

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

**NATIONAL CONSTITUTIONAL CONFERENCE
(NCC)**

VERBATIM REPORT OF

**PLENARY PROCEEDINGS
DECISIONS ON DRAFT BILL BY THE COMMITTEE
OF THE WHOLE CONFERENCE
HELD AT THE PLENARY HALL, BOMAS OF KENYA**

ON

15.03.04

CONSTITUTION OF KENYA REVIEW COMMISSION

NCC – PLENARY PROCEEDINGS ON DISCUSSION OF THE ZERO DRAFT, HELD AT THE PLENARY HALL, AT BOMAS OF KENYA ON 15TH MARCH 2004

Present:

Prof. Yash Pal Ghai	-	Chairperson NCC
Hon. Delegate Koitamet Ole Kina	-	Vice Chairperson NCC
Hon. Bonaya Godana	-	Vice Chairperson NCC
Hon. Delegate Sultana Fadil	-	Vice Chairperson NCC
Prof. Okoth Ogendo	-	Rapporteur General
PLO Lumumba	-	Secretary of the Commission
Mr. Ndoria Gicheru	-	Draftsperson
Hon. Delegate Moody Awori	-	Vice President

Secretariat Staff In Attendance:

Mumba Werunga	-	Deputy Clerk (National Assembly) -
Tom Mboya	-	Officer from AGs Chambers
Kipkemboi Kirui	-	Clerk
Stephen Njenga	-	Clerk
Christine Mwambua	-	Clerk
Mary Babu	-	Verbatim Reporter
Flora Wafula	-	Verbatim Reporter

The meeting was called to order at 9.35 a.m. with Prof. Yash Pal Ghai in the Chair.

Prof. Yash Pal Ghai: We will start our proceedings. I am going to ask Arap Ng'eny, Grace Ogot, Baldip Rihal and Abdulrahman Badawy to say prayers this morning.

PLO Lumumba: So, note there are four prayers, the National Anthem after the fourth prayer, please, up there.

(Consultation at the “high” table).

Prof. Yash Pal Ghai: Arap Ng'eny, please start the prayers, to be followed by Grace Ogot. Baldip Rihal, Abulrahman Badawy and the National Anthem to follow that, so please stand up for the prayers.

Hon. Delegate Arap Ng'eny: Let us pray.

In the name of the Father and of the Son and of the Holy Spirit. God Almighty, we thank You this morning for bringing us here safely. We thank You for the gift of life and we thank you for this assembly. Lord God You know why we are here because You ordained from the beginning when You created human beings and authorized them to look after the earth. All that therein is and to use all that You have placed here for their enjoyment. It is in that spirit Lord that we are gathered here in order to craft for the people of Kenya a Constitution that will enable them to govern as You ordered, to that extent Lord, we pray this morning that Your spirit lives among these people. The mandate that they have to prepare a Constitution, let them not be distracted by other things. It is important, it is sacred and we would like Your spirit to be among us, so that all distractions can be left out. Enable all of us to be focused to see and understand, let our minds and spirits keep remembering why we are here. Give us peace, give us understanding, thoughtfulness, respect for others so that any divergent views that maybe proffered, will be given in the spirit of love among ourselves. Let our emotions be under control and let our minds be uppermost in the consideration of the proceedings of this day. And with that Lord, we say again, thank You for bringing us here and it is because we ask in the name of Jesus Christ our Lord. Amen.

Hon. Delegate Grace Ogot: Father we thank You for Your presence in this Hall. We have come from all corners of this country and beyond and this week starting today Father is so crucial in order for *Katiba* to bring the wishes of Your people countrywide, the poor, the rich, the lame and those who are walking on their feet. Father what we do not have, You can provide to us and it is the patience that we are asking You for today and the power of negotiation, the power of wisdom that will come from one another and not from an individual. Father we know that the entire Kenya and the world is looking at what the people of Kenya will resolve today at this Plenary Hall, Your presence is felt, You are not seen, but Your presence is felt. Finally Father, I want to remind Your people that when those communities were crossing river Jordan and it was so swollen, they couldn't cross, they had boats, they had no ships, but then when the leader lifted the rod, the river was divided open and the land was seen and Your people walked across. Father we know You can do it today. Soften our hearts in give and take as we cross the River that has been split open for us this morning. Bless the Chair and the team; bless individual Delegates big

and small, because they are representatives of the people. We ask You this in the name of Jesus Christ. Amen.

Hon. Delegate Baldip Rihal: *Ek Onkar Satnam.* Oh, Supreme God Absolute yet All-pervading, the Eternal, the Creator of the universe, the Cause of causes without enmity, without hate both Imminent in your creation and beyond it. You are not the God of one nation, but the God of grace. Oh, Supreme Lord the National Constitutional Conference of Kenya has reached the final and most critical stage of its work, Oh God we all pray that You give Delegates to this Conference wisdom to deliberate soberly without emotions. Oh God, remove any bitterness and hate from the hearts of the Delegates so that they can think with their minds and work in harmony to write a new Draft Constitution for Kenya, for the future generations and for posterity, for the children and the future great grand children of this nation so that they can work and live in peace in this country. Oh God, give us light, give us understanding so that we may know what pleases Thee and may all man kind prosper by Thy Grace. Oh Supreme God, we pray for Your mercy and blessings on all people of this nation. *Waheguru Ji Ka Khalsa, Waheguru Ji Ki Fateh.*

Hon. Delegate Abdulrahman Badawy: *Bismillahi Rahmani Rahim.* In the name of God, the benefice and the merciful, praise be to Allah, Lord of the world. The benefice and the merciful, Thee alone we worship and Thee alone we ask for help, the owner of the day of judgment. *Ewe Mola, Muumba Mbingu na nchi na wanadamu, tumesimama mbele yako hapa, nyoyo zetu zote zikikuelekea Wewe kwa kukuomba, ututeremshie rehema yako na amani na mwafaka, ndani ya chombo hichi ambao kwamba ndani yake mabaharia sasa wanaingia katika mlango wa mawimbi makubwa kabisa, bandari ile pale tunaiona, kipitishie chombo hichi na mzigo ambao kwamba uko ndani, kifike bandarini, kipite mawimbi bila ya msukosuko wowote kiwapelekee wananchi viumbe vyako vya nchi hii, Katiba ambayo kwamba itawaridhisha na Katiba ambayo kwamba itatunga maslaha yao, wote walioko chini wainuke na kutengeneza maisha yao. Na walioko juu pia wanyoshe mkono kuonyesha wale walioko chini ili nao wawe katika hali bora njema ambayo kwamba ndio nia yetu. Hakuna mwenye kulifanya hilo, kuzilainisha nyoyo zetu na kuzileta pamoja kwa mapenzi na mwafaka na amani, ila ni Wewe. Ewe Mola tunakuomba utubarikie kazi hii. Amen.*

(NATIONAL ANTHEM.)

Prof. Yash Pal Ghai: Thank you very much.

Silence.

Prof. Yash Pal Ghai: Please take your seats.

(Consultations at the “high” table).

Prof. Yash Pal Ghai: We want to start in one minute, so please be brisk about getting to your seats and sitting down. Ladies and gentlemen, order, please. So we can begin our proceedings. So, will you please sit down and be quiet. Honourable Delegates, I told the Steering Committee earlier today that we begin our proceedings with prayers everyday and we have heard wonderful inspiring prayers in this room full of wisdom and counseling us to be tolerant and to search for consensus.

We listened with a combination of pride and humility to a National Anthem, which we have called one of our National symbols. Please, please and the moment the prayers have been said and the Anthem has been played, we forget all the wonderful messages that come through these media. We start quarrelling almost straightaway.

I hope that today we will constantly keep in mind the prayers that have been said and the spirit of the National Anthem. I would particularly like to appeal to politicians to please, do not bring your quarrels into the Auditorium. We do not want in this Auditorium these polemics, this exchange of insults, does not befit leaders of this country, certainly the Delegates have no stomach for such nastiness. So, I will specially plea to the Politicians, please be restrained in your language, do not bring your quarrels and mess up the proceedings of Bomas. *(Clapping)*.

This day, ladies and gentlemen, may be the single most important day of the Bomas process. We have laboured long and hard to arrive at this, the critical stage of the process. We have made very good progress in the last few days. That progress has brought us to the point where two

principle matters resolved to be dissolved. The Structure of the Executive and Devolution. Even on these matters there is already broad agreement on a number of issues of principle. The differences that remain to be resolved are narrow. Let us resolve these remaining issues in the spirit of consensus.

Let me remind you of the high expectations people have that the process will be concluded today for most practical purposes. Mired in poverty, hunger, disease, unemployment and physical and psychological insecurity, most of the people look to the new Constitution--

(Murmurs on the floor).

Prof. Yash Pal Ghai: Please be silent. As a new beginning which will bring them justice and prosperity and above all they long for peace and unity. They want a Constitution which will bring us together as individuals and as communities. They are tired of political bickering and the indecisiveness, policy and the administration that merely worsens their misery.

Honourable Delegates, you have been sent here by your Districts, your Constituency electorates, your Religious, Social, Professional, Gender Groups and Civil Society Organizations to make a Constitution for Kenya which will answer its pressing needs. The process has dragged on long enough and must now be concluded, we have little time left, if we do not finish consideration of the Draft Constitution today, latest tomorrow morning, our efforts of the last three and half years maybe overtaken by forces outside our control. How will we then account to our people for a failure to give them a new Constitution? Will they forgive us?

Ladies and Gentlemen, you have been sent here not only to make a new Constitution, you have also been sent here to heal the wounds of the nation. Your mission is to establish peace and lay the foundations of political, economic and social cooperation. Hence the constant emphasis in the Review Act on consensus and let me remind you that the first among the goals of Review under the Review Act, is the strengthening of national unity, the integration of our people and the security of the Republic. I reminded you barely three weeks ago, that in entrusting the task of Constitution making to us, people have placed their future and those of their children into our hands. Today, we must fulfill that trust. We must demonstrate the ability to reach consensus,

the magnanimity to see each others point of view and to reach out to those that we have chosen to see as our enemies.

Let me draw your attention to a point that has been made numerous times since the Review process started. The point that we are not making the Constitution for one or another community or for one or another individual. We are making a Constitution for all of us and for generations to come. The national interest must be a constant inspiration and our guide. In wishing you successful deliberations let me plead with you please, do not fail the people. (*Clapping*). I am delighted to learn that His Excellency the Vice President is with us and I welcome him most warmly on behalf of all of us. (*Clapping*).

Honourable Delegates, this morning the Steering Committee discussed how we might proceed today. We had the presentation by Bishop Sulumeti of the recommendations of the Consensus Building Committee on both the Executive and Devolution. We discussed how we might deal with those recommendations and we may proceed with our task of approving and adopting the remaining Chapters. We discussed various options that we could follow in this process. One was to have a brief debate and adopt the modified principle of consensus that were presented to us on Friday. If you went down that route and approved the principles with amendments if necessary then on the basis of those principles, we could ask the Drafters to revise the Chapters in the Zero Draft and then we discuss those revised Drafts as a way of adopting those Chapters. The other option we discussed was that we would start with the Zero Draft and the Secretary perhaps would then read out the amendments as we come to the relevant Articles. Amendments which will insert into the document the consensus that was reported to us and then we adopt the Articles if we so agree on the basis of those amendments.

When we left, there was some support for the second alternative. Many Delegates have come to see me since saying the first alternative as the message I bring to you from the Steering is, we start with the Zero Draft. The Secretary introduces amendments which our Drafters have prepared for us and that would be one way of adopting the document. I think the intention was to start with the Chapter on the Executive then we will go to the Chapter on Devolution in the same way. Is that broadly acceptable?

Hon. Delegates: Yes.

Prof. Yash Pal Ghai: Delegate 320 and then 427.

Hon. Delegate Benson Kegoro:

(Inaudible).

Prof. Yash Pal Ghai: Do you have a point of order?

Hon. Delegate Benson Kegoro: Yes.

Prof. Yash Pal Ghai: Okay, let us have the point of order first please.

Hon. Delegate Benson Kegoro: Mr. Chairman, my name is Kegoro, number 427. So far Mr. Chairman, this Conference has done very well since Bomas I, Bomas II and now Bomas III. We have done most work and we are nearly in completion. We know Mr. Chairman that the programme as it is, we should end by 19th, next Friday. Should we not complete the work as envisaged, is there any feeling that we extend the work of this Conference for another one week to complete the work, should we not complete?

Hon. Delegates: No.

Prof. Yash Pal Ghai: No, I think we have set ourselves the deadline of 19th March, it was recommended by the Steering. We have repeatedly endorsed that and let us aim to complete our work by 19th of March. *(Clapping)*.

Hon. Delegate Kiriro wa Ngugi: Do I have the floor?

Prof. Yash Pal Ghai: 320, yes.

Hon. Delegate Kiriro wa Ngugi: Thank you Mr. Chairman. First I think I owe the Delegates an apology. I have spoken stern words both in this hall and other places and to individuals and I would like to unreservedly apologize on my stern words.

PLO Lumumba: Could you identify yourself on the record.

Hon. Delegate Kiroro wa Ngugi: My name is Kiroro wa Ngugi, Delegate 320 from Kiambu, litigant number one in court. Now, my apology to you because of certain stern words I felt a little disappointed. I hold these Delegates with love and affection and please forgive me for my stern words. I am only human and insofar as I am human fellow Delegates so are you. We are all human we are capable of a mistake. Before I come to why I stand Mr. Chairman, I needed to say that off my chest. We are a creature of statute, it is Parliament that created Cap 3A under which we are operating. At the end of our deliberations we expect and demand of Parliament to pass this document without amendment. That is what we expect of our parent, the one that created us.

Mr. Chairman, in this hall we also gave birth to a Consensus Group, that Consensus Group has a product. It is my humble submission to fellow Delegates that in as much as we have expectations on Parliament as to what to do with our document, what moral authority can we bear on them if we ourselves do not treat with equal humility and tact on the product of those that we sent to discuss and arrive at a consensus? Our first duty Mr. Chairman therefore, would be to debate that report, make amendments as necessary. We have a duty to the Consensus Committee that we formed and I therefore propose that we proceed first by discussing and possibly amending those areas but we discuss in two parts. First we discuss the Executive report and deal with that and make the amendments if there is a principle at that point. Once we have finished with that, then we discuss the second part of the Committee report on Devolution but that is the best way to do justice to ourselves and justice to the very, very people we sent. Thank you very much.

Prof. Yash Pal Ghai: 067.

Hon. Delegate Mukhisa Kituyi: Thank you very much Mr. Chairman. My name is Mukhisa Kituyi, Delegate number 067. Mr. Chairman, allow me to brave the indulgence of the Honourable Delegates, to beseech them on just one little thing as a preamble to my recommendation. In the next 10 days this country is hosting the largest International Investment Conference, this country has ever had. It is not partisan, it is not government, it is Kenya. We

make it or we break it as Kenya. Our ability to husband the process that has been protracted here over the next one week is critical among other things to the success or failure of that international Conference. (*Clapping*).

Mr. Chairman, the events of the past one week have shown that if we hurl insults at each other we can score points but we cannot win a war. Individuals, factions, parties will win battles but none of us will win a war. At this critical historical moment Mr. Chairman, it is not desirable that we try to see who wins and who loses, it is about Kenya succeeding. The historical momentous events that have to happen over the next few days, must be informed by a desire to rise above our pettiness as individuals, as groups, as parties and I want to suggest this. Rather than go through a process that is going to seek who wins and who loses, let us take those components of the Consensus Report which are least contentious, see if we can proceed upon those ones. Where there is so much contention, instead of saying let us make amendments here. Let the Consensus Building Committee listen to the mood of these Delegates, go back and come back with a suggestion that reflects their mood. (*Uproar*).

Prof. Yash Pal Ghai: Order, order.

Hon. Delegate Mukhisa Kituyi: I am not only saying something because I will please anybody. Mr. Chairman, it is not about me winning or being booed. It is about, what is the best way to go forward. Not who is going to win and who is going to lose. But how can we avoid some losing and some winning? I want to propose Mr. Chairman, that we split as the Honourable Delegate did mention this report in two components. Let us receive the recommendations of the Executive, see what adjustments we can make about it but refer the component on Devolution back to the Consensus Committee and request that they come back as soon as possible with a report that reflects the mood of the Delegates. Thank you Mr. Chairman. (*Clapping*).

Prof. Yash Pal Ghai: 221.

Hon. Delegate Ruth Oniang'o: Thank you Chair, I am Delegate 221, Ruth Oniang'o, Parliament. Mr. Chairman, the baby is about to be delivered and some of us, most of us have been here guarding that pregnancy, making sure the mother is well nourished ready to deliver a

healthy baby. Somehow, I think it is the husband who has kept away and wants to be told whether it is a girl or a boy. *(Clapping)*.

Mr. Chairman, we have had precedence here and we have had procedures here which have gotten us where we are. Even the previous Consensus Group, when they came with their report we did not adopt it wholesale.

Hon. Delegates: Yes.

Hon. Delegate Ruth Oniang'o: And Mr. Chairman you have just presented to the Conference what seems to gain consensus in terms of the way forward at the Steering Committee. That is, that we take the Zero Draft like we have done all other Chapters. The Secretariat has worked over the weekend and they have come with some Motions of amendments and we proceed forward Mr. Chairman and we want that baby. *(Clapping)*. We want that baby. Mr. Chairman, we want that baby delivered by or sooner than 19th of March 2004. Thank you. *(Clapping)*.

Prof. Yash Pal Ghai: Delegate 179.

Hon. Delegate William Ruto: Mr. Chairman, William Ruto, Parliament. I want to agree with Delegate 221. Mr. Chairman, we have proceeded in this Plenary since it began, on the basis of the Zero Draft and Motions that have been brought by Delegates to amend the Zero Draft. That is, those are the regulations that govern the management of this Conference. Mr. Chairman, I want to agree with you, on the part that you have said. "Let the Drafters, look at the Consensus report, and draft appropriate Motions to amend Articles of the Zero Draft, along side other Motions that have been prepared by other Delegates, to amend the Zero Draft". *(Clapping)*. That way Mr. Chairman, we will save on time, because, as you said correctly, we are not making this Constitution against anybody, and we are not making this Constitution for anybody. We have to make a Constitution for Kenya.

Chairman, we must proceed on an equal basis for all Motions. I want to propose that we proceed. *(Clapping)*.

Prof. Yash pal Ghai: I would like to put the matter to vote.

Hon. Delegates: Yes!

Prof. Yash Pal Ghai: We have two proposals. The first one is that we discuss and adopt the recommendations of the Consensus Group, and then ask the Drafters to produce a Chapter on the basis of those principles and we debate the Draft.

The second one is that we go through Zero Draft and introduce amendments to introduce the principles of the Consensus. Let us take a vote on this first. So, those who propose that we debate the recommendations and then ask the Drafters to revise the Draft could you please raise your hands?

(Hon. Delegates raise their hands).

(Consultation at the “high” table).

Prof. Yash Pal Ghai: Let me make it clear. The question I am now putting to you is that we debate the recommendations of the Consensus Group, and having debated and adopted those principles, if necessary after amendments, we turn over the principles or decisions to Legal Draftsperson to revise the Draft and bring it back to us for debate. Those who support this procedure please raise your hands. *(Uproar).*

An. Hon. Delegate: Point of Order!

(Consultation at the “high” table and discussions on the floor).

Prof. Yash Pal Ghai: Just to clarify to Delegates whom I asked to raise their hands, the question is, do we debate the report first?

Hon. Delegates: No! No!

Prof. Yash Pal Ghai: Excuse me. Excuse me I am trying to clarify because some of you have told me you have not understood the question. (*Uproar*). The question is, those who want to debate the report first--

Hon. Delegates: No! No!

Prof. Yash Pal Ghai: --raise their hands. (*Uproar*).

(Consultation at the "high" table).

Prof. Yash Pal Ghai: Okay. Now, I want-- (*Uproar*).

PLO Lumumba: Excuse me. (*Noise*). Excuse me please. We have the count going on.

Hon. Delegates: Yes!

PLO Lumumba: Because of the apparent confusion. (*Uproar*). Kindly listen to us, kindly listen to us so that our Tellers are not confused. The question on the table is this. Those who support the position that the Consensus report be debated, amended and adopted as a way forward, please raise your hands. (*Noise*).

PLO Lumumba: We will give the alternative sampling. (*Noise*). The alternative will be this, if you want to be clear. The alternative will be, those who want us to use the Zero Draft as a basis-- (*Uproar*) --and to amend it as we go on--

Prof. Yash Pal Ghai: Order!

PLO Lumumba: --now, with those two alternative I am putting the question.

Number one, those who want us to debate the Consensus report first, amend it and adopt it and then turn it over to the Drafters. Could you kindly raise your hands? (*Noise*).

(Hon. Delegates raise their placards).

(Noise).

(Consultation at the “high” table).

PLO Lumumba: Teller number 1, are you ready? Teller number 2, ready? 3, ready? 4, ready? 5, ready? 6, ready? 7, ready? 8, ready? 9, ready? The question on the floor now is, those who want us to have the Zero Draft as the basis and to be amendment Article by Article--.

(Applause).

(Delegates raise their placards and counting goes on).

(Consultation at the “high” table).

PLO Lumumba: Teller number 1, are you ready? Not yet.

(Inaudible response from the floor).

PLO Lumumba: Teller number 1, are you ready? Teller number 2, ready? Teller number 3, ready? 4, ready? 5, ready? 6, ready? 7, ready? 8, ready? 9, ready? One? ready. One is ready. Those who wish to abstain?

(No, placard raised).

PLO Lumumba: No abstention.

Prof. Yash Pal Ghai: No.

(Consultation at the “high” table).

Prof. Yash Pal Ghai: Do we have all those amendments on the floor?

(Consultation at the “high” table).

(Noise).

Prof. Yash Pal Ghai: I now have the count and those who supported the first alternative that is, we debate the Draft report first is 151. Those who support the alternative of using the Zero Draft are 275 (*Clapping*) and one abstention. So, we proceed with the Zero Draft (*Clapping*). I need to remind you once again of the need for civility. No heckling, please. Let us listen to the debate carefully. What I propose to do is as follows: With the help of the Drafters, a series of amendments have been prepared which reflect the Consensus view. I am, in the first instance going to deal with those amendments which the Secretary will read out to you and then we proceed with those Articles and then at the end of that, we see if there is still for other amendments.

So, I am now in the usual way going to ask the secretary to read the Articles in accordance with the regulations and then where there is a proposal for amendment, to read the amendment as well so that you see how the Article is proposed to be amended.

PLO Lumumba: With the Chair’s permission, I now have the floor and I am reading from page 104, Chapter 12.

(Consultation at the “high” table).

Hon. Delegate Mwangi Kiunjuri: Point of Order!

PLO Lumumba: There is somebody with a Point of Order. Will you take it?

Prof. Yash Pal Ghai: Yes, 068.

Hon. Delegate Mwangi Kiunjuri: Thank you, M. chairman. Mr. Chairman, I have an issue to raise that we are discussing very serious matters and this Conference has been held backwards because of the two issues of Executive and Devolution. Mr. Chairman, now that it seems that it is the final leg and at the same time the outcome of this debate will also have a relative relation with the one the Drafters will bring in as the final Zero Draft. Mr. Chairman, I would propose that if there is any vote to be taken, let us do it physically. Let there be a division and not raising but we have physical counting. Let the division be physical, Mr. Chairman (*Clapping*).

Prof. Yash Pal Ghai: No, sorry--

Hon. Delegate Mwangi Kiunjuri: Mr. Chairman, that is what the regulations say. We have just been doing it. We are agreeing on everything. So, for this time round, now that we do not want anybody to say that he is not aware or that he was confused, let us go for physical counting.

Prof. Yash Pal Ghai: No, I am sorry. We have decided and followed for the last three weeks, on this procedure for voting and it is a very reliable voting. It is very clear and we shall stick to that, thank you (*Clapping*).

PLO Lumumba: Mr. Chairman, I now have the floor. I refer Honourable Delegates to page number 104, Chapter 12: *The Executive*. Article number 171: *Principles of Executive Authority*. On the basis of the Consensus Group--

(Consultation at the "high" table).

PLO Lumumba: I am being told I should read the text?

Hon. Delegates: Yes!

Prof. Yash Pal Ghai: Will Delegates like the text to be read?

(Mixed responses from the floor).

PLO Lumumba: Read them the proposed amendments.

Prof. Yash Pal Ghai: Order!

PLO Lumumba: Let me read.

Prof. Yash Pal Ghai: Yes, let him read so that we are quite clear on what we are discussing and what we are amending.

PLO Lumumba: Article 171; Sub-Article (1): *The powers of the Executive are to be exercised for the well-being and benefits of the people and the communities of the Republic of Kenya.*

Hon. Delegates: Yes!

PLO Lumumba: (2) *An office bearer who is assigned an Executive Authority by or in terms of this Constitution:-*

(a) shall serve the people and shall not act in a manner incompatible with the principle of service to the people; and

(b) shall exercise that Authority in a manner consistent with the purpose and objects of this Constitution and the laws.

Hon. Delegates: Yes!

PLO Lumumba: The proposed introduction would add Article 3, to read thus:-

(3) The composition of the National Executive shall reflect the Regional and ethnic diversity of the people of Kenya.

Hon. Delegates: Yes!

Prof. Yash Pal Ghai: Yes. So, that is the amendment the Secretary has read to you. I would ask for a vote on this. Those who approve of Article 171 as amended in the manner read out by the Secretary, please raise your hands.

(Delegates raise their placards).

Prof. Yash Pal Ghai: Those who are opposed to the adoption of the Article, please raise your hands.

(No placard raised).

Prof. Yash Pal Ghai: The Article is carried (*Clapping*).

PLO Lumumba: If it be so, the Article as amendment is carried. Article 172: Structure of the National Executive. It is proposed thus: That the Article as currently written be deleted and the provisions be substituted thus. Therefore, reading the Article as it is, then I will read the substitute. The Article now reads thus:

174. The National Executive of the Republic of Kenya comprises the President, The Deputy President, the Prime Minister, the two Deputy Prime Ministers and the Cabinet Ministers appointed under Article 174.

The proposed amendment which would replace the entire Article will read thus:

174. The Executive Authority of the Republic at the National level of Government is vested in the President, the Deputy President, the Prime Minister, Cabinet Ministers and Deputy Ministers all of whom, in the performance of their respective functions shall work in harmony for the good governance and the progress of the people of Kenya.

Prof. Yash Pal Ghai: Actually, we just had President, Deputies and the Cabinet. We did not have all those Deputy - but never mind.

(Noise).

Hon. Delegate Adhu Awiti: Point of Order!

Prof. Yash Pal Ghai: We now have- the Secretary has read to you the proposed amendment to Article 172. I want to put it to vote now. Those who approve of the deletion of the present 172 and the adoption of the proposed amendment--

Hon. Delegate Adhu Awiti: Point of Order!

Prof. Yash Pal Ghai: -- please--

PLO Lumumba: There is a Point of Order, 009.

Hon. Delegate Adhu Awiti: Mr. Chair, it is not clear to us; the difference. Could the Secretary circulate the proposed amendments so that the Delegates would see what they are voting for?
(Clapping).

Prof. Yash Pal Ghai: Well, we can certainly do that, but we can't do it immediately because we will have to print six hundred hard copies.

Prof. Yash Pal Ghai: It is being done and it will take a while. If you like, we could break for coffee--

Hon. Delegates: Yes.

Prof. Yash Pal Ghai: --and tea and when we come, hopefully, you will have those documents.

Prof. Yash Pal Ghai: Thirty minutes, please. No more.

The meeting adjourned for tea at 10.38 a.m.

The Meeting reconvened at 11:30 am.

Presentation of Chapter 12 on the Executive

Prof. Yash Pal Ghai: Please sit down. I would like to start in about 30 seconds.

(Consultations at the “high” table).

Prof. Yash Pal Ghai: Okay, ladies and gentlemen, the Secretary will now read – no, let me just explain. Order, please Order! Order! I have during the tea break spoken with the Drafting team and they have given me now the amendments which would reflect the consensus but they have also told me that if you approve these, there will be some minor consequential amendments which they will have to make. This is normal of course in every Chapter but they just wanted me to tell you that. I will now ask the Secretary to proceed from where we stopped before the break.

(Consultations at the “high” table).

Prof. Yash Pal Ghai: Now, you all have a copy of the proposed amendments but the Secretary will read the amendments in any case so that you know exactly what has been proposed.

(Long pause).

PLO Lumumba: May I now proceed, as directed by the Chairman, to read from page 104.
Page 104.

(Consultations at the “high” table).

PLO Lumumba: Page 104, Article 172.

Hon. Delegates: Point of Order.

Prof. Yash Pal Ghai: We are now going through Article by Article, there are no Points of Order. We are adopting it, we are voting and we are discussing it. So please sit down and let the Secretary read the Article. Go ahead.

PLO Lumumba: I am reading from the Zero Draft and the template that has three pages. I am reading the text as it is in the Zero Draft, which reads thus;

The National Executive of the Republic of Kenya comprises the President, the Deputy President, the Prime Minister, the two Deputy Prime Ministers and the Cabinet Ministers appointed under Article 174.

The amendment as it would be on the basis of the Consensus would now read thus;

The Executive authority of the Republic at the national level of Government is vested in the President, the Deputy President, the Prime Minister and the Cabinet all of whom in the performance of their respective functions shall work in harmony for the good governance of Kenya and the progress of the people of Kenya.

Prof. Yash Pal Ghai: This is in fact the same amendment that you had adopted before we broke for coffee. So we can now proceed to 173.

(Consultations at the “high” table).

Prof. Yash Pal Ghai: Okay. I am corrected by my colleagues. So I would now put the question. Those who support the--

Hon. Delegate George Nyamweya: Point of Order.

Prof. Yash Pal Ghai: 615.

Hon. Delegate George Nyamweya: Thank you, Mr. Chairman. My name is George Omari Nyamweya, Delegate number 615. Mr. Chairman, as you know, I have a large number of Motions on the entire Chapter and I think we need your guidance here. When you bring what

you are calling the Consensus Report and bring in some Motions, you must also remember that we have Motions and must either agree we are withdrawing our own Motions and support the Motion of the Consensus Report on how we proceed on this one. I do not think it would fair to simply ignore and think that Points of Order we are raising have anything that is not to facilitate and help progress in this Conference. Now, Mr. Chairman, I actually have a Motion on that same Article. Now, how are we going to deal with these ones? That is because in the morning when we decided we were not going to follow the Consensus Report and we go to the Zero Draft, it means all those Motions that we had prepared for us then become and remain burning.

Prof. Yash Pal Ghai: Excuse me, I had ruled earlier, under authority which vests the Chair with that power, that we will first deal with the amendments coming from the Consensus Group and then many of the amendments will become either relevant or irrelevant. So, I am going to proceed as I had ruled under Regulation 20(8) and so please sit down and let us proceed with the consideration of the proposed amendments. We were at 172. I now want to put the question. First, we shall vote on the amendment--

An Hon. Delegate: Point of Order.

Prof. Yash Pal Ghai: First we shall vote on the amendment that the--

An Hon. Delegate: Point of Order.

Prof. Yash Pal Ghai: I am sorry, I am going to proceed with putting the question. The question is as read by the Secretary that, “the Executive authority of the Republic at the national level of Government is vested in the President, the Deputy President, the Prime Minister and the Cabinet all of whom in the performance of their respective functions shall work in harmony for the good governance of Kenya and the progress of the people of Kenya”. So those who support this amendment, please raise your hands, your number plates.

Honourable Delegates raise their placards.

Prof. Yash Pal Ghai: Those who oppose the amendment, please raise your hands.

Few Honourable Delegates raise their placards.

Prof. Yash Pal Ghai: So the amendment is carried and we--

(Noisy protestations on the floor).

Prof. Yash Pal Ghai: So we proceed to the next Article.

PLO Lumumba: Article 173 – Authority of the President.

- (1) There shall be a President of the Republic of Kenya.
- (2) The President –
 - (a) is the Head of State and Commander-in-Chief of the Armed Forces, and the Chairperson of the National Security Council;
 - (b) is a symbol of national unity, and has responsibility to promote and enhance the unity of the nation, safeguard the sovereignty of the Republic, promote and respect the diversity of the people and the communities of Kenya and ensure the protection of their human rights and fundamental freedoms; and
 - (c) shall uphold, safeguard, and respect this Constitution and the rule of law.
- (3) The powers of the President shall be exercised in accordance with this Constitution and the laws.
- (4) The President shall not hold any other public office, including any elected or appointed office within a political party.

The proposed amendment to the Zero Draft is as follows:

Article 173(2), it is proposed to delete paragraph (a) and substitute it with the following amendment.

The President is the Head of State, the Head of Government, the Commander-in-Chief of the Kenya Defence Forces, the Chairperson of the Cabinet and the Chairperson of the National Security Council.

Prof. Yash Pal Ghai: I now put the question of the amendment to the Article 172 as read by the Secretary, that is to say that; “the President is the Head of State, Head of Government, the Commander-in-Chief of the Kenya Defence Forces, the Chairperson of the Cabinet and the Chairperson of the National Security Council”. Those who support this amendment, please raise your hands.

Hon. Delegates: Count.

(Consultations at the “high” table).

Prof. Yash Pal Ghai: We count then.

PLO Lumumba: Tellers will count and just--

(Consultations at the “high” table).

(Counting going on).

PLO Lumumba: Teller 1, are you ready? Teller 2, 3, 4, 5, 6, 7, 8, 9.

Prof. Yash Pal Ghai: Those who are opposed to the amendments please raise your hands.

(Hon. Delegates raise their placards).

Prof. Yash Pal Ghai: Please do not make noise, let us be quiet and let the tellers do their job properly without too much disturbance. Please, Order, Order.

(Consultations at the “high” table).

Prof. Yash Pal Ghai: Order, please. Too much noise, too much noise I am getting a headache, please.

PLO Lumumba: Teller 1, are we ready? Teller 2, teller 3, teller 4, teller 5, 6,7, 8, 9.

Prof. Yash Pal Ghai: Any abstentions?

PLO Lumumba: 9 not yet. 9, raise your hand when you are ready. 9 is ready.

(Consultations at the “high” table).

Prof. Yash Pal Ghai: I would like now to give the results of the votes on the proposed amendment to 173. Those who supported the amendment are 172 Delegates. Those who opposed that are 297 and one abstained. Therefore the “NAYS” have it. *(Clapping)*.

PLO Lumumba: We do not have two-thirds at this stage.

Prof. Yash Pal Ghai: --only, is then we take the whole thing together.

PLO Lumumba: May I now read Article 174.

Prof. Yash Pal Ghai: No, you do not read 174, you read 170 as the original. 063.

Hon. Delegate Amos Kimunya: Thank you, Chairman. Mr. Chairman, I beg to move that we change the mode of voting.

Hon. Delegates: No.

(Inaudible responses from the floor).

Hon. Delegate Amos Kimunya: Listen to me, Honourable Delegates. We have witnessed from where we are sitting here some Delegates are being harassed to vote in a certain way.

(Inaudible comments from the floor).

Hon. Delegate Amos Kimunya: Others are being intimidated not to vote in a certain way.

(Inaudible comments from the floor).

Hon. Delegate Amos Kimunya: And we had to be fair to everybody and we need to have a system that people can feel comfortable with. Let them go and vote with the teller and keep their secrecy on how they voted.

(Uproar from the floor).

Hon. Delegate Amos Kimunya: Honourable Delegates, let us not be carried by emotions, we are making fundamental decisions for the future of this country and I would beg that we give everyone a chance to exercise their democracy without feeling intimidated or without feeling that they are voting or they do not have to vote because they were not sure that they will upset anyone. So, I would urge that we actually move back to the situation where people have to go to the teller or any other method that will ensure equitable voting on this Motions. Thank you, Chairman.

Prof. Yash Pal Ghai: Order! Order! Order! 182.

Hon. Delegate Nicholas Salat: Thank you, Mr. Chairman. I am Delegate 182, Honourable Salat, Bunge. Mr. Chairman, the only people we recognize to be sitting at the front are the front bench. What are the others doing behind you Mr. Chairman?

(Applause from the floor).

Hon. Delegate Nicholas Salat: What we would like is to have - everybody is a Delegate were. Can they sit at their respective positions because the only people who should be conducting business here is yourself and the Secretary and the Vice-Chairs. As of now Mr. Chairman, everybody - we request that they go and sit at their respective seats. *(Clapping).*

Prof. Yash Pal Ghai: We will come to that in a minute but let us conclude this debate, please.

(Inaudible comments from the floor).

Prof. Yash Pal Ghai: Order! Order, please.

PLO Lumumba: Let us give the floor to 007, please.

Hon. Delegate Jimmy Angwenyi: My name is Jimmy Angwenyi, Delegate number 007, Parliament. I support the proposal made by my colleague there because it is constitutional. The proposal made by 063 that we vote through secret ballot.

(Booing from the floor).

Hon. Delegate Jimmy Angwenyi: Mr. Chairman--

(Booing from the floor).

Prof. Yash Pal Ghai: Order! Order!

Hon. Delegate Jimmy Angwenyi: Mr. Chairman, I must have my say here. They can have their way but I must have my say here. Mr. Chairman, secret ballot is a democratic way of voting. Mr. Chairman, we do know the way *mlolongo* system destroyed this country because people saw where you voted and then pursued you after the voting exercise. Mr. Chairman, if we are writing a democratic document here, then we must go a democratic processes in writing that Constitution--

Prof. Yash Pal Ghai: Order, Please. Order!

Hon. Delegate Jimmy Angwenyi: Mr. Chairman, you must be able to control this Conference if you want us to participate actively. Mr. Chairman, I have been elected to come here to express the views of my people and you cannot cow me Mr. Chairman. Nobody will cow me, nobody will tell me here.

Prof. Yash Pal Ghai: You have made your point, sit down.

Hon. Delegate Jimmy Angwenyi: Before I stop, they must stop and allow me--

Prof. Yash Pal Ghai: Sit down please.

Hon. Delegate Jimmy Angwenyi: --to express myself the way I want to. I second the Motion.

PLO Lumumba: Can we have a quiet assembly so that the Chairman can lead this proceeding in dignity and quiet. The Chairman will now address this assembly.

(Noise from the floor).

Prof. Yash Pal Ghai: Well, it seems important to me that we have a system of voting in which people have confidence.

Hon. Delegates: Yes.

Prof. Yash Pal Ghai: That does not mean that the majority have to say that the system of voting is to protect the minority. So, if a significance number of Delegates feel that the voting as we are conducting is not fare, there is intimidation, there is double voting, I think we have to take it seriously.

(Uproar).

Prof. Yash Pal Ghai: But I am going to give the floor to 595 before making a ruling on this issue.

Hon. Delegate Martin Shikuku: Thank you Mr. Chairman. What we are doing now is very important, we have done about 19--

Hon. Delegates: 20.

Hon. Delegate Martin Shikuku: --20 Chapters in this system the question is. What has happened why do you want to change the system? Mr. Chairman--

(Murmurings on the floor).

Prof Yash Pal Ghai: Order. Order please.

Hon. Delegate Martin Shikuku: --the logical thing you should do is to put this question of voting by secret ballot and the present system and we go on. Thank you.

(Murmurs).

Prof. Yash Pal Ghai: I am now going to make a ruling and my ruling is that we have a voting by secret ballot. I want to be fair to everyone, I do not want even a smallest minority to come at the end of the process and say, we were intimidated, we did not have an opportunity. So, the Secretary will announce in a minute the procedure we will adopt for conducting the ballot.

(Consultation at the "high" table).

PLO Lumumba: Honourable Delegates, in light with the Chairman's ruling.

(Noise on the floor).

Prof. Yash Pal Ghai: Please listen to the Secretary he is going to tell you about the procedure that we intend to follow.

(Noise on the floor).

Prof Yash Pal Ghai: It is Chairman's ruling please respect it. I am trying to be fair to every group in the assembly. The Secretary will speak when you have stopped your interventions until that time there will be no business in this assembly. So, if you want to proceed with speed,

please let the Secretary announce how we should proceed and if it is necessary we shall sit until 8.00 pm today to conclude our business.

An Hon. Delegates: Point of Order.

(Consultation at the “high” table).

Prof. Yash Pal Ghai: There will be no further proceedings unless you are quiet and the Secretary has a chance to make his announcements.

PLO Lumumba: Ladies and gentleman, you now permit me to give you the logistical arrangements.

(Uproar).

Prof. Yash Pal Ghai: If you are concerned about the timings, I have said that we will sit here until 8.00 p.m. today and we will finish our business.

(Noise on the floor).

PLO Lumumba: Can I give the logistical arrangements?

(Consultation at the “high’ table).

Prof Yash Pal Ghai: Can I please appeal to you this is not the way to conduct our proceedings and I cannot Chair this session if you are going to behave like this. So, please, please cooperate with us, we had agreed this morning to proceed in an orderly way.

(Noise on the floor).

Hon. Delegate Koitamet Ole Kina: Honourable Delegates. Order please. Order, Order. Well I know we have had a problem because of time and a lot of us feel that we must proceed without wasting time, but right now what we are actually doing is wasting that time. So, let us please--

(Noise on the floor).

Hon. Delegate Koitamet Ole Kina: --please Honourable Delegates I know we will waste time and then blame ourselves later for having wasted it.

An Honourable Delegate: Point of Order.

Hon. Delegate Koitamet Ole Kina: Order. Please allow me also to make a Point of Order. I would like to appeal to this Conference for us to look for the easiest way to proceed and I think the easiest way, is we do not want to give anybody a reason tomorrow to say that a certain vote was fraud. So, the best we can do, is that let we proceed and vote, but at the sometime accept to be hear as long as possible so that we must finish this even if it means sleeping here up to 1.00 a.m. we do that.

(Noise on the floor).

Hon. Delegate Koitamet Ole Kina: Please let us proceed so that all of us feel that we had our rights exercised. I appeal to all Delegates please to allow us to proceed.

Hon. Delegates: Point of Order.

(Noise on the floor).

Hon. Delegate Koitamet Ole Kina: Please allow us to proceed. I appeal to you.

(Consultation at the "high" table).

Prof Yash Pal Ghai: 451.

PLO Lumumba: Could we proceed in silence the Chairman has recognized 451 please.

Hon. Delegate Millie Odhiambo: Chairman. My name is Millie Odhiambo. Delegate number 451, representing the Civil Society Organizations. Chair, coming from a Human Right perspective I do understand, I do appreciate that we have to take into account minority views, but Chair, we have also to take account majority views. We were sent here by various organizations, we are here representing Kenyans and Kenyans that we are representing need to know whether we are representing their interests and Chair for that matter, I do not understand why we want to go secretive about the people who have sent us here to represent them.

Hon. Delegates: Yes. (*Clapping*).

Hon. Delegate Millie Odhiambo: So, Chair. If we decide that we are going by the secret ballot I want to register myself as a minority view against that system and we have to be given a chance to register ourselves as a minority view. Thank you Chair.

(Noise on the floor).

Prof. Yash Pal Ghai: 500.

(Consultation at the "high" table).

PLO Lumumba: Let us listen to Delegate number 500 please. Honourable Delegates, let us listen to 500 in silence.

Hon. Delegate Kamla Sikand: Hallo Delegates? Hallo let us have peace. Mr. Chairman, I cannot quite understand what is the objection against secret ballot. This is the form we use in all our State elections too--

Hon. Delegates: Point of Order.

Hon. Delegate Kamla Sikanda: Hold on.

(Consultation at the “high” table).

Hon. Delegate Kamla Sikanda: I do not think we are capable of making any decision if we are so loudy. We got to face it we are so loudy we are not even capable of making any decision.

(Noise on the floor).

Prof. Yash Pal Ghai: Order, Order please.

Hon. Delegate Kamla Sikanda: Mr. Chairman. I have a suggestion. Those people who feel there is going to be a rigging, let us have an open register for every Delegate to check late. When I vote, I sign Kamla Sikand Delegate Number 500, yes or no. So, let there be an open register and the issue of rigging is out.

Prof. Yash Pal Ghai: The Secretary has a proposal along those lines so please hear him out. We really want to proceed with the work but we have to deal with this issue. We will deal with this issue if we are-- If we listen in silence and the Secretary now has the proposal along the lines that Mrs. Sikand has proposed. Please listen to him.

PLOLumumba: Please listen to me like I am Delegate 260 without vote. This is my proposal which is in keeping with the regulations. That there be a division that our tellers maintain a register which contains the names of all Delegates, that at the appropriate voting moment in an orderly row by row fashion the Delegates move to our tellers and signify their vote by signing against their names.

(Uproar and Clapping).

Prof. Yash Pal Ghai: I suggest we proceed along those lines because you need time Secretary to organize that.

(Uproar).

PLO Lumumba: Tellers if that proposal is carried, do we have the lists? Teller one, teller two, teller three, teller four, teller five, teller six, teller seven, teller eight and teller nine. Backup staff can we get more lists?

(Uproar and inaudible discussion on the floor).

Prof. Yash Pal Ghai: Well, I suggest people sit on that basis and it is fair, it is fair to everyone and if you like we can take a sounding on this and those who support this please raise your hands.

(Uproar).

Prof. Yash Pal Ghai: Those who support the method of voting suggested by the Secretary.

(Uproar and Inaudible consultation at the “high” table).

PLO Lumumba: Ladies and Gentlemen, amid these apparent confusion there will ultimately be order I have no doubt. Now, the Chairman has asked me the ultimate way of making decisions that is I have made a proposal; if you support the proposal the Chairman asked me to ask, raise your hands.

(Uproar, counting and inaudible consultation at the “high” table).

PLO Lumumba: Teller one are you ready? Teller two, teller three, teller four, teller five, teller six, teller seven, teller eight and teller nine. Teller nine not yet ready?

(Inaudible consultation at the “high” table).

Prof. Yash Pal Ghai: The next question is we retain the existing procedure. Those who support that proposition please raise your hands.

(Delegates raise their placards and inaudible consultation at the “high” table).

PLO Lumumba: Teller one are you ready? Teller one ready? Teller two ready, teller three ready, teller four not yet, teller five not yet, teller six, teller seven, yes teller eight not yet, teller nine? Not yet.

(Uproar and inaudible discussions on the floor).

PLO Lumumba: Teller four are you ready now? Teller five are you ready now? Teller eight are you ready now? Not yet. Teller nine are you ready now? Not yet. Eight and nine not ready.

(Uproar and inaudible discussions on the floor).

PLO Lumumba: Teller nine now ready? Teller eight ready. All tellers ready. Let us do the tally.

(Tallying being done and inaudible consultations at the “high” table).

Prof. Yash Pal Ghai: I have the votes now. Those who support the new propose--

PLO Lumumba: Silence on the floor please we have the votes gentlemen and ladies.

Prof. Yash Pal Ghai: Those who support the new proposed system - 193, those who preferred the old method – 214. *(Clapping)*. Therefore, the old method-- *(Clapping)*.

(Consultations at the “high” table).

Prof. Yash Pal Ghai: We proceed now with the-- and under the rules, we have rejected the amendment to 173. Therefore, now I put 173 as originally proposed for the vote.

(Noise on the floor and consultations at the “high” table).

Prof. Yash Pal Ghai: I would now like to proceed with the vote on 173 as in the Zero Draft and those who support the adoption of 173 as part of the Draft Constitution, please raise your hands. So this is the votes to force adopting 173 as in the Zero Draft, please raise your hands.

(Members raise their placards)

(Consultations at the “high” table).

Prof. Yash Pal Ghai: Please let us count in silence. It is very disturbing for the tellers when there is so much noise.

An. Hon. Delegate: There is a point of order.

Prof. Yash Pal Ghai: No “points of orders” are taken during the voting. I have explained that many times. You are wasting your breath.

(Consultations at the “high” table and counting of votes).

PLO Lumumba: Teller one, are we ready? Teller two? Teller three? Teller four? Teller Five? Teller six? Teller seven? Teller eight? Teller Nine? Not yet, Teller nine.

(Consultations at the “high” table).

PLO Lumumba: Teller nine, are you ready now? Teller nine is ready.

Prof. Yash Pal Ghai: Those who oppose the adoption of 173 as part of the Draft Constitution, will you please raise your hands now?

(Members raise their placards).

PLO Lumumba: Teller one? Ready. Teller two? Ready. Teller three? Ready. Teller three, not yet. Teller four? Ready. Teller five? Ready. Teller six? Ready. Seven? Eight? Nine? Teller

three, you are at the tail. Teller three is now ready. So we wait for the tallies, please. Abstentions?

(Consultations at the “high” table).

Prof. Yash Pal Ghai: Abstentions?

(Counting of votes).

Prof. Yash Pal Ghai: I would like now to give the results.

PLO Lumumba: We have the vote count, ladies and gentlemen.

Prof. Yash Pal Ghai: Those who in support of the adopting the Article as it stands in the Zero Draft - 314, those opposed – 151, one abstention. Those voting in support of the Article are more than two-thirds of the votes casts. *(Clapping)*. Therefore, the Article is adopted. *(Clapping)*.

We move on, now please--

(Inaudible responses from the floor and consultations at the “high” table).

Prof. Yash Pal Ghai: Can I take a point of order from 047?

(Inaudible comments on the floor).

Prof. Yash Pal Ghai: Order please! Order!

Hon. Delegate Kembi Gitura: Mr. Chairman, I am 047, Delegate Kembi Gitura. We voted on the Bishop Sulumeti’s amendment. The vote was 172, for and 297 against. Now, I heard the Secretary say that it failed. I want to understand right from the outset. Do we require a two-thirds majority or a full two-thirds or a one-third for this Motion to pass or not? Since that has happened, how is it that it was said that this Motion by Bishop Sulumeti failed? Mr. Chairman,

there must be something very wrong with the voting also, because – and I think that is why we ought to have a division – how is it that now for the Zero Draft, we have 314 votes, for and 151 against, if we are following the same pattern? Or are we going to be told that people have been coming-- (*uproar*).

Hon. Delegate Kembi Gitura: Let me finish! I need to finish and you have to listen to me! You listen to me and then you can make your position! We want to understand whether it is the voting pattern that has changed, on why we are not going for division because it is not applicable how suddenly that voting system has changed so tremendously? Before I sit down Mr-- (*uproar*) I think you will have to listen to me also. I have a right to be heard. The point I am making is, we have now voted for two versions; the Bishop Sulumeti's proposal to amendment, which did not garner two-thirds and therefore cannot have failed according to the rules of procedure that we are following. Then now, we notice that for the Zero Draft, there is 314 and 151 against. What is the position and what procedure are you following? So that we can know what has passed and what has not passed.

Prof. Yash Pal Ghai: The procedure I am following is that when have a vote on an amendment, we go by majority vote, because ultimately that becomes then part of the Article, then we put the entire Article to vote for inclusion in the Constitution. At that stage, we require a two-thirds vote of those present and voting. (*Clapping*).
(*Consultations at the "high" table*).

Prof. Yash Pal Ghai: We can move on to the next Article and I should explain to you that the proposal that says we have now adopted Article 173, which says, "The President is head of State and the Chairperson of the Security Council", for example provision 174 (1) (b), now cannot be debated because we have already agreed that the President shall be the Chairperson of the National Security Council.

Hon. Delegates: Yes!

Prof. Yash Pal Ghai: So, I ask the Secretary to read the next Article with that qualification.
(*Noise on the floor*).

PLO Lumumba: Article 174 – State Functions of the President. I am reading from page 105.

Sub-Article (1), The President -

- (a) shall preside at the meetings of the Cabinet;
- (b) shall be the Chairperson of the National Security Council.

Hon. Delegates: Yes.

PLO Lumumba: Number 2, the President-

- (a) shall address the opening of each newly elected Parliament;

Hon. Delegates: Yes.

PLO Lumumba: (b) may address Parliament at any other time;

Hon. Delegates: Yes.

PLO Lumumba: (c) shall once every year,

- (i) report in, and address to the nation on, all the measures taken and the progress achieved in the realization of the national goals, values and principles set out in Chapter Three;
- (ii) cause to be published in the Gazette the details of the measures and progress referred to in sub-paragraph (i).

Hon. Delegates: Yes.

PLO Lumumba: (3) The President, in accordance with this Constitution, shall appoint and may dismiss-

- (a) the Cabinet, consisting of –

- (i) the Prime Minister;
 - (ii) two Deputy Prime Ministers nominated by the Prime Minister;
 - (iii) not less than fifteen and not more than twenty Ministers nominated by the Prime Minister;
- (b) not less than fifteen and not more than twenty Deputy Ministers nominated by the Prime Ministers;
- (c) the judges of the Superior Courts of Record;
- (d) any other public officer who the Constitution requires the President to appoint, subject to the applicable provisions of the Constitution or legislation.

Hon. Delegates: Yes.

PLO Lumumba: (4) with the prior consent of Parliament, the President may-

- a) appoint Commissions of Inquiry; or
- b) sing instruments of consent by Kenya to be bound by international agreements in accordance with Article 133.

(5) The report of a Commission of Inquiry appointed by the President shall be laid before Parliament within twenty one days of the receipt of the report by the President.

(6) After approval of the Cabinet, the President may, subject to Article 83, and in accordance with Article 133-

- (a) declare a state of emergency; or
- (b) declare war.

(7) the President may-

- (a) appoint persons to represent the Republic as high commissioners, ambassadors, or diplomatic or consular representatives with the approval of the National Assembly and may dismiss them;
- (b) receive foreign diplomatic and consular representatives;

(c) exercise the power of clemency in accordance with Article 230; and

(d) acting in accordance with the advice of the Ethics and Integrity Commission, confer honours in the name of the people and the Republic of Kenya.

(8) The President shall ensure that-

(a) the international obligation to the Republic are fulfilled through the actions of the relevant Minister and shall submit a progress report to Parliament annually; and

(b) the courts and Constitutional Commissions and the officers are able to secure their independence, impartiality, dignity, accessibility and effectiveness, as contemplated in this Constitution.

Hon. Delegates: Yes.

PLO Lumumba: The proposed amendments arising out of the Consensus report are to found in page of the document with three pages.

Article 174, it is recommended that Article 174 (1) be deleted in its entirety. Article 173, the following recommendations are made:-

That Article 174(3) be deleted and be replaced with the Article that I am now proceeding to read.

That the President in accordance with this Constitution shall appoint and may dismiss-

(a) the Prime Minister;

(b) the Deputy Prime Ministers;

(c) Cabinet Ministers and Deputy Ministers;

(d) The Judges of the Superior Court of Record; and

(e) Any other public officer whom this Constitution requires the President to appoint.

Article 174(4): The recommendation is that the Article as in the Zero Draft be deleted and be substituted with following Article: "With the prior approval of the National Assembly, the

President may sign instruments of consent by the Republic to be bound by international agreements in accordance with Article 133”.

Lastly, that Article 174(5) be deleted in its entirety. Thank you, Mr. Chairman and Honourable Delegates.

Prof. Yash Pal Ghai: I think the way we will now proceed is to vote on the proposed amendments--

Hon. Delegate Kivutha Kibwana: Point of Order.

(Uproar from Honourable Delegates).

Prof. Yash Pal Ghai: I think we will just proceed in the way that I want to outline. The general rule is that if we have adopted an Article, we cannot subsequently adopt a Clause on Article which is contrary to the Articles that we have adopted.

Hon. Delegates: Yes.

Prof. Yash Pal Ghai: Now, in adopting Article 173, we have adopted that the President is the Chairperson of the National Security Council, so we cannot delete 1(b). So subject to that we will consider the amendments. The first amendment is--

Hon. Delegate Kivutha Kibwana: Point of Order.

(Consultations at the “high” table)

Prof. Yash Pal Ghai: What we have now to vote--

Hon. Delegate Kivutha Kibwana: Point of Order.

Prof. Yash Pal Ghai: Please listen to me, then you say you are confused and you do not give me the chance to explain the procedure.

(Uproar from Honourable Delegates)

PLO Lumumba: Can we let the Chairman make his statement and if there any Point of Order they can be raised after he has spoken.

Prof. Yash Pal Ghai: I am not going to put to vote the proposal to delete 174(1), but I have explained that we cannot delete 1(b) because they have already proved that. So, all we can do is to delete 1(a) and I now put to vote. Those who support the amendment to delete 1(a), please raise your hands.

(Inaudible discussions on the floor)

Prof. Yash Pal Ghai: We should have order. I do not want to proceed to a vote when there is no order, I want every delegate to understand what there are voting on.

(Uproar from Honourable Delegates).

(Consultations at the “high” table).

Prof. Yash Pal Ghai: The Attorney General has very kindly consulted with us and since in deleting the proposed amendment 173, the proposal you will notice was that, “the President will also be Head of Government”, that has been rejected, “and the Chairperson of the Cabinet”, that has been rejected. Therefore, we do not need to vote on 174(1) because those are already being taken away by your vote on 173.

Hon. Delegates: Yes.

Prof. Yash Pal Ghai: Then we move to 174(3). I am not actually entirely sure that--

(Consultation at the “high” table)

Prof. Yash Pal Ghai: Okay, what is the Point of Order maybe it is time - 27, please go ahead.

Hon. Delegate William Kabogo: Thank you Chair, for finally seeing me. Delegate 27, Parliament. My name is Kabogo William. Chair, it is my humble submission to you as a Point of Order, that we have thrown the rules of this Conference through the window. I will support my statement by saying, rule number 43, when you call for a division, it says “shall” and the procedure is written in there. I want you to confirm that we do not have these rules being followed here today.

Number two, you have misled us, Chair, when you said Section 27 of the Act, Cap 3A, which you are supposed to be following, Chair, with all due respect. 27(5)(i), “in the case of any question concerning a proposal for inclusion in the Constitution, the decision of the National Constitutional Conference shall be carried by at least two-thirds”. Confirm Chair, that the motion of Bishop Sulumeti was about inclusion in the Constitution. If you so confirm, then it required a third or two-thirds for it to sail through. Are we still following the rules or are we not following the rules?

Prof. Yash Pal Ghai: Yes, we are following the rules.

Hon. Delegate William Kabogo: Stop misleading us.

Prof. Yash Pal Ghai: Yes, we are following the rules. We are looking for two-thirds before anything goes in the Constitution.

Hon. Delegate William Kabogo: On the issue of division, it is clear on rule 43, what is your ruling, Chair?

Prof. Yash Pal Ghai: I am following the procedure.

Hon. Delegate William Kabogo: It says, clear the corridors for a division. That is what it says.

Prof. Yash Pal Ghai: You are not supposed to shout at the Chairman.

Hon. Delegate William Kabogo: I am not shouting--

Prof. Yash Pal Ghai: We have been following these procedures for the last three weeks, I am fully familiar with the procedures and anything which goes into the Constitution must have two-thirds. (*Applause*).

Prof. Yash Pal Ghai: Please sit down, I have already explained this more than once and I will not take any more Point of Order. I want to finish this Article now.

Hon. Delegate William Kabogo: So, are you saying Chair, that number 43 is out of the question? Is that what you are saying?

Prof. Yash Pal Ghai: So we put to--

Hon. Delegate Kivutha Kibwana: Point of Order.

Hon. Delegate William Kabogo: I am still on a Point of Order, Chair, if you allow.

Prof. Yash Pal Ghai: As far as I can tell, the only difference between--

Hon. Delegate Kivutha Kibwana: Point of Order.

(Consultation at the "high" table).

Hon. Delegate William Kabogo: Chair, do I have the floor?

Prof. Yash Pal Ghai: You are out of order; please. I shall have to get the stewards to remove you from the assembly if you persist on this!

Hon. Delegate William Kabogo: Because I insist on following the rules. I will be obliged to leave if you so desire.

Prof. Yash Pal Ghai: We proceed now, we vote on the amendment that Clause (3) be deleted and substituted by the Clause as read. First, we vote on deletion of Clause (3) and substitution, "by the President".

Hon. Delegate Kivutha Kibwana: Point of Order.

(Uproar from Honourable Delegates).

Hon. Delegate Kivutha Kibwana: Point of Order.

Prof. Yash Pal Ghai: If you are not going to allow me to proceed, I adjourn the meeting. We meet after lunch and we will probably proceed with that properly.

Meeting adjourned at 12.57 for lunch.

AFTERNOON

The meeting reconvened at 2.35 p.m.

Prof. Yash Pal Ghai: Delegate 124 has asked for the floor and I give the floor to him now. So, Delegate 124, please make your statement. Order please, order, order. Please take your seats.

(Noise on the floor).

Prof. Yash Pal Ghai: Please take your seats and please be quiet so we can begin our proceedings. Delegate 124 has the floor. Thank you.

Hon. Delegate Kiraitu Murungi: Thank you Chair. My name is Kiraitu Murungi, Delegate number 124. Chair, I would like to refer the Plenary to Section 27 of the Constitution of Kenya Review Act which guides the proceedings of the Conference. Chair, that section makes it very clear that there are two principle methods of making decisions by this Conference and the primary method of making the decision is through consensus. We only go to voting when we have tried to reach a consensus and we have been unable to reach a consensus.

Chair, I must say I am a very saddened man today because we have ignored this fundamental principle. Chair, you recall we have been away from this process for sometime but we came because we believed that there was a genuine desire to build a national consensus in this final phase of the review process. Chair, we genuinely participated and I must say we have been very happy and excited about the decision of the Plenary to form a Consensus Building Committee to resolve certain contentious issues so that we can move together as a united country, as a united people under a new Constitution.

Also Chair, we did very good work under chairmanship of Bishop Sulumeti and we reached a very, very clear consensus Chair on the issue of the Executive and we agreed that indeed we would have a President who would be the Head of State and Head of government and Chair, all of us who were in the meeting were asked whether if we come into Plenary we would go into support of that position and each and everyone said we do. Chair, we expected that this position would be brought by Bishop Sulumeti to this meeting for adoption this morning and that we will be given that opportunity to confirm that indeed we had agreed and therefore seek the adoption of that consensus by the Plenary. We are very disappointed Chair that Bishop Sulumeti's report was not given a chance and that we were not asked whether we adopt it or whether we reject it and Chair, the amendments that we are discussing now are based on that report. So, if we do agree, I will plead with Delegates even at this late hour that we adopt that report because it contains a very clear consensus.

(Murmurings on the floor).

Hon. Delegate Kiraitu Murungi: Chair, I think what was an issue was not the consensus on the Executive. What was the issue was the consensus on Devolution where one member of the Committee said, when the final decision was taken he was not there. Chair, we suggested in the morning that the Committee goes back and comes with a unanimous position on the Devolution but this was not done. So, Chair we are very, very disappointed that the very spirit of Section 27, the very spirit of this Plenary which appointed the Consensus Committee has not been followed this morning. Chair, we are also disappointed at the method we have used at arriving at decisions this morning. The voting process that we are adopting Chair, is suspect, it is irregular, is compromised and is totally unacceptable. *(Clapping)*.

Chair, we have no method of ascertaining that the votes that we are showing in our placards and being a truly recorded. There are no agents to ensure that indeed *(Clapping)*. Yes, there is no voting without agents to ensure that there is some integrity in the process. Mr. Chairman, we have information Chair, that the figures especially in the last round of voting were doctored.

(Uproar on the floor).

Mr. Chair, there is no independent verification of the votes and the tallying of the votes is not properly being done. Chairman, although the Act clearly provides for a division, accessible division to take place like in Parliament where people vote in different booths and they are physically counted, there is no actual division taking place here. Mr. Chair, in the morning you made a decision that voting will be made by secret ballot which we supported. But Chair, this decision was not implemented. Chair, we insist that the voting be done by secret ballot (*Clapping*) and we also requesting Chair that the voting which was done in the morning, be repeated under a secret ballot.

(Uproar on the floor).

Prof. Yash Pal Ghai: Order please!

Hon. Delegate Kiraitu Murungi: Chair,

Prof. Yash Pal Ghai: You try to conclude your --

Hon. Delegate Kiraitu Murungi: I am just about to conclude. What I am saying is that we are here to participate in this Conference in good faith, we want integrity in the process, we want the Consensus report to be adopted and respected and Chair, unless this Consensus report is tabled for adoption in this meeting and unless Chair that all the vote taken in the morning and declare null and void.

(Uproar on the floor).

Also Chair, unless we institute voting by secret ballot as a method of voting in this Conference while I am withdrawing from this Conference.

(Noise on the floor).

Prof. Yash Pal Ghai: Order, order. Order, order. The Conference, the Committee decided this morning to proceed with its business by operating through the Zero Draft. I think we have to proceed with that method.

As for the voting, I have expressed my views that a system of voting should protect one against intimidation and I don't think that we can re-open votes which has taken place. (*Clapping*). But I would like us to consider the suggestion of the Secretary that people come to the Tellers and sign. I think we have to try to accommodate those minorities who might feel they are intimidated. 500?

(Noise on the floor).

Prof. Yash Pal Ghai: Please listen to-- Please.

Hon. Delegate Kamla Sikand: Mr. Chairman, I just have to ask a very small question. I would like to know what is the objection to the secret voting, why? Answer me that question.

(Noise on the floor).

Prof. Yash Pal Ghai: I think we-- 15.

Hon. Delegate Billow Kerrow: Thank you Mr. Chairman. My name is Billow Kerrow, Delegate number 015. Mr. Chairman we have heard the Minister's statement. Mr. Chairman we do appreciate that the Minister has in the last few days been very active here but Mr. Chairman with all due respect, we want to – if we take one step towards the Minister's proposal, is he ready to take a similar step? My suggestion is this, if we go down there and vote on that Article is worried about 174 and he loses in a vote that you are proposing, is he going to accept now in front of everybody that he will stand by that decision and will walk away having lost. Because if he accepts Mr. Chairman, we are ready but we don't want to be taken on a circus, we are being told to vote, when we voted again he comes and he will tell us again no. So, can he now categorically state that we indeed go ahead and vote on a ballot or whatever he wants and he loses, that he will stand by the decision of the Delegates of this Conference? Thank you.

Prof. Yash Pal Ghai: Do you want to respond? Please quiet please.

Hon. Delegate Amos Kimunya: Thank you Chairman. I have been given the floor. Honourable Delegates, when I raised the issue of protection of people who feel they are not free to express, their voting--Because their conscience, is because of people coming and saying, is just what we confirmed during lunch time and the issue here, is not whether anyone is loosing in the vote or whether anyone is winning. What we would like to see is let everyone get a fair chance to express themselves and if there are 470 voting in a certain way, nobody is complaining but what we want to be able to see is that everyone has been given a fair chance to express themselves without feeling that, because Delegate Kimunya is voting this way, I should vote that way. That influence, we should remove, we are advocating in this Constitution that voting shall be by secret ballot and we should be the first ones to be implementing it here. We are flouting what we are recommending, we might as well recommend in the Constitution that we should go back to *mlolongo* and I think we need to take this fundamental decisions. This is a contentious issue, it has taken many many days of discussing. People have agreed, people are feeling that perhaps they agreed because of who was in that team.

Let us see it is reflected here in the voting and I think that is all we are asking for so that we can have fairness, so that we can protect the minority, and so that the votes translates the conscience of the people rather than being influenced by the neighbour, or by who is standing across you or who you promised a vote last night. Thank you Chairman.

(Noise on the floor).

Prof. Yash Pal Ghai: I don't want to spend much time on this. I have made a proposal which you can reject which is that the Delegates would come to the desk and sign, this is a kind of compromise between that---

(Consultation at high table).

I would like to make a ruling on that point please. Those of you who have the numbers don't need to worry how the voting is conducted you will win in anyway. Let us give assurances to

minority that their voice is also being heard. So let us proceed on the basis and see how it works and if there is a problem, we can review again but let us now proceed with the work in hand and I would like with your permission to ask the Secretary to read, to come down and they sign and let us proceed, we don't have very much time, we want to finish this work today or tomorrow so that we can adopt the document on Friday. So, please let us proceed.

PLO Lumumba: So, Article 174. If you remember we had gone through the entire Article and what was on the table is that from Bishop Sulumeti's Consensus Group is that we delete 174(1) and then 174(3) that we delete (3) and substitute it with what appears on the first page of the template from the Consensus Group and then on Article 174(4), we substitute it to what is in the Zero Draft with the words "with the prior approval of the National Assembly, The President may sign instruments of consent by the Republic to be bound by international agreements in accordance with Article 133", and then Article 174(5), that the same be deleted in its entirety.

An Hon. Delegate: Point of Order?

Prof. Yash Pal Ghai: I want now to proceed with the discussion of this Article, I am not going to take points of orders for the time being, I want to make some progress. So I would like to then put to it to the House the question on the deletion of Section 174(1). As I had explained, we have already decided that the President shall be the Chairperson of the National Security Council and that decision has to stand. So the option for us is rather we delete 1(a), which is to say that the President presides at the meeting of the Cabinet. I would now like to put that to vote. Those who support the deletion of 7 (1) (a), will you please raise your hands now.

(Noise on the floor).

Prof. Yash Pal Ghai: I am asking for those who support the proposed amendment that 1(a) be deleted to raise their hands now please. And you can come down and register with the Tellers your vote, as you think you would like confidentiality. Those who are happy to vote, so this is going to take bit of time but I will ask you to come down and sign the register with the Tellers so that we can move forward.

(Inaudible discussions on the floor).

Prof. Yash Pal Ghai: Yes, that is the Motion, that 1(a),--

PLO Lumumba: The voting that is going on is those who support that Article 171(a) be deleted. Can you now vote?

(Inaudible discussions on the floor).

Prof Yash Pal Ghai: Excuse me, I have an Amendment to make to what I said. I think everyone should calm down, those who are voting “yes”, indicate that in the register, those who are voting “no”, indicate in the register. So, we will not be calling on two different sets of Delegates, you all come down, so that has an element of secrecy and you will register “Yes” or “No”.

PLO Lumumba: We are discouraging Delegates from crowding the podium please.

Hon. Delegate Nyabote Aburi: Mr. Chairman, I am not crowding the podium. Mr. Chairman, won't we have been explained why the Consensus Group recommended the way they recommended?

Prof. Yash Pal Ghai: It is too late now. Let us proceed.

(Inaudible discussions on the floor as Delegates go to vote).

(Consultations at the “high” table).

Prof. Yash Pal Ghai: Patrick Lumumba to come to the podium, please.

PLO Lumumba: Let us have people move away from the podium. Let us have everybody sit down. Let us return to our seats. Let us resume our seats.

(Inaudible discussions on the floor).

PLO Lumumba: Excuse me, can we resume our seats? Ladies and gentlemen, resume your seats. Pauline Nyamweya come over please, urgently. Can you resume your seats please?

(Inaudible discussions on the floor).

PLO Lumumba: Let us resume our seats. Let us resume our seats. Mr. Owidi, Samson Weya, please, please, let us resume our seats. We want to clear this anomaly.

(Inaudible discussions on the floor).

(Bell rings).

PLO Lumumba: Can we have the orderlies?

(Inaudible discussions on the floor).

(Consultations at the “high” table).

PLO Lumumba: Let us resume our seat. Let us resume our seats please. Please we are asking Delegates to leave the podium. We are asking the Delegates to leave the podium now. All Delegates to leave the podium and we resume our seats.

(Noise as Delegates resume their seats).

PLO Lumumba: All Delegates, let us resume our seats. All Delegates are requested to resume their seats.

(More noise).

PLO Lumumba: All Delegates are requested to resume their seats so that we can resolve the concerns. All Delegates resume your seats. All Delegates, Professor, G. G., resume your seats please.

(More noise).

PLO Lumumba: Let us kindly resume our seats and maintain silence. The Chairman will now communicate.

(Consultations at the “high” table).

PLO Lumumba: Honourable Delegates, may we have the floor, I am speaking with permission of the Chair. It appears that the system we have used is subject to abuse.

(Uproar from the floor).

PLO Lumumba: And I believe you want to be understanding because we are fumbling. In order to solve the fumbling, we are making the following proposals which answer to the spirit of transparency in the process of voting. I am now asking my Tellers to open a fresh list. Just go with me slowly, you will correct me at the end. Open a fresh list, assume there was no last vote. Open a fresh list.

Number two, in order to ensure that there is no double voting, we are now going to recommend as follows which answers to the spirit, and there will be movement, it will be slow but fool proof. Delegates number 001 – 070 will vote in booth number 1. Delegates number 001-070 will vote in booth 1 to 70. The booth is here, we shall form lines and what will happen is that the Chairman will, because our memories have now been faded, put the question again.

(Inaudible comments on the floor)

PLO Lumumba: Delegates number 071 – 140 will vote in booth number 2. That is the booth. Delegates number 141 – 210 will vote in booth number 3. Delegates number 211 – 280 will vote

in booth number 4. Delegates number 281 –350 will vote in booth number 5. Stand up booth 5. Delegates number 351 – 420 will vote in booth number 6. Delegates number 421 – 490 will vote in booth number 7. Delegates number 491 – 560, booth number 8, stand up. Delegates numbers 561 – 630 booth number 9.

Secretariat Staff can you quickly do placards and stand before the booths for ease of identification. And now you want to remain in your seats? The Chairman will now address you to guarantee orderly movement. The Chairman will now have the floor with your permission.

(Inaudible discussions on the floor).

PLO Lumumba: Delegates with disability, we are creating a special booth for you at the entrance. Our Tellers will come there.

Hon. Delegates: Point of Order.

PLO Lumumba: The question will be put by the Chair.

(Consultations at the “High” table).

*Prof. Yash Pal Ghai: Can I clarify a point that was raised during the break, during the voting?
Let me take you back to the decision that we made--*

Hon. Delegate Kivutha Kibwana: Chair.

Prof. Yash Pal Ghai: Okay, 057.

(Inaudible discussions on the floor).

Prof. Yash Pal Ghai: Order please.

Hon. Delegate Kivutha Kibwana: The Chair of this Conference, I have all this time since you became Chair thought that you are the most democratic people in this Conference, but I am sorry to say, you have really been very unfair, discriminatory, because since morning, I have been asking on a Point of Order and you even give a Point of Order to people who ask after me. I am disappointed but since you have given me the chance, let me say the following.

It is true as the Secretary said, we have been fumbling in this electoral process. We took some votes earlier through people showing by these placards--

Hon. Delegates: Yes.

Hon. Delegate Kuvutha Kibwana: --and some people were even taking placards which do not belong to them and putting them up.

(Uproar from the floor).

Hon. Delegate Kivutha Kibwana: Please let me be heard. There was no way of even determining the votes which were being counted were the votes of the placards raised. There was no way of determining whether the numbers that were brought to you were the correct numbers.

(Inaudible comments from the floor).

Hon. Delegate Kivutha Kibwana: And at this juncture, you have changed the process of voting hoping that you are going to have a fairer system of voting; and because you have changed the system now after people have asked for a fairer system, it is important that the prior votes also be subjected to this system--

(Booing by Honourable Delegates).

Prof. Yash Pal Ghai: No, I have already ruled against that.

Hon. Delegate Kivutha Kibwana: Please--

Prof. Yash Pal Ghai: I am sorry.

Hon. Delegate Kivutha Kibwana: --hear me out and then you can also have your chance

Hon. Delegates: No!

Hon. Delegate Kivutha Kibwana: Because we have seen the reason we have changed the system of voting is because we have seen the previous system was wrong.

Hon. Delegates: No!

Hon. Delegate Kivutha Kibwana: If that is so--

Hon. Delegates: No!

Hon. Delegate Kivutha Kibwana: If that is so--

Hon. Delegates: No!

Hon. Delegate Kivutha Kibwana: If that is so, then the previous votes need also to be taken afresh.

Hon. Delegates: No! No!

Hon. Delegate Kivutha Kibwana: And the Chair, in all honesty, in all honesty, the regulations 43 talk about a division, where people who vote for “yes” go to one side, those who vote for “no” go another side. And that is the closest we can have to a secret ballot because at least when people go to one side, those who will go to another side will not try to influence how each group votes. So, I really think that if we want to give this process integrity, it is necessary we stick to

the regulations and do division instead of improvising every time we find that a way we have chosen is not correct.

Finally the Chair, I want to say this, you have misled the Conference from a legal point of view. The Sulumeti proposals or the proposals of the Consensus--

(Uproar from the floor).

Prof. Yash Pal Ghai: Go on. Let him speak.

(Noise from the floor).

Hon. Delegate Kivutha Kibwana: The Chair, I withdraw the word misled and to use these words. It is not correct, the legal position, that you put on the table because if any proposal from the Sulumeti Committee gets a two-thirds of those who are here, it will get into the Constitution and that is a fact. Therefore, it is necessary that when we do not get a two-thirds for those proposals, we determine whether there is a third for them because the moment there is a third for them, then those who have that thirds, can ask for another votes and if there is two-thirds again, that proposal will go to the referendum. So, the Chair, all this morning-- *(Clapping).*

Hon. Delegate Kivutha Kibwana: All this morning, that is what I have been trying to say. To say that, the proposals from the Sulumeti Committee, if they get to attract two-thirds, they go into the Constitution. Therefore, they are proposals about what to include into the Constitution. And if that is correct it means, if somebody garners a third, they can propose another vote and if there is the two-thirds, then that will go to the referendum and that is the sense in which even for what we voted for before it is necessary that we ask whether there is a third supporting it and if that third wants another vote of two-thirds so that it can be taken to referendum. And the Chair therefore, I really ask for recognition of people whom the Chair might not like because that is democracy. Thank you. *(Clapping).*

Prof. Yash Pal Ghai: Well, the Secretary wants to respond but what I just want to say before he does, let the rulings I have made on the voting are correct. The Attorney General is with us, he can give his legal opinion on this question.

PLO Lumumba: I want specifically to respond to Professor Kibwana on what is fundamentally casting aspersions on the Tellers sitting here. It is not correct Professor Kibwana and what you can do is to verify these votes. Early this morning a Delegate came here saying that Delegate 105 was absent and that somebody had voted. Upon verification we discovered that the person who is 105 is actually present and has been voting. We have all these proceedings covered by video and I want to assure you, without fear of contradiction that if you have any doubts booth by booth supported by this physical verification, this vote is good and fine. (*Clapping*). I am speaking as Delegate 260, Professor Kibwana I want to tell you that we have all been silent as we voted on all the others. The reason why the Executive and Devolution are generating this heat is because of their contentious nature and that should not be allowed to negate good votes which are subject to verification by way of physical and video records. Let us be faithful to the truth, let us not cast aspersions on of the Secretariat Staff merely because, you have a position which negates a position that you favour. Thank you.

(Yelling and clapping of hands).

Prof. Yash Pal Ghai: I think with that explanation, we can move forward-- I would like now if we can move forward, I am sure we all want to do so. I should explain that when we voted on 173, which we did before lunch, we agreed that the President would be the Head of State, Commander in Chief of Armed Forces and the Chairperson of the National Security Council.

We also agreed that he would not be head of Government. So, the result is that -- If you look at 174 (1), we have already decided that the President is not Chairperson of the Cabinet, we have also decided that the President is indeed Chairperson of the National Security Council so we do not need to vote on 174 (a).

I should also explain that we are going to have considerable difficulty in going through this exercise because these amendments have been based on certain assumptions, on assumptions that

the Sulumeti amendments would go through. Since they are not going through in the entirety, there are some amendments which we do not need to deal with at all as with one I have just mentioned, others may need to be reformulated. This is why in a way though you did not agree, it would have been much more rational and orderly if we had discussed the principles of consensus, modified them – turned it over to the Drafters and they could have brought us a Revised Draft based on that consensus. But you chose to go another route and we will continue to do so because that is what your decision is, but you will have to be patient with us, we shall need constantly to be discussing with my colleagues what exact words we put to you for amendment. So, please be patient with us, if we have to consult with my colleagues, particularly Dr. Godana who has been a Deputy Speaker and he is well versed in these matters and perhaps I could ask him to come nearer to me so that we can be consulting regularly.

So, now with that explanation, we can go to--

Hon. Delegate Paul Muite: Point of Order.

Prof. Yash Pal Ghai: 114.

Hon. Delegate Paul Muite: Mr. Chairman, we voted this morning on Article 173. This afternoon you made us vote on Section 174 (1), which you are now saying-- I am on a point of order please.

(Murmurs on the floor).

Hon. Delegate Paul Muite: Which you are now saying is not necessary to a certain extent, I agree with you because it relates to 173. If you look at the figures of 173, this morning, they were exactly one third and two thirds. Under the rules, the one third that voted against is entitled to call for a second vote and we are calling for that second vote on 173 before we can proceed. It is the only way under the law that you may then be able to send the particular Article to a Referendum--

Prof. Yash Pal Ghai: I am not allowing the opening of the vote on 173.

Hon. Delegate Paul Muite: It is not for you to allow, it is what the law says. It is nothing to do with the Chairman.

(Heckling on the floor).

Hon. Delegate Paul Muite: Mr. Chairman, the one-third people who voted are entitled by law, not the discretion of the Chairman to call for a second vote and that is what we are doing. If you cannot allow that to happen, then it means that you do not want these proceedings to proceed according to law and some of us certainly will have to walk out.

(Noise).

(Consultations at the "high" table).

Prof. Yash Pal Ghai: It was more than two thirds, I gave you the precise figures and we had calculated that and please no more time wasting. I do not want orders to be used for wasting time and I want to now proceed with the voting. *(Clapping).*

An Hon. Delegate: Yes.

Prof. Yash Pal Ghai: We are now at 174 (3) where the proposal is to delete Clause (3) and to adopt--

(Murmurs on the floor).

(Consultation that the "high" table).

Prof. Yash Pal Ghai: What is the Motion?

PLO Lumumba: Can we regain the floor and allow George Nyamweya to move his Motion please?

Hon. Delegate George Nyamweya: Thank you, Mr. Chairman. My name is George Omari Nyamweya, Delegate number 615. Mr. Chairman, I did this morning seek your guidance and I am seeking it again for clarity for all of us to know how to proceed.

Mr. Chairman, I have well over forty Motions based on what we discussed from the Executive Committee. Mr. Chairman, this Conference set up a Consensus Committee which has a series of Motions also. Now, Mr. Chairman, when you decided this morning that you are going to go to the Zero Draft, it automatically would mean that the Motions that we have filed must also be debated and voted upon. Had we gone with Bishop Sulumeti's Motions, then some of our Motions would have been absorbed by that Consensus Report.

Now, you have put us in a very difficult situation here Mr. Chairman, because if you do vote on Bishop Sulumeti's Motion and they are defeated or accepted, what then becomes of our Motions? Because we are entitled also to be heard and our Motion to be voted upon. Otherwise we would have no option Mr. Chairman, but to say that we were never given an opportunity at the Conference and challenge the legality and the constitutionality of whatever the outcome is. Surely we must clear that air first before we proceed any further. And if so Mr. Chairman if--

Prof. Yash Pal Ghai: Let me say this. I had proposed that we deal with Consensus amendment on the assumption that once we have gone through that, some Motions will become irrelevant. I have to say to some extent that I made the ruling on the assumption that the consensus recommendations will go through, because I thought they represented the consensus, that turned out not to be the case. Some of you have come to see me during the break and said that let us take all the amendment on a particular Article together, vote for them, I think it would be a complicated process, but I am willing to follow that, if that is the wish of the Delegates.

Hon. Delegate George Nyamweya: Indeed Mr. Chairman--

Prof. Yash Pal Ghai: In other words, once we have an Article, we would consider all the amendments, Motions on that Article and vote one by one until we deal with that Article. My ruling was made on the assumption that we could have a more orderly process, we could have saved time if we followed my procedure. But since large number of the consensus

recommendations are going to be – it looks like defeated, then we might as well follow the procedure that you are suggesting and so what we then need to do is to consolidate these amendments. So, we deal together with the amendments which are of the same effect and so let us first deal with 171. So, do you have something on--

Hon. Delegate George Nyamweya: Sorry, Mr. Chairman, I do not wish to appear to be engaging in any debate with the Chair. It is the fact that although you are ruling some of the points which have been raised here, there are Motions which in facts raise the very same subject again and until we actually-- Let me put it this way, Mr. Chairman, in all sincerity we want to write a Constitution here we must leave this Hall, all of us being to say, this is our Constitution. We must not leave here some of us thinking that is theirs, we were defeated, they won. I do not think that would be a good way of going about it.

Mr. Chairman, let us be brave enough, courageous enough to say as the Secretary said, we have fumbled, if we have fumbled on such a fundamental Chapter, why don't we rethink clearly and perhaps find a way of dealing with it conclusively and effectively and openly. And I think because some of these Motions will take us back to what we have already ruled on, let us actually deal with them from the word go.

Prof. Yash Pal Ghai: I had not intended to exclude any particular Motion, I was just suggesting an order but if you want to Move your Motion, please do so. You have one on 171?

Hon. Delegate George Nyamweya: *(Inaudible).*

Prof. Yash Pal Ghai: Could you please read it to us? *(Noise)*. Please be silent, let the Honourable Delegate have a chance to present his amendment.

Hon. Delegate George Nyamweya: Now, Mr. Chairman, perhaps you did not understand because I have Motions which go back to 172 and 171. *(Uproar)*. And because you did not allow me, to Move them at that time, you cannot now say because you voted on Bishop Sulumeti's Motions, mine are now closed out. We must therefore go back to the other Motions. *(Uproar)*.

(Consultation at the “high” table).

Prof. Yash Pal Ghai: You see, Honourable Delegate, you know this well that if your Motion is identical to the one that was rejected or accepted, then there is no point in you moving it.

Hon. Delegate George Nyamweya: Now, Mr. Chairman, I did say I did not wish to debate with the Chair. Mr. Chairman, at that point and I did rise in the morning, it would have been in order, then if they were similar to have asked that those of us who have Motions to either withdraw them or Move them, so that they could be dealt with and an order of ruling made on them. There was no ruling or order made in any of my Motions. So, I cannot be asked now that you have made a ruling of a different Motion and say that ruling--

Prof. Yash Pal Ghai: Well, I am sorry I have already-- Thank you--

Hon. Delegate George Nyamweya: --has an effect on my own case.

Prof. Yash Pal Ghai: --the rules that if your Motions are identical to the ones that have been dealt with, then you cannot Move it now. But if there are Motions that you have which have not been covered, please feel free to Move them now. *(Noise)*.

(Consultation at the “high” table).

Prof. Yash Pal Ghai: We are actually now, on 174, do you have a Motion on 174?

Hon. Delegate George Nyamweya: Yes, I have a Motion on 174.

Prof. Yash Pal Ghai: Okay, let us have it and please Delegates, listen to the Speaker.

Hon. Delegate George Nyamweya: Mr. Chairman, in all the Motions that I am proposing to Move, there is a principle in play. And we are Mr. Chairman saying that, we do not wish to have a situation where we are creating an Executive which is going to have positions where there is potential area of conflicts. Mr. Chairman, I think it has been very clear, and I have been here

from the very beginning. My position is this Mr. Chairman, I do not mind whether Executive authority rests with a Prime Minister or with the President. But Mr. Chairman, whichever position this Conference takes, for goodness sake let us not divide this country. If we chose we want a Parliamentary system, for goodness sake, let us be courageous enough to say, “that is what we want”, and then we get the Prime Minister to be elected by the people of Kenya.

If we chose we want the Presidential system, then let the people of Kenya decide who their Chief Executive is going to be. That is the basis of all the Motions that I am going to move Mr. Chairman. To remove my names again for the record if you wish, I am George Omari Nyamweya, Delegate number 615, representing Democratic Party of Kenya. You wanted to know which Delegate I am, that is who I am. (*Uproar*). Now, Mr. Chairman. (*Noise*).

Prof. Yash Pal Ghai: Please go on.

Hon. Delegate George Nyamweya: Now, Mr. Chairman, I had said they said oh no! that is very good we all know each other now and we can all settle to a more amicable debate. (*Laughter*). Now, Mr. Chairman, it is on that spirit that now, the order of Article 174, where we had agreed that the President would chair the Cabinets and this is an agreement that we had at the Executive Committee. Now, we are going back even on what the Executive Committee itself agreed, and even what the Zero Draft agreed. Now, Mr. Chairman, the proposition, which was put earlier by removing the President as being head of Government negates this particular Article. So, Mr. Chairman, my Motion would be that we retain the President as Chair of the Cabinet. The Motion is there, there are a series of Motions.

Now, Mr. Chairman, on the whole of Article 174, Mr. Chairman, we are a bit uncomfortable here, but let me get my-- Now Mr. Chairman, and I seek your indulgence here because as I said, because the principle is different, we are going to have to come up with these amendments in every one of them. We had this Motion on the National Executive and the appointment of Ministers by the President. Mr. Chairman the amendment was not with the Article itself, because one of the issues we have been saying is the appointment of Ministers, should be in consultation with Prime Minister and--

Prof. Yash Pal Ghai: Can you give us the Article and the Clause number please?

Hon. Delegate George Nyamweya: Mr. Chairman, we are dealing with Article 174.

Prof. Yash Pal Ghai: Yes.

Hon. Delegate George Nyamweya: (1), “the President shall preside the meeting of the Cabinet”. Now, Mr. Chairman, you were proposing here that we should vote, that that should be deleted. Is that not how I understood it? Now, Mr. Chairman, having at least from my point of view, that we have an Executive which comprises, the President, the Deputy President, the Prime Minister and the Cabinet and so on. Now, Mr. Chairman, I cannot see how in good sense, you can then go back and say, that the President should no longer Chair, or preside over the meeting of the Cabinets, because you are actually now negating what you have described as the National Executive. Now, that is why I am saying Mr. Chairman, we must make up our minds what it is we want to do. And Mr. Chairman, if we do decide, that the President should not Chair the Cabinet and so on, obviously it means, why should we subject the President to seek elections from every Kenyan?

Now, Mr. Chairman, because that is my position--

Prof. Yash Pal Ghai: I think you should Move your Motion and we vote on that, if it is admissible.

Hon. Delegate George Nyamweya: My Motion Mr. Chairman, is therefore we retain, that the President shall preside the meetings of the Cabinet, and that the rest and where it comes to Article 3, I may as well finish them before I sit Mr. Chairman, that the President in accordance with this Constitution shall appoint and may dismiss Ministers. Now, Mr. Chairman, we are proposing there that the Prime Minister nominates, but in consultation with the President for appointment of those Ministers.

Mr. Chairman I believe particularly when you have made the President Commander in Chief of the Armed Forces, if there is no consultation in the appointment of Ministers, what will happen

when a Defence Minister is appointed by the Prime Minister, in who the President has no confidence?

Prof. Yash Pal Ghai: I am still having difficulty identifying the exact amendment you are making. It is not very clear for my--

Hon. Delegate George Nyamweya: Mr. Chairman, I am speaking in support of the Article as is, you are proposing that in fact we delete this particular Article.

Prof. Yash Pal Ghai: What? (*Noise*).

Hon. Delegate George Nyamweya: That is what my Motion is all about. Aren't we retaining it?

(Consultation at the "high" table).

Hon. Delegate George Nyamweya: Mr. Chairman, I just wanted to finish with that Article, so that I do not keep on coming up and down again. Now, Mr. Chairman, I also had a Motion on the appointment of Ambassadors--

Prof. Yash Pal Ghai: Can we take it one by one please?

Hon. Delegate George Nyamweya: Yes.

(Murmurs on the floor).

Prof. Yash Pal Ghai: Now, as I understand that your proposal that the President should preside at the meeting of the Cabinet--

Hon. Delegate George Nyamweya: Yes.

Hon. Delegate George Nyamweya: --has already been resolved in a vote earlier, when the House rejected that the President shall be head of the Cabinet.

Hon. Delegate George Nyamweya: No, it does not.

Prof. Yash Pal Ghai: That matter has been resolved.

Hon. Delegate George Nyamweya: It does not follow Mr. Chairman, and this is why I said I have difficulty in dealing with your ruling. Because had you allowed us to debate that one at that point, this decision would not be coming up, because otherwise you are saying because we went wrong, on certain points, everything else--

Prof. Yash Pal Ghai: It did not go wrong, there was a firm decision.

Hon. Delegate George Nyamweya: It may well be so Mr. Chairman--

Prof. Yash Pal Ghai: For better or worse, there was a decision..

Hon. Delegate George Nyamweya: Mr. Chairman, I respect that there was a decision, but had we been allowed also to participate at that point in time, we would have respected that decision.

Prof. Yash pal Ghai: If you do not respect the ruling of the Chair, then we should never proceed, never make any progress.

Hon. Delegate George Nyamweya: Then Mr. Chairman, I will have problems with all the Motions I have. (*Uproar*).

(Consultation at the "high" table).

Hon. Delegate George Nyamweya: Mr. Chairman, we must find a way of dealing with these issues.

Prof. Yash Pal Ghai: I do not exactly have your Motion in my book, I do not have any wording in my book on this question, and I have also said that it is not permissible to raise a Motion that the president shall preside over the Cabinet, when this House has already decided that the President is not head of the Cabinet.

Com. Charles Maranga: Point of clarification.

(Hon. Delegates calling on Point of Orders).

Prof. Yash Pal Ghai: Okay. Can we move on? What is your next Motion please?

Com. Charles Maranga: Point of clarification. Clarification.

(Hon. Delegates calling on Point of Orders).

Prof. Yash Pal Ghai: 554, Mr. Maranga, I think has some information.

PLO Lumumba: We are receiving information from Commissioner Maranga, who was the Rapporteur.

Com. Charles Maranga: Mr. Chairman, that particular Article 174 (1) (a), should actually remain, because we had just deleted 173 (2) from Sulumeti Committee. After we deleted that, then we did not provide anywhere, where the President can be able to Chair. So, Mr. Chairman, I think it is only fair to leave that particular Article to remain so, because it was also resolved from the Technical Committee that the Chairperson of the Cabinet should be the President. Because if you give the pecking order, of all the National Executive, then ordinarily the President starts first, then followed by the rest. So, Mr. Chairman, because we did not pass 173 (2) of the Sulumeti report, then that particular Article as of necessity should remain as it is.

Prof. Yash Pal Ghai: I am sorry, that is not correct. We voted very specifically on the question of the President presiding over the Cabinet. We said no. I am sorry Mr. Maranga, you got the

law wrong on this point. (*Applause and Clapping*). We just proceed, I do not want these points of orders, which are just--

(Consultation on the “high” table).

Hon. Delegate Bonaya Godana: Order! Order! Honourable Nyamweya, I see you have a series of proposed amendments, that is Motions. Alright? You have not talked about any specific Motion which is numbered, if you have the document of Motions, on the right. There are quite a number on Article 174. Alright? When you sit down, do we understand that you do not intend to prosecute any of them? If you are talking to a Motion, please be specific. That you are for example, talking to Motion number 189, Article 174 (2) (a). We need to be that specific.

An Hon. Delegate: What of clarification, Bwana Commissioner?

Hon. Delegate George Nyamweya: Thank you, Mr. Chairman. I will try this again maybe in a different way. My difficulties, Mr. Chairman, arise from the ruling of the Chairman in the morning. If I can say, I did not understand his ruling because, Mr. Chairman, once we said we are dealing with Bishop Sulumeti’s set of Motions--

Hon. Delegate Bonaya Godana: No, I am sorry, Mr. Nyamweya. We have passed that. The Chairman clarified that he had hoped that Sulumeti’s Motions would take care of many of these Motions but now he has agreed that any other Motion in addition to Sulumeti’s Motions, will be considered. Since you have a series, if you want to take the floor, please tell us that you are talking to your Motion number that on that Article, then we dispose of it one by one.

Hon. Delegate George Nyamweya: Thank you, Mr. Chairman. I am glad that you are also an advocate/layer like I and like the Professor. Now, Mr. Chairman, the Constitution is the supreme law of any country. Mr. Chairman, there –

Prof. Yash Pal Ghai: Get to the point! What is your motion?

Hon. Delegate George Nyamweya: Mr. Chairman, I will get to the Motion. Mr. Chairman, I want then this to be on record for historical purposes, Mr. Chairman. That you are asking me now to move Motions when you have removed the foundations of any of those Motions' existence. That is really what the point is. If you have already ruled that you have not going to have a Presidential System, how can you now ask me to move Motions, when you have already ruled that you are not having that!

(Uproar).

Hon. Delegate Bonaya Godana: Do I therefore understand you find your Motions have been overtaken and you do not intend to prosecute them? I think you had better just say so!

(Noise).

Hon. Delegate George Nyamweya: Mr. Chairman, I will take my seat after these particular statements. Mr. Chairman, I stood here in the morning like yourself, in the mistaken belief that we are going to discuss Bishop Sulumeti's series of Motions. At that point, I desisted from moving my own Motions because of the way you advised me. Now, this afternoon, for whatever reasons, you have now said that is history. That is water beneath the bridge. *Imeenda hiyo! Imeenda!* So, you cannot in all honesty assume or try to get my consensus on withdrawal of my Motions. I will not withdraw them, but it is because the very foundation of my Motion has been taken by you! *(Clapping)*. So, I must go on record that--

Prof. Yash Pal Ghai: Not by me, but by the Conference.

Hon. Delegate George Nyamweya: Well, by you!

Prof. Yash Pal Ghai: There was overwhelming vote on this issue.

Hon. Delegate George Nyamweya: It was not the Conference, Mr. Chairman, which ruled. You ruled that we would come back to these Motions after we have finished! Now, Mr.

Chairman, on that basis and in good conscience, I cannot purport or pretend to participate in an exercise in which my conscience will not allow me to accept the outcome. Thank you.

Hon. Delegate Jimmy Angwenyi: Point of Clarification!

Prof. Yash Pal Ghai: Thank you very much. So, we just proceed then. Does anybody else have a Motion on 174?

Hon. Delegate Jimmy Angwenyi: Point of Clarification!

PLO Lumumba: Let him clarify.

Prof. Yash Pal Ghai: Yes.

Hon. Delegate Jimmy Angwenyi: Thanks, Mr. Chairman. Mr. Chairman, my name is Honourable Jimmy Angwenyi, Parliament. Mr. Chairman, I will like to seek clarification, in fact a definition. What is the definition of “Government” according to the Constitution that we are writing? Two, what is the definition of “a Cabinet” according to the Constitution that we are writing here today? I would like to have that clarification first before I can make a decision as to which way I need to vote. Mr. Chairman, the reason why I am seeking this clarification is this: If the Cabinet for example includes the President, I cannot see the President sitting down there to be presided over by a Prime minister when he is a member of the Cabinet. If he is not a member of the Cabinet, Mr. Chairman, maybe then, we can allow the Prime Minister to be the Chair of the Cabinet. Mr. Chairman, if the Government does not include the President, does not include the Vice President, then, Mr. Chairman, we cannot allow him to be the Head of Government. If the Government includes the President, the Vice President and the Permanent Secretaries and other organs of Government, then the President will have to be the Head of the Government. That is my submission, Mr. Chairman.

Prof. Yash Pal Ghai: I think we better proceed. It is not for me give long description of what the Executive means. We have very precise wording in the Zero Draft. Let us follow those and it may be that the results we will have in the end will be quite absurd but that is not really what I

am here to do. I am here to facilitate the examination and adoption of the different Articles of the Draft Constitution. We are now at 174 and I am asking if anybody from the floor wants to move a Motion.

(Uproar).

Prof. Yash Pal Ghai: 084. I do notice that you have a Motion so, please proceed.

Hon. Delegate Wangari Maathai: Thank you very much, Mr. Chairman. I have been trying to draw your attention to me, Mr. Chairman, because as you know I was a member of the Consensus-Building Group. On that basis, I too was hoping that we would discuss Sulumeti's Report. As you had originally suggested in the morning, that once we have discussed the report, then the Drafters would go back and they would give us a document with Motions that would reflect the consensus. Ideally, we should have two documents in front of us. One, which is a full document just like it is in the Zero Draft but reflecting the changes as a follow-up to the Sulumeti Report. On the other hand we should have the Zero Draft and we should be able to vote on either of the two reports. At the moment, Mr. Chairman, those of us who are supporting Sulumeti's Report are completely lost because right now we were just about to vote for 174. Was it 174(a)?

Hon. Delegates: Yes.

Hon. Delegate Wangari Maathai: It says, the, "*The President shall preside at the meeting of the Cabinet*". That was the position that we held in Sulumeti's Report but because of what had already been decided, we were now just about to delete it just because that is what is reported by Sulumeti's Report. So, following the 3-page Report or the suggestions from Sulumeti's Report, it is extremely misleading, Mr. Chairman. For those of us who are supporting Sulumeti's Report and we will be forced to vote against our own Motions because we do not have the Motion in front of us. So, it is absolutely necessary that the Drafters give us another document--

Prof. Yash Pal Ghai: You should have.

Hon. Delegate Wangari Maathai: --just like the zero Draft now reflecting the Sulumeti Report so that we can read the two of them side by side.

Prof. Yash Pal Ghai: But you have the Zero Draft and you have the proposed amendments. These are the two documents. For better or worse we have agreed a long time ago today, that we shall work through the Zero Draft. I explained to you a little while ago some of the difficulties we are facing as a result but it is a decision that has been made.

Hon. Delegate Wangari Maathai: But Mr. Chairman--

Prof. Yash Pal Ghai: So, we have to proceed along that. I am sorry, Professor.

Hon. Delegate Wangari Maathai: --Mr. Chairman, that would make it very, very unfair to those of us who are voting against a document that we do not have in front of us.

(Uproar).

Prof. Yash Pal Ghai: But you have the document in front of you.

Hon. Delegate Wangari Maathai: No, we don't. That document is the recommendations! Those recommendations must be reflected in the document by the Drafters. We want to see exactly what those recommendations would look like in the actual document.

Prof. Yash Pal Ghai: Do you have this?

Hon. Delegate Wangari Maathai: I have the three-page Report but that is not what I am talking about, Mr. Chairman and you know it. I want to be able to read exactly what the Sulumeti Report recommendations look like in the Motions.

(Noise).

Prof. Yash Pal Ghai: Professor--

Hon. Delegate Wangari Maathai: In the Articles, sorry Mr. Chairman. That is absolutely essential otherwise, you are trying to work our minds and we are making mistakes and we shall vote against our own Motions!

Prof. Yash Pal Ghai: I think we have to proceed. I am sorry. Once you decided to adopt this approach, this is the logic of that system of adoption. So please, I will not entertain any more objections, I will proceed with the substantive provisions in front of us and if there is no other person who has a Motion on 174, then I would proceed to the proposal on page 1 of the document.

(Noise).

Hon. Delegates: Point of Order!

Prof. Yash Pal Ghai: I will not take any Points of Order. I have said for the time being, we need to proceed with this document.

(Noise).

(Consultation at the "high" table).

Prof. Yash Pal Ghai: Well, I think 174(3). You just read it and ask them for a vote, I am tired.

PLO Lumumba: 174(3). The proposal that is being made--

(Noise).

Hon. Delegates: Point of Order! Point of Clarification!

PLO Lumumba: The Chairman has already said he is taking no more Points of Order. I will therefore read above your din of noise.

(Uproar).

PLO Lumumba: Article 174(3): *The president in accordance with this Constitution shall appoint and may dismiss:-*

(a) The Prime Minister, the Deputy Prime minister, the Cabinet Ministers, the Judges of the Superior Courts of Records and any other Public Officer whom this Constitution requires the President to appoint.

(Noise).

Prof. Yash Pal Ghai: Those who support this, please *(Uproar)*. I am now going to call the Secretary to call the numbers again that he mentioned. So, you please vote accordingly.

Hon. Delegates: No!

Prof. Yash Pal Ghai: Those-- “Yes” or “No”, you go to the desk that you have been assigned. The voting will begin now.

(Noise).

PLO Lumumba: Just hold on. We start with booth 1 to 70. Numbers 170 will queue. You will turn you tables, please. You will turn your tables for ease of voting to face-- Tellers, turn your tables.

(Uproar on the floor).

Prof. Yash Pal Ghai: The vote is in respect of the proposal to amend 174(3)--

(Uproar on the floor).

Prof. Yash Pal Ghai: The vote is to amend Article 174(3) by deleting the present wording and substituting for it the wording on page one of this document.

(Consultations at the “high” table).

PLO Lumumba: The vote is going on. The vote is on the following things; Please listen so that you get what the vote is all about now. You are voting that Article 174(3), be delete and be substituted with what is on page three namely;

That the President in accordance with this Constitution shall appoint and may dismiss –

- (a) the Prime Minister;
- (b) the Deputy Prime Minister;
- (c) Cabinet Ministers;
- (d) Deputy Ministers;
- (e) Judges of the Superior Court; and
- (f) any other public officer whom the Constitution requires.

Those who support that proposal you vote “yes” those who oppose vote “no”.

(Consultations at the “high” table as voting goes on).

Hon. Delegate Kiraitu Murungi: Excuse me, excuse me please, could all the Members of Parliament please and those supporting Sulumet’s Consensus Report, can we consult outside for a moment please.

(Uproar on the floor).

Hon. Delegate Kiraitu Murungi: Members of Parliament, those supporting the Consensus Report, let us consult outside for a moment. Thank you.

(Uproar on the floor).

PLO Lumumba: If you have voted please resume your seats. Once you have voted, kindly sit down. Those who have voted please resume your seats.

(Inaudible discussions on the floor).

PLO Lumumba: Those who have voted, take your seats.

(Noise on the floor).

PLO Lumumba: Those who have voted sit down. Gideon Moi, sit down.

(Inaudible comments from the floor).

PLO Lumumba: Engineer Owidi sit down.

(Consultations at the "high" table).

Prof. Yash Pal Ghai: Please, if you have voted go back to your seats.

(Inaudible discussions on the floor).

PLO Lumumba: I think we now resume our seats once we have voted please.

Prof. Yash Pal Ghai: Go back to your seats if you have voted so that we can continue.

PLO Lumumba: Teller number one, are you through?

Teller Number One:

(Inaudible).

PLO Lumumba: Teller number two, are you through?

Teller Number Two: Not yet.

PLO Lumumba: Teller number three?

Teller Number Three: *(Inaudible).*

PLO Lumumba: Teller number four?

Teller Number Four: Not yet.

PLO Lumumba: Number five?

Teller Number Five: *(Inaudible).*

PLO Lumumba: Number six? Seven? Eight? Nine?

(Inaudible discussions on the floor).

PLO Lumumba: Teller number Two? Teller number 4? Number two, not yet?

(Inaudible discussions on the floor).

PLO Lumumba: Number two, finished? Teller number 4? Not yet, five? Teller number six?
Not yet Teller seven? Teller Eight? Teller number 4.

(Inaudible discussions e on the floor).

PLO Lumumba: Teller number 4?

(Inaudible discussions on the floor).

PLO Lumumba: Teller number 4, finished? Not yet, Teller number 5, not yet, Teller number six not yet, Teller number seven? Not yet.

(Inaudible discussions on the floor).

PLO Lumumba: Teller number 4 are you finished now?

Teller Number Four:

(Inaudible).

PLO Lumumba: I will give you Tellers two more minutes.

(Inaudible discussions on the floor).

PLO Lumumba: We now have Teller one done, Teller two done, Teller three done Teller four? Teller four done, Teller five? Done, Teller six? Teller seven done, Teller eight done, Teller nine done. Teller six, we are waiting for you.

Teller Number Six: Done.

PLO Lumumba: All Tellers done. We go to the count. We are now counting to establish the quorum, ring the bell. We are asking Delegates to resume their seats, can we have the bell rung please. Please move, move Ushers move, and bring people in please. Ushers move with Otieno with speed. Speed, speed, speed please move, move, move. All our Ushers move out and bring Delegates in. Delegates on your part resume your seats please.

(Consultations at the "high" table).

PLO Lumumba: Delegates resume your seats and that includes my good friend Bishop Njoroge--

(Inaudible discussions on the floor).

PLO Lumumba: --Leslie Mwachiro.

(Inaudible discussions on the floor).

PLO Lumumba: Delegates please go back to the podium. *(Microphone cutting).*

(Inaudible discussions on the floor).

PLO Lumumba: Delegates resume your seats so that we can do the count. Leslie Mwachiro seat down. Please let us resume our seats.

(Inaudible discussions on the floor).

PLO Lumumba: We are doing physical count to establish quorum, it is important that we are all seated down please. It is important that we are all seated.

(Consultations at the “high” table).

Prof. Yash Pal Ghai: 368.

Hon. Delegate Joel Sang’: Thank you, Honourable Chair. I am Delegate number 368.

Prof. Yash Pal Ghai: Order, please. Order.

Hon. Delegate Joel Sang’: I am Delegate number 368. Honorable Chair, since we have really persevered under a lot of provocation and a waste of time and we are beholden to the Kenyan people who are waiting for a new Constitution. Some of us are dedicated to the process. I am only requesting the Chair to protect the majority also who have been harassed since morning so that the proceedings can go on. If we have a quorum I move that we proceed. Thank you, Chair.

Prof. Yash Pal Ghai: That was the intention; so, if you all sit down on your seats then we can count quickly and establish whether we have a quorum.

(Noise on the floor).

Prof. Yash Pal Ghai: Yes, please everyone sit down so we can do a proper count.

(Noise on the floor).

Prof. Yash Pal Ghai: We have quorum so we will proceed with our work. *(Applause)*. I can now give you the results of the vote on the amendment proposed to 174 (3). Those who supported the--

PLO Lumumba: Please give us the floor we have the vote count now.

Prof. Yash Pal Ghai: Those who supported the amendments were 58, those who were against 311, one abstention. The “**AYES**” have it two-thirds votes have been achieved *(Clapping)* Now, I would like to--

PLO Lumumba: Could you kindly grant us the floor for the purpose of expeditious movement?

Prof. Yash Pal Ghai: I would like now to propose that in view of the fact that the Consensus view is not essentially supported by the Delegates, we go through Article by Article in the Zero Draft and in that way we will move faster. *(Clapping)*. So, I will ask the Secretary to read. I have asked him not to read the text so we do as we have been doing in the previous weeks. He will just read the Article number and the heading.

PLO Lumumba: Ladies and gentlemen, I now have the floor. I am on page 107, you are familiar with the Zero Draft, I will therefore read the title and the Article numbers only. Article 175 Legislative Functions of the President.

Hon. Delegates: Yes.

PLO Lumumba: Article 176 Decisions of the President.

Hon. Delegates: Yes.

PLO Lumumba: Article 177 Curtailment of Presidential powers.

Hon. Delegates: Yes.

PLO Lumumba: Article 178 Right to vote and timing of presidential elections.

Hon. Delegates: Yes.

PLO Lumumba: Article 179 Qualifications and Disqualifications for election as President.

Hon. Delegates: Yes.

PLO Lumumba: Article 180 Procedure at presidential elections.

Hon. Delegates: Yes.

PLO Lumumba: Article 181--

(Inaudible discussions on the floor).

PLO Lumumba: Motion? Motion, 179.

Prof. Yash Pal Ghai: Sorry, can we be clearer on what Article we are proposing and who is proposing I do not see anyone.

Hon. Delegate William Ruto: William Ruto, Parliament. Mr. Chairman, I am proposing an amendment to Article 178 (1). Mr. Chairman my reasons for proposing an amendment to that particular Article is because this Conference in its wisdom, Mr. Chairman this morning made a decision that the Prime Minister is going to be Head of Government and the President is going to be Head of State. Mr. Chairman, I want to therefore propose that because the President--

Prof. Yash Pal Ghai: Excuse me, when did we decide that the Prime Minister will be the head of government? Can you refer to what section is that?

Hon. Delegate William Ruto: Mr. Chairman, we made this morning a decision that the President will not be Head of Government.

Prof. Yash Pal Ghai: Yeah, we did not decide who would be.

Hon. Delegate William Ruto: Further down in Article 193, Mr. Chairman, in the Zero Draft 193--

Prof. Yash Pal Ghai: Yeah, but you are anticipating that.

Hon. Delegate William Ruto: Okay, Mr. Chairman. I was a member of the Executive Committee and we made that decision that the Prime Minister will be head of government, but we will get there suffice it to say, Mr. Chairman, therefore I am proposing, that because the President will not be head of government there will be no point Mr. Chairman, in my opinion for us to subject to an election of universal suffrage. It will make do for the President to be elected by a college and Mr. Chairman, because we want this country political parties to compete and whoever is the head of the political party that has the majority--

Prof. Yash Pal Ghai: Please move your Motion. Please move your Motion first.

Hon. Delegate William Ruto: Mr. Chairman, therefore I want to move that the President be elected by an electoral college instead of the universal suffrage. Mr. Chairman, I beg to move.

Prof. Yash Pal Ghai: What exactly is your proposal please?

Hon. Delegate William Ruto: The wording.

Prof. Yash Pal Ghai: The wording. I want the wording.

Hon. Delegate William Ruto: It is all there, Mr. Chairman, it says the election of the President Article 178 (1) says delete Article 178 (1) and replace with a new Article, the election of the President shall be by a college of the National Assembly, the Senate and their Chairperson of regions and districts in a joint seating. *(Clapping)*.

Prof. Yash Pal Ghai: Shall we put that to vote or do you want a debate?

Hon. Delegates: No.

Prof. Yash Pal Ghai: Anybody who opposes has the floor. 395.

Hon. Delegate Ajaa Olubayi: My name is Olubayi, Delegate number 395 from Teso district.

(Noise on the floor).

Prof. Yash Pal Ghai: Order, please.

Hon. Delegate Ajaa Olubayi: I stand to oppose the Motion of Honourable Ruto. In my opinion it is very, very radical, we never had an opportunity to deliberate and consider it at our Committee levels. I was myself a Delegate a member of the Committee on the Executive and this never at all arose for deliberations. Whereas I agree that the President should not be the head of government. I think being the Head of State, he should still be elected by universal suffrage. When we go down the road you will see that there is a proposal that the Prime Minister will not be elected by universal suffrage, he will come from Parliament. Here we are proposing come a situation where we have both, top leaders of the country not being elected by universal suffrage. I think it is dangerous. I oppose it. Thank you.

Prof. Yash Pal Ghai: Thank you. 131

Hon. Delegate Mwandawiro Mghanga: Mr. Chairman, I stand here actually to support the Motion of Ruto. How it has emerged up to now is that the general spirit inside here is that we are moving towards a Parliamentary form of governance. *(Clapping)*. Furthermore, there should be

no fear. I appeal to Kenyans - there is no fear. The country will not break because we are more democratic. The country will not break because we have a Prime Minister with full Executive powers. In fact, this is a situation where as Kenyans we can really be able to change Government without speaking of using any other form apart from the people's will.

Parliamentary form of Government means people themselves belong to political parties, they go around the country collecting people's views, campaigning on certain ideologies and certain stands in the country and we know we have different opinions on how this country should be governed, how it should be moved economically, environmentally, in agriculture, commerce, industry and so forth. So, it gives us the chance as citizens now to listen to other Kenyans. If we agree with their programme let us elect them, and if we elect them surely we should give them the opportunity to--

Prof. Yash Pal Ghai: Okay. You have 30 seconds more.

Hon. Delegate Mwandawiro Mghanga: Yes, I will finish Chair. The opportunity to form a Government and lead the people for the time given in the Constitution, for five years.

Prof. Yash Pal Ghai: Your time is up, I am afraid.

Hon. Delegate Mwandawiro Mghanga: Yes. Bringing in a President who is elected directly again, in a Parliamentary system of Government, is a waste of time and this is a system which you can have all over.

Prof. Yash Pal Ghai: Your time is up, I am telling you. 086.

Hon. Delegate Marsden Madoka: Mr. Chairman, I am Delegate number 086. Marsden Madoka, MP for Mwatate. Honourable Delegates, we are all here saying that we want to give Kenyans the Wanjiku Constitution. That is what we have said. Wanjiku has said she wants to elect her President, that is what Wanjiku has said. So, why are you making this major shift without going back to her?

Hon. Delegates: Yeah.

Hon. Delegate Marsden Madoka: I think it would be unjust to the Kenyans, if we make this major shift to a Parliamentary system, where Wanjiku and in all areas (I have read that report) they have said they want to elect their President. Let us respect Wanjiku. (*Clapping*).

Prof. Yash Pal Ghai: 595.

Hon. Delegate Martin Shikuku: Thank you Mr. Chairman, for giving me this opportunity and the honour of being the Convenor of this Committee. This idea is new, we were going by the wishes of Wanjiku. Wanjiku said, first and foremost, there shall be a President *lakini madaraka yake yapunguzwe*. That is what she said and she also said there be the creation of the post of the Prime Minister, so I do concur with those. We never considered this question that is being raised on the floor of this House, it was not in our amendment there. Honourable Ruto knows in the name of God, he never moved it there. So, let us not joke around with Wanjiku.

Prof. Yash Pal Ghai: I would like to put this question to vote now. Mr. Ruto, can you please specify, to me are you proposing deleting all of 178 or Clause (1)? It would be helpful if you could.

Hon. Delegate William Ruto: Mr. Chairman, I am proposing that we delete 178 (1), and Mr. Chairman, I want to take issue with what my Convenor said. We had a debate Mr. Chairman, in our Committee and I brought up this issue, that as a country we have to make a decision at this point in time. We have to make a decision--

Prof. Yash Pal Ghai: I am just asking you for the wording, that is all.

Hon. Delegate William Ruto:-- as to whether we are going to have a Parliamentary system or a Presidential system. Mr. Chairman, we cannot postpone the making of this decision to the year 2012, we have to make that decision now.

Prof. Yash Pal Ghai: I am putting it to vote. I just wanted to know the exact wording, that is all.

Hon. Delegate William Ruto: Mr. Chairman, I have said 178 (1) to be deleted and replaced with the words that I have put there, “by Electoral College”.

Prof. Yash Pal Ghai: So, the Motion is that “the election of the President shall be by College of National Assembly, the Senate and Chairpersons of all regions and districts in a joint sitting”. Those who support this, please?

Hon. Delegates: *(Inaudible).*

Prof. Yash Pal Ghai: No. I am sorry. I am about to have a vote on this. So the Secretary will--

PLO Lumumba: The Chairman has already put the matter to the vote.

Prof. Yash Pal Ghai: So, you please vote in the usual way.

Hon. Delegates: Yes.

PLO Lumumba: So, those who support that “the election of the President shall be by College of National Assembly, the Senate, and Chairpersons of all regions and districts in a joint sitting”, raise your placards.

(Hon. Delegates raise their placards).

PLO Lumumba: Yes, those who oppose?

(Many Hon. Delegates raise their placards).

(Consultation at the “high” table).

Prof. Yash Pal Ghai: It seems that the Motion is lost.

Hon. Delegates: Yeah.

(Clapping and laughter on the floor).

Prof. Yash Pal Ghai: Can you read the next one?

PLO Lumumba: I am now on page number 109, Qualifications and disqualifications for election as President.

Hon. Delegates: Yes.

PLO Lumumba: Article--

An Honourable Delegate: There is a Motion.

PLO Lumumba: There is a Motion? 392.

Hon. Delegate Paul Nakitare: Thank you Honourable Chair. A small matter albeit, and this is in respect to Article 178 (2) (a). I am requesting kindly, Honourable Delegates, that we remove the word “second Tuesday” and have the “fourth Tuesday of August” and I am pleading to the Honourable Delegates that this particular period, because of the fact that we now accept diverse communities and their different rights, that this particular one affects a particular community. I understand that it is suggested to be in August because schools will be on holiday, but simply asking that we move it to the fourth week Honourable Chair, is not asking too much and I request Delegates to kindly support me on this.

(Murmuring on the floor).

Hon. Delegate Paul Nakitare: This is the Bukusu Community. I therefore wish to move accordingly. Thank you, Honourable Chair.

(Noise on the floor).

Prof. Yash Pal Ghai: Those who support the amendment that the election be moved to the fourth Tuesday of August, please raise your hands.

(Few Hon. Delegates raise their placards).

Prof. Yash Pal Ghai: Those who oppose the Motion, please raise your hands.

(Many Hon. Delegates raise their placards).

Prof. Yash Pal Ghai: The Motion is defeated. Read first.

PLO Lumumba: Article-- Page 109, Procedure at Presidential elections, Article 180. There is a Motion?

Hon. Delegate Osoi Kamwende: Mr. Chairman, Point of Order.

PLO Lumumba: Is it a Motion?

Hon. Delegate Osoi Kamwende: Thank you. 364 Osoi--

Prof. Yash Pal Ghai: No. Unless there is a Motion--

Hon. Delegate Osoi Kamwende: I have noted, as we go along, an abnormality or something which is not actually going well. If you go to Article 168--

Prof. Yash Pal Ghai: We cannot go back to 168.

Hon. Delegate Osoi Kamwende: No, I am not taking you back! There are Articles that have to harmonize. Please listen to me. 168 (4), and you come to the Article we are. 178(a) - one says "you dissolve Parliament in November" and another one says "we do the election in August. So, surely you have to harmonize that. You cannot dissolve Parliament and then you stay without anything until August.

(Murmuring on the floor).

Prof. Yash Pal Ghai: Well, when we come to that you could raise it. There will be some consequential changes--

PLO Lumumba: Excuse me. Once this fundamental decision has been made, adjustments are consequential upon the decision.

Prof. Yash Pal Ghai: So, can we please proceed?

Hon. Delegates: Yes.

(Inaudible comments on the floor).

Prof Yash Pal Gahi: Yes, 010.

Hon. Delegate Davis Nakitare: Mr. Chairman, I am Delegate number 010, Honourable Captain Davis Nakitare, a Member of Parliament from Saboti. We have been talking about respect of Culture, we have been talking about respect of the minority--

Prof Yash Pal Ghai: I am sorry--

Hon. Delegate Davis Nakitare:-- and here we are. In this Article here, we are just talking about the elections which concur with the ceremonial aspect of a tribe and we have been muscled. We are requesting that we move forward--

Prof. Yash Pal Ghai: That Motion has been defeated and I am not going to re-open that please.

Hon. Delegate Davis Nakitare: It was defeated because we were not given chance to talk. Mr. Chairman.

Prof. Yash Pal Ghai: I am sorry, we had a voted on this, the vote was very clear.....(?).

Hon. Delegate Dennis Nakitare: Well, I needed to go on record so that you also understand that we are angry about it!

(Arguments on the floor).

Prof. Yash Pal Ghai: I want to proceed now, Secretary please read on.

PLO Lumumba: Article 181, Questions as to validity of Presidential election.

Hon. Delegates: Yes.

PLO Lumumba: Article 182, Assumption of Office of President.

Hon. Delegates: Yes.

PLO Lumumba: Article 183, Term of Office of President.

Hon. Delegates: Yes.

PLO Lumumba: Article 184, Protection from legal proceedings.

Hon. Delegates: Yes.

An Hon Delegate: There is a Motion there. There is a Motion here, 182.

PLO Lumumba: 18--

(Murmurs on the floor).

PLO Lumumba: Article 185, Removal of President on grounds of incapacity.

Hon. Delegates: Yes.

PLO Lumumba: Article 186, Impeachment and removal of President.

Hon. Delegates: Yes.

PLO Lumumba: Motion? Motion 592, 593. Article 187, Vacancy in the Office of the President.

Hon. Delegates: Yes.

PLO Lumumba: Article 188, Office of the Deputy President.

Hon. Delegates: Yes.

PLO Lumumba: Article 189, Vacancy in the Office of the Deputy President.

Hon. Delegates: Yes.

PLO Lumumba: Article 190, Functions of the Deputy President.

Hon. Delegates: Yes.

PLO Lumumba: Article 191, Death before assuming office.

Hon. Delegates: Yes.

PLO Lumumba: Article 192, Remuneration and benefits of the President and the Deputy President.

Hon. Delegates: Yes.

PLO Lumumba: Part number 3, The Prime Minister and the Cabinet. Article 193, the Prime Minister.

Hon. Delegates: Yes.

PLO Lumumba: Article 194, Appointment of Prime Minister.

Hon. Delegate: Yes.

PLO Lumumba: Article 195, Term of Office.

Hon. Delegates: Yes.

PLO Lumumba: Article 196, Resignation of the Prime Minister.

Hon. Delegates: Yes.

(Inaudible comments on the floor).

Prof. Yash Pal Ghai: Is that a Point of Order or a Motion?

An Hon. Delegate: We have a Motion.

PLO Lumumba: Motion.

Prof. Yash Pal Ghai: Okay, 321.

Hon. Delegate Rhoda Loyor: Thank you Mr. Chairman, it seems there is no time to talk about many things, so I will just go straight to my proposed amendments according to Article 194. Noting that all Kenyans asked for Prime Minister and aware that--

(Uproar).

Hon. Delegate Rhoda Loyor: Sorry, meet--

PLO Lumumba: Just to guide you, if you look at the document of Motions, it is what number please, to guide us.

Hon. Delegate Rhoda Loyor: Sorry.

PLO Lumumba: We have document that lists Motions, just give us the number to help your fellow Delegates.

Hon. Delegate Rhoda Loyor: Number 195, please.

PLO Lumumba: Is it?

Hon. Delegate Rhoda Loyor: My number is 321, Rhoda Arupe Loyor, from Turkana District.

PLO Lumumba: Your Motion is on Article 195(1), Motion number 269.

Hon. Delegate Rhoda Loyor: Okay. So I wait.

PLO Lumumba: So you wait.

An. Hon. Delegate: Point of Information.

PLO Lumumba: Which is now Article 195, Term of Office that is where your Motion is.

An. Hon. Delegate: Point of Information.

Hon. Delegate Rhoda Loyor: Okay, thank you. So, I am saying that, noting that Kenyans asked for a Prime Minister, aware that they also demanded to elect the President directly themselves, acknowledging that Technical Working Group 'D' has recommended a powerful

Prime Minister, it follows then that, such a Prime Minister should also undergo scrutiny and seek mandate directly from the people as well.

(Uproar).

Hon. Delegate Rhoda Loyal: Just listen.

Prof. Yash Pal Ghai: Listen to the speaker.

Hon. Delegate Rhoda Loyal: Therefore, I move the following Amendments:-

- (i) delete the word “appointment” as the sub-heading to Article 195, and replace it thereof with the word “election”;
- (ii) delete the Clause 1 to 7, inclusive of Article 194 and replace thereof with provisions at Article 178, 179, 180 and 181, with necessary modifications to refer to a Prime Minister;
- (iii) Delete Clause (1) of Article 195 and re-number as appropriate;
- (iv) Delete the word “appointed” at Article 195(2) (b), immediately following the word “person” and replace thereof with the word “elected”;
- (v) Delete in its entirety Article 197 including the sub title “Dismissal of Prime Minister”;
- (vi) Make such other changes---

(Uproar).

Prof. Yash Pal Ghai: Listen please.

Hon. Delegate Rhoda Loyal:

(vi)--as becomes necessary to maintain Constituency with these changes in the Constitutional Draft.

Mr. Chairman, knowing that the Kenyans wanted a Prime Minister who has powers, I thought that the Prime Minister should go to seek election of the people country wide. Those are my proposed amendments, please. I beg to move.

Hon. Delegates: Vote.

Prof. Yash Pal Ghai: Shall we take a vote on this?

Hon. Delegates: Yes.

Prof. Yash Pal Ghai: Those who support the amendment please raise your hands

(Few Delegates raise their placards).

Prof. Yash Pal Ghai: Those who oppose the amendment?

(More delegates raise their placards).

Prof. Yash Pal Ghai: Well the Amendment is rejected.

PLO Lumumba: Article 196, Resignation of Prime Minister.

Hon. Delegate Joel Sang: Point of Information.

Prof. Yash Pal Ghai: Information from 368.

Hon. Delegate Joel Sang: Honourable Chair, I am 368, Joel Sang. It is not my desire to waste time, only that I wanted to draw the attention of the Chair to the fact that, at a certain point we removed a very critical function from the Office of the President and I thought we should have placed under Article 193, although there is no Motion to that effect. That the Prime Minister shall be the Chairman of the Cabinet, thank you.

Prof. Yash Pal Ghai: We have already moved that. It is already been dealt with. Continue please.

PLO Lumumba: 196, Resignation of Prime Minister.

Hon. Delegates: Motion.

PLO Lumumba: Motion 433.

Hon. Delegate David Rakamba: Thank you Mr. Chairman. It has been a long struggle since I started putting across my Motions on the floor.

PLO Lumumba: Just move your Motion please.

Hon. Delegate David Rakamba: Today I have the pleasure to bring this Motion before you Mr. Chairman and before the Honourable Delegates. Mr. Chairman, there is a Motion that was moved and I was supposed to have moved that Motion Mr. Chairman, but I found that you were moving so first Mr. Chairman. Going straight to my Motions, I have a number of Motions on the same Chapter--

Prof. Yash Pal Ghai: Which Article is this?

Hon. Delegate David Rakamba: My names are David Marcos Rakamba.

Prof. Yash Pal Ghai: No, no, which Article.

Hon. Delegate David Rakamba: Yes, I am saying the Articles, the first Motion is on 170--

Prof. Yash Pal Ghai: No we cannot go back to 180.

(Discussion on the floor)

Hon. Delegate David Rakamba: Mr. Chairman--

Prof. Yash Pal Ghai: That Motion has already been dealt with.

Hon. Delegate David Rakamba: Excuse me Mr. Chairman. If I can not be allowed to speak
Mr. Chairman--

PLO Lumumba: Please move your Motion Mr. Rakamba.

Hon. Delegate Godana Bonaya: Mr. Delegate. Honourable Delegate, the purpose of reading
Article by Article is so that, at the appropriate time when the Article that you have a Motion to
amend is read, you stand up and say, you have an Amendment on this. We have now come to
Article 197, do you have a Motion on that.

An. Hon. Delegate: I have got a Motion on that also.

Hon. Delegate Godana Bonaya: If that is the case, tell us what is your Motion number, in the
document listing Motions.

Hon. Delegate David Rakamba: Mr. Chairman, I have said I had a number of Motions and now
I am raising on a Motion on 193(4).

Hon. Delegate Godana Bonaya: I am afraid we passed that.

Hon. Delegates: No.

Hon. Delegate David Rakamba: Mr. Chairman, why are you moving?

PLO Lumumba: Why don't you move the Motion Mr. Rakamba.

Hon. Delegate David Rakamba: Thank you Mr. Chairman. Mr. Chairman and Honourable
Delegates, I am moving the Motion in--

Prof. Yash Pal Ghai: I still do not know what Article number it is, where it is here in the--

Hon. Delegate David Rakamba: 193(4) Mr. Chairman.

Prof. Yash Pal Ghai: Yes, but which Motion number is it.

Hon. Delegate David Rakamba: Motion number is 264.

Prof. Yash Pal Ghai: 264.

Hon. Delegate David Rakamba: Yes, the Motion number and the Article is 193(4). Mr. Chairman--

Prof. Yash Pal Ghai: I am looking for it, I cannot find it, just two minutes.

PLO Lumumba: It is actually there, on page 118.

Hon. Delegate David Rakamba: Mr. Chairman, I am saying that delete the words, "in absence of the President and Deputy President", so that the Prime Minister remains to chair the Cabinet. I beg to move Mr. Chairman.

Prof. Yash Pal Ghai: Those who support the Motion raise your hands.

(Many Delegates raise placards).

Prof. Yash Pal Ghai: Those who oppose.

(Few Delegates raise placards).

Prof. Yash Pal Ghai: It is carried, but please next time be more alert pick up when your Article is called.

PLO Lumumba: I am now Article 197, Dismissal of Prime Minister.

Hon. Delegates: Yes.

PLO Lumumba: Article 198, the Cabinet.

Hon. Delegates: Yes.

PLO Lumumba: Article 199, Secretary to the Cabinet.

Hon. Delegates: Yes.

PLO Lumumba: Article 200, Decisions, Responsibility and Accountability of Cabinet.

Hon. Delegates: Yes.

PLO Lumumba: Article 201, Assignment of functions.

Hon. Delegates: Yes.

PLO Lumumba: Article 202, Conduct of Members of the Cabinet.

Hon. Delegates: Yes.

PLO Lumumba: Article 203, Functions of Ministers and Deputy Prime Ministers.

Hon. Delegates: Yes.

PLO Lumumba: Article 204, Remunerations and Benefits of the Prime Ministers, Deputy Prime Ministers, Ministers and Deputy Ministers.

Hon. Delegates: Yes.

PLO Lumumba: Article 205, absence of Deputy President, Prime Minister, Deputy Prime Ministers and Deputy Ministers from the Republic.

Hon. Delegates: Yes.

PLO Lumumba: Article 206, Principle Secretaries.

Hon. Delegates: Yes. (*Clapping*).

Prof. Yash Pal Ghai: We have now concluded the consideration of all the Articles in the Chapter dealing with the Executive, we now have to take a formal vote on these Articles together so that we satisfy the rule of two-third of the members. I am now going to put the question that Articles from 171 to 206 stand adopted as part of the Draft Constitution as amended.

(Inaudible discussions on the floor).

Prof. Yash Pal Ghai: We have to count this unfortunately because of the procedural rules. So, if you will do the same as you did before, come with your number to the Tellers and register your vote please.

(Delegates register their votes)

PLO Lumumba: To sit kindly.

(Inaudible discussions on the floor).

PLO Lumumba: Everybody please resume your seats. Teller number one are you through? Teller number two are you through? Teller number three are you through? Not yet.

(Uproar).

PLO Lumumba: Teller number one, two down, Teller three, Teller four, Teller five, Teller six, Teller seven, Teller eight, three more minutes. Let us resume our seats, let us resume our seats.

(Uproar and inaudible debate on the floor).

PLO Lumumba: Ladies and gentlemen, let us resume our seats. Ladies and gentlemen--

(Uproar and inaudible debate on the floor).

PLO Lumumba: Ladies and gentlemen let us resume our seats. Teller one are you through now? Teller two, Teller three finished, Teller four, Teller five, Teller six not yet, Teller seven, Teller eight and Teller nine finished?

(Uproar and inaudible debate on the floor).

PLO Lumumba: Anybody who has card number 376? Please bring it to the podium, 376. Teller number four, Teller number four are you through? Finished? Teller number five done, Teller number six not yet, Teller number seven not yet, Teller number eight done. So, Teller six and seven we wait for you. Teller six and seven we wait for you.

(Uproar and inaudible discussions on the floor).

PLO Lumumba: Ladies and gentlemen once you have vote please – Professor Ruth you are supposed to be my mother could you kindly sit down.

(Uproar and inaudible discussions on the floor).

PLO Lumumba: Leslie you are supposed to be my friend, could you seat down please.

(Uproar and noise on the floor).

PLO Lumumba: Honourable Okemo you were supposed to be my friend, could you kindly resume your seat and my mother Dr. Julia. Take your seats please. Teller number six you are a little slow.

(Uproar and noise on the floor).

PLO Lumumba: Teller number seven--

(Noise and inaudible debate on the floor).

PLO Lumumba: Ladies and gentlemen, we can now resume our seats the voting is concluded. We are waiting for the Chair or the Vice Chair. The substantive Chair will be coming shortly. Indeed I see him moving to the podium.

(Noise and inaudible discussions on the floor).

PLO Lumumba: Honourable Delegates (*Laughter*), the Chair will be on his seat shortly to recognize you.

(Consultation on the “high” table).

Prof. Yash Pal Ghai: Once we take the vote can we move on the next, to the Devolution Chapter?

Hon. Delegates Yes. (*Clapping*).

PLO Lumumba: The Chair has now given me the permission to take you to page number 145, Chapter Fourteen which deals with the devolved government.

Part I – Structure and principles of devolved government.

Article 231, objects of devolution of governments.

Article 232, cooperation between governments at the different levels.

Please ensure to rise when there is a Motion.

Article 233, assignments of functions. There is a Motion, 388.

Hon. Delegate Sammy Chemwey: Now Mr. Chairman, my name is Sammy Naibei Chemwey, District Delegate from Mount Elgon. Mr. Chairman, I wish you could read that Chapter in correlation with corrigendum because the corrigendum had made specific adjustments to that particular Chapter, so that it moves in tandem together with the issues raising out of the Executive and Legislature. So, please I would request that instead of me moving the Motion that you accept that the corrigendum takes care of the Motion as it arise out of it. Thank you Mr. Chairman.

Prof. Yash Pal Ghai: Which Article?

Hon. Delegate Sammy Chemwey: Mr. Chairman for ease of your reference, the corrigendum is dated 8th of March 2004 and if you look at it, it will take care so that whenever you look at it, you look with that of Legislature so that we move with speed. Thank you.

(Noise on the floor).

Prof. Yash Pal Ghai: Which page is it? It is not in there, sorry.

PLO Lumumba: So, may I proceed to read?

Hon. Delegates: Yes.

(Consultation at the “high” table).

PLO Lumumba: Honourable Chemwey was giving us information. I have now read Article 233 on assignments of functions.

Article 234 on regional government. Motion, 286.

Hon. Delegate Isa Ireri Ngunia: Delegate 286, Isa Ireri Ngunia. My Motion is to actually amend that Article by adding the words “giving special consideration to indigenous minorities and marginalized communities like the Nubins, Isakia and Swahili’s in the city of Nairobi--

PLO Lumumba: Information please.

Hon. Delegate Isa Ireri Ngunia: --immediately after the word Parliament.

PLO Lumumba: Information.

Hon. Delegate Isa Ireri Ngunia: Yeah.

PLO Lumumba: Under Article 234 in the corrigendum it is already corrected to read, “the Nairobi region shall be managed as a metropolitan city as prescribed by national legislation taking into consideration the special needs of the marginalized communities and groups”.

Hon. Delegate Isa Ireri Ngunia: Yeah, although I seem to agree with the corrigendum to the extent but I thought it was good and that is what I was seeking for in my Motion to actually specify who these minorities are in the city of Nairobi because I need to be given the floor. I thought the floor was mine Mr. Chairman. Yeah, because I believe that if we talk of minorities, there are people in Nairobi who actually have no other homes apart from Nairobi and that is why I thought that a specification of those minorities was quite necessary in that Article. I beg to move the amendment Mr. Chairman.

(Uproar and noise on the floor).

Prof. Yash Pal Ghai: I will put it to vote I am told those who support the amendment raise your hands. Those who oppose the amendment raise your hands, the Motion is rejected.

(Inaudible discussions on the floor).

PLO Lumumba: Article 235, Regional Legislative Assemblies.

Article 236, election of members of Regional Legislative Assemblies but let me read the corrigendum so that you see if it takes care of your Motion. In Article 236(3) it now reads thus “a member of the Regional Legislative Assembly may attend the meetings of the district council and take part in its deliberations but may not vote on any matter”.

(Uproar and noise on the floor).

PLO Lumumba: Lawrence Mute.

(Inaudible consultation at the “high” table).

Hon. Delegate Samuel Tororei: Chair, Delegate 462, Samuel Tororei, Disability. *Mheshimiwa* Lawrence Mute and I jointly move this Motion. I was seconding and he was supposed to move it and we move or we request the Conference to amend section 236 (2) by inserting the words, “including persons with disabilities” immediately after the word “diversities”. I hope it will not generate any debate. Thank you Chair. *(Uproar)*.

Prof. Yash Pal Ghai: Those who support the Motion to ---

(Many Delegates raise their placards).

Prof. Yash Pal Ghai: Those against.

(A few Delegates raise their placards).

Prof. Yash Pal Ghai: The Motion is carried.

PLO Lumumba: Article 237, Officers and procedures of regional legislative assemblies.

Hon. Delegates: Yes.

PLO Lumumba: Article 238, Regional Executive Committee

Hon. Delegate Joel Sang: Motion.

PLO Lumumba: Motion by Honourable Sang.

Hon. Delegate Joel Sang: Thank you, Honourable Chair. I am really conscious of the time factor now. I am Delegate 368, Joel Sang. I want to move an amendment under 238 (1) (a) (ii) that we insert the word “metropolitan” immediately before the words, “mayor and deputy mayor” appearing in the paragraph. This is because Nairobi will consist of four Municipalities, Westlands, Embakasi, Langata and Kasarani. These will be headed by Mayors. If we do not distinguish between the regional head then they will all be Mayors and I think it will be very hard to distinguish between them. So I thought the regional head, who is the Mayor of the whole city of Nairobi, shall be the Metropolitan Mayor and the Deputy shall be the Deputy Metropolitan Mayor of Nairobi. Thank you. *(Noise)*.

Prof. Yash Pal Ghai: Those who support the amendment please, raise your hands.

PLO Lumumba: Information. Dr. Adhu, Sir.

Hon. Delegate Adhu Awiti: Thank you, Chair. The four boroughs in Nairobi, we were treating them as the district. So the heads of those boroughs would be the governors like the governors in those rural districts. The Mayor of the city of Nairobi will be Mayor but will be directly elected. *(Noise)*.

An Hon. Delegate: Withdraw.

Prof. Yash Pal Ghai: Mr. Sang, do you want to speak to it?

Hon. Delegate Joel Sang: In view of the explanation already given Sir, it fits what I intended, so I withdraw my Motion. Thank you.

Prof. Yash Pal Ghai: Thank you.

PLO Lumumba: May I proceed?

Hon. Delegates: Yes.

PLO Lumumba: If I may.

Article 239 - Election of Regional Premier and Deputy Regional Premier.

Hon. Delegates: Yes.

PLO Lumumba: Article 240 - Election of Mayor and the Deputy Mayor of Nairobi.

Hon. Delegates: Yes.

PLO Lumumba: Article 241 - Functions of Regional Executive Committees.

Hon. Delegates: Yes.

PLO Lumumba: Part (3), Districts.

Application part.

Article 242 - (Let me just bring to your attention that under the corrigendum, the entire Article 242 is deleted).

Hon. Delegates: Yes.

PLO Lumumba: Article 243 – District governments.

Hon. Delegates: Yes.

PLO Lumumba: Article 244 – Legislative authority of District Councils.

Hon. Delegates: Yes.

PLO Lumumba: Article 245 – Election of district councilors.

Hon. Delegates: Yes.

PLO Lumumba: Motion, I think.

Prof. Yash Pal Ghai: Is there a Motion?

PLO Lumumba: 462, Honourable Tororei.

Hon. Delegate Samuel Tororei: Again Chair, we wish to beg the indulgence of the Conference and propose a Motion and because it has too many words, shall I use my borrowed eye to read the words, please.

An Assistant to Tororei: Thank you. “Insert an new Clause immediately after Article 245 (1) (b) as follows. (c) Marginalized groups, including persons with disabilities, older persons and youth, provided that at least 2 shall be persons with disabilities”.

Hon. Delegate Samuel Tororei: Mr. Chairman, this would enhance the principle that we adopted a little earlier and therefore I beg to move and hope again you will indulge this small group. Thank you.

Prof. Yash Pal Ghai: Those who support the amendment please, raise your hands.

(All Delegates raise their hands).

Prof. Yash Pal Ghai: Those who oppose.

(None).

Prof. Yash Pal Ghai: The Motion is carried.

PLO Lumumba: Article 246 – Speaker and Deputy Speaker.

Hon. Delegates: Yes.

PLO Lumumba: Article 247 – Procedure of District Councils.

Hon. Delegates: Yes.

PLO Lumumba: Article 248 – District Executive Committee.

Hon. Delegates: Yes.

PLO Lumumba: Article 249 – Election of District Governor and Deputy District Governor.

Hon. Delegates: Yes.

PLO Lumumba: Article 250 – Functions of the District Executive Committee.

Hon. Delegates: Yes.

PLO Lumumba: Article 251.

Part IV – Locations.

Article 251 – Locational governments.

Hon. Delegates: Yes.

PLO Lumumba: Article 252 – Composition and election of locational council.

Hon. Delegates: Yes.

PLO Lumumba: Article 253 – Presiding Officer.

An Hon. Delegate: Motion.

PLO Lumumba: Motion?

Prof. Yash Pal Ghai: I do not have any –

Hon. Delegate Samuel Tororei: Chair, on 252.

PLO Lumumba: It is on 252, it is Motion number 315 on page number 122 of your Motion documents.

Hon. Delegate Samuel Tororei: So Chair, I think the arguments are the same as in previous two Motions, so I just will just beg to move because I think you all have the text. Thank you, Chair.

Some Delegates: No.

Prof. Yash Pal Ghai: Those who support this, please raise your hands.

(Delegates raise their hands).

Prof. Yash Pal Ghai: Those who oppose.

(Delegates raise their hands).

(Inaudible consultation at the “high” table).

Prof. Yash Pal Ghai: I do not have a clear sense of the vote on this. Those who support the amendment please, raise your hands.

PLO Lumumba: That Mr. Chairman if we read out the amendments--

Prof. Yash Pal Ghai: Okay, please do that.

PLO Lumumba: The proposed amendment is that under Article 252, Sub Article (2), we insert the following words, “and that at least one member shall be a person with disability” immediately after the word, “elected”. (*Uproar*).

Prof. Yash Pal Ghai: So those who support the Motion.

(*Delegates raise their hands*).

Prof. Yash Pal Ghai: Those who oppose it.

(*Delegates raise their hands*).

PLO Lumumba: We must take the vote.

Prof. Yash Pal Ghai: It is pretty close, I am afraid we will have to take the vote. So please come to your tents and register your vote.

PLO Lumumba: Let the counting be done as you sit or do I repeat the question?

Hon. Delegates: Yes.

PLO Lumumba: The Motion goes thus, “that under Article 252 (2) the following words -- (*Noise*).

Hon. Delegate Samuel Tororei: I think Chair, in the interest of time and because the Conference has indulged so much with us, we will also indulge you by withdrawing the Motion. (*Noise*).

PLO Lumumba: Then with that may I now proceed.

Article 253 – Presiding Officer.

Hon. Delegates: Yes.

Article 254 – Locational Administrator.

Hon. Delegates: Yes.

PLO Lumumba: Part V – General provisions relating to devolved governments and their members.

Article 255 – Conduct of elections.

Hon. Delegates: Yes.

PLO Lumumba: Article 256 – Vacancies.

Hon. Delegates: Yes.

PLO Lumumba: Article 257 – Oath of office.

Hon. Delegates: Yes.

PLO Lumumba: Article 258 – Quorum.

Hon. Delegates: Yes.

PLO Lumumba: Article 259 – Decisions.

Hon. Delegates: Yes.

PL Lumumba: Article 260 – Remuneration and benefits.

Hon. Delegates: Yes.

PLO Lumumba: Article 261 – Public access and participation, and powers, privileges and immunities.

Hon. Delegates: Yes.

PLO Lumumba: Article 262 – Balance of gender and diversity.

Hon. Delegates: Yes.

PLO Lumumba: Article 263 – Government during transition.

Hon. Delegates: Yes.

PLO Lumumba: Article 264 – Ethics.

Hon. Delegates: Yes.

PLO Lumumba: Article 265 – Removal of elected executives.

Hon. Delegates: Yes.

PLO Lumumba: Part VI – Miscellaneous.

Article 266 – Formalities of law making.

Hon. Delegates: Yes.

PLO Lumumba: Article 267 – Publication of laws.

Hon. Delegates: Yes.

PLO Lumumba: Article 268 – Conflict of laws.

Hon. Delegates: Yes.

An Hon. Delegate: Point of order.

PLO Lumumba: Motion 268.

Hon. Delegate Ahmed Maalim Omar: Thank you. I am Delegate 255, Ahmed Maalim Omar. Mr. Chairman, I would like to move a Motion. The Motion says, “district legislation prevails over regional legislation if Article 235 (c) does not apply”. Mr. Chairman, I am moving this Motion because Regional Assemblies have limited functions and it gives them the powers to legislate certain legislations with limitations under 235 (c) as per the functions. So Mr. Chairman, I thought Regional Assemblies may be given a legislation for which they do not have the functions. So I thought it will be appropriate if we decided to move, “district legislation prevails over regional legislation if Article 235 (c) does not apply”. Thank you. I beg to move the Motion.

Prof. Yash Pal Ghai: Those who support the Motion, please raise your hands.

(Members raise their placards).

Prof. Yash Pal Ghai: Those who oppose the Motion.

(Few Members raise their placards).

Prof. Yash Pal Ghai: The Motion has lost.

PLO Lumumba: Article 269 – Management of urban district and urban areas.

Hon. Delegates: Yes.

PLO Lumumba: Article 270 – Suspension of regional or district governments.

Hon. Delegates: Yes.

PLO Lumumba: Article 271 – Prohibition against holding elective office at national and devolved levels.

Hon. Delegates: Yes.

PLO Lumumba: And very lastly, Article 272 - Supplementary legislation.

Hon. Delegates: Yes. (*Clapping*).

Prof. Yash Pal Ghai: Now, I would like to put to the Conference, to the Committee, the adoption of Articles 231 up to 272 in the Chapter on Devolved Governments. Those who support the adoption of these Articles as part of the Draft Constitution, please raise your hands.

(Inaudible comments on the floor).

Prof. Yash Pal Ghai: I think you have to vote in the normal way because we need to have the exact number. This one 231 to-- As a mandate--

(Members voting, inaudible comments on the floor and consultations at the “high” table).

PLO Lumumba: Maintain quorum.

(Consultations at the “high” table).

PLO Lumumba: Are you through? Teller three? Teller four? Teller five? Teller six? Teller seven? Teller eight? Teller nine? We are about to complete the count. Please resume your seats. Delegates who have voted, resume your seats, the count is complete. Delegates resume your seats! The count is complete! The count is complete resume your seats!

Prof. Yash Pal Ghai:

(Inaudible).

PLO Lumumba: Except in teller number six and seven and four and five. Let us resume our seats!

(Noise from the floor).

Prof. Yash Pal Ghai: We have not done Legislature, yet.

(Noise from the floor).

PLO Lumumba: Ladies, please resume your seats. Ladies, gentlemen, let us resume our seats! You have been so nice. Just a few more minutes! Ladies, remember your oath of office. Ladies and gentlemen, remember historians. Let us resume our seats! Ladies! Honourable Shabir, I can see you moving to your seat. Orié Rogo Manduli, can you resume your seat? Honourable Kiliku, resume your seat. Honourable Otieno Ogingo, resume your seat.

(Noise from the floor).

PLO Lumumba: Kindly resume your seats, ladies and gentlemen. Ole Yiaile, Ole Osoi, please vote quickly. Vote quickly. Professor Mark Olunga, James Magara and Kerrow Billow resume your seats. Honourable Odoyo, mama Grace Ogot, Oliewo, Mr. Foster, resume your seat. I can see you moving in the wrong direction. *(Laughter)*. You are devolving to another region. Rose Owino Lukalo, move to your seat. Happy Gloria--

(Noise from the floor).

PLO Lumumba: Teller number one? Teller two? Teller Three? Teller four? Teller five? Teller six? Teller seven? Teller eight? Teller nine? So, teller six and seven, we will wait for you. Ladies and gentlemen, let us resume our seats, the count is about to be ready. The results on the Chapter on Executive are ready and will be announced shortly.

(Consultations at the "high" table).

PLO Lumumba: Please do not go out, retain quorum. The Chairman now has the floor.

Prof. Yash Pal Gahi: I have the results of the voting on Chapter 12. Those who supported the adoption of the Chapter – 321. Those who objected – 5 and abstention – 1 out of total of 327.
(Clapping).

(Consultations at the “high” table).

Prof. Yash Pal Gahi: Therefore, the Chapter stands as part of the Draft Constitution.
(Clapping). Shall we go to “Public Finance”, Chapter 15, starting on page 167--

Hon. Delegates: Yes.

(Consultations at the “high” table).

Prof. Yash Pal Gahi: and the Secretary in the usual way will read the Articles and the headings.

PLO Lumumba: Ladies and gentlemen, the Chairman has just given me the floor to read from Article 273. The Chapter is to found on page 167, Chapter 15, Public Finance - Objects and Principles of Public Finance Management.

Article 273 – Objects of public finance and management system.

Hon. Delegates: Yes.

PLO Lumumba: Article number 274 – Principles of Public Finance, administration and management.

Hon. Delegates: Yes.

Com Mutakha Kangu: Corrigendum.

PLO Lumumba: My attention is being-- There is no corrigendum on that.

Com Mutakha Kangu: There is.

PLO Lumumba: On Article 274?

Com Mutakha Kangu: Oh no, sorry.

PLO Lumumba: It is not on 274. Part II – Taxation.

Article 275 - Principles of taxation

Hon. Delegates: Yes.

PLO Lumumba: Article 276 – Imposition of tax.

Hon. Delegates: Yes.

PLO Lumumba: Article-- Taxation powers. I believe the word, “etcetera”, which means end of thinking process must be removed.

Hon. Delegates: Yes.

PLO Lumumba: So, it reads, “Taxation powers” – Article 277.

Hon. Delegates: Yes.

PLO Lumumba: Article 278 – Financial equalization.

Hon. Delegates: Yes.

PLO Lumumba: Article 279 – Devolved governments, shares of national funds.

Hon. Delegates: Yes.

PLO Lumumba: Part IV – Funds For Holding Public Money.

Article 280 – Consolidated fund.

Hon. Delegates: Yes.

PLO Lumumba: Article 281 – Withdrawals from the consolidated funds.

Hon. Delegates: Yes.

PLO Lumumba: Article 282 – Revenue reserves fund for devolved governments.

Hon. Delegates: Yes.

PLO Lumumba: Article 283 – Contingency fund.

Hon. Delegates: Yes.

PLO Lumumba: Article 284 – procurement of public goods and services.

Hon. Delegates: Yes.

PLO Lumumba: Part V – Borrowing.

Article 285 – Borrowing by national government.

Hon. Delegates: Yes.

PLO Lumumba: Article 286 – Borrowing by devolved governments.

Hon. Delegates: Yes.

PLO Lumumba: Article 287 – Public debt.

Hon. Delegates: Yes.

PLO Lumumba: Article 288 – Loan guarantees by governments.

Hon. Delegates: Yes.

PLO Lumumba: Part VI – Budget.

Article 289 – Financial year estimates.

Article 290--

Motion on 289?

Hon. Delegate Paul Nakitare: Thank you, Honourable Chair. I am moving that Article 289 Clause (7), that we insert the word, “cultural”, between - so that it reads, “economic...”, we remove, “and”, “...social” and then we put “... and cultural council”. I beg to move.

(Inaudible comments on the floor).

Prof. Yash Pal Ghai: Those who support the amendment, raise your hands.

(Few Members raise their placards).

Prof. Yash Pal Ghai: Those who oppose the amendment.

(Members raise their Placards).

An Hon. Delegate: We do not understand.

(Inaudible responses from the floor).

Prof. Yash Pal Ghai: I think it is rejected.

PLO Lumumba: Article 290 – Devolved governments, plans and budgets.

Hon. Delegates: Yes.

PLO Lumumba: Article 291 – There is a corrigendum, which will now make it read thus, “Division and appropriation of revenue Bills” will be the new title and Sub-Article (1) will read, “Before any level of government appropriates revenue for expenditure by its various departments, there shall be a division of revenue raised nationally to the four levels of government”.

Sub-Article (2), “Upon division of such revenue, each level of government shall prepare and pass their own budgets and appropriation bills”.

That is the corrigendum that is added in that Article.

Article 292 – Accounts and audit of public institutions.

Hon. Delegates: Yes.

PLO Lumumba: 293, reports on publicly funded organizations. Article 294 National Treasury Control.

Hon. Delegates: Yes.

PLO Lumumba: Article 295, National Revenue Authority.

Hon. Delegates: Yes.

PLO Lumumba: There is a corrigendum in 294 to read thus; (b) A decision to stop the transfer of funds taken in terms of Clause 2-

- (a) may not stop the transfer of more that 50 per cent of funds due to any level of government.

I will read it again. A decision to stop the transfer of funds taken in terms of Clause 2-

- (a) may not stop the transfer of more than 50 per cent of funds due to any level of government.

I now proceed to Article 295, National Revenue Authority.

Hon. Delegates: Yes.

PLO Lumumba: Article 296, Commission on Revenue allocation. Motion, 255.

Hon. Delegate Ahmed Maalim: Thank you Mr. Chairman, I am Delegate 255. There are two 2s there. So I am moving a motion we delete the first 2 and retain the second 2 which is in brackets. I beg to move that motion. Thank you. Page 181, the Commission on revenue allocation. (2) says; The Commission consists of:

- (a) Seven members.
- (b) The Principal Secretary
- (c) The Controller of Budget.

Then there is another option which says:-

[(2) The Commission consists of:-

- (a) a Chairperson,
- (b) fourteen persons, consisting one nominee from the regional assembly,
- (c) two persons to represent district governments,

- (d) two persons nominated by National Assembly,
- (e) the Principal Secretary, and
- (f) the Controller of Budget.]

So Mr. Chairman there are two--

PLO Lumumba: There is a corrigendum, let me just read the corrigendum so that the Article now reads thus; “There is established a Constitutional Commission to be known as the Commission on revenue allocation.” The following are deleted:-

The Commission consists of:-

- (a) Seven members appointed by the President on nomination of the Senate. That is deleted.
- (b) The Principal Secretary responsible for finance is deleted.
- (c) The Controller of Budget is deleted.

So that the composition now reads; The Composition is to consist of the following persons appointed by the President,

- (a) a Chairperson,
- (b) fourteen persons consisting of one nominee from each regional assembly;
- (c) two persons to represent district governments, appointed in accordance with national legislation;
- (d) two persons nominated by the National Assembly;
- (e) Principal Secretary responsible for finance; and
- (f) the Controller of Budget.

297 Controller of Budget, 298, Auditor-General.

Hon. Delegates: Yes.

PLO Lumumba: 299, The Central Bank of Kenya,

Hon. Delegates: Yes.

PLO Lumumba: 300, Functions of the Central Bank.

Hon. Delegates: Yes.

PLO Lumumba: And another corrigendum on which one? 296, there is a 5(a) which has been added. It reads thus Honourable Delegates; in its recommendations concerning distribution of national revenues, the Commission shall take into account:-

- (a) National interest;
- (b) Any provision that must be made in respect of the national debt and other national obligations;
- (c) The needs and interest of the national government determined by objective criteria;
- (d) The need to ensure that regions and districts are able to provide basic services and perform the functions allocated to them;
- (e) The fiscal capacity and efficiency of the regions and the districts;
- (f) Developmental and other needs of regions and districts;
- (g) Economic disparities within and among the regions and the need for financial equalization;
- (h) The need for Affirmative Action in respect of arid and semi-arid areas and other marginalized areas.
- (i) The need for economic optimization of each region and district;
- (j) Obligations of the regions and the districts in terms of the national legislation;
- (k) The desirability of stable and predictable allocations of revenue shares;
- (l) The need for flexibility in responding to emergencies or other temporary needs and other factors based on similar objective criteria.

And 5(b), the recommendations of the Commission may be modified by the national government, supported by a majority of each house of Parliament and

(11) Recommendations of the Commission, as amended under clause (10), are binding on all governments, and must be reflected in their respective budgets and in their taxation and other legislative policies.

That is the corrigendum which is to be read together with the Article as it appears. Article 300, Functions of the Central Bank.

Hon. Delegates: Yes.

PLO Lumumba: And finally Economic and Social Council, Article 301 and there is information- (*Clapping*).

Com. Kavesta Adagala: I want the Delegates to please, I am requesting you to please bear with me that we had discussed the-- although I realize in an earlier Article you have said there should not be an Economic Social and Cultural Council. I would like to plead with you because worldwide one third of economic activities are cultural and in our situation, culture has sustained this economy through tourism and wildlife for many decades and if we do not put cultural there, then it will not be able to develop in terms – Culture will not be able to develop in terms of economic activities. I would like to plead with you because this is an advisory council that we include Culture.

Prof. Yash Pal Ghai: We already have a Commission on Culture. I think we have discussed disposal of this matter, now I want to put to you whether you will adopt Articles 231---

An Hon Delegate: Point of Order.

(*Consultation at “high” table*).

Prof. Yash Pal Ghai: 368.

Hon. Delegate Joel Sang: Thank you Honourable Chair. I am 368, Joel Sang. Before you move to 301, I really thought there is somebody with a Motion on 3, Clause 3 of 300 where it

says; Notes and coins issued by the Central Bank. Actually somebody sneaked in a feature-- It says; Notes and coins issued by the Central Bank of Kenya may bear only the portrait of the first President of Kenya or other images that depict or symbolize Kenya or an aspect of Kenya. I was of the view that we should be allowed to raise Motions because I think to include the first President, some criteria that was used, we must be told of the criteria used because politicians are not supposed to appear. Some other people will want it and it will become a national pass time to put politicians on our currency. So, I think this is an anomaly that must be removed. Thank you. If the rules, do not--I move that we delete that particular reference to the first President in that particular Clause. Thanks.

Prof. Yash Pal Ghai: You are urged to withdraw. Okay, have you withdrawn it?

PLO Lumumba: He has withdrawn it.

Hon. Delegate Joel Sang: No, I moved it.

PLO Lumumba: You moved it?

Hon. Delegate Joel Sang: Yeah, on my speech.

Prof. Yash Pal Ghai: So can you give us your precise wording now please?

Hon. Delegate Joel Sang: Actually, the wording should be minus the portrait of the first president of Kenya and should bear images that depict the *flora, fauna* and other important monuments in Kenya.

(Noise on the floor).

Prof. Yash Pal Ghai: I put the amendment to vote. Those who support the amendment proposed will you please raise your hands. Those who oppose?

(Honourable Delegates raise their placards for vote counting)

Prof. Yash Pal Ghai: Those who oppose? I think it is rejected. Thank you.

(Consultations at “high” table).

Prof. Yash Pal Ghai: I put to vote the proposition that Articles 273 to 301 be adopted as part of the Draft Constitution as amended. So please cast your votes.

(Inaudible noise and comments on the floor).

PLO Lumumba: Let us resume our seats and let us remain to maintain quorum. Please let us resume our seats. Quorum must be maintained. We already have results on devolution. Sit down to listen to results on devolution. We have results on devolution, can you sit down, after you have voted, we have results on Devolution. Please once you have voted, let us resume our seats. Teller number 1, are your ready? Teller number 2?

(Inaudible discussions on the floor).

PLO Lumumba: Please let us resume our seats for the sake of quorum. Nyabote Aburi, resume your seat. Chelule, resume your seat. Rhoda, keep quiet. Honourable Koech, Honourable Sang resume your seat; and Honourable Ochieng, Happy Gloria and Ngorongo Makanga, Ahindukha, resume your seats. Gakuya, Raster Gakuya, Sang’, resume your seats please. Charles Owino Likowa, resume your seat. Honourable Naomi Shaban, resume your seat. Honourable Ruth Oniang’o, resume your seat. Honourable retired Major Marsden Madoka, resume your seat. His Grace, should resume his seat.

(Consultations on the “high” table).

PLO Lumumba: Honourable Raphael Mwai should be moving close to his seat. Honourable Kennedy Kiliku, I can see foster is now moving in the right direction. Sang, can you resume your seat? My good friend James Mageria, Rose Owino Lukalo, Raster Mwai, Raster move to your seat.

Teller number one, teller 2, teller 3, teller 4, teller 5, teller 6, teller 7, teller 8, teller 9? Teller 6 and 7, we are waiting for you. Teller 6 and 7, we are waiting for you. Teller 6 and 7. Teller 6? Teller 6, we are waiting for you. Ngorongo Makanga return to your seat.

(Inaudible discussions on the floor)

(Consultations at the “high” table).

PLO Lumumba: Teller number 6, we are waiting for you. The results on Devolution are also ready, they will be announced by the Chairman shortly. Teller 6, are we ready now? Teller 6. Teller 1, 2, 3, 4, 5, 6. 6, we are still waiting for you, finish.

Prof. Yash Pal Ghai: I can give you're the results of the vote on Devolution. Those who supported the adoption of those Articles, 329. *(Clapping)*. “NAYS” 2, abstention, zero, total vote 331. We can now go to The Legislature, which begins at page 85. May I ask the Secretary to read the--

PLO Lumumba: Ladies and gentlemen, I now have the floor to refer you to page number 85. Page 85. It is Chapter Eleven, The Legislature – Part I - Establishment and role of Parliament, Page 85, Article 132, Establishment.

Hon. Delegates: Yes.

PLO Lumumba: Article 133 – Exercise of sovereignty.

Hon. Delegates: Yes.

PLO Lumumba: Article 134 - Approval of appointment by Parliament.

Hon. Delegates: Yes.

PLO Lumumba: Article 135 – Approval of revenue and expenditure by Parliament.

Part II – Composition and membership of Parliament. Article 136 – Membership of the Senate.

Hon. Delegates: Yes.

An Hon. Delegate: Point of Order.

PLO Lumumba: A Motion?

Hon. Delegates: No! No!

PLO Lumumba: Article 137 – Membership-- There is information?

Hon. Delegate Moses Cheboi: Chairman, this is Cheboi, 018, I withdraw my Motion.
(Clapping).

PLO Lumumba: There is a corrigendum on Article 133, Sub-Article (2) (d). It should now read, “approving the sharing of revenue among the four levels of government and appropriating funds for expenditure by the departments of the National Level by Government”.

Hon. Delegates: Yes.

PLO Lumumba: Article 134 – Approval of appointments by Parliament.

Hon. Delegates: Yes.

PLO Lumumba: Article 135 – Approval of revenue and expenditure by Parliament.

Hon. Delegates: Yes.

PLO Lumumba: Article 136 – Composition-- There is a corrigendum which reads thus, “The Senate shall consist of-

- (a) one member elected from each district by the District Council of that District acting as an Electoral College to represent the region of which the district forms part;
- (b) two women elected from each region by an Electoral College consisting of all the elected members of District Councils within the regions;
- (c) such number of marginalized groups, half of whom shall be women as satisfies the requirements of Article 110, Sub-Article (3), elected after members have been elected under Clauses, (1) (a) and (1) (b) and;
- (d) that the Speaker shall be an Ex-officio member.

Hon. Delegates: Yes.

PLO Lumumba: The following Articles are new and are proposed as additions to Article 136.

Article (3) – Upon election, the Senators elected from each region shall correctively constitute a single delegation for the purpose of Clause 147 (a), Sub-Article (1) (a). And

- (4) Upon election, the Senators elected to represent marginalized groups shall correctively constitute a single delegation for the purpose of Clause 147 (a), Sub-Article (1)(a).

Article 137 – Membership of the National Assembly with the following, there is no corrigendum on that. The National Assembly shall consist of-

(Consultations at the “high” table).

Hon. Delegates: Motion.

PLO Lumumba: 137 – Membership of the National Assembly.

(Inaudible discussions on the floor).

PLO Lumumba: I do not have the corrigendum but I would want to point out that the National Assembly shall consist of 210 members elected from single member constituencies. Just from where I sit, if you provide for review of boundaries, do you want to tie down the number?

Hon. Delegates: No.

PLO Lumumba: That is perhaps where the corrigendum is. What is the corrigendum? As we look for the corrigendum can I skip 137 and move to 138?

Hon. Delegates: Yes.

PLO Lumumba: Qualifications and disqualifications of members.

Hon. Delegates: Yes.

PLO Lumumba: 139 – Marginalized groups.

Hon. Delegates: Yes.

An Hon. Delegate: Motion.

PLO Lumumba: Motion?

Hon. Delegates: No! No!

Hon. Delegate Atsango Chesoni: Thank you, Mr. Chairperson. Atsango Chesoni, Delegate number 510, representing Women's Organizations. I have a Motion in respect of Article 139, which is to insert a new Clause, which had been in our original Article 109 but was removed. "That any representative of a marginalized group shall be eligible for re-election to Parliament as such representative once". The purpose of this Motion is that because one gets in on the basis of Affirmative Action. One, if elected the second time, can run, but a third time if one wants to run, then he or she should run for one of the other regular seats. So, that is the purpose of the Motion. Thank you.

(Inaudible discussions on the floor).

Prof. Yash Pal Ghai: I do not have the Motion.

PLO Lumumba: The Motion is to be found on your Motion papers as number 180 on page 64 of 158. It is a Motion by Atsango Chesoni on Article 139 number 180?

(Consultations at the “high” table).

Prof. Yash Pal Ghai: Those who support these amendment, please raise your hands.

(Hon. Delegates raise their placards).

(Murmurs on the floor).

Prof. Yash Pal Ghai: Those who oppose the amendment.

(Hon. Delegates raise their placards).

(Consultation at the “high” table).

Prof. Yash Pal Ghai: I think the amendment is carried.

PLO Lumumba: The amendment is carried.

Hon. Delegate Luseno Liyai:

(Inaudible).

PLO Lumumba: There is a Motion?

Hon. Delegate Luseno Liyai:

(Inaudible).

PLO Lumumba: Clarification?

Hon. Delegate Luseno Liyai: Motion. 601, Luseno Liyai from Political Parties. These are marginalized communities in this republic, we have left out one very important group of Kenyans who live outside this country and they are almost numbering to half a million. Please can we as Delegates Honourably include them, they are called Kenyan Community Abroad, please include them as marginalized. Thank you.

(Murmurs on the floor).

Prof. Yash Pal Ghai: Those supporting the Motion, please raise your hands.

None.

Prof. Yash Pal Ghai: Those opposed to the Motion.

All.

Prof. Yash Pal Ghai: Motion is lost.

PLO Lumumba: Article 140, there is a clarification.

Prof. Yash Pal Ghai: What is the number?

(Consultations at the “high” table).

Prof. Yash Pal Ghai: Okay, go ahead 589.

Hon. Delegate Daniel Njoroge: Thank you very much. My name – no, it is here. I am moving a Motion Mr. Chairman, on qualification and disqualifications. I want us to add to the (2) (f), disqualification that, if a person is given an office and he misuses that office, he becomes corrupt or he gathers money in a wrong way and he is proved by the Public Accounts Committee, that means that the Auditor General will also have proved it and then he has already gone against the Ethics and Integrity Act that, that person should not be allowed to stand for a Public office. And

I would think that this particular Conference do not condone that people are given offices and then they misuse them and then use that money to stand for public offices. Therefore, Mr. Chairman I am saying that we add another Clause as a disqualification that such people would not be allowed to stand for public office. I move the Motion.

Prof. Yash Pal Ghai: Do you have a number and the book here?

Hon. Delegate Daniel Njoroge: The Motion is already there in it is saying that the--

Prof. Yash Pal Ghai: 179?

PLO Lumumba: 179.

Hon. Delegate Daniel Njoroge: It is saying that if a person has been implicated by the Public Accounts Committee, the Anti-Corruption Authority for misuse or abuse of Public or any other office or in any way had contravene the principles of Ethics and Integrity Commission, that he should not be allowed to stand for Public office, Mr. Chairman.

Prof. Yash Pal Ghai: *(Inaudible)*.

Hon. Delegate Daniel Njoroge: It has not been taken care of, all the other places we are talking about if he have been convicted, but somebody may also have already resigned from the position.

Prof. Yash Pal Ghai: Yes, we have a Motion here to include factors on which a person is disqualified from being a Member of Parliament. It comes at the end of Clause 2 and Article 138, is that right.

Hon. Delegate Daniel Njoroge: Yeah.

Prof. Yash Pal Ghai: And so those who support this Motion, will you please raise your hands?

(Hon. Delegates raise their hands).

Prof. Yash Pal Ghai: Those who oppose?

(Hon. Delegates raise their placards).

Prof. Yash Pal Ghai: You do not want to keep graft people out of your Parliament? Okay, this Motion is defeated, so we move on to--

(Murmurs on the floor).

Prof. Yash Pal Ghai: It was defeated, I am sorry to say. I would have voted for it myself if I had a vote. Okay, go on.

(Consultations at the "high" table).

PLO Lumumba: Do we have a question clearly?

Hon. Delegates: No.

PLO Lumumba: The question is this. The proposed Article is that, anybody who has been implicated by the Public Accounts Committee, the Anti-Corruption Authority for misuse or abuse of Public or any other office or in any way had contravened the principles of Ethics and Integrity should be barred. Those who support the Motion.

Majority of the Delegates.

PLO Lumumba: Those who oppose the Motion?

None.

Prof. Yash Pal Ghai: It is carried.

PLO Lumumba: It is carried. (*Clapping*). Article 140, which deals with elections of Members of Parliament.

Hon. Delegates: Yes.

PLO Lumumba: Article 141, Oaths and Affirmations.

Hon. Delegates: Yes.

PLO Lumumba: Article 142, Vacation of office of Member of Parliament.

Hon. Delegates: Yes.

PLO Lumumba: Article 143.

Hon. Delegate Osili Adungo: (*Inaudible*).

PLO Lumumba: On what Article?

Hon. Delegate Osili Adungo: 394, Osili Adungo. This is a very brief Motion. 142--

Prof. Yash Pal Ghai: What Article is this?

Hon. Delegate Osili Adungo: 142, Condition for vacation of Member of Parliament office. When one dies, he vacates the office. I think it was an omission from the Drafters or whoever that did not include that as one of the conditions for vacation of an office of a Member. So, I have said that when a member dies, he vacates office. Kenyans--

(Uproar on the floor).

Hon. Delegate Osili Adungo: When it is not--

(Murmurs on the floor).

Prof. Yash Pal Ghai: We do not want dead MPs, do we? So--

PLO Lumumba: We proceed. Article 143, Remuneration of Members of Parliament.

Hon. Delegates: Yes.

PLO Lumumba: Article 144, Determination of questions of membership.

Hon. Delegates: Yes.

PLO Lumumba: Part 3, Officers of Parliament and other Functionaries. Article 145, there is a Motion by Nancy Lung'ahi. Is she in? Nancy.

(Murmurs on the floor).

Prof. Yash Pal Ghai: You do not intimidate her, let her stand for herself.

PLO Lumumba: Is she in?

Hon. Delegate Nancy Lung'ahi: Thank you, I withdraw the Motion. *(Clapping)*.

PLO Lumumba: Article 146, Presiding in the Senate.

Hon. Delegates: Yes.

PLO Lumumba: Article 147, Clerk and Staff of the Senate.

Hon. Delegates: Yes.

PLO Lumumba: Article 147 (a), Decision of the Senate.

(Murmurs on the floor).

Prof. Yash Pal Ghai: It is not in ours.

PLO Lumumba: It is a corrigendum decisions of the Senate has been inserted and it reads that, “except where this Constitution provide otherwise, each region and the marginalized groups shall have one vote to be cast on behalf of the region or the marginalized group by the head of its delegation or in the absence of the head of the delegations, by another member of the delegation acting on his or her behalf”.

(b) “All question before the senate shall be determined by a two thirds majority of those delegations”.

(2) National legislation enacted in accordance with the procedure establish for the passing of Bills affecting regions and districts shall provide for a uniform procedure in terms of which the delegation shall consult for publishes of Clause (1) (a).

(3) A Senator representing a region;

a) may on his or her own Motion; and

b) shall at the request of the relevant Regional Legislative Assembly attend and speak at a meeting of that assembly, but shall not vote.

(4) Cabinet Ministers and Deputy Ministers of the National Government may attend and may speak in the Senate, but shall not vote.

(5) The Senate may a require Cabinet Minister, a Deputy Minister or an official in the national executive or a regional executive or a private individual, to submit memorandum to or appear before the senate or a Committee of the Senate to give evidence;

(b) shall have the powers of the High Court in;

- (i) Forcing the attendance of witnesses and examining them on oaths, affirmation or otherwise.
- (ii) Compelling the production of documents; and
- (iii) Issuing a Commission or a request to examine witnesses abroad.

Article 148, The Speaker and Deputy Speaker of the National Assembly.

Hon. Delegates: Yes.

PLO Lumumba: Article 149, Presiding in the National Assembly.

Hon. Delegates: Yes.

PLO Lumumba: Article 150, Clerk and staff of the National Assembly.

Hon. Delegates: Yes.

PLO Lumumba: Article 151, Leader of the Opposition.

Hon. Delegates: Yes.

PLO Lumumba: Article 152, Legislation and procedure in Parliament, exercise of legislative powers, Article 152.

Hon. Delegates: Yes.

PLO Lumumba: Article 153, Restriction with regard to certain financial measures.

Hon. Delegates: Yes.

PLO Lumumba: Article 154, Consideration by the other House.

Hon. Delegates: Yes.

PLO Lumumba: Article 155, Presidential assent and referral back.

Hon. Delegates: Yes.

PLO Lumumba: Article 156, Other reservations and reconsideration.

Hon. Delegates: Yes.

PLO Lumumba: Article 157, Coming into force of laws.

Hon. Delegates: Yes.

PLO Lumumba: Article 158, Right of petition to Parliament.

Hon. Delegates: Yes.

PLO Lumumba: Article 159, Registry and custody of laws.

Hon. Delegates: Yes.

PLO Lumumba: Article 160, quorum.

Hon. Delegates: Yes.

PLO Lumumba: Article--

(Murmurs on the floor).

(Consultation at the “high” table).

Prof. Yash Pal Ghai: Yes, okay, yes, please.

Hon. Delegate Shakeel Shabbir: The Motion from the floor. Delegate 406, Shakeel Shabbir. On the issue of quorum, may I propose that the quorum be increased from 30% to 50%?

(Murmurs on the floor).

Hon. Delegate Shakeel Shabbir: Take it--

(Consultations at the “high” table).

Prof. Yash Pal Ghai: Those who support the Motion, please raise your hands.

(Many Hon. Delegates raise up their placards).

Prof. Yash Pal Ghai: Those who rejected, yes if defeated. *(Applause).*

PLO Lumumba: Article number 161, official languages.

Hon. Delegates: Yes.

PLO Lumumba: Article number 162, voting in parliament.

Hon. Delegates: Yes.

PLO Lumumba: Article 163, there is corrigendum which is included as 1(a) which reads thus: “Parliament shall regulate its own procedure, and shall in particular make standing orders for the orderly conduct of its joint sittings and proceedings”.

Hon. Delegates: Yes.

PLO Lumumba: Article 164, power to call for evidence.

Hon. Delegates: Yes.

PLO Lumumba: Article 165, public access and participation.

Hon. Delegates: Yes.

PLO Lumumba: Article 166, powers privileges and immunities.

Hon. Delegates: Yes.

PLO Lumumba: Article 167, which is part 5 under the sub-heading, “Miscellaneous the seat of Parliament.”

Hon. Delegates: Yes.

PLO Lumumba: There is a Motion. (*Noise*). Seat of Parliament. Erulu David, 397.

An Honourable Delegate: (*Inaudible*).

PLO Lumumba: Let him Move his Motion please.

Hon. Delegate David Erulu: I have a Motion number 188; it is on 167 (6). I would like to propose that the Article as it reads, should be amended to read as per the Motion. We delete the word “35%” and substitute therefore the word” 65% “and further on, “only where there is an emergency or national disaster, that is Article 167 (6). I think this is done in the good spirit of making it a bit difficult to reconvene Parliament when it is on recess. (*Laughter*) Only when there is an emergency or a national disaster.

(Discussions on the floor).

Prof. Yash Pal Ghai: Those who support the Motion, please raise your hands.

Hon. Delegate David Erulu: I beg to Move. (*Laughter*).

Prof. Yash Pal Ghai: Sorry, those who support the Motion please raise your hands.

(No hands were raised).

Prof. Yash Pal Ghai: Those who opposed to the Motion, the Motion is defeated. (*Noise*).

PLO Lumumba: Article 168, Life and prorogation of Parliament.

Hon. Delegates: Yes.

PLO Lumumba: Article 169, No confidence Motion.

Hon. Delegates: Yes.

PLO Lumumba: Article 170, which is the last, Parliamentary Service Commission. (*Applause and clapping*).

Prof. Yash Pal Ghai: The Secretary has suggested that before we vote to adopt this, we should also cover Transitional and Preamble and then adopt them all through one vote.

Hon. Delegates: Yes!

(Discussions on the floor).

Prof. Yash Pal Ghai: Meanwhile I can announce the results--

PLO Lumumba: The results of Public Finance are ready.

Prof. Yash Pal Ghai: --all in support of adopting the Chapter 333, "NAY" - zero, extension (1), and therefore the Chapter is adopted. (*Clapping*).

(Consultation at the "high" table).

Prof. Yash Pal Ghai: 333 voted in favour.

PLO Lumumba: We now look at Chapter 21, which must be read together with the schedule.

Hon. Delegate David Musila: Chapter 21.

Prof. Yash Pal Ghai: 125. 125.

Hon. Delegate David Musila: Thank you Chair. I do not know whether I was a sleep or something but-- Musila, 125. Mr. Chairman, I thought we agreed to leave behind 137 and come back to it. Is it not appropriate that we go to 137 now, so that we finish that Chapter on Legislation before we go to another one?

Prof. Yash Pal Ghai: Yes. Thank you, for reminding us.

Hon. Delegate David Musila: Thank you, Mr. Chairman.

PLO Lumumba: 137. (*Noise*). The corrigendum. Where is the corrigendum on the--

Com. Abubakar Zein: Information.

PLO Lumumba: Yes, Information, Zein. Zein Abubakar, information. Was the Rapporteur.

Com. Abubakar Zein: Thank you Mr. Chairman, the only correction there, is to use the same language of 136 (c), to also be used in the 137 (c). It is just the language. Thank you, Mr. Chairman.

Prof. Yash Pal Ghai: So you are saying the Article remains largely as it is? Zein, are you saying that the Article remains the same, but there is some slight change of language?

Com. Abubakar Zein: Yes, Sir. It is just language, so it is a drafting matter.

Hon. Delegate Daniel Rasugu: There is a Motion.

(Consultation on the “high” table).

Prof. Yash Pal Ghai: Is it a Motion?

Hon. Delegate Daniel Rasugu: Yeah.

Prof. Yash Pal Ghai: I do not have any notice. Yes.

Hon. Delegate Daniel Rasugu: This is Rasugu 579, Political Parties. Realizing that in future we may have more than 210 seats in the National Assembly, I would request that this Article reads, “The membership of the National Assembly, shall consist of members elected from single member Constituencies”. This will provide even for those other Constituencies, which will be created later by the Commission that is going to review the boundaries of various Constituencies, instead of restricting ourselves to 210 Constituencies. Thank you.

PLO Lumumba: The corrigendum is this, 137(a), “single member Constituencies, as may be provided by law”.

Hon. Delegates: Yes.

Hon. Delegate Samuel Arap Nge’ny: *(Inaudible).*

Prof. Yash Pal Ghai: Yes, 538.

Hon. Delegate Samuel Arap Nge'ny: Mr. Chairman, Samuel Arap Nge'ny, 538, Convenor of this Technical Working Committee. It has not completed, it is an editorial matter because under (b) instead of seventy-four, it is going to be one woman member, from each of the Districts, forming one Constituency for that purpose, then it will complete itself, so that it can adjust whenever the boundary is adjusted appropriately. Thank you.

PLO Lumumba: So, with that amendment-- There is a Motion? 472.

Hon. Delegate Miriam Muto: Thank you, Honourable Chair, I am Delegate number 472, Miriam Muto, representing Persons with disabilities. In order to ensure that persons with disabilities issues are taken on board, I wish to Move a Motion on Article 137 (1) (c), which reads that-- Insert the word 'provided that at least five shall be persons with disabilities, after the figure 139. (*Noise*).

(Discussions on the floor).

Hon. Delegate Miriam Muto: I beg to Move, having in mind that disability is growing day by day, we are having accidents. And there is a need to represent these number of people. I request and I plead with the Honourable Delegates that you support this Motion. (*Noise*). Please.

PLO Lumumba: Information. If you look at Article 137 (2), "Elections under clause (1)(c), shall be by electoral colleges of the respective marginalized groups". You do not want to fix numbers (*Noise*). And it is said that it shall be provided by Legislation.

Hon. Delegates: Yes.

Prof. Yash Pal Ghai: Those who support the Motion?

Silence.

Prof. Yash Pal Ghai: Those who oppose the Motion? The Motion is lost.

PLO Lumumba: Page 229, Transitional and Consequential Provisions. Consequential, Legislation, Article 349.

Hon. Delegates: Yes.

PLO Lumumba: Article 350, Transitional.

Hon. Delegates: Yes.

PLO Lumumba: Article 351, Effective Date.

Hon. Delegates: Yes.

PLO Lumumba: Article 352, Repeal.

Hon. Dlegates: Yes.

Prof. Yash Pal Ghai: Wait. Yes, the Secretary is coming to the Preamble.

PLO Lumumba: The Preamble. This one, I must read. (*Noise*). “We, the people of Kenya – **ACKNOWLEDGING** the supremacy of the Almighty God of all creation”:

Hon. Delegates: Yes.

PLO Lumumba: “**HONOURING** those who struggled to bring freedom and justice to our land”:

Hon. Delegates: Yes.

PLO Lumumba: “**AWARE** of our ethnic, cultural and religious diversity--

Hon. Delegates: Yes.

PLO Lumumba: --and determined to live in peace and unity--

Hon. Delegates: Yes.

PLO Lumumba: --as one indivisible sovereign nation”:

Hon. Delegates: Yes.

PLO Lumumba: “**RESPECTFUL** of the natural environment that is our heritage, and determined to sustain it for the benefit of future generations”:

Hon. Delegates: Yes.

PLO Lumumba: “**COMMITTED** to nurturing and protecting the well-being of the individual, the family and the community”:

Hon. Delegates: Yes.

PLO Lumumba: “**RECOGNISING** the aspirations of all Kenyans for a government based on the essential values of freedom, democracy, social justice and the rule of law”:

Hon. Delegates: Yes.

PLO Lumumba: “**EXERCISING** our sovereign an inalienable right to determine the form of governance of our country and having participated fully in the making of this Constitution”:

Hon. Delegates: Yes.

PLO Lumumba: “**ADOPT**, enact and give this Constitution to ourselves and to our future generations. (*Applause and clapping*). God Bless Kenya! . (*Applause and clapping*).

Prof. Yash Pal Ghai: I would now like to put these Chapters--

(Consultation at the “high” table and discussions on the floor).

Hon. Delegate Gitu wa Kahengeri:

(Inaudible).

PLO Lumumba: Just a moment, *Mzee* Gitu wa Kahengeri. Ladies and Gentlemen let us listen to *Mzee* Gitu wa Kahengeri. *(Noise)*.

Prof. Yash Pal Ghai: Please listen to him, every Delegate has an opportunity to make amendments, please.

Hon. Delegate Gitu wa Kahengeri: Mr. Chairman, I beg to Move an Amendment, it is only a simple one, I will ask the Honourable Delegate to support. In the second line, of the Preamble, where we are honouring those who struggled to bring the independence in our country, we insert the word ‘who heroically struggled to bring independence to our land.

Prof. Yash Pal Ghai: Those in favour of this Amendment, please raise your hands.

(Hon. Delegates raise their hands).

Prof. Yash Pal Ghai: Those opposed?

(No Delegate raises their hands).

Prof. Yash Pal Ghai: So, the Motion is carried. And now I would like to take a formal vote, so we that we are consistent with the procedures. We shall be voting on three-- *(Noise)*.

PLO Lumumba: Ladies and Gentlemen, I now wish for the sake of completeness, to refer you to schedule (1).

Hon. Delegates: Yes.

PLO Lumumba: Regions and Districts.

Hon. Delegates: Yes.

PLO Lumumba: Schedule number (2), National Symbols. (*Uproar*).

Prof. Yash Pal Ghai: Motion?

Hon. Delegate Roseline Ashepete: (*Inaudible*).

(*Discussions on the floor*).

Hon. Delegate Roseline Ashepete: I am Delegate 393. I would have preferred we withdraw this Motion, but it is very important, listen to it. I am Ashepete Barasa Roseline from Teso District. If you look at the Provisions that have been given in the schedule, I would have wanted to Move a Motion which is -- I am number 361 in the list of Motions. I would start by correcting my name, it is not properly put, and that is for my identity. Remove the letter 'h' after 'p.

PLO Lumumba: We'll correct that.

Hon. Delegate Roseline Ashepete: Yes. Now, I would want to Move a Motion, that we put part II to the first schedule, which raises all the communities in this country. I am aware and you are aware that, there are communities in this country who have been ignored for a long time. I would not want to take much time, because already you have the list which we struggled so hard to get, and if there is any community that has been omitted, I do plead your indulgence that you include such a community, so that in the long run, we know who are making this Constitution for. Let us not forget anybody. Let everybody be brought on board. So, that we know whom we are making the Constitution for. (*Clapping*). Let it be included there for posterity purposes.

Prof. Yash Pal Ghai: Do you have a specific Motion?

Hon. Delegate Roseline Ashepete: That is my Motion to have part II of schedule (1) which raises all the communities of Kenya. (*Noise*).

(Consultation at the “high” table).

Hon. Delegate Roseline Ashepete: I am seeking the indulgence of the Conference, to have part II, according to the first schedule.

PLO Lumumba: Just information. Information.

Hon. Delegate Roseline Ashepete: Yes.

PLO Lumumba: It is impossible to establish the communities of Kenya, now. The Culture Commission, in my view, I am speaking as Delegate 260, will go round the country, we have already on the basis of the list given, received representation from very many communities that is incomplete. It is therefore proper that the Culture Commission goes round the country and establishes that list, so that it is beyond any reasonable doubt, before it forms part of the Constitution.

Hon. Delegates: Yes.

Hon. Delegate Roseline Ashepete: It is okay. *(Clapping)*.

Pro. Yash Pal Ghai: So, I put the Motion, those who support the Motion, please raise your hands. *(Uproar)*. Those who oppose? Motion is lost.

Hon. Delegate Roseline Ashepete: I beg to withdraw. *(Clapping)*.

PLO Lumumba: Schedule number (2), National Symbols. 350. Kiptingos.

Hon. Delegate Saul Kiptingos: Yes Sir. Kiptingos 350. I am Moving my Motion. It is Motion number 370, if you have the template and the list. That is schedule 2 (1). We insert schedule 2 (a). National Flag shall be as follows: “The National flag is rectangular in its--
(Uproar).

(Consultation at the “high” table).

PLO Lumumba: Information. The National Flag is described in an Act of Parliament.

Prof. Yash Pal Ghai: I am told it is identical to the description here, I am not aware myself, but the Secretary shows me, in which case we do not need to put it here. *(Noise)*. Shall we proceed, you want to withdraw?

Hon. Delegate Saul Kiptingos: Due to the public demand, I withdraw. *(Uproar)*.

PLO Lumumba: Third Schedule: *National Oaths and Affirmations*.

(Consultation at the “high” table).

Hon. Delegate Ruth Oniang’o: Thank you Mr. Chairman. I had proposed a Motion, just to enrich a little bit on who we are as the people of Kenya and I had proposed that we add an insertion after “Almighty God of all creation”. That we bring in that which has brought us to where we are and who we are and kept us together. So, I was suggesting that we put “proud” after “acknowledging” and then thereafter, “proud to be the cradle of human rights.”

Prof. Yash Pal Ghai: We are a little bit lost. What Article or Schedule are you referring to?

Hon. Delegate Ruth Oniang’o: Preamble, Mr. Chairman.

Prof. Yash Pal Ghai: Preamble.

Hon. Delegate Ruth Oniang’o: On preamble itself--

Prof. Yash Pal Ghai: I think we have to proceed now. I do not have notice of this.

Hon. Delegate Ruth Oniang’o: Mr. Chairman, if you allow me to just put this to the Conference--

Hon. Delegates: No!

Hon. Delegate Ruth Oniang'o: --and they can decide whether to take it in or not.

Prof. Yash Pal Ghai: What is your proposal?

Hon. Delegate Ruth Oniang'o: I am saying that my proposal reads this way. Below “acknowledging” we put “proud to be the cradle of human kind, enduring common philosophy of “*Utu*” which has been nurtured for many centuries and survived through our shared history of struggle against foreign domination”, and then we come on to honour-- (*Uproar*).

Prof. Yash Pal Ghai: Please, let her finish.

Hon. Delegate Ruth Oniang'o: --our heroes. This is because our heroes have come out of that group to struggle for what we are, Mr. Chairman.

Prof. Yash Pal Ghai: Thank you. Those who support the amendment?

Silence.

Prof. Yash Pal Ghai: Those who oppose?

(Hon. Delegates raise their placards).

Prof. Yash Pal Ghai: I think it is defeated.

PLO Lumumba: Page 238. Fourth Schedule: *Actions to be taken by Parliament.* Remember that there was a corrigendum on page 242 and all matters relating to the civil and commercial disputes over small claims under Kadhis Courts were deleted.

Fifth Schedule: *Distribution of functions between the National Government and devolved levels of Government.*

Hon. Delegate Abdulrahaman Wandati: A Motion.

PLO Lumumba: There is a Motion, 547.

Prof. Yash Pal Ghai: Yes, 547.

Hon. Delegate Abdulrahaman Wandati: Thank you, Chair. My name is Abdulrahaman Wandati, Delegate number 547. Chair, the reason I arose and said that I may have a Motion is because in the Fourth Schedule which reads, “*Actions to be taken by Parliament*” I have looked, - maybe I have missed - and I do not see any actions proposed in respect of the Executive. I do not know whether having made the decisions we made, there are no actions consequential to that decision or those decisions that ought to be undertaken in this Schedule. Thank you.

(Consultation at the “high” table).

Prof. Yash Pal Ghai: 538.

Hon. Delegate Samuel Arap Ng’eny: Thank you, Mr. Chairman. Samuel Arap Ng’eny, 538, the Convenor of Technical Working Committee on the Legislature. Mr. Chairman, under the Motions-- I am sorry, but my file was a little removed. Under 304, Schedule 5, I have a Motion which is printed here which was to deal with the Senate as to when it should come into being. It reads “The first elections to the Senate shall be held within twelve months of the effective date”. Mr. Chairman, what has happened is that on the assent of the President, this Constitution will come into being. Now that this August House has approved the establishment of the Senate, I felt that it was not going to be appropriate to wait until the year 2007 for the Senate to come into being. This is because otherwise, we will be running the country on a Constitution that is bi-cameral and yet we will only have a unicameral House. So, Mr. Chairman, I ask the Delegates to approve this to be included in the Schedule Five in order to effectively implement this Constitution. I beg to move.

Prof. Yash Pal Ghai: Those who support the Motion, please?

(Hon. Delegates raise their placards).

Prof. Yash Pal Ghai: Those who oppose the Motion?

(No placard raised.)

Prof. Yash Pal Ghai: The Motion is carried. *(Clapping).*

PLO Lumumba: Excuse me. Let me just give a Point of Information. Page 250, the Sixth Schedule, Senate, which is, in my view as Delegate 260, the right thing. The first election of the Senate shall take place at the first elections held under this Constitution. Until the Senate has been elected under this Constitution, the functions of the Senate shall be exercised by the National Assembly. Mr. Chairman, I want to speak as Delegate 260.

(Inaudible discussion on the floor).

Prof. Yash Pal Ghai: 599.

Hon. Delegate Leslie Mwachiro: Chair, 599, Leslie Betawa Mwachiro. Chair, actually, I have a Motion on that particular Article and it is Motion number 379.

Prof. Yash Pal Ghai: Sorry, what number?

Hon. Delegate Leslie Mwachiro: 379.

PLO Lumumba: Motion number 379 is Ruth Oniang'o.

Hon. Delegate Leslie Mwachiro: Well, at least in my Schedule here, I have it as I.

Prof. Yash Pal Ghai: I think it has been renumbered.

Hon. Delegate Leslie Mwachiro: Then I am told it is 386. It has been renumbered because I am still using the old Schedule. So, Chair, I am inserting in Section 10 basically, “to get Electoral Colleges on the implementation of the Constitution” and I am saying all Councilors of all local authorities in a District, comprising of Urban Townships, Municipalities and County Councils shall constitute themselves into collective District Council Electoral Colleges and elect one Councilor, one District Governor, the four members from the District to the--

An Hon. Delegate:

(Inaudible).

Prof. Yash Pal Ghai: One Senator?

Hon. Delegate Leslie Mwachiro: But, Chair, this I basically a Transitional Arrangement which is going actually to ensure the Senate gets into effect immediately the new Constitution is in place.

(Inaudible responses from the floor).

PLO Lumumba: Please, we may lose quorum. Could you sit in before we leave?

Hon. Delegate Leslie Mwachiro: So, Chair, I am saying, whatever Honourable Samuel Ng’enyi was trying to say is actually covered by this Motion and I think, with your permission and if the Delegates so wish, we could basically adopt it and basically have in place Transitional Arrangement on how the Senate comes into place.

(Inaudible responses from the floor).

Prof. Yash Pal Ghai: Order! Order! Those who support the Motion, please raise your hands.

(No hand raised).

Prof. Yash Pal Ghai: Those opposed to the Motion?

(Hon. Delegates raise their hands).

Prof. Yash Pal Ghai: The Motion is defeated. *(Noise)*.

PLO Lumumba: I am now on the Sixth Schedule, *Transitional and Consequential Provisions*. There is a Motion, Ruth Oniang'o.

Hon. Delegate Ruth Oniang'o: Thank you, Chair. I know you all want to guillotine Motions but this one is important for me. It should come as a new facility, immediately after Section four and in realization of the fact that Parliament will be expected to do a lot following enactment of this Constitution and the current provisions of the Standing Orders do not allow flexibility to move efficiently and quickly enough. So, what I am saying is that within six months after the effective date, the National Assembly shall revise its Standing Orders and the Senate shall adopt Standing Orders so as to enable Parliament to perform efficiently, its duties under this Constitution. I hope you can support it, Delegates. Thank you.

Prof. Yash Pal Ghai: Those in support of the Motion?

(Hon. Delegates raise their Placards).

Prof. Yash Pal Ghai: Those against?

(No placard raised).

Prof. Yash Pal Ghai: The Motion is carried.

(Consultation at the "high" table).

Prof. Yash Pal Ghai: Yes, 155.

PLO Lumumba: Is it a Motion?

Hon. Delegate Raila Odinga: Yes, Mr. Chairman, I want to give a Motion for which no notice was given in advance because of circumstances. This is page 251 on the Executive. Mr. Chairman, that section only provides that “The personal keeper in the offices of the President and the Vice President immediately before the effective dates shall continue to serve as President and Deputy President respectively in accordance with this Constitution until the first elections held under this Constitution”. Mr. Chairman, in the morning you already passed a vote here that removed the functions of the Head of Government from the presidency. I want to move here that we restate that for the transitional period that the President shall be both the Head of State and Head of Government and that therefore there shall be no need for appointment of the Prime Minister until after the next elections held under this Constitution.*(Clapping)*.

Prof. Yash Pal Ghai: Those in favour of this Motion?

(Hon. Delegates raise their placards).

Prof. Yash Pal Ghai: Those opposed?

(No placard raised).

Prof. Yash Pal Ghai: The Motion is carried.

PLO Lumumba: That is the Seventh Schedule: *Taxation Powers*. Passed.

Prof. Yash Pal Ghai: Now, I am going to ask you, formally to adopt these various provisions, the Preamble, the provisions and Articles in the Legislature. *(Noise)*.

Prof. Yash Pal Ghai: Please, let me put it to vote then I will take your Point of Order.

PLO Lumumba: The voting procedure is like this. Because we are voting for the Legislature, there will be three lists: one for the Legislature, one for the Preamble and one for Transition and Schedules.

(Inaudible comments on the floor).

Prof. Yash Pal Ghai: Yes, 361. *(Noise)*.

PLO Lumumba: Ole Yiaile. Just wait. Wait first, there is a Motion. *(Noise)*. Excuse me, wait first, there is a Motion! Wait first, there is a Motion. Ole Yiaile.

Hon. Delegate William Ole Yiaile: Thank you. My number is 361 and I have a Motion, number 390 which talks about the Sixth Schedule; Article 21(2). It reads, I would like the words “National Land Commission” to be removed and substituted by “devolved district governments”. This is because all community lands that are under local communities should remain like they are in the present Constitution under the devolved units of Governments, rather than transferring them to the national authorities. I beg all the Delegates to support that amendment. It is life and death to us. *(Noise)*. Yes. So, put the question sir.

(Inaudible discussions on the floor).

Prof. Yash Pal Ghai: Those who support the Motion please raise your hands--

Hon. Delegate William Ole Yiaile: *Wote. Yote.*

Prof. Yash Pal Ghai: Excuse me there, the Rapporteur General says it has been covered and he will explain.

Hon. Delegate William Ole Yiaile: No, it is not.

PLO Lumumba: Tellers let us be very careful, three lists. The Ayes and the Nays, three lists.

Com. Okoth Ogendo: I would like to inform the Delegate who has just moved the Motion that since the Land Chapter vests community land in communities, that transitional provision is now irrelevant and it has been deleted from the latest Draft.

Hon. Delegate William Ole Yiaile: Thank you, sir.

(Inaudible discussions on the floor).

PLO Lumumba: Please, you must sign three lists, Legislature, Preamble, Transition and Schedules.

(Inaudible discussions on the floor).

PLO Lumumba: Three times, Legislature, Preamble, Transition combined with Schedules.

(Inaudible discussions on the floor).

PLO Lumumba: Please, let us maintain quorum and ensure to vote three times.

An Hon. Delegate: *Pigeni kura pole pole tafadhalini.*

(Consultations at the "high" table as voting goes on).

(Inaudible discussions on the floor).

PLO Lumumba: Please do not interfere with the microphones you are interfering with our recording please. Delegates do not leave until we have announced the count, quorum must be maintained until we have the count.

(Inaudible discussions on the floor).

PLO Lumumba: Once the results have been announced we shall have prayers from Somoina Keko and play the National Anthem. Somoina Keko, are you around? If you are, could you come to the podium so that we confirm your presence.

(Inaudible discussions on the floor).

Hon. Delegate David Musila: Attention! All Honourable Members of Parliament who have remained here up to now, you are kindly asked to meet here tomorrow at 10.00 o'clock for an important Press statement. *(Clapping)*. Tomorrow 10.00 o'clock, all Honourable Members of Parliament please assemble outside here so that we can decide on some things. All Members of Parliament. Thank you.

PLO Lumumba: Somoina, we now know you are around just stay on stand by. Reverend Musungu--

An Hon. Delegate: *(Inaudible)*.

PLO Lumumba: No, Somoina will say prayers and Sheikh Ali Shee, is the Sheikh in today?

(Inaudible discussions on the floor).

PLO Lumumba: Is the Sheikh in?

Hon. Delegate Abdulrahman Badawy: He is not there, I am there.

PLO Lumumba: Badawy will say prayers. Is Rihal in? Baldip Singh Rihal? Yeah, just vote first, short prayers, people are tired.

(Inaudible discussions on the floor).

(Singing and clapping on the floor).

PLO Lumumba: Before we dance let us have the votes.

(Consultations at the "high" table as voting goes on).

(Singing on the floor).

PLO Lumumba: Ladies and gentlemen this is how we intend to proceed. After the results we will make announcements, the Chairman will formally adjourn our sittings to tomorrow. We will say prayers and play the National Anthem. Please do not leave! Please do not leave! Please do not leave resume your seats. Resume your seats after the votes have been taken.

(Inaudible discussions on the floor).

PLO Lumumba: Ladies and gentlemen, could you kindly resume your seats after voting. Ladies and gentlemen immediately after voting resume your seats so that we can adjourn in an orderly fashion.

(Inaudible discussions on the floor).

PLO Lumumba: Teller number one are you through? Delegate 270 could you resume your seat, you have finished, you have voted. Delegate Thomas Nyabote Aburi, resume your seat. Delegate Engineer Owidi, resume your seat, Delegate Reverend Ibrahim Omondi, resume your seat. Delegate Ochieng from Migori resume your seat. Delegate Honourable Yusuf Haji resume your seat. Delegate Kimaiyo arap Sego, Delegate Digore, once you have voted resume your seats. Delegate Ruth Oniang'o, Delegate Masese.

(Inaudible discussions on the floor).

PLO Lumumba: Delegates resume your seats. Delegate Baldip Rihal resume your seat and be prepared to say prayers. Delegate Professor Yahya.

(Inaudible discussions on the floor).

PLO Lumumba: Delegate Mzee arap Ng'eny, could you take your seat? Delegate Kellan and Delegate Happy Gloria.

(Inaudible discussions on the floor).

PLO Lumumba: Teller number six, move briskly, Teller number seven, move briskly, Teller number four, move briskly.

(Inaudible discussions on the floor).

PLO Lumumba: Galgalo resume your seat and see Honourable Bonaya on the podium.

(Inaudible discussions on the floor).

PLO Lumumba: Teller one? Teller two? Teller three? Teller four? Teller five? Teller six? Teller seven? Teller 8? Teller 9? Tallying Clerks? Teller four?

(Inaudible discussions on the floor).

PLO Lumumba: Teller four are we ready? Teller six are we ready? Teller one, two, three, four, four are we ready? Teller five are we ready? Teller seven? Not yet.

(Inaudible discussions on the floor).

PLO Lumumba: Teller number seven are you ready?

(Inaudible discussions on the floor).

Hon. Delegate Koitamet Ole Kina: Order! Order please. I have an announcement; there is a Delegate who has lost a mobile phone I think--

(Information from the "high" table).

Hon. Delegate Koitamet Ole Kina: Oh, thank you, Colonel has it. So it is there, you have not lost it. *(Clapping).*

(Inaudible discussions on the floor and consultations at the "high" table as voting goes on).

Prof. Yash Pal Ghai: Honourable Delegates, we still have to adopt the title of the document that we have adopted--

(Consultations at the “high” table)

Prof. Yash Pal Ghai: The document we have adopted is “The Constitution of Kenya”. It does require your formal approval. I think it is sufficient if you just raise your hands if you approve, and if there is no dissent then we do not need to have any formal voting or any counting. So, all those who approve the title, please raise your hands.

Honourable Delegates raise their hands.

PLO Lumumba: Count the votes. Tellers, count the votes.

Prof. Yash Pal Ghai: Yes please, count the votes. We have to have two thirds please.

(Inaudible discussions on the floor)

PLO Lumumba: Tellers just do a count, do a count as you did before on the title. Just do a count Tellers. Please turn to the Delegates, you can't do it without turning and facing them. Delegates please sit down. Tellers up turn to the Delegates. Tellers turn to the Delegates. Delegate Achieng' could you kindly settle down please. Charles Oyaya and Fidelix Wangata can you help me from the podium? Charles Oyaya, Fidelix Wangata.

(Consultations at the “high” table)

PLO Lumumba: Can you go and do the tally, take the tally for the title? Fidelix Wangata, Charles Oyaya, Menak, can you do the count please?

(Consultations at the “high” table)

Prof. Yash Pal Ghai: Now I have the vote count.

The Preamble 332 in favour-- (*Clapping*). --No “NAYS” and no abstentions. So, the Preamble is adopted as part of the Constitution.

The Legislature likewise, 332 in support-- (*Clapping*). --None in opposition. The Chapter is adopted.

Chapter 21, Transition and the Schedules, the same vote – 332 for, none against.

With these votes and the adoption of the Title, the Constitution of the Republic of Kenya formerly stands adopted by the National Constitution Conference.

(Applause in the House).

Prof. Yash Pal Ghai: I just want to make one announcement. I want to make one announcement

(Applause in the House).

Prof. Yash Pal Ghai: Can I have your attention and let us conclude our business and then we can celebrate? I just want to mention that your decisions now will be put into the final text by the Drafting Team and we shall meet later in the week to adopt it formerly and hand it to the Attorney General.

(Applause in the House).

(Consultations at the” high” table)

Prof. Yash Pal Ghai: We will now have some short prayers and then the National Anthem and then that will be the end of our meeting today and I am sure we will all assemble here to morrow. Now, I want to ask Somoina Keko--

PLO Lumumba: Short prayers, people are tired, please. Somoina Keko, Badawy, Rihal and conclusion by Archbishop Okoth, then the National Anthem. Short prayers, God hears short ones.

(Applause in the House).

Hon. Delegate Badawy Ahmed: *Bismillahi Rahamani Rahim. Ewe Mola, twakushukuru sasa, chombo kimefika bandarini salama na kimeziteremsha bidhaa. Hakuna alokifikisha ila ni Wewe. Hakuna alo teremsha baraka na amani na utulivu ila ni Wewe. Hakuna wa kushukuriwa ila ni Wewe. Twakuomba uteremshe amani katika nchi yetu, masikilizano na moyo mmoja, na ufanisi na unawirishe Kenya hii yetu iwe na utajo mzuri ulimwenguni mzima. Twakuomba ya kwamba hii Katiba ambayo kwamba tumeiandika kwa sababu ya wananchi wetu wote, kwa maslahi yao iwe italeti fanaka na baraka na maelewano mema. Hakuna wakulifanya hilo ila ni Wewe Mola, Amin.*

Hon. Delegate Baldip Rihal: *Ek Onkar Satnam.* Oh Supreme God, Absolute yet All-pervading. The Eternal, the Creator of the universe, the Cause of causes, without enmity without hate, both Imminent in Your creation and beyond it. Oh merciful Lord, today was the most critical day in the drafting of the new Constitution of Kenya by the Delegates to the National Constitutional Conference. Oh Supreme God, we want to thank you for your blessings for the way in which Delegates have voted and the most democratic process to craft the new Constitution for Kenya. Oh merciful Lord, some Delegates went away from the Conference. Oh merciful Lord, you have the power, you have the wisdom to understand their follies, but the majority of the Delegates have been here and they have exercised their democratic right. Oh merciful God, we want to thank you that all communities of Kenya have worked in harmony without any bitterness and have drafted this new Constitution. Oh merciful Lord, bless all people of this Nation, because this country belongs to all the different and diverse communities of Kenya. *Waheguru Ji Ka Khalsa, Waheguru Ji Ki Fateh.*

Hon. Delegate Archbishop Okoth: In the Name of the Father and of the Son and of the Holy Spirit, Amen. God of love and compassion, since 1991 we have been on the road to democracy realising this Constitution. We thank you for the gift of your spirit. We thank you for the gift of

your wisdom. We thank you for the gift of your knowledge and we thank you for the gift of your unity. We have been, since last April - now it is almost a year Lord, deliberating, discussing, disagreeing and agreeing, seeking consensus, building consensus and we have indeed arrived at the foot of this consensus building. The consensus for the 30 million Kenyans has been displayed today in this House. We have agreed, we have accepted, we have voted, our democratic rights have been fulfilled, even those who have voted sometimes to the contrary, have shown, that you have shown them, they have the right to do so. Lord, we thank you for the gift of today, and may this Constitution – the Kenya Constitution we have established, may it be a source of unity, a source of understanding, a source of togetherness, a source of oneness for our people.

And now Lord, we want to bless – let your blessing be upon these Delegates, in the Name of the Father and of the Son and of the Holy Spirit. Amen.

Hon. Delegate Margaret Keko: *Tuombe. Mtakatifu, mtakatifu, Mungu wangu uishie mahali palipo inuka. Tazama Mungu umejidhirisha na kuonekana jioni hii. Baba tunajua ya kwamba hata Pharaoh hakupendezwa alipojua ya kwamba wana wa Israeli watatoka katika nchi ya Misri, na kuelikea nchi ya Kanani, lakini Mfalme, kwa sababu ilikuwa ni mapenzi yako, hata leo sisi tunafurahi na kushukuru ni kwa sababu umetufikisha. Asante Mwokozi mwema, asante ni kwa sababu leo wa Kenya wengi walio umia, wengi ambao hata malazi, hata chakula hawana, Kristo umependezwa wakafika nchi ile ya maziwa na asali Baba. Asante Roho Mtakatifu ni kwa sababu umetenda.*

Tazama nilitangulia na kusema ya kwamba huchelewi lakini unakuja kwa wakati unaofaa. Asante ni kwa sababu umefika kwa wakati wako binafsi. Pharaoh alikataa, lakini mwisho wa mambo, wana wa Israeli walifika Kanani. Asante Roho Mtakatifu, asante ni kwa sababu tumefika na tumepitisha, kama tulivyoagizwa na Wakenya milioni thelathini na mmoja. Ni furaha kuu Kristo, ni kwa sababu umekuwa pamoja nasi. Tumenyong'onyea kwa siku nyingi, tumeteseka Kristo, lakini umependezwa na ukasema ni lazima yawe. Asante Roho Mtakatifu, ninakupenda, ninakuheshimu, ni kwa sababu fadhili zako ni za milele.

