

NATIONAL ASSEMBLY

OFFICIAL REPORT

Tuesday, 21st December, 2010

The House met at 2.30 p.m.

[Mr. Deputy Speaker in the Chair]

PRAYERS

CONSIDERED RULING

HON. ISAAC RUTO'S MOTION OF THE ROME STATUTE IS INADMISSIBLE

Mr. Deputy Speaker: Hon. Members, I have the following considered ruling to make.

Hon. Members, on Thursday 16th December, 2010, during the morning sitting, the Member of Parliament for Chepalungu, hon. Isaac Ruto moved the Motion appearing as Order No.8 on the Order Paper of that morning sitting. No sooner had the Question been proposed than the Member for Garsen, Mr. Danson Mungatana stood on a point of order claiming that the Motion was unconstitutional and, therefore, inadmissible and incompetent to be moved and debated by the House under our Standing Orders and the Constitution of Kenya.

Hon. Members will recall that the Motion calls on the House to resolve that the Government takes immediate action to have the International Crimes Act repealed, so that Kenya can be immediately released from any obligation to implement the Rome Statute and further that any criminal investigations or prosecutions arising out of the post-election violence of 2007/2008 be undertaken under the framework of the new Constitution and that the Government suspends any links, cooperation and assistance to International Criminal Court forthwith.

Mr. Mungatana sought the direction and guidance of the Chair urging that the Chair breached the provisions of the Constitution and in particular Article 2 that deals with the supremacy of the Constitution. Further, that the Motion was a violation of Article 25 that makes the general rules of international law part of the Constitution of Kenya. To him, genocide, slavery and torture form part of international customary law and are covered by Article 25 of the Constitution. He further cited Article 26 of the Constitution to the effect that any treaty ratified by Kenya forms part of the law under the Constitution and, therefore, upon promulgation of the Constitution, the Rome Statute, which Kenya has signed and ratified, became part and parcel of our Constitution. To that extent, according to Mr. Mungantana, it was not possible to amend the Constitution through a Motion without following the procedure set out in the Constitution.

Mr. Mungatana invited the Chair to note that contrary to the terms of the Motion, Article 127 of the Rome Statute provides that withdrawal can only be effected at least

one year after notification and that it has no effect on prior obligations of a state party. Similar interventions were urged by the Minister for Justice, National Cohesion and Constitutional Affairs, hon. M. Kilonzo, hon. Manyara, and hon. Ms. Karua.

Hon. Members, at the Bar, please, come in.

(Hon. Members at the Bar entered the Chamber)

Hon. Members, from the other point of view, the Minister for Nairobi Metropolitan Development, hon. Githae, argued that Parliament is supreme and that it had powers to make and unmake laws and that the Motion was not amending any law, but merely urging the Government to proceed and withdraw from the Rome Statute. Passage of the Motion would mean that the Government takes the necessary action. To him, to say that international law is part of our law does not mean that it is part of our Constitution.

Hon. Members, interventions by way of points of order were made by hon. Gabbow, hon. Shebesh and hon. Bahari. The Chair recognized the weighty issues raised by the Motion and the points of order and undertook to give a ruling on the same at the earliest possible opportunity and deferred the Motion for the time being.

Hon. Members the admissibility of a Motion is covered by among others Standing Order No.47(3), which provides:-

“(3) If the Speaker is of the opinion that any proposed Motion –

(a) is one which infringes, or the debate on which is likely to infringe, any of these Standing Orders; or

(b) is contrary to the Constitution, without expressly proposing appropriate amendment of the Constitution; or,

(c) is too long; or

(d) is framed in terms which are inconsistent with the dignity of the House; or,

(e) contains or implies allegations which the Speaker is not satisfied that the Mover can substantiate; or

(f) calls for the commitment of public funds for which no provision is made in the Annual Estimates as adopted by the National Assembly;

the Speaker may direct either that, the Motion is inadmissible, or that notice of it cannot be given without such alteration as the Speaker may approve.”

Hon. Members, the new Constitution under Article 25 provides that the general rules of international law shall form part of the law of Kenya. Further, Article 26 provides that any treaty or convention ratified by Kenya shall form part of the law of Kenya under the Constitution. Kenya signed the Rome Statute of the International Criminal Court on 11th August, 1999 and subsequently ratified the Statute on 15th March, 2005. The Statute entered into force on 1st June, 2005. In accordance with the Constitution, therefore, the Rome Statute of International Criminal Court is part of the law of Kenya and has been specifically given legislative effect by the International Crimes Act, which was passed by this House in 2008, and came into force on 1st January, 2009.

The International Crimes Act itself makes the Rome Statute have the force of law in Kenya in relation to the matters covered by the proposed Motion.

Hon. Members at the Bar could you, please, come in.

(Hon. Members at the Bar entered the Chamber)

Hon. Members, Article 127 of the Statute details the procedure for State parties withdrawing from the Statute. It provides as follows:-

“Article 127(1) A State party may, by written notification addressed to the Secretary-General of the United Nations, withdraw from the Statute. The withdrawal shall take effect one year after the date of receipt of ratification unless the ratification specifies a later date.

(2) A State shall not be discharged by reason of its withdrawal from the obligations arising from this Statute while it was a party to the Statute, including any financial obligations which may have accrued. Its withdrawal shall not affect any co-operation with the court in connection with criminal investigations and proceedings in relation to which the withdrawing State had a duty to co-operate, and which were commenced prior to the date on which the withdrawal became effective, nor shall it prejudice in any way the continued consideration of any matter which was already under consideration by the court prior to the date on which the withdrawal became effective”.

Hon. Members, these provisions, by virtue of the Constitution, are part of the law of Kenya. I emphasise that these provisions are part of the law of Kenya, and not part of the Constitution because this distinction is crucially important and must not be lost in the debate.

Clauses 5 and 6 of Article 2 of the Constitution make both the general rules of international law, treaties and conventions ratified by Kenya part of the law of Kenya under the Constitution, and not part of the Constitution. It follows that the procedure for amending such law is a statutory rather than a constitutional amendment procedure.

Hon. Members, therefore, the Motion in purporting that a repeal of the International Crimes Act would immediately release Kenya from our obligations under the Rome Statute, and that criminal investigations and prosecutions arising out of the post-election violence, which took place while Kenya was a party to the Rome Statute, could be undertaken outside the framework of the Rome Statute. That is contrary to the law, because the Rome Statute is part of our law.

Additionally, it is quite clear from the provisions of Article 127 of the Rome Statute that the Government cannot, under the terms of the Rome Statute, suspend any links, co-operation and assistance to the International Criminal Court forthwith. The proposed Motion is, therefore, contrary to the law also on this score. As the Constitution enjoins every person to obey and respect the rule of law, a Motion calling on the Government to disobey, contravene or defy the law is unlawful and unconstitutional.

(Applause)

Hon. Members, the new Constitution, at Article 259, enjoins every person, not least of all, the Speaker of the National Assembly, to interpret the Constitution in a manner that promotes its purposes, values and principles and advances the rule of law. The Motion is in conflict with the purposes, values and principles of the Constitution.

Hon. Members at the Bar, could you please walk in?

(The hon. Members at the Bar walked into the Chamber)

Hon. Members, the issue may arise why the Motion should be disallowed having been approved and put on the Order Paper and, indeed, having been moved. It is worth noting that under Standing Order No.47(3), the role of the Speaker on admissibility of Motions is at two levels. The first level is applied when notice of Motion is being given and the second level is the point at which a Motion is to be moved. It is open to the Speaker at any of these two levels to determine that the Motion is inadmissible. I should also urge that the Speaker can disallow a Motion at any stage if it should become apparent that it is an inadmissible Motion.

Hon. Members, it is the role of the Chair to act as a neutral arbiter and to facilitate hon. Members, as far as lawfully possible to deliberate on matters affecting the people they represent in this House. The Chair should, therefore, be prepared to go to all reasonable lengths to accommodate and facilitate hon. Members to discharge their constitutional mandates. The functions of the Speaker are, of course, subject to the overriding requirement of fidelity to the Constitution and the laws of Kenya, which the Chair, like all other hon. Members, has sworn to uphold and defend.

Hon. Members, after considering all the factors, it is my considered view that the Motion would have been admissible, and, indeed, would still be admissible, if its text had been limited, or were to be amended to be limited, to calling on the House to resolve that the Government takes immediate action to have the International Crimes Act repealed. The hon. Member is perfectly entitled to move such a Motion, for, indeed, the hon. Member himself is entitled to introduce a Bill to repeal that Act. For the present purposes, however, it is the wording thereafter in the Motion in purporting to interpret the effect of such repeal, and in calling for cessation of links, co-operation and assistance to the International Criminal Court forthwith that render the Motion inadmissible.

(Applause)

Hon. Members, from all the foregoing, I rule that the Motion by hon. Isaac Ruto is, in its present form, inadmissible within the meaning of Standing Order No.47(3), and direct that the Motion may not be debated further without such alterations as I have indicated, or otherwise as the Speaker may approve.

Thank you.

(Applause)

PAPERS LAID

The following Papers were laid on the Table:-

The Third Quarterly Report for the year 2010 covering the period 1st July to 30th September, 2010 by the Kenya Anti-Corruption Commission pursuant to Sections 25 and 36 of the Anti-Corruption and Economic Crimes Act, 2003

(By the Attorney-General)

The Seventeenth Report of Public Investments Committee on the Accounts of State Corporations, Volumes I and II.

(By Mr. Linturi)

NOTICE OF MOTION

ADOPTION OF 17TH PIC REPORT

Mr. Linturi: Mr. Deputy Speaker, Sir, I beg to give notice of the following Motion:-

THAT, this House adopts the Seventeenth Report of the Public Investments Committee on the Accounts of State Corporations, Volumes I and II, laid on the Table of the House 21st December, 2010.

QUESTIONS BY PRIVATE NOTICE

CANCELLATION OF WAMALWA /MAINA NJENGA KAMUKUNJI MEETING BY POLICE

Mrs. Shebesh: Mr. Deputy Speaker, Sir, I beg to ask the Minister of State for Provincial Administration and Internal Security the following Question by Private Notice.

(a) Could the Minister give reasons as to why the police cancelled the meeting scheduled for 12th December 2010 and organized by hon. Eugene Wamalwa and Mr. Maina Njenga at Kamukunji Grounds, Nairobi, in disregard of the Constitution?

(b) Could the Minister also explain why the Government failed to provide security at the venue as required when the meeting was rescheduled to 13th December 2010?

The Assistant Minister, Ministry of State for Provincial Administration and Internal Security (Mr. Ojode): Mr. Deputy Speaker, Sir, I beg to reply-

(a) Hon. Wamalwa and Mr. Maina Njenga did not notify police of any intention to hold a meeting at Kamukunji Grounds on 12th December, 2010. However, on 15th November, 2010, one Archbishop J.M. Kigia of Grace Presbyterian Church General Synod Office notified the OCS, Shauri Moyo, of their intention to hold a prayer meeting at the Kamukunji Grounds on 12th December, 2010 starting at 12.00 noon to 6.00 p.m. I wish to lay on the Table the letter from Archbishop J.M. Kigia.

(Mr. Ojode laid the document on the Table)

(b) Since 12th of every year, as stipulated by Article 2 Section 9 (3) of the Constitution, is recognized as a national day to be observed by all Kenyans, on 7th December 2010, the Provincial Police Officer, Nairobi, wrote to the church informing them of the same. It was agreed that the meeting be rescheduled to 13th December, 2010. However, when it became apparent that some politicians intended to hijack the prayer meeting and use it to further their political agenda, after receiving credible intelligence reports of possible security threats, the PPO wrote to the Archbishop Kigia again

informing him of the same and advising him that the meeting had been cancelled on security grounds. The Archbishop wrote back to the PPO concurring with the decision to cancel the meeting. The letter is also hereby tabled.

(Mr. Ojode laid the document on the Table)

Mr. Deputy Speaker, hon. Wamalwa and Maina Njenga or any of their supporters or agents did not at any time notify the OCS, Shauri Moyo or the PPO, Nairobi of any intention to hold a meeting on 13th December, 2010. It is important to note here that the Government was not obliged to provide security as the prayer meeting earlier scheduled to be held there had been cancelled on security grounds.

Mrs. Shebesh: Mr. Deputy Speaker, Sir, I would want the Assistant Minister to clarify exactly what the reason was because from his answer he has given quite a number of reasons. One, he speaks about intelligence sources saying that there were some politicians who wanted to hijack the meeting. The other one, he says that since it was a national holiday, Kenyans are obligated to attend the national holiday, which I do not think is correct. But could he just clarify exactly which intelligence information he received to implicate hon. Wamalwa to be intending to use this as a political rally?

Mr. Ojode: Mr. Deputy Speaker, Sir, if you look at the Public Order Act, Cap.56, it says clearly that you have to notify the police. In the absence of the notification and after Archbishop wrote back to the police saying that he also concurred with the police, we had nothing to do. We cancelled the meeting because the Archbishop himself also did cancel his meeting.

I will refer you to Public Gatherings on the Public Order Act No.5 (2) which says that any person intending to convene a public meeting or a public procession shall notify the regulating officer of such intent at least three days but not more than 14 days before the proposed date of the scheduled public meeting or procession. The police agreed with the Archbishop that he was to reschedule the meeting so there was no need of providing security for that particular meeting.

Mr. Mungatana: Mr. Deputy Speaker, Sir, I want to rely on Standing Order No.43 which allows me to lay down the foundation of facts before I ask a question. The fact of the matter is that the police cancelled a rally when in fact they had not informed the members that had wished to have that rally take place. Secondly, the Constitution of Kenya has made it very clear that freedom of association is one of the fundamental individual rights that is inviolable under the new Constitution. I know my other friends will talk about the others but I wanted the hon. Member to look at Sections 21 and 19.

Mr. Deputy Speaker, Sir, I have said that the rights and fundamental freedoms of this country are enshrined in this Constitution and not the Public Order Act. Is the Assistant Minister in order to try and limit the right of association and freedom of assembly and association to the Public Order Act when he knows very well that the only limitation to the rights in this Constitution are subject to the limitation of this Constitution itself? I wanted the Assistant Minister to read with me Section 19 of the Constitution, which is on page 20, so that he can understand what we are talking about. It says that the rights and fundamental freedoms in the Bill of Rights, which include the right of freedom to assembly and association:-

“(a) belong to each individual and are not granted by the State

(c) are subject only to the limitations contemplated in this Constitution”

Mr. Deputy Speaker, Sir, could the Assistant Minister quote the section of the Constitution, not the Public Order Act that limited the rights of hon. Wamalwa and all the other people who wanted to assemble and express their rights? Which section of the Constitution limited that? We want that section because it is not the Public Order Act. It is the Constitution and we want to hear from the Assistant Minister today.

Mr. Deputy Speaker: You have made your point, hon. Mungatana! Proceed, hon. Assistant Minister!

Mr. Ojode: Mr. Deputy Speaker, Sir, let me also refer you to the Public Order Act which says that where the regulating officer notifies the organizer of a public meeting - and in this case, the organizer was the Archbishop - or public processions in accordance with subsection (3) that it is not possible to hold the proposed meeting or procession, such public meeting or procession shall not be held on that particular date at the time and the venue proposed.

Mr. Deputy Speaker, Sir, what are we saying here? We are saying that the Archbishop gave a notification to the police that he wanted to have a gathering within Kamukunji Grounds. Later on, he agreed that he wanted to have the meeting at a later date. The letter says the following:-

“Kindly note that I fully concur with this decision (that is the police decision). My church and I have postponed the meeting to a later date. Should any person, groups or other organizations attempt to hold a meeting on those grounds on that day in the guise of a prayers meeting that I intended to hold, I notify you that my church and I should not be associated with such.”

Mr. Deputy Speaker, Sir, we are saying that Mr. Eugene Wamalwa did not notify the police. I am talking about the person who notified the police in this case. It was Archbishop Kigia.

Mr. Deputy Speaker, Sir, if Mr. Wamalwa had notified the police that he was going to have a meeting there, that would have been a different thing. But here is a case where we are talking about a notification by an Archbishop and not Mr. Eugene Wamalwa. It is our duty to provide security especially where hon. Members, including Mr. Wamalwa go. Should there be any problem, we should be responsible for that problem. That is why we cancelled the meeting. Mr. Wamalwa did not notify the police and it is our duty to provide security to Mr. Wamalwa, the rest of my colleagues and any other Kenyan.

Mr. Wamalwa: On a point of order, Mr. Deputy Speaker, Sir. Is it in order for the Assistant Minister to mislead the House that I did not give notice to the police when, indeed I did notify the officer in charge of Shauri Moyo Police Station? I visited that station and gave notice of our intended meeting. I have a copy of the letter with me here. The letter was received by the officer in charge of Shauri Moyo Police Station. I wish to table it.

(Mr. Wamalwa laid the letter on the Table)

Subsequently, we paid a visit to the Provincial Police Officer (PPO) who addressed me and not the Archbishop. He said: “You should not have the meeting on 12th. You should have the meeting on 13th”. This was publicized. It was on television and

radio stations. The PPO was quoted as saying he had then authorized our meeting on 13th. Is the Assistant Minister in order to mislead the House that I gave no notice when, indeed, I did and was authorized by the PPO to proceed on 13th at his suggestion?

Mr. Ojode: Mr. Deputy Speaker, Sir, upon realizing that the Archbishop had already requested for that particular ground, we had to cancel both meetings because we did not have adequate security.

Mr. Eugene is a good friend of mine and I would want to say it here that, that meeting was cancelled simply because we did not have enough security on that particular day. I would urge Mr. Wamalwa to notify the police again and hold the meeting.

Mr. C. Kilonzo: Mr. Deputy Speaker, Sir, is the Assistant Minister in order to mislead this House that there was not adequate security while, when dispersing my good friend Mr. Eugene Wamalwa, he had over 400 police officers? Why could he not use those police officers to provide security instead of chasing this handsome looking presidential candidate?

Mr. Ojode: Mr. Deputy Speaker, Sir, you know very well that Mr. Eugene Wamalwa is a presidential candidate. I do not want to go overboard because next time, I might not get any position in his Government.

(Laughter)

Mr. Deputy Speaker, Sir, I want to say that---

Mr. Kabogo: On a point of order, Mr. Deputy Speaker, Sir.

Mr. Ojode: Why do you not just hold your horses?

Mr. Deputy Speaker: Order, Mr. Kabogo! Assistant Minister, please, proceed!

Mr. Ojode: Mr. Deputy Speaker, Sir, as much as we respect the rights of Mr. Eugene Wamalwa, let him notify the police. We will mobilize the security team to guard him and the area.

Mr. Kabogo: On a point of order, Mr. Deputy Speaker, Sir. This is a very serious matter and you have seen the causal way in which the Assistant Minister behaves in this House. This is a matter of leaders being subjected to bad treatment like in the old days of the KANU regime, in the guise of security. They used over 400 police officers to disperse those people. Is Mr. Orwa Ojode in order?

Mr. Ojode: Mr. Deputy Speaker, Sir, this is a serious matter and we should not play around with it when we are answering Questions touching on Members of Parliament. I would request Mr. Eugene Wamalwa to reapply, notify the police and I will be able to provide security. I will also be in that meeting.

Mr. Imanyara: Mr. Deputy Speaker, Sir, the Assistant Minister is a good friend of mine but, unlike Mr. Orengo, he has never gone through what we went through in order to create the circumstances which have made the holding of public meetings enshrined in the Constitution.

(Applause)

Can there be any justification? If there is, can the Assistant Minister tell this House what was the justification for assaulting a Member of Parliament with teargas,

when the PPO himself had confirmed in writing that the meeting could take place on 13th? That letter is here. The PPO in a letter dated on the 7th December says:-

“The prayer meeting at Kamukunji grounds can be held on Monday 13th December 2010 because it is a public holiday.”

That document is here. What justification can the Assistant Minister give for assaulting a Member of Parliament for going to Kamukunji under circumstances that were confirmed by the PPO?

Mr. Ojode: Mr. Deputy Speaker, Sir, you will realize that the 7th of December and the 13th of December are far apart. I want to say the following: One, if a notification has been received by the Officer Commanding Station (OCS) and later on it is found out that we will have insecurity within the area, for purposes of clarity, we will notify the person who has applied that we have cancelled the meeting and ask him or her to reconvene or reschedule it. That is exactly what we did. I am still convincing my friend, Mr. Eugene Wamalwa, that nothing is lost. He can go ahead and notify the police and we will give him the licence.

Mr. Imanyara: Mr. Deputy Speaker, Sir, is it in order for an Assistant Minister of this Government to tell us that we can only hold meetings at their pleasure and not at the holders’ pleasure? Must we do meetings when they want us to? Should we not be able to enjoy the rights that are guaranteed by the Constitution? There is no requirement at all under the Constitution for those notices he keeps referring to.

Mr. Ojode: Mr. Deputy Speaker, Sir, in the same vein, there is a requirement for the Minister of State for Provincial Administration and Internal Security to take charge and give security to Members of Parliament and any other Kenyan. I think we did the right thing. As I have said, let Mr. Eugene reapply and notify the police.

Mr. Linturi: Mr. Deputy Speaker, Sir, I would want the Assistant Minister to tell this House whether he is aware that the decision to cancel that meeting was just an afterthought? If the Assistant Minister was at Nyayo Stadium on 12th the President and the Prime Minister spoke very harshly on the youth being supported by the Americans, which I personally support. However, the Assistant Minister having admitted that Mr. Wamalwa is a presidential candidate, and bearing in mind that those who were likely to attend that meeting were the youth, I think the people the Assistant Minister gets instructions from must have been scared by the youth meeting under the name of a prayer meeting. Why is it that those old people are just afraid of very young boys who want to meet and discuss their own issues that relate to the future of this country?

(Applause)

Mr. Ojode: Mr. Deputy Speaker, I am not aware of that. However, we will equally protect the youth of this country by providing them with security.

Mr. Mwangi: On a point of order, Mr. Deputy Speaker, Sir. Is the former speaker---

Mr. Deputy Speaker: Order, hon. Muturi! You should understand by now how the rules of the House work.

Mr. Mwangi: Mr. Deputy Speaker, Sir, I want to give some information to hon. Linturi. Is the Assistant Minister in order to call Members of Parliament “boys”?

Mr. Deputy Speaker: Order! Proceed, Mr. Assistant Minister!

Mr. Ojode: Mr. Deputy Speaker, Sir, we will encourage the youth of this country to vie for various positions. At a glance, I am also still within the bracket of the youth. So, I will definitely support the youth of this country to continue advancing what they want.

Mr. Wamalwa: Mr. Deputy Speaker, Sir, we intend to go back to Kamukunji on 29th January, 2011. We intend to give notice of this meeting. Will the Assistant Minister assure the Members of this House and Kenyans that they will be free to meet at Kamukunji on 29th January, 2011 and he will provide security instead of disrupting the meeting and assaulting us with tear gas and dogs and anything that they did in the 1990s?

Mr. Ojode: Mr. Deputy Speaker, Sir, if there is no other notification for that particular date, I have no problem with the meeting. We will go by the law. However, if it is occupied or there is notification giving intention to occupy that ground on that date, we will still write and notify hon. Wamalwa.

Dr. Khalwale: On a point or order, Mr. Deputy Speaker, Sir. Is the Assistant Minister in order to avoid answering a direct a question? This is a very serious matter. We must condemn the Government if it contradicts the new Constitution. More importantly, we must also condemn him if he denies any Member of Parliament the chance to enjoy freedom of association. The fundamental issue is that the leadership that was going to participate in the rally has been in the past associated with an outlawed tribal militia. If this is the case, what assurance is he giving to the parents of the youth, who have been attracted by the legitimization of that particular outlawed militia using the political leadership of the country in the pretext of registering religious organizations in its name, that our children will not be lured to join those outlawed tribal militia?

Mr. Ojode: Mr. Deputy Speaker, Sir, you are aware that we do not accept any outlawed sect or grouping. The law is very clear on that. The freedom of speech and association for everybody, youth or old, as prescribed in the Constitution, must be followed. In the same vein, they also require security in order for them to enjoy that freedom of association. I am ready to provide that security if we go by what the law says.

Mrs. Shebesh: Mr. Deputy Speaker, Sir, in his answer, the Assistant Minister has clearly stated that he had some intelligence and that is why he cancelled this meeting. It is important for him to be clear because he is touching on the reputation of an hon. Member. What intelligence report did he have which forced him to cancel the rally and teargas a Member of Parliament and lead to this kind of excessive use of force? We know that excessive use of force by the police has caused this country too much pain and we do not want to go back to the past.

Mr. Ojode: Mr. Deputy Speaker, Sir, I had already answered that question, but I will say something about it before I sit down. We received intelligence report that *Mungiki* followers were going to disrupt that meeting. I had no choice, but to cancel it. I was called from home and we agreed to postpone the meeting until a later date, which hon. Wamalwa and the Archbishop had accepted. Now that hon. Wamalwa has given a new date of 29th January, 2011, hopefully, we will be free on that date and we will be there with him.

GOVERNMENT SHIFT IN POSITION ON FUEL PRICE CONTROL

Mr. Ochieng: Mr. Deputy Speaker, Sir, I beg to ask the Minister for Energy the following Question by Private Notice.

(a) What is the reason for Government shift in position with regard to fuel price control, considering that the Minister has previously indicated that he was unable to control fuel prices?

(b) Is the Minister aware that the recent astronomical increase in fuel prices is as a result of faulty machines at the Kenya Petroleum Refineries, demurrage charges accrued from the imported crude oil and the delay in offloading which is due to under-handling capacity at Kipevu which can only store up to 33,454 metric tonnes of petrol?

(c) What urgent measures is the Minister taking to address the issues in “b” above?

The Minister for Agriculture (Dr. Kosgei): Mr. Deputy Speaker, Sir, I am informed by the Member that he has had a conversation with hon. Magerer, who has agreed to defer this Question.

Mr. Deputy Speaker: Up to when do you want the Question to be deferred?

The Minister for Agriculture (Dr. Kosgei): Mr. Deputy Speaker, Sir, it can be deferred to the next sitting because he is apparently out of town over something important, which is only effective today.

Mr. Deputy Speaker: The House will sit tomorrow morning. So, the Chair directs that this Question be deferred to tomorrow morning. Hon. Ochieng’, the Chair is of the opinion that you are comfortable with the Question being deferred to tomorrow morning?

Mr. Ochieng’: Mr. Deputy Speaker, Sir, I quite agree with that.

(Question deferred)

PROPERTY RIGHTS FOR PASTORALISTS/ MARGINALIZED GROUPS

Mr. Ethuro: Mr. Deputy Speaker, Sir, I beg to ask the Minister for Lands the following Question by Private Notice.

(a) What plans has the Minister put in place to secure property rights to all pastoralists, marginalized and other minorities in the Republic of Kenya?

(b) Could the Minister also indicate the number of landless people in the country and especially the minorities such as the Endorois, IIIchamus and Ogiek?

(c) What steps has the Minister taken to comply with the African Union resolution of the Endorois case in February 2010?

The Minister for Lands (Mr. Orengo): Mr. Deputy Speaker, Sir, I have sought the Member’s indulgence that I got this Question yesterday in the evening and I have not been able to craft an appropriate answer. Could I be allowed to answer this Question on Thursday this week? I do not know why the Question is there by Private Notice because if you look at it, there is no life threatening situation. However, I would seek the Member’s indulgence that I answer it on Thursday.

Mr. Ethuro: Mr. Deputy Speaker, Sir, I wish to confirm that the Minister has approached me asking that the Question be deferred to Thursday. I have no problem with that except he has said that he received the Question in the evening. I wonder which Government offices are open in the evening.

The Minister for Lands (Mr. Orengo): Mr. Deputy Speaker, Sir, it depends on where you were brought up. If you were brought up by the Anglo-Saxons, evening starts at 3.00 o'clock and not at 6.00 o'clock. At 6.00 o'clock it is already night. If you are in Oslo, it is deep in the night.

Mr. Deputy Speaker: Fair enough! The Chair directs that this Question be deferred to Thursday.

(Question deferred)

ORAL ANSWERS TO QUESTIONS

Question No.436

LIST OF *BONA FIDE* FARMERS FOR BURA/HOLA IRRIGATION SCHEMES

Dr. Nuh asked the Minister for Water and Irrigation:-

(a) whether she could provide a list of *bona fide* farmers of Bura and Hola Irrigation Schemes, clearly indicating the acreage of land held by each farmer;

(b) how many acres of land are under cultivation by the National Irrigation Board and the National Youth Service and also to indicate the number of tonnes of maize harvested by each entity and how the proceeds are utilized; and,

(c) when the land under the two entities will revert to the residents.

The Assistant Minister for Water and Irrigation (Mr. Waititu): Mr. Deputy Speaker, Sir, I beg to reply.

(a) I have provided a list of the *bona fide* farmers of Bura and Hola Irrigation Schemes, indicating the acreage for each farm in Annex 1.

(b) The land under cultivation by the National Irrigation Board in Bura is 1,000 while that under the National Youth Service in Bura and Hola is 850 acres and 130 acres, respectively. The maize seeds produced by the National Irrigation Board in Bura were 3,748 bags and sold to the Kenya Seed Company. The proceeds from the sales, which is approximately Kshs16 million is used to increase the area under cultivation and improving farm infrastructure. The maize harvested by the National Youth Service at Hola and Bura was 1,223 bags and 279 tonnes respectively. The produce is intended to go to the National Strategic Food Reserve and harvesting is still in progress in Bura.

(c) Mr. Deputy Speaker, Sir, the land under the NYS Irrigation Scheme in Bura will revert back to the original farmers after completion of the rehabilitation works. However, the land utilized by the National Irrigation Board (NIB) at the NYS in Bura Irrigation Scheme is Government land.

Dr. Nuh: Thank you, Mr. Deputy Speaker, Sir. The Assistant Minister has said that the land that is being cultivated by the NIB and the NYS in Bura is Government land. This is ambiguous because the more reason why I asked that land to be redistributed to the residents is because it belongs to the Government. I am not asking for private land to be distributed to the public.

Mr. Deputy Speaker, Sir, just to let the Assistant Minister know, Bura Irrigation farmers were settled in 1970 and between that time and now, you have grown up families which are offshoots of people who were resettled in the 1970s and 1980s. These people are landless. Those people had livestock which they lost due to incessant drought and fights. Could the Assistant Minister undertake that because that is Government land, it will be distributed to the landless people in Bura so that they can cultivate it?

Mr. Waititu: Mr. Deputy Speaker, Sir, the Government and our Ministry appreciate the fact that since 1982 when the last bunch of people was resettled, there are those who have grown and need land. We, at the Ministry, have consulted widely and are in agreement with the hon. Member that the Advisory Committee can spearhead the reallocation of the land to the landless in the Bura area.

Mr. Mungatana: Mr. Deputy Speaker, Sir, I was there on 19th of August, 2006, when the President and the Assistant Minister for Water and Irrigation at that time, Mr. Raphael Wanjala said in a public rally that they will pump in Kshs170 million to revive the Bura Irrigation Scheme.

Mr. Deputy Speaker, Sir, the same remarks were repeated in Irimani Secondary School when the President held a leaders meeting. I want to know from the Assistant Minister whether, indeed, that money was released by the Government. Does it make any sense right now for two acres, which yield 60 bags to be deducted 55 bags of maize to meet the cost of fertilizer, water costs and everything, leaving the farmers with five bags? The NIB does not pay that money to the farmers. When will the Government start making the growing of maize in that place profitable? When will the Government pump the Kshs170 million that was promised by the President in 2006?

Mr. Waititu: Mr. Deputy Speaker, Sir, I am aware that some of the farmers are not able to produce more than 60 bags, as the hon. Member has said. The money promised has actually not been released in full, but I promise the hon. Member that I will push for the release of that money immediately.

Mr. Deputy Speaker: Dr. Nuh, can you ask the last supplementary question on the same?

Dr. Nuh: Thank you, Mr. Deputy Speaker, Sir. The Assistant Minister has provided the list of the *bona fide* Bura farmers, but having gone through it, I have close to 100 people who do not have identification card numbers. I do not know whether these are aliens or they are Kenyans, because if they are Kenyans they should have identification card numbers.

Further to that, when the Economic Stimulus Programme was being commissioned by the Minister for Agriculture late last year, the number of *bona fide* farmers was 1,600, as per the Government register. However, today, they have provided names of 2,245 farmers. Could the Assistant Minister explain whether there were new farmers who were resettled within this year and whether the people who do not have identification card numbers are, indeed, Kenyans?

Mr. Waititu: Mr. Deputy Speaker, Sir, this list of farmers was compiled between 1979 and 1982 when the project was operating successfully. However, in 1995, the Tana River changed its course naturally and the project collapsed. Some of the farmers who had been allocated land subsequently went back to where they had come from.

It is worth mentioning that these farmers were allocated land from all over the country through the Provincial Administration. However, now that the project is

operating properly, members have been coming back from where they had gone. That is why there is an increase in the number of farmers because the original farmers are returning back to their farms. When these people come, they are resettled by the village committees. They attend village committees which are able to identify the members who had been allocated land originally. Therefore, even the ones who had not provided their identity card numbers are identified by the village committees.

Mr. Ethuro: On a point of order, Mr. Deputy Speaker, Sir. Is the Assistant Minister in order to mislead this House that you can actually have Kenyan---

(Loud consultations)

Mr. Deputy Speaker: Order, hon .Members! Order!
Proceed Mr. Ethuro!

Mr. Ethuro: Mr. Deputy Speaker, Sir, is it in order for the Assistant Minister to mislead the House that it is possible for adult Kenyans to be allocated land without a national identification card?

If you look at part “c” of the Question, you will find that the Member is asking: “When will this land under the two entities revert to the residents?” We need to have their identity card numbers so that we can know where these people are coming from. Is the Assistant Minister in order to be evasive?

Mr. Waititu: Mr. Deputy Speaker, Sir, the genesis of this resettlement was that all the people were allocated land through the Provincial Administration. These people came from all over the country. If you look at the list, you will find that there are people who came from Nyanza, Central and Coast. However, when the project collapsed, they went back to where they had come from. But those people have now returned now that the project has again taken off and the Provincial Administration, together with the village committees is resettling the original allottees and not the locals. That is why we said that the land that has recently been developed by the NYS can be given to the locals. However, the original allottees can go back to their original land.

Mr. Deputy Speaker: Let us move on to the next Question by Mr. Kabogo!

Question No.541

EXPANSION OF RUIRU EDUCATION OFFICE

Mr. Kabogo asked the Minister for Education:-

(a) whether he is aware that Ruiru Education Office operates from one room shared by 12 officials; and,

(b) when the Ministry plans to expand the office because its current state is hindering effective educational management in Ruiru area.

The Assistant Minister for Education (Mr. Mwatela): Mr. Deputy Speaker, Sir, I beg to reply.

(a) Yes, I am aware that Ruiru Education Office operates from a two-roomed office shared by 12 officials within the District Commissioner’s compound.

(b) The Ministry of Education, in liason with the Ministry of Housing, is in the process of preparing a lease agreement for another office building within Ruiru Town as

a temporary measure. Meanwhile the Ministry has allocated Kshs4 million for the construction of a permanent office which will be disbursed after the receipt of the bill of quantities and a land allotment letter. I urge the District Education Board, on which the hon. Member sits, to urgently submit these requirements. I will table the extracts of the sub-itemized estimates of the Recurrent and Development Expenditure which show an allocation of Kshs100 million for the construction of new offices for new districts.

(Mr. Mwatela laid the documents on the Table)

Mr. Kabogo: Mr. Deputy Speaker, Sir, if you look at part “a” of the Question, it asks whether the Minister is aware that Ruiru Education Office operates from one room. If you look at his answer, he is saying “yes”, he is aware that they operate from two rooms. The Question talks about one room. Could he clarify that?

Nevertheless, he is talking about Kshs4 million awarded for putting up a District Education Office. He says the officers are 12, but the office has given a list of 24 officers. This Assistant Minister does not seem to know what is going on. I table a list of 24 officers in one room and not in two rooms. What is the Ministry doing about this?

(Mr. Kabogo laid the list on the Table)

Mr. Mwatela: Mr. Deputy Speaker, Sir, first of all, I appreciate the hon. Member’s concern, but the Ministry is constrained, considering that there has been creation of very many new districts. On the issue of whether there are two offices, a two-roomed office or a one-roomed office, I say that there are two rooms not one room. The physical inspection revealed that there are two rooms.

The allocation is done as to any other district. There is no special treatment for any particular district. Each district has been allocated Kshs4 million.

Mr. Olago: Mr. Deputy Speaker, Sir, the problem of education offices in the new districts is not confined to Ruiru. I am glad that the Assistant Minister has said that in this financial year the sum of Kshs100 million has been allocated for construction of offices in the new districts. Could he kindly confirm that among the new districts which will have new offices for education officers is Kisumu North?

Mr. Mwatela: Mr. Deputy Speaker, Sir, I hope the hon. Member was listening to me. I have said, and I repeat, present your bill of quantities and your allotment letter for piece of land. That guarantees you the Kshs4 million.

Mr. Kabogo: Mr. Deputy Speaker, Sir, you heard the Assistant Minister say that we should present letters of allotment of land and it is this Government that issues letters of allotment. When will you issue a letter of allotment and when will you increase the funds to build a new office for the District Education Officer in Ruiru?

Mr. Mwatela: Mr. Deputy Speaker, Sir, yes, it is this same Government that gives the allotment letters, but it is the District Education Board members who have to apply for those allotment letters. Apply for it.

Question No.621

SETTLEMENT OF SQUATTERS IN BANITA SETTLEMENT SCHEME

Mr. Kigen asked the Minister for Lands:-

(a) whether he is aware that Banita Settlement Scheme in Rongai was bought by the Government to settle squatters living in Makongeni Location, and if so, to state the value of the 16,000 acre land;

(b) to explain why the Government cancelled the first survey work and commissioned another one using the same Government surveyors and also state why allotments done in 2002 were cancelled, leaving out some of the previous beneficiaries; and,

(c) whether he could also provide a list of the beneficiaries of the first and second allotments, explain why a number of deserving persons were replaced in the second allocation and state what the Ministry is doing to ensure the replaced persons are among the beneficiaries.

The Assistant Minister for Lands (Mr. Bifwoli): Mr. Deputy Speaker, Sir, I beg to reply.

(a) Yes, I am aware that Banita Settlement Scheme was purchased by the Government through the Settlement Fund Trustees to settle squatters within Makongeni area of Rongai in Nakuru District, and other areas of Kenya. The total acreage is 14,115 and not 16,000 acres, as claimed by the hon. Member. The 14,115 acres were purchased at the price of Kshs292,078,280.

(b) The first exercise was suspended and nullified in April, 2003, after some squatters in the scheme complained that they were left out during the adjudication and verification stage. The Minister for Lands ordered fresh vetting and verification of squatters based on households within the scheme boundaries. This was done in liaison with the Provincial Administration and local leaders elected by the squatters who completed the exercise in 2003, and all squatters were considered. Planning and survey was done by the Government surveyors to accommodate those who were initially left out.

(c) I can provide the list of beneficiaries who were allocated land in Banita Settlement Scheme. Here is the list.

(Mr. Bifwoli laid the document on the Table)

Some 82 persons who complained that they had been left out were accommodated through a decree by Nakuru High Court pursuant to High Court Case No. 4 of 2005. Another civil suit No.2 of 2009 by another 160 squatters claiming to have been left out is still pending at the Nakuru High Court. Further direction on their fate will be determined by the outcome of the said case.

Mr. Kigen: Mr. Deputy Speaker, Sir, listening to the Assistant Minister, he has addressed himself to the Question and confirmed clearly that the settlement scheme was purchased to settle squatters in the larger Makongeni Location. When the Assistant Minister went ahead and cancelled the allocation, you will realize that he has given this House an answer to the effect that it was for purposes of verifying and identifying those who had been left out. He did that exercise within the confines of the scheme as opposed to addressing the complaints from the larger location as was originally intended.

Mr. Assistant Minister, why is it that you left out the entire location and confined yourself to the squatters who were already residing in the settlement scheme? Secondly,

the Assistant Minister has just laid on the Table a list of the beneficiaries. I have not had the opportunity to look through it, so that I can prosecute this matter more effectively. Could I ask that I get an opportunity to look through it, so that I can appreciate where the Assistant Minister is coming from, as far as his answer is concerned?

Mr. Deputy Speaker: Do you wish to continue with the Question, or to have the list first?

(Loud consultations)

Mr. Kigen: Mr. Deputy Speaker, Sir, I cannot hear you at all.

(Loud consultations)

Mr. Deputy Speaker: Order! Order, hon. Members! Indeed, the Chair appreciates that this is a very big list and it is surprised that you did not have access to it before the Assistant Minister started answering it. This is an Ordinary Question and not a Question by Private Notice. Ideally, the Assistant Minister is supposed to make the material available to the Questioner. Do you wish to continue prosecuting this Question now or we would rather get the list and we defer it to another date?

Mr. Kigen: Mr. Deputy Speaker, Sir, I would rather have it deferred for now to afford me an opportunity to look through it.

Mr. Deputy Speaker: Fair enough! How is tomorrow morning or afternoon for you, hon. Kigen? Are you comfortable with tomorrow morning?

Mr. Kigen: Yes, Mr. Deputy Speaker, Sir.

Mr. Deputy Speaker: Fair enough! The Chair directs that this Question appears on the Order Paper tomorrow morning.

The Assistant Minister for Lands (Mr. Bifwoli): Mr. Deputy Speaker, Sir, I have no problem with tomorrow morning.

Mr. Deputy Speaker: Fair enough! It is so directed!

(Question deferred)

PERSONAL STATEMENT

FORCEFUL ACCESS TO HON. MBUVI'S
PARLIAMENTARY OFFICE BY POLICE

Mr. Mbuvi: On a point of order, Mr. Deputy Speaker, Sir. I wish to make a personal statement on the raid at my house in Buru Buru and forceful access to my parliamentary office in Continental House by the police.

Mr. Deputy Speaker, Sir, on 10th December, 2010, at around 5.45 a.m. four armed gangsters raided my house, which is some few metres from Buru Buru Police Station, roughed up my two watchmen, a Mr. Paul Karia and Richard Safaya. Luckily, the two thugs were arrested by my security officers and the rest managed to escape. Those arrested were booked at Buru Buru Police Station vide OB No.8 of December, 2010.

Mr. Deputy Speaker, Sir, as the law requires, I proceeded to the Kibera Law Courts for a mention, expecting that the police would investigate the matter and prefer charges against the suspects. On the same day, when I went back to Buru Buru Police Station to record a statement, to my surprise, the two suspects had already been released without any charge having been preferred against them. My attempt to seek clarification from the Officer Commanding Station (OCS) was met by the answer that it was an order from above for the suspects to be released. I even went further to call the Commissioner of Police on his cell phone number 071669930, and he told me that I was too junior to talk to him.

Mr. Deputy Speaker, Sir, today, 21st December, 2010, at 11.00 a.m., three senior police officers from Vigilance House, led by a Deputy Commissioner of Police (DCP), Assistant Commissioner of Police (ACP) and a Senior Superintendent of Police (SSP), a fact that I confirmed from the OCS, Parliament Police Station, forced their way into my Continental House office and threatened Parliamentary staff in total disregard of Parliamentary Privileges. They told me that I should not consider myself to be special. They even went further to threaten me with death, if I continued to question the integrity and credibility of their boss, the Commissioner of Police, Mr. Mathew Iteere. The happening was well recorded and I can table it if directed to do so.

Mr. Deputy Speaker, Sir, I wish to state categorically that if there are any allegations framed against me, which I am not aware of, I am not above the law. I am ready to face the law as per the laid down procedures. I suspect that it is political since I have been all over the media when I was representing my constituents against the so-called Michuki Rules vide Miscellaneous Application No.520 of 2006.

Mr. Deputy Speaker, Sir, again, I was in court to represent the residents of Eastlands when the PSV vehicles were barred from accessing the Central Business District (CBD). I took the Government to court and also won the case vide Miscellaneous Application No.659 of 2007. Two police officers, a Chief Inspector Maurice Odhiambo and Dickson Kibet were arrested and charged by the Anti-Corruption Court through my own efforts as a complainant.

Mr. Deputy Speaker, Sir, the above three cases attracted a lot of interest and media publicity because I was the sole applicant and complainant. I will not forget to mention that during the Referendum campaigns, I was all over urging citizens to vote Yes in order to have a Constitution that would end impunity. My face was the same at that time and is still the same now. I have not done any plastic surgery to conceal any of my identity. Why is it that upon being elected as a Member of Parliament, that is when everybody is coming for me?

Mr. Deputy Speaker, Sir, this raid at my house and subsequent release of the suspects via orders from above, the forceful entering of my Parliamentary office by three police officers and the threats have greatly left me and my family in a state of shock. I want this House to assure me of my safety both at home and my Parliamentary office. I further request the House to take strict measures against the three officers who forcefully entered my Continental office today.

Mr. Deputy Speaker, Sir, in conclusion, I wish to state to this House, without any fear of contradiction, that I am not going to succumb to any form of intimidation by any person, be it a politician or the police, and that I will continue to serve my Makadara constituents diligently.

Thank you, Mr. Deputy Speaker, Sir.

Mr. Ruto: On a point of order, Mr. Deputy Speaker, Sir. Fully aware that the Standing Orders do not allow us to debate any matters about a personal statement, I, however, cannot fail to take note of the fact that a statement has been made that the police have actually forcefully accessed our offices at Continental House. I think the Powers and Privileges Act does not allow such a thing to happen. The last time it did happen was when hon. Seroney and hon. Martin Shikuku were actually whisked away from Parliament precincts. I think this is a very serious offence and an affront on the institution of Parliament. I think we expect a Statement from the Speaker's Office on this matter; whether, indeed, there were strangers accessing a Member's office and if so, under what circumstances.

Mr. Deputy Speaker: Indeed, that is a very serious breach of the Powers and Privileges Act. A Member of Parliament is entitled to certain rights. The Chair is going to carry out its own internal investigations and make a communication to the House tomorrow on the same.

Hon. Khaniri, you have a Ministerial Statement. How long is it?

The Assistant Minister for Information and Communications (Mr. Khaniri): Mr. Deputy Speaker, Sir, it is not very long. I request you to give me five minutes.

Mr. Deputy Speaker: I would like to defer that to tomorrow morning if you do not mind.

The Assistant Minister for Information and Communications (Mr. Khaniri): That's fine.

COMMUNICATION FROM THE CHAIR

ADMISSIBILITY OF MOTION BY HON. ISAAC RUTO

Mr. Deputy Speaker: Hon. Members, I have a small communication to make. Subsequent to my communication on the admissibility of the Motion by hon. Isaac Ruto, the Chair has since received an intention of an amendment to the Motion from hon. Mututho, and which the Chair has approved.

(Applause)

Further, the business to be transacted in the House is organized by the House Business Committee. The Speaker is merely an *ex-officio* Member of the House Business Committee. The Chair has further Communication from the Leader of Government Business that the Motion by hon. Isaac Ruto, which is to be amended, should be given preference over the other Motions.

We will now move to defer Order Nos. 8 and 9 and move to Order No.10.

MOTIONS

REPEAL OF INTERNATIONAL CRIMES ACT

THAT, aware that Kenya promulgated a new Constitution on 27th August, 2010 which has had fundamental changes in circumstances upon

which several statutes had been enacted in the past, including the International Crimes Act which domesticates the Rome Statute, this House resolves that the Government takes immediate action to have the International Crimes Act repealed so that Kenya be immediately released from any obligation to implement the Rome Statute and further that any criminal investigations or prosecutions arising out of the post election violence of 2007/2008 be undertaken under the framework of the new Constitution and that the Government suspends any links, co-operation and assistance to International Criminal Court forthwith.

(Mr. Ruto on 16.12.2010)

(Resumption of Debate interrupted on 16.11. 2010)

Mr. Mututho: On a point of order, Mr. Deputy Speaker, Sir. I rise on Standing Order No.48 which allows a Member to amend a Motion as long as he does not change the actual feeling and philosophy of the Motion.

I beg to propose an amendment to the Motion by Isaac Ruto as follows:-

THAT, the Motion be amended by deleting all the words after the word “repealed” at the end. Two, substituting therefore, with the following words:- “And further that the Government takes appropriate action to withdraw from the Rome Statute pursuant to Articles 127, 19 and 17 of the Rome Statute as read together with the principle of complementarity emphasized in paragraph 10 of the preamble to the Rome Statute and further that any criminal investigations or prosecutions arising out of the post election violence of 2007/2008 be undertaken under the framework of the new Constitution.

Mr. Deputy Speaker, Sir, the whole idea of going to the ICC was to achieve justice. There is nothing more important in life as justice. Justice starts with very good investigations and has to be seen to be done. The principles set under paragraph 10, the preamble, first and foremost, and I read:- “Emphasizing that the International Criminal Court established under the statute shall be complementary to the National Criminal Jurisdiction.” Most hon. Members here and, to be specific, 48 of them, have gone through a judicial process to be here; either through a petition or otherwise. Are we saying that Kenya is a failed state which cannot carry out the basics of trying those bad and mad people who burned and maimed my people in Naivasha? Are we saying that this court is so incompetent, as it may be for now, that we are not worth having a full judicial process? For the sake of hon. Members who may not have had time to go through the Rome Statute, I will go through Article 17(i) (a). I read:-

“The case is being investigated---

Mr. Deputy Speaker: Hon. Mututho, after moving the amendment, can you now read the Motion as amended; in its entirety?

Dr. Khalwale: On a point of order, Mr. Deputy Speaker, Sir. I rise on a point of order on a serious matter of procedure. We cannot go on with this! I want to remind the Chair that the attempt to amend this Motion is being done unprocedurally and even if he purports to move it, it will not be done properly before the House. Why is that? There are

three reasons. One, is that today, 21st December, 2010, is a Tuesday. According to the Rules of this House, a Private Member's Motion like this one can only be moved on a Wednesday morning. I know that when this Motion was first moved last week, it was on a Thursday. But that was after a decision had been made by the House Business Committee that we so do. The second reason why I think it is not properly before the House is that this will be the first time, in my eight years in Parliament, to see an amendment Motion being done through a point of order. I have not seen that for eight years and I would like the Chair to tell us whether it is possible to move an amendment to a Motion through a point of order.

The third reason why I think that this Motion is not properly before the House is that you have cited direction from the Leader of Government Business. I am a regular attendant of meetings of the House Business Committee in this Parliament. I am a Member of the House Business Committee. I am aware of the procedure. The Leader of Government Business Committee merely communicates to this House the position of the House Business Committee. Subsequent to your ruling, the House Business Committee is yet to sit in order to direct the Leader of House Business Committee to so say. I beg you and invite you to find that this Motion is not properly before the House.

Mr. Ruto: Mr. Deputy Speaker, Sir, it is quite strange that hon. Dr. Khalwale purports to imply that the Speaker, under Standing Order No.1, cannot order---

(Mr. Deputy Speaker consulted with the Clerk)

Maybe, I should wait.

Mr. Deputy Speaker: Proceed!

Mr. Ruto: Mr. Deputy Speaker, Sir, Standing Order No.1 gives the Speaker the powers to organise the business of the House at his discretion, notwithstanding the published Order Paper. Therefore, the statements by hon. Dr. Khalwale are flying in the face of the known rules. I do not think he intends to discover new ones today. I think the hon. Member rose to contribute after the Order had been called out. I did not hear him rise on a point of order.

Mr. Mungatana: Mr. Deputy Speaker, Sir, the first time this Motion was moved in this House, it had difficulties because people were trying to do things in a manner that is not correct. This is the second time people are trying to do things in a manner that breaches the Standing Orders of this House. Standing Order No.38 is very clear. It states that on a day such as this one, we discuss Government business. It is only on a Wednesday morning that a Private Member's Motion can be properly before this House.

I request that you look at this Motion again and find that it is actually wrong for a Private Member's Motion to be on the Order Paper on a Tuesday afternoon. I urge you to guide us properly so that if they must have their way, then let us argue the merits or demerits of this tomorrow morning. Otherwise, under our Standing Orders, we cannot debate this Motion this afternoon.

Mr. Kioni: Mr. Deputy Speaker, Sir, first, I want to thank you for the ruling you have just made. On the fourth page of your ruling, you made it clear to Kenyans that the Motion as it were on the Floor before the amendment was not intended to amend the Constitution. This was the argument that was advanced by many and it is important that it remains clear in our records that there was no such intention.

Secondly, you indicated in your ruling – and those who are rising on points of order after your ruling are in my opinion out of order – that you are a neutral arbiter and that you are prepared to go to all reasonable lengths to accommodate and facilitate hon. Members to discharge their constitutional mandate.

Thirdly, in your ruling – and this is why I think those who wanted to object to your ruling should have done that earlier on – you indicated that after considering all the factors “the Motion would have been admissible and, indeed, would still be admissible if its texts had been limited or were to be amended to be limited to calling on the House to resolve---”

Mr. Deputy Speaker, Sir, your ruling was clear that you had no difficulties with the amendment of the Motion and if it is amended to remove the offending words and sentences, the Motion would continue. Standing Order No.1 states:

“In all cases where matters are not expressly provided for by these Standing Orders or by other Orders of the House, procedural questions shall be decided by the Speaker.”

This is a case that is not quite provided for and I believe that it is something that can be decided by the Speaker. However, Standing Order No.53 requires that an amendment can be moved at any time. Standing Order No.54 requires that any such amendment be in writing and given to the Speaker and that has been satisfied. With regard to Standing Order No.55 (2), the amendment does not in any way go contrary to the question that had earlier been proposed.

Lastly, I want to submit that this amendment is properly before the House.

Ms. Karua: Mr. Deputy Speaker, Sir, I just want to add to my colleagues’ contributions and cite Standing Order No.1. That particular Standing Order is for cases not provided for. Otherwise, the manner of bringing Motions to the House and allotting time is already provided for. It is the House Business Committee (HBC) that allots time. Mr. Speaker, with respect, cannot allot time to any Motion. His discretion is limited to matters not provided for.

Mr. Deputy Speaker, Sir, the HBC, of which I am a member, has not met since your ruling. We have not at all allotted any time to this Motion. It is important that during this reform period, we follow the simple rules that we make. To that extent, the Motion is improperly before the House.

Mr. Olago: Mr. Deputy Speaker, Sir, was it in order for the Chair of the HBC, in his own discretion, to jump Order Nos8 and 9 and give preference to Order No.10 without the HBC having met?

Mr. Deputy Speaker: Hon. Members, to begin with, I want you to look at Standing Order No.36 and it is going to be read in conjunction with other Standing Orders. Standing Order No.36 (2) says:

“Business shall be disposed of in the sequence in which it appears in the Order Paper or in such other sequence as the Speaker may, for the convenience of the House direct.”

Standing Order No.38 states:

“The Government shall have the right to have its business placed on the Order Paper in such sequence as it may determine.”

To begin with, the Chair is going to share with you the communication between it and the Leader of Government Business. As far as the Chair is concerned, it does not talk

to every member of the HBC. If the Chair of the HBC informs the Chair that this is how the Government would like the business of the day to be transacted and to relegate certain Motions and give preference to others, the Chair has no business in seeing any mischief in that. In addition to that, when it says: "For the convenience of the House".

The Chief Whip came to my office and indicated that it will be a problem passing these other Motions if this Motion is not disposed of for reasons best known to you all. The Chair has the responsibility and duty to understand the mood of the House and protect this country in the best possible way. We have very important Motions to be disposed of for the operationalization of the Constitution we all uphold. It is under those circumstances that the Chair cannot act out of vain, but in accordance with the Standing Orders and in the interest or the convenience of the House to accept the manner in which the Government wanted the business to be transacted today.

Hon. Members, on whether the Motion can be amended through a point of order, yes, it is understandable that, indeed, it has not happened. The Chair is not about to have that happen now. However, we are now on Order No.10 which is taking preference over the others. As for the Motion, the Chair has got a notice of the amendment that essentially seeks to delete all the inadmissible aspects of that. The Chair has no problem reading that Motion as amended. However, that cannot be done now. It has to be done on the Floor by none other than the hon. Member who is moving the amended Motion.

(Applause)

Hon. Mututho, the liberty is on you, whether you want to dispose of it in the manner you want to do it. The Chair has no business in determining how this amended Motion will be disposed of.

Mr. Mututho: Mr. Deputy Speaker, Sir, thank you for that very useful guidance.

Mr. Deputy Speaker, Sir, I now wish to read the Motion as amended:-

THAT, aware that Kenya promulgated a new Constitution on 27th August, 2010, which had fundamental changes upon which several statutes---

The Minister for Lands (Mr. Orengo): On a point of order, Mr. Deputy Speaker, Sir. If I heard hon. Mututho right, he was reading an amendment Motion? I thought he was moving an amendment to this Motion.

Mr. Deputy Speaker: He must, first of all, move the amendment.

The Minister for Lands (Mr. Orengo): Mr. Deputy Speaker, Sir, one of the things I would really plead with you because I have been in this House, when the House is subjected into doing things in a rush. That is how this country became a one party state. This is how J.M. Kariuki was killed!

Hon. Members: Yes! Yes!

The Minister for Lands (Mr. Orengo): This is how hon. Shikuku and hon. Seroney were arrested and detained from the precincts of this House because of disregarding procedures and rules of the House. In fact, I was going away, but today, you will allow me to say things in this House that must be said today, as we debate this Motion. Hon. Mututho should not be allowed to cannibalize the rules of this House without stating the point correctly. This is a serious issue and that is why so many points of orders have been raised. So, shall he, be guided and if he is so guided, do not be lenient on him. If he does not know the rules of the House, there is always sanction

against a Member who stands up on a serious issue like this and does not know what to do.

(Several hon. Members stood up in their places)

Mr. Deputy Speaker: Order! Order! In line with upholding the basic traditions and the rules of the House, you do not rise on a point of order, when the Chair is addressing the House.

Having said that, what is your point of order, hon. Odhiambo-Mabona?

Mrs. Odhiambo-Mabona: On a point of order, Mr. Deputy Speaker, Sir. I am very eager to debate the Motion that is to be brought before us and that is why I have been sitting patiently. However, as a lawyer, I feel it is not right. Let us debate the Motion procedurally. Your ruling say:-

“Hon. Members, from all the foregoing, I rule that the Motion by the hon. Isaac Ruto, in its present form, is inadmissible.”

So, what we have before us is inadmissible. How can we be amending what is inadmissible? So, I am very eager to debate that Motion. We have refused to go on Recess until we debate that Motion. However, let us not abuse process.

(Several hon. Members stood up in their places)

Mr. Deputy Speaker: Order! Order!

Hon. Members, indeed, whereas the Chair had approved the amendment, the Motion that the Chair had ruled as inadmissible is the Motion on Order No.8. Under those circumstances, with all the zeal and vigour, the House is trying to dispose of a lot of important business, it is not possible for debate on this Motion to proceed on.

So, under the circumstances, the Chair rules that the Motion itself must be balloted for again by the House Business Committee in the amended form and then to be brought into the Order Paper in a manner that is right.

Mr. Midiwo: On a point of order, Mr. Deputy Speaker, Sir.

Mr. Deputy Speaker, Sir, in your Communication, you said that the Chief whip came to your office. I am getting a little disturbed because people think I am the one who came to your office.

Mr. Deputy Speaker: The hon. Muthama is also a Chief Whip like you.

Under the circumstances, we will have to go back to Order No.8.

ADOPTION OF IIBRC REPORT

THAT, this House adopts the Report of the Departmental Committee on Justice and Legal Affairs on the Report of the Interim Independent Boundaries Review Commission (IIBRC) laid on the Table of the House on Thursday, 16th December 2010.

(Mr. Namwamba on 16.12.2010)

(Resumption of debate interrupted on

16.12.2010)

The Minister for Lands (Mr. Orengo): On a point of order, Mr. Deputy Speaker, Sir. I do not want to revisit your ruling, but one of the facts of life that we must take into judicial notice is that there is a Coalition Government. At all times, we should get any communication from any member of the Coalition, even if it is James Orengo, do not take it as the gospel truth. The Speaker has said as much, because then we get into these embarrassing positions, where I am supposed something which has come from the Leader of Government Business. I do not want to do so. Therefore, give us the privilege---

Mr. Deputy Speaker: Hon. Members, you will realize these are extraordinary times---

The Minister for Lands (Mr. Orengo): Mr. Deputy Speaker, Sir, that is why I am pleading with you. We do not want such situations to be created on the Floor of the House.

In fact, in spirit, I support hon. Ruto's Motion for the reasons I will give but not in its present form.

(Several hon. Members stood up in their places)

Mr. Deputy Speaker: Order! Order! Hon. Orengo, you cannot support hon. Ruto's Motion in the form it was because it is inadmissible.

It can only be debated under the amended form on the Floor of the House in line with our laws. But having said that, the Chair understands that we are in extraordinary times and there is need for both the Chair and the House to understand the mood. There is very serious substantive business that has been transacted on the Floor of the House. Let us now proceed on to that substantive business. Proceed with order No.8.

Mr. Namwamba: Mr. Deputy Speaker, Sir, it would be recalled that last Thursday, I moved this Motion inviting the House to adopt the Report of the Departmental Committee on Justice and Legal Affairs on the Report of the Interim Independent Boundaries Review Commission (IIBRC).

Mr. Deputy Speaker, Sir, in moving this Motion, I had reached a point where I was drawing the House's attention to a number of guiding principles which guided the Committee in considering this matter. For the record, those guiding principles were as follows:

1. That the IIBRC should be regarded as having been a constitutional process and its Report must, therefore, be dealt with as a product of the exercise of a constitutional mandate;
2. That, however, that constitutional process had raised some fundamental questions requiring answers, including the constitutionality of some of the decisions taken, as well as fairness of process and possible errors and omissions on record;
3. That the noted questions notwithstanding, the IIBRC Report is now an official public record in the possession of a Committee of the House, and forms the basis for discussion on this matter as well as the reference material for any subsequent action;
4. That any subsequent action to the IIBRC Report shall respect and protect gains therein, while maintaining the ends of justice, fairness and constitutionality;

5. That for the avoidance of doubt, the Departmental Committee on Justice and Legal Affairs has defined the IIBRC Report in very specific terms to mean the full complement of documents, diagrams, records and maps submitted to the Committee by the IIBRC on diverse dates between 13th November and 1st December, 2010. Further, the Committee has also placed on its record, presentations of the three dissenting former Commissioners of the IIBRC.

Mr. Deputy Speaker, Sir, based on these principles, the Committee considered a number of options as the way forward out of this matter. The first option that the Committee considered was whether it would be tenable to return the IIBRC to office, with a specific timeframe within which to conclude their constitutional mandate, including gazettelement of their Report. The Committee found that this option would have the following advantages:-

1. That the IIBRC has the original express constitutional mandate to undertake the first review and determine constituencies and ward boundaries in accordance with Section 41B(3) of the former Constitution, as well as Articles 1(a) and 27 of Schedule 6 of the new Constitution;

(Loud consultations)

Mr. Ogindo: On a point of order, Mr. Deputy Speaker, Sir. The level of consultations is quite high. Would I be in order to ask you to ask hon. Members to lower the level of their consultations?

Mr. Deputy Speaker: Order! Order, hon. Members!
Proceed, hon. Namwamba!

Mr. Namwamba: Mr. Deputy Speaker, Sir, this option was also found to have the advantage as follows:

1. That the IIBRC has the institutional memory and real time experience on this matter, and that it is best placed to answer questions on its work;
2. That returning the IIBRC would afford it time for activities previously denied it, including the opportunity for public feed-back, as happened with the Committee of Experts on the Constitutional Review.

However, this option would have the following challenges:

1. Returning the IIBRC to office required amending the Constitution, raising the challenge of time and the two thirds majority threshold required under Articles 255 and 256 of the Constitution;
2. The IIBR would also have to deal with the strong divisive political sentiments, both for and against it;
3. The Commission would have to grapple with the challenge of internal splits that had encumbered the tail-end of its work.

Mr. Deputy Speaker, Sir, the second option that the Committee considered was to expand the mandate of the Interim Independent Electoral Commission (IIEC) to include a specific mandate to conclude and publish the IIBRC work within a specific timeframe and defined parameters. This option was found to have the advantage that the IIEC was available, has existing infrastructure, and would not waste too much time and resources getting down to handling the proposed additional mandate. But it would face the following challenges:

1. Like the option of returning the IIBRC to office, expanding the mandate of the IIEC would also require amending the Constitution; this option could also bog down the IIEC, with the politics already encumbering the IIBRC Report. The option could also be open to a legal challenge, given the specific mandate of the IIEC in the light of the rationale behind having both the IIBRC and the IIEC.

This Report provides in detail the various legal issues that the Committee considered in detail, which I will not go into but are placed on record, in terms of the specific provisions of the Constitution and in the law regarding the two options.

Mr. Deputy Speaker, Sir, the third option that the Committee looked at was constituting the new Independent Electoral and Boundaries Commission (IEBC), under Article 80(8) of the Constitution, and giving it the responsibility of addressing outstanding issues from the IIBRC Report, guided by legislation under Articles 89(5) and 250 of the Constitution. This option was found to have the following advantages:

1. The IEBC may not require constitutional amendment if Article 259(3)(d) of the Constitution is applied; if it is determined that it can, indeed, handle issues from the first review as envisaged in Articles 1(a) and 27(4) of Schedule 6 to the Constitution;
2. The new body may enjoy higher public trust and goodwill;
3. Parliament could determine the character of the Commission through Article 250, and its functions under Article 289(5);
4. This option may be faster than returning the IIBRC, or expanding the mandate of the IIEC.

Mr. Deputy Speaker, Sir, the challenges that would be faced by this Commission were:-

1. The great risk of soiling the image of the IIEC, because of the already poisoned political sentiments, thus gravely compromising its ability to handle the crucial 2012 general election;
2. It has no institutional memory and could also be challenged as to whether it has the mandate to handle the first review, in accordance with Clauses 1(a) and 27(1) of the Sixth Schedule of the Constitution, and to save protected constituencies under Clause 27(4) of the same Schedule;
3. Parliament's legislative guidance could be challenged for being *ultra vires* in the absence of specific limits;
4. Possible compromised independence at the initial if its composition is as a result of a political dealing.

Mr. Deputy Speaker, Sir, the Report also provides in great detail, the specific legal and constitutional issues that the Committee considered while looking at this option, which I will also not mention specifically, but which I go ahead to place on record.

The fourth option the Committee looked at was for Parliament to debate the IIBRC Report, adopt it with any agreed amendments paying due regard to address issues outlined in a Report by the Justice and Legal Affairs Committee, and proceed to effect it through legislation and or gazettelement. This will be done under the broad mandate of Article 254 of the Constitution, and the initial mandate of the IIBRC, under Articles 41B and 41C of the former Constitution. This process was found to have two positives.

1. The process would benefit from a political settlement in Parliament.

2. It would be faster than options one, two and three.

Mr. Deputy Speaker, Sir, the challenge was that while Article 254 empowers Parliament to receive reports of all Commissions, there is no express authority for Parliament to deal with this matter through legislation, or otherwise. This could open the option to judicial challenges. Again, I draw hon. Members' attention to the specific constitutional issues that the Report provides in great detail, in terms of the implications of pursuing this option.

Mr. Deputy Speaker, Sir, the last option that the Committee looked at was to get the IIBRC Report gazetted as presented to the Government Printer and outstanding issues dealt with through judicial action as contemplated by law, and, possibly, with the input of Parliament.

The advantages of this input were that the process would not require amending the Constitution. Secondly, it would be the fastest of all the options. However, the Committee did note that the option would face three challenges:

1. how to deal with the outstanding issues;
2. what would be the fate of the many legal suites;
3. the gazetting of the IIBRC Report had already become victim of intense politics.

Mr. Deputy Speaker, Sir, based on these options, the Committee proposes the following roadmap of resolving these outstanding issues.

1. The Committee would prepare its report on the IIBRC Report.
2. The Committee would table its report in this House.
3. That the House would consider this report on the IIBRC Report together.
4. That the process will then be concluded through the preferred option of the five options we have looked at.

At a meeting held on Monday in Kabete that brought together all Members of Parliament, the House agreed to give the Committee the mandate to consider merging option three and four as presented here and specifically asked the Committee to prepare its own report, bring it to the House for consideration alongside the Report of the IIBRC.

Mr. Deputy Speaker, Sir, the Committee was also mandated to look into specific outstanding issues. In taking this mandate forward, the Committee named a subcommittee to listen to Members of Parliament on the various outstanding issues that had been identified. The membership of the subcommittee were hon. Mrs. Odhiambo-Mabona as its Chairperson, hon. Amina Abdalla, hon. Isaac Ruto, hon. George Nyamweya and hon. Sophia Noor. That subcommittee received detailed submissions from Members of Parliament both orally and in written form and reduced those hearings in a record that I have tabled before this House, that is now part of this Report.

[Mr. Deputy Speaker left the Chair]

*[The Temporary Deputy Speaker
(Prof. Kaloki) in the Chair]*

Mr. Temporary Deputy Speaker, Sir, those issues touch on redistribution of wards, the population quota and the census figures. They also touch on the question of protected constituencies.

Mr. Temporary Deputy Speaker, Sir, in the interest of time, allow me now to move to the last part of this Report which provides the specific recommendations made by this Committee for the consideration of this House.

This Committee made the following recommendations:

- (1) The Committee recommends that this House adopts the annexed report of the IIBRC subject to addressing the outstanding issues set out in Recommendation two below.
- (2) This Committee recommends that the House notes the outstanding issues referred in (1) above as follows:
 - (i) Redistribution of wards and relevant administrative units in the affected constituencies as may be appropriate to correct any misplacement or errors that affect constitutional parameters on community of interest, geographical accessibility and historical cultural and economic ties.
 - (ii) Addressing issues arising out of any of the 80 new constituencies outside the population quota set in Article 89 (6) of the Constitution with due regard to Article 89(7)(b) of the Constitution that requires the progressive efforts towards attaining the population quota in each constituency and ward subject to “c” and “d” herein below.

Mr. Temporary Deputy Speaker, Sir, it is important for Members to note the effect of the said Article 89(7)(b). It states that the Constitution does not envisage instant demographic equality of all the constituencies as this is impractical. Therefore, constituencies above or below the population quota or mean, are not precluded since reaching the ideal quota or mean has to be sought progressively over time.

(c) That the process of addressing outstanding issues is not subject to new definition of terms used by the IIBRC in the constituency boundaries review exercise, specifically definition of cities, urban areas and sparsely populated areas.

(d) That the process of addressing the outstanding issues is subject to the use of enumerated census figures and not projected figures.

(e) That addressing the issue of progressively advancing towards the population quota in protected constituencies in relation to neighbouring constituencies as may be appropriate. In doing so, the provisions of Article 89 (7) (b) of the Constitution applies to the effect that the Constitution does not envisage instant demographic equality of all the constituencies and constituencies above or below the population quota and or mean, are not precluded since reaching the ideal quota has to be sought progressively over time.

Mr. Temporary Deputy Speaker, Sir, I note that I have run out of time but given that my time was interrupted constantly by many points of order, please, give me five minutes to finish submitting this recommendation which is the heart of this Report.

The Temporary Deputy Speaker (Prof. Kaloki): You have just two minutes!

Mr. Namwamba: Thank you, Mr. Temporary Deputy Speaker, Sir. The third recommendation is on the Independent Electoral and Boundaries Commission Bill 2010. The Committee recommends that the House expeditiously moves within a period of one month from the date hereof to enact a law in accordance with Articles 88(5) and 250 of the Constitution to anchor the new Independent Electoral and Boundaries Commission established in Article 88 of the Constitution and that further in furtherance of this recommendation, the House adopts the Draft Independent Electoral and Boundaries Bill, 2010, annexed to this Report. The Bill is part of the consensus on this IIBRC Report and its publication debate and enactment should accordingly be expedited.

Mr. Temporary Deputy Speaker, Sir, allow me to call Members' attention to this Bill that is annexed to the Report and marked as Annexure JLA 3 which is the Bill that the Committee is proposing.

The fourth recommendation touches on the mandate of the IEBC to address issues arising from the first review of constituencies and ward boundaries. The Committee recommends:

a) That the Independent Electoral and Boundaries Commission be granted a defined limited mandate to address the identified issues outstanding from the first review of the constituencies and ward boundaries as undertaken by the IIBRC in accordance with Articles 41(B) and (C) of the former Constitution and Article 27 of the Sixth Schedule of the Constitution.

(b) That in undertaking its limited mandate over the said first review, the IEBC shall:

(i) as its primary reference material, use the Report of the IIBRC annexed hereto and adopted by this House;

(ii) as its secondary reference material, the Commission shall use this Report of the Justice and Legal Affairs Committee

(c) That at the conclusion of its defined limited task of addressing the identified outstanding issues, the IEBC shall consult widely for the purposes of feedback and validation prior to gazettment. The validation exercise shall include the Commission referring its Report to Parliament.

- 4) That the proposed IEBC Bill shall include a mechanism for any members of the public to seek judicial redress subsequent to gazettment.
- 5) This Committee recommends to this House that the House notes the significance of enacting legislation on the following matters:
 - (i) A law on wards including determination of the number of wards per county for purposes of county assemblies. This legislation is urgent.
 - (ii) A law to address the current historical concerns of minority and marginalized communities to advance *inter alia* the aims of Article one of the Constitution.
 - (iii) A law on definition of urban areas and cities and sparsely populated areas which law should be impact subsequent reviews and delimitation of electoral reviews.
 - (iv) A law on definitions and application of geographical features to similarly impact on the subsequent reviews and delimitation of electoral units.

The final recommendation is as follows: That this Committee recommends to the House that the House adopts this Report of the Departmental Committee on Justice and Legal Affairs on the Report of the Interim Independent Boundaries Review Commission (IIBRC).

Mr. Temporary Deputy Speaker, Sir, allow me to conclude by reminding the House that in adopting this Report which addresses critical issues; issues that have raised controversy and divided many, the Committee set aside its differences and unanimously adopted this Report. I want to stress to this House that in considering this Report, the Committee did not have to vote on whether to bring this Report here or not. The Committee adopted this Report unanimously. That spirit reflects the following words of Edmund Buck that I want you to allow me to put on record. Edmund Buck said the following:-

“Parliament is not a congress of ambassadors from different and hostile interests; which interests each must maintain as an agent and advocate against other agents and

advocates. But Parliament is a deliberative assembly of one nation with one interest; that of the whole, where not local purposes, not local prejudices ought to guide, but the general good resulting from the general reason of the whole. You choose a Member of Parliament, indeed. But when you have chosen him, he is not a Member of Bristol, but a Member of Parliament”

Mr. Temporary Deputy Speaker, Sir, I could as well say that we have come here as individual Members representing individual constituencies. However, as we consider this heavy matter, may we stand up proudly for Kenya.

I be got move.

The Temporary Deputy Speaker (Prof. Kaloki): Who is seconding the Motion?

Mr. Namwamba: Mr. Temporary Deputy Speaker, Sir, the Vice-Chairman of the Committee Mr. Njoroge Baiya, will kindly second the Motion.

Mr. Baiya: Mr. Temporary Deputy Speaker, Sir, I want to acknowledge the eloquent manner in which the Chair of the Committee of Justice and Legal Affairs has moved the Motion. He has moved the Motion and I am rising to second it.

As is well known in the public domain, the work of IIBRC has, at the end of the day, subjected this country to a controversy in terms of sharing the 80 new constituencies. By the nature of the exercise that this Commission was given to undertake, it ended up as a divisive exercise. This was borne out by the fact that Parliament had actually failed in previous years - like in 2007 - to carry out the process conclusively. Therefore, the country is supposed to go through a review of the constituencies every ten years. But that has not happened for some time. That was, therefore, a critical test to undertake the exercise immediately we had adopted the new Constitution.

Mr. Temporary Deputy Speaker, Sir, concerns were raised both ways. On the one side, there were people who felt that they benefited from the new constituencies and they sought to ensure that they safeguarded those gains. On the other hand, there were concerns by a number of people who thought that IIBRC may not have fully brought into account the full constitutional principles that it was enshrined to do under the Constitution. In trying to arrive at the consensus that we are bringing to this House to adopt as a way forward, we tried to merge the two sides. In this regard, I would want to state some of those concerns because they also touch on our ability, as a country, to implement the new Constitution as we had committed to do through the promulgation of the new Constitution.

While we were trying to grumble with the issues that were being raised, we had a sitting at the Kenya Institute of Administration (KIA) at Kabete. We invited certain professionals or consultants who had also been invited by IIBRC. They came to KIA and gave us their own critique on the work of IIBRC. I would like to put their views into account. As a country that wants to go forward, it is also important that we take into account what professionals are telling us.

Mr. Temporary Deputy Speaker, Sir, if I may quote those two experts--- One of them was F.W. Aduol and the other was Sakaja Johnson. In an executive summary that they presented, I want to quote what Sakaja said:-

“An analysis of the work of IIBRC Report shows a number of technical inconsistencies and legal oversights in the methodology employed by the Commission in the submission of its work. The Commission did not adhere to the criteria and delimits provided for in the Constitution. As a result of this, the Commission was unable to fully

achieve the objective for which it was created. Equal representation has not been achieved nationally and in many cases, gross disparities in constituency population have been maintained. Whereas many constituencies remain overpopulated and way above the legal range that is set in the Constitution, some have been moved further away from the quota by way of unmerited splitting. The Commission also failed to constructively consult the public and other interested parties in the spirit of the provisions in the new Constitution.”

That being the conclusions of the professionals, it is my view in seconding this Motion that these are fundamental issues touching on the constitutional viability of the proposed delimitations which have been highlighted in four areas.

The first concern related to the method that was used by IIBRC – the population quota. Section 89(6) of the Constitution gives maximum permissible departure of 40 per cent in cities and sparsely populated areas and 30 per cent in other areas. This is a very specific criteria given by the Constitution. Section 89(7) allows consultations to all interested parties. That is also a constitutional criterion. Section 89(7)(b) sets up the criteria for progressive advance towards population quota. That is a requirement by the Constitution. However, if you look at the process and product that was given by IIBRC, there is a substantial departure from some of those methods. That is what our consultants brought out. For example, if you look at a City like Nairobi, the maximum departure on the upward side was about 186,000 people per constituency. But in this same area of Nairobi, you will find we have a proposed constituency like Starehe with a population of about 104,000 people.

The other thing is that having taken Nairobi to have 186,000 people to be the maximum, they adopted the population quota criteria for other areas to be 129,000 people. The criterion which was applied for the rest of the country was clearly unconstitutional in light of the population quota given in the Constitution.

The other major methodological challenge is that the Constitution requires the Commission to look at every constituency on its own merit. They are supposed to look at the various criteria against every single constituency. But the approach they used is what we call provinces. We know provinces used to be there in the old Constitution, but they are not there in the current Constitution. In doing so, they ended up favouring some areas at the expense of others. They had no mandate to do so, because the current Constitution no longer recognizes provinces.

Mr. Temporary Deputy Speaker, Sir, the other one was the issue of protected constituencies. The way they handled the protected constituencies was not consistent. In some situations, they redistributed the constituencies, for instance, in Kiharu and Makeni. In other cases, they left them intact merely because they considered them protected.

The challenge is about consultation. There was clearly no sufficient consultation. This is brought out by the fact that the moment they published the first Gazette Notice, objections were raised.

The Assistant Minister for Higher Education, Science and Technology (Mr. Kamama): On a point of order, Mr. Temporary Deputy Speaker, Sir. Is it in order for the Vice-Chairman of the Departmental Committee on Justice and Legal Affairs to second and oppose the same Motion? I need your guidance on this because he is opposing the Motion.

The Temporary Deputy Speaker (Prof. Kaloki): Hon. Baiya, proceed! He is actually going through the Report of the Committee. So, he has the right to continue.

Mr. Baiya: Mr. Temporary Deputy Speaker, Sir, I am not opposing this Motion. The main drift of the Motion is to adopt the report, subject to the following. I am only highlighting the issues which are the subject to which we are doing these amendments. These are major concerns that need to be addressed as we move forward.

Mr. Bahari: On a point of order, Mr. Temporary Deputy Speaker, Sir. Going through the report, I agree with hon. Kamama that the way the Vice-Chairman is addressing some of the issues, he is strongly opposing it. In the report, I do not see all the objection issues that he has raised. They are new.

The Temporary Deputy Speaker (Prof. Kaloki): Hon. Baiya, are the issues you are raising contained in the report?

Mr. Baiya: Yes, Mr. Temporary Deputy Speaker, Sir. They are, indeed, contained in the report. I am raising the issues of population quota and consultation. All I am highlighting in my contribution is the impact of these issues. They were not without impact in terms of the work of the IIBRC. They need to be addressed if we will have consensus and the way forward as far as the new constituencies are concerned.

I was trying to highlight these things, which have been captured clearly by the consultants we were using. In terms of the methodology, some constituencies were within the range to be split, but others fall far below the minimum. Others did not deserve to be split. I can give examples because these are on record.

Mr. Ruto: On a point of order, Mr. Temporary Deputy Speaker, Sir. I am a Member of the Committee on Justice and Legal Affairs. I support the report from my Committee. However, I am worried because the hon. Member who is supposed to be seconding is not representing the views of the Committee. I would suggest that he seconds the Motion on the basis of what the Committee did, but not on his own mind.

The Temporary Deputy Speaker (Prof. Kaloki): Hon. Baiya, you have to understand the concerns of the Members. You are seconding the Motion. Stick to the report! Proceed!

Mr. Baiya: Mr. Temporary Deputy Speaker, Sir, we are trying to bring forward a solution. When you are trying to build consensus, you do not exclude certain concerns raised and think that by carrying forward one side of the story, you will be moving forward.

The Temporary Deputy Speaker (Prof. Kaloki): Second the Motion!

Mr. Baiya: Mr. Temporary Deputy Speaker, Sir, those are the concerns that one of the sides has. We are highlighting these concerns because they should be addressed and recognized. They also go to the root of the constitutional criteria which has been given.

With those remarks, I beg to second the Motion.

(Question proposed)

The Minister for Nairobi Metropolitan Development (Mr. Githae): On a point of order, Mr. Temporary Deputy Speaker, Sir. I rise under Standing Order No.80, which deals with *sub judice* or secret matters, in particular Standing Order No. 80(4), which talks of proceedings before a court of law. Page 8 of the report of the Committee says:-

“Three suits were subsequently filed seeking to stop the Commission from gazetting its report. This is Petition No.72 of 2010, Petition No.74 of 2010 and High Court (Miscellaneous) Application No.339 of 2010”.

The first suit, namely, Petition No.72 of 2010, John Maingi versus hon. Andrew Ligale and Rozah Mbuyu, Irene Masit, IIBRC and the Attorney-General, is of fundamental importance to this House. Two other cases have not yet been settled; no ruling has been given.

I am, therefore, submitting that this House is not competent under Standing Order No.80 to discuss this report as the matter is *sub judice* and there is an injunction on it. We should not be seen as if we are not respecting the other arm of Government. It is important that this House follows its own rules. Where matters are in court, this House has not debated them. The Committee is calling upon us to debate a matter which is already in court and this will be prejudicial not only to the court that will give its ruling, but will also embarrass this House if the High Court gives a contrary view. I, therefore, seek your guidance that we should not discuss this matter as it is *sub judice*.

Mr. Imanyara: On a point of order, Mr. Temporary Deputy Speaker, Sir. This matter has come before this House before and the Speaker has ruled on it. The hon. Member is required to bring the pleadings which he is relying on, and not just citing a case number in order to benefit from that Standing Order. So, he is not in order to raise that point of order without providing the materials.

Mr. Wamalwa: Mr. Temporary Deputy Speaker, Sir, I do not know if the hon. Member has gone through the Report, because what he is raising before the House was actually considered by the Committee. If he goes to page 10, he will find that all these matters were considered. I fear that the hon. Member has not gone through the Report.

Mr. Namwamba: Mr. Temporary Deputy Speaker, Sir, I hope that we do not play games with this matter of critical national importance. I want to draw the attention of this House to the fact that, indeed, if you read this Report holistically and not selectively, you will find answers to the questions that the hon. Member has raised.

Mr. Temporary Deputy Speaker, Sir, this is the report of the Departmental Committee on Justice and Legal Affairs. If you look at this Report, you will find that the Committee went into great lengths to look at all the issues touching on the suits in court. Let me confirm that what this Committee was seized of was not the matters in court. This Committee was not seized of the subject of the Gazette Notice. This Committee was seized of the mandate of the Commission and the fact that, that mandate had run into headwinds and that it was necessary for this House to find a way to steer this matter into calmer waters. So, to purport to tell this House that what the House has moved here is the matter before the court is absolutely misleading. It is sad when that comes from a Senior Attorney.

First of all, if you look at this Report, you will find that the said three suits which the Committee expressly makes reference to are not annexed to this Report. This is because they are not the subject of this Report. We made reference to those suits because we wanted the House to be seized of the broad environment within which the Committee worked.

Finally, before the Committee became seized of this matter, the Chair had the opportunity to ventilate on this matter. The Chair gave guidance on this matter and it was on that guidance that the Committee proceeded to transact this matter. The Committee

has consistently kept in touch with the Chair. It has reported to the Speaker at every point and it invited all hon. Members to Kabete to ventilate on this matter. This matter never entered the record of those interactions. I plead with the Chair not to allow cheap politics to poison this process. I plead with the Chair to rule in a manner that this process can move forward.

Thank you, Mr. Temporary Deputy Speaker, Sir.

(Loud consultations)

The Temporary Deputy Speaker (Prof. Kaloki): Order, hon. Members!

Thank you, Mr. Minister for bringing Standing Order No. 80 to the attention of the Chair. However, you did not notice Standing Order No.80(5) which states:

“Notwithstanding this Standing Order, the Speaker may allow reference to any matter before the House or a Committee.”

On this matter, I will allow the debate to continue.

(Applause)

Proceed Mr. Affey.

Mr. Affey: Thank you, Mr. Temporary Deputy Speaker, Sir. I rise to support this Motion but with amendments. These are amendments I intend to propose to this very important Motion, which the Committee of this House has put a lot of effort into.

Mr. Temporary Deputy Speaker, Sir, I beg to move that the Motion be amended as follows:-

- (a) By deleting the word “not” appearing immediately before the word “subject” in paragraph 2(c) of the Committees recommendation;
- (b) By deleting the word “subsequent” appearing immediately before the word “review” in paragraph 5 (c) of the Committees recommendation and substituting therefor the word “current.”

Mr. Temporary Deputy Speaker, Sir, the effect of these amendments is that if you read paragraph 2 (c) of the Committee’s recommendation on page 29---

The Assistant Minister for Forestry and Wildlife (Mr. Nanok): On a point of order, Mr. Temporary Deputy Speaker, Sir. I seek your guidance. When the Mover and the Seconder moves and seconds, the Motion is supposed to be read out. Is it in order for an amended motion to be brought before it has been read out?

Mr. Affey: Mr. Temporary Deputy Speaker, Sir, the Motion was moved, seconded properly and the question proposed. I actually support the Report of this Committee subject to some amendments.

The Temporary Deputy Speaker (Prof. Kaloki): Order, Mr. Affey! Hon. Members, indeed, I read out the Motion and, now, there is an amendment which is before us. So, we have to let the hon. Member proceed, and I have already done that as the Chair.

So, Mr. Affey, proceed and move your amendment!

Mr. Affey: Thank you, Mr. Temporary Deputy Speaker, Sir. If you go to page 29 of the Committee’s Report, you will find that part “c” says:-

“The process of addressing outstanding issues is not subject to new definitions of terms used by the IIBRC in the constituency boundaries review exercise, and specifically, definitions of cities, urban areas and sparsely populated areas.”

Mr. Temporary Deputy Speaker, Sir, in the same Report, there is a suggestion that a new Commission is expected to take over this responsibility. The expectation is that the new Commission is independent. There is no way we can create an independent Commission, and yet in our recommendations, we want to gag them by giving them specifications of what they need to do.

(Applause)

Mr. Temporary Deputy Speaker, Sir, if you go to recommendation No. 5 (c) – because we are debating the Report, and the Report is suggesting several legislations - it says that a number of legislations will come, namely one, two, three. One of the legislations that this Report recommends this House to debate is in part “c”, which says:-

“A law on definition of urban areas and cities and sparsely populated areas which law shall impact the subsequent reviews and delimitations of electoral units.”

What we are telling the new Commission is that it has nothing to do with the reviews as we have them now. Subsequently, reviews will come after 10, 15 or 30 years.

Mr. Temporary Deputy Speaker, Sir, the intention of my amendment is to request the Commission--- If you tell them about subsequent reviews, you will be denying them an opportunity, even though they are a constitutional Commission---

Mr. Shakeel: On a point of order, Mr. Temporary Deputy Speaker, Sir. I am confused. The House was informed that this was the unanimous decision of the Committee, and the hon. Member who has moved an amendment is a Member of the Committee.

Hon. Members: No!

Mr. Shakeel: Let me withdraw.

The Temporary Deputy Speaker (Prof. Kaloki): Mr. Shakeel, let the hon. Member move the amendment.

Proceed, Mr. Affey.

Mr. Affey: Mr. Temporary Deputy Speaker, Sir, if I was a Member of this Committee I would have dissented from its recommendations. Definitely, I would have dissented.

What, therefore, are we suggesting as a House? We are saying that a new Commission must be set up in order for it to then gazette the report. As we speak today, there is not a single constituency of the 80 suggested by Ligale which is officially in existence. So, none has been gazzeted. It does not exist. It only exists in the minds of the defunct Commission. It does not exist anywhere in this country.

Therefore, if we are asking that a new Commission be established, under what circumstances then can we discuss proposals in this House which are intended to guide them? Part of the principles of this Committee, if you go to their principles--- I have a lot of respect for the Chairman of this Commission. I think he could have been overwhelmed by---. If you look at the Committee’s guiding principles, number four states that any subsequent action on the IIBRC shall respect and protect it, while maintaining the ends of justice, fairness and constitutionality.

Dr. Eseli: On a point of order, Mr. Temporary Deputy Speaker, Sir. Is the hon. Member in order to suggest that the Report belongs only to the Chairman and not the whole Committee, and to even cast aspersions on the Chairman and say that he was overwhelmed? Is the hon. Member in order? He should withdraw.

Mr. Affey: Mr. Temporary Deputy Speaker, Sir, I withdraw. As I have said, and I repeat, that the Chairman is a qualified lawyer whom I have a lot of respect for. Therefore, if there was any indication that I cast aspersions on him, I have not done so.

Mr. Temporary Deputy Speaker, Sir, what do they suggest here as a Committee, that you save the gains? From whom do you save the gains and for whom are you saving the gains? In the Constitution that we have now, if you look at Article 259(1), it should inform the spirit of any Commission. It is not only the IIBRC; it should inform the spirit of any commission that we establish in this country, and particularly those commissions established under Agenda Four. Article 259(1) says that the Constitution of Kenya shall be interpreted in a manner that promotes its purpose, values and principles, advances the rule of law, human rights and fundamental freedoms in the Bill of Rights, permits the development of the law and contributes to good governance.

Mr. Temporary Deputy Speaker, Sir, I think that this Report is faulty in many ways. This Report attempts to manipulate a Commission that has not yet been established by giving it a road map---

Mr. Ogindo: On a point of order, Mr. Temporary Deputy Speaker, Sir. Is the hon. Member in order to turn around after he rose to support the Report and now say the Report is faulty? Is he in order to turn round and bring mischief to the debate?

The Temporary Deputy Speaker (Prof. Kaloki): Order, Mr. Ogindo.

Mr. Namwamba: On a point of order, Mr. Temporary Deputy Speaker, Sir. First of all, the hon. Member is absolutely out of order to purport to indicate that this is the Chairman's Report. This is a Report of a Committee of this august House. It is a Report that has arisen out of very lengthy and deep consultations within the Committee and outside the Committee. The hon. Member who is proposing this amendment did also appear before this Committee to express his views, the same views he is repeating here.

The Temporary Deputy Speaker (Prof. Kaloki): Mr. Namwamba, what is your point of order?

Mr. Namwamba: My point of order is; is the hon. Member in order to move amendments to this Report that amount to completely altering the very character and spirit of this Report? He is completely upsetting the very delicate balance upon which this Report is anchored, especially with due regard to Standing Order No. 55(2), which reads:-

“No amendment shall be permitted if in the opinion of the Speaker, it represents a direct negative of the Question proposed”.

In my humble view, the hon. Member is attempting to camouflage his negative efforts in the language he is using. That is absolutely unacceptable.

The Temporary Deputy Speaker (Prof. Kaloki): Mr. Affey, you will stick to the amendment. You will be very specific to what you have provided the Chair with; stick to the particular amendments.

Mr. Affey: Mr. Temporary Deputy Speaker, Sir, I will stick to the amendments suggested.

Mr. Namwamba: On a point of order, Mr. Temporary Deputy Speaker, Sir!

The Temporary Deputy Speaker (Prof. Kaloki): Order, Mr. Namwamba. Mr. Affey, you will stick to the issues relating to the amendments that you are moving.

Proceed, Mr. Affey.

Mr. Affey: Mr. Temporary Deputy Speaker, Sir, it is very clear---

Mr. Namwamba: On a point of order, Mr. Temporary Deputy Speaker, Sir.

The Temporary Deputy Speaker (Prof. Kaloki): Order, Mr. Namwamba.

Proceed, Mr. Affey.

Mr. Affey: What I am suggesting about these amendments---

Hon. Members: On a point of order, Mr. Temporary Deputy Speaker, Sir.

The Temporary Deputy Speaker (Prof. Kaloki): Let us hear Mr. Affey. We will put this in a form of a question and then vote either way. So, it is an amendment which will be seconded and then if the House finds it unacceptable we will reject it; otherwise we can adopt it.

Proceed, Mr. Affey.

Mr. Affey: Mr. Temporary Deputy Speaker, Sir, my suggested amendment is absolutely within the Standing Orders. I have given a notice of amendment to the Chair and the Clerk's office. They looked at the amendment in their wisdom and understood it to be correct. If the Members of Parliament are not comfortable with the amendment, they have the absolute right to reject it.

The Temporary Deputy Speaker (Prof. Kaloki): Order! Could you be specific? What is it that you are moving.

Mr. Affey: What I am moving is that hon. Members can refer to page 31 of the Committee's recommendations. The recommendations---

The Prime Minister (Mr. Raila): On a point of order, Mr. Temporary Deputy Speaker, Sir. I did not want to interrupt the hon. Member, because he is entitled to move the amendment and be seconded and, thereafter, it can be challenged to see whether it conforms to the Standing Orders or not. The amendment needs to be read out, so that we know exactly what it is about.

Mr. Affey: Thank you very much, Mr. Prime Minister for that support. I have read the amendment but for the benefit of the hon. Member, I will read it again.

The Temporary Deputy Speaker (Prof. Kaloki): Hon. Affey, you have two amendments. Is that not the case?

Mr. Affey: Yes, Mr. Temporary Deputy Speaker, Sir.

The Temporary Deputy Speaker (Prof. Kaloki): Could you be specific on those amendments?

Mr. Affey: Mr. Temporary Deputy Speaker, Sir, I beg to move:

THAT, this House adopts the Report of the Departmental Committee on Justice and Legal Affairs on the Report of the Interim Independent Boundaries Commission (IIBRC) laid on the Table of the House on Thursday, 16th December, 2010, subject to the deletion of the word "not" appearing immediately before the word "subject" in paragraph 2(c) of the Committee's recommendation.

Mr. Temporary Deputy Speaker, Sir, I am sure the hon. Members have the recommendations.

Hon. Members: What is the effect of the amendment?

Mr. Affey: Mr. Temporary Deputy Speaker, Sir, the effect of the amendment is to free a Commission that we are going to establish - and it is a constitutional Commission – from interference by a Committee Report. The recommendation says: “The process of addressing outstanding issues is not subject to new definitions.” Why do we not allow the new Commission to define the way it wants to define cities, sparsely populated areas, towns and other areas? Let us give them the freedom.

The Temporary Deputy Speaker (Prof. Kaloki): Hon. Affey, that is very clear. What is the second amendment?

Mr. Affey: Mr. Temporary Deputy Speaker, Sir, the second one is on page 31. We are saying that we will approve a law in this House on definition of urban areas, cities and sparsely populated areas which law shall impact subsequent reviews. We have a problem with the current review and not the subsequent review. We have a problem with what hon. Ligale did, which is current. So, this Commission must be given a free hand to determine the current review and not tomorrow or another day.

The Temporary Deputy Speaker (Prof. Kaloki): Hon. Affey, that is very clear. Now, who is seconding your Motion?

Mr. Affey: Mr. Temporary Deputy Speaker, Sir, I have got a few minutes before I finish.

Mr. Temporary Deputy Speaker, Sir, in forming this Commission, we have to reflect on the spirit. If this new Commission does not define these cities and sparsely populated areas--- If the Ligale Commission actually defined what a sparsely populated area means, North Horr would not be subject of discussion. If they defined properly, Wajir South would not be a problem. If they defined properly, Makueni would not have been a problem because they do not have the land and they have the population. So, the problem is in regard to definition. This House must assist the Commission to define these terms, so that then the Commission can use the law. But if we are refusing them to define, we are not defining for them and saying we want the gains here retained.

Mr. Temporary Deputy Speaker, Sir, I beg to move this amendment and request hon. M.M. Ali to second.

The Assistant Minister, Ministry of State for Special Programmes (Mr. M. M. Ali): Mr. Temporary Deputy Speaker, Sir, in seconding the amendment to this Motion, I want to state a few things.

Mr. Temporary Deputy Speaker, Sir, just a few minutes ago, you stated that these are extra ordinary times. Extra ordinary times require extra ordinary leadership. We have been debating this matter time and again. Indeed, we had a Kamukunji in this Chamber a couple of weeks ago and subsequently, had a discussion with the Committee on Justice and Legal Affairs. In this Report, we submitted very clearly areas where we felt really needed to be addressed by the Commission to be set up. As it is, if we are not going to amend this Report as proposed and define the meaning of sparsely populated and densely populated areas, this will have a negative effect on those problems that we saw raised. We clearly and elaborately submitted to the Committee on Justice and Legal Affairs that the Report they had from the Ligale Commission overlooked many factors which were stated clearly in the Constitution. They concentrated on the population quota formula alone. If you have to consider the population quota alone, then this population must be acceptable to all. It must be accurate. If it is not, then it is not doing justice to those areas which are underrepresented.

Mr. Temporary Deputy Speaker, Sir, although I do not see it in the Report of our honourable Commission, I did a written submission to it on behalf of the Upper Eastern region and my own constituency, Moyale. I do not know why they have not acknowledged that.

Hon. Members: Second the amendment!

The Assistant Minister, Ministry of State for Special Programmes (Mr. M. M. Ali): Mr. Temporary Deputy Speaker, Sir, I think you will guide me. In seconding amendments to Motions, do we not express our feelings?

The Temporary Deputy Speaker (Prof. Kaloki): Proceed!

The Assistant Minister, Ministry of State for Special Programmes (Mr. M. M. Ali): That is what I am doing, Mr. Temporary Deputy Speaker, Sir.

Mr. Temporary Deputy Speaker, Sir, if that definition is not going to be done and the Commission to be set up is going to follow in the footsteps of the Ligale Commission, which is going to ignore all the other factors, then justice will not be achieved for the country. As the name suggests, this is the Committee on Legal and Justice Affairs. Therefore, we must be seen to be doing justice to the country. Let us not preside over impunity. Let us allow the new Commission to be set up to have a free hand in fairly determining the constituencies for the nation.

Mr. Temporary Deputy Speaker, Sir, we debated on the Floor of this House very clearly, Clause 89. At that time---

Mr. Shakeel: On a point of order, Mr. Temporary Deputy Speaker, Sir. Is it in order for the seconder to suggest that there is impunity involved in the Committee? Is he saying that there is impunity at the Committee level?

The Assistant Minister, Ministry of State for Special Programmes (Mr. M. M. Ali): Mr. Temporary Deputy Speaker, Sir, I am not talking about the Committee that has practiced impunity. I am saying confidently and I submitted to the Committee, that the product of the Ligale Commission was not just and fair. That is what I am referring to, for the record.

Mr. Temporary Deputy Speaker, Sir, while proceeding in seconding this Motion, I submitted here, when we had the Kamukunji that gathered in this Chamber; 222 hon. Members willing to serve and care for the nation in a very fair and transparent manner. In allowing this amendment, we shall be able to give opportunity to the new Commission to look at fairly what the Ligale Commission has done and correct accordingly so that Kenyans get what they desire.

Mr. Temporary Deputy Speaker, Sir, if I may refer to what we submitted, North Horr is 38,000 square kilometres. The whole of Upper Eastern is 20 per cent of the nation. If somebody comes around and tells us that the whole of that mass of land is going to be ignored as if it does not belong to this country, it is not fair. The population of Moyale is said to be 103,000 as per the population census. We wrote to the Minister of State for Planning, National Development and Vision 2030 and disputed that. That is not fair because the Commission based its report on false population figures. We have written to the Minister of State for Planning, National Development and Vision 2030 to correct this anomaly and copied to the Ligale Commission. If you were keen enough and looked at the registered voters in Moyale, it is the second largest in the whole of North Eastern and Upper Eastern put together. Since the census, have these people crossed into other

countries or have they all died or have the others multiplied in millions and, therefore, left us in the same position?

We condemn the outcome of the census that hon. Ligale based his work on. That is why we want to appeal to this honourable Committee and this honourable House to ensure that the Commission we are going to set up will be fair to this country. As you know, I made a submission to the IIBRC in Embu and it is in the HANSARD. The population of every child who is born in the urban areas in this country--- A Report from UNICEF indicates that three out of every 1,000 die while, in the arid and semi-arid areas, 300 babies die because we do not have health centers and dispensaries. Therefore, our population cannot measure up.

Constitutions all over the world are there to guard the people who are disadvantaged in a country. I will give an example of India, where your counterparts come from. The constituency of the Speaker of India has got a variance of over 65 per cent because of special consideration. Can we not rise to the occasion and look at our nation as a whole and look at some of the factors that have kept that region in a condition of under-development for very many years? We have been left behind. Everybody knows that. Thanks to this Government because last year, a stretch of 130 kilometers of a tarmac road was constructed from Isiolo to Merile. I want to thank this Government for that. What have we been doing since Independence? We do not have health centers. You will get one after travelling for 80 kilometers and we want to equate people at par. Are we being fair? Is this House being fair? Is the Ligale Commission being fair? It is not fair. If you are an honourable Member, you must be honourable at all times. Let us not look at the fact that since you got a constituency, and so be it. Let us not be greedy. Let us ensure that we are fair.

I want to submit that this House rises to the occasion and ensure we do what is in the best interest of this country.

I second.

(Question that the words to be left out be left out proposed)

Mrs. Shebesh: Mr. Temporary Deputy Speaker, Sir, I want to oppose this amendment and state clearly that there is no House that has supported the cause of the people who have been marginalized like the Tenth Parliament. Therefore, I feel that it is out of total respect that this House came together to find a way forward. I believe that it is this House that gave the mandate to this Committee to come up with a way forward that would unite the different voices. In relation to the amendment that has been brought by hon. Affey, it is clear that it negates totally the work of the Departmental Committee on Justice and Legal Affairs and the very reason why we gave the mandate to this Committee. It would be unfair, considering the discussions that we held at the Kenya Institute of Administration (KIA), this House, *Kamkunjis* and at the Committee to bring this amendment. This would be totally unfair and in fact, it could be considered mischievous to bring the debate to the Floor of this House when the Committee and the Speaker, through his ruling, gave everybody the opportunity to bring these issues to the fore. What it really negates is this:-

I want to make it clear, for the sake of those who do not understand why IIBRC was set up separately from the IIEC. It was because of the recommendation by the

Kriegler Report. In the report by Kriegler, the mandate of the IIEC was very clear. That is why, in his amendment, hon. Affey, wants us to imagine that we do not know why IIBRC was given a specific mandate. It was given a specific mandate because we were coming from issues of the post election violence. It would be unfair to negate the whole purpose of the information given by IIBRC by allowing frivolous amendments at this particular time.

Mr. Bahari: Mr. Temporary Deputy Speaker, Sir, arising from the matter that has been raised by hon. Affey, it is quite clear that from this Report--- Page 29 of the Report says that IIBRC Bill 2010 allows the House to expeditiously move within a period of one month from the date thereof, to enact a law in accordance with Article 88(5) and 250 of the Constitution to anchor the new Independent Electoral and Boundaries Commission established in Article 88 of the Constitution.

On Part (c), it talks about a law to define urban areas and cities and sparsely populated areas, which law should impact the subsequent review and delimitation of electoral units. The same Report attempts to limit the powers of an Independent Commission as already expressed by hon. Affey. From the start, this Report is unlawful in the sense that it attempts to limit the powers of a Constitutional Commission that it proposes to be established. Therefore, it is contradictory and, therefore, this Report should not be debated.

Mr. Namwamba: On a point of order, Mr. Temporary Deputy Speaker, Sir. First of all, before I raise anything further, I had invited you to make a ruling in terms of Standing Order No.55(2) which says:

“No amendment shall be permitted, if in the opinion of the Speaker, it represents a direct negative of the Question proposed.”

I am shocked that you are allowing this Debate to proceed before you respond to my concern. Further to that, I would like to draw your attention to the fact that this amendment completely upsets the very essence of this Report. That is because what is being recommended completely ignores the basis upon which the recommendations are built. Those recommendations did not just jump from the air. They are based on a settlement or compromises. Could you, Mr. Temporary Deputy Speaker, in the interest of procedure, make a ruling before we proceed?

(Loud consultations)

The Temporary Deputy Speaker (Prof. Kaloki): Order, hon. Members! There is an amendment from Mr. Affey. The amendment has been approved and it has been brought to this Chamber. We can debate on whether we support or oppose the same amendment. We will entertain only two contributions and then we shall put a question on the amendment.

Yes, Mr. Mbadi!

Mr. Mbadi: Thank you, Mr. Temporary Deputy Speaker, Sir. I rise to oppose this amendment because of two reasons. First, this Committee of the House, in its own wisdom invited hon. Members to make presentations to it. The mover of this Motion, I believe, had ample time to present his case to the Committee. If he did---

Mr. Affey: On a point of order, Mr. Temporary Deputy Speaker, Sir!

The Temporary Deputy Speaker (Prof. Kaloki): Order, Mr. Affey. Proceed, Mr. Mbadi!

Mr. Mbadi: Mr. Temporary Deputy Speaker, Sir, if he made his presentation before the Committee and it saw it fit to exclude that proposal--- The Committee is composed of 11 members and it is my understanding that the Committee gave his presentation due consideration and arrived at a conclusion.

The Temporary Deputy Speaker (Prof. Kaloki): Mr. Mbadi, are you opposing the amendment?

Mr. Mbadi: Mr. Temporary Deputy Speaker, Sir, I am making my contribution and I oppose the amendment.

My second proposal is this. I really sympathize with the hon. Member for Moyale. However, my fear is that the amendment that is being proposed will not help the hon. Member to achieve the objective for which he wants us to amend this Motion.

I oppose the amendment.

The Minister for Public Health and Sanitation (Mrs. Mugo): Thank you, Mr. Temporary Deputy Speaker, Sir. Let me first thank the Rt. hon. Prime Minister for making it clear that this House is for debating issues. We come here to debate issues and not to gag people from speaking. There is no way the Chair can make a ruling if we do not contribute. Therefore, I urge my colleagues to honour this House. Let us give it dignity and let us debate because we come here to debate.

I stand here to support this amendment very strongly. We cannot set double standards. We want to remember why we are here. There was a lot of talk on this Report, including some Kenyans going to court to oppose it. We know the judgment highlighted that the whole process was illegal – they did not follow the law. Again, our own professionals, whom we invited, that is, Prof. Oduor and his colleague, showed us all the areas where the law had not been followed. A case in point is Dagoretti Constituency which was ignored and not given an extra constituency and yet those whose areas had low population were given extra constituencies. When I complained bitterly, I was given a constituency called Kawangware. This shows that the Ligale Report is full of areas that need to be relooked at. This is because not everybody was able to put his case forward and get their “Kawangware” included in this Report.

So, by putting part “c” on page 29, we are just playing games. We are pretending that we are forming a new Commission to correct what was wrong. Here it says: “Outstanding issues”. In the next page under part “c” it states that this Commission cannot do anything. So, how will they sort out the outstanding issues? That should be the question.

We should not hide things in this Report. As much as I really want to commend the Committee---

Mr. Mbadi: On a point of order, Mr. Temporary Deputy Speaker, Sir.

The Minister for Public Health and Sanitation (Mrs. Mugo): Mr. Temporary Deputy Speaker, Sir, I think hon. Members must be allowed to speak. The hon. Member will have his chance to speak.

The Temporary Deputy Speaker (Prof. Kaloki): Proceed, Mrs. Mugo!

The Minister for Public Health and Sanitation (Mrs. Mugo): Thank you, Mr. Temporary Deputy Speaker, Sir, for your protection.

There are things we cannot change. You cannot give a so-called independent commission independence on one hand and on the other hand tell them in part “c” that they cannot use that independence to correct what is wrong by adding or subtracting. They might remove or add. We must give them a free hand.

I submit that if we are honest and we support this and we want to set a commission then we need to relook at this. We need to decide whether it is right or wrong. We cannot tie their hands and pretend that we are forming the Independent Electoral and Boundaries Commission.

I support the amendment very strongly.

(Question, that the words to be left out be left out, put and negatived)

Hon. Members: Division! Division!

The Temporary Deputy Speaker (Prof. Kaloki): Yes, there are more than enough Members seeking a Division. Ring the Division Bell!

The Temporary Deputy Speaker (Prof. Kaloki): Order! Order, hon. Members! May the Bar be drawn?

(The Bar was drawn)

Hon. Members, the tellers for the “Ayes” are hon. Charles Onyancha and hon. James Maina Kamau, while those for the “Noes” are hon. M.H. Ali and hon. Moses Lessonet.

Those hon. Members voting for “Ayes” shall proceed to the lobby to my right, while those voting for “Noes” shall proceed to the lobby to my left. Please, note that those hon. Members who opt not to vote should register with the Clerks-at-the-Table.

DIVISION

(Question put and the House divided)

(Question negatived by 87 votes to 37)

AYES: Ms. Abdalla A., Messrs. Affey, Ali M.M., Bahari, Baya, Chachu, Githae, Haji, Kabando wa Kabando, Kamau Irungu Jamleck, Kamau Maina James, Kiilu, Mrs. Kilimo; Messrs. M. Kilonzo, Kimunya, Kinyanjui, Kioni, M’Mithiaru, Ms. Leshomo, Ms. Mathenge; Mr. Michuki, Mrs. Mugo; Messrs. Muoki I., Muoki D., Mureithi, Muthama, Mwakwere, Mwangi, Dr. Mwiria; Messrs. Mwiru, Ngugi, Nyambati, Dr. Shaban; Messrs. Sirat, Waibara, Wambugu and Warugongo.

Tellers for the Ayes: Messrs. C. Onyancha and James Maina Kamau

NOES: Messrs Abdikadir, Ali H.M., Baiya, Bifwoli, Chepkitony, Cheptumo, Cheruiyot, Duale, Elmi, Eseli, Gesami, Gumo, Gunda, Imanyara, Joho, Kaino, Kamama Prof. Kamar, Mr. Kapondi, Ms. Karua, Messrs Keya, Keynan, Dr. Khalwale, Messrs Khang’ati, Khaniri, Kigen, Kiptanui, Kiuna, Kizito, Koech, Dr. Kones, Dr. Kosgei, Messrs Kosgey, Kutuny, Dr. Laboso, Messrs Lagat, ole Lankas, Lessonet, Linturi, Litole, Magwanga, Eng. M.M. Mahamud, Messrs Mbadi, Mbiuki, Midiwo, Dr. Monda, Messrs

Mudavadi, Murgor, Mututho, Mwadeghu, Mwaita, Mwakulegwa, Mwatela, Namwamba, Nanok, Maj-Gen. Nkaissery, Mrs. Noor, Messrs ole Ntimama, Nyamweya G., Obure, Ochieng’ Odhiambo, Ms. Odhiambo, Messrs Ogari, Ogindo, Olago, Prof. Olweny, Messrs Onyancha C., Onyonka, Ombui, Omollo, Mrs. Ongoro, Messrs Orengo, Otieno, Outa, Dr. Otuoma, Mr. Pesa, Eng. Rege, Mr. Ruto, Mrs. Shebesh, Messrs Shakeel, Sirma, Maj. Sugow, Messrs Wamalwa, Washiali, Were and Yinda.

Tellers of the Noes: Messrs. Lessonet and M.H. Ali

The Temporary Deputy Speaker (Prof. Kaloki): Order, hon. Members. We will now proceed with the original Motion the way it was brought to this House.

(Debate on the original Motion resumed)

Ms. Karua: Mr. Temporary Deputy Speaker, Sir, I rise in support of the Motion. I want to very briefly state that as we look for a solution to the issues before us, we must ensure that we respect the institutions we create.

Hon. Members: On a point of order, Mr. Temporary Deputy Speaker, Sir.

Ms. Karua: Mr. Temporary Deputy Speaker, Sir, protect me.

Mr. Ruto: On a point of order, Mr. Temporary Deputy Speaker, Sir.

The Temporary Deputy Speaker (Prof. Kaloki): Hon. Members, Mr. Ruto is on a point of order.

Mr. Ruto: On a point of order, Mr. Temporary Deputy Speaker, Sir. Would I be in order to call upon the Mover to reply?

(Several hon. Members stood up in their places)

The Temporary Deputy Speaker (Prof. Kaloki): Order! Order! Hon. Karua, please, continue for two minutes and then we dispose of that particular point of order.

Ms. Karua: Mr. Temporary Deputy Speaker, Sir, as I wind up, it is important that we ensure we respect the Constitution we passed. We should adopt the Report of the Committee, but we cannot adopt the report that is not a Report of this House. But we must make it a primary source for the next Commission that will complete the work.

Mr. Temporary Deputy Speaker, Sir, I beg to support.

The Temporary Deputy Speaker (Prof. Kaloki): Hon. M. Kilonzo, you have two minutes.

The Minister for Justice, National Cohesion and Constitutional Affairs (Mr. M. Kilonzo): Mr. Temporary Deputy Speaker, Sir, unfortunately, some things must be said loudly. If we pass this Motion the way it is, we will be violating the Constitution. Allow me to read Article 249 of the Constitution which says:

“(1) The objects of the commissions and the independent offices are to—

(a) protect the sovereignty of the people;

(b) secure the observance by all State organs of democratic values and principles;

and,

(c) promote constitutionalism.

(2) The commissions and the holders of independent offices—

(a) are subject only to this Constitution and the law; and,

(b) are independent and not subject to direction or control by any person or authority.”

Mr. Temporary Deputy Speaker, Sir, for the House to adopt this Report, you are violating the Constitution in advance and it must be refused.

(Several hon. Members stood up in their places)

The Temporary Deputy Speaker (Prof. Kaloki): Order! Order, Minister! There was a point of order by hon. Ruto that the Mover be now called to reply. I will now put the Question.

(Question, that the Mover be now called upon to reply, put and agreed to)

Mr. Namwamba: Mr. Temporary Deputy Speaker, Sir, with due respect to this House, I beg to move the Motion.

The Temporary Deputy Speaker (Prof. Kaloki): Order, hon. Members! I will now put the Question.

Mr. Kioni: On a point of order, Mr. Temporary Deputy Speaker, Sir.

The Temporary Deputy Speaker (Prof. Kaloki): Order! Order!

(Mr. Kioni remained standing in his place)

Hon. Kioni, you should now leave this Chamber!

(Mr. Kioni withdrew from the Chamber)

(Question put and agreed to)

ADJOURNMENT

The Temporary Deputy Speaker (Prof. Kaloki): Hon. Members, it is now time for the interruption of business. This House is, therefore, adjourned until tomorrow Wednesday 22nd December, 2010, at 9.00 a.m.

The House rose at 6.30 p.m.