

HANSARD

02ND SEPTEMBER 2009

**VERBATIM RECORD OF
PROCEEDINGS OF THE COMMITTEE OF
EXPERTS ON CONSTITUTIONAL REVIEW
CONSULTATIVE FORUM WITH POLITICAL
PARTIES HELD on 2ND SEPTEMBER 2009
AT LEISURE LODGE RESORT, MOMBASA**

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EXPERTS ON CONSTITUTIONAL REVIEW, CONSULTATIVE FORUM
WITH POLITICAL PARTIES HELD ON 02ND SEPTEMBER 2009 AT
LEISURE LODGE RESORT, MOMBASA**

Present:

Mr. Nzamba Kitonga, S.C.	Chairperson
Ms. Atsango Chesoni	Vice-Chairperson
Mr. Abdirashid Abdullahi	Member
Mr. Bobby Mkangi	Member
Dr. Chaloka Beyani	Member
Prof. Christina Murray	Member
Prof. Frederick Ssempebwa	Member
Ms. Njoki Ndung'u	Member
Mr. Amollo Otiende	Member
Dr. Ekuru Aukot	Director, Ex-Officio

Apologies:

Hon. Amos Wako, A.G.	Member, Ex-Officio
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Secretariat Staff In Attendance:

Ms. Veronica Nduva	Deputy Director, Civic Education, Mobilization and Outreach
Mr. Vitalis Musebe	Deputy Director, Public Information and Media
Dr. Michael Chelogy	Deputy Director, Research, Drafting & Technical Support
Mr. Ibrahim Ahmed	Programme Officer, Civic Education, Mobilization and Outreach
Mr. David Seurei	Programme Officer, Civic Education, Mobilization and Outreach
Ms. Mary Njoroge	Senior Secretary, Civic Education, Mobilization and Outreach
Ms. Hellen Kimari	Hansard Reporter
Ms. Susan Kimiti	Hansard Reporter
Mr. John Koross	Office Assistant
Mr. Vincent Mbuka	Office Assistant
Ms. Zahra Haji	Assistant Programme Officer, Public Information and Media
Mr. Elijah Girimani	Assistant Programme Officer, Public Information and Media

Meeting was called to order at 9.24 a.m. with Mr. Nzamba Kitonga in the Chair.

Ms. Veronica Nduva: I would like to call the meeting to order. We are starting, for those who are outside. May I please call the meeting to order and for the gentlemen who are coming in, it is free sitting but do sit with your Party members.

We are going to start the meeting, welcome to the retreat of Political Parties convened by the Committee of Experts on Constitutional Review, we are sorry for the late start but we are starting. Just to start us off, I would request for volunteers, Christian and Muslim to start off the meeting with a word of Prayer. We have a Christian volunteer; do we have a Muslim who is going to offer prayer? You will do it? Okay. *Karibu.*

Mr. David Waihiga: Please, if I may, may I request us to be up standing for Prayer. Let us Pray. We want to acknowledge you, Our Father who Art in Heaven as the Giver of life. We want to thank You for the gift of a new day and the gift of our Nation, the gift of each other, for Political Parties, for the Committee of Experts and for this process because it is Your will that this Nation has a new Constitution and this process becomes successful.

We pray as we start this Constitution and this conference, that You will guide and lead us, that Your presence will be with us and even in disagreement You will give us unity of purpose so that our desire at the end of the day would be one. We ask that You will help the programme, the facilitators and everybody who is taking any part of this process. The Nation is looking over here at what will come out of here. We ask that our minds will be directed of you and our intentions will be Your intentions. So, be with us and grant us good proceedings even as we start because we ask all this in the Name of Jesus Christ our Lord and Saviour. Amen.

Ms. Veronica Nduva: Muslim Prayer.

Mr. Hussein Mohammed: *(Arabic Prayer).*

Ms. Veronica Nduva: Thank you very much, you may take your seats. We are going to start off. My name is Veronica Nduva and I am the Deputy Director for Civic Education, Mobilization and Outreach with the Committee of Experts and to start us off, it would be important that we all get to know each other although I realize a lot of us do know each other. But what we are going to do is have a round of introduction. There will be some microphones coming round probably on each side and you are going to state your name and of course the Party that you are representing for this forum. Thank you. Kindly be brief.

(Inaudible comments on the floor).

Ms. Veronica Nduva: Okay, we are going to acknowledge then, I do have a list here and perhaps I can read it out and then you acknowledge. Is that shorter?

Participants: Yes.

Ms. Veronica Nduva: Okay, thank you. It is not in any order, it is just in order of confirmation. Party of Independent Candidates of Kenya – PICK, Mr. Julius Wambua and Michael Olieyo, if you are in the house just kindly acknowledge by raising up your hand.

(PICK participants raise up their hands.)

Ms. Veronica Nduva: Okay, we are going to pass that, I am going to move over it quite fast. NARC Kenya, I do think they are on the way, so let me skip that. Democratic Party of Kenya, we have Hon. Joseph Munyao, (*waving*) he is here, *karibu*, and Mr. Kihara (*waving*). Welcome.

Labour Party of Kenya, Prof. Moni Wekesa (*waving*) *Karibu*. And Jacklyne Nyongesa. (*waving*). Welcome. You are far from each other, I hope you will be able-- Through SMS? (*Laughter*).

Then we have Forum for Restoration of Democratic, Kenya, FORD-K. Do we have Hon. Musikari Kombo? (*waving*) *karibu*. And Hon. Eugene Wamalwa. I know they are making their way from the airport, they will be joining us any time now.

Safina Party, Hon. Paul Muite, (*waving*) welcome and Mr. Cyprian Nyamwamu (*waving*). Welcome. ODM Kenya, we have Mr. Abikar Mohammed, Deputy Secretary General, is he here? Mr. Ben Momanyi (*waving*). *Karibu*.

Then we have Grand National Union Party of Kenya – GNU, Hon. Mwangi Kiunjuri (*waving*). *Karibu*. Mr. Nderitu Gachagua? (*waving*). Welcome.

Mazingira Greens Party of Kenya, do we have Mr. Ngorongo Makanga? (*waving*). Welcome. Ms. Pamela Mburia (*waving*). *Karibu*. Then we move on to KENDA, do we have Mr. Ephraim Murigo? (*waving*). *Karibu*. Ms. Norah Ominde? (*waving*). Welcome.

Restoration of Democracy for the People – FORD-P, Mrs. Dorothy Miriti, (*waving*). *Karibu*. Mr. Mwancha Okioma. (*waving*). Welcome. Kenya Solidarity Movement, Mr. Watson Simiyu (*waving*) Welcome. Mr. James Ndung'u Mungai (*waving*). *Karibu*.

National Alliance Party of Kenya, Dr. Kariba Muniyu (*waving*) welcome and Ms. Mercy Muthoni (*waving*). You are far from each other. Kenya National Congress – KNC, Mr. Onesmus Mbali, (*waving*). Welcome. Mr. Ogembo Masese (*waving*). Welcome.

From KADDU, we have Hon. Cyrus Jirongo, the National Chairman, is he here? Not yet. Mr. Hassan Haji, Secretary General, (*waving*). Welcome.

KANU, we have Hon. Nick Salat, Secretary General, no? Then we have Mr. Justin Muturi who is the National Organizing Secretary? (*waving*). Welcome, Sir.

New FORD-K, Mr. Kirwa Kemboi who is the Vice Party Leader, (*waving*) and then Mr. Benjamin Mwema who is the Secretary General. Social Democratic Party of Kenya, Mr.

Mwandawiro Mghanga, Chairperson (*waving*). *Karibu*. Mr. Joseph Makoha, NEC member, (*waving*), welcome.

ODM, we have Mr. Mutakha Kangu, (*waving*) welcome. Mr. Mugambi Imanyara (*waving*). National Patriotic Party of Kenya, Mr. David Wakahu Ng'ang'a, National Chairman (*waving*) welcome. Mr. Benjamin Kitoi, Assistant Secretary. *Karibu*.

United Democratic Movement – UDM, General John Koech who is the National Chairman, (*waving*) welcome. Mr. Martin Ole Kamwaro, Secretary General, (*waving*) welcome.

Peoples Democratic Party – PDP, Mr. Charles Oigara Mogere, Party Leader, (*waving*) welcome. Mr. Stephen Nyarangi Onsomu, National Chairman, (*waving*) welcome.

PNU, we have Hon. George Nyamweya, (*waving*) welcome, Sir. Dr. Njiru Stephen, Legal Adviser, (*waving*) you are far from each other but welcome. Chama Cha Mwananchi – CCM, Mr. Dick Kamau, Secretary General, (*waving*) and Ms. Nancy Wanjiru Ranji, Treasurer, (*waving*) welcome.

National Rainbow Coalition – NARC, Mr. Masila Bart Mbuvi, (*waving*) welcome and Mr. Alex Ng'ang'a, Executive Director, (*waving*)welcome. Shirikisho Party of Kenya, Mr. Yusuf Abubakar – Secretary General, is he here? And Mr. Adam Mbeto, is he here? Okay, we do not have Shirikisho.

Then we have National Vision Party, Hon. K. Biwott? And Hon. Sammy Leshore, Chairman (*waving*) welcome, Sir. New Democrats, Hon. David Sudi, Party Leader (*waving*)welcome. Mr. Daniel Musembi, National Chairman? (*waving*) welcome.

Party of Hope, Mr. Hussein Abdirahman Mohamed, (*waving*) welcome. Ms. Majory Patience Owino, (*waving*) welcome, you need to get close to each other probably at tea break. Nuru Pary, Mr. Stephen Kariuki, Chairman? He is on the way? Okay. Mr. Geoffrey Makwaro, Secretary

General, (*waving*). People's Party of Kenya, Ms. Rose Mutiso, National Chairperson, (*waving*).
Karibu. Mr. John Kuria Kihiko, (*waving*) welcome.

We have Chama Cha Uzalendo – CCU, Ms. Lilian Mukami, is she here? No. Mr. Antony Kaara? Not here. Alliance for the Restoration of Democracy in Kenya – AFORD-IN-K, Mr. Amisi Omukanda, Party Leader? Not here. Mr. Alex Amasakha? Not here.

Progressive Party of Kenya, Mr. Evans Misati, Chairman? (*waving*) *karibu*. Mr. Robert Chutha, Secretary General, (*waving*) welcome. National Party of Kenya, Mr. Ngotho Kasyoki, Secretary General, (*waving*) *karibu*. Mr. Joseph Kithyaka, (*waving*) welcome.

National Labour Party, Dr. Sadjah Phillipe, Secretary General, (*waving*) welcome. Mr. Musembi Jackson, Deputy Organizing Secretary (*waving*) *karibu sana*. Muungano Development Party of Kenya, Mr. Titito Mutunga Muunda, Chairperson, (*waving*) welcome. Mr. Lawrence Nzunga, Secretary General, (*waving*) welcome.

VIPA Progressive Alliance, Mr. Sadat Muhindi, Party Leader, (*waving*) *karibu*. Mr. Antony Kibagendi, Chair, (*waving*) welcome. KADU – ASILI, Mr. Jimmy Ngala, patron, (*waving*) welcome. Mr. Joshua Kombora, Second Vice Chair, (*waving*) welcome.

AGANO Party, Mr. David Waihiga, National Chairperson, (*waving*) welcome. Japheth Koech, Vice Chair, (*waving*) welcome. Independent Party, Hon. Kalembe Ndile.

Hon. Kalembe Ndile: TIP TIP!

Ms. Veronica Nduva: Welcome, Tip. (*Laughter*). Amani Kenya, and Ms. Jane Ndila Willy, Secretary General.

Mr. Jane Ndila: Tip Tip!

Ms. Veronica Nduva: *Amani Kenya. (Laughter).* No, we will not have Party slogans. Forum for Restoration of Democracy, FORD-ASILI-- Tip, Tip, you need to sit together after tea break. Forum for Restoration of Democracy, FORD – ASILI, Mr. Njeru Kathangu, Secretary General, *(waving) karibu*, Sir. Ms. Elizabeth Waleghwa? She is on the way coming. All right.

National Agenda Party of Kenya, Mr. Alfayo Alfonze Agugana, *(waving)* welcome. Mr. Abdi Ali Abdi, Secretary General, *(waving)* welcome. People Patriotic Party of Kenya, Mr. Samuel Mburu Kariuki, National Chairperson, *(waving) karibu*. Mr. Francis Rugio Kinuthia, Secretary General, *(waving)*. Federal Party of Kenya, Mr. Caleb Burudi, Chairman, *karibu*. Risper Akinyi Pete, *(waving)* welcome, you are far apart. Kenya Social Congress, Mr. Samson Atati Mose, Chairman *(waving)* welcome. Mr. Jephita Otuke, *(waving) karibu*.

Then we have Farmers Party, Mr. John Itugi Kahura, *(waving)* welcome, Secretary General and Mr. Jackson Kieye, Executive Director *(waving)* welcome.

Then we have Representatives from the office of the Prime Minister, Mr. Miguna Miguna, *(waving)* welcome and we have representative from the office of the President, Hon. Kibutha Kibwana *(waving)* welcome.

I guess you must have all heard your names?

Dr. Ekuru Aukot:

(Inaudible).

Ms. Veronica Nduva: Sorry about that, we also have observers, we have Centre for Multi-party Democracy, are they here? Not yet. Then we have National Democratic Institute *(waving)* welcome, and please state your name.

(Inaudible introductions.)

Ms. Veronica Nduva: Okay, do we have any other observers? We are expecting Registrar of Political Parties and I think PSC, Parliamentary Select Committee. Now, the observers are part of us but as the name suggests, they are observing the retreat. *Karibu sana.*

Now, we have other participants that we are going to bring to your attention, kindly allow me to introduce the Secretariat that has worked very hard over the last number of days to put this together; we have Mary who you met outside there, she is still outside, Mary Njoroge. We have starting from back there, Mr. John Koross, who is taking care of all our IT needs together with Vincent Mbuka. We do have Mr. David Seurei, David is the Programme Officer, Civic Education. We have Ms. Zahra Hajji, she is the Media person in our office. We have Susan Kimiti and Hellen Kimari who are taking your Hansard record so this meeting will be on verbatim Hansard record. Please, every time you are speaking, do state your name at the beginning before you start your input. We have Ibrahim, where is Ibrahim? Ibrahim Ahmed is also a Programme Officer, Civic Education. Have I left out anyone else from Secretariat?

Definitely we have a very important group, Members of the Fourth Estate, the Media, welcome very much, Media crew. Other than that, I think we are going to save time now and we are going to the team that is up here. I did mention I skipped I think NARC- K, we do know Hon. Danson Mungatana is on his way here anytime, they are crossing the ferry. We are also expecting Hon. Eugene Wamalwa, they are just probably around the corner, so when they come, we will acknowledge them.

But allow me now to take an opportunity to introduce the team that is also here. I will introduce them and I will ask them to say good morning. We are expecting-- Let me start with the ones who are not here, we are expecting the AG, Hon. Amos Wako, he is on the same flight that the others have mentioned, he is coming. He is an *ex-officio* member of the Committee and as you are aware, the Attorney General.

We also have Dr. Chaloka Beyani, who is on his way here, one of the Foreign Experts. Dr. Chaloka Beyani is from Zambia, when he comes, he will be acknowledged. We do also have Prof. Frederick Ssempebwa; Frederick Ssempebwa is a former Cabinet Minister of Uganda and a

Lawyer by profession. He will also be joining us, he is one of the foreign members to the Committee of Experts.

Allow me to start with the people who are already here, allow me to introduce Hon. Njoki Ndung'u. Hon. Njoki Ndung'u is a member of the Committee and a former Parliamentarian as you well know and a very serious advocacy campaigner for a number of rights. Welcome.

Next to her, is Mr. Abdirashid Abdullahi. Mr. Abdirashid Abdullahi is a member of the Committee and an expert in conflict. He has worked in various UN bodies before his placement with the Committee of Experts, *karibu*. Next to him is Mr. Bobby Mkangi, you need to say good morning, they need to hear your voices.

Mr. Bobby Mkangi: *Shikamoo.*

Ms. Veronica Nduva: Bobby Mkangi is also a member of the Committee of Experts, he is a lawyer by profession and says he has a passion with children's rights and has worked with several child-based organizations on advocacy. Next to him, I will skip all the way to Mr. Otiende Amollo.

Mr. Amollo Otiende: Good morning.

Ms. Veronica Nduva: Mr. Otiende Amollo is a practising advocate of the High Court of Kenya, I am sure he is well known by the people who are in this meeting. He is also a former Chair of the Law Society of Kenya and currently--

Participants: No, no!

Ms. Veronica Nduva: Sorry, ICJ-- May be he will be, in future. The ICJ, International--

Participants: Commission of Jurists.

Ms. Veronica Nduva: Yeah, yeah, just to see if we are all attentive. Currently, he sits as a member of the Committee of Experts. Allow me to introduce the lady next to him, Prof. Christina Murray, you have a microphone, please say good morning.

Prof. Christina Murray: Good morning.

Ms. Veronica Nduva: Prof. Christina Murray is one of the three Foreign Experts, I have mentioned the other two, they are on their way. She is a teacher by profession but a senior teacher because she is a Professor of Human Rights and Constitutional Law at the University of Cape Town and was nominated to this team through the African Union Panel of Eminent Persons, *karibu*. Allow me to introduce the Director of the Committee of Experts, who is well known to most of us, if not all of us, Dr. Ekuru Aukot.

Dr. Ekuru Aukot: Morning, everybody.

Ms. Veronica Nduva: Dr. Ekuru Aukot is the Director, as I have mentioned, of the Committee of Experts and he is a lawyer by profession. Dr. Ekuru headed Kituo Cha Sheria before he came to head the Committee of Experts as the Director.

I think we will revert back now to the Vice Chair.

Ms. Atsango Chesoni: Good Morning, everyone.

Ms. Veronica Nduva: Until her appointment as the Deputy Chairperson of the Committee of Experts on Constitutional Review, Atsango has worked as a consultant on various sectors, especially in Governance, Gender, Human Rights, Anti-Corruption and Democracy and has a very keen passion towards the new Constitution for this country.

Then allow me to introduce-- Before I introduce the Chair, I will introduce my colleague here, Mr. Vitalis Musebe, he is the Deputy Director in charge of Media and Information at the Committee of Experts and he heads all our Media and Communication aspects.

Finally, allow me to introduce Mr. Nzamba Kitonga, who as you are all aware is the Chairman of the Committee of Experts on Constitutional Review. He is a lawyer by training and has served as a Council member on the International Bar Association and as a Council Member of the Law Society of Kenya and as the Chairman of the Law Society of Kenya. He has also held the Vice Presidency of the East African Law Society and he is a Council Member of the NGO Statutory Disciplinary Tribunal and the Pan African Lawyers Union. He also served as a Council member on the Council of Legal Education in Kenya and the Legal Sector Reform Committee Task Force of Kenya. Welcome.

Mr. Nzamba Kitonga: *Salaam alekum.*

Participants: *Alekum Salaam.*

Ms. Veronica Nduva: So you are all very welcome to this meeting. At this juncture, I would like to hand over the meeting-- We do acknowledge Hon. Nick Salat who walked in, please give a wave.

Mr. Nick Salat: *(Waving).*

Ms. Veronica Nduva: *Karibu sana.* You do notice his wave. Allow me to hand over the meeting to Mr. Nzamba Kitonga. *Karibu, Chair.* Do clap for him, kindly. *(Clapping).*

Mr. Nzamba Kitonga: Good morning, Ladies and Gentlemen. I believe claps should be spontaneous, those ones were imposed so maybe at the end of my speech, you might think whether you should clap or not.

Leaders of Political Parties, Honourable Members of Parliament, distinguished delegates, invited guests, ladies and gentlemen.

On behalf of the Committee of Experts, I welcome you all to this consultative forum over the Constitutional Review process. Nevertheless, I must at the outset confess that I welcome this engagement with a measure of trepidation for the Committee is faced with the awful responsibility of reconciling your diverse political views on the subject at hand. Yet I remain confident that we can overcome this task for despite your varied political positions, I have no doubt whatsoever of your patriotism. It is this patriotism which informs our belief as the Committee that you will hear the cry of your countrymen and women and come to their rescue at this hour of need.

The quest for a new Constitution has always been spearheaded by one of your own and has also always been opposed by one of your own.

In the case of 1980's and the early 1990's, it was KANU as the then ruling party which could not countenance talk of a new Constitution. It was a strange position for KANU to adopt considering that it was the party of Kenya's independence having led Kenya's liberation struggle. It was, however, a consistent position considering that KANU had also presided over the mutilation and emasculation of the current Constitution. This is, however, KANU of yester-years. The KANU of today has categorically stated that it stands with the people of Kenya in their search for a new Constitution.

FORD is the party in those years which, uncompromisingly, stood for constitutional reform. Perhaps if it had remained intact as a formidable political party, we would have attained a new Constitution a long time ago. Kenyans watched in dismay as Ford disintegrated into Ford Kenya, Ford Asili, Asili Saba-Saba, Ford People, New Ford-Kenya until we finally lost count. *(Laughter)*.

At the time, there also came into being the Democratic Party of Kenya, an off-shoot of KANU. It stood for constitutional reform. Its flag bearer was later to become the President of the Republic of Kenya.

However, there were intervening events in that one of the off-shoots of Ford Kenya, the National Development Party of Kenya then nicknamed the “tractor” was swallowed by KANU. To KANU’s utter dismay, the tractor was indigestible. (*Laughter*). It later violently ejected and left KANU in tatters. It then metamorphosed with others to form the Liberal Democratic Party which comprised of elements of both the old KANU hardliners and KANU’s new kids on the block.

As this was happening, Ford Kenya, Social Democratic Party and the Democratic Party of Kenya had formed themselves into what was initially known as the National Alliance of Kenya.

In the heat of the politics of 2002, the National Alliance of Kenya went into a coalition with the Liberal Democratic Party and there was born the National Rainbow Coalition which claimed power in 2002.

We had come full circle. The political class had engineered and re-engineered itself until finally, the players from the various sides coalesced themselves into a winning formula. We naively believed that at last the reform train was about to reach its final destination. This is because the actual constitutional reform train was still moving albeit in fits and bouts.

You will recollect that initially President Moi suggested that we should have a Committee of Foreign Experts to guide the Constitutional Review process. This idea was resoundingly rejected. That was the correct decision at the time because the enactment of a new Constitution required a broad consultative process so as to legitimize the document in terms of public input and ownership. There followed an attempt to install a government controlled review process through the single-handed appointment of commissioners by the Government. This process again came to nought. It however gave birth to the Ufungamano initiative which witnessed the clamour for the formation of a balanced commission involving the religious sector, politicians and the civil society.

The road to a new Constitution became clearer when Prof. Yash Pal Ghai was able to persuade the then competing interests to form what came to be known as the Ghai Commission or the

Constitution of Kenya Review Commission. This Commission spent a period of close to three years in collecting and collating the views of all Kenyans on a new Constitution. Its product known as the Ghai Draft was then submitted to the famous Bomas Conference where it was widely discussed but amidst acrimony and suspicion. In the twilight of his rule, President Moi disbanded the Bomas Conference and a general election followed.

The newly elected NARC Government came to power on a platform of reforms and vowed to complete the stalled Constitutional Review Process. However, the Coalition partners as you all remember differed on how to divide the political spoils through a new Constitution. What had started as the people's process therefore quickly degenerated into the machinations and intrigues of partisan politics.

Which it took to the Referendum.

The Referendum of 2005, again you all remember - but this must be stated for historical records - was a fiasco. Everything went wrong in that Referendum. The main coalition partners in NARC Government had irreversibly fallen out. In the process the country was deeply polarized and the prevailing mood on both sides of the political divide was "*tutaonana*" and so the Referendum was lost and the country remained malignantly divided.

Despite this, nothing prepared all of us Kenyans for the rebellion and the breakdown of constitutional order which we witnessed in what is popularly known as post election violence. Although this breakdown of constitutional order has been politically camouflaged as tribal clashes or post election violence, it is partly rooted in the pre-Referendum fallout which was at the time posited in terms of whether the country should have two centres of power, that is whether the country should have an Executive Presidency and an Executive Prime Minister's office. In effect, at stake was which system of government we should adopt. As a corollary of this, there were questions of the system of devolved government which the country should enact to guarantee some measure of the equitable distribution of resources in all areas of the country. To cap this is the debate over whether the country requires an additional chamber of Parliament to protect and promote regional interests.

I have briefly summarized the mutations of Political Parties to demonstrate that you, the players, almost inevitably remain the same. Like footballers, you only shed one uniform for another to play for a different team. You have liberally been able to change your positions on the system of government and devolution depending on which party you belong to.

But ordinary Kenyans do not have the benefit of such luxury. What may have started as a game of political brinkmanship deeply polarized the country and led to the breakdown of constitutional order, the ramifications of which remain with us to date.

To your credit, you were quickly able to construct the National Accord to somehow accommodate the two centers of power – a task which had previously seemed insurmountable.

You even went further and crafted Agenda 4, which includes the creation of the Committee of Experts, the Interim Independent Electoral Commission, the Interim Independent Boundaries Commission and the Truth, Justice and Reconciliation Commission. The work, of all these bodies will eventually instruct the new Constitutional draft. You are today called upon to go the extra mile and help the country to attain a new Constitution. Indeed it could be less than a mile because some hitherto deeply contentious issues such as devolution appear to be resolvable, at least in principle.

The country continues to dither on the precipice of instability, suspicion and fear. We cannot afford failure; therefore, we can no longer afford to take extremely hard positions in the face of a bleeding country. As I said earlier, reports of your differences to quote a famous author; “*are highly exaggerated.*” For you are able to move from one party to another and from one ideology to another when the situation so demands.

You are called upon to demonstrate the same spirit of flexibility as we march towards a new Constitution. You are called upon to even where it is necessary contradict your previously stated position in the interest of the country. In doing so, you should have no difficulty for in the famous words of Winston Churchill; “*Politicians eat their words all the time and they do not suffer from constipation.*” (**Laughter**).

I want to thank you and to welcome you to this forum so that we may have useful deliberations. I will start by chairing this session.

(Clapping).

Mr. Nzamba Kitonga: Oh, these ones were spontaneous. Thank you. *(Referring to the clapping).* I will start chairing this session by now asking our Director, Dr. Ekuru Aukot, to give us a presentation of what we call the winning formula.

Mr. Njeru Kathangu: *Habari ya asubuhi, bwana Mwenyekiti?*

Mr. Nzamba Kitonga: *Mzuri sana.*

Mr. Njeru Kathangu: *Na Commissioners wetu wote na marafiki zangu.* I think it is fair, Mr. Chairman, for you to allow that the members in this room-- As Koross is reminding me to state my name; my name is Mtumishi Njeru Kathangu, Ford Asili. Mr. Chairman, I think it is fair that you should allow a few comments about your opening remarks which I think are very moving. First and foremost because we are not constipated; secondly, the centrality of political parties in this process and, thirdly, Mr. Chairman, you have called us here so that your Commission and these political parties could be able to dialogue and agree.

Mr. Nzamba Kitonga: If you could give me a minute, Mtumishi, after the presentation which is following, we will have a short plenary, so if you could just wait for that.

(Inaudible comments).

Mr. Njeru Kathangu: Yeah, I also agree with what the Chairman is saying, but I also think it is fair for us to agree about the agenda because, *Bwana* Chairman, you have got an agenda here, which I think it is also fair for the political parties here to agree on and if I am wrong, Mr.

Chairman, of course you will excuse me because one, it is mistakes that have brought us this far and I think it is through these mistakes that we shall be able to learn.

Bwana Chairman you will also agree that *tumetoka mbali mpaka sasa tuko mbali sana na bado tutaenda mbali kweli. Kwa hivyo kuna maana ya tuzungumuze kidogo*, because this is the first time maybe all these political parties have come together and, Mr. Chairman, you will be killing two birds with one stone, first of all uniting them because they are bonding and secondly that they will be understanding you. Thank you, Sir.

Mr. Nzamba Kitonga: So, we will have the presentation then move to the plenary.

Dr. Ekuru Aukot: In the meantime, let me acknowledge the presence of Hon. Danson Mungatana, NARC-K, if you could kindly just wave your hand so that people know you are here.

(Hon. Danson Mungatana waving).

Dr. Ekuru Aukot: Then the Hon. Dr. Mukhisa Kituyi.

(Hon. Mukhisa Kituyi waving).

Dr. Ekuru Aukot: Welcome. I do not know whether we are all able to-- Because we are going to use some power point, is it all clear or, the Press, you may have to assist us with a bit of the lighting. I think just drawing from the Chairman's speech, it seems to me that we need to talk about the reality of Constitution making in Kenya today and in that of course it is part of our longer research that we are doing which is basically to ask the question, is the Constitution always a shopping list of needs of interest? I think for us that will be the starting point of addressing the challenges and the realities of Constitution making because all the 47 political parties obviously have got interest in what kind of Constitution this country needs and for me I think this could probably be the starting point of us thinking about that in itself as a reality, that we need to deal with and that reality becoming a challenge in the Constitution making process.

It is precisely for that reason that we are trying to find out, what is the role of political parties? Mtumishi, you have said that you have come a long way and we are now asking that question, since we have come that long way to this very date, what could possibly be your role in trying to finalize this process? In that we are asking a question, I hope it is not rhetorical to say, do we all have now a winning formula in the Constitution making process in Kenya especially with all of you as political parties? I say this deliberately because in the next 2012 elections, all of you will be wanting to form a government. All of you will be wanting to implement the new Constitution, so I think you need to be part of that winning formula. I know a lot will be said to you, Otiende will be able to present to you about the work of the Committee but I just want to take you through some ideas.

For purposes of just giving you the framework, my presentation is very brief. Maybe we need to be reminded about the factual or legal reality of Constitution making in Kenya to this very date. A couple of months ago, I think Mutahi Ngunyi wrote an article in which he said that perhaps this country is going towards Samara, the City of Death for those who are familiar with the Bible. I hope we are not engaging in this process with a view to actually driving our people to that city of death called Samara. Will the Review Act ask this question? My presentation alone gives us the new Constitution because therein is the mandate of the Committee of Experts and you will hear more about this from Otiende Amollo and in our view we think the law alone may not be sufficient and Political Parties are part of that.

Then of course there were a couple of ideas about, how do we ensure that this process is actually finalized? Again therein, we insist there is a role for the Political Parties, there is a role that you can play in that winning formula. If you agree that the Constitution of Kenya Review Act to date is part of that winning formula, the Expert is part of that winning formula, we hasten to add that Political Parties too are actually part of that winning formula to this very date.

Then of course there are opportunities and challenges that we have identified especially from the Committee of Experts perspective and also from the Secretariat perspective and we think a combination of all these factors, these realities, these opportunities, are what could possibly give

Kenya a new Constitution. Therein again we see the critical role of political parties and of course I will make some concluding remarks.

Now, in terms of just my introduction, I want to say, how different is this process? I know Otiende Amollo will speak more about that but I want to just remind us a few things. One is to pose the question; perhaps it is not for me to decide, can we today say that we have a Constitutional moment in Kenya or an opportunity to complete the Constitution? I want to be a bit critical in saying this because often a time constitutional moment is discussed in the context of societies that are emerging from conflict and I hope I will be able to demonstrate to you at the very end of this that even taking that aspect alone, we actually, I think, have a constitutional opportunity. But even if you do not agree that we have a constitutional moment, we have an opportunity to complete this process even if you take into account how many years we have actually taken struggling about a new Constitution the metamorphosis of how we want to govern this country for a long time.

It is true, under that it is important to agree that Kenyans actually need a Constitution and I think you also need a Constitution. It is also important here that the process is time bound and I know Otiende will speak more about that. Secondly, I think I want to remind us that the Committee of Experts is not replicating the work of the CKRC. Under it I want to ask a very rhetorical question; can everybody honestly write a Constitution?

If you go to my village in Turkana which is where I come from, first, of course, you have the challenge of education. Not everybody has gone to school, not everybody has read the Constitution of Kenya Review Act, so sometimes we have to trust some people to make certain prudent decisions for us. This is why I ask the question, can everybody make a constitution?

The process so far, you must all be reminded, has been very expensive. I think as a country we are struggling about how we can apportion our resources more reasonably. Again I want us to reflect on that as political parties. How far do we want to take this process in terms of cost alone? You know very well how much CKRC cost us. We do not want this Committee of Experts, in my view, to be another guzzler Committee, we want to complete our work within the

timeframe. But again to go back to Mtumishi Kathangu, you have said we have taken so long. There are two schools or three schools of thought about how long this constitution process in Kenya has taken. They are those who say 20 years, some say 18 years some will say we go back to 1968 with the first Constitutional amendment in this country so that is when people began to question the idea that perhaps what we got at Independence was not really a negotiated instrument. So you can stretch your mind to how long we have come as a country. That is also a fact we need to contend with in this constitution making process.

I think it is also to say that as the Committee of Experts, certainly from our end, we need support. We need support in the context of other successful processes and I am just flagging in here a few countries that I think have had successful processes: South Africa, and I am sure Christina Murray, when you interact with her will tell you of some few ideas of how their process was successful. It did not have to be as contentious probably as ours, I do not know. Chaloka Beyani from Zambia will probably tell you they have a Constitution, perhaps their process was very successful. We have had successes in Uganda, next door, Eritrea, countries that have had very serious troubles. Some very tiny island in Papua New Guinea, Bougainville, Colombia, Bolivia, all these countries have had some successes and somehow there has been an aspect of support to the people writing the Constitution. It is in that context we also say we need that support from the Political Parties.

Fifthly, I want to say that we need to find that formula together. In finding that formula, it is not just to say we must find a formula that must just write the constitution of Kenya, but how we balance the various competing interests in what will finally be the Constitution for this country without necessarily killing it because we know the Media has an interest, Political Parties have an interest, Civil Society, the *mwananchi* have an interest.

Just lastly to say, whatever the product, a Constitution should not really be reduced into a shopping list of interest, that if I do not get my interest, my need in that text, then that is necessarily bad.

Now, what are some of the ideas that we think we are exploring and which we want to sell to you today? One, I think we need to bring on board the political class and the political support. As I said, 47 of you will be wanting to form the next Government in 2012, will be wanting to implement the new Constitution, will be wanting to implement the Laws in this country. So, your support is very critical in finalizing this process. That support in our view should be based on how we strike a partnership and an objective relationship. It should not be us versus them. So, it is a partnership that is based on objectivity and that is intended on finalizing the process.

I want to say that you are human beings, we are human beings, we all want to succeed in this process and we all want to be associated with a successful process. I am not sure how many of us today-- Actually, we need to ask the question; do we need to fail this time round? We do not think so and we think that political parties have got structures, structures at the grass root level that can actually support this process at the national, at the constituency at the locational level and we think that Political Parties have got structures, structures at the grassroots level that can support actually this process, at the national, at the constituency, at the locational levels and those structures are what we want to exploit. I am just being deliberate here by joking that, you know, somebody was telling us, *“if you think politicians are the problem, then marry them so that we can have some intimate working relationship so that we can finalize this process.”* These were the words of some participant in a process.

We also think that you must get involved in ensuring public participation so really, part of our winning formula is the idea that we need to bring the political class and political support on board. We want to ask you during this forum, how do we bring that? We also want these ideas from you. We are not pontificating that we know how to bring the political class on board. By political support here I mean, political support from both sectors. The public also have their own political ideas, civil society and everybody else, but how do we galvanize, how do we synergize all those competing political interests so that we can have a finalized process.

Secondly, I think we are thinking of a vibrant civic education and public participation programme. I will be talking about programmes of the Committee of Experts. I think to ensure that there is vibrant public participation into this process, one of the things that we are thinking

is important and you can also help us with, is to ensure that you tell the public what process is being followed. Under public awareness process and substance of the process itself is something that we are actually keen on and we think you are actually agents of credibility in this aspect. You need to know what process is being followed.

We do not want to assume that the people do not know, because often times people know about what issues concern them. People speak from real life experiences. Well, the Committee of Experts or Constitutional law experts sometimes speak technically about the draft constitution, about the text of the constitution but if you ensure there is a vibrant public participation, then you are able to understand the issues that really affect people on a day to day basis. So we think this is one aspect of that winning formula. Do not leave it to Committee of Experts alone to say that we will ensure vibrant public participation. We also think you, as political parties, 47 of you, as you hold your political rallies, as you speak to your constituents, you have got the opportunity to tell them what process is being followed, what is the substance of the current process.

Of course, we believe that you are agencies of credibility because in many cases, people do not know the Committee of Experts. Not everybody today has interacted with the Committee of Experts. But you have got that capacity to interact with the Committee of Experts, either directly by walking into our offices, or by calling us, not every member of the public in your constituencies has interacted with us. It is for that reason that we believe the 47 political parties are actually agencies of credibility. By the way, let me at this stage also acknowledge that we know there is *Sisi kwa Sisi* who are not registered but at least they have got Members of Parliament. So we need to acknowledge that is also another 48th Political party.

For that, we acknowledge the fact that we have structures, we have structures that we can all exploit for purposes of ensuring that this process is successful. For me, I want to ask the question, and I want us to reflect on this, who in Kenya today can actually boast of a tangible constituency than you, Political Parties, the 47 of you. You have membership across the country. You have complied with the Political Parties Act, which, therefore, means you actually have a tangible Constituency that you can talk to every day or every so often on matters Constitutional.

We think that by getting to you, we are getting to the people who can get to the people because I am not sure it is possible for us to reach every-- I mean, we are now I think about 40 Million, I hope the census is completed very soon. 40 million of us, is it really possible to reach the 40 or so million Kenyans? At least those who can vote? We believe you can and that is why we think you are agencies of credibility for us to work with.

Of course, in other countries, for example, they use catchy slogans such as, "*eleven languages, one people, one Nation.*" like in South Africa, I believe. We should also now start thinking about how we can use the slogan of "*42 tribes or ethnic groups, one people, one nation.*" I think this is something that we need to think about and there is the whole question of inclusion in this process. I do not know how many of us know about the-- I think this is something that we need to think about and there is the whole question of inclusion in this process. I do not know how many of us know about the Yakku, the Bonni, the Awer, the Malakote, the Galjaeel, the Sengwer, the Endorois, all these Kenyans who want to be part and parcel of this Nation and we think because of your membership, the important role that you play in the political context, the economy of this country, I think you can reach all these people so they can be included into what will finally be our Constitution.

We also think that we need to move away from just the idea of public awareness to public education or maybe even political education and this is a role that you as political parties can play. We are thinking this is part of our winning formula. Other than just bringing awareness, how do we educate people politically into this process, into what is going on? There are so many media that you can use here, radio stations, local FM stations, you all go to those local stations, you give interviews, you talk to your constituents through these various media. You hold sectoral meetings, you have got certain target groups, be it professionals, be it the private sector, be it the civil society and we think that you cannot only just create an awareness, but also an education of the process of where this country needs to go. So we think that is another element of it, of the winning formula.

Thirdly, we feel that we need to start thinking about, how do we use high profile figures? I am just being rhetorical in asking this question because I do not know who is a high profile figure

but I think you should be part and parcel of that high profile figure as political parties. But who are the drivers of change in this country? We need to ask this question. The two principles? CSO's? Civil Society Organizations, Religious groups, women groups, political parties, Wanjiku or the Experts? For me this is a question that we all need to start asking. I mean, who are the drivers of change?

Today, I am convinced the drivers of change are the 47 political parties that aspire to have certain governance in this country. Whatever the case, the list can be long of who the drivers of change are, but in our proposal, I want to believe that if we can all underwrite the finalization of this process, then we can become part of that winning formula that we are thinking about.

Now I want to go to the second part of my presentation which is to just give you an idea of what are some of the operational ideas that we have at the Committee of Experts especially at the Secretariat level and I will just restrict myself to about seven key result areas or even three of them actually, which we think are important and must go hand in hand with the Constitution writing or constitution building process.

One, we have an operational plan that is on-going as identified, the need, what are the objectives, what we need to do in terms of our programme and we have identified these four programmes which are, Finance and Administration, we do not have the representative Director here, but we have got the Deputy Director in charge of Civic Education, Mobilization and Outreach and what we think, with these programmes, you are actually able to interact with our programmes directly at the Secretariat level. What materials for example do you need to even educate the public, your constituents.? We are very open, if you wanted us to give you some material on the process itself, the context, we are more than happy to organize that for you and feel free. Veronica Nduva who is the Deputy Director in charge of Civic Education, Mobilization and Outreach is here. We are opening our doors, how we can possibly work with you in terms of content and material for Civic Education and how we can even do a bit of mobilization and outreach.

We also have Public Information and Media. Mr. Musebe who is the Deputy Director in charge of that programme is here. There is a lot of information that we need to get out there. I want to

propose that you can feel free to work with us, call us, walk into our offices. Some of you have actually come into our offices and you have made some inquiries. Again, we are opening our doors to that extent.

We have got Research, Drafting and Technical Support. A lot of Research is out there, a lot of material, we have been receiving a lot of materials, data from the former CKRC and this is material that, in my view, should be available to you for your perusal and I think you can just make a modest request and we can give you some of the materials for purposes of your work.

If I can just go to the result areas, where we need your support as part of the winning formula, of course financial independence was an issue. We are now past that one, I can assure everybody now we have a lot of money and we are going to complete the process but I wanted to go to the second result area for us which we think is very, very important in completing this process and that is political consensus and agreement. You can see the theme of this meeting with you is ensuring political consensus towards a harmonized constitution.

TAPES 3 & 4

Tied

Dr. Ekuru Aukot: My feeling - and maybe that could be the feeling of the rest of the Committee of Experts - is that it does not really matter. You can sit down and technically write a Constitution reducing the technical language but unless you achieve some consensus politically-- I think we are accessing that as a reality and as a challenge, which is why we think dialoging with you, achieving political agreement, is very important. In fact I want to welcome you if you read the Constitution of Kenya Review Act, probably Otiende Amollo will take you through, you will see that perhaps the input, the language therein is about consensus building and dialoging.

The second area for us we think is that of religious and cultural consensus. It is a broad area, there are all these competing interests from religious, from cultural perspectives and that we think redress for this area generally will help the technical writing of the Constitution, the

delivery of a Constitution. So there is a lot of work that needs to be done within the religious and cultural consensus. I mean many of you speak in religious gatherings as politicians, we also think that you can also help achieve some consensus in that regard. So, that again for us is a broad area in which we feel that you have got a role to play in.

Fourthly is how do we ensure effective public participation in the review process? For us it is another broad area and we feel that political parties can help us ensure there is effective public participation, one, as I said by ensuring that the public is educated on what process is being followed at the moment. What really is the mandate of the Committee of Experts today? I think if your supporters, your constituents understand this process, then I think we can ensure an effective public participation in the process. For us we think this is another broad area. Of course we welcome your ideas on how we can ensure that is happening, we are proposing of course civic education, we are proposing mobilization but again we want to rope you into that aspect.

The fifth area for us we think is that of affirmative referendum result. How do we ensure that we get an affirmative referendum result this time round because referendum has always been taken in the negative. Sometimes it is a process of just legitimizing a process. You can vote in countries like Switzerland, for example, they subject everything almost to referendum. People do not have to fight, people do not have to get divided along political, ethnic lines. Political lines are how do we ensure an affirmative referendum result is achieved this time round and of course there is the area of Draft Constitution within the short time frame. Otiende Amollo will speak about that but for me the other important area is that of a Harmonized Draft Constitution and for me the word Harmonized is loaded in meaning. I know the law says in Section 29 we have to look at reference materials with a view to harmonizing the Draft. I want to look at it broadly in the context that, how do we harmonize the various competing interests, be they religious, political, ethnic, regional or minorities versus majority so that at the end of the day as a Kenyan I can lift that document and say, this document has harmonized me with region X? It has harmonized me with ethnic group X.? So I want to look at this Harmonized Constitution Draft broadly for us as a result area so that finally even as we go to the referendum, we can actually affirm a document that will harmonize us as a country.

Now in terms of conclusion, I know Chairman hinted at this, I was also going to a historical question, was Moi right in 1995 when he said that *Wanjiku* cannot write a Constitution but it is the work of Experts? I also want ask another historical question, can we say today that the Bomas Process achieved some constituent power in constitutional speak? Can we also say that the Wako Draft tested the political ventilation of the Kenyan people? I think that is a question that I want to ask us. There are other people who have given certain Drafts including the *Mfungamano* initial Draft. Can we say that gave us a third way, I do not know, I am just posing these historical questions with a view to saying, having gone through all this process, has the time now come for us to actually finalize? If Bomas gave us something, if Wako process gave us something, if the *Ufungamano* gave us something, there was even the Law Society of Kenya Draft, all these other Drafts put together, are they actually taking us towards a process? Now, I just want to say in conclusion that consensus is key to this process. We can politicize everything else including where does Ekuru comes from, is my region represented, a, b, c, d, but at the end of the day, we need to sit down as a family and have some frank talk in this family we call Kenya and give Kenyans a Constitution.

Lastly, very lastly, is we need political will. Somebody joked one time and said maybe we need to buy it, if we knew where there is market for political will, we need to buy it and give it to the people who do not have good political will. I am looking for that market everyday and once I get it, I think we will all shop around for it. But very lastly is to ask the question, where do you fit into this formula or operational plan of the Committee of Experts or even in the Review Act itself, which I think Otiende Amollo will speak about substantively. However, lest we forget, I just want to remind us that if you look at where this process started, suppose it started by last year's post-election violence and I want to take out Section 4 of the Review Act which I hope we all are familiar with. Section 4 of that Review Act talks about the objects and purpose of Constitution making process in Kenya. Allow me to just read Section 4 (a) and (b) and show you a small clip which I think will give us the reality of where we really want to put this country or where we want to take this country. Section 4 (a) reads as follows, "*the objects and purpose of the Review of the Constitution is to ensure provision therein, (a) guarantying peace, national unity and integrity of the Republic of Kenya in order to safeguard the well being of the people of*

Kenya” and (b) which I want to read with a lot of emphasis says, “*Establishing a free and democratic system of Government that guarantees good governance, constitutionalism, the rule of law, human rights, gender equity, gender equality and affirmative action.*”. Now even if we were to take those two provisions of the Act alone, I just want to remind us of where this country was yesterday, last year. Did we guarantee human rights, rule of law in the post-election violence of last year and I want to warn you in advance the clip I want to show you, which is a one minute show, is very horrific. It tells us of the kind of Kenya that in my view we need to avoid if we read this law if we must support the completion of this process. Some of this clip has not been shown before but we feel that we need to have a reality check in this process.

I must warn you that if you are the faint hearted, maybe do not watch this.

(Video clip show)

Dr. Ekuru Aukot: Anyway, the point I wanted to underscore there is we all have a role to play to change this country in this process especially if you look at Section 4 of this law and I do not think that is where we want to Kenya back by politicizing everything about this process and therein you can see the role of various actors. You have seen the role of politicians, political parties, you have seen the role of the media, you have seen the role of the common *mwananchi*, the public. You have seen the role of everybody in the kind of Kenya that we want. That for me is the reality check I thought we need to start with as we engage in the finalization of this process.

Now, allow me to acknowledge the presence in the house of the Honourable Chris Murungaru, if you kindly just wave. Thank you very much. That is the end of my presentation. *(Clapping)*

Mr. Nzamba Kitonga: Thank you, *Daktari*, for that presentation and particularly for a reality check because sometimes our memories are short so it was necessary to jog our memories to what happened to us only last year and to understand that the constitutional review making process is part of the solutions to those problems. Now we will have a short plenary then we will go for tea break and we come for further presentations. You need not worry about your

presentations. After lunch we will be on the business only of your presentations for you to hear each other and we develop a way forward as we go along. Yes, Honourable Mungatana.

Hon. Danson Mungatana: Okay. I have been asked to state my name. My name is Danson Mungatana. I am representing NARC Kenya in this meeting. Mr. Chairman, first of all I want to thank you for the presentation that we heard last but I just wanted to make some observation that probably will help us.

Number one, he talked of effective public education. In my opinion, Mr. Chairman, the CEO of this country is the President, the Prime Minister as we have in this arrangement right now and I think on behalf of all of us, they have mandated the constitutional Committee of Experts through Parliament to write the agenda of the AGM for Kenya because the agenda for Constitutional making is not your agenda, it is not our agenda, it is the agenda of the people of Kenya and I think your work is very simple that you write that agenda and present it for discussion. I am thinking, I do not know how you will marry this, but I am thinking it will be very easy in fact even to achieve that consensus they talked about and to achieve the understanding within Kenya. If you can come up with that agenda, ordinarily when you are going for a meeting, the agenda you write does not necessarily mean that it will be accepted or disregarded. So number one, I wanted you as the Committee of Experts to come up with a model of your proposed Constitution and do not fear what people will say because whatever you come up with they will criticize you. Even if Jesus Christ came down and gave us a Constitution, it will be criticized because He was here alive and He was crucified anyway. So you must come up with an agenda so that the country can walk with you and, Mr. Chairman, I am thinking everything will be so easy if there was a place where Kenyans know they will come to discuss that agenda at appointed times. In the same manner that we meet in Parliament and we talk about things affecting the country, you must come up with a place where this agenda can start being discussed stage by stage.

Mr. Chairman, your model Constitution will have several sections and the participants can be all of us, the 47 members of whatever and other people that you think are necessary, but a controlled place. In your offices or at KICC or wherever but if it is Chapter one that we are talking about the Republic, we partner with the Media and I think you need to spend the money that Dr. Ekuru

said he has, pay them for live presentation, let people discuss, let us agree or disagree. If you say it is the question of the Republic, if it is the question of sharing powers, come and tell us because when suspicion starts it is when one group says they want this, the other one says this and they are not being given opportunity to discuss. We would want those discussions to be live and nowadays we even have televisions that give retics(?). As we go Chapter by Chapter you will see the general opinions of Kenyans. Have they agreed with this view or with that view, then we say we have finished this, we move one Chapter by Chapter. Mr. Chairman, I was really begging that you consider setting up what I am calling the PCA, the Peoples Constitutional Assembly where we will not only meet like today, but we will meet many times, not just as constitutional political parties but even others that you think are necessary, we discuss these things. If we discuss when the referendum comes everybody will know what we are voting for. Everybody will know where we are going and everyone will be accepting the new Constitution order that we are bringing.

So, Mr. Chairman, I am strongly suggesting that instead of calling Political Parties aside, calling Religious people aside, calling I do not know who aside, let us have a place where we will call the People Constitutional Assembly where we will discuss, exchange slowly and build consensus with the rest of the people while partnering with the media and I am sure, Mr. Chairman, by the time the same comes to Parliament and it goes now to the referendum, we will have a new Constitution and I am confident we will make it, Mr. Chairman. Thank you very much.

Mr. Nzamba Kitonga: I I will take Hon. George Nyamweya, the gentleman next and the gentleman behind then I will move to this side.

Hon. George Nyamweya: Thank you, Chairman. George Omari Nyamweya, Party of National Unity (PNU). Chairman, I think I will probably take a somewhat different approach to what my colleague is suggesting taking that reality check that you have given us. I would propose Mr. Chairman that we ought to be sitting with you and with the Committee of Boundaries, we ought to be sitting with you and the Commission on Elections because what you have shown us arose because of elections and their representation. Maybe others felt you ought not to be staying here. Others felt maybe you have got your vote which is not as equal to the other persons vote. Now, I

see you have mentioned March 2010. How do we get to 2010 if the Commission of Boundaries has not even indicated how many constituencies, how many provinces, how many districts there are so that the Commission of Elections can ask us to register as voters? Right now there are only voters in Bomachoge and Shinyalu the rest of us are not voters yet at the end of it you are going to ask us to vote in a referendum. So if we do not know how long it is going to take the Boundaries people to do their work, those ones to register us, how are you going to be able to give us a date when we are going to have a referendum? I think we need to do this before the next election so perhaps in a meeting suggested by Hon. Mungatana, we should have the other Commission so that we do not have to go to them aside, to you aside then to the other one then eventually try and get together. I think that is something which we need to process, even work out from this meeting, how long is it going to take us actually, the reality not just figures? If we made a mistake let us not repeat it, let us not be bound by time and we get into another crisis because we have given ourselves unrealistic time frames. Thank you.

Mr. Nzamba Kitonga: While I appreciate the comments by Honourable George Nyamweya and my learned friend Mungatana, you also need to look into the Statutes because they came from the House.

Mr. Ogembo Masese: Thank you, Chairman. My name is Ogembo Masese, Kenya National Congress. I want to thank you for recognizing the views and contributions from Political Party leaders. We have heard presentations and what I was expecting is that after you having gone round on provincial tours and collecting views and after having identified the contentious issues, I want to differ with Hon. Mungatana about going through Chapter after Chapter. I think we have a few contentious issues which should be identified and discussed, which has been done which should be brought forward here now and we discuss those because we do not have much time. Mr. Chairman, what we have seen here is one of the things that I think should make everyone of us here concerned and worried of a repeat. We still have IDPs in camps. I come from Bomachoge. It was very difficult to campaign because some people were coming and saying, look, I have scars here and we have IDPs there, we have some IDPs who were ejected from the Rift Valley who were not allocated land, who bought land on a willing seller, a willing buyer basis These people are still there. We have totally ignored them, we are now discussing about in

fact sharing power. What happened at Bomas was people wanting to benefit. The Constitution is about, how do I benefit? And we should not fall into that trap. As *Mheshimiwa Nyamweya* said, do you want to do things regardless of what many people will say because whichever way you go, we are going to have people blaming you for this or that. In fact, what I was expecting is to see the recommendations and for us the Political Party leaders to say, yes, I think we agree with this one, we do not agree with this one, we agree with this one,. We should have gotten this earlier so that last evening we could have gone through them. Thank you and I hope we will get somewhere.

Mr. Mwancha Okyuma: Thank you very much, Mr. Chairman. My names are Mwancha Okyuma, I represent Ford People. Why I stood really was in a way to differ with Hon. Mungatana because Mungatana is of the view that you should have come and given us what you think should be the next Constitution. I differ with him because I feel that can only come from a meeting of this nature with Political Parties and even with Religious Organizations then you, having listened, having collated the already existing Draft, then you can come up with what you think should be a Draft Constitution that should be considered for a referendum into the future. I sometimes get the impression that the Committee of Experts, I do not know, you are a little timid because the grapevine in Kenya says you already have a Draft Constitution. I think your name is Ekuru? Whatever name it is, anyway, Mr. Commissioner you will excuse me, I am not very familiar with Turkana names, I think he was being asked on TV-- You were being interviewed and you were asked whether you have a Draft. Then you said, no, no, no, we do not have a Draft. There is nothing wrong with having a Draft, a Draft is a working document. So I think you should say, we have some Drafts and maybe that is the kind of thing we could have discussed but I suggest that you bring the Draft after you have listened to the Political Parties and also you have listened to other Religious Organizations and the like. My last comment, you have in the Committee of Experts a Director of Civic Education, Mobilization and the like but we do not hear this-- I hear he is on paper and in the press but we never see any civic education going on. Can you clarify those two issues? What is happening with your civic education? Why are we not seeing it even in our constituencies? Do you actually have a Draft where we are told you have recommended the Parliamentary System or don't you have it? What is the correct position? Thank you.

Mr. Nzamba Kitonga: I will take 3 comments from this side now then we will go for the tea break. There will be a lot of opportunity to speak so you really need not worry. The other thing is just to clarify to honourable delegates here, there is a statutory road map which we are following. It is not that we are not able to do what we want, even we think it could be the good thing to do. So that Statute requires that we undertake these thematic consultations which is what we are doing now, then come up with a Draft and then the Draft will be debated for 30 days. Otiende Amollo will actually go through the details of the statutory road map. So I will take Mwaura, I will take Honourable Mwandawiro Mghanga and Nick Salat then. The others can speak after the tea session is over.

Mr. David Mwaura: Thank you very much, Mr. Chairman. My names are David Mwaura Waihiga with AGANO Party. First of all let me join my remarks with those of my friend Masese, thank you for convening us, Mr. Chairman. We were long and waiting and we do not want to think it is because of what we saw in the media that we are here. No, no, no, we want to take it in good faith. I was going to say at the outset, but it has been said, that transparency will assist your communication and our communication very much in this process. So do let us know at the outset whether you do have a Draft. I think it will be important because we have read about it.

Mr. Nzamba Kitonga: I can answer while you are still there.

Mr. David Mwaura: Yes.

Mr. Nzamba Kitonga: We have about 20 Drafts of various constitutional models because that is our work, to study various Drafts in a bid to know what is suitable for Kenyans and in a bid to also enhance our capacity to discuss with you.

Mr. David Mwaura: Thank you very much. We know you will let us have sight of them in due course. My other one and half questions, one was on procedure. You did not mention in your speech the expectations at the end of the day of this conference tomorrow, you come with a

community, will there be a voting process. I noticed and I am glad you acknowledged several persons here, that we were unequal in attendance. I thought I saw a party or two with more than two persons and that is of concern to me as a political party you need to clarify that and I emphasize and underscored the word transparency. Also please if we are that important stakeholders and, Dr. Ekuru – and your name is easy to mention, yes, it is a very good name – you let it out that we are a very important constituency, would you let us know whether, Chair-- You did mention this in your speech contrary to what we know you gave a press conference the other day and said that as Committee of Experts, we can now take you very seriously that you are working together, you are flowing together. I am saying that if we are that important stakeholders.

Tape 4 – 2/09/09

Your speech also did not mention whether the contentious issues remained the 3, what happens to the other issues that have been raised by other groups? How do you seek to address them? I think that was important for you to communicate to us and I believe in the course of the day you will so that we know whether to prepare to address other issues, land, religious courts and right to life which have been raised here or how you handle them. Thank you.

Mr. Mwandawiro Mghanga: *Asante sana, Mwenyekiti. Naitwa Mwandawiro Mghanga, Mwenyekiti wa Kitaifa wa Social Democratic Party. Kwanza jambo langu la kwanza ningetaka kufahamu, sijaelewa sawa sawa, malengo hasa ya mkutano huu ni nini? Tutakapo maliza mkutano huu, kesho ama kesho kutwa tunatarajia tuwe tumefikia malengo gani? Na ikiwa mojawapo wa malengo ni kujadiliana hayo maswala nyeti ambayo tayari yameteuliwa, jambo ambalo linatakikana tufanye, tuyapatie mda wa kutosha wa kuyajadiliana kutoka hizi vyama ambavyo viko hapa na vile vile wanaweza kukutana kushawishiana, tena kwa uwanja huru usio na hofu. Ingawa nasikitika sana kwa yale mambo ambayo tumeonyeshwa hapa ambayo yametokea kila Mkenya anasikitisha yalivunja sana haki za binadamu na ni aibu kubwa. Lakini yasitumwe kutuharakish, mawazo hapa yatoke huru bila hofu na watu hasa kuhusu haya maswala nyeti ambayo yanatakikana.*

Jambo la tatu ni kwamba kwa hiyo Kamati ya Wataalamu ambayo naizungumzia na heshima kubwa ambayo inastahili, tujue kama vile mlivyoeleza-- Mwenyekiti alieleza vizuri sana kihistoria kwamba mambo ya marekebisho ya Katiba hayakuanza leo, yalianza zamani na hasa mimi nazungumzia Tume ya Urekebishaji Katiba ilifanya kazi nzuri sana maanake iliende mashinani. Ukienda kwa archive ya ile ilifanywa na Tume ya Urekebishaji Katiba, utaona Wakenya walisema nini hasa katika kule kijijini. Naomba hiyo Tume pia izingatie hayo maoni. Na katika wakati watu wanajadiliana na kupewa maoni yao mbali mbali, nadhani mojawapo wa kazi ya hii Tume ni kuwa na ukweli kabisa na kuhakikisha mambo ambayo yanatokea mnaona ni mambo hisia zenyewe ambazo zinatoka kutoka kwa watu wenyewe ambao wametoka hapa na kuzingatia kusaidia katika kuandikisha Katiba. Lakini lazima mrudi hapo kabisa katika nini? Katika Tume ya Urekebishaji Katiba.

Na mwisho ni kwamba hiyo hiyo historia yetu maanake nimekuwa huko Bomas, ilituonyesha Wakenya tuna uwezo wa kuzungumza na kukubaliana hatimaye. Huo uwezo upo. Mimi nilikuwapo mwanzoni na niliona wakati watu walianza kuzungumzia Katiba, ilikuwa ni kama nchi imegawanyika. Lakini baada ya kukaa wiki mbili, tatu, Wakenya tulianza--

Mr. Nzamba Kitonga: *Haya, haya tafadhali.*

Mr. Mwandawiro Mghanga: *Tukakaribia pamoja kufikia hiyo Bomas Draft.*

Mr. Nzamba Kitonga: *Tafadhali mda--*

Mr. Mwandawiro Mghanga: *Kwa hivyo nasema nikimalizia asante sana, lakini tuzungumzie tukiwa na moyo kwamba tuna uwezo wa kusikilizana kama Wakenya na historia inaonyesha. Asante.*

Mr. Nzamba Kitonga: *Mheshimiwa Nick Salat.*

Mr. Nick Salat: Thank you, Chair. I am Nick Salat, KANU. Mine is to thank you for the presentation by yourself and the Director. I stand to also raise fear, I mean because I look at

what has been happening, the exchanges in the press between the office of the Prime Minister and the Office of the President which seem to be turning this Committee of Experts into an ODM/PNU exchange. So I am here to appeal to you that it is not a matter of PNU or ODM, it is a Constitution we are trying to make for this country. So, I would want also you, as the Experts, not to be infiltrated by outside forces that try to make you think or make decisions in a certain way. So it is my appear that you have a very limited time and as has been said, Kenyans are yearning for a Constitution soon because the more we draw closer to 2012, those are the-- What we have just seen is an example of what is awaiting Kenyans because let us not have too many conferences. Let us not have too many discussions. We are here to harmonize already what you have so show us exactly what is contentious, those that we agree on because no Political Party here wants to be considered a failure. I want to say, I agree with that and I am part of that, I am not agreeing with that and I want to give a solution for it, so that if you leave it to us again, you go to Nairobi, you go where and hold conferences, people will have differing opinions and you will never arrive at a decision and the time you have, as I said, is very limited. So, I am wishing you success and we are also here to see that what we agree on, let us agree. Those that are contentious, let us lay them there on the floor and say this is contentious; if it is a religious group, we know how to deal with it because all of us here we belong to a certain religion. So we are going to discuss it in an open and a good forum. Thank you so much.

Mr. Nzamba Kitonga: As I had said we are going now for tea break. There will be a lot of opportunities to speak so you need not worry. On the issue of the might/height correspondence between the two gentlemen, that need not worry you, it has no impact on our work. We took it aboard as part of the views of Kenyans and as many Kenyans as possible are welcome to submit their views. So let us go for a tea break of 15 minutes and we return. Thank you.

Meeting adjourned for Tea Break at 10:57 am.

Meeting resumed at 11:26 am

Mr. Nzamba Kitonga: May I call the meeting to order. Please let us be seated. Okay. Are you ready? May I now invite Mr. Otiende Amollo to make his presentation with regard to aspects of our methodology and structure. As I said, those of you who are worried about procedure, I do not know whether that is what you want to ask JB but those of you who are worried about procedure, we will get to the plenary after lunch.

Mr. Justin Muturi: Point of order, Mr. Chairman. Mr. Chairman, my point of order relates to what is now about to be presented. It is about timelines, methodology and challenges. Mr. Chairman, we know you came into existence within the professions of the Review Act. You have been proceeding exactly as provided for in the Act. So, Mr. Chairman, now if you start giving us presentation on methodology, you have already identified the contentious issues, you have actually done a lot of other work. I am just wondering whether, Mr. Chairman, these leaders of Political Parties assembled here are going to give you sufficient input regarding the issues that you have dealt with, you have identified those 3 contentious issues--

Mr. Nzamba Kitonga: Do not worry JB. There is a way in which we have structured this meeting to cover all your concerns. What you assume that you know, do not assume that everybody else also knows it that way. So allow the presentation to go on and then we go into the next presentation, from there we will go into plenary for a long time.

Mr. Justin Muturi: But then, Mr. Chairman, sorry I am only saying this because if we are just going to be here to listen to your presentation, you are there because you are Experts. Indeed this methodology and the others will not change a lot of perceptions and that is why, Mr. Chairman I still want to go back to the point raised earlier on by Kathangu about, what is it that we expect to achieve at the end of this forum? Is it just to come here and listen to you telling us that you know the Act tells us to do this, within 30 days we should do this/? Now how are we going to help you Mr. Chairman, please? This need to be cleared otherwise we are going to take a lot of time.

Mr. Nzamba Kitonga: These presentations are not going to take time and as they go on, you will understand how they inform this process and you will understand how they also assist all of

us to discuss later on at plenary level what we intend to achieve and also in terms of enriching the submission of your views.

Dr. Sadjah Phillipe: Mr. Chairman.

Mr. Nzamba Kitonga: Yes. And I will not take another point of order after this, we will go into the presentation.

Dr. Sadjah Phillipe: Thank you very much, Mr. Chairman. Only one question I want to put to you. Are we part and parcel of this process and if we are part and parcel-- My name is Dr. Sadjah Phillipe, Secretary General of National Labour Party. If we are part and parcel of this process, then you have to give us a right to be heard. Thank you.

Mr. Nzamba Kitonga: But I have told you and I have assured you that from Lunch it is your right to be heard.

(Inaudible responses from the floor)

Mr. Nzamba Kitonga: Please bear with us and let us go through the programme the way we had drawn it because--

Mr. Amollo Otiende: Ladies and Gentlemen, one minute please. There are questions that were posed before we went for tea break including, what are the objectives of this meeting? They include how we are going to treat issues that arise from this meeting and how are we going to conduct this meeting. Mr. Mwaura raised the issue that some parties have more than two representatives and all. There are issues that relate to this meeting which intend to be covered in this session. Now, it is up to you, members, if you feel that they should be covered or they be left open and we hear the members. I think that is really what we should put back to the plenary. Thank you, Mr. Chairman.

Mr. Nzamba Kitonga: May I again suggest that you let the presentations go on then there will be a lot of time for plenary. I do not know why there is worry about time. So please may I now at this point ask Mr. Otiende Amollo to make the presentation.

Mr. Amollo Otiende: Thank you, Mr. Chairman. I am going to be very brief. Mr. Chairman, last week the lawyers were meeting in this room and the lawyers who were here - and I have seen a lot of them - asked me to make a presentation on behalf of the Committee and I posed a question which I want to pose today to the lawyers. How many of us honestly in this room have read the Act that guides us, the Constitution of Kenya Review Act, in all honesty? About 11 of us. I am asking here, 11 of us in this room, how many of us who have read the Act are familiar with the timeline of the Committee of the 11 who raised their hand? All of us who raised our hands are familiar with the timelines. The importance of that I think first is that happily, I think this room represents more readership of the Act than the lawyers did because when we asked the lawyers this question, only 12 of them raised their hands and they were about 400. Here we have about 13 hands raised but we are much less, we are about 110. The point is - and this point was made to us during the break - that perhaps as we engage in this process and discuss more, we should as we are discussing the content also familiarize ourselves with the Act and any recommendations we have on the Act and I think that task is for us and it is also for you. Our first lesson in that I think is that we must avail the Act much more often. I will leave that point.

Secondly, the question was asked in terms of how are we proceeding in this meeting, what are the objectives? I want to give the proposals that we had reached on as a Committee but before that-- I will abandon the presentation I had intended to make and just make 3 quick points. I will assume that you are aware of the preliminary part of the Act as to how we were appointed, how we have gone about our work. We had thought it would be important for you because one of the issues that has usually been raised and it has been raised this morning is, how did the Committee arrive at the contentious issues? But I will skip that bit in terms of what we did in the preliminary part. I will come straight to identification of the contentious issues so that we are clear. If you look at the presentation you have that is between page 7 and 8 of my presentation, I want to highlight 6 things very quickly.

Our first task and this we are mandated by the Act to do was to consider all the documents that the former CKRC considered. These are the documents that *Mheshimiwa* Mwandawiro was speaking about and I assure you we have considered all of them. They helped us identify the contentious issues.

Secondly, we also considered the Draft Constitutional Documents. You are aware of the first Ghai Draft, the Bomas Draft, the one popularly known as Wako Draft, so we looked at all that and looked at the differences. Where they were in agreement, we could not consider it contentious as such but where they differed, we highlighted it as possibly contentious.

Thirdly, we looked at documents that came subsequently. You are aware of the Kilifi document, the Naivasha document, the Kiplagat Report. We also looked at that and the issues which each of those documents raised as issues that needed to be settled by Kenyans.

Number four, we considered other circumstances and subsequent reports. We considered the Waki Report, the Kriegler Report and we considered the Referendum debate. We did not consider the Kriegler envelope because we did not have it but we looked at the Report for sure because both the Waki Report, the Kriegler Report raised very fundamental issues some of which relate to the clip that the Director showed here.

Number five. Although the Act did not require us to do this, before we identified the contentious issues, we wrote to Kenyans at large to tell us what in their opinion was contentious. Now, this is important because a lot of people sometimes say, the contentious issues identified by the Committee are not the real contentious issues. What we did in this category was to invite Kenyans generally to give us what in their opinion was contentious. A lot of Political Parties made submissions on this. A lot of other Kenyans did and we categorized this in what we call the Rapid Assessment Method and we were able to identify what scored highly. It is important to mention perhaps at this stage and we will come back to it, that in terms of the contentious issues, we identified core contentious issues and we identified other issues which we thought were resolvable not by putting them to the general public but by negotiation and engagement and we will come back to that shortly. In addition to that invitation after we received that, of course

we then also asked specific entities and we received memoranda from Political Parties, from professional societies, the LSK, the Association of Professional Societies and all others on what they considered contentious.

Lastly, we took cognizance of the 2005 referendum because although there are a lot of things that may not have appeared contentious on the face of the document, we all know that as we went through the referendum, there were a lot of things and a lot of debate that became contentious. The contentious issues we identified were 5, the core contentious issues. The Executive, the Legislature, the Judiciary, Devolution of Power and Transitional Clauses. We decided to cluster Executive and Legislature together under System of Government because they are inter-related. Then we have Devolution. When it came to the Judiciary, we discovered the issues really in contention are the Transitional Clauses as relate to the Judiciary, not really the Judiciary itself. So we brought that in together with the other part of Transitional Clauses so that the question of the Transition of the Judiciary and other office holders including Members of Parliament, the President, the Prime Minister, Councillors are all classified under bringing the Constitution into effect. That is why sometimes we say they were five but when you look you see only 3.

Let me mention something else. A lot of people have said and even some Parties which are here, that those are not the only contentious issue. The question of same sex marriage is an issue. Some of the submissions made by the parties here raised the question of the Kadhi's Court, the question of Land and others. In addition to those core contentious issues, there are 4 other issues which we identified as resolvable and which we proposed and we have since had a couple of sessions on; one of them is the question of Land. Why did we not classify Land as a highly contentious issue? We did not classify Land as highly contentious because when we examined all the three documents and all the documents that we had to examine, we found one of the Chapters in which there is more or less agreement is actually the Chapter of Land. It remains largely un-interfered with in all the three Drafts and even in all the subsequent documents so that the structure of the Land Chapter is not in itself contentious. The issues that are contentious in it are issues which remained contentious even before and on which all the Drafts are agreed and they include, for example, classification of land into community, public and private, they include

the question of the National Land Commission, they include such things on which all the Drafts are similar so that instead of classifying it as contentious, what we would do is organize specific sessions on Land or when we were doing the provincial hearings and many of you appeared in those hearings we would say, talk to us about the 3 contentious issues but if you have something specific, not just general on the Land Chapter because they are more or less similar, please give us the specific recommendation. Of course there were various recommendations, as we would imagine land issues are not constant. The land issues at the Coast are not the same as the land issues in Lodwar and they are not the same as the land issues in Kisii but you see the Constitution must address the principles not the specific issues. So what we would ask and with the benefit of the provincial hearings, it actually vindicated us because everybody who spoke about land suggested that something be included which is already in the Draft and I wish to invite you also if you have anything on Land which is not on the Draft it is actually important to consider. In some instances, there were those who suggested other things. They might look minor but they are not on the face of the Draft. Like when we went to Narok and Turkana and all, they would say all those Drafts have what they call idle land and idle land in respect of pastoralist is not the same as idle land in respect of agriculturalist so that they asked us to qualify that when you say idle land, say, except land occupied by pastoral communities. Now, we can consider that because that is quite specific.

There is the issue of the Kadhi's Court. We did not classify it as contentious but we classified it as resolvable because we thought on the issue of the Kadhi's Court, we are most likely to reach consensus through sober and informed debate rather than by throwing it to the public so that we have held consultations which have been attended by our Muslim brothers, which have been attended by our Christian brothers and which are preceded by actually explaining the nature of the Kadhi's Court as it exists today and the nature of the proposals come on either extremes and I will not take time on this, we can always come back to it. But you find that in that kind of fora, you achieve much more than if you put it to the public. During the provincial hearings in a few places we put it to the public and I am sure you saw on TV what actually happened even here in Mombasa. Instead of the debate being informed, the debate becomes a confrontation with the danger that other than our tribal differences that we already have, we are adding a religious

divide and we thought that it is the kind of thing which if focused on, we are much more likely to reach consensus than if thrown out generally.

The other two on which we have treated similarly is the question of the Electoral System, what some of you call Representation and also the question of Affirmative Action. I do not have time to explain them in great detail so that is all. I will stop on that.

How do we intend to resolve these contentious issues? First of all, of course, is through public views. The public views include the views we have received when we send the general invitation, it includes the views we have received on the specific contentious issues, it includes the memoranda that was submitted to the former CKRC and it also includes what we heard during our provincial hearings.

Secondly, it is through thematic consultations. We have already held a number of thematic consultations on each of these areas, on the Executive by itself, on the Legislature by itself, on Affirmative Action, on the Electoral System, on the Judiciary and all this and many of you here attended some of those sessions.

Thirdly, is through sectoral consultation. The sectoral consultation we talk of are those we have already had such consultations with the private sector, we have had it with the civil society, we have had it with the religious organizations and we are now having it with the Political Parties and I will come back to that.

Four, is through Expert engagement. In some instances we have had to seek technical assistance on specific areas and this include even some of the representatives of Political Parties, it includes some of the Experts internally, it includes some of the Experts externally. In any process this is unavoidable although it is minimal in our case. Also, there are the questions of consultations with the Reference Group. You will know that when we were sworn in, there was a reference to a Reference Group but it had not been legislated so we suggested to Parliament through the PSC and Parliament agreed, to amend the Act at least in three respects which is important. One is they now brought into place the Reference Group under Section 30. It is a group of 30 and those

of us who are familiar with the Act know which groups they are. Some of you are also represented there. Two, Parliament agreed which was important to amend the Act to give timelines within which the Parliamentary Select Committee will deal with the Draft that goes to it and within which Parliament itself will deal with the Draft that goes to it. Before that it was open ended so that although we were time bound, once it goes to the PSC it could technically have taken one year or more or once it goes to Parliament so we suggested 21 days and the Parliamentarians accepted it so in each case there is a restriction of 21 days. Ultimately of course, the resolution of the contentious issues must also involve internal discussion by the Committee instructed by all this resulting in presentation and production of a Harmonized Draft and a Report which *Mheshimiwa* Mungatana spoke on.

Towards the end of this, I just want to highlight two more things. One is in all this and all the debate and all the discussions, we are instructed by principles which are contained in the Act. There are principles in Section 4 of the Act, I will not go through them, they are on page 11 of my presentation, you can read them. Director highlighted only two but those are the principles which Parliamentarians in their wisdom thought are important as principles for Constitution making for this country. There other principles which are also on Section 6, they are on page 12 of my presentation and you will go through them, I will also not go through them. Let me only mention that in addition to the principles in Section 4 and 6, we as a Committee thought that we should have some background principles which we thought was best and important in Constitution making.

TAPES 5 & 6

Tape 5 & 6 of 2.09.09

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Mr. Amollo Otiende: These are the principles I have outlined on page 12 to 13 of the presentation, they are ten clear principles which we thought are important. The need to unify and strength the nation of Kenya, the need to constrain Executive power and resting the separation of powers with checks and balances, the need to decentralize power, the need to avoid dangerous and acrimonious Presidential or National Assembly elections and avoid a winner take all election, the need to deepen democracy and have an accountable Government, the need for an effective Government, the need for a stable Government, the need for equity and distribution of resources to strengthen and regulate Political Parties and the need for ethnic, regional and gender balance. In addition to this, we thought there are certain things that are unique to us as Kenyans, what we call the Kenyan context and they are outlined there. I will not go through them. They are on page 13 to 14. Let me mention only two last things in terms of this presentation.

One is that in doing this process sometimes it is good to revisit what is actually not on Section 4 or 6 of the Act, but what is actually contained in Section 23(g) of the Act. Section 23(g) of the Act emphasizes that ultimately, the Draft Constitution and the Draft Report must respect the greater good of the people of Kenya. To me sometimes I think that is the most important principle, the greater good of the people of Kenya and sometimes I thought that in doing this, there are times, as we were listening to the Chairman, when Constitution making is all contextualized and sometimes contextualized in terms of personalities. Sometimes, I wish it was possible to make a Constitution today and say it will come into operation 40 years from now, because then we will all disabuse our minds of who wants to go for what position and we will focus our minds on what will be good for this country in 40 years' time, when none of us here, well maybe some of us, but most of us will not have any specific interest. But since that is not possible, the invitation is the possibility of focusing on 40 years from now as you are making the Constitution, so that you do not look at it as in terms of who is likely to go for which position and with the mutations of the parties, then it will not be about which party is likely to go for what.

Let me take three minutes to now address the specifics of this meeting as proposed and say one more thing. First, Mr. Mwaura asked this question, that some parties have more representatives than two. As a Committee, we had settled that each party will only have two representatives and

in any case, as far as we know and we were checking this even during the break, we know of no party that has more than two representatives for now. If they are, then we will have to deal with that, because we had settled that the parties are free to choose who represents them, provided they are two. So, if they are ten and they want to do it in rotation we will only include two. What is most important, and the Chairman will explain this, we have tried to structure the session from the afternoon today to the whole day tomorrow, to make sure that each Political Party is heard, not just those who either raise their hands the most number of times or who can speak longer, so that there are restrictions in time. The suggestion is each should take perhaps not more than eight minutes, maximum ten and in that suggestion because each party sent two representatives, if they choose to speak through one person, throughout that time, that is fine. But if both choose to speak, they can do so provided the time is not extended. That is the first suggestion and that is what we agreed on, Mr. Mwaura, I hope answers you.

Secondly, in terms of the role of the observers, we had settled that the observers will only observe. The observers here are NDI, CMD and the Registrar of Political Parties. The representatives, the Constitutional Advisor to the President and the Constitutional Advisor to the Prime Minister were also invited and to them, they will fall under the similar fate, if they choose to speak as we had agreed, it is only a maximum of eight or ten minutes. But each person on those sessions will only speak once. That is what was agreed. In terms of the objective, and this was asked, perhaps this can be answered in three respects. First, you will remember that the Committee had invited Political Parties to meet on 16th of July in the afternoon, at your request it was suggested that, that time was too short. First the notice was too short and then the time was too short. So, you requested that we needed a little more time perhaps in a Retreat. So, the first part of this is that, it is in fulfillment of the request by the Political Parties, which we agreed with because this is a very important sector, even though we have consulted other sectors, it is extremely important that we get sufficient time to consult the Political Parties.

Secondly, we had invited presentations. I will have you know that of the 47 Political Parties represented so far, we only received, as we speak, eight presentations from Political Parties. Two of them actually came in the last two weeks and so part of our question was, do we accept them because they only came recently, after the time, or not, but we have accepted them. One of

those presentations is in dispute because it has been indicated to us that it may not represent the legitimate position of the party. If you were to go technical, then you are left with only five presentations of 47 Political Parties. Our thinking is, five out of 47 of a very important sector is not representative enough. We would like to hear your views on these issues, because before we give the Draft, as *Mheshimiwa* Mungatana was saying, we must take your views into consideration and five out of 47 is not representative. We would like to hear your position in a very preliminary manner and also give you the opportunity that for those who have not presented, you could have a short period after this, whatever time we will agree on, to make a written presentation that explains your position more. But we would be interested not just in your position, but on your justification for that position, because it is easy to say, I want this system of Government.

But for us, we must know why, because the reason might be overwhelming that if we get to know it, we might just agree with it. It is also during that presentation that you might take the opportunity because some of the Parties have since come to us and told us, although this was a submission, we will be willing to consider up to this much. It is your opportunity to state the concessions, what are you willing to concede? It might just be that what you are willing to concede will bring us to a common understanding and position with the others with whom you disagree. So, this is actually also, that opportunity. How do we propose to do this? In terms of proceeding and if you allow me, just look at the programme again, you will notice that so far we have already amended the programme. The programme as drafted did not have a plenary question or comment session after the presentation. We have proposed and have proceeded to amend the programme, so that after each presentation, there would be a short Plenary in terms of comments and questions. So that after my presentation, Dr. Chaloka will come and do the presentation on System of Government, then we have about 30 minutes of interactive engagement. Those 30 minutes are open and general. It is not that if *Mheshimiwa* Nyamweya speaks, then he can now not speak during that period, because that is open. But once we are through with that, when we come to the afternoon, then we come to the most structured session when you will raise your hand and speak for the Party. During this general comment, you are speaking for yourself, but at that session you will speak for the Party and the Chair of the session will give directions in terms of how long you should take and the maximum amount of time and

once that is done, we will follow that channel and make sure that all the parties get to speak. We have the whole afternoon today, we have the whole day tomorrow, but because even as you speak for the Party, there might be others who might want to give a short comment, we will go with that procedure up to the end of each session and still for a maximum of thirty minutes allow again a general interactive session. However, the point is, during the session when you are presenting as a party, it will not be a matter of competition that you just raise your hand, it will be a structured manner in which you agree with the other representative of the party, who is going to speak. As you are speaking, you will speak on the three contentious issues. But if you feel there is any other thing that you should say, you will be able to say it, provided you say it within that time, Mr. Mwaura. That is basically what we have proposed. Thank you ladies and gentlemen, I think I should stop there and allow Chaloka to continue. *(Clapping)*.

Mr. Nzamba Kitonga: May I now call upon Mr. Chaloka Beyani to make a presentation on--

Hon. George Nyamweya:

(Inaudible).

Mr. Nzamba Kitonga: Okay, that will be addressed in the afternoon session. In fact, I did not want to interrupt Mr. Otiende. I have just received one other Memorandum just now. Anyway, may I now call Dr. Chaloka Beyani to make a presentation on the systems of Government. Dr. Chaloka Beyani is from Zambia and he is a Lecturer in Law at the London School of Economics. He is one of our Foreign Experts, who was appointed by the Eminent Persons to come and assist us in this process. He has some broad experience in Constitutional Review Process, because he has been involved in the Constitutional Review Process in Zambia and in various other countries.

An Expert:

(Inaudible).

Mr. Nzamba Kitonga: Yeah, okay. So, I urge Delegates to listen to this presentation, because it is the most important, because it is about System of Government and that is where really the crux of the matter lies. Before he starts his presentation, one of our Foreign Experts, who has been away has also joined us, this is Professor Frederick Ssempebwa from Uganda. Professor Frederick Ssempebwa is an Advocate practising in Uganda, but over and above that, he took

over from me as President of East Africa Law Society and he was also the Chairman of the Constitutional Review Commission of Uganda and he steered that process successfully, until Uganda was able to attain a Constitution and so we asked him to bring this *juju* here, so that it might perhaps help us to finally resolve our problem. Dr. Beyani, please.

Dr. Chaloka Beyani: Thank you very much Chair for your very kind introduction. May I just say it is a great pleasure to be here and to share some ideas and perspective on System of Government. The purpose of this presentation is to lay the foundation for our discussion later this afternoon when we look at some of the proposals that have been given, but it is also to give you an indication of the work that we have done and of the systems that we have examined with a view to trying to determine what sort of system we could recommend when we complete our Draft.

Let me just refer to some remarks by giving a synopsis of the systems of Government and then come to the material that we have on the Hybrid Systems. This is a fundamental issue for us, mainly because the System of Government has to do with the relationship between the State's Government and its people and it seems that from the time of Independence, African States have been engaged in this exercise or at least the majority of them, without finding a formula and we are still looking for that formula that establishes a balance between ascendance to political power, the distribution of political power, the exercise of political power and the relationship between the people and its Government.

Before we start, I think it is important to just suppose the two older systems of Government before we come to the Hybrid and these are the Parliamentary and perhaps the Pure Presidential System in so far as any one might call it pure. With Parliamentary System, it is a relic of Western European States in their fight against despotism as well as absolutism. It emerged instantly at the time of the renaissance, the reformation and the dissolution of the Roman Empire and was pioneered by social movements and the number of people who symbolized those movements, much the same way as we are trying to do. So, people like Brazil, John Lock and others put forward the idea of the Constitution as a social contract between the governed and the governors and they established that relationship with limited powers on the basis of specific

grant theory i.e. what the Constitution does not grant, it does not permit. But these models still exist in most Western European States; at the very heart of it symbolically is the Monarch, the King or Queen representing a compromise at the time when the Hedo Lords were overthrown throughout Europe. So, although it is Parliamentary, it is actually a Hybrid in that particular stance, that it did reflect a compromise in the way in which power would be exercised between the Monarch as Head of State and the Prime Minister as Head of Government. It took different scenarios in the Westminster model; we find that there are direct elections to Parliament, the Cabinet and the Prime Minister are drawn from within Parliament and therefore exercise power on that basis. In Continental Europe the model varies slightly in the sense that the elections are based on proportional representation, rather than First Past The Post and also an important variation was made in the sense the Members of the Cabinet were drawn from outside Parliament in order to have an enhanced system of checks and balances. It is this model that found its way to us at Independence, handed down to us by the British. Most of the francophone countries had a Hybrid System in which there is a President as well as a Prime Minister. The model has survived from India, Canada, Australia, Malaysia, Singapore and others.

However, in Africa we found it fit to try and contextualize the system and the first argument was that, African Societies were so different and so polarized and they therefore needed a strong Executive System and the argument was made, therefore, for a Presidential System of Government. The result in Presidential System of Government was the Hybrid. It did not take into account the checks and balances that exist within the Presidential System nor did it take into account the checks and balances that exist in some of the Parliamentary Systems. So, we took what we wanted, modified it to suit our own premises and our own end. Just supposed besides that, of course, is the Pure Presidential System, the only model which perhaps we have seen in the United States; Mozambique has attempted to model its constitutional system on that basis in Africa and stands alone as the only country in Africa that is trying to emulate the United States. The United States model blows again in different historical circumstances, circumstances that were symbolized by the civil war, the need to have a strong Presidency, but they also visualized that they did not have Monarchs in the way in which European States did have. So, they found it fit to borrow elements from the French System which had a President and also to take elements from the Westminster model which has two Houses of Parliament at least., the House of Lords

being a symbolic one, but even today, there are some Ministers appointed from outside Parliament who are therefore nominated to serve with the House of Lords, which shows how the system has begun to reform itself and come to contemporary terms. So, the Americans, having settled on that system, they also decided on rigid checks and balances. Executive power is right in an all strong powerful Presidency and everything results around the Presidency, but because of that, the President is also open to rigid checks and balances. His appointments are scrutinized by both Houses to avoid cronyism, favouritism and the like. The President may be impeached for misconduct and you also have a powerful Judiciary alongside that and, of course, the rule of the Press and in modern history we saw Watergate and Nixon getting impeached on the one hand, on the other hand we saw a contemptuous attempt to try and impeach President Clinton which did not succeed. However, fourth aspect indicate how the system of checks and balances in that particular respect operate.

We then contextualize the system from the time of Independence which is where I had left it, that we have Parliamentary Systems and by about between 1970 and the 1980s we began to change again. So, the Hybrid model of the President, Vice President or Prime Minister begun to change and it changed more towards the line of the one-party state, where the Imperial Presidency begun to be consolidated and self perpetuating regimes then emerged throughout Africa and in some States the only solution, though ill-advised, was to attempt to mount military coups to get rid of such regimes. But such was the struggle for a system of Government that those techniques were resulted to. In the 1990s we then have a wind of change brought about by globalization, the collapse of the model in the most of the Eastern, Central, European regimes and I think for most African States and Heads of State, the turning point was the public executive of Ceausescu in Romania and people begun to think that they did not want to end up like that and therefore multi-partyism came back, not just in Kenya, Tanzania or Zambia. So, the social political movements can be traced across the board and placed in context.

However, what happens at this point, of course, is that we adopted multi-partyism without constitutional democracy and that is the real pitfall and what we are trying to do in looking for a Constitutional formula is to see a formula that contains the system of Government, that reflects the wishes and the will of the people is fair in the way in which it distributes and uses power, but

at the same time, it is anchored in the system of constitutional democracy, without which perhaps multi-partyism in itself becomes a system that is not complete.

That notwithstanding, let us see how the Hybrid measures out. The Hybrids become important at this stage mostly because of the fact that they are a compromise between the two extremes, between the Parliamentary System and the Presidential System. They have also emerged in particular historical circumstances whereby power is contested and the contestation of power either leads to instability or leads to violence in some respects and some of the Eastern European States have embraced the Hybrid model as a system. But they are also important because when we move from the Parliamentary System, we essentially embraced a Hybrid System of Government, carrying both the elements of the Parliamentary System and the elements of a Presidential System.

So, in our discussions as regards these particular models, the first model we have is that of a Presidential Hybrid. This is typical for example in the Wako Draft that we have, what Wako presented was a Presidential Hybrid. There is no dispute about the principles on which Executive authority is to be exercised, that seems to be fairly straightforward. There is not much dispute about the nature or composition of the national executive, apart from the fact that in the context of two, clearly Bomas did require that the composition of the national executive shall reflect the regional and ethnic diversity of the people of Kenya. The Wako Draft has not carried that particular statement but it is a statement that is worthwhile reflecting in the context of the post-electoral violence that were experienced. We also did consider in terms of 2(3) including a statement which essential is borrowed from the Tanzanian model, but the Tanzania model is unique in the sense that if the President comes from the Mainland , i.e.Tanzania, then, of course, Zanzibar also has its own role to play in Government and if the President comes from Zanzibar, then the reverse also applies. The way in which the Tanzanian model expresses that is in (3) where the President of the Republic is from one region of the Republic, rather than part, then the Vice President, the Prime Minister, the Deputy Prime Ministers shall be persons who are from other regions of the Republic, taking into account gender balance and equity. This is worth reflecting but it may also be a principle that is difficult to apply in practice. But as Experts we put the menu on the table and we let the politicians digest the food and see how far they will go

ahead and see if they will suffer from indigestion or whether their digestive systems are actually proper and running. But that is for you to consider.

In the next aspect that we looked at in the context of the role of the President - and you will see that the role of the President in terms of authority and functions remain the same throughout these models - the major characteristic of a Hybrid System is that there is shared executive authority between the President, the Vice President, Prime Minister or Cabinet Ministers. The way in which that authority is shared obviously varies from place to place and it is a matter of political judgement as to where the balance would lie. But there is no dispute in the fact that there should be a President. One resounding message we got throughout, was that Kenyans want to elect their President directly and, therefore, that is quite uncontroversial, but we might come back to the reasons for that, towards the end. What the President does as Head of State and Government is clear in this Hybrid because it is Presidential; the President combines both the petitional powers of the Head of State and the petitional powers of Head of Government while in the Parliamentary Systems these roles are split. Although the Monarch is symbolic, the Monarch is officially the Head of State and the Prime Minister goes to the Monarch in order to be able to form the Government and seek their permission formally. But in the Hybrid that we adopted, the roles become fuse; in the Presidential System in the US, the roles also become fused but they counter-balance by the fact that they were rigid checks and balances.

The functions of the President are also not in dispute and I shall not go through them, they are in (4). Presidential elections, we need not spend too much time about that, but it is really the relationship between the President and the Prime Minister that becomes an important aspect to focus on, which appears in the context of (6). Here in this Hybrid, the Prime Minister is accommodated within a Presidential System, so there is no doubting the fact that the power largely descends from the Presidency and the Prime Minister is part of an integrated executive operating under the orders of the President and therefore, the role of the Prime Minister here in (6) is merely to coordinate the work of the Ministries and the preparation of legislation and is responsible to the President. This is the model that emerged in the 1990s in places like Tanzania, places like Uganda where there is a Prime Minister, that it was clear that the role of the Prime Minister was to coordinate. But in bringing back the Prime Minister which had been discarded

at Independence, there is also the reality that the President needed help quite apart from the Vice Presidency that coordinating the affairs of Government and combining the functions of Head of State was something that was onerous on the Presidency and, therefore, the Prime Ministership came back to form a Presidential Hybrid. Other than that, the way in which the Prime Minister is appointed within this model is also important, that the President, because he or she wields executive power, proposes a Member of Parliament for appointment as Prime Minister and this is the person of the President own choice; it has nothing to do with political majorities in Parliament. The President has absolute powers of appointment and the model, therefore, works in that particular way.

The next point of interest is the removal of the Prime Minister under Section 10. The President may remove the Prime Minister from office absolutely when-- This was an original Draft, but in our discussions we thought that because this is the Presidential Hybrid, the President clearly ought to have powers to remove the Prime Minister at any time, whether they consult Parliament or n, and also that the President is part of the Cabinet, so the Cabinet consists of, it should read, (a) *“the President, Deputy President, the Prime Minister and the others and that the President shall preside over the meeting in Cabinet.”*.

We then move to the next Presidential Hybrid, where again the principles of executive authority, the nature of the functions exercised by the President again are not in dispute. What changes more is the relationship between the President and the Prime Minister and perhaps it might be useful to go to that immediately rather than waste time covering all the things that we have covered so far and in that regard Section 6 becomes an important point of reference. *“There shall be a Prime Minister of the Republic who shall supervise the day-to-day functions and coordinate the work of Ministries and the (? legislation and is responsible to Parliament.”*. So, two important things here change, that the Prime Minister moves from simply coordinating the work of the Ministries but actually on a day-to-day basis supervises the work of Ministries as well as coordinating them. So, this is a relatively more powerful Prime Minister than the previous one. The Prime Minister here also becomes responsible or accountable to Parliament, rather than the President, in that Parliament is emerging as an institution which wields its political authority and which in its own right requires a Prime Minister to be accountable to it.

So, stronger elements from the Parliamentary System begin to emerge, whereby the Prime Minister drawn from Parliament has to exercise more responsibility and accountability within Parliament. The removal of the Prime Minister then also becomes an issue in turn which is that the President loses the power to dismiss the Prime Minister out of his own discretion, because of the political power and the role that the Prime Minister exercises in supervising and coordinating Ministries and, therefore, the President may propose to the National Assembly that the Prime Minister maybe removed and if the National Assembly does agree, you know how that process operates, how blocks in Parliament, the lobbying in the corridors over tea-breaks, operate and that would be the function of the Parliament to try and address. However, equally in terms of the Cabinet under 11, because this Prime Minister supervises, what notes are reflecting in 11 and what we reflected at after our discussions, was that the Prime Minister would be consulted on the appointment of Members of the Cabinet, because after all he or she does supervise their functions and it is important that their own persons are also reflected in the appointment of the Cabinet.

We then perhaps move to the Presidential Hybrid Three, which begins to change, in those respects that are important to focus on and again those are in relation to the Prime Minister under 6. *There shall be a Prime Minister who shall have authority over the control, supervision and execution of the day-to-day functions of the Government.*” So, here a further dimension is added i.e. the Prime Minister is actually in control of the process of Government and the President is beginning to yield more and more responsibility towards the Prime Minister in that particular respect and although this may not be immediately clear, it is the case that a number of Hybrids do have these kinds of models whereby, although the President still has executive power nonetheless, a great measure of that executive power is exercised by the Prime Minister. We also thought and we came across at least two or three propositions that emerged, that the Prime Minister may be directly elected and we thought we would reflect on that. However, in reflecting on that we also came not so much to the conclusion but thought loudly, that you would have two centres of power directly elected by the people and it would be difficult for them to work together, because the Prime Minister can easily say, well I am also elected by the people, so what is to stop the Prime Minister from challenging the President. Although this is not the

model that we have at present, the fact that the imbalance in the outcome of the elections produce two centres of power, you see almost at the beginning of the Coalition Government the problems and tensions between the Principals reflecting the fact that each one of them actually believes they have the commands of the will of the people to exercise the power that they do exercise and that obviously carries a certain danger. It also follows that, in that model, the Prime Minister would probably only be removed from office by impeachment, because he or she is directly elected by the people. They may not be dismissed by the President directly, the National Assembly may not also dismiss them and so reflections are to be given on that.

Then we have the Parliamentary Hybrid finally to try and relief your boredom on this aspect. The Parliamentary Hybrid proceeds from the fact that, again the principles of Executive authority are the same, the role of the national executive is the same, the authority of the President has not changed but what changes more is the way in which first of all, the President may be elected. The particular aspect or feature of this system is that the Presidency this time is accommodated within a Parliamentary System rather than the President accommodating a Parliamentary System and the Prime Minister. So, more of the elements from the Parliamentary System are prominent, are in relation to the Presidential System and, therefore, the first aspect that might be considered is how the President is actually elected and in some of the models that we looked at, the President maybe directly elected as in the case of Ireland.

Let me try and just get there, sorry. Okay, 5(1) symbolizes that, that the President shall be elected by Parliament on the basis of proportional representation. Now, this indicates that the measure of power actually gravitates around Parliament, but it may also be that Parliament is sufficiently representative such that the President does not need to be directly elected by the people and of course we have India as I mentioned as one of the epitomes of that model. We also have not very far from us Botswana, we also have South Africa, whereby even if Presidents of Botswana and South Africa are referred to as Presidents, in fact, they are Prime Ministers, because they are elected by Parliament. However, the systems of election obviously vary. In India, there is proportional representation which is that the President is elected by both Houses of Parliament on a proportion of the votes obtained. In Botswana as you see towards the end, each MP, upon standing, will indicate which Presidential candidate they support and if the majority of

the MPs supporting that candidate are elected, then the President stands elected. In South Africa, the MPs elect the President directly, but very often this would be the leader of a Political Party obviously that on a proportionate basis has the majority of the votes in the Parliament. So, it is important again to see how these variations operate in so far as we attempt to get the models that we are trying. The only question mark against that model is the explicit wish of the people in this country to elect the President directly. So, we have to think about that particular aspect and the way in which others operate. In Ireland too the President is elected directly, although it is a Parliamentary System, as I said, the Law Society in Malaysia, even in the Monarch is elected directly, because people want to elect, you know, their National representative, although they may not have executive power as such, but that executive role becomes a very, very critical one.

There are also further issues to consider in this model, which are that at this point the person who has the majority of seats in Parliament obviously becomes the Prime Minister immediately. So, the President simply proposes to appoint this person on the basis that they have the majority of the seats in Parliament. But there may also be other variations to look at within this model and these variations occur essentially in the system of delegation of power as between the President and the Prime Minister, which is that the President may delegate his powers constitutionally to the Prime Minister and others or the Prime Minister and others may exercise power on behalf of the Government or the President may act only on the advice of the Prime Minister and Government, especially in key particular areas.

So, to conclude this aspect where does this then take us to in terms of thinking about the System of Government that we may embark on, having looked at these models. I think it is quite clear that a directly elected President is a demand that has to be fulfilled and I do not think there is any way of going around that, unless it is the Parliamentarians and the politicians somehow wave the magic wand to try and persuade the people otherwise. The second thing that is important is that, there is a clear stand against an Imperial Presidency, in so much as the people want an elected President, but it also seems quite clear that the President should have limited powers, going back to the idea as posed by the originators of the models of constitutionalism, yes, stand against absolutism and despotism, that the power should be limited, they should be checked, there should be a constitutional system.

As the late Professor Okoth Ogendo so famously said once, that the problem is we adopt the Constitutions without constitutionalism i.e. without the idea that Constitutions actually limit power and we have operate within the limits of that particular power.

It may also be necessary to think about separating out the functions of Head of State and the functions of Head of Government. Now, the moment you touch the subject people immediately say, aah, you going ceremonial. But, in fact, as you have seen in all these models, the functions of the President have stayed the same, whether it is a Parliamentary Hybrid or whether it is a Presidential Hybrid of some sort and if you did examine the South African Constitution too, you find that, in fact, the powers and functions of the President are less than the functions that are specified in either of these models and yet they are still an executive President so-called. So, I think we should exercise ourselves of the labels i.e. ceremonial, executive and look at this in a sparely holistic way, in terms of balancing out, what are the functions of the Head of State? The Head of State should concentrate on building the State, reconstructing it and making sure that the State is functioning. A Head of Government must concentrate on running the basics of Government in order to fulfill the expectations of the people, but within that whole system, of course, there are checks and balances as between the Prime Minister and the President.

I think it is also important that there is a qualified power of appointment on both sides. I think this has been a huge problem throughout Africa, whereas in the original Presidential model, the power of appointment is checked. Some Parliamentary Systems have also now embraced that particular idea and I think it is important to avoid political patronage, cronyism, ethnic hegemony that the Prime Minister may recommend to the President persons for appointment. The President may act on that recommendation or may be obliged to act on that recommendation, but neither of the two of them would have an absolute power to appoint and that is the check and balance that is worthwhile considering, so that the resulting appointments, even as they are ratified by Parliament are at least checks by both the appointing authorities. I think it is also important to consider finally as politicians that when we look at Constitutional system, as Otiende said, we look at how this is going to favour x. We look at the political circumstances of the moment, but we do not look to the future and the primary question that embraces us is, essentially how does

this Constitution enable or disable me from gaining power? But politicians never think about losing power and I would like to suggest that the key question for us to ask ourselves, if I am not in power, would I live with this Constitution? What would it do for me in terms of the checks and balances, the fairness in the rules that would create a fairly level playing ground, so that those with ability in political terms, those who may persuade people to vote for them, can do so without the Constitution being an impediment? So, the ball is in your court, but it is not yet in your hands, because it is in your hands when you actually agree the rules of fairness and within the rules of fairness, you can play hard ball, it is all fair, at least you know, the ground is level and I think that is the proportion that I would like to leave us to think with. Thank you very much. *(Laughter)*.

Mr. Nzamba Kitonga: Thank you *Daktari*. The other way that Honourable Njoki Ndung'u has put this issue of how comfortable you will be with the Constitution is to assume that your work enemy becomes the President or the Prime Minister and if you are able to live with that, then you have a good Constitution. The other lesson that emerges from Dr. Chaloka's presentation is that we must avoid labelling a system as ceremonial. The devil is in the details. It is quite possible to have a Presidency with Executive Constitutional authority and it is also quite possible to have a Prime Ministerial system with some limited authority and it is quite possible for those two offices to work together, without the assumption that one is ceremonial. So, as we come into concrete discussions in the afternoon, I hope we will be able to benefit from that presentation and understand that this idea that a Presidency is ceremonial should not always be the case. So, I shall now invite a few comments, then we break for lunch and we now come for the substantive presentations by Political Parties. So, I want somebody who has not spoken. I will take you, then you. Yeah, then after that I will take *Mheshimiwa* Leshore.

Mr. Japheth Koech: Yeah, I would like to--

Mr. Nzamba Kitonga: Would you please state your name and party?

Mr. Japheth Koech: My name is Koech from AGANO Party. I would like to give thanks to God who is watching us and has more interest than us, more interest than the Committee than the

Committee of Experts for the stability of this nation, for the posterity of our people. Secondly, I want to appreciate the work of the Committee of Experts,. We have seen that you have identified us as an important entity as Political Parties, drawn from the speech of Dr. Ekuru and the Chairman, that the Political Parties will play a very critical role in synergizing and reconciliatory-- We have seen a picture, how the country had been polarized and went into mayhem. I want to go now to the point that Mr. Amollo had mentioned, that there were contentious issues. One of the contentious issues that he spoke about as resolvable is the one of Kadhi's Courts or Religious Courts. I would like to be very fundamental in this issue because I represent not only AGANO Party, but I represent also the Christians. There is a very great danger and within the question cycles now, not only-- The eye is focused on the Chair because you had made some statements that have displeased the Christian fraternity. I was in Nairobi the other day and they have begua to, you know, look at you but not in a bad way, but to pray for you. *(Laughter)*.

Mr. Nzamba Kitonga: I need prayers.

Mr. Japheth Koech: The Constitution is a very serious issue that even the Christians are planning demonstrations, because if we would like to make this nation a stable nation, these contentious issues of Religious Courts must come to the people. You say that it is hidden, it should not go to the parties, but I will tell you, right now the over 80% Christians are looking at all Political Parties very critically and I would like the Committee of Experts, if you want to leave posterity in this nation, if you want to leave a legacy, as you have said it, we will really urge you – I am representative, I have got even many calls from Nakuru and other areas - that we would like you to underline religious courts and make it very, very important and highly contentious issue. The other one is the right of marriage and the other one is the issue of abortion. So, I am just saying that so that you may put it as a very critical issue.

Ms. Atsango Chesoni: Fine.

Mr. Japheth Koech: Thank you.

Mr. Cyprian Nyamwamu: Mr. Chairman, thank you so much. My--

Mr. Nzamba Kitonga: Just a minute, just a minute. I am not making this. Actually, you are going to say something, just a minute. Political Parties, Honourable Leaders, you will have time to comment on the issue of the Kadhi's Courts but we need to inform you that our decision not to categorize it as a contentious issue was based on the written Memoranda that we received from Kenyans, the overwhelming of which submissions did not categorize that issue as contentious, therefore we did not have the statutory mandate to declare it a contentious issue, based on the Memoranda that we received. In fact, most of the Memoranda alluded to the fact that the Kadhi's Courts have been with us for the last 48 years. They have not caused us harm. They are about the personal Law of Muslims. They have not interfered with the Christian belief and so there were even questions by the Muslims who were asking Christians, like Christmas Holiday is like Law in Christian countries, Christian Religious Education is taught in schools and they are not quarelling about that. They were talking about Sunday being a public holiday. So, maybe in your thinking you might be able to consider that when you give your presentations, both sides of the scale, so that Kenyans can come closer to the truth. They are of course those who are swearing that if the Kadhi's Courts are in that Constitution, I will not vote for the new Constitution, which means we will be left with the current Constitution which has the Kadhi's Courts and an Imperial Presidency, therefore you will be voting for both. May I now have the next question?

Mr. Cyprian Nyamwamu: Thank you, Mr. Chairman, I do not have a specific question, I wanted to appreciate the presentation by Dr. Chaloka Beyani. My name is Cyprian Nyamwamu, I am representing Safina at this meeting. I just wanted to make a very specific comment that the challenge we havewith the Hybrid System is that it does not solve Kenyans two most radical and difficult challenges and problems of governance.; separation of powers and checking balances which indeed has bred in this country a serious culture of impunity and lack of accountability. The political patronage cronyism ethnic hegemony that you talked about are indeed because of that fusing of these systems into Hybrid and it does not solve our problems.

As Safina, our idea is that we need to be candid at this point in history and say that, if we are going to have a system of Government that does not resolve these climates where political corruption, impunity, patronage and ethnic hegemony, that becomes a reality, we may not be solving a problem. Therefore, very briefly to say that if we are going to move forward in terms of improving our governance and entrenching our democratic governance, we need to say that if Members of Parliament are elected to the House, they shall remain Members of Parliament and let the Cabinet consist of Members who are outside of Parliament, so that then Parliament can be able to have powers to check and have a normal control over the Executive. The attempt to-- I am not accusing you, I am saying that since Bomas, there has been an attempt to fuse and create a Hybrid System where then you have the both Members of Parliament, like the case is now, where Members of Parliament are also Members of Cabinet and Ministers tend to use their offices indeed to serve their very selfish and very narrow interests as individuals first of all, sometimes of ethnic communities. So, we need to see a greater movement forward as a country and moving towards the Hybrid System, as it has been the case since Bomas, may not be solving our problems. We recommend a way where we have a choice and this historical opportunity has to be taken, where we choose whether we are going to have separation of powers under Presidential System or a Parliamentary System. Thank you.

Mr. Nzamba Kitonga: Honourable Leshore.

Hon. Sammy Leshore: Thank you very much, Mr. Chairman. My name is Hon. Sammy Leshore, former MP for Samburu East and National Chairman--

Mr. Nzamba Kitonga: I think you are holding the mic in a way that you cannot be heard and we need to move--

Hon. Sammy Leshore: I am the National Chairman of The National Vision Party.

Mr. Nzamba Kitonga: I think you need to move your hand below the--

Hon. Sammy Leshore: Thank you Chairman.

Mr. Nzamba Kitonga: Hmm!

Hon. Sammy Leshore: Thank you very much. Mr. Chairman, first I would like to thank you and your Committee for calling us to this Retreat and my prayers are that at the end of this Retreat we shall come out as Political Parties and Committee of Experts to tell Kenyans, at least we appreciate something. Let me not comment on the contentious issues now, because I think I will have time in the afternoon? But I want to thank very much Dr. Beyani.

Mr. Nzamba Kitonga: Chaloka Beyani.

Hon. Sammy Leshore: Beyani. Mr. Beyani has given us some two or three Hybrid Systems. I am not as learned as him but at least when I was learning in Europe or working in Europe, one of the best governed countries in Europe is Switzerland and I thought that was one of the best Hybrid Systems in Europe. Could you please shed some light on that, so that we can compare the Hybrids you have given us and that of Switzerland? Thank you very much, Chairman.

Mr. Nzamba Kitonga: I will take Mutakha--

A Participant: Lady.

Mr. Nzamba Kitonga: Hmm! Where is lady, I have not seen. *Ama hii yaa ndiyo nafikiri inavuruga mimi.* I will take you then Mr. Mutakha Kangu.

Ms. Pamela Mburia: Thank you, Mr. Chairman; I am speaking as a representative of Mazingira not so much as a lady. My name is Pamela Mburia. Two concerns for me, first of all, it is about, I want to--

Mr. Nzamba Kitonga: Excuse me.

Ms. Pamela Mburia: Yes.

Mr. Nzamba Kitonga: Is it possible to switch off this light or it is in use?

(Inaudible Responsef).

Mr. Nzamba Kitonga: Oh, okay, fine. Continue then.

Ms. Pamela Mburia: I would like to underscore the importance of Civic Education, first of all, the presentations we have had but I am not commenting on those right away. Civic Education, I know a lot of the issues that we are discussing and a lot of the issues that stalled the process are because of lack of Civic Education or inadequate Civic Education.

(Tied)

TAPES 7 & 8

Tapes 7 & 8 – Political Parties – 02.09.09

(Tied)

Ms. Pamela Mburia: Even listening to people in this room, I know as representatives of the people, as leaders of political parties we have the task of educating Kenyans on the constitution making process. The fear would be that we are already coming from various directions. How are we going to account for that education? What is the monitoring process that has been put in place by the Committee so that we are all speaking the same language?

I know the media role is very important as well and I am glad that you have a media team on the Committee but is the media also well equipped to handle this? The various FM stations, all the media organizations of the journalists, let us also rethink their contribution in this. I know that in responding to the grapevine, the press conference, I know the Vice Chair was very categorical on the role of the media, the misinformation or allowing themselves to run along with the grapevine.

How are we going to handle this? I want to believe that the team or the media can be given the relevant skills to handle this.

I want to address my colleagues in this room, the representatives of political parties. We are talking about a representative process and when I look at this forum, I am not seeing that, Mr. Chairman. I want to believe that the political parties have the various entities that make for a representative process. Let us walk the talk. We are making a constitution, so we begin from how we are making it, not the product but the process. Thank you very much.

Mr. Nzamba Kitonga: Mr. Mutakha Kangu.

Mr. Mutakha Kangu: Thank you, Mr. Chairman. My name is Mutakha Kangu. I would like to raise one question because looking at the document that Dr. Chaloka has presented to us, one gets the impression that you wanted to place before these members some working material to help them discuss--

Mr. Nzamba Kitonga: No, it was informative material, that is the word.

Mr. Mutakha Kangu: Yes, fine. Informative material and my question is that the models you have presented with some drafts are only the hHbrid models. I do not know why it would not have been reasonable to also present a model for a Presidential system and a model for a Parliamentary system so that these members when they are discussing, they have information on all the available systems. If we were to say for the Presidential, this is how the draft would look like, if we were to say Parliamentary, this is how the draft would look like and if we were to go hHbrid these are the various models for a Hybrid system, so that they are able to look at all of them.

Number two, I would be of the view that if we had those other two models, perhaps people would start understanding that the emphasis on direct election of the President may be a little overstated in the sense that the real model of the Presidential system, the American model, actually the method of election of the President is a mixture of participation by the people and an

electoral process. So, it cannot be described as a system in which the people directly elect the President.

Number two, if you look at models of Parliamentary systems, you will also be able to see that there are Parliamentary systems in which the people elect a party which has a leader and by so doing they are saying we are electing this party, if the party wins the leader of this party will form the government. Effectively, they would be electing that person directly. So, I would suggest that perhaps we have some drafts on the two.

Mr. Nzamba Kitonga: I am not sure we have gone carrying those ready drafts but Chaloka Beyani will answer that when it comes to his time for answering. Yes?

Mr. Geoffrey Makwaro: Thank you, Mr. Chairman. My name is Geoffrey from Nuru Party. Mine is just a brief maybe addressed to you. You have called us here so that you may hear our views as one of the groups that you are consulting. I would like to maybe request you to allow us, the way we have said, you listen to our views. If you are going to discuss about them later -- Previously we have seen the confrontations you have had with some groups especially, let me use an example, with the religious group. It is because maybe you dismissed their views even before they came to you, You know, once you have a stand it does not matter what I tell you, you will not buy it because you have already taken a stand. So, like that issue you would not sort it out the way Ekuru said that they are doing consultations. You will not go to consult with people who are already hostile, who perceive you as an enemy. Like now those religious people, it is not easy to get them to the table and sit maybe the way we are seated because they perceive you as hostile to them. The first approach when they came, you had already taken a stand, you were explaining a stand to them before listening to them which was a problem. So, we would like you, as we give our issues, also do not take that step. Do not explain what we are presenting. Let us present to you then if you dismiss it, dismiss it in your own way. So, listen to what we are saying. That is my comment.

Mr. Nzamba Kitonga: Yes?

Mr. James Ndung'u: Thank you, Mr. Chairman. I am James Ndung'u Mungai from Kenya Solidarity Movement. Most presenters actually have presented very interesting presentations but I would like to point out that one area is very much absent apart from Ekuru who perhaps mentioned something little about it. For example, in the case of the Constitution of Uganda, the historical background of Uganda is far much different than the one of Kenya. The historical background actually is the one that develops the historical experiences of the society or of the people. It is actually the one which culminates into constitution because you will find that they will be guarding against such certain values because of historical experiences. Even if you look at the Constitution of America, they were very bitter against the British kind of rule and they were very serious. If you look at the Constitution of America you find they were trying to guard against anything that would look as if it was coming from England. That is what we call the commodity of price. They wanted to guard.

So, it is very important also to look at our history, otherwise, we may have so many crimes of what we call models. We may have several of them but none of them may apply to our case and especially as we are coming from the experience of the crown colony and the way crown colony was ruled and especially after the Independence of America, is different. It is actually very important to critically look at our history so that we may know where we are going and where we are coming from. Thanks.

Mr. Nzamba Kitonga: I will take one from this side and then we will break for lunch and come for the substantial presentations. The gentleman there.

Mr. Evans Misati: Thanks, Chair. My name is Evans Misati. I am the Chairman for Progressive Party of Kenya. Now, I am happy that you have called us here and when I look around we have people who can give you good views but I have one problem. If I look at the presentations from Ekuru and Dr. Beyani since morning and the way the documents have been put, if anybody looks at how we present our documents in terms of drafts and constitutions, we are actually the best. But the problem we have now is actually implementation or action of the Constitution or whatever we are doing. For instance, if somebody looks at our current Constitution, somebody would want to give all manner of amendments or kinds of putting where

we have mistakes. But take for instance, if somebody looks at today's paper, we have the issue of Ringera and we are talking about the Executive and checks and balances.

The current Constitution provides that the Executive has what we call the Advisory Committee where he has to seek and do all this. Even before the Advisory Committee sits, already we have had the gazettment of Ringera. Now, the question comes, the checks and balances are in place, the roles are there but the problem is that they are not being followed. Then my question is, why are we here? Why is the Committee of Experts even in place if we know that whatever you will come up with nobody will follow it? Kenyans forget very fast. This thing of Ringera by next week, I am sure not even the week after we will have forgotten about it and we will have gone to other things. So, my appeal is to all of us here and to the Committee of Experts, can we entrench something in the constitution or whatever we are trying to do now to observe or rather to say that whatever we are going to come up with everybody is going to respect in terms of implementation. Thanks.

Mr. Nzamba Kitonga: That is why precisely all the drafts talk about impeachment of the presidency when issues like those arise which is not in the current Constitution. Let me ask Dr. Chaloka Beyani to now respond briefly and we break for lunch then we come for the plenary.

Dr. Chaloka Beyani: Thank you very much, Chair, and thank you very much to those who have put questions and comments. I may not be able to deal with them as a whole but at least I will try and give a perspective.

The first issue about whether we go absolutely Parliamentary or absolutely Presidential, of course is an important one and in the light of the other question that was asked as to why we have only considered Hybrid, I think I can put those two issues together. We did consider the Parliamentary system from India, Ireland, France and the UK in stone, the way they are. We also considered the US Presidential system but we did put some emphasis on Hybrid because not much is actually known about how Hybrids work and people think that the Hybrid is one hybrid but as the models show, there are different types of Hybrids. So, that seemed important for us to highlight.

The second thing is that when we went down and up the country and got people's views, we got the impression that depending on where particular political support existed, you also had a preference for a certain system of government and of course that is for the politicians to exercise in terms of judgment but there is the danger that once you go one way or another, you polarize the whole country and this is why Hybrid, to some extent, emerged as a way of compromise but in a way which does not sacrifice the elements of either system. So, on that particular issue I think my personal thinking, which fellow Experts would also have their own opinions, but my personal thinking is that the system of government adopted in the end does not really matter. What matters are the principles underlying it and the checks and balances underlying it.

I also think that if you have a Hybrid, then you should also have the checks and balances that exist both in Parliamentary as well as in Presidential systems and I think that one of the reasons why we have become somehow unsatisfied of Hybrids is that as I said, we took what we actually wanted in ways that would enable us and those in power to run the State without irritation or control and I think that is where the problem actually lies, that we are having again to look at each one of those models and see the checks and balances and see the implications but at the end of the day, I think one is also aware of the fact that you probably do not want to go so far back as the debate that existed after Bomas and also given the way in which polarity tends to exist.

In so far as the Swiss system is concerned, we have not examined this in detail and I cannot say I am a great expert on it. There is actually an invitation from Switzerland on the table for the Committee to travel, but Switzerland is a very unique country whose political system is based on its political as well as socio-culture. A country prides itself on being neutral. It also prides itself in being peaceful. Its history is that it was drawn out of several cartons and operates more or less a federal system of government which perhaps is unique in the world. It has the monarch as the Head of State and I was actually privileged to meet the Monarch two years ago when I went to Switzerland for a seminar that was held to mark the first visit by the King of Norway to Switzerland and I was part of that discussion in terms of systems of government and human rights and other issues.

So, the Monarch is very ceremonial, more ceremonial than even the Queen who takes a very low back seat. There is head of Government who is actively in charge of Government affairs, there is an Executive council drawn from outside Parliament. The way in which Parliament is elected combines proportional representation and more based on the canon system, so each canon elects its own representatives that go into Parliament. The last time I discussed this was probably about 1993 with one of the great constitutional experts, Walter Kelling from Switzerland and if you are really interested in discussing that, Walter Kelling is one person who would come and unravel the Swiss system of government to us.

There are then the issues of working materials and I think I have related to this already in terms of what we looked at and why we did not produce the Presidential or the Parliamentary, that they are cast in stone. You can actually look at the cNstitutions themselves from India to Ireland to France, to the more modern Eastern European States such as Poland or Slovakia all of whom have Parliamentary systems but perhaps in a slightly more hybrid manner.

There was an issue about the historical circumstances. Of course, each Constitution does reflect the historical circumstances of a particular country and we have to reflect on our own historical circumstances that for 40 years - and Kenya is not alone, Zambia is still in the same boat-- As we are sitting here trying to look at what sort of Constitution we should have, the Zambians are also having exactly the same exercise which points out the fact that quite a good number of African States are still in search of the constitutional formula on which to base their systems of government. But, our historical circumstances in rejecting the Westminster model were based upon the idea that power could not be shared between a monarch, as in the case of Uganda, the Prof is here he can tell you in great detail about how Obote's Prime Minister and the Kabaka who was King did not work together and eventually Obote thought that it was time to get rid of the King and become Prime Minister-- So, to some extent the systems boil down to difficulties between political personalities. We also saw it in DRC, Zaire between Lumumba and Kasababwe's presidencies and the tensions between those two personalities that led to a greater crisis.

So, the other issue for us as politicians is how do we manage crises within a constitutional system because when crises develop we tend to forget and negate the Constitution and take high-handed measures? Which then leads to the last question about how does the Constitution become respected by the people, by those in power? I think the Chair did reflect on that particular aspect and it is an aspect which is more about political culture and political behavior that even if Constitutions exist, somehow those in charge of State and Governments seem to operate on the basis that there is inherent or residual power which is not in the Constitution or if it is in the Constitution, somehow the inherent residual power can be overridden and hence the failure to follow proper processes and procedures. But then it lies down to the political parties, it happens primarily, I think, to raise issues about why the Constitution is not being observed, it also comes down to Parliament in the Presidential system. As the Chair said, you would have impeachment proceedings immediately in systems that work. In Parliamentary systems you may have a vote of no confidence brought immediately visiting the prime minister or the person whose government has not operated. But part of the difficulty is that our institutions are subordinated by individuals and when they are supposed to operate as checks and balances, the individuals dominate them and I think this is the sense in which the whole movement against an all powerful President or an all powerful Prime mMnister is coming from not just in Kenya but you see it resonating throughout the more recent democracies in Africa as well as in Eastern Europe. Thank you very much.

Mr. Nzamba Kitonga: Let me now ask my Deputy Director to make or two house-keeping announcements and then we break for lunch.

Ms. Veronica Nduva: Thank you, Chair. I will be very brief. The first one, we invite the team for a group photo immediately after this before we proceed for lunch, there will be a group photo outside there. Lunch will be served at *Bustani Garden*, not where you had breakfast but on the other end. There are some people who had breakfast at *Bustani*. There is *Diani* and then there is *Bustani*, but all of us will have our lunch at *Bustani*. Then I wanted to also take the opportunity to make the announcement about the package. All the meals will be served with a soft drink which in this case means either a soda or juice. You are welcome to partake any other but that will be billed directly to your account. The hotel has a tradition where they name bars depending

on the process. So, for those who would like to enjoy drinks at a discounted rate, they have come up with *Katiba* Bar which for those who are familiar with the hotel it is the *Pango*, in the main area but it is downstairs where they are going to serve your drinks at discounted rates.

The other issue I wanted to draw to your attention, the programme does mention a cocktail. So, you are kindly welcome to that cocktail towards the end of the day. I am sure it might be much later. The Director will be hosting the cocktail. It will be held towards the Beach area, there is a place there, you will be directed but it is at the Beach area and after that we will have a special dinner with a live band. So, I hope it will in some way contribute towards the theme of the Conference, ensuring consensus. (*Laughter*).

Finally, for some of us who have been receiving some sms alerts on some Tsunami, that warning has already been lifted. The hotel has a warning system and it occurred very far in Indonesia about 10,000 miles away which is about a 15-hour flight to Kenya. So, the hotel has assured us that it has no impact and that has since been lifted. We have cross checked with all relevant departments, so, there is no need to worry. Otherwise, welcome for lunch, *bon appétit*.

Mr. Nzamba Kitonga: Thank you. We will resume at 2.30 p.m.

Meeting adjourned at 1.10 p.m.

Meeting resumed at 2.35 p.m.

Ms. Atsango Chesoni: Please, could you help us to whip the rest of the colleagues who are missing in action so that we can get started? Thank you.

Good afternoon ladies and gentlemen. I think I am going to start because as we have indicated in the morning, we really wanted as much as possible for this to be your forum and for you to be the ones who are speaking and after having had to listen to us all morning, I think it is only fair

and important that we get started. Just before we start, the Director has a couple of announcements that he needs to make and then we will go into the presentations. Thank you.

Dr. Ekuru Aukot: Thanks, Madam Vice Chair. Just quick ones; the hotel has a tradition of giving alerts for all its residents and one of the alerts that I have just received is that you should stop worrying about power cuts in Nairobi from early next month first week because now Kenya Power has bought a lot of generators, I am told. So, I am just letting you know.

The second announcement is to announce to you that some of the Media Houses still think they need to afford equal opportunity to all the political parties present for a quick interview. So, we encourage that all the Party leaders or Secretary Generals of parties at least afford the media some five or ten minutes of their thoughts on this process. I think it is good for you, good for us, good for everybody else. So, the Media is present throughout this session.

Thirdly, of course, is to announce that for our Muslim brothers, there is the *Cascada* room just by the main reception of the hotel where they will be preparing your meals for breaking the fast for those who are fasting, is it called *Iftar* and *Dakor*. So, that room is specially set for you, so all the foods will be there. Then, of course, lastly is acknowledge the presence of Honorable Cyrus Jirongo who was not here in the morning from KADU, if you could just wave for people to see you. Thank you.

Ms. Astango Chesoni: Thank you very much, Ekuru. Just so that we are all operating from the same page because we all know and understand that when we do not have a clear understanding of how we are moving it creates problems for all of us, so, first of all I would like to say thank you for accepting our invitation and being here today. I think the workshop has been very well attended and what we are going to be doing in this session, as we had discussed earlier in the morning and what we had proposed, from now on until tomorrow, really what we are going to be doing is hearing from you as political parties, what it is that you would like to present on the issues of contention, the issues which Otiende had gone through earlier in the morning that we had identified as being the Chapters in contention. If you have a few other things that you would like to mention you are free to do so. There is only rule that each party is going to have a

maximum of 8 minutes. The reason we are doing it that way so that you do not think we are being mean is that we would like to hear from everybody. So, we are just going to start today, then hopefully if we have some extra time over and after we have heard from everyone, we will then be able in the course of tomorrow at some point in time, then maybe can consider having things happen in a different way. Are we all agreed on that?

Participants: Yes.

Ms. Atsango Chesoni: So, it is up to you as a party, we assume that you have agreed amongst yourself who amongst your representatives or if both of you are going to do it. Our request is that you highlight. We are also interested in hearing, in terms of the proposals that you are making, why you think that. If, for example, you think that Kenya should be a monarchy, why do you think that Kenya should have a monarchy? Okay? So, it is important to give us a sense of why you think that that particular system that you are suggesting or why that particular type of legislature or why the transitional clause that you are suggesting is for you very important, why that needs to be considered or why whatever issue it is that you are raising that may be outside of the contentious issues, is an important issue to be resolved. Okay? All right, and we were going to be going to be quite democratic, as I said the only rule is that you are not going to be allowed to speak one more time during the next three sets of plenaries until we have heard from everyone. So, it is a bit of a free for all but the one rule is that I do have a list or we do know who all the registered political parties are that we have invited. So, just as per normal because everything is being document on Hansard as required by law, we will need you to state what your name is and the particular party that you are representing. Okay? So, who would like to have the first go? We will have Mtumishi Kathangu and then you, Sir, please and then I will come to Honourable Muite and you, Sir, please in the black shirt at the back. Can I take another four after that please? Thank you.

Hon. Njeru Kathangu: *Asante sana*, Madam Chair. The first thing, Madam, I would like to say is that I know this morning when I talked about the agenda some people did not take it very kindly. They thought that I was going to derail discussions *kidogo* but I meant well, very well and even now I mean very well when I say that for 47 political parties to take ten minutes each

will require four hundred and about eighty minutes, that is about 8 hours, and then it means therefore by the time we are finishing tomorrow we may not have enough time to discuss anything else but those general comments which I am not sure how they are going to pacify the political parties.

Two, Madam Chair, that the political parties according to me continue to be very central to this process and because they were missed out in the Act, I think it is only fair that the Committee of Experts kind of constitutes some kind of forum for political parties to belong to a certain process so that they are and feel part of this. Parliament refused to recognize them, I think it is only fair that the Committee of Experts-- Like my brother Mungatana was saying this morning, instead of just having the people's forum, let us have the political parties forum that is going to be the debating forum for you to be able to polish whatever else that comes from the political parties. That is going to accord you a political mileage.

The other thing is that I hear you saying that land is not contentious. That surprised me. It surprised me because all the quarrels in this country-- In fact, I think Agenda Four in the Accord looks at land more centrally than anything else. Madam Chair, when you look at a country where one person has got 650,000 acres and that the whole Coast Province, particularly this area, has been taken over by foreigners, it is really important to take land as contentious and this thing is going to bring us fights, struggles, wars, quarrels until this country will become a laughing stock here. So, it is important to discuss land so centrally that Kenya can be able to move from where we have always been. We are talking about Mau, we are talking about everything else and all that is war.

The next point I want to bring here is that when looking at the three, the system of government, the Devolution and so forth, according to me this nation needs to look at representation because it is going to sort out all those systems, whether we are talking about monarchs, we are talking about Executive, we are talking about Parliamentary, but we have not considered the representation proportional whatever, then it becomes very conflicting.

One, if you take Embakasi constituency with three hundred or so thousand people and you are taking another one with seven thousand, both of them are represented in Parliament. There is no way we can deny that the one with fewer people will feel more powerful than those with greater numbers. If you have got a President from a constituency with seven thousand voters and you deny a person with three hundred thousand voters that opportunity, then the one elected by two thousand or three thousand is going to be looking at the other one with a lot of contempt and that is what we have seen in this country. People feel more powerful because like one person said, *'mnasema ma-professor wamesoma, wamesoma wapi? Degree ni kitu gani? What have you been to us ati mko na degree, ya kufanya kitu gani* simply because we were being ruled by people that had gone up to I think standard two or three. So for them, professors are nothing.

I think, therefore, when we are talking about representation, if Parliament has 300 Members of Parliament and they are well distributed according to voter populations, then it means, Madam Chair, we are going to have a respecting group in that House and we are going to have a country that can be ruled by whatever system you call it. If it is about the Monarchy or the Executive or the Parliamentary they will get their power from those representatives. Otherwise, I do not think that there is a constituency that is going to respect the other and you have seen it. Madam Chair, here we must be open with each other. We are politicians, yes, but the Kikuyu population in this country after Kenyatta went were left thinking that they are the most powerful. The Kalenjin population in this country after Moi went was left thinking they are very great. If you look at the history you will be able to understand because Kenyatta dished to some of them and they thought they were very great people. Moi came and did the same and so forth. Constituencies, one time, Kiambu alone had five ministers. So, of course they would feel that they are very, very powerful people. What about the other side, the Kalenjins? If you look at them, they split the constituencies into small little paddocks until everybody thought that they should be Members of Parliament. These are the things to address and after we have addressed them, according to me, we shall have sorted out what you are calling government systems.

The next one is about Devolution. Devolution--

Ms. Atsango Chesoni: *Mtumishi*, you only have two minutes.

Hon. Njeru Kathangu: I will finish in exactly half a minute.

Ms. Atsango Chesoni: Thank you, excellent.

Hon. Njeru Kathangu: Devolution, Madam Chair, is about change and the power to the people. There is nothing else. If you asked Kenyans what change they want in this country, majority of them will not tell you they want this and that change but they want change. Which change? They do not know and it is up to us now to be able to discuss what change we are talking about. According to me, Madam Chair, it is that we have seen the *Mzungu*, we have seen Kenyatta, we have seen Moi and we have seen Kibaki. According to me, they are not any different. That is one system. What does it mean here? For our people to feel that there is change, we must move from that system to another system where we are saying our people must be given the power. They must elect at every sub location, at every location, division etc. etc. for all their leaders. That is the devolvement we are talking about. If we did that according to me we shall have devolved the power but this business about discussing whether it is the Prime Minister or the president or which-- Oh my Lord, that is going to waste a lot of our time and I do not think that we shall be empowering the people still to direct them to personalities etc, etc, Madam Chair.

Finally, because I know I have got less than one and a half minutes now, finally, Madam Chair, is that until this country recognizes these political parties which have been so empowered by the Political Parties Act, then we are actually saying we do not respect whether it is the president or it is this Committee or whichever institution that is going to touch on politics. I do not think, Madam Chair, it is going to be fair or even any better for you or for anybody when you exclude them in any of the issues. In fact, one of your people one time said, *'I do not think we need these political parties'*. According to them, we are already a problem, you know. Why? They just like talking, talking, talking, talking, talking and it is true because now you have given me 8 minutes. After this talk *nitasikia kama nimekunywa maji* after a big thirst, *unajua*, Madam, and then maybe you may do nothing else other than that. May God Bless you, Madam Chair. I wish you a lot of luck, a lot and I pray that we succeed.

Ms. Atsango Chesoni: *Asante sana* and may God bless you too. *Mtumishi* if I could just make one last request please say your name you did not say it at the beginning and I kept saying it into this that you need for the purpose of the record, just say your name and the party into the microphone for the Hansard people please.

Hon. Njeru Kathangu: Yes, thank you very much, Madam. I always forget it because I thought that it is like a sign post, *Mtumishi* Njeru Kathangu, sign post from Ford Asili. I am the Secretary General. Thank you, Ma'am.

Ms. Atsango Chesoni: *Asante sana.* Yes, Sir. Sorry, *Mheshimiwa* Ndile, I will do another round. Do not worry, everybody *hata kama huzungumzi leo* definitely tomorrow you will get a chance but it will probably even be this afternoon. Yes, Sir.

Hon. Nderitu Gachagwa: Madam, my name is Nderitu Gachagwa, GNU. Maybe just by way of observation from what Kathangu has said, it would appear to me, because you have submissions and if you just listen to what Kathangu said, he basically went through a whole list of issues and it is going to happen again because it is good for us to react to some of these and start building consensus. We had a very good exposition on forms of government and I do not know what is the feeling of most of the members here but I think we should build in on that and keep on disposing these issues one by one because we are going to have a repeat of all these issues coming up again and again and that is my observation. These are things that we all know even for those parties who have not given their submissions. These issues are familiar to them.

Ms. Atsango Chesoni: Okay, thank you Sir. Would you excuse me just for a minute then to consult because one of the concerns we had was that whereas we have heard from other constituencies, the one constituency we have not heard from is the Political Parties. So, really we wanted this to be your afternoon to speak to us on what you wanted during that time. So, with the hope that we could hear from you and as we had pointed out earlier in terms of presentation, we only received written memoranda from about seven. So, that is what our concern had been. Just hold on for a second. If you could just give me one minute and then I

will quickly consult with the Chair just on what has been raised and then come back to you. Is that okay?

Participants: Yes.

Ms. Atsango Chesoni: Okay. All right, I thank you.

(Inaudible comment from the floor).

Ms. Atsango Chesoni: You want to speak to what Hon. Nderitu Gachagwa has just suggested in which case please-- Then Yusuf as well please, okay?

Mr. Benjamin Mwema: My name is Benjamin Mwema, I am the Secretary General of New Ford Kenya. We are here to solve the issues that are outstanding that we have problems with. Everybody here knows that the system of governance is one of those issues. Now, even if the 47 of us here were to stand up and give a presentation of whatever form or shape, at the end of the day we are going to end up with either one, two or three forms of governance that we can rely on. So, my submission is this, Madam Chair, even if 47 of us talk we will end up with two or three forms of governance which we must debate, discuss and agree on the one that we deem most for this nation. So, I will submit that as he has said, let us focus on one issue, deal with it because we can only digress so far, we cannot go any further and even if the 47 of us stood and spoke we will end up speaking the same thing, repeating the same thing and I am sure we do not have time for that. Thank you.

Ms. Atsango Chesoni: Yusuf and then I will come back to you, Sir.

Mr. Yusuf Abubakar: Thank you, Madam Chair. My name is Yusuf Mahmoud Abubakar, Secretary General Shirikisho Party of Kenya. Building on the proposal by Honourable Nderitu, I think it depends on the objective of this meeting. If the objective is to build consensus, then it would be proper we tackle issue by issue. If the objective is to hear the political parties on the contentious issues as spelt out by the Committee, then I think it should be better for us to hear the

political parties the way Honourable *Mtumishi* had presented his proposals and after that, maybe the Experts, after hearing the political parties-- There will be two advantages hearing the political parties. I may be convinced. I may hold a certain position but after listening to ten people speaking on the same issue, I start changing my position. So, there is also some merit in listening to the 47 political parties' proposals but that will be in form with the objective of this meeting. If we are building consensus, the proper way is to go issue by issue but if you want to hear out the political parties and, in my view, let the political parties ventilate, let them speak to you, listen to them-- At the same time, I will be listening to what another party is saying on an issue which is very dear to me. That may convince me and when we start building consensus, I will have known what others say on that particular issue. So, I do not think it is an exercise in futility to listen to the proposals of political parties. That is my humble proposal.

(Clapping).

Ms. Atsango Chesoni: Okay. Having heard the clap I am assuming that there is some agreement vis-à-vis that. Is that any different? Thank you.

Mr. Lawrence Nzunga: I am Lawrence Nzunga, Secretary General Muungano Development Movement Party of Kenya. I am suggesting something to all of us, the Committee of Experts and the party leaders who are here. I am expecting at the end through the Chair and Madam Chair that we may form group works for discussions because as parties we may hold different ideas towards the contentious issues and the group work may assist us in ironing out something which you feel is very serious. I am suggesting that and if not now, maybe after hearing the political parties speak, you may have the idea in another forum so that at least we iron out the issues that each party may represent here. In that time, I expect us to have all the informal working drafts including the ones we have just been taken through by *Daktari*. Thank you.

Ms. Atsango Chesoni: Thank you. I am now going to ask, Sir, please. I think let us just hear from a few more groups and then we can start. What I am asking is what we had originally agreed as I understand it from the suggestion that was made by Yusuf because by the clap I got the feeling that we generally wanted to continue and just ventilate. So, please because this was

your opportunity and as a constituency I am asking please that we cooperate because we are otherwise eating into the opportunity for you to actually share with each other and get to hear each other and this is one of the benefits as had been pointed out that occurred for the other constituencies but has not occurred for yours. Okay? Thank you. So, Sir, please.

Prof. Moni Wekesa: Thank you, Chair. I am Professor Moni Wekesa, Legal Secretary, Labour Party of Kenya. My party's position, Madam Chair, is that we need a new Constitution like yesterday. Having said that, we have some suggestions on the systems of governance, Devolution of powers and the Transition clauses. In terms of system of governance, Madam Chair, we want to agree with what Dr. Chaloka Beyani said or presented especially under Presidential Hybrid nNمبر tTo. That largely represents our position. The only exclusions which we would like to be accommodated under that are that number one, the President and the Prime Minister must be cleared by the Kenya Anti Corruption Commission.

(Applause from the floor).

Ms. Atsango Chesoni: Go on, Sir, do not allow them to eat into your 8 minutes.

Prof. Moni Wekesa: Number two on the same, there is no provision for impeachment as presented to us by Dr. Beyani but we want to have an opportunity to punish the President for misbehaving. For example, at the moment we have a system under which the President can violate the law of the land and get away with it. Retirement age has been 55 years, now it has been extended to 60 years but we have people aged over 60 years who are still serving in the Civil Service and who have been appointed by the President. We think that is a violation of the law and no person holding the office the pPresident should be allowed to get away with things like those. Secondly, the appointment or re-appointment particularly of Aaron Ringera just shows the utter disregard that the Executive may have for the laws of the land and when things like this happen, we want a situation whereby we can have our day in impeaching the President. So, the bit of impeachment is not there.

Then the other inclusion we want to propose under that Presidential Hybrid Number Three is the order of succession. Here, we just have about the President, there is a Prime Minister but then supposing both of them are indisposed, who manages the country in their absence? So, we have proposed that number one, the President; number two, the Prime Minister; number three, the Speaker of Parliament. That is all we want to say about the systems of governance.

On Devolution of powers, Madam Chair, it is the position of the Labour Party of Kenya that we have two systems of governance. We have the central government as we have it currently and the local government as it stands but over and above that we should find a way of continuing financial devolution like through the CDF and other funds that are already organized and in place. We think that system is serving us well and that is the system that needs to be strengthened especially in matters of auditing.

(Tied)

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Prof. Moni Wekesa: Madam Chair, on Transition, our proposal is that the political Transition, when the new Constitution comes into place, takes place with the elections following that enactment of the Constitution. In terms of the Judiciary which is a very key institution in this Country, we are proposing that all judicial officers, especially Judges of the High Court and Court of Appeal must step aside and be asked to reapply for those jobs and that we have a system to vet them. This position is informed by the fact that some of us meet these Judges very early in the morning when they are banking bundles of hundreds of thousands of shillings on a working day and we wonder if they are paid through their bank accounts, how would they be carrying bundles of cash money to bank so early in the morning. Now, because of that we would like them to step aside, reapply for their jobs and then we can also have other Kenyans compete with them so that we can have a Judiciary we can believe in. Thank you very much. That is all.

Ms. Atsango Chesoni: Thank you very much. The Chair would like to ask you a couple of questions for clarification.

Mr. Nzamba Kitonga: Yes, Professor Wekesa, you spoke of a chain of command which has the President, in his absence the Prime Minister and the Speaker. I wanted to know whether in this formulation, you have a Vice-President in mind.

Two, you spoke of two levels of Government but you did not identify them. I want to know whether you are talking about the District Level and the National or the National and the Regional.

Prof. Moni Wekesa. Thank you very much, Mr. Chairman. We said that our position agrees largely with Presidential Hybrid Number 2 which does not provide for a Deputy President and so then, informed by that, then in terms of succession, should the President be indisposed and the Prime Minister be unwell for whatever reason, then the person to take whole reins of the State should then, according to our proposal, be the Speaker of the National Assembly until fresh elections are organized.

In terms of levels of Government, Mr. Chairman, we have the Central Government as it is and then we have the Civic or Local Government. That is our position. Thank you.

Ms. Atsango Chesoni: Okay. Thank you. Sorry, Honourable Muite and then, Sir, it was you in the back and then I will do the next round, please, Sirs.

Participants: Okay.

Ms. Atsango Chesoni: Okay? Thank you.

Hon. Paul Muite: I thank you, Madam Chair. My name is Paul Muite and I am here in my capacity representing SAFINA. I agree, Madam Chair, that there is great value in each of the forty-seven Parties represented making a presentation on the various Contentious issues. But

more important, Madam Chair, there is need for us as Parties to build consensus because if it is just presentation, presentation, presentation and we do not get an opportunity to build consensus, then perhaps we will not be moving forward.

So, I would like to suggest that at some point, your Committee, Madam Chair, will need to agree on an exhaustive list of all the Contentious issues because as you have heard from the Floor, Members are feeling that you have left out some Contentious issues from your list and if we could have the opportunity of building consensus item by item, we shall make progress rather than just making presentations.

While at that, Madam Chair, it might help as it is now the practice that in matters of this nature, there is nothing to hide, it might help a lot if you were to open a Website, your meetings, your Minutes should be posted on the Website so that the Kenyan public can be able to access your deliberations including posting the various Memoranda by the various Parties on that Website so that when we are coming to meetings like this ones, we will have known what the others are saying.

SAFINA's position is that we cannot within these eight minutes be able to give a presentation on each of the Contentious issues but I see that most of the presentations were on the System of Government. We have not had any presentation on Devolution, for example. We have not had any presentation of Land or even on the Judiciary.; it is on the System of Government and I would like to congratulate Dr. Beyani and indeed the entire Committee for the very subtle attempt at seducing our intellect towards a Hybrid. (*Laughter*).

Presidential/Parliamentary System, almost successfully. Therefore. I would like to confine my presentation to that issue of the System of Government and to say that when Dr. Beyani made a point about checks and balances, that is it; whether it is a Parliamentary System, whether it is a Presidential System, whether it is a Hybrid, we must focus on checks and balances. But, I had a bit of difficulty because I got the impression when reading between the lines, that it is almost as if there is a bias towards a Parliamentary System which many of us can also live with. But I

suppose the Committee having gone round and listened to the view of Kenyans, the Kenyans as Dr. Beyani said, are quite clear that they want to continue electing their President.

So the issue is, how does that get accommodated and some of the things we have heard, I heard the Substantive Chair saying, let us not talk about ceremonial and that sort of thing. But if you want a decision to be made by these delegates, you need to allow debate on what is a pure Presidential System? What are the merits and what are the demerits? What is a pure Parliamentary System? What are the merits and what are the demerits? What are these various forms of Presidential/Parliamentary, Parliamentary/Presidential? If my understanding, and if we were to get away from confusing terms by Presidential/Parliamentary, if I understand you to be saying a system where Executive Authority is shared between an Executive President and an Executive Prime Minister, where do you draw the balance? Some of the talks we have had are that you will be subjecting a President to going round the country to garner more than fifty plus one of the votes cast including twenty-five per cent in each of the Provinces and then you ask that President to be Head of State and Commander-in-Chief. Obviously the title of Head of State sounds nice. He is Commander-in-Chief, how many times do we go to war? Indeed, can the President declare war as Commander-in-Chief if the Prime Minister who is appointee, the Minister of Finance denies him money to carry on that war? So, that balance, I have some difficulties with. I come from a community that values goat eating when it is roasted and I can tell you the meat of the goat is in the *kifua* and in the ribs.

So, in a Government, the meat is in the Cabinet, the Civil Service, the Police, and the Provincial Administration. So, surely (*laughter*) if that is under the Prime Minister, how then can you subject the other guy or the other lady to going round the country asking for votes and then-- Let us not beat about the bush, if an elected President is not going to be Head of Government, then he is by and large ceremonial and there are going to be difficulties there.

We would like to suggest that if we were to look at the essential ingredients of each of these Systems, we will perhaps begin to move to the point where we as a Nation will bite the bullet so that if we are going to go Parliamentary, *twende* pure Parliamentary System. South Africa is an example of a pure Parliamentary System. It is just that they do not call their Chief Executive

Prime Minister, they call him or her President and probably that is an example we might wish to adopt because what role in that context will a Head of State be playing at all if we are to go Parliamentary?

If we are going to go Presidential, let us go pure Presidential System so that even the Cabinet is appointed from outside Parliament and so that Parliament can be strengthened as an Institution of checks and balances. Let us resist the temptation of entrenching and Balkanizing ethnicity in this country. That has been the sickness, the cancer that has been eating us. This Hybrid provides the environment for the entrenchment of ethnic balkanization and that is why we are going to end up having a President, a first Vice-President, second Vice-President, Prime Minister and several Deputy Prime Ministers. What value do they add to the administration and yet it is very, very expensive even for the Kenyan people.

(POWER BLACK OUT)

Hon. Paul Muite (continues): But Madam Chair, the actual point that I really wanted to make is this. That I think in order--

Ms. Atsango Chesoni: You only have three minutes.

Hon. Paul Muite: Yes. In order--

Ms. Atsango Chesoni: Thank you.

Hon. Paul Muite: Thank you. In order for us to make an informed decision on whether we want Presidential, Parliamentary or Hybrid, in order to make a decision on that, we need to debate first the issue of representation of the people. That is the core. We need to agree on the highest number of people, population, in a given Constituency and the lowest number. We need to agree first of all on whether we need to divide Kenya into three classes of Constituencies, Urban/Rural Densely populated, Arid and Semi-arid because we need to be fair. But if we were to agree on that sort of classification, then we would move towards agreeing on the minimum population in

an Urban Constituency and the maximum and we do the same for the rural densely populated and arid and semi-arid. To me, it is almost like putting the cart before the horse to start now talking about Parliamentary versus Presidential before we resolve the issue of representation of the people including Mixed Proportional Representation.

Madam Chair, I do not want to go beyond but please include the issue of land in your list of contentious issues, include the issue of Kadhi's Courts and at the risk of annoying the ladies who push for issues of choice, include the issues of the health care, those issues that people were taking interest in, reproductive health rights and anything that you think will be contentious. I know, however much we might pretend, it makes a lot of logical sense to say, retain the Kadhi's Court in the Constitution. I am not saying it should be retained or it should be removed, but please understand there are substantial numbers of Kenyans who consider it as a Contentious issue and you need to build consensus amongst them because they are the stakeholders. So, I know that you are moving at full steam, Madam Chair, you are moving at full steam and the comprehensive review of the Constitution is entrenched in the Constitution. So nobody can take it away. But is there a case for your Committee to consider a package of essential reforms to go alongside the journey towards a comprehensive Constitution.? What happens if we wake up tomorrow and the President is gone? We do not even have a voters' register.

(POWER BLACK OUT)

Ms. Atsango Chesoni: Okay, your time is up--

Hon. Paul Muite: Yeah.

Ms. Atsango Chesoni: --but there were two--

Hon. Paul Muite: Excuse me--

Ms. Atsango Chesoni: There were a couple of questions of clarification--

Hon. Paul Muite: --it was interrupted just when I was half a minute gone.

Ms. Atsango Chesoni: No. No. You are very persuasive but actually, I was just about to--

Hon. Paul Muite: I concede.

Ms. Atsango Chesoni: You concede?

Hon. Paul Muite: Let me listen to the questions.

Ms. Atsango Chesoni: Thank you very much.

Hon. Paul Muite: Thanks.

Ms. Atsango Chesoni: Okay.

Mr. Nzamba Kitonga: Yes, my Learned Senior Paul. If the Kadhi's Court was categorized as contentious, what would be your proposal in respect to its existence? Like, do you want it retained the way it is, or you would want it done away with altogether? I think, you would be more helpful to us if we moved from saying that it should be made contentious and go ahead and say, then what?

Hon. Paul Muite: Let me give you an answer, Mr. Chairman. First, perhaps I should have said, flag it in and I say this because I have been involved in this process and I know there is a potential danger for the Draft Constitution not going through the Referendum if this issue and consensus around it is not, sort of, obtained. The answer to your specific question is that, I am only one of the stakeholders as a good Anglican. The major stakeholders are the Christian leadership in this country and the leadership of our Muslim brothers and sisters. What I would do is that I would seek a meeting, if I was where you are, with the President and with the Prime Minister and I would sell to them the idea of calling a meeting at KICC of the Christian leaders in this country and the Muslim leaders in this county throwing a challenge to them that, you are

our spiritual leaders and you are always throwing brick bats at us that we need to have consensus. Therefore, *muondoke muende mujifungie mahali* as the Christian leaders and the Muslim leaders *na mutulete* a consensus position of these issues because those are the major stakeholders of that issue. That, Mr. Chairman, is my suggestion.

Ms. Atsango Chesoni: Okay, thank you, Sir.

Mr. Caleb Burudi: Okay, thank you very much.

Ms. Atsango Chesoni: Please do not forget to state your name and your Party.

Mr. Caleb Burudi: Thank you very much. My names are Caleb Burudi, Federal Party of Kenya. I am the Chairman and, of course, I have the Deputy Party leader with me here to witness the stand of the Party. Federal Party of Kenya, Madam, have looked at these issues and we would want to request you as Experts that, please kindly take courage, be sincere and honest and actually come out with what is the problem that is ailing this country. The problem that is ailing our Constitution, in our belief, is that it is politics and politicians and it is good that we are convened here today. For sure if politicians of this country agree today that they want a Constitution, we will have it. I have never seen professionals rising up and saying that there is a problem with that Draft. I have never seen the churches coming up-- Of course the Christians and the Muslims are coming up but again, the major problem is politicians and politics and we want to say this. I have seen what happened in Kibera and we, as the Federal Party of Kenya, look at this as the issue of power. If you deal with the issue of power, we will have no problem.

There were two schools of thought before the last general election from the other experts that were there and they said, you can only make a good Constitution in times of crisis. We have had a crisis and that is why we have Agenda 4. They said maybe we have to bring all Kenyans together and they speak, and Kenyans have spoken and you know it. From our own President, he said, even in Parliament one time, he said, Paul Muite-- Not Paul Muite, Orenge as a person, exactly knows what Kenyans want. Actually all these guys you are seeing here, they know what Kenyans want. The problem is, can we have courage to come up and say that, let us swallow our

pride, Kenyans do not want this and they want this and the Federal Party of Kenya believes that the answer to our problem is to devolve power. Let us have the Unitary Government and let us have also Federal Government whereby we have our regions empowered and they are united at the National Level on ideologies. Because you have refused that, we are living in an illusion, but that is not what divides us. However, when the time comes, Rift Valley will go on its way, Western will go on its way, Nyanza will go on its way. Why can we not have them powered so that they can organize themselves and we are united at the National Level on ideologies. This is working in America. You do not want to tell me that this is splitting us because that is what we believe but ask me and I will tell you that in the United States of America there is no patriotism. They are more patriotic than Kenyans are and they have different States. Why can we not develop our institutions to a level whereby, yes, we are proud of those institutions, we can have the regional governments existing but united by the National. In fact you will have put the pressure on the National leaders to ensure that they can sell themselves to these regions and, therefore, they will actually bring up the unity in this country. That is our stand.

Furthermore, we will want to ask you, kindly, to engage these politicians and use the numbers of these Political Parties. Why am I saying this? Because when you look at the wrangling, we are forty-seven Parties, but only maybe two or three Parties are disagreeing but all of us, when you put us together, we will tell you that we are agreeing as small Parties. So, why can you not take advantage of the small Parties numbers and strengths in this understanding and push the political agenda and say, we have agreed? Also maybe I would want to bring to your attention that kindly, Chair, work with the Media because like what we heard in the newspapers the last time when you held a Press Conference, it was as if you do not recognize politicians and if you depend on that vote, I am sure you are going nowhere. I can assure you today.

So, kindly as a Political Party, on Kadhi's Court, maybe I would want to finish on that, us we are saying that we support the freedom of worship. So, if Muslims want to go their way, we believe they believe on the Koran, give them time and they will move on. If Christians want to go on their own way, they have the Ten Commandments, let them be given them and they will move forward because there is nothing that will actually unite Muslims and Christians but give them the freedom of worship. I hope I am not forgetting anything, but I wanted to be very precise.

Lastly, I want to say, kindly let us give power to institutions in the Constitution. Let us empower institutions, let us streamline institutions so that we will not be looking up to these individuals because as per now, I will concede that we are giving a lot of power to them and that is why you see people fighting for Presidency, fighting for Premiership. They are not actually fighting for institutions but they are fighting for individualism and personalities and that is what we must kill in this Constitution. Thank you very much.

Ms. Atsango Chesoni: Thank you very much and thank you for taking less than your allocated time. So, I have been looking at the back and I just want to start on this side this time round because last time I started on my right. So Honourable Wamalwa, Mr. Kioma, Mr. Ali Hussein Ali, the Honourable Kalembe Ndile, okay, Honourable Mungatana, Mr. Yusuf, okay. Those are three.

Mr. Nzamba Kitonga: Three, three.

Ms. Atsango Chesoni: Could I just have those three first please?

Mr. Nzamba Kitonga: No. No.

Participant: Madam Chair, if you are mentioning people by their names, what about the people you do not know their names?

Ms. Atsango Chesoni: We are being fair because the last round I took at least two people whom I did not know by name.

Participant: Now, you are mentioning them by name.

Mr. Nzamba Kitonga: No. No.

Ms. Atsango Chesoni: I do not think you are being fair.

Mr. Nzamba Kitonga: Take the three, three.

Ms. Atsango Chesoni: Thank you and tantrums will not help either. This is a shared State.

Participant: You do not need to know anybody's name.

Ms. Atsango Chesoni: Honourable Wamalwa and please state your name and the Party that you are representing. Thank you.

Hon. Eugene Wamalwa: Thank you Madam Chair. I am Eugene Wamalwa, Secretary Legal Affairs, Ford Kenya and Madam Chair, my Chairman was here and I think he is still within and he will be joining us again. I just wanted to agree with what the Chairman for the Federal Party of Kenya said here a few minutes ago that indeed the major stumbling block to finalization of our Constitutional journey that has taken us almost two decades as a Nation are really the people before you today, the politicians and the Political Parties. I also want to agree with what Honourable Muite said that indeed Constitution making ideally should be a consensus process but we do not live in an ideal society. As we can see here we have about forty-several different Political Parties., we have forty-two tribes in Kenya meaning almost every tribe has a Political Party now and there are some that have more than one. So, we will expect because of our diversity that indeed it will be difficult for all us to agree on almost anything or everything.

Today, Madam Chair, what we were hoping was that if we were to debate all the Contentious issues, we will not really be able to agree but if we pick the main issue and we were able to actually build consensus around that, I think we will be able to achieve something as a forum today. What I had wanted to propose is that the other Contentious issues that we have mentioned, whether it is Devolution or the Transition, that can actually come in our different Memoranda as Political Parties but today, if we focus on the System of governance and we are able to actually debate and out of all these Political Parties we come up with a consensus, I can tell you, Madam Chair, it will give hope to this Nation. It is something that can actually make

your work very easy and chart the way forward towards the completion of this Constitutional Review Process.

What we wanted to propose Madam Chair, is that our two presenters today as they spoke, indeed we were told that they were only serving a Menu for us to pick whatever we like, but the Menu that was served looked more like only starch and there was no protein (*laughter*). Everything looked to us the Presidential Hybrid. I think this is what we were picking up but we also agree with the first presenter and the second presenter when they said that, going around the country, you would find that many people actually want to elect their President. Many Kenyans want to do that. It is a general feeling across the country. But also there are parts of this country, Madam Chair, if you ask them today to go back to elect the President, they do not want to do it. I come from a Constituency that was affected by the post-election violence and several villages were wiped out, entire villages burnt as a result of the Presidential elections. I have been to those villages, Madam Chair, and the healing has not taken place. In fact what they tell me is that, will you allow us to just elect our Councillor *hapa na Mbunge wetu hapa, hio maneno ingine musituulize*.

TAPE 10 STARTS HERE

This is actually one crude way in their own minds where they are saying, probably if there was a system where they were not actually forced to elect a President and their houses were burnt and their families were killed, they might be talking of a form of Parliamentary System where they will not be forced or made to elect a President. I think what we wanted to urge the Experts here today is that, let us have a good Menu that will have both the President System, the Parliamentary System and a Hybrid. In fact what many people are asking is that, if there is a way that we were able to go to the Referendum and they were given the choice to actually choose, even if there were two Drafts or something, that we had a Presidential one and a Parliamentary one and there was Civic education across the country to be told what are the advantages of this System, what are the disadvantages of the other and perhaps we have a compromise of a Hybrid System, I think this is what many Kenyans are also looking at. In the course of your work, you have told us what you have come across, they want to elect their President directly, but I do not

know if you have also come across this view because as politicians we go around and we are gathering these views across the country and perhaps it is something as Ford Kenya, we wanted to recommend, that perhaps you should also put it on the Menu so that we consider if we are able to actually agree on the System of governance, I think it is the most Contentious issue. If this forum was able to determine that, Madam Chair, I think the other issues let them come by way of Memorandum and we should be able to actually agree on them.

I wanted to suggest that instead of taking the eight minutes, I am seeing that we are so many here, if we were able to focus on the main issue and we each took five minutes and actually debated and build consensus, Madam Chair, it will really help this forum. Thank you very much.

Ms. Atsango Chesoni: Thank you very much and thank you for taking less than the eight minutes allocated. Mr. Okioma.

Mr. Mwanje Okioma: Thank you very much, Madam Chairlady. My names are Mwanje Okioma and I represent Ford People. The position of Ford People even before we listened to these presentations, which I must say was quite an informed presentation is that we are in for a Hybrid Presidential System. Madam Chairlady, we are of the opinion that there is no reason why someone should go round looking for Presidency, get voted for by all Kenyans and then come to State Government and then he does not have full control because Kenyans have confidence and trust in him and that is why they have voted for him. He should be given for the five years sufficient Executive Power of course with respective checks to run the country.

The Prime Minister should come from the Party with the majority Members of Parliament or the Coalition of Parties but should report directly or work directly under the supervision of the President. Any attempts to elect the Prime Minister by Parliamentarians will be extremely dangerous because in the events of any disagreements, the President will hold on to the people because they elected him, the Prime Minister will hold on to the Parliamentarians because they are also elected by the people and that can cause very serious problems.

Our view is that the Ministers or Members of the Executive should come from outside of Parliament. The Members of Parliament should be left to deal with their Constituencies and the Cabinet should come from outside Parliament. I have been a Member of Parliament and I know that when you have a Minister in-charge of energy or the Office of the President and there are recruitments of the Forces, the Police, the Kenya Army and the rest, naturally if I were in that position, those positions I would take a very sizeable nature (*laughter*). I am not saying that, that is what Murungaru did but Murungaru may have been a saint and those others who have held such positions, but there would be such tendencies in me personally, if I am given that chance, because I am going to be elected next time. So, let the Members of the Executive come from the respective professionals. What have you seen? People in-charge of forests, they do not even understand what is happening, people in-charge of Agriculture and all that. So, that is our view as Ford People.

The issue of Devolution, we have seen when we have devolved the CDF funds, what they have been able to do. Ladies and gentlemen in-charge of Political Parties, now Constituencies can get up to eighty million shillings going to Constituencies; if they are well looked after, sufficient development can come out of these funds. We need to be given more Devolution. There must be an agreed formula of specific funds from the Central Government to the respective Constituencies so that we can actually realize development. Kenyans are now asking these funds to the Constituencies, where was it in those days before Devolution. Imagine and this is only 2.5% of the total collection. If it was up to 7.5% even Constituencies perhaps could have more money and we would have to engage experts help them utilize those funds. So, we support a System of Devolution especially economically where funds go direct to the Constituencies so that in that way we can realize development.

Land is a big issue. I come from the Kisii community and fortunately or unfortunately, we are among the people who have settled outside in the Rift Valley and in many other areas of this country and if you look at the people in the IDP camps, the fair fraction comes from the Kisii region. There is need that this is identified as a Contentious issue and we need clear outcome from the Constituency to state what exactly are the problems in land. Kenyans should be allowed

to own land anywhere in the country. There is even need for a maximum number of acreage which an individual can have because there is no need for people to cultivate on the roadside--

Ms. Atsango Chesoni: Sir, you have two more minutes. Thank you.

Mr. Mwanje Okioma: Thank you very much. On Kadhi's Court, all I would say is this, I will come back to what I said about Civic Education. There are many Kenyans who do not know that Kadhi's Court today are actually in the Constitution. This is a matter of Civic Education. If you inform them that we have had them for so long, we have had no problems, when you do not take-- If people have gained entries into the Constitution, you do not just throw them out like that and just as you said, maybe consensus can help in this one. Thank you very much.

Ms. Atsango Chesoni: Thank you very much. I just have one question for you. I do not know if any of my colleagues--

Expert: *(Inaudible).*

Ms. Atsango Chesoni: Okay. I am just wondering why if you support a Presidential System, why you feel that you need to have a Prime Minister because in a proper Presidential System--

Mr. Mwanje Okioma: I said Hybrid.

Ms. Atsango Chesoni: --we actually do not have one--

Mr. Mwanje Okioma: I said Presidential Hybrid.

Ms. Atsango Chesoni: Presidential Hybrid. I see.

Mr. Mwanje Okioma: Yes.

Ms. Atsango Chesoni: Now, why would you want a System where the President is elected and then you have a Prime Minister who comes from the majority Party, he did say majority Party or Coalition of parties.

Mr. Mwanje Okioma: Coalition of Parties.

Ms. Atsango Chesoni: Coalition of Parties--

Mr. Mwanje Okioma: Yeah.

Ms. Atsango Chesoni: --when there is a potential that they may not come from the same Party as the President does.

Mr. Mwanje Okioma: They do not have to come from the same Party. I do not even see why they should because if you have a Party with so many Members of Parliament and they chose the Prime Minister, he is allocated the duties espoused by--

Participants: Dr. Chaloka.

Mr. Mwanje Okioma: --Chaloka. Yeah, they were very clear, coordination of Government and like that so that the President does not have to take all the duties. Some can actually be done by him but he must have the power to appoint him because if he does not and there is a problem then even the Prime Minister will work in tandem with the President. Otherwise if he says, I have enough powers and I cannot be sacked, then you have a problem. We need a peaceful country and if the President does not work well in five years, you throw him out and you get another one. Thank you.

Ms. Atsango Chesoni: Okay. I think there is a concern I am having. I do not know whether or not anyone else heard it, which is the concern in the context where if your guiding principle is the fact that this person comes from the leading Party, you may have a situation where they come from a Party where they are not cooperating. It is not even somebody who belongs to the

Coalition of Parties that the President is working with. That is what it is that I am trying to understand, how you then deal with that in that particular model that you are offering.

Mr. Mwanje Okioma: My assumption is that the President elected by universal suffrage has the power of the people who elected him and he is answerable to them. So the Prime Minister would really have to work according to the-- I mean the duties as allocated to him as a Prime Minister, Coordination of the Ministries and all that.

Ms. Atsango Chesoni: Okay. I will leave it for the time being but-- Please go on Mr. Ali. Thank you.

Mr. Hussein Mohamed: I am Hussein Mohamed from Party of Hope. First and foremost, mine is to request the Political Party leaders who are here today to please make sure that we are here to give Kenyans a Constitution, first and foremost. Let us keep our differences outside because what you want, you, yourself is not what Kenyans are yearning for. Kenyans are dying for this Constitution. Kenyans are having a lot of problems because of the difference of two people. Some Kenyans are marginalized like in North Eastern Province, Turkana and so many others. If we have a Constitution which will equally serve the Republic, I think that is what we are looking for. If forty-seven Political Parties here can agree on this Constitution, I think we can go very far. If I remember very well, the Bomas, the Kilifi and this Constitution, the Drafts that were there, ninety percent of it was really okay. I personally headed the law campaign team because of the ten percent but the real thing was that people were not understanding exactly what was there. If we can correct the ten percent, I think we already have the Draft that can lead us to the Constitution. Thank you very much. That is for the purposes of the Political Party leaders.

The other thing, my Party is for two Houses, the Upper and the Regional, Upper as in the way it is now in Kenya and Lower in the sense that we need to have Regional House, Provincial or whatever.

The other thing is that we need to have two centres of power where we have a President directly elected by the people and a Prime Minister from the Party with the majority of Members of Parliament, just the way my fellow Party leader has said.

The other thing is the Devolution of resources. I think if we share resources, that is economic devolution if we share resources to the number of Constituencies or Districts, I think we will not have any Constituency or District that will be discriminated or marginalized as it is now.

The other thing I really wanted to comment about is the issue of the Kadhi's Court. I think it is extremely, extremely wrong for someone to quote Kadhi's Court as contentious. Kadhi's Court has been there since the coming of the Independence of the Republic of Kenya. Maybe you have not known, but it has been there. If it was there and you have not even known and it has not affected you in any way, why do you have to call it contentious because now when we are making our own Constitution is when you are realizing that the Kadhi's Court was there? After all it is not going to serve you but it is going to serve only your Muslim brothers and sisters. One thing I would like to remind you is that so many cases, I mean Muslim cases, especially on inheritance and divorce do not go to the Kenyan courts and that to me is helping the Government of the Republic of Kenya and the Judiciary because right now because of what is going on now, cases might stay there for thirty years. So, what do you think if the 30%-plus of Kenyans who are Muslims take all their cases there? I think we will not have anything to be proud of. That is a burden that has been taken away by the Muslim leadership. For me, it is not a contentious issue and therefore let us not make it so. It is not affecting you. If my Christian brothers want to have Christian Courts, we will support you, we will support you. Come with the idea and we will not object to that but please the one we want and because it is not going to affect you, do not deny us our right. Thank you very much.

Ms. Atsango Chesoni: Thank you very much. Excuse me please, Sir. When you were speaking, he did not interrupt you, let us please not interrupt other people when they are speaking. Let us respect each other's rights to speak. Thank you.

Hon. Kalembe Ndile: Okay, kwa majina naitwa Kalembe Ndile na Chama ni TIP TIP, Amani Kenya. Kwanza nitaanza na kuwapongeza kwa ile kazi mnafanya na kusema ni nzuri na mimi nitoe maoni yangu na mimi niko na mafikiria tofauti sana. In fact tuko na Katiba Kenya hii ambao tunafuata. Lakini kusema kweli wananchi kule chini wanasema tuko na Katiba mbili, ile imeandikwa, imeadikiwa wao, juu haifuatwi. So unashindwa hata hii Katiba tunaunda, hata kama tunaunda, nani atafuata. Sijui kama kwa Katiba kutaandikwa mwenye hatafuata atafanywa nini, sijui, mpaka tufuate, lakini tuko na shida hapo.

In fact ile kitu imekosokana Kenya ni watu waaminifu. In 1990 nilifanya kazi kidogo kule Busia na kwa sababu pesa za Amin zilikuwa mingi, ilikuwa economy yao ni mbaya, ukienda kununua vitu kama ni ya wholesale, na labda unaenda kununua vitu Kampala, inabidii uchukue mfuko mkubwa wa pesa na uweke ma million ya pesa na saa ingine kulikuwa na hio uaminifu wa duka, unaenda na mtu anakwambia, mimi sina nafasi ya kuhesabu. Ndile, mimi ninakujua, weka mfuko yako hapo na pesa zako na nitahesabu baadaye ni confirm na unapewa vitu (*laughter*). Anasema zile atakuta ziko nyingi atakurudishia. In fact saa ingine unaenda na anakurudishia.

Tunaongea juu ya Katiba na tulisema ile Katiba ilikuwako ilikuwa ninety-five percent ilikuwa nzuri na wale wanafikiria Civic Education wananchi hawajui ni nini, unakumbuka kuna wengine walisema hatutaku kujua, tusomewe na Fulani, sijui hapo tutatutua namna gani? Maanake nilazima tuambie Fulani sijui afanye nini?

Ile shida nadhani tuko naye, na watu wanapigania zaidi, ni mambo ya uongozi, hii system tuko nayo. Mimi najua ndio, wananchi wanasema hawataki Parliament ipewe nguvu ya kuchagua President. Wanataka wajichagulie. Na ile kitu wanao, assumption yao ni rahisi ati ni kwa sababu Wabunge wanaweza kuhongwa. Hio ndio kitu sijui walitoa wapi? Hio ikitoweka.

Kwa maoni yangu kama kuna institution ambayo inge-check President vizuri, ni Parliament. Uchaguwe mtu na huyu mtu atakuwa akijua nyinyi mmechaguliwa. Angalia System yenye tuko naye leo. Tuko na President, ninawapea mfano mmoja. Wale ambao munafikiria na munasema ati ni lazima tuwe na President ambao amechaguliwa na watu ndio apewe nguvu, nashindwa munaongea juu ya watu maanake lazima nikuulize-- Mimi natoa mfano nzuri kama Kalembe

Ndile. Ukambani si kuona mahali ningesimama kwa sababu mtoto wetu, usiongee juu ya motto wetu, inakuwa hauna nafasi wewe mtoto wetu kwa sababu, ni nini anaenda kufanya? Unasema hata akiwa President ni lazima tutamwagikiwa na vitu. Kwa sababu wanaamini imefika wakatu wetu ya kukula. Hakuna kitu ingine ambao inang'ang'aniwa. Hakuna hata kidogo.

In fact, kama ningeulizwa, mimi ile System tungejaribu kutumia ndio tuelekana na hii maneno, sijui vile mtaandika kwa sababu nyinyi ndio wenye sheria-- (*laughter*). Leo tujiulize kama Wakenya, si tunahaguwanga Speaker? Na tunachagua Speaker na saa hio anawacha kiti chake anakuwa ni Speaker wa Kenya nzima. Hata vile mnasema hapa ati tutoe maoni ya vyama, tutoe maoni-- TIP, TIP sina maoni ya kutoa hapa. Nafikiria nimekuja kuwakilisha Wakenya. Kuna mwingine bado hajazaliwa, na ananitegemea (*laughter*). Ni kweli. Kwa hivyo jaribuni vile mtaandika na m-convince wale ambao watahusika. Hata hii Katiba mnakumbuka, mtu alikuwa mtu mzima na ni mtu amechaguliwa anainuka na anaambia watu, hii Katiba imesema msichana hata kama ameolewa ni lazima akatiwe shamba na nyinyi mnajua hio kitu haikukuwako hio (*laughter*). Lakini watu walienda hivyo. In fact mpaka mama yangu akaniuliza, nilisikia mulikuwa Bomas, kweli mulisema ati sisi wote tutairiwe, mama mzee kama mimi? You know, na ukimuuliza anasema, si nimeona Fulani anasema na ni mtu ambaye anaamini. Na hio ilisemwa. Kwa hivyo ile kitu tumekosa ni uaminifu, ni uaminifu.

Mambo ya mashamba ndio nafasi yangu isikosekane. Nadhani mashamba ni swala nyeti kwa sababu mnajua ile kitu ya kuchukuwa uhuru, ilikuwa watu wanapigania wajitawale na wakuwe na mchanga. Lakini, wale walishika viti mnakumbuka waligeuza ikawa ni uhuru na kazi, sio uhuru na mashamba. Kwa hivyo kwa mashamba kuna shida na hizo shida ziko. Kila sehemu ina shida zake. Kama ni Ukambani, kuna shida zake, kama ni wapi, kuna shida zake.

Na jambo linguine ya muhimu sana katika mashamba, mnaona hata saa hii Mau vile imelipuka na kila mtu anataka kusema nini, kila mtu anataka kusema nini. Hata wengine wanazidi kusema, hii watu wa Mau hata muondoke nyinyi wote kwa sababu mlipewa na Rais na aliwapea namna gani? Hio ilikuwa ni makosa. In fact, watu wange-assume shamba walipewa na Rais kwa niaba ya Serikali na sio kwa niaba ya watu. Hio ndio kitu moja ilileta shida na watu wakapigana. Na in

fact hata mambo ya Mau, ni vile wizi wa mashamba ulikuwa ni wa Coast, w-Coast wanakatiwa kwao, watu wa Mau wanakatiwa kwao, ukienda sehemu za Nyanza wanakatiwa kwao. Ni vile haijatokezea vizuri. Nadhani kwa Report ya Ndung'u iko. Na kitu ya kujiuliza ni je, wakati itafika kwa sababu saa hii hakuna mvua, ndio watu wamekumbuka Mau, kama kungekuwa kunanyesha, hakuna kitu ingetokea Mau.

Ms. Atsango Chesoni: Mheshimiwa Ndile, dakika mmoja. Tafadhali. Naomba?

Hon. Kalembe Ndile: (*Laughter*). Kwa mashamba; kwa hivyo nadhani ni muhimu. Ya mwisho, mimi nikakuwa tena Diwani. Leo kuna Diwani amejiuzulu hapa akasema, kumbe alichaguliwa na hakujua kwamba hana nguvu? In fact ile kitu ingine tungeangalia zaidi ni Local Government kwa sababu hio ni lazima tuangalie ili wawe wale watu wamechaguliwa wana uwezo kama Bunge. Vile Bungeni tuna uwezo wa kufanya kitu, Councillors hawana usemi. In fact wakati nilikuwa mwenyekiti wa Baraza la Makueni, kuna (*laughter*) wakati tulikuwa na mikutano mitatu kwa mwaka mzima. Na kama kuna mtu amekosa na amekula pesa mahali, ati you meet after three months, atakuwa overtaken na events. Hata ukienda kule unazungushwa, unazungushwa, kwa hivyo powers nyingi ziko na ni mtu ambao hajachaguliwa, z Ziko na Clerk. Hizo ni vitu zinafaa muamue.

Na mwhisho nikikaa chini, niseme, hapa tukikubaliana-- Wenzangu wote ni kama nimesikia wamesema, niahio ndio msimamo wangu pia, ni kama wanasema, kama tungekuwa ni hii vile tumeonyeshwa hapo, hii Serikali, hii na hii na hii, tungekuwa tumejadiliana na tusha malizana na hii maneno, maanake tukitoka hapa ati muwe nyinyi kazi yenu ni kuandika tu, muandike, hatutaelewa mmeandika nini. Lakini tukijadiliana, tukubaliane, hata kama ni kwa vikundi, vikundi, twende tuseme, hii kikundi, na mchanganyikeni kwa sababu hapa hakuna kitu inaitwa Chama ama nini, hapana, changanyikaneni tuwe Wwaanze kujua ile tumesema. Hii iakuwa ya muhimu sana. Asanta sana.

(Clapping)

Ms. Atsango Chesoni: Asante.

Hon. Danson Mungatana: Okay. Yes, Madam Chair, the-- My name is Danson Mungatana and I am representing Narok-Kenya here. On Devolution of powers, we would like as Narok-Kenya to have two levels of Government, the Central Government and the Regional Government. We should have two sets of Members of Parliament. There should be the MPR, (Member of Parliament for the Region) and the Member of Parliament being the normal Member of Parliament who should represent at the National sitting in Nairobi.

So, Madam Chair, what powers should each Level of Government be? The Regional Government, Madam Chair, should be headed by a Governor; a Provincial Governor should be elected for each Region. These Regions should be divided in accordance with whatever recommendations the Boundaries Commission should come up with. Madam Chair, the Regional Governor, the way we perceive him, he should be having the MPR and himself but he will be working with the Central Government so that we have a Central Government Minister, for example, in Education. We normally vote a budget of about thirty-three billion shillings for education. He will divide that money. It will come to say, Coast Region who will apportion it in a way that will suit their Regional aspirations under the Governor. So, we have a Central Government and we have a Regional Government.

Madam Chair, on the question of the kind of Government we should have now at the centre from the Region to the Centre, of course the details of which we can discuss later, but at the centre, we should have a President, who is elected by universal suffrage by the people of Kenya all over the country and then we should have a Prime Minister who is elected by Parliament. The point we are trying to make is that the justification you are looking for there, you cannot control a President or a political persona with a non-political persona. There has got to be someone who can balance those powers and this can only come from a Prime Minister or from the person who controls Parliament. So, we should have a President, we should have a Prime Minister.

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Hon. Danson Mungatana (contd): Madam Chairperson, we propose we scrap the position of the Vice President so that we have a President then we have a Prime Minister. The Vice President is actually a very ceremonial position even right now, we all know it, it is very ceremonial. So in the event of the ultimate fear that the President is incapable of executing power for whatever reason, we propose that the Cabinet should have a special session which should be convened by the Attorney General because the Attorney General is a non-political person and then they will choose among themselves the person who should handle the duties of the President for a transitional period until a full Presidential election is held so that the country does not operate in a vacuum. We would not want the head of Parliament or the Prime Minister who also controls Parliament, even though he has some executive powers, to be the person who will take over from the President automatically. It should be a member of that Cabinet that has been chosen.

Madam Chairperson, I want to convince my colleagues here that the President, the Prime Minister, the Ministers and the Cabinet should all evolve from within Parliament. The reason is that an expert in economics from Harvard will be an excellent Minister for Finance, for example, but he would import the World Bank notion of down sizing Government in a very inhuman manner and make it happen in Kenya to the detriment of the many, many Kenyans. He would not understand why you need to be employed, for example, in the chief's office. So let us have someone who has gone through that process who can identify with normal ordinary Kenyans, even with the risk of that person favouring his place. We have now passed the Fiscal Management Act. It is not possible for a Minister, even the President, for example-- If I am elected President today it is not possible for me to just build roads in Garsen. All these things must go through the Budget Committee which has stayed there, the Finance Committee which has stayed there, it is very difficult to do the things that used to happen in the past. So I want Honourable Members here to be persuaded that we need Ministers that you can approach and talk to and not those hired guns from University who will come and tell you things that you cannot understand yourself and will want to implement them.

A very good example is this Mau thing. Ministers do not know what is happening, the Permanent Secretaries have already issued orders people should be evicted and they do not care

where you are going, you see. Be very careful to yield your powers to non-elected people, these are the most dangerous people you can ever have in this country.

Madam Chairperson, I wanted to also say that as Narc Kenya, I would like to persuade those people who are arguing that we should have a pure Presidential System or a pure Parliamentary System, I think let us get out of this kind of framework of mind. I would ask my colleagues here, even in Kenya today, can we say, for example, that we are a purely capitalistic nation or a purely communistic nation? We are neither of those, or are we socialists? We are neither of those yet those concepts are there. We have borrowed here a bit, we have borrowed there a bit and we have made this country. There is no black and white in this Constitution making. We need a President that we have elected, that is for sure and we need a Prime Minister who will answer questions in Parliament, that is for sure, whether you call it pure Presidential, pure whatever, whatever, that is not the issue. Let us not be bogged down in theoretical discussions. The reality as we know it, and as I see it in Parliament, is you need these two office holders.

I want to also address the fear that has been mentioned here that there could be a Prime Minister from a different political party and a President from a different political party. Then there is the fear that those two would not work together. I want to state here, as a political party we believe it is even better for the country to have people from different political parties heading those two offices because the natural checks and balances will follow without even having to worry too much. If you have the Prime Minister yourself and the President yourself, you control everything, it is not good for the country unless we have a very strong Opposition. So I think we should not have these fears. Let us move forward, let us deal with this section and the justification for me of putting this thing down and moving forward is that if we can agree today as Political Parties that we have that section done that way, details of which we can work out on who handles what, I think we will have made a very big step forward in terms of Constitution making.

I also want to argue against the idea of essential reform package. The moment we start focusing on minimum reforms, we will never get a Constitution in this country. So let us all say that we

want to get a Constitution, let us not go half way, let us agree – and this is the position of NARC Kenya – we do not want small bits. As NARC Kenya we would like the whole, not half way.

So, Madam Chairperson, on the System of Government; the Executive we have said the Legislature and the Devolution of Power, those are our opinions as a Party and, as far as bringing the Constitution into force is concerned, we think that we should not make the mistake we made with the ECK where we chased away a Constitutional Office holder and then we were left with a vacuum. We suddenly said the whole ECK should go and then there was nothing, there was not even an institutional memory. Let us be careful when we are handling Constitutional Office holders.

Ms. Atsango Chesoni: I am sorry, Mungatana, I am going to have to stop you.

Hon. Danson Mungatana: I thought you give me one minute to finish.

Ms. Atsango Chesoni: Okay.

Hon. Danson Mungatana: So, I am just making the final point, Madam Chair, that there should be a transitional period; the current Attorney General, the current Chief Justice, the current Judges, their offices must continue that way until we bring in new office holders; the current Members of Parliament, the President, the Ministers and whatever, so that we do not have a vacuum in the country because we will then have a problem. Thank you, Madam Chair.

Ms. Atsango Chesoni: Thank you. I had a question of clarification from this end for you.

Hon. Danson Mungatana: Yes.

Mr. Nzamba Kitonga: Hon. Mungatana, I wanted to know how you get the provincial governor, how is he going to be elected?

Hon. Danson Mungatana: Mr. Chairman, I will give the specific example, say, in the Coast Province. A lot of us have said that the issues of the Coast, for example, are not properly articulated in Parliament and even in Parliament you would see when we brought up the motion on Cashew Nuts an amendment was moved to include all other nuts, including other nuts which are never--

Ms. Atsango Chesoni: I am sorry, Mheshimiwa, we are not asking you to justify the opposed, just the method of how you get them in.

Hon. Danson Mungatana: Yes. Madam Chair, if you look at what I am saying, the aspiration of the people is that that is the justification, that we should have somebody that we have elected directly who understands you and who feels for you, who is like you and then the President will obviously know he is the boss, it is automatic. It is like the way a Councillor and a Member of Parliament operate. The Councillor knows his area of jurisdiction and an MP knows his area of jurisdiction and the people like the Councillor, where he comes from. So let us have a governor who is directly elected by the people of his region.

Ms. Atsango Chesoni: So you are saying through universal suffrage basically.

Hon. Danson Mungatana: Yes.

Ms. Atsango Chesoni: Okay. Mr. Yusuf is going to speak but I need to consult with you because it has gotten to 4 o'clock, in fact a little past 4 o'clock. When we broke for lunch, we were running a little late and we ran a little late coming in. Now, under our old programme we were meant to stop for tea at 4 o'clock and then, you know--

Response: No.

Ms. Atsango Chesoni: Do you want to go on until 5.00 and then end the day at 5.00? Is that how you would rather do it?

Response: Yes.

Ms. Atsango Chesoni: Okay. All right. Veronica, will it be possible to arrange for tea to still be kept if anyone wants it? Okay, thank you. All right, so Yusuf and then I will take the next round after he speaks. Thank you.

Mr. Yusuf Abubakar: Thank you, Madam Chair. My name is Yusuf Mahamoud Abubakar, Secretary General, Shirikisho Party of Kenya. Madam Chair, these are the proposals for Shirikisho Party of Kenya, the contentious issues.

Madam Chair, on the System of Government we believe as a Party the solution lies in defining the roles of the State and the Government and we have proposed that we should have the President as the Head of State, the Prime Minister as the Head of Government. Madam Chair, we believe the State has fundamental constitutional recognition due to its character. The State is perpetual in its character and, therefore, the President as the Head of State will be exercising supervisory powers over the Government and not competing powers. However, these are distinct powers. The Government will do the day to day running of the Government but the State, because of its constitutional significance, will be supervising the functions of the Government. Therefore, Madam Chair, we propose that the President should be elected directly by the people as Head of State, he should also be the Commander in Chief and should exercise State powers as spelt out by the experts who gave us some menu on the System of Government.

The Prime Minister should be the Head of Government and the Prime Minister should come from the majority party in Parliament or Coalition and he should be the head of the majority party in Parliament or Coalition. The Prime Minister should appoint the Cabinet from amongst Members of Parliament because if a Government is headed by a Prime Minister it is justified to have Cabinet Ministers from Parliament. It is only in a Presidential System where you could have a justification to appoint Ministers from outside Parliament.

Madam Chair, we also propose that there should be a National Parliament and Regional Assemblies. We are opposed to the two-Chamber Parliament. We want one national Parliament which will be complimented by the Regional Assemblies.

Ms. Atsango Chesoni: Your voice is disappearing, I am not sure--

Mr. Yusuf Abubakar: I am sorry I am fasting, Madam Chair, it may have some effect on my voice.

The reason is that since we are devolving power to the regions, the regions will have powers to decide or to make policies and these policies will be presented to the National Parliament, so there will be coordination between National Assembly and the National Parliament in coming up with various policies on various issues like education, land, agriculture and so on.

Madam Chair, Shirikisho also believes it is time that we chose a system that is well known by people in its governing principles. This is why we agree with the Chairperson of Federal Party of Kenya that we must have a declaration that Kenya becomes federal; so we have Federal Republic of Kenya with eight regions, or not more than ten. Hon. Mungatana has stated that the Independent Boundaries Commission will come up with these regions, but there must be a ceiling. We must not come up with regions that do not make sense. There are two fundamental principles that these regions must be able to meet: the resources, they should have enough resources to sustain their activities and should have the geographical areas that are necessary for their development. We should not be informed by ethnic or tribal considerations in coming up with these regions. It does not matter where you are, what matters is the principle of governance that development will reach you wherever you are.

We also propose, Madam Chair, that proper devolution connotes to major principles. The devolved government should have the power to collect revenue and utilize it. It should have the power to decide on the development agenda and implement it. So these are two principles that the regional government, if we are truly to devolve, must have.

We are opposed to the CDF system where the Central Government collects the money and decides that we are giving 60 million to each constituency. Let the devolved government collect the money, retain a certain amount, 65% or 70%, and use it for its development. That is devolution, that is power properly devolved because collection of money is power and if you deny the devolved government the power to collect revenue, you have not devolved power.

We believe, Madam Chair, there should be three levels of government: the national government, the regional government and the district government. The district government will replace the local authorities that we have and the district should not be in line with the constituencies, but rather the 70 or so districts that we had previously, or the present local authorities should resurrect the district governments that were--

Ms. Atsango Chesoni: Mr. Yusuf, I am going to ask you to wind up please.

Mr. Yusuf Abubakar: Madam Chair, I am finishing. I have only two points, Madam Chair, I do not want to speak again, maybe tomorrow.

Madam Chair, on the issue of transition, just one sentence: I agree with the sentiments of Hon. Mungatana. It may cause rifts by sending home all the Constitutional office holders. Some people, some tribes or some ethnic entities will feel victimized so I think it is better that their terms are extended until the new Constitution takes effect.

Finally, as a Muslim, Madam Chair, the issue of the Kadhi's Court is very dear to us. I have a very humble request. We did this in Bomas. I think there should be a standard; for an issue to be contentious it must have caused some disputes, some problem somewhere. Madam Chair, we have lived with the Kadhi's Court for 40 years and I know of no dispute caused by the existence of the Kadhi's Court but I have been sent by Muslims, Madam Chair. They are saying, this is a nation of tolerance, we live believing that unity should be in our diversity but they are saying, Madam Chair, if our Christian brothers and sisters are not ready to tolerate this simple issue of the Kadhi's Court, then they have two proposals, Madam Chair. One is, if Kenya can pass a law establishing zones for smoking, then we should pass in our Constitution a law establishing zones

for Muslims and Christians. If we cannot tolerate each other, we cannot live in peace as Muslims and Christian brothers, there is no religious tolerance, then we should have zones. This is where a Muslim can go, practise Islam, this is another zone for Christians and we should have zones that are neutral. Alternatively, we should divide Kenya like Nigeria, so that we have a Christian Kenya and a Muslim Kenya, then one can choose where to live.

Finally, Madam Chair, they are saying in order for this principle of equality we change-- We go for weekends on Saturday and Sunday. The Muslim weekend is Thursday and Friday, it is not considered. For purposes of equality then we change our way of life; our weekends should be Friday and Saturday so that Muslims are also taken care of; Friday and Saturday.

Madam Chair, they are saying if we have a Christian President, then let us have a Muslim Prime Minister.

If we have 12 Judges, if 6 of them are Christians, then 6 are Muslims.

Madam Chair, these are alternatives if we cannot tolerate each other. The Muslims are not asking for anything, they have lived in this system very well, they are happy with this system, what they are asking from you is the Kadhi's Court for their own personal family law but if that is not possible then we should go for true equality, we set out on equal terms, President/Prime Minister, Saturday/Friday, Muslim/Christian and then we see how to go about it, or divide Kenya into two states.

Thank you very much, Madam Chair.

Ms. Atsango Chesoni: Thank you very much. I think in all fairness I had not taken anybody from the front two rows on either side. So I will start now from this side, I will take you, Sir, please and the gentleman from Agano and then I will take you two gentlemen and then I will take you, Sir, in the checked shirt and Hon. Kiunjuri, please, and then Hon. Mwandawiro and then you, Sir, please and then I had had a special request-- I am sorry, just a second, I had had a special request-- First of all let us recognize the presence of Hon. Biwott. I had had a special

request, because I understand that you will not be represented as a Party tomorrow, so if we could have their presentation as well, please. Okay? Thank you.

Mr. Kengera Mose: Thank you, Session Chair. My name is Kengera Mose, Chairman, Kenya Social Congress. I am delighted to be here today and I want to salute my brothers for finding time to be with us today. First, Madam Chair, I want to say that this country is yearning for a new Constitution. It is like now the bread for the day.

Ms. Atsango Chesoni: Sorry, Sir, could you just tell me what party you are from? I am sorry.

Mr. Kengera Mose: I said my name is Kengera Mose, Chairman, Kenya Social Congress.

Ms. Atsango Chesoni: Thank you.

Mr. Kengera Mose: I said that this country is yearning for a new Constitution. They believe with enactment of the new Constitution our problems will be sorted out. So if we can provide that, then chances are that a few of the problems that are bedevilling this country will be managed.

One, I want to start with the kind of Government that we want to have. Even before my brother, Dr. Beyani, came in, we were considering a Hybrid System of Government as a party, but I am happy that Dr. Beyani brought in an idea which persuaded us to be skewed towards Presidential/Hybrid 2. However, there are certain challenges that we must entrench in the Constitution that we are making following that process. One is that we need to have a system of Government which has one center of power where we do not have a conflict of interest because if you look at the current system we have development is hampered by internal conflicts. Those are experiences we have had and we would want to minimize them.

Two, Madam Chair, we want a Constitution that is not ambiguous, a Constitution that everybody can easily interpret, a Constitution that is friendly.

Thirdly, Madam Chair, we are saying if the people of this country are electing their President – and they have openly and loudly said they want a President who is answerable to them, in this Constitution that we are proposing - we want a clause that can call the President to be answerable to the people of this country. In other words, I am saying that we should have a clause within the Constitution that allows for impeachment of the President. In effect, that is we want to control where the President takes a lot of powers against the wishes of the people.

Madam Chair, I want to say that in this system that we are proposing, we want the Constitution to be very clear on the numbers of Ministers and we are saying, if possible we should have--

Ms. Atsango Chesoni: I am sorry, Sir, just one second. Could there be another microphone, I will not deduct it from your time. Could we just make sure that all other microphones are off, please. Okay, go on, Sir. Thank you.

Mr. Kengera Mose: Thank you. I will say that we are proposing that the number of Ministries should be clear in the Constitution. We are proposing that if possible we should have a maximum of 25 Ministers and equal number of the deputies.

Madam Chair, I also wish to mention that we are proposing that we have two levels of Government, namely, the Central Government as proposed in Presidential Hybrid 2, with those amendments I have just proposed, and we have a local government. I am saying this because if you look at this country, as we are now we think ethnic and to avoid thinking ethnic we should avoid going regional. Without taking offence with my friend Mungatana or anybody else, let me take an example; I come from Nyanza Province. Right now in Nyanza Province you will hear of Kisii Nyanza and Luo Nyanza. So we are talking about regions and still you will have conflicts of that region. If you are in Coast Province you will be talking about South Coast and North Coast. So we shall still have regional conflict. So I think what we need to do in our Constitution, we should have a clause that governs the local authorities where powers are vested with elected leaders because right now we have problems with local authorities because the Clerks have powers, elected leaders do not have powers. So I think somewhere there should be a

compromise *per se* to enable us manage regions and for the time being manage the syndrome of ethnicity.

Madam Chair, let me say something that is likely to be a challenge with that system of Government and I think quite a number of people have said it here and I saw you writing it very prominently, namely, the President has won elections from Kenya Social Congress. However, the Prime Minister is going to come from ODM Kenya. What is going to happen is, there are likely to be challenges in governance but there are two options here, either natural justice comes into place, the Mungatana version, or in the Constitution we include a clause where, once a Prime Minister has been appointed from whichever party, either the majority party or parties which have equal membership but who have preference, once elected, the Constitution supersedes the party authority. In other words there should be a clause where once you have been appointed you no longer have loyalty to your party, you have your loyalty to the State, to the country. That maybe will overcome the challenge of conflict of interest.

Madam Chair, on devolution of power, I think what Kenyans want to see and where the challenges have come from is how much money is going to region A and region B, so if we are unable to use our natural resources, our incomes equitably, like what we are doing for--

Ms. Atsango Chesoni: Mr. Kengera, you have two more minutes.

Mr. Kengera Mose: Thank you, I will finish in those two minutes, I will restrain myself. I think most important is to distribute resources well. That is a bone of contention.

Second last, Madam Chair, I want to talk on the issue of land. Land as a fact of production has been the cause of problems in this country. Even the clashes we have are pegged against land as a factor of production. Some communities have more love for land than others, others have love for money. So, as Mheshimiwa Okioma said, I think we should have a strong land policy entrenched in the Constitution. How should we manage our land issues? What is the number of acres one should have and what is the role of each kind of land that we have? We have pastoral (?), we have-- We should declare it in our Constitution particularly when we are saying,

individuals should have so much land and this should be used for this. That way we will be able to sort out that problem and by extension the ownership of property for Kenyans.

Lastly, Madam Chair, I want to say this, we need civic education for us to appreciate the challenges which, as a country, we are going through. This civic education goes all the way to freedom of worship. I must be categorical in this case about the struggle between the Christians and our Muslim brothers. I do not think there should be a problem here. We should not sabotage the process of giving Kenyans a Constitution by bringing a new dimension of fighting. Let us respect the rights of the Muslims, let us respect the rights of the Christians. I, personally, come from a region where Muslim religion is practised in a small way but we have not seen any conflict between the two religions. I am a Catholic myself and I have not seen a conflict. So it should not be a source of making Kenyans divert their attention from delivering the new Constitution.

With those very many remarks, Ladies and Gentlemen, thank you very much.

Ms. Atsango Chesoni: Thank you very much, Mr. Mose. I just wanted to ask one thing from you. You had said that when somebody is appointed they should stop having allegiance. I was not clear, was it the President or the Prime Minister who you were saying should stop having allegiance to their party; which of those two was it?

Mr. Kengeru Mose: I was talking, Madam Chair, on the challenges we have when the President is appointing the Prime Minister; the Prime Minister will come from the party with the highest number of MPs in Parliament. In the event the President comes from the minority party in Parliament in terms of MP-ship, then he will appoint the Prime Minister from the party with the majority MPs in Parliament but then a clause should be entrenched in the Constitution where, once appointed, his loyalty goes to the country and not to the sponsoring party to Parliament. It was the Prime Minister I was talking about.

Ms. Atsango Chesoni: Okay. I think we needed to do some explaining about who a Prime Minister is and I think I am beginning to understand why there were challenges around not

explaining the Presidential System, the pure Presidential System and the Parliamentary System. The purpose of a Prime Minister and the reason why a Prime Minister in a Parliamentary System comes from the party with the largest system of both-- Okay. Let us look at the UK system. The Prime Minister gets picked from the party that has basically won the election, so they get to pick who the Prime Minister is. The reason for that is that the Prime Minister's role is going to be to implement their policies. The Prime Minister is coming from the largest party because the Prime Minister is somebody who will influence over Parliament by virtue of commanding the most seats in Parliament. To, therefore, now take somebody who comes from a party which is ideologically not consistent with your own, it now becomes problematic because you both are sitting in completely opposite camps. So, if the basis of appointment for your Prime Minister in a properly functioning Parliamentary system is your basis, or something that is based on a Parliamentary system, is that this is a person who is going to be able to implement your policies and it is a person who comes from the party that has won the most votes, you cannot then have people who are not sharing the same ideological space. It just will not work and you cannot ask that person to give up their seat. I think this is something we have to be very clear about this System even as we are promoting different systems. I think we need to be very clear about the checks. This is part of the checks; these are parts of the checks and the balances in the different systems. Thank you.

I will ask Hon. Kiunjuri--

(Inaudible discussion on the floor)

Ms. Atsango Chesoni: He is next but if I could just make a request, I am sorry-- Okay, thank you.

Mr. David Waihiga: Thank you, Madam Chair. My name is David Mwaura Waihiga from Agano Party. We proposed in our submissions that the Chief Executive of our Republic, by whatever name we call him or her, should be directly elected by the people. We made cognizance of the fact that since the Grand Coalition Government came into place, Kenyans acknowledged another office, the office of a Prime Minister and thank you for the explanation

you did a little earlier. We have tried to look at the question, what are the roles of when you have the two persons? We struggled with, having accepted this office, what would be served by that office in future? We clearly had some struggles and while we acknowledge we will need that other office - and in our case we said the Prime Minister since so far we have elected Presidents - so why not keep the presidency as the one elected directly by the people and the Prime Minister as the other person? We said, can this person or this office be given to the Leader of the Official Opposition? That raises the stature of that office and certain provisions be added in the Constitution to give that office some stature. However, we were clearly opposed to a sharing of power as we have seen it since February last year because for us as a party it does not work. For us we take it, it was just an arrangement for a time and we cannot have this type of thing, we did not think it is good.

We thought also the Prime Minister, if he or she is the Leader of the Official Opposition, can have some semi-ceremonial powers and what we had in mind was like the system in the UK. I think the Leader of the Opposition – not I think, it is a fact – is consulted on certain things. Even in the US system, there are certain things that the democratic President will not just do without consulting the Republic; they could do with issues of national emergencies and other national issues.

On the Legislature, we share the view since Bomas-- There has been a very strong view for two Chambers and the new one would be the Senate which would have regional representatives and I think thus far then we agree with what NARC Kenya is saying, I think that was the view ventilated by Hon. Mungatana. The only further thing we observe in respect of the Legislature was, we felt the need to adopt what is referred to in some countries as proportional representation by way of voting. I think that is done in South Africa and it is a lot more done in a complex way in New Zealand and in New Zealand it has both a component of looking at the votes, I think, and getting Members of Parliament according to the votes passed, but also it includes looking at interest areas that have not been included, the disabled for instance. We thought, for instance, if that is what we had last year, a party like the one I lead - and you could say this is selfish but, no, this is why the party exists - we would have about two Members of Parliament, if we had that

sort of system today and several other parties. What do we have now? Most of the decisions in Parliament are between two parties, sometimes they include the other parties.

On devolution, we said, can we have it in the existing systems, improve them, Central Government, provincial and district? There has been a proposal, we have listened to one party this afternoon, Shirikisho, of, I think, provincial legislatures. Maybe before tomorrow afternoon you will have convinced me and by tomorrow I may support your position on that. However, we were thinking the current devolution would be expeditious, less costly; Judiciary, Supreme Court, yes, and the Judges of the Supreme Court be vetted by Parliament. Transition, we submitted.

The National Accord proposes that there be an election as soon as this new Constitution is promulgated. We share that view. It provided how in our view we were saying not more than four months after and, of course, vetting of all systems of all Constitutional offices.

So far we have not felt a very strong case for essential minimum reforms because this process has not failed. In our view when we start looking at two views we will get side-tracked.

Having finished that, let me touch a little-- I know members would expect me to dwell very much on the contentious but easily resolvable issues because, as a born-again Christian, it is probably expected I will say a lot more, but I do not think so. I share two views: one is I wish to request all of us to listen equally to what the Christians are saying in respect of this thing. Why do I say that? In 46 years, this is the first time that we are reviewing this Constitution. The Act that sets the Committee of Experts says it is to facilitate the completion of the review of the Constitutional process. It is the first time in 46 years. My understanding is since the Bomas effort, everything was put on the table, everything has been getting interrogated and, therefore, I think every view should be listened to. The Kadhi's Court or religious court, and I prefer using the term religious court, was also put on the table as an issue that needed to be interrogated. How did it come into the Constitution? What has justified its continued existence and should it continue even existing after this? I think that is the point to start and when you go that way you will even ask other questions: why is it not in the Constitution of Zambia, for instance, Uganda

or South Africa or other countries? What necessitated it being in our Constitution? Maybe certain things will start being made clear.

The other issue I want to say is, I seem to share strongly the view of Hon. Muite but with a few amendments, that the issue is complex than whether religious groups should be in the Constitution or not and I am not sure we, members of political parties, are qualified because we may not have studied enough to know what are the dynamics. The dynamics are deeper than whether simply Kadhi's Courts should be in the Constitution or not. If you ask the Christians, and--

Ms. Atsango Chesoni: Mr. Waihiga, I am going to ask you to wrap up, please.

Mr. David Waihiga: Yes, I am wrapping. If you ask – and let me just hazard one or two guesses-- For instance, for the Christians, it is a question of whether Sharia law is part of our sources of law or not, if you ask the Christians. They are saying, at this time when we are reviewing the Constitution, that questions needs to be answered because really the foundational law on which Kadhi's Court is governed is Sharia law. Beyond that, they are going back again and they are even going to the Bomas Draft and saying, look, at that time the desire was to extend it; they are not sure that desire has been done away with, it is only that maybe our Muslim brothers have pulled back saying, to what extent should we allow this to happen? They are also saying – and they have issues with you, the Committee of Experts – when you say you received submissions and Kadhi's Court was not one of those contentious issues, they ask you, did you look at the Bomas? 67% of the respondents said they do not want religious courts in our Constitution and 19% of those were Muslims. The Act enjoins you to check also through research and other ways, what is happening, I believe in other jurisdictions. Why do we not have Kadhi's Courts in other nations? The other question the Christians are asking is, in constitution making – and I want to ask the Experts from Kenya and the foreigners – is incorporation of religious entities, and specifically something that is done in modern constitution making, covered, or can this Kadhi's Court, the Njuri Ncheke, alternative dispute resolution, be provided for in our Constitution, be acknowledged, yes. They are important in our system and culture. However, they should be provided for through other provisions and the Constitution can be

amended. Last year it was amended to include the Interim Electoral Independent Dispute Resolution Court and provide for that. For them, this is what they say. We have a conflict now with Kadhi's Court and, in fact, the point is they say, we know the Muslims have not dropped what they wanted in Ghai's Draft, they would want it extended, they would even want it provided and applied in certain regions. It provides for them an advantage above the others, two systems of law. That is not proper indiscrimination.

Secondly, it also acknowledges a system of law which has not been debated. Is Sharia law one of our sources of law? Why is it not in other nations? Why is it not even in Indonesia Constitution, unless it has recently been amended, which is the greatest Islamic country? However, they are not saying the Muslims or the Njuri Ncheke or the Christians should not have ways of solving their disputes. No, I would hate my Muslim brothers who are here to think I am coming from that point of view, to the contrary. So I ask, listen to them and for you, the Committee of Experts, what Mr. Otiende said at the beginning, I would rather you always stop at that. We identified other side issues that are contentious but we think they are easily resolvable, and stop there. When, Mr. Chair, you are quoted as saying Kadhi's Court is not contentious and you repeated it here very categorically, you have been wrong, I think there are other persons who are purported to speak for you, the Hon. Minister for Justice, some politicians, it brought confusion. However, through this sort of consultation, get these parties, they will sit down-- They sit in other fora, the Muslims and Christians in Ufungamano, I think they will tell you which way to go. I say all this very respectfully and I am ready to sit at the table of brotherhood with my Muslim brothers here and nothing personal, it is all about constitution making.

Ms. Atsango Chesoni: Thank you very much. Mr. Amollo has a question for you please, Mr. Waihiga.

Mr. Amollo Otiende: Thank you, Mr. Waihiga. I do not want to comment on your submissions on the Kadhi's Court. As a colleague I will only ask you and the others who are here to consider whether actually, as the Kadhi's Court exists in the Constitution, whether it is actually a religious court as you have said or whether it is actually a court that determines matters of personal law. However, that is a different matter. What I want to ask you is on the system you proposed

because I read the submissions and you have repeated it here and you have proposed a unique system. You are proposing that the Prime Minister be the Leader of the Opposition. I need to understand this because, first of all, you say that the Prime Minister will be the person nominated the leader, with the party with the highest voters. I do not know whether that means voters generally in terms of what the party got, or Members of Parliament. I do not know what will happen if both the Prime Minister and President are from the same party, whether the Prime Minister must be caused to cross over. I just need to be clear on this proposal, as a lawyer.

Mr. David Waihiga: Thank you. I think I need to clarify that, I will be very brief. I admitted we had problems with that office. It is a phenomenon for our country that came from last year. It does exist in other jurisdictions and we had a problem. However, we did not want to ignore it and when we were thinking through it much more we were thinking, okay, we are not talking about sharing of power, we think it is a problematic approach, how otherwise would this person be in Government and be irrelevant? That is why we said, why don't you give it to the Leader of the Opposition, give them some semi-ceremonial role, consult them on certain posts and let them justify their being referred to as the Prime Minister and the Leader of the Opposition by either the fact that they were the second runner as a party and let them only be given that post if they do not get into a coalition with the party which the President comes from because the Political Parties Act also provides for coalition. If they get into coalition they may butt in and get the vice-presidency. So it would have to be a party that was strong. In fact we went ahead and said, in order of succession, then it would be the President, the Vice-President and then in the event the two are not there, the Prime Minister because whether their party is the third or fourth, they got lots of votes and endorsement by the people and they either came second or third or at the worst fourth. Again it sounds confused but we are speaking out on what we found out.

Ms. Atsango Chesoni: Okay. Thank you very much. I just wanted to say maybe one of the things we need to reflect on is not being held by the exigencies of the present and just understand things from a functional perspective. If we look at the roles that a particular office is supposed to play, it might help us not to be tied to whether or not it exists, whether or not-- Kenya has had a Prime Minister, it did at Independence. So Kenya has actually had a system where you had a Parliamentary system. It was removed and it is again considering that and it currently has a

Prime Minister. So, let us not be tied to the exigencies of the present, let us look at the functionality when we are working. It may help, I am just making a suggestion when we are working through models. Thank you.

Hon. Mwangi Kiunjuri: I am Mwangi Kiunjuri, GNU, Grand National Union. The issue of the system of Government – we are very clear and as you have said, Madam Chair, you are not experimenting anything new in this country. We have had a Prime Minister and we have one today. On the issue of where the Prime Minister or the President should come from, because we also believe in this Hybrid system, that they must derive their mandate from the people and Kenyans, the Committee told us in the morning, are very clear that they want a President. If that is the position then this President must get mandate from the people. What you are saying is that you are the custodian of the law and what you are also saying is that you need to be checked. However, by checking the President is not having a situation as we have today whereby we have two centers of power and we pretend that we are checking one another because these, constitutionally, are powers that cannot be questioned by the President. It means then tomorrow I can go and issue directives and the President issues directives and Kenyans are in confusion.

What are we suggesting? That we have a President elected by the people, we have a Prime Minister from the same party or a coalition of parties that already have majority of votes and this Prime Minister to make sure that he is the same just the same way we have Attorney General today with a security of tenure. We have Chief Justice who is the same, meaning he can be independent. Then by giving power to the Prime Minister through the Constitution, he is very safe and therefore he can be able to balance these powers.

We are saying that if we want to go Parliamentary System, then let us have a Prime Minister coming from the party with the majority of votes because we cannot pretend that we are advocating for democracy and it means the rule of majority and then you want to have a Prime Minister with the highest number of Parliamentarians but with a lower number of the actual suffrage votes.

What am I trying to say? I might today be with the party of GNU, I have 100 Members of Parliament out of a Parliament of 250 and out of the 150 Members of Parliament I have only 2 million people and my friend Gachagua, leading another party with only 50 Members of Parliament, comes in with 4 million votes. Who really has got the mandate of the people? Is it the person with the 150 Members of Parliament and no voters or the person with 50 Members of Parliament with the votes? So we must consider all those aspects and that is why, to be democratic enough, if we go Presidential and Hybrid system, then let us get, as you said, Madam, the President and the Prime Minister coming from the same party.

On the issue of the President, the President should not have a constituency, he should not be a Member of Parliament. On the issue of Cabinet, the Cabinet should come both from Members of Parliament and out of Parliament. Why? If you are only talking of a professional Cabinet, are you trying to tell us that we do not have professionals in Parliament? We have lawyers in Parliament, we have Professors who equally can enjoy to serve Kenya as Cabinet Ministers, but how do we get them in the system? Our suggestion is after a General Election and a Member of Parliament is appointed to the Cabinet, he immediately resigns from being a Member of Parliament.

What about the question of cost because at the end of the day if you have 20 Members of Parliament appointed to the Cabinet and they are required to resign as Members of Parliament, it means automatically another 20 by-elections. How do we check on that one? This Constitution should have a clause whereby before the elections are conducted, every party must go through primaries and during the primaries, the party should give a list of two or three of their candidates in the order of preference. For example, GNU conducts nominations in Laikipia, I am No. 1, then my friend is No. 2, Prof. Kivutha is No. 3. The Electoral Commission of Kenya should have that list of who was No. 1, No. 2 and No. 3, so that in case I am appointed to the Cabinet, my No. 2, because the party won, automatically assumes the membership of Parliament. In the case that No. 2 is not available, No. 3 becomes the Member of Parliament. This will not only serve on the issue of Cabinet, it will also serve in case of a by-election caused by incapacitation or in case of death. We have been having by-elections in this country, like the last one we had the one that was caused by death; why should we subject this country into undergoing by-

elections and spending millions and millions of shillings while we can check that one through the parties. The party that won election, for example, it was ODM in Shinyalu-- For example, out of the 100 by-elections conducted, it cannot be even 10% where the original party loses that election which tells you people are committed to those parties. So we are proposing that there should be lists of candidates to replace in case of death, incapacitation or one being--

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(Glass breaking) (inaudible comments).

Hon. Mwangi Kiunjuri: *Shindwe!* or one being appointed to the Cabinet. You can see the cause of death tells you there should be another by-election for the glass to be replaced. *(Laughter)*. On the issue of--

Ms. Atsango Chesoni: You have 2 more minutes please.

Hon. Mwangi Kiunjuri: Okay, let us take the most important one, the Cabinet, we have tackled that one. The issue of system of government, we advocate for two chambers of government and those who sit in the Senate should be the governors from the region. So we should qualify Mungatana's argument, so that those governors can also sit in the Senate.

Lastly, in the case of vote of no confidence, I have read the draft from *Daktari* from Ghana (*meaning Zambia*) that a Prime Minister resigns with the Cabinet. We are proposing that if there is vote of no confidence, the President goes home alone or the Prime Minister goes home alone.

The last point was about minimum reforms and this one I would like to ask the Committee to be very keen on it. We already have the Committee of Experts, the Interim Independent Boundaries Review Commission and we have the Interim Independent Electoral Commission. The three

must sit together, why? There is no way one of them can work without the other. For the Boundaries Review Committee, to commission those boundaries, delimitation of boundaries, they will require to know how many people are to be represented in those constituencies. For the Interim Independent Electoral Commission of Kenya to register voters, they must have the constituencies where they are registering voters. I understand they are about to announce the voter registration but where, without us curving the Constituencies.

If the constituencies are going to be curved, we have to listen to the issue of representation from Hon. Muite, which most of us support, that we are representing the people. How do you know how you represent the people in the arid and semi-arid areas whereby you have a special case, whereby, you are not only looking at the population of those people, but you are also looking at the area? So this Committee, your Committee must determine how many Kenyans are represented in a region, on whether it is geographical or population and that being the case, then you have no other way, you must go for minimum reforms or essential reform.

I am calling upon this Committee of Experts to consider this issue, so that you can present your case to the Parliamentary Select Committee and then, therefore, we can be able to move amendments in the House. Otherwise, as much as we pretend here, there is no way you will be able to mark the boundaries, or start registering voters without agreeing on representation; how many people are being represented or the geographical area, because even in the current Constitution, it is very clear those are the considerations. So for me, I would propose that we agree to have minimum or essential reforms and one of them touching on the issue of representation which will offer us solutions to the Boundaries Review and the Independent Electoral Commissions. Thank you very much.

Ms. Atsango Chesoni: Thank you.

Hon. Mwangi Kiunjuri: And parties should committee to support these amendments if they deem them to be viable but I do not think we have any choice but to amend the Constitution for the same.

Ms. Atsango Chesoni: Thank you. There is a clarification over here.

Mr. Nzamba Kitonga: I do not need you to answer this, Hon. Kiunjuri but it is just a comment that the meeting can consider, because it was one of the challenges that was presented to us, where you say the leader of the Party, because Hon. Kiunjuri has suggested that the President should not be a Member of Parliament, but there is a challenge and this happens in Tanzania sometimes, where the leader of the party stands as the Presidential candidate, he is not eligible to be elected as an MP, his party loses the Presidency and then you have a situation where the Party leader is outside Parliament although maybe he commands quite a following in Parliament. So, there has been a suggestion that maybe the Presidential candidate should be allowed to stand as an MP, but if he wins, he resigns the Presidency.

The other thing was just a caution for my friend Otiende here, saying that if MPs were replaced by Parties, there is a danger of a lot of them being knocked out.

Hon. Mwangi Kiunjuri: Sorry, you did not require an answer from me, but on the issue of the President running and not becoming a Member of Parliament can be taken care of by the other argument. That he can also let us know, if the President is from Laikipia, then the second in the party list, when the President is elected, automatically becomes the Member of Parliament.

Ms. Atsango Chesoni: Okay, thank you. I was just going to say, on the issue of the process, Parliament is the same Parliament that decided that the Committee of Experts will have one year to do their job. It is the same Parliament that passed the amendment that set up the IIBC and the IIEC and did not appoint them until we were quite well into our work. So, I think with respect to the process, so that we are not accused of any self interest, we would request that being Hon. Members of Parliament yourself, that you begin to have this constant engagement amongst yourself and also encourage an informed discourse in the public domain so that it is clear that it is not us who are determining those processes and when they began and when they ended or the format that we are taking. So that we are all clear and we are all in the same page because it may be very clear for some of the members but it may not be clear for everyone. Thank you. Next please.

Mr. Benjamin Muema: Thank you, Madam Chair, my name is Col Muema, I am the Secretary General of New Ford Kenya. This is our position. First of all, let me thank the Committee of Experts for this engagement with Political Parties. Secondly, before we say what we think should be in the Constitution, we also came up with some principles that I think we will share with you because I do not have time to go through them and these are constitutional principles which we think should be the determining factor, a check upon which the Constitution, after being enacted or after being proposed, should be checked against to make sure that it meets certain criteria.

Let me go directly to the Executive. Ours is a Presidential system and we are looking at a President who is elected by universal suffrage with a Deputy and these gentlemen shall not be Members of Parliament and their Ministers will come from outside Parliament vetted by Parliament and we propose that we do not have more than 24 Ministries. Actually we propose that within a period of time not exceeding 12 months after the enactment of the new Constitution, Parliament be mandated to come up with a law that prescribes how many Ministries we shall have as a nation.

Now, let us look at the Legislature. We recommend a bicameral system whereby we have Parliament as currently created and as it will be after the boundaries have been re-demarcated. We also propose an Upper House on which we have something that is rather controversial and this is to say, we have been fighting a fight for a while now, we killed each other, we saw that thing there and some people here were saying, “*stop it, stop it, stop it*” why? Because tribalism has become our way of life. Every time you say a Muema, people will say, yes, that is a Mkamba.

Now, how do we stop this from the national level? The small tribes feel that the big tribes take everything away from them by sheer numbers and by being everywhere all the time. So we said, we want to have an Upper House of 42 tribes, each tribe bringing in two people and those are the people who are going to check the Member of Parliament, check the Presidency, check everybody so that when we sit in that Council of Tribes or whatever you want to call it, we are

the same and that happens elsewhere and I think that will help us have a level of playing field whereby we do not say, “*this tribe has ten people, this other one has fifty or this one has a hundred.*” I am sure that is controversial but that is the reason we are here.

On devolution, we want to have two levels of devolution, the national level and the regional level. Now, we want to create a constitution on the national level and then give the regions leeway to make their own Constitutions because we believe that every region in this country has their own peculiarities that they would want to capture in their own Constitutions and that way we will be devolving everything from the centre without diluting the centre. By doing so, I can go into the details of how we want to collect taxes and so forth and so forth but that is rather cumbersome because I will not have time to do it. But I think in a nutshell I have said what I think.

However, I want to say something else. The reason, we are not proposing that we have a Prime Minister is one; the Prime Minister and the President-- In our current system or in other systems, the buck does not stop with one person, you have two centres of power whereby when there is a problem, I do not know this principle, this principle or whatever, whatever. So we said, let us leave the principle of separation of powers whereby Parliament is alone. Anybody who is in the Executive has nothing to do with the Legislature and anybody who is in the Legislature has nothing to do with the Executive. That way, we have a system whereby nobody can ride roughshod over the other and that way we have a way whereby we can maybe regain sanity in this country of ours. Thank you.

Ms. Atsango Chesoni: Thank you Sir. I have been reminded in various ways from different parts of the floor that it is already 5 O'clock and our agreement was that we were going to go up to 5 O'clock. So, I am in a bit of a quandary from the perspective of the Chair because we had actually identified at least 5 more people. You are not the last, Sir, you are actually somewhere in the middle. So, what I was going to suggest is that maybe tomorrow, because we are going to continue with this session tomorrow morning, so tomorrow morning, those people should be the first and what I need from you is for you to please give me your names, I am sorry, Sir, you should really have had your opportunity today and I know you gave up something for it, so-- If

we can do it that way, okay? And I will insist that you are the first person to speak tomorrow, please. Okay.

If you could put your names down so that we go in proper order. *Wewe pia, Mheshimiwa Mwandawiro, ninajua ninani. Nikwamba tu tukiendelea, wenzetu wanasema kwamba* we are not being fair. Is that okay with everyone?

Participants: Yeah.

Ms. Atsango Chesoni: All right, thank you. Could we just have-- Because I do think I know the four gentlemen, if we could have everybody--

(Consultations between the Chairperson and Vice Chairperson).

Ms. Atsango Chesoni: Okay.

Dr. Kariba Muniu: I think my name is first there for tomorrow morning.

Ms. Atsango Chesoni: Yes, if you could just give me your name again please.

Dr. Kariba Muniu: Dr. Kariba Muniu.

Ms. Atsango Chesoni: Thank you.

Mr. Ngorongo Makanga: Makanga from Mazingira Greens Party.

Dr. Ekuru Aukot: Please, I need to make an announcement before you leave if the Vice Chair is through.

Ms. Atsango Chesoni: If we could--

(Inaudible comments on the floor).

Ms. Atsango Chesoni: Okay, there was a gentleman on this end with blue. I have the names, it is fine, thank you. We are adjourning to--

Mr. Kibutha Kibwana: Point of order, Mr. Chairman.

Ms. Atsango Chesoni: --8.30 a.m. tomorrow, please. Let us please be on time and the Director has a couple of remarks.

Mr. Kibutha Kibwana: Chair, there was a point of order that you said would rule (?).

Ms. Atsango Chesoni: Okay, Prof. Kibwana, what is your point of order?

Mr. Kibutha Kibwana: From some of the presentations that were made, I think they really helped this particular debate and I am requesting if it is thought proper, that we also get another presentation maybe tomorrow first thing on representation so that we can also enrich our debate on that particular aspect because these two aspects on the System of Government and Representation have been spoken a lot about, so that is a request.

Ms. Atsango Chesoni: Okay, thank you, we have heard the request, thank you, very much.

Dr. Ekuru Aukot: My announcement is very simple, it is something that is to your own interest, please ensure as you leave, you see a fellow called Ndiwa who is from our IMF part of the CoE and you may want to shake his hand.

(Participants walking out of the conference hall).

Ms. Atsango Chesoni: Hang on, hang on, there is something else happening else before tomorrow at 8.30 a.m. which you may also want to hear about because you may not need to shake Ndiwa's hand or you may want to make a saving based on the shaking of Ndiwa's hand.

Dr. Ekuru Aukot: Yes, and that is another issue of interest to you, that is the cocktail, it starts at exactly 7.00 p.m. just by the beach. You see where we had dinner yesterday, just down the beach there and then we can also have our dinner by the beach. You have those two options today.

Meeting adjourned the meeting at 5.11 p.m.

