

# NATIONAL ASSEMBLY

## OFFICIAL REPORT

Tuesday, 23<sup>rd</sup> March, 2010

The House met at 2.30 p.m.

*[Mr. Speaker in the Chair]*

### PRAYERS

### COMMUNICATION FROM THE CHAIR

#### WELCOME TO DELEGATION FROM SOUTH AFRICAN MPUMALANGA PROVINCIAL LEGISLATURE

**Mr. Speaker:** Hon. Members, I wish to introduce to you and welcome this afternoon a delegation from Mpumalanga Provincial Legislature in South Africa, who are seated at the Speaker's Row. They are as follows:-

1. Hon. Pretty Jabhile Ngubeni, MP, Chairperson and Leader of
2. Delegation;
3. Hon. Refilwe Mtshweni, MP;
4. Hon. Blessing Shongwe, MP;
5. Hon. Caroline Refilwe Mahlobogoane, MP;
6. Hon. Lazarus Thabelang Maabane, MP;
7. Hon. Patricia Ngobeni, MP;
8. Hon. Celine Nomakhosi Mamabolo, MP;
9. Hon. Velly Makasana Manzini, MP; and,
10. Ms. Eggy Thabane – Committee Co-ordinator.

They are Members of the South African Parliamentary Committee on Improvement of Quality and Status of Women, Youth, Children and People with Disabilities. On behalf of the House and on my own behalf, I wish the delegation a fruitful and happy stay in Kenya.

Thank you.

### PAPER LAID

The following Paper was laid on the Table:-

The Budget Policy Statement

*(By the Assistant Minister for Finance (Dr. Oburu)  
on behalf of the Minister for Finance)*

**QUESTIONS BY PRIVATE NOTICE****STATUS OF ICT PROJECTS IN CONSTITUENCIES  
UNDER ECONOMIC STIMULUS PACKAGE**

**(Mr. Shakeel)** to ask the Minister for Information and Communications:-

(a) Could the Minister update the House on the status of the Information Communication and Technology Project for each constituency planned to be funded through the Economic Stimulus Package?

(b) Could the Minister confirm whether he will supply desktop computers to each constituency under the same project in view of exorbitant proposal of the IT Buses of Kshs.7million, which was rejected by the House?

**Mr. Speaker:** Is Mr. Shakeel not here? We will extend some indulgence to the hon. Member and re-visit that Question a little later.

Let us proceed to the next Question, by the Member of Parliament for Emuhaya!

**CAUSE OF DEATH OF FISH IN LAKE NAIVASHA**

**Dr. Otichilo:** Mr. Speaker, Sir, I beg to ask the Minister for Fisheries Development the following Question by Private Notice.

(a) Could the Minister inform the House the cause of recent death of fish in Lake Naivasha and reveal the scope of effects on other aquatic life in the lake?

(b) Could the Minister also indicate the potential toxic levels of all chemicals used, give trends in the levels of lake pollution or eutrophication in the last ten years and reveal the expected long-term impact on aquatic life?

(c) What mitigation measures is the Minister taking to save the fish and other aquatic life in the lake?

Mr. Speaker, Sir, I want to bring to your attention the fact that I have not received any written answer despite the fact that we gave him extra time to bring a comprehensive answer.

**Mr. Speaker:** Yes, I recollect that fact.

Yes, Minister for Fisheries Development! Is he not here? Similarly, I will revisit the Question a little later.

Next Question, Member of Parliament for Keiyo North!

**INTERCEPTION OF FIREARMS IN NAROK**

**Mr. Chepkitony:** Mr. 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 explain the circumstances surrounding the recent interception of assorted firearms in Narok town, the types and quantities, the source and the intended destination of the firearms?

(b) Could the Minister reveal the identities of the persons responsible in procuring, transporting and storage of these arms as well as the intended use of the firearms?

(c) What are the threats and concerns posed to national security by the saga?

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

(a) On 7<sup>th</sup> December, 2009, the police, acting on a tip off, intercepted a Mr. Munir Haroun Ismail and his wife, Nahid Tabaasam Sumar, at Embakasi Village. Upon search, he was found in possession of a pistol make SIG 9mm, Serial No.U746797, and an assortment of ammunition. On further search of his godown situated along Nanyuki Road in Industrial Area, the following items were found: Three lorry batteries, 13 military green steel jericans, six military fatigue pangas, five pairs of military boots and assorted motor vehicle parts.

At his Parklands home, a pistol, make SIG 9 mm, Serial No.0735732, and 5,000 rounds of ammunition and pair of military uniform were also recovered. The suspect led the police to his Parklands and Narok residences where the following items were also recovered: Over 40,000 rounds of assorted ammunition; shotgun Serial No.A0S2195; three 08 rifle, Serial No.A17444; 3006 rifle, Serial No.40909; four roles of aphanet cloth, ten military canvas spares, military uniform, assorted motor vehicle spare parts, 11 lorry tyres, 14 motor vehicle logbooks, and cash money to the tune of Kshs429, 000.

Mr. Speaker, Sir, all the guns are licensed to the holder, Munir Haroun Ismail vide Civilian Firearms Bureau Licence No.3469. The ammunition was not licensed, and the businessman was charged before Nairobi Chief Magistrate vide CCN.2217/2009, along with three others for possession of unlicensed ammunition.

On 1<sup>st</sup> February, 2010, further information was received that the businessman had more ammunition in his garage. Police officers visited the garage and recovered further 31,211 assorted ammunition.

Preliminary investigations indicated that part of the ammunition was from the Administration Police Training College, and the British Military Training Base at Nanyuki. The intended destination is still under investigation

(b) The identities of persons responsible for procuring, transporting and storage of these arms are Munir Haroun Ismail, Nahid Tabaasam Sumar, Joseph Maritim, John Wandetu Kiragu and Dominic Abisan Mafuni. The intended user of the firearm is still under investigation.

(c) There are no threats or concerns posed to national security as the ammunition are in the hands of the police and the suspects were arrested and arraigned in court vide Police Case File No.152/5AD/09 and Court File No.2217/09.

Thank you.

**Mr. Chepkitony:** Mr. Speaker, Sir, the Assistant Minister has said that there is no threat to national security yet these are huge quantities of firearms, including military hardware materials. Could he confirm or qualify his statement that there are no threats? If not, is this suspect licensed to handle this ammunition? Is he a firearms dealer or what is he?

**Mr. Ojode:** Mr. Speaker, Sir, I mentioned in my answer that this man called "Munir" is not licensed to have ammunition. We confiscated all the ammunition he had including those found in the garage. We have charged him. We are also investigating this

case. In any case, this could have been a *sub judice* case although the hon. Member wanted me to talk about it.

Mr. Speaker, Sir, I have the charge sheet here. I will not be in a position to divulge some information because the case is in court and it might also jeopardize the findings.

**Mr. Speaker:** Could you table the charge sheet?

**Mr. Ojode:** Mr. Speaker, Sir, I would like to table the charge sheet for all the cases.

*(Mr. Ojode laid the document on the Table)*

**Mr. K. Kilonzo:** Mr. Speaker, Sir, could the Assistant Minister confirm that this is not the first time that the same trader has been found holding ammunition illegally? What action was taken against him last time he was caught with a cache of arms?

**Mr. Ojode:** Mr. Speaker, Sir, this is a very serious offence. That is why the Government had to arrest all those who were involved. As far as I am concerned, this is the first time I have heard what the hon. Member has raised. The only thing is that we did not inspect what he had in his garage or residences. However, the detectives got assortment of ammunition when they went to his garage and other residence.

Mr. Speaker, Sir, I would like to assure Kenyans that the police will arrest, at any time, anybody found with ammunition or a firearm without a licence. I have indicated in this House that we will conduct the disarmament exercise in areas where people hold illegal guns because we want to make sure that Kenya is a safe country.

**Mr. Ochieng:** Mr. Speaker, Sir, could the Assistant Minister tell us what the National Security Intelligence Service (NSIS) was doing all this time to the extent that those arms were not discovered in good time?

**Mr. Ojode:** Mr. Speaker, Sir, first of all of I want to commend the NSIS. This is because they are the people who made us find this fellow. The officers in the NSIS are doing a good job and I encourage them to continue with that good work.

**Mr. C. Kilonzo:** On a point of order, Mr. Speaker, Sir. Is the Assistant Minister in order to mislead this House? When these arms were discovered, the same Assistant Minister issued a Statement thanking the public for having tipped the police and now he is telling us it was the NSIS.

**Mr. Ojode:** Mr. Speaker, Sir, what my friend the hon. Member does not know is that the NSIS are policemen. The public gave a tip to one of the NSIS members and we recovered these guns. In any case, all of us should congratulate them for the work they have done.

**Mr. Ruto:** On a point of order, Mr. Speaker, Sir. Is it in order for the Assistant Minister to mislead this House that the NSIS are also policemen? Does he understand his docket? Does he know the functions of these two units?

**Mr. Ojode:** Mr. Speaker, Sir, these are security agents. I understand this docket very well. I am saying that we should congratulate them because they made us find this fellow hiding the assorted ammunition at the right time.

**Mr. ole Lankas:** Mr. Speaker, Sir, this is not the first time that this issue is coming before this House. The first time we brought up this issue, the Minister assured Kenyans that investigations would be carried out immediately. He promised this House

that he would issue Statements on the progress of the investigations fortnightly. To date, he has not come up with a full report on the investigations. Could the Assistant Minister tell us what is not happening? It appears he is not ready to reveal the information contained in the investigations. From December up to now, he should have come up with the position as to where these ammunitions were intended to go.

**Mr. Ojode:** Mr. Speaker, Sir, I indicated in my first remarks that the case is in court. I have some information, which I would not share with you now because the case is in court. However, after the ruling, I will share with my colleagues what has been happening within Narok.

**Mr. Speaker:** Is the Member for Central Imenti satisfied?

**Mr. Imanyara:** No, Mr. Speaker, Sir. It was just last week I raised this issue with the Minister. My interest at that time was that since the ammunition came from a Government owned factory and was manufactured by members of the Kenya Armed Forces, what steps have they taken to ensure that security at the military barracks in Eldoret where the bullets and ammunition came from is changed and protected from encroachment from outsiders?

**The Minister of State for Defence** (Mr. Haji): On a point of information, Mr. Speaker, Sir.

**Mr. Speaker:** Has the Assistant Minister accepted that point of information?

**The Minister of State for Defence** (Mr. Haji): Mr. Speaker, Sir, he has accepted.

*(Mr. Imanyara stood up in his place)*

**Mr. Speaker:** Order, the Member for Central Imenti!

**Mr. Imanyara:** Mr. Speaker, Sir, he is informing me and yet I do not want him to inform me.

**Mr. Speaker:** Order! As I heard it, the Minister wants to inform the Assistant Minister of State for Provincial Administration and Internal Security.

Mr. Minister, proceed!

**The Minister of State for Defence** (Mr. Haji): Mr. Speaker, Sir, although this ammunition is manufactured at Eldoret, the Army sells it to all Government and international institutions. Therefore, there is no reason that the officers there should be removed.

**Mr. Imanyara:** On a point of order, Mr. Speaker, Sir.

**Mr. Speaker:** Order, the Member for Central Imenti!

Mr. Assistant Minister of State for Provincial Administration and Internal Security, have you found that information useful? Can you proceed to answer the question by the Member for Central Imenti?

**Mr. Ojode:** Mr. Speaker, Sir, I would like to say that the procedures of acquiring ammunition from the Eldoret factory have been enhanced. As I speak, it is not easy for every Tom, Dick and Harry to have any ammunition in his or her possession.

We have also enhanced security within the training centre in Nanyuki. That is where we had a loophole and ammunition was being channeled through there. We are quite happy with what is happening now. We have beefed up security and nobody will have access to the ammunition, as I speak here.

**Mr. Imanyara:** On a point of order, Mr. Speaker, Sir. I asked him what measures he has taken but instead of answering he is saying there has been “enhancement”. What form of enhancement and what steps has he taken against the officers in Eldoret who were responsible for sending the ammunition out of the barracks?

**Mr. Ojode:** Mr. Speaker, Sir, you will agree with me that the Armed Forces is not within my docket. I will ask the Minister concerned to answer that. However, he has also given information with regard to the question the hon. Member, who is a friend of mine, has asked.

**Mr. Olago:** On a point of Order, Mr. Speaker, Sir. Is it in order for the hon. Ministers, the Minister of State for Defence Mr. Haji and the Assistant Minister, Ministry of State for Provincial Administration and Internal Security, Mr. Ojode, to mislead the House by saying that it is the Army that manufactures and sells ammunition, when in actual fact it is the Kenya Ordnance Factory, which is a parastatal that manufactures the arms? Why can they not mention that clearly?

**Mr. Speaker:** Order Minister! You are pursuing the same matter from the same angle?

*(Mr. Olago nodded)*

Okay proceed.

**Mr. K. Kilonzo:** In view of the fact that the Minister of State for Defence has given information, would we be in order to interrogate that information, because the Question from Mr. Imanyara arises from the information which the Minister has given to the Assistant Minister? Would we be allowed to interrogate it?

**Mr. Imanyara:** On a point of Order, Mr. Speaker, Sir. Since the Assistant Minister, Ministry of State for Provincial Administration and Internal Security, admits that the proper province for this Question is the Defence Department, would it be in order that I request you to direct that this Question be deferred until tomorrow, or another day, so that Mr. Haji can come to this House and answer the question properly, and we seek clarification properly?

**Mr. Speaker:** Order, hon. Members! The Assistant Minister, Ministry of State for Provincial Administration and Internal Security, had actually handled his part fairly ably; so, in so far as this Question is concerned, the Question asked, has adequately been dealt with by the Assistant Minister, Ministry of State for Provincial Administration and Internal Security. However, if there are aspects of the Question which are different and need to be addressed, then the Member for Central Imenti, or for that matter, even the hon. Member for Mutito can bring those Questions and I will order that they be placed on the Order Paper.

**Mr. K. Kilonzo:** On a point of order, Mr. Speaker, Sir. I want to seek directives from you because from time to time Ministers have been coming in aid of others to offer information. Where a Minister has volunteered to offer information, would we, as MPs be given the right to interrogate a Minister who has brought that information. The Minister of State for Defence has just volunteered to answer a Question which was not on the Floor of the House for him to answer?

**Mr. Speaker:** Yes, you will be allowed to interrogate a Minister where he conducts himself in that manner, but where it is restricted to a matter of information, then

we will deal with it accordingly. Otherwise, hon. Members are at liberty to ask those Questions and I will allow them to appear on the Order Paper under the category of Questions by Private Notice.

Member for Keiyo North, last Question!

**Mr. Chepkitony:** In his answer, the Minister has indicated that part of the ammunition was from the Administration Police Training College and the British Military Training College at Nanyuki. This goes to show that there are serious lapses within the various security agencies. It goes to confirm that the sources of the arms which are in pastoral areas, and are used by cattle rustlers and the gangs who steal in our cities are our security forces. What action is the Minister going to take to ensure that arms within the security forces are securely kept to prevent any theft of them, or sale of them to criminals and other members public?

**Mr. Ojode:** Anybody found with any ammunition, or firearm, without a licence will be arrested on the spot. The other bit is that disarmament will continue within the Upper Eastern, the Rift Valley and Nairobi. There is no cause for alarm, and I want to assure my colleagues that we are doing all that we can to bring back normalcy and sanity. I will also plead with my colleagues not to politicise it; I need their assistance and their support. Arms and ammunition in the hands of thugs must be mopped up, otherwise Kenya is safe and you are free to move to wherever you want.

**Mr. Chepkitony:** On a point of order, Mr. Speaker, Sir. Is it in order for the Assistant Minister to avoid my question? I asked him what he is doing to ensure that there are no lapses within the security forces, which enable members of the public to access arms.

**Mr. Ojode:** Mr. Speaker, Sir, I said that first of all we have enhanced security within those areas where there were possibilities of getting arms or ammunition. I also mentioned that all those who were involved in this illicit sale or acquiring of any ammunition were all arrested, and we are continuing to arrest those who have not been arrested.

#### LICENSING OF INVESCO BEFORE PAYMENT OF CLAIMS

**Mr. C. Kilonzo:** Mr. Speaker, Sir, I beg to ask the Deputy Prime Minister and Minister for Finance the following Question by Private Notice.

Could the Minister explain the circumstances under which the collapsed Invesco Assurance Company (Under Receivership) was licensed to operate before paying the Kshs600 million owed to claimants?

**The Assistant Minister, Office of the Deputy Prime Minister and Ministry of Finance (Dr. Oburu):** Mr. Speaker, Sir, I beg to reply.

I would like to make a correction and state that Invesco Assurance Company Limited, was not placed under receivership, as stated by the hon. Member, but under statutory management. A statutory manager is under no obligation to settle claims owed by the insurer, but he is required to prepare and submit to the Insurance Regulatory Authority (IRA) a report on the financial position and management of the insurer with recommendations as to whether the insurer is capable of being revived, or should be placed under receivership or liquidation. The appointed Statutory Manager,

recommended the first option, and it was on this basis that the IRA reopened Invesco Assurance Company under a restructured arrangement.

**Mr. C. Kilonzo:** In that case Mr. Speaker, Sir, can the Assistant Minister tell this House when the people owed over Kshs600 will be paid?

**Dr. Oburu:** Mr. Speaker, Sir, under the restructured arrangement, the Matatu Owners Association (MOA), who have an investment arm, have already bought 80 per cent of the Invesco Assurance Company Limited, and they have put advertisements in newspapers asking those who have claims to submit their applications, so that they can process the claims. So, far 1,500 members have made their claims, which are being processed and the total amount involved so far in the claims is Kshs300 million.

**Mr. Linturi:** Thank you Mr. Speaker, Sir. I would want the Assistant Minister to state whether he is aware that there are many insurance firms in this country that are not following the package of the Finance Bill of December, 2009 where we provided that any insurer who does not meet its obligations within 60 days after filing of a claim is supposed to give reasons and just in case the Director or the CEO of IRA gives extension of time for payment of that claim and the same is delayed and paid after 30 days, then the company is deemed to be insolvent or unable to pay the claim. I want him to tell the House what he is doing to make sure that these insurers that have so many pending claims that have not been paid within the provided period, comply.

**Dr. Oburu:** Mr. Speaker, Sir, the Insurance Regulatory Authority (IRA) was specifically established to deal with cases of non-compliant insurance companies. For this particular one, a lot has been done. Several measures have been taken. They have demanded for more capitalization. They have decided that the shareholders should not be directly involved in the management of the company. Several other measures have been taken to ensure that members of the public are not cheated. If there are any specific cases of errant insurance companies, we are ready to recommend to the IRA to take the necessary measures and deal with them as per their mandate.

**Mr. James Maina Kamau:** Mr. Speaker, Sir, could the Assistant Minister tell this House what he will do with insurance companies which fleece Kenyans, hide under bankruptcy; only to venture into other businesses? For example, we know a lot about the Invesco Company. It came, conned people and started doing another business. What is the Assistant Minister doing to make sure that Kenyans are not fleeced?

**Dr. Oburu:** Mr. Speaker, Sir, I have stated that for any insurance company to come up, it has to have sufficient capitalization. That particular insurance business is not easy because it involves *matatus*. There are only three insurance companies that deal with *matatus* in this country. That is because of the type of risk involved in that particular investment. This Parliament, in its wisdom, established IRA in order to deal with those insurance companies which are likely to fleece members of the public out of their ignorance.

**Mr. K. Kilonzo:** Mr. Speaker, Sir, I would like to thank the Assistant Minister and, more so, IRA for a job well done. The Chief Executive Officer has been able to structure the industry in such a way that firms are now able to offer better service. However, my fear is: Since that is a service industry, what is he doing to protect local investors from foreign interference?

**Dr. Oburu:** Mr. Speaker, Sir, when you talk about protection against risk and you only restrict that business to locals, you must know that, that is a very risky business and,



therefore, it requires a very high investment. The only way we can go about that is to insist that insurance companies must be financially stable, so that the people who are insuring do not take too much risk. But if Parliament would like to put restrictions to foreigners, then we might consider bringing that legislation so that you restrict them. But, as it is now, it is a free market and we are not restricting investors from coming into the market, provided that they satisfy our regulatory requirements.

**Mr. Linturi:** On a point of order, Mr. Speaker, Sir. I am not really satisfied because the Assistant Minister is avoiding to answer a very pertinent question. I said that we came up with a rule that insurance companies must pay claims within a certain specified period. Kenyans are being fleeced every day because the insurance companies are collecting premiums and they are not paying claims. Those claims fall due within the period by which they are supposed to be paid and yet, they are not paid. What is he going to do to make sure that those claimants are paid?

**Mr. Speaker:** Mr. Assistant Minister, what are you doing to ensure compliance?

**Dr. Oburu:** Mr. Speaker, Sir, I am saying that if there are any specific non-compliance cases, let him draw our attention to them and we shall take the necessary action.

*(Several hon. Members sneezed)*

**Mr. Mututho:** On a point of order, Mr. Speaker, Sir. Every hon. Member here is sneezing! There is foreign gas here!

**Mr. Speaker:** Order, hon. Members! I know that our resistance levels are different but hon. Members are put on notice---

*(Several hon. Members sneezed again)*

*(Laughter)*

Hon. Members are put on notice that there is teargas which has been discharged in the environs of Parliament. This is as a result of activists wanting to push hon. Members to fast-track the debate on the Constitution. That is what I have been told. So, hon. Members will have to tolerate this and when we get to a level where we cannot withstand it anymore, then we may have to adjourn. But for the time being, we will take the last question from Mr. C. Kilonzo!

**Mr. C. Kilonzo:** Mr. Speaker, Sir, my interest in this matter - which the Assistant Minister did not specifically state - is that, that insurance company was put under statutory management purely because it could not meet the claims totaling to Kshs600 million. The new owners have only pumped in Kshs200 million. My question is very simple: What assurance is there that Invesco will be able to pay the previous claims amounting to Kshs600 million? They might as well accumulate more!

**Dr. Oburu:** Mr. Speaker, Sir, that is the reason why the licence which has been given to that company is conditional. It is conditional on several performance measures which they must fulfill in order to get a full licence. If they are not able to pay as per the agreement with our IRA, then we might not---

**Mr. C. Kilonzo:** On a point of order, Mr. Speaker, Sir. He has said that the agreement has certain conditions and that is what I am asking. Could he table or bring all those conditions here?

**Mr. Speaker:** Mr. Assistant Minister, are you able to table the document with conditions?

**Dr. Oburu:** Mr. Speaker, Sir, the report by the statutory manager which recommended that, that company be revived and be restructured is the only document which is there. Others are just correspondence which we had with those people and the interviews which we held and gave them certain conditions which they must fulfill before they can be allowed to get a full licence. So, the only document which we can table is the report by the statutory manager which gave recommendations for that company to be restructured and not liquidated.

**Mr. Speaker:** Mr. Assistant Minister, are the conditions captured in the report? Are the conditions that the hon. Member is alluding to captured in the report which you can table?

**Dr. Oburu:** Mr. Speaker, Sir, those conditions are there.

**Mr. Speaker:** Please table it!

**Dr. Oburu:** Mr. Speaker, Sir, I do not have it here with me!

**Mr. Speaker:** Can you table it tomorrow?

**Dr. Oburu:** Yes, Mr. Speaker, Sir.

**Mr. Keynan:** On a point of order, Mr. Speaker, Sir. The insurance industry plays a key role in the economy of this country.

We also know that the *matatu* industry is a very important sector in our economy. I know that the reason why Invesco Assurance Company is being revived is not what the Assistant Minister is telling Parliament. After 2003, with the adoption of the Michuki rules---

**Mr. Speaker:** Order, Mr. Keynan! You know that you have stood up on a point of order?

**Mr. Keynan:** That is what I am coming to. Is it in order for the Assistant Minister to mislead the House when he knows very well that the very reason why the Government revived Invesco Assurance Company is that no other underwriter was willing to accept PSV insurance? All the other underwriters were operating at a loss and the Government had to persuade the *Matatu* Owners Association and the *Matatu* Welfare Association to form an insurance company to manage PSV. Is the Assistant Minister in order to mislead the House?

**Mr. Speaker:** Order! Mr. Assistant Minister, I think you should be able to deal with that fairly easily from the answers that you gave previously without going into a story.

**Dr. Oburu:** Mr. Speaker, Sir, as I said, this is a very risky industry and there are only two other insurance companies which are ready to deal with this. That is why one of the recommendations was to revive it because it is a very vital sector.

**Mr. Speaker:** Next Question.

**Mr. Letimalo:** Mr. Speaker, Sir, I beg to ask the Minister for Roads the following Question by Private Notice.

What immediate action is the Minister taking to repair the bridge at Seiya River between Kisima Trading Centre and Lekuru Market in Samburu Central District, which has been damaged due to the on-going heavy rains, before it completely collapses?

**The Assistant Minister for Roads** (Dr. Machage): Mr. Speaker, Sir, I beg to reply.

The bridge in question is actually a drift across River Seiya. I have set aside Kshs4.5 million which has been availed to the Regional Manager of the Kenya Highways Authority, South Rift Region, for the repair of the drift. The tunneling process has already commenced and the works are expected to begin in early April, 2010.

**Mr. Letimalo:** Mr. Speaker, Sir, I must thank the Assistant Minister for the prompt action he has taken. Now that he has given the works to be undertaken by the Regional Manager, South Rift, could he tell the House which districts form South Rift region will benefit to ensure that leaders from the larger Samburu will not be left out in the tendering process?

**Dr. Machage:** Mr. Speaker, Sir, I was answering this Question in respect of the area that the MP asked. In view of the ongoings on the constitutional review process, may I request that the hon. Member leaves it as such.

**Mr. Lekuton:** Mr. Speaker, Sir, the Ministry of Roads knew that there was a lot of focus on *El Nino* rains. I am sure in our country there are so many bridges that are destabilized and many culverts washed away because of *El Nino* rains. Did the Ministry prepare for this eventuality this time and how much money do they have to cater for this? Are there any emergency funds set aside for such occasions?

**Dr. Machage:** Mr. Speaker, Sir, although this is a different question, we had set aside Kshs500 million for purposes of emergencies, but the extent of the construction of our road network has been far much in excess of that. We have requested the Office of the Deputy Prime Minister and Ministry for Finance to avail Kshs2.2 billion for the purposes of the repair. We have got an undertaking and an agreement to our request by the Prime Minister. I believe the Prime Minister is in the process of trying to see that we get this money for that purpose.

**Mr. Kigen:** Mr. Speaker, Sir, in January we had floods in Mogotio and Rongai and two bridges were swept away. These were very important bridges. We have since requested for the Ministry to assist to repair those bridges. How long will it take the Assistant Minister to respond to this?

**Dr. Machage:** Mr. Speaker, Sir, amongst the emergency projects that I have on my list are those two projects. I will endeavour to repair them as soon as finances are available. I think the Office of the Deputy Prime Minister and Ministry of Finance has listened to our case. They will respond.

**Mr. Letimalo:** Mr. Speaker, Sir, given that this is the road that links Samburu Central and Samburu East, could the Assistant Minister tell the House how long the project will take to ensure that the traders who rely on this road for transportation of goods and services will not be inconvenienced for long? How long will the project take to reach completion?

**Dr. Machage:** Mr. Speaker, Sir, since the bids for the same projects are supposed to be opened on 22<sup>nd</sup> April, I will seek the indulgence of the hon. Member that I do not talk about it this time because it is in the process of bidding.

**Mr. Letimalo:** On a point of order, Mr. Speaker, Sir. I think the Assistant Minister is being unfair to the people who are served by that road. According to the expectations and planning of that Ministry, how long did they expect the works to take so that the people who rely on that road for transportation of goods and services will not be inconvenienced? That is what I am asking! He should be able to give an estimate.

**Mr. Speaker:** Order, Mr. Assistant Minister! That is a genuine concern. Could you give us an estimate in terms of time?

**Dr. Machage:** Mr. Speaker, Sir, as soon as possible.

## ORAL ANSWERS TO QUESTIONS

### *Question No.072*

#### COMPENSATION TO MR. JORAM OCHENGA

**Mr. Chanzu** asked the Minister for Forestry and Wildlife:-

(a) what plans he has to compensate Mr. Joram Ochenga, who was attacked and seriously injured by a lion at Maragoli Hills on 3<sup>rd</sup> September, 2002; and,

(b) what measures he will take to protect the residents of the area from such attacks in future.

**The Assistant Minister for Forestry and Wildlife** (Mr. Nanok): Mr. Speaker, Sir, before I respond to this Question, let me say that last week on Tuesday you had issued a directive that we will not transact business here because there was no Minister from this Ministry. I want to explain by giving two reasons.

One, I had expected my colleague, the Cabinet Minister to be here to respond to this Question but unfortunately, he was not able to make it. Secondly, when I made efforts to get sufficient information to answer this Question and the supplementary questions that would have arisen, that directive was ignored by the senior technocrats in the Ministry. Following several directives, I have got the information I need to respond to this Question. I can only plead with you to allow us to proceed since in the past we have not failed to represent the Ministry and to respond to the Questions that hon. Members have asked my Ministry.

**Mr. Speaker:** Mr. Assistant Minister, you may resume your seat for a minute. The explanation given by the Assistant Minister is obviously inadequate but since this Assistant Minister has normally been very dutiful - I know that he has always been in the House to answer Questions and it appears there are administrative lapses in your Ministry. So, we will not penalize you for those lapses, but maybe the Head of the Civil Service will take care to ensure that there are no such lapses. So, you may proceed.

**The Assistant Minister for Forestry and Wildlife** (Mr. Nanok): Mr. Speaker, Sir, we are trying to address that through the respective offices to try and sort this so that it does not happen again.

Mr. Speaker, Sir, I beg to reply.

(a) The said Mr. Joram Ochenga from Enzaro Village of Vihiga District was attacked by a Leopard and not a lion on 3<sup>rd</sup> September, 2002. He has not been paid his compensation dues because he did not fill the necessary compensation forms to initiate the process of compensation. However, the KWS warden at Kakamega has now traced and assisted him to fill the compensation claim forms. The forms were presented on 22<sup>nd</sup> February to the District Wildlife Compensation Committee and forwarded on 24<sup>th</sup> February to the Ministry headquarters for compensation.

(b) My Ministry, through the KWS, is committed to protect the residents of Maragoli Hills and also throughout the country against wildlife attacks. The KWS has an office in Kakamega headed by a warden. The office has rangers who patrol the place and respond to any reported cases. Despite the prevailing scarcity of food and water that increases conflict, the KWS has reduced significantly the human/wildlife conflict in Vihiga District.

**Mr. Chanzu:** Mr. Speaker, Sir, I want to thank the Assistant Minister for the answer. He has indicated that the recommendation for the claim has been received by the Ministry. Could he give an indication specifically when this claim will be paid to the complainant?

**Mr. Nanok:** Mr. Speaker, Sir, as you will notice from previous presentations in this House, cases of human/wildlife conflict has increased, which we had not anticipated. For instance, during this financial year, we have received about 1,500 cases as opposed to 763 cases in the last financial year. We have asked the Treasury to give us the finances to address this particular claim alongside 399 others. As soon as we get the finances, we will pay the compensation.

**Mr. Chanzu:** Mr. Speaker, Sir, Maragoli Forest was vandalized, but we intend to have it back in place. Could the Assistant Minister consider setting up an office to deal with these kinds of situations in Vihiga other than us going to Kakamega, which is a bit far from us?

**Mr. Nanok:** Mr. Speaker, Sir, that is a matter that we can consider. I would like to ask the hon. Member that we meet outside the House and look at the details of that proposal.

*Question No.087*

STAFFING LEVEL AT DEPARTMENT OF REGISTRATION  
OF PERSONS IN NEP

**Mrs. Noor** asked the Minister of State for Immigration and Registration of Persons:-

(a) whether he could provide the staffing level at the Department of Registration of Persons in North Eastern Province, the months worked in 2009 and the amount of money they were paid;

(b) whether he could give the names and number of applicants for national identity cards in the province in the last one year, indicating how many were issued with the document; and,

(c) whether he could also explain the requirements for vetting procedures in North Eastern and clarify whether the procedure applies nationwide.

**The Minister of State for Immigration and Registration of Persons** (Mr. Kajwang): Mr. Speaker, Sir, I beg to reply.

(a) The staffing levels of the Department of Registration of Persons in North Eastern Province are 106 officers. In 2009, the officers worked for 12 months less their leave days. The total gross salary paid to these officers in 2009 was Kshs24 million.

(b) The number of applicants received from North Eastern between 1<sup>st</sup> January, 2009 and 10<sup>th</sup> March, 2010, was 12,236. Out of these applicants, 9,497 were issued with identity cards and 1,641 are in progress while the remaining 1,098 applications were rejected on either of the following grounds:-

(i) Some applicants had already registered as refugees and were in our database, or

(ii) Some applicants had already been issued with national identity cards, but were trying to re-apply as different persons.

(c) Vetting is carried out in all designated border districts. The requirements for vetting procedures are as follows:-

(i) The applicant must appear in person before the vetting committee.

(ii) The applicant must produce proof of citizenship and age;

(iii) The vetting process should be done in one sitting;

(iv) The applicant must have been born in the district where vetting is taking place; or the applicant hails from a border district and is applying elsewhere.

(v) The applicant must be identified as a Kenyan by at least one of the elders who must vouch this by filing or appending his left thumb print on the form and he will include his name and identity card on the registration form.

(vi) Vetting proceedings are captured in form of minutes which must accompany the application from of the applicant to the headquarters for processing.

These requirements apply to all designated border districts in the country and some urban areas like Nairobi, Mombasa and Thika.

**Mrs. Noor:** Thank you, Mr. Speaker, Sir. It is unfortunate that we get misleading information from the Minister. The issuance of the national identity cards in North Eastern Province was suspended. How many months was this exercise suspended? Why and who suspended it? He did not answer those questions. In part "b" of my Question---

**Mr. Speaker:** Order, Mrs. Noor! Ask the question that you want the Minister to answer!

**Mrs. Noor:** Mr. Speaker, Sir, the whole Question was not answered satisfactorily and that is why I want further elaboration. I want the Minister to understand because this is a very sensitive issue. We are talking about the national identity cards. This is a constitutional right that the people of North Eastern are being denied. Please, I want him to explain because he did not answer that part of the question.

**Mr. Speaker:** Order! Hon. Noor, please, ask a question that has not been answered! Just one question!

**Mrs. Noor:** Mr. Speaker, Sir, the Minister did not answer part "b" of my Question.

**Mr. Speaker:** Could you, please, ask the question again and I will compel the Minister to answer it?

**Mrs. Noor:** Mr. Speaker, Sir, I would like the Minister to table the names of the applicants who were issued with identity cards from each location in North Eastern Province, so that we can know them.

**Mr. Kajwang:** Mr. Speaker, Sir, I want to apologise that I did not give the names from each location. However, the names are here. We have 9,497 names of those who were issued with identity cards. You can go through the gymnastics of checking. Below the list, there are the 1,098 applications that were rejected. I think I have now answered that question.

**Mr. Speaker:** Hon. Noor, are you able to go through those names and interrogate the Minister further or you want more time?

**Mrs. Noor:** Mr. Speaker, Sir, I would like to have more time. The people who were issued with identity cards are 9,497. If you divide that by 12 districts and then by 12 locations, you will realize that it is only 65 people who were issued with identity cards per month. According to the figures that the Minister has just given us, if you analyse them, you will realize that it is only two people who were issued with identity cards per day. So, I need more time to go through this list.

*(Loud consultations)*

**Mr. Speaker:** Order! Order, hon. Members! The concern by the hon. Member is genuine and we want to give her a fair chance to interrogate the Minister fully on the answers that he has provided. So, Mr. Minister, I want to defer this Question to tomorrow afternoon. Will you be available tomorrow afternoon?

**Mr. Kajwang:** Mr. Speaker, Sir, I should be available tomorrow afternoon, only that we deal with applications and I have said that they were 12,000---

**Mr. Speaker:** Order, Minister! Prepare to respond to all supplementary questions including those by the Member and any other hon. Members who may come to her aid.

The Question is deferred to tomorrow afternoon.

*(Question deferred)*

*Question No.106*

SUSPENSION OF WKCDD/FM PROJECT  
BY WORLD BANK

**Mr. Namwamba** asked the Minister of State for Special Programmes:-

(a) whether she could explain the reasons that led to the suspension by the World Bank funding for Western Kenya Community-driven Development and Flood Mitigation (WKCDD/FM) Project; and,

(b) what steps the Government is taking to have the project back on track, and when the project is expected to restart.

**The Minister of State for Special Programmes** (Dr. Shaban): Mr. Speaker, Sir, I beg to reply.

(a) The suspension by the World Bank funding for WKCDD&FM Project was a result of the draft report of an in-depth audit carried out by the internal audit department of the Government of Kenya together with the World Bank from July through September 2009, which indicated that there may have been integrity issues in some of the project expenditure to the tune of Kshs55,993,947, consisting of Kshs12,740,597 allegedly confirmed as fraud; Kshs41,563,154 as suspected fraud and Kshs1.7 million as attempted fraud. On the basis of that draft audit report, the Government suspended the funding of the project as well as the staff implicated in these practices on 23<sup>rd</sup> September, 2009. On the same day, on the basis of the Government action, the World Bank suspended the disbursements to the projects pending the completion and validation of the audit reports. Subsequently, a taskforce that included internal auditors was formed by the Permanent Secretary for Special Programmes and Permanent Secretary, Treasury, to undertake a validation exercise on the draft audit report. It was, therefore, confirmed that out of the Kshs55.9 million alleged to have been lost, Kshs11.5 million was the amount validated to have integrity issues of which Kshs5.4 million was under the confirmed category and Kshs6 million under the suspected category.

(b) The Government has drawn an action plan which is agreeable between the World Bank and itself and is, therefore, implementing the following steps in bringing the project back on track:

- (i) Disciplinary action has been taken against officers suspected to have been complicit. Also procedures for recovery of funds have been instituted for seven line Ministry staff members.
- (ii) The Kenya Anti-Corruption Commission (KACC) has taken documents relevant to fraudulent transactions and to date, one officer has already been arraigned in court.
- (iii) Other investigations were conducted and concluded by the anti-banking fraud and the officers involved would have their cases commence in court by 1<sup>st</sup> April, 2010.

On when the project may resume, this is a decision that lies between the Office of the Deputy Prime Minister and Ministry of Finance and the World Bank.

*[Mr. Speaker left the Chair]*

*[The Temporary Deputy Speaker  
(Mr. Imanyara) took the Chair]*

**Mr. Namwamba:** Mr. Temporary Deputy Speaker, Sir, one of the actual reasons that led to the problems being experienced in this project is very obvious inherent and, indeed, incurable defects in the structural design and implementation of this project, which went to such critical elements like accountability mechanisms within this project. What is the Minister or Government doing to ensure that when this project takes off in the next phase, these defects will be cured, so that we forestall a similar scenario occurring?



**Dr. Shaban:** Mr. Temporary Deputy Speaker, Sir, yes, we have noticed that there are quite a number of loopholes in the project and that is why we were working on it with the World Bank to make sure that those loopholes are not used again to derail the project. The project has done very well in western Kenya and the worst thing that would happen is for us to stop it. We think it can move on to change the lives of the people of western Kenya. As part of the action plan, in my reply, I said that some staff members have been arraigned in court and others are already being investigated by the KACC. Also, the Anti-Banking Fraud Department has taken action. For the officers who have been suspended, we are just awaiting a word from the World Bank headquarters, so that the ones who had been exonerated after the validation was done can actually come back to work.

**Dr. Eseli:** Mr. Temporary Deputy Speaker, Sir, this is one of the largest projects ever implemented in western Kenya by the World Bank to the tune of over Kshs6 billion. Only Kshs600 million had been disbursed that far. By the time of the suspension of this programme, the World Bank was actually happy with the performance of the programme.

I wish to table here a letter from the World Bank showing that it was actually entirely satisfied with the performance of the programme. The suspension of this programme was by the Office of the Deputy Prime Minister and Ministry of Finance unilaterally. Could the Minister now confirm that actually it is a witchhunt with serious ethnic overtones in the sense that somebody is displeased by the fact that this programme employs Luos and Luhyas as per the terms of reference of this programme?

*(Dr. Eseli laid the document on the Table)*

**Dr. Shaban:** Mr. Temporary Deputy Speaker, Sir, as for the ethnic intonations in it, I beg to differ with my colleague. The truth is that there are some issues in this project. Unfortunately, action was taken before the validation was done. That was basically where the problem was, but it has nothing to do with the ethnic communities or the people who work in this project. This project has been tailor-made to help the people of western Kenya; Siaya and Bondo. It does not cover the whole of Nyanza, but it is intended to help the people improve on their basic livelihoods. I believe that the project was already achieving the goals it was meant for. So, the auditors carried out a normal audit and, yes, there were question marks which were there. I believe that the action which we are taking is something we should be able to learn from and cover the loopholes which are there.

**Dr. Eseli:** On a point of order, Mr. Temporary Deputy Speaker, Sir. I had wanted the Minister to confirm whether this project was suspended by the World Bank or the Office of the Deputy Prime Minister and Ministry of Finance.

**Dr. Shaban:** Mr. Temporary Deputy Speaker, Sir, the project was suspended after consultations between the Office of the Deputy Prime Minister and Ministry of Finance, World Bank and the Ministry of State for Special Programmes.

**Dr. Khalwale:** Mr. Temporary Deputy Speaker, Sir, as the Minister in charge of the implementing Ministry, what is the Minister doing to ensure that the consultations between the World Bank and the Ministry of Finance are done fast enough, so that the project can come back on course?

**Dr. Shaban:** Mr. Temporary Deputy Speaker, Sir, consultation have been going on even as late as last week. We had a session with the World Bank officials. We have agreed that we need to move on now to the Ministry of Finance with the World Bank

people so that we can finalise. Although the report is already in the head office, we have not had a feedback from the head office of the World Bank. The World Bank Country Director is willing to discuss and see how we can move on and push for faster resolution where this issue is concerned.

**Mr. Namwamba:** Mr. Temporary Deputy Speaker, Sir, this project is critical to the welfare of the western region, including my people in Budalangi. From the answer given by the Minister, this project was stopped on 23<sup>rd</sup> September last year. It is now exactly six months ago.

The reasons that she has given here for the suspension of this project are at best pariah and completely not of a character that would have warranted a project of this magnitude to be stopped. It is exactly six months of consultations. Six months of stalled projects where money is being wasted, especially for the projects that had already started. When she says that the decision on restarting this project belongs to the Ministry of Finance and the World Bank, yet she is the Minister in charge of the implementing Ministry, she must give a firm commitment as to when we shall expect this project to restart without any prevarication or circumlocution.

**Dr. Shaban:** Mr. Temporary Deputy Speaker, Sir, I do understand the frustrations of the Member of Parliament. I am just as frustrated as he is, because financial matters are dealt with by the Ministry of Finance and the donor. When it comes to those particular issues, I can only put in a word because I want my project to resume and go on to benefit the people of western Kenya.

*(Several hon. Members stood up  
in their places)*

**The Temporary Deputy Speaker** (Mr. Imanyara): Order! Order! Member for Naivasha, Question No.126.

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

**The Temporary Deputy Speaker** (Mr. Imanyara): Order! Order! Mr. John Mututho!

*Question No.126*

DECISION BY KEBS TO INCREASE  
PERMISSIBLE FLUORIDE LEVEL

**Mr. Mututho** asked the Minister for Industrialization:-

(a) what informed the decision by the Kenya Bureau of Standards to increase the threshold of permissible fluoride level in mineral water from 1.5ppm to 4.0ppm against WHO recommendations that mineral water shall not exceed 1.5ppm;

(b) if he could list the mineral water products with fluoride contents exceeding WHO levels indicating the respective manufacturers and dates of licensing as well as those below the WHO standards of 1.5ppm;

(c) if he could confirm that all mineral water in the market in the country appears to have the same PH and/or whether this PH levels are falsified; and,

(d) when the Ministry will impose the warning prescribed by WHO on all mineral water fluoride levels exceeding 1.5ppm.

**The Minister for Industrialization** (Mr. Kosgey): Mr. Temporary Deputy Speaker, Sir, I beg to reply.

**Dr. Eseli:** On a point of order, Mr. Temporary Deputy Speaker, Sir. With all due respect to the Chair, the Question on the World Bank projects touches on the lives of the whole western Kenya and Nyanza. We feel that we have not been given time to ventilate.

**The Temporary Deputy Speaker** (Mr. Imanyara): Order! You know what to do if you are not satisfied with an answer given by the Minister. The rules are very clear you can come back and you know the procedures.

Go on, Mr. Minister!

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

**The Temporary Deputy Speaker** (Mr. Imanyara): Continue, Mr. Minister!

**The Minister for Industrialization** (Mr. Kosgey): Mr. Temporary Deputy Speaker, Sir, I beg to reply.

(a) The decision to increase the threshold of permissible fluoride level for mineral water from 1.5ppm to 4.0ppm was based on WHO guidelines which do not indicate the maximum levels of fluoride for mineral water directly obtained from natural or drilled sources from underground water bearing strata, and without being subjected to any treatment other than filtration and decantation process. The CODEX standard, CS 108:1981 (amended in 2001) for Natural Mineral Waters, provides a threshold of 2mg/l fluoride for purposes of labeling and does not indicate the maximum limit of fluoride in water. The maximum level of 4.0mg/l was, therefore, adopted based on the United States Environmental Protection Agency (EPA) Standards for water and the mean value of fluoride detected in mineral waters sampled within Kenya.

(b) KEBS has, so far, certified 73 firms as per attached list, and issued them with permits to apply the standard mark on their mineral water products. Only two firms out of the 73 exceed the WHO standards of 1.5ppm with levels of 1.8ppm.

(c) Laboratory tests conducted during the initial testing of water, therefore, granting of the permits, and subsequent market surveillance are sufficient confirmation that the waters sampled are within acceptable PH range for mineral water (PH 6.5 - 8.5) and carbonated water (PH 4.0).

(d) The CODEX standards requires all mineral water manufacturers to place a warning on all their packaged products with a declaration that the product is not suitable for infants and children under the age of seven years when packaging mineral water which exceeds the threshold of 1.5ppm. Kenya Bureau of Standards ensures that this is adhered to when carrying out initial tests on water and during surveillance campaigns.

At the moment, we have over 100 firms now bottling water. Due to the increased sourcing of water, we are revising and consulting. We have set up a consultative committee comprising 11 Government organizations to further look at this sector which is growing. This is the list of firms which have been sampled showing PH levels. This is the list of firms which have been sampled to show the fluoride levels. They are 73 firms.

*(Mr. Kosgey laid the document on the Table)*

**Mr. Mututho:** Mr. Temporary Deputy Speaker, Sir, I seek your indulgence to inform the House the dangers of fluoride and then I will ask a question.

**The Temporary Deputy Speaker** (Mr. Imanyara): No, just ask a question.

**Mr. Mututho:** Mr. Temporary Deputy Speaker, Sir, looking at the documents that he has attached and reference made to the CODEX Standards, it is clear that the said standard is 632. It is also clear that it says a maximum threshold of 1 part per million. So, the issue that it is not specified does not arise.

Secondly---

**The Temporary Deputy Speaker** (Mr. Imanyara): One question, Mr. Mututho!

**Mr. Kosgey:** Mr. Temporary Deputy Speaker, Sir, I have the same CODEX standards which the hon. Member has. So, he is not holding a strange document. It is a document that is available to everybody in the standards world. He is quoting on 632. As I said, it does not specify the maximum levels, with respect to water which is drilled from sources underground, from water bearing strata and without being subjected to any treatment other than filtration and decantation. Some of the water from the tapped water is different from underground water bearing rocks. This is where there is no specific maximum. When the people who are formulating our standards looked at this, they had to specify a maximum. They went into US EPA standards and it was quoted a maximum of 4.0 mg/l. So, it was not really that this is specifying 1.5ppm and we had exceeded.

*(Loud consultations)*

Mr. Temporary Deputy Speaker, Sir, there is loud consultation forcing me to raise my voice.

*(Loud consultations)*

**The Temporary Deputy Speaker** (Mr. Imanyara): Order! Order, hon. Members!

**Mr. Kosgey:** So, Mr. Temporary Deputy Speaker, Sir, this codex, the standard here, which is actually a World Health Organization (WHO) standard under 6.32 specifically says a maximum standard of 1.5PPM for different water, which is not the one we are given as a maximum.

Mr. Temporary Deputy Speaker, Sir, our water – the 73 that we have sampled – all of them conform except two. Even those two had a maximum of 1.8 PPM, which is still within the maximum we had given for that particular---

*(Loud consultations)*

Mr. Temporary Deputy Speaker, Sir, there are loud consultations going on and I cannot be heard!

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

**The Temporary Deputy Speaker** (Mr. Imanyara): Order, hon. Members! Order! Order, Eng. Rege!

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

**The Temporary Deputy Speaker** (Mr. Imanyara): Order! I am aware that hon. Members want us to go to the next Order, but we must allow the Minister to complete and address the supplementary questions coming up.

What is your point of order, Mr. Mututho?

**Mr. Mututho:** Mr. Temporary Deputy Speaker, Sir, is the Minister in order to continue on the Floor of the House misleading us about the threshold of parts per million while in his answer, No. 58 is Keringet Water, which he says is 1.1 PPM, whereas the label is clear; they themselves are saying that it is 1.8 PPM! The whole thing is wrong; it is cooked up!

**Mr. Kosgey:** Mr. Temporary Deputy Speaker, Sir, in fact, Keringet falls exactly on what we have defined as water originating from rocks, underground water. We have said that since this standard does not specify the maximum levels that particular source should be, we have specified a maximum of 4 PPM, so, that, 1.1 PPM or 1.8 PPM, is still within our recommended maximum levels.

**Eng. Rege:** Mr. Temporary Deputy Speaker, Sir, bottled mineral water loses its viscosity or density of 1 after you open it and in three days time; it becomes very thick. Can the Minister assure this House that this water is still drinkable by children, if they happen to get hold of water inadvertently?

**Mr. Kosgey:** Mr. Temporary Deputy Speaker, Sir, I have said in my reply that if water exceeds the maximum level for infants; if it exceeds 1.5 PPM, they are required to put a warning on the label, which says that the water is not suitable for infants and children under the age of 7 years. Now, if water has been opened and, as the hon. Member has said, it loses its viscosity – it becomes, probably, thicker or whatever – I have not been able to analyze a sample which has been opened to be able to know what chemical changes occur when it is exposed to air. Of course, as a chemist, I know that if you really expose a fluoride or a chloride, for that matter, to air, it can have a small reaction to produce a hypochlorite or a hypofluoride. So, it can change its viscosity.

Thank you, Mr. Temporary Deputy Speaker, Sir.

**The Temporary Deputy Speaker** (Mr. Imanyara): Ask your last question, Mr. Mututho!

**Mr. Mututho:** Thank you, Mr. Temporary Deputy Speaker, Sir. You heard the Minister admit that in Kenya, it is legal and perfectly in order to have 4.0 PPM as fluoride levels. Is he prepared then to accept public liability if he is taken to court, particularly by children and mothers, pregnant ones in particular?

**Mr. Kosgey:** Mr. Temporary Deputy Speaker, Sir, the hon. Member should not be allowed to get away with that kind of statement. I have said, and I repeat, that the maximum levels that are allowed of water, say from the tap which has been filtered, is 1.5 PPM, as specified in the codex standard here. However, when you go to water bearing rocks, we have said that there was no specification for that, and we have specified that as having a maximum of 4 PPM, in conformity with the standard which already exists – the American standard. We have also said that wherever there are maximum levels above 1.5 PPM, producers should have a label saying that it is not suitable for children under 7 years old. So, if you are giving your child fluoride levels above the recommended 1.5 PPM for ordinary water and then--- You should read the labels! So, there is no liability to be incurred by KEBs or anybody else.

Thank you, Mr. Temporary Deputy Speaker, Sir.

*Question No.136*NON-UTILIZATION OF FUNDS ALLOCATED FOR  
DEVELOPMENT OF KIMUMU MARKET

**Prof. Kamar** asked the Deputy Prime Minister and Minister for Local Government:-

(a) to explain why the money allocated to Eldoret Municipal Council, for the development of Kimumu Market in the Financial Year 2008/2009, amounting to Kshs50 million has not been spent;

(b) why the Ministry diverted funds meant for the development of the Eldoret East fresh produce market, which was obtained through the stimulus package budget in 2009/2010, to the Kimumu Market; and,

(c) when the market will be constructed?

Mr. Temporary Deputy Speaker, Sir, I have not received the written answer.

**The Assistant Minister for Local Government** (Mr. Nguyai): Mr. Temporary Deputy Speaker, Sir, this answer was provided to Parliament early this morning, and it was signed by the Minister; I apologize if she has not received it. But I do have a copy of the answer; I do not know if she would indulge me, so that I read through it and then she can continue to interrogate me? Is that okay?

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

(a) It is true that the Government allocated Kshs.50 million for the development of Kimumu Hawkers Market in the Financial Year 2008/2009, but the amount was withdrawn by the Treasury due to the austerity measures introduced by the Government vide Treasury Circular No. 2 of 2009.

(b) I am not aware of any diversion of funds under the Economic Stimulus Programme from Kimumu Market. The Economic Stimulus Programme is at the evaluation stage and the allocation of Kshs10 million to the Eldoret East fresh produce market is intact.

(c) During the 2009/2010 Financial Year, funds for the market development were not provided; even for other on-going market projects and, therefore, there are no funds to undertake the project.

**Prof. Kamar:** Mr. Speaker, Sir, the Assistant Minister has said that he is not aware that the funds were diverted. Is he telling us that there is another Ministry that put up adverts to say that the stimulus package market of Eldoret East would be set up in Kimumu, the same site they had allocated Kshs50 million?

**Mr. Nguyai:** Mr. Speaker, Sir, the adverts that appeared in the newspapers depended on the information provided by particular constituencies. The constituency which the hon. Member comes from, including mine---

**Prof. Kamar:** On a point of order, Mr. Speaker, Sir. Is the Assistant Minister in order to mislead the House? I am telling him that they put up the advert without consulting the people of Eldoret East?

**Mr. Nguyai:** Mr. Speaker, Sir, the information that I have is that the funds that were allocated for Kimumu Market are on a two-and-a-half acre plot adjacent to the market. It is not on a particular plot where the original project was to be carried out.

**Mr. Njuguna:** Mr. Speaker, Sir, having heard the Assistant Minister clearly on the Stimulus Package Project concerning the fresh produce market, could he indicate to this House when the market will be established so that wananchi can know that this was not an illusion or a failure as indicated?

**Mr. Nguyai:** Mr. Speaker, Sir, the majority of the tenders for the Economic Stimulus Package markets are in the final stage of evaluation. The majority of the tenders should be awarded most likely by the end of April, 2010. The projects will commence from then on.

**Mr. Ethuro:** Mr. Speaker, Sir, in his answer to part (a) of the Question, the Assistant Minister has said that the project could not be sustained and had to be taken away because of stringent conditions. He has said now that they will award tenders for the Economic Stimulus Programme (ESP) by the end of April. Could he assure this House that the markets under the ESP will be started within this financial year, and that they will not run the risk of diversion of funds?

**Mr. Nguyai:** Mr. Speaker, Sir, the funds that were reduced were those for major markets which had not been started. However, all funds under the ESP are intact and all projects due will be carried out.

**Prof. Kamar:** Mr. Speaker, Sir, now that I have informed the Assistant Minister that we did not submit anything, could he assure this House that they will desist from awarding a tender to the market whose site we had not chosen and give us a chance to select the site for the market?

**Mr. Nguyai:** Mr. Speaker, Sir, with all certainty, if the venue was not selected upon consensus and consultations from the hon. Member and her constituents, we will give them the chance to select the venue they desire.

## QUESTIONS BY PRIVATE NOTICE

### CAUSE OF DEATH OF FISH IN LAKE NAIVASHA

**Dr. Otichilo:** Mr. Speaker, Sir, once again, I beg to ask the Minister for Fisheries Development the following Question by Private Notice.

(a) Could the Minister inform the House the cause of recent death of fish in Lake Naivasha and reveal the scope of effects on other aquatic life in the lake?

(b) Could the Minister indicate the potential toxic levels of all chemicals used, give trends in the levels of lake pollution or eutrophication in the last ten years and reveal the expected long-term impact on aquatic life?

(c) What mitigation measures is the Minister taking to save the fish and other aquatic life in the lake?

**Mr. Speaker:** Is the Minister for Fisheries Development here? The Minister for Information and Communications, could you hold brief for your colleague? What is happening to the Minister for Fisheries Development?

**The Minister for Information and Communications (Mr. Poghio):** Mr. Speaker, Sir, I thought that the Minister had indicated that he would not be able to answer the Question today. However, now that he is not here the Question can be deferred to another day and I will pass the information to him.

**Mr. Speaker:** Is the Assistant Minister for Fisheries Development here?

*(Loud consultations)*

Order, Members! The impression we get, unfortunately, from the record of events is that the Minister may very well be avoiding answering this Question! This is because this Question was asked and deferred to today because the Minister did not have adequate information as I recollect. So, he has no reason not to be here a second time!

**The Minister for Information and Communications** (Mr. Poghio): Mr. Speaker, Sir, I request for a second chance and see if that can be disproved.

**Mr. Speaker:** Fair enough! I will defer this Question to Thursday this week. In the meantime, the House will not hear the Minister on any business whatsoever, including his contribution to the Constitution until we have an explanation.

*(Question deferred)*

STATUS OF ICT PROJECTS IN CONSTITUENCIES UNDER  
ECONOMIC STIMULUS PACKAGE

**(Mr. Shakeel)** to ask the Minister for Information and Communications:-

(a) To update the House on the Status of the Information Communication and Technology Project for each constituency planned to be funded through the Economic Stimulus Package.

(b) Will the Minister supply desktop computers to each constituency under the same project in view of exorbitant proposal of the IT Buses of Kshs7 million which was rejected by the House?

**Mr. Speaker:** Hon. Members, Question No.1 by Private Notice is deferred until Wednesday afternoon. This is largely because the Member for Kisumu Town East was not able to get here on time. The Minister was actually dutifully here as we started. So, the Member for Kisumu Town East, please, try to be on time next time. I know there is a problem with the traffic, but it affects all of us.

*(Question deferred)*

Hon. Members, that brings us to the end of Question Time.

**MINISTERIAL STATEMENT**

CANCELLATION OF KQ FLIGHT NO.0403

**The Assistant Minister for Transport** (Mr. Mwau): Mr. Speaker, Sir, I wish to make the following Ministerial Statement regarding the cancellation of the KQ Flight No.0403 on 26<sup>th</sup> February, 2010 scheduled for Addis Ababa-Nairobi route.

Mr. Speaker, Sir, I wish to clarify that the Kenya Airways Flight No.KQ0403 of 26<sup>th</sup> February, 2010 was cancelled after its crew ran out of the duty time allowed. This was caused by the delay in sorting out passengers who had overflowed from the flight



that had been cancelled the previous day. The route's normal operations were restored the next day, 27<sup>th</sup> February, 2010.

The main reason of the first cancellation arose from the Kenya Airways issuance to the media on 25<sup>th</sup> February, 2010 of a statement announcing that its pilot under the umbrella of the body of Kenya Airlines Pilots Association (KAPA) had withdrawn goodwill with the management of the Kenya Airways over a failed agreement during negotiations of encashment of outstanding leave days. This led to several cancellations and the delay across the KQ network. The KQ Flight Nos. 0403 and 0406 were amongst those affected.

All the affected passengers, among them hon. David Koech, Member of Parliament for Mosop, were handled with deserving respect and utmost courtesy by the airline staff in Addis Ababa. Part of this included hotel accommodation and related expenses which are paid as normal airline operation costs. The Kenya Airways paid a total of US\$50 as passage fees following the delay.

Mr. Speaker, Sir, the standards of our national carrier have not dropped but have grown from strength to strength with a significant improvement in its network and product offering in just a few years.

There have been dramatic improvements in all time flight departures and arrivals that hit at all times a record high of 95 per cent as measured by the International Air Travel Association (IATA) standard in September, 2009. The airline continues to maintain a high degree of liability, schedule integrity and high safety standards throughout its operations.

Earlier this year, KQ was again recognised as the first airline in Africa to be awarded the International Safety Audit for Ground Permission for its operations at Jomo Kenyatta International Airport (JKIA), Nairobi and Moi International Airport, Mombasa.

The national career has continued to earn several accolades in recognition of its excellence in the market place during the last one year alone, owing to its reputation. These include and not limited to the following:-

1. Marketing Society of Kenya Award for the Kenya Best Flag Bearer in Kenya.
2. The airline was ranked second in the East African Most Respected Companies Award last year.
3. In Africa, KQ has been declared African Business Airline of the Year during the African Investors Tourism Award ceremony held recently in Zimbabwe.

Mr. Speaker, Sir, the above is proof that the management and staff of Kenya Airways continue to offer a superior brand of service and experience to all customers and stakeholders with a warm, caring and friendly attitude that signifies and enhances the career's position as "*The Pride of Africa*".

Thank you.

**Mr. Koech:** Mr. Speaker, Sir, first, let me thank the Assistant Minister for the Ministerial Statement. Kenya Airways is our national career and I would like, on the onset, to congratulate them for the many awards they have received. However, the concern we have is that, being "*The Pride of Africa*", I did request the Assistant Minister to indicate to this House how much money was spent on payment to hotels and parking fee at Addis Ababa Airport.

Secondly, the reason that he has given for the delay on that particular day is because the crew ran out of their duty time. From Addis Ababa to Nairobi is only one

hour and forty minutes flight time. Would it not have been better for the crew to fly to Nairobi and protect the good name of this country? I saw serious disappointment from those who were on board.

**Mr. Shakeel:** Mr. Speaker, Sir, earlier last year, the former Minister for Transport, Mr. Mwakwere, told us in this House that Kenya Airways was not a national airline. Could the Assistant Minister confirm whether the former Minister was correct? Could he confirm that Kenya Airways is a national airline, and that it is not owned by a foreign shareholder?

**Prof. Kamar:** Mr. Speaker, Sir, is the Assistant Minister aware that when a flight was parked in Ethiopia on 26<sup>th</sup> February, 2010, on 28<sup>th</sup> February, 2010, another flight left Bujumbura, landed in Kigali, where passengers were kept in the aeroplane for three hours, causing the crew to also run out of duty hours and, therefore, causing them to sleep in Kigali?

**Mr. Speaker:** Yes, Assistant, Minister!

**The Assistant Minister for Transport** (Mr. Mwau): Mr. Speaker, Sir, first, on Prof. Kamar's question, I am not aware of the incident that happened during that particular time. Since that is not part of what was sought in the Ministerial Statement, I will not interrogate that process.

I hope that satisfies you, Madam.

Mr. Speaker, Sir, I would like to state that the total cost for the two nights hotel accommodation, Visa and telephone expenses was US\$19,429. I would also like to reiterate that the reason for the cancellation of the flight was not just that particular flight. It was because there was another flight, Flight KQ0406, which had affected the flight to Ethiopia. Flight KQ0406 was cancelled. The cancellation of that flight affected Flight KQ0402.

In response to Mr. Shakeel's question, I would like to state that it is a matter of public importance to note that Kenya Airways is a company floated at the Nairobi Stock Exchange. Therefore, it is a public company. It has shareholders who are foreigners and locals. The Ministry's responsibility is derived from the fact that flying is a matter of national interest. So, whether the company is private or national, the Ministry has to ensure that the passengers' safety is catered for. Even if the airline belonged to a private company and a question is raised in this House, it becomes the duty of the Ministry to find out exactly what happened in order to respond.

Thank you.

*(Several hon. Members stood up in their places)*

**Mr. Speaker:** Order! Order, hon. Members! Is there any other Statement due for delivery that is ready? If not, we will move to requests, starting with hon. Kioni!

## POINT OF ORDER

ACQUISITION OF INTERNATIONAL CASINO  
PLOT LR.NO.2097437

**Mr. Kioni:** Mr. Speaker, Sir, I rise on a point of order to request for a Ministerial Statement from the Minister for Lands on the secret sale of public plot L.R. No.2097437, popularly referred to as “The International Casino”, which is located at the Museum Hill.

In that Statement, I would like the Minister to give the background of this property, indicating the following: The rental income on it, who the developer who had erected a fence around the property is, when and under what circumstances he acquired the property; confirm whether the procedure of allocating this public land was followed, when and how the public lost this property, what was paid for it; whether that consideration was the market price and whether he will consider allowing the ownership of the property to revert back to the public.

Mr. Otieno Kajwang, can you hold brief for the Minister for Lands?

**The Minister of State for Immigration and Registration of Persons** (Mr. Kajwang): Mr. Speaker, Sir, I undertake to inform the Minister so that he can respond sometime next week after doing some serious consultations.

**Mr. Speaker:** Is Tuesday next week, okay?

**The Minister of State for Immigration and Registration of Persons** (Mr. Kajwang): Yes, Mr. Speaker, Sir.

**Mr. Speaker:** Order, hon. Members! Hon. Otieno Kajwang has full instructions to brief the Minister for Lands.

**The Minister of State for Immigration and Registration of Persons** (Mr. Kajwang): Mr. Speaker, Sir, the Ministerial Statement will be issued on Tuesday afternoon.

**Mr. Speaker:** It is so ordered! This is a matter of public interest. We all have known The International Casino for many years. So, it should not be too difficult for the Minister to deal with this matter.

### COMMUNICATIONS FROM THE CHAIR

Hon. Members, before we move to the next Order, I have two Communications to make.

#### PRESENTATION OF BUDGET POLICY STATEMENT

Hon. Members, further to my Communication to this House on 16<sup>th</sup> March, 2010, in respect of the Budget Policy Statement, I wish to draw your attention to the fact that the Budget Policy Statement having been laid on the Table this afternoon, stands committed to the Budget Committee for consideration, pursuant to Standing Order No.143(3). Further, in terms of the provisions of Standing Order No.143 (4), in considering the Budget Policy Statement, the Budget Committee shall consult each Departmental Committee and shall, not later than 15<sup>th</sup> April, 2010, lay its Report before the House.

As hon. Members are aware, in accordance with Standing Order No.198, all Departmental Committees have been discharging their respective mandates through inter alia, inspection tours, investigations and interactions with various Ministries and other stakeholders. The consultations between each Departmental Committee and the Budget Committee now presents appropriate opportunity for Departmental Committees to

articulate the policies and strategies required for the Ministries under their jurisdiction in the forthcoming Annual Budget.

Given that the annual budget is the basis of delivery of services, I urge the Budget Committee and the Departmental Committees to accord these consultations utmost importance and priority.

*(Several hon. Members stood at the Bar)*

Thank you.

Those Members at the Bar may walk in before I do the next Communication!

Order, Eng. Rege! Could you find a place to sit?

PROCEDURE FOR CONSIDERATION OF  
THE DRAFT CONSTITUTION

**Mr. Speaker:** Hon. Members, you will recall that the Chairperson of the Parliamentary Select Committee on the Review of the Constitution tabled the Report and the Draft Constitution submitted by the Committee of Experts (CoE) on Tuesday the 2<sup>nd</sup> March, 2010 pursuant to Section 33(3) of the Constitution of Kenya Review Act, 2008. He further gave Notice of Motion for the House to approve the Draft Constitution.

The House is expected to consider the Draft Constitution and do either of the following as required by Section 33(4) of the Constitution of Kenya Review Act:-

(a) Approve the Draft Constitution without amendments and submit it to the Attorney-General for publication; or

(b) Propose amendments to the Draft Constitution and submit the Draft Constitution and proposed amendments to the Attorney-General, who shall, within seven days, submit them to the CoE for consultation and re-drafting.

Consequently, I would like to guide the House on the procedure that will obtain with regard to the consideration of the Draft Constitution.

There are certain precedents that have been set in the past that could be useful in the present scenario, which it must be noted, is very unique. On the 27<sup>th</sup> October, 1964, when the House of Representatives was debating the Constitution of Kenya (Amendment) Bill which led to the creation of the Republican Government in Kenya, the amendments were introduced in the House in the form of a Bill. The House then, as it is today, was embarking on a very important constitutional debate and changes. Whereas the House then carried a major review of the Constitution in the form of a Bill, in our present case, the House is required by law to approve the Draft Constitution, with or without amendments.

*(Several Members stood at the Bar)*

A situation like the present case occurred on the 30<sup>th</sup> June, 2005 when the House was deliberating on a Report of the Select Committee on Review of the Constitution of Kenya on contentious issues identified in accordance with Section 27(1) (b) and Section 27(2) of the Constitution of Kenya Review (Amendment) Act, 2004 (now repealed), laid on the Table of the House on the 29<sup>th</sup> June, 2005. The House passed the Motion which

culminated in the 2005 Referendum. This Motion was treated like any other Motion in the House.

Hon. Members, I will allow those at the Bar to come in!

Hon. Members, in view of the above, I direct that the considerations of the Draft Constitution by the House shall be done in the plenary through a Motion to be moved by the Chairperson of the Parliamentary Select Committee on the Review of the Constitution as indicated in order No.8 in the Order Paper.

Once the Motion has been seconded and the Question proposed, the Motion will be debated pursuant to provisions of Standing Order No.53. Thereupon, any Member who wishes to propose amendments to the Draft Constitution may do so, provided that the amendment shall relate to a specific Article or Schedule contained in the Draft Constitution.

In order to have an orderly consideration of the Draft Constitution, any proposed amendments will be framed in the following manner:-

“That, pursuant to the provisions of Section 33(4) of the Review Act, this House approves the Draft Constitution submitted by the Committee of Experts and laid on the Table of the House on the 2<sup>nd</sup> March, 2010 subject to deletion or insertion of the following words, article, clause or schedule as the case may be.”

Every proposed amendment shall be signed by the proposer and handed over to the Clerk pursuant to the provisions of Standing Order No.54 commencing after the question of the Motion has been proposed. The amendments will then be handed over to the legal counsel for drafting and harmonization with other provisions in the Draft Constitution.

In order to abide by the practice established by the House on consideration of a Bill, any such proposed amendments once approved, will be annexed on the Order Paper.

Hon. Members, for the convenience of the House, I direct that all proposed amendments that will have been received by the rise of the House on Wednesday the 24<sup>th</sup> March, 2010 afternoon sitting, be appended to the Order Paper for the House to begin considering them from Thursday, 25<sup>th</sup> March, 2010.

In the meantime, Members contributing to the Motion will restrict themselves to the general debate. To allow Members who will have already spoken to the Question to move amendments, I order that the provision of Standing Order No.74 relating to speaking more than once to a Question shall not apply to them and will, therefore, be permitted to move their amendments.

(Applause)

Hon. Members, your attention is drawn to Section 47A(b) of the Constitution which states *inter alia*:-

“No alteration can be made to the Draft Constitution tabled unless such alternation is supported by the votes of not less than 65 per cent of all the Members of the National Assembly (excluding Ex-Officio Members)”.

Consequently, whenever there is a proposed amendment to the Draft Constitution framed as a foresaid, the House must proceed on a Division. However, the House shall not proceed to a Division unless and until it has requisite numbers; this is 145 Members

pursuant to the provisions of Standing Order No.68 (1). Any amendment which fails to obtain the requisite numbers shall be deemed to be negated.

While considering the amendments, the Chair will take into account the chronological order of the Articles in the Draft Constitution.

Hon. Members, your attention is drawn to the provisions of Standing Order No.55 (2) which states that:-

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

It should not be too complicated. Those of you who will find it difficult, we will give you direction every time you have any difficulty at all. Apart from amendments, any other procedural question proposed in the consideration of the Draft Constitution, such as adjournment Motions, will be determined by a majority of the votes of the Members present and voting, pursuant to Section 54(1) of the Constitution.

If any amendment is carried, the motion will then be debated as amended. When debate on the Motion is concluded, the Mover will reply. The Chair will then put the Question of the Motion in its original form if no amendment is carried. If any amendment is carried, the Chair will put the Question of the Motion with the amendments agreed to. The Draft Constitution shall stand approved by the House unless the Motion for approval is negative by votes of not less than 65 per cent of all the Members of the National Assembly (excluding the ex-official Members).

In addition, I wish to bring to the attention of the Members that Section 47 (2), paragraph (c) of the Constitution requires the House to conclude its debate on the Draft Constitution within 30 days of its introduction in the House. In view of the fact that the report was tabled on the 2<sup>nd</sup> March, 2010, the House must conclude the debate on or before Thursday, the 1<sup>st</sup> April, 2010. Thank you.

**The Minister for Lands** (Mr. Orengo): Mr. Speaker, Sir, for the convenience of hon. Members, would it be possible that a copies of your directions are made available in our pigeon holes? It will be difficult to retrieve it from the HANSARD as quickly as possible; it is important that when we are debating this very important motion that we strictly comply with your directions.

**Mr. Speaker:** Yes, Minister for Lands, that is okay and I direct that this communication be made available at the rise of the House today, so that all Members have access to it from their pigeon holes.

*(Mr. Ruto stood up in his place)*

What is it Mr. Isack Ruto?

**Mr. Ruto:** Mr. Speaker, Sir, I wish to request for directions as to the stage we are in according to the Constitution of Kenya Review Act. I also wish to seek clarification as to what document is before the House. We are dealing with it as a Motion from the Chairman of the Parliamentary Select Committee on Constitution Review. There are various generous references to it as a “Draft Constitution”. At what stage does it become a Draft Constitution? It has been generously referred to as a Draft Constitution all the way from Bomas. But at this stage, in my view, we have to be guided by the review Act and the Act states--- The Constitution refers to it generously but I will leave that to Mr. Orengo.

The point I am putting across is that you have indicated to us that we are now at Section 33(4). At this stage, we are supposed to debate it and do either (a) or (b). After this, it is indicated what happens to the document. But Section 33 (5) specifically states, and I wish to read it out for us to understand.

Section 5(a) states that the National Assembly shall consider the draft Constitution submitted under Sub-section 5. That is, whatever will be submitted to us after Sub-section 5 in accordance with the provisions of Section 47A (2) (b). At this stage, it assumed that, that is when this document starts a life as a draft Constitution. Otherwise, in the Review Act, there would have been no need for us to introduce an amendment in Sub-section 5(a), which determines the stage at which the provisions of Section 47A(2)(b) start becoming applicable. Otherwise, it has generously been referred to as a draft Constitution all along. My position is also based on the philosophical view that a draft Constitution cannot, obviously, emanate from a group of seven sitting somewhere. There must be some form of representation. There has been no form of representation that has discussed this document except at this particular stage. If that is the case, the Review Act specifically guides this process and at 4, it simply tells what to do. I do not want to take the time of this House by referring to it because hon. Members can read it for themselves. We are at 4 and 5(a) says that we have to go through the provisions done by 5. At that stage is when we apply Section 47A. Otherwise, I do not believe that Parliament acts in vain. There would have been no need for us to pass a law that specifically indicates how we are moving. At this stage, there is no reason for us to flout our own laws. Why would we expect anybody else to follow them? I wish to seek your indulgence because this is a very delicate matter; we are dealing with a replacement of an entire Constitution. This document is being discussed by a representative body for the first time. There has been no constituent assembly. I believe that, that particular edition was meant to cure the fact that there has been no constituent assembly to discuss the draft Constitution. The Committee of Experts (CoE) is not a constituent assembly. The Parliamentary Select Committee (PSC) is not a representative body. It was just a technical group which is now forwarding a document which even the Committee membership does not entirely own.

*(Applause)*

If we knew that we were supposed to own the document, we would have put in much more effort to look at it. But as of now, the document emanated from a group of seven called a CoE. I do not know! But as of now, we are at Stage 4. I would like some guidance as to whether we are still at Stage 4 or we have jumped to Stage 5.

**Mr. Mungatana:** On a point of order, Mr. Speaker, Sir. I am wondering whether we are reading the same law with Mr. Ruto because we cannot, in any way, try to interpret that law in any other way. Everybody in this House and the country at large knows that the intention of Parliament is to make alteration if necessary and if possible. But it should be so grave a matter that it should gather two thirds majority support of the House.

*(Applause)*

Is it in order for us to seek to try and introduce an interpretation that seems to suggest that a simple majority should, in fact, be able to amend any section? This is not a simple report. Everybody knows that it is a constitutional matter. Is he in order?

*(Dr. Machage stood up in his place)*

**Mr. Speaker:** Order, Dr. Machage! The Member for Ikolomani was on his feet earlier than you were!

**Dr. Khalwale:** On a point of order, Mr. Speaker, Sir. This point of order by Mr. Ruto--- He has raised two issues which are really disturbing me and I beg that, in your ruling, you address yourself to them. The first one is that, without saying it, he is implying that the Chair should find that for us to make this decision, we should not be guided by the requirement of two thirds majority, but a simple majority. If this is what the Chair should, therefore, rule, then it means that we want to use the Chair to help hon. Members who want to mutilate this particular draft to fit their own desires. The second thing which he has raised, and which I would like you to comment on, is that only a group of seven has worked on this document. If that is not arrogance; if that is not lack of respect for the millions of Kenyans who sat for all those days to give their views; if that is not lack of respect for the PSC, CoE and assume that the only competent people who can now talk about this is us, then I beg that the Chair finds him out of order.

*(Applause)*

**The Assistant Minister for Roads (Dr. Machage):** On a point of order, Mr. Speaker, Sir. Mr. Ruto raised a point of order that is of far much importance to us in the House and yet, Mr. Mungatana purported to answer it on your behalf. Was he in order to do that? The point of order was raised directly to you, the Chair! Would I, therefore, be in order to suggest that Mr. Mungatana's suggestions be completely erased from the HANSARD for the purposes of this discussion?

*(Laughter)*

**Mr. Speaker:** Order, hon. Members! I will deal with the concern by Dr. Machage easily. Dr. Machage, the Speaker enjoys that discretion to take Members contributions when a matter is raised, more so, a matter of a weighty nature such as this. So, the contributions by Mr. Mungatana are legitimate and the Chair accepts them in good faith; except that the Chair does not make a finding on them. What Mr. Mungatana attempted to do is persuade the Chair to think in a given direction which Dr. Machage you could reverse by putting in place a contribution that will persuade me otherwise. So, I will not direct that the contributions by Mr. Mungatana be erased from the HANSARD because I will find them useful even as I exercise my mind on what ruling to make.

**The Minister for Lands (Mr. Orenge):** Mr. Speaker, Sir, the points brought out by my friend, Mr. Ruto, are important, but I think they are based, with respect, on some fallacies. I think it is because he is reading the Act without reading it together with the Constitution. Indeed, the CoE had indicated that there was a need to amend the Review Act because it came before the constitutional amendments and there were some sections



in the Review Act which were not completely in consonance with the constitutional provisions. To answer his question, if you read the Review Act, it takes about a draft Constitution. That is the document which would be introduced to this House if we were solely dealing with the Review Act. But the document recognized by the Constitution--- If you look at your copy of the document which was introduced by the Chairman of PSC, it is titled "Proposed Constitution". Those are two different things!

The second fallacy is that Mr. Ruto is still looking for this animal called the constituent assembly. A constituent assembly can actually enact a Constitution!

This Parliament decided that the organ that will enact a new Constitution is not Parliament; it is the people of Kenya. If you read Section 47 together with 47(a) of the Constitution, it says that sovereign power to replace the Constitution of Kenya vests in the people of Kenya but the power to amend is with this Parliament. So, we can amend but we cannot replace the Constitution.

So, this Parliament is a transit station in the making of a new Constitution. It is a very important transit station. The making of the Constitution will be expressed by the popular will of the people through a referendum. This arose out of the Ringera judgment where he said that Parliament lacks the capacity to enact a new constitution; that you can always replace a constitution through a constituent assembly directly elected by the people for that purpose. If there was no constituent assembly, the only way was to replace the constitution through a referendum.

Mr. Speaker, Sir, for that reason, I would encourage the Member for Chepalungu that if you read those sections separately without reading the Constitution and Mr. M. Kilonzo will tell you, such provisions of an ordinary legislation which do not comply with the Constitution are either rendered otiose or they are rendered to be inconsistent with the Constitution which is the supreme law of the land.

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

**Mr. Speaker:** What is it Mr. I. Ruto and be careful that you do not go to argument.

**Mr. Ruto:** Mr. Speaker, Sir, I am not going into arguments. I only want to bring to the attention of the hon. Minister that I am not arguing along the lines as to who has the responsibility of replacement and I am not arguing against the participation of the Kenyan people and its replacement through the referendum. I was asking about the sequencing of our events and at what stage, which I am requesting the Chair to make a ruling on, at what stage do we apply the provisions of Article 59(a) of Section 33.

I want to confirm to Mr. Orenge that I have read the Constitution. I can read them simultaneously, but you cannot challenge my ability to read them. I am talking about the sequencing. What is the sequencing and at what stage do these things become applicable?

**Mr. Speaker:** Order, Mr. Ruto! Your point is made. Indeed, it is repetitive.

**Mr. Gabbow:** Mr. Speaker, Sir, I understand and know that the term of the Committee of Experts has expired. Are they still an organ of the review process?

**Mr. Speaker:** Order, hon. Members!

*(Mr. Outa stood up in his place)*

Member for Nyando, you either freeze or find a place to sit.

**Hon. Members:** Freeze! Freeze!

**Mr. Speaker:** Hon. Members, I have heard the matter canvassed by Mr. Ruto on a point of order and I appreciate that he has serious concerns with respect to interpretation of the Constitution of Kenya Review Act as passed by this House in 2008 read alongside the Constitution of this country and the supplements made in the points of orders raised by other hon. Members; Mr. Mungatana, Dr. Khalwale, Dr. Machage and Mr. Orengo.

Hon. Members, I will take time to consider those issues as canvassed. For the moment, I am able, having acquainted myself with the relevant provisions of the law to direct that we proceed with Order No.8 for the reason that this Notice of Motion was in fact given on 2<sup>nd</sup> March 2010 when the Report of the Committee was laid on the Table. There was no objection raised to the Notice of Motion as given.

With respect to the Motion itself and the content of the Motion, hon. Members are at liberty to make contributions to the Motion after it is moved, seconded and proposed.

So, hon. Members, just by way of preliminary observation, the stage at which we are, according to the Constitution of Kenya Review Act, under Section 5 is the stage that we ought to be at as an organ of review. The two organs of review that precede us have actually discharged their obligations as envisaged by the Act. So, this third organ of review must begin to discharge its mandate as expected by the Act.

Hon. Members, I will be giving further directions on those fine points as to what stage we are, what we can do and what we cannot do outside the contributions that you make in the debate. I will do that tomorrow afternoon. So, for the moment, I will direct that we proceed to Order No.8.

**Mr. Ethuro:** On a point of order, Mr. Speaker, Sir, on a different matter. Thank you for indulging me. I know the excitement for the next Order. You made a ruling two weeks ago on the memorandum from the President on the matter of the Office of Ministers Bill that was due to the House on 17<sup>th</sup> March which was last week. Now today if my reading of the Order Paper is the same like yours, it reads 23<sup>rd</sup> March. I just need further guidance from the Chair.

**Mr. Speaker:** Indeed, I gave directions on that matter and I gave further directions on Wednesday last week. I directed that I would be reading the Presidential memorandum tomorrow Wednesday. We will then proceed to transact business on that memorandum as I will direct tomorrow.

## MOTION

### APPROVAL OF DRAFT CONSTITUTION OF REPUBLIC OF KENYA

**Mr. Abdikadir:** Mr. Speaker, Sir, I beg to move:-

THAT, pursuant to the provisions of Section 33(4) of the Constitution of Kenya Review Act, 2008, this House approves the Draft Constitution submitted by the Committee of Experts and laid on the Table of the House on Tuesday, 2<sup>nd</sup> March, 2010.

Mr. Speaker, Sir, to call historical, the functions that we are asked to do by this Motion is an understatement. The journey to seek for a new constitutional order in this

country has been long and torturous. It started before Independence. It has been on since Independence and if the activities of the election violence were to show anything, it has been bloody. Indeed, many people have lost their lives through the process that we have undergone.

Probably, I should start with an elucidation of the philosophy of the Act. This process is predicated upon the earlier processes. It is not a fresh start. If anything, we are at the very tail end of the process. The architecture of the Act is such that we are to build on everything that has preceded up to this point; in other words, the Bomas process, the process of the Wako Draft and thereafter.

One of the departures is to learn from the mistakes of the past. One of the issues is that the roadmap Act gives a number of indications that this House, indeed, learnt from the mistakes of the past. First, the reliance on experts and not stakeholders in concluding this process, so that the Committee of Experts (CoE) was, indeed, a very deliberate departure from the functions of the Bomas process. Instead of bringing a whole load of stakeholders into one hall and telling them to negotiate, we had a group of experts conclude the process for us.

Mr. Speaker, Sir, the second departure was in designing the document in such a way that there were organs which build on each other's actions. First, we had the CoE, collate, collect and harmonize everything that went before them. They submit that to the public, hear the views of the public, harmonize it and deliver it to the Parliamentary Select Committee, namely, the second organ of review. The PSC was to emphasis deliberation on the contentious issues, conclude the political discussion on the contentious issues, submit the document to the CoE and then get a document from the same CoE which was then to be delivered to the third organ of review, namely, this House. That is exactly where we are now. The document from the CoE has been delivered to this House. It is now for us to move forward by building on the work of the PSC and the CoE. There is no CoE draft or the PSC draft. Indeed, there is only one proposed Constitution which is before the House. The action that is expected from the House this afternoon and the next few days before the time lapses, is for us to debate with the hope that there would be improvements to the document. If no improvements are agreed on, the document moves forward towards the fourth organ of review, namely, the people of Kenya.

You will allow me to quote Section 47(A) of the Constitution of Kenya which states as follows:-

“Notwithstanding anything to the contrary in this Constitution, the sovereign right to replace this Constitution with a new Constitution vests collectively in the people of Kenya and shall be exercisable by the people of Kenya through a referendum in accordance with this section”.

So, the ultimate right of the popular sovereign cannot, therefore, be stopped by this third organ of review. The benefit of the work that has preceded this organ cannot also be easily interfered with. That is why there is a requirement for a 65 per cent majority, so that if anything was to be changed, it has the benefit of majority of the Members of this House. Indeed, that is another lesson learnt from the earlier process. The famous or infamous Kilifi Draft came as a result of the fact that simple majority could change the draft. A simple majority of the Members of this House could go ahead and completely change that draft. That draft did not carry a majority of the Members of the

National Assembly. The process now requires that a majority of the Members of the National Assembly be carried along if there has to be changes.

The road for a new Constitution has been long and torturous as I said earlier. It started before the colonial period. When the Westminster style Constitution was negotiated, indeed, we had a Westminster style Constitution and a Federal State that had regions and regional assemblies. But immediately thereafter, like most other Westminster based constitutions, the Executive immediately started a process where they hunkered back to the colonial period. In the colonial period, we had a Governor. We did not have a Legislature and the Crown was totally in power. So, immediately after Independence, most African States crawled back on the rights of the people and to bring in a Presidential System of Government without the checks that go with it. So, we had what one African scholar called Presidentialism. This phenomenon involves the centralization of State power in the hands of an Executive President. When most African States gained Independence, attempts were made to blend the Westminster style Cabinet Government with an American version of Presidential power. In the majority of cases, the functions of the Head of State and the Chief Executive were immediately fused in the Office of the President while others, soon thereafter, adopted this approach. In most States, soon after Independence, the constitutional President became an easy with the demands and the challenges of the position. The President began groping for absolute power and for a constitutional order that would increasingly allow him to operate outside the scriptures of the Constitution. This was achieved by constant amendments of the Constitution or removal of any resistance on the Presidential power and to give excessive power to the President.

Mr. Speaker, Sir, in our case, many constitutional amendments were passed immediately after Independence. The first ten amendments went towards dismantling the Federal original System of Government. Another list of amendments went ahead to whittle down any checks and balances that the Constitution had. So, the problem with the imperial Presidency was not in increasing the powers of the President, but indeed, in decreasing the powers of the other arms of the Government or completely removing any checks the presidency had. If I was to mention one or two of those amendments, Amendment No.15 made in 1975 was to enable a person who had committed an electoral offence and, therefore, been disqualified from standing in future elections for five years to be given reprieve by the President. This is allegedly an amendment which was brought because a friend of the President then had been convicted of an election offence and the President wished to have that friend stand for elections.

In 1982, the famous amendment which said that there shall be in Kenya only one political party, the Kenya African National Union (KANU) was passed by this Legislature. In 1986, the post of Chief Secretary was abolished and the President could appoint Permanent Secretaries and security of tenure for the Attorney-General and the Auditor-General were removed. In 1987, by virtue of Amendment No.23, people who were charged with capital offences could no longer access bail. In 1988 by virtue of Amendment No.24, the security of tenure for the Public Service Commission and the High Court and the Court of Appeal judges was removed. Thereafter, through constant pressure and agitation, in 1990, the tide started turning. So, from 1990, we have a series of amendments which pull towards going back on some of the massive powers that had been taken by the President and bringing back some of the checks. So, in 1991, Section

2(A) was repealed and in 1997, we had the Inter-Parties Parliamentary Group (IPPG) package which brought in nominated Members to be sent by political parties and which increased the members of the Electoral Commission of Kenya from four to 21 members.

Mr. Speaker, Sir, be that as it may, even after those amendments, the need for a complete overhaul of the constitutional order could not be more urgent. From then on, there was a major push for the complete overhaul of the Constitution. Indeed, there was a complete failure of most of the institutions of the State. There was need for legal reforms, institutional reforms, reforms in the Judiciary and in the financial sector. We reached the bottom as far as those issues are concerned after the 2007 elections when the constitutional order completely came to a halt and the Constitution could not resolve the issues between the protagonists in that fight.

We ended up going to the streets and many of our compatriots lost their lives. That is what is at stake. The lives of the people of Kenya and the nation are at stake. It is then time for us to be able to take this step so that we give this country a new constitutional order, so that we do not have the very unstable structure or framework that we have, which could not in 2007 solve those problems for us. If we were to do that, this would be a very good start. Indeed, if we wanted reforms in the Judicial sector, the proposed Constitution goes a long way in reforming that sector. If we wanted reforms in the financial sector, the public finance chapter goes a long way in reforming those issues.

Mr. Speaker, Sir, the other thing that the proposed Constitution does is to bring back majority of the checks and balances that were lost through the constant amendments of the Constitution. For example, the proposed Constitution makes fundamental choices which are necessary by any Constitution. The proposed Constitution chooses to have a Presidential system of Government as opposed to a fused system of Government. It chooses separation of powers so that we have a clear Executive, not residing in Parliament but in the Executive branch of Government and a clear branch of the Legislature which does legislation and does not also undertake or moonlight to do executive functions. It allows for a running mate of the President, so that the running mate becomes the Vice-President. A Vice-President is not chosen because of loyalty but because the people of Kenya elect him or her as the second in the constitutional order for the Executive branch. That is very important.

Mr. Speaker, Sir, the other thing is that the Cabinet will be approved by the National Assembly. Parliament also has the authority to hold the Executive branch, because it can fire Ministers of the Executive. When it comes to impeachment, for the first time, if this goes through, we will have impeachment powers in this country. As I speak now, we have the ability to impeach in the books, but there is a suicide pact. So, if this House were to carry a vote of no confidence in the Executive, the House then has to go. The House naturally, does not want to end its own life. Therefore, the Executive has a free ride. That will end because if this proposal goes through, the lives of the House and Executive are not intertwined. Indeed, for the first time, we will have a free calendar of the National Assembly, so that Parliament and the National Assembly is free of the control of the Executive. But more importantly, Parliament can check the Executive by impeaching a sitting Head of State without having to end the life of Parliament.

Mr. Speaker, Sir, we also have time limits. Indeed, one of those amendments that I was talking about earlier was referred to as the avoidance of doubt amendment. But for the avoidance of doubt, there is, indeed, a time limit for the Executive – two terms of five

years each. None of those who held before or who are holding office now will be eligible to vie for that post.

Mr. Speaker, Sir, allow me to go through a number of the Chapters in the proposed Constitution. Let me start with Citizenship. As far as Citizenship is concerned, I wish to point out two issues. One is dual citizenship and the other is gender equity and equality as far as citizenship is concerned. For a long time, those of our compatriots who are abroad and may wish to take citizenship of other countries have been outlawed from doing so by our laws. This now has been removed so that a citizen of this country may become a dual citizen of another country. As far as our sisters and women folk are concerned, for the first time, they will have the same ability as the men to be able to transfer their nationality to their offsprings, a right which they had been denied for too long.

Mr. Speaker, Sir, I wish to go to the Bill of Rights. This has been referred to as the heart of the Constitution. Indeed, I think it is the largest chapter, going from Article 19 to Article 59. It is referred to as the peoples Chapter. This is because this really is the reason we went for constitutional reform. Indeed, if this were to go, we have a very strong heart beating in the Bill of Rights that is proposed. I wish to look at a number of the Articles with your permission, because this bill of rights chapter has generated quite a bit of debate. I wish to read one or two of those chapters.

Mr. Speaker, Sir, the first is Article 24 of the Bill of Rights Chapter. Article 24 deals with limitation of rights. It says:

“A right of fundamental freedom in the Bill of Rights shall not be limited except by law only to the extent that the limitation is reasonable and justified in an open and democratic society based on human rights, equality and freedom, taking into account all relevant factors.”

Further, despite Clause 1, a provisional legislation limiting a fundamental right and freedom:

(a) In the case of provisions enacted or amended on or after the effective date is not valid unless the legislation specifically expresses the intention to limit the right of fundamental freedom and the nature and extent of the limitation.

Mr. Speaker, Sir, the reason I am reading is that the current Constitution has a very old fashioned exemption clause which was used essentially to suspend the Constitution, so that when in the 1980s and 1990s people wanted to exercise their rights, that exemption clause was used because the Constitution seemed to have given them on the right hand and taken away on the left hand. This is a modern exemption clause. It understands that, indeed, times will arise when the Constitution provisions may be limited, but only in as far as the Constitution provisions say, so that the limitations are specific and for reasons that are very clear. But where, indeed, those clear reasons are, there is nothing stopping this legislature from limiting those rights.

Mr. Speaker, Sir, further on, sub-article 5 says that despite Clauses 1 and 2, provisions in legislation may limit the application of the right of fundamental freedoms in the following provisions to persons serving in the Kenya Defence Forces and the National Police Service: Article 1, to deal with privacy, Article 36, freedom of association, Article 37, assembly, demonstration, picketing and petition, Article 41, labour relations, Article 43, economic and social rights and Article 46, rights of arrested persons. The point is that members of the defence forces are, indeed, exempted. But I

have heard debate on the issues concerning other disciplined forces or, indeed, limitation as far as national security is concerned, when you look at Article 35 which deals with access to information. Indeed, in my opinion, this Article on limitation allows this House to go ahead and limit, if there are reasonable needs, the rights of members of the disciplined forces, or access of information for national security purpose, are either through the use of the proposed law dealing with freedom of information or the Armed Forces Act.

Mr. Speaker, Sir, as far as the Executive is concerned, the proposal is for a pure Presidential system; that is, an Executive that has clear executive authority to execute and rule, but with sufficient checks and balances. As far as the Legislature is concerned, there is a proposal to reintroduce the bi-cameral system of the legislature, so that we have a Senate and National Assembly. The two of them jointly become Parliament. As we are now, the National Assembly and the President together form Parliament. But when we have the legislature we will have complete separation of the Executive from the Legislature, so that we have the Senate and the National Assembly forming Parliament. Because of the controversies surrounding the Senate, I will plead to read Article 96 on the role of the Senate so that it is very clear.

The role of the Senate in the Constitution is provided under Clause 96. Clause 96(1) says:

The Senate represents the counties, and serves to protect the interests of the counties and their governments.

(2) The Senate participates in the law-making function of Parliament by considering, debating and approving Bills concerning counties, as provided in Articles 109 to 113.

(3) The Senate determines the allocation of national revenue among counties, as provided in Article 216, and exercises oversight over national revenue allocated to the county governments.

(4) The Senate participates in the oversight of State officers by considering and determining any resolution to remove the President or Deputy President from office in accordance with Article 145.”

Mr. Speaker, Sir, we have, therefore, a limited function for the Senate as opposed to those who say this is a powerful Senate. Indeed, it is a weak Senate with limited functions.

Mr. Speaker, Sir, as far as the Judiciary is concerned, this third arm of Government, indeed, in my opinion, is the most sick of all the arms of the Government. Indeed, if there is any arm of Government that requires urgent attention, it is the Judiciary. It is my opinion that if any of the lawyers in this House or anywhere else, were to be sent to the current set up in the Judiciary, they would not perform any better than those who are there currently, because of the complete breakdown of the institutional infrastructure of that institution. That institution is set to fail as it is currently constituted. Our hope and through the proposal, the idea is to give a rebirth to that institution, so that we have a Judiciary worth its name; so that we have a third arm of Government that completes the architecture of the State. As it is, that arm is not there, and the stool is not stable.

Mr. Speaker, Sir, in terms of the institutional structure, there is proposed a Judicial Service Commission (JSC). The JSC gives independence for the first time to the

Judiciary in terms of institutional framework. It is no longer possible for the Executive to handpick who they will want as judges. In any event, for the Chief Justice and the Deputy Chief Justice, those will be subject to approval by this House.

Secondly, there is created a Supreme Court, which will be the highest court in the land which will deal with constitutional matters. But more importantly, it will deal with elections and petitions against the election of a sitting President. If the history of election petitions against the President is anything to go by, there is, indeed, need for very clear procedures when it comes to that process. Indeed, the courts made a very interesting ruling that for you to have an election petition against a sitting President, you must go ahead and personally serve a sitting President. Those of us who have seen the security around the President know that it is completely impossible to physically serve a sitting President. Therefore, the idea that you could actually have an election petition against the President was not there. There is need for a Supreme Court and timelines for concluding that petition is important.

Thirdly, there is need for financial independence. The financial self determination of the Judiciary is very critical. One of the issues is that the Budget for that arm of Government currently is so small that it is completely starved of resources. The proposed Constitution sets up a Fund which has complete independence from the Executive. Indeed, the procedure is such that the proposals for that Budget come to the National Assembly. The National Assembly approves it and that fund goes as a one line Item to a Fund managed by the Judiciary for purposes of financial independence.

Finally, there is a vetting framework to allow for the members of the judiciary to be sieved such that there is a rebirth of that institution.

Mr. Speaker, Sir, next I want to touch on the public finance Chapter of the Proposed Constitution. You will indulge me to read from the report of the Committee of Experts (CoE) on the Constitution Review as far as the issue of the Public Finance Chapter is concerned. The CoE on page 26 of their Report says as follows:-

“The Chapter on Public Finance is based on the three principles of public finance.

(1) The Governance Principle - often captured in the phrase: No taxation without representation; which means that the management of public finance must be transparent and controlled by the people through democratic institutions.

(2) The principle of resource allocation which means that both taxation and public spending should be fair and equitable.

(3) The principle of accountability which means that there must no corruption and those entrusted with public money must account to citizens for the way it is spent.”

These basic principles are implemented in Chapter 12 on Public Finance by instituting controls for the use of public and establishing a framework for the equitable sharing of public revenue through special provisions for marginalized communities and a mechanism for the division of national revenue between the national government and county governments. Indeed, it is that equitable distribution that I will refer to on page 28. It says the following:-

“This Chapter seeks to ensure that the national government and county governments receive a fair share of the revenue that is raised by Government in Kenya. As in all countries in the world with systems of devolved Government, the fiscal capacities of counties will vary greatly. Some will be rich and others poor. To remedy



this, the Chapter establishes a system of revenue sharing. The most significant sources of revenue, including income tax and value added tax, for example, are granted to the national government. Then the chapter requires the revenue raised by the national government to be equitably shared between the national government and county level government. Once the share that is going to the county government is determined, that share too is divided equitably among the Counties.

The Chapter provides criteria that are to be taken into account in sharing the national revenue. These include national interests, the need to ensure the county governments can fulfill their functions, economic disparities among regions and the need to provide incentives to counties to develop their capacity to raise revenue, among other things. Overall, this ensures that the national government and the Counties are allocated funds according to their needs. Not all counties will receive the same funding. Their differences will be considered. The Chapter also retains the important protection on funding for county governments that had been introduced by the Parliamentary Select Committee requiring that at least 15 per cent of the revenue raised by the national government, annually be set aside for Counties. Two institutions, the Senate and the Commission on Revenue Allocation (CRA) are to play a special role in the process of division of revenue. The CRA provides expert independent advice to the Senate, national government and county governments on the division of revenue and the Senate determines the way in which the share of revenue allocated to the counties shall be divided.

There is an elaborate procedure for doing that function. But indeed, the point is that this House has been pushing for those issues for a long time; how to have equitable distribution of the resources and, more importantly, how to have oversight over those resources. Often times, the Budget has been a ceremony, more than really a serious function of this House. So, the Minister for Finance delivers the statement and all Members are allowed to do is to pass the Votes. Rarely does Parliament have any role in that function other than ceremonial or legalistic. Now for the first time, we will have a situation where, indeed, there is equitable procedure. There are Constitutional principles to be followed in doing that equitable resource sharing. Parliament will have expert advice independent of the Executive to be able to help Members of Parliament to do their function of resource allocation and oversight. This does happen. It is not the wheel being reinvented. This does happen. It is, indeed, possible also in the Constitution of the Republic of South Africa.

Mr. Speaker, Sir, on the issue of national security, the proposed Constitution gives a framework for national security that is far superior to the current national security set that we have.

Let me then turn to the provisions as far as transitional and consequential clauses are concerned. It is proposed that the new Constitution comes into force 14 days after the Referendum is passed; in the event that the Referendum returns are "yes." If it was to happen in the next few months we will, indeed, then have the new Constitutional order. But because there are a number of issues to be handled in the interim period, a number of the functions or institutions of the current Constitutions are saved to allow for a smooth transition from current the Constitution to the new Constitution.

I am aware that a number of these transitional clauses have, indeed, become controversial through public debate and debate by the hon. Members of this House.

Mr. Speaker, Sir, I am aware of the issues as far as the Judiciary is concerned, and also as far as the local authorities are concerned. In fact, the people and, indeed, hon. Members of this House, had to sniff a bit of tear gas, which really was how the constitutional reform process was pushed by people struggling in the streets, having to be tear-gassed time and again. So, it was interesting this afternoon, indeed, we had a whiff of that tear gas when I am informed that councilors or supporters of local authorities--- But can I point out that under Article 18, as it is, all local authorities established under the Local Government Act, Cap 265, existing immediately before the effective date shall continue to exist subject to any law that may be enacted.

*(Applause)*

So, indeed, as the draft is currently, the current local authorities will exist.

Mr. Speaker, Sir, let me then go to another controversial issue which has generated a lot of debate – that is Article 29 on new appointments. Article 29 says: “The process of appointment of persons to fill vacancies arising in consequence of the coming into force of this Constitution shall begin on the effective date and be finalized within one year.” Further, in (2): “Unless this schedule prescribes otherwise, when this Constitution requires an appointment to be made by the President with the approval of the National Assembly, until after the first election under this Constitution, the President shall, subject to the National Accord and Reconciliation Act, appoint a person after consultation with the Prime Minister and with the approval of the National Assembly.”

Mr. Speaker, Sir, indeed, let me point out that this format was set up by the Parliamentary Select Committee, and not by the Committee of Experts (CoE). The proposal from the CoE was based on a hybrid system of Government, where it was, indeed, the Prime Minister who was making these appointments with the concurrence of the President and the approval of the National Assembly. Our instructions to our drafters were: Change that to fit into the new system of the Executive we had crafted, which was a Presidential system, but save the National Accord for the life of this Parliament. That is, indeed, what is there; the National Accord is saved for the life of Parliament while we have the President making those appointments instead of the Prime Minister.

Mr. Speaker, Sir, allow me to refer to one final point of controversy, which is Article 26 of the draft Constitution. That article is on the Rights and Fundamental Freedoms and the Right to Life. Article 26 states:

- “(1) every person has the right to life
- (2) The life of a person begins at conception;
- (3) A person shall not be deprived of life intentionally, except to the extent authorized by this Constitution or other written law;
- (4) Abortion is not permitted.”

Let me repeat:

- (4) Abortion is not permitted unless, in the opinion of a trained health professional, there is need for emergency treatment or the life or health of the mother is in danger or if permitted by any other written law.”

Mr. Speaker, Sir, this, again, was the framing that was proposed by the Parliamentary Select Committee. Indeed, we brought in the issue of the life of the person beginning at conception because of the very strong push from a huge sector of our

community to have that as part of our Constitution. Indeed, the Constitution, being a living organism, has to take on board the needs of a majority of our populace, and that is the reason why that proposal was put in. It was not put in by the CoE; it was put in by the Parliamentary Select Committee and adopted by the CoE. But, we all, indeed, agree that time would arrive when an exception needs to be created for that article, hence the need for parts (3) and (4) – part (3) dealing with capital offences and part (4) dealing with emergencies or health issues that might require abortion. So, to say that the draft legalizes abortion is to miss the point. The draft says that the life of a person begins at conception; and provides an exception where that is not possible. The removal of the exception will not do.

Mr. Speaker, Sir, the long and short of it is that we have a good document before this House. Indeed, it is miles apart or light years apart from the document that is currently ruling in this jurisdiction. The current Constitution that we have is not fit for purpose; it is completely not fit for the purpose of ruling and running this country. It is time we changed it. It is time we changed it peacefully, that is through a peaceful process; this is the process that is culminating with this document going to the people of Kenya as a draft. What this House is called upon to do is one of two things; one, to improve the document, if it is possible – and it is possible by garnering the majority that is required by the current Constitution, so that the document can be improved. Indeed, it can be improved because it is a document from human beings! In the event that the document cannot be improved, then release it so that it moves forward to the fourth and final organ of review. What this House has no power to do is to stop the process, because the process was set by law; the law is anchored in the Constitution and the process is laid down by a road map designed, debated and passed by this House.

Mr. Speaker, Sir, this long, torturous road has an end in sight. Indeed, there is a silver lining that is beckoning this House. This House has the ability to write itself in history in golden letters; it has the ability to be remembered as the House that finally ushered in a new constitutional order in this country.

*(Applause)*

That, indeed, Mr. Speaker, Sir, is an opportunity many a House have not had. Indeed, no other House has had that opportunity other than, probably, the 1<sup>st</sup> House. On the other hand, this House can go through the ignominy of not being able to muster the courage of passing this draft Constitution and, there, we will not be alone. Many have failed before us, but we will be one of the Houses that failed in this duty, and the eyes of the people of Kenya are on us. This House, to this point, has acquitted itself well; this House is the one that passed the Constitutional amendment that anchored this process in the law; this House is the one that passed the roadmap Act that is guiding this process along; this House is the one that set up the Parliamentary Select Committee; it is the one that appointed the CoE; it is the one that has provided for this process up to this point. What is remaining are a few steps. These few steps are, probably, the most critical. What the House is called upon to do is to deliberate through this draft, and move the process forward to the people of Kenya.

Mr. Speaker, Sir, if I was to paraphrase the former Prime Minister of Britain, Gladstone, who spoke on the 5<sup>th</sup> December, 1879, and, probably, that is where we find

ourselves at this time: “Are we able to bear, at least, the consolation that we spared no effort in making the point at which the roads divide; the one part which plunges into suffering discredits, dishonours and the other which slowly, perhaps, but surely leads the free and high-minded people towards the greater ends of prosperity and justice of liberty and peace.”

Mr. Speaker, Sir, I beg to move, and hon. Namwamba will second.

*(Applause)*

**Mr. Speaker:** Order, Members! We are applying the provisions of Standing Order No.87. The Chair of the Committee had 60 minutes at his disposal. The Seconder will have 20 minutes while the Minister will have 30 minutes. The rest of us will have 20 minutes.

**Mr. Namwamba:** Mr. Speaker, Sir, in seconding this Motion, allow me to start by humbly reminding this House of two fundamentals which I hope will remain at the back of our minds as we debate this critical Motion in the life of our nation.

The first fundamental is that the role assigned to Parliament in this process is critical, but not divine. We have a role that is critical, but it is not divine. So, we must not at any moment imagine that even though we are the supreme law making organ in this country, that we are superior to the other organs of review. This is because we are not.

This process has been designed by its very architecture. The architecture was designed by this very House in such an interlocking manner that gives due recognition and respect to each organ of review in a forward moving manner.

Mr. Speaker, Sir, I want to remind hon. Members that if we, by any chance, fail to undertake our responsibility as an organ of review, we shall have thrown away the great opportunity to influence this process in a fundamental manner. In saying that, I want to invite hon. Members to look at the Constitution of Kenya Review Act that governs this process. Section 33(6) says:-

“If the National Assembly fails to approve the Draft Constitution in accordance with sub-sections 4 and 5, a joint meeting between the Parliamentary Select Committee and the Committee of Experts (CoE) shall be convened by the Chair of the CoE to consider the issue or issues and make recommendations to the National Assembly.

In considering issues not approved by the National Assembly, the meeting convened under Sub-section 6 shall invite the reference group to make recommendations on how the issue or issues may be resolved. The meeting convened under Sub-section 7, a meeting to which a reference group shall have been invited, shall be held in consecutive sessions over a period of not more than seven days and shall be chaired by the Chairperson of the CoE. Upon decision of the meeting, the CoE shall within seven days revise the Draft Constitution and submit a report and the new Draft Constitution to the National Assembly.”

Section 33(10) says:-

“The National Assembly shall within 21 days approve the Draft Constitution and submit it to the Attorney-General for publication.”

Mr. Speaker, Sir, what I am reminding hon. Members is that if by any chance we choose not to approve this draft, let us not imagine that that will kill this process, because we will not. This process will proceed onwards only that, unfortunately, rather than this

House bringing its influence and collective wisdom to bear on this process, we shall give that responsibility to the reference group to make those critical final decisions. We shall give that responsibility to the CoE as an organ of review. So, it is up to us as we undertake this draft - allow me to paraphrase President Harry Truman, the 33<sup>rd</sup> President of the USA – to either say the buck stops here and we make the critical decisions that must be made or to pass that buck to other organs of review because the process shall not die on the Floor of this House.

Mr. Speaker, Sir, the second fundamental I want to remind hon. Members is that Constitution-making anywhere in the world has never and must never be undertaken in a vacuum. It must be anchored on certain fundamentals and irreducible minimums. These are the guiding principles. The process that we are blessed to have taken part of in terms of moving forward to this stage has certain fundamentals and foundations upon which it is built. Neither this House nor any other organ of review can ignore these fundamentals. There is the history of this process that the Chairman of the PSC has so eloquently elucidated. There are also objects of review that are well spelt out in Section 4 of the Constitution of Kenya Review Act. There are also guiding principles of review well set out and enacted by this House in Section 6 of the Constitution of Kenya Review Act.

The CoE, another organ of review that this House mandated to be a custodian of this collective national wisdom, history and reservoir of information that we have gathered over the years has consistently reminded us of these pillars of review. In its report to the PSC, the CoE, in reference to the objectives of review reminds us as follows:-

“Section 4 of the Constitution of Kenya Review Act establishes certain criteria which the Constitution must fulfill. These criteria include guaranteeing peace, national unity and integrity of the Republic of Kenya. This is to be achieved by establishing a free and democratic system of government that guarantees good governance, constitutionalism, the rule of law, human rights, gender equity, gender equality and affirmative action.

Furthermore, the new Constitution must contain therein provisions recognising and demarcating divisions of responsibility among the various State organs including the Executive, the Legislature and the Judiciary so as to create checks and balances between them and to ensure accountability of the Government and its officers to the people of Kenya.”

The CoE goes on to make wide ranging reference to the guiding principles that must guide this process all along. These principles include ensuring that national interest prevails over regional or sectoral interests. Furthermore, organs of review must be accountable to the people of Kenya and ensure that the review process accommodates the diversity of the people of Kenya, including the socio-economic status, race, ethnicity, gender, religious faith, occupation, learning, persons with disabilities and the disadvantaged. Those are irreducible minimums. They are the fundamentals such that as we debate this process and make proposals even for amendments, let us not make them with the imagination that this is a process to be conducted in a vacuum.

Mr. Speaker, Sir, we are not the only country and we will not be reinventing any wheel by abiding by these principles. When 55 delegates met in Philadelphia between 25<sup>th</sup> May, 1787 and 17<sup>th</sup> September, 1787, 232 years ago to enact the Constitution of the USA, they had guiding principles broadly enacted in the Articles of Confederation. When

the people of South Africa made their Constitution between 1994 and 1996 through the Convention for a Democratic South Africa (CODESA) process and the Multi-party Negotiating Forum, they had 34 irreducible guiding principles of Constitution-making.

Mr. Speaker, Sir, let me remind this House that in South Africa, where Parliament tried to convert itself into a Constituent Assembly for purposes of debating the Constitution of that country, that Constituent Assembly went on to imagine that it could make changes to the draft outside of the 34 guiding principles. But when they released their draft which went on to the Constitutional Court---

In our case, the Committee of Experts (CoE) is the custodian. In South Africa, the Constitutional Court was the custodian of the guiding principles. It will be recalled that in May, 1996, the South African Constitutional Court disapproved and rejected the Draft Constitution because the Constituent Assembly had stepped out of the 34 guiding principles. They went on to list the four guiding principles that the process had not abided by.

So, I want to remind hon. Members that may we make all the effort to live within the spirit of the guiding principles that we have enacted ourselves in this House, for it is only by abiding by those principles that we shall maintain legitimacy for this process. Anything done outside those principles will render any product of this process illegitimate and, inherently, unconstitutional and, therefore, untenable.

Mr. Speaker, Sir, as we commence this debate today, we need to be aware that the country is sliding into a state of despair. In January, after 11 days of negotiation, the Parliamentary Select Committee put in place by this House, walked out of Naivasha and announced to the nation that we had a deal. That announcement; that we had build consensus on the four critical areas of contention lifted this country to cloud nine. There was a sense of hope and of renewed anticipation that, finally, the Tenth Parliament had what it takes to crack this 20-year puzzle and deliver a new Constitution to this country.

That hope and sense of anticipation, has quickly dissipated and has now been replaced by apprehension and suspicion, especially following the walkout from Kabete without a deal. However, the House has an opportunity to return the country to that pedestal of hope and anticipation. Indeed, as the Chair has said, the Tenth Parliament stands on the threshold of history.

Mr. Speaker, Sir, how we handle this opportunity will determine whether we will take a pre-eminent position in the generated pages of the history of this land or whether we will be relegated to a footnote in the pages of the history of this country as yet another House that attempted this task and failed by the wayside. So, it is up to us!

Nelson Mandela challenged the people of South Africa when he walked off Robben Island in 1990 that, it falls on a generation only once in a life time or in so many life times, to be great, but it depends on whether that generation chooses to be great or whether that generation chooses to take the opportunity and cement its place in history. It is up to us to decide whether we want to go the way of having failed or whether we want to go the way of history and take our pride of place on the pages of history.

Mr. Speaker, Sir, those who have visited the Louvre Museum in Paris may have beheld the eight-metre stèle; a statue or stone standing eight metres. On that stone are inscribed 232 of the earliest laws known to be written history. Those 232 laws are attributed to a man that has come to be known in history as Hamurabi, the law giver. This man lived between the years 1792 BC and 1750 BC.

Anybody who enters that museum and stands before that towering statue cannot but be transported back to 1750 BC and marvel at the ingenuity of Hammurabi the law giver and the empire upon which he presided. This is only because of that set of 232 laws that he bequeathed the world as the cornerstone of law making.

Mr. Speaker, Sir, 1792 to 1750 BC is mind boggling in terms of the arithmetic of years and time that has passed. We could be remembered several hundred years from today as the House that gave this country a new Constitution. The names of the women and men that have the honour of sitting in this House could be inscribed in the sands of time for eternity or as we have already said, we could be just another House that attempted but never cracked the puzzle.

If history has taught us anything and if the wars that we have engaged in this country have taught us anything, it is that our fate as a people is inexorably intertwined. As we debate this Draft, let us realise that unless there is peace, liberty and prosperity for all, there shall be no peace, liberty and prosperity for any. So, to engage in this debate with the imagination that we want to score a goal or ensure that your fellow Kenyan does not gain his due, will only land us in trouble.

*(Applause)*

Mr. Speaker, Sir, it is only by opening doors of opportunities for everybody that we too shall enjoy the same dose of opportunity.

The late Kwame Nkrumah would say this is a process that demands that we walk together. He quoted an African proverb which says:-

“If you want to go fast, walk alone. But if you want to go far, you must walk with others”.

For this process to go all the way, we have no choice but to walk with each other, hand in glove, whether you like the shape of my nose or not.

Mr. Speaker, Sir, let me also remind hon. Members that there are no perfect Constitutions; there has never been, and that is why every Constitution normally has in its infrastructure, opportunity for growth and regeneration.

Indeed, on September 17<sup>th</sup> as the delegates in Philadelphia appended their signatures to the Draft Constitution of the United States, there were many delegates who were very unhappy with that Draft. Some had even walked out of the conference and their feelings of no absolute satisfaction were well captured by the words of Benjamin Franklin who said:-

“There are several parts of this Constitution which I do not at present approve, but I am not sure I shall never approve them. I doubt too whether any other convention we can obtain maybe able to make a better Constitution”.

Mr. Speaker, Sir, Benjamin Franklin, reflecting the sentiments of many other delegates, was accepting that they had done the best they could. We must come to a point when we say, we have given it our best shot and this journey must come to a close and move this country forward.

*(Applause)*

I believe that this House is blessed with some of the best minds and souls that Kenyan women have brought forth onto the face of this earth.

I have no doubt that we have the ability to take charge of this process and bring our wisdom and collective influence to bear on this process. It would be running away from responsibility not to do that!

Mr. Speaker, Sir, Galileo Galilei once said: "I do not feel obliged to believe that the same God who has endowed us with sense, reason and intellect has intended us to forego their use. No he has not!" The intellect that is replete in this House was intended by God to be used at moments such as this.

*(Applause)*

Mr. Speaker, Sir, Constitution-making needs champions! It needs heroes and Kenya has now reached a point where Kenyans want to see champions and heroes of this process. Americans had James Madison, Alexander Hamilton and others. South Africa had Cyril Ramaphosa, Rolf Meyer and others. This process this far has had great sons and daughters of this land; some who are in this House. Messrs. Orenge and Kajwang, Ms. Karua, Mr. Imanyara and Mr. Murungi are here. They are Members in this House who have already made considerable contribution to this process. But remember, it is said that you are not remembered for what you begin. You are only remembered for what you complete!

*(Applause)*

So, even for you who are in this House who have brought this process this far, history shall not remember you for what you started. You shall only be remembered for concluding this process.

Mr. Speaker, Sir, unfortunately, in the interest of time, I beg to second.

*(Question proposed)*

**Ms. Karua:** Mr. Speaker, Sir, I rise in support of the Motion.

*(Loud consultations)*

**Mr. Speaker:** Order, hon. Members! I hear murmurs that the Minister for Justice, National Cohesion and Constitutional Affairs should have caught my eye. The Minister did not picket for a place!

Please, Ms. Karua, proceed!

**Ms. Karua:** Thank you, Mr. Speaker, Sir. I rise in support of this Motion which has been so eloquently moved and seconded by the Chair and Vice-Chair of the Parliamentary Select Committee (PSC).

*(Applause)*



I will endeavour not to repeat what has already been put before the House. A lot of issues have been raised by people about the checks and balances of a presidential system of government. I will begin by saying that it must be noted by all that the system we have is a parliamentary system, but corrupted by the Office of the President being merged with the Office of the Governor at Independence and, therefore, creating a presidency that is unknown to a pure parliamentary system.

*[Mr. Speaker left the Chair]*

*[The Temporary Deputy Speaker  
(Mr. Imanyara) took the Chair]*

Mr. Temporary Deputy Speaker, Sir, but the defining feature is that in a parliamentary system, there is a fusion of Parliament and the Executive. Ministers are Members of Parliament and are picked from Parliament. In a presidential system, there is complete separation of powers between the Executive and the Legislature, such as which we want to create. Kenyans have lamented for a long time that any time Parliament wishes to censure the Executive or a member of the Executive, something happens and that attempt fails. It rarely succeeds and the reason is obvious. It is because the Executive dominates Parliament in a parliamentary system.

Even today, a whooping 96 of the Members of this House belong the Executive. They are either Ministers or Assistant Ministers. When they want to defeat a censure Motion, all they need is to lobby a few of the Back Benchers.

Mr. Temporary Deputy Speaker, Sir, a distinguishing mark of a pure presidential system such as obtains in America is that no Member of the Executive sits in the legislative body, the Congress. That is why, today, President Obama had to sweat to get the health plan passed although his party dominates the House. He had to explain himself because the Executive had no foothold in the legislature. Therefore, the greatest check and balance is the total separation of power.

The other check and balance is the requirement that all important Executive appointments be approved by the legislature such as is proposed in this Draft Constitution.

Mr. Temporary Deputy Speaker, Sir, it is also important to note that in the system that is proposed here, Parliament is not a rubberstamp for the Executive in the Budget approval. According to the proposed Section 22, the Executive will have to present to Parliament a budget two months in advance so that Parliament is able, through a Committee of Parliament, to sit and scrutinize, negotiate with the Executive and ensure that there is equity and that it follows the Constitution. It means that the legislature will no longer be a house of lamentation where we lament about marginalization. It will be incumbent upon the House to ensure that the Budget is properly allocated and that the priorities are right. We shall no longer have to say either the Ministry of Defence or any other Ministry has more money than another critical area. It will be our duty to balance. So, the checks and balances lie in a very strong legislature that balances out with a strong presidency.

Mr. Temporary Deputy Speaker, Sir, it is also clear that Kenyans wanted devolution and it has been provided. The devolution provided is in mind a unitary state

because this Draft Constitution proposes a unitary state. Therefore, the Senate provided, which the Mover of the Motion called a weak senate, is weak compared to the senate say, in America. America is a purely presidential system but it is also federal. We have opted in this document for a purely presidential system but within a unitary state. Therefore, the design of the senate has been amended to reflect our status as a unitary state. That is why the senate has been restricted to matters concerning the devolved government and their financial allocation and any Bills that impinge on the devolved government.

It has also been given the duty of conducting proceedings to impeach the President. But those proceedings will be initiated by the National Assembly. It is important to say that because a lot of people have commented and wondered why the senate is the way it is. The distinguishing feature is that we are a unitary state. If you look at the Constitution of Kenya Review Act, 2008, the design of that law which guided the constitutional review was for a unitary state. That is what this National Assembly passed; a design for a unitary state. Therefore, the COE has provided, together with the Parliamentary Select Committee, a senate to serve a unitary, not a federal state.

Mr. Temporary Deputy Speaker, Sir, when it is a federal state, the National Assembly in our case or the House of Representatives in America, are normally based on the strict equality of the vote. To act as a check and balance on the majority and to protect and safeguard the minority, the Senate is then based on the equality of the State. We ought not to get confused to design two Houses that are unequal. What the CoE has proposed here is good enough and protects every citizen. It protects the majority. It protects and safeguards the minority. That is why a deviation of 30 per cent in the circumstances is allowed.

I want to laud this document for coming up with the idea of the Equalization Fund. For too long, we have been talking about the marginalized. We have been talking about areas that have lacked development for most of the time. This Equalization Fund, which will be a substantial Fund, will then accelerate development, so that all areas of Kenya can be, nearly as possible, equal in services and infrastructure. Then we can truly be one Kenya, one nation, one people. When the disparities exist, such as exist today in development, they are a recipe for people not feeling that they are one and they belong.

The Bill of Rights which has already been lauded has something very special. Today, if a person or an organization goes to court to enforce the Bill of Rights in a matter that does not relate to them, but relates to another or to Kenyans in general, the court will dismiss them and call them busybodies. In this draft, the Bill of Rights is allowing any citizen, a group of citizens or an organization to enforce the Bill of Rights through going to the constitutional court, which in this case will be the Supreme Court. This will allow us as citizens, not to merely urge the Government to do things, but to also challenge the Government and get a court pronouncement that will give direction. It reminds me that for close to four years now, Kenyans have been lamenting to the Government about extra-judicial killings. With this kind of provision, we will not have to look for Professor Ashton. We will not have to beg the State, but we will be able to enforce through the Bill of Rights.

Mr. Temporary Deputy Speaker, Sir, in the case of irregular appointments, if Parliament does not act, citizens will have recourse. They can challenge. I can hear my learned colleague saying: What about the courts? We know the weaknesses in our courts. This draft Constitution is supposed to give a rebirth to our country. Therefore, there is

provision for ensuring that the Judiciary is reborn once again. That is not by another radical surgery which may fail, but through a systematic way of doing things. First, is by revamping the Judicial Service Commission (JSC), by ensuring that it has two professionals from the private sector and two from the Law Society of Kenya (LSK) and several from the Government. The current JSC has only people from the Government. With the injection of four members from the private sector, we should see a JSC that does better than the current one. We do not want to have a JSC that appoints judges and then takes the same judges to court within a short time, thereby confirming that the right hand does not know what the left hand is doing. It is also introduced that appointments to the Judiciary will not be through the current process of cronyism, favouritism and even corrupt practices, but it will be through competitiveness. Competitiveness means that all people who feel that they should be judges will have a chance to compete with those who apply. That system will then give us the best.

It also introduces disciplinary procedure. The JSC will be capable of disciplining judges. This is a good way and together with the vetting process introduced, it will assist the Judiciary to wake up once more, so that when citizens go to court in the manner I have described, they will get their rights.

Mr. Temporary Deputy Speaker, Sir, we have been talking about police reforms. The Government has been dilly-dallying and forming a committee after another. This Constitution introduces very fundamental reforms to the police force; making sure that there is coordination between the Administration Police (AP) and the Regular Police by making sure that they are under one head and that the hiring, disciplinary and everything are also under one body. This introduces harmony. For example, we do not hear of the Armed Forces having too many arms. We know that they have the Navy, the Army and the Air Force, yet we hear of no quarrels. The reason we have had a dysfunctional system with the Regular Police and the AP is because they do not report to the same chain of command. This is being revolutionalized here. Some of the reasons why we had problems after the last general election were: One, lack of confidence in the courts, two, failure by our security forces and the electoral system failed us. All those institutions are going to be reborn through this new Constitution.

Mr. Temporary Deputy Speaker, Sir, I would urge hon. Members that even if there are things that you do not agree with, remember that here in the House we are 222 but in the country we are 40 million. It is very difficult and impossible to harmonize each and every view. So, if this document meets the threshold of a document we can live with, I would urge that we leave it and pass it as it is. As a Member of the Select Committee, I know that the Committee of Experts (CoE) changed some of the things we had proposed. Obviously, as a human being, the first reaction is irritation. But we must realize that Kenya does not belong to us alone; not even as Members of Parliament. Therefore, if Kenyans and others we chose in the CoE bring their expertise and amend certain things, we should be able to live with it. Just like when we propose laws here, those who have sent us allow us to do that and believe in it. The burden or task we have is to make a Constitution which our worst enemies would feel comfortable with. This is because tomorrow, you may be standing in the position you think your enemy is in. If you make any oppressive law or clause in a Constitution, tomorrow, you may be the one to suffer that oppression.

Mr. Temporary Deputy Speaker, Sir, we have the language that has been circulating about majorities and minorities. Those are not permanent features. The demographics are changing. Today's majorities will be tomorrow's minorities and today's minorities will be tomorrow's majorities. This Constitution must be made devoid of partisan interests. Know that you may bequeath to your loved ones a burden while trying to settle scores with somebody else. I want to repeat that let us all join hands and pass a Constitution that even our worst enemies would be comfortable with.

Mr. Temporary Deputy Speaker, Sir, on the issue of the right to life, I just want to say that the Attorney-General and the CoE may wish to consider this an issue for editing. The term "abortion" refers in medicine even to a natural miscarriage. We are told by doctors that about 30 per cent of pregnancies result in a natural miscarriage. Therefore, when we say abortion is not permitted, how shall we permit those which are natural? This word may need to be edited and language that is medically palatable put. Remember, it was put without the help of experts. Save for editorial issues, I would urge that we pass the document.

Mr. Temporary Speaker, Sir, finally, we have one choice; to vote for the status quo or vote for change. This Draft is not perfect but it takes us many miles ahead of where we are. We have been lamenting. We can block ourselves, precipitate a crisis and take the status quo, or we can decide to be bold enough. Change is always difficult because you are going into the unknown.

People will say; when shall we ever develop our system to the extent of the developed nations? Let us not be so cowardly. We have been calling for a new Constitution for this long, let us take this document. Let us work hard to make it a reality and let us do what Kenyans expect us to do. Give them a new document that will enable us to transit from a country at war with itself to a modern nation where everybody can develop their full potential.

With those many remarks, I beg to support.

**The Assistant Minister for Roads** (Dr. Machage): Mr. Temporary Deputy Speaker, Sir, yes, it is a historic occasion that will be remembered either for boosting the morale and interest of development of our people in Kenya or demoralise and subject some communities of this country into oblivion. Yes, the Constitution has been designed and carefully so by lawyers and able people, referred to as a Committee of Experts. It aims at reducing imperial powers of the Presidency as we have all known since Independence. But this proposed Constitution should not be used as a document of oppression to minorities and marginalised communities in this country, with a mere promise that it will give birth to an equal society. That will never happen. That is the truth.

Mr. Temporary Deputy Speaker, Sir, population increase is a demographic factor and it is exponential. This document has many clauses and articles that need to be relooked into. I pray that this House becomes wise enough to see the details that lie in these statements as being derogatively oppressive or totally inconsistent with what the Kenyan people want. I beg to quote some of these issues from the same book.

Mr. Temporary Deputy Speaker, Sir, this document says those holding offices of power; I believe Presidency or leadership either before or currently are barred from contesting the next election. It sounds nice. However, remember we have a National Accord. This National Accord was signed a few months ago by the two Principals. It says

the President and the Prime Minister will share power equally. This power sharing deal is embedded in the current Constitution. This document as it is, accept it or not, bars the Prime Minister from contesting in 2012. I am not a lawyer, but that is the truth.

**An hon. Member:** Which Section?

**The Assistant Minister for Roads (Dr. Machage):** You read it. You have been reading this book.

Mr. Temporary Deputy Speaker, Sir, indeed, the statement that a deal was made in Naivasha was totally wrong. There was no deal in many perspectives.

This document assures the sovereignty of the people. It says:

“(1) All sovereign power belongs to the people of Kenya and shall be exercised only in accordance with this Constitution.

Thank you for that provision. But if you go to Clause 1(4) it says:-

“(4) The sovereign power of the people is exercised at—

(a) the national level; and

(b) the county level.

Yet, they give us 47 Counties in total exclusion of other communities of this country. Kuria is not included; it is well known! Mt. Elgon is not included; it is well known! Baringo is not included; it is well known! Kuria is not included; it is well known! Marakwet is not included; it is well known! Taveta is not included; it is well known! Increase the list!

Mr. Temporary Deputy Speaker, Sir, if you go to Chapter 2 of the draft Constitution, it tells us--- It constitutionalises that the Republic of Kenya is divided into counties as mentioned in the First Schedule, which legalises only 47 counties, exclusive of other communities! Should we migrate to other countries? Should Kurias migrate to Tanzania? Should the Turkanas migrate to Sudan? Should the Tavetas go to Tanzania? You constitutionalise that; it is an issue that would have been left very politely to the Interim Independent Boundaries Review Commission! The First Schedule, therefore, will be the first document that I will pray about; I humbly pray; I kneel down before all these hon. Members--- Look at me and have mercy! Please, increase this number to 80.

Mr. Temporary Deputy Speaker, Sir, in the Bill of Rights, Section 19(2), the purpose of recognizing and protecting human rights and fundamental freedoms is to preserve the dignity of individual communities and to promote social justice and realization of the potential of every human being, including Dr. Machage wanting to be the President of this country!

*(Applause)*

Section 21 of this document, implementation of the fundamental rights, says: “All state organs and public officers have a duty to redress the needs of the vulnerable groups within society, including women, older members, the marginalized communities, members of a particular ethnic group, religions and cultural communities.” This document says that; it gives you with the left hand and takes everything away with the right hand!

This very document, Mr. Temporary Deputy Speaker, Sir, in section 24 - the Rights to Fundamental Freedoms - says: “The rights of anybody cannot be limited except by law” and then: “only to the extent that the limitation is reasonable, justifiable and in an

open democratic society, based on human dignity, equity and freedom, taking into account relevant factors, including the need to ensure that the enjoyment of rights and fundamental freedoms by an individual does not prejudice the rights and fundamental freedoms of others.” We are now being told that because 41 communities will get counties we just accept and follow. This is totally wrong!

Mr. Temporary Deputy Speaker, Sir, there are many other flaws in this document. If you look at Part III of the Specific Rights, you will find that the rights of the minorities and marginalized communities have been given in Section 56. They have put in place affirmative action programmes designed to ensure that minorities and marginalized groups participate and are represented in Government and other spheres of life. We have a right to be represented and be given counties.

I want to use this Floor to call upon all the minorities of this country that if this Draft Constitution is not amended to include that ability of the system to give us our rights and counties, then we should reject it when it goes to the people. It is our right to say no. Let me tell you that we have a big population if we come together. We are many.

Mr. Temporary Deputy Speaker, Sir, I am trying to talk politely and humbly. I am sorry that I might be carried by emotions because it is the truth. I am talking to the wise of this country. I am talking to the representatives of the people of this country. If you go to Article 100, you will find that they have come here and sworn: “For the promotion of representation of the marginalized groups.” The Article says that this Parliament shall enact, as we are doing now, legislation to promote representation of, among others, women, persons with disabilities, the youth, ethnic and minority groups and the marginalized communities. You will have failed in this House if this is not legislated. This is because this Constitution that you have worked on, through various Committees, gives us those rights and gives you those powers to do it.

This Draft Constitution talks of many factors. It also has many flaws that I may not mention but I believe my colleagues will mention them. What is more important is that this document has made it very difficult, once we pass it, to make any changes. It is impossible to make any changes once we pass it. I am talking of Chapter 16 which is on the amendment of this Draft Constitution. Please, re-look that. I have no more words. However, I pray that this House listens to the cries and wishes of the minority and the marginalized of this country. It should not be that while others are rejoicing and dining with the passing of this Constitution, the minority will be eating sand and grinding their teeth.

Mr. Temporary Deputy Speaker, Sir, I will only support this document with amendments.

### ADJOURNMENT

**The Temporary Deputy Speaker** (Mr. Imanyara): Hon. Members, we have come to the end of today’s sitting. Therefore, the House stands adjourned until tomorrow, Wednesday, 24<sup>th</sup> March, 2010, at 9.00 a.m.

The House rose at 6.30 p.m.