

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

**NATIONAL CONSTITUTIONAL CONFERENCE
(NCC)**

VERBATIM REPORT OF

**PLENARY PROCEEDINGS , HELD IN THE PLENARY HALL
BOMAS OF KENYA**

ON

03.03.04

CONSTITUTION OF KENYA REVIEW COMMISSION

**NCC – PLENARY PROCEEDINGS, HELD AT THE PLENARY HALL
AT BOMAS OF KENYA ON 3RD MARCH 2004**

Session Chair - Hon. Delegate Sultana Fadhil (Vice Chair NCC)
Co-Chair - Hon. Delegate Koitamet Ole Kina (Vice Chair NCC)

Presenters:

Hon. Delegate Adhu Awiti - **Convenor**
Com. Prof. Wanjiku Kabira - **Rapporteur**
Com. Mutakha Kangu - **Rapporteur**

Secretariat Staff In Attendance:

Carol Ndindi - **Assistant Program Officer**
Fidelis W. Wangata - **Assistant Program Officer**
Serah Ndeto - **Clerk from Parliament**
Asha Boru - **Verbatim Reporter**

The meeting was called to order at 9.15 a.m. with Hon. Delegate Sultana Fadhil in the Chair.

Hon. Delegate Sultana Fadhil: Reverend David Oginde, Ambassador Manduli and Sheikh Ali Shee to please lead us in prayers. Could you please stand up for prayers? Thank you.

Rev. David Oginde: *(Prayers). Let us pray.*

Our God and our Heavenly Father, we want to thank you for this day. We thank you for the gift of life. That we are alive today is a gift from your hands. Lord as we look around our nation, we want to come before you and pray that you take charge of this land. We want to remember especially the damage that was done at City Hall by the fire. Lord we are praying that even as we assess this and try to find out what exactly happened, that you calm us down and you help us to reflect on our lives as a Nation. Lord that we would acknowledge that you alone is God and without you we can do nothing. This morning we are gathered here as Delegates, considering matters that are going to do with the future of this land. Father I want to pray that you give us sobriety. Help us oh Lord to be at peace with ourselves and with one another. That everything that we do will not just be for our own selfish interest, but for posterity. Father at times we have spoken words that may have hurt others and I pray that you would help us to forgive one another. That Lord, as we continue with our deliberations, especially as we enter this very crucial section of our deliberation, help us oh Lord to be

sober, to be alert and grant us wisdom and courage to do only that which is right for this Nation. I pray for all those who are going to bring reports. I pray for every person who is going to participate in one way or another. I pray oh God that your spirit would superintend in this building, that Father your peace will reign and that nothing that is planned by the enemy, by anybody that is contrary to your will, shall enter into this document. So, we commit ourselves to you this morning, indeed this whole day as we commit ourselves to you in Jesus' Name. Amen.

Hon. Delegate Orie Rogo-Manduli: *(Let us pray).*

Lord Almighty, God of all things, large and small, I am offering this prayer this morning particularly as a woman. I am doing that Dear Lord, because I know that you love your creation. That you love and you placed women all over the world in a special position and the position that you placed the women in is that of peacemakers. You have actually made women intermediaries throughout the ages; throughout history. You have made women, those who can walk into places that are difficult and who can talk in situations which are unattainable and who could change hearts and change destinies. I am praying particularly for the women at this Conference and I am thanking you Lord for putting together a group of very very dedicated women. That have shown, they have shown their dedication to the grave task that has been assigned to them. There are no more than one hundred; just slightly over one hundred. But they are felt and they participate and they contribute and they are true to the calling. They are true to the grave duty and duties that you placed on their laps. These women will remain in the annals of history as those who along with their men, struggled to bring together a document that will bring good governance, prosperity and peace in this land.

Dear Lord, we will be having the International Women's Day pretty soon and I want to particularly place the women of the Conference in your hands to now more than ever walk with wisdom, talk with wisdom and mediate with wisdom. Wherever you place them in the different Committees and now in the Plenary of the Whole, I want their voices to make possible what a lot of people thought would be impossible. I know Dear Lord that you love Kenya. You have given us a beautiful land. You have given us beautiful people who in all their diversity are able to appreciate things that are good. To walk together, talk together, chart their way forward together and plan their destiny together in one voice despite the different languages that they speak in their private capacities and in their private abodes.

We want this common language that you made possible for Kenyans. This common destiny that is ours together to be the guiding light in whatever decisions that we will be making in this final lap, in this vital lap of the long long Conference that has sapped a lot of our energies. But that we must now recharge our energies anew to face and to complete with victory. Be said that for every runner dear Lord, it is that final lap that is important and we know that you have helped us and you will help us to reserve a bit of energy, to reserve a bit of resolve to help us do the final lap with honour and in glory. Dear Lord, bless the leadership of this country. Dear Lord bless us in our different tribulations. My brother has already prayed for the calamities at City Hall and we as the Mothers of Kenya, we cry at the destruction of such a beautiful historic building, with all the records and with all the important documentation that forms the vital history of this country. We know that you will give us wisdom to look at the way forward. You will also give that which is called chivalry. Chivalry does not only belong to men. Chivalry belongs to women as well.

To leave our pettiness behind and stop looking at personal gains and look at the national gains. All these, dear Lord, we are just requesting in the Name of thy Son who put himself on the cross and whose example we must all follow to humble ourselves and lay ourselves prostrate on the cross. We ask this in the Name of your dear Son, Jesus Christ the Lord. Amen.

Hon. Delegate Sheikh Ali Shee: *Bismillahi Rahmani Rahim. Kwa jina lako Mola, Muumbaji wa mbingu na ardhi, tuko mbele yako sisi wajawako, wanyonge, wanyenyekevu, tukiwa tunatoa shukrani zetu kwako Muumbaji kwa kutuweka katika hali iliyo bora. Hali ambayo ni ya kuridhisha, bora kushinda nchi nyingi katika ulimwengu. Mola , wewe ndiwe mlinzi wa taifa hili na umelilinda kwa muda mrefu. Twakuomba uendelee kulilinda tena taifa hili ili liweze kupata mafanikio na maendeleo kwa vizazi vilivoko sasa na vizazi vinavyokuja. Ee Mola bariki mkutano huu. Wabariki watu wote walioshiriki kwenye mkutano huu kwa ajili ya kutengeneza Katiba ambayo ni mwongozo wa vizazi vilivoko sasa na vizazi vinavyokuja.*

Ee Mola sisi ni waja wako ambao mara ingine tunakosea na hiyo ndio tabia ya udhaifu wa mwanadamu. Twakuomba utupe msamaha na nguvu ya kuweza kutorejelea tena kwenye makosa ambayo tumeyafanya. Wenzetu ambao ni wagonjwa na waliopata maafa na ambao wameadhirika wamekuwa hawawezi kuhudhuria kwenye fungamano kama hili, Mola wape afua, uwape msamaha, uwape afya ya kuweza kurudi tena, kuja kushiriki kwenye mkutano huu. Ewe Mola tupe busara na uwezo wa kuvumiliana na ushujaa wa kuvumilia, ikiwa maoni

ya wenzetu wengine ni maoni ya wachache na hayatakubalika, basi wape ushujaa na uwezo wa kuvumilia kushindwa kwa maoni yao, ili taifa hili liweze kwenda mbele. Mola bariki watu wetu wote walioko hapa na walioko nje na utupe msamaha wako na nguvu zako ili tuweze kuendelea. Tunakuomba kwa jina lako tukufu Ee Mola tubariki. Yarabi, Amini.

(The National Anthem).

Hon. Delegate Sultana Fadhil: I am giving you a minute to settle down before we proceed with today's programme. I want us to remind ourselves of certain things. We are all familiar with the regulations of the procedure of the Conference. There were a lot of issues been raised about minority reports, minority views, e.t.c. According to the regulation, any view that was raised at any Technical Committee, whether it was a minority report, minority view, an oral report or anything, it will appear in the Minutes and the report of that Committee which will be officially tabled at this Conference. But let me remind everyone that the mere fact that you have put forward a minority report or a minority view does not automatically give you the right to amend or alter an Article. According to the regulations, this must be accompanied by a notice of Motion. Anyone is free to file any notice of Motion, provided that is done according to the regulations. Yesterday, you were all given a two-page document titled "Procedure in the Committee of the whole Conference." On page 2 and Clause 5, it states, "Delegates who wish to move any amendment to a Draft Article as adopted by any Committee, as presented are in the mean time urged to prepare their Motions for amendments and to submit such Motions, duly signed by them to the Office of the Rapporteur General."

Six, "the deadline for submissions of amendments is Thursday 4th at 6 p.m." I have been informed by the Secretariat that all Motions can be delivered at an office next to the Press Tent. It is called CEPIC. There will be ushers there who will even assist you if you want to draft a Motion. So, I think you are all familiar with those regulations and – let me remind you again – any Delegate is free to table a Motion to amend an Article. I now call upon Dr. Adhu Awiti to proceed with today's programme and he is going to make a presentation on Devolution.

PRESENTATION OF REPORT OF TWC G:

CHAPTER 10 - DEVOLUTION

Hon. Delegate Adhu Awiti: Thank you, Chair. I would like to greet all Honourable Delegates. Good morning. My names are Adhu Awiti, Delegate number 009 and I am going to give the report on the deliberation on the Committee on Devolution. But at the outset, I would like to let you know that this is the Committee whose work has spread to many other Technical Working Committees. For example, our work has been transferred to Chapter 6 which deals with the Republic, our work has been transferred to the Committee of Representation, our work has been transferred to the Committee of Legislature and our work has also been transferred into Committee of Finance and of course Transition and Consequential Committee.

The second point I would like you to know is that I am going to read the report of the Committee and the policy which the Committee made which we are presenting to the Committee of the Whole for their consideration. I am told that the template for our Committee is being prepared and I hope by the time I finish reading the report, that template will be available to the Delegates. So, I will request your indulgence that this is a Committee whose report cannot be summarized in few words because it amends a lot of things. So, I will request Delegates to bear with me so that even if it becomes boring at a certain time, it is because of the nature of our work and the way we debated and the way we made our decision. I am pleased to introduce to you here with me the Rapporteurs who went through with us during the deliberation of the Committee. To my left is Rapporteur Professor Wanjiku Kabira and to my right is Kangu, who sometimes we referred to as the high priest of the Devolution. (*Clapping*).

So, I hope that you have my report which I am about to read. Introduction, the Devolution Committee examined the Commission's report and Draft Bill as well as special and supplementary working document on Devolution of power and the revised Draft Bill on Devolution of powers as required by the Constitution of Kenya Review Act, CAP 3A. The Devolution Committee was guided by the values, objects and purposes of the Review enshrined in Section 3 of the Review Act, *inter alia* promotion of people's participation in governance of the country through the Devolution and exercise of power. The respect for ethnic and regional diversity and communal rights including the communities rights to enjoy

their cultures and express their identities. Establishment of free and democratic system based on good governance and separation of powers and checks and balances. The promotion of accountability of public authorities, guaranteeing peace, national unity and integrity of Kenya in order to safeguard the well-being of the people and ensuring the provision of basic needs of all Kenyans through the establishment of an equitable framework for economic growth and equitable access to National Resources.

The Committee wishes of course to thank the Convenor who is reading and the Rapporteur Commissioner Mutakha Kangu and Commissioner Professor Wanjiku Kabira, the Draftspersons, Mr. Peter Barret and Jeremy Wainwright and the Committee members for all their commitment, consistency and participation in the work of the Committee. The Committee had quorum for all its meetings. The Committee is very grateful to the Secretariat who included the following program staff: Fidelis Wangata, Menach Evans, Joyce Wamucii, Mary Chesoni, Millicent Achieng' and Thambiria Janda. They worked professionally and tirelessly to support the work of the Committee.

Committee Mandate: The Technical Committee on Devolution of power is established pursuant to Regulation 49 (4) of the Conference regulations to consider any issue or theme arising from the Chapter on Devolution of Powers and the Commission's report. The Committee comprising sixty members drawn from different categories of the Delegates to the Conference, widely and robustly debated *inter alia* the following:

The Constitutions, functions and operation of Government at the various levels of Government with the aim of maximizing the mutual checks and balances and securing their independence.

Principles of power sharing between national and devolved levels of Government, finance and fiscal management, the Senate, the Intergovernmental relationship in the devolved setup, the linkages between the Chapters on Devolution and the other provisions in the Draft Bill and Implementation of the proposed Devolution System of Government.

Method of work: The Conference regulations and Rapporteur General's Guidelines for the National Constitutional Conference *ad hoc* and Technical Committees guided the Committee's proceedings. The Convenor chaired the debates and the questions arising thereof. The Rapporteurs took the Committee through national reports, the people's view on

Devolution, relevant technical working papers, recommendations of the Commission , the views of the Conference expressed during the general debate in Bomas I, and II sessions, the special and supplementary working documents on Devolution of Powers. The Rapporteurs explained to the members the rationale behind the provisions in the statutory and relevant working documents and generally ensured the availability of technical and logistical support for the Committees.

The Committee was assigned a Draftsperson. The Committee was also served by a small Secretariat consisting of Program staff, a Clerk, Hansard reporter and Support staff. Local and International Observers monitored the proceedings. As agreed by the Steering Committee of the Conference, the first hour of most sessions was committed to general comments on the items on the day's Agenda by members of the Committee, as well as other Delegates from other Committees, wishing to make any contribution on the same. The Committee proceeded in line with its adopted work plan on policy level. Subsequently, consideration of the Draft Bill on an Article by Article basis followed. The Committee, as far as possible, made decision by consensus. Most Devolution provision have been mainstreamed in the revised Zero Draft, as I had said earlier, and are therefore part of other Chapters as well, other than Chapter 14 on the Devolved Government.

The Committee faced a number of challenges. The sad, tragic and brutal assassination of the Committee's first Convenor, the Late Dr. Chrispine Odhiambo Mbai, interrupted the steadfast and focused Committee's progress. Members were deeply touched by the sad loss but reaffirmed their commitments, focus and dedication to the steadfast progress of the Committee's work. The Committee began its deliberation without the Draft Bill on the Devolution Chapter and had to proceed for sometime on the basis of the Commission's main report and the Special Working Document on Devolution of Powers. Questions of linkages of Devolution provision with other Chapters of the Draft Bill, were myriad. The Committee made various suggestions on such issues. The Committee hopes that the relevant Technical Working Committees and the Committee of this House will find these recommendations useful and will accept them.

The Role of Experts

The Committee invited various experts to address the Committee on various needs, among them, the following –

1. Financial and fiscal aspect of Devolution.
2. Distribution of functions between and among the various levels of government.
3. The cost benefit analysis of the proposed Devolution structure.

Members noted that a Section of the public was opposed to Devolution of Powers on ground that the proposed Devolution structure would be too expensive to implement. The Committee however, found considerable information and evidence to the contrary. The experts who addressed to the Committee, included Julius Kipkeng'etich, Professor Peter Wanyande, Nicholas Simiyu, Joseph Oyula, Gilbert Wang'alwa and Willy Samute – the Permanent Secretary, Department of Local Government in the office of the President of the Republic of Malawi.

Study Visit

The Committee visited Kilifi District Development Program, Projects for a fast hand experience of self-governance at the village level. The lessons learned from the visit, greatly enriched the deliberation and informed the decision on local government as well as the accommodation of villages in the context of the devolved setup. The Committee is grateful to the German Technical Corporation Agency (GTZ) and the United Nations Development program (UNDP) for arranging and funding the study visit.

General Comments on the Commission's Report

The Committee debated the Commission's report. It considered various efforts at Devolution by independence Constitution, the current Constitution and other reforms such as the local government reform initiative spearheaded by the Association of Local Government Authorities of Kenya (ALGAK) and the Ministry of Local Government. It examined how selected countries, including Germany, South Africa, Malawi and Switzerland had dealt with the question of Devolution in their Constitutions. It was noted that the independence Constitution was the result of intense and considerable discussions especially in regard to the system of government.

As a consequence, the two major principle of the independence Constitution were Parliamentary Democracy and Devolution of Power as an instrument for minority protection. Thus, the structure of government resulting from the Constitution composed of the national

government, a system of eight semi-autonomous regions as well as an elaborate system of local government. The Committee noted that the devolved government structure of the independence Constitution was gradually eroded through several Constitutional Amendments effectively introducing the present structure of an authoritarian and centralized government with an elaborate system of provincial administration.

The Committee was alive to the views of Kenya on Devolution as well as the Commission's recommendations thereto, which included the following –

1. That recommendations should reflect a cost benefit analysis.
2. That the level of Devolution and distinct powers be exercised by the Devolved units be clearly defined.
3. That the model of Devolution should reflect the following broad principles -
 - (a) clear demarcation of the functions and powers within and across the units of Devolution in a way that ensures checks on power and reduces conflict in the exercise of power;
 - (b) the efficient and equitable mobilization, allocation and management of resources;
 - (c) the need to enhance participatory governance and accommodate diversity including cultural diversities;
 - (d) the needs of vulnerable groups such as women, children, disabled, minorities and marginalized groups.
4. That the question of financing the Devolution unit and the methodologies of sharing of resources be carefully developed.
5. That proper mechanism to coordinate the inter-governmental relations should be provided for.
6. That transition and implementation of the new system and dispute settlement mechanisms.

Members also noted that the general debate at the National Constitutional Conference during the Bomas I and II Sessions generally supported the proposal for Devolution of Power. It was urged very strongly for the formulation of viable structures that would be able to promote equitable resource location, accountable governance, delivery of services and the empowerment of the people.

Delegates were considerably in the support of district as the principle-- (there is something wrong with that “principle”) --principle centers of Devolution. The subject of the legality of existing district as the basis for the proposed Devolution’s structure was a matter that was the subject of a hotly debated Motion. It was generally proposed that there ought to be comparable social and economic resources for the proposed units of Devolution.

Some Delegates asserted that the Constitution ought to specify the percentage of national resources that ought to go to devolved government. The conference felt very strongly that the Constitution ought to provide for an independent Boundaries Commission to determine, define and review the boundaries of the units of Devolution.

Principles of Devolution

Arising from the above concerns, the Committee supported the principle of Devolution elucidated by the Commission. The need to clearly identify the system and structure of government was underscored. Whereas it was acknowledged that there was a need to protect minorities, it was noted that an acceptable and well inclusive definition of the term, should be agreed on. The need to mainstream questions of devolution throughout the Draft Bill was underscored.

The Committee noted that Kenyans in their views to the Commission, as well as the General Debate at the Conference had unanimously called for Devolution of Power for three main objectives -

1. To enhance local peoples participation in governance without interfering with the territorial integrity of the nation.
2. Afford all Kenyans accessible and proximate service delivery and control.
3. Equalization and distribution of national resources.

The Committee adopted the principle of Devolution as amended as a true reflection of the view of Kenyans.

Levels of Government

The Committee considered the question of levels of government. Members unanimously agreed that there should be four levels of government namely –

1. The National;
2. Regional;
3. District; and
4. Location Governments

The governments, at each level are distinct, inter-dependent consultative and negotiative. Regions would mainly coordinate the activities and policies of the District Government that constitute that region. By consensus, it was agreed that Local Government should be the third level of Government and be based at the District level. This subsumes the local authorities into the proposed structure of Devolution. All aspect of local authorities including their powers and functions must there fore be seen in light of the proposed District Governments, which have now replaced them. The Provincial Administration is abolished.

However, a section of the meeting proposed that since numerous development programmes are currently anchored in the constituencies, there was need to consider a constituency as an alternative level of Devolution of Power. This was however rejected by the Committee. Members felt that constituencies are electoral units. It was felt that the role of parliamentarians should be restricted to legislation in the National Assembly only and should not be integrated in executive functions, as this would offend the Constitutional principle of separation of Powers among the Arms of Government. Development of the constituencies would therefore form parts of the district development planning to which the constituency forms part.

The Committee also agreed on the establishment of Location Government consisting of Location Council and Location Executive. The Location Administrator is to be elected by voters residents in the location in the manner prescribed by District Legislation. The meeting noted the need for local communities or villagers be guaranteed the right to manage all affairs of local concern on their own responsibility within the limit set by the National Legislation. In this regard, the Committee proposed that associations, federations and networks of local communities or villagers within the framework of their statutory powers and functions likewise, have the right of self management as set by the National Legislation.

Units of Devolution

Members passionately, debated the delicate question of the number of units of the Devolution. The following factors were considered in the deliberation –

1. Viability.
2. Sustainability.
3. Comparable territorial size.
4. Comparable population size.
5. Historical and cultural ties.
6. The protection and welfare of minorities in the unit.
7. Presently existing administrative and political unit.

The Functions

The proposed units are intended to take over from the national government –

1. Economic potential.
2. Natural resource endowment.
3. Efficiency, effectiveness and biodiversity.

Members were remarkably patient, understanding and accommodative during the highly charged emotive debate. The need to keep the territorial integrity and unity of the country was underscored throughout. Equally, noted was the question of regional district boundaries. Some delegates noted that there exist a lot of anomalies in the current district boundaries and should not be entrenched in the Constitution. Correcting such anomalies in future would be very difficult, as it would require Constitutional Amendments.

However, Members were considerably in support of the district as the principle unit of Devolution. The issue of protection of minority communities arose. Numerous examples all over the world were given, where Constitutions have been designed an tailored to meet the needs of such groups. Of particular concern was the plight of the Teso people, who made a strong case for special status in the devolved government system. Some Members felt that there was need to afford Constitutional protection to the minority at all levels of government and not just to focus on isolated cases.

On fears of domination of numerically small communities by the numerically superior communities, it was explained that the Bill of Rights would guarantee the safety and well being of all Kenyans throughout the Republic. The most difficult question to determine was,

what region Trans Nzoia District and to same extent, Mount Elgon District should be placed in. This controversial question was resolved by the decision to place the two Districts in one Region with Turkana, Marakwet, West pokot Districts.

The Committee then resolved that the territory of the Republic would be divided into eighteen regions and special units comprising Teso District. There would be seventy-four units at the third level of government corresponding with the existing number of districts, as well as those that shall be created from the Division of Nairobi into four boroughs. Each region would comprise the aggregate territory of district that constitute the region. The boundaries of a district whose name corresponds to the name of a district existing at the date, the provision of district take effect, would be the boundary of that district.

Members also agreed that each district shall be divided into such location with such boundaries and shall be prescribed by National Legislation. However, following discussions on the Zero Draft and the issue and recommendations arising from the working Session in Mombasa held between 2nd February to 11th February this year to harmonize decisions arrived at by the various Committees, Members agreed on the need to re-visit decision earlier reached on division of the country into regions, as well as the distribution of functions between and among the various levels of government.

Specifically, the Committee unanimously agreed on the need to reduce the number of regions for the following reason –

1. Fewer regions were more, economically viable.
2. Since the regions would be mainly coordinative units, there was merit in having fewer regions.
3. The general public mood also favoured fewer regions.
4. Finally, the Committee took the view that the fewer regions there were, the less the cost of running the proposed devolution structure would be.

Consequently the Committee agreed on the following guidelines to enable Delegates decide on fewer regions than those already agreed to -

1. That Central, Coast, Western, Nairobi, North Eastern Provinces should consist of one Region each.
2. Nyanza Province should have either one Region or a maximum of two Regions.

3. Rift Valley and Eastern Provinces were to have two Regions each or maximum of three Regions each.

Subsequently, the Committee reversed its earlier decision on the number of regions and unanimously agreed on fourteen regions, namely –

1. Coast, Western, Nairobi, Central, and North Eastern would constitute one Region each.
2. Nyanza and Eastern Provinces would have two and four Regions respectively.
3. Rift Valley Province would be divide into three Regions, namely -
 - (a) The North;
 - (b) Central; and
 - (c) South Rift Regions.

The question as to what region Trans Nzoia District and to some extent Mount Elgon District should be placed drew a lot of controversies and heated debate again. The question was resolved by the decision to place the two Districts in the Northern Rift Region with Turkana, Marakwet, Keiyo, Uasin Gishu, Nandi North, Nandi South and West Pokot Districts. There would be no special unit as the Committee resolved to integrate Teso District into a wider Western Region. The need to protect minorities within the regions, generally and across all the units of Devolution was underscored.

Variations of Boundaries

The Committee noted that there exist a lot of anomalies in boundaries of regions, districts and locations. It was proposed that there be established a Commission on Boundaries and Elections that would not only oversee election but also make recommendations concerning the fixing, review and variation of boundaries of regions, districts and locations. This proposal was harmonized with the recommendation of the Committee on Representation of the People.

In making any such recommendation, the Commission will be required to have regard to the viability, sustainability and effectiveness of the region, district or location, taking into account –

- (a) its population and area;
- (b) historical and cultural ties;

- (c) its economic and natural resources; and
- (d) the objects and principle of Devolution of Government.

After consultation with the government of any region, district and location effected and on recommendation of the Boundaries Commission, Parliament may by enactment, vary the boundaries of a region, district or location.

Distribution of Functions

The Committee further considered the question of assignment of functions among the various levels of government. It was strongly urged that every level of government should exercise and perform only such powers and functions as are assigned and re-assigned to each by the Constitution and any legislation. The allocation of functions was based on the principle of subsidiarity, so that functions were assigned to the lowest level of government, best placed to perform them, where they would be best performed.

The Committee assigned most implementation functions to District Government. Consequently, District Governments were assigned much in taxation powers to enable them successfully and effectively perform the myriad functions allocated to them. Members also agreed that when one level of government by legislation or other measures assigns or re-assigns power and functions to another level of government, necessary arrangements shall be put in place to ensure that the funds necessary for the exercise and performance of such additional powers and functions shall follow.

In other words, funds must follow functions. Also, where power or function is to be exercised and performed concurrently by two or more levels of government, such levels of government may consult and coordinate with each other in the exercise and performance of the power and functions. Similarly, as noted earlier and following discussions on the Zero Draft and the issues and recommendations arising from the working Session in Mombasa to harmonize decision arrived at by the various Committees, Members re-visited decision earlier reached on the allocation of functions between and among the various levels of government. Subsequently, regions were allocated merely coordinative functions only.

Finance and Fiscal Management

The Committee considered the fiscal and financial aspect of Devolution. Members emphasized that the success of the proposed Devolution structure will depend on the financial arrangements that would be put in place. The Committee distinguished the following financial powers of the State –

1. The power to raise revenue.
2. The power to administer revenue.
3. The power to spend revenue; and
4. The power to control and audit finances.

It was noted that the importance of sharing of financial resources among different orders or levels of government in devolved system of government, stems from a number of reasons –

Firstly, financial resources are important to each level of government as they enable or constrain government in the exercise of their constitutionally assigned responsibility, particularly legislative and executive functions. Responsibilities should not be given without the accompanying means necessary for the effective discharge of the responsibility.

It is appreciated the Devolution attempts by the independence Constitution, as well as the present day decentralization by the Central Government to Local Authorities have failed to yield benefits, Devolution offers, because of failure to properly design and entrench financial arrangements.

Secondly, taxation and expenditure powers are important instruments for effecting and regulating the economy and to maintain a proper macro-economic equilibrium. Financial resources play a very important role in resource distribution and ensuring a balanced development of the country. Re-distribution of resources is also to be seen as an overall value in the governance process. There is that need to address both vertical and horizontal imbalances between and among the units and levels of governance. The cause of the imbalances was traced back to the governance, development and investment policies of our past governments both colonial and post colonial. Thus the need for financial equalization to ensure that all citizens within the country are able to access comparable services at reasonably comparable tax rates. There was consensus on the need to establish an independent Commission on finance and fiscal policy, whose function shall be to make such

recommendation as will ensure that the sharing of revenue from national resources is equitable as between government at all four levels and is equitable at each level as between the different units at that level.

The Commission would also play the following further functions:

- a) report to four levels of government its recommendation, concerning the apportionment of national revenue to the four levels;
- b) frequently review such recommendations to ensure they conform with changing circumstances;
- c) mediate in and determine disputes relating to financial arrangements between the national and devolved governments.

The Commission is to consist of the following persons appointed by the President:

- a) a chairperson.
- b) fourteen persons consisting of one nominee from each regional assembly.
- c) two persons to represent district governments appointed in accordance with the national legislation.
- d) two persons nominated by the national assembly and the principle secretary responsible for finance and controller of budget.

Excuse me.

All levels of government are represented in the Commission. This is so that no one level shall have the monopoly of decision making as regards finances. In its recommendation the Commission shall aim at defining and enhancing the revenue sources of government at the four levels with the object of encouraging fiscal responsibility and moving the devolved governments over time toward financial self sufficiency, taking into account the principle of taxation set out in the Constitution. The Committee also considered how the fiscal capacity of devolved governments might be developed and strengthened through the austere treasury and budget control.

Audit requirements, transparent public procurement, control public borrowing and effective revenue administration: An innovation of the Committee is the establishment of

other consolidated funds for devolved government into which all revenue collected or due to the devolved government shall be kept and may only be withdrawn therefrom in accordance with the appropriate legislative authority.

The Committee's decision on finance shall be harmonized with those of the Technical Working Committee on Public Finance and be transferred to the Chapter on Public Finance.

Taxation Powers: Members assigned taxation powers to the national and district levels of government. The critical consideration was the functions that were assigned to the various levels of government. Members firmly intended that funds must follow functions. Major taxes were assigned to the national government with the intention that the revenue so collected will be used mainly for financial equalization. Other taxes were assigned to the district government. The Committee noted that whereas the regional level of government is necessary to supervise and coordinate the affairs of the lower devolved level of government and whereas numerous functions had been assigned to regional government, the regional government should not have taxation powers. But, mechanism for financing this level of government would have to be provided for in the Constitution to avoid marginalization of regions by the national and district governments. A section of the Committee however, took the contrary view, that since level of governments were distinctive, regional government should have taxation powers. It was agreed that local government should not have taxation powers.

Borrowing by government: The Committee debated borrowing by various levels of government. Members agreed that all government should have power to borrow funds from other governments and from external sources. The borrowing power would be regulated in accordance with national legislation which would, *inter alia*, provide that terms and conditions of the loan shall be laid before the legislature of the various government and shall not come into force unless they have been approved by the resolution of the said Legislatures.

Monies received in respect of any loan, shall be paid into consolidated fund or reserved fund and form part of that fund or into some other public fund which exists or is created for the purpose of the loan. Regional, district, local government may also raise loans for capital or recurrent expenditure in accordance with reasonable conditions determined by national legislation. However, loans for recurrent expenditure may only be raised when necessary for bridging purposes during a fiscal year and shall be repaid within 12 months.

Public service at devolved level of government: The Committee proposed that there should be a single Public Service Commission for the Republic. The Commission is to consist of a chairperson, 14 persons consisting of 1 person nominated by each regional assembly, 2 persons to represent district government appointed in accordance with national legislation and 2 persons nominated by the national government. All levels of government are represented in the Commission, this is so that no one level shall have the monopoly of decision making as regards public service. In this regard, a regional and district government would be responsible for the recruitment, appointment, promotion, transfer, dismissal of members of its public service within a framework of uniform norms and standards applying to public service described by the national legislation. This shall also apply to the Teachers Service Commission and the Police Service Commission.

The Senate: The Committee has proposed the establishment of the second national chamber, the Senate, whose principle role shall be to provide an institutional framework through which the devolved level of governments share and participate in legislation, governance, administration and decision making at the national level. It would also make legislation, governance, administration and decision making at the national level to become a shared function between the national, regional and district governments. The principle role of the Senate therefore, is to provide an institutional framework for the consultation between the different levels of government. The Committee is current negotiating with the Committee on Legislature to harmonize our provision on the Senate with those of the Legislature Committee and to transfer the provision to that Chapter on Legislature.

Balance of gender and diversity: The Committee was alive to the need to mainstream affirmative action for women in the Chapter. Great efforts were made to mainstream gender issues in the Chapter. Additionally, further provisions protecting both genders were agreed on so that at all times not more that two-thirds of the members of any Executive Committee or Legislative body constituted under the Chapter would be of the same sex. Composition of government at various levels shall reflect this position. This way no one gender would be marginalized.

It was also agreed that national legislation shall be enacted to ensure that community and cultural diversity in a region, district or locality is reflected in the legislative and executive bodies exercising power in the region, district or localities and that minorities would also be protected.

Government during transition: The Committee considered questions of transition from one government to another and resolved that while any election is being held to constitute an assembly or council under the Chapter, the assembly or council as last constituted should remain competent to function until reconstituted after the election. This would avoid any integnum in the government.

Removal of elected leaders: The Committee passionately debated the delicate matter of removal from office of elected leaders before their constitutional terms expire. Whereas members agreed with the wisdom and need for such a provision, members were also alive to the fact that such provision was susceptible to abuse. While the provision would be retained, there was a need to tightly control the circumstances under which elected leaders may be legally removed from office before the expiry of their term.

Publication of laws: It is to be noted that there have been established various legislative bodies. The Committee therefore, appreciated the need to make provision to require laws made by numerous legislative bodies are published in the Kenya Gazette before they take effect.

Conflict of laws: The Committee considered that since myriad laws will be passed by legislative bodies, conflicts in the laws might arise from time to time. Consequently, the Committee made provision for resolution of conflict between national legislation and regional or district legislation falling within the concurrent jurisdiction.

Recommendation on transition: The Committee also debated the difficult question of implementation of the new devolved structure. The recommendation would be forwarded to the Committee on Transitional and Consequential Arrangements. There was a suggestion that there should be a transitional board in every district to advice and monitor the transition process to ensure smooth transition from the present to the new authorities and dispensation. It was suggested that the Constitution of Kenya Review Commission should conduct civic education before the next general election to educate Kenyans on the proposed new constitutional dispensation. Noting that the Committee on Transitional and Consequential Arrangements had proposed that all legislation to put into effect all provisions of the new Constitution must be enacted within three years, the Committee took the view that the Senate must be established immediately upon the enactment of the Constitution to enable it participate in the anticipated legislative processes. It was agreed that the various legislations

were of such important nature to be left to the National Assembly alone. It was further suggested that the election of the members of the devolved government and the members of the national government should be held at different times.

If it is deemed that 2002 General Elections were held under the proposed new Constitution as elucidated by Article 3 of 8th Schedule, it was felt that Concillors within a given district should, within 6 months of the enactment of the new Constitution, constitute an electoral college for the purpose of electing members of their respective regional legislative, assembly and the senate.

In conclusion, the Committee achieved remarkable results in executing its mandate. The people's views have been accurately crystallized. The Committee has in addition, carefully considered the fears and concerns of the people and fully taken them into account. The Committee's proposals are aimed at facilitating social and economic changes that people want and which are necessary to ensure democratic, participatory and just society. We believe that many of these changes will come about through the new institution and procedures for government decision-making and accountability that we are recommending.

Equally, we recognize that national unity will not come about unless all our communities are treated justly and feel that they are treated fairly. We propose that communities that have been denied opportunities to benefit from social and economic development should be assisted to achieve living standards of other Kenyans. The Committee's proposals are designed to give voice to the people and to affirm their sovereignty. They re-affirm our commitment to a united Kenya and the resolve to find a framework for the coexistence of all Committee.

I thank you all. (*clapping*).

Hon. Delegate Sultana Fadhil: We go for tea right now, but please do come back in exactly half an hour. There is an announcement for Nyanza Delegates, you are all invited by your Secretary to have lunch together at the Devolution Tent. Thank you. Please, by 20 past we should be here. Thank you.

Meeting adjourned at 10.45 a.m. for tea.

Meeting reconvened at 11.37 a.m. after tea break.

Hon. Delegate Fadhil Sultana: We go through the Articles on the Chapter on Devolution. Please be seated and those who are coming in, please do it quietly. Thank you.

Com. Wanjiku Kabira: Thank you Chair. I am going to ask the Delegates to go to page 145, Chapter 14 of the Zero Draft. We go to Chapter 14 of the Zero Draft which appears on page 145. As you listen to our Convenor, you realize that Devolution touches on various Chapters. We will at times move you from this particular Chapter to a different Chapter to look at some of the Articles that have been mainstreamed within the Draft. We are looking at page 145, Chapter 14, and before we begin reading the objects of devolution of government, I want you to go to Article 6, which is on page 4 and this one refers to part of our section and I will read Article 6 on the Territory. It says that:

- (i) The Republic of Kenya consists of the territory recognized under international law and international agreements.
- (ii) The Republic is divided into the regions and districts set out in the First Schedule.

Now, I want to go to the First Schedule, which is on page 231. If you look at page 231 we have the First Schedule which is the regions comprising the various districts. We have Region 1, which consists of Kwale, Mombasa, Taita Taveta, Kilifi, Lamu, Tana River and Malindi. That is the Coast Region.

An Hon. Delegate:

(Inaudible).

Hon. Delegate Wanjiku Kabira: First Schedule, page 231. You have found it? Okay. And then we have Region 2, which consists of Makueni, Machakos, Kitui and Mwingi. Region 3, which consists of Meru Central, Meru South, Meru North and Tharaka. Region 4, which consists of Mbeere, Embu and Kirinyaga. Region 5 which consists of Isiolo, Marsabit and Moyale. Region 6 consisting of Garissa, Ijara, Mandera and Wajir. Region 7, which consists of Kajiado, Narok, Transmara and Kuria. Region 8, which consists of Kisii Central, Gucha and Nyamira. Region 9, which consists of Teso, Bungoma, Busia, Lugari, Kakamega, Vihiga and Butere Mumias. Region 10 which consists of Turkana, West Pokot, Marakwet, Transzoia, Mt. Elgon, Keiyo, Uasin-gishu, Nandi North and Nandi South. Region 11 which

consists of Kericho, Bureti, Bomet, Baringo, Koibatek, Nakuru, Samburu and Laikipia. Region 12 which consists of Kisumu, Bondo, Nyando, Siaya, Suba, Rachuonyo, Homabay and Migori. Region 13 which consists of Kiambu, Thika, Murang'a, Maragwa, Nyadarua and Nyeri. And then Region 14 which is Nairobi, which is divided into four boroughs, Westlands Municipality which consists of Westlands, Starehe and Dagoretti; Karasani Municipality which consists of Kasarani and Kamukoji; Langata Municipality which has Langata and Makadara; and Embakasi Municipality.

So, those are the 14 regions. We do not yet have the names and the Committee members are still to propose the names, which they will probably do in the course of the debate. I want you to go back to page 4 again and you will find another Article there, Article 7 on Devolution. This Article on Devolution-- I will read the first Sub-Article and then I will explain a little because there have been some amendments on the other Sub-Articles. Page 4, Chapter two, which is called the Republic. There is an Article? You have found it? Okay.

An Hon. Delegate: Just go on.

The sovereign authority of the people is exercised at the following levels-

- (a) the national level;
- (b) the regional level;
- (c) the districts level; and
- (d) the locational level.

Sub-Article 2 changes, there were some omissions, so I will just read it. "The district is the principle level of devolution", that is Sub-Article 2.

Sub-Article 3, is what we have now as Sub-Article 3, which is, "the principle role of the regional government is to co-ordinate the implementation of programmes and projects that go across districts". There is a paper that was given two days ago but the corrections have not yet come to you. Then we go to the next Article, which is, "the principle role of the Senate is to provide an institution through which the devolved levels of government share and participate in legislation at the national level". The next Sub-Article says that, "the two Houses of Parliament, as the principle source of national legislation, are responsible for the enactment of the framework legislation applicable to the devolved levels of government, either directly or adopted to local conditions by their legislation".

And then I want you to back to Sub-Article 2 of the same Article. The governments at each level are distinct, inter-dependent, consultative and negotiative. You will notice that Article 7 is a little bit re-organized and in the revised Draft it will appear re-organized a little bit more, but the essence is the same. I want you to go now to Chapter 14. In Chapter 14, we will look at the objects of devolution of government, which is page 145. That is the substantive Chapter, page 145, Article 231, Sub-Article (1), “the objects of devolution of government are as follows-

- (a) to ensure the democratic and accountable exercise of sovereign power;
 - (b) to foster national unity by recognizing diversity;
 - (c) to give powers of self-governance to the people at all levels and enhance the participation of people in the exercise of the powers of the state;
 - (d) to protect and promote the interests and rights of minorities and disadvantaged groups at all levels;
 - (e) to promote social and economic development and the provision of proximate, easily-accessed services throughout Kenya;
 - (f) to ensure equitable sharing of national and local resources throughout Kenya with special provisions for less developed areas;
 - (g) to recognize the right of local communities to manage their own local affairs and to form networks and associations to assist in that management and to further their development; and
 - (h) to facilitate the decentralization of government agencies and functions away from the capital territory.
- (2) All persons and bodies exercising and performing powers and functions in accordance with this Chapter, must take account of the objects set out in this Article.

Co-operation between government at the different levels

- 232.** (1) Government at every level shall be loyal to the Constitution and support the goals values and principles of the Republic.
- (2) Government at every level shall exercise and perform its powers and functions in a manner that does not encroach on the geographical, functional or institutional integrity of the government at any other level and must respect the Constitutional status, institutions and rights of government at all levels.
- (3) Government at every level shall assist and support, and consult with each other level and shall as appropriate implement the laws of each other levels.
- (4) Government at every level shall maintain liaison with government at each other level for the purpose of exchange of information, co-ordination of policies and administration and enhancement of capacity.
- (5) Government at every level, or different units of government at the same level may co-operate in the performance of functions and, for that purpose may set up joint Committees or joint authorities.
- (6) A government involved in an inter-governmental dispute shall make every reasonable effort to settle the dispute by means of procedures provided for that purpose, and shall exhaust all other remedies before it approaches a court to resolve the dispute.
- (7) When resort to such procedures has failed to resolve a dispute, the dispute may be referred to the High Court for resolution.
- (8) The High Court shall deal with any matter referred to it under Clause (7) with expedition, but if the court is not satisfied that the requirements of Clause (6) have been met, it may refer a dispute back to the governments involved.
- (9) For the purposes of Clause (6), an Act of Parliament shall provide procedures for the settlement of inter-governmental dispute by negotiation, mediation or arbitration.

Assignment of functions

233.

Now we look assignment of functions and this section is also going to be reorganized but I will read that section and then we will move on to the schedules.

Article 233.

- (1) Until other provision is made by an Act of Parliament, the powers and functions of the various levels of government other than the region and sub-locational level of government are set out in the Fifth Schedule.
- (2) Except where this Constitution and legislation provide otherwise, the powers and functions of the regional level of government in all its functional areas shall, in consultation with the districts in the region be -
 - a. the co-ordination and supervision of the districts in the course of the implementation of the national and regional policies and standards;
 - b. the formulation of regional policies;
 - c. the setting of regional standards;
 - d. regional planning;
 - e. the monitoring and evaluation of implementation of region projects;
 - f. actual production, management and delivery of regional services;
 - g. actual development operation and maintenance of regional infrastructure and services;
 - h. the facilitation and harmonization operations within the region; and

i. capacity building and technical assistance to the districts.

All those functions are going to go to the schedule where the national and district functions are. Now sub-Article 3;

- (3) Local communities or villages shall be guaranteed the right to manage all affairs of local concern within the limit set by national legislation.
- (4) Associations, federations and networks of local communities or villages within the framework of their statutory powers and functions, likewise have the right of self-management as set by national legislation.
- (5) Subject to the Act of Parliament referred to in Article 234(2), for the purpose of this Chapter, the Nairobi regional government has the powers and functions of both a regional government and a district government and a district forming the Nairobi region, do not constitute separate devolved governments.

I want to make a correction, that Nairobi region remains a region like all the other regions and the districts, the four boroughs that I read a little earlier remain as the four boroughs. So, the principle is the same, that is a mistake that is corrected, but it is not reflected in the Draft.

- (6) Subject to Clause (7), each level of government shall exercise and perform only such powers and functions as are assigned to it under Clause (1) and any legislation.
- (7) It is the duty of every district government to decentralize the provision of services and other functions of government by providing, by laws of the district government, for their devolution to locational government to the extent that it is efficient and practicable to do so.
- (8) When powers and functions are re-assigned or devolved from one level of government to another level of government, arrangements shall be put in place to ensure that the funds necessary for the exercise and performance of those powers and functions are transferred accordingly.

- (9) Where a power or a function is to be exercised and performed concurrently by two or more levels of government, each of those levels of government may consult and coordinate with each other in the exercise and performance of the power or function.
- (10) A function that is assigned to more than one level of government is a function within the concurrent jurisdiction of each of those levels of government.

(Consultation at the “high” table).

Hon. Delegate John Katuku: Point of Order.

Hon. Delegate Sultana Fadhil: You have a Point of Order?

Hon. Delegate John Katuku: Mr. Chairman. My number is 046, John Katuku. I was just drawing your attention to a certain religious functions which is going around there, which I do not know what has happened to it now, but Mr. Chairman, I wanted your guidance in this matter because we are not familiar with that kind of practice here. Thank you. *(Clapping)*.

An Hon. Delegate: What is going on?

Hon. Delegate Sultana Fadhil: No, no, she has already complied – just a Minute. That one was tabled there officially yesterday, we did not object to it, but if there is any objection for it – I did not notice what was going on, I was following Dr. Kabira.

Hon. Delegate John Katuku: *(Inaudible)*.

Hon. Delegate Sultana Fadhil: It is okay, let us just proceed, let us just proceed, please. No debate on this issue.

Hon. Delegates: No, no.

Hon. Delegate Sultana Fadhil: Let us focus on serious business now, please. Dr. Kabira continue. *(Clapping)*.

Com. Wanjiku Kabira: Okay, so I will continue. Before we move on to part two which is on regions, I would like you to move to page 245 where we have the Fifth Schedule, we have the Fifth Schedule which I said we are going to refer to.

So the Fifth Schedule – I hope you are there – 245. We have the;

DISTRIBUTION OF FUNCTIONS BETWEEN THE NATIONAL GOVERNMENT AND THE DEVOLVED LEVELS OF GOVERNMENTS

Part I – National Governments

Part (I) deals with the National Governments which will deal with:

1. Foreign affairs, foreign policy and international trade.
2. In consultation with the regions and districts, the use of international waters and water resources.
3. Immigration and citizenship.
4. The relationship between religion and state.
5. Language policy and the promotion of official and local languages.
6. National defence and the use of the national defence services.
7. National security, including –
 - (a) the setting of standards of recruitment, training of police and use of police services;
 - (b) criminal law; and
 - (c) correctional services.
8. Courts.

9. National economic policy and planning.
10. Monetary policy, currency, banking (including central banking), the incorporation and regulation of banking, insurance and financial corporations;
11. National statistics and data on population, the economy and society generally.
12. Intellectual property rights.
13. Labour standards.
14. Consumer protection, including standards for social security and professional pension plans.
15. Education policy, standards, curriculum, examination and the granting of university charters.
16. National universities, tertiary educational institutions and other institutions of research and higher learning and support for regional and districts universities and other institutions of research and higher learning.
17. Promotion of sports and sports education.
18. Transport and communications, including, in particular –
 - (a) road traffic;
 - (b) the construction and operation of national trunk roads;
 - (c) standards for the construction and maintenance of other roads by regions and districts;
 - (d) railways;
 - (e) pipelines;
 - (f) marine navigation;
 - (g) civil aviation;
 - (h) space travel;
 - (i) postal services;

- (j) telecommunications; and
- (k) radio and television broadcasting.

19. National public works.

20. Housing policy.

21. General principles of land planning and the co-ordination of planning by the regions and districts.

22. Protection of the environment and natural resources with a view to establishing a durable and sustainable system of development, including in particular –

- (a) fishing, hunting and gathering;
- (b) protection of animals and wildlife;
- (c) water protection, securing sufficient residual water, hydraulic engineering and the safety of dams; and
- (d) energy policy.

23. It will also deal with National referral health facilities.

24. Disaster management.

25. Ancient and historical monuments of national importance.

26. National elections.

Part II – District Governments

On the next page you have the District Governments functions, which will include:

- (1) Agriculture, including -
 - a. crop and animal husbandry;
 - b. livestock sale yards;
 - c. district abattoirs;

- d. plants and animal disease control; and
 - e. fisheries.
- (2) District health services, including in particular -
- a. districts health facilities and pharmacies;
 - b. ambulance services;
 - c. promotion of primary health care;
 - d. licensing and control of undertakings that sell food to the public;
 - e. veterinary services (excluding regulation of the profession);
 - f. cemeteries, funeral parlours and crematoria; and
 - g. refuse removal, refuse dumps and solid waste disposal.
- (3) Control of air pollution, noise pollution, other public nuisances and outdoor advertising.
- (4) **Cultural activities, public entertainment and public amenities, including -**
- a. casinos and other forms of gambling;
 - b. racing;
 - c. liquor licensing;
 - d. cinemas;
 - e. video shows and hiring;
 - f. libraries;
 - g. museums;
 - h. sports and cultural activities and facilities; and
 - i. district parks, beaches and recreation facilities.
- (5) District transport, including -
- a. district roads;
 - b. street lighting;
 - c. traffic and parking;
 - d. public and road transport;
 - e. ferries and harbours, excluding the regulation of international; and
 - f. national shipping and matters related thereto.

- (6) Animal control and welfare, including -
 - a. licensing of dogs; and
 - b. facilities for the accommodation care and burial of animals.

- (7) Trade development and regulations, including -
 - a. markets;
 - b. trade licenses
 - c. fair trading practices;
 - d. local tourism; and
 - e. cooperative societies.

- (8) District planning and development including -
 - a. statistics;
 - b. land survey and mapping;
 - c. boundaries and fencing;
 - d. housing; and
 - e. electricity and gas reticulation and energy regulation; and

- (9) Education at free pre-primary, primary and secondary levels, special education, village polytechnics, homecraft centers and childcare faculties.

- (10) Implementation of national government policies on natural resources and environmental conservation, including -
 - a. soil and water conservation; and
 - b. forestry.

- (11) District public works and services, including -
 - a. storm water management systems in built-up areas and
 - b. water and sanitation services.

- (12) Police and firefighting services and disaster management

- (13) Control of drugs and pornography.
- (14) In consultation with the locational governments, ensuring and coordinating the participation of communities and locations in governance at the local level and assisting communities and locations to develop the administrative capacity for the effective exercise of the powers and functions and participation in governance at the local levels.

Part III – Locational Governments

You will remember that we read the list of the regional government. So we will come to the functions of the locational governments and Article –

- (1) Says that, in consultation with district government, promotion of the self-determination which we have changed to self governance and development of communities in the location, by -
 - a. initiating, planning, implementing and co-ordinating local community projects, activities and services;
 - b. applying and co-ordinating the application of funds available from any source for the purposes of such projects, activities and services;
 - c. implementing within the locality, projects planned at the district, regional or national levels of government;
 - d. implementing with the locality, laws of the nation, region or district;
and
 - e. generally fostering the integrated and participatory self-management of local affairs and communities.

There are addition two or three Sub-Articles which include dispute settlement, management of local law and order which are added in the Revised Draft, but which were also decisions of the Committee.

So we will go back to page 148 and look at the regions, part II where we are dealing with the regions.

Regional Government

- 234.** (1) A regional government consisting of a regional legislative assembly and a regional Executive is established for each region. *(There is a small amendment there which will appear later). It says taking into consideration the special needs of indigenous and marginalized communities and groups. That was an amendment within the Committee but it is reflected in the Revised Draft.*
- (2) The Nairobi region shall be managed as a metropolitan capital city, as prescribed by National legislation. In our document, we actually talk about national legislation and not an Act of Parliament because it is the legislation which is going to be created by both Houses.

Regional Legislative assemblies

- 235.** A regional Legislative assembly –
- a. consists of four Delegates, (not being members of any district council) elected in accordance with Article 236, from each district within the region by the council of that district;
 - b. is constituted for a term of five years; and
 - c. has the power to pass any laws that are reasonably necessary for, or incidental to, the effective exercise of the powers and performance of the functions that are assigned to the region.

Election of members of regional Legislative assemblies

- 236.** (1) A person is eligible to be a member of the regional Legislative assembly if that person –
- a. is qualified from membership of the National Assembly; and

- b. meets the requirement relating to residency in the region prescribed by an Act of Parliament.
- (2) In electing Delegates to the regional Legislative assembly, a district council shall take into consideration the various diversities represented in the districts; and
- (3) A member of the regional Legislative assembly, is a member of the district council by which that member was elected and may attend its meeting and take part in its deliberations but may not vote. We are saying these are Ex-officio members of the district councils).

Officers and procedures of regional Legislative assemblies

- 237.** (1) The members of each regional Legislative assembly shall elect -
- a. one of their number as the speaker of the regional; and
 - b. one of their number to be deputy speaker, who may exercise all the powers of the speaker during the illness or absence of the speaker.
- (2) The members of a regional Legislative assembly may elect such other office holders as they desire.
- (3) At any sitting of a regional Legislative assembly-
- a. the speaker presides; or
 - b. in the absence of the speaker, the deputy speaker presides; or
 - c. in the absence of both, a member appointed for the purpose by the speakers presides.
- (4) The speaker and deputy speaker have such other powers and functions as the members, from time to time, confer upon them; and
- (5) A regional Legislative assembly may, by a vote of two thirds majority of its members remove a speaker or deputy speaker from office.

- (6) (Numbering is not good, we will make corrections). The provisions of Article 162 and 163 apply with any necessary modifications to a regional Legislative assembly, in the same way as they apply to a House of Parliament.

Regional Executive Committee

238. (1) The executive authority of a regional is exercised by a regional executive Committee consisting of -

a. a regional chief Executive and a deputy regional chief executive, to be known –

(i) except in the case of the Nairobi region, as a premier and the deputy premier;

(ii) in the case of the Nairobi region, as the mayor and the deputy mayor;

and elected in accordance with Article 239 or 240, as the case requires. (There is a difference there because in Nairobi, the election is direct), and;

b. other members appointed by the regional chief Executive with the approval of the regional legislative assembly.

(2) The number of members appointed under clause (1) (b) must not exceed one-third of the number of members of the regional legislative assembly. (You need back benchers).

(3) A person is eligible to be a member of a regional Executive Committee if that parson -

a) is qualified for membership of the National Assembly; and

b) meets the requirements relating to residency in the region prescribed by national legislation.

- (4) During the illness or absence of a regional chief executive, the deputy regional chief executive, has all the functions powers and responsibilities of the regional chief executive; and
- (5) The regional chief executive and the deputy regional executive referred in clause (1), hold office for a term of five years and are eligible if otherwise qualified for re-election for one further term; and
- (6) A member of the regional executive committee other than the regional chief executive or the deputy regional chief executive, may be dismissed from office by resolution of the regional legislative assembly.

Election of regional premier and deputy regional premier

- 239.** (1) A regional premier and a deputy regional premier shall each be elected by the electoral college consisting of all the elected members of district councils within the region.
- (2) A member of the electoral college constituted under clause (1) is not eligible to be elected regional premier or deputy regional premier.
- (3) At an election under clause (1) -
- a) the candidate who obtains a two-thirds majority of the votes cast is to be declared elected; and
 - b) if not candidate obtains such a majority –
 - (i) a second ballot shall be held in which the only candidate are those who obtain the highest and the second highest number of votes in the first ballot; and

- (ii) the candidate who obtains a greater number of votes in the second ballot is to be declared elected.

Election of mayor and the deputy mayor of Nairobi

240. The mayor and deputy mayor of Nairobi shall each be elected in the manner prescribed by national legislation by a simple majority, by registered voters who meets the requirements relating to residency within the region prescribed by legislation.

We look at;

Functions of regional executive committee Article

241. (1) The members of the regional executive committee under the chairmanship of the regional chief executive responsible for the functions of the assigned to them by or under this Constitution.

(2) Members of the regional executive Committee are accountable collectively and individually to the regional legislative assembly for the exercise of their powers and the performance of their functions.

(3) Members of the regional executive committee shall -

a) act in accordance with the Constitution; and

b) provide the regional legislative assembly with full and regular reports concerning matters under their control.

Part III – Districts

Part III we look at the districts.

Application of Part

242. Unless the contrary intention appears, this Part and any other provision of the Chapter and we have removed that Sub-Article because after further discussion, we thought it was not necessary.

District governments

243. (We look at district governments which is sub-Article 243 they will be renumbered). A district government consisting of a district council and a district executive established for each district.

Legislative authority of district councils

- 244** (1) The legislative authority of a district is vested in its district council.
- (2) A district council may pass any laws that are reasonably necessary for or incidental to the effective exercise of the powers and the performance of the functions that are assigned to the districts and-
- (3) A district council may recommend to the Regional Legislative Assembly the enactment of legislation concerning any matter outside the authority of that District Council that is within the legislative competence of the Regional Legislative Council.
- (4) A district Council may formulate plans and policies for the management and exploitation of the District's resources and development and management of the District's infrastructure and institutions.
- (5) In the exercise of its legislative authority, a District Council has power to-
- (a) maintain oversight over the Districts Executive Committee, and any other Executive Organs established by laws of the District Council, particularly with respect to the implementation of laws and other legislation required to be implemented by the District Government. And-
 - (b) Summon any person to appear before it or any of its Committees for the purpose of giving evidence or providing information; and

(c) For the purposes of paragraph (b), has the powers of the High Court in

(i) enforcing the attendance of witnesses and examining them on oath, affirmation or otherwise,

(ii) comparing the production of documents and-

(iii) issuing a Commission on request to examine witnesses abroad.

The Election of district councillors

A district council consists of-

(a) one member elected for each of such number of wards, with such boundaries as are prescribed by the National Legislation, passed after taking account of the recommendations of the Electoral Commission and-

(b) such number of special seats, seat members, all of whom are women, as are required to ensure that at least one-third membership of the council comprises women elected after members have been declared elected under paragraph (a). And-

(2) A person is eligible to be a member of a district council if that person -

(a) is qualified for membership of the National Assembly and –

(b) meets the requirements relating to the residency in the district prescribed by an Act of Parliament.

(3) Nothing in this Article prevents a woman who stood unsuccessfully for election under paragraph (a) of Clause 3, from contesting a special seat under paragraph (b) of that clause.

(4) A District Council is constituted for a term of five years.

Speaker and deputy speaker of the district councils

246 (1) The members of each district council shall elect-

(a) one of their number to be Speaker; and-

(b) one of their number to be deputy speaker who may exercise all the powers of the Speaker during the illness or absence of the speaker

(2) the members of a district council may elect such other office holders as they desire and-

- (3) At any sitting of a district council-
 - (a) the speaker presides; or
 - (b) in the absence of the speaker, the deputy speaker presides; or
 - (c) in the absence of both, one of the members elected by the members present presides. And

- (4) the speaker and deputy speaker have such other powers and functions as the members confer upon them.

Procedures of district councils

247. Subject to provisions made by an Act of Parliament, a district council is free to regulate its own procedures.

District executive committee

248. (1) The executive authority of a district is exercised by a district executive committee consisting of

- (a) a district governor and a deputy district governor
 - (b) subject to clause 2, such other members as are appointed by the district governor with the approval of the district council.
- (2) The number of members appointed under paragraph (b) of clause (1) shall not exceed either-
- (a) one-third of the number of members of the district council or ten persons;
 - or
- (3) A person is eligible to be a district governor or deputy district governor if the person-
- (a) is qualified for the membership of National Assembly; and
 - (b) meets the requirements relating to residency in the district prescribed by a Act of Parliament (National Legislation)
- (4) During the illness or absence of the district governor, the deputy district governor has all the functions, powers and responsibilities of the district governor.

Election of District governors and deputy district governors

249. (1) The district governor and deputy district governor shall each be elected in an election which they contest as a team by registered voters who meet the requirements relating to residency within the district prescribed by national legislation; and

(2) The district governor and deputy district governor each hold office for a term of five years, and each of them is eligible if otherwise qualified for election for one further term.

(3) A member of the district executive committee other than the district governor or deputy governor may be dismissed from office by resolution of the district council.

Functions of the district executive committee

250. (1) A district executive committee shall-

- (a) implement laws of the district council;
- (b) implement, within the district, provisions of national and regional legislation concerning any matter specified in part (3) of the 5th schedule, except to the extent that this Constitution or national or regional legislation otherwise provides;
- (c) implement within the district, other national and regional legislation, to the extent that legislation so requires;
- (d) coordinate the functions of the district administration and its departments;
- (e) coordinate the functions of locations and communities within the district.

(2) Without limiting any power of the district council, a district executive committee may prepare and initiate proposed laws for enactment by the council.

(3) The district executive committee has such other powers and functions as maybe conferred on it by this Constitution or by national or regional legislation.

(4) Members of a district executive committee are accountable collectively and individually to the district council for the exercise of their powers and the performance of their functions.

(5) A district executive committee shall-

- (d) act in accordance with the Constitution; and
- (e) provide the district council with full and regular reports concerning matters under the control of the district executive committee.

And now we move on to **Locations**.

Locational Governments

251 A locational government, consisting of a locational council and locational executive committee is established for each location

Composition and election of locational council

252. (1) A locational council consists of representatives elected by registered voters who meet the requirements for residency in the location prescribed by an Act of Parliament.

- (2) The election for the purpose of clause one, shall be conducted in such a manner as is prescribed by an Act of Parliament or national legislation, being a manner that ensures that an equal number of women are elected.

Presiding officer

253. (1) The members of each locational council shall elect-

- (a) One of their number to be the presiding officer, to be known as the chairperson or by such other name as the assembly or council determines;
- (b) One of their number to be the deputy presiding officer, to be known as the deputy chairperson or by such other name as the assembly or council determines who may exercise all the powers of the presiding officer during illness or absence of the presiding officer.

(2) The members of the locational council may elect such other officers as they desire.

(3) At any sitting of the locational council-

- (a) the presiding officer presides;
- (b) in the absence of the presiding officer, the deputy presiding officer presides; or
- (c) in the absence of both, one of the members elected by the members present presides.

(4) The presiding officer and his or her deputy have such other powers and functions as the members may from time to time confer upon them.

(5) A locational council shall appoint a treasurer and a secretary to the council.

Location administrator

254. (1) The location administrator is the executive authority of the location and is to be elected, in the manner prescribed by district legislation, by voters resident in the location.

(2) A person is eligible to be a location administrator if that person has completed four years of secondary education and meets the residency qualifications in relation to location prescribed by national legislation.

(3) The term of office of a location administrator is five years.

Part V— General provisions relating to devolved governments and their members

Conduct of elections

255. Elections, including by-elections, held for the purposes of this Chapter shall be conducted by the Electoral Commission

Vacancies

256. (1) A member of an assembly, council or committee constituted under this Chapter vacates his or her office if the member-

- (a) dies;
- (b) reaches the end of his or her term of office;
- (c) resigns the office by notice in writing to the relevant officer within the meaning of clause (2).
- (d) Is removed from office under this Constitution;
- (e) Is declared bankrupt;
- (f) Without reasonable cause and without a mission of the body of which he or she is a member, fails to attend four consecutive meetings of the body of which due notice was given to the member;

- (g) Is convicted of an offense punishable by imprisonment for a term of or exceeding six months; or
- (h) Ceases to hold any qualification essential for membership

(2) For the purposes of paragraph (1)(c), the relevant officer is-

- (a) where the member resigning is not the presiding officer of the body concerned – the presiding officer;
- (b) where the member resigning is the presiding officer of an executive committee – the presiding officer or the legislature;
- (c) where the member resigning is the presiding officer of a legislature - the presiding officer of the executive committee

(3) When a vacancy occurs in the office of an elected or appointed member, a person shall as soon as practicable, be elected or appointed, as the case requires, to fill the vacancy.

The oath of office

257. A person shall not act as a member of any assembly, council or executive committee constituted under this Chapter, or exercise any power vested in such a member, unless the person has taken an oath or affirmation pertaining to his or her office as a member prescribed by the national legislation.

Quorum

258 At any meeting of an assembly, council or executive committee constituted under this Chapter, a quorum is present if the number of members present is more than one-half of the total membership of the assembly, council or committee.

Decisions

259. At any meeting of an assembly, council, executive, committee constituted under this Chapter, at which a quorum is present, a decision supported by a majority of voters is the decision of the assembly, council or committee.

Remuneration and benefits

260. A member of an assembly, council or executive committee constituted under this Chapter, is entitled to such remuneration and benefit as are determined in respect of members

of that assembly, council or executive committee by the salaries and remunerations commission.

Public access and participation and powers, privileges and immunities

261. Article 165 and 166 apply in relation to the regional legislative assemblies and the district and locational councils in the same manner as in the national legislature.

Balance of gender and diversity

262. (1) At any time, not more than two-thirds of the members of any assembly, any council or executive committee constituted under this Chapter are to be of the same sex.

(2) An Act of Parliament shall be enacted to ensure that community and cultural diversity in a region, a district or a locality is reflected in legislative and executive bodies exercising power in the region, the district or the locality.

(3) Without limiting the generality of clause (2), that legislation must prescribe means to protect minorities within the districts.

Government during transition

263. While any election is being held to constitute an assembly or council under this Chapter, the assembly or council as last constituted remains competent to function until reconstituted after the election.

Ethics

264. Members of an assembly, a council or committee constituted under this Chapter, shall act in accordance with the principles set out in Chapter 9.

Removal of elected executives

265. (1) In this Article-

“elected executive” means a person holding office as an elected member an executive committee constituted under this Chapter;

(2) The Attorney General, if requested to do so by resolution of the legislature of a devolved government, conveyed to the Attorney General by the presiding officer of that legislature, shall appoint a tribunal constituted in accordance with the national

legislation to consider the question whether an elected executive of that devolved government specified in the resolution is unable by reason of mental or physical infirmity to perform the functions of his or her office.

(3) The tribunal shall inquire into the matter and make a report to the Attorney General, stating its opinion, whether or not the person in respect of whom the question arises is by reason of physical or mental infirmity, unable to decide the functions of the office concerned.

(4) For the purposes of its functions, the tribunal has such powers as are prescribed by national legislation.

(5) The Attorney General shall certify in writing, the decisions of the tribunal and cause the certificate to be conveyed to the presiding officer concerned.

(6) If a tribunal appointed by this Article (5) that an elected executive is by reason of physical or mental infirmity, unable to discharge the functions of the office, the legislature shall declare the office vacant.

(7) Where an office is declared vacant in accordance with the provisions, fresh elections shall be called to fill the vacancy.

Miscellaneous formalities of law making

266. (1) The national, regional and district Governments must afford the citizens in affected parts of Kenya an opportunity to participate in their decision making on matters that affect the status, institutions, powers and functions of districts and locations, by publishing for public comment any legislation in this regard before introduction or promulgation.

(2) Subject to clause (1) and Article 267, the necessary procedures and formalities pertaining to law making by a legislative assembly or council are specified in its own rules or procedure and standing orders.

Publication of laws

267. (1) A law or subordinate instrument made by a regional legislative assembly, a district or a locational council or an executive committee does not take effect unless published in the gazette.

(2) National regional and district laws may prescribe other requirements in relation to the publication of law of devolved Governments

Conflicts of laws

268 (1) The Article applies to conflicts between legislation in relation to matters falling within the concurrent jurisdiction of the various levels of Government.

(2) National legislation prevails over regional and district legislation if-

(a) The national legislation applies uniformly throughout Kenya and any of the conditions specified in Clause (3) is satisfied.

(b) The National Legislation is aimed at preventing unreasonable action by a region or district that –

(i) is prejudicial to the economic health or security interest of another region or district or of Kenya as a whole or

(ii) impedes the implementation of national economic policy.

(3) The conditions mentioned in Clause (2) are as follows:

(a) The national legislation deals with a matter that cannot be regulated effectively by legislation enacted by the regions individually;

(b) The national legislation deals with a matter that, to be dealt with effectively requires uniformity across the nation and the national legislation provides that uniformity by establishing –

(i) norms and standards;

(ii) frameworks or national policies.

(c) The national legislation is necessary for-

- (i) the maintenance of national security;
- (ii) the maintenance of economic unity;
- (iii) the protection of the common markets in respect of the mobility of goods, services, capital and labour;
- (iv) the promotion of economic activities across regions or district boundaries;
- (v) the promotion of equal opportunity or equal access to government services; or
- (vi) the protection of the environment.

(4) regional or district legislation prevails over national legislation if Clause(2) does not apply.

(5) Regional legislation prevails over district legislation

(6) A decision by a court that a provision of legislation of one level of government prevails over a provision of legislation of another level of government, does not invalidate that other provision but that other provision becomes inoperative to the extent of the inconsistency for as long as the conflict remains.

(7) When considering an apparent conflict between legislation of different levels of government, a court shall prefer any reasonable interpretation of the legislation that avoids a conflict to any alternative interpretation that results in conflicts.

(8) A court before which an apparent conflict between legislation of different levels of government arises shall decide the issue unless-

- (a) because of the importance or complexity of the matter, the court on its own motion, refers the matter to the High Court; or
- (b) any party to the proceedings requests that the matter be so referred.

Management of urban districts and urban areas.

269 (1) National legislation provides for the governance and management of urban districts and urban areas.

(2) That legislation shall-

(a) establish criteria for distinguishing between-

- (i) urban districts and areas; and
- (ii) rural districts and areas;

(b) establish criteria and procedures by which transition from a rural district into an urban district is recognized;

(c) establish criteria for classifying an area within a district as an urban area;

(d) establish the principles of governance and management of urban districts and urban areas which take into account the special requirements of the national capital and other major centers;

(e) provide for participation, by the citizens of urban areas in governance functions of the district within which it lies.

(3) That legislation may-

(a) provide for the identification of different categories of urban areas within a district

(b) make other provisions for the better governance of urban areas and urban districts.

The Suspension of regional or district government

270 (1) A regional or district government may be suspended -

(a) in an emergency arising out of internal conflict or war; or

(b) for gross inefficiency or corrupt practices, or for failure to comply with a code of conduct prescribed by national legislation in respect of regional or district governments.

(2) A regional or district government shall not be suspended under Clause(1) (b) unless an independent commission of inquiry has investigated the allegations against it, the president is satisfied that the allegations are justified and that he Senate has authorized the suspension.

(3) During a suspension under this Article, arrangements shall be made for the performance of the functions of the regional or district government in accordance with a national legislation; and

(4) A suspension under this Article shall not extend beyond a period of ninety days, during which period new elections for the relevant council shall be held.

Prohibition against holding elective office at national and devolved levels.

271 Except as otherwise provided by this Constitution, a person shall not hold a public or elective office at the same time in both the national government and a devolved government or in any more than one devolved government whether at the same or a different level.

Supplementary legislation.

272 National legislation-

- (a) shall require constitutional Commissions, over a specified period to establish such offices in the regions and in districts as are necessary to provide the people with adequate access to those Commissions;
- (b) may provide that the power to make laws on a matter is with one government and power to implement it with another government or governments;
- (c) Shall provide for delegation of powers of one level of Government to another and shall specify the conditions for the transfer and recall of the powers delegated;
- (d) may require legislation passed by Parliament to contain provisions for its adaptation to local circumstances by a region or a district;
- (e) may provide for a phased transfer of powers, functions and resources to devolved government bodies on the basis of their satisfying clearly the prescribed criteria as to

the demonstration by them of the capacity to discharge their respective functions and powers;

- (f) may require the cost of salaries of members and officers of devolved governments to be met from revenues raised directly by the devolved governments.
- (g) may specify special measures for the development of marginalized areas;
- (h) may provide for the establishment of criteria and procedures for classification of cities and townships and for governance of their internal structure;
- (i) may institute arrangements for adapting the structure of devolved governance to urban requirements; and
- (j) generally may make provision for carrying out or giving effect to the provisions of this Chapter. *(Clapping)*.

(Inaudible discussion on the floor).

Com. Wanjiku Kabira: And Devolution is not yet over so, **(Laughter)** I will hand over to Commissioner Kangu to present the rest.

Com. Mutakha Kangu: Thank you very much as was mentioned at the beginning there are a number of decisions we made which have found their way in other Chapters and others we are still negotiating with members of different Committees to find their way there. So, my purpose is to try and draw your attention to some of the decisions we made that are in other Chapters and for a start I would want you to go to page 180 and this process will involve you moving from one page to the other.

At page 180 under the Chapter on Public Finance, Article 296 entitled Commission on Revenue allocation our Committee of course insist that the Commission should be called, "Commission on Finance and Fiscal Policy". That Article there says.

- (1) there is established a constitutional Commission to be known as, "The Commission on Revenue Allocation".
- (2) You will notice that there are two Sub-Articles (2), the first one says, the "Commission consists of -
 - (a) seven members appointed by the President on the nomination of the Senate;
 - (b) the Principle Secretary responsible for Finance and
 - (c) the Controller of budget

That is what is proposed by the Committee on Finance but the Sub-Article (2) in italics is what the Committee on Devolution is proposing and it reads,

- (2) The Commission is to consist of the following persons appointed by the President-
 - (a) A Chairperson;
 - (b) Fourteen persons consisting of one nominee from each Regional Assembly;
 - (c) Two persons to represent district governments appointed in accordance with national legislation;
 - (d) Two persons nominated by the National Assembly;
 - (e) The Principle Secretary responsible for Finance; and
 - (f) The Controller of Budget.

So, that is an issue we are still negotiating with them to see which version of composition should be accepted.

- (3) The principle function of the Commission is to determine the basis for the sharing of revenue from National Resources and to ensure that-
 - (a) the sharing is equitable as between the national government and the various levels of devolved government;
 - (b) the sharing is equitable as between the various levels of devolved government at any particular level; and
 - (c) where necessary, conditional or unconditional grants are made.
- (4) The Commission shall-
 - (a) report to the four levels of government its recommendations concerning the apportionment of national revenues to the four levels;
 - (b) frequently review such recommendations to ensure they conform with changing circumstances;
 - (c) mediate in and determine disputes relating to financial arrangements between the national and devolved governments.
- (5) In its recommendations, the Commission shall –
 - (a) aim at defining and enhancing the revenue sources of governments at the four levels with the object of encouraging fiscal responsibility and moving the devolved governments over time toward financial self-sufficiency; and
 - (b) affirmative action for local business persons or for classes of persons, and social groups, previously disadvantaged and marginalized by discrimination;

- (c) the exclusion of contractors who - I think this must be misplaced because this was supposed to be under procurement of services but let us just read it, “the exclusion of contractors who default on their tax”
- (6) National legislation shall prescribe a framework within which the policy referred to in Clause (4) may be implemented.
 - (7) The Commission has such other functions as are conferred upon it by National Legislation.
 - (8) In discharging its functions, the Commission shall have regard to such principles, criteria, formulae, conditions and frameworks for ensuring equitable sharing and allocation of national revenue and resources as are, from time to time, prescribed by National Legislation.
 - (9) Not later than 31st January in each year, the Commission shall prepare a report, in accordance with such requirements as are prescribed by National Legislation, setting out its recommendations concerning the distribution of national revenues to the several levels of government and submit the report to Parliament for approval.
 - (10) The recommendations of the Commission may be amended by Parliament by a resolution supported by a simple majority in each House of Parliament.
 - (11) Recommendations of the Commission, as amended under Clause (10), are binding on all governments, and must be reflected in their respective budgets and in their taxation and other legislative policies.

Then I will again ask you to move to page 176, Article 290 which deals with devolved government’s plans and budgets. Our Committee is saying that instead of calling them devolved governments, we now know them we just say national, regional, districts and locational plans and budgets and the Article reads;

- (1) The planning and budgetary processors of each devolved government must promote transparency, accountability and effective management of public finance, debt, delivery of services and the economy.
- (2) Budgets at each devolved level of government shall contain-
 - (a) estimates of revenue and expenditure, differentiating between recurrent and development expenditure;
 - (b) proposals for financing any anticipated deficit for the period to which they apply;

- (c) all proposals regarding borrowing and other forms of public liability that will increase public debt during the ensuing year.
- (3) National Legislation shall prescribe;
 - (a) the structure of the plans and budgets of all devolved governments;
 - (b) the contents of the plans and budgets of all devolved governments, including the sources of revenue and the way in which the proposed expenditure will comply with the national plan and financial estimates;
 - (c) when the devolved governments plans and budgets shall be tabled; and
 - (d) the form and manner of consultation between the national and the devolved governments in the process of preparation of plans and budgets.

Now, I will again ask you to move to page

(Consultation at the “high” table).

Com. Mutakha Kangu: Page 179 on Article 294 dealing with National Treasury controls.

- (1) National Legislation shall establish an organ of the national government, to be known as the Treasury and prescribe measures to ensure both transparency and expenditure control in each level of government, by introducing-
 - (a) generally recognized accounting practices;
 - (b) uniform expenditure classifications; and
 - (c) uniform treasury norms and standards.
- (2) The Treasury, with the concurrence of the Minister responsible for finance, may stop the transfer of funds to a state organ or any other public institution only for a serious material breach, or persistent material breaches of the measures established in terms of Clause (1).
- (3) A decision to stop the transfer of funds taken in terms of Clause (2)-
 - (a) shall not stop the transfer of funds for more than sixty days; and
 - (b) may be enforced immediately, but will lapse retrospectively unless, within thirty days after the date of the decision, Parliament approves it by resolution passed by both Houses.
Our Committee has an addition that such a stoppage can only be for fifty percent of the funds and not all the funds due to a devolved government.
- (4) Parliament may renew a decision to stop the transfer of funds for no more than sixty days at a time, following the process established in terms of Clause (3).

- (5) Before Parliament may approve or renew a decision to stop the transfer of funds-
 - (a) the Controller of Budget shall make a report to Parliament; and
 - (b) the affected devolved government, state organ or public institution shall be given an opportunity to answer the allegations against it, and to state its case, before the relevant parliamentary committee.

I will again then ask you to move page 172 where there a Clause dealing with the procurement of goods and services, Article 284-

- (1) When a State organ or any other public institution at any level of government contracts for goods or services, it shall do so in accordance with a system that is fair, equitable, transparent, competitive and cost-effective.
- (2) Subject to Clause (3), Clause (1) does not prevent a state organ or public institution from implementing a procurement policy that it considers necessary.
- (3) National Legislation shall prescribe a framework within which policies referred to in Clause (2) may be implemented, providing for all or any of the following-
 - (a) categories of preference in the allocation of contracts;
 - (b) the protection or advancement of persons, categories of persons or groups previously disadvantaged by unfair competition or discrimination;
 - (c) sanctions against contractors that have not performed according to professionally regulated procedures, contractual agreement or legislation;
 - (d) sanctions against persons who have defaulted on their tax obligations.

If you to page 184 on Audit Clause 288 a lot of other things came from the Committee on Finance but Sub-Article (4) had contribution from our Committee which says-

The Auditor-General shall, “audit the accounts of the national and devolved levels of government and state corporations”. Therefore, our Committee was of the view that accounts of even devolved governments must be subject to audit.

Then at page 171, if you go back to page 171 Article 279 which deals with devolved governments’ shares of national funds.

- (1) Each devolved government-
 - (a) is entitled to an equitable share of revenue raised nationally to enable it to provide basic services and perform the functions allocated to it; and

(b) may receive equalization grants or other allocations from the national government revenue, either conditionally or unconditionally.

- (2) Additional revenue raised by a devolved government may not be deducted from its share of revenue raised nationally, or from other allocations made to it out of national government revenue.
- (3) There is no obligation on the national government to compensate a devolved government that does not raise revenue commensurate with its fiscal capacity and tax base.
- (4) A devolved government's share of revenue raised nationally shall be transferred to that government promptly and without deduction, except when the transfer has been stopped in terms of Article 294(2).

I will then ask you to move to page 168 where there is Article 275 that deals with the principles of taxation again on this we consolidated our views from both Devolution and Finance and one reads-

- (1) To the extent that the nature of a tax allows, the principles of universality, of equality of tax treatment and of taxation according to economic capacity shall be respected.
- (2) In imposing tax, the national government shall take into account the burden of direct taxes on the devolved governments and the people.
- (3) The general principles of taxation , particularly the coverage of taxpayers, and the object of tax and its calculations shall be established by law.

Number four there is a repetition of one so it needs to be cancelled.

- (5) Inter-regional and inter-district double taxation shall not be allowed. National legislation shall provide for the necessary measures.
- (6) National legislation referred to in Clause (3) shall establish principles on the harmonization of direct taxes other than tax scales, tax rates, and tax exempt amounts at the national and devolved levels of government.
- (7) The tax harmonization concerns include tax liability, object, period, procedure and criminal law related to taxation.
- (8) Parliament shall enact appropriate legislation against unjustified tax advantage.

Now, again if you move to page 169, Article 277, which deals with taxation powers. Our Committee again made contribution on this-

- (1) The taxation and other revenue-raising powers of the national and devolved governments are as set out in the Seventh Schedule.
- (2) The taxation and other revenue-raising powers of a devolved government-
 - (a) shall not be exercised in a way that materially and unreasonably prejudices national economic policies, economic activities across regional, district or locational boundaries or the national mobility of goods, services, capital or labour; and
 - (b) shall be regulated in terms of a National Legislation.
- (3) When two or more governments have taxation or other revenue-raising powers and functions with regard to the same subject matter, an appropriate division of those powers and functions shall be made by National Legislation.
- (4) The division referred to in Clause (3) shall be made having regard to at least the following criteria-
 - (a) the need to comply with sound principles of taxation;
 - (b) the powers and functions performed by each government;
 - (c) the fiscal capacity of the governments;
 - (d) the effectiveness and efficiency of raising taxes, levies and duties and
 - (e) equity.
- (5) A regional government has the power to-
 - (a) facilitate taxation activities or the district governments within the regions;
 - (b) promote harmonization of national and district taxation regimes within the region and across regions;
 - (c) provide technical support to the district governments within the region where necessary;
 - (d) facilitate negotiations with national government authorities and other organizations on behalf of the district government of the region; and
 - (e) perform any other function prescribed by a National Legislation.
- (6) Nothing in this Article precludes the sharing of revenue raised in terms of this Article between governments that have taxation or other revenue-raising powers and functions with regard to the same subject matter.
- (7) A National Legislation envisaged in this Article may be enacted only after the Commission on Revenue Allocation, the Minister responsible for the devolved governments and the Controller of Budget have been consulted, and their recommendations have been tabled in Parliament.

Now if you turn page 259, which has the Schedule that is being referred to here, that is the Schedule on taxes, you will see Seventh Schedule Taxation Powers.

Part I – Taxation Powers of the National Government.

The national legislature may raise, by way of taxes, duties, levies fees and charges, the following-

- (a) income tax;
- (b) value added tax;
- (c) corporation tax;
- (d) customs duties and other duties on import and export of goods;
- (e) excise tax;
- (f) general sales tax;
- (g) national stamp duties,
- (h) taxes from the national lottery and schemes of a similar nature;
- (i) taxes on transport by road, air, rail and water;
- (j) rents from houses and other property owned by the national level of government;
- (k) fees for licenses issued by the national level of government;
- (l) court fees, fines and forfeitures;
- (m) exchange receipts;
- (n) motor vehicles registration fees and driving license fees;
- (o) fees for government goods and services; and
- (p) any other taxes authorized by national legislation.

Part II – Taxation Powers of the Districts

A district council may raise, by way of taxes, duties, surcharges, fees, levies and charges, the following-

- (a) flat rate surcharges on the tax bases of any tax, levy or duty that is imposed by national legislation other than the tax bases of corporate income tax, value added tax and customs and excise;
- (b) land use fees;
- (c) agricultural tax;
- (d) charges for the use of properties owned by the district government;

- (e) rates on property and surcharges for services provided by or on behalf of the district;
- (f) cess on produce;
- (g) licensing fees, including liquor licensing fees, market fees, hawking fees;
- (h) business permit fees;
- (i) entertainment tax;
- (j) district roads maintenance charges;
- (k) district hotels and restaurants tax;
- (l) natural resource royalties tax;
- (m) gate fees for game parks and reserves;
- (n) transport tax. Parking fees and
- (o) such other taxes duties, surcharges levies and charges as the district is authorized from time to time by national legislation to impose; and
- (p) any other taxes duty, surcharges, fees, levies, and charges that are not exclusively assigned to the national level of government.

Then I will ask you to move to page 171 and 172. 171, we have there what is called Consolidated Funds. Our Committee was of the view that we distinguish between the national consolidated fund and other consolidated funds. So, Article 280 says,

- (1) There is established a fund to be known as the consolidated fund.
- (2) Subject to Clause 3, all money raised or received for the purposes of, or on behalf of, or in trust for the national government shall be paid into the consolidated fund.
- (3) The money referred to in Clause 2 does not include any money-
 - (a) that is payable under an Act of Parliament into some other public funds of the national Government established by a specific purpose; or
 - (b) that may under an Act of Parliament be retained by the State organ at national or devolved level that received it for the purpose of defraying the expenses of that state organ.

I think instead of 281 we go to 282, which is entitled revenue or Reserve Fund for devolved governments and our Committee is saying, let us just call them other consolidated funds so that we have National Consolidated Fund and other consolidated funds. It reads;

- (1) There shall be established a Revenue Fund for each devolved government into which shall be paid all money received by the devolved government, except money reasonably excluded by an Act of Parliament.
- (2) Money may be withdrawn from the Revenue Fund of a devolved government only;
 - (a) in terms of an appropriation by legislation of the devolved government, or;
 - (b) as a direct charge against the Revenue Fund that is provided for by an Act of Parliament or by legislation of the devolved government.

Still at page 172, we have the Article on;

Procurement of Public goods and services.

Article 284 (1) When a State organ or any other public institution at any level of government.

An Hon. Delegate: We have read it.

Com. Mutakha Kangu: We have read that, okay, fine. I am sorry. Then we move page 173 on

Borrowing by National Government.

Of course this also refers to borrowing by devolved governments and I want to leave the one of national government because finance will deal with that. Let us look at 174 Article 286, which says that

- (1) A devolved government may raise loans for development or recurrent expenditure in accordance with reasonable conditions determined by an Act of Parliament.

- (2) An Act of Parliament referred to in Clause (1) may be enacted only after all relevant recommendations of the Commission on revenue allocation have been considered.

This is the Commission we are saying we would like to call the Commission on finance and fiscal policy.

- (3) A devolved government will not borrow without first obtaining approval from its Assembly of Council.

Then we move to page 180, there is Article 295 which deals with National Revenue Authority, our Committee was calling it National Administration of Revenue Authority.

- (1) There is established a national revenue authority.
- (2) The authority is responsible for the collection of revenue due to the National Government except as determined by National Legislation.
- (3) The composition, functions and operations of the authority are as prescribed, from time to time, by an Act of Parliament.

295, our Committee has a few differences, we are still negotiating with the other Committee and we hope we will sort them out and then bring them to your attention.

At page 188, we have the question of public service and you can see Article 302, which sets out the principles of public service and our Committee is proposing that all those principles should become sub-Article 1 and then we have a sub-Article 2, which says and this is not in the Draft you have. That the principles of public service mentioned above apply to public service in every level of government, public service in all organs of state and public service in all public enterprises.

Then Article 303, you will notice that there is sub-Article 5, which is in italics, and sub-Article 6. That is a proposal from our Committee, that is how our Committee would like the Public service to look like and it says;

There shall be a single Public Service Commission for the Republic. The Commission is to consist of-

- (a) *a Chairperson,*
- (b) *fourteen persons, consisting of one person nominate by each regional assembly;*
- (c) *two persons to represent district governments appointed in accordance with the national legislation; and*
- (d) *two persons nominated by the National Executive.*

(6) *A regional and district government is responsible for the recruitment, appointment, promotion, transfer and dismissal of members of its public service within a framework of uniform norms and standards applying to public service prescribed by national legislation.*

Then if we move to page – I think publication of laws have been covered, even conflicts of laws.

(Consultations at the “high” table).

Com. Mutakha Kangu: I am just about to finish, then you can have lunch as you think through some of these important issues. Now, if you move page 87, go back to page 87 where there is Article 136 on the Senate. What you have there is what is proposed by the Committee on the Senate but our Committee had a different version of it which I would like to read to you, it will be provide later.

(1) That the Senate shall comprise Senators as follows;

- (a) seventy-four persons elected one from each district by the district council of that district acting as an electoral college to represent the region of which the district forms part.
- (b) twenty-eight women elected, two by each regional legislative assembly acting as an electoral college to represent there respective regions; and
- (c) ten person five of whom shall be women elected from the special interest groups including ethnic minorities, elected by their respective electoral colleges.

Then we have a sub-Article 2, which says.

(2) A person is eligible for election to the Senate if the person is eligible for election to the National Assembly but a member of an electoral college mentioned in Clause.

(i) is not eligible for election as a Senator.

(3) The term of office of Senators is five years; and most importantly

(4) Upon election, the Senators elected from each region shall collectively constitute a single delegation and shall in consultation with the regional legislative assembly for that region elect one of their member as the head of the delegation.

Then if you move to page 92, immediately after Article 147 our Committee is of the view that we should introduce a new Article there which is entitled, "decisions of the Senate" and which will read that except where this Constitution provides otherwise;

(a) Each region and the marginalized groups shall have one vote to be cast on behalf of the region or the marginalized groups by the head of its delegation or in the absence of the head of the delegation by another member of the delegation acting on his or a her behalf.

(1) All questions before the Senate shall be determined by a two-thirds majority of those delegations

(2) National legislation enacted in accordance with the procedure established for the passing of Bills affecting regions, shall provide for a uniform procedure in terms of which the regional legislative assemblies and the marginalized groups confer authority on their delegations to cast votes on their behalf.

(3) A Senator representing a region may on his or her own Motion, and shall at the request of the relevant regional legislative assembly attend and speak at a meeting of that assembly that shall not vote.

(4) Cabinet Ministers and Deputy Ministers of the national government may attend and may speak in the Senate but shall not vote.

- (5) The Senate may require a Cabinet Minister, a Deputy Minister, an official in the National Executive or a Regional Executive or a private individual to submit memoranda to or appear before the Senate or a Committee of the Senate to give evidence.

- (b) Shall have powers of the High Court in enforcing the attendance of witnesses and examining them
on oath affirmation or otherwise;

- (c) Compelling the production of documents;

- (d) Issuing a Commission or request to examine witness abroad.

Then if you move to page 95, our Committee of Devolution is of the view that Articles 154 and 155 should be replaced by the following Articles and this is concerning Bills not amending the Constitution or affecting regions.

- (1) When the National Assembly passes a Bill other than a Bill amending the Constitution or a Bill affecting regions, the Bill shall be referred to the Senate and dealt with in accordance with the following procedure.
 - (a) The Senate must pass the Bill subject to amendments proposed by it or reject the Bill;

 - (b) If the Senate passes the Bill without proposing amendments, the Bill must be submitted to the President for assent;

 - (c) If the Senate rejects the Bill or passes it subject to amendments, the National Assembly must reconsider the Bill taking into account any amendments proposed by the Senate and may
 - (i) Pass the Bill again either with or without amendments or;
 - (ii) Decide not to proceed with the Bill.

(d) A Bill passed by the National Assembly in terms of paragraph (c) must be submitted to the President for assent.

(a) When the Senate votes on a question in terms of this Article;

I think it is the one we were referring to earlier does not apply where the vote is for the region. That does not apply instead each Senator has one vote.

(c) At least one-third of the Senators must be present before a vote may be taken on the question; and

(d) The question is decided by a majority of the votes cast but if there is an equal number of votes a second and third vote may be taken after which it lapses but may be resubmitted after three months.

The point therefore is that our Committee is proposing that decision making in the Senate will be in two ways. On certain matters, the vote will belong to the region, in other matters the votes will belong to the individual Senators.

Then we are also saying that we should introduce another Clause that says, Bills affecting regions. When the National Assembly passes a Bill referred to in Clause 3 or 4, the Bill shall be referred to the Senate and dealt with in accordance with the following procedure.

(a) The Senate shall pass an amended Bill or shall reject the Bill;

(b) If the Senate passes the Bill without amendment the Bill shall be submitted to the President for assent;

(c) If the Senate passes an amended Bill, the amendment Bill shall be referred to the National Assembly and if the National Assembly passes the amended Bill it shall be submitted to the President for assent;

(d) If the Senate rejects the Bill or if the National Assembly refuses to pass the amended Bill referred to it in terms of paragraph (c), the Bill and where applicable also the amended Bill shall be referred to an Ad hoc joint select Committee for mediation in this Clause referred to as the Mediation Committee which may agree

on the Bill as passed by the National Assembly, the amended Bill as passed by the Senate or another version of the Bill;

- (e) If the Mediation Committee is unable to agree within thirty days of the Bills referral to it, the Bill lapses unless the National Assembly again passes the Bill but with a supporting vote of at least two-thirds of its members
- (f) If the Mediation Committee agrees on the Bill as passed by the National Assembly the Bill shall be referred to the Senate and if the Senate passes the Bill, the Bill must be submitted to the President for assent;
- (g) If the Mediation Committee agrees on the amended Bill, as passed by the Senate, the Bill must be referred to the National Assembly and if it is passed by the National Assembly it must be submitted to the President for assent;
- (h) If the Mediation Committee agrees on another version of the Bill that version of the Bill shall be referred to both the National Assembly and the Senate and if it is passed by the National Assembly and the Senate, it shall be submitted to the President for assent;
- (i) If a Bill referred to the Senate in terms of paragraph (f) or (h) is not passed by the Senate, the Bill lapses but the Bill as originally passed by the National Assembly, may again be passed by the National Assembly but with a supporting vote of at least two-thirds of its members;
- (j) A Bill passed by the National Assembly in terms of paragraph (e) or (i) shall be submitted to the President for assent; and

- (2) When the Senate passes a Bill referred to in Clause 3, the Bill shall be referred to the National assembly and dealt with in accordance with the following procedure.

The National Assembly shall pass an amended Bill or reject the Bill.

A Bill passed by the National Assembly in terms of paragraph (a) shall be submitted to the President for assent. If the National Assembly passes an amended Bill the amended Bill shall

be referred to the Senate and if the Senate passes the amended Bill, it shall be submitted to the President for assent. If the National Assembly rejects the Bill or if the Senate refuses to pass an amended Bill referred to it in terms of paragraph (c), the Bill and where applicable also the amended Bill shall be referred to an Ad hoc joint select committee for mediation in this Clause referred to as the Mediation Committee which may agree on the Bill as passed by the Senate.

(Consultations at the “high” table).

Hon. Delegate Sultana Fadhil: Honourable Delegates I want to thank you for your patience and concentration, I will get you please. May be what I am going to say will cover what you want to raise. I suggest to the Devolution team to make copies and circulate on these whatever new Articles they are coming up with because it is not a sentence of two is a number of pages. I think you need to look at them and I have a few announcements. I will get to you. Delegates from Western Province you are invited for a lunch meeting at the Commissions Tent, you know the Commissions Tent at 1.00 p.m. today and Delegates from Eastern Province you are all invited by your co-ordinator for lunch at the *Nyama Choma*. Members of the working Technical Committee on Land Rights and Environment, you are to meet in your Tents at 2.00 p.m. today. Yes 446, please be brief people want to go for lunch.

Hon. Delegate Francis Wangara: 446, Francis Wangara. I tend to believe that the particular Technical Committee that is submitting has not completed its work and therefore if they require more time to go and harmonize what they have to do, Let them be given more time so that we are referring to one document the Zero Draft other than - -e are getting lost. Thank you..

Hon. Delegate Sultana Fadhil: That is why I suggested that photocopies be made to be circulated to the Delegates and we will take it from there in the afternoon. Let us adjourn for lunch. Thank you.

Meeting adjourned for lunch at 1.27 p.m.

The meeting reconvened at 2.49 p.m. with Honourable Delegate Sultana Fadhil in Chair.

Prof. Yash Pal Ghai: Ladies and gentlemen, we are about to resume our meeting and I have the pleasant duty of swearing in the Honourable Abdullahi Sheikh Dahir. Mr. Dahir, what I will ask you to do is to raise your right hand and then read the oath, following me. I will read out and you will repeat after me. I will first say, 'I', and then you will mention your name and then repeat after me.

Hon. Delegate Abdullahi Sheikh Dahir: I, Abdullahi Sheikh Dahir, being appointed a Delegate to the National Constitutional Conference under the Constitution of Kenya Review Commission Act, do solemnly swear that I will faithfully and fully, impartially and to the best of my ability discharge the trust and perform the functions and exercise the powers devolving upon me by virtue of this appointment without fear, favour, bias, affection, ill-will or prejudice and to the end that in the exercise of the functions and powers as such Delegate, I shall at all times be guided by the national interest. So help me God.

Prof. Yash Pal Ghai: Well, I welcome you to this August body and look forward to your contributions. (*Clapping*).

Hon. Delegate Sultana Fadhil: Good afternoon, Honourable Delegates. We are about to conclude the Devolution Chapter. I have been given an assurance by the Secretariat that before we adjourn this session, copies of the Articles or the Paper Commissioner Kangu was reading, will be available and you can go read them and reflect on them and you can have a say during the discussion sessions. In the meantime, let us just conclude the Devolution.

Prof. Yash Pal Ghai: The general report, that you speed up a little bit.

Com. Mutakha Kangu: Yes. In fact, we were just at the tail end of what we were going through and we are going to distribute that part so members will read, and our Chair has just arrived to conclude the proceedings so that we can move to the next Chapter.

Hon. Delegate Adhu Awiti: Honourable Delegates, I know that our report was a bit lengthy, but I am sure people were very interested in listening. So with the explanation you have just

been given, I will now wish to propose to the Committee of the Whole House to adopt the report of the Devolution. I thank you. (*Clapping*).

PRESENTATION OF REPORT OF TWC H:

- CHAPTER 13** - **PUBLIC FINANCE & REVENUE MANAGEMENT**
- CHAPTER 14** - **PUBLIC SERVICE**
- CHAPTER 16** - **LEADERSHIP AND INTEGRITY**

Hon. Delegate Sultana Fadhil: Can we have the Finance team?

(Consultation at the “high” table).

Hon. Delegate Sultana Fadhil: They will organize themselves and tell you who is going to do what. Thank you.

Hon. Delegate Chrysanthus Okemo: Thank you very much indeed. I would like to take the opportunity, first and foremost, to thank my Committee for their dedication and their commitment and engagement in producing the work that is before us here. I would also like to take the opportunity to thank the Secretariat, the Rapporteurs and the Draftspeople, who were with us throughout the deliberations. We have a Report here, which I am going to ask Reverend Ayonga to present, after which then I will go through the decisions in the form of the various Articles, in the three Chapters, which we were mandated to deal with, that is, Chapter 9, on Leadership and Integrity, and then Chapter 15, which deals with Public Finance, and finally Chapter 16, which deals with the Public Service. I will now ask Pastor Ayonga to present the Report.

Com. Pastor Zablon Ayonga: Ladies and gentlemen, Honourable Delegates. The Committee on Public Finance, Public Service, Leadership and Integrity, known as TWC ‘H’, was established under regulation 49 of the Constitution of Kenya Review Act Cap 3 ‘A’ with a membership of forty-six Honourable Delegates. The Convenor of the Committee is Honourable Billow Kerrow, who is absent, and is deputized by the Convenor, Honourable Chrisantus Okemo, who is on my left. Honourable Chrisantus Okemo is the ex-Minister of Finance, and therefore, this is very close to himself.

The Secretariat attached to the Committee is made up of the following:

1. Mr. Isaac Lenaola, - CKRC Commissioner and was recently appointed Judge of the High Court.
2. Pastor Zablon Ayonga, - CKRC Commissioner.
3. Mrs. Margaret Nzioka - Draftsperson up to Bomas II.
4. Mr. Mark Spakowski - Draftsperson , part of Bomas III.
5. Mr. Gad Awuonda - currently Drafts person, Bomas III.
6. Ms Noor Awadh - Programme Assistant.
7. Ms. Kezia Kamau - Programme Assistant
8. Ms. C. W. Munga - Clerk.
9. Miss Lillian Momanyi - Verbatim Recorder.

Mandate and method of work:

- a) The mandate of the Committee specifically entitles the members to move amendments to the Draft Bill and in particular to examine all issues raised during the General Debate and any other issue touching on matters provided for in the report and Draft prepared by the Commission, and to consider how best this may be used to strengthen or enrich the recommendations and proposals presented therein, in respect of specific thematic mandate.
- b) Propose amendments or changes to the contents of the Draft Bill in relation to matters under the specific thematic mandate.
- c) Report on their proposed amendments to the Bill, to the Steering Committee for presentation to, and debate by, the Conference; and
- d) Consider and report on any other matter referred to it by the Steering Committee or the Conference.

Method of work

The Convenor informed members of the procedural issues on the management of the Committee, referring to regulations 44 and 45 of the Review Act. The Convenor further informed the members of the Committee that, to consider the Report and propose

amendments on the Draft Bill, each amendment should be moved before the Convenor proposes the question. After the Committee deliberates and votes on all issues relating to Public Finance, Public Service, Leadership and Integrity, it will prepare report, which will be tabled in the Conference for adoption. The Report of the Committee will include the following:

- a) Minutes of all meetings of the Committee;
- b) audio and verbatim transcripts of all meetings;
- c) recommendations agreed to by the Committee as well as minority positions, if any, taken by some Delegates; and
- d) any other matter which the Committee would want the Conference to address or resolve.

The Committee noted the following to act as a guide in the management of the Committee's business.

- a) Financial Regulations currently used by the Government should be made available to the Committee for reference purposes.
- b) experts from relevant Government Ministries and the private sector were invited to the Committee to offer technical expertise when discussing relevant Articles.

The first meeting of the Committee was held on the 26th May 2003, Bomas I, where members elected the Convenor. The next meeting was held on the 29th May 2003 for the members to receive the relevant Committee documentation. Subsequent to the Conference decision, the Committee was adjourned on the 30th May, 2003 to allow Members of the National Assembly to go back to Parliament to discuss the national Budget.

Bomas II reconvened on the 19th August 2003. However, it was soon adjourned on the 25th August 2003 for two weeks, following the demise of the Vice President, Mr. Michael Wamalwa.

The substantial work of the Committee began on 9th September 2003. During the meeting, the members decided to start off discussions by looking through the mandate of the Committee. The members further resolved to discuss the then Chapter 16, followed by the then Chapter 14 and finally the then Chapter 13 of the Draft Bill in that order. Discussion on

the then Chapter 14 and 16 was concluded when Bomas II was adjourned on the 26th September 2003.

On the 12th September 2003, the Conference reconvened for the third stage of the NCC process. Bomas III substantial Committee discussion continued between 13th September and 2nd February 2004. During this period, the Committee deliberated on Chapter Thirteen on the Draft Bill, part V of the Devolution Chapter and the relevant Schedules. The Committee also called for expert consultation on several financial issues. These include officials from Kenya Revenue Authority and the Treasury, among others.

The Committee went further to hold joint sessions with the Devolution Committee in order to harmonize the crosscutting issues.

SUCCINCT SUMMARY OF THE COMMITTEE'S PROCEEDINGS

The Committee proposed the following general recommendations as a way forward in the entire review process:

- a) that the Constitution should lay down broad principles upon which subordinate laws may be enacted. At the same time, it was felt that too much detail should be avoided and left for the relevant law-making bodies; and
- b) that alongside laying down broad principles, the Constitution should list areas needing legislations so that intentions are not lost.

CHAPTER FIFTEEN: PUBLIC FINANCE AND REVENUE MANAGEMENT

The following issues were raised during the general discussion on the Chapter:

1. Role of Government in the management of Public Finance

1. There is a need to capture the role of Government in the management of Public Finance in the Constitution in order to avoid the conflict between the Government and the citizens.
2. That Government expenditure is too high; it spends beyond its means. There is therefore a need to set limits within which the Government could borrow.

3. The Government is in a form of competition with its citizens. There should thus be a principle that Government should not compete in running businesses with the citizens. That the Government should concentrate on its co-functions; governance, facilitation and delivery of efficient services.
4. That there is unnecessary secrecy in Government information that concerns the public. Government should be open, transparent and accountable.

2. Taxation

1. That taxation is too high; there should be no taxation without representation.
2. That standards should be laid down on how people should be taxed and that people from the grassroots should have a say on the tax measures taken by the Government.

3. Trade and Investment

1. There are too many unnecessary restrictions in the issuance of trading licenses. This discourages trading among Kenyans.
2. That there is need to capture the issue of investment, both local and foreign, in the Chapter.

4. Controller of Budget and Auditor General

1. That there should be a timeframe within which the Auditor-General submits his/her report.
2. There is need to empower the office of the Controller of Budget after splitting it from the Auditor-General's office. It was further proposed that the Controller of Budget's office should control the expenditure of the Government.

CHAPTER SIXTEEN: THE PUBLIC SERVICE

The following issues were raised during the general discussion on the Chapter:

a) The Public Service and Public Service Commission

1. The current provisions in the Draft Bill are based on a Unitary System of Government as opposed to a Devolved System of Government. Therefore, Public Service should be decentralized to the Devolved Units. However, some felt that this would have a lot of financial implications.

2. There should be a clear distinction between the Public Service of the Central Government and that of the Devolved Units.
3. Public Service should be de-politicized.
4. "Public Service" should be defined to include all the organs of the Public Service.
5. That there should be a clear definition of what constitutes "Public Service".
6. The basis of appointing the nine PSC Commissioners, should be clarified in the Draft Bill.
7. That the membership of PSC should have a national outlook.
8. Public Officers should not have private businesses alongside Public Office.

CHAPTER 9: LEADERSHIP AND INTEGRITY

The following issues were raised during the general discussion on the Chapter:

1. While discussing this Chapter, members should think in line with the current legislation on ethics of public officers, Public Officer's Ethics Act.
2. The Chapter should also apply to civil society and private sector.
3. While discussing the application of the Chapter, members should bear in mind legal personae recognized by the Constitution.
4. The Chapter should have an introduction bearing the guiding principles of leadership and integrity, which by suggestion should be distilled from the Code of Ethics.
5. Reference should be made to the Fifth Schedule of the Draft Bill, which operationalizes the Chapter.

The Committee unanimously agreed on the following issues:

- a) The Committee recommended the removal of the Leadership and Integrity Code from the Fifth Schedule and from it they extracted broad principles which were incorporated in the then Chapter Sixteen.
- b) That Ethics and Integrity Commission created under Article 289 be shifted to Chapter Sixteen for purposes of uniformity and harmonization.

RECOMMENDATIONS AND DECISIONS ON THE REPORT AND DRAFT BILL AS AGREED BY THE COMMITTEE

GENERAL COMMENTS ON THE REPORT

The discussion on the contents of the Commission's Report was done on a day-to-day basis prior to the discussions of the relevant articles(s). The Report was used by the Committee to guide members in their discussions. All the recommendations for amendment of Clauses were based on the Draft Bill provisions and not the Report. The following issues were of particular concern to the Committee:

1. Establishing a Parliamentary Budget Office.
2. Setting a ceiling on the Public Debt.
3. That all Government borrowing must be approved by Parliament.

Ladies and Gentlemen, that is the end of our report, and now I turn the microphone to Honourable Chrisantus Okemo to take us through.

Hon. Delegate Sultana Fadhil: Thank you very much. (*Clapping*)

Hon. Delegate Chrysanthus Okemo: Thank you very much indeed. I will now begin my presentation of the Article-by-Article presentation of the three Chapters, beginning with Chapter 9, which is dealing with Leadership and Integrity.

Principle of representative leadership

- 101.** (1) Any sovereign authority of the people assigned to a State office:-
- a) Is a public trust to be exercised in a manner that –
 - (i) is consistent with the purpose and objects of the Constitution.
 - (ii) demonstrate respect for the people;
 - (iii) brings honour to the nation and dignity to the office; and
 - (iv) promotes public confidence in the integrity of the office and
 - b) vests in that officer the responsibility to serve the people rather than the power to rule them.

(2) The guiding principles of leadership and integrity include -

- a) selection on the basis of integrity, competence and suitability or election in free and fair elections;
- b) objectivity and impartiality in decision making and in particular, ensuring the decisions are not influenced by nepotism, favoritism or other improper motives;
- c) selfless service based solely on the public interest demonstrated by
 - i) honesty in the execution of public duties; and
 - ii) the declaration of any personal interest that may conflict with public duties;
- d) accountability to the public for decisions and actions; and
- e) discipline and commitment in services to the people.

Assumption of office

102. Before assuming office or performing any functions of office, each person elected or appointed to a State office shall -

- a) swear allegiance to the Republic, and
- b) take the oath of office in the manner and form prescribed by the third schedule or by an Act of Parliament.

The conduct of State officers

103. (1) A State officer shall -

- a) adhere to the oath of office;
- b) comply with the provisions of this Chapter; and
- c) submit to and promote the rule of law.

(2) A State officer shall behave, whether in public and official life, in private, or in association with other persons, in such a manner as to avoid -

- a) any conflict between personal and public or official duties;
- b) compromising any public or official interest in favour of a personal interest; or
- c) demeaning the office or position the officer holds

Abuse of office

104. (1) A State officer shall not -

- a) directly or indirectly use State office for personal gain;
- b) seek or accept any property, gift or benefit of any kind as an inducement or bribe for the granting of a favour or for the performance or non-performance of an official function;
- c) misappropriate public funds or misuse or unlawfully destroy public property;
- d) use public assets or property to solicit contributions from the public for any non-official purpose;
- e) sexually or physically abuse any person, or use the influence of their office to attempt to attain sexual favours or other undue advantage from any person;
- f) direct another person to -
 - i) do anything prohibited by this Article for the benefit of the State officer; or
 - ii) perform an unlawful act.

(2) If a State officer is convicted of an offence and sentenced to a term of at least six months imprisonment without the option of a fine, that State officer shall be deemed to have been removed from office.

Finances of State officers:

105. (1) A State officer shall submit a written declaration to the Ethics and Integrity Commission in the manner and form determined by the Commission, declaring the properties, assets and liabilities of the State officers, the officer's spouse and the State officers' unmarried children who have not attained the age of eighteen years -

- a) immediately before assuming office subject to Clause 2 and
- b) at the end of every fourth year in office and
- c) when the person ceases to be a State officer subject to Clause 2.

Subsequently, our discussions seem to have zeroed in on instead of making a declaration every fourth year, that we make a declaration annually. So, in subsequent submissions, you will see annually, rather than every fourth year.

(2) A State officer who assumes the second state office without interruption between the periods of services-

- a) is not required to make a declaration under Clause (1) (a) upon assuming the latter office or under Clause (1) (c) upon leaving the former office; but
- b) is required to make a fresh declaration (instead of fourth anniversary that will now be annual. It will be an annual thing so it will not be the fourth anniversary) of the previous declaration made by that State officer.

(3) It is a contravention of this Chapter for a State officer to-

- a) fail to make a declaration required by this Article; or
- b) knowingly make a false statement in a declaration filed under this Article.

(4) A State officer shall not –

- (a) maintain or operate a Bank account in a country outside Kenya ; or
- (b) seek or accept a personal loan or benefit in circumstances that might reasonably be considered to compromise the integrity of the State officer.

(5) A gift or donation to a State officer on a public or official ceremonial occasion is a gift to the Republic and shall be delivered to the State to the extent required by and in accordance with an Act of Parliament (or national legislation).

Restriction on Activities

106. (1) A full time State officer shall not participate full time in any other remunerative activity.

(2) The President, Deputy President and any appointed State officer may not hold office in a political party.

(3) After retiring a former State officer who is receiving a pension from public funds shall not accept more than two remunerative positions as chairperson, director or employee of -

- (a) a company owned or controlled by the State or;
- (b) a state organ.

(4) A retired State officer shall not receive any other remuneration from public funds in addition to a pension and the remuneration of two remunerative positions, as contemplated in Clause (3) above.

Ethics and Integrity Commission

107. (1) The Ethics and Integrity Commission is established as a Constitutional Commission,
consisting of seven members.

(2) The functions of the Ethics and Integrity Commissions are to-

- (a) receive declarations required by this Chapter;
- (b) retain custody of the declarations;
- (c) ensure compliance with and enforce the provisions of this Chapter;
- (d) receive and investigate complaints about non compliance with the Chapter and if appropriate, refer the complaint to the relevant authorities for action;
- (e) put in place measures aimed at the prevention of corruption including issuing guidelines to the state organs; and
- (f) perform any other functions conferred on the Commission by Parliament or by Legislation.

(3) The Commission shall not investigate any matter pending before a court or a judicial tribunal.

(4) The Ethics and Integrity Commission shall establish and maintain a register in which the assets and liabilities of State officers are recorded.

(5) The Commission is the custodian of the register of the assets and liabilities of the State officers.

(6) The Commission shall make the register of assets and liabilities of State officers available for inspection in a manner prescribed by (national legislation) an Act of Parliament.

Leadership Legislation

108. (1) Parliament shall enact legislation to -

- a) establish procedures and mechanisms for the better administration of this Chapter;
- b) prescribe the penalties that may be imposed for breach of the provisions of this Chapter; or
- c) make any other provision necessary for ensuring the promotion of the principles of leadership and integrity set out in this Chapter.

(2) Legislation required under this Article may provide that a person who has been dismissed or removed from a leadership office for contravention of this Chapter is disqualified from holding any other leadership office.

That is the end of that Chapter. (*Clapping*)

I would now like to move on to the Chapter on Public Finance, that is Chapter 15. But before I begin, I just want to make a clarification that during the presentation by the Committee on Devolution, it did appear as if we had never met and discussed and agreed, but I want to confirm that the Committee on Public Finance and the Committee on Devolution did actually meet and the issues which were being raised by the Committee, most of them actually have been agreed and adopted.

I do not know whether I should repeat what has already been read out by Commissioner Kangu or whether I should just make casual reference?

(Inaudible responses)

Hon. Delegate Chrysanthus Okemo: So, I will make casual reference just to avoid repetition, but I want to confirm that we had actually agreed- the two Commissions- on the cross-cutting issues and what you see in the Revised Draft Report is substantially what we agreed upon with the exception of a few Clauses which I will point out.

Part I - Objects and Principles of Public Finance Management System

Objects of Public Finance Management System

273. The object of the public finance management system is to ensure that public finance is managed efficiently, effectively and transparently with appropriate controls and oversight including ensuring -

- a) that revenue is raised efficiently and effectively;
- b) that there are appropriate controls and oversight in borrowing; and
- c) that proper plans and budgets are made in relation to public revenue and expenditure;
- d) that expenditure is properly managed and made only in accordance with the law; and
- e) that the public accounts are audited and reported on regularly.

Principles of Public Finance, Administration and Management

274. In administering and managing public finance, the following principles shall be observed-

- a) revenue shall be raised equitably- -

I think Commissioner Kangu did mention this. So, I do not know whether I should really go through them again?

Hon. Delegates:

(Inaudible).

Hon. Delegate Chrysanthus Okemo: It is not necessary. So, let me move on to Principles of Taxation again here, Commissioner Kangu read out all of them except that I would like to strike out number 4 which again Commissioner Kangu also did point out that was a repetition. So, just strike out number 4; Article 275 (4).

Hon. Delegates:

(Inaudible).

Hon. Delegate Chrysanthus Okemo: Article 275, on Principles of Taxation. Look at Clause (4).

Hon. Delegates:

(Inaudible).

Hon. Delegate Chris Okemo: I am reading from the Revised Draft

Hon. Delegate Fadhil Sultana: Page 168.

Hon. Delegate Chrysanthus Okemo: Page 168.

Hon. Delegates:

(Inaudible).

Hon. Delegate Chrysanthus Okemo: Oh, you cancelled? So I am just confirming and I am re-emphasizing that please cancel it. So, if you did it, well and good. If you have not done it, please do it. Thank you.

Then we move on to Imposition of Tax that is Article 276.

Hon. Delegates:

(Inaudible).

Hon. Delegate Chrysanthus Okemo: Oh! 274 was not covered? I thought I had- - all right. So, let me go back to Article 274 and for everybody's benefit, let us go through it. That is on:

Principles of Public Finance, Administration and Management

274. In administering and managing public finance, the following principles shall be observed-

- a) revenue shall be raised equitably from among the people of Kenya;
- b) public money shall be used efficiently in the pursuit of national objectives and goals;
- c) national and local resources shall be shared equitably throughout Kenya taking into account the special needs of marginalized areas and communities;
- d) revenue shall be shared equitably among the different levels of government;
- e) the benefits and burdens of public borrowing and spending shall be shared equitably among different generations including future generations;
- f) people, communities and civil society organizations shall participate in public finance management; and
- g) the budget and budgetary processes shall promote transparency, accountability and effective management of public finance, debt and economy.

So, we skip Article 275 and go on to-

Imposition of Tax

276. (1) No tax shall be imposed except by legislation at either the national or a devolved level of government.

(2) No person or authority may waive or vary any tax imposed by law except as expressly provided by law.

Taxation Powers, I think this again was read out in total by Commissioner Kangu, so I am not going to read it again. Let us go to part three-

Financial Equalization

278. The national government-

- a) shall promote financial equalization among all levels of government; and
- b) when granting subsidies shall take into account the financial capacity of each level of devolved government and the special situation of the marginalized areas and communities.

Somebody is lost? We are on page 170, Article 278. Now, when we move we are together. Good.

Devolved Government s’ Shares of national funds: Again, I think this was read out in total by Commissioner Kangu. Therefore, I would not like to repeat it. So, I will move on to Article 280, Consolidated Fund, that again was also read. Then Commissioner Kangu did all my work for me.

Right, let us move on to Article 281.

Withdrawal from Consolidated Fund-

281. (1) Money shall not be withdrawn from the Consolidated Fund except-

- a) to meet expenditure charged on the Fund by the Constitution or an Act of Parliament; or
- b) when the issue of that money has been authorized by an Appropriation Act or a Supplementary Appropriation Act.

(2) Money shall not be withdrawn from any public fund of the national government other than the Consolidated Fund, unless the issue of that money has been authorized by an Act of Parliament.

(3) Money shall not be withdrawn from the Consolidated Fund or any other public fund of the national government unless the Controller of Budget has approved the withdrawal in terms of Article 297 (4).

Revenue (Reserve) Fund for Devolved Governments- Again, I think this was touched upon and there are still little issues; finer details which we are going to discuss with the Devolution

Committee on whether to call it Revenue/Reserve or whether to call it other Consolidated Funds. Therefore, that is an issue that we are going to discuss and we will be able to reach an agreement through meeting with other Committee members.

Contingency Fund

283. There is established a fund to be known as the Contingency Fund, the operation of which shall be in accordance with an Act of Parliament.

Procurement of Public Goods and Services: Again, Commissioner Kangu covered this, so I will skip it and move on to-

Part V - Borrowing.

Borrowing by national government

- 285.** (1) The national government may borrow from any source.
- (2) The national government shall not on behalf of itself or any other public institution, authority or person, borrow money, guarantee a loan or receive a grant unless the terms and conditions of the transaction have been laid before Parliament and have been approved by a resolution of each House of Parliament.
- (3) All money received as a result of a transaction referred to in Clause (2) shall be paid into, and form part of, the Consolidated Fund or some other public fund that is existing or is created for the purpose of that transaction.
- (4) Within seven days after either House of Parliament, by resolution, so requests, the Minister responsible for Finance shall present to both Houses of Parliament all information concerning a loan that is necessary to show-
- a) the extent of the total indebtedness by way of principle and accumulated interest;
 - b) the provision made for servicing or repayment of the loan;
 - c) the use made of the proceeds of the loan; and

d) the progress made in the repayment of the loan.

(5) For the purposes of this Article, “loan” includes any money lent or given to the Government on condition of return or repayment and any other form of borrowing or lending in respect of which money from the Consolidated Fund or any other public fund may or as required to be used for payments or repayment.

Borrowing by Devolved Governments: Again this I think was touched upon by Commissioner Kangu so I do not want to repeat. So, I will move on to-

Public Debts

278. (1) Subject to Clause (2), the public debt of the Republic is a charge on the Consolidated Fund.

(2) Provision may be made by an Act of Parliament, for charging all or part of the public debt of the Republic to other public funds.

(3) For the purposes of this Article, the public debt includes-

- a) interest on amounts borrowed;
- b) sinking fund payments in respect of borrowings;
- c) the costs, charges and expenses incidental to the management of borrowing and their repayments; and
- d) outstanding guarantees by Government and government departments and agencies.

(4) The aggregate amounts borrowed in any financial year by both the national government and all devolved governments shall not be such as to increase the accumulated public debts to an amount greater than fifty percent of the overall gross domestic product of Kenya in the immediately preceding financial year.

I just want to add here that we are making a provision here, which we shall add to this particular Clause saying that, to move from where we are to that, we will need a ten-year transitional period. Therefore, we will be revising that slightly.

Loans Guarantees by Governments

288. (1) An Act of Parliament shall provide terms and conditions under which each level of government may guarantee a loan.

(2) An Act of Parliament referred to in Clause (1) may be enacted only after any recommendations of the Commission on Revenue Allocation have been considered.

(3) Within two months after the end of each financial year, the Minister responsible for Finance and the Chief Executive of each devolved government shall each publish a report in the Gazette or on all the guarantees that were given by the national government and that devolved government respectively during that year. (Let me read that again).

Within two months after the end of each financial year, the Minister responsible for Finance and the Chief Executive of each devolved government shall each publish a report in the Gazette or (*remove or*) on all the guarantees that were given by the national government and the devolved government respectively.

So, remove that and devolved government respectively during that year.

Part VI - Budget:

Financial Year Estimates

289. 1) At least two months before the commencement of each financial year, the Minister responsible for Finance shall lay before each House of Parliament-

- a) estimates of the revenues and expenditure of the national government for that financial year; and
- b) a detailed fiscal, monetary and development strategic plan for a period of at least three years (or such longer period as is provided for an Act of Parliament) prepared by the Minister responsible for Finance in collaboration with the Minister responsible for Planning and National Development.

- (2) The Minister responsible for Finance shall include, in the annual estimates a special budgetary provision for the development of the marginalized areas and communities.
- (3) Parliament shall consider the strategic plan together with estimates and may propose improvements or alterations to the plan which shall be incorporated within thirty days.
- (4) At least two months before the end of each financial year the head of each department, state organ, constitutional Commission and public institution shall submit to the Minister responsible for finance estimates of recurrent and development expenditure, and estimates of revenue of that department, Commission or public institution for the following financial year.
- (5) The estimates prepared under clause (4) shall be laid before each house of Parliament by the Minister responsible for finance without revision, but with any recommendations that the Commission on Revenue Allocation may have on them.
- (6) At any time before Parliament considers the estimates of revenue and expenditure laid before it by or on the authority of the Minister responsible for finance, an appropriate Committee of Parliament shall discuss and review the estimates and make appropriate recommendations to Parliament.
- (7) The committee referred to in clause (6) shall in discussing and reviewing the estimates, seek representations from the Public and the Economic and Social Council and those recommendations shall be taken into account when the Committee makes its recommendations to Parliament.

Devolved governments' plans and budgets

I think this was read by Commissioner Kangu, so I will skip it and move on to;

Appropriation Bills

291. (1) The heads of expenditure contained in the estimates, other than expenditure charged on the Consolidated Fund by the Constitution or an Act of Parliament, shall be included in a Bill to be known as an Appropriation Bill, which shall be introduced into the national Assembly to provide for the issue from the Consolidated Fund of the sums necessary to meet that expenditure and for the appropriation of those sums for the purposes specified in the Bill.

(2) If, in respect of any Financial year-

(a) the amount appropriated for any purpose under the Appropriation Act is insufficient or that need has arisen for expenditure for a purpose for which no amount has been appropriated by that Act; or

(b) money has been expended out of the Contingency Account for a purpose for which no amount has been appropriated by the Act,

a supplementary estimate showing the sums required or spent shall be laid before each House of Parliament and, in the case of excess expenditure, within four months after the first drawing on the money is made.

(3) The sum sought in a supplementary estimate for purposes for which money already appropriated was insufficient shall not in total exceed ten percent of the sums previously appropriated by Parliament for those purposes during that financial year.

(4) Where, in respect of any financial year, a supplementary estimate has, or supplementary estimates have, been approved by Parliament in accordance with clause (2), a Supplementary Appropriation Bill shall be introduced in Parliament in the financial year next following the financial year to which the estimates relate, providing for the appropriation of the sums so approved for the purpose specified in those estimates.

(5) Article 289(5) applies to estimates prepared under clause (2).

- (6) If the Appropriation Act for a financial year has not been assented to, or is not likely to be assented to, by the beginning of that financial year, Parliament may, by a vote on account, authorize the withdrawal from the Consolidated Fund of money (not exceeding in total one-half of the sums included in the estimates of the expenditure for that year that have been laid before Parliament) for the purposes of meeting expenditure necessary to carry on the services of the national government during that year until such time as the Appropriation Act, is assented to--

Comes should be removed;

--but any moneys so withdrawn shall be included, under separate votes for the several services in respect of which they were with drawn, in the Appropriation Act.

Part VII- Financial Management

Accounts and audit of public institutions

- 292.** (1) The accounts of the offices of the Controller of Budget and the Auditor-General shall be audited and reported on by a professionally qualified accountant appointed by the National Assembly.
- (2) The Principle Secretary in charge of a ministry and the accounting officer in charge of a department or a public body are each accountable to Parliament for funds in that ministry, department or public body.
- (3) If, while, the holder of a public office, including a political office, a person directs or approves the use of public funds contrary to law, regulations or instructions, that person is liable for any loss arising from that use and is obliged to make good the loss, whether that person remains the holder of that office or not.

Reports on publicly-funded organizations

- 293** (1) Within two months after the end of each financial year, each organization that is funded from public funds shall report to the Auditor-General, for each financial year, with respect to the use by that

organization during that financial year of the public funds received by it.

- (2) Each report under clause (1) shall be certified by professionally qualified accountant authorized for the purpose by the Auditor-General.
- (3) This Article does not apply with respect to organizations whose accounts are audited by the Auditor-General.

National Treasury control

I think that was again read by Commissioner Kangu, and there was a small amendment where he was talking about fifty percent of the money to be stopped, again the Committee on Devolution and the Committee on Public Finance are going to sit and iron that out so that we agree - we reach a consensus.

Part VIII – Institutions

National Revenue Authority

295. (1)

He read that.

Then we come to;

Commissions on Revenue Allocation

I think he also read that. That is a long one, it goes on up to page 183.

There are areas there where we are going again as two Committees to sit and agree on a common position. In fact, we have agreed on most of what is there. So what is left to be agreed on is very, very minor.

Controller of Budgets

297. (1)

Has that been read?

Hon. Delegates: No.

Hon. Delegate Chrysanthus Okemo: Okay.

- 297.** (1) There shall be a Controller of Budget, who shall be appointed by the President with the approval of the National Assembly.
- (2) To be appointed Controller of Budget, a person shall be –
- (a) a professionally qualified accountant of no less than ten years' standing who has extensive experience in the management of public finance; and
 - (b) a person of integrity and moral probity.
- (3) The Controller of Budget holds office, subject to Article 332(5)(b), (c) and (d) for a term of five years and is eligible, if otherwise qualified, for re-appointment for one further term.
- (4) The Controller of Budget shall oversee the implementation of the budget as approved by Parliament by-
- (a) ensuring that money is spent in accordance with appropriations or, in the case of money drawn from the Contingency Fund, in accordance with the Act of Parliament referred to in Article 283;
 - (b) providing accounts of actual, as opposed to budgeted, expenditure;
 - (c) providing technical advice to parliamentary finance Committees; and
 - (d) working closely with the Treasury, departments and Ministries.

- (5) Within two months of the end of each financial year, the Controller of Budget shall submit to House of Parliament a report on the operations of the office of the Controller of Budget during that financial year.
- (6) Within three months after the submission of a report under clause (5), Parliament shall debate and consider the report and take appropriate action.
- (7) In performing the functions of office, the Controller of Budget shall not be under the direction or control of any person or authority.
- (8) The grounds and procedure for removal of the Controller of Budget are as for the removal of a member of a constitutional Commission, as set out in Article 336.

Auditor-General

I think we went through that, didn't we?

Hon. Delegates:

(Inaudible).

Hon. Delegate Chrysanthus Okemo: Did we or did we not?

Hon. Delegates: We did not.

Hon. Delegate Chrysanthus Okemo: We did not. So, let me read it.

Auditor-General

- 298.** (1) There shall be an Auditor-General, who shall be appointed by the President with the approval of the National assembly.
- (2) To be appointed Auditor-General, a person shall be-
- (a) a professionally qualified accountant of not less than ten years' standing who has extensive audit and public finance experience; and
 - (b) a person of integrity and moral probity.

- (3) The Auditor-General holds office subject to Article 332(5)(b), (c), (d), for a term of five years and is eligible, if otherwise qualified, for re-appointment for one further term.
- (4) The Auditor-General shall-
- (a) audit the accounts of the national and devolved levels of government and of state corporations;
 - (b) Confirm that all money that has been appropriated by Parliament and disbursed has been applied to the purpose to which it was appropriated, that the expenditure conforms to the authority that governs it and that the use of the money was economical efficient and effective; and
 - (c) Within six months after the end of each financial year, audit and report, in respect of that financial year, on-
 - (i) the public accounts of the national and devolved levels of Government;
 - (ii) the accounts of all funds and authorities of the national and devolved levels of Government;
 - (iii) the accounts of all courts;
 - (iv) the accounts of every Commission established by this Constitution;
 - (v) the accounts of the National assembly and the Senate;
 - (vi) the accounts of Political Parties funded from public funds;
 - (vii) the accounts of any other organization funded from public funds; and
 - (viii) public debt.
- (5) Within three months after the submission of the report referred to in clause (4) (c), Parliament shall debate and consider the report and take appropriate action.
- (6) An Act of Parliament shall provided for the keeping of the records and Auditing of accounts of the devolved governments, and prescribe other measures for securing efficient and transparent fiscal management.

- (7) In performing the functions of the office, the Auditor-General shall not under the direction or control of any person or authority.
- (8) The grounds and the procedure for the removal of the Auditor-General are as for the removal of a member of constitutional Commission, as set out in Article 336.

Central Bank of Kenya

- 299.** (1) There is established the central Bank of Kenya.
- (2) The Central Bank of Kenya shall be the only authority to issue currency of Kenya.
 - (3) The authority of the Central bank of Kenya shall vest in a Board, consisting of a Governor, a Deputy Governor and not more than five other members.
 - (4) The members of the board shall-
 - (a) be appointed by the President with the approval of the National Assembly; and
 - (b) hold office, subject to Article 332(5)(b), (c) and (d), for a term of five years and are eligible, if otherwise qualified, for re-appointment for one further term.
 - (5) To be appointed Governor, a person shall have extensive knowledge and experience in matters relating to economics, finance or accounting and is a person of integrity and moral probity.
 - (6) The Governor of Central Bank is the Chairman of the Board.
 - (7) The grounds and procedure for the removal of a member of the Board are as for the removal of member of a constitutional Commission, as set out in article 366.

Functions of Central Bank

- 300.** (1) The Central Bank of Kenya shall-
- (a) promote and maintain the stability of the value of the currency of Kenya;
 - (b) issue notes and coins;
 - (c) act as banker and financial advisor of the Government;
 - (d) conduct the monetary policy of the Government in a manner consistent with the relevant provisions of the law in the interest of the balance and sustainable economic growth of the Republic;
 - (e) encourage and promote economic development, and the efficient utilization of the resources of Kenya, through effective and efficient operation of a banking and credit system; and
 - (f) perform all such other functions, not inconsistent with this Article, as maybe prescribed by law.
- (2) In performing its functions, the Central Bank of Kenya shall conform to the Constitution and shall not be subject to the direction or control of any person or authority.
- (3) Notes and coins issued by the Central Bank of Kenya may bear only the portrait of the first President of Kenya or other images that depict or symbolize Kenya or an aspect of Kenya.

Economic and Social Council

- 301.** (1) There is established an economic and social Council consisting of nine persons appointed, on the basis of merit but taking into account the

diversity of the people of Kenya, by the President acting on the advice of the Prime Minister with the approval of the national Assembly.

- (2) Persons appointed to the Council shall-
 - (a) be highly qualified and experienced in economical and social development matters; and
 - (b) have no partisan affiliation once appointed to the Council.

- (3) The functions of the Council are-
 - (a) to advise the Government and the Parliament on matters of economic and social concern to the people of Kenya;
 - (b) to advise the Government on the formulation, implementation, monitoring and evaluation of strategic economic and social policies;

 - (c) To consider and report to Parliament on the economic and social implications of all Bills and budgetary proposals introduced in Parliament;

 - (d) To monitor progress in the improvement of the living standards of the Kenyans, particularly those of the poor and the disadvantaged;

 - (e) Such other functions as are conferred on it by an Act of Parliament.

- (4) Subject to this Article, Parliament shall make legislation-
 - (a) regulating the manner in which the Council carries out its functions; and

 - (b) prescribing the form, content and manner of submitting the reports of the Council.

So, that is the end of that Chapter. (*Clapping*).

Finally, I go on to Chapter sixteen which is the Chapter on the Public Service. Again, we have a few issues to iron out with the Committee on Devolution, where we would like the same principle that apply in this Article to also apply to devolved units.

Values and principles of public service generally

302. The guiding values and principles of public service include -

- (a) maintenance and promotion of a high standard of professional ethics;
- (b) promotion of efficient, effective and economic use of resources;
- (c) effective, impartial, fair and equitable provision of services;
- (d) encouragement of people to participate in the process of policy making;
- (e) prompt, efficient and timely response to people's needs;
- (f) commitment to the implementation of public policy and programmes;
- (g) accountability for administrative acts of omission and commission;
- (h) transparency fostered by providing the public with timely, accessible and accurate information;
- (i) subject to paragraph (k), merit as the basis of appointment and promotions;
- (j) adequate and equal opportunities for appointments, training and advancement of men and women and the members of all ethnic groups;
- (k) despite paragraph (i), reflection of Kenya's diverse communities, persons with disabilities and minorities and other marginalized groups in the composition of the public service at all levels.

The Public Service Commission

- 303.** (1) There is established the Public Service Commission.
- (2) Chapter eighteen shall apply to the Public Service Commission.
- (3) There shall be a secretary to the Commission who shall be the Chief Executive and shall be appointed by the President on the recommendation of the Public Service Commission and with the approval of the National Assembly.
- (4) The Secretary of the Commission shall hold office for a term of five years and is eligible for re-appointment for only one further term of five years.
- (5) *There shall be a single Public Service Commission for the Republic. the Commission is to consist of*
- (a) *a chairperson;*

(5) and (6), should be looked at as proposals that actually came from the Committee on Devolution. However, I will read them nonetheless, and we will be sitting again with the Committee on Devolution to come up with an agreed position.

(Inaudible comments from the floor)

Hon. Delegate Chrysanthus Okemo: And it was read?

Hon. Delegates: Yes.

Hon. Delegate Chrysanthus Okemo: If it was read, then I move on to;

Powers and Functions

- 304.** (1) The powers and functions of the Commission are –

- (a) to promote the values and principles set out in Article 13 throughout the public service;
 - (b) to investigate, monitor and evaluate the organization, administration and the personnel practices of the public service;
 - (c) to ensure efficient and effective performance of the public service;
 - (d) to ensure that procedures relating to recruitment, transfers, promotions and disciplinary measures of the personnel comply with the values and principles set out in Article 13 and 302;
 - (e) to review the terms and conditions of service, code of regulations, qualifications of public officers and to develop human resources in the public service and make recommendations on them to Government;
 - (f) to report on the activities and the performance of its functions in accordance with Article 334 and to evaluate the extent to which the values and principles set out in Article 13 and 302 are complied with;
 - (g) to hear and determine appeals in respect to matters relating to public service from the devolved governments; and
 - (h) to perform such other functions as may be prescribed by the Constitution or any other law.
- (2) The Commission may, subject to conditions that it may think fit, by directions in writing, delegate any of its power and functions under this Article to anyone or more of its members, or any officer, body or authority in the public service.

- (3) Clause (1) shall not apply to any of the following offices in the public service -
- (a) the office of a judge;
 - (b) the office of a member or a secretary of a constitutional Commission;
 - (c) the Constitutional Offices;
 - (d) in relation to the appointment or acting appointment of a Principle Secretary, Secretary to the Cabinet, the Director of Personnel Management or the Solicitor-General;
 - (e) the office of Ambassador, High Commissioner or other principle representative of Kenya in another country;
 - (f) an office to which Article 170 (which relates to offices within the jurisdiction of the Parliamentary Service Commission) applies;
 - (g) an office to which Article 225 (which relates to offices within the jurisdiction of Judicial Service commission) applies;
 - (h) an office to which Article 309 (which relates to offices within the jurisdiction of the Teachers Service Commission) applies;
 - (i) an office in the Kenya Police Service to which Article 325 applies;
 - (j) an office in the Administrative Police Service to which Article 326 applies;
 - (k) except in relation to appeals in clause (1) (g), any office in the service of a devolved government.
- (4) Parliament shall enact legislation for the better functioning of the Commission.

Staffing of devolved governments

- 305.** (1) A Regional government or District government may employ its own staff.
- (2) The Public Service Commission, in consultation with the Regional governments, shall establish--.

This is a clause that we are going to discuss further with the Committee on Devolution so it will have to change but as it is, I will read it out in the form in which it appears.

- (2) The Public Service Commission, in consultation with the Regional governments, shall establish Regional Service commissions under clause (2).

That is not going to happen so, I do not need to read (3).

Establishment of offices

- 306.** (1) Except where there is a contrary provision in this Constitution, the power to constitute offices for the republic and the power to abolish any such offices shall vest in the Public Service commission,
- (2) Except where there is contrary provision in this Constitution, the power to appoint persons to hold or act in offices, to confirm appointments, exercise disciplinary control or remove persons holding or acting in offices established under clause (1), shall vest in the Public Service Commission.

Appointment of Public Officers

- 307.** (1) The Public service Commission shall appoint persons to hold or act in any office in the Public Service of the Republic of the rank below that of Principle Secretary, including confirmation of appointments, the exercise of disciplinary control over such persons and their removal from office.

- (2) A person shall not be appointed under this Article to act in any office on the personal staff of the President or a retired President, except with the consent of the President or of the retired President as the case may be.

Protection of the Public Officer.

308. A public officer shall not-

- a) be victimized or discriminated against for having performed the functions of office in accordance with the Constitution or any other Legislation; or
- b) dismissed or removed from office or demoted in rank or otherwise punished without due process of the law.

Teachers Service Commission

309. (1) There is established the Teachers Service Commission.

(2) The functions of the Teachers Service Commission are-

- a) to register trained teachers;
- b) subject to the provisions of this Constitution on Devolution-
 - (i) to recruit and employ registered teachers;
 - (ii) to assign teachers employed by the Commission for service in any public school and any other institution;
 - (iii) to promote and transfer any such teachers;
 - (iv) to terminate the employment of any such teacher; and
 - (v) to do anything which is incidental or conducive to the exercise of its powers under paragraphs (i) – (iv).

(3) The Commission shall keep under review the standards of education, training and fitness to teach appropriate to persons entering the teachers service and the supply of teachers and to tender- -, (I think it is to render)- - and to render advice to the government on matters relating to the teaching profession.

(4) Chapter Eighteen shall apply to the Teachers Service Commission.

Health Service Commission

An Hon. Delegate: I think it was dealt with yesterday.

Hon. Delegate Chrysanthus Okemo: The Health Service Commission was dealt with yesterday, in fact all the Commissions, which therefore, brings me to a close. Thank you very much.

(Consultations at the “high” table)

Hon. Delegate Chrysanthus Okemo: There is only one Commission which I will run through very quickly, that is the Correctional Service Commission. That is on Part II, page 194 and that will mark the end of my contribution when I am through with it.

The Kenya Correctional Service

Establishment of the Kenya Correctional Service

311. (1) There is established the Kenya Correctional Service.

(2) The object of the Kenya Correctional Service is to ensure-

- (a) the safe custody of the country’s prison population and the provision of humane living conditions in the prisons;
- (b) the supervision of offenders within the community who are serving non-custodial sentences or who are on probation; and
- (c) the rehabilitation of offenders in order to facilitate their return to useful lives within the society.

(3) The Kenya Correctional Service shall be structured and regulated so as to-

- (a) achieve the highest standards of professionalism and discipline among its members and by its members in the exercise of their respective powers;
- (b) work to eliminate and avoid corruption;

- (c) observe human rights standards in the exercise of its powers and the performance of its functions; and
 - (d) train its members to the highest possible standards of competence, on minimal use of force, have integrity and the respect for human rights and fundamental freedoms and dignity, and to recognize the duty of accountability to society.
- (4) The functions of the Kenya Correctional Service shall be organized to take into account the structure of Devolution.
- (5) Parliament shall enact legislation-
- (a) establishing adequate mechanisms for accountability and governance of the Kenya Correctional Service;
 - (b) providing for the organization, administration and functioning of the Kenya Correctional Service; and
 - (c) generally regulating the Kenya Correctional Service.

Director-General of the Kenya Correctional Service

- 312.** (1) There is established the office of Director-General of the Kenya Correctional Service.
- (2) The Director-General of the Kenya Correctional Service shall be appointed by the President on the advice of the Public Service Commission and after approval by the National Assembly.
- (3) A person shall not be appointed as Director-General unless that person-
- (a) holds a degree from a recognized university; and
 - (b) as served in the Kenya Correctional Service for at least ten years; or has wide experience in the management and administration of correctional services.
- (4) The power to appoint powers to hold or act in offices in the Kenya Correctional Service including the power to confirm appointments, and to exercise disciplinary control over persons holding or acting in those offices shall vest in the Public Service Commission.
- (5) The Director-General of the Kenya Correctional Service shall hold office for a term of five years and shall be eligible for re-appointment for one further term of five years.

(6) Clause 328 (3) relating to qualifications of Commission shall apply to the Director-General.

Thank you very much, Ladies and Gentlemen. *(Clapping)*

(Consultations at the “high” table)

Hon. Delegate Chrysanthus Okemo: I now wish to propose that the Committee of the Whole House adopts the three Chapters that I have presented. *(Clapping)*

PRESENTATION OF REPORT OF TWC I:

CHAPTER 15 - DEFENCE AND NATIONAL SECURITY

Hon. Delegate Sultana Fadhil: Thank you very much. Can I now call on the Defence team, Honourable Madoka. It is a short report and even the Chapter is just eight pages. So, let us have the patience which we had in the morning so that we finish with Defence and National Security, thank you. Go ahead.

(Inaudible discussions on the floor)

Hon. Delegate Marsden Madoka: Thank you, Madam Chairperson. Honourable Delegates, first let me take this opportunity to thank all the members of my Committee who worked diligently to ensure that we did the best for this particular Chapter.

I want to thank the Rapporteurs for their assistance. I want to thank the secretarial staff and all the subordinate staff who worked with us, they were simply superb in their support. So, we do thank you.

I will not go through the narrative report of our Committee, I will make a brief summary because we all operated under the same regulations so the mandate is the same, the regulation and the method of work.

You will recall that when this Chapter when presented, it was Chapter 15 in the Draft of the Constitution. Chapter 15 was headed ‘Defence and National Security’. When the Committee met, we all understood what Defence was, but we wanted to define what National Security

was. When we defined National Security, we then went down to determine which services or organs were responsible for National Security.

Having done that, then we looked at the various principles and objects of these organs under various committees which will be responsible for ensuring that the National Security is properly safeguarded.

In doing so, we found that the Chapter had only taken into account the Defence Forces which were the Army, the Kenya Air Force and the Navy. But for National Security, we brought in the Kenya Police, the Administration Police and the National Security Intelligence Service which had in fact been left out of the Draft Constitution.

Now, the Kenya Police and the Administration Police have been put under Chapter Fourteen, that was Public Service and on discussion with the Chairman, the Rapporteur-General, the Convenor of Chapter Fourteen and their Rapporteurs, we agreed that the Kenya Police and the Administration Police should all be pushed to my Committee and we took them on board and we discussed them.

Honourable Delegates, we had very useful, healthy discussions sometimes very heated discussions but we did arrive at certain decisions and throughout our deliberations, it was may be consensus and we only had two points where there was a minority view, a very strong minority view and that was when we came to the question of the possible merger of the Administration Police with the Kenya Police. So, a minority view was recorded and I know there will be a Motion to that effect.

So, we felt that since National Security is a very important matter that we will not afford to make any mistake, we would allow the Committee of the Whole Conference to make the final decision.

Having said that, I will now go through the Chapter as we have now arranged and it and we hope you will find that the Committee did a satisfactory job. The Chapter will now be headed-

“National Security”

Part I – National Security Organs

Definition.

313. National Security is the protection of the territory of Kenya, its people, their property, freedoms and other national interests against internal and external threats.

National Security Organs

314. (1) The national security organs shall be-

- (a) the Kenya Defence Forces;
- (b) the National Security Intelligence Service;
- (c) the Kenya Police Service; and
- (d) the Administration Police Service.

(2) The national security organs shall be subordinate to civil authority. (The emphasis here is that, the Defence Forces of the security organs should be subordinate to the elected body by the Kenyans).

(3) A person shall not establish an organization concerned with national security except as provided for by an Act of Parliament.

Principles and Objects of National Security

315. (1) The Primary object of the national security organs and security system of the Republic of Kenya is to safeguard the well-being of the people of Kenya and their property, and the sovereignty, peace, national unity and territorial integrity of the Republic.

(2) The national security of the Republic of Kenya shall be promoted and guaranteed in accordance with the following principles:

- (a) national security is subject to the authority of this Constitution and Parliament;
- (b) national security shall be pursued in compliance with the law, including international law, and with the utmost respect for the rule of law, democracy, human rights and fundamental rights;
- (c) national security organs shall respect the diverse culture of the communities within Kenya in discharging their duties; and

(d) recruitment by the national security organs shall reflect the diversity of the Kenyan people in equitable proportions.

(4) In the performance of their functions, the national security organs and every member of the national security organs shall not-

- (a) act in a partisan manner;
- (b) further any interest of a political party or cause; or
- (c) prejudice a political interest or political cause that is legitimate in terms of this Constitution.

Establishment of the National Security Council

316. (1) There is established a National Security Council consisting of-

- i. the President;
- ii. the Deputy President;
- iii. the Prime Minister;
- iv. the Minister responsible for Defence;
- v. the Minister responsible for Foreign Affairs;
- vi. the Minister responsible for Internal Security;
- vii. the Attorney General;
- viii. the Chief of Defence Forces;
- ix. the Director-General of National Security Service;
- x. the Inspector-General of Kenya Police Service; and
- xi. the Commandant of Administration Police Service.

Before I read Sub-Article (2), there was a minority view on the question of membership of the Commandant of the Administration Police Service. But I think this will be sorted out once we make a firm decision as to the position of the Administration Police Service when we come to that particular point.

(2) The President shall preside at the meetings of the Council and in the absence of the President the Deputy President, and in the absence of the Deputy President, the Prime Minister shall preside.

(3) The National Security Council shall elect or appoint its Secretary.

Functions of the National Security Council

317. (1) The National Security Council shall-

- (a) integrate the domestic foreign and military policies relating to national security in order to enable the national security organs to co-operate effectively;
- (b) assess and appraise the objectives, commitments and risks to the Republic in relation to actual and potential national security capabilities; and
- (c) initiate and consider policies on matters of common interests to the national security organs and exercise supervisory control over the national security organs.

(2) The National Security Council shall report annually to Parliament on the state of the security of the Republic.

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

(a) deploy national forces outside Kenya for-

- (i) United Nations and other peace keeping support operations; or
- (ii) Other support operations; or

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

Part II – The Kenya Defence Forces

Establishment of the Kenya Defence Forces

318. (1) There is established the Kenya Defence Forces consisting of-

- (i) the Kenya Army;
- (ii) the Kenya Air Force; and
- (iii) the Kenya Navy.

- (2) A person shall not raise a defence force, a military or a paramilitary organization except as provided for under this Constitution.
- (3) There is established a Defence Council consisting of –
 - (a) the Minister responsible for defence who shall be the Chairperson;
 - (b) the Deputy Minister responsible for defence who shall be the vice-chairperson;
 - (c) the Chief of Defence Forces;
 - (d) the Army Commander;
 - (e) the Air Force Commander;
 - (f) the Navy Commander; and
 - (g) the Principle Secretary responsible for defence.
- (4) The Defence Council shall appoint its Secretary.
- (5) The Defence Council shall be responsible for the overall policy, control, and supervision of the Kenya Defence Forces and such other functions as Parliament may by legislation prescribe.

Command of the Kenya Defence Forces

- 319.** (1) The President, shall, in consultation with the Defence Council appoint the Chief of Defence Forces, the Army Commander, the Air Force Commander, and the Navy Commander.
- (2) Subject to the powers of command of the President as the Commander-in-Chief, the Chief of Defence Forces and service commanders shall exercise command over the Kenya Defence Forces and perform such other duties as Parliament may by legislation prescribe.

Part III – The National Security Intelligence Service

I would like to say here that we have further recommended the change of the title of the National Security Intelligence Service to National Intelligence Service. This will be in keeping with the International trend because our National Intelligence Service deals with all

intelligence. They deal with industrial intelligence, marketing intelligence, agricultural intelligence, trade intelligence and security is one of their functions. So, we sat and agreed that the title will change to National Intelligence Service.

Establishment of the National Intelligence Service

Where I read the National Security Intelligence Service as I said, note, it will change.

- 320.**
- (1) There is established the National Intelligence Service.
 - (2) The President shall, with the approval of Parliament appoint the Director-General of the National Intelligence Service.
 - (3) The Director-General shall exercise command over the National Intelligence Service and perform such other duties as Parliament may by legislation prescribe.
 - (4) The National Intelligence Service shall be responsible for security intelligence, and counter intelligence to enhance national security, defend the constitution, the interest of the state and the well being of people of Kenya, and shall exercise such other functions as Parliament may by legislation prescribe.
 - (5) The National Security Intelligence Service shall be organized and administered in such manner as Parliament may by legislation prescribe.
 - (6) The National Security Intelligence Service shall, in exercising its functions observe respect for human rights, fundamental freedoms and the rule of law.
 - (7) No intelligence service, other than an intelligence division of the Kenya Defence Forces or the Kenya Police Service shall be established except by legislation.

Establishment of the National Intelligence Council

- 321.** (1) There is established a National Intelligence Council consisting of –
- i. the Minister responsible for national security and Intelligence who shall be the Chairperson;
 - ii. the Minister responsible for foreign affairs;
 - iii. the Minister responsible for finance; (We have put the Minister responsible for Finance as you will appreciate, the Intelligence Service

spends a lot of money and some of it cannot quite be accounted for because of the nature of their operations and therefore, it was felt absolutely necessary to have the Minister for Finance to try and keep a proper check on the finances of this Service).

- iv. the Attorney General; and
- v. the Head of Public Service

(2) The Director-General of the National Intelligence Service shall be the Secretary to the National Security Intelligence Council.

(3) The functions of the National Intelligence Council shall be –

(a) to advise the National Intelligence Service on all matters pertaining to –

- i. national security and intelligence policies;
- ii. the administration of the service; and
- iii. the expenditure of the service; and

(b) to perform such other functions as are conferred on the Council by legislation.

Part IV – The Kenya Police Service

Establishment of the Kenya Police Service

322. (1) There is established the Kenya Police Service.

- a. The Kenya Police Service shall be organized and administered in such a manner and shall have such functions as Parliament may by legislation prescribe.
- b. The Kenya Police Service shall be professional and disciplined.
- c. The Kenya Police Service shall remain a national police force, and the division of its functions shall be organized to take into account the structure of devolution.
- d. The Kenya Police Service shall work closely with communities to ensure security and safety for the people of Kenya.

Objects and functions of the Kenya Police Service

323.(1) The Kenya Police Service Shall –

- i. strive for the highest standards of professionalism;
- ii. work to eliminate corruption;
- iii. observe the principles specified in Article 315 (3) – (this is the overall of principles and objects of the National Security organs);
- iv. observe human rights standards;
- v. train staff to the highest possible standards of competence and integrity and to respect human rights and dignity;
- vi. abide by the principles of transparency and accountability; and
- vii. foster and promote relationships with the broader society.

(2) The Kenya Police Service shall work with the people to ensure-

- (a) a peaceful and safe environment;
- (b) the protection of rights and freedoms;
- (c) the security of the people;
- (d) the prevention and detection of crime;
- (e) the support of victims of crime and disorder; and
- (f) the protection of life and property.

Appointment of the Inspector-General of the Kenya Police Service

Here you will note that we have changed, we will not have the Commissioner of Police, the title will change to Inspector-General of the Police.

- 324.**
- (1) The President shall, with the approval of Parliament appoint the Inspector-General of the Kenya Police Service.
 - (2) The Inspector-General shall hold office for one term of five years.
 - (3) The Inspector-General shall exercise command over the Kenya Police Service and perform such other duties as Parliament may by legislation prescribe.
 - (4) The Inspector-General, shall in exercise of the functions of Inspector-General not be subject to the direction or control of any person or authority.
 - (5) The Inspector-General may be removed from office by the President for –

- (a) inability to perform the functions of office arising from infirmity of body or mind;
 - (b) misconduct;
 - (c) incompetence; or
 - (d) any other just cause.
- (6) The Inspector-General shall not be removed from office except on the recommendations of a tribunal appointed by the President comprising of the following –
- (a) a High Court Judge, who shall be the chairperson;
 - (b) the Chairperson of the Police Service Commission; and
 - (c) one other person of integrity who has served the public with distinction.

An Hon. Delegate: a,b,c.

Hon. Delegate Marsden Madoka: a,b,c, my apologies. (6), (c), one other person of integrity who has served the public with distinction.

I think the point here is that we need an Inspector-General who will operate independently, who will not fear being dismissed by the President for just refusing may be to take what he might consider an unlawful order from the President.

Establishment of the Police Service Commission

325. (1) There is established the Police Service Commission.

(2) The Police Service Commission shall consist of –

- (a) a chairperson appointed by the President from amongst the members of the Commission;
- (b) a person who is qualified to be appointed as a High Court Judge;
- (c) two retired senior police officers, one from each of the Service (here we are thinking of the Kenya Police and the Administration Police);

- (d) three persons of integrity who have served the public with distinction;
- (e) the Inspector-General of the Kenya Police Service; and
- (f) the Commandant of the Administration Police Service.

- (3) The Police Service Commission shall appoint its secretary.
- (4) The Commissioners appointed under Clause (2) shall hold office for a period of five years and shall be eligible for re-appointment for only one further term of five years.
- (5) The functions of the Police Service Commission shall be to-
 - (a) recruit and appoint persons to hold or act in an office, and to determine promotions in the services;
 - (b) Keep under review all matters relating to the standards or qualifications required of members of the Services;
 - (c) Keep under review all matters relating to salaries, allowances and other terms and conditions of service;
 - (d) Ensure adequate budgetary provisions for the Services;
 - (e) Exercise disciplinary control, including hearing and disposal of appeals by persons in the Services;
 - (f) Exercise such other functions as are provided for by this Constitution or under an Act of Parliament.
- (6) In this Article “Service” means the Kenya Police Service and Administration Police Service.

Part V – The Administration Police Service

Establishment of the Administration Police Service

- 325.** (1) There is established a service to be known as the Administration Police Service.
- (2) The Administration Police Service shall be a separate service from the Kenya Police. (As I indicated at the beginning that we had a very strong minority view and this issue is being brought up).
- (3) The Administration Police Service shall be organized and administered as Parliament may by legislation prescribe.
- (4) The Administration Police Service shall be organized to take into account the structure of devolution.
- (5) The Administration Police Service shall be a service under the Police Service

Principles and objects

327. (1) The principle object of the Administration Police Service is to work with the people to-

- (a) preserve and maintain public peace; and
- (b) prevent commission of offences.

(2) The Administration Police –

- (a) may arrest offenders and do all such things as are necessary for the preservation of the public peace and protection of human rights and freedoms; and
- (b) shall observe the principles specified in Articles 315 (3).

Again these are the overall objects and principles of the National Security Organs.

The Commandant of the Administration Police Service

328. (1) There shall be a Commandant of the Administration Police Service, who shall be appointed by the President with the approval of Parliament, for one term of five years.

(2) The Commandant of the Administration Police shall exercise command over the Administration Police Service and perform such other duties as Parliament may by legislation prescribe.

Honourable Delegates, I present to you this Report for your digestion for the next round of discussion. Thank you.

(Clapping)

(Consultations at the “high” table)

Hon. Delegate Marsden Madoka: I now move a Motion that we adopt this Report of the Technical Committee.

(Clapping)

Hon. Delegate Sultana Fadhil: You want to finish the last Chapter?

(Inaudible discussions on the floor)

Prof. Yash Pal Ghai: There must be a quorum.

Hon. Delegate Sultana Fadhil: I thank you very much for today, please let us start early tomorrow morning so that we finish the Transitional Chapter. I know you are tired of just sitting and listening so that we get to talking now. Please let us start the session early tomorrow. Thank you very much and on behalf of the Conference, I thank all the Convenors and the Rapporteurs for their presentations today. Thank you.

The Meeting adjourned at 4.42 p.m.

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