss hon. Members can point it out and I would be happy to clarify. Since hon. Baiya has asked about the attendance. All the Commissioners except one, who was up country, remember this was a Sunday, Commissioner, Professor Wayande was out of Nairobi and could not make it on time for the meeting. All the other Commissioners were present in that meeting.

Following the deliberations, the Commission looked specifically at the issue of Constitutional provisions relating to the appointments in two categories. We first looked at the provisions that relate to the appointment of the Chief Justice. We then looked at the provisions that relate to the other three appointments together; the appointment of Attorney-General, Director of Public Prosecutions and Controller of Budget. The reason for that was that in the view of the Commission, the Constitutional provisions that touch on the process of appointment of the latter three Constitutional offices are the same and we therefore we deliberated on those three Constitutional offices together.

On the first one, appointment of the Chief Justice, after deliberations, the Commission concluded that the applicable process was as follows:-

1. Recommendations by the JSC to the President.
2. Consultations between the President and the Prime Minister
3. Submission of the nominee to the National Assembly for approval and,
4. Formal appointment by the President.

As regards the other three,--- Sorry, if I can just go back to put that in context, the process that I have just outlined in respect of the Chief Justice is based on the Commission's reading of both Article 166 of the Constitution and Section 24 of the Sixth Schedule, both of which, in the view of the Commission are applicable in the appointment of the Chief Justice. As regards the other three, whose substantive provisions in the Constitution are Articles 156, 157 and 228. That is for the Attorney-General, DPP and Controller of

Budget respectively. The Commission concluded that the applicable process with respect to these Constitutional offices is as follows:-

1. Consultations between the President and the Prime Minister.
2. Nomination by the President and presentation of the nominees to Parliament
3. Approval by Parliament.
4. Formal appointment by the President.

The Commissioners, therefore, noted that the latter procedure, just like that of appointing of the CJ in the manner in which we have setted out was equally mandatory, if the Constitution was to be complied with.

In terms of what the Commission then decided at this meeting, the Commission came to the following conclusions:-

First, that it was not the place of the Commission to establish the fact relating to the process that was used to arrive at the nominees announced for the positions of CJ, AG, DPP and Controller of Budget.

Secondly, the Commission should right its opinion based on the provisions of the Constitution on the process that should be followed for the appointment of those Constitutional offices and that this opinion should be published for the information of all Kenyans.

Thirdly, the Commission would urgently seek audience with both the Principals to request them to consult further and speak in one voice on the issue of nomination to avoid the possible polarization of the nation and any negative effect on the Constitutional implementation process.

The Commissioners considered the matters at hand to be potentially contentious and capable of harming the delicate process of implementing the Constitution. The Commission, therefore, felt there was need for the CIC to build public confidence in the implementation process and to account to the public on the performance of its mandate.

Thus the meeting resolved as follows:-

1. To meet the following day and prepare a Press Statement for publication in the Dailies.
2. Seek to meet the President and Prime Minister preferably jointly to explain the Commission's position.
3. Meet the JSC as we had already scheduled. That meeting would be to transact the agenda that was stated in my letter to the JSC.

These were the resolutions that were made at that meeting. As I have said, all the Commission's Bar 1(?) were present at that meeting. These resolutions were unanimous at that particular meeting. For the record, there was no dissent on these resolutions.

Mr. Chairman, Sir, that was the meeting that the Commission had on Sunday, 30th January, 2011. In the following morning, the Commission, as had been agreed, had another early morning meeting. At that meeting, it was agreed on the modalities of how the Commission would divide itself for purposes of crafting the statement, which would then be considered in plenary after the various teams had done different parts of the statement. It was also agreed in that meeting that letters would be written to the President and the Prime Minister, seeking to meet them at the earliest opportunity, so that we could explain our position.

So, that is the background to the statement, which was crafted, put together and brought to plenary later in the day. The statement was adopted by all the nine Commissioners. All the Commissioners were present on Monday. Again, the statement was adopted unanimously. It was resolved to publish the statement in the English daily newspaper that had the largest circulation as well as in Kiswahili daily newspaper that had the largest circulation.

Mr. Chairman, Sir, since that gives the background, and since hon. Members are in possession of the contents of that communication to the public, I do not know whether you want me to pause there.

Mr. Chairman: You can pause there and then I will ask hon. Members, if they have any clarifications to seek, to do so at this stage. You can then pick it up from there. You can also invite your colleagues to chip in, if any of them would wish to do so, depending on your own procedure of how you want to handle this.

Mr. Ruto: Thank you, Mr. Chairman, Sir. Commissioners, I want to find out how in that short span of time you were able to determine that there were no consultations. What methodology did you use?

Mr. Chairman: Let us take a set of questions and then you could respond composite, Mr. Nyachae.

Mr. Nyamweya: Mr. Chairman, Sir, I am going to, first, ask questions on behalf of hon. Amina Abdala and then proceed to ask my own questions. For the record, the following questions are from her to the Commission: (1) What is the reporting mechanism to the CIOC, and why did you decide to communicate through the Press? (2) Did you review the HANSARD of Naivasha and COC to check the intentions of the drafters to establish whether Article 166 applies or not? (3) Do you believe that the Judicial Service Commission (JSC) is properly constituted with five unvetted members of the JSC? (4) Despite 29(4), why was "24" included in this? Was this a mistake?

I think that is Sections 24 and 29(4).

Mr. Chairman, Sir, having done that, I would now like to ask my own question.

Mr. Nyachae, after listening to the method you have described, really, as you said, the first impression is that one would proceed, particularly in terms of the nominations and the subsequent appointment of the Chief Justice. Probably, there are now two schools of thought on this one. The first one is exactly what you said. The second one is that the National Accord excluding the Judicial Service Commission in the first instance or even in the subsequent one until after the first election.

If that is so, and this is really what we are grappling with, the suggestion you seem to have come up with is that the Executive seems to have taken this route but you do not need to go this direction.

To add a little bit of what hon. A. Abdala has asked, in your role as the Constitution Implementation Commission, do you think it is prudent that where there was a clear division in this process, the best way was to give a public opinion as opposed to a more quiet way of getting to answer these questions? Your first move would have to go to the CIOC.

Mr. Wamalwa: Mr. Chairman, Sir, the mandate of the Commission, as set out in their statement, is to monitor, facilitate and oversee the development of legislation and administrative procedures required to implement the Constitution, and to report regularly to the CIOC. I just want to find out how many meetings they have had and how many reports they have made to the CIOC since their appointment. From what they have explained, there was correspondence with the Chief Justice and other offices. Was there any correspondence between them and the CIOC before issuing the statement?

Secondly, I would like to find out what informed their decision, and particularly their interpretation of Article 166; whether they had the guidance of legal advice on the interpretation of Article 166, and whether, in arriving at their decision to interpret the relevance of Article 166 to this procedure, they considered the provisions of Section 12?

Mr. Chairman: You may respond, Mr. Nyachae.

Mr. Nyachae: Mr. Chairman, Sir, may I seek clarification? I did not quite follow hon. Isaac Ruto's question on the issue of consultation.

Mr. Chairman: Member for Chepalungu, would you want to re-cast your question?

Mr. Ruto: Yes, Mr. Chairman, Sir. Mr. Nyachae, I noted that one of the issues you emphasized is that there may not have been consultations between the two Principals. So, I want to find out how, at that stage, you came to the conclusion that there may not have been consultations. You emphasized it in your statement. To me, you had not meant anything in the statement without that emphasis, considering that your statement was quit brief. So, did you in any way suspect that the Principals did not appropriately consult or were you just stating it as a requirement? Unless I am reading a different thing.

Mr. Nyachae: Mr. Chairman, Sir, that is an important point. We would appreciate if you could refer us specifically to the part of the statement you wish us to clarify.

Mr. Ruto: Mr. Chairman, Sir, the statement I was just going through is titled "Opinion of the Commission for the Implementation of the Constitution". Is that statement yours?

Mr. Nyachae: Yes, it is, Mr. Chairman, Sir.

Mr. Ruto: Mr. Chairman, Sir, towards the end, the statement says:-

"Consequently, such appointments being made prior to the first elections require the President to consult the Prime Minister prior to appointment, subject to the National Accord and Reconciliation Act. The process of appointment should also reflect the later and spirit of the Constitution."

To me, there is a suggestion here that probably you feel that way, although you mention that that is part of what you have dwelt on down there under "b"(i) and (ii). So, I just want to know whether you are putting emphasis on the question of consultation.

Mr. Nyachae: Mr. Chairman, Sir, we did not, and we still do not, take any position as regards the question of consultations other than to state that it is a requirement, under Section 24 of the Sixth Schedule which, in our plain reading, does require consultations. As to the factual issue of whether there were consultations, you will agree with us, whether explicitly or by implications, suggested whether there were or there were no consultations.

Mr. Chairman: Please, proceed to respond to the other requests for clarification.

Mr. Nyachae: Mr. Chairman, Sir, there is a couple of questions from hon. Members. We have been asked why we communicated with the public as opposed to any other mode of communication. In this respect, I would invite hon. Members to look at Article 10 of the Constitution. In fact, we could begin by looking at Article 1 of the Constitution, which reads as follows:-

"1. (1) All sovereign power belongs to the people of Kenya and shall be exercised only in accordance with this Constitution---"

Mr. Chairman, Sir, Article 2(1) of the Constitution says as follows:-

"2. (1) This Constitution is the supreme law of the Republic and binds all persons and all State organs at both levels of government.

(2) No person may claim or exercise State authority except as authorised under this Constitution."

Mr. Chairman, Sir, if we go to Article 10, which sets out the National Values and Principles of Governance, you will see that it says as follows:-

"10. (1) The national values and principles of governance in this Article bind all State organs, State officers, public officers and all persons whenever any of them—

(a) applies or interprets this Constitution;

(b) enacts, applies or interprets any law; or

(c) makes or implements public policy decisions.

(2) The national values and principles of governance include—

(a) patriotism, national unity, sharing and devolution of power, the rule of law, democracy and participation of the people;

(b) human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalised;

(c) good governance, integrity, transparency and accountability; and

(d) sustainable development."

Mr. Chairman, Sir, you will see that Article 10(2)(c) sets out what these national values and principles of governance are, and in particular, under 10(2)(a), one of those national values is participation of the people.

Under Article 10(2)(c) is set out as national values; transparency and accountability.

Mr. Chairman, Sir, looking at all this, as a Commission, we are convinced that in carrying out our work, we have an obligation to keep the public fully informed and give the public the opportunity to participate in this process. We do so to enable them to do this from an informed perspective.

Mr. Chairman, Sir, on the question about the CIOC, yes, this is a fundamental function of this Commission; to report regularly to the CIOC on two issues: (i) progress in the implementation of this Constitution; and (ii) any impediments to its implementation.

As we sit here today, from the perspective of this Commission, what is happening, including our appearance before this Committee today, is just part of the process. We are not yet in a position to say to the CIOC that there has been any difficulty or any impediment to the process. We are participating in the process.

Under Section 4(d) of the Constitution Implementation Commission Act, we are specifically required to report to the CIOC at least once every three months. So, in answer to hon. Wamalwa's question, we have not yet had occasion to make a report to the CIOC. Firstly, we are within the three months period, and we fully intend to comply within that period. Secondly, in the intervening period, if there was a reason for us to report to the CIOC, we would have done so but it was our conviction that the need had not yet arisen for us to make any specific report to the CIOC.

Mr. Chairman, Sir, I will allow my colleagues to assist me in answering some of the other questions.

Mr. Chairman: Go ahead.

Mr. Wamalwa: Mr. Chairman, Sir, before you hand over the Floor, I would like to seek clarification on the same issue of reporting to the CIOC. I suppose that impediments would include any danger that could derail the process or threaten the implementation process. In your letter, you are saying that what is happening can really endanger the implementation process, and you are urging the Principals to work together and embrace the spirit of the National Accord. Our concern really is whether you deemed it necessary that you could have consulted with the CIOC on this matter, which is quite sensitive and which is polarising the nation; before you went public. This is really what we want to know. Did you not deem it necessary to consult the CIOC?

Mr. Nyachae: Mr. Chairman, Sir, the short answer to the hon. Member's question is "No, we did not deem it necessary". What we were warning against is that if the public discourse continued as it started, the CIC was concerned that it may degenerate into a situation where we would then be looking at an impediment. The very fact of our statement was intended to avoid the nation heading in that direction. This is the same message we communicated to the Principals when we got the opportunity to see them.

I also want to stress that from the view point of the Commission, informing the public is not intended in any way to contradict the intentions of the Principals or the Legislature or anybody else who is involved in the process. It is the view of the Commission that just like all the other participants, the public is an important stakeholder in this process and, therefore, by informing the public, the CIC sought to discharge that mandate without compromising the constitutional responsibilities of any of the other actors in the process.

Mr. Wamalwa: Mr. Chairman, Sir, just allow me to quote from their letter. On page two, they say: "---it is our considered view that the nature of the ongoing public debate on the legitimacy of the nominations can only do harm to the delicate process of implementing the Constitution---"

So, you appreciate the delicate process and the danger of this public debate in terms of polarising the nation. Now, being the very important institution that you are, you were joining the public debate and taking a very strong position in the same debate that you were saying was likely to endanger the process. Could you not have handled it in another way before going public, maybe, by way of consultation as we urge the Principals to consult?

Mr. Nyachae: Mr. Chairman, Sir, the hon. Member is suggesting that we ought not to have gone out to the public whereas the Constitution specifically requires public participation. I think we would be failing in our duty if we fail to involve the public. I do not think we would agree with Mr. Wamalwa's view that in issuing this statement we were getting into the debate at the level which we were trying to get away from. Our communication to the public was intended to do two things; first of all it was intended to set out the constitutional position on this appointment so that if there is going to be a debate then it should be about the law or the constitution. Secondly, we wanted to protect

the implementation process by appealing to all leaders. If you read our statement, our appeal was not just to the Principals but all leaders both in the Executive and the legislature. We were not appealing to them to stop the debate but to avoid the debate in such a manner that would endanger the implementation process.

Mr. Chairman: I do believe that you have sufficiently responded even though Ms. Muli can add to that if she wishes to. My own view is that you are an independent Constitutional Commission and you have the full mandate to interact with the public. Indeed, it is a constitutional duty for you to interact with the public even though we look forward and we do expect interaction between the commission and other organs of implementation. I honestly believe that you have sufficiently responded to that issue. Ms. Muli, you are welcome to add anything further that may be useful for purposes of the hon. Member's question.

Ms. Muli: Mr. Chairman, Sir, I will be very brief. I want to highlight Section 249(2) which states that as an independent Commission we are subject only to the Constitution and the law and that we are not subject to the direction or control of any person or authority. So, before we issue any public statements, we are actually not required not to get any direction or authority from any office. However, we do believe that we have a Constitutional relationship with the Constitutional Implementation and Oversight Committee (CIOC) which we are looking forward to work with. However, when we look at the mandate of the CIOC and Section 4 of the Sixth schedule it does not require the CIOC to require us as a Commission to consult before we issue any public statement. We are supposed to report and it is very clearly set out what we should be doing and what the CIOC is doing. Nevertheless, we take note of your concerns.

Mr. Chairman: I hope it does not come across as if this Committee is seeking to direct the Commission in any way because that is certainly not the intention. We respect the independence of this Commission.

Mr. Nyachae: Mr. Chairman, Sir, our concern is that by the statement and the statement by the Judicial Service Commission (JSC) seems to have triggered the debate. Rather than calming down the situation, it seems to have added fuel to the matter. Even what brought us to this position was your statement itself and what was tabled in the House. Also the statement by the JSC giving credence that the whole process was not done constitutionally. Our concern was that you as the Commission on implementation and that you are actually required to manage the country so that you do not appear to leaning this way or that way, as Mr. I. Ruto was saying that when you suggested that consultations should be there, in the eyes of the public it appears that you suggesting that there were not consultation so the whole thing is unconstitutional. Nobody is directing you on what to do but we are just raising our concerns of how it arises. We are going to be together for a very long time and we may want to learn from this particular incidence on how to handle very delicate situations.

Mr. Chairman, Sir, I remember that I came to Naivasha and hinted that the management of this implementation when you have a very competitive situation in the country can be

very difficult if it is not handled judicially but I do not think there is any intention of anybody telling you how to conduct your business in any manner.

Mr. Nyachae: I want to invite my colleague, Commissioner Waiganjo to say something.

Mr. I. Ruto: Mr. Chairman, Sir, I want to clarify one thing in relation to what Mr. Nyamweya has mentioned. I did indicate to you that the press did not put to us exactly the way the statement was. The press indicated that even you wanted to be consulted. That was the press but reading your statement now it is not exactly the way it appeared.

Mr. Chairman: Fortunately, that is why the Standing Orders of Parliament preclude us from taking any action or making any decisions based on media reports. That is why we are now engaging the Commission directly which is neater and more prudent way of conducting business.

Mr. Musyimi: Mr. Chairman, Sir, I do not know why Mr. I. Ruto is not giving full disclosure. At some point, he wondered whether we had a third principal in the person of Mr. Charles Nyachae.

Mrs. Odhiambo-Mabona: That is a clever way of apologizing.

Mr. I. Ruto: Mr. Chairman, Sir, I now withdraw that allusion in the press that you are a third principal now that I have read the true statement here.

Mr. Abdikadir: Mr. Chairman, Sir, we are happy with the actions of CIC because there is no problem with the Commission discussing anything in public. I think the action of the Commission to a large extent helped this process. I am also happy that the hon. Member for Chepalungu has now withdrawn his threat that he considers you, the chairman, as one of the principals and not in very good light. I think we can now move forward.

Mr. Nyachae: Mr. Chairman, Sir, I just wanted to emphasized because when I made the previous presentation, I said that it was a deliberate commission that notwithstanding the expense and because of the importance and delicate nature of this matter, we will publish the statement as is rather than leaving it for interpretation. We were trying to avoid that difficult. I am happy that the Member has now seen what exactly it is that we said.

Mr. Chairman: Karibu Commissioner!

Mr. Waiganjo: Mr. Chairman, Sir, I want to move to some of the other questions that were raised by Mr. Nyamweya. The question of the press has been debated. The issue that was raised by the two hon. Members was about our understanding of the application of Article 166 as to whether we do not think or do not hold the opinion that is held by certain persons that the only applicable provisions when it comes to the appointment of the Chief Justice is Article 24(2). Our understanding of these provisions is that you must read them together. We have many reasons why we felt that way. Among others is that

Article 166 is not among the suspended articles if you read Section 2 of the Transitional provisions. It does not exclude the application of Section 166. Article 24(2) as read does not oust the JSC. It is silent but it does not oust it. It does include or exclude it. Which means that if Article 166 is not suspended then the most natural way of interpreting those provisions is to read them together. In our own view, we also took cognizance of the fact that the JSC was now in operation and we found it very difficult to justify a situation where a constitutional office is in existence and it has a constitutional mandate which has not been suspended and it is not allowed to carry out that mandate. It was more natural both in terms of the letter of the Constitution and the spirit of the Constitution to find a meaning that allowed its involvement. For us, we were even surprised that there seems to be a controversy on that issue. Therefore, we did not feel that there was a need to go to the HANSARD discussions, not because we do not think that they have value but because we do not think there was sufficient doubt on the interpretation of these sections as to find out what the parties meant. Our own understanding is that as the people of Kenya voted for this Constitution, their understanding was that as long as there was a JSC given the mandate of recommending the Chief Justice of the Republic of Kenya who is going to be there for the next ten years, post the next election, then that institution should be allowed to participate for the credibility and legitimacy of that office. That was the basis on which we understood that Article 29, Article 24(2) and Article 166 should be read together.

Mr. Nyamweya: Mr. Chairman, Sir, what Ms. A. Abdalla was asking about was on your view of the JSC where most of its members have not even been vetted and if they are in a position to carry out the functions of the JSC. She mentioned about five members of the JSC who have not been vetted.

Mr. Waiganjo: Mr. Chairman, Sir, our view is that what the Constitution requires in terms of vetting is the suitability of judges to continue to serve as judges. The question of suitability to serve as a member of the JSC requires vetting by Parliament. Those members had been vetted. The other two members, the Chief Justice and the Attorney-General occupy those offices by virtue of their office and the Constitution has not expressly excluded the sitting Chief Justice and the sitting Attorney-General from being member of the JSC. If that has been the intention of the Constitution, they would exclude them. To them that we have a Chief Justice and he is a substantive Chief Justice of the Republic of Kenya and the chair of the JSC it would be very difficult to interpret for ourselves that he cannot sit in the JSC if the Constitution expressly excludes him. That was the reading of that provision.

Mr. Abdikadir: Mr. Chairman, Sir, everybody holds a different view in terms of interpretation. You have just said one of the key points which is that if the Constitution wanted to exclude them it would have said so. It is my point that if the Constitution in the transition wanted to include them in JSC it would have said so also. In terms of the ouster, Article 168 deals with the exit of the Chief Justice. That is in force now just like Article 166 yet when Article 168 comes, none of us has any doubt that the current Chief Justice will not exit through a tribunal. Article 168 which is not ousted says that a chief justice will go out office in this fashion. Obvious, Article 166 is not ousted because the

issues of qualification are current. The question is; if the President and the Prime Minister, unfortunately we had both them this morning and both agree that in their opinion the issue is not what is best, but would it be held unconstitutional if the President and the Prime Minister consulted and nominated a party and send it to Parliament. Would it be better if they went through JSC? I respect your opinion and your reasons for holding it, and there are very many lawyers including in this Committee and I respect that but where a person holds a different view, then in the event that the two Principals consulted and nominates a qualified person, could we hold that decision as unconstitutional purely on the ground that the JSC was not consulted when the transitional clauses says otherwise. That is where the departure is.

Mr. Waiganjo: Mr. Chairman, Sir, this is a point where lawyers could argue until the rest of the nation gets very exhausted. Our view is that it is important that this Constitution be read as a whole. The intention of doing a Constitution is not to find the meaning that expressly one thing or includes the other but to read it in terms of its intent. If you read Article 259, what does it say? If you are reading this Constitution then you must interpret it in a manner that promotes its purposes, values and principles. In a sense that is our understanding as to why we read it together. The question of the oust of the Chief Justice is provided for in Article 24. Our reading of Article 24(2), that is why I said that it does not include or exclude the JSC. If it does not say anything about it then you go back to the question whether Article 166 is applicable and the article has not been excluded. So, on what basis would you find that you exclude the involvement of JSC. In our mind we found it very difficult to argue for exclusion on the basis of the silence of Article 24(2). This position covered adequately and we were all of unanimous opinion that that is the most progress reading in Article 259 of promoting the object and values of the Constitution.

Mr. Chairman: Let us have some order so that we do not make this an exchange. That is the position of the Commission canvass and taken unanimously as you have stated. If this Committee has any contrary view, then we will have an opportunity to debate that because we are not here to convince you away from a position that you canvass and took after consideration. I think we can let it rest and have it on record as the position taken by the Commission and considered opinion. Let us move on so that we can conclude this.

Mr. Wamalwa: I had asked how they arrived at that position and whether they had the benefit of legal counsel. I had also asked about the interpretation of the provisions of Section 12 of Schedule 6. They have not responded to that. It was found that probably they had misinterpreted the law.

Mr. Chairman: That is valid. I see that your team is full of eminent attorneys of considerable repute, please, respond to that specific question.

Mr. Nyachae: I will let my colleague, Commission Omosa respond on Article 12. On the more general question, what we have said about the applicability of Article 166 to be read together with Article 24, is in our unanimous view as a Commission is on the plain

reading of the Constitution. On that basis therefore, at that level, we would not have found it necessary to seek independent legal counsel. I will let Commissioner Omosa.

Ms. Omosa: I thought I can give a Wanjiku view, and starting by a repetition of what has been said that we need to read the Constitution together all articles, specifically Articles 73 and 232. Section 12 of the Sixth Schedule, I would suggest that we read it together with Section 7 that talks about existing laws and if they are in contradiction of the Constitution, the Constitution takes the day.

Mr. Chairman: Hon. Millie, you were seeking another clarification.

Mrs. Odhiambo-Mabona: I was not actually seeking a clarification. I was just going to say that when you are interpreting the constitution, you look at the letter and the law. On this issue, I disagree with the Prime Minister and the President. I agree with the Commission.

Mr. Baiya: Just to confirm, you are not saying that you are supposed to be consulted as such. There is no requirement of that, but in view of the mandate given to you, anybody seeking to exercise a constitutional mandate under the new Constitution risk finding himself with the challenge of having to deal with the kind of position that you took. Was there any attempt at the time when these decisions were made to seek your input on the legality of that process?

Mr. Nyachae: The short answer is no, there was no attempt. We had had no discussions or consultations with any person outside the Commission either prior to the nominations or the appointments being public or any other time other than the point at which we sought the opportunity to meet with the Principal. In the interest of transparency, the very point that Baiya has made is a point that we recommended to both His Excellency the President and the Prime Minister when we met them that in order to assist the process on any matter which may touch on implementation, they may wish to consider. We may not insist on it. They have responsibilities and mandate under the constitution but it would help the process if the matter is going to touch on implementation, if there was some level of consultation with the CIC prior to any step being taken. Again, it is just a recommendation and we think it would help the process. I am told that Prof. Wanyande and Catherine Muma, if they are given the opportunity to speak, they are likely to oust me as Chairman.

Mr. Chairman: Before they do so, let put this across so that they could pull them together as they conclude for us because we should really be closing this. You have brought us directly to Justice Musinga's ruling in your opinion. Have you taken any position in view of that ruling, the exact effect of that ruling and how we should regard it? Secondly, whether the Commission has taken any position as to how you wish this matter to be brought to a conclusion. If you have, we would wish to benefit from that. If you have not, so be it.

Ms. Muma: I would like to array the fears that hon. Nyamweya that should we have gone public at the time we went public. The Principals themselves went public and the publicity was not because of het CIC, but because of the Principals. We felt that in the circumstances, it was important for the CIC which has a mandate around this issue to pronounce itself in order to guide all those who are participating.

Mr. Chairman: There is really nothing that precludes you from going public.

Ms. Muma: But just to show that it was not in bad faith. We were not going out there because of bad faith. Secondly, we made the decision to actually meet the Principals. We have never asked just directly to meet the Principals because we felt that we would hope to give them opportunity to persuade them to retreat and lead the nation by speaking in one voice. That still remains our way forward. We sincerely hope and wish that the leaders in this country will retreat, relook at the issue and speak with one voice while at the same time realizing that they cannot circumvent the Constitution. They must actually respect the Constitution. Justice Musinga ruling came long after we had pronounced ourselves. The courts, as you are aware, have the mandate of enforcing and interpreting any matters relating to the Constitution. I believe that those who feel that the ruling may not be okay can appeal that ruling and I would hope that the ruling may not be trashed because even if it is trashed at the level of Parliament, I am sure under Section 3(1) some Kenyans, acting under that responsibility might see the need to go back to the Supreme Court when it is set up or the court of appeal to pronounce a clear position on this.

Prof. Wanyande: The CIC is determined to stick to its mandate and will not do anything outside its mandate. We only hope that all institutions and actors in this country will respect the institutions that have been created legitimately to carry out specific functions. If we do that, then we will be moving this country forward. This matter is so critical because if we do not start implementing this Constitution rightly from the beginning, we are likely to run into a lot of problem. We would like to see this matter resolved by adhering to the Constitution.

Mr. Nyachae: By way of closing, the view of the CIC on the way forward, simply put, the Commission would like to see nothing else other than compliance with the Constitution as set out. If the Constitution means something different, then there are those organs that are provided for in terms of interpreting it. But if the Constitution is clear, the way forward is compliance with the provisions of the Constitution. As we all comply with the provisions of the Constitution, other than the primary provisions that relate to the appointments, it is important that we bear in mind the values in this constitution and I would specifically refer to Articles 10, 73 and 232 of the Constitution. If we do that, the implementation process will be on track and we will have done ourselves, as a country, a huge favor.

Mr. Chairman: Thank you very much. This has been useful certainly. I must say that in this era of divisions and factions, it is so refreshing to see a Commission sitting before me reflecting the face of Kenya and speaking with such unanimity and conviction around the Constitution in the manner that you are doing. It is an inspiration to those of us who

really hope that we can say this more often. That compliment is also a challenge that we wish to see them that way because then it gives us hope. Of course, it will give hope to the Committee Chairman, hon. Abdikadir that with this kind of unanimity, this commonality of purpose, then the implementation of the Constitution is in safe hands.

We wish you well and we hope that soon, we will see an amicable end to this. You are at liberty to take your leave.

(The Chairman, Constitution Implementation Commission (Mr. Charles Nyachae) and members of his team withdrew from the Committee Room)

ANNEX JLA 9

NATIONAL ASSEMBLY

OFFICIAL REPORT

Tuesday, 1st February, 2011

The House met at 2.30 p.m.

[Mr. Speaker in the Chair]

PRAYERS

PAPER

The following Paper was laid on the Table:-

The Kenya Anti-Corruption Commission (KACC) Fourth Quarterly Report for the year 2010 covering the period 1st October, 2010 to 31st December, 2010.

(By the Attorney-General)

QUESTIONS BY PRIVATE NOTICE

HUMAN-WILDLIFE CONFLICT IN NAIVASHA

Mr. Mututho: Mr. Speaker, Sir, I beg to ask the Minister for Forestry and Wildlife the following Question by Private Notice.

(a) Is the Minister is aware that in the recent past, five people and hundreds of sheep and goats have been attacked and killed by wildlife in Naivasha?

(b) What immediate measures is the Minister taking to relocate all rogue buffaloes to the park and when will the Minister compensate farmers for destruction of crops by buffaloes and baboons?

(c) Could the Minister state the measures taken by the Ministry over the last five years in Naivasha to solve human-wildlife conflicts?

Mr. Speaker: Is the Minister in? He is not in. Maybe we will consider revisiting the Question one more time.

DETAILS OF CORRUPTION CASES FORWARDED TO ATTORNEY-GENERAL BY KACC

Mr. Kombo: Mr. Speaker, Sir, I beg to ask the Attorney-General the following Question by Private Notice.

(a) Could the Attorney-General provide details of corruption cases that the Kenya Anti-Corruption Commission (KACC) has investigated and forwarded to the Attorney-General for direction since the appointment of the current Director?

(b) How many of these cases has the Attorney-General approved for prosecution, rejected and/ or returned to the Commission and why?

The Attorney-General (Mr. Wako): Mr. Speaker, Sir, I beg to reply.

Since the appointment of the current Director of the KACC in July 2010, a total of 53 files were forwarded to the Attorney-General for direction. These include files submitted to my office as recently as the close of business yesterday 31st January, 2011.

I lay on the Table the list submitted to me of the files requested for. The files show all the required details. These details are contained in the copy of the KACC Third Quarter Report for the period 1st July, 2010 to 31st September, 2010 which I already laid on the Table last year. I have today tabled the Report for the quarter covering the period 1st October, 2010 to 31st December, 2010. It has the recommendations the KACC submitted to me, my actions thereon, and the reasons therefore.

(Mr. Wako laid the document on the Table)

Mr. Kombo: Mr. Speaker, Sir, obviously, it is a bit of an ambush from the Attorney-General. He has just laid the Report on the Table this afternoon and so I have no copy of it. I have not been able to see it so as to be able to interrogate the reasons why he may or may not have taken some actions. Could I be in order to ask that the Question be deferred so that I can peruse the document that has been laid on the Table?

Mr. Speaker: Mr. Wako, will you be available tomorrow afternoon so that we consider this matter?

Mr. Wako: Mr. Speaker, Sir, although he says that it is an ambush; it is not because I only received this Quarterly Report from KACC on Friday. It is for the period covering up to 31st December, 2010. If he wants to peruse the Report, it is okay. I agree. Tomorrow is Wednesday and I will make myself available in the afternoon to answer the questions that may be raised.

Mr. Speaker: Mr. Kombo, are you comfortable with that?

Mr. Kombo: Mr. Speaker, Sir, the Departmental Committee on Finance, Planning, and Trade will be sitting in Mombasa tomorrow to discuss the Tourism Bill. So, maybe, Thursday will do.

Mr. Speaker: What do you have to say, Mr. Wako? Sorry, hon. Members. We have to do it this way so that it is convenient to all.

Mr. Wako: Mr. Speaker, Sir, I am sorry that if it is not tomorrow, then it may have to be done after ten days because I am proceeding on some visit and I will come back after the first week of February.

Mr. Speaker: Mr. Kombo, could the Committee do without you tomorrow afternoon?

Mr. Kombo: Mr. Speaker, Sir, that is exactly what I was going to say. If that is the case, then I will be available tomorrow afternoon.

Mr. Speaker: That, to me, looks reasonable.

Hon. Members, please, note that when you ask a Question by Private Notice, it may entail a very quick answer within 24 hours. So, you should not complain when you want it dealt with urgently that it is now being dealt with urgently. This is because that is what you desire.

So, that Question is deferred until tomorrow at 2.30 p.m.

(Question deferred)

Mr. Ochieng: On a point of order, Mr. Speaker, Sir!

Mr. Speaker: Order, Member for Nyakach! I know that you have Question No.2 by Private Notice. I am not blind to it.

Member for Ikolomani, maybe you will want to ask your Question a little later. The Minister has some information that he wants that has not arrived. We will come to your Question a little later.

ORAL ANSWERS TO QUESTIONS

Question No.405

CHARGES LEVIED ON PATIENTS' VISITORS IN NYANZA HOSPITAL

Mr. Olago asked the Minister for Medical Services:-

(a) what informed the decision by the management of Nyanza Provincial General Hospital to charge all relatives and friends who visit patients at the hospital Kshs.200/= per day; and,

(b) if it is now policy of the Ministry to charge the Kshs.200/= in all Government Hospitals or if it only applies to Nyanza Provincial General Hospital.

The Assistant Minister for Medical Services (Mr. Kambi): Mr. Speaker, Sir, I beg to reply.

(a) Between 2008 and April, 2010, Nyanza Provincial Hospital used to charge relatives staying with patients in the ward Kshs200 a day. However, at no time has the hospital charged relatives and friends visiting patients during designated visiting times.

The decision to charge relatives staying in the wards back then was taken for two reasons:

(i) To discourage relatives other than designated caretakers crowding the wards outside the designated visiting time as this was affecting the quality of care given to patients.

(ii) To compensate the hospital for the extra expense on utilities, mainly water, occasioned by relatives staying in the ward. The charge was, however, abandoned in April, 2010 in favor of crowd control through the use of guards.

(b) It has never been the policy of the Ministry to charge relatives and friends visiting patients.

Mr. Olago: Mr. Speaker, Sir, I am satisfied that the charges have now been withdrawn. However, my only regard was the condition to make these charges applicable to members of the public until this Question was asked in the House. However, under what circumstances has the hospital introduced Kshs10 per bicycle entering the hospital, instead of these charges?

Mr. Kambi: Mr. Speaker, Sir, I am not aware that *boda bodas* are being charged Kshs10 to enter the hospital. However, I will investigate the matter and instruct my officers appropriately. If that is found to be true, we will punish them according to the law of this land.

Mr. Shakeel: Mr. Speaker, Sir, I have the honor of having been the Chairman of the hospital for the period up to end of December, 2009. I would like the Assistant Minister to clarify why this charge was levied. The Assistant Minister knows that there were not enough members of the nursing staff. In fact, the hospital, at that time, was operating with less than 200 staff out of the designated more than 500 staff. The relatives had to stay behind to help staff look after the patients. We had pleaded with the Ministry to give us more nurses. Could the Assistant Minister confirm whether or not New Nyanza Hospital has sufficient nurses to do the job?

Mr. Kambi: Mr. Speaker, Sir, the hon. Member did not ask a question. He says he was the chairman until 2009. So, how comes he was the chairman of the hospital as well as the Member of Parliament in 2009?

Mr. Olago: On a point of order, Mr. Speaker, Sir. Is it in order for the Assistant Minister to refuse to answer the question simply because, in his view, Mr. Shakeel was the chairman of the Hospital Board? That is a fact. However, is that good reason for him not to answer the question?

Mr. Speaker: Certainly that is valid.

Mr. Kambi: Mr. Speaker, Sir---

Mr. Speaker: Order, Mr. Assistant Minister! Please, resume your seat and relax. It is not in order for you not to answer a question merely because the Member for Kisumu Town East served in a certain capacity. Secondly, it is not in order for you, instead of answering a question, to ask a question.

Mr. Assistant Minister, respond to the question by the Member for Kisumu Town East.

Mr. Kambi: Mr. Speaker, Sir, the Member of Parliament did not ask a question. He was just giving a statement.

Mr. Speaker: Order, Mr. Assistant Minister! Please, resume your seat.

Member for Kisumu Town East, could you repeat your question?

Mr. Shakeel: Mr. Speaker, Sir, could the Assistant Minister confirm that the New Nyanza General Hospital now has the complete complement of 554 nurses that it is meant to have? We had about 200 nurses. Could he confirm that we now have the full complement of nurses?

Mr. Speaker: Mr. Assistant Minister, that is a valid question.

Mr. Kambi: Mr. Speaker, Sir, with regard to the nurses, that is a different question. However, I will go and ask my technical people how many nurses are in Nyanza General Hospital.

Mr. Chanzu: Mr. Speaker, Sir, in one of his supplementary answers, the Assistant Minister said that they were charging Kshs200 in order to control the many visitors who were visiting the hospital. Does the Ministry or the Government not have a policy of containing this kind of situation rather than putting in place what seems like *ad hoc* measure? What will happen to the other hospitals in case something like that happens? Do you not have a policy in place?

Mr. Kambi: Mr. Speaker, Sir, I said clearly that we used to charge Kshs200. However, we no longer charge because it is not a Government policy. There is no hospital in the whole Republic of Kenya which charge patients or relatives who visit them.

Mr. Shakeel: Mr. Speaker, Sir, I think the Assistant Minister is not being very clear. The Members of public who have been charged Kshs200 were the ones who were staying there overnight and utilizing the services and the food of the hospital. Could he be very clear that we are talking about those members of the public who stayed overnight with the patients and not those who were visiting the patients? They have never been charged.

Mr. Kambi: Mr. Speaker, Sir, as I said, it is only this hospital which used to charge Kshs200. However, we scrapped it immediately and employed guards. So, when it is time for visiting patients, nobody is denied permission to do so.

Mr. Ochieng: On a point of order, Mr. Speaker, Sir. Is the Assistant Minister in order to mislead this House that New Nyanza General Hospital does not have guards while the hospital has had guards all along? Is he in order? Could he just give us the proper reason as to why they were charging the Kshs200 to people who go to visit patients?

Mr. Speaker: Order, Member for Nyakach. The Assistant Minister has said that that used to happen. They then determined that it was wrong and they gave directions that that charging should cease. So the situation has been remedied. Do not flog it beyond where it is necessary.

Last Question, Member for Kisumu Town West.

Mr. Olago: Mr. Speaker, Sir, I have no further question.

Mr. Speaker: Next Question.

Question No.423

CIRCUMSTANCES SORROUNDING SUSPENSION OF COMMISSIONER OF MINES

Mr. Speaker: The Member for Wundanyi not here? The Question is dropped.

(Question dropped)

Question No.465

OUTCOME OF MINERALS SURVEYS UNDERTAKEN IN KENYA

Dr. Otichilo asked the Minister for Environment and Mineral Resources:-

(a) what has been the outcome of specific mineral surveys that have been undertaken in the country since 2000,

(b) which minerals have high economic potential for exploitation and where they are found; and,

(c) whether it is true that western Kenya has gold deposits.

Mr. Speaker, Sir, I have not received a written answer.

Mr. Speaker: Mr. Michuki, are you the Minister for Environment and Mineral Resources?

The Minister for Environment and Mineral Resources (Mr. Michuki): Mr. Speaker, Sir, this is a very strange situation. The Question for which we were prepared to answer has not been asked. I beg the indulgence of the Chair to go and prepare for Question No.465.

Mr. Speaker: Very well. How long do you require, Mr. Minister?

The Minister for Environment and Mineral Resources (Mr. Michuki): Mr. Speaker, Sir, we can answer this Question on Thursday.

Mr. Speaker: Member for Emuhaya, are you comfortable with that?

Dr. Otichilo: It is okay, Mr. Speaker, Sir.

Mr. Speaker: Very well. It is so ordered! The Question will appear on the Order Paper on Thursday this week, at 2.30 p.m.

(Question deferred)

Question No.563

REPAIR OF KYOGONG-SIGOR-KABOSON-CHEBUNYO-MOGOR ROAD

Mr. Ruto asked the Minister for Roads:-

(a) whether he is aware that the Kyogong-Sigor-Kaboson-Chebunyo-Mogor Road (C14) is in a deplorable condition, and if so, what steps he is taking to ensure the road is repaired; and,

(b) how the Kshs25,000,000 set aside for the repair of the road in the 2009/2010 Financial Year was utilized.

The Assistant Minister for Roads (Mr. Kinyanjui): Mr. Speaker, Sir, before I reply, I want to confirm to the hon. Member that I am fully aware of the contents of his Question and I will answer to his satisfaction.

The road in question starts from Kilgoris to Junction of D5 with a total of 84 kilometres.

(a) I am aware that the above road is in need of urgent repair and that my Ministry has set aside funds for maintenance of this section of the road during this financial year. The maintenance work is expected to begin within February 2011.

(b) The sum of Kshs25 million which was set aside in the Financial Year 2009/2010 budget was used in procuring a design contract for the said road.

I also wish to add that in the same year, a total of Kshs6,146,300 was allocated for routine maintenance of the said road and a further Kshs7,289,900 for periodic maintenance. However, due the transitional period from the Ministry to the authorities, the amount was not utilized and was, therefore, returned to the Ministry.

Mr. Ruto: Mr. Speaker, Sir, it is really shocking to hear that funds were returned to the Treasury and yet the road was in such a bad shape. Could the Assistant Minister explain to us what disciplinary measures he has taken against these officers who returned the funds to the Treasury, leaving the road impassable?

Secondly, could he explain---

Mr. Speaker: Order! Ask one question at a time. Mr. Assistant Minister, please, respond. You will have another opportunity.

Mr. Kinyanjui: Mr. Speaker, Sir, I would not call it disciplinary measures; probably correctional measures. As I said, we have now started the procurement process. The hon. Member will appreciate that previously the Ministry was actually undertaking all the works in the constituencies. Since, 2009/2010 Financial Year, three authorities were formed. During that year, we had to ensure that we now transfer the procurement of the works to the authorities. During the same period, we were not able to do the procurement for the said works. During the said period, we were not able to do the procurement for the said works. However, during this financial year, we have set aside a total of Kshs15,597,000 and a contract has already been awarded and work will commence next month.

Mr. Chanzu: Mr. Speaker, Sir, it is good that the Ministry came up with the three Authorities, but I think it still has the overall responsibility. For example, why has money allocated for a road in last year's Budget not been utilized up to now, yet the financial year is almost ending? The Kshs45 million that was allocated for the Majengo-Luanda Road has not been utilized up to now. What is the Ministry doing about that?

Mr. Kinyanjui: Mr. Speaker, Sir, I want to agree with the hon. Member that, indeed, we have had challenges when it comes to ensuring that we are able to utilize the funds that are set aside within the given period. But I also wish to state that we also have serious capacity challenges within certain areas in the country, where we send money but we are not able to absorb as much as the Government has actually set aside. One of the things my Ministry is doing is to try and ensure that we increase the capacity of our contractors to be able to absorb the funds allocated for maintenance of these said roads.

Ms. Karua: Mr. Speaker, Sir, now that we are on the subject of repairs of roads, could the Assistant Minister tell us what action they are taking, as they build new roads, to ensure that the old ones are repaired, especially the Kutus-Kerugoya-Kagumo-Karatina Road? What action are you taking among many other roads which are in a terrible state?

Mr. Kinyanjui: Mr. Speaker, Sir, I wish to remind the House that, indeed, the budget for the Ministry of Roads is divided into two. We have the development budget and the maintenance budget, where funds are specifically set aside for the maintenance of the roads that have already been constructed. However, as to when that road would be done, I would request the hon. Member to file a Question specific to that road and we would be able to respond to that.

Mr. Ruto: Mr. Speaker, Sir, could the Assistant Minister tell this House what designs he has come up with using the Kshs25 million which he said he set aside for design? Who actually authorized the Kshs25 million to be used on design instead of repair of the road? What design is this and could he table a copy of that particular design? Have you budgeted for the implementation of that design?

Mr. Kinyanjui: Mr. Speaker, Sir, the Kshs25 million in question was within the Development Budget. Within the year 2009/2010, my Ministry advertised for the design of this road and it was awarded to Crestar and Truder(?) Consulting Engineers at a total cost of Kshs34.4 million. The design is in the final stage and is expected to be completed by March, 2011. Once the budget is complete, then the Ministry will prioritize the road in terms of its upgrading to bitumen standards.

Question No.588

MISMANAGEMENT/CORRUPTION AT MOSACCO

Mr. Speaker: The Member for Mumias still not here? The Question is dropped.

(Question dropped)

(Dr. Khalwale stood up in his place)

Mr. Speaker: I have dropped the Question already. Member for Ikolomani, you are standing too late!

Next Question by the Member for Juja!

Question No.626

DISMISSAL OF THIKA MUNICIPAL COUNCIL EMPLOYEES

Mr. Kabogo asked the Deputy Prime Minister and Minister for Local Government:-

a) whether he is aware that Thika Municipal Council unlawfully terminated the services of 250 workers in November 2008, all of whom had worked for over 5 years;

(b) why the several orders from the Thika Labour Office to reinstate the employees have been ignored; and,

(c) whether he could also explain why the council advertised the vacant posts on 11th November 2008 and immediately filled them with persons related to councillors.

The Assistant Minister, Office of the Deputy Prime Minister and Ministry of Local Government (Mr. Nguyai): Mr. Speaker, Sir, I beg to reply.

(a) I am aware that the Municipal Council of Thika lawfully terminated the services of 250 casual workers in November, 2008.

(b) Orders from the Thika Labour Office were not ignored but their request for reinstatement of the casuals could not be implemented as the council had no budget for the same at the time.

(c) After getting the necessary approvals from the Office of the Deputy Prime Minister and Ministry of Local Government to employ 52 permanent workers, the council advertized for the recruitment in November, 2008. Applications were received and shortlisted following the official laid down procedures. There is no evidence to show that the successful applicants were relatives to the councillors.

Mr. Kabogo: Mr. Speaker, Sir, if you will recall last week or the week before, the Deputy Prime Minister and Minister for Local Government requested for more time to be able to come with a comprehensive answer to this House. If you look at the answer given by the Assistant Minister, is this truly what the Deputy Prime Minister and Minister for Local Government asked time for to come and answer? I have documents here that say the contrary to what the Assistant Minister is saying. He says that these workers were actually casual workers whereas documents that were given to me by the Labour Office say that they were actually not casual workers but permanent workers being paid at the

end of the month. They were 250 employees and the Ministry is saying "reinstate and pay them their dues," yet the Minister comes here and says casually that they were casual workers. I request that this matter be forwarded to the Departmental Committee on Local Authorities for a thorough investigation, because this is abuse of office. I have a list of employees' names and their relatives in the council, whereas 250 people are left suffering without salaries and jobs. I seek your indulgence.

Mr. Speaker: Order, Member for Juja! This is Question Time. Indeed, the House is now transacting Question No.626. The Assistant Minister has given you an answer. Can you, please, interrogate the parts of the answer which are not satisfactory, so that he can give you an answer as complete as you wish? Please, stick to the rules; avoid making a speech now!

Mr. Kabogo: Mr. Speaker, Sir, I have heard you. I am only saying that none of the parts of the Question has been answered. I want to table documents here that will help you understand the frustrations of the people who have been sacked. I have a document here which I want the Assistant Minister to react to. It is a letter written on 24th December, 2008 from the Labour Office. In part, it says:-

"They are not casual workers as is meant in the meaning of employment Cap.2007. You have declared them redundant unlawfully."

Mr. Speaker, Sir, could the Assistant Minister react to that?

(Mr. Kabogo laid the document on the Table)

Mr. Speaker: Very well! That is a good question. Mr. Assistant Minister, could you respond to that?

Mr. Nguyai: Mr. Speaker, Sir, as much as I do sympathize with the issue of having 250 employees declared redundant, I am also in possession of that particular letter and if he was to read through it, there was only one side of the picture as far as this letter is concerned. They say:-

"We wish to inform you that we have thoroughly interviewed the grievance and formed the opinion. They did not wait to get the side of the council and as such"---

Mr. Speaker, Sir, I would want to table this list of 238 of the said employees who were casual labourers and we still consider them as such.

(Mr. Nguyai laid the document on the Table)

Mr. C. Kilonzo: On a point of order, Mr. Speaker, Sir. The reason why there are different Ministries is because each Ministry is specialized in a particular field. We have a letter here from the Ministry of Labour which classifies the 250 workers as permanent and pensionable and not casuals. Is the Assistant Minister in order to mislead the House that the professionals in the Ministry of Labour do not know what they are doing and that he knows better than them?

Mr. Nguyai: Mr. Speaker, Sir, as I stated before, when the opinion issue was addressed, we had formed an opinion without the consent of the employing agency. I think it is necessary for the two parties to sit down and discuss so that they can have a balanced approach.

(Some hon. Members stood up in their places)

Mr. Speaker: Order! Hon. Members, please, resume your seats! I have a document that has been tabled by the Assistant Minister as authority that the 250 persons named here were casuals. This document, unfortunately, fails the test of the standards we have set in the House. The document has no date or signature. It is not known where it emanated from. In those circumstances, if the Assistant Minister has temerity to table a document that is anonymous, I am afraid that he is not taking the matter seriously. On that basis, I will refer this matter to the relevant Departmental Committee to inquire into it and file a report in the House in the next 31 days. It is so ordered and that is how we will proceed.

Dr. Khalwale: On a point of order Mr. Speaker, Sir. So that no other Assistant Minister attempts to mislead this House by bringing documents that do not pass the standards of the House, could the Chair, seriously consider placing sanctions on the Assistant Minister because it is less than three weeks ago when I tabled a document where the same Assistant Minister had directed the Clerk of the Thika Municipal Council to pay councilors to attend a political party arranged by a presidential candidate?

(Mr. Nguyai stood up in his place)

Mr. Speaker: Order! Please, Mr. Assistant Minister, take your seat. Among other things, the Committee will make its inquiries and capture that in their report. I will then consider whether or not to mete out sanctions against the Assistant Minister. Mr. Assistant Minister, you need not to respond. I am afraid. You do not need to respond at this stage.

Next Question by the Member for Kilgoris!

Question No.647

NON-SUPPLY OF WATER TO KILGORIS TOWN

Mr. Speaker: The Member for Kilgoris not in? The Question is dropped.

(Question dropped)

Question No.681

STATISTICS ON POLICE SHOOTINGS SINCE AUGUST 2010

Ms. Karua asked the Minister of State for Provincial Administration and Internal Security:-

(a) whether he could state how many people have been shot dead by police in the country since 4th August, 2010, giving the names and places they were shot and the circumstances;

(b) whether he could also provide the identities of the officers involved and indicate the disciplinary action taken against them; and,

(c) what measures he is taking to ensure that the trend is curbed.

The Assistant Minister, Ministry of State for Provincial Administration and Internal Security (Mr. Ojode): Mr. Speaker, Sir, I beg to reply.

(a) Since 4th August, 2010, the following persons have been shot dead under circumstances that pointed to criminal intent on the part of the police officers involved. On 31st October, 2010, Joyce Waithera Githu was shot dead by police officers in suspicious circumstances. The deceased was in the company of Anthony Karanja Kibe while riding a motor cycle, registration number KMCC 632 A, along the Nakuru-Nyahururu Road at Ahero Trading Centre where they were stopped but declined to stop. This prompted one of the police officers to shoot at them killing the mentioned person instantly. On 21st November, 2010 at about 1.30 am in Njoro area of Ndonyo Loit Sub-location in Laikipia West District, Julius Kiharu Njeru was shot by police officers after being suspected that he was a cattle rustler. He was accompanied by three other people. Again, on the night of 8th and 9th December, 2010 at Ndonyo Yang area of Turkana North District, one Martin Opiyo was shot dead in suspicious circumstances. While the deceased was sleeping in the company of his two colleagues, he was attacked and shot dead by an unknown person in a robbery incident. Investigations pointed the suspect to be a police officer.

On 6th November, 2010, within Siakago Town of Mbeere District, the following persons were shot dead by Mr. Peter Karanja, an Administrative Police Officer. Juliano Muchira, Eliphantus Muthiru Munyi, Rayan Muthoni, Agostino Kinyua Nthumbi, Anthony Mwaniki Nyaga, George Ng'ang'a, Kennedy Namu, Lydia Ng'endo, Wilfred Gitonga, an AP Officer and Fredrick Okwako, an AP Officer.

The circumstances were that at about 11.30 p.m., the officer left his place of duty while armed with a G3 rifle and went into a shooting spree, killing the ten, including two of his colleagues. On 19th January, 2011 at about 9.00 a.m., CID Officers from the Special Crime Prevention Unit were pursuing armed suspected robbers who were in a motor vehicle registration No.KBE 637G, Toyota Corolla Station Wagon, along Langata Road following a tip off from members of the public. On reaching the area between the Wilson Airport and the Nairobi West Prison, the suspects who were six in number were challenged to stop and surrender. Three of them namely; Paul Jomo Wanjiku, David Kanini Mwangi and Musee Michuki Mwangi were shot dead. The others escaped on foot towards Kibera Slums while another one drove off with the suspected motor vehicle.

All the three had previous criminal convictions of robbery with violence and police had information that they were headed for a robbery mission. One pistol, American Star Serial No.xx00022 loaded with two rounds of ammunition were recovered. Following the incident, the six officers involved in the incident were interdicted and an inquest file No.3/2011/Langata Police Prison was opened by Nairobi PCIO. The three officers are as follows. No.68684, Sergeant David Chebii; No.56310, Corprol Ben Aboka, No.81496, Corporal Moses Simiyu, No.67162 PC, who was the driver then, Mr. William Tarus, No. 73845, PC. Collins Makhoha, No.67353 PC, Mwigi Murugu. The case file will be forwarded to the Attorney-General in due cause after completion of the investigations for perusing and advice.

Another incident occurred on 29th January, 2011 at 2.10 a.m. whereby administrative police officers at Shibundi AP Camp in Kakamega Division of Kakamega

County were called to a scene of robbery by the area councillor Benedict Abundo. Officers, No.220413, APC Evans Cheruiyot and No.220135, APC Charles Sawe, rushed to the scene where it was alleged that the robbers were still inside the compound of Mrs. Agnetta Aburo. Acting on this report, they shot dead the watchman, Mr. Joseph Ewoi, who was guarding the homestead. He died when being rushed to hospital. An Inquest File No.2/2011, Kakamega Police Station, was opened and is pending under investigation.

(b) The following officers have so far been charged and the cases are pending before court:-

(i) Corporal Joseph Mwangi charged with the murder of Joyce Waithera Ngigi vide Murder Case File No. Criminal 769/168/2010.

(ii) Corporal Dishon Musau Kithuka charged with the murder of Julius Kihara Njeru vide Case File No. Criminal 759/15/2010. The case is pending before court.

(iii) APC Ferdinand Mategwa Chivanda charged with the murder of Martin Opiyo vide Criminal Case No.881/32/2010. The case is pending before court.

(iv) APC Peter Karanja charged with killing ten people in Siakago vide Police Criminal Case File No.4B2/379/2010.

(c) The following measures are being put in place to curb the trend:-

(i) Officers with proven history of mental instability are being identified with a view of retiring them on medical grounds.

(ii) Continuous guidance and counseling to all officers to avoid cases of depression and mental stress.

(iii) Close supervision of officers on duty.

(iv) Facilitating officers to take their leaves and off-days.

(v) In the spirit of police reforms, the Kenya Police Service has been training top police managers about human rights issues as enshrined in the new Constitution and how to deal with both internal and external customers.

Ms. Karua: On a point of order, Mr. Speaker, Sir. Have you noticed that the Assistant Minister has been answering his own question and not my Question? In part (a) of my Question, I have asked the Assistant Minister to tell us how many people have been shot dead by police officers in the country since 4th August, 2010, when we voted in the new Constitution, giving the names and the places they were shot and the circumstances under which they were shot.

He has given me the names of the people who have been shot dead in circumstances that pointed to criminal intent on part of the police. So, he has modified my Question because he knows that police officers have shot dead more than 100 people since then. He has modified the Question, so that there can just be below 20 people. Is it in order for him to answer his own question instead of answering the Question that I asked? Consequently, the answer to part (b) of the Question would not be valid. The only answer which would remotely be as a result of the Question would be part (c), which in the absence of parts (a) and (b), would not make sense. Is he in order? Could you direct him to answer my Question as it appears on the Order Paper and not his own question?

Mr. Ojode: Mr. Speaker, Sir, if you look at my answer, you will realize that I have answered the Question. The Member has asked me to state how many people have been shot dead by the police in the country since 4th August. In my answer, I have said that: "The following persons have been shot dead---". I have mentioned Joyce Waithera Ngige, who was shot dead by police officers in suspicious circumstances. I have

mentioned even where the incidents occurred, for example, along the Nakuru-Nyahururu Road and Ahero Trading Centre.

Mr. Imanyara: On a point of order, Mr. Speaker, Sir. The Assistant Minister is trivializing the answer and is not even commenting on the issue raised by the Questioner. If you look at the answer, you will find that he has only answered the Question in relation to those who have been shot with criminal intent. The Question is: "How many people were killed by the police?" We want to know those who were killed by the police under circumstances that will not amount to criminal intent. We know they are more than what he has given.

Mr. Ojode: Mr. Speaker, Sir, when we are dealing with a Question of this nature, it is always good to tell the truth, but I cannot be forced to bring something which is not in existence. The ones which have been captured are the ones I know of. If there are any contradictory names or any other killings, I would prefer that the hon. Member brings the list of those who have been killed and then I can bring mine. I have already tabled my list and so, let us get any contrary view. I have the capacity to check and know those who have been killed by the police and those who have not been killed by the police. If there are any contradictory names, I would like, with the indulgence of the Chair, the Member to bring the names of the people who have been killed by the police that she knows that I do not know. I am the Assistant Minister in charge of that docket.

(Several Members stood up in their places)

Mr. Speaker: Order, hon. Members! Please, relax! Mr. Assistant Minister, will you, please, indicate to the House if the list that you have furnished the House with this afternoon in answer to the Question by the Member for Gichugu includes all persons who have been shot by the police since 4th August, 2010?

Mr. Ojode: Mr. Speaker, Sir, if you look at my reply, I have said that: "From 4th August, 2010, the following persons have been shot dead---".

Mr. Speaker: Order, Assistant Minister! Of course, I have looked at your answer even as I pose that question. Please, resume your seat!

If you look at part (a) of Question No.681, asks you to state how many people have been shot dead by the police in the country since 4th August, 2010. In your answer, you say: "Since 4th August, 2010, the following persons have been shot in circumstances that pointed to criminal intent". You see, you qualify your answer that these persons have been shot in circumstances that pointed to criminal intent. Are there persons who have been shot by the police in circumstances that are different from pointing to criminal intent?

Mr. Ojode: Mr. Speaker, Sir, I am not aware of that.

Mr. C. Kilonzo: On a point of order, Mr. Speaker, Sir. The Assistant Minister is not taking this Question seriously. The question here is not about the people who were shot by the police because of criminal intent on the part of the police officers. All the people who were shot, intent aside---

Mr. Speaker: Order, Member for Yatta! Our Standing Orders tell us that we should refrain from being repetitive. I put exactly what you are asking the Assistant Minister and he has responded and said that as far as he is concerned, these are the only persons who have been shot by the police since 4th August, 2010.

Mr. C. Kilonzo: Mr. Speaker, Sir, I was building my point.

Mr. Speaker: Then come properly and clearly!

Mr. C. Kilonzo: Mr. Speaker, Sir, the other day, the police executed some criminals in the streets, who are not on the list. This means that this list is not conclusive. It also does not include people who are shot by police officers on love triangle issues like what happened about a month ago.

Ms. Karua: On a point of order, Mr. Speaker, Sir.

Mr. Speaker: Order, Member for Gichugu! Let the Assistant Minister respond first!

Mr. Ojode: Mr. Speaker, Sir, you will agree with me that even on the incident of Langata Road, I said that we have so far interdicted those officers, and that investigations are going on. If the officers are found to be guilty, they will be charged with murder. I even mentioned the names of the officers who were involved. With your indulgence, if you want me to repeat, I will do so.

Mr. Speaker: Order! You do not have to repeat.

(Ms. Karua stood up in her place)

What is it, Member for Gichugu?

Ms. Karua: On a point of order, Mr. Speaker, Sir. I think we have to stick to the rules of the House. A Minister cannot originate a Question and purport to answer it. I am the Questioner, and the Chair had forwarded my Question to the Ministry. Is it in order that that answer be accepted by the House on the oral amendment by the Assistant Minister? In answer to your Question, the Assistant Minister is purporting to orally amend a written answer, claiming that these are all the people who had been shot by the police. What was so difficult in phrasing the answer in the same terms as the Question?

Mr. Speaker, Sir, I think this House needs your direction, so that the Assistant Minister can answer the Question properly. This is one Assistant Minister who has been very casual in dealing with matters of life and death. He has been so casual, defending his "boys" and has caused the police to kill people with abandon. So, we need your direction.

(Several hon. Members stood up in their places)

Mr. Speaker: Order! Order, hon. Members!

Assistant Minister, you have used a word there, which is not the language in which you were transacting business before you said it, and you did so without leave of the Chair. So, I want you to apologize to the House before we proceed.

Mr. Ojode: Mr. Speaker, Sir, I apologise.

Mr. Speaker: Very well. Could you then come forward and respond to the point of order by the Member for Gichugu?

Mr. Ojode: Mr. Speaker, Sir, I have given a very good answer to the Question. I cannot give answers on which I cannot make any substantiation. Apparently, from August last year to date, my police officers have not killed as many as 100 suspects as is being alleged by the Questioner. In respect of those who have been killed, I have already indicated who they were, the action that has been taken and where the killings took place. I need not mislead this House. It is not in my nature to say something which I cannot

substantiate. The names I have given and the places where the incidents happened are here. I have given them out and read them out to the Questioner.

(Several hon. Members stood up in their places)

Mr. Speaker: Order! Order, hon. Members! I have acquainted myself to the Question asked by the Member for Gichugu. I also have with me the answer given by the Assistant Minister. Our Standing Orders are clear on the content of Questions. Questions are intended to seek information which may be in the custody of the Executive. In this particular case, the Question seeks information from the Ministry of State for Provincial Administration and Internal Security. The Question is explicit in terms of what information it is seeking. I am afraid that the answer given by the Assistant Minister is not categorical and unequivocal as expected by the Questioner. The Question clearly seeks certain information. The Assistant Minister then goes on to give information that is qualified and appears to be restricted. So, I will direct that this Question is deferred to Thursday this week, at 2.30 p.m., so that if the Assistant Minister is taking the position that these are the only persons who have been shot by the police since 4th August, 2010, then he should categorically and unequivocally state so. If the Member for Gichugu and other hon. Members have information that may be different from what the Assistant Minister will be saying, then they will avail that information and the Assistant Minister will inquire into it further. I so direct, Mr. Assistant Minister.

Mr. Ojode: Mr. Speaker, Sir, I concur with your ruling.

Mr. Speaker: Very well. So, the Question is deferred to Thursday, this week, at 2.30 p.m.

(Question deferred)

OUESTIONS BY PRIVATE NOTICE

HUMAN-WILDLIFE CONFLICT IN NAIVASHA

Mr. Mututho: Mr. Speaker, Sir, I beg to ask the Minister for Forestry and Wildlife the following Question by Private Notice.

(a) Is the Minister aware that in the recent past, five people and hundreds of sheep and goats have been attacked and killed by wildlife in Naivasha?

(b) What immediate measures is the Minister taking to relocate all rogue buffaloes to the park, and when will he compensate farmers for destruction of crops by buffaloes and baboons?

(c) Could the Minister state the measures taken by the Ministry over the last five years in Naivasha to solve human-wildlife conflicts?

The Assistant Minister for Forestry and Wildlife (Mr. Nanok): Mr. Speaker, Sir, first, I would like to apologise for coming in late to answer this Question. I expected my Minister to have responded to the Question. I have been informed that he is out of the country. So, I stepped in to answer it.

Mr. Speaker, Sir, I beg to reply.

(a) I am aware that over the last two months, livestock have attacked several people, sheep and goats in Naivasha. The attacks on people in the recent past, which unfortunately resulted in deaths, are as follows:-

(1) We had two deaths in Loldia Farm within the month of November, 2010. The two were attacked while tracking a rogue buffalo together with Kenya Wildlife Service (KWS) staff at the victims' farm.

(2) We had one death in Ndabibi area. The victim was attacked while herding livestock in Tanki Tatu area.

(3) We had two deaths in Soysambu Conservancy. Two persons were injured, and were airlifted to Nairobi Hospital, while the tour guide was taken to St. Mary's Hospital in Gilgil. So, the total number of persons who were attacked and killed by wildlife was three and those who were injured were three.

(b) My Ministry, through the KWS, is totally committed to the protection of people and their property throughout the country. However, the buffaloes within Naivasha did not originate from the KWS protected parks per se but rather from the privately owned Soysambu Ranch and Maruela Conservancy and the surrounding area. However, the Ministry will liaise with those private conservancies and demand that they take control of buffaloes under their jurisdiction.

The KWS has an office in Naivasha Town, headed by a warden and assisted by Problem Animal Control Rangers, who are specially trained on wildlife management. As per the current Wildlife Conservation and Management Act, Cap. 376, the Government only compensates for human injuries or deaths caused by wildlife. Section 52 of the Wildlife Act, which was amended vide Bill No.16 of 1989, did away with compensation in respect of any damage to crops, livestock and property by wildlife. So, as the current law stands, the only legally acceptable compensation is for human death and injury.

(Loud consultations)

Mr. Speaker: Order! Order, hon. Members! Members for Kisumu Town West and Cherengany, we have facilities within these Chambers where you can go and consult, if necessary. It is disorderly conduct to remain standing in the pathways of this Chamber. So, please, note that we will be beginning to take action hereafter.

Proceed, Assistant Minister!

The Assistant Minister for Forestry and Wildlife (Mr. Nanok): Thank you, Mr. Speaker, Sir.

(c) The measures that my Ministry has put in place in Naivasha, through the KWS, are as follows:-

(i) We have established adequate capacity with an office manned by staff and rangers on the ground to respond to emergencies.

(ii) In the year 2009, the KWS helped put up a 10 kilometre fence between Mbaruk and Soysambu area to reduce the number of accidents on the Naivasha-Nakuru Road as a result of motorists hitting buffaloes.

(iii) The KWS has, in addition, developed and is maintaining a database on conflicts, which has enabled the KWS to map out areas with high conflict rates, and which allows for strategic decision making on human-wildlife conflict management.

As such, in Naivasha area, the KWS conducts patrols in Kari, Oserian, Duka Moja, Ewaso Kedong, Marula, Kongoni, Ndabibi, Two Crater Lake, Gilgil, Kikopey, Oljijit, Kongoni, Huruma, Loldia and Manda areas.

Lastly, we have established telephone hotlines that are given to the public for swift reporting of conflict cases. In Naivasha, these numbers are 0718983398 and 050-2020510.

Mr. Mututho: Mr. Speaker, Sir, you have heard the Assistant Minister admit that all these buffaloes originate from private ranchers, what they call "conservancies". You have also heard the Assistant Minister state that they have used public funds to fence 10 kilometres of that area. What steps has he taken to compensate those poor farmers who cannot harvest anything because of wildlife from the conservancies?

Mr. Nanok: Mr. Speaker, Sir, while I tend to agree with the hon. Member for Naivasha, the current law we are following indicates that any damage to crops is not compensated. However, we had looked at this in the amended Bill which we were meant to have brought to this House. Last year, I tabled a document in this House which we discussed that showed the stage of that Bill. So far, this Bill has not yet been brought to the House and we expect that very soon, it will be finalized and approved by the Cabinet so that we can bring it before the House.

Mr. Mututho: On a point of order, Mr. Speaker, Sir.

Mr. Speaker: Order, the Member for Naivasha!

Yes, the Member for Gwassi!

Mr. Mbadi: Mr. Speaker, Sir, cases of attacks by wildlife on human beings and domestic animals are very frequent especially in the constituencies which border the parks. The Assistant Minister has indicated to this House severally that the Bill will be presented to this House soon. Could we get a clear date or timeframe today within which this Bill will be brought to this House so that it is adopted and it becomes law?

Mr. Nanok: Mr. Speaker, Sir, by the time we presented the Bill to the Cabinet for approval, it happened that we had a new Constitution in place and all Bills that had been presented to the Cabinet were referred back so that they can be in line with it. I hope that in the next few weeks, if not few months, that document will be finalized, approved by the Cabinet and brought to this House for debate and approval.

Mr. Mbai: Mr. Speaker, Sir, the destruction caused by wildlife is not only confined to Naivasha. It is also happening in Masinga and Kiathani Village. The damage is caused by elephants which cross over from Mwea Game Reserve. What plans does the Assistant Minister have to put an electric fence along the game reserve so that the elephants can be restricted from crossing over to Masinga where they destroy farmers' crops?

Mr. Nanok: Mr. Speaker, Sir, that is an issue that we can take up. If any Member has problems in areas where we have game parks and game reserves, he is welcome to come and discuss with us so that we can agree on the way forward. You have to realise that during dry conditions, particularly now, wild animals also go out foraging for pasture and water. Most of these incidents happen at this time. I welcome the idea of hon. Members coming so that we can sit down and discuss so that we can find a solution that can satisfy the community.

Dr. Nuh: Mr. Speaker, Sir, time and again, it happens that the Kenya Wildlife Service (KWS) usually takes a very long time to compensate people who are injured even

after the District Wildlife Compensation Committee approves and forwards the request. Could the Assistant Minister tell us the maximum time limit within which compensation should be forwarded to the clients after the district committee recommends to the KWS? Could he also tell us what they are doing to shorten this duration of time?

Mr. Nanok: Mr. Speaker, Sir, you will realise that after the District Wildlife Compensation Committee approves claims, they are normally forwarded to the Ministry Headquarters where we have the Ministry Wildlife Compensation Committee. The Committee looks at all the claims that have been forwarded by the District Wildlife Compensation Committees every month. Delays normally occur as we await the Treasury to provide us with the funds so that we can channel them to the district treasuries for payment. In the new Bill to be brought before this House, we have looked at the establishment of a trust fund which will make the payments as soon as the approvals are made by the headquarters.

Mr. Mututho: Mr. Speaker, Sir, the wildlife still come from private conservancy. Does the law still protect the private conservancy to the extent that their wildlife come out and kill and yet these people cannot claim any form of compensation?

Mr. Speaker, Sir, I seek your indulgence. There are 41 families who have been chased away from their farms by baboons.

Mr. Speaker: Order, the Member for Naivasha. You must comply with the rules of the House.

Mr. Assistant Minister, please answer that question!

Mr. Nanok: Mr. Speaker, Sir, the KWS is the one charged with the responsibility of protecting our wildlife resources. We have taken the responsibility to discuss with private conservancies to make sure that they put those buffaloes under control.

Mr. Mututho: On a point of order, Mr. Speaker, Sir. The question has not been answered. Does the no-compensation policy against destroyed crops and injured animals also cover private conservancies?

Mr. Nanok: Mr. Speaker, Sir, as the Act is now, it is only the Government that can compensate.

NUMBER OF FORM ONE CHANCES IN NATIONAL SCHOOLS

Dr. Khalwale: Mr. Speaker, Sir, I beg to ask the Minister for Education the following Question by Private Notice.

(a) Could the Minister confirm the total number of Form One chances that exist in national secondary schools in Kenya and state the minimum marks/score required for admission into these schools?

(b) How many candidates qualified for admission into those schools in the 2010 KCPE?

(c) What is the Government doing to ensure that all the candidates who qualified join national secondary schools?

The Minister for Education (Prof. Ongeri): Mr. Speaker, Sir, I beg to reply.

(a) There are 4,517 form one places in the 18 national secondary schools.

(b) The Ministry does not set the cut-off marks to national schools. This is because the minimum marks score required for admission into a national school varies from one district to another and depends on the district's number of Kenya Certificate of

Primary Education (KCPE) candidates, performance in KCPE examinations and candidates' national school of choice. The formula for computing the district quota is as follows:

"District candidature times the available vacancies in the national school over the national candidature." It is, therefore, possible for a candidate with high marks from a performing district to miss a slot in a national school while one with a lower marks in a lesser competitive district to secure a place in the national school. However, for Starehe Boys and Girls schools and centres, they have their own criteria and mechanism of selecting their students. The admission of candidates is carried in favour of needy and vulnerable candidates. The national schools established by the members of the Armed Forces also admit 80 per cent of their students from their members of staff while 20 per cent is admitted from the civilians.

(c) All candidates who qualify for admission to national schools will not be absorbed due to the limited spaces available. However, the Ministry has taken the following measures to ensure a majority of the KCPE candidates join national schools.

(i) In the Financial Year 2010/2011 the Treasury allocated Kshs750 million for the expansion of the learning facilities to accommodate an extra class of 45 students in each of the 18 national schools. As a result of this expansion, an additional 810 places were created in the national schools.

(ii) The Ministry is exploring modalities of elevating two top performing provincial secondary schools in each of the 47 counties to national school status. This will reduce pressure on the current 18 national schools, and also guarantee opportunities and quality education in the disadvantaged districts.

(iii) We are engaging the Treasury for additional funding for the expansion and improvement of provincial schools to enable them absorb the majority of candidates.

Dr. Khalwale: Mr. Speaker, Sir, may I congratulate the Minister for the urgent measures he is taking to increase the number of places for our children. In respect of the two schools he wants to elevate in each county to national status, could he confirm whether the process of elevating those schools will be done in accordance with the new Constitution? If he is going to respect the new Constitution, it will be wrong for him to give two national schools equally across the board. The Constitution contemplates that the counties with bigger populations should have access to more national schools than smaller counties.

Prof. Ongeri: Mr. Speaker, Sir, what we have is an intention of elevating the county schools to national level. There will be several dynamics that will be looked at in considering the positions. It may well be that some counties will not, in fact, require as many national schools as other counties with big populations. Therefore, we intend to take affirmative action in order to conform to the Constitution.

Mrs. Odhiambo-Mabona: Mr. Speaker, Sir, could the Minister clarify his Statement that all the candidates who qualified to join national schools joined? Could the Minister clarify why they have limited the number of students from private schools joining national schools? They have thereby affected students who are orphans from schools that support orphans like Gethsemane School in Mfangano Island and Christ Gift in Mbita Point. These are schools that deal with orphans, yet they are classified as private schools.

I even have the names of girls who qualified to join national schools but have not, as a consequence of the policy, joined them, yet they are from marginalized areas.

Prof. Ongeri: Mr. Speaker, Sir, I am aware of the few cases of "private schools" that were public schools. Therefore, we have every intention that during the replacements of 15th February, they will have priority to be considered for Form I places in national schools.

Mr. Bahari: Mr. Speaker, Sir, in the Minister's distribution of national schools across the country, can he ensure that they are distributed within the counties? In my county, the schools that have been identified are just next to each other.

Prof. Ongeri: Mr. Speaker, Sir, the list the hon. Member is seeing in national newspapers is a creation of the national newspapers. We have only requested for proposals from counties in order to consider them on the basis of merit. The list that was published in one of the dailies is not the official one. We have only requested that proposals be made to the Ministry, so that on the basis of that, and in line with a discussion with the Treasury, we can make an informed decision.

Mr. Mwiru: Mr. Speaker, Sir, I commend the Ministry for the good job they are trying to do to create more chances for our children in these schools. I do not know which criteria the Ministry is using to choose the schools that are supposed to be elevated to national school status, and whether they are considering other dynamics within those counties like the sponsors and the areas they are in, including the constituencies.

Prof. Ongeri: Mr. Speaker, Sir, I think we are jumping the gun. All that we have done is to express the intent. In view of the congestion at the national level, and in line with the policy of the Ministry, we need to look at schools in counties that can be elevated to national schools, so that they can mitigate against the shortage of places in national schools. Furthermore, I want to inform this hon. House that, indeed, I have appointed and gazetted a task force to look at all these areas, including realigning the Ministry of Education policy with Sessional Paper No.1 2005 in tandem with the new Constitution from the national level to the county level. When that information and policy paper is presented to us, hon. Members will have the opportunity, through a Sessional Paper that I intend to publish, to come to this House for further debate. It is only then that we will make conclusive decisions on which direction we are moving.

Mr. Speaker: Last point; Member for Ikolomani!

Dr. Khalwale: Mr. Speaker, Sir, the net effect of the affirmative action that the Ministry took is that some of the deserving children from very poor families have found their way into national schools. Thank you very much.

However, given that in those national schools the school fees can range from Kshs60,000 to Kshs100,000, what is the Ministry doing specifically to support the same children from poor backgrounds whom they took to national schools, and now risk missing those positions? The situation is open to corruption, as rich parents will buy the positions.

Prof. Ongeri: Mr. Speaker, Sir, that is a very good question. We give bursaries to constituencies. There is Kshs500 million distributed to every constituency for taking care of such poor children, who may have gone to national schools. We have told the principals that they should not expel any of those students. We are requesting that the principals bring the names to us. I have every intention to write to each Member of Parliament, where a case may arise, soliciting for your help along these lines.

Secondly, recently we launched a scholarship programme for Form I students through the Equity Foundation and the Master Card Foundation. These are sponsoring 1,200 students every year and a total of 5,000 students at a cost of Kshs4 billion. This is an additional injection of scholarships available to the poor and needy deserving candidates. Therefore, there is every opportunity for these poor students to access these scholarships.

Mr. Speaker, Sir, if they are not enough, and they are never enough, I will request that, through your CDF kitty, you help them acquire education. All we did was to offer them positions in national schools. I think this has gone down very well nationally; the poor fellows would never have been able to achieve those opportunities without that affirmative action.

Mr. Speaker: Next Question!

PREMATURE RETIREMENT OF SENIOR MILITARY OFFICERS

Mr. Ochieng: Mr. Speaker, Sir, I beg to ask the the Minister of State for Defence the following Question by Private Notice.

(a)What are the reasons for the premature retirement of Major- Gen. Enock Sasia, Brig. Arthur Owour, Col. Joseph Ojwang, Lt. Col. Rono and Lt. Col. Machasiu from the Armed Forces?

(b) Could the Minister provide a list of senior military officers whose services were extended, the respective justifications for the extension of service and explain the apparent skewed application of the decision?

(c) Could the Minister also explain the correlation between the premature retirements and the procurement of the 42 AMR Parhard Light Armored Cars from M/s Sayamar (an Israeli company), APC from a single-sourced South African Company, *KN Nyayo* and *KN Umoja* war ships from Financantieri of La Special based in Italy and F5 Aircraft from the Government of Jordan, and clarify whether the Government got value for money in the deals?

Mr. Speaker: Hon. Members, with respect to Question No.2 by Private Notice, you will all recall that this Question appeared on the Order Paper on 18th January this year, and on that occasion, hon. Members raised certain concerns with respect to the Question among which were the following:-

(a) This matter is already referred or being dealt with by the Committee on Defence and Foreign Relations.

(b) There was a bid by the Member for Ikolomani which was supported by a few other Members that strangers be excluded from the House so that this matter is heard to the exlusion of other Members of the public.

(c) The matter related to aspects that are by operation of law secret.

So, hon. Members, I have weighed all those concerns and doing all I can; balancing one thing against the other, I have arrived at the view that this Question raises matters that go to the core of the defence and security of this country and that, therefore, it would be advisable and expedient for it to be referred to the relevant Parliamentary Committee, which is the Committee on Defence and Foreign Relations so that, that

Committee prepares a report which it will then table in the House for our consideration, if necessary, to the exclusion of strangers. That is how we will proceed.

The Committee will be expected to prepare and table its report within the next 14 days from today. Member for Nyakach, it is so directed!

That then brings us to the end of Question Time and we will take the next order.

Hon. Members, we will proceed this way: I am aware that issues have been raised in relation to the appointments which were made recently by the Executive, led by His Excellency the President of the Republic of Kenya, and we will hear Members who have issues with respect to that matter, but first we will take other Statements or requests for Statements away from that matter.

Member for Juja!

PERSONAL STATEMENT

MEMBERS ADVERSELY MENTIONED IN THE HOUSE

Mr. Kabogo: Mr. Speaker, I rise under Standing Order No.76 to make a Personal Statement arising from the communication from the Chair on documents I laid before the Table of the House on 22nd December, 2010.

It is my understanding that a matter concerning the conduct of a Member can only be discussed in the House in accordance with Standing Order No. 79. It is unfortunate that this was disregarded and names of hon. Members were adversely mentioned in the House unprocedurally, in clear disregard of the House Standing Orders.

Mr. Speaker, Sir, on 23rd December 2010, I wrote letters to the Director of the Kenya Anti-Corruption Commission, Prof. Lumumba, the Minister of State, Office of the President and the Police Commissioner; letters that I wish to table.

Despite having demanded to be provided with a copy of the allegations against me, neither the Minister nor the Commissioner of Police has responded nor acknowledged my request. However, I did receive a copy of a US dossier marked "Secret Real Kenya" from the Director of the Kenya Anti-Corruption Commission who in his reply dated 29th December, 2010 wrote, saying:-

"We refer to your letter dated 23rd December 2010 and pursuant to your request and in accordance with section 35 1(a) and (b), of the Constitution, we enclose a copy of the information in our custody and germane to your case.

Mr. Speaker, Sir, I wish to table that letter from the Kenya Anti-Corruption Commission and attached to it is a document that was handed over to me. Equally, I have the document also forwarded by the Kenya Anti-Corruption Commission which I wish to table.

I wish to bring to your attention that the information I have just tabled is a replica of the information I had tabled earlier on 22nd December 2010, germane to my case. I would wish to remind you that the Rt. Hon. Prime Minister did confirm to the House having received the same report from the American Ambassador. It is not in dispute and it is on record that the American Ambassador Michael Ranneberger filed alleged criminal complaint with the Kenya Anti-Corruption Commission and distributed copies to various Government departments as confirmed by the Rt. Hon. Prime Minister. I therefore urge

that the Prime Minister do table the document that he was given by the Ambassador. On 22nd December, Prof. George Saitoti did promise to do a comparative analysis of the report that I tabled and the one that was in his possession. He indicated that he would come back to the House and to date he has not brought it to the House.

Mr. Speaker, Sir, drug trafficking is a concern the world over and Mr. Michael Ranneberger hailing from the United States of America, a country where drug trafficking is rife and whose efforts in the war against such trafficking has been nothing short of futile and plagued with corruption, should be in a position to grasp the importance of fighting this war with information whose veracity would be beyond reasonable doubt.

Mr. Speaker, Sir, I invite you to look at the document titled "Sham and Corrupt War on Drugs and the Crimes against America" which I beg to table.

(Mr. Kabogo laid the document on the Table)

Mr. Speaker, Sir, this report or dossier is nothing else but falsehoods, innuendos and malicious statements made with the sole purpose of maligning the names of hon. Members of Parliament. It is very unfortunate that the US Ambassador can alter or cause to be authored such a criminal document whose contents, falsehoods and inaccurate information has no supporting evidence.

Section 28 of our Constitution States:-

"Every person has inherent dignity and the right to have that dignity respected and protected"

It is in the face of these unsubstantiated allegations that I am of the view that my right to that inherent dignity has been infringed.

Section 35(2) of our Constitution states:-

"Every person has a right to the correction or deletion of untrue or misleading information that affects the person"

So, in general, I am saying that the information tabled in this House by the Minister of State for Provincial Administration and Internal Security, having seen the information that came from the KACC, it is clear, putting the two documents together; the one by hon. Hassan Ali Joho and the one by myself, it has eight hon. Members of Parliament named negatively as drug traffickers or suspects and yet that information is not the information that the Minister did table.

Mr. Speaker, Sir, I urge that the Minister tables the information that he holds. In addition, since you did not give me a lot of time, I would like to table the Personal Statement.

Mr. Speaker: Very well! You may do so. Hon. Members, note that, that is a Statement issued pursuant to the provisions of Standing Order No.76. So, there shall be no debate; no *sub poena*, but it would go on record.

(Mrs. Shebesh stood up in her place)

Mr. Speaker: What is it, Mrs. Shebesh? I am not on notice that you will issue any Statement or make any request.

Mrs. Shebesh: Mr. Speaker, Sir, I did issue a notice, but if it has not got to you, then I will issue it again. However, I did issue the notice in the morning.

Mr. Speaker: You issued the notice to whom and through which means?

Mrs. Shebesh: Mr. Speaker, Sir, I issued the notice through the Office of the Clerk and the Speaker, but I will confirm that that happened.

Mr. Speaker: Order! Please, resume your seat! I will have to verify that before I allow you.

(The Clerk-at-the-Table consulted with the Speaker)

The Clerk declines that you gave any such notice to him and I know that you did not bring it to me.

Mrs. Shebesh: Mr. Speaker, Sir, I will clarify that and request for the Statement tomorrow.

Mr. Speaker: Please, ensure that you comply with the Standing Orders all the time!

What is it, the Member for Central Imenti?

POINT OF ORDER

VIOLATION OF THE NEW CONSTITUTION IN JUDICIAL APPOINTMENTS BY THE PRESIDENT

Mr. Imanyara: Mr. Speaker, Sir. I rise on a point of order to seek your assurance, guidance and direction on what we, hon. Members of this National Assembly should do where incidents of gross violation of the Constitution occur, instigated by either the Members of this House, the Executive or the Judiciary.

In rising on a point of order, Mr. Speaker, Sir, I am aware of Article 3 (1) of the Constitution that we recently promulgated which says: "Every person has an obligation to respect, uphold and defend this Constitution."

Yesterday, Kenyans were treated to a spectacle that we have not seen in the history of this country where the country's Chief Justice and the Country's Chief Legal Advisor held a press conference and signed a statement which accused the Head of State of breach of the Constitution in the manner in which he has submitted to you the nominees for positions under the new Constitution.

Mr. Speaker, Sir, in the Statement by the Judicial Service Commission at which the hon. Chief Justice was present and signed this Statement; and at which the hon. Attorney-General, a constitutional office holder who is the Chief Legal Advisor to the Government and whom we depend upon to let us know whether the Government is acting in accordance with the Constitution, stated as follows, and I have a copy of the statement that was signed by all of them:-

"We, the members of the Judicial Service Commission express our grave concern and misgivings about the nomination for the Chief Justice that was made by the President last week. We note that the President states that he consulted the Prime Minister prior to the nomination. We have also noted the views expressed by the Prime Minister that he was not consulted prior to the nomination. As we implement and internalize the new Constitution, we, the Judicial Service Commission, are of the view that both the Judiciary and the Kenyan people must start the new era heralded by the new Constitution on the

right footing; both the letter and the spirit of the new Constitution must be adhered to in our view. In light of the divergent views coming from the principals, we are of the view that the principals need to reconsider their respective positions. There is an urgent need for a rethink of the matter and to put the country first that entails a withdrawal of the nominations and a fresh start. On our part, it is our view that in order to give the process of appointing judicial officers' legitimacy, public confidence, ownership and acceptance by the people of Kenya, the Judicial Service Commission must play an integral role in the process. It is our view that Articles 171 (e) and (2) read together with Article 166 (1) and Schedule 6, Section 24, gives the Judicial Service Commission powers to play that important role. Such a process, in our view, would de-politicize and provide the much needed legitimacy and acceptance of the nominees."

Mr. Speaker, Sir, that is a very important Statement issued by an arm of the Government - the Judiciary - which is headed by the Chief Justice. I have just said that the Chief Justice sat at a press conference and signed this Statement, a copy of which I table before the House.

(Mr. Imanyara laid the document on the Table)

Shortly thereafter, another Commission formed under the laws passed in this House and appointed only the other week upon our return also issued a Statement signed by the Chairman of that Commission, namely the Commission for the Implementation of the Constitution (CIC) expressing similar views and ending – because it is a lengthy Statement – as follows:-

"In view of the above, it is the position of the CIC that the letter of the Constitution as provided for in Article 66, together with Sections 24 and 29 of the Sixth Schedule require that the appointment of the Chief Justice by the appointing authorities should be as follows.

(i) The process of appointment should commence with recommendations by the Judicial Service Commission to the President, who in turn should consult the Prime Minister after which the President forwards the name of the nominee to the National Assembly for approval before final appointment by the President.

(ii) The role of the Judicial Service Commission in the appointment of the Chief Justice should be respected and the Commission allowed to undertake the function reserved to it by the Constitution."

Mr. Speaker, Sir, that is a lengthy statement. It is signed and I table before this House a copy of the statement.

(Mr. Imanyara laid the document on the Table)

Mr. Speaker, Sir, you would have noticed that the Judicial Service Commission did point out that the Prime Minister did dissociate himself from that nomination process, which would point to a breach of the provisions of the Constitution that incorporate the National Accord that requires consultations between the Principals before appointments are made.

Indeed, I am aware that the Rt. Hon. Prime Minister has written to you at length on this issue and you have a copy of that letter, which I have tabled before the House.

What bothers me and hon. Members of this House who I have spoken to is that, contrary to the oath that all of us took, each of us, as a Member of Parliament and each of the heads of the various arms of the Government, there is a clear attempt to undermine the Constitution under the circumstances that will point to a very dangerous trend.

Mr. Speaker, Sir, should we get this wrong and go back to the old days, then there would have been no need for the long crusade for a new Constitution in this Republic. This is if the implementation process is carried out in a way that undermines that process.

Mr. Speaker, Sir, because you have made Communications from the Chair on the need for the implementation of the Constitution in a manner provided for in the Constitution, I rise to seek your directions on how we should proceed in this regard, bearing in mind the provisions of Standing Order No. 47 (b) which forbid the bringing into this House of any Motions, laws or any Bills that are contrary to the Constitution.

Hon. Members: Yes!

Mr. Imanyara: Mr. Speaker, Sir, I do seek your direction and guidance.

(Applause)

Mr. Mungatana: On a point of order, Mr. Speaker, Sir. I thank you for giving me the opportunity to also put my thoughts in this matter.

Mr. Speaker, Sir, I want to state that irrespective of whatever has happened, there are two schools of thought here; one that believes these nominations were within the Constitution. The other school of thought believes that these nominations were not within the Constitution. I want to plead with you that whatever directions you will give concerning this matter, at the end of it all, we must all be winners.

Mr. Speaker, Sir, I do not wish to repeat the arguments which were very well put by the hon. Gitobu Imanyara. I believe that the process may not have been followed. I also hold the opinion that it was not done constitutionally. However, my opinion and opinions of all us cannot outweigh the opinion of the Committee on the Implementation of the Constitution (CIC). Why I say so is that the CIC is mandated expressly by the Constitution under the Transitional and Consequential provisions, Section 5, to monitor, facilitate and oversee the implementation of this Constitution and also make a report on any impediments on the implementation of the Constitution, amongst other things.

Mr. Speaker, Sir, we have been told how this CIC has already pronounced itself. There is need for you to give direction so that the temperatures in the country can come down and the politics around this thing can come down and we move forward. At the end of it, we must have a Chief Justice, an Attorney-General, a Director of Public Prosecutions and a Budget Controller.

Mr. Speaker, Sir, I seek your direction that you find the following. As of this date, Parliament is now seized of this matter officially. Therefore, there should be no outside discussions that may prejudice or harden positions, with a view to finding a solution.

Secondly, I wish that you would direct that the Parliamentary Select Committee that we elected here, known as the Constitutional Implementation Oversight Committee (CIOC) under the chairmanship of hon. Abdikadir be convened within 24 hours with a view to receiving formally a report from the CIC. As they bring that report, they bear in mind the provisions regarding the appointment of the Chief Justice, Article 166 of the Constitution, regarding the appointment of the Attorney-General, Article 156 of the

Constitution, regarding the appointment of the Director of Public Prosecution, Article 157 of the Constitution and, finally, regarding the appointment of the Controller of Budget, Article 228 of the Constitution, which will be read together with the Sixth Schedule, Sections 24 and 29.

Mr. Speaker, Sir, thirdly, I would request that you find and direct that the Office of the President and the Office of the Prime Minister be present in these meetings, so that whatever direction that is agreed upon in that meeting of the Parliamentary Committee on the Constitutional Implementation and Oversight Committee and the CIC, it may be implemented so that this country is saved the problems of press wars.

Mr. Speaker, Sir, you should also direct that the names of these distinguished members, who have been nominated, as we stand now, should not be prejudiced only by reason that they were nominated in an unconstitutional manner. So, when the representatives of the two big offices and the Parliamentary Committee on the Constitutional Implementation and Oversight Committee are sitting, they look at all these things together. At the end of it, I request that you direct that that report be brought to this House at least by next week so that the country can move forward, so at the end of it all, we are all winners. At the end of it all, we must have a Chief Justice, a Director of Public Prosecutions, an Attorney-General and a Controller of Budget.

With those few remarks, I beg to support.

The Minister for Energy (Mr. Murungi): On a point of order, Mr. Speaker, Sir.

Mr. Speaker, Sir, I would like to comment on the statement laid on the table from the Commission on the Implementation of the Constitution (CIC) and the Judicial Service Commission (JSC).

Mr. Speaker, Sir, both statements indicate the process used by the Executive in nomination of the names that are now before the House was unconstitutional and did not follow the procedures laid in our current Constitution. The main complaint is that the procedure was flawed because the JSC was not involved in the sourcing of those names.

Mr. Speaker, Sir, I have very great respect for the hon. Attorney-General, the hon. Chief Justice and the Chairman and other members of the CIC. However, on this particular case, they are all wrong in the interpretation of the Constitution.

Mr. Speaker, Sir, we are Members of Parliament. We passed this Constitution and we can read the provisions of the Constitution ourselves. The key Articles of the Constitution on which these arguments hang is Section 24(2) of the Sixth Schedule of the Constitution and Section 166. I would plead with the hon. Members to read these two Sections themselves and make their own interpretations.

Mr. Speaker, Sir, regarding Section 24(2) of the Sixth Schedule, which is part of the transitional provisions, it says that:-

" A new Chief of Justice shall be appointed by the President, subject to the National Accord and Reconciliation Act and after consultation with the Prime Minister and with the approval of the National Assembly."

Where is the JSC referred to? It is quite clear from plain reading of this section that the JSC has absolutely no role to play in the appointment of the Chief Justice during this transition period. Those Members who were in the discussion that led to the preparation of this new Constitution at Naivasha know the reason why this provision reads the way it does, and I would like them to speak.

Mr. Speaker, Sir, Section 166 relates to the appointment of the Chief Justice after the transition period and it reads as follows:- "The President shall appoint the Chief Justice and the Deputy Chief Justice in accordance with the recommendation of the Judicial Service Commission (JSC) and subject to the approval of the National Assembly." So, after the transition period, that is when the JSC comes in and that time, as you know, there will be no Prime Minister who will be consulted.

(Applause)

I think it is worth of note and we need to speak plainly about this. The Chief Justice is the outgoing CJ; he is the one being replaced. The Attorney-General is also outgoing; he is also being replaced and so, they have an interest.

An hon. Member: So does the President!

The Minister for Energy (Mr. Murungi): Mr. Speaker, Sir, we should read these statements because every person has an interest. The only factual issue that this House should consider---

An hon. Member: On a point of information!

The Minister for Energy (Mr. Murungi): Mr. Speaker, Sir, I do not need any information! I am very educated as far as law is concerned. The issue for this House to consider is whether there was any consultation between the President and the Prime Minister. That is the only issue! That is because the President says there were consultations while the Prime Minister says there were no consultations. Let those who also participated in the consultations come here and tell us how the consultations took place and then it will be for hon. Members to decide whether there were any consultations or not.

(Applause)

(Several hon. Members stood up in their places)

Mr. Speaker: Order!

Mr. Farah: Mr. Speaker, Sir, I do not wish to take a lot of time. I think we are trying to usher in a new era in this country in which--- A person said this is going to be a nation of flaws. It is not a nation of men and men; not a nation in which the position and status of a person overrides every other consideration.

(Mr. Munya stood up in his place)

Mr. Farah: Mr. Speaker, Sir, I am on a point of order. Whereas I want to---

(Mr. Munya consulted loudly)

Mr. Speaker: Order, Mr. Munya! Allow Mr. Farah, at least, to open his contribution.

Mr. Munya: *(Inaudible)*

Mr. Farah: Mr. Speaker, Sir, that is a matter for the conscience of the Deputy Speaker because he is---

Hon. Members: No!

Mr. Speaker: Order! Mr. Farah, you cannot respond to a point of order which has not been raised.

Mr. Farah: Fair enough, Mr. Speaker, Sir! I have illustrated it with what it deserves. The point I am trying to get across is: This is a nation of flaws because of the Constitution that we promulgated. I want to agree with what Mr. Imanyara and partly what Mr. Mungatana have said. It says that unless Schedule Six, Part IV(29)(2) prescribes otherwise, when this Constitution requires an appointment to be made by the President with the approval of the National Assembly, up and until after the first election under this Constitution, the President shall, subject to the National Accord and Reconciliation Act, appoint a person after consultation with the Prime Minister and with the approval of the National Assembly.

(Loud consultations)

Consultation is not information! Consultation is concurrence!

(Loud consultations)

Mr. Speaker, Sir, can you protect me from---

(Loud consultations)

Having said, I do not know if a matter---

(Loud consultations)

Can I have your protection?

Mr. Speaker: Order, hon. Members! Please, let us be tolerant and hear Mr. Farah!

Mr. Farah: Mr. Speaker, Sir, it sickens me to see a whole House delude itself – or a substantial part of the House – that the so called National Accord need not take into consideration the aspect of power sharing. It is in that spirit that the President is not exercising executive power under this Constitution and through the transition individually. He is exercising powers with the Prime Minister.

(Applause)

Power is shared under this Constitution! It is under these circumstances that none of them; neither the Prime Minister on his own nor the President on his own can take an executive decision of this magnitude without the concurrence of the two of them.

Having said that, I am seeking your direction on how validly is this matter being now discussed before this House in the sense that--- My presumption would be if the President had given his own appointments, however unconstitutional – and it is for the

House itself to determine, would it be moved as a Motion by a Minister? We have not had this thing moved as a Motion here on the Floor of the House. I am seeking your direction on that!

The Minister for Lands (Mr. Orengo): Mr. Speaker, Sir, I thank you for giving me an opportunity to add my voice to this very important issue. I would like to plead with hon. Members that the matters that we are discussing are very weighty constitutional issues and it is important that we consider them soberly. I am saying soberly because if you look at the Constitution, Parliament is given the important role of ensuring that this Constitution is implemented through Bills and other decisions that are required in the transitional and consequential provisions.

With the greatest respect, I would want to disagree with my learned friend, Mr. Murungi. In this Constitution, where any provisions are suspended, it makes it clear which section is suspended and does not apply.

(Applause)

If you look at the Sixth Schedule on Transitional and Consequential Provisions, Section 2, the provisions of the Constitution that are suspended are clearly set out. That is found on page 192. The sections and the provisions related to the Judiciary are not included. Chapter 7 is excluded. It deals with the Executive. Chapter 8 is excluded. Articles 129 to 155 are suspended and the provisions of the Constitution relating to devolved funds are suspended. The other articles that are suspended are those dealing with elections for county assemblies and governance. Then the laws relating to devolved governments are set out and they are suspended. Article 62 and 63 in relation to the National Land Commission are also suspended. So, when I listen to my dear brother who is a senior counsel saying that one part of the Constitution is suspended - when the Constitution itself is not saying so - that is the greatest breach of the Constitution that one can perform before an august Assembly like this.

Mr. Speaker, Sir, if, indeed, it is true that the provisions of the Constitution which my learned friend referred to are suspended, then when the President is appointing the Chief Justice on the issue of qualification, where does he look? They are found in the body of the Constitution! He does not have to look at 24 because if he looks there, then he can appoint Dr. Khalwale to be the Chief Justice and, obviously, that cannot be true. He has to go into the main provisions of the Constitution to find out who is qualified to be the Chief Justice!

Mr. Speaker, Sir, this is a weighty constitutional issue. I plead with you because in this issue there will not be any winners. There is no PNU or ODM about this.

This Constitution bars the current Chief Justice from becoming a Chief Justice. It also does not allow him even to become a member of the Supreme Court. It says that the only position he can hold in the Judiciary is in the Court of Appeal after he has been vetted. How then can a junior member in the Judiciary be able to occupy the seat of the Chief Justice without being vetted? It does not make any sense. I do not know where my learned friend learned his law because this is a simple matter of interpretation.

We cannot take one section and then say that these are the provisions of the Constitution. Section 24 must be read together with other provisions of the Constitution. The article dealing with national values and principles of governance is very critical. It

says there must be the rule of law, participation of the people, transparency and accountability.

Finally, on the provisions dealing with the public service, the Constitution requires that the process of recruiting officers be competitive. It says there must be competitiveness, gender equality and regional balance. These are public offices. All those principles are in the Constitution.

Mr. Speaker, Sir, when we are looking at regional balance we are not just looking at those four positions. For example, if we look at the office of the Attorney-General as presently constituted by the nomination by the President, the Attorney-General will be somebody from Central Province. The Solicitor-General will be somebody from Central Province. The Deputy Solicitor-General will be somebody from Central Province. The Registrar-General will be somebody from Central Province.

Hon. Members: No! No!

The Minister for Lands (Mr. Orengo): Yes. These are facts!

(Loud consultations)

Mr. Speaker: Order, hon. Members. Let us hear the Member for Ugenya. You will also have an opportunity to be heard as I am sure you will want to be heard.

The Minister for Lands (Mr. Orengo): These are facts which I am stating.

Finally, this provision has been quoted by my learned friend, Mr. Imanyara and others. This is Section 24(2) of the Sixth Schedule. Everybody is talking about the consultation. It is the hierarchy of what the President is required to do. Consultation is number three. It states as follows:

"A new Chief Justice shall be appointed by the President subject to the National Accord and Reconciliation Act---". Before we even come to consultation, it must be in accordance with the National Accord and Reconciliation Act. If you look at the Accord, the title reads as follows:

"An Act of Parliament to give effect to agreement on principles of partnership of coalition."

If you look at the principles of partnership and coalition, because it is part of the law, and by our own Act through a constitutional amendment we enthroned the schedule into a constitutional status.

It states as follows:- "There must be real power sharing in the partnership."

So, before you begin to talk about consultation you must determine whether in making that appointment, it was done on the basis of the National Accord.

(Loud consultations)

Mr. Speaker, Sir, this is a new Kenya. There is nobody who will make decisions in political backrooms and get away with it. You are required to be accountable to the people of Kenya and their sovereignty. So, whatever you do, at the end of the day, you must pass the test of accountability.

Thank you, Mr. Speaker, Sir.

Mr. Speaker: The Minister for Justice, National Cohesion and Constitutional Affairs.

(Ms. Karua stood up in her place)

(Laughter)

Order, hon. Members! Let us hear the Minister for Justice, National Cohesion and Constitutional Affairs, Mr. M. Kilonzo. We will, at a suitable time, hear the former Minister for Justice, National Cohesion and Constitutional Affairs.

The Minister for Justice, National Cohesion and Constitutional Affairs (Mr. M. Kilonzo): Mr. Speaker, Sir, forgive me for starting in a slightly different way and say that we, as a Parliament, have an obligation not to confuse the public. I think the requirement to respect the Constitution is fundamental.

Therefore, I will start with Article 10 which talks about National Values and Principles of Governance. They are so clear and it is possible that some of us who were so vehement in "Yes" never internalized these values. When I say so, I am speaking to both my bosses, His Excellency the President and the Right hon. Prime Minister. The first value is patriotism, national unity, sharing and devolution of power, the rule of law, democracy and participation of the people.

I cannot see how you can dismiss that clause. Secondly, part "b" talks of human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and so on. I am surprised at my friends who have spoken before me. They have not noticed that in this list, even if there were consultations, there is no single woman. I cannot understand that at all. On that basis alone, I would urge serious understanding and fore bearing in what I am about to say.

Look at the issues of consultation. Article 259(11) on page 169 of the Constitution says: -

"If a function of power conferred on a person under this Constitution is exercisable by the person only on the advice or recommendation with the approval or consent of, or on consultation with another person, the function may be performed or the power exercised only on that advice, recommendation with that approval or with that consent or after the consultation, except where to the extent that this Constitution provides otherwise."

The question that I think the country must come to terms with is that if you look at Article 259(11), it has the words "approval" and "consent". Therefore, the obvious conclusion that I make is for you to decide on this although we are treating you as a judge and you are qualified. We are treating you like a Chief Justice and you are qualified. However, you will have to consider this. Does the word "consultation" in Section 24 that has been cited after consultation mean consent? Does it mean with the approval of the Prime Minister? Does it mean with the consent of the Prime Minister? Does it mean with the concurrence of the Prime Minister?

An hon. Member: Yes!

The Minister for Justice, National Cohesion and Constitutional Affairs (Mr. M. Kilonzo): Fortunately, it is not the honourable Speaker making those remarks that I hear on the Floor.

Mr. Speaker, Sir, therefore, I will defer to you in making this decision to bear in mind that in my firm view, the consultation provided for in Section 24---

Mr. Speaker: Order! Minister for Justice, National Cohesion and Constitutional Affairs, I am allowing this point of order because I have the discretion to do so.

What is it Mr. Nyamweya?

Mr. G. Nyamweya: On a point of order, Mr. Speaker, Sir. Is it really in order for the Minister for Justice, National Cohesion and Constitutional Affairs to urge you as the Speaker to take the functions of the Judiciary? The Constitution can only be interpreted by the Judiciary; the Supreme Court. In the absence of the Supreme Court, it says very clearly that the Court of Appeal will do so. It is quite disturbing for the Minister to be urging you to take the place of the Chief Justice. It is true that it is a weighty matter, but let the Minister also give us factual and wise counsel and not mislead the House.

Mr. Speaker: Order! Indeed, the Minister was conscious of that concern. He did urge me reservedly, knowing that I am not the Chief Justice or Judge, but saying that even as Speaker I have qualifications to be, but that I should not exercise that power from this Chair. So, I have heard him.

The Minister for Justice, National Cohesion and Constitutional Affairs (Mr. M. Kilonzo): Mr. Speaker, Sir, I thank you for that because it is correct.

Mr. Speaker, Sir, I was simply saying that I hope that – because you are the one who has allowed these contributions through points of order – you will bear in mind that reading of Article 259(11) that distinguishes consent from approval, recommendation from approval and also uses the word "consultation" knowing very well that it also contains the words "approval", "consent" as well as "recommendation." My observation, politely and with utmost respect – and I say so for the benefit of the country – is that the word "concurrence" does not appear in Section 24 at page 201.

Mr. Speaker, Sir, having said that, I want to also invite those who are saying that this is constitutional to go to Articles 172 of the Constitution. You will begin to see the theme of the appointment of Judges as well as the Chief Justice. If you look at Article 172(2) it says:

"In the performance of its functions the Judicial Service Commission shall be guided by the following-

(a) Competitiveness and transparent processes of appointment of judicial officers and other staff of the Judiciary; and,

(b) promotion of gender equality.

Mr. Speaker, Sir, I have already spoken to the fact that the list, even if there were consultations that the Rt. Hon. Prime Minister is asking for--- I believe there were consultations, because I happen to be in the Office of the President several times last week and I saw these wonderful and very important gentlemen meet. I cannot say with certainty what they discussed but I know that they spoke. They spent four hours when I was waiting for the approval to present the two Bills on the Judicial Service. I have an obligation for full disclosure. As far as I am concerned, I cannot say for sure whether they discussed these appointments, but I would expect them to have been aware if the notice has come out in the course of the week.

Mr. Speaker, Sir, my argument is: What is consultation? To what extent do you consult? If two gentlemen sit in a room, did this Constitution envisage that they come out and shake hands and then say "we have agreed?" It is my argument that we request the two Principals to apply Chapter Six of the Constitution. Let me read it because this is my

final recommendation this afternoon. If you look at a Chapter Six, on Leadership and Integrity, what does it tell all of us? Article 73 says:

"Responsibilities of leadership

Authority assigned to a State officer-

(a) is a public trust to be exercised in a manner that-

(ii) demonstrates respect for the people;

(iv) promotes public confidence in the integrity of the office."

Mr. Speaker, Sir, it is in my view – and I say this very firmly – unfair that the two Principals having met, as I have said I saw them meet and consulted as I saw them consult, that they expose the public to this debate. I would like to plead with the Rt. hon. Prime Minister and His Excellency the President to offer leadership to this country, so that as we start judicial reforms, the country understands that there is dignity in their offices and the offices we are trying to create.

Mr. Speaker, Sir, I beg your ruling.

The Vice-President and Minister for Home Affairs (Mr. Musyoka): Thank you, Mr. Speaker, Sir. As you will have noticed, I have just returned from claiming our country back.

Mr. Speaker, Sir, I want to issue this clarification. I will have occasion to make a full Statement on what the media has called "shuttle diplomacy" because I think this House is entitled, if for no other reason than that, the leader actually had to go on this mission.

Mr. Speaker, Sir, today, I want to issue a clarification with regard only to the matter of consultation. This is because what we are faced with – and I am happy that my brother, the Prime Minister is here – is a matter of credibility. Who between the President and the Prime Minister is telling the country the truth? That is actually the truth. The subject of judicial appointments was first discussed at a meeting between the President and the Prime Minister held before Christmas on 16th December, 2010. During the meeting, the President felt that it would be better if the issue was revisited after the New Year.

Mr. Speaker, Sir, the item of the appointments was subsequently placed in the agenda and discussed on 6th January, 2011 at Harambee House between His Excellency the President and the Rt. hon. Prime Minister. The meeting agreed on the procedure to be followed in the appointments.

(a) The identification and consultations on the nominations by the two Principals and submission to Parliament by His Excellency the President for approval.

(b) It was agreed that the law did not require the selection of candidates by either the Judicial Service Commission or the Public Service Commission.

(c) The technical team was instructed to identify suitable candidates to facilitate further consultations. In the technical meetings it was reported that the Prime Minister expressed the view that we should have a foreign Chief Justice. However, the President insisted that at close to 50 years of Independence, we have very qualified Kenyans and to search for a Chief Justice outside of Kenya would be improper and that it would send the wrong message to the law society, the legal fraternity and, indeed, the whole country.

Mr. Speaker, Sir, on Thursday, 27th January, 2011, the item was on the agenda in a consultative meeting held from 12.00 p.m. between again, His Excellency the President and the Rt. hon. Prime Minister. It must have been about the same time the Minister for

Justice, National Cohesion and Constitutional Affairs was at Harambee House but, clearly, he was not able to get into the consultations. During the meeting, President Kibaki presented his proposal, borrowing on the consultations which had taken place between the technical teams representing him and those representing the Prime Minister.

The proposal, therefore, presented by His Excellency the President was as follows:

(a) Justice Kihara for Chief Justice.

(b) Fred Ojiambo for Attorney-General.

(c) The post of Deputy Chief Justice to be filled by a woman through the Judicial Service Commission.

(d) Kioko Kilukumi for Director of Public Prosecutions; and,

(e) William Kirwa for Director of Budget.

In response, the Prime Minister said that if the President could not agree to a judge from the Commonwealth to be nominated as the Chief Justice, then he would insist on Justice Omolo to be nominated in the position.

Number five, the President - it is ecstatic to see that His Lordship, Justice Omolo was present at the Press Conference - the President pointed out that he needed to make appointments before he left for Addis Ababa, Ethiopia for the African Union Meeting. It was, therefore, decided that the technical team would discuss and report back on the same day in the afternoon. The team comprised of Ambassador Muthaura, Mr. Mohamed Isakhakia, Prof. Nick Wanjohi and Mr. Caroli Omondi.

Six, the technical teams reported separately that they had agreed on three of the positions, but were unable to agree on the position of the Chief Justice. The team presented three options for Chief Justice; Justice Omolo, Justice Kihara or Justice Visram for consideration by the Principals.

Seven, at the same time, the President asked the Prime Minister to propose an Attorney-General to replace Mr. Ojiambo as the job of the Attorney-General, being the Chief Legal Advisor of the Government, required higher post graduate qualifications. I have no difficulty with my learned brother, Mr. Fred Ojiambo. He is a senior partner at Kaplan and Stratton where I did my pupilage. However, I think it was felt that higher post graduate qualifications would be proper. So, Prof. Githu Muigai was proposed and agreed upon by both technical sides.

Eight, the President said that because he was travelling to Addis Ababa on Saturday, the matter needed to be finalized by 12.00 noon, Friday, 28th January, 2011. It was imperative that the proposals were made before the African Union Heads of States Meeting in Addis Ababa. You can understand the reason for this. The President has been saying that he would want to have a local mechanism and he wanted to demonstrate before his colleagues that he was serious on this matter of appointments of the new Judiciary officers. This was made clear to the Right Hon. Prime Minister. On Friday morning, 28th January, 2011, the Prime Minister sent a letter signed by Mr. Caroli Omondi, addressed to Ambassador Muthaura saying that he had left for Addis Ababa and that the consultations should be held the following week. Obviously, the Prime Minister did a very good job because he tried to represent all of us with regard to the Cote d'Ivoire crisis and that he was required to make a report. That is contained in the letter signed by Mr. Caroli Omondi.

Number ten, the Prime Minister was informed that because the matter needed to be concluded before the President left for Addis Ababa, consultations could be facilitated through the phone. The President then made a proposal that Justice Alnashir Visram be nominated as the Chief Justice, who hails from a minority community, so as to accommodate the Prime Minister's concerns of neutrality. The proposal was communicated to the Prime Minister. In response, the Prime Minister said that he had no problem with Prof. Githu Muigai being the Attorney-General, but insisted on Justice Omolo being nominated as the Chief Justice. The Prime Minister was asked to call the President from Addis Ababa so that they could finalize. The Prime Minister said that he would call the President. The President waited at the Harambee House between 12.30 pm and 3.00 pm, but the Prime Minister did not make that call. At 3.00 p.m., the President left for State House to have lunch. This was at 3.00 p.m. What a late time to have lunch! A telephone number to reach the President at State House was communicated to the Right Hon. Prime Minister so that he could call the President. The Prime Minister did not make that call. At 6.00 p.m., the State House Comptroller called the Prime Minister so that the President could speak to him in Addis Ababa. Mr. Caroli Omondi answered the Prime Minister's phone. After consulting, Mr. Caroli Omondi said that the Prime Minister was busy and he would call back after one and half hours. This is the time that he was reporting, hopefully.

Number 14 and finally, at this point, the President felt that he had consulted extensively, had accommodated the Prime Minister and had fulfilled the constitutional requirement with regard to consultation and, therefore, made the announcement on Friday, 28th January at 8.30 a.m.

I think it is up to the country to decide whether there were consultations or not.

Mr. Speaker: Order! Leader of Government Business, you have done your part. You have said your piece in the language that you had. However, there is one area in which, perhaps you have strayed, in my opinion. It is not right to say that the House will decide on who between the President and the Prime Minister is saying the truth. It is not the conduct of the two that is in question here. That position will have to be expunged from the records.

Ms. Karua: Mr. Speaker, Sir, we have heard from the Leader of Government Business. My conclusion is that there was no agreement between the President and the Prime Minister. That has been made very clear. However, the President got tired of the consultations. The President must not tire of consultations. Sometimes, consultations go wrong and can take a long time. However, on important matters, it is my plea that we should not tire; whether it is the Assembly or the two Principals. I want to say that this is not about the two Principals. This is not a power game between them. This is about our country. This is about reforms. Courts of law are everything to our country. It is failure to believe the courts that was used as an excuse to do what we did to each other. It is important that as we set out to get a Chief Justice to steer off the judicial reforms, we must burn our midnight oil, even if it means going round and round until we come to the answer. I am urging that soberly, this matter is referred back to consultations.

Number two, even if the consultation was right, the process was wrong. I said that this is not about the two individuals. Before I go back to the sections my colleagues read, what did we want to achieve as Kenyans when we passed the new Constitution on 4th August? We wanted a complete break from the past. We wanted a new method of filling

the top offices. That is why Section 166, unlike the previous Constitution where the President could appoint any judicial officer, this time it is the Judicial Service Commission (JSC) made not only of lawyers, but of others within the society. It is an expanded JSC which this House, for the first time in the history of this country, has vetted. All the other JSCs have been an in-house thing. So, for the first time, we have vetted the JSC which will give us a head of the Judiciary who then must be approved by Parliament. It is not right that we should use our knowledge of the law to mislead. The Schedule cannot take over the substantive sections of the Constitution. When it comes to appointments, Section 166 overrides anything the Schedule says. Again, does the Schedule conflict? It does not. The Schedule talks about consultations. The Schedule is helping us. After 2012, we will not have two Principals. We will have one Principal, the President.

Mr. Speaker, Sir, after 2012, we shall not have two Principals. We shall have one Principal, namely, the President. This is an accident in history that we have two Principals. So, the Schedule is helping us to know how to behave during this period where we have two Principals. So, every reference to the President appointing in this Constitution, during the transition and before the 2012 Elections, will mean in consultation with the Prime Minister as per the National Accord. That is all that the Schedule is directing. It is not seeking to take over the provisions of Section 166. Therefore, the Judicial Service Commission (JSC), in my view, is totally right when it asserts its right to originate the names. This takes it away from being a power game between two individuals. You have seen the reaction of the House. People are reacting emotionally depending on which Principal you support. I support neither. I want to go with the law. I want to support Kenya and go with the law.

Therefore, let us sober up and remember that beyond Parliament, we are Kenyans. We are going to quarrel with each other and we will need an independent court to arbitrate over our quarrels. We will go through elections and any disputes that we will have, we will go the court.

(Loud consultations)

Mr. Speaker, Sir, will you protect me from across the aisle consultation that is taking place?

Mr. Speaker: Order, hon. Members! Order Member for Westlands, Member for Lugari and Member for Kisumu West! Let us hear the Member for Gichugu!

Ms. Karua: Mr. Speaker, Sir, I was saying that we all need the courts to solve our disputes with each other and to even handle this sort of situation where we are arguing about the interpretation of the Constitution. If we do not have a court that we can all believe in, where are we going to go? I want to urge the President and the Prime Minister not to tire in their consultations and that the JSC is the one that must give them the names. These two gentlemen must not have the liberty to bring their cronies to us. The JSC must give us the names and then all they do is to pick from a pre-determined bucket.

I want to agree with those who have said that because the Chief Justice is outgoing, he ought not to sit in the JSC, but that is not my reason. Let us look at Schedule 6, Chapter 24. His time has expired by sheer effluxion of time. His tenure ended on Friday. The Schedule reads that:-

"The Chief Justice in office immediately before the effective date shall within six months after the effective date vacate office and may choose..." So, he vacated office by sheer passage of time; effluxion of time on Friday. Therefore, in yesterday's Press conference, he was accompanying--- We can say sorry that he was in attendance. So, the Committee must choose one among them to chair temporarily. We must, therefore, be conscious, as a House and the leadership of this country, that we do not have a Chief Justice in Kenya at the moment. We, therefore, must move with speed. Let the Judicial Service Commission very quickly come up with the names. Let the House do its work.

Mr. Jamleck Irungu Kamau: On a point of order, Mr. Speaker, Sir. Is it in order for hon. Karua to mislead this House that the tenure of the Chief Justice expired on Friday while we know very well it has not expired until 27th February? This will be six months after the promulgation of the new Constitution.

Ms. Karua: Mr. Speaker, Sir, if he has counted accurately and it will be on 27th February, then it will expire on that date and we still have time, but I need not apologize on that. His tenure is fixed and will expire by sheer effluxion of time.

The Minister for Justice, National Cohesion and Constitutional Affairs (Mr. M. Kilonzo): On a point of order, Mr. Speaker, Sir.

Mr. Speaker: Order, Member for Gichugu!

Ms. Karua: Mr. Speaker, Sir, but I sat in silence listening to him.

Mr. Speaker: Order, Member for Gichugu! The Minister for Justice, National Cohesion and Constitutional Affairs has caught my eye and I have the discretion to allow a point of order notwithstanding that you are on a point of order!

Ms. Karua: And that I sat in silence when he contributed.

Mr. Speaker: Well, he may not have the same manners that you do.

The Minister for Justice, National Cohesion and Constitutional Affairs (Mr. M. Kilonzo): Mr. Speaker, Sir, I have a lot of respect for my learned friend, hon. Karua, but a simple calculation from 27th August, 2010, is that the first month ended on 27th September, the second month on 27th October, the third month on 27th November, the fourth month on 27th December, the fifth month on 27th January and the sixth month will end on 27th February, 2011. Therefore, we have an obligation to advise the country correctly.

Ms. Karua: Mr. Speaker, Sir, that is nothing new. He has merely repeated what hon. Jamleck Kamau had ably and with brevity convinced me. Even though the Chief Justice's tenure is unexpired, to sit to determine who his successor is going to be, is morally wrong. He should exclude himself. I talked of a new break and even the Attorney-General, although he is not barred, both of them are being retired by this document. They may wish to let a new team help us, otherwise, we will not have a complete break with the past. It is their choices in the past that have got us to where we are, namely, to need a new beginning. That is the point I was trying to make.

To wind up, we will still need to vet whoever is nominated by the Judicial Service Commission and appointed by the two Principals. They will still need to undergo vetting. You cannot sit as Chief Justice who have not been vetted and preside over the vetting of judges. I want to agree with the principle of gender inclusivity and also looking at Kenya as a whole. If it is the Finance Chapter, it has the Commission on Revenue Allocation, Director of Budget and other officers. When appointments are being made, the two Principals must look at Kenya, so that you do not take a cluster and cluster it with

individuals without looking at the larger country and the gender composition. I heard my learned colleague, the Minister for Lands, complaining about certain structures. Yes, you will go to Ministries and find that there is no geographical distribution, but it is not only the office he was citing. You will go to the Prime Minister's or the President's office and the story is the same. This is an opportunity for us to break with the past and we better do it right.

Mr. Speaker, Sir, you have been asked not to interpret the law as the court. For purposes of House proceedings, the Speaker is the final arbiter. A court of law may later, on a Motion, interpret differently, but for purposes of our proceedings, it is to the Speaker we turn for directions. Do not shy away from your responsibility of giving directions to the House. You will only be exercising your function as the head of this arm of the Government called the Legislature. You will not have overstepped your mandate and the writing is clear. Once again, the Principals should consult and give us a name that will have originated from the Judicial Service Commission.

The Prime Minister (Mr. Raila): Thank you, Mr. Speaker, Sir. I did not anticipate that I will be required to make this Statement, but I am compelled to do so having listened very carefully to what the Leader of Government Business has said here. Probably, it may not have been fair for me to make this Statement without the President being present here, but the circumstances as I have said, are the ones that compel me to do so.

Mr. Speaker, Sir, I want us to understand that over the period, we have perfected the method of consultation with His Excellency the President. Indeed, we have been guided by the National Accord, which we jointly signed, and in which we say as follows in the preamble:-

"Given the current situation, neither side can realistically govern the country without the other. There must be real power-sharing to move the country forward and begin the healing and reconciliation process.

With this agreement, we are stepping forward together as political leaders to overcome the current crisis and to set the country on a new path. As partners in a coalition government, we commit ourselves to work together in good faith as two partners through constant consultation and willingness to compromise.

This agreement is designed to create an environment conducive to such a partnership and to build mutual trust and confidence. It is not about creating positions that reward individuals. It seeks to enable Kenya's political leaders to look beyond partisan considerations with a view to promoting the greater interests of the nation as a whole. It provides the means to implement a coherent and far-reaching reform agenda to address the fundamental root causes of recurrent conflict, and to create a better, more secure and more prosperous Kenya for all."

Mr. Speaker, Sir, guided by the National Accord, we have perfected the art of consultation with the President. We meet regularly. Usually, we agree on the agenda we are going to discuss before we meet. That means we do not have to spend a lot of time.

I want to say that I wish the Vice-President and Minister for Home Affairs had shared with me the Statement that he had been given to read here. He would probably have thought twice before he read that Statement. There are certain aspects of that Statement which are correct. I want to inform the House in advance that I am going to be very candid and very factual. I think it is important to do so.

(Applause)

Mr. Speaker, Sir, the dates that the Vice-President and Minister for Home Affairs has mentioned, that is 6th December and 16th December, 2010 are correct. Indeed, we met on 6th December, 2010 and said that we would meet again. We met on 16th December, 2010. When we met on 16th December, our experts drew our attention to Transitional Clause 24, on the appointment of the Chief Justice, which says:-

"24(2) The new Chief Justice shall be appointed by the President subject to the National Accord and Reconciliation Act and after consultation with the Prime Minister and with the approval of the National Assembly."

Advised that way, we decided that there must be some kind of procedure we were going to follow to be able to identify the Chief Justice, the Attorney-General, the Director of Public Prosecutions and the Controller of Budget. We agreed that a panel be set up to handle this matter and come up with recommendations of three names for each of those positions.

We suggested that the panel should consist of one officer from the Office of the President, one officer from the Office of the Prime Minister, one officer from the Law Reform Commission, one officer from the Law Society of Kenya, one officer from the Judicial Service Commission, and one officer from the Public Service Commission. We agreed that that panel should find a way of interviewing Kenyans and then making recommendations of three names from which we would be able to pick individuals.

Mr. Speaker, Sir, that was on 16th December, 2010. We did not meet again until 27th January, 2011, which was Thursday, last week. Before our meeting of Thursday, our aids had agreed on the agenda we were going to discuss. The Minister for Justice, National Cohesion and Constitutional Affairs has said that we met for a long time. On that day, we were not talking about these positions. The agenda from my office was:-

First, I was going to brief the President on the drought situation in the country and the measures we were taking as Government to deal with that situation. When I was in North Eastern Kenya, parents petitioned that during this period of serious drought, as Government, we needed to find a way of waiving school fees for them. This is a decision which has financial implications, and which is to be taken to him.

Secondly, I was going to brief the President on my mediation role in Ivory Coast.

Mr. Speaker, Sir, on the other side, the President's agenda was:-

First, he was to brief me on the issue of the African Union and the "shuttle diplomacy", which the Vice-President and Minister for Home Affairs talked about.

Secondly, he was to brief me on the issue of the International Criminal Court (ICC).

Thirdly, he was to brief me on the issue of these appointments.

Having dealt with the three other items, we came to this other one, and I said that we had appointed a panel to give us advice but that panel had not come up with any names. Over the issue of the Chief Justice, I told the President that because we were setting up a process of vetting all the judges and the process had not started, we appoint a new person before 27th February, 2011, when the term of the current Chief Justice would expire. I suggested that we get a judge from the Commonwealth for a fixed term of three years, non-renewable, as we go through the process of vetting the current judges and looking at them before we do the appointment.

Mr. Speaker, Sir, His Excellency the President said: "Yes, that is also a good idea. However, we can also look at the people we have locally and maybe, we can have somebody who has got near it. That way, we will be seen to have rewarded merit locally." I told him: "Mr. President, I have no serious objection about that if we can get somebody who is acceptable."

At that time, no name had been mentioned. I asked him: "Do you have any suggestions?" He told me: "Yes, I have made some consultations and I have the names." I said: "Then let us look at those names." He then produced a list of names, which I have here, and which are as follows:-

(i) The Chief Justice is Justice Paul Kihara Kariuki, High Court Judge, Kiambu County.

(ii) The Deputy Chief Justice is Justice Hannah Okwengu, High Court Judge, Homa Bay County. The Attorney-General is Mr. Fred Ojiambo, private practice; Director of Public Prosecutions is Mr. Kioko Kilukumi, private practice. The Controller of Budget is Mr. William Kirwa who is the Managing Director, Agricultural Development Corporation (ADC). The Director of the Kenya Anti-Corruption Commission (KACC) is Dr. PLO Lumumba. That is the list that I was given by His Excellency, the President. I informed him that because I was seeing the list for the first time, I needed time to consult. He then told me that he wanted us to agree so that those names could be announced the same day.

Mr. Speaker, Sir, you understand that this is a weighty issue because I said that we had already appointed a panel. I was told that one of the two gentlemen who were with us in the room were members of the panel. They told us that they only met once and they interviewed persons for the position of the Director of Public Prosecution and had come up with two names. One was Mr. Kioko Kilukumi and the other was Mr. Kiage. They adjourned to meet again to deal with the issues of the Attorney-General, the Chief Justice and the Controller of Budget but they had not yet met. We agreed with the President that I should go, make some consultations and send my Permanent Secretary and Chief of Staff to meet with his Permanent Secretary and Personal Secretary or advisor that afternoon.

When I made some consultations, our view was that to pick from the current Judiciary people who have not been vetted will not be right. Through those consultations, we came up with the name of Mr. Pheroze Nowrojee as the Chief Justice. We said that, that was the name we had from the private sector, otherwise we would get somebody from outside and if not he would come up with another name. We have nothing against Justice Paul Kihara Kariuki except that he is a member of the current bench and has not been vetted. When this team went back to consult, they did not agree. First, they said that Mr. Pheroze Nowrojee is an activist and, therefore, is not acceptable. I said that I will be very candid. Mr. Pheroze Nowrojee's name, having been dropped, they came up with a list of judges in the Judiciary. That is something that I was amazed with.

During the first consultation with the President, I asked what the background of Mr. Kariuki was and I was told that he is a reformer. That is the reputation that he has. So, the list of pecking order was provided from the Office of the President and not from me. So, when they were discussing at that time, they came up with a pecking order of the Judiciary which they got from the Judiciary. It is in that list that the names of Justice Ringa Riaga and Justice C.S. Omolo appear. I had never talked about Justice Omolo. This

was never my idea. I did not talk about Justice Omolo being the Chief Justice. This list was provided when the experts were discussing at the Office of the President. It was provided from the Office of the President.

(Loud consultations)

Mr. Speaker: Order, hon. Members!

Please let us hear the Prime Minister.

The Prime Minister (Mr. Raila): Mr. Speaker, Sir, I said that if they insist then I would say that Justice Omolo is a serving judge and, therefore, he does not qualify because he has not been vetted. I said that if they insist that they must have people from the bench then let them go by the seniority. I said that in that pecking order there is, first, Justice Omolo, Justice Phillip Tanui, Justice Samuel Bosire, Justice Emmanuel Okubasu, Justice Bowijo ole Keiwua, Justice Erastus Githinji, Justice Phillip Nyamu Waki, Justice Onyango Otieno, Justice Aganyanya, Justice Magan Visram and Justice Gregory Nyamu.

Mr. Speaker, Sir, on the list of High Court judges which they had, we found the first one was Justice Mbogholi Musagha. We also found that Justice Kariuki who had been projected was number 21 on the list of High Court judges. Our view was that this matter needed more time for consideration. The gentlemen from the Office of the President left my people and said that they were going to consult with the President. After they came back I was called later and told that they were saying that I should pick the Attorney-General of my choice and they would pick the Chief Justice. I said that it is not a question of me or the President's preference in picking people to fill very important offices in the country. It was not an ODM's Attorney-General or PNU's Chief Justice but we were picking a Chief Justice for the Republic of Kenya. That is why I said that this matter needed further consultations. Since I was travelling to Addis Ababa the following morning, I suggested that this matter be deferred until we come back because the President was also leaving for Addis Ababa the day after my departure. I instructed my secretary to write a letter to the Permanent Secretary, Office of the President. The letter says:-

"I have been instructed to advise you that the Rt. Hon. Raila Odinga, the Prime Minister of the Republic of Kenya will be travelling to Addis Ababa, Ethiopia tomorrow on 28th January, 2011 to present his report on the Cote d'ivoire to the Africa Union Peace and Security Council. Consequently, the consultations between His Excellency, Mwai Kibaki, the President and Commander-in-Chief of the Armed Forces of the Republic of Kenya and the Prime Minister on the appointments of the Chief Justice, the Attorney-General, the Director of Public Prosecutions and the Controller of Budget should be held sometime next week on a date convenient to both Principals."

Mr. Speaker, Sir, that is how I left the country and travelled the following day. The meeting that I was attending in Addis Ababa started late in the afternoon at 4.00 p.m. We were in a closed door meeting and I was not informed that anybody wanted to talk to me. When I went out of the room to go and have some refreshments, I was confronted by a battery of journalists asking me if I was consulted about the appointments. I was not aware and I did not make any comment at that time. Later on, I was told that the President, in consultation with the Prime Minister, had appointed not Justice Paul Kihara Kariuki but Justice Visram and not Mr. Ojiambo but Prof.Githu Muigai as the Attorney-

General. At that point I said that when we discussed with His Excellency the President, those two names never appeared in the list. When I discussed with His Excellency the President, those two names never appeared anywhere. I am prepared to swear to this. Therefore, I was never consulted.

I want to say that we are dealing with very weighty issues of State and, therefore, we need to be very transparent in our dealings with these matters. I would say that I have nothing against the appointment of Justice Visram as the Chief Justice of the Republic Kenya and Prof. Githu Muigai as the Attorney-General. He is a good friend of mine. In fact, he is also my neighbour. His fence touches mine, and he is someone I have known for a long time. I would have no objection at all to these being appointed, but we must create proper criteria for appointing these people.

Mr. Speaker, I feel very strongly that there must be some kind of transparency and competitiveness in these appointments, because we are not appointing them for this Government. We are going for elections and there will be another Government, but these positions will be there for another number of years. That is why it is important that we have a neutral, transparent and credible process of choosing these people. That is all that I have been asking for. I do believe strongly that this has not been done. This was done in a hurry because we were going to Addis Ababa to meet heads of State to try and convince then that we have begun the process of judicial reforms.

Mr. Speaker, my hon. friend, the former Minister for Justice and Constitutional Affairs, the Member for Imenti South started what he called "radical surgery" of the Judiciary in 2003. At that time, we had Mr. Chunga as the Chief Justice. Mr. Chunga was my prosecutor in those dark days. So, I really had no time for him; he also comes from my constituency. Mr. Chunga was hounded out of office. Once out office, we then appointed Justice Gicheru, who then appointed Justice Ringera to carry out investigations in the Judiciary and carry out reforms. So, the question was: Who vetted Justice Gicheru? Who vetted Justice Ringera, so that he could pass judgment over his other colleagues?

The Minister for Energy (Mr. Murungi): On a point of information, Mr. Speaker, Sir.

Mr. Speaker: Order! The Right Honourable Prime Minister, do you wish to be informed?

The Prime Minister (Mr. Raila): No! I do not need any information, Mr. Speaker, Sir.

(Laughter)

So, that is where the rain began to beat us, because we did not start on a clean slate or platform. That was why the so-called "radical surgery" ended up without any serious reforms in the Judiciary. That is why we still have a situation where we have some judgments which are negotiated in advance. That is why every hon. Member in this House will agree with me that the Judiciary is as corrupt today as it was under Chief Justice Chunga.

Mr. Speaker, Sir, it is important that this time round we get it right. Let us get it right from the very beginning. Let us not just try to sinecure. Let us not appoint people because so and so comes from this corner. No!

Mr. Speaker, Sir, the other issue that I have, and I have said it, is that our Constitution talks about gender. I would like to see this reflected properly in

appointments which are being made now henceforth. Therefore, I found it extremely objectionable that we can appoint people to four very important positions and there is not a single woman. We have a situation where the Chief Justice is--- If we did not have them, then we would have an excuse. We have a situation where in Ghana, the Chief Justice is a woman. The Chair of the Electoral Commission of South Africa is a woman. Therefore, I insist that this process was done unconstitutionally. It needs to be nullified and then we start afresh.

Mr. Kioni: Thank you, Mr. Speaker. One of the things that needed clarification was whether there was consultation. Listening to the Leader of Government Business and the Prime Minister, both of them confirmed that there was consultation.

Mrs. Odhiambo-Mabona: On a point of order, Mr. Speaker, Sir. Is the hon. Member in order to misinform the House? We have all been here. We have listened to the Vice-President and Minister for Home Affairs and to the Prime Minister. The Prime Minister has been very categorical that for two of those positions, there was no consultation. I shall not be intimidated. There was no consultation.

Mr. Kioni: Mr. Speaker, Sir, I said that listening to the Prime Minister and the Vice-President and Minister for Home Affairs it is now clear to us, and the public at large that there was consultation, and the utterances that one maybe mad and not the other one, really has no place in our politics now.

Mr. Speaker, Sir, I was one of the 27 people who were in Naivasha.

Mr. Speaker: Order, hon. Member for Ndaragwa! You have used language that appears very offensive. You are referring to His Excellency the President and the Right Hon. Prime Minister and saying that one of them may have been mad.

Mr. Kioni: No! Mr. Speaker, Sir, I said that utterances to that effect have no room. I did not say that any of them is mad. I have no doubt.

Mr. Speaker: Fair enough. I will give you the benefit of the doubt. If the word "mad" appears in what you say, it is ordered to be expunged.

Mr. Kioni: Mr. Speaker, Sir, I will go with that ruling.

I was saying that I was one of those people who went to Naivasha as the Parliamentary Select Committee (PSC) on constitutional review. When we received the draft from the Committee of Experts (CoE), within it there was the provision that in any consultation between the Prime Minister and the President there would be need for concurrence. We sat as members of the PSC and agreed that if we allow the word "concurrence" into the Constitution, then we would allow ourselves to get into a stalemate in this country. We were unanimous in saying that what we needed was consultation, so that the country never came to a standstill. That is one of the things.

Mr. Speaker, Sir, in that meeting my good friend, the Minister for Lands amongst others, were present.

The Minister for Lands (Mr. Orengo): On a point of order, Mr. Speaker, Sir. It may go on record that what Mr. Kioni is saying is accurate when it is not accurate. There were arguments about what is in the National Accord, and that is why we said that because it is clear on the issue of power sharing--- It went beyond consultations. In law, the inclusion of the word, "concurrence" would have been completely superfluous.

Mr. Kioni: Mr. Speaker, Sir, again he has confirmed that we agreed not to have the word "concurrence" in the Constitution. That is why it is not there.

The other thing was---

Mr. Speaker: Order! That will need interpretation, because each of you has a different position from the other.

Mr. Kioni: Mine is that it is not in the Constitution; so interpretation would be easy.

Mr. Speaker, Sir, the other thing was the issue of the appointment of the Chief Justice. In the Sixth Schedule if you read 29(2) it says:-

"Unless this Schedule prescribes otherwise, when this Constitution requires an appointment to be made by the President with the approval of the National Assembly, until after the first elections under this Constitution, the President shall, subject to the National Accord and Reconciliation Act, appoint a person after consultation with the Prime Minister and with the approval of the National Assembly"

Mr. Speaker, Sir, again, it is "unless this Schedule prescribes otherwise". It prescribes that a new Chief Justice shall be appointed by the President subject to the National Accord and Reconciliation Act, after consultation with the Prime Minister and with the approval of the National Assembly. Nowhere does the Judicial Service Commission (JSC) come in. In the event that there is a vacancy, Section 3 provides how that vacancy will be filed.

Mr. Speaker, Sir, you have been invited to make a ruling and give an interpretation of all this. As you do so, I want to draw your attention to Article 165(3) (d). It says:-

"Subject to Clause (5) the High Court shall have jurisdiction to hear any question respecting the interpretation of this Constitution, including the determination of the question whether any law is inconsistent with, or in contravention of this Constitution"

You can read the whole of it. In other words, matters of the interpretation of this Constitution lie with the High Court.

Mr. Speaker, Sir, I am happy to recall that you have on a number of occasions in previous sittings said that it is not your work to interpret the Constitution. So as we do this, it is important that you remain clear as to what you have told us in the past.

Mr. Speaker, Sir, there is the Political Parties Act which was passed by this same House. Under Section 5, there is an establishment of a tribunal called "the Political Parties Disputes Tribunal". Section 6 provides for the purpose of that Tribunal. The purpose of that Tribunal is to determine disputes between members of a political party, disputes between political parties forming a coalition, or appeals from decisions of the Registrar under this Act.

If the dispute that is before us has anything to do with the political parties in the name of ODM and PNU, then the place to take that dispute is to the Political Parties Dispute Tribunal, and not to the Speaker of this House.

Mr. Mbadi: On a point of order, Mr. Speaker, Sir. The hon. Member for Ndaragwa has made a very serious assertion and allegation, which I feel is out of order by saying that the appointment of the Chief Justice and three other officers, which are Constitutional provisions, can be taken to a tribunal that handles matters of political parties. Is it in order for the hon. Member to reduce a constitutional matter to a matter of differences between political parties?

Mr. Speaker: Member for Gwassi, you have raised that matter, but I am afraid it does not amount to a valid point of order. You must follow the proceedings in this House to be able to raise a point of order that will pass the test. The Member for Ndaragwa put a

situation which is figurative. He is not categorical. He says, "If it is a problem of political parties---". Obviously, he is not asserting that, that is so. I know you are a good scholar.

Proceed, Mr. Kioni!

Mr. Kioni: Thank you Mr. Speaker, Sir, for that clarification.

It is also important for us to take note of the fact that the power sharing, as contained in the National Accord, is between parties. Any dispute coming out of power sharing then has a bearing on the political parties.

Finally, listening to the Prime Minister I did not hear him make any proposal for giving a woman one of the four positions. There was no initiative from that side. I was keenly listening to hear that the aspect of gender had consideration by both sides.

The Prime Minister (Mr. Raila): On a point of order, Mr. Speaker, Sir. As I have mentioned, we had not agreed on the other positions at all. We were talking about the Chief Justice only. We had names which we were not able to submit because of lack of consultations.

Mr. Speaker, Sir, if you allow me, we always agree. We have sent names here for members of other Commissions, for example the Commission on the Implementation of the Constitution (CIC) and the Revenue Allocation Commission (RAC). We always agree if there is proper consultation, but in this case there was no consultation.

The Minister of State for Immigration and Registration of Persons (Mr. Kajwang'): Mr. Speaker, Sir, I will be very brief. I just want to address one issue. That is the issue of the jurisdiction of the Speaker in determining whether this House can discuss the names that have been brought forward to his office for discussion either in this House or in a Committee of this House. The law is that this House cannot discuss anything that is unconstitutional. It is up to the Speaker to determine whether the Motion to come before the House meets the test of constitutionality. It is not for a court to determine for this House whether a matter is constitutional or not. In fact, it is the duty of the Speaker to, either in his own Chambers or on the Floor of the House, to make a ruling as to whether a matter---

Mr. G. Nyamweya: On a point of order, Mr. Speaker, Sir, this is really of grave concern. There is really no Motion before the House in the first place. So, there is nothing that we can ask you to go and rule on. In fact---

Mr. Speaker: Order, Mr. Nyamweya! Why do you want to pre-empt any possible decision by the Speaker. Leave that to me!

The Minister for Lands (Mr. Orengo): On a point of information, Mr. Speaker, Sir.

The Minister for of State for Immigration and Registration of Persons (Mr. Kajwang): I will allow!

(Laughter)

The Minister for Lands (Mr. Orengo): Mr. Speaker, Sir, I just want to inform the Member for Mbita that indeed, the Constitution contemplates that every person in Kenya including State organ and State officers; in the national values and principles of governance, must apply or interpret this Constitution. For example, when the President is making a decision, he has to satisfy himself that the decision he is making is Constitutional. So, this Constitution is wise to advise every State organ, every State

officer, every public officer and all persons, whenever any of them applies or interprets this Constitution - this is on page 15 – enacts, applies or interprets any law or makes or implements public policy decisions.

Mr. Speaker, Sir, the simple answer is, if what Mr. Nyamweya is saying is true, then the oath of allegiance and/or affirmation is completely useless because it says: "I shall obey, protect, preserve and defend the Constitution" If you cannot interpret it, then how do you defend it? So, with respect, I think you need to go back to Law School.

Mr. Speaker: Order, Order hon. Orengo! Some of what you have said is completely unnecessary because I had ruled hon. Nyamweya actually, as not raising a valid point of order because he was seeking to usurp my role. So, you did not have to speak to that and in the process perhaps, insult hon. Nyamweya. But because you asked him to go back to school, I will allow hon. Nyamweya to say his piece.

Mr. G. Nyamweya: Thank you Mr. Speaker, Sir. Ordinarily, I would not be bothered really to engage myself in matters that have no concern to ourselves. Truly we are dealing with very heavy and weighty matters, and this is something we must be able to get out of. We must navigate the country of this quagmire. For that, we must be truthful and factual to the Constitution which we have passed. We must also be truthful to our own procedures. Our own procedures, truly, was a point of order raised and we have dealt at great length with all these matters without enabling the House to eventually come to any conclusion. I think that is common sense. It is not a question of my loyalty or patriotism to the Constitution. I think my learned friend should have the courtesy of honouring me the way I honour him.

The Minister of State for Immigration and Registration of Persons (Mr. Kajwang): Mr. Speaker, Sir, I was just about to conclude. As much as we emphasise the consultation which ought to be there and which must be there because it is in the Constitution, we must also understand that we did not even start with the word "consultation". We started with "National Accord" and due weight must be given to the spirit and the letter of the National Accord before you suggest whether the consultation has actually happened or not.

Mr. Speaker, Sir, the only little thing I wanted to add is that, I can hear a lot of Members suggesting that you have no jurisdiction to determine whether this matter can be ruled on; whether we should discuss it or not. But I want to urge that it can be ruled on. In fact, that is why you have allowed us to speak on it. That you can rule on it with or without a Motion because you have the jurisdiction to do so and if time comes for a Motion, we can debate that Motion. I think you can save this country a lot of time and a lot of agony by ruling on this matter; that there was no consultation and that the appointments were unconstitutional.

Mr. Abdikadir: Mr. Speaker, Sir, after the passing of the Constitution, probably the most seminal decision this House will make involves the appointment of the new Chief Justice. There is one major decision we have to take very seriously; that is the decision. Other than the House and the Executive, the most critical institution for us at this time in the history of this country is the Judiciary. Having the right Chief Justice with the right support from the country behind him or her is really the best gift this Parliament can give to the country at this point in time.

Mr. Speaker, Sir, this is really about the law, but it is more than the law. It is about a culture. It is about constitutional culture and developing the right conventions as

we move forward in the implementation of the Constitution. The way we do these things is very important. It is not just the things that are done, but really the way we do these things is very important. Somehow, it looks like we always look for the most difficulty way of doing things. I do not know why we torture ourselves as a country and always look for the most difficult routes. Surely, there are simpler ways of handling these things.

Last week, a number of us travelled as Justice Committee and we met a lot of Kenyans. The hope in their eyes and the aspirations they have for this country and the frustration that is out there; that we as a country have everything as an ingredient to move us forward but we just refuse to make these decisions and move forward. Surely as a people and a leadership, we do not have to do this every time based on politics. Really, let us get to the bottom of this. This is the game of politics being played as a zero sum game. Not only that you must win, but the other party must lose. It does not have to be that way. The law is very simple; in my opinion, the Judicial Service Commission is not necessary in this first appointment and the law is very clear. But the consultation of the Prime Minister is compulsory. That is the law! The first appointment is made under Article 24.

Mr. Speaker, Sir, two weeks ago, I heard that the Executive was setting up a committee to interview these appointments, and I was shocked that we would have a committee of the Executive interview a future Chief Justice. It does not go well that the future Chief Justice of the country can be interviewed by junior civil servants. So, I called both offices of the Executive and asked if that was the case and whether it would be better if they could go the way of advertising. I asked them whether it would be better to use the Judicial Service Commission now that it was there. The view from both sides of the Executive was that this is the Executive's mandate at this point in time. I agreed because that is what the law says. Article 24 talks about the first appointment of the Chief Justice and while it is better to have the Judicial Service Commission, it is not constitutionally necessary to have the Judicial Service Commission in that first appointment. It says:-

"The Chief Justice in office immediately before the effective date shall within six months after the effective date vacate office and may choose to vacate office".

The normal way for a Chief Justice to vacate office under this Constitution is under Article 168. So, if we were to follow the argument that because Article 166 deals with the appointment of a Chief Justice normally and is operative, we should also use the same interpration to say the normal exit process for a Chief Justice is under Aritlce 168 and, therefore, that ought to apply irrespective of the Schedule. That is not the case. The first appointment of the Chief Justice was special because we were not sure we would have a Judicial Service Commission in place, in time for the six months when we intended the Chief Justice to exit. We did not want to have a vacuum. That is the reason we put that. This was agreed to three weeks ago by both sides of the Executive. They were very clear in their mind that this was a decision for the Executive to make. That is the first point.

The second point on whether the judges are vetted or not, any appointment, including the ones we made to the Judicial Service Commission (JSC), in the event of a sitting judge is subject to vetting. That is also clear. The critical point before the House now is the issue of consultation. This is about culture. The Office of the Prime Minister and the Office of the President are the two most senior offices other than that of the Speaker and the Chief Justice that we have in this country. Those offices have decorum.

They have to be led with decency, a lot of weight and circumspection. For a normal country, the Prime Minister saying "I was not consulted" or the President saying "I consulted" should be enough. Sometime back, the American President realized that he had to talk to his French counterpart because he thought there were Soviet missiles in Cuba. He sent the photos to show his colleague that this was the case. The French Prime Minister told him: "Look, your word is good enough for me. If you say they are there, I take it." That is the way it is supposed to be. The way the country is run ought to be on that basis. Surely, this is a decision our two senior most leaders can take.

Mr. Speaker, Sir, I leave it to you and to the two Principals.

(Applause)

Mr. Speaker: Order, hon. Members! You will note that we just have another 20 minutes to go.

Proceed, Dr. Machage!

Dr. Machage: Mr. Speaker, Sir, again an opportunity arises for the leadership of this country to show their strength or weaknesses. I am very happy to note the Statement by the Prime Minister that they have designed a way of talking and solving issues as Principals. He confirms that they have always consulted and agreed on everything. That is noble and that is statesmanship. If I quote him on the speech he gave after he landed, he said: "I have no problem with his Excellency the President. I have only a problem with people surrounding him." I wish he could also say that he has a problem with people surrounding him, because I think that is the problem.

(Laughter)

Mr. Speaker, Sir, the Prime Minister was told and interviewed while in Addis Ababa, and he held his peace not to comment. Why? Because age and wisdom dictated that he does that. However, what happened here at home? An hon. Member of this House rushed and pre-empted what he thought the Prime Minister should say. He fixed the Prime Minister on what to say when he arrived.

An hon. Member: Can you tell us who that was?

An hon. Member: Toboa!

Dr. Machage: I do not have to expound on that because it is public knowledge.

An hon. Member: Toboa!

Dr. Machage: Mr. Speaker, Sir, this is the issue. Section 24(2) and Section 29(2) are very clear. There are two schools of thought on the appointment of the Chief Justice. However, the two Principles had picked on one school of thought. They all agreed that there was no need for the involvement of the Judicial Service Commission. They consulted and agreed with their teams. The Prime Minister has said in this House that he wishes His Excellency the President was seated as he made his Statement. I find it noble. However, let me say this: The Leader of Government Business, who is the Principal Assistant to the President issued a Statement that I believe is a true summary of what might have transpired in those noble houses.

Hon. Members: Why do you believe that?

Dr. Machage: Because that is the only information we have here.

(Applause)

Mr. Speaker, Sir, if it is so, I find very little diversion between the statement of the Leader of Government Business and the speech, as put to this House by the Prime Minister. The problem is; how much is enough consultation? How long can a consultation be accepted to take place? This is a subjective issue. Everybody is born with his own personality and different background of upbringing and culture. Some people are impatient and some people are over-patient. That is the truth about humanity. Mr. Abdikadir has made a very moving speech here. You are now called upon as the Principals of this country to give that leadership that has been bestowed upon you by the people of this country. What is my advice? Since---

Mr. Ogindo: On a point of order, Mr. Speaker, Sir. Given the interest that is there on this matter and given the amount of time remaining, would I be in order to request that hon. Members take a maximum of three minutes?

Mr. Speaker: You will be in order, but even then, only five of you will speak.

Dr. Machage: Mr. Speaker, Sir, I am nearly concluding. I will not take much time. Mr. Speaker, Sir, on the way forward, since for some reason a cat has been let out of the bag and already His Excellency the President did what he thought in his wisdom, is more than enough consultation--- We do not know what he would have talked with the Prime Minister over the telephone – the telephone call that the Prime Minister said he was never informed was from the Head of State--- Since he already announced a list of names that are public knowledge, it would be erroneous and not wise - and I seek the Prime Minister to listen to this – not to accept and let this list of names be brought to this House and let us discuss it. That is the only way forward.

Thank you very much.

(Applause)

An hon. Member: Those are rejected!

Mr. Speaker: Order, hon. Members!

Proceed, Mr. Joho!

Mr. Joho: Asante Bwana Spika. Kenya ni nchi ambayo inadai kuwa na uongozi. Sababu ya uongozi, haitoshi kuwa unaweza kuwa na nafasi ya kufanya uteuzi ama uchaguzi. Bibilia na hata Qur'ani zimekubali na zimesisitiza umuhimu wa ushauri. Ushauri haumaanishi kuelezana. Kenya ama Wakenya wamejichagulia na kujitengezea Katiba ambayo inafaa kuendesha na kulinda maisha yao.

Bw. Spika, tuko katika mwanzo wa kuanzisha utendaji kazi wa Katiba ambayo imetengezwa na Mkenya kwa niaba ya kuendesha maisha yake. Hatari iko wakati tunaanza safari muhimu na kupiga siasa za kibinafsi wakati Wakenya wanatokwa na machozi wanapoangalia ni uongozi gani Bunge la Kumi na hawa *Principals* wawili wataonyesha katika kuikomboa Kenya.

Hatuchagui majaji wala Jaji Mkuu kwa sababu tumeamka leo na tukasema tunataka kuwachagua majaji. Tunafanya hivyo kwa sababu ya yale yaliyotendeka. Mwaka wa 2008 ni juzi. Hatari ni kwamba sisi viongozi tumesahau.

Bw. Spika, ni maombi ya Wakenya kuwe na amani nchini. Ikiwa kuna mwanasiasa ambaye hashughuliki na matakwa na maono ya Wakenya, basi hafai yeye

kuwa mwanasiasa. Wanasiasa huwakilisha matakwa na maono ya Wakenya. Wakenya wamechoshwa na siasa duni.

Mhe. Waziri Mkuu amesimama hapa na kusema mashauriano kati yake na mhe. Rais yalikuwa yakiendelea kabla ya uteuzi huu kufanywa. Nimemnukuu akisema kwamba majina mawili ya watu walioteuliwa hayakutajwa katika mashauriano yao. Hata hivyo, ni majina hayo tunayoyajadili hapa leo. Je, mazungumzo yetu hapa yanaelekea wapi? Ni wazi kwamba hakuna mashauriano kamili yanayoendelea.

Bw. Spika, sisi kama waheshimiwa Wabunge wa Bunge la Kumi ni lazima tufaulu mtihani wetu leo. Si lazima kwangu au mhe. Mbunge yeyote hapa kumuunga mkono mhe. Rais au Mhe. Waziri Mkuu bila sababu madhubuti. Ni muhimu kwa sisi Wabunge kusema haki kila mara. Sisi viongozi chipukizi hupigwa na butwaa kwa sababu ya mwelekeo wa kisiasa katika nchi hii.

Ni muhimu kwetu mambo haya yaangaliwe upya. Kuwe na mashauriano mapya ili msimamo wa mhe. Rais na Mhe. Waziri Mkuu uoane vilivyo ikiwa tutakuwa na uamuzi mwafaka juu ya matakwa ya wananchi wetu.

Asante sana, Bw. Spika.

Mr. Wamalwa: Mr. Speaker, Sir, it is a sad day for this country. I do recall in February, 2008, when we came to this Parliament, when the country was burning. We saw our two Principals rise to the occasion and demonstrate statesmanship and leadership to a new level. Once Napoleon said that from the sublime height to the ridiculous, there is but a thin line. We have seen the leaders; the two Principals, descend from the sublime height of statesmanship into politics. What is before this House could have been afforded.

It is sad that we have had today to see the Prime Minister stand before the House and the President through his very able deputy stand before this House, to defend themselves on this issue. They are doing so before the national television, where the whole nation is watching. It is a sad day. However, I do believe that what hon. Imanyara has read before the House are really two issues. One, whether it is unconstitutional to proceed to discuss the names that have been sent to this House on the basis that there were no consultations, and on the basis that they did not follow the procedure by including the Judicial Service Commission (JSC).

Mr. Speaker, Sir, from the debate this afternoon it is clear that there are two scenarios anticipated by the Constitution, one before the next election, where we would still have this grand Coalition Government with two Principals and that is covered under Article 24 under Sixth Schedule and one after the elections, which, we will only have one President, who will actually act on the advisor of the JSC. That is very clear. As to whether the JSC was to be involved or not, it is very clear that, that should be after the General Election.

The second one is the issue of consultation. Looking at the meaning of "consultation" under the Black's Law dictionary, it is very clear that consultation means the act of asking the advice or opinion of someone, a meeting in which parties consult or confer each other. So, it is possible that, as we have seen this afternoon, there were consultations between the two Principals. Indeed, there were extensive consultations between the two Principals. As to whether "consultation" and "concurrence" mean the same thing, it is not correct---

Mr. Olago: On a point of order, Mr. Speaker, Sir. Is it in order for hon. Wamalwa to mislead the House about the meaning of the word "consult," when the Concise Oxford

Dictionary, which we all respect, defines the word "consult" as follows amongst others, "to seek permission or approval from a person for a proposed action".

Mr. Wamalwa: Mr. Speaker, Sir, I was quoting the Black's Law Dictionary. Hon. Olago is my senior, he knows very well, as a lawyer, when you are talking about legal issues, there is the general English Dictionary and the legal dictionary that every lawyer in this House respects. It is the Black's Laws Dictionary, where the meaning is very clear. I can see my learned friend laughing.

(Several hon. Members stood up in their places)

Mr. Speaker: Order, hon. Members! We must all relax so that we can come to conclusion of this matter.

Member for Saboti, I think that kind of argument will sell in a trial of a case in the High Court or the Magistrates Court, or the Supreme Court as and when we establish it. But here, this is Parliament, a political institution, so we will take the ordinary meaning of the word "consult".

Mrs. Odhiambo- Mabona: On a point of order, Mr. Speaker, Sir.

Mr. Speaker: Order, hon. Odhiambo-Mabona!

Mr. Wamalwa: That was the definition of the Black's Laws Dictionary. Mr. Speaker, Sir, the second definition in the Collins English Dictionary is even clearer. "To consult", and probably, my learned friend would listen to this very carefully, "is to go to somebody for information or advice". This is the meaning of "consult" under the Collins Dictionary.

Mr. Speaker, Sir, what we are saying is that, indeed, there were consultations. The appointing authority is the President, but he consults with the Prime Minister to get the advice of the Prime Minister. They can agree, after consultations, or they can disagree or they can even agree to disagree.

(Several hon. Members stood up in their places)

Mr. Speaker: Order, hon. Memebers! Please relax. Allow the Member for Saboti to finish.

Mr. Wamalwa: Mr. Speaker, Sir, what I am saying is that where we stand as a House today, we must not forget the doctrine of separation of powers. The province of interpretation is squarely the province of the High Court. As to whether there were consultations or not, is a matter of fact. We have had both sides. As to whether we have followed the Constitution or not are a matter of the interpretation of the Constitution, which can be done by the High Court. But we are urging that we must find a way out of this situation. There is still room for consultation, but that cannot stop the process before the House. The names should go to the Departmental Committee on Justice and Legal Affairs.

Thank you.

Mr. K. Kilonzo: Mr. Speaker, Sir, it is quite unfortunate that the National Assembly has spent almost two hours deliberating on issues of the Executive, which ordinarily, they should have agreed before they got here.

Mr. Speaker, Sir, the Executive, and more so the two Principals, must realize that any time they read from different scripts, the economy of this country is affected. It is serious. So, it is imperative that when you come to this House, being the vanguard of business in this country, they should be reading from the same script.

Mr. Speaker, Sir, I have very ably listened to the Leader of Government Business. I have equally listened very ably to the Prime Minister. I am convinced from the two statements that, indeed, there was consultation. However, if there was consensus or not, it is a different matter altogether. But since the Constitution is very clear under Section 24(2), I think it is the wisdom of the drafters of the Constitution that they envisaged a disagreement when it comes to consultations at times. Therefore, they brought in the issue of Parliament. This Parliament represents the face of Kenya. The whole country is here and so, I urge you to rule that those names are forwarded to the Committee of this Parliament so that we can approve or disapprove them.

The Minister for Nairobi Metropolitan Development (Mr. Githae): Mr. Speaker, Sir, I will not go into the legal arguments that I have heard here because you have given me two minutes. I want to suggest a way forward. Not a single hon. colleague has said that the people nominated by the President are not credible, professional---

(Loud consultations)

Not a single person has cast any aspersions on the four gentlemen. Therefore, the way forward - and I think this is what the drafters of the Constitution had in mind - is where consultations between the President and the Prime Minister do not lead to a consensus, the matter is brought to this House so that it can vote on the issue. I am saying that the way forward is for the matter to come before this House and we vote on it and we move forward.

The Minister of State for Public Service (Mr. Otieno): Mr. Speaker, Sir, we can now understand the environment under which these decisions were made. There was pressure to communicate some appointments in the judicial system to help the case that was going on in Addis Ababa. I was in Addis Ababa myself and by the time these announcements were being made, we had already secured the Kenyan position at Ministerial level and it never changed.

(Applause)

So, there was no urgency after the Ministerial level had already supported the Kenya case in Addis Ababa. There was, therefore, no reason to continue the pressure on the President to name the Chief Justice and the Attorney-General and then propose names that had not been discussed with the Prime Minister because they are totally new names.

I would invite that as a House, we look for what will be good for Kenya because we are in a phase where we are creating precedents. We took several weeks to constitute this Coalition Government. We had a crisis here before concerning the Leader of Government Business. We took time until the matter resolved itself amicably. Now we have a serious case of a Chief Justice that would preside over our judicial system for ten years; a Controller of Budget and a Director of Public Prosecutions who would run our

system for eight years. We cannot make those decisions in a hurry and I plead with hon. Members.

Mr. Speaker, Sir, we are placing before you a decision whether this business is properly before us for the House to resolve it by voting. The hon. Member said that we have numbers. I plead with hon. Members that, please, do not reduce us to voting machines; we are handling serious issues that we should have---

Mr. Speaker: Order, Mr. Otieno! Your two minutes are over! I am afraid that we must now come to the end of the arguments and points of order as have been raised.

(The Serjeant-at-Arms entered the Chamber in at 6.30 p.m.)

Order, Sergeant-at-Arms! Hon. Members, I will say this: That the matter which has been canvassed before the House this afternoon is, obviously, a matter of great national importance. The issues raised are critical to the governance of this nation and I am satisfied that I have jurisdiction to determine this matter. Indeed, I have the *locus standi* to intervene in the matter as requested by Mr. Imanyara and ably supported by the arguments and points of order by 17 other hon. Members, making a total of 18. I will give directions one way or the other on Thursday afternoon at 2.30 p.m.

In the meantime, I wish to bring it to the attention of hon. Members that, indeed, we received communication from the Office of the Head of the Civil Service and Secretary to the Cabinet vide a letter dated 31st January, 2011, advising that His Excellency the President had nominated certain persons to occupy the offices of Chief Justice, Attorney-General, Director of Public Prosecutions and Controller of Budget. We, from the Speaker's Office, direct the Clerk of the National Assembly to refer the matter to the relevant Departmental Committees. In this case there will be two relevant Departmental Committees, namely, the Departmental Committee on Justice and Legal Affairs and the Departmental Committee on Finance, Planning and Trade. That is what had transpired up to yesterday evening. But, subsequently, I also received a letter from the Office of the Right Honourable Prime Minister which arrived on my desk this morning, also stating a certain position. With what has transpired in the House this afternoon, I undertake to give directions in some form or other on Thursday at 2.30 p.m. So, that will be the position and it brings us to the end of business for today.

ADJOURNMENT

Mr. Speaker: Hon. Members, that brings us to the end of business today. The House is, therefore, adjourned until tomorrow morning, Wednesday, 2nd February, 2011 at 9.00 a.m.

The House rose at 6.33 p.m.

ANNEX JLA 10

LEGAL OPINION ON THE CONSTITUTIONALITY OF NOMINATION OF THE OFFICE OF THE CHIEF JUSTICE, THE ATTORNEY GENERAL AND THE DIRECTOR OF PUBLIC PROSECUTIONS

Submitted to
PARLIAMENTARY COMMITTEE ON JUSTICE AND LEGAL AFFAIRS

By
Federation of Women Lawyers (FIDA-Kenya)

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Federation of Women Lawyers in Kenya
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BACKGROUND

The Federation of Women Lawyers - Kenya (FIDA-Kenya) is the leading women's human rights organization in Kenya. It was established in 1985 to improve the legal status of women, to increase access to justice for women in Kenya and to enhance public awareness and understanding on their rights. FIDA Kenya is a membership based organization of women lawyers and women law students.

On 4th of August 2010 over 70% of registered voters turned up to vote on the then Proposed Constitution that was published by the Attorney General on the 6th of May 2010.

This was indeed a great turning point for Kenya as the country had at this juncture matured in its interactions on constitutional matters and was able to have a spirited campaign based on issues. The results of the referendum were overwhelmingly in favour of the Proposed Constitution which was thereafter promulgated by the President on the 27th of August 2010.

On 28th of January 2011, the Office of the President announced the nomination for approval and appointment of persons to the office of the Chief Justice, Attorney General, Director of Public Prosecutions and Controller of Budget.

The announcement was contested by the Prime Minister on the basis that the said nominations were unconstitutional as there were inadequate consultations in accordance with the principles of the National Accord and Reconciliation Act of 2008 and Section 24 of the sixth schedule of the Constitution of the Republic of Kenya. In addition there have been widespread calls for withdrawal of the nominations by a cross section of civil society leaders and the public due to the controversy around the same.

Following the ruling made on the 3rd of February 2011 by the Speaker of the National Assembly, Hon. Kenneth Marende, FIDA Kenya wishes to take this opportunity to formally present its views to the Parliamentary Committee on Justice and Legal Affairs.

Through this legal opinion FIDA Kenya has considered the following issues:

1. The ruling of Hon. Kenneth Marende, Speaker of the National Assembly dated and delivered on the floor of the house on the 3rd of February 2011.

2. The Ruling of Justice Daniel Musinga, Judge of the High Court of Kenya dated and delivered on the 3rd of February 2011 in respect of NRB HCC

PETITION NO: 16 OF 2011(a copy herewith attached for perusal and ease of verification).

3. Whether the letter and the spirit of the Constitution was adhered to in the nomination process.

4. Did the process of nominations accord both men and women of Kenya equal treatment which includes right to equal opportunities in political, economic, cultural and social sphere as envisaged under Article 27 of the Constitution of Kenya.

5. What are the implications of not having a transparent, participatory, competitive process for constitutional office bearers and more specifically the current nominations.

6. What is the historical background in respect of equality and discrimination.

7. What is the bearing of political impasse in regard to the implementation of the constitution to the Kenyan citizenry.

FIDA-Kenya has relied on article 2(1), article 3, article 10, article 27, article 129, article 131, and article 259 of the Constitution of the Republic of Kenya in this opinion.

As FIDA-Kenya we believe;

1. That the process of nominations was not inclusive and therefore Article 129 and 131(2) of the Constitution were not upheld.

2. That Article 10 of the Constitution which sets out the national values and principles were disregarded whilst undertaking the nominations.

3. Article 27 of the Constitution provides for equality and freedom from discrimination however the nomination process that was undertaken did not afford equal opportunity to both men and women. The nominations proposed favored only men and therefore discriminated against women.

4. Any violation of the Constitution by any arm of Government will undermine the fundamentals of constitutionalism in the Country and continue to destroy public confidence in the Executive, Judiciary and the Legislature's ability to implement the new Constitution.

THE OFFICE OF THE CHIEF JUSTICE OF KENYA

Historically the Kenyan judiciary has been plagued with allegations of corruption, ineptitude, and indolence. In the past there has been no clear and transparent system for appointment and removal of judges and this has been highlighted in several reports from various commissions that have been formed to make recommendations for reform within the Judiciary.

It is important to note that the Judiciary being one of the state organs has perpetuated gender imbalance in key positions. A gender analysis of the Court of Appeal and the High Court reveals stark gender inequality and this cannot be allowed to continue in the new constitutional dispensation.

According to a report by the Judicial Service Commission and DPM Compliment Statistical Unit, the following illustrates a gender analysis of judicial officers as at April, 2009.

Judicial Service Establishment in Kenya by Grade and Sex[1]

RANK	Female	Male	Total	(%) Female
Chief Justice	-	1	1	
Court of Appeal Judges	0	9	9	0
High Court Judges	14	48	62	22.5
Chief Magistrates	5	8	13	38.5
Senior Principle Magistrates	5	13	18	27.8
Principal Magistrates	12	22	34	35.3
SRM	38	62	100	38.0
Resident Magistrates	30	44	74	40.5

The above table illustrates the gender disparity notable in the higher offices within the judiciary.

[1] Judicial Service Commission and DPM Compliment Statistical Unit, 2009

The Constitution of Kenya provides a firm backdrop for the much needed judicial reforms as it sets out the establishment of a reconstituted Judicial Service Commission[2] to include other stakeholders and enhance the independence and autonomy of the Commission. The recruitment of a person to this office must be transparent to ensure that the country gets the best man or woman to provide the leadership of the judicial arm of the State. Every effort must be made to fight the ever gnawing temptation to slip back to the old order that was characterized by ethnic and political considerations, partisan lobbying and horse trading. The process of appointment must not only be done but also be seen to be done in an open and credible manner that will allow all interested persons a fair opportunity to be considered and appointed to this office.

Article 159 (1) of the Constitution of Kenya provides *that "judicial authority is derived from the people and vests in, and shall be exercised by, the courts and tribunals established by or under this Constitution"*

Article 166(1) (a) of the Constitution of Kenya provides that *"the President shall appoint the Chief Justice and the Deputy Chief Justice, in accordance with the recommendation of the Judicial Service Commission, and subject to the approval of the National Assembly"*

These provisions, we submit, point to the role that is to be played by each of the three arms of Government in the selection and eventual appointment of a person to the office of the Chief Justice. The provisions further re - affirms the principle of sovereignty of power of the people as set out in Article 1 of the Constitution.

Section 24 (2) of the Sixth Schedule of the Constitution of Kenya provides that "A *new Chief Justice shall be appointed by the President, subject to the National Accord and Reconciliation Act, and after consultation with the Prime Minister and with the approval of the National Assembly."*

This position is further ingrained in Section 29 (2) of the Sixth Schedule[3] which provides that in all new appointments that require approval by the National Assembly, these shall be made by the President, subject to the National Accord and Reconciliation Act, after consultation with the Prime Minister.

In as much as the President in consultation with the Prime Minister have the mandate to nominate the Chief Justice, FIDA Kenya recommends that the

[2] Article 171, The Constitution of the Republic of Kenya, 2010.
[3] Article 262, Constitution of the Republic of Kenya – Transitional and Consequential provisions

appointment process must be an inclusive process and there fore uphold the national values and principles of governance set out in Article 10 of the Constitution.

The corollary of the aforesaid is that appointment to the position of the Chief Justice should be handled through the newly established Judicial Service Commission (JSC) which must be allowed to carry out its mandate and functions as reserved under the Constitution in Article 172.

We note in particular the provision of Article 172(2) which provides that " *in the performance of its functions the Commission shall be guided by the following:*

(a) Competitiveness and transparent process of appointment of judicial officers and other staff of the judiciary; and
(b) The promotion of gender equality."

Recommendation:

FIDA Kenya recommends that the process of appointment of the Chief Justice ought to be as follows;

1) The JSC must call for applications from qualified and interested persons.
2) The JSC should then proceed to shortlist, interview the persons.
3) The JSC will make recommendations to the President as to persons suitable for this position.
4) Upon receipt of the forwarded names, the President following consultations with the Prime Minister, shall nominate at least 3 persons, one third of whom should be from either gender.
5) The name of the nominees shall be forwarded to the National Assembly for approval.
6) Following approval by the National Assembly, the final appointment shall be made by the President.

We urge that there is every urgency in this process. It must not be lost to us the requirement that the incumbent is required to vacate office by 27th February 2011[4].

[4] Section 24(1), Sixth Schedule, Constitution of the Republic of Kenya, 2010

THE OFFICE OF THE ATTORNEY GENERAL

The process of appointment for the incoming Attorney General should reflect the letter and spirit of the Constitution. This means that the national values and principles of governance as provided under Article 10 must be adhered to. These principles include the rule of law, democracy, and participation of the people, equity, non discrimination and protection of the marginalized, integrity, accountability and transparency amongst other values.

Article 156[2] provides that "*the Attorney General shall be nominated for appointment by the President and, with the approval of the National Assembly, appointed by the President.*" This section must be read together with the provisions of Section 29 of the Sixth Schedule of the Constitution, which provides as follows:

(1) *The process of appointment of persons to fill new offices and vacancies arising in consequence of the coming into force of this Constitution shall begin on the effective date and be finalized within one year.*
(2) *Unless this Schedule prescribes otherwise, when this Constitution requires an appointment to be made by the President with the approval of the National Assembly, until after the first elections under this Constitution, the President shall, subject to the National Accord and Reconciliation Act, appoint a person after consultation with the Prime Minister and with the approval of the National Assembly.*

This means that the appointment of the office holder is ultimately the collective role of the Executive and the Legislature.

FIDA Kenya holds the view that while the appointment to this office is the mandate of the Prime Minister and the President, we hold the belief that the process of nomination and eventual appointment should be transparent, competitive and takes into consideration the provisions of gender equality and freedom set out in Article 27 of the Constitution.

It is also important to note that only men have occupied the office of the Attorney General since independence.

Recommendation:

We therefore recommend as follows;

1) The Executive must call for applications from qualified and interested persons.
2) The Executive should then proceed to shortlist and interview the persons.
3) The Executive will make recommendations to the President as to persons suitable for this position.
4) Upon receipt of the forwarded names, the President following consultations with the Prime Minister shall nominate at least 3 persons, one third of whom should be from either gender.
5) The names of the nominees shall be forwarded to the National Assembly for approval.
6) Following approval by the National Assembly, the final appointment shall be made by the President.

THE OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTION:

The Constitution establishes the office of the Director of Public Prosecution and the duties entrusted on this office are expansive and monumental to Kenyans.

FIDA Kenya states firmly that Article 27 (3), (4) and (8) of the Constitution was disregarded in the current nomination of the Director of Public Prosecution. The historical back ground of the judiciary and other state organs that deal with administration of justice have been awarded to one gender. Kenyans of all walks of life passed the Constitution with a firm belief that not only the letter but the spirit of the Constitution will be upheld by all. It is therefore important that process of appointment enables public participation and equal opportunity accorded to all Kenyans who may be qualified for the post.

Under Article 157 (2) of the Kenyan Constitution sets out that *"The Director of Public Prosecutions shall be nominated and, with the approval of the National Assembly, appointed by the President."*

Recommendation:

FIDA-Kenya is of the considered opinion that the process of appointment ought to be as follows;

1) The Executive must call for applications from qualified and interested persons.
2) The Executive should then proceed to shortlist and interview the persons.
3) The Executive will make recommendations to the President as to persons suitable for this position.
4) Upon receipt of the forwarded names, the President following consultations with the Prime Minister shall nominate at least 3 persons , one third of whom should be from either gender.
5) The names of the nominees shall be forwarded to the National Assembly for approval.
6) Following approval by the National Assembly, the final appointment shall be made by the President.

We believe that the above process will make the appointment competitive, transparent, and inclusive and in regard to Articles 10 of the Constitution.

CONCLUSION

In view of the foregoing submissions on the positions of the Chief Justice, Attorney General and Director of Public Prosecutions we firmly believe that any attempt to approve the names presented so far will not be in the spirit of the Constitution. The present nomination process if allowed to continue will ignore the right to equal opportunities accorded to both women and men and marginalized communities.

In addition it will be in disregard of the national values and principles of governance and ultimately disregard Article 259 of the Constitution that provides that the Constitution must be interpreted in a manner that promotes its purposes, values and principles, advances the rule of law, human rights and fundamental freedoms in the Bill of Rights, permits for the development of the law and contributing to good governance.

We humbly submit that to enhance constitutionalism in our nation there is need to reconsider these nominations and proceed in a manner that upholds the spirit of the Constitution that both the men and women of Kenya so overwhelmingly passed.

LEGAL OPINION ON THE CONSTITUTIONALITY OF NOMINATION OF THE OFFICE OF THE CHIEF JUSTICE, THE ATTORNEY GENERAL AND THE DIRECTOR OF PUBLIC PROSECUTIONS

Submitted to
PARLIAMENTARY COMMITTEE ON JUSTICE AND LEGAL AFFAIRS

By
Federation of Women Lawyers (FIDA-Kenya)

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3. Whether the letter and the spirit of the Constitution was adhered to in the nomination process.

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5. What are the implications of not having a transparent, participatory, competitive process for constitutional office bearers and more specifically the current nominations.

6. What is the historical background in respect of equality and discrimination.

7. What is the bearing of political impasse in regard to the implementation of the constitution to the Kenyan citizenry.

FIDA-Kenya has relied on article 2(1), article 3, article 10, article 27, article 129, article 131, and article 259 of the Constitution of the Republic of Kenya in this opinion.

As FIDA-Kenya we believe;

1. That the process of nominations was not inclusive and therefore Article 129 and 131(2) of the Constitution were not upheld.

2. That Article 10 of the Constitution which sets out the national values and principles were disregarded whilst undertaking the nominations.

3. Article 27 of the Constitution provides for equality and freedom from discrimination however the nomination process that was undertaken did not afford equal opportunity to both men and women. The nominations proposed favored only men and therefore discriminated against women.

4. Any violation of the Constitution by any arm of Government will undermine the fundamentals of constitutionalism in the Country and continue to destroy public confidence in the Executive, Judiciary and the Legislature's ability to implement the new Constitution.

THE OFFICE OF THE CHIEF JUSTICE OF KENYA

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The above table illustrates the gender disparity notable in the higher offices within the judiciary.

[1] Judicial Service Commission and DPM Compliment Statistical Unit, 2009

The Constitution of Kenya provides a firm backdrop for the much needed judicial reforms as it sets out the establishment of a reconstituted Judicial Service Commission[2] to include other stakeholders and enhance the independence and autonomy of the Commission. The recruitment of a person to this office must be transparent to ensure that the country gets the best man or woman to provide the leadership of the judicial arm of the State. Every effort must be made to fight the ever gnawing temptation to slip back to the old order that was characterized by ethnic and political considerations, partisan lobbying and horse trading. The process of appointment must not only be done but also be seen to be done in an open and credible manner that will allow all interested persons a fair opportunity to be considered and appointed to this office.

Article 159 (1) of the Constitution of Kenya provides *that "judicial authority is derived from the people and vests in, and shall be exercised by, the courts and tribunals established by or under this Constitution"*

Article 166(1) (a) of the Constitution of Kenya provides that *"the President shall appoint the Chief Justice and the Deputy Chief Justice, in accordance with the recommendation of the Judicial Service Commission, and subject to the approval of the National Assembly"*

These provisions, we submit, point to the role that is to be played by each of the three arms of Government in the selection and eventual appointment of a person to the office of the Chief Justice. The provisions further re - affirms the principle of sovereignty of power of the people as set out in Article 1 of the Constitution.

Section 24 (2) of the Sixth Schedule of the Constitution of Kenya provides that *"A new Chief Justice shall be appointed by the President, subject to the National Accord and Reconciliation Act, and after consultation with the Prime Minister and with the approval of the National Assembly."*

This position is further ingrained in Section 29 (2) of the Sixth Schedule[3] which provides that in all new appointments that require approval by the National Assembly, these shall be made by the President, subject to the National Accord and Reconciliation Act, after consultation with the Prime Minister.

In as much as the President in consultation with the Prime Minister have the mandate to nominate the Chief Justice, FIDA Kenya recommends that the

[2] Article 171, The Constitution of the Republic of Kenya, 2010.
[3] Article 262, Constitution of the Republic of Kenya – Transitional and Consequential provisions

appointment process must be an inclusive process and there fore uphold the national values and principles of governance set out in Article 10 of the Constitution.

The corollary of the aforesaid is that appointment to the position of the Chief Justice should be handled through the newly established Judicial Service Commission (JSC) which must be allowed to carry out its mandate and functions as reserved under the Constitution in Article 172.

We note in particular the provision of Article 172(2) which provides that " *in the performance of its functions the Commission shall be guided by the following:*

(a) Competitiveness and transparent process of appointment of judicial officers and other staff of the judiciary; and
(b) The promotion of gender equality."

Recommendation:

FIDA Kenya recommends that the process of appointment of the Chief Justice ought to be as follows;

1) The JSC must call for applications from qualified and interested persons.
2) The JSC should then proceed to shortlist, interview the persons.
3) The JSC will make recommendations to the President as to persons suitable for this position.
4) Upon receipt of the forwarded names, the President following consultations with the Prime Minister, shall nominate at least 3 persons, one third of whom should be from either gender.
5) The name of the nominees shall be forwarded to the National Assembly for approval.
6) Following approval by the National Assembly, the final appointment shall be made by the President.

We urge that there is every urgency in this process. It must not be lost to us the requirement that the incumbent is required to vacate office by 27th February 2011[4].

[4] Section 24(1), Sixth Schedule, Constitution of the Republic of Kenya, 2010

THE OFFICE OF THE ATTORNEY GENERAL

The process of appointment for the incoming Attorney General should reflect the letter and spirit of the Constitution. This means that the national values and principles of governance as provided under Article 10 must be adhered to. These principles include the rule of law, democracy, and participation of the people, equity, non discrimination and protection of the marginalized, integrity, accountability and transparency amongst other values.

Article 156[2] provides that "*the Attorney General shall be nominated for appointment by the President and, with the approval of the National Assembly, appointed by the President.*" This section must be read together with the provisions of Section 29 of the Sixth Schedule of the Constitution, which provides as follows:

(1) *The process of appointment of persons to fill new offices and vacancies arising in consequence of the coming into force of this Constitution shall begin on the effective date and be finalized within one year.*
(2) *Unless this Schedule prescribes otherwise, when this Constitution requires an appointment to be made by the President with the approval of the National Assembly, until after the first elections under this Constitution, the President shall, subject to the National Accord and Reconciliation Act, appoint a person after consultation with the Prime Minister and with the approval of the National Assembly.*

This means that the appointment of the office holder is ultimately the collective role of the Executive and the Legislature.

FIDA Kenya holds the view that while the appointment to this office is the mandate of the Prime Minister and the President, we hold the belief that the process of nomination and eventual appointment should be transparent, competitive and takes into consideration the provisions of gender equality and freedom set out in Article 27 of the Constitution.

It is also important to note that only men have occupied the office of the Attorney General since independence.

Recommendation:

We therefore recommend as follows;

1) The Executive must call for applications from qualified and interested persons.
2) The Executive should then proceed to shortlist and interview the persons.
3) The Executive will make recommendations to the President as to persons suitable for this position.
4) Upon receipt of the forwarded names, the President following consultations with the Prime Minister shall nominate at least 3 persons, one third of whom should be from either gender.
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6) Following approval by the National Assembly, the final appointment shall be made by the President.

THE OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTION:

The Constitution establishes the office of the Director of Public Prosecution and the duties entrusted on this office are expansive and monumental to Kenyans.

FIDA Kenya states firmly that Article 27 (3), (4) and (8) of the Constitution was disregarded in the current nomination of the Director of Public Prosecution. The historical back ground of the judiciary and other state organs that deal with administration of justice have been awarded to one gender. Kenyans of all walks of life passed the Constitution with a firm belief that not only the letter but the spirit of the Constitution will be upheld by all. It is therefore important that process of appointment enables public participation and equal opportunity accorded to all Kenyans who may be qualified for the post.

Under Article 157 (2) of the Kenyan Constitution sets out that *"The Director of Public Prosecutions shall be nominated and, with the approval of the National Assembly, appointed by the President."*

Recommendation:

FIDA-Kenya is of the considered opinion that the process of appointment ought to be as follows;

1) The Executive must call for applications from qualified and interested persons.
2) The Executive should then proceed to shortlist and interview the persons.
3) The Executive will make recommendations to the President as to persons suitable for this position.
4) Upon receipt of the forwarded names, the President following consultations with the Prime Minister shall nominate at least 3 persons , one third of whom should be from either gender.
5) The names of the nominees shall be forwarded to the National Assembly for approval.
6) Following approval by the National Assembly, the final appointment shall be made by the President.

We believe that the above process will make the appointment competitive, transparent, and inclusive and in regard to Articles 10 of the Constitution.

CONCLUSION

In view of the foregoing submissions on the positions of the Chief Justice, Attorney General and Director of Public Prosecutions we firmly believe that any attempt to approve the names presented so far will not be in the spirit of the Constitution. The present nomination process if allowed to continue will ignore the right to equal opportunities accorded to both women and men and marginalized communities.

In addition it will be in disregard of the national values and principles of governance and ultimately disregard Article 259 of the Constitution that provides that the Constitution must be interpreted in a manner that promotes its purposes, values and principles, advances the rule of law, human rights and fundamental freedoms in the Bill of Rights, permits for the development of the law and contributing to good governance.

We humbly submit that to enhance constitutionalism in our nation there is need to reconsider these nominations and proceed in a manner that upholds the spirit of the Constitution that both the men and women of Kenya so overwhelmingly passed.

LAW SOCIETY OF KENYA

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MEMORANDUM
TO
THE PARLIAMENTARY DEPARTMENTAL COMMITTEE ON ADMINISTRATION OF JUSTICE AND LEGAL AFFAIRS

Nomination to the Offices of the Chief Justice, Attorney General and the Director of Public Prosecution

Apollo Mboya,
Secretary/ CEO
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The Law Society of Kenya

The Law Society of Kenya is 8,654 member body corporate established by the Law Society of Kenya Act Chapter 18 of the Laws of Kenya. One of its statutory objects as provided for in section 4 of the Act is to assist the Government and the courts in all matters affecting legislation and the administration and practice of the law in Kenya.

Pursuant to this mandate, the Law Society among other things circulates Bills to its members for comments, collates those comments and engages with relevant arms of the Government including Ministries and Departmental Committees of Parliament with a view to ensuring that any proposed legislation is drafted to achieve its desired goal of promoting the Rule of Law.

The Council is the governing body of the Law Society of Kenya. It comprises a Chairman, a Vice-Chairman and ten other members, all of whom must be members of the Law Society of Kenya. Council members are elected annually by the members of the Society by means of a postal ballot conducted in accordance with the Law Society of Kenya Act. Currently the Council comprise of:

(i) Kenneth Okide -Chairman
(ii) Florence Kajuju- Vice Chairman
(iii) Joseph Munyithya-Member
(iv) Isaac Wamaasa-Member
(v) Eric Mutua-Member
(vi) George Ochich-Member
(vii) John Mburu-Member
(viii) Roselyne Odede-Member
(ix) Lillian Omondi-Member
(x) Justus Munyithya-Member
(xi) Alfred Ochieng-Member
(xii) Faith Waigwa-Member

In the performance of its mandate, the Law Society of Kenya invites comments from members on legal issue, collates those comments before engaging with relevant arms of government and other stakeholders.

INTRODUCTION

On 28th January 2011 a dispatch from Presidential Press Service said the President ***"after consultation with the Prime Minister of the Republic of Kenya Raila Odinga"*** has nominated Justice Alnashir Visram for the Chief Justice, Pro. Githu Muigai as the Attorney General, Mr. Kioko Kilukumi as the Director of Public Prosecutions and Mr William Kirwa as Controller of Budget. The Prime Minister on 29th January 2011 pronounced his shock and dismay of the nominations without due consultations as required by the Constitution.

Stand of the Judicial Service Commission

The Judicial Service Commission (JSC) in a statement issued on 30th January 2011 demanded a transparent, competitive, flawless, free and fair process devoid of partisan politics and which would win public confidence that entails a withdrawal of the nominations and a fresh start. The Attorney General who is the principal legal advisor signed the joint statement of the JSC to that effect and being highly learned and experienced in law, the President ought to take his advice.

Article 172(1) state that the Judicial Service Commission shall promote and facilitate the independence and accountability of the judiciary and the efficient, effective and transparent administration of justice.

Stand of the Commission on Implementation of the Constitution

The Commission on Implementation of the Constitution (CIC) also followed suit on 30th January 2011 and stated *inter alia* that the letter of the Constitution as provided for in Article 166 read together with Sections 24 and 29 of the Sixth schedule require that the appointment of the Chief Justice by the appointing authorities should be as follows:

- That the process of appointment should commence with recommendations by the Judicial Service Commission to the President who in turn should consult the Prime Minister after which the President forwards the name of the nominee to the National Assembly for approval before final appointment by the President.

- That the role of the Judicial Service Commission in the appointment of the Chief Justice should be respected, and the Commission allowed to undertake the function reserved to it by the Constitution

On the nominations of the Attorney General, the Director of Public Prosecutions and the Controller of Budget, CIC said the process of their appointment is set out in Articles 156, 157 and 228 of the Constitution respectively. Though the stated Articles require that the three office holders be nominated and appointed by the President, subject to approval by the National Assembly, the current situation calls for due recognition of the National Accord and Reconciliation Act, meaning the PM must be fully consulted.

The CIC further observed that in the period before the first election, this section must be read together with the provisions of section 29 of the Sixth Schedule of the Constitution, which provides that ***the process of appointment of persons to fill new offices and vacancies arising in consequence of the coming into force of this Constitution shall begin on the effective date, and be finalised within one year."***

Transmission of the names of the nominees to the Speaker

Despite the statements from the JSC and the CIC, the Head of Public Service by a letter of 31st January 2011 transmitted the names of the nominees for processing by Parliament.

Ruling of the Court

On 3rd February 2011 Justice Daniel Musinga in a High Court Petition No. 16 of 2011 issued a Ruling that the nominations did not comply with Article 166 read together with Section 24(2) of Schedule 6 and that Article 27(3), was violated since there was no woman nominated in any of the four positions.

Article 166(1) of the Constitution states: ***"The President shall appoint the Chief Justice and Deputy Chief Justice, in accordance with the recommendation of the Judicial Service Commission, and subject to the approval of the National Assembly."***

Section 24(2) of Schedule 6 provides that ***a new Chief Justice shall be appointed by the President, subject to the National Accord and Reconciliation Act, and after consultation with the Prime Minister and with the approval of the National Assembly.***

Article 27(3) states that ***Women and men have the right to equal treatment, including the right to equal opportunities in political, economic, cultural and social spheres.***

The Justice Musinga further observed that:
" the National Assembly will be perpetuating an unconstitutional act unless the Speaker of the National Assembly points out the unconstitutionality of the intended action and thus disallows the process of approval, this court is under obligation to make an appropriate declaration and bring it to the attention of the National Assembly and declared that it would be unconstitutional for any State officer or organ of the State to carry on with the process of approval and eventual appointment to the offices of the Chief Justice, Attorney General, Director of Public Prosecutions and Controller of Budget based on the nominations made by the President on January 28th 2001."

Ruling of the Speaker to the National Assembly

On 3rd February 2011 the Speaker declined to make a determination as to whether or not the nominations transmitted to him by the Office of His Excellency the President were or were not constitutionally arrived nor whether there was no or was not consultation within the meaning of the Constitution, nor whether or not ethnic diversity and gender equality were observed. The speaker also withheld the determination or comment on the veracity and weight to be accorded to the letter recived from the Prime Minister.
The Speaker directed that the two letters from the President and the Prime Minister be forwarded to the Departmental Committees on Justice and Legal affairs and Finance, Planning and Trade according to ~~their~~ respective mandates for disposal as provided for in the Standing Orders and the law.

The constitutionality of the nomination having been addressed by the High Court Ruling in Petition No. 16 of 2011(**See annex 1**), this memorandum therefore concentrates on the following outstanding issues:

1. What consultation means in the context of Section 24(2) of Schedule 6 of the Constitution.
2. Suitability of the nominees. In view of the stage of the nominations and due to the fact that there is no other opportunity to address the issue of suitability if the nominees were to be appointed, the Law Society takes the opportunity to converse on the issue.

WHAT IS CONSULTATION

The Constitution does not define the expression consultation. However the expression **"in consultation"** and **"after consultation"** have been examined in other jurisdictions such as South Africa where in the Interim Constitution it was defined:

"such decision shall require the concurrence of such other functionary: Provided that if such functionary is a body of persons, it shall express its concurrence in accordance with its own decision-making procedures"[1]

By using the expression **"In consultation",** the legislature attempted to *"describe the joint action of the head of government and the members of the Cabinet as it exists in the Westminister system."*

The expression is used in the 1996 Constitution of South Africa but is no longer defined. It is used in relation to the second category of Presidential powers referred to above. In the 1996 Constitution, the expression **"together with"** is used and the new terminology does not change the constitutional position. The actual degree of consultation will depend on the prevailing political circumstances and the political style of the president. However, it is a strong form of consultation.[2]

The term **"after consultation"** which is used in Section 24(2) of Schedule 6 of the Constitution of Kenya is also used in the interim constitution of South Africa as well as the present Constitution of South Africa.[3] It is defined by requiring that *"such decision shall be taken in good faith after consulting and giving serious consideration to the views of such functionary."*

[1] Constitution of the Republic of South Africa of 1993, Section 233(3)
[2] Klaaren and Chaskalson in Constitutional Law of South Africa 3-10
[3] See Constitution of the Republic of South Africa 108 of 1996 section 174(3) dealing with appointment of judicial officers.

SUITABILITY OF THE NOMINEES

Due to the fact that the nominations were done without public participation and there is no other forum to determine the suitability of nomineess, the law Society of Kenya forwards the following information.

Justice Alnashir Visram

1. In the Nairobi Civil Appeal No. 9 of 2007, the judge is a respondent in a matter for failure to remit the proceeds of a sale totaling Ksh 14,167,080. In the matterthe judge has sworn an affidavit to the fact that he resigned as a partner in the law firm of Messers Veljee Devshi & Bakrania Advocates on 1st August 1998 **(see page 81 in the bundle annexed).**

   This contradicts the declaration accompanying application for practsising certificate for the year 1998 and 1999 filed with the Law Society of Kenya in which the judge stated that he was the Employer in the said law firm**(See page 94 a & b)**

2. In Nairobi Court of Appeal Civil Application No. 265 of 2009 the judge sitting in a bench comprising two other judges took out a matter from a cause list and denied a hearing to a litigant on the basis of extraneous issues *inter alia:*
   - *That the litigant is not happy appearing before all judges in the Republic of Kenya*
   - *Thjat the litigant according to press reports filed a complaint in the UN Human Rights Committee in Geneva against his brother Judge.*

(see Judgment annexed to this memorandum).

Mr. Kioko Kilukumi

1. It is public knowledge that Mr Kilukumi has been acting for a client facing investigation by the International Criminal Court(ICC). This is likely to bring conflicts of interest since Kenya is actively campaigning to defer the ICC process and put in place a domestic process for the prosecution of perpetrators of 2007 post-election violence. That Process will to a great extent depend on the Director of Public Prosecution for which Mr. Kilukumi has been proposed.

2. Mr Kilukumi was one of the beneficiaries of the Ksh 72 million paid by the State Law Office through the law firm of Waweru Gatonye Advocate in contravention of the Government financial regulations on the following account:
    - The payment voucher was signed by Mr. Wanjuki Muchemi, Solicitor General as a signatory as the accounting officer and the AIE Holder(Authority to Incur Expenditure) which is contravention of the Government financial regulations
    - The said payment was for six Advocates and there is no evidence of the amount of payment each received since the payment was done to one advocate for distribution to others for reasons that are yet to be explained.

(see copy of the payment voucher annexed to this memorandum).

The issues canvassed herein and any other that may be within the knowledge of the public can only be canvassed if there is public participation in the nomination as required by Article 10(2) (a) of the Constitution of Kenya.

IN THE COURT OF APPEAL
AT NAIROBI

(CORAM: TUNOI, O'KUBASU & VISRAM, JJ.A)

CIVIL APPLICATION NO. NAI. 265 OF 2009 (UR. 184/2009)

BETWEEN

PETER ODIWUOR NGOGE T/A
O.P. NGOGE & ASSOCIATES .....APPLICANT

AND

W.M. MUIRURI
SENIOR DEPUTY REGISTRAR
HIGH COURT OF KENYA AT NAIROBI .....RESPONDENT

(An application for injunction, stay of proceedings from the ruling and order of the High Court of Kenya at Nairobi (Nambuye, J.) dated 26th September, 2008

in

H.C.C.C. NO. 813 OF 2007)

****

ORDER OF THE COURT

As the applicant, Mr. Ngoge, is not happy appearing before all the Judges in the country, this matter is taken out of today's cause list. The certificate of urgency accorded to the motion is hereby removed and the matter shall not be listed for hearing without the leave of the Court. This order has been occasioned by the disparaging, scandalous and scurrilous attacks made by the applicant against the Judiciary.

Made at Nairobi this 8th day of December, 2009.

P.K. TUNOI
.....
JUDGE OF APPEAL

E.O. O'KUBASU

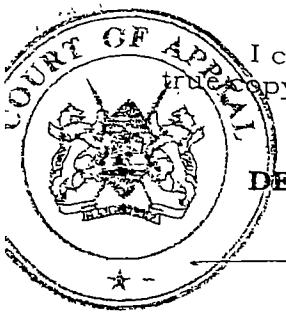
.....

JUDGE OF APPEAL

ALNASHIR VISRAM

.....

JUDGE OF APPEAL



I certify that this is a true copy of the original.

DEPUTY REGISTRAR

IN THE COURT OF APPEAL
AT NAIROBI

(CORAM: GITHINJI, VISRAM & NYAMU, JJ.A.)

CIVIL APPLICATION NO. NAI. 265 OF 2009 (UR. 184/2009)

BETWEEN

O. P. NGOGE T/A
O. P. NGOGE & ASSOCIATES ADVOCATES ..... APPLICANT

AND

W. M. MUIRURI
SENIOR DEPUTY REGISTRAR
HIGH COURT OF KENYA AT NAIROBI ..... RESPONDENT

(Application for injunction, stay of proceedings from the ruling and order of the High Court of Kenya at Nairobi (Nambuye J) dated 26th September, 2008

in

H.C.C.C. NO. 813 OF 2007)

ORDER OF THE COURT

It has transpired that the applicant in this case who is an advocate of the High Court of Kenya has according to recent press reports filed a complaint in the U.N. Human Rights Committee, Geneva against Githinji JA and two other judges in a respect of their decision in another case. Although the applicant states that he does not know where the press got the information, it is in the interest of justice that the application should be heard by a bench excluding Githinji JA.

In the circumstances, the application is taken out of the hearing list and is adjourned to another date to be given on priority basis. The next bench to exclude Githinji JA.

Dated at Nairobi this 13th day of October, 2009.

E. M. GITHINJI

.....

JUDGE OF APPEAL

ALNASHIR VISRAM

.....

JUDGE OF APPEAL

J. G. NYAMU

.....

JUDGE OF APPEAL

I certify that this is a
true copy of ~~the original~~.

DEPUTY REGISTRAR

Lilian
Pse Enter in our deposit
Ledger Property.

(21)

INTERNAL MEMO

11 NOV 2005
PAID BY CHEQUE

TO: SOLICITOR-GENERAL

FROM: DEPUTY CHIEF FINANCE OFFICER

DATE: 3RD NOVEMBER 2005

Approval given to pay Kshs.72 mil to M/s Waweru Gatonye & Company Advocates
03/11/05

FEES ON VARIOUS CASES DEFENDING THE ATTORNEY-GENERAL BY PRIVATE LAWYERS

You had requested Treasury for extra funds amounting to Kshs.120 million of which Kshs.85.5 million has been granted under the letter reference No.42/05/01/13 dated 25th October 2005. A cheque of equivalent amount has been released to the office. The funds released is enough to meet the following:-

- Constitution case No.1216 of 2005 - Kshs.72,000,000.00
- Anglo leasing case No.8 and 378 of 2005 - Kshs. 3,500,000.00
- **TOTAL - Kshs.75,500,000.00**

It is only the lawyers in the first case who have submitted their demand fee note of Kshs.72,000,000.00. The following documents are available in the file to support their claim.

- Fee note dated 26th August 2005 and signed by Gibson Kamau Kuria, SC.
- Correspondences on appointment of the six lawyers by office on behalf of Attorney General.
- Correspondences from six lawyers appointing the M/S Waweru Gatonye & Company, through which their fees will be paid.

The purpose of this note is to seek your clearance of payments to the payee.

Ms Waweru Gatonye and Company Advocates
Commissioner for oaths
P.O. Box 55207,
Nairobi

VPI
Pse process pay to M/s Waweru Gatonye & Co. Advocates.

It is however important to clarify whether to pay the whole amount or on installments depending on the progress of the case. The funds will be captured under Vote Head - 872 – Item 2211300 – Sub-Item – 2211308.

Submitted for your consideration.

J.M. KIUNGA KANG'ETHE
DEPUTY CHIEF FINANCE OFFICER

Accts Controller
for your immediate action

(32)

KILUKUMI & CO.

Kioko Kilukumi
Advocate
LL.B (Hons) Nairobi
Diploma (law) K.S.L.
Certified Public Secretary

Ufanisi House
4th Floor
Haile Selassie Avenue
P.O. Box 48588-00100 GPO
NAIROBI
Tel # 338916 Tel/Fax # 244982

Your Ref:

Our Ref: KK/GEN/001/2005

Date 19/08/2005

Wanjuki Muchemi
Solicitor - General
Attorney General's Chambers
Sheria House
P. O. Box 40112 - 001100
Nairobi

Dear Mr. Muchemi

RE: HC MISC. CIVIL APPL NO. 1216 OF 2005
HON. JOSEPH MATANO KHAMISI & 21 OTHERS
-VERSUS- THE HON. ATTORNEY GENERAL & 3 OTHERS

Receipt is acknowledged of your letter dated 18th August, 2005.

This is to confirm that I will be in a position to handle the above referenced brief.

Regarding remuneration, we have consulted with the lead Counsel, Mr. Waweru Gatonye and it has been agreed that our remuneration, inclusive of all disbursements, shall be discussed and agreed by the said lead Counsel as our representative with your office.

We hereby confirm that the portion of our agreed fees should be remitted to the law firm of Waweru Gatonye & Co. advocates

May I take this opportunity to thank you for instructing us to handle the above referenced proceedings.

Yours sincerely

KIOKO KILUKUMI
KILUKUMI & CO. ADVOCATES

CC
1. Waweru Gatonye & Co.
Advocates
Cotts House – 6th Floor
Wabera Street
Nairobi

2. Ngatia & Associates
Advocates
ACK Garden House
Nairobi

19

F.O. 20 (Revised)

ATTORNEY GENERAL'S CHAMBERS CASH OFFICE 11 NOV 2005 PAID BY CHEQUE 042830

042831

REPUBLIC OF KENYA

PAYMENT VOUCHER

(VOTED PROVISION)

Payee's Name and Address: Waweru Gatonye and Co. Advocates - NAIROBI

Particulars	LPO/LSO No.	Invoice No.	Amount Sh.	Amount Cts.
Payment in respect of legal fees for services provided by the above on Constitution Case No.1261 of 2005. Hon. Joseph Matano Khamisi and 21 others VS AG and 3 others which was handled by the following. i) Gibson Kamau Kuria SC ii) Waweru Gatonye iii) Fred Ngatia iv) Kioko Kilukumi v) Lucy Kambuni vi) Nioroge Regem.	Waweru Gatonye & Co. -		62,068,965	55
	VAT 16% -		9,931,034	45
		TOTAL Sh.	72,000,000	00

Amount payable (in words)

Shillings Seventy Two Million Only Cts. Nil

Authority Reference No.

EXAMINATION

Voucher Examined by

Date 09.11.2005

Internal Audit

VBC CERTIFICATE

I certify that the expenditure has been entered in the Vote Book and that adequate funds to cover it are available against the chargeable Item as shown here below.

Approved Estimates/Allocation—

Item No. 2211308 KSh. 85500 000

Less: Total expenditure plus commitments KSh. —

Balance — KSh. 85500 000

Less: This ENTRY—Vch.

No. 5141 KSh. 72000 000

Balance KSh. 13500 000

Date 11/11/05 Signature

Accountant i/c VBC

AIE HOLDER CERTIFICATE

I certify that the expenditure detailed above has been incurred for the authorized purpose and should be charged to the Item shown here below.

Signature Designation of AIE Holder

Date 8/11/2005

AUTHORIZATION

I certify that the rate/price charged is/are according to regulation/contract, fair and reasonable, that the expenditure has been incurred on proper authority and should be charged as under. *Where appropriate a certificate overleaf has been completed.* I hereby AUTHORIZE payment of the amount shown above without any alteration.

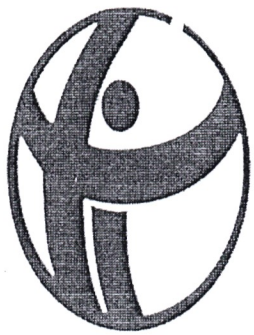
Signature

Accounting Officer/District Accountant

Date 8/11/2005

Vote	Head	Sub-Head	Item
R25 AGC	872	000	2211308

A.I.E. No.	Account No.	Dept. Vch. No.	Station	Cash Book Vch. No.	Cash Book Date	Amount Sh.	Amount Cts.
	0-872-000-2211308	5141	0101	1328	11/11/2005	72,000,000	00



TRANSPARENCY
INTERNATIONAL
KENYA

TRANSPARENCY INTERNATIONAL- KENYA CHAPTER'S ADVISORYON THE FATE OF THE NOMINATIONS MADE BY HIS EXCELLENCY THE PRESIDENT IN LIGHT OF THE COMMUNICATION BY THE SPEAKER AND THE RULING ISSUED BY THE HIGH COURT

Contact Person; Mr. Sam K. Mbithi

Executive Director

Transparency International- Kenya

P.O Box 198-00200

Nairobi Kenya

3rd Floor ACK Garden House, Wing D

1st Ngong Avenue off Bishop's Road

Tel: 254-20-2727763/5

http//www.tikenya.org

Introduction

TRANSPARENCY INTERNATIONAL-KENYA is a non-profit organisation founded in 1999 and registered as a company limited by guarantee, with the aim of a transparent and corruption-free Kenya for good governance and social justice initiatives in Kenya.

TI-KENYA is part of the Transparency International Group that is a non-partisan coalition of individuals with a shared vision of a corruption-free world. TI-Kenya is an autonomous Chapter in the Transparency International movement, a global coalition against corruption, with which we share knowledge and exchange ideas for the greater good of Kenya.

The vision of TI-Kenya is for a *transparent, just and accountable Kenyan society and its* Mission is *to support citizens and governance institutions effect transparency and accountability in public and business affairs through legal and policy frameworks, skills, knowledge and information.*

Background

The speaker of the National Assembly in a communication issued on the 3rd February 2011 on the constitutionality of nominations to certain constitutional offices by His Excellency the President referred the issue to the departmental committees of Justice and Legal Affairs and that of Finance, Planning and Trade. In the speaker's direction, he directed that the committees to carry out an inquiry into the constitutionality or otherwise of the process leading to the nomination of names.

It behooves us to note that since the referral of the matter to the two committees the courts have since issued a ruling touching on the same[1]. It is therefore imperative that

[1] In the High Court Petition Number 16 of 2011 Nairobi

the committees in fulfilling the directive given by the speaker ought to comply with and respect the decision that was given by the court.

The court in its ruling held that;

a) That the nomination for the position of Chief Justice was unconstitutional to the extent that it did not comply with article 166 (1) of the constitution as read together with section 24 (2) of the sixth schedule.
b) That consultation does not necessarily have to lead to a meeting of the minds or consensus.
c) That in making nominations to the four offices, the provisions of article 10 of the constitution and the National Accord and Reconciliation Act must be respected and borne in mind.
d) That the nominations violated the provisions of article 10 in respect to gender equity and article 27 (3) of the constitution regarding equal treatment of men and women.
e) That the court cannot restrain the National Assembly from performing its constitutional duty of approving nominees to appointive bodies.
f) That where it is demonstrated that in giving its approval, the National Assembly would be perpetuating an unconstitutional, the court is under an obligation to make an appropriate order and bring it to the attention of the National Assembly.
g) That it is unconstitutional for any State officer or organ of the State to carry on with the process of approval and eventual appointment to the offices of the Chief Justice, Attorney General, Director of Public Prosecutions and Controller of Budget based on the nominations made by the President on 28th January, 2011.

Based on the above holdings by the court, it is therefore crucial to consider if the Honorable Committee can legally proceed to consider the matter at hand and if so what would be the import of such an eventuality.

Does the court order stop the Parliamentary Process?

The short answer is no.

The constitution recognizes the principle of separation of powers as vested in the various organs of the Republic. The underlying import of this principle is that there should be checks and balances to avoid against abuse by one organ. The courts are to adjudicate on disputes while Parliament is to legislate and exercise oversight on the executive.

The court cannot therefore injunct Parliament from the conduct of its business. To the extent that the court order attempts to stop Parliament from carrying on with the approval of the names of the nominees the order is not accurate. The court can only render its decision after the Parliamentary process. Courts can only determine the legality of Parliamentary Bills, resolutions and motions but they cannot stop Parliamentary proceedings from going on.

This position is supported by a *communication made by the Honourable Speaker issued on the 27th November 2008 at 2.30 p.m* where he averred that a court cannot prevent the Assembly from conducting its legislative functions.

Further in the case of *Sanli & Another vs. Fotofili & Others (1987) LRC 247* the Supreme Court of Tonga held that the court had no jurisdiction to pronounce on the validity of the internal proceedings of the Assembly which included the procedure adopted by it to conduct its business. Per in curiam the court averred that it is not the function of the court to become involved in the legislative process.

As we have stated above, the National Assembly can still proceed with its inquiry subject only that the court can quash the findings of that inquiry after the whole House passes a motion or a resolution on the same.

In *AG of Mauritious vs. Ramgoolan (1993) 3 LRC 82* the Supreme Court held that where Parliament exercises sovereign powers under the constitution and the courts are empowered to exercise a particular jurisdiction which itself requires an inquiry into the exercise of those powers by Parliament, then the jurisdiction of the courts must be exercised to the appropriate extent in order to enable it to determine the particular question before it. It would be misleading to invoke the sovereignty of the National Assembly which would have the effect of paralyzing the effective exercise of the constitutional jurisdiction of the courts.

Conclusion

In conclusion, the committees can proceed to conduct their inquiry into the matter but they must stay alive to the fact that the court has already given a declaratory order which if the House reaches a determination that is contrary to, would render the decision of the House unconstitutional.

We have also identified the below stated provisions of the law which the Parliamentary Committee should consider if there was compliance with when the names the subject matter of the inquiries were proposed;

a) The preamble which states that recognizing the aspirations of all Kenyans for a government based on the essential values of human rights, equality, freedom, democracy, social justice and the rule of law.

b) Article 2 (1) of the constitution which provides that the constitution is the supreme law of the Republic and binds all persons and all state organs at both levels of government. Article 2(2) which provide that no person may claim or exercise state authority except as authorized under this constitution. Consider if the exercise of state power in making the nominations was done in accordance with the constitution.

c) Article 10 setting out the national values and principles of governance that are binding on all state organs and persons. Of import are the principles of inclusiveness rule of law, democracy, and participation of the people, transparency and accountability.

d) Article 21 assigning an obligation on the state and all its organs to observe, respect, protect, promote and fulfill the rights and fundamental freedoms on the Bill of Rights.

e) Article 166 of the constitution on the appointment of the Chief Justice. How can this article be implemented in harmony with section 24 (2) of sixth schedule bearing in mind the provisions of section 2 of the sixth schedule specifically setting out the provisions of the constitution whose coming into effect have been suspended until the next general elections.

f) Article 27 on equality and freedom from discrimination. Equality granted to all citizens to aspire to and be considered to all appointive offices that come up for filling.

9th February 2011

The Chairperson
Departmental Committee on Justice and Legal affairs
Kenya National Assembly
P. O. Box 40629-00100
Nairobi, Kenya

Dear Sir,

RE: NOMINATIONS TO THE OFFICES OF CHIEF JUSTICE, ATTORNEY GENERAL AND DIRECTOR OF PUBLIC PROSECUTIONS

As Kenyans we believe that his Excellency the President did not follow constitutional process in the appointment of the four persons in the new Constitutional offices established by the Constitution of Kenya which was promulgated in August 27, 2010.

As per the constitution (Article 262 Section 24 Sub-clause 2) it is stated that the Chief Justice shall be appointed by the President subject to the National Accord and Reconciliation Act, and after consultation with the Prime Minister and with the approval of the National Assembly.

Consultation here clearly does not mean the principles informing one another or one principle informing the other over a decision, nor does it mean listening to the other and ignoring the advice of the other. Consultation must be understood in context of the National Accord and Reconciliation Act, which has been made an integral part of the Constitution.

The National Accord was put in place because of the disputed presidential elections of 2007, and it was a mechanism through which Kenya was to be returned to peace, with emphasis to establishing proper institutional framework including the promulgation of the constitution. This was done through the following ways:

i. By establishing the coalition government as a means of ensuring power sharing and
ii. By establishing institutions to resolve elections dispute as recommended by the Independent Review Commission (IREC) 'the Kreigler Commission'.

It was IRECs findings that the 2007 presidential elections were so flawed that it was not possible to determine who won the elections. As per the report by this commission the disputed elections had a violent outcome because Kenyans had no confidence in the judiciary. It therefore follows that if we do not abide by the constitution in the appointment of the judiciary properly, Kenyans will most definitely not have faith in this important office. This can turn dangerous in the event that we have a disputed presidential election in 2012, hence making the possibility of the country erupting into violence a reality yet again.

In this context therefore, consultation must be seen that both Principals must concur with the appointment of the Chief Justice.

Appointment of the Attorney General

The appointment of the Attorney General in like manner must be done upon the agreement of both Principals as per Article 262 Section 29 Clause 2. Further appointments must conform with the Constitution to ensure that there is regional balance, gender equity and equality and keeping in mind the national values provided for under Article 10 and Article 232, (1) (h) and (i) of the Constitution. It is a fact that if the proposal goes through, the Attorney General and key persons in the State Law office would all be from one community, a clear violation of the constitution.

Appointment of Director of Public Prosecutions

The appointment to this office is governed by Article 157 (2) and Article 262 Section (29), (2) and hence the appointment must also be done in consultation with the Prime Minister of the Accord.

Furthermore, should the proposed candidate occupy the office of the DPP, and in the event that Kenya sets up a local tribunal to try the persons accused by the ICC Prosecutor Mr. Luis Ocampo on the issue of post elections violence, one of the suspects would invoke article 50 of the Constitution raising the defense, that there cannot be a fair trial since the DPP has been his advocate. This will derail the process of establishing the truth about the post elections violence and will leave room for impunity to grow.

Further it is important to note that in making public appointments the process must meet the values enshrined in Article 10 of the Constitution of Kenya, there must be transparency, social justice inclusiveness, non-discrimination among other values and this entails that all citizens must be allowed to participate and in essence therefore appointments to public offices cannot be done only by the two Principals, every Kenyan must have the opportunity of applying for this public offices.

It is further important to note that, appointments to commissions which are public offices as a whole must adhere to the requirements of the Constitution Article 232 (h) which demands representation of Kenya's diverse communities, regional and ethnic balance which also includes religious balance.

If this action of the President is accepted, it will give a very dangerous precedent because nothing will stop the current or any future Presidents from duplicating his/her actions in the appointment of other constitutional and independent offices including that of the Independent Electoral and Boundaries Commission. This would have serious impact on the credibility of the 2012 elections, just like it did with the unilateral appointments of the defunct Electoral Commission of Kenya that blatantly disregarded of the recommendations of the Inter-Parties Parliamentary Group (IPPG). A discredited judiciary and election commission were principle contributors to the 2007 chaos.

It is our submission that the process is flawed beyond repair and it needs to be restarted afresh and must conform with the other critical constitutional requirements relating to transparency, citizen participation, gender, regional and ethnic balance.

We must not allow Kenyans to be dragged along the same path of impunity, disregard of the opinion of Wananchi and unconstitutional approach to critical national issues.

We thank the Committee for giving us the opportunity to contribute and to hear us on matters affecting our beloved country.

Signed **Abdullahi Abdi**
Chairman

NATIONAL MUSLIM LEADERS FORUM

Subject: Position of Women on the Recent Appointments of Chief Justice, Attorney General, Director of Public Prosecutions and the Controller of Budgets

Presented to

The Parliamentary Committee on Legal Affairs and Administration of Justice

On

9th February 2011

I. Introduction

Men hold over 95% of all senior government positions in this country. Kenyan women have been advocating for positive change in this gross gender inequality situation for decades, a fact that is on record in the country's constitutional development history.

The recent executive nominations of the Chief Justice, Attorney General, Director of Public Prosecutions, and the Controller of Budget are ***ultra vires*** the constitution to the extent that they locked women out of those positions. They are a blatant and direct violation of women's constitutional rights of equality and non-discrimination based on sex. This action, if left uncorrected would widen the inequality gap between men and women in leadership positions.

The relevant provisions of the current constitution, its spirit and the contemporary circumstance around that issue dictates that State action in this area should be directed towards closing this inequality gap. Indeed a fundamental gender equality test of any government action is whether the action contributes to widening this gap or closing it.

Failure of the State to recognize, respect and fulfill these constitutional rights of over 50% of Kenyans amounts to:

i) A travesty of the rule of law;
ii) A fraudulent act that seeks to emasculate and take for granted the sovereign power of the people of Kenya (over 50% of whom are women) that is vested in the state organs;
iii) An act that makes a charade of the whole idea of constitutionalism;
iv) A violation of international law(CEDAW, UDHR, Africa Protocol on Women among others);
v) The ultimate insult to Kenyan women, women around the world, and in essence the Kenyan people;
vi) An early threat to the longevity of the new constitution by causing discontent and indignation amongst over 50% of the population

Kenyan women demand as of constitutional right a minimum of two of the four appointive positions under discussion.

We illustrate here below why the nominations must be revised, and base our demand is based on cogent constitutional argument and basis.

II. The constitutional interpretive framework for provisions authorizing the executive appointments.

We are of the considered view that any constitutional provision authorizing a constitutional implementation action must be subjected to an interpretive framework that is rationalized and constructed from the constitution itself, constitutional history and the contemporary circumstance.

We lay out below the interpretive framework that should inform the interpretation of the provisions authorizing the executive appointments under discussion here.

The *authorizing* provisions are:

- 166(1)(a) on appointment of Chief Justice,
- 156(2) on appointment of the AG,
- 157(2) on appointment of the DPP;
- and 228(1) on appointment of Controller of Budget

The interpretive framework for these provisions in our view must consist of the following pillars and planks to which we subject the above authorizing provisions:

a) Permanent constitutional interpretive reference pillars:

- Articles 259 and 260 of the constitution on its construction and interpretation;
- Article 10 on national values and principles of governance;
- Chapter 4- The Bill of Rights;

i) Article 259

Article 259 is critical in this endeavor, as it stipulates how the meaning of any provision is to be *construed*, and *applied.* In our reading of it, it contemplates a constitutional interpretive model similar to what Americans have referred to as the *'living constitution'* doctrine. The general claim of this doctrine is that the constitution has a dynamic meaning. This means that contemporaneous society should be taken into account when interpreting key constitutional phrases. Contemporary society includes local situation and regional and international trends. This approach calls for respect for the text and meaning of constitutional language, but also the allowing of contemporary needs, beliefs, values and indicative trends to inform the application of such meaning to the current events under deliberation.

This Article is indicative that as the letter of the constitution is considered to decipher meaning, due regarded too should be had to the current situation in order to see what the drafters may have intended, and how it may be applied to the current situation. As noted elsewhere in this memorandum, the current situation in regard to gender inequality in leadership is still contemporaneous and women's sentiments and demands are the same as during the drafting period. For indication purposes however, some elements that constitute the relevant current circumstances may include: the continuing situation of gross gender inequality in leadership that is causing women tremendous suffering in different respects; regional and international trends in terms of gender equality in senior leadership positions, and the continuous and relentless voice of Kenyan women demanding their constitutional right to equality at all levels.

ii) Article 10

Article 10 is proffered as an interpretive point of reference by Article 259(1) (a). It is also obligatory in its own language as an interpretive reference point, and is of pivotal relevance to the issue of gender equality as illustrated in the following Articles:

- Clause 10 (a) which stipulates: ***"The national values and principles of governance in this Article bind all State organs, State officers, public officers and all persons whenever any of them applies or interprets this constitution";*** and

- Clause 10(2) (b) which stipulates: ***"The national values and principles of governance include: human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination, and protection of the marginalised"***. (Emphasis ours - the underlined values are of core pertinence to our claim here.)

As the executive apply and interpret the authorizing Articles in regard to the nominations for appointments under discussion here, they are constitutionally bound by the above provisions to observe the values and principles of equity, equality, human rights, and non-discrimination among the other values.

From this interpretive lens, the nominations are contrary to the constitution as the lack of inclusion of women in them illustrates that the executive did not consider, and was not guided by the values and principles of: inclusiveness (of women in decision making); equality (between men and women); human rights (of women to equality and non-discrimination based on sex); and was not being protective of women as a marginalized group.

iii) The Bill of Rights

The Bill of Rights is explicitly proffered as a core interpretive point of reference by Article 259(1) (b), and in its own language declares itself a major consideration in the application of the constitution as can be construed in:

- Article 20(1) which stipulates: "***The Bill of rights applies to all laws and binds all state organs and persons***. (emphasis ours)";

- Article 21(1) which stipulates: "***It is a fundamental duty of the State and every state organ to observe, respect, promote and fulfill the rights and fundamental freedoms in the Bill of Rights***"(emphasis ours);

- Article 21(3) which stipulates: ***"All State organs and all public officers have the duty to address the needs of vulnerable groups within society, including women....."*** (Emphasis ours).

Further, of critical substantive relevance to our case here is the entire Article 27 on *Equality and Freedom from Discrimination* and especially the following clauses:

- Clause 27(3) which stipulates: ***"Women and men have the right to equal treatment, including the right to equal opportunities in political, economic, cultural and social spheres."*** (Emphasis ours).

- Clause 27(4) – ***"The state shall not discriminate directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status....."*** (emphasis ours)

- Article 27(6) –***"To give full effect to the realization of the rights guaranteed under this Article, the State shall take legislative and other measures, including affirmative action..... to redress any disadvantage suffered by individuals and groups because of past discrimination."*** (emphasis ours)

- Article 27(7) - ***"In addition to the measures contemplated in clause (6), the State shall take legislative and other measures to implement the principle that not more than two-thirds of the members of the elective or appointive bodies shall be of the same gender."*** (emphasis ours)

Subjecting the authorizing provisions, and the nominations to the above provisions, it becomes indisputably clear beyond question that the executive:

- **Violated clause 20(1)** as they did not act in accordance to and in observance of the Bill of rights as required thereof;

- **Violated clause 21(1)** as their nomination decisions illustrate disrespect, undermining, and refusal to fulfill the fundamental rights of women of equality and non-discrimination based on sex in direct and barefaced disregard of this clause;

- **Failed in its constitutional duty under clause 21 (3)** to address the needs of women as a vulnerable group such as the need for inclusion, equality, and non-discrimination in allocation of decision making positions;

- **Violated clause 27(3)** by refusing and/or failing to treat women equally to men in regard to the nominations, and refusing and/or failing to give women any and equal opportunities in the areas of the nominations;

- **Violated clause 27(4)** by directly and deliberately discriminating against women in the nominations on the basis of their sex;

- **Violated clause 27(6)** and failed in its constitutional duty under it because instead of taking measures to redress past discrimination against women, the nominations are an action in exacerbation of discrimination against women;

- **Violated clause 27(7)** by failing to meet the minimum threshold of gender balance in the nominations by nominating 100% men in blatant violation of the requirement of this clause that "....not more than two-thirds of the members of the elective or appointive bodies shall be of the same gender".

Note: It is important that it be understood that clause 27(7) contemplates that any gender could have the two thirds majority. There is nothing in the provision that could be construed to mean that the two thirds majority is a reserve of men, and the one third for women. Taking the one third as the default allocation for women, and the two thirds allocation for men, would amount to discrimination against women and a violation of their right to equality.

a) Other important supports in the broader interpretive framework

The authorising Articles for the nominations must be read with these, but they are not of immediate relevance to the gender equality case and include:

- Article 73 on Responsibilities of leadership;
- Article 129 on Principles of executive authority;
- Article 132(2) on the function of the President to nominate persons
- Article 135 on decisions of the President;
- Section 24(2) of Sixth Schedule on consultation in appointment of Chief Justice
- 166(1)(a) on appointment of Chief Justice
- 156(2) on appointment of the AG;
- 57(2) on appointment of the DPP;
- 228(1) on appointment of Controller of Budget
- Section 29(2)of Sixth Schedule on the consultation between President and Prime Minister in regard to appointments

c) Other important interpretive considerations

These often backstop constitutional interpretation, and are relevant to the case of gender equality in appointive positions. They are:

- constitutional history and;
- Contemporary circumstance.

These would be useful for purposes of inferring intended meanings of the framers and the drafters, in regard to specific words and or phrases, and to provide guidance on the application of those meanings to the issue at hand.

i) Constitutional history.

Constitutional history, refers to the recorded or remembered constitutional development process over the years, capturing the memoranda, the attestations, debates, drafters notes, the compromises, the various drafts, opinions and other relevant materials developed whether publicized or not that were presented towards constitutional reform from the time of the struggle for independence to the day of the promulgation of the current constitution. It helps to establish underlying reasons, causes, and to discern the intent of the drafters in regard to any constitutional provision. Such information is useful as it provides cogent rationalization of actions taken and legislative content preferred in constitutional implementation.

Kenyan constitutional history records a whole body of historical material consisting of memoranda, notes, petitions, protests, and provisions in various drafts of the proposed constitutions, among other evidential forms indicating that Kenyan women have consistently agitated for equality with men in the social, political and economic sectors; and for non-discrimination based on sex among other forms.

Such history will also show and the current constitution is clear that from the understanding of Kenyan women, equality and freedom from non-discrimination based on sex among other things is and has been an innate right, not conferred by the state, and is therefore a primary entitlement to be realized now, and not a favor or privilege to be given in the future when the conditions are right.

ii) Contemporary circumstance

Contemporary circumstance refers to the obtaining situation, beliefs, needs, values and relevant opinions regarding the issue under discussion at the time of the interpretation in the country, and regional and international trends on the issue, as opposed to the time of drafting. It is useful at it *informs the application* of the meanings of provisions as intended by drafters to current events or situations, as opposed to assuming that social, cultural, political, and economic circumstances remain frozen in the time of the drafting.

Our view here is that the drafting time of the current constitution is still contemporaneous as it was just a few months ago. The reality today, as it was then is that inequality between men and women in leadership positions stands at 95%, one of the lowest rates in the world, and the region. Further, Kenyan women are as alert and demanding their right to equality and non-discrimination today as they were at the framing and drafting periods. Regional and international trends in respect to holding of senior leadership positions by women are indicative of a firm deliberate move toward equality with illustrious examples in Rwanda and South Africa. Further, the state has not done much to date to alleviate inequality and gender discrimination.

Conclusion

1. **The letter and spirit of the constitution as illustrated above requires that the executive allocate women a minimum allocation of equal positions to men in the nominations under discussions and all future public appointments under the constitution and in other instances.**

2. **The executive is in violation of the constitution as it has not allocated women any of the positions under discussion and the nominations are therefore unconstitutional and illegal.**

3. **To comply with the constitution, the executive must allocate women a minimum of <u>two</u> (2) of the positions under discussion. Anything less will render the constitutional actions of State organs in this respect fraudulent in terms of taking the sovereign power entrusted them by over 50% of Kenyans, and then using it to render them powerless. That would be a rip off that is absolutely not acceptable to women.**

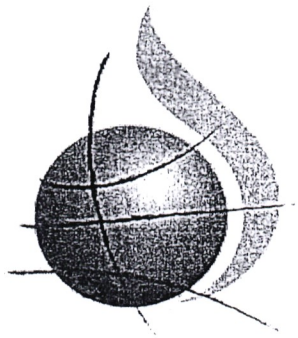
4. **Women of Kenya <u>do not and will not accept</u> a <u>zero or minimalist approach</u> in terms of the fulfillment of their constitutional rights. They are entitled as a matter of course, they fought for independence, and they continue to carry the greatest burden in building this nation.**

5. **The two thirds majority of one gender in clause 27(7) must therefore not be construed to be the default allocation for men. Indeed given the gross inequality, and in order for the State to meet the equality threshold contemplated in the Bill of Rights, the two thirds majority should more often than not be the allocation for women.**

6. **Further, in order to meet the gender equality threshold contemplated by the Bill of Rights, and to pre-empt situations of violations such as the one over these nominations, the Constitutional implementation actors should prioritize the development of policies and legislation on Gender Affirmative Action and other such gender equality programmes contemplated by Article 27 in the Bill of Rights.**

7. **Women of Kenya care for this nation and its people. The nominations are an indication that unless State organs and State Officers take the constitution and all constitutional provisions seriously, its implementation will be a facade, Kenyans will lose regard for the constitution, and the prospects for entrenching constitutionalism and the rule of law will fade off. The unified national project of the second republic which has been the preoccupation of this generation for 45 years will then become another white elephant, and we shall be a failed generation, leading a failed state.**

8. **Women of Kenya are determined that this will not happen on their watch. We hope that this is the resolve of this committee too.**



THE KENYAN SECTION OF THE INTERNATIONAL COMMISSION OF JURIST'S MEMORANDUM ON NOMINATIONS IMPASSE

BACKGROUND

The Speaker of the National Assembly, Honorable Kenneth Marende, and yesterday 3rd February 2011 declined to make a ruling on the Constitutionality of the nominations to the Constitutional offices of Chief Justice, Attorney General, Director of Public Prosecution and Controller of Budget by H.E President Kibaki. The speaker referred the matter to the two house committees –Justice and Legal Affairs and Finance Planning and Trade to deliberate and report on this issue to parliament by 10th February 2011.

At the same time a petition filed in the High Court to determine the constitutionality of the nomination process was heard and determined on 3rd February 2011. The High Court held that the nominations were unconstitutional and the nominees should not be processed further for their proposed offices.

In view of the foregoing we hereby submit this advisory opinion to you.

1. **JURISDICTION**

The Parliamentary Departmental Committees do not have jurisdiction to decide matters the Courts have already determined

The Constitution in Chapter 10 article 165 sub article 3d(ii) gives the High Court exclusive Jurisdiction to hear any question regarding the interpretation of the Constitution. This Article further specifies that such interpretation includes the determination of whether anything said to be done under the authority of the Constitution, is constitutional or not. An appeal from such a decision lies in the Court of Appeal and finally the Supreme Court.

The Judicial ruling by the High Court on **PETITION NUMBER 16 OF 2011** with regards to the Constitutionality of the nominations to these constitutional offices was properly heard and determined. Article 160 (1) of the Constitution further buttresses this position as it states that such decision is not subject to the control or direction of any person or authority.

This provision in law is important and should be respected in order to prevent anarchy. In the Kenyan case the 2007-2008 post poll violence erupted because neither party went to court to have their matter determined. The Courts mandate as a final arbiter on Constitutional interpretation ensures the upholding of the rule of law. Otherwise everyone will interpret the Constitution as they dim fit.

In borrowing from different jurisdictions in the case of *Marbury v. Madison* (1803)[1] the Supreme Court of the United States of America established that the Court would be the sole interpreter of the Constitution and laid down several important ground rules of interpretation which are:

- The rules in the Constitution are to be regarded as supreme
- In cases of conflict, inferior rules must give way to superior rules
- In cases of dispute, it is the role of the judiciary to determine what rules should apply

Should the departmental committees therefore proceed to determine the Constitutionality of the nominations therefore they would be in breach of the Constitution.

2. SEPERATION OF POWERS.

The Constitution in chapter 8, 9 and 10 provides for the separation of powers as it divides the arms of government into Legislature, Executive and Judiciary respectively. It ensures diffusion rather than a concentration of power within the state ensuring that powers are not abused thereby protect the rights and liberties of citizens. The Legislature in Chapter 8 legislates; the Executive in Chapter 9 is tasked with implementation of the law whereas the Judiciary interprets the law. Without such distinction or respect for the independence of each arm of government then there is no rule of law and anarchy can and will break out as there is no authority in place. In light of its assurances to the International community of its intent to prosecute perpetrators of Post Election Violence, the government is revamping the Judiciary. It would be important to see if decisions from this Judiciary are respected if at all. Otherwise such revamping would be superficial and we cannot rule out future post election violence as aggrieved parties would also not respect Court decisions.

Further and alternatively:

3. THE NOMINATIONS ARE UNCONSTITUTIONAL

i) <u>For the office of the Chief Justice the nomination was in violation of the Constitution.</u>

a) The President failed to include the Judicial Service Commission in the nomination process. The Constitution in article 166(1) b instructs the President to appoint the Chief Justice and his deputy upon the recommendation of the Judicial Service Commission. In the transitional clauses, the Sixth Schedule clause 24 of the Constitution provides that a new Chief Justice shall be appointed by the President subject to the National Accord and Reconciliation Act and after consultation with the Prime

[1] The Jurisprudence of Constitutional Interpretation: http//faculty.ncwc.edu.mstevens accessed :4/2/2011

Minister and with the approval of the National Assembly. The Sixth Schedule however lists the Constitutional provisions which are suspended pending transition. Chapter 10 of the Constitution where article 166 falls is not listed as such and therefore became operative immediately the constitution was promulgated on Friday August 27th 2010. The President therefore is required to appoint the new Chief Justice in line with Article 166 of the Constitution as read with clause 24 of the Sixth Schedule. It is incumbent upon the President therefore to appoint the new Chief Justice upon the recommendation of the Judicial Service Commission and after consultation with the prime minister and with the approval of the National Assembly.

b) The President violated the spirit of the Constitution by excluding Public Participation. Articles10 (2) a and (c) of the Constitution provide that the entire Constitution shall be given effect through participation of the public, good governance, integrity, transparency and accountability. Articles 69,118,196 and 201 of the Constitution provide for Public Participation in governance. The process of nominating the Chief Justice, Attorney General and Director of Public Prosecution should therefore be a competitive open accountable and transparent process. These Constitutional offices should be **publicly advertised, publicly shortlisted** and publicly nominated. The public ought to have been informed of every step of the nominations process. Constitutional offices cannot be legally filled behind closed doors and still be in compliance with these provisions.

c) Due process was not followed as the consultation process is in doubt. In the Sixth Schedule clause 24 of the Constitution, a new Chief Justice shall be appointed by the President subject to the National Accord and Reconciliation Act and after consultation with the prime minister. Further Clause 29 of the same schedule also requires the President to consult with the Prime Minister in making any appointments to new Constitutional offices or those that fall vacant. The nominations of the Attorney General, the Director for Public Prosecution and the Controller of Budget, legally require a consultative process between the two principals as well. Consultation in various case laws and jurisdictions has been accepted as

"such decision shall require the concurrence of such other functionary: Provided that if such functionary is a body of persons it shall express its concurrence in accordance with its own decision-making procedures"[2]

Under the National Accord and reconciliation Act the two principals are equal partners in the governance of this country and the new Constitution also takes cognizance of this. The assertions by

[2] Constitution of the Republic of SA 200 of 1993 s 233(3).

the Prime Minister that he was not consulted are grave and should be ventilated prior to nominees from such a process being accepted.

In view of the foregoing we strongly urge the committee to:

1. **Declare the nomination process unconstitutional in solidarity with the High Court**
2. **Render the process back to the President and the Prime minister for proper nomination in accordance with the Constitution.**

We attach hereto a recommended framework for the nomination process

35 B

Kenya Youth Parliament

SANA Safer Nairobi Coalition

COPA

THE YOUTH PLATFORM FOR CHANGE [YP4C]

[National Youth Conversation on Peace, Peace Building, Reforms and Youth Economic Empowerment]

The Chairman
Parliamentary Select Committee on Justice &
Legal Affairs
Parliament Building
NAIROBI.

PETITION ON THE CONSTITUTIONALITY OF THE NOMINATIONS FOR APPOINTMENT TO THE OFFICERS OF THE CHIEF JUSTICE, ATTORNEY GENERAL, THE DEPUTY PUBLIC PROSECUTOR AND CONTROLLER OF BUDGET.

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Hon. Members of the Parliamentary Select Committee on Legal Affairs, the petitioners/ applicants are a total of eleven youth based, youth-led, non- governmental organizations and community based organizations, and the petitioners also include thirteen individuals / petitioners' working for gain/volunteers with various youth organizations.

The petitioners' recently filed a Petition before the High Court of Kenya at Nairobi which Petition is still pending determination and will be coming up for *inter partes* hearing of the Petitioners applications for Conservatory orders on the 14th of February, 2011. This Petition No. 16 of 2011 [Patrick Njuguna & Others versus the Attorney General] was filed on the 3rd of February, 2011 and comes in the wake of what the Petitioners consider to be the unconstitutionality of the nominations made by his Excellency the President to the offices of the Chief Justice, the Attorney General, Deputy Public Prosecutor and Controller of Budget.

The Petitioners were before the court as citizens of this country entitled under the constitution to not only to defend the supreme law but also to uphold it, they also approached the Court as the beneficiaries of the rights enshrined under the constitution and in particular the bill of rights. The attorney general has been joined pursuant to article 156 (4) of the constitution as the government principal legal advisor.

Jurisdiction of the Court and /Legal Grounding of the Petitioners Opposition to the Appointments.

1. The applicants/ petitioners' moved the court under article 22 (1) which empowers every person/Kenyan to institute proceedings claiming that a right or fundamental freedom in the bill of rights (i) has been or (ii) is deemed to be violated or infringed or is (iii) threatened.
2. It is instructive to note that the rights claimed can either (i) have been violated or threatened with violations.
3. Article 20 (1) of the Bill of Rights applies to all persons and state organs under Article 20 (3), the court in this article is enjoined in applying the provisions of the Bill of Rights to
    (i) Develop the Law to the extent that it gives effect to a right or fundamental freedom
    (ii) Adopt the interpretation that most favors the enforcement of (the) a right or fundamental freedom
4. Article 20 (4), the court has the authority, in interpreting the Bill of Rights to promote:
    (i) The values that underlie an open and democratic society based on Human Dignity, equity, equality and freedom and;
    (ii) The spirit purport and objects of the Bill of Rights
5. Under Article 21 (1) it is the fundamental duty of the state and every state organ to observe, respect, protect and fulfill the rights and the fundamental freedoms in the Bill of Rights
6. Article 21 (3) all state organs and all public officers have the duty to address the needs of vulnerable groups within society, including
    (i) Women
    (ii) Older members of the society
    (iii) Persons with disability
    (iv) Children
    (v) Youth
    (vi) Members of minority
    (vii) Marginalized communities
    (viii) Members of a particular ethnic,
    (ix) Religious or
    (x) Cultural communities
7. Article 23. The High Court, under Article 23 (1) as read together with Article 165 (3) both confer to the High Court the Jurisdiction to hear and determine applications to redress a denial, violation or infringement of , or threat to a right or fundamental freedom in the Bill of Rights,
8. Article 23 (3) clothes the High Court with powers to grant any of the following orders or remedies, in any proceedings brought under Article 22;

(i) A declaration of rights
(ii) An injunction
(iii) A conservatory order etc.

BACKGROUND/ SUMMARY OF FACTS: (Your Lordship)

1. On the 28th February 2011, the government communicated to the public a decision of the President to nominate 4 appointments Hon. Alnasir Visram as Chief Justice, Professor Githu Muigai as Attorney General, Mr. Kioko Kilukumi as Deputy Public Prosecutor and Mr. William Kirwa as Controller of Budgets.
2. The decision was forwarded on the 31st January or 1st of February 2011 by head of the civil service and secretary to the Cabinet, Amb Francis Muthaura to the speaker of the national assembly for discussions and adoption/ approval.
3. On or above the 2nd of February 2011, the speaker of the national assembly received a letter from the Rgt. Hon. Prime Minister, Raila Odinga disputing that the list of nominees forwarded by the President was as result of consultations contemplated under section 24 of the sixth schedule of the constitution as read together with the National Accord and Reconciliation Act of 2008
4. In light of the public altercations and open disagreements has arise the question as to the constitutionality of the process leading to the said decision/nominations
5. The petitioners' have identified and wish to canvas the following breaches of the Bill of Rights under the constitution

BREACHES OR VIOLATIONS OF THE CONSTITUTION

1. Article 10(1) and (2) a, b and c dealing with National Principles and Values and which codify the spirit of the constitution (read Article 20 (4)b – in interpreting the Bill of Rights, a court shall promote the spirit, purport and objects of the Bill of Rights
2. Article 27 (1), (2),(3),(4) & (5) which provides for equality and freedom of discrimination on the grounds of
   i. Sex
   ii. Race
   iii. Marital status
   iv. Age
   v. Disability
   vi. Religion
   vii. Ethnic and social origin
   viii. Colour
   ix. Culture
   x. Belief or conscience

3. In making or arriving at the decision to nominate the four (4) persons adverted to above the State not only breached provisions of Article 27 by failing to give due consideration to gender equity/equality, it also discriminated against other category of persons enumerated under Article 27 (4) of the Constitution in particular the youth and to the extent that the nominations failed to

meet the test set out in this provision it is discriminatory,unconstitutional, null and therefore null and void.

4. Article 55 (b) Which deals with the Youth and which places an obligation upon the state to take measures which shall include affirmative action to ensure that the youth:
   (a) Have the opportunities to associate
   (b) Be represented and participate in, Political, Economic, Social and Social spheres of life

5. Article 55 (b) must be read not in isolation but in conjunction with article 27 (1), (2), (3), (4) of the Constitution and in so doing this court will arrive at the conclusion that it is not only the women who were discriminated but all persons enumerated under section 27 (4) including the youth who are in Court in Petition No. 17 of 2011 seeking redress.

6. Article 157 (3) 166(3) 156 (3)deals with qualification of office bearers to the offices of Chief Justice, Attorney general and director of public prosecutor will lend credence to how discrimination of the youth of this country was perpetuated contrary to or in breach of article 27 (1) and 2, 3, 4 as read with article 55(b).

7. Article 157 (3) of the constitution provides for the qualifications for the director of public prosecutions to be those similar under article 166 (5) to these for appointment of a high court Judge namely a requirement to have:

   (a) At least ten years experience as a superior court Judge
   (b) As a distinguished legal academic or legal practitioner or experience in relevant field
   (c) Held qualifications specified in paragraph a and b for a period amounting in aggregate to ten years

8. It is a well known fact a lawyer begins training at the university at the age of 18 years and after six years including two years Post University training in which they attend pupilage and diploma at the Kenya school of law he/she is ready for an admission as an advocate.

9. If they choose to take the legal practice in the bar between the age of 24 – 34 they will have attained or accumulated 10 years requisite experience for qualification as Judge of the high court under article 166 (5) which is the qualification necessary for nomination a s deputy public prosecutor.

10. In other words at 34 years all young lawyers are ready to assume office and your Lordship they are in great numbers all of whom will walked to the offices themselves for nomination or being nominated by peers and gladly would have whished to under go vetting or interview.

11. Under article 260 of the constitution Youth is interpreted or defined to mean the collectivity of all individuals in the Republic of Kenya who
   (a) Have attained the age of 18 year, but
   (b) Who have not attained the age of thirty five years

12. Article 166(3)the appointment of chief justice your lordship even if one was to consider qualification for the chief justice and attorney general (article 156 (3)) - 15 years qualification

as a high court judge or illegal practice or accumulation of both the aggregate of which amounts to 15 years.

13. A lawyer who begins practice at 24 years will only be 39 year after 15 years experience and relatively be considered youthful for purposes of appointment to the offices of attorney general and chief justice

14. Article 73 (1) and (2) Which states that authority assigned to a state office is a public trust and sets the benchmark as to how it is to be exercised

15. Article 131(2) Authority of the president and how its to be exercised that the President shall respect, uphold and safeguard this constitution

16. Article 131 (2)read together with article 10 (1) and (2) dealing with principles and values of governance binds all state organs, offices or agents, public officers at all levels of government (including the executive) to uphold there value

17. Article 2 (1) declares the supremacy of the constitution and thus no one including the President is above the law.

18. Article 1 (10 and (2)Declares the people of the People of Kenya as the true sovereign and all power belongs to them to be exercised in accordance with the Constitution.

19. Breach of article 10 (1) and (2) The Petitioner submit that the nomination for appointment were in breach of article 10 (1) and (2) which binds all state offices, officers and organs and persons whenever any of them

- Applies
- Enacts
- Makes or implements the constitution

20. The powers conferred upon the president subject to the national accord and in consultation with the Prime Minister under section 24 of sixth schedule were on powers conferred either to apply, enact, make or implement the constitution in respect of the nomination and appointment of Attorney general, director of public prosecutions and controller of budget

21. In effect the nomination was also then subject to Article 10 (2), a,b,c which provides that the national value and principles of governance include

- The rule of law
- Democracy
- Participation of people
- Equity

- Social justice
- Inclusiveness
- Equality
- Non discrimination
- Protection marginalized
- Good governance
- Integrity
- Transparency
- Accountability

22. **Breach of section 24 (6) schedule**

- Section 24 of the sixth schedule deals with the appointment of the chief justice during transitional period
- Under this provision article 166 (1) of the constitution, it would appear, is temporarily either suspended or yields power top the president without necessarily seeking recommendations of the judicial service commission.
- However, this interpretation obtains only if one reads section 24 of schedule six in isolation from the rest of the constitution.
- The petitioners concern is that the provisions of section 24 of the sixth schedule, though arguably giving discretion to the president to side step article 166 (1),was not meant to be a "carte blanche" or blank cheque to the President to overlook the entire constitution, in particular the bill of rights
- Section 24 (sixth schedule) in particular did not oust the express provisions of
    i. Article 1 – which confers sovereignty upon the people of Kenya?
    ii. Article 2 – Which declares the constitution supreme and subjects all state organs and officers/ public officers to its dictates – and binds all to enforcement of bill of rights
    iii. Article 3 – Which place a duty upon all Kenyans to defend and uphold the constitution
    iv. Article 10 – Which codifies the spirit of the constitution in form of national values and principles to include requirements for public participation, equity, equality, non discrimination, transparency and accountability.
    v. Article 27 – On non-discrimination on any basis including age and gender plus equality of treatment.
    vi. Article 55 (6) – Equal appointments and participation of the youth.
    vii. Article 73 (1) a - Which says authorities leadership is assigned to any state officer as ---------- exercisable in a manner that (is)
        - Consistent with the constitution
        - Demonstrate respect to the people
        - Brings honor to the nation and dignity to the office
        - Promotes public confidence in the integrity of the office

viii. Article 73(2) - specifically forbids use or exercise of state power in decision making in a manner that promotes

i. Favoritism
ii. Nepotism
iii. Corrupt practices
iv. Cronyism

ix. The petitioners submit that by failing to read section 24 of sixth schedule together with the above outlined provisions, in particular article 10 (2) a that requires public participation . The communications failed the test of constitutionality and must therefore declared null and void.

x. On a public recruitment process where offices were advertised and representations made both by the public and interested professional organizations such as L,S.K and I.C.J, J.S.C and interested groups such as women, youth, church and other would have met the test set under article 10(1) and (2) as read with article 27 (1) and (2) a,b, c, and d, article 55 (b) and article 73 (1) and (2).

23. **Article 259 (11) – Construing the Constitution**

Provides that if a function or power is conferred upon a p[person exercisable only after, *inter alia* constitution....., that function, can be so exercised ((constitutionally) only after that consultation.

24. In the circumstances of the nominations we submit a very humble submission indeed that there was no proper consultation within the meaning/ spirit of the entire constitutions

25. By consultation we do not subscribe to the school of thought that the two parties merely confer and either agree/concur or fail to do so

26. Consultation we have endeavored to show was intended under section 24 sixth schedule to give principles and appointment author the opportunity to vet proposed names against certain benchmarks and ensure they pass the test under articles 10(1) and (2), 27 (1) and (2) article 55(6), article 73(1) and (2)

27. (Article 10 (1) and (2)- the Constitution very deliberately and consistently upholds its values –see article 10, read with article 259, construing constitution plus article 20 (4) a and b.

28. Only then could the President after being satisfied (in process of such a consultation) that candidates met requirement under the Constitution over and above provisions of article 166 (1), 56 (1) ,and 157 (3) could he properly make the nominations. Anything short of this must and should be declared unconstitutional.

29. Requirements to give reasons ;Making the process open, participatory and transparent, opportunity for equal treatment, equity and non discrimination including opportunity for youth and women to apply and be considered for nomination and appointment and either accepted or rejected would have been afforded.

30. This Committee must find that the nominations, for them to meet the test of constitutionality

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i. President had to not only forward names but give reasons as to why and how he settled for names/nominees for the parliament to debate process/ procedure and constitutionality

ii. Bill of rights chapter (4) provisions is not suspended and took effect immediately upon promulgation of the constitution. See schedule 5 article 261.

These are a summary of representations we have made to Court and which are pending hearing on Monday 14th of February, 2011 and possibly ruling the same day at 2.30 pm. We trust that in making your finding as to the Constitutionality of the appointments due considerations will be given to issues raises herein and which are also pending in Court.

PATRICK NJUGUNA

EXECUTIVE DIRECTOR – KENYA YOUTH PARLIAMENT

FOR AND ON BEHALF OF THE YOUTH PLATFORM FOR CHANGE:

HIGH COURT OF KENYA
CENTRAL REGISTRY
09 FEB 2011
CIVIL SIDE
NAIROBI

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
PETITION NO....17....OF 2011

IN THE MATTER OF ARTICLE 2 (1), 3 (1), 10 (1), (2), a, b & c, AND IN THE MATTER OF ARTICLE 22 & 23 AND
IN THE MATTER OF THE NOMINATION FOR APPOINTMENT OF THE CHIEF JUSTICE OF THE REPUBLIC OF KENYA, THE DEPUTY PUBLIC PROSECUTOR AND THE ATTORNEY GENERAL OF THE REPUBLIC OF KENYA
AND
IN THE MATTER ARTICLE 22 (1), (2) (a), (b), (c), (d), (3) ARTICLE 23 (1), (3) (a) & (c) OF THE CONSTITUTION AND ARTICLE 27 (1), (2), (3), (4), (5), ARTICLE 55 (5), ARTICLE 131 (a) & (e), ARTICLE 259 (1) (a), (b), (c) & (d) AND IN THE MATTER OF THE SIXTH SCHEDULE: ARTICLE 262 - SECTION 24 (1), (2) & (3) AND THE NATIONAL ACCORD AND RECONCILIATION ACT 2008.
IN THE MATTER OF SECTION 19 OF THE 6TH SCHEDULE AS READ WITH SECTION 20 AND 21 OF THE CONSTITUTION OF KENYA [SUPERVISORY JURISDICTION AND PROTECTION OF FUNDAMENTAL RIGHTS AND FREEDOMS OF THE INDIVIDUAL) HIGH COURT PRACTICE AND PROCEDURE RULES, 2006.[GICHERU RULES].

PATRICK NJUGUNA
ABDULLAZIZ ABUBAKAR, ERICK OYUGI, EMMANUEL KHISA
ANTHONY MASHETI, LOUIS KAPTCH, CALEB OUMA OKECH
LILIAN NJUGUNA, PAUL NYAMWEA, BANTU KINARU
VINCENT OMONDI, FRED MUNYIRI,
KAMKUNJI HUMAN RIGHTS DEFENDERS MOVEMENT
AFRICAN CENTRE FOR INTERNATIONAL YOUTH EXCHGANGE SHIP FOR WORLD YOUTH [SWYAA-KENYA]
KINAMBA YOUTH GROUP, KAMKUNJI PARA-LEGAL NETWORK
34 YOUTH GROUP, PUMWANI YOUTH WOMEN ASSOCIATION
ECO YOUTH CLUB MUTHURWA, NGARA YOUTH PELICO
UZIMA FOUNDATION-AFRICA
KENYA YOUTH PARLIAMENT.....PETITIONERS

VERSUS

THE HON. ATTORNEY GENERAL.....RESPONDENT

CERTIFICATE OF URGENCY

I ANTHONY T. OLUOCH, an Advocate of the High Court of Kenya practicing as such with the firm of A. T. OLUOCH & Company Advocates in Nairobi do hereby certify that the Chamber Summons Application herein is urgent and should be heard and disposed of urgently on the GROUNDS THAT: -

1. On the 28th of January, 2011 the President of the Republic of Kenya nominated for appointment the Hon. Justice Alnasir Visram as the Chief Justice, Professor Githu Muigai as the Hon. Attorney General and Mr. Kioko Kilukumi as the Deputy Public Prosecutor

2. On the 4th of February, 2011 the Government communicated to the public the decision of the President to appoint Hon. Justice Alnasir Visram as the Chief Justice, Professor Githu Muigai as the Hon. Attorney General and Mr. Kioko Kilukumi as the Deputy Public Prosecutor.

3. The decision was forwarded on the 1st of February, 2011 by the Head of the Civil Service and Secretary to the Cabinet Ambassador Francis Muthaura to the Speaker of the National Assembly Hon. Kenneth Marende requesting that the proposed names or nominees be discussed and approved by Parliament for formal appointment by the President.

4. The procedure of appointment of the three individuals Hon. Justice Alnasir Visram as the Chief Justice, Professor Githu Muigai as the Hon. Attorney General and Mr. Kioko Kilukumi as the Deputy Public Prosecutor violates clear provisions of the Constitution.

5. The Petititioners/Applicants allege that there has been breaches and contraventions of the Constitution under Articles 10 (1) & (2) a, b & c, and provisions of Articles 27 (1), (2), (3), (4) & (5) Article 55 (b), 73 (1) & (2), 131 (2) a & e, and the sixth schedule section 24 (1) & (2) and there is likely to continue being breaches of these provisions unless this Honourable Court grants the orders sought have been complied with.

DATED at NAIROBI this 3rd day of February, 2011.

A. T. OLUOCH & COMPANY
ADVOCATE FOR THE PETITIONERS

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NAIROBI.

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
PETITION NO.....OF 2011

IN THE MATTER OF ARTICLE 2 (1), 3 (1), 10 (1), (2), a, b & c, AND IN THE MATTER OF ARTICLE 22 & 23 AND
IN THE MATTER OF THE NOMINATION FOR APPOINTMENT OF THE CHIEF JUSTICE OF THE REPUBLIC OF KENYA, THE DEPUTY PUBLIC PROSECUTOR AND THE ATTORNEY GENERAL OF THE REPUBLIC OF KENYA
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KENYA YOUTH PARLIAMENT.....PETITIONERS

VERSUS

THE HON. ATTORNEY GENERAL.....RESPONDENT

CHAMBER SUMMONS

[Under Article 23 (3) (C) of the Constitution, Section 19 of the Sixth Schedule of the Constitution, Section 20 and 21 of the Constitution of Kenya [Supervisory Jurisdiction and Protection of Fundamental Rights and Freedoms of the Individual) High Court practice and procedure Rules, 2006, and the Courts Inherent Jurisdiction]

LET ALL PARTIES CONCERNED attend to the Judge in Chambers on the .....day of .....2011 at 9.00 O'clock in the forenoon or soon thereafter on the hearing of the Application by Counsel for the Petitioner/Applicant FOR ORDERS THAT:-

1. This application be certified urgent and heard *ex parte* in the first instance.

2. Pending the hearing of this application inter partes a conservatory order does issue restraining the Respondents and or any State or public officials proceeding with the process of nomination and or appointments including possible gazettement to the offices of the Chief Justice, the Hon. Attorney General and the Controller of the + budget pursuant to the nominations for approval forwarded by the President to the Speaker of the National Assembly on the 1st of February, 2011.

3. Pending the hearing of main Petition a conservatory order does issue restraining the Respondents and or any State or public officials proceeding with the process of nomination and or appointments including possible gazettement to the offices of the Chief Justice, the Hon. Attorney General and the Controller of the budget pursuant to the nominations for approval forwarded by the President to the Speaker of the National Assembly on the 1st of February, 2011.

4. The costs of this petition be provided for.

WHICH APPLICATION IS based on the Affidavit if PATRICK NJUGUNA and upon such other or further grounds to be adduced at the hearing as the Court shall direct:

1. On the 28th of February, 2011 the Government communicated to the public the decision of the President to appoint Hon. Justice Alnasir Visram as the Chief Justice, Professor Githu Muigai as the Hon. Attorney General and Mr. Kioko Kilukumi as the Deputy Public Prosecutor.
2. The decision was forwarded on the 1st of February, 2011 by the Head of the Civil Service and Secretary to the Cabinet Ambassador Francis Muthaura to the Speaker of the National Assembly Hon. Kenneth Marende requesting that the proposed names or nominees be discussed and approved by Parliament for formal appointment by the President.

3. The procedure of appointment of the three individuals Hon. Justice Alnasir Visram as the Chief Justice, Professor Githu Muigai as the Hon. Attorney General and Mr. Kioko Kilukumi as the Deputy Public Prosecutor violates clear provisions of the Constitution.

4. The two Principals namely President Mwai Kibaki and Rt. Hon. Raila Odinga, the Prime Minister have have publicly disagreed over the nominations with one principal saying or alleging their was wide consultations and the other denying their was any or that the consultation was not sufficient.

5. The public debate and indeed the debate in Parliament have focused naively on the definition of the terms "consultation", in other words the proposed nominations would pass if the Prime Minister were to state that indeed there was consultation which he denies.

6. It is the Petitioners case that the issues run deeper than the consultation or the lack of it and go into the very root of our culture as a people, the values and principles we enshrined under Article 10 of the Constitution and the respect for integrity in public processes and the need for public input or processes, the people who under Article 1 (1) & (2) of the Constitution.

7. Article 27 places every person as equal before the law and prohibits any form of discrimination based on *inter alia* sex/gender. Women and men have the right under this Article to equal treatment, including the right to equal opportunities in the political, economic, cultural and cultural and social spheres.

8. Article 55 (b) of the Constitution read together with Article 27 (1) & (2) which provides for equality before the law, equal treatment and non discrimination on grounds inter alia of age and sub article (4) of Article 27.

9. Under Article 55 (b) "the State shall take measures, including affirmative action programs to ensure that the youth".... (b) " have opportunities to associate, be represented and participate in political, social, economic and other spheres of life."

10. The above article construed in light of the circumstances of the nominations to the offices of the Chief Justice, Attorney General and Deputy Public Prosecutor was precluded by breaches of Article 10 that call for or enjoins the state officials, officers and agents, which in this case includes the state officer number one "His Excellency the President, to ensure public participation and inclusiveness, equity, justice non discrimination, transparency and accountability in making the appointment.

11. A look at the three nominees shows clearly that neither of these very respected Kennyans namely Hon. Justice Alnasir Visram, Professor Githu Muigai or Mr. Kioko Kilukumi are of youthfull age yet had the process been opened to public participation the youth who constitute 70% of the population would either have volunteered their name, applied or been nominated by their peers and had an equal opportunity for consideration to these converted posts.

12. Article 157 (3) the qualifications for Director of Public Prosecution are similar to those of a Judge under Article 166 (5) which provides that "each judge of the High Court shall be appointed from among persons who have (a) 10 years experience as a superior court judge or (b) at least 10 years experience as a distinguished academic or legal practitioner or such experience in other relevant field or (c) held the qualifications specified in paragraph a & b for a period amounting in aggregate to ten years.

13. It is a well know fact that a lawyer graduates and is ready for legal practice as an advocate after the requisite post University training at the average age of 24-25 years. If the qualifications for a DPP is 10 years of academic or legal practice then at the age of between 35 and 40 such a lawyer or an advocate and there hundreds of thousands who fall in this youtfull bracket qualify to take up the position. The procedure and haste with which the position was announced robbed youtfull practitioners the opportunity to apply in an open public process of recruitment and recruitment or short listing or to make representation made by their peers as well as the public as to their suitability or otherwise.

14. Likewise under Article 166 (3) a Chief and judges of the supreme Court shall be appointed from among persons of "(a) at least 15 years experience as a superior Court Judge or (b) at least 15 years experience as a distinguished academic or legal practitioner or such experience in other relevant field or (c) held the qualifications specified in paragraph a & b for a period amounting in aggregate to 15 years.

15. The same argument for young advocates and practitioners who would otherwise have qualified to apply or be nominated to the office of DDP applies: if at age 24 or 25 the youthful lawyers are ready for practice, academic or other legal practice then at an average and youthful age of 40 which is 15 years experience they would, but for the procedure used by the "appointing authority" be eligible for nomination as Chief Justice of the Republic of Kenya.

16. The same argument applied in the argument for nomination of Chief Justice and DPP has robbed the youth and youthful professional lawyers an opportunity to apply to the post of Attorney General whom under Article 156 (3) requires the same qualifications as those for Chief Justice under Article 166 (3).

17. The spirit of the Constitution captured in the Article dealing with the National values and principles have been violated and they include the principles of democracy and the rule of law, public participation of the people, principles and values of equity, inclusiveness, equality, non discrimination and protection of marginalized. It also enshrines the principles of good governance, integrity, transparency and accountability in the conduct of public affairs including the decisions of the President and the Prime Minister as the Principles in the Coalition Government created under the National Accord and Reconciliation Act, 2008.

18. The Petitioners have a legitimate and rightful expectations that having appended their signatures to the new Constitution and sworn allegiance to defend and protect it the President of the Republic of Kenya Hon. Mwai Kibaki and the Rt Hon. Prime Minister Raila Amolo Odinga have not only a duty but an obligation to Kenyans and to the Constitution the swore to

14. Likewise under Article 166 (3) a Chief and judges of the supreme Court shall be appointed from among persons of "(a) at least 15 years experience as a superior Court Judge or (b) at least 15 years experience as a distinguished academic or legal practitioner or such experience in other relevant field or (c) held the qualifications specified in paragraph a & b for a period amounting in aggregate to 15 years.

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17. The spirit of the Constitution captured in the Article dealing with the National values and principles have been violated and they include the principles of democracy and the rule of law, public participation of the people, principles and values of equity, inclusiveness, equality, non discrimination and protection of marginalized. It also enshrines the principles of good governance, integrity, transparency and accountability in the conduct of public affairs including the decisions of the President and the Prime Minister as the Principles in the Coalition Government created under the National Accord and Reconciliation Act, 2008.

18. The Petitioners have a legitimate and rightful expectations that having appended their signatures to the new Constitution and sworn allegiance to defend and protect it the President of the Republic of Kenya Hon. Mwai Kibaki and the Rt Hon. Prime Minister Raila Amolo Odinga have not only a duty but an obligation to Kenyans and to the Constitution the swore to

decide to make such crucial appointments as that of the Chief Justice and the Hon. Attorney General by giving credence to the spirit and letter of the Constitution as read together with the National Accord.

19. The letter of the law and the Constitution gives the President the powers in the 1st instance, during this transitional period to appoint the Chief Justice, but it is not enough to point to the letter of the law, the letter must be read together with and joint together with the spirit.

20. Under the National Accord and Reconciliation Act, which became part of the Constitution in March, 2008 the Coalition Government is based and founded on the basis of two equals or equality of the two principals, accordingly any appointments must and should give due regard to the spirit of the National Accord in all public decision making including serious appointments such as that of the Chief Justice.

21. The spirit of the Constitution has been subverted through this unilateral and un-procedural appointment by selective application of section 24 of the Constitution and which is being read in exclusion of the other parts of the Constitution especially Article 10 (1), (2) a, b, c, d and e, which capture the spirit of the supreme law in particular the public's right to participation in all processes of governance that affect them.

22. The spirit of the Law has been subverted by using provisions of the so called "letter of the Constitution": this is what imputy and bad governance is and was made of and what the mischief of new constitution sought to address.

23. Article 73 of the Constitution provides that "authority assigned to a public officer is a public trust to be exercised in a manner that (inter alia) (i) Consistent with the purposes and objects of the Constitution (ii) demonstrates respect for people (iii) brings honour to the nation and and dignity to the office and (iv) promotes public confidence in the integrity of the office.

24. Sub-Article (2) (b) of Article 73 is even more succinct in saying that "The guiding principles of leadership and integrity include (b) objectivity an impartiality in decision making and in ensuring that decisions are not

influenced by nepotism, favoritism, other improper motives and corrupt practices.

25. It is clear, within the public domain and a very poorly kept secret that decision to nominate for appointment the Chief Justice, the Attorney General and the Deputy Public Prosecutor was rushed to serve sectarian interests and not the public good, in particular it would appear to have been influenced by the desire to save the so called "Ocampo Six" and to give the African Union heads of States the erroneous impression that we were at an advanced stage of reforming the Judiciary as well as the criminal and administration of justice system and thereby get their approval to secure a deferral of the ICC cases from the Security Council of the United Nations.

26. Now that the African Union has passed such a resolution we must now reclaim our rightful place in defending and upholding the Constitution and this Court is enjoined under Articles 22 & 23, 159 (1), (2) a, b, d & e 165 (b) & (d), and Article 259 ...to give effect to this quest.

27. The Petititioners/Applicants allege that there has been breaches and contraventions of the Constitution under Articles 10 (1) & (2) a, b & c, and provisions of Articles 27 (1), (2), (3), (4) & (5) Article 55 (b), 73 (1) & (2), 131 (2) a & e, and the sixth schedule section 24 (1) & (2) and there is likely to continue being breaches of these provisions unless this Honourable Court grants the orders sought have been complied with.

DATED at NAIROBI this 3rd day of February, 2011.

A. T. OLUOCH & COMPANY
ADVOCATE FOR THE PETITIONERS

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REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
PETITION NO.....OF 2011

HIGH COURT OF KENYA
CENTRAL REGISTRY
03 FEB 2011
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IN THE MATTER OF ARTICLE 2 (1), 3 (1), 10 (1), (2), a, b & c, AND IN THE MATTER OF ARTICLE 22 & 23 AND
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UZIMA FOUNDATION-AFRICA
KENYA YOUTH PARLIAMENT.....PETITIONERS

VERSUS

THE HON. ATTORNEY GENERAL.....RESPONDENT

SUPPORTING AFFIDAVIT

I PATRICK NJUGUNA a resident of NAIROBI in the Republic of Kenya of Post Office Box Number 10678-00100 NAIROBI hereby make oath and state as follows: THAT -

1. I am a male adult of sound mind and disposition and the applicant herein and I am conversant with the fact of the matter herein and as such competent to swear this Affidavit.

2. I have read and had explained to me the Chamber Summons applicationd seeking conservatory orders dated 3rd February, 2011 seeking declaratory orders against the purported nomination for appointment of the Hon. Justice Alnasir Visram, Professor Githu Muigai and Mr. Kioko Kilokumi to the positions of Chief Justice, Attorney General and Deputy Public Prosecutor Respectively and I wish to swear this affidavit in support thereof.

3. I heard from the Radio and subsequently read on the daily newspapers that on the 28th of January, 2011 the President of the Republic of Kenya nominated for appointment the Hon. Justice Alnasir Visram as the Chief Justice, Professor Githu Muigai as the Hon. Attorney General and Mr. Kioko Kilukumi as the Deputy Public Prosecutor

4. I subsequently read in the dailies and saw on National Television that on the 4th of February, 2011 the Government through Ambasador Francis Muthaura, Head of Public Service and Secretary to the Cabinet communicated to the speaker of the National Assembly the decision of the President to appoint Hon. Justice Alnasir Visram as the Chief Justice, Professor Githu Muigai as the Hon. Attorney General and Mr. Kioko Kilukumi as the Deputy Public Prosecutor and sought to have the same discussed in Parliament for approval and eventual appointment. Annexed herewith and marked **PN-1** are true copies of cutting from the dailiy newspapers evidencing the said nominations for appointment and the discussions and disagreement by the two principles over the said nominations.

5. The procedure of appointment of the three individuals Hon. Justice Alnasir Visram as the Chief Justice, Professor Githu Muigai as the Hon. Attorney General and Mr. Kioko Kilukumi as the Deputy Public Prosecutor violates clear provisions of the Constitution.

6. There have been breaches and there may continue to be be breaches and contraventions of provisions of Articles 10 (1) & (2) a, b & c, and provisions of Articles 27 (1), (2), (3), (4) & (5) Article 55 (b), 73 (1) & (2), 131 (2) a & e, and the sixth schedule section 24 (1) & (2) of the Constitution

further action in the nomination and appointment of the Chief Justice, Attorney General and Deputy Public Prosecutor until the law has been complied with.

7. The two Principals namely President Mwai Kibaki and Rt. Hon. Raila Odinga, the Prime Minister have have publicly disagreed over the nominations with one principal saying or alleging their was wide consultations and the other denying their was any or that the consultation was not sufficient.

8. The public debate and indeed the debate in Parliament have focused naively on the definition of the terms "consultation", in other words the proposed nominations would pass if the Prime Minister were to state that indeed there was consultation which he denies.

9. It is my case and that of the other Petitioners that the issues run deeper than the consultation or the lack of it and go into the very root of our culture as a people, the values and principles we enshrined under Article 10 of the Constitution and the respect for integrity in public processes and the need for public input or processes, the people who under Article 1 (1) & (2) of the Constitution.

7. I have been advised by my advocates on record and believe the same to be true that Article 27 places every person as equal before the law and prohibits any form of discrimination based on *inter alia* sex/gender. Women and men have the right under this Article to equal treatment, including the right to equal opportunities in the political, economic, cultural and cultural and social spheres.

8. I have been advised by my advocates on record and believe the same to be true that the spirit of the Constitution captured in the Article dealing with the National values and principles have been violated and they include the principles of democracy and the rule of law, public participation of the people, principles and values of equity, inclusiveness, equality, non discrimination and protection of marginalized. It also enshrines the principles of good governance, integrity, transparency and accountability in the conduct of public affairs including the decisions of the President

and the Prime Minister as the Principles in the Coalition Government created under the National Accord and Reconciliation Act, 2008.

9. I and the other Petitioners have a legitimate and rightful expectations that having appended their signatures to the new Constitution and sworn allegiance to defend and protect it the President of the Republic of Kenya Hon. Mwai Kibaki and the Rt Hon. Prime Minister Raila Amolo Odinga have not only a duty but an obligation to Kenyans and to the Constitution the swore to defend to make such crucial appointments as that of the Chief Justice and the Hon. Attorney General by giving credence to the spirit and letter of the Constitution as read together with the National Accord.

10. I have been advised by my advocates on record and believe the same to be true that the letter of the law and the Constitution gives the President the powers in the 1st instance, during this transitional period to appoint the Chief Justice, but it is not enough to point to the letter of the law, the letter must be read together with and joint together with the spirit.

11. I am further advised by my advocates on record and believe the same to be true that Under the National Accord and Reconciliation Act, which became part of the Constitution in March, 2008 the Coalition Government is based and founded on the basis of two equals or equality of the two principals, accordingly any appointments must and should give due regard to the spirit of the National Accord in all public decision making including serious appointments such as that of the Chief Justice.

12. I have been advised by my advocates on record and believe the same to be true that the spirit of the Constitution has been subverted through this unilateral and un-procedural appointment by selective application of section 24 of the Constitution and which is being read in exclusion of the other parts of the Constitution especially Article 10 (1), (2) a, b, c, d and e, which capture the spirit of the supreme law in particular the public's right to participation in all processes of governance that affect them.

13. The spirit of the Law has been subverted by using provisions of the so called "letter of the Constitution": this is what imputy and bad

governance is and was made of and what the mischief of new constitution sought to address.

14. I have been advised by my advocates on record and believe the same to be true that Article 73 of the Constitution provides that "authority assigned to a public officer is a public trust to be exercised in a manner that (inter alia) (i) Consistent with the purposes and objects of the Constitution (ii) demonstrates respect for people (iii) brings honour to the nation and and dignity to the office and (iv) promotes public confidence in the integrity of the office.

15. I have been advised by my advocates on record and believe the same to be true that Sub-Article (2) (b) of Article 73 is even more succinct in saying that "The guiding principles of leadership and integrity include (b) objectivity an impartiality in decision making and in ensuring that decisions are not influenced by nepotism, favoritism, other improper motives and corrupt practices.

16. It is clear, within the public domain and a very poorly kept secret that decision to nominate for appointment the Chief Justice, the Attorney General and the Deputy Public Prosecutor was rushed to serve sectarian interests and not the public good, in particular it would appear to have been influenced by the desire to save the so called "Ocampo Six" and to give the African Union heads of States the erroneous impression that we were at an advanced stage of reforming the Judiciary as well as the criminal and administration of justice system and thereby get their approval to secure a deferral of the ICC cases from the Security Council of the United Nations.

17. Now that the African Union has passed such a resolution we must now reclaim our rightful place in defending and upholding the Constitution and I have been advised by my advocates on record and believe the same to be true that this Court is enjoined under Articles 22 & 23, 159 (1), (2) a, b, d & e 165 (b) & (d), and Article 259 ...to give effect to this quest.

18. I have been advised by my advocates on record and believe the same to be true that there has been breaches under Articles 10 (1) & (2) a, b & c, and

provisions of Articles 27 (1), (2), (3), (4) & (5) Article 55 (b), 73 (1) & (2), 131 (2) a & e, and the sixth schedule section 24 (1) & (2) and there is likely to continue being breaches of these provisions unless this Honourable Court grants the orders sought have been complied with.

19. THAT all that I have deponed to herein is true to the best of my knowledge information and belief save those based on information sources whereof I have duly disclosed.

SWORN by the said]
PATRICK NJUGUNA]
At NAIROBI this 3rd day of February, 2011]..... DEPONENT
] DEPONENT
]
]
]
]

BEFORE ME

COMMISSIONER FOR OATH

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HIGH COURT OF KENYA
CENTRAL REGISTRY
03 FEB 2011
CIVIL SIDE
NAIROBI

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
PETITION NO....17....OF 2011

IN THE MATTER OF ARTICLE 2 (1), 3 (1), 10 (1), (2), a, b & c, AND IN THE MATTER OF ARTICLE 22 & 23 AND
IN THE MATTER OF THE NOMINATION FOR APPOINTMENT OF THE CHIEF JUSTICE OF THE REPUBLIC OF KENYA, THE DEPUTY PUBLIC PROSECUTOR AND THE ATTORNEY GENERAL OF THE REPUBLIC OF KENYA
AND
IN THE MATTER ARTICLE 22 (1), (2) (a), (b), (c), (d), (3) ARTICLE 23 (1), (3) (a) & (c) OF THE CONSTITUTION AND ARTICLE 27 (1), (2), (3), (4), (5), ARTICLE 55 (5), ARTICLE 131 (a) & (e), ARTICLE 259 (1) (a), (b), (c) & (d) AND IN THE MATTER OF THE SIXTH SCHEDULE: ARTICLE 262 - SECTION 24 (1), (2) & (3) AND THE NATIONAL ACCORD AND RECONCILIATION ACT 2008.
IN THE MATTER OF SECTION 19 OF THE 6TH SCHEDULE AS READ WITH SECTION 20 AND 21 OF THE CONSTITUTION OF KENYA [SUPERVISORY JURISDICTION AND PROTECTION OF FUNDAMENTAL RIGHTS AND FREEDOMS OF THE INDIVIDUAL) HIGH COURT PRACTICE AND PROCEDURE RULES, 2006.[GICHERU RULES].

PATRICK NJUGUNA
ABDULLAZIZ ABUBAKAR, ERICK OYUGI, EMMANUEL KHISA
ANTHONY MASHETI, LOUIS KAPTCH, CALEB OUMA OKECH
LILIAN NJUGUNA, PAUL NYAMWEA, BANTU KINARU
VINCENT OMONDI, FRED MUNYIRI,
KAMKUNJI HUMAN RIGHTS DEFENDERS MOVEMENT
AFRICAN CENTRE FOR INTERNATIONAL YOUTH EXCHGANGE
SHIP FOR WORLD YOUTH [SWYAA-KENYA]
KINAMBA YOUTH GROUP, KAMKUNJI PARA-LEGAL NETWORK
34 YOUTH GROUP, PUMWANI YOUTH WOMEN ASSOCIATION
ECO YOUTH CLUB MUTHURWA, NGARA YOUTH PELICO
UZIMA FOUNDATION-AFRICA
KENYA YOUTH PARLIAMENT.....PETITIONERS

VERSUS

THE HON. ATTORNEY GENERAL.....RESPONDENT

PETITION

To: The High Court of Kenya
NAIROBI.

The Humble Petition of Patrick Njuguna, Abdullaziz Abubakar, Erick Oyugi, Emmanuel Khisa, Anthony Masheti, Louis Kaptch, Caleb Ouma Okech, Lilian Njuguna, Paul Nyamwea, Bantu Kinaru, Fred Munyiri, Vincent Omondi, Kamkunji Human Rights Defenders Movement, African Centre For International Youth Exchange, Ship For World Youth-Kenya, Kinamba Youth Group, Kamkunji Para-Legal Network, 34 Youth Group, Pumwani Youth Women

Association, Eco Youth Club Muthurwa, Ngara Youth Pelico, Uzima Foundation AND Kenya Youth Parliament [KYP] IS AS FOLLOWS:

PARTIES TO THE PETITION:

1. The Petitioners are individual male and female adults of sound minds working for gain and on voluntary basis with various youth led and youth based organizations within the Republic of Kenya, Youth organizations registered under Ministry of Gender and Social Services, the Registration of Business Names Act and under the Non-Governmental Organizations and Co-ordination Act. The individuals and Groups bring this Petition in their individual right or groups coalescing under the banner of YOUTH PLATFORM FOR CHANGE [YP4C] and collectively in their capacity as Kenyan Citizens charged with the duty and responsibility of safeguarding the Constitution of the Republic of Kenya, public interest and public good in particular the principles and values captures under Article 10 (1), (2) a, b & c of the Constitution which enshrines the idea of the "Spirit of the Constitution". The Address of service for the Petitioners for the purpose of this Petition/proceedings shall be care of A. T. OLUOCH & COMPANY ADVOCATES, St Ellis House, 1st Floor Room 112, Wabera Street/City Hall Way, P.O.Box 15917-00100- NAIROBI.

2. The Respondent is the Hon. ATTORNEY GENERAL of the Republic of Kenya and the Chief legal advisor of the Government including the President of the Republic of Kenya. The Hon. Attorney General is joined to this Petition pursuant to Article 156 (4) a, which makes him/her the Principal legal Advisor to the Government and empowered to represent the National Government in Court or in any other legal proceedings to which the National Government is a party other than criminal proceedings, The Address of Service fore the Hon. Attorney General for purposes of these Petition shall be Care of The State Law Office Sheria House, P. O. Box 40112-00100 NAIROBI.

LEGAL BASIS OF THE PETITION AND BREACHES:

3. Article 2 of The Constitution of the Republic of Kenya pronounces its supremacy and binds all persons, and all state organs, including the Executive and the two Principles as the heads.

4. Under Article 3 of the Constitution every person has an obligation to respect, uphold and defend not only the letter but also the spirit of the Constitution, the decision made to appoint Hon. Justice Alnasir Visram as the Chief Justice, Professor Githu Muigai as the Hon. Attorney General and Mr. Kioko Kilukumi as the Deputy Public Prosecutor offends not only the letter but the spirit of the Constitution enshrined in Article 10 of the Constitution.

5. Article 10 which enshrines the spirit and letter of the Constitution and the culture of Constitutionalism captures the core principles and values that bind the Country as one nation: namely principles of democracy and the rule of law, public participation of the people, principles and values of equity, inclusiveness, equality, non discrimination and protection of marginalized. It also enshrines the principles of good governance, integrity, transparency and accountability in the conduct of public affairs.

7. Article 10 enjoins all State organs, state officers, public officers and all persons including the President and the Prime Minister, whenever any of them applies, enacts, interprets or implements the Constitution.

8. Article 20 and 21 of the Constitution the supreme law lay down the stand and extent to which fundamental rights and freedoms may be enjoyed and states the bench mark as such " the bill of rights applies to all and binds all state organs and all persons, (which seems to suggest that even though the President of the Republic of Kenya, though enjoying immunity from civil and criminal proceedings under Article 143 (1) & (2), the President is not above the law)....."every person shall enjoy the rights and fundamental freedoms in the bill of rights **to the greatest extent consistent** with the nature of the right and fundamental freedom.....in applying a provision of the Bill of Rights, a Court shall (a) develop the law to the extent that it gives effect to the right and fundamental freedom

(b) adopt the interpretation that most favours the enforcement of a right and fundamental freedom". In other words a window of opportunity exists or is open here for this honourable Court to develop a jurisprudence that will not only take into account the intention of the drafters of the Constitution but also capture the Spirit. Indeed it is in the spirit of the law that this Court will find fertile group to develop jurisprudence with the advent of the new law and put an end to the culture of impunity in this Country. But this calls for the men and women whose job it is to interpret and pronounce upon the law to rise to the occasion and not shy away from the historic challenge.

9. Under Article 20 (4) a & b is where the crux of the matter lies for the Petitioners and where the "rubber meets the road": This Court is enjoined while "interpreting the Bill of Rights .....promote ***(a) the values that underlie an open and democratic society based on human dignity, equality, equity and freedom and (b) the Court Courts shall promote " the spirit, purport and objects of the bill of rights".***

10. Article 55 (b) of the Constitution read together with Article 27 (1) & (2) which provides for equality before the law, equal treatment and non discrimination on grounds inter alia of age and sub article (4) of Article 27.

11. Under Article 55 (b) "the State shall take measures, including affirmative action programs to ensure that the youth".... (b) " have opportunities to associate, be represented and participate in political, social, economic and other spheres of life."

12. The above article construed in light of the circumstances of the nominations to the offices of the Chief Justice, Attorney General and Deputy Public Prosecutor was precluded by breaches of Article 10 that call for or enjoins the state officials, officers and agents, which in this case includes the state officer number one "His Excellency the President, to ensure public participation and inclusiveness, equity, justice non discrimination, transparency and accountability in making the appointment.

13. A look at the three nominees shows clearly that neither of these very respected Kennyans namely Hon. Justice Alnasir Visram, Professor Githu Muigai or Mr. Kioko Kilukumi are of youthfull age yet had the process been opened to public participation the youth who constitute 70% of the population would either have volunteered their name, applied or been nominated by their peers and had an equal opportunity for consideration to these converted posts.

14. Article 157 (3) the qualifications for Director of Public Prosecution are similar to those of a Judge under Article 166 (5) which provides that "each judge of the High Court shall be appointed from among persons who have (a) 10 years experience as a superior court judge or (b) at least 10 years experience as a distinguished academic or legal practitioner or such experience in other relevant field or (c) held the qualifications specified in paragraph a & b for a period amounting in aggregate to ten years.

15. It is a well know fact that a lawyer graduates and is ready for legal practice as an advocate after the requisite post University training at the average age of 24-25 years. If the qualifications for a DPP is 10 years of academic or legal practice then at the age of between 35 and 40 such a lawyer or an advocate and there hundreds of thousands who fall in this youtfull bracket qualify to take up the position. The procedure and haste with which the position was announced robbed youtfull practitioners the opportunity to apply in an open public process of recruitment and recruitment or short listing or to make representation made by their peers as well as the public as to their suitability or otherwise.

16. Likewise under Article 166 (3) a Chief and judges of the supreme Court shall be appointed from among persons of "(a) at least 15 years experience as a superior Court Judge or (b) at least 15 years experience as a distinguished academic or legal practitioner or such experience in other relevant field or (c) held the qualifications specified in paragraph a & b for a period amounting in aggregate to 15 years.

17. The same argument for young advocates and practitioners who would otherwise have qualified to apply or be nominated to the office of DDP

applies: if at age 24 or 25 the youthful lawyers are ready for practice, academic or other legal practice then at an average and youthful age of 40 which is 15 years experience they would, but for the procedure used by the "appointing authority" be eligible for nomination as Chief Justice of the Republic of Kenya.

18. The same argument applied in the argument for nomination of Chief Justice and DPP has robbed the youth and youthful professional lawyers an opportunity to apply to the post of Attorney General whom under Article 156 (3) requires the same qualifications as those for Chief Justice under Article 166 (3).

19. The Petitioners could rest their case there but it is instructive to note that our public officials, Government officers and indeed the our legislators have in a narrow and parochial fashion reduced the appointment of the Chief Justice, the Attorney General and the Deputy Public Prosecutor to a contest between two competing powers and the playing ground being the definition of the words "in consultation with"...so that had the Prime Minister accepted the nominations and confirmed he was consulted the very serious and fundamentals breaches and contraventions of the Constitution would not come to fore.

20. The reform and or overhaul of the Judiciary and the entire criminal justice system headed by the Attorney General and the Deputy Public Prosecutor are at the very centre of the key reform the Constitution envisaged upon its enactment.

21. In a sense the Nation should breath a sigh of relief and thank the Principles for the public disagreement and lack of Consent because in one party claiming their was consultation and the other denying it the Petitioners before this Court have a opportunity to test the veracity and potency of the provisions of Articles 2 (1), (3 (1), 10 (1) & (2) a, b & c, Article 20 (1), (2), (3)& (4), Articles 21, 22, 23, 27, 55 (b), 157, 159 (1), (2) a, b, d & e 165 (b) & (d) and section 24 of the 6th Schedule of the Constitution.

THE FACTS:

6. On the 28th of January, 2011 the Government communicated to the public the decision of the President to appoint Hon. Justice Alnasir Visram as the Chief Justice, Professor Githu Muigai as the Hon. Attorney General and Mr. Kioko Kilukumi as the Deputy Public Prosecutor.

7. The decision was forwarded on the 1st of February, 2011 by the Head of the Civil Service and Secretary to the Cabinet Ambassador Francis Muthaura to the Speaker of the National Assembly Hon. Kenneth Marende requesting that the proposed names or nominees be discussed and approved by Parliament for formal appointment by the President.

8. The procedure of appointment of the three individuals Hon. Justice Alnasir Visram as the Chief Justice, Professor Githu Muigai as the Hon. Attorney General and Mr. Kioko Kilukumi as the Deputy Public Prosecutor violates clear provisions of the Constitution.

9. The two Principals namely President Mwai Kibaki and Rt. Hon. Raila Odinga, the Prime Minister have have publicly disagreed over the nominations with one principal saying or alleging their was wide consultations and the other denying their was any or that the consultation was not sufficient.

10. The public debate and indeed the debate in Parliament have focused naively on the definition of the terms "consultation", in other words the proposed nominations would pass if the Prime Minister were to state that indeed there was consultation which he denies.

11. It is the Petitioners case that the issues run deeper than the consultation or the lack of it and go into the very root of our culture as a people, the values and principles we enshrined under Article 10 of the Constitution and the respect for integrity in public processes and the need for public input or processes, the people who under Article 1 (1) & (2) of the Constitution.

22. Article 27 places every person as equal before the law and prohibits any form of discrimination based on *inter alia* sex/gender. Women and men have the right under this Article to equal treatment, including the right to

equal opportunities in the political, economic, cultural and cultural and social spheres.

23. The spirit of the Constitution captured in the Article dealing with the National values and principles have been violated and they include the principles of democracy and the rule of law, public participation of the people, principles and values of equity, inclusiveness, equality, non discrimination and protection of marginalized. It also enshrines the principles of good governance, integrity, transparency and accountability in the conduct of public affairs including the decisions of the President and the Prime Minister as the Principles in the Coalition Government created under the National Accord and Reconciliation Act, 2008.

24. The Petitioners have a legitimate and rightful expectations that having appended their signatures to the new Constitution and sworn allegiance to defend and protect it the President of the Republic of Kenya Hon. Mwai Kibaki and the Rt Hon. Prime Minister Raila Amolo Odinga have not only a duty but an obligation to Kenyans and to the Constitution the swore to defend to make such crucial appointments as that of the Chief Justice and the Hon. Attorney General by giving credence to the spirit and letter of the Constitution as read together with the National Accord.

25. The letter of the law and the Constitution gives the President the powers in the 1st instance, during this transitional period to appoint the Chief Justice, but it is not enough to point to the letter of the law, the letter must be read together with and joint together with the spirit.

26. Under the National Accord and Reconciliation Act, which became part of the Constitution in March, 2008 the Coalition Government is based and founded on the basis of two equals or equality of the two principals, accordingly any appointments must and should give due regard to the spirit of the National Accord in all public decision making including serious appointments such as that of the Chief Justice.

27. The spirit of the Constitution has been subverted through this unilateral and un-procedural appointment by selective application of section 24 of the Constitution and which is being read in exclusion of the other parts of

the Constitution especially Article 10 (1), (2) a, b, c, d and e, which capture the spirit of the supreme law in particular the public's right to participation in all processes of governance that affect them.

28. The spirit of the Law has been subverted by using provisions of the so called "letter of the Constitution": this is what imputy and bad governance is and was made of and what the mischief of new constitution sought to address.

29. Article 73 of the Constitution provides that "authority assigned to a public officer is a public trust to be exercised in a manner that (inter alia) (i) Consistent with the purposes and objects of the Constitution (ii) demonstrates respect for people (iii) brings honour to the nation and and dignity to the office and (iv) promotes public confidence in the integrity of the office.

30. Sub-Article (2) (b) of Article 73 is even more succinct in saying that "The guiding principles of leadership and integrity include (b) objectivity an impartiality in decision making and in ensuring that decisions are not influenced by nepotism, favoritism, other improper motives and corrupt practices.

31. It is clear, within the public domain and a very poorly kept secret that decision to nominate for appointment the Chief Justice, the Attorney General and the Deputy Public Prosecutor was rushed to serve sectarian interests and not the public good, in particular it would appear to have been influenced by the desire to save the so called "Ocampo Six" and to give the African Union heads of States the erroneous impression that we were at an advanced stage of reforming the Judiciary as well as the criminal and administration of justice system and thereby get their approval to secure a deferral of the ICC cases from the Security Council of the United Nations.

32. Now that the African Union has passed such a resolution we must now reclaim our rightful place in defending and upholding the Constitution and this Court is enjoined under Articles 22 & 23, 159 (1), (2) a, b, d & e 165 (b) & (d), and Article 259 ...to give effect to this quest.

33. There have been breaches and there may continue to be be breaches and contraventions of provisions of Articles 10 (1) & (2) a, b & c, and provisions of Articles 27 (1), (2), (3), (4) & (5) Article 55 (b), 73 (1) & (2), 131 (2) a & e, and the sixth schedule section 24 (1) & (2) of the Constitution unless this Court makes the declaratory orders sought and restrain any further action in the nomination and appointment of the Chief Justice, Attorney General and Deputy Public Prosecutor until the law has been complied with.

PRAYERS:

1. A DECLARATION that to the extent that the nominations for appointment to the offices of the Hon. Attorney General, the Chief Justice and the Deputy Public Prosecutor were done in breach of or in contravention of the "spirit and letter of the Constitution in particular Articles 2 (1), 10 (1) & (2) a, b & c, 21 (1), 27 (1), (2), (3), (4) & (5) Article 55 (b), 73 (1) & (2), 131 (2) a & e, and the sixth schedule section 24 (1) & (2), the nominations for appointment are unconstitutional, illegal and therefore null and void.
2. A DECLARATION that to the extent that the nominations for appointment to the offices of the Hon. Attorney General, the Chief Justice and the Deputy Public Prosecutor were done in breach of or in contravention of the Constitution in particular Articles 27 (1), (2), (3), (4) & (5) and Article 55 (b) the appointments are unconstitutional, illegal and therefore null and void.
3. A DECLARATION that under Articles 10 (1) & (2) a, b & c, Article 73 (1) (a) i and (2) leadership is a public trust and all state officers, agents and officials including the President and Prime Minister must exercise that authority in a manner that is consistent with the purposes and objects of the Constitution, in a manner that demonstrates respect for the people, promotes public confidence in the integrity of these offices and gives meaning to the principles and values enshrined under article 10 of the

Constitution namely: respect for the rule of law and democracy, openness, transparency accountability, inclusiveness, equity and equality, non-discrimination and open participation by the people of the Republic of Kenya who under Article 1 of the Constitution are the true sovereigns.

4. An ORDER restraining the approval, nomination and appointment including the gazettement of the purported nominees to the offices of the Chief Justice of the Republic of Kenya, the Hon Attorney General, the Deputy Public Prosecutor and the Controller of Budget until the "Spirit and letter" of the Constitution entrenched in Articles 10 (1) & (2) a, b & c, and provisions of Articles 27 (1), (2), (3), (4) & (5) Article 55 (b), 73 (1) & (2), 131 (2) a & e, and the sixth schedule section 24 (1) & (2) have been complied with.

DATED at NAIROBI this 3rd day of February, 2011.

A. T. OLUOCH & COMPANY
ADVOCATE FOR THE PETITIONERS

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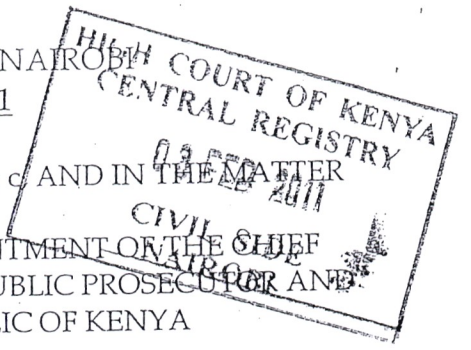
REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

PETITION NO....17.....OF 2011



IN THE MATTER OF ARTICLE 2 (1), 3 (1), 10 (1), (2), a, b & c AND IN THE MATTER OF ARTICLE 22 & 23 AND

IN THE MATTER OF THE NOMINATION FOR APPOINTMENT OF THE CHIEF JUSTICE OF THE REPUBLIC OF KENYA, THE DEPUTY PUBLIC PROSECUTOR AND THE ATTORNEY GENERAL OF THE REPUBLIC OF KENYA

AND

IN THE MATTER ARTICLE 22 (1), (2) (a), (b), (c), (d), (3) ARTICLE 23 (1), (3) (a) & (c) OF THE CONSTITUTION AND ARTICLE 27 (1), (2), (3), (4), (5), ARTICLE 55 (5), ARTICLE 131 (a) & (e), ARTICLE 259 (1) (a), (b), (c) & (d) AND IN THE MATTER OF THE SIXTH SCHEDULE: ARTICLE 262 - SECTION 24 (1), (2) & (3) AND THE NATIONAL ACCORD AND RECONCILIATION ACT 2008.

IN THE MATTER OF SECTION 19 OF THE 6TH SCHEDULE AS READ WITH SECTION 20 AND 21 OF THE CONSTITUTION OF KENYA [SUPERVISORY JURISDICTION AND PROTECTION OF FUNDAMENTAL RIGHTS AND FREEDOMS OF THE INDIVIDUAL) HIGH COURT PRACTICE AND PROCEDURE RULES, 2006.[GICHERU RULES].

PATRICK NJUGUNA
ABDULLAZIZ ABUBAKAR, ERICK OYUGI, EMMANUEL KHISA
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34 YOUTH GROUP, PUMWANI YOUTH WOMEN ASSOCIATION
ECO YOUTH CLUB MUTHURWA, NGARA YOUTH PELICO
UZIMA FOUNDATION-AFRICA
KENYA YOUTH PARLIAMENT.....PETITIONERS

VERSUS

THE HON. ATTORNEY GENERAL.....RESPONDENT

SUPPORTING AFFIDAVIT

I PATRICK NJUGUNA a resident of NAIROBI in the Republic of Kenya of Post Office Box Number 10678-00100 NAIROBI hereby make oath and state as follows: THAT -

1. I am a male adult of sound mind and disposition and the applicant herein and I am conversant with the fact of the matter herein and as such competent to swear this Affidavit.

2. I have read and had explained to me the Petition dated 3rd February, 2011 seeking declaratory orders against the purported nomination for appointment of the Hon. Justice Alnasir Visram, Professor Githu Muigai and Mr. Kioko Kilokumi to the positions of Chief Justice, Attorney General and Deputy Public Prosecutor Respectively and I wish to swear this affidavit in support thereof.

3. I heard from the Radio and subsequently read on the daily newspapers that on the 28th of January, 2011 the President of the Republic of Kenya nominated for appointment the Hon. Justice Alnasir Visram as the Chief Justice, Professor Githu Muigai as the Hon. Attorney General and Mr. Kioko Kilukumi as the Deputy Public Prosecutor

4. I subsequently read in the dailies and saw on National Television that on the 4th of February, 2011 the Government through Ambasador Francis Muthaura, Head of Public Service and Secretary to the Cabinet communicated to the speaker of the National Assembly the decision of the President to appoint Hon. Justice Alnasir Visram as the Chief Justice, Professor Githu Muigai as the Hon. Attorney General and Mr. Kioko Kilukumi as the Deputy Public Prosecutor and sought to have the same discussed in Parliament for approval and eventual appointment. Annexed herewith and marked **PN-1** are true copies of cutting from the dailiy newspapers evidencing the said nominations for appointment and the discussions and disagreement by the two principles over the said nominations.

5. The procedure of appointment of the three individuals Hon. Justice Alnasir Visram as the Chief Justice, Professor Githu Muigai as the Hon. Attorney General and Mr. Kioko Kilukumi as the Deputy Public Prosecutor violates clear provisions of the Constitution.

6. There have been breaches and there may continue to be be breaches and contraventions of provisions of Articles 10 (1) & (2) a, b & c, and provisions of Articles 27 (1), (2), (3), (4) & (5) Article 55 (b), 73 (1) & (2), 131 (2) a & e, and the sixth schedule section 24 (1) & (2) of the Constitution unless this Court makes the declaratory orders sought and restrain any

further action in the nomination and appointment of the Chief Justice, Attorney General and Deputy Public Prosecutor until the law has been complied with.

7. The two Principals namely President Mwai Kibaki and Rt. Hon. Raila Odinga, the Prime Minister have have publicly disagreed over the nominations with one principal saying or alleging their was wide consultations and the other denying their was any or that the consultation was not sufficient.

8. The public debate and indeed the debate in Parliament have focused naively on the definition of the terms "consultation", in other words the proposed nominations would pass if the Prime Minister were to state that indeed there was consultation which he denies.

9. It is my case and that of the other Petitioners that the issues run deeper than the consultation or the lack of it and go into the very root of our culture as a people, the values and principles we enshrined under Article 10 of the Constitution and the respect for integrity in public processes and the need for public input or processes, the people who under Article 1 (1) & (2) of the Constitution.

7. I have been advised by my advocates on record and believe the same to be true that Article 27 places every person as equal before the law and prohibits any form of discrimination based on *inter alia* sex/gender. Women and men have the right under this Article to equal treatment, including the right to equal opportunities in the political, economic, cultural and cultural and social spheres.

8. I have been advised by my advocates on record and believe the same to be true that the spirit of the Constitution captured in the Article dealing with the National values and principles have been violated and they include the principles of democracy and the rule of law, public participation of the people, principles and values of equity, inclusiveness, equality, non discrimination and protection of marginalized. It also enshrines the principles of good governance, integrity, transparency and accountability in the conduct of public affairs including the decisions of the President

and the Prime Minister as the Principles in the Coalition Government created under the National Accord and Reconciliation Act, 2008.

9. I and the other Petitioners have a legitimate and rightful expectations that having appended their signatures to the new Constitution and sworn allegiance to defend and protect it the President of the Republic of Kenya Hon. Mwai Kibaki and the Rt Hon. Prime Minister Raila Amolo Odinga have not only a duty but an obligation to Kenyans and to the Constitution the swore to defend to make such crucial appointments as that of the Chief Justice and the Hon. Attorney General by giving credence to the spirit and letter of the Constitution as read together with the National Accord.

10. I have been advised by my advocates on record and believe the same to be true that the letter of the law and the Constitution gives the President the powers in the 1st instance, during this transitional period to appoint the Chief Justice, but it is not enough to point to the letter of the law, the letter must be read together with and joint together with the spirit.

11. I am further advised by my advocates on record and believe the same to be true that Under the National Accord and Reconciliation Act, which became part of the Constitution in March, 2008 the Coalition Government is based and founded on the basis of two equals or equality of the two principals, accordingly any appointments must and should give due regard to the spirit of the National Accord in all public decision making including serious appointments such as that of the Chief Justice.

12. I have been advised by my advocates on record and believe the same to be true that the spirit of the Constitution has been subverted through this unilateral and un-procedural appointment by selective application of section 24 of the Constitution and which is being read in exclusion of the other parts of the Constitution especially Article 10 (1), (2) a, b, c, d and e, which capture the spirit of the supreme law in particular the public's right to participation in all processes of governance that affect them.

13. The spirit of the Law has been subverted by using provisions of the so called "letter of the Constitution": this is what imputy and bad

governance is and was made of and what the mischief of new constitution sought to address.

14. I have been advised by my advocates on record and believe the same to be true that Article 73 of the Constitution provides that "authority assigned to a public officer is a public trust to be exercised in a manner that (inter alia) (i) Consistent with the purposes and objects of the Constitution (ii) demonstrates respect for people (iii) brings honour to the nation and and dignity to the office and (iv) promotes public confidence in the integrity of the office.

15. I have been advised by my advocates on record and believe the same to be true that Sub-Article (2) (b) of Article 73 is even more succinct in saying that "The guiding principles of leadership and integrity include (b) objectivity an impartiality in decision making and in ensuring that decisions are not influenced by nepotism, favoritism, other improper motives and corrupt practices.

16. It is clear, within the public domain and a very poorly kept secret that decision to nominate for appointment the Chief Justice, the Attorney General and the Deputy Public Prosecutor was rushed to serve sectarian interests and not the public good, in particular it would appear to have been influenced by the desire to save the so called "Ocampo Six" and to give the African Union heads of States the erroneous impression that we were at an advanced stage of reforming the Judiciary as well as the criminal and administration of justice system and thereby get their approval to secure a deferral of the ICC cases from the Security Council of the United Nations.

17. Now that the African Union has passed such a resolution we must now reclaim our rightful place in defending and upholding the Constitution and I have been advised by my advocates on record and believe the same to be true that this Court is enjoined under Articles 22 & 23, 159 (1), (2) a, b, d & e 165 (b) & (d), and Article 259 ...to give effect to this quest.

18. I have been advised by my advocates on record and believe the same to be true that there has been breaches under Articles 10 (1) & (2) a, b & c, and

provisions of Articles 27 (1), (2), (3), (4) & (5) Article 55 (b), 73 (1) & (2), 131 (2) a & e, and the sixth schedule section 24 (1) & (2) and there is likely to continue being breaches of these provisions unless this Honourable Court grants the orders sought have been complied with.

19. THAT all that I have deponed to herein is true to the best of my knowledge information and belief save those based on information sources whereof I have duly disclosed.

SWORN by the said]
PATRICK NJUGUNA]
At NAIROBI this 3rd day of February, 2011].....
] DEPONENT
BEFORE ME]
]
]
COMMISSIONER FOR OATH]

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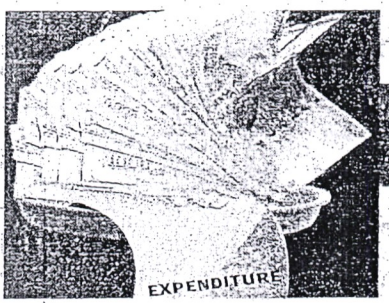
Political alliances or party infidelity?., P.24

Why with the new constitution, marriages of convenience could come to an end





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uesday, February 1, 2011

THE STANDARD

For Fairness and Justice

JSC and CIC rule President subverted Constitution on nominations as Muthaura sends controversial list to Speaker ready for debate

Why Kibaki is wrong'

CIC team calls for withdrawal of President's ominations

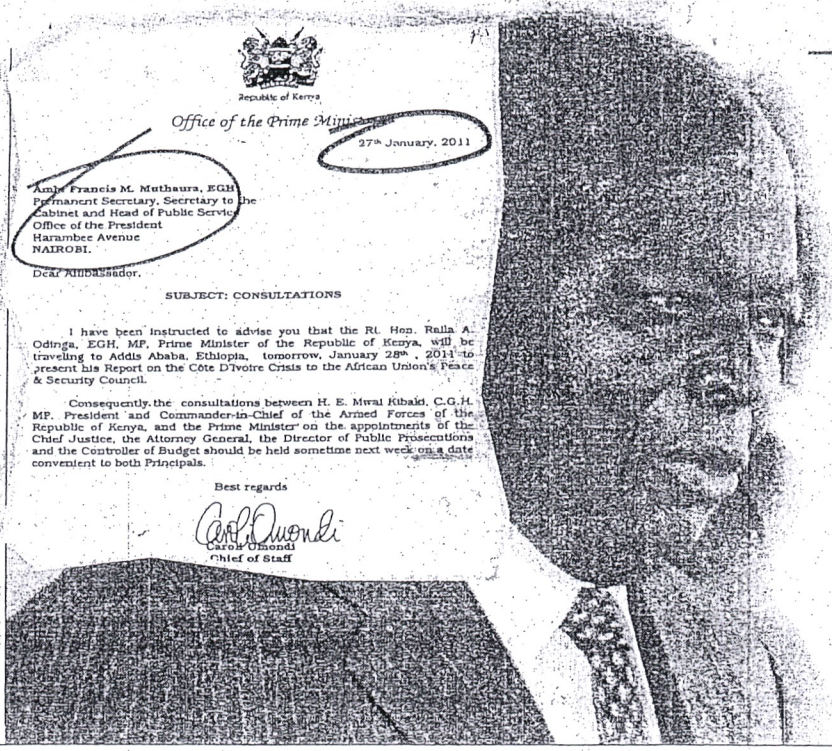
By PETER OPIYO

sident Kibaki jetted into the y last night from the AU sum- Addis Ababa, and walked straight position from two constitutional issions over his nominees to key al offices.

Judicial Service Commission was the first to trash the nomi- especially of the Chief Justice, for its urgent reversal on the ls that the Commission was side- d, contrary to the provision in nstitution.

l even before the ink could dry

CONTINUED ON PAGE 4



Republic of Kenya

Office of the Prime Minister

27th January, 2011

Amb. Francis M. Muthaura, EGH
Permanent Secretary, Secretary to the Cabinet and Head of Public Service
Office of the President
Harambee Avenue
NAIROBI.

Dear Ambassador,

SUBJECT: CONSULTATIONS

I have been instructed to advise you that the Rt. Hon. Raila A. Odinga, EGH, MP, Prime Minister of the Republic of Kenya, will be traveling to Addis Ababa, Ethiopia, tomorrow, January 28th, 2011 to present his Report on the Côte D'Ivoire Crisis to the African Union's Peace & Security Council.

Consequently, the consultations between H. E. Mwai Kibaki, C.G.H, MP, President and Commander-in-Chief of the Armed Forces of the Republic of Kenya, and the Prime Minister on the appointments of the Chief Justice, the Attorney General, the Director of Public Prosecutions and the Controller of Budget should be held sometime next week on a date convenient to both Principals.

Best regards

Carol Omondi
Chief of Staff

'There is urgent need for a re-think of the matter and to put the country first. That entails withdrawal of the nominations and a fresh start' **(Judicial Service Commission)**

'Appointment of CJ should start with JSC recommendation to President who in turn consults PM before forwarding names to Parliament' **(Implementation Commission)**

BY STANDARD TEAM

Could President Kibaki have bitten off more than he can chew in last week's nominations to four key constitutional offices?

Would Kenya's divided Parliament approve the President's nominees on the platform of ethnic and political considerations rather than the constitutionality of the process, competence and suitability of those proposed to the

CONTINUED ON PAGE 6

17- feelanga free
6am to 6pm daily

NAIROBI

Kibaki list: JSC, CIC say action is unconstitutional

Continued from P1

offices of Chief Justice, Attorney neral, Director of Public Prosecu-ns, and the Director of Budget? ould the President's action backfire s as his decision to unilaterally give mer anti-graft boss Justice Aaron ngera another term? Or would the le end up in Parliament with an ttering ruling by Speaker Ken-h Marende that mirrors his choice Vice President Kalonzo Musyoka as ader of Government Business, giv-that the President has once again ted outside the provisions of the tional Accord that holds together Grand Coalition Government?

INDEPENDENT INSTITUTIONS

These are the question Kenyans re left asking even as two key inde-ndent institutions — Judicial Ser-e Commission (JSC) and the Con-ution Implementation mmission (CIC) — returned the dict the President subverted the w.

The statement by JSC was notably ned by occupants of the two con-utional officers to be replaced — ief Justice Evan Gicheru and Attor-General Amos Wako.

"There is an urgent need for a re-k of the matter and to put the ntry first. That entails a withdraw-of the nominations and a fresh rt," said the JSC in its statement d by High Court Registrar Lydia node who its secretary.

> There is an urgent eed for a rethink of ie matter and to put ie country first. That ntails a withdrawal of the ominations and a fresh art.



CIC'S ADVICE ON THE NOMINATIONS ROW

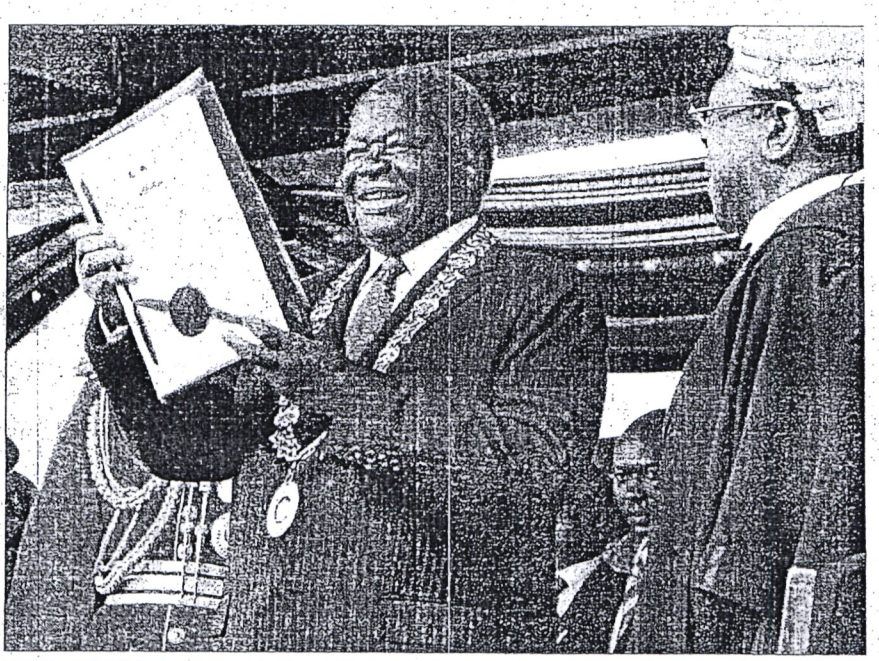
Commission on Implementation of the Constitution (CICC) headed by Charles Nyachae (pictured above) warn discordant messages from leaders only polarise Kenyans and prejudice implementation of the Constitution.

The CIC urges the President to Consult PM prior to appointments and call on htem to ensure the process reflects the letter and Spirit of the Constitution.

The wider implication of the President's move, and Raila's remonstrations, was discernible from the voice of Dr Kofi Annan, who brokered Kenya's peace deal. In his usual diplomatic speak, he urged Kibaki and Raila to "adhere to the Constitution".

The CIC, which is headed by lawyer Charles Nyachae, and whose mandate includes ensuring all aspects of the new Constitution are implemented in line with the spirit with which it was written and passed in the 2010 national referendum, challenged Kibaki and Raila to "provide forward looking and selfless leadership".

The team also warned that the "ongoing debate is detrimental to implementation of the Constitution."



President Kibaki during the promulgation of the new Constitution at Uhuru Park last year. Dr Kofi Annan, who broker Kenya's peace deal, has urged Kibaki and Raila to "adhere to the Constitution". [PHOTO: FILE/STANDARD]

The two bodies declared the President, who arrived from Addis Ababa last evening, acted in bad faith by holding inconclusive consultations with Prime Minister Raila Odinga, then going ahead to pick the nominees. This, they argued, goes against the grain of the Constitution which requires there be consultation and unanimity or agreement between the two on appointments to the offices, set up by or about to be rendered vacant by the new Constitution.

'KIBAKI IS WRONG'

The 'Kibaki is wrong' verdict came as the storm stirred by the latest row in the troubled Grand Coalition Cabinet built up, despite the President's response to Raila, given through Internal Security Minister Prof George Saitoti and Defence Minister Yusuf Haji that adequate consultations took place and there was no constitutional crisis. Further signs there was no let-up in the new tussle came with the news that the President, through the Head of the Civil Service and Secretary to the Cabinet Mr Francis Muthaura, has already forwarded the names to the Speaker of Parliament to await vetting by the House, which resumes its sittings today. National Assembly Clerk Mr Patrick Gichohi received the communication from Muthaura. Curiously, the President's aide sent the names to Speaker Kenneth Marende on the day the JSC, which should vet the appointment of judges, called on Kibaki to withdraw the names. Yesterday Marende said he had not received any communication from the PM informing him the list from Muthaura did not have his support.

The weight of the problem facing the country stood out in a letter Raila's Chief of Staff, Mr Karoli Omondi, sent on his behalf, to Muthaura on January 27th, a day before the controversial nominations, informing him it was the PM's wish that the "consultations be held sometime next week on a date convenient to the two principals." Karoli explained to Muthaura the PM was headed to Ethiopia to present his report on the Ivorian political crisis, in his capacity as the African Union-appointed mediator.

CONSULTATIVE PROCESS

But as Muthaura rushed Kibaki's list to Parliament, sources within Raila's office revealed the PM would write to President Kibaki to formally protest his exclusion from the consultative process, contrary to the spirit and letter of the new Constitution as well as the National Accord that calmed Kenya's post-election violence in 2008 by way of power sharing between the tw principals.

It was also revealed Raila's Oran Democratic Movement (ODM) par was planning to write to Maren spelling out its misgivings on the Pre ident's action, and asking him to ru if the appointments were in line wi the Constitution, in the same way l did when the President sidestepp the PM and unilaterally picked t Vice President as the Leader of Go ernment Business in Parliament.

But the President's Party of Natio al Unity (PNU)— which is bracing f battle in Parliament over the nomin tions where it expects support fro Rift Valley MPs who have rebelle against Raila — meets today und Kalonzo to plot against ODM. Ma ende explained now that he has Kib ki's list "parliamentary procedure w follow".

When MPs reconvene today, the are expected to debate the Vetting Judges and Magistrates Bill and Jud cial Service Bill that seek to reform th Judiciary.

(Read more stories Pages 7)

To comment on this and othe stories:
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Karua, Muite, LSK, Cotu, EALS back JSC stand on appointees

BY BEAUTTAH OMANGA

Gichugu MP Martha Karua has ed the position taken by the Ju-al Service Commission to reject inees to key positions even as she ioned the two principals against g carried by demands of their re-tive parties.

Law Society of Kenya, through Sec-ry Apollo Mboya, distanced itself the initial position taken by their rman, Mboya said the LSK coun-as already received complaints nst nominated Chief Justice Al-ir Visram, making him unquali-to serve as a CJ.

"We have received public complaints against Justice Visram and we were waiting for the vetting of judges to start to expose what we have," said Mboya.

Cotu Secretary General Francis Atwoli and the Deputy President of the East Africa Law Society (EALS) James Mwamu all agreed with the JSC position, and urged the President act accordingly.

Senior Counsel Paul Muite said the statement by the topmost officials of the Judiciary and the Legal Government adviser amounted to an indictment of the President and he has to agree with them.

PNU meets to discuss nominations

BY BEAUTTAH OMANGA

MPs affiliated to President Kibaki's wing of the coalition will meet this morning to deliberate on a common stand over the controversial names picked for top positions in the Judiciary and State Law Office.

Chief Whip Johnstone Muthama confirmed the meeting scheduled to start at 9am was set to discuss the appointments and prepare for "the passing of the names as proposed by the President".

"It is true we are meeting as PNU and we are set to agree to rally by what the President has recommended. We will have other house keeping business to look at too," said Muthama.

PNU meets as its coalition partner members differed in opinion over the nominations. North Rift MPs are also divided over the nomination of William Kirwa as Controller of Budget.

Yesterday, Konoin MP Julius Kones disagreed with his colleagues, Charles Keter and Joshua Kuttuny, who had said Mr Kirwa was not qualified to hold the office.

DESERVES SUPPORT

The Konoin MP said that what the President did deserves support as it was geared at having in place necessary reforms in the Judiciary "to handle crucial matters pending elsewhere and as per the provisions of the new Constitution".

He said the reforms in the Judicia ry should not be held back because an individual and protests over lack adequate consultation to the satisfac tion of some leaders. But Keiyo Nort MP Lucas Chepkitony dismissed at tempts by some MPs from the Rift val ley to root for the adoption of the lis simply because "one of their sons wa due to benefit".

"I have nothing personal agains Kirwa but using his position to wo the Kalenjin community into sup porting an illegality cannot hold. Th President ought to have consulte widely given the sensitivity of the of fice itself," said Chepkitony, one of th few MPs in the region allied to Prim Minister Raila Odinga.

COALITION DIVIDED

Abide by law

Commission trashes Kibaki ist of nominees

l al Service) mission says ocess should be nducted as per the w Constitution

VELYN KWAMBOKA

The Judicial Service Commission) has rejected President Kibaki's of nominees to four constitutional ces.

The members, among them Govnment legal advisor Attorney Gen- Amos Wako, said the list should withdrawn urgently and the pro- conducted as per the Constitu-

his is because the names were recommended to the President by as required by law and, therefore, t against the spirit and letter of Constitution, they argued.,

The JSC demanded a transparent, petitive, flawless, free and fair cess devoid of partisan politics which would win public confice.

rticle 166(1) of the Constitution : "The President shall appoint Chief Justice and Deputy Chief ce, in accordance with the recom-

mendation of the Judicial Service Commission, and subject to the approval of the National Assembly."

"There is an urgent need for a rethink of the matter and to put the country first. That entails a withdrawal of the nominations and a fresh start," said JSC secretary, Lydia Achode.

Article 172 (1) (e) of the Constitution, Ms Achode said, gives powers to the Commission to play an important role in the nomination of AG, CJ and DPP.

It states that JSC shall facilitate the independence and accountability of the Judiciary and the efficient, effective and transparent administration of justice.

PRINCIPALS' POSITIONS

It further states that JSC shall advise the national Government on improving the efficiency of the administration of justice. "On our part, it is legitimacy, public confidence, ownership and acceptance by the people of Kenya, the JSC must play an integral role in the process," Achode said.

Yesterday, in a statement read on behalf of JSC, Achode said they were of the view that the two Principals need to reconsider their positions.

"In light of the divergent views coming from the Principals, we are of the view that they need to reconsider their respective positions," she said.

The statement was read at a press conference attended by Wako, Chief Justice Evan Gicheru, Appellate judge Riaga Omolo, Justice Isaac Lenaola, Ms Emily Ominde, Florence Mwangangi, Ahmednasir Abdullahi and Prof Christine mango.

Prof Githu Muigai was nominated for AG, Justice Alnashir Visram for CJ, and Mr Kioko Kilukumi for Deputy Public Prosecutor, while Mr William Kirwa was nominated for Controller of Budget.

Achode said both the Judiciary and Kenyans must start a new era on the right footing by adhering to the spirit of the new Constitution.



PROPOSAL TO ALLOW TEAM PICK OFFICERS

Last month, when JSC members were sworn in, Commissioner Ahmednassir Abdullahi said the two Principals should subcontract JSC to carry out the appointments

"Even though the Constitution allows the President to appoint the CJ, he should give JSC powers to do the job," he said

Article 166(1) of the Constitution states: "The President shall appoint the Chief Justice and Deputy Chief Justice, in accordance with the recommendation of the Judicial Service Commission, and subject to the approval of the National Assembly."

The Judicial Service Commission yesterday rejected nominees to constitutional offices by President Kibaki. (PHOTO: EVANS HABIL/STANDARD)

Rift farmers support choice of Budget chief

By OSINDE OBARE

The nomination of Agricultural Development Corporation (ADC) Managing Director William Kirwa as Controller of Budget has been defended.

Stakeholders in the Agriculture sector in North Rift differed with Cherangani MP Joshua Kuttuny for opposing the nomination of Kirwa.

The stakeholders lauded President Kibaki's choice, arguing he was the right man for the job.

Farmers led by Pius Mzee Kauka dismissed claims by Kuttuny that Kirwa's nomination was a wrong choice, arguing the ADC chief is credited for revamping the Corporation.

"It is absolutely misleading for Kuttuny to claim Kirwa is a wrong choice for the post when his performance at the helm of ADC speaks volumes. This is the man who strived to make ADC functional after years of collapse," charged Kauka.

PERSONAL VENDETA

They alleged the MP's attack against Kirwa was a personal vendetta and urged Kibaki to ignore the MP.

Speaking in Kitale, the farmers praised the ADC chief, saying he is a committed civil servant who has helped to change the face of ADC.

Meanwhile, Central Organisation of Trade Unions (Cotu) Secretary General, Francis Atwoli has challenged MPs in ODM and PNU to push the two principals to agree on the controversial nominations.

, said the Legislature should reconcile the two leaders instead of widening the rift between them.

The Cotu boss said dishonesty and mistrust among leaders was to blame for the differences rocking the presidency and premiership.

what others are saying
n the Online
. dardmedia.co.ke

Minister urges eason to prevail

By KENAN MIRUKA

ublic Works Minister Chris Obure warned his Cabinet colleagues to entrench party positions over ominations to the Judiciary.

he minister said the row over the of nominees picked by President ki was likely to affect the spirit of new Constitution and hinder its ementation.

peaking in his Bobasi Constitu- while inspecting various devel- ent projects, Obure termed the over consultation between the cipals as unfortunate, adding that the last thing Kenyans wanted to

ith the passing of the Constitu- expectations of Kenyans were d and this spirit has to be carried g, otherwise implementation d be difficult. We cannot dim that t future we envisaged by not s," said Obure.

I not against the names but ss has to be followed and be proach," added Obure.

>> Other stories inside

Community based organisation to spend Sh69m on houses for IDPs.

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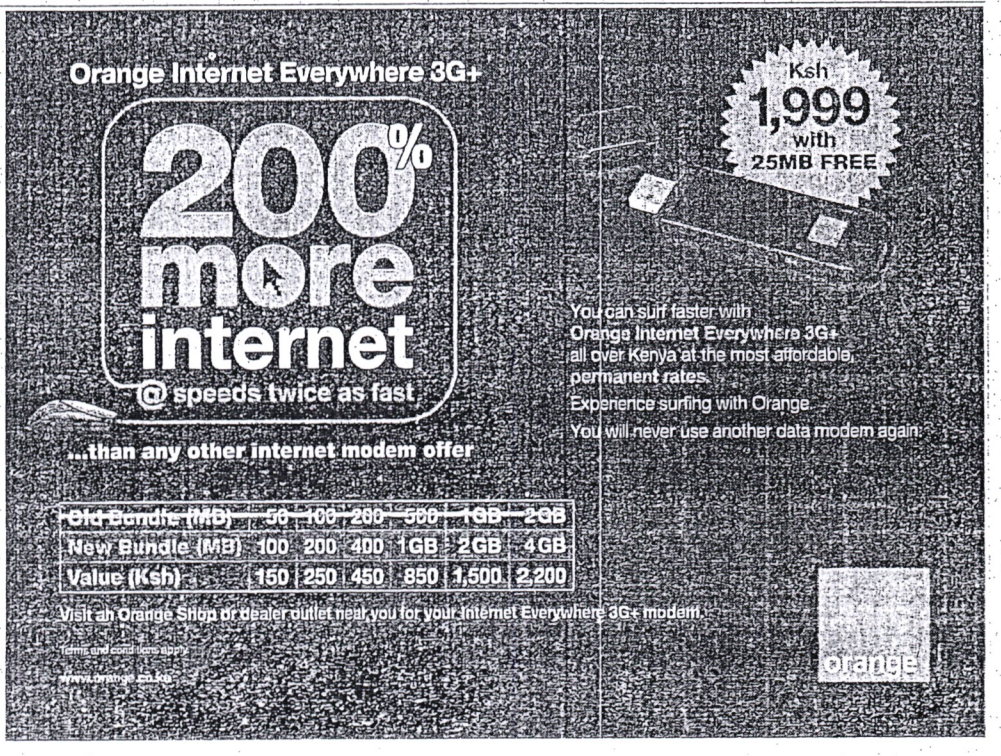



EVEGAL

EVE D'SOUZA'S BAG, PG10

STANDARD EDITORIAL COMMENT

'A good general not only sees the way to victory; he also knows when victory is impossible' – Polybius

KIBAKI, RAILA MUST GO BACK TO THE BASICS

Once again Kenya is at a political crossroads characterised by uncertainty over the future of the fractious Grand Coalition Government.

Hanging over a country that just a little over three years ago was in flames over disputed presidential election results is a dark cloud of anxiety over the present and uncertainty over the future. The cornerstone CONTINUED ON PAGE 15

ednesday, February 2, 2011

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THE STANDARD

For Fairness and Justice

Kibaki, Raila spill the beans on their 'consultations'; House turns into battlefield; and fate of President list now in Marende hands

CONFRONTATION





By STANDARD TEAM

The standoff between President Kibaki and Prime Minister Raila Odinga imploded in Parliament, but the final verdict on admissibility of the President's list now lies with Speaker Kenneth Marende. The confrontation between President and PM who claims he was not consulted on the final list and who has since written to Marende seeking his intervention, played out in Parliament where both sides put up their case for and against the nominations.

After both sides prosecuted their case, which literally cast the image of a President and a PM washing their dirty linen in public

CONTINUED ON PAGE 6

KIBAKI SIDE OF STORY

- Raila insisted on Justice Omollo and Kihara but President picked on Visram for neutrality
- I chose Visram to accommodate Raila's wish on CJ after I could not reach him in Addis
- PM was keen on having Justice Omollo as new CJ but I insisted on Kihara seeing as he is junior
- Raila kept President waiting for his call from Addis Ababa for hours despite being informed
- The President had earlier had separate consultations with Raila, Uhuru and Kalonzo

RAILA SIDE OF STORY

- Kibaki wanted Kihara to be CJ and I proposed Commonwealth Judge but President refused
- He bypassed Justices Tunoi and Bosire after rejecting Omollo though far senior to Visram
- I never proposed Omollo but his name topped seniority list of Judges from Judiciary
- I was in AU meeting but he could not call and that asked consultations be questioned
- After a vote to President (but unmodified) I was shocked to find changes had been done

KIBAKI NOMINEES

COALITION DIVIDED



Imenti Central MP **Gitobu Imanyara** sought to have the Speaker guide Parliament on what position to take over the nominations by the President



"The only issue for this House to consider is whether there was any consultation between the President and the Prime Minister" — **Farah Maalim**



"This is a matter [nominations of judicial officials] of national importance and I will make a ruling on Thursday at 2.30pm" — **Kenneth Marende**



"As a commission, we don't support an illegality. The President ought to have followed provisions of the law on the appointments" — **Mzalendo Kibunjia**



"The process of appointing eligible candidates is as cruci as the product and Kibaki shou stop abusing his powers to impo his people" — **Danson Mungatana**

Face-off: House clash over Kibaki list of nominees

Continued from P1

through letting out the not so flattering discussions on who should take which position, Marende announced he would rule on Thursday at 2:30pm.

Marende's ruling is now awaited with the same magnitude of interest as that he made last year after Kibaki and Raila once again locked horns over the President's unilateral appointment of Vice- President Kalonzo Musyoka to be the Leader of Government Business and House Business Committee. Marende, who was in receipt of contradictory letters from Kibaki and Raila, threw the matter back to the principals with a further ruling the President's action did not respect the spirit and letter of the National Accord and Reconciliation Act 2008.

"The matters canvassed before the House are a matter of great national importance. I am satisfied I have jurisdiction over the matters raised, and the ruling sought by Mr Gitobu Imanyara and supported by 17 other MPs. I have the locus standi to make the ruling. I will do so on Thursday at 2:30pm," Marende ruled, and adjourned the sitting of the House.

PATTERN OF DEBATE

In her debate, former Justice Minister Martha Karua captured the attention of the country when she called for sobriety in the House arguing the issue was bigger then Kibaki and Raila.

"The pattern of this debate is based on who is on the side if which principal. I am not in either side. I am on the side of the law and Kenya." She added: My conclusion is that there was no agreement between the two principals. The President got tired. The President cannot tire. On important matters the President cannot tire."

Lands Minister James Orengo said: "This is a new Kenya. You cannot expect to make a backroom appointment and expect to get away with it."

He added: "If approved some of these nominations will lead to some offices dominated by people from one region. In the State Law office the Attorney General, Solicitor General, deputy Solicitor General, and Registrar General would all come from Central Province."

The day was dramatic in the way Raila gave his account of the 'consultations' with the President, which in many aspects differed with Kibaki's account of what transpired as told by Vice- President Kalonzo Musyoka in a 14-point statement later publicised by the Government Spokesman Alfred Mutua in the local dailies and his website. It described how the President sat at Harambee House on Friday between 12:30pm to 3pm waiting for Raila's call from Addis Ababa. The President later left a number on which the PM could get him, then left for State House for lunch and another wait. "At 6pm, the State House Comptroller called the Prime Minister for the President to speak to him. Mr Caroli Omondi, (the PM's administrative secretary), answered the Prime Minister's phone. After consulting, Mr Caroli Omondi said the Prime Minister was busy and would call back after one and a half hours," said Kalonzo, who read the pre-prepared statement on the President's side.

FELT HE CONSULTED

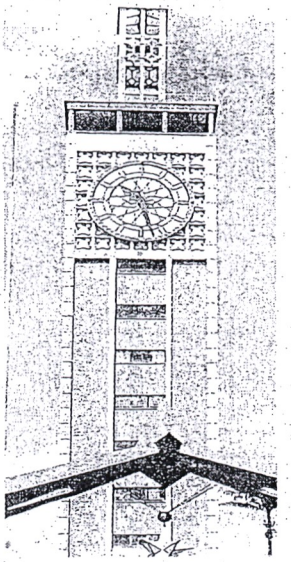
It went on: "The President then felt that he had consulted extensively and had accommodated the Prime Minister and had fulfilled the constitutional requirements and therefore, made the announcement on Friday, January 28, at 8.30pm."

But whereas Kibaki's account was that the consultations were longdrawn and adhered to the Constitution, it was glaring in the concession that he made the announcement after failing to get Raila's final word, because he was apparently held up in the Africa Union Summit.

The PM said the announcement went against their agreement the discussions be deferred until the African

THE DEBATE AT A GLANCE

- The row over the controversial nomination of three key judicial office holders took centre stage in Parliament after it re-opened on yesterday afternoon
- MPs were divided down in the middle over the nominations with those supporting President Kibaki supporting the move while those allied to Prime Minister Raila Odinga protested against the list
- Speaker Kenneth Marende will rule whether the Parliament will continue to vet the names as required by law



Union summit and it was on this understanding that Raila left for Addis. Raila said the decision was taken after the President dismissed his proposal for a foreign lawyer for CJ, and the second on lawyer Pheroze Nowrojee on the basis he is an 'activist'. He made the proposal, Raila said, after the President's first nominee, Justice Kihara Kariuki, turned out to have been ranked number 21 among the High Court judges in the list provided by the Judiciary to the joint technical team, and that he was not even an Appellate Judge. Raila explained the President had pushed for Justice Kariuki on the basis he was a 'reformer'.

PECKING ORDER

He revealed the President rejected his proposal for a foreign CJ from the Commonwealth, arguing that 50 years after Independence, it would not go down well with Law Society of Kenya.

Kibaki's argument, as told by the PM, was that Kihara was the best suited for the job, but Raila argued the current team of judges had not been vetted. But after he gave in to the President's push for a local judge, he proposed that Justice RCS Omolo, who was ranked number one on the list of Appeal Court judges, takes it on the basis of seniority.

But after Raila's departure and inaccessibility the President decided to go for a judge from 'minority group' for reasons on neutrality, in the process jumping over eight Appellate Judges, including Justice Phillip Tunoi and Justice Samuel Bosire who were ranked second and third after Omolo, and picked Justice Alnashir Visram.

The PM insisted as part of the trade-off the Kibaki side offered to strike off the President's nominee of lawyer Fred Ojiambo as AG and allow Raila to pick his replacement, because Ojiambo was reportedly rated low on the basis of post-graduate training. The name, which came up was that of Githu Muigai, proposed by the technical teams representing both principals.

FOR

Jeremiah Kioni (Ndaragwa)
Erastuis Mureithi (Ol Kalou)
Lenny Kivuiti (Siakago)
Jamleck Kamau (Kigumo)
Nderitu Muriithi (Laikipia West)
Elias Mbau (Maragua)
Ephraim Maina (Mathira)
Kareke Mbiuku (Nithi)
David Njuguna (Lari)
Beth Mugo (Dagoretti)
Dr Julius Kones (Konoin)
Fred Kapondi (Mt Elgon)
Lee Kinyanjui (Nakuru Town)
John Mututho (Naivasha
Joseph Kiuna (Molo)
Luka Kigen (Rongai)
Zakayo Cheruiyot (Kuresoi)
Benjamin Langat (Ainamoi)
Charles Keter (Belgut)
Isaac Ruto (Chepalungu)
Dr. Julius Kones (Konoin)
Sammy Mwaita (Baringo Central)
Nelson Gaichuhie (Subukia)
Joshua Kuttuny (Cherangany)
Joshua Chepkitony (Keiyo North
Ferdinand Waititu (Embakasi)
Kiraitu Murungi (Imenti South)
Eugene Wamalwa (Saboti)
Kalonzo Musyoka (Mwingi North

AGAINST

Martha Karua (Gichugu)
Gitobu Imanyara (Imenti North)
Musalia Mudavadi (Sabatia)
Yusuf Chanzu (Vihiga)
Wilbur Otichilo (Emuhaya)
Wycliffe Oparanyah
Bonny Khalwale (Ikolomani)
Cyrus Jirongo (Lugari)
Manyala Keya (Lurambi)
David Were (Matungu)
Evans Akula (Kwhisero)
Ben Washiali (Mumias)
Esseli Simiyu (Kimilili)
Bifwoli Wakoli (Bumula)
Alfred Khangati (Kanduyi)
Alfred Sambu (Webuye)
Paul Otuoma (Funyula)
Ababu Namwamba (Budalangi)
Alfred Odhiambo (Butula)
Sospeter Ojaamong (Amagoro
Otieno Kajwang' (Mbita)
James Orengo (Ugenya)
Fred Outa (Nyando)
Olago Aluoch (Kisumu Town West)
James Rege (Karachunyo)
John Mbadi (Gwasi)
Oyugi Magwanga (Kasipul Kapon
Shakeel Shabbir (Kisumu Town Ea
Jakoyo Midiwo (Gem)
Pollyns Ochieng (Nyakach)
Ayiecho Olweny (Muhoroni)
Nicholas Gumbo (Rarieda)
Edwin Yinda (Alego/Usonga)
Edick Anyanga (Nyatike)
Manson Nyamweya (South Mugir
Chris Obure (Bobasi)
Richard Onyoka (Kitutu Chache)
Simon Ogari (Bomachoge)
Franklin Bett (Bureti)
Joyce Laboso (Sotik)
Beatrice Kones (Bomet)
Magerer Lang'at (Kipkelion)
Nkodila Lankas (Narok South)
William ole Ntimama (Narok Nortl
Mutula Kilonzo (Mbooni)
Joseph Nkaisery (Kajiado Central)
Katoo ole Mitito (Kajiado South)
Fred Gumo (Westlands)
Elizabeth Ongoro (Kasarani)

Mutula says law must be respecte

BY DAVID OCHAMI

Justice Minister Mutula Kilonzo accused the two principals of exposing the country to an unnecessary debate. He said the appointments must be based on holistic interpretation of the Constitution including Chapter Six on leadership and integrity.

"I believe there were consultations. I know these gentlemen (President Kibaki and Prime Minister Raila Odinga) met but I cannot say for sure what they discussed," he said.

And Energy Minister Kiraitu Murungi declared that the Judicial Service Commission (JSC) has no role in appointment of a Chief Justice after the retirement of Justice Evan Gicheru, according to the new charter's Sixth Schedule of the new supreme law.

"The JSC is not referred to in the Sixth Schedule. It has absolutely no role," he said.

Kiraitu said the outgoing CJ and Attorney General Amos Wako who signed a statement on Monday denouncing Kibaki's nominatior an interest in the matter and not be allowed to preside o nomination of their successor

And Deputy Speaker Farah I Mohamed said Parliament discuss the list of the nomin cause "this matter is not validly this House" and said the Pr cannot exercise power alone the National Accord.

He said no women were ered in the list announced la by President Kibaki.



My conclusion is that there was no agreement between the two principals. The president got tired...On important matters Kibaki can't tire — **Martha Karua**



The Judicial Service Commission (JSC) has no role in appointment of a Chief Justice after the retirement of Justice Evan Gicheru — **Kiraitu Murungi**



We should not torture ourselves to follow different routes. There are simpler routes. Let's not do this as a game of politics — **Abdikadir Mohammed**



The appointments must be based on holistic interpretation of the Constitution including Chapter 6 on leadership and integrity — **Mutula Kilonzo**



A junior member of the judiciary cannot sit as head of the judiciary before being vetted — **James Orengo**

Showdown as aila, Kibaki 'put record straight'

principals tell the se their versions of t transpired in bid ick nominees for judicial offices

By MARTIN MUTUA

iiament was turned upside with President Kibaki and Prime er Raila Odinga tearing each apart over the recent judicial nations by the President.

ile Raila made his position on the floor of the House, Ki- sent Vice-President Kalonzo ka to state his position.

e move arose following a re- by Imenti Central MP Gitobu ara to Speaker Kenneth Mar- to make a ruling on the matter the names are tabled for de-

ila maintained no consultations held between him and the Pres- over the nominations and said is shocked to learn two of the s Kibaki nominated had never ed when they had met on two ions.

he process is unconstitutional eeds to be nullified and started ," concluded the PM.

Raila said since the VP had read a chronology of events he was himself going to be candid and factual with the House to clear the air on the matter.

Raila said on December 6 and 16 he indeed met with Kibaki together with their aides. Their attention was drawn on the transitional clause 24 on the appointment of the CJ.

Raila said during the meeting on December 16 they decided there must be some kind of procedure on how to pick the CJ, the AG, the DPP and the Controller of Budget.

"We agreed a panel be set up to come up with the names," he said. Members suggested included those from the Office of the President, the PM, law reform commission and the Judicial Service Commission.

MEDIATION TRIP

Raila said the panel was supposed to interview applicants for the positions.

The principals never met again until last Thursday, he said. The last week's meeting agenda were four and that of the appointments was the last in the list, he added.

Raila said he went to Harambee House to brief Kibaki on the drought situation in North Eastern because the region's parents had petitioned him to have the Government waive school fees for their children and he needed to discuss it with the President.



Prime Minister Raila Odinga shares a light moment with Burundian President Pierre Nkurunziza at the launch of East African trade mark in Nairobi, yesterday. [PHOTO: TABITHA OTWORI/STANDARD]

He also went to brief the President about his mediation trip in Ivory Coast and the President had the agenda of the AU and the shuttle diplomacy to brief him.

"Having dealt with the four issues we then came to the last one, which was on the appointments," he added.

The panel they had mandated to come up with the names never did so and he then suggested to the President that they source a CJ from the commonwealth for a period of three years as they embark on vetting of local judges, he told the Parliament.

The President insisted they can source the same locally.

"At that time there were no names that had been suggested, but the President made some suggestions," said Raila.

Kibaki unleashed the names of Justice Paul Kihara for CJ, Justice Hannah Okwengu for deputy CJ, Fred Ojiambo for AG, Kioko Kilukumi or Kiage for Director of Public Prosecutions, and William Kirwa for Controller of Budget. "I informed the President that I needed to consult," the PM said.

After consultations, Raila returned and suggested lawyer Pheroze Nowrojee for the position of CJ, but when the experts went back to consult they returned and rejected him, saying he was an activist and claimed Justice Kariuki was a reformer.

Raila said since they had disagreed he called for the pecking order at the Court of Appeal and the High Court and suggested if they have to pick from the Bench then they go by seniority.

PERSONAL ISSUE

"I never spoke of Justice Omollo being the CJ. It was provided for by the team of experts when we called for the pecking order," he added.

Raila said at the High Court Justice Msagha Mbogholi was the senior most while Justice Kihara was number 21. The PM said it was then that he was told he should pick an AG of his choice and the President will pick the CJ, a move he protested, saying the matter was not a party or personal issue. "We are picking the CJ of the republic of Kenya not of ODM and AG for Kenya and not PNU," Raila told the House.

Raila said when he went to Addis Ababa he entered a meeting which went late into the evening and that at no time was he informed the President had called him as alleged.

He further noted that when he came out of the meeting he met a team of journalists who asked him whether he had been consulted on the nominations, but he held his breath and refused to comment.

"I am prepared to swear that those two names of Justice Visram and Prof Muigai never featured in any of our talks before I left for Addis," he added.

RAILA'S TAKE ON KEY NOMINATIONS

- Raila told Parliament the country was dealing with very weighty issues and it needs a neutral, transparent and credible body to carry out the process
- The premier says the appointments should not be carried out because "people come from one corner or the other" and gender parity was equally ignored
- The PM issue a nationatinal issues and should be void of partisan politics since "picking the CJ of the republic of Kenya not of ODM and AG for Kenya and not PNU"

Karua accuses Head of State of abandoning consultations

By DAVID OCHAMI

chugu MP Martha Karua has consultations between the two ipals collapsed after the Presi- got tired of negotiations over the ial nominations.

ie said Kibaki could not nomi- officials to the judiciary without vetting and interview by the new ial Service Commission (JSC). said the nominations should be ted and the process repeated.

ie added that it is counterpro- ive to name a Chief Justice whose ination is contested and hope to m the Judiciary.

She said: "My conclusion is that there was no agreement between the two principals. The President got tired. The President cannot get tired on important matters."

She defended the role of the JSC to name the CJ to replace retiring Justice Evan Gicheru and accused Kibaki's supporters of "using knowledge of the law to mislead".

Earlier, Karua had echoed the position taken by the Judicial Service Commission to reject nominees to key positions even as she cautioned the two principals against being carried by demands of their respective parties.

Orengo chides President over move

By DAVID OCHAMI

Lands Minister James Orengo yesterday said President Kibaki trashed the power-sharing National accord when he nominated four public officials last week, and said it will be unconstitutional for Parliament to discuss these names.

Orengo, who said the nominations were unilateral and in gross violation of various sections of the new charter, should be discarded and Kibaki forced to nominate new ones in accordance with the law.

The Lands Minister said failure to respect the law and consult could lead to nominations to key posts that are tribally skewed and discriminatory to

> "It was mandatory for Kibaki to consult the Prime Minister for the nominations and seek the input of the JSC in the matter.

women. "This is new Kenya. You cannot expect to make a backroom appointment and expect to get away with it."

He said if allowed to stand, Kibaki's nominations would create a State Law Office dominated by professionals from Central Province because their appointment was neither competitive nor in conformity with national values contained in the new charter.

"If approved some of these nominations will lead to some offices dominated by people from one region. In the State Law Office, the Attorney General, Solicitor General, Deputy Solicitor General and Registrar General would all come from Central Province."

Orengo said it was mandatory for Kibaki to consult the Prime Minister for the nominations and seek the input of the JSC in the matter.

Moreover, he said appointing Justice Alnashir Visram to become CJ before his vetting was illegal.

KIBAKI NOMINEES

COALITION DIVIDED

Kibaki team unveils trail of events before the final decision

Raila and Kibaki said to have agreed, but due to communication breakdown failed to settle on a neutral and qualified Chief Justice

By BEAUTTAH OMANGA

President Kibaki's wing of the Coalition Government hit back at claims by Prime Minister Raila Odinga that there were no consultations before the nominations of four individuals to key State posts.

The document presented to *The Standard* shows the chronology of events leading to the President's controversial announcement.

As per the document, consultations started in December, last year, and continued last month.

"The issue of the judicial appointments was in the agenda of a meeting between the President and the PM held before Christmas, last year. During the meeting, the President felt it was better to revisit the issue after the New Year," read the document.

The brief indicated the matter was discussed on January 6, at Harambee House by Kibaki and Odinga.

The two agreed on the procedure, among them identification and consultations before submission to Parliament.

The two principals reportedly agreed that the law did not require the selection of the candidates by either the Judicial Service Commission or Public Service Commission.

The technical team was instructed to identify suitable candidates to facilitate further consultations. In the technical meetings, it was observed that the PM wanted an external CJ, but Kibaki insisted the country had enough qualified personnel.

It explains that on Thursday, January 27, the item was on the agenda in a meeting held from 12pm between the principals at Harambee House.

During the meeting, Kibaki presented his proposal borrowing on the consultations held by the technical teams, with representatives from him and the PM. The President proposed Justice Kihara to take the position of CJ, deputy CJ to be filled by a woman through the JSC, Fred Ojiambo to become AG and Kioko Kilukumi Director of Public Prosecution.

In response, the PM said if the President could not agree to have a judge from the Commonwealth to become the CJ, then Bench seniority should prevail. Justice Riaga Omollo would take the job as the senior-most judge in the current Bench after Chief Justice Evan Gicheru. Justice Kihara is ranked 21.

The President is reported to have pointed out that he needed to make appointments before he left for Addis Ababa, Ethiopia, for the AU meeting.

TECHNICAL TEAM DISCUSSED

"It was, therefore, decided that the technical team discusses the lists and reports back the same day in the afternoon. The team included Francis Muthaura, Mohamed Isahakia, Nick Wanjohi and Caroli Omondi.

The team reported separately that they had agreed on three of the positions, but could not agree on the CJ. The team presented three options for the CJ, Justice Omollo, Justice Kihara or Justice Alnashir Visram for consideration.

At the same time, the President asked the PM to propose an AG to replace Ojiambo, as the job of AG, being the chief legal advisor of the Government, required higher post-graduate qualifications. Prof Githu Muigai was proposed and agreed on by both technical sides. Kibaki said because he was to travel to Addis Ababa on Saturday, the matter needed to be finalised by 12pm on Friday. It was imperative that the proposals were made for the sake of the AU meeting.

The report indicates this was made clear to Raila.

The VP stated in Parliament yesterday that on Friday morning, the PM sent a letter signed by Omondi before the President left for Ethiopia, that consultations could be facilitated at a later date.

PM'S CONCERNS

The President then proposed Justice Visram as CJ to accommodate the PM's concerns of neutrality. The VP told Parliament the PM was asked to call the President from Addis Ababa so they could finalise, and the President waited at Harambee House from 12.30pm to 3pm without hearing from the PM.

The President, according to Kalonzo, left for State House for lunch at 3pm, and the PM was given a number to contact the President. But the PM did not call.

The report indicates that at 6pm, the State House Comptroller called the PM. Omondi of the PM's office answered the PM's phone and after consulting, said the PM would call back after one and a half hours.

The President, the VP said, then felt he had consulted extensively, accommodated the PM and fulfilled the constitutional requirements.



Vice-President Kalonzo Musyoka addressed journalists after a PNU meeting at KICC, Nairobi, yesterday. [PHOTO: MBUGUA KIBERA /STANDARD]

HOW SOME HAVE RESPONDED TO MOVE

- Judicial Service Commission has demanded a transparrent, competitive, flawless, free and fair process
- Law Society of Kenya has differed with its chair, saying nominated Chief Justice Alnashir Visram was unqualified to serve in that capacity
- Energy Minister Kiraitu Murungi has defended the President and said PNU would support the nominees
- Justice Minister Mutula Kilonzo has disapproved of the process

See what others are saying, join us Online: www.standardmedia.co.ke

PNU 'still consulting' on Kibaki nominees

By ATHMAN AMRAN

PNU MPs took a cautious stat President Kibaki's controversial i inations, saying the party wa consulting.

After a Parliamentary Group i ing at the KICC, Nairobi, yeste Vice-President Kalonzo Musyok the saga was a credibility issu tween Kibaki and Prime Ministe la Odinga.

"It amounts to who is tellin truth between the President an Prime Minister," Kalonzo tol Press after the meeting attend more than 30 MPs, including D Prime Minister Uhuru Kenyatta

The VP said: "Leaders are stil sulting on the matter. All of us on the need to implement the Constitution fast."

The VP, however, said Kiba sured him he consulted with th adding the matter was "above b "The President assured me he sulted the way it was supposed under the new Constitution," t said.

He said Kenyans should not about exchanges between allies baki and Raila, arguing such dis ments were expected in coalitio ernments.

IN SUPPORTING KIBAKI

But Energy Minister K Murungi, who addressed the earlier before the meeting ende an uncompromising stand.

Kiraitu said: "Consultation not necessarily mean cons agreement or approval."

He said PNU was going to su Kibaki's nominees to the pc Chief Justice, Attorney Gener the Director of Public Prosecut Parliament.

Kiraitu also dismissed as "se ing and misleading" the stand Judicial Service Commission th nominations were unconstitut

The minister said the comn has no role in the nomination.

"It is only after the Genera tion that the President would the appointments upon the r mendation of the Judicial S Commission," Kiraitu said.

Kiraitu said it was surprisin Justice Evan Gicheru and At General Amos Wako appende signatures in a statement by jecting the nominees.



Mutula: Nominations the way to Hague

By MARTIN MUTUA

If the nominations by President Kibaki are allowed to take effect, judicial reforms would have been dealt a major blow.

Justice and Constitutional Affairs Minister Mutula Kilonzo warned that the Ocampo Six would have to be tried at The Hague as the local mechanism envisaged after the judicial reforms would not have been attained.

"If the intention was to show the African Union and other countries that we are renewing our institutions, then we just shot ourselves in the foot. You cannot afford to have a prosecutor, Attorney General and a Chief Justice perceived to enjoy the support of one political party," he added.

Mutula told the *BBC* in an interview that he had been arguing since last August that the positions be filled so the country could have a new AG, prosecutor, CJ and an Inspector General of Police to restructure police services. The minister said he hoped the Government would use a person appointed by the Inspector Ger investigate the post-election v crimes and a new prosecutor to the suspects.

A special Bench would be lished under Section 8 of the I tional Crimes Act consisting judges who will have been vet

While describing the nomi as "unconstitutional", Mutula Constitution provided that a the nominations be filled by which was not the case.

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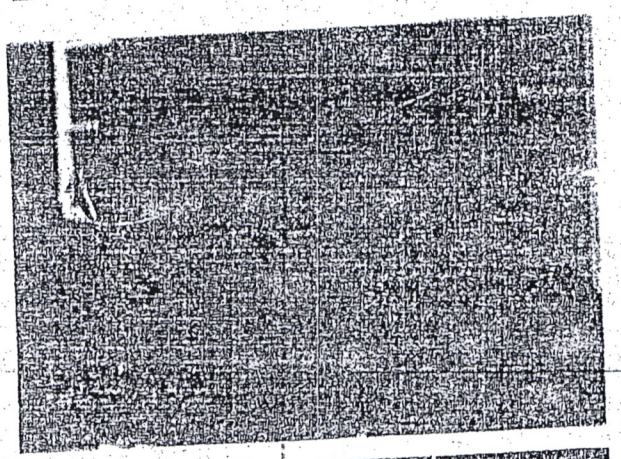
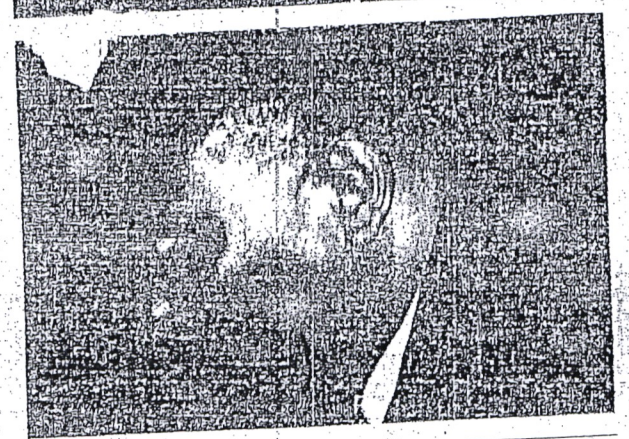
making last night after President made key appointments 'without PM's nod'

Kibaki names new Chief Justice as ODM protests

Coalition partner says No to nomination of Visram as CJ, Githu Muigai as AG and Kioko Kilukumi as prosecutor





BY ERIC SHIMOLI
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AND EMEKA MAYAKA GEKARA
gmayaka@ke.nationmedia.com

Court of Appeal Judge Alnashir Ramazanadi Magan Visram was last night named Chief Justice to replace Mr Justice Evan Gicheru.

President Kibaki also nominated law professor Githu Muigai to take over from Mr Amos Wako as Attorney General.

The President also proposed Mr Kioko Kilukimi, a Nairobi lawyer for the new powerful post of Director of Public Prosecutions.

The Managing Director of the Agricultural Development Corporation, Mr William Kirwa, was proposed for

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YOUR FRIDAY - SUNDAY 7PM AND 9PM ON NTV NEWS ntv

NEW CRISIS | The appointments threaten to divide coalition government even further

Kibaki appoints new CJ as ODM protests

CONTINUED FROM PAGE 1

the new postition of Controller of Budget.

But the nominations threatened to divide the government further and provoke a major fight for nomination in parliament after ODM rejected them.

Lands Minister James Orengo protested the nomination of the candidates saying Mr Odinga had not been consulted.

Addressing a swift press conference, Lands Minister James Orengo said that Mr Odinga had advised that the release of the names be delayed awaiting further deliberations by after the two coalition leaders return home from the AU summit in Addis Ababa.

He said that the PM's position was communicated to the President through Public Service head Francis Muthaura.

"However Mr Muthaura called Mohammed Isahakia (the PS in the office of Prime Minister) yesterday afternoon to inform him that the President had made a decision that the names of the nominees be announced."

The split of the key appointments effectively draws battle lines in Parliament between the President Kibaki's PNU and Mr Odinga's Orange movement.

The new Constitution mandates the President to make the appointment in consultation with the Prime Minister.

After identifying their choice, the candidate's name will be sent to Parliament for debate and approval before the President makes the final appointment.

Another source disputed that Prime

The source who is familiar with the PM's diary said President Kibaki and Mr Odinga had discussed the subject but not the names. "The names were to be discussed in the next weeks," the source said.

The PM's office had been informed of the pending announcement earlier in the day.

With ODM MPs from Rift Valley having rebelled aginst Mr Odinga and depending with whether the PNU coalition remains united, the vote in parliament could be close. But the specter of the matter being bogged down in the courts could delay the process if ODM decides to mount a legal challenge against the nominations.

Earlier, there were expectations that a judge from the Commonwealth would be named as CJ to preside over the transition within the judiciary.

Mr Gicheru's term was to end by February 27 under the new constitution which also provides for the vetting of judges and magistrates.

The changes are intended to clean up the Judiciary and prosecution services and demonstrate to the International Criminal Court that Kenya is capable of handing cases involving post-election violence suspects.

Mr Justice Visram graduated with a degree in law from the University of British Columbia in 1972. In 1978, he graduated with a second degree in law from University of British Columbia, Canada. In 2006 he graduated with a Master of Laws degree in International Law from the University of Nairobi. While in practice he specialised in commercial, corporate and civil law. In

MORE INFORMATION

Work and academic history of appointees

Chief Justice: Justice Alnashir Ramazanadi Magan Visram

Justice Visram graduated with a degree in law from the University of British Columbia in 1972. In 1978, he graduated with a second degree in Law from University of British Columbia, Canada. In 2006 he graduated with a Master of Laws degree in International Law from the University of Nairobi. While in practice he specialised in commercial, corporate and civil law. In 1999, he was appointed Commissioner of Assize, and in 2001, he was sworn in as a Judge of the High Court of Kenya, and in 2009 as Judge of Appeal.

Attorney General: Prof. Githu Muigai

He holds LLB and Ph.D. degrees from the University of Nairobi and an LLM Degree from Columbia University School of Law, New York. He is also a Fellow of the Chartered Institute of Arbitrators (UK) and a member of the American Association of Trial Lawyers. He is an Associate Professor of public law in the School of Law of the University of Nairobi.

He specialises in public law and trans-national legal practice. He is an Associate professor at the University of Nairobi, an international human rights lawyer and a constitutional lawyer.

Director of Public Prosecutions: Kioko Kilukumi

Graduated with an LLB from the University of Nairobi in 1990. 1990-1993 — Worked with Kaplan and Stratton Advocates. 1993-1996 — Appointed public prosecutor in the Kingdom of Swaziland. 1996-present - Private legal practice and part time lecturer in criminal litigation.

Controller of Budget: William Kirwa

He is currently the managing director of the Agricultural Development Corporation. Holds an MBA in Banking and Finance. Also holder of an MA in Agricultural Economics. Previously worked with Barclays Bank as a senior Manager.

1999, he was appointed Commissioner of Assize, and in March 2001, he was sworn in as a Judge of the High Court of Kenya, and in April 2009 as Judge of Appeal.

Prof Muigai holds LLB and Ph.D. degrees from the University of Nairobi and an LLM Degree from Columbia University School of Law, New York. He is also a Fellow of the Chartered Institute of Arbitrators (UK) and a member of the American Association of Trial Lawyers. In addition to the practice of law he is an Associate Professor of Public law in the school of law of the University of Nairobi. [illegible]ialises in Public law and trans[illegible] practice. He is [illegible] arbitration. He is an Associate professor at the University of Nairobi and an International Human Rights Lawyer and a Constitutional lawyer.

Mr Kilukumi graduated with an LLB from the University of Nairobi in 1990. Between 1990-1993, he worked with Kaplan and Stratton advocates. In 1993-1996, he was Public Prosecutor in the Kingdom of Swaziland. He has been in private legal practice and part time lecturer in criminal litigation since 1996.

Mr Kirwa Holder an MBA in Banking and Finance and is holder of [illegible] in

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COA

Abide by law

Commission trashes Kibaki list of nominees

Judicial Service Commission says process should be conducted as per the new Constitution

By EVELYN KWAMBOKA

The Judicial Service Commission (JSC) has rejected President Kibaki's list of nominees to four constitutional offices.

All the members, among them Government legal advisor Attorney General Amos Wako, said the list should be withdrawn urgently and the process conducted as per the Constitution.

This is because the names were not recommended to the President by JSC as required by law and, therefore, went against the spirit and letter of the Constitution, they argued.

The JSC demanded a transparent, competitive, flawless, free and fair process devoid of partisan politics and which would win public confidence.

Article 166(1) of the Constitution states: "The President shall appoint the Chief Justice and Deputy Chief Justice in accordance with the recommendation of the Judicial Service Commission, and subject to the approval of the National Assembly."

"There is an urgent need for a rethink of the matter and to put the country first. That entails a withdrawal of the nominations and a fresh start," said JSC secretary, Lydia Achode.

Article 172 (1) (e) of the Constitution, Ms Achode said, gives powers to the Commission to play an important role in the nomination of AG, CJ and DPP.

It states that JSC shall facilitate the independence and accountability of the Judiciary and the efficient, effective and transparent administration of justice.

PRINCIPALS' POSITIONS

It further states that JSC shall advise the national Government on improving the efficiency of the administration of justice. "On our part, it is legitimacy, public confidence, ownership and acceptance by the people of Kenya, the JSC must play an integral role in the process," Achode said.

Yesterday, in a statement read on behalf of JSC, Achode said they were of the view that the two Principals need to reconsider their positions.

"In light of the divergent views coming from the Principals, we are of the view that they need to reconsider their respective positions," she said.

The statement was read at a press conference attended by Wako, Chief

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REPUBLIC OF KENYA

KENYA GAZETTE SUPPLEMENT

ACTS, 2008

NAIROBI, 20th March, 2008

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The National Accord and Reconciliation Act, 2008. 7

THE NATIONAL ACCORD AND RECONCILIATION ACT

No. 4 of 2008

Date of Assent: 20th March, 2008

Date of Commencement: 20th March, 2008

ARRANGEMENT OF SECTIONS

Section

1—Short title.

2—Commencement.

3— Appointment of Prime Minister and Deputy Prime Ministers.

4— Functions of the Prime Minister, etc.

5— The Cabinet.

6— Dissolution of coalition.

7— Salary and allowances.

8— Act to cease to apply.

9—Interpretation.

SCHEDULE – AGREEMENT ON THE PRINCIPLES OF PARTNERSHIP OF THE COALITION GOVERNMENT

THE NATIONAL ACCORD AND RECONCILIATION ACT, 2008

AN ACT of Parliament to give effect to the Agreement on the Principles of Partnership of the Coalition Government, to foster national accord and reconciliation, to provide for the formation of a coalition Government and the establishment of the offices of Prime Minister, Deputy Prime Ministers and Ministers of the Government of Kenya, their functions and various matters connected with and incidental to the foregoing

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Short title.

1. This Act may be cited as the National Accord and Reconciliation Act, 2008.

Commencement.

2. This Act shall come into force upon its publication in the Kenya Gazette, which shall not be later than fourteen days from the date of assent.

Appointment of Prime Minister and Deputy Prime Ministers.

3. (1) There shall be a Prime Minister of the Government of Kenya and two Deputy Prime Ministers, who shall be appointed by the President in accordance with this section.

(2) The person to be appointed as Prime Minister shall be an elected member of the National Assembly who is the parliamentary leader of—

(a) the political party that has the largest number of members in the National Assembly; or

(b) a coalition of political parties in the event that the leader of the political party that has the largest number of members in the National Assembly does not command the majority in the National Assembly.

(3) Each member of the coalition shall nominate one person from the elected members of the National Assembly to be appointed a Deputy Prime Minister.

Functions of the Prime Minister, etc.

4. (1) The Prime Minister—

(a) shall have authority to co-ordinate and supervise the execution of the functions and affairs of the Government, including those of Ministries;

(b) may assign any of the co-ordination responsibilities of his office to the Deputy Prime Ministers, as well as one of them to deputise for him;

(c) shall perform such other duties as may be assigned to him by the President or under any written law.

(2) In the formation of the coalition Government, the persons to be appointed as Ministers and Assistant Ministers from the political parties that are partners in the coalition other than the President's party shall be nominated by the parliamentary leader of the party in the coalition and thereafter there shall be full consultation with the President on the appointment of all Ministers.

(3) The composition of the coalition Government shall at all times reflect the relative parliamentary strength of the respective parties and shall at all times take into account the principle of portfolio balance.

(4) The office of the Prime Minister and the Deputy Prime Minister shall become vacant only if—

(a) the holder of the office dies, resigns

or ceases to be a member of the National Assembly otherwise than by reason of the dissolution of Parliament;

(b) the National Assembly passes a resolution which is supported by a majority of all the members of the National Assembly, excluding the *ex-officio* members, and of which not less than seven days notice has been given, declaring that the National Assembly has no confidence in the Prime Minister or Deputy Prime Minister, as the case may be; or

(c) the coalition is dissolved.

(5) The removal of any Minister nominated by a parliamentary party of the coalition shall be made only after prior consultation and concurrence in writing with the leader of that party.

The Cabinet.

5. The Cabinet shall consist of the President, the Vice-President, the Prime Minister, the two Deputy Prime Ministers and the other Ministers.

Dissolution of coalition.

6. The coalition shall stand dissolved if—

(a) the Tenth Parliament is dissolved;

(b) the coalition parties agree in writing: or

(c) one coalition partner withdraws from the coalition by a resolution of the highest decision-making organ of that party in writing.

Salary and allowances

7. The Prime Minister and Deputy Prime Ministers shall be entitled to such salaries, allowances, benefits, privileges and emoluments as may be approved by Parliament from time to time.

Act to cease to apply

8. This Act shall cease to apply upon dissolution of the tenth Parliament, if the coalition is dissolved, or a new Constitution is enacted, whichever is earlier.

Interpretation

9. In this Act, the Agreement on the Principles of Partnership of the Coalition Government means the Agreement set out in the Schedule.

SCHEDULE (s. 9)

ACTING TOGETHER FOR KENYA

AGREEMENT ON THE PRINCIPLES OF PARTNERSHIP OF THE COALITION GOVERNMENT

Preamble:

The crisis triggered by the 2007 disputed presidential elections has brought to the surface deep-seated and long-standing divisions within Kenyan society. If left unaddressed, these divisions threaten the very existence of Kenya as a unified country. The Kenyan people are now looking to their leaders to ensure that their country will not be lost.

Given the current situation, neither side can realistically govern the country without the other. There must be real power-sharing to move the country forward and begin the healing and reconciliation process.

With this agreement, we are stepping forward together, as political leaders, to overcome the current crisis and to set the country on a new path. As partners in a coalition

government, we commit ourselves to work together in good faith as true partners, through constant consultation and willingness to compromise.

This agreement is designed to create an environment conducive to such a partnership and to build mutual trust and confidence. It is not about creating positions that reward individuals. It seeks to enable Kenya's political leaders to look beyond partisan considerations with a view to promoting the greater interests of the nation as a whole. It provides the means to implement a coherent and far-reaching reform agenda, to address the fundamental root causes of recurrent conflict, and to create a better, more secure, more prosperous Kenya for all.

To resolve the political crisis, and in the spirit of coalition and partnership, we have agreed to enact the National Accord and Reconciliation Act, 2008, whose provisions have been agreed upon in their entirety by the parties hereto and a draft copy thereof is appended hereto.

Its key points are:

- There will be a Prime Minister of the Government of Kenya, with authority to co-ordinate and supervise the execution of the functions and affairs of the Government of Kenya.
- The Prime Minister will be an elected member of the National Assembly and the parliamentary leader of the largest party in the National Assembly, or of a coalition, if the largest party does not command a majority.
- Each member of the coalition shall nominate one person from the National Assembly to be appointed a Deputy Prime Minister.
- The Cabinet will consist of the President, the Vice-President, the Prime Minister, the two Deputy Prime Ministers and the other Ministers. The removal of any Minister of the coalition will be subject to consultation and concurrence in writing by the leaders.
- The Prime Minister and Deputy Prime Ministers can only be removed if the National Assembly passes a motion of no confidence with a majority vote.
- The composition of the coalition government will at all times take into account the principle of portfolio balance and will reflect their relative parliamentary strength.
- The coalition will be dissolved if the Tenth Parliament is dissolved; or if the parties agree in writing; or if one coalition partner withdraws from the coalition.
- The National Accord and Reconciliation Act shall be entrenched in the Constitution.

Having agreed on the critical issues above, we will now take this process to Parliament. It will be convened at the earliest moment to enact these agreements. This will be in the form of an Act of Parliament and the necessary amendment to the Constitution.

We believe by these steps we can together in the spirit of partnership bring peace and prosperity back to the people of Kenya who so richly deserve it.

Agreed this date 28 February, 2008.

H.E. President Mwai Kibaki
Government/Party of National Unity

Hon. Raila Odinga
Orange Democratic Movement

Witnessed By:

H.E. President Jakaya Kikwete
President of the United Republic of
Tanzania and Chairman of the African Union

H.E. Kofi A. Annan
Chairman of the Panel of
Eminent African Personalities

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MEMORUNDUM FROM YOUTH CONSORTIUM ON THE IMPLEMENTATION OF THE NEW CONSTITUTION (YOUTH KATIBA NETWORK)

PRESENTED TO BE: PARLIAMENTARY COMMITTEE ON LEGAL JUSTICE AND CONSTITUTION AFFAIRS AT PARLIAMENT BUILDINGS ON 8/2/11

As young people who have a stake in the future of this country especially the full implementation of new constitution, we wish to submit as follows regarding the recent appointments by His Excellency the President Mwai Kibaki

- We would like to categorically state that Article 24 (2) of the sixth schedule of the constitution is clear that the appointment of the Chief Justice shall be made by the president, subject to the National Accord and Reconciliation Act, after consultation with the Prime Minister and with the approval of the National Assembly. We insist that that there is no requirement that the Judicial Service Commission be involved. Indeed it is based on this clear interpretation of the law that the two principals initially embarked on the consultations without advertising the positions or involving the Judicial Service Commission.
- Both principals agreed to consult yesterday. Clearly there was no agreement a trend which has been the hall mark of the coalition government. As a way of moving forward, we advise that the matter do proceed to parliament which is the constitutionally recognized body to approve the nominations or reject the same.
- We as young people WE DID NOT ONLY voted overwhelmingly for the new constitution BUT ACTUALY CAMPAIGNED FOR IT. We welcome the fact that people seeking high office are now open to public scrutiny. However we caution that the scrutiny should be fair and should allow those being scrutinized a chance to be heard. In this regard we call upon those who have issues to raise regarding the nominees to await the vetting process in parliament. We especially single out criticism based on the discharge of ones duty in accordance with the law. We also caution that the vetting process should not be such a rail road that it will in future prevent competent people from seeking high office. In this regard we empathize with nominees who are people of good standing who are now suffering as a result of circumstances beyond their control. We submit that the services of competent people should not be sacrificed at the altar of procedure.
- We wish to appreciate the fact that Hon Justice Visram who is the youngest Judge in the Court of Appeal was nominated for the office of Chief Justice. As young people this encourages us to believe that we are at the dawn of a new era where we shall be judged not by our age but by our competence. Given that he is from a minority community we believe he is the best compromise candidate.

We hope for a speedy resolution to this matter so that the process of implementation of the constitution can continue. We also pray for sobriety in parliament when this matter comes up for hearing.

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Government/Party of National Unity

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Chairman of the Panel of
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