

CONSTITUTION OF KENYA REVIEW COMMISSION

**NATIONAL CONSTITUTIONAL CONFERENCE
(NCC)**

Verbatim Report of

**PRESENTATION OF REPORT OF THE TASK FORCE ON
DEVOLUTION OF POWERS HELD AT THE BOMAS OF
KENYA**

ON

21ST AUGUST, 2003

PRESENTATION OF THE REPORT OF THE TASK FORCE ON DEVOLUTION OF POWERS - CHAPTER 10, HELD AT THE BOMAS OF KENYA ON 21st AUGUST 2003

Meeting was called to order at 9.30 a.m. with Prof. Yash Pal Ghai in the Chair.

Prof. Yash Pal Ghai: We are going to commence with prayers in about 2 minutes' time and I would like you to be silent for the prayers, you were not yesterday, I am afraid to say, so please take your seats as soon as you can. Prayers will be led by Rev. Samuel Macharia, Sister Maria Gachambi and Sheikh Ali Shee. Could I please call for Rev. Samuel Macharia to begin and I would ask you all to please stand up.

Hon. Delegate Sheikh Ali Shee: (inaudible).

Bismillahi kwa Jina la Mwenyezi Mungu mukarimu, murehemu e Mola wetu muumbaji wa mbingu na ardhi na viumbe vyote, tuko mbele yako tumejiweka mbele ya uwezo wako na nguvu zako tukiomba baraka zako na heri zako ubariki watu wetu, ubariki mkutano huu, utupe nguvu na busara za kuweza kuendelea na kazi hii ngumu, utuwezesha kuwa na maelewano, uvumilivu na kusikizana, tuweza kufanya kazi hii ambayo wewe ulitaka tuifanye, kuwafanyia watu wako, watu wetu wote wa nchi hii. Mola, twakuomba tena mara ingine utupe utulivu na utupe heri na baraka kwenye nchi hii na amani na kila lile ambalo ni ovu utuepushe nalo nafikira, mawazo na matendo ya shetani (inaudible).

Hon. Delegate Samuel Macharia: Our Gracious Father we come before you with a lot of humility, aware that you are Holy and we are not as Holy as you are, but we appreciate that you allow us to live here to approach your seat of power, to approach you seat of grace. We come before you God to thank you for so many things you have done for us. We cannot count them individually and collectively. Accept our thanks God and especially we thank you God for giving us the privilege to represent our people, not because we are the best, but it is your will that we come to this Conference so that we may write the Constitution of this Nation. Help us God so that we may not let down our people.

We want to thank you for the way you have started with us this session, phase II. In particular, God we thank you for the debate yesterday, the discussions that we had on culture. Thank you for helping us to feel proud to discover our identity, whom we are. We thank you for our positive culture which has come from you, help us never to abandon it, that which glorifies you. Father we also want to confess any wrongs that we may have made here or any omissions while we are going on with this conference, accept our confession Father. We ask you now for your guidance as we continue to have stable minds, clear thinking, let the voice of reason prevail. Help us to demonstrate maturity in our conduct in this house. Father in heaven, help us also to tolerate one another, to respect one another. Finally Father, help us to put Kenya before personality. For we pray in Jesus Name.

Hon. Delegate Sister Martha Gachambi: In the Name of the Father and of the Son and of the Holy Spirit, Amen. God our Creator we praise and thank you for the gift of life, for the gift of this new day. We want to consecrate it to you so that whatever we are going to be and to do, particularly in our deliberations, we may be guided by you. You tell us that we build in vain if we do not build with you. One of our values is the belief in the Supreme God. We want this value to guide and help us to come out with ways and means that can help us as Kenyans, as those who have great desire to find fullness of life for our people, for the generations and generations to come. We ask you this morning that we may be guided by your spirit. All that which does not respect the dignity of each person, that it may not be the one that guide us we offer everything to you because you are the source of wisdom and we ask your guidance through Jesus Christ our Lord, Amen.

Prof. Yash Pal Ghai: Delegates, please take your seats. I expect that by now there is no Delegate who has not been sworn in and if there is such a Delegate, will he or she please come to the middle of the room and in the usual way I will administer the oath. I have not received any advance notice so I am assuming we can still go on to the next item, Communication from the Chair. I would like to make three or four points which arose from the Steering Committee this morning.

Communication from the Chair:

Prof. Yash Pal Ghai: The first point, the Steering Committee this morning requested me to remind the Hon. Delegates about the necessity of efficient time management. I notice that the Delegates are now a bit more punctual than they were last session but we still need to make sure that we return from breaks at the prescribed time and we make the best use of our time. I notice that for a great part of yesterday, we really had a very limited attendance by the Delegates and indeed perhaps at some point there was not even a quorum. So, could I please plead with you all to attend for most of the day or all the day, so that everybody is listened to by all the other Delegates. We shall soon be breaking into committees, so this is the last maybe couple of days for a while, and we will have a plenary session. So please make every attempt to attend and to return to the auditorium at the prescribed times.

The second point I want to reiterate is the importance of building trust. We have often talked about the necessity to listen to others without a suspicious mind, not to impute motives to people and when they make a particular statement, we have to begin to trust each other. We are all engaged in a very important and common enterprise, the enterprise of giving our country the best Constitution we are capable of, and this exercise as I have said many times, can only be done through cooperation, trust, exchange of ideas. Therefore, let us listen to speakers without interruptions, without heckling and let us try then to resolve the differences that emerge in the presentations by the Delegates. Some of this work will of course be done by the committees next week.

I also want to say, to repeat something that we repeated several times last session, that it is not always possible for all Delegates to have the opportunity to make their points during the proceedings, we welcome any written comments that they might have and they are incorporated into the record. So please if you so wish, let us have your written comments.

The next point I want to make is about the way in which we should treat our guests. The rules of procedure to invite for the members of the public to attend the proceedings of the conference, the Review Act places very special emphasis on transparency, public participation, every Kenyan

and indeed every visitor to our country is welcome to our proceedings but because sometimes the security question and other times the limited space we have for visitors, we have to have some mechanism to issue day passes but once those have been issued, they are our guests and we should regard that people are interested in our proceedings and we should treat them with civility and welcome them.

The final point I want to make is that the Steering Committee this morning discussed the question of how we proceed further on the issue of culture, yesterday a very wide support for including further provisions in the constitution dealing with culture and we have suggested that the ad hoc committee on culture will assist the Commission to prepare a paper which captures the key points that were made yesterday and also draw upon the report prepared by the commission. We hope this work can be concluded soon and then we should consider how best to proceed after that. Certainly that report will be made available to all the committees because one message that came through yesterday was that culture runs through many, many aspects of our lives and therefore of the Constitution, but we will be reporting on that in the next two or three days by which time the document will be prepared.

Today we begin the discussion on Devolution, a document has been distributed which summarizes a much longer document that the Commission prepared. A much longer document is now being printed and it will be available to you in the course of the day. So, I will invite the Commissioners who are going to present devolution to come and join us here at the podium.

Hon. Delegate Thomas Nyabote Aburi: Point of order.

Prof. Yash Pal Ghai: Yes.

Hon. Delegate Thomas Nyabote Aburi: I think it is prudent that we give the Presenters of last evening's topic time to respond to what was actually deliberated yesterday in the Conference. Thank you.

Prof. Yash Pal Ghai: Do they wish to do so?

Hon. Delegates:

(Inaudible).

Prof. Yash Pal Ghai: Okay. Could I please then invite the Commissioners who presented the paper yesterday to come and very briefly respond to the comments on the paper made by the Delegates.

Report of the Task Force on Culture (Contd. From 20.08.03):

Session Chair:

Prof. Yash Pal Ghai

Presenters:

Com. Kavetsa Adagala

Com. Salome Muigai

Com. Abubakar Zein Abubakar

Com. Kavetsa Adagala: We appreciate this time that we have been given because we know there is pressure of time and I would like to begin this session by thanking God that Honourable Shikuku and Honourable Akumu are still alive. Because they told us something yesterday that has made us suffer for so many years; that has made people go into detention for defending culture; that has made almost anything cultural not to succeed; that has made us not even have a cultural policy and even when we have it in plans of development it just doesn't work. It has always puzzled me why things which are cultural don't work, and that is why in the Lancaster House debate culture was left out.

It has caused untold suffering. I would like to tell you and I think you also know it yourselves that nothing cultural has worked at all. Whether it is film-- and we are told that Kenya is a good filming site nothing comes out of Kenya. When we talk about the national theatre we even had to struggle for it and this theatre was built by colonialists in 1952 it and can never go anywhere. We don't even have any other building that we have had or the government has not put up any other structure and it is just left that cultural workers will do it. So, I would like to thank them for saying that they sent a message through the late Doctor Kiano to the Lancaster House and said 'we should include our culture in the Constitution' and the politicians told them 'we don't have time, it will delay the independent. We don't have time to include it and truly the politicians never included the culture. So as I said yesterday, if you are looking for political rights you will end up with a State, but to end up with a nation, you have to constitute ourselves culturally,

socially, so that we can build a nation and that is why we have difficulties in establishing a nation.

I would like to say that at the beginning. Now the other questions we had I think, let (inaudible) start us off because she was in recommendations then we will go on. But I really thank Honourable Shikuku and Honourable Akumu for that insight.

Com. Zein Abubakar: Thank you, Chairlady. Good morning, Honourable Delegates. I would like to spend some time in summary to look at some of the things that you were saying to us very important things. But I would like first to say that hearing the feedback we were getting from the Delegates, that there are certain things which more or less we have developed some form of consensus listening to the people. For instance, we have agreed, one, culture is dynamic; two, that there are aspects of culture which are positive and there are aspects which are negative and that we will need to promote and enhance those which are positive and then do away with those which are negative. I think that was clear coming from the delegates. And then three, that from our perspective we will need as a Commission to isolate constitutional principles and I think this might not have been very clear to some of the Delegates; that they were thinking that possibly what people are talking about is the inclusion of details, traditions, customs, morals and so on and so forth of each and every community in the constitution. What is clear at least to the Commission and the Task Force, is that we will need to develop constitutional principles which will then go to the constitution, then we will need to propose a legislative framework which than will be left to Parliament to enact, and also to develop a policy programme which will then be a guide to a government when it is established in a new constitutional dispensation. And I think it is very important for us to see these three areas although interrelated but distinctively separate; that we can not for instance take those which need to go to the legislative framework and put it in the constitution.

So the Constitution will deal with general principles, which affect culture.

Then there are other things which were not adequately even addressed in the Task Force report which have been raised with some of the Delegates. For instance addressed it but not very adequately, the question of intergenerational equity. A delegate yesterday raised the question that

in most if not all our cultures we had a way of dealing with the question of generation, with the question of different generations existing at the same time, with the question of the older members of society, the question of the middle aged, the youth and the children, and that came out clearly that there need to be established as a principle that there is intergenerational equity in society.

The other thing I would like to address myself to is the question which kept on coming from some Delegates when they were proposing and saying that we should have a chapter on culture. My personal view is that we need to give more thinking and time to this question. It is not necessarily true that if we have a chapter on culture then it means that we have adequately address culture.

As I said yesterday there are two views on this question:

1. In order to enhance the status of culture you need to mainstream it; in other words it needs to be accommodated in all Chapters which have aspects of culture. For instance when you are dealing with the Environment Chapter, with the Land chapter, Devolution, Bill of Rights. All of them have aspects of culture.
2. You develop mechanisms and devices to deal with that. That is one approach. The other approach is to say consolidate everything in a chapter. I don't think this should be left open-ended. A technical committee possibly of the Commission would look into this and develop a position.

The very last thing I would like to say, Mr. Chairman with your permission, is that I would like to really, really thank the Delegates who made very useful comments on the Task Force report, and I would like to say personally as a cultural worker that I was particularly satisfied by the seriousness that was shown by all Delegates on this important question which is facing the Conference. Thank you very much.

Com. Salome Muigai: Thank you very much. I would also like to add my voice to thanking the Delegates for the enrichments, which you brought to the discussion of culture yesterday. Mine is

just a very short and brief summary of what we seemed to be hearing yesterday. That our culture is the thread that holds us together. We can view this thread as a precious gold chain. As women know, and men are starting to know since they have started to wear chains, a chain is as strong as its weakest link. If you have a chain with a weak link even if it is just one that is what determines the strength of that chain. So, for as long as our culture nurtures the so-called weaklings then no one can break it; when we ignore the weaklings then our culture can be broken by anything. So it is up to us to decided which are the deciding factors in our culture, deal with them, and as Commissioner Kavetsa would say, make sure that we wash our culture, throw out the dirty water but keep a very, very healthy baby that is able to grow, able to develop and able to become a useful member of our society, the same link that holds us together. Thank you very much.

Com. Kavetsa Adagala: Okay. I was still coercing myself when we settled I settle down, but I think that this Conference, the people who are here, you should be able to explain to the rest of Kenyans where we are in terms of culture. Because yesterday I saw some people raising questions again about harmful practices, about discriminatory practices and even some conflicts over that including the live one that we had happening here, and I think it is important to help the confusion not be there.

We have Human Rights, we have Bill of Rights in the Constitution. That chapter serves a purpose and that chapter deals with equality, equity, Affirmative Action and there will be some aspects of Devolution there. These are the articles that we have used to wash out the negative. So let us not always go back that our culture; is negative. We will have to deal with it in living but in terms of the Constitution, equality deals with the discrimination against children so that as we say respect elders, we also say respect children. Now in our culture, we don't even respect children. In our culture the elderly have a tremendous love for children. We just want to affirm that, and we also say in terms of equality articles, we want also minorities to feel that they have an equal place with the larger population whichever they may be whether they are ethnic or whatever.

Then the other one is people with disabilities. You will all agree with me that in our cultures, we have a love for people with disabilities and even a respect for them even up to the spiritual fear, that they have another sense of life that we don't necessary have those people with able bodies.

So we want to also put that there in terms of our culture, not just in terms of the universal articles, but in terms of our culture. In our culture, you can't laugh or do bad things against a person with disability because you don't know what your grand son will be. You don't know what your daughter will be. So we want to get that sense in.

We want to have respect for the elderly, not as a burden but as a people we are returning to. We are giving back what they gave us. This is how our culture is. When they are a little infirm and not so strong, we will be able to appreciate them for what they did. But not only that, because we also want to do it because they have an inter-generational responsibility. They are a reservoir of our knowledge. So the family, the clan, the state, or the traditional association should take care of them because of what they have and all other types is there, are involved in all those equality articles.

Equity is almost the same but we want to do it particularly in terms of development so that we don't leave some other people behind. Most of us come traditionally from communal societies where there were no such huge gaps of disparity. We want also to say the Constitution have dealt with us so that some people don't become overwhelmingly wealthy and others are so poor, destitute, wretched of the earth. We do not want that to happen.

Then affirmative Action also deals with trying to equalize the power in the society. So that, the Constitution has taken care of, not just in terms of women but also in terms of minority, in terms of people with disability again in the same way as with equality.

Devolution which will be talked about and some of the issues will come out; Devolution deals with specific, when the Devolved unit come, it will be that each people will deal with their own culture and as we have here, we wanted elders, now a Kikuyu elder cannot function in Taveta because he will not know the workings there, nor she will not be able to function there. What is that all the issues that were raised about FGM and these other aspects will be dealt with at the local level. So don't worry that we shall take everything and put it in the Constitution. They will be dealt with at the local level.

The other aspect I would like to say is that the chapter, the way we have talked about needs to be there, but we must have it always through us because our cultures are heavily marginalized. May be one day when we are also better off culturally, we will be able to say, this we do not need or that but for now we need both the culture and the capitalized issues that cut a cross.

The last point I would like to talk about is that no one here could say that Christianity as a culture is a way of life, because we have been describing culture as a way of life. Many of us here live that life and yet we are living it out. This is a time we are trying to resolve contradictions and conflicts in our societies and I don't see how people who wake up at five in the morning, pray, and doing this and that and then now we are still divorcing these two. We need to work it out. I know the part of church history is negative but I saw some of us divorce ourselves from it. But we need to find a way to reconcile our lives, our values and Christian values and I don't think they are very different. I know in my language we say "*mirembe*" all the time. That is peace. Why don't we reconcile those values and principles? Islam people say this is our way of life and they stick to it. So we also need to find a way of reconciling these ways of life so that we don't live in a contradictory way.

The report that is presented on Culture is being printed and will be distributed to you. Thank you very much for all your contributions, it is as if we cooked a meal and then we thought it was an ordinary meal but then you are all licking your fingers and saying how good it is and we are very, very happy. God Bless you all. God bless Kenya.

Prof Yash Pal Ghai: Thank you very much, Commissioner, for that response and thank you for your excellent work. I have a couple of announcements before I call for the Commissioners to present the reports on Devolution. I have been told that members of Technical Working Group G on Devolution, should collect their files from tent number seven. Perhaps you could do that during the coffee break. I have also been asked to tell members of the Technical Working committee on Citizenship and the Bill of Rights, to meet briefly today in tent number, I believe is eight to confirm the appointment of the new Convener, as I think we announced yesterday Justice Martha Koome has resigned and she was the Chair of the Committee on Citizenship and Rights and the Committee has to nominate a new Convenor. I propose that members meet at teatime possibly before they go and collect their cups of tea. The Convener has to be confirmed

by today, because this afternoon there is a meeting of conveners to discuss the procedure that will be followed in the Committees. So please, Committee on Devolution, collect your files, and remember that the Committee on Human Rights meet at break and confirm the Convener. Thank you. Yes, 263?

Hon. Delegate Abdulkadir Guled Kaaru: Thank you, Mr. Chairman. A lot of Kenyans mistake Moyale, Marsabit and Isiolo to be in North Eastern Province. Fortunately or unfortunately those districts are brothers, and among the language which are mentioned in the Northern Kenya, the Boran language is not included in the Kenya language. Secondly Mr. Chairman, among the tribes which are mentioned for the Cushites in Northern Kenya, an omission on a minority tribe like Konso was done. May I request the Task Force to include those in your records. Thank you.

Prof. Yash Pal Ghai: Thank you very much indeed. Can I invite the Commissioners who are going to present the report of Devolution to come forward? Our colleague will be chairing this session or at least facilitating the presentations by the Commissioners. So I would like to invite him to comment.

Report of Task Force on Devolution of Power:

Session Chair:

Prof Yash Pal Ghai

Presenters:

**Com. Mosonik arap Korir
Com. Wanjiku Kabira
Com. Mutakha Kangu**

Hon. Delegate Mosonik: I would like to thank the Chairman of the National Constitutional Conference and the Commission and also thank you all Delegates, as we proceed with this

session on Devolution. You will recall that during Bomas I, the issue of Devolution, very much like the other issues, was addressed but towards the end, we were requested as a Commission to revisit it.

During the break between Bomas I and this particular session, we went back to the Commission as mandated by the Conference and formed a Task Force to reconsider the design and the principles of Devolution. The Task Force was formed with two co-convenors; Professor Wanjiku Kabira, on my right and Mr. Mutakha Kangu, on my left. The other members were Dr. Githu Muigai, Ms. Kavetsa Adagala, Mrs. Alice Yano, Bishop Benard Njoroge Kariuki, Dr. Andronico Adede, Dr. Maranga Bagwasi, Dr. Mosonik arap Korir, myself, Hon. Dr. Phoebe Asiyu, Commissioner Isaac Lenaola, Dr. Mohammed Swazuri, Mr. Riunga Raiji, Mr. Ahmed Isaack Hassan and we had three ex-officio members, the Chairman of the Commission, Professor Yash Pal Ghai, the Vice-Chair of the Commission and the Chair of the Research, Drafting and Technical Support Committee, Professor Okoth-Ogendo and the Secretary of the Conference and the Commission, Mr. P L O Lumumba. The members of the Secretariat who worked with us were Ms. Pauline Nyamweya, Ms. Eunice Gichangi, Mr. Jeremiah Nyegenye, Mr. Fidelis Wangata, Mr. Dan Juma, Mrs. Jacqueline Obiero, Mr. Steven Mukaindo, Ms. Jonuba Beker, and Ms. Rukia Abdinasir.

Initially, we worked for some time as a Task Force, to agree on the task itself and decided that to ease matters we would divide ourselves into two sub-Task Forces, if I can put it that way. A sub- Task Force on the Principles of Devolution, led by Professor Wanjiku Kabira and the Task Force on the Design of Devolution, led by Mr. Mutakha Kangu. Then towards the end, we all got back together to go through the two documents and harmonize them. It is therefore my pleasure to introduce Professor Wanjiku Kabira and to request her to present the first part of the report on the Principles of Devolution, then Mr. Mutakha Kangu will take over on the Design. Towards the end, I will highlight the summary, whose copies the Delegates already have. Professor Wanjiku Kabira, please.

Com. Wanjiku Kabira: Good morning, Delegates. I am happy to come back and revisit the issue of Devolution, because the comments that were made during the last session indicated that we needed to rethink this Chapter a little bit more. Maybe before I talk about what we thought

transpired during the last session on the debate on Chapter ten, I wanted to remind ourselves that initially we had made consultations with the Lancaster group on the issues of Devolution because of the work they had done in the Independence Constitution.

Among those whom we consulted, for the purposes of record again were: Honourable D'souza, Honourable George Nthenge, Honourable Joseph Martin Shikuku, Honourable J.J.M. Nyaga, Honourable John Keen, Honourable Dr. Taita arap Towett, Honourable J.T. Otiende, Honourable Achieng' Oneko, Honourable Robert Matano and the late Honourable Julius Gikonyo Kiano. When we presented those proposals, we had had consultations with them. Again, because of the experiences in the preparation of the Independence Constitution, whose objectives we have in our main report, so it may be a good idea to look at the main report that we were given the last time. However, they are also repeated in the complete Devolution Report, which you are going to get early next week.

We also had expert consultations on Devolution and we consulted some of the experts like Professor Roan Watts, Professor Richard Simeon, Dr. Peter Wanyande, from University of Nairobi, Professor Walter Oyugi, from university of Nairobi, Mr. Julius Kipng'etich, formerly from University of Nairobi, Dr. Crispin Muli, Dr. Gerishon Kiara and Kiraitu Murungi, among other people who presented different papers to us before we presented the last Chapter. Again, in the main report, the issues they raised are reflected there.

We have also reproduced the views of Kenyans on this particular issue in the report that you are going to get probably towards the end of the week or early next week. Those views are clear about what Kenyans were looking for. They wanted Devolution, I think that is an issue on which there was no question and maybe the design that we presented needed to be redesigned again to make sure that we reflect their concerns.

Now, during the last Conference, the debate on Devolution in a way implicitly and explicitly, made comments on the kind of principles that should guide us in the design itself. We had about one hundred and forty-five people who spoke on this issue, for the three days that we debated Devolution. Among those who spoke, one talked about provincial government, that Devolution should go to the provincial government level. On the district government level, there were about

fifteen people who talked about the district level being the main area of Devolution. We had others who spoke on locational government, village-government level, village-district-province level, national-province-district level, village-district-province-location, district and location and so on. So it is clear that the views were diverse on whether we should have the five, four or three levels. Although the district was considered the main area for Devolution, we had a variety of views on the number of levels, the level at which power should go and so on.

So, during the Conference, the proposals for Devolution of Power was on the whole supported. There were not any Delegates who did not want power to be devolved. Delegates strongly supported the formulation of viable structures that would be able to promote equitable resource allocation and accountable governance as well as delivery of services and empowerment of the people and they overwhelmingly supported that principle. On the levels of government, the Delegates were considerably in the support of the districts as the principle centers of Devolution, although it was suggested that they would be too many while others were economically challenged. That necessitated our review of the proposals that we have made. It was also noted that the proposed structure lacked a clear linkage with the national government and we needed to review that as well.

Now, with respect to local government, the translation of towns and municipalities to the status of districts was also opposed by some Delegates. Some Delegates favoured a three-tier Devolution structure, which I talked about, that is, location, district and province; while others were of the view that it would be a two-tier Devolution structure: location and the districts and therefore leaving out the province. It was generally proposed that there ought to be comparable social and economic resources for the proposed units of Devolution.

In terms of functions of devolved government, the Conference felt that some of the proposed functions and services, including education, environment and agriculture, ought to remain in the ambit of the central government. Furthermore, the Draft Bill was not clear on the responsibility for the management of local resources. The Delegates were of the view that district councils ought to have legislative power devolved to them while others were of the view that the second chamber ought to handle all legislative issues of the devolved government.

In terms of financial arrangements, some Delegates asserted that the Constitution ought to specify the percentage of national resources that ought to go to the district governments. They proposed a ratio between 50 – 60%. Others were of the opinion that national resources ought to be distributed amongst constituencies rather than districts. It was proposed that the Auditor-General should audit the accounts of the devolved government units. It was also proposed that the devolved governments, irrespective of their size, should share the local authorities transfer fund equitably.

In terms of administration of devolved units, it was proposed that a Local Government Service Commission ought to be established to provide personnel to the devolved units. The Conference also proposed that the Draft should specify the tenure, the academic and age qualifications for administrators of the devolved governments.

The Delegates also proposed that there should be a Boundaries Commission. The Commission would ensure the capacity of local people to exercise their governance. It would also ensure that power is devolved to the units of Devolution, and the capacity of the local people to exercise power and self-governance. It should also ensure the participation of the citizens in the governance process, since they have been perceived as passive recipients of services. It should also ensure that units enhance good governance, transparency and accountability, and that these units, which will be created, will be able to promote democratic practice, ensure equitable distribution of resources, promote efficient and effective delivery of services, among other recommendations. In a sense, we are saying that the Boundaries Commission would be able to ensure that these particular units that we have agreed upon would be able to facilitate the needs of the Kenyans at the different levels.

During our discussion, it was very clear that the Delegates came up with additional principles that they think should guide this process. They talked about the importance of separation of powers between the center and the local units. They also talked about ensuring that checks and balances are provided for; and accommodating and reconciling cultural values and diversity. They wanted us to ensure protection of rights of communities on the basis of participation, accountability and social justice. They wanted us to promote better use of power. They wanted us to have principles that ensure promotion of access to basic needs which we have provided for

in the Bill of Rights. They wanted us to ensure that these units also take governance closer to the people. They wanted us to ensure we will promote equality and human rights through those devolved units. They wanted us to reduce the abuse of power by governments and devolved governments and they wanted us to protect minorities. On the whole, they wanted to ensure that we promote participatory governance and also ensure affirmative action, not only for the women but for other disadvantaged, marginalized groups within our communities.

So, having taken those views into consideration, we tried to look at the gaps that existed in Chapter ten of our Draft. In doing this, we also looked at what kinds of principles guide other governments. During the recess, we looked at Ethiopia, for instance and found that there were some principles that we could easily look at. For instance, the Ethiopian Constitution has adopted the principle of the promotion of the identities of the nationalities and integration of communities, as well as the principle of self determination for the nationalities, including the rights to govern themselves and to develop their culture and languages. But we also recognize that each country develops its own principles based on their own experiences. In terms of self-determination for instance, the Ethiopian Constitution make it very difficult for people to succeed. Although actually the right to succeed exists in their Constitution, before you can succeed, there has to be certain number of agreements between the government and the regional governments and so on and it is a very difficult thing. But again as we say, each country has its own history and its own context within which it develops its own principles.

In the Ethiopian Constitution still they have adopted the principle of entrenchments of the regions in the Constitution which we have in our own Constitution. They have also adopted the principle of equality of distribution of resources and opportunities as well as affirmative provisions for less developed regions.

The Principle of concurrent and exclusive taxation and revenue is also adopted by the Ethiopian Constitution. They have also adopted the principle of co-operative government and the inter-governmental relations at all levels and I think that one is also reflected in our own draft.

They also have a principle which insures that they preserve the peace, national unity and indivisibility of the Republic; that, as much as you may have independent units, the indivisibility of the Republic is considered of maximum importance to the Ethiopians. They have also

adopted the principle where devolution is to ensure that they secure the well being of the people of the republic.

We have looked at a number of the principles. They have a long list of principles which you will find in the report.

We also looked at Ghanaian Constitution which focuses on the principles of the subservient to the general principles of state policy. In other words, a devolved government is supposed to be subservient to the general principles of state policy. The principle of co-ordination, the principle of sound financial base with adequate and reliable resources, which we think the Conference was asking for in our devolved structure, the principle of efficiency and effective control of affairs and the principle of accountability among others. In Tanzania, they have adopted similar principles and by the way all of them have adopted the principle of entrenchment of government in their own Constitutions.

The principle of total devolution, that is devolution of all the organs of the government, is adopted by Tanzanians, which includes not only the legislative powers, executive powers, but also Judiciary. In our draft we had not devolved in Judiciary.

The Principle of subservient to the national principles and policies as in Ghana has been adopted by Tanzania and again the principle and the need to promote unity and national unity as it is done in Ethiopia has been adopted by Tanzania.

We looked at Nigeria as well and we also looked at Namibia and in Nigeria. For instance, the principle of the need to ensure that the exercise of power by the state does not prejudice the existence and investment of the Federal Republic is one of the principles that is guiding the Nigerian Government.

Again the principle of the Cultural, Communal and Religious diversity and the encouragement of Cultural integration, in other words concept of unity within diversity, is also proposed in the Nigerian Constitution.

In Namibia they have adopted the principle of multi-culturalism, promoting integration of the various cultures. They have adopted the democratic principle in the Constitution of the devolved unit. In other words they have also talked about entrenching the devolved government within the Constitution.

We also looked at Canada, Switzerland among other countries. And what we have done in our own studies is to look at what is useful for Kenya, because we believe we do not live in an isolated country and in a sense we learn from other people and look at issues that are relevant to us. As I have said we have looked at South Africa, Namibia, Ethiopia, Ghana, Tanzania and so on, the countries that are also closer to us. After this, we looked at some of the principles and at some of the issues that were missing or some of the principles that could be missing in our own Draft and we have come up with a few recommendations which I know must be in the summary. In this respect we have proposed that maybe we need to strengthen some of the principles that we have, including, for instance, to ensure equitable representation of all Kenyans in national institutions, the protection and promotion of cultural, communal, religious, ethnic, and linguistic minorities, I think an issue that came up yesterday in our discussion on culture.

We have also suggested that we need to ensure that in appropriate cases the higher levels of government exercise restraint in favour of the lower levels of devolved government. In other words if you have conflicts between the sub-national and a local government, it is a sub-national government that should restrain itself. And if you have a conflict between the national government, the central government and local authorities, it is central government that should restrain itself. It is a process of protecting the weaker at all stages.

We have also looked at the question of ensuring that the national government and the government at each level to which power is devolved shall be loyal to the Constitution and uphold the national goals, values and principles of the republic, something we had not put in our Constitution; that while there are certain levels of independence within the unit, that there is need to keep to the principles of the Constitution and uphold the values and the principles of the Republic which need to be protected.

We have also said that in this regard, studies which we have looked at indicate that, although we had captured the interest of the Kenyans, maybe we needed to look at the document a little bit more and that is why we have proposed additional principles in our report for your consideration.

So again the need to promote peace, internal harmony, indivisibility of the nation, coherence and national unit is something that was not reflected in our documents and we thought it is important to bring it into our principles, because we are talking about a nation which wants to retain its unity and which wants to remain as one.

Again, we have also included the subservient, the need to include the subservient in the rule of the Law at all levels. We have, although it is also reflected in our Draft, indicated that we need to retain the entrenchment of the devolution in the Constitution. Again as I said, most of the other countries have adopted that principle.

We also suggested that the national government and the devolved government shall exercise such power and perform their function in a manner that does not entrench on the geographical, functional or institutional integrity of other governments and shall respect the Constitutional status, institutions, powers and functions of governments in all the other levels. In other words, once we have created those units and once the Boundaries Commission has ensured that the boundaries are in place, that the devolved governments are expected to operate within their own boundaries.

We have also included the principle of viability, sustainability, efficiency and effectiveness of devolved units of the government based on population, geographic size, historical and cultural size, economic and natural resources, which shall be considered in the establishment of units and levels of devolution and in the review of the boundaries.

Again we think this is important, it is an issue that was brought you during our last session here. That we need to look at geography, population, the history of the people, cultural ties, because our intention is to promote harmony in whatever devolved government that will be in place.

The Constitution powers and functions of the lower level of government, including local authorities and village governments, that is if we agree on them, we are saying they shall be established by the devolution Act. So we may not need all the details that we had. In terms of principles that is what we have done, we have looked at other countries, we have reviewed what you said during Bomas I and we have them made certain proposals for the consideration by the Committee.

We also looked at taxation because that was a major issue during our debate during Bomas I. And on the issue of taxation, we have again looked at various countries to see what they propose in terms of taxation for the various levels of government. And we looked at South Africa which has a lot of details on revenue collection, and they have given us information on provincial revenue funds. They say that, they have a consolidated fund for each province into which all money received by the regional governments must be paid, except money reasonably excluded by an act of Parliament. And they have given details on how money is withdrawn from provincial Funds. I will not read the details because we are going to get the report and you can look at it.

In terms of local governments, they propose that local governments and each region is entitled to an equitable share of revenue raised nationally to enable it to provide basic services and perform the functions allocated to it. And they may also receive other allocation including from the national government revenue either conditionally or unconditionally. So the details on taxation are clearly spelt out. They had talks about the regional taxes, what kind of regional taxes can be raised, they talk about local government physical powers and function and which you will have in your reports. They say for instance that local government may impose rates on property and sub-charges on fees for services provided or on behalf of the local government. And they also say that if authorized by national legislation, other taxes, levies and duties appropriate to local government or to the category of local government in to which that local government falls, but no local government may impose Income Tax, Value Added Tax and general Sales Tax. those ones they cannot raise

The power of the local government to impose Rates in this country on property, sub-charges or fee for services provided by or on behalf of the local governments or other taxes levies or duties are clearly marked out in their Law.

And in Switzerland, we have similar principles where they adopt the general principle of taxations, particularly the circle of taxpayers and the object of the tax and its circulation where they are saying this will be established by the statute. They also talk about the harmonization of taxes in Switzerland and they also adopt the principle of financial equalization, where they suggest that the national governments shall promote financial equalization among the region. And when granting subsidies as they said, it shall be taking into account the financial capacity of the regions and the special situation in the regions.

We have also quite a lot of information from Ethiopia on taxation powers of the national government where they indicate that the regional government will have the power to levy and collect taxes, custom duties and other duties on import and export good. They also have power to levy and collect tax on income from the employees of the regional government and the international organizations.

They also have the power, these are regional governments, to levy and collect income, sales tax, income tax, from employment from public enterprises owned by the regional governments and they have many other taxes that they are able to collect both at the regional level and also at the central government. They also have details on the concurrent taxes; in terms of principles of taxation a lot of details can be found from Ethiopia.

We had some information also from America, (USA), where they say that no tax or duty shall be laid on articles exported from any region and we thought it was interesting in our own case if we are saying that the regions will collect taxes.

And there is quite a bit of information we got on Canada and Nigeria. And from there what we are saying is that, we have come up with additional proposals on taxation based on the kind of studies that we have done.

Uganda is also a very interesting case where they have give a whole list of taxes that can be levied by the various governments and we may want to look at the details when we get the report. So we are recommending that we should have Revenue Mobilization Allocation Physical Commission, whose functions shall be to monitor their accrued revenue allocation formula and principles in operations to ensure conformity with changing realities. We are also proposing that this Commission will be able to settle this disputes relating to the financial arrangement between the national and regional governments and that it will advice the Salaries and Remuneration Commission to determine the salaries in relation to the revenues collected.

We are also proposing that this Commission will be able to advise the national government and the regional government on fiscal efficiency and methods by which their revenue can be increased. And this Commission will be able to discharge such functions as are conferred on it by the Constitution, depending on whether this is adopted by the Committee. So in general we have proposed that there are quite a number of principles which are not in our Draft, that every effort needs to be made, to ensure that the same institutions or individuals, are not over burdened with many different taxes, as to make the overall tax burden unbearable. The tax experts tell us that Kenyans are the most highly taxed people, they say in this region and even far beyond.

We are also suggesting that the proper balance should be struck between services required, to be surrendered by the devolved levels of government and the revenue mobilized, and that every effort should be made to promote investments as the most suitable source of tax revenue, in order to reduce the burden the taxes on citizens.

The other principle we are proposing, is that there may be need for a consolidated fund that should be established for each region into which all money is received by the sub-national government, must be paid. That money may be withdrawn from a consolidated fund only with the Regional Act, that is if we adapt some of the proposals that are made in the design that is going to be presented later. We are also suggesting that every devolved level of government is entitled to an equitable share of revenue, raised nationally, to enable it to provide basic services and to perform the functions allocated to it. An additional revenue raised by the devolved levels of government, may not be deducted from the share of revenue raised nationally or from other allocations made to them out of national government revenue. Equally we are saying that there is no obligation on the national government to compensate the devolved levels of government

that do not raise revenue commensurate with their fiscal capacity and tax bill. Again this is to try to encourage the various levels of government to raise revenue for themselves. We have also proposed that the sub national Legislature may impose taxes, levies and duties including income tax and other taxes and be able to implement the same. We are suggesting that the power of devolved national Legislature to impose taxes, levies, duties and the charges, may not be exercised in a way that materially and unreasonably prejudices national economic policies, economic activities across sub-regional boundaries, or the national mobility of goods.

We are also saying that the local government may impose rates on property and such charges, for services provided by or on behalf of the local government and other taxes.

Additional principles that we have will include the suggestion that; when two local governments or more than one level of devolved government have the same fiscal powers and functions with regards to the same area, an appropriate division of such powers and functions should be made in accordance with national legislation. We are saying that the division may be made only after taking into account at least three of the following criteria:-

1. The need to comply with sound principles of taxation.
2. The powers and functions performed by each local government.
3. The fiscal capacity of each local government.
4. The effectiveness and efficiency of raising taxes, levies and duties and
5. Equity.

We are also suggesting that the principles of universality and equality of tax treatment and of taxation according to economic capacity shall be followed, and that the national government shall promote financial equalization among the regions and when granting subsidies, it shall take into account the financial capacity of the regions and the special situations of the regions. We are also suggesting that the national and devolved government when levying taxes and duties, shall ensure that the taxes and duties are related to the source of the revenue and determined after appropriate studies have been conducted.

These proposals also have an impact on the seventh schedule, so if they are adapted, we may want to review the seventh schedule in our Draft. Although we have made quite a number of recommendations, we still want to acknowledge that this is an area where we have received some information from Kenya Revenue Authority, some studies have been done by them, and they have made some recommendations as well. We are suggesting that when we get into the committees, it is possible to get experts to help the committees to address the issues of taxation probably much more closely and make appropriate recommendations.

We kind of developed a check-list that we should use in determining the kind of design that we want to adopt. That is whether we are talking about the bigger regions or whether we are talking about an aggregate of districts as some delegates recommended the last time, yet we think that when we have these units, we need to maybe use the check-list and find out whether those units respond to that check-list. In this check-list we raise questions such as: how do we achieve shared rule at the center and self rule at the devolved levels? In other words, how do we ensure that we retain the national indivisibility that we have talked about and at the same time promote self rule and empowerment of the people at the various level? We also are saying that we need to find out whether the structure, distribution and degree of co-operation between the different levels is clear.

We need to look at the question that was raised the last time by many delegates, whether these units we are talking about are viable, sustainable, efficient and effective. Are they based on population, geographic size, historical and cultural ties, economic and natural resources? When we look at a unit and we want to give it certain functions, and we also want to give it legislative, Executive powers, and also the capacity to raise revenue, we want to ask ourselves whether we meet that kind of a criteria. We are also asking whether we should not ensure that the definition of the unit is clear, so that we don't have a problem when we create units which are not clear to ourselves or to the people that live within that particular unit.

We want to ask ourselves whether the need for a balance between the powers of the devolved government and indivisibility and internal harmony has been achieved, whether we retain that indivisibility of the nation and internal harmony. And we need to ask the question at the various

levels, both at the national level and sub-national level, and again at the local authorities or the third level, whichever we agree on.

We also want to ask ourselves whether we are able to take care of the less endowed units. Does the chapter ensure that we are taking care of those who live in the less endowed units? We want to make sure we have clear mechanisms for settlement of disputes. Some of these other countries have very clear mechanisms. We want to ensure that the governance structures for each level of government is clear, and that we need to be clear about how they relate to each other. We want to ensure that there is a complementarity of the functions on the various levels of government: that they are complementing each other, rather than fighting each other. We want to ask ourselves whether we have made provisions for regions specific policies. For instance livestock policy in North Eastern Province, or Lake Region Fisheries Policy and so on. Have we given room for those particular regions to have policies that are going to be appropriate for their regions? We want to ask ourselves, what provisions we have put in place, to facilitate access to basic needs; that is food, shelter, clothing, basic health care, security, education, skills training, legal services, housing etc. These are also basic needs that we have provided for in the Bill of Rights, but which we are not clear how they will be met, how we are going to achieve this.

We also want to ask ourselves whether the design facilitates equitable distribution of resources, while promoting greater productivity of individuals and communities. We want to ensure that they create that balance. We also want to ensure that the design promotes greater participation of the people in their own governance, mobilization of resources and decision-making in all areas. We want to ask ourselves whether this design will promote social, political, economic and cultural ties of the people, moving towards self-actualization. In other words, you do not want to create conflict where there is no need for conflict. If the people have cultural ties and have a history that they share, you would want to enhance and promote that.

We also want to ask ourselves whether the design will ensure greater participation of women, minorities and other marginalized groups, in all aspects affecting their lives. That is why when we talk about not only the design itself, but also the various levels of government; we then have to look at the governance structures to ensure that these are protected. We also want to ensure

that the design addresses the design of equitable representation of the people at all levels of the devolved government, and ensure that power is as close to the people as possible, so that they can make decisions on their own governance. We want to ask whether the design promotes co-operation between the devolved units, whether there is a clear linkage between devolved governments and the national governments. Issues like whether Kenyans have a right to buy properties or live anywhere they want to live, are addressed by those units. Whether the issue of equalization is factored in the design, so that again with less endowed units, we are able to talk about the equalization and how we deal with it, and whether the design is informed by cultural richness and distinctiveness. These are some of the issues that we think need to guide our design. What we have done is then looked into, having talked about these principles, we have gone into the issues of the linkages between Chapter 10 and the other Chapters. This is because, depending on the decisions we make, even if we did not make any decisions to change that particular Draft, we think the linkages to other Chapters have not been properly covered and I think I will leave that one to Com. Mutakha Kangu and thank you very much for listening to me. *(clapping)*

Com. Mosonik arap Korir: The tea break was supposed to be 10:30 to 11:00 and now it is just past 11:00, shall we take 20 to 30 minutes please and then reconvene, so that Com. Mutakha Kangu can make his presentation?

Prof. Yash Pal Ghai: Can I just add to that, please be here at 11:30 as you know Dr. Kangu is not only a very interesting speaker, but he also makes long speeches. So please be here at 11:30.

Meeting Adjourned for tea break at 11.10 a.m.

Meeting reconvened at 11.45 a.m.

Prof. Yash Pal Ghai: We want to start our proceedings in about two minutes. Take your seats; I am going to ask Doctor Mosonik Korir to resume his facilitation.

Com. Mosonik Arap Korir: Ladies and Gentlemen, we would like to continue with the presentations. I would like at this point to invite Mr. Mutakha Kangu to make the presentation on the design of devolution. Mr. Kangu, please.

Com. Mutakha Kangu: Thank you Ladies and Gentlemen. Before I proceed there is a correction that you need to make on the summary document you received where we have given the options. Option number 1, that is supposed to have 10 units at page 11, unit 4, you will notice that we have put there Garissa/Ijara. You need to correct that Ijara is to be indicated as a separate district. The reason we had put the stroke is because we had not yet secured the statistics in terms of area and population but through the assistance of some of the Delegates, we have received that information and Ijara as a district has an area of eleven thousand, three hundred and thirty two square kilometers. If that is subtracted in the total area of Garissa/Ijara which was 440, 952, Garissa remains at 330,620.

On population against Ijara, the information we have received is that the population is 72,638 subtracted from the total of 392,510, Garissa remains with 319,872. The same correction should be reflected under option 3 unit 6, the same correction should be indicated that is at page 18. At page 19 unit 9, Koibatek district is missing so it should be added there, Koibatek district, page 19 unit 9. Koibatek district has an area of 2,306sq kilometers and the population is 138,163. Those are the corrections and I wish to apologize for the initial lack of information to all those concerned.

Going into the substance of redesigning Devolution, I want to start by making some general remarks at the conceptual level which say that Orthodox Constitutional scholarship and constitution making has in the past caused failure of Government and constitutions because they approach the question of configuring State power from a narrow misleading point of view in two senses. Number one: Orthodox constitutional scholarship and constitution making seeks to address the question of State power.

Prof. Yash Pal Ghai: Point of order?

An Hon. Delegate: Mr. Chairman, my point of order is that we who are sitting here are terribly being interrupted from behind here. Can the orderlies please make sure that these people are cleared if they do not want to listen to what we are listening to?

Com. Mutakha Kangu: Now, I was saying that they approach the configuration of State power from a narrow and misleading point of view in two senses. The first sense is that they seek to conceptualize about State power from an institutional point of view rather than starting from the functional power point of view and it is for that reason that a lot of people and constitutions start talking of State power in terms of the three organs of States. Once you talk about organs, it is my argument that you are talking about institutions but the correct approach would be, in my view, to start thinking about State power from the functional point of view, from the power point of view and talk of not the three organs of State but in fact the three powers of State, namely, the Legislative power of the State, the Judicial power of the State and the Executive power of the State and once you have done that, then you move to the second stage of establishing the institutions that exercise that power.

Number two, when Orthodox Constitution making talks in terms of the institutions (the organs) it also limits those organs to only three when the reality is that we should be talking about four powers of State. The Judicial power of the State, the Executive power of the State, the Legislative power of the State and most importantly, the Financial power of the State. We must recognize that there are four powers of the State and that in the past Constitutions have concentrated on defining, dividing and controlling the three powers of State but ignoring the most important power of the State, the Financial power of the State. I want to say that if we are going to make a good Constitution, we must ensure that that Constitution also seeks to define, distribute and control the Financial Power of the State. I also want to say that the reason we must do that is as you all know, he who controls the past controls everything.

Number three, if we recognize those four powers of the State and talk the Kenyan language of power sharing, then we must appreciate that that power sharing will involve all the four powers of the State. If we pursue that line, we will be able to recognize that in a centralized system of Government, the power sharing is done at the horizontal level only but in a devolved system of Government, the power sharing will be done first vertically among the different levels of Government and secondly, horizontally within each level of Government. If we appreciate those parameters, then we shall be able to address the design question on Devolution in a successful way.

I therefore move into the design question on design, I want to say that as Kenyans, we need to appreciate the global context within which we are trying to write a Constitution that devolves power to lower levels of Government. The trends at the global level are that people are now talking about globalization and localization. That you go global but internally back home, you go local so that the people at the local level are empowered to participate in decision making on matters that affect them.

To be able to clearly appreciate where we are coming from and going, we may need again to define devolution by trying to distinguish it from two other terms known as de-concentration and delegation; and I will do that by quoting from some scholars who have stated that de-concentration occurs when the Central Government disperses responsibilities for certain services to its regional branch offices. This does not involve any transfer of authority to lower levels of government and it is unlikely to lead to the potential benefits or pit falls of decentralization. The decentralization that has occurred in many unitary countries is actually de-concentration since independent local governments which are legally accountable to local constituents, do not exist and local few offices of the Central Government are simply used to improve the efficiency and effectiveness of service delivery. This is the case in East Asian countries and until recently, was the rule in Eastern European countries. De-concentration can also exist for some functions in federal countries when the Central Government maintains a strong interest in ensuring delivery of a particular service.

On the other hand, delegation refers to a situation in which the central government transfers responsibility for decision-making and administration of public functions to local governments or semi-autonomous organizations that are not wholly controlled by the central government but are ultimately accountable to it. These organizations usually have a great deal of discretion in decision making. This form of decentralization can be characterized as a principle urgent relationship with the central government as the principle and the local government as the urgent. From these perspectives, the main design issue is to ensure that the self interested urgent, the local government or semi-autonomous organizations, faces incentives that induce it to act as closely as possible in accordance with the wishes of the principle that is the central government.

Finally, devolution, a more extensive form of decentralization refers to a situation in which the central government transfers authority for decision making, finance and management to quasi-autonomous units of local governments. Devolution usually transfers responsibilities for services to municipalities that elect their own mayors and councils, raise their own revenues and have independent authority to make investment decisions. In a devolved system, local governments have clear and eagerly recognized the geographic boundaries over which they exercise authority and within which they perform public functions. That is what this scholars say about devolution as distinguished from the other two. We asked ourselves, what then are Kenyans looking for? Are they looking for de-concentration? Are they looking for delegation? Or are they looking for devolution? We came to the conclusion that the Kenyans are looking for devolution and not de-concentration and not delegation; and we said that the District Focus For Rural Development Program which we considered failed, was de-concentration.

We also are of the view that the discredited Provincial Administration system is a system of delegation, and we said, if Kenyans have not been happy with those approaches, they are not looking for de-concentration or delegation, they are looking for devolution proper.

Having said that, at the designed level, we identified a number of issues to address and the first question is the question of how many orders or levels of government that our constitution should create? The Draft as we told you last time, proposes the establishment of five levels of government; the national level, the provincial level, the district level, the locational level and the village level. We have done comparative studies which have indicated to us that the majority of countries go for three levels of governments and the examples are South Africa which under its 1996 constitution has established three levels of governments known as, the national level, the provincial level and the local level. In South Africa they are not called levels, they are called spheres, and the reason they call them spheres is because, when they did the interim constitution in 1993, they called them “tiers of government” or levels of government, but when they were doing the final constitution, it was argued that the suggestion that they call them tiers or levels, connote a hierarchy that suggests that some levels are inferior to the other levels; and they said that is not what they were looking for, they were looking for a system of government that involves partnership among the three levels of government, partnership on an equal basis which involves sharing decision making, consulting and so on, and they said therefore, they do not want

to use any phrase that will suggest that the national level is superior to the other levels of government. So they changed from “tiers of government” to “spheres of government”.

In German, they also have three levels of government, the national, the Lander and the local which is called commune or municipalities. In Switzerland, they also have three levels of government and in Australia they also have three levels of government, in Canada there are three levels of governments, in Finland there are three levels of government. Nearer home, in Uganda they have six levels of governments, five of them that are referred to as LC 1-5 plus the national level of government. In Ethiopia, they have four levels of government, and our colleagues who went there were strongly advised against establishing more than four levels of government.

Looking at these statistics, one would be able to say that, the ideal situation is to go for three levels of government; but looking at the principles which were given to you by my colleague Wanjiku, we said that one of the main principle is to bring government closer to the people and we said, if we have three levels of government, the chances are that, government will still be very far from the people. So we are of the view that we go for four levels of government and those levels will be the national, the sub-national, which we have not named, it could be called regional, provincial, county or whatever, the local government level and another level below the local government at the locational level. And we recognized that, in those other countries we have looked at, the third level of government is what is normally considered as the local government level, taking into account the unique nature of local government that recognizes that you will need different administration and management mechanisms for rural local government and urban local government. So in those other countries, the third level is the level at which local government is put with those distinctions. So that is the one issue we have addressed.

The issue number two is, where do we put local government in those four levels of government we are proposing to you? Under the Draft you have, you noted we said last time that Article 220 identifies the district as the principle level of devolution, and Article 222 tries to equate cities and municipalities to the status of districts; and we said that was causing confusion and we are saying therefore, that we must address the question of local government and in our view we are saying, local government has to be at the third level of government and like other countries we should be able to recognize the distinction between rural local government and urban local

government. We looked at the current situation and noted that, under the current situation, we have cities, we have municipalities, we have townships and we have county councils; and we are saying that, on the side of rural local governments, we shall provide for county councils at the level we have them today which is the district, as the third level of government that we shall also provide for urban local governments but we want to restrict that to cities and then deal with municipalities and townships within the county councils they belong. That is the proposal we are making for your consideration. But when it comes to cities, we will again have to address the question of Nairobi because when we come to the sub-national level, we are giving Nairobi the status of a unit at the sub-national level and therefore we may have to consider to subdivide Nairobi into say three or four local governments to operate at the third level of government as local governments. So that is an issue I think the committee will have to address.

Having made that decision, we are saying that, below local government, there will be the fourth level called the location within our structure of devolution. That therefore takes us to the third question. At the sub-national level, how many units should we create? And you will correct that under the Draft, Article 220 which I have already referred to, had talked about the districts as the principle unit of devolution and Article 222 had talked of cities and municipalities being units of devolution with the status of the districts. We think that following the debate here, that may not be the approach, and following what I have already said, that may not be the approach and we have to reconsider that. We looked at the current situation and we noted that we have three cities, we have 43 municipalities and 67 districts. We are saying 67 districts because Nairobi which is a city, and Mombasa which is a city and Kisumu are also districts, I believe, I don't know, I am not very clear about the Kisumu situation, but I think Mombasa is clear. So we are saying that if you count districts, they are 70 but among them there are two or three units which are also cities, then you talk of 67 districts and three cities and 43 municipalities, you have a total of 113.

We are of the view that having taken into account the debate that were here and considering comparative studies in other places and what scholars have said and we have looked at what one scholar called Uwe Leonardy talks about demarcation of regions, and international perspective. He was advising the South Africans, he has identified a number of general principals, one which says that the more comparable the constituent unit are in size, institutional structure,

administrative capacity, economic viability and financial strength the more stable the system will be as a whole. That is the general rule he puts and then he goes into particulars, and says that, a system that comprises two units is exposed to danger that will destroy it. Because it will be engaged in what is called by bipolar politic, struggling one against the other. He also notes that a system that involves only three units will also suffer from similar dangers because two units can permanently gang-up against another unit. He looks at the option of four units and he says, that again can suffer from two ganging-up against another two and you have a permanent situation of bipolar politics. He says it is difficult to identify a minimum number, but he says something between five and six is reasonable as minimum. He tries to look at a maximum, and he says it is also difficult to decide what the maximum number would be, but he says if you have too many units, then you expose them to the possibility of divide and rule being used by the Central Government against the devolved unit to divide and control them. So he warns against that. He refers to the American situation, which I mentioned to you last time and says that is a situation of rather too many units. He points out that the Americans themselves think we are too many. He then notes that in trying to come-up with a unit, you must also make sure that there isn't a huge disproportion between the number of units and the territorial size of the country. That the smaller the country, the better you are with a smaller number of units, the bigger the country then the better you are with probably a little larger number of units. The examples there are, are that a country like Germany is slightly smaller than Kenya by about 40,000 sq km, Germany is 540,000 sq km Kenya is about 581,000 sq km and he says, sixteen units for Germany for that size is rather a bit to high, and you need to note that Germany has sixteen Landers and among them three are City States. The City of Berlin, Rumen and Harbor. So the proper units are thirteen. Austria is about 7 M sq km and it has six states. South Africa, which is almost twice the size of Kenya, has created under the final Constitution nine Provinces. Under the apartheid system they had six Provinces in the whites only republic and ten Bantustans making a total of sixteen. When they embarked on drawing new unites, they decided that sixteen would be rather too high and they settled for nine Provinces. Ethiopia, I can't remember the exact number of units but it is slightly bigger than Kenya.

Having looked at this, we said that the factors that have to be taken into account and some of which that were mentioned by the scholar I referred to.....he says, that in creating units you must avoid inequalities in the following areas: -

1. There should not be inequalities in the political, economic and financial potential of the respective unit.
2. There should not be inequalities in the potential of one or several units dominating the national level of Government.
3. That the national level of Government should not be structured in such a manner that it can be able to dominate the other levels of Government. We must guard against that.

Then he considers the question of ethnic factors and he says, that ethnic factors will inevitably play a role, but he warns they must not certainly play the dominant role when you are creating units. So having taken these warnings from. We came to the position that we need to look at a number of factors in determining how many units to create and how to draw them out. And we said: -

1. Viability is very important
2. The territorial size has to be looked at
3. The economic viability of the units taking into account the common economic activities and the resource endowment, we must take into account population distribution in the unit. We also must take into account the question cultural homogeneity, harmony and integration. And we must also take into account the presently existing administrative and political units and boundaries. We should also consider the question of the welfare and protection of the minorities within the units we create. We must also consider the functions which we intent the devolved units to take over from the national Government. We must consider the sustainability of those units. We must look at the historical and cultural ties of the units we create.

At this level I want to emphasise that a lot of Africans have complained that the colonialists came and just divided us saying this is Uganda, this Kenya, this Tanzania and some communities were divided without among regard to the social capital they had already created and put in place which they were relying on. We are saying that similarly when creating our units we must not make the mistakes that the colonialist made by ignoring the fact of social capital and dividing communities without regard to some of those issues. So that is why we are saying we must consider historical and cultural times that people may have already developed and are relying on

for their sustenance. We must consider the questions of efficiency, effectiveness and biodiversity. It was emphasized in the Commission that biodiversity must be taken into account, because we are emphasizing environmental protection and if we overemphasize population and ignore biodiversity then we again make a mistake.

We also must consider the question of the intergovernmental relationships that we will need to create both vertically with the national level of Government and the lower levels of Government, and horizontally with other devolved units. Having taken these factors into account we have attempted to provide you with three options to look at. Of course in the Commission, we looked at very many options some of which are not before because we have chosen to present to you three, but of course I think when we go the committees, the committee may want to look at the details of the other options we had looked out. They may find that may be we were wrong and make a different decision.

The options we proposed to you are option number, which gives us 10 units. Unit 1 has Kwale District, which measures 8,295Km² and has a population of 496,000. The details are there; you can look at them yourselves but we have under that; Kwale, Mombasa, Taita Taveta, Kilifi, Lamu, Tana River and Malindi with a total area of 82,816Km² and a population, as we are using the 1999 Census statistics. We are aware that those statistics have been questioned time and again but those are the only statistics we had. There are those who have proposed that we can use the 1979 Statistics and project them, but we haven't yet done that projection, so we are using the 1999 one. The population for that unit is 2, 487,264.

Unit 2 puts together Makueni, Machakos, Kitui, Mwingi, Mbeere, Meru Central, Meru South/Nithi, we didn't have the statistics as we are still looking for them, Meru North, Tharaka, and Embu. That gives you a total territorial area of 57,088km² with a population of 4,355,961

For Unit 3: We are trying to put together Isiolo, Marsabit, Moyale, Samburu and Laikipia with a total area of 126,740km² with a population of 741,552.

Unit 4: We are putting together Garissa, Ijara, Mandera and Wajir with an area of 128,124Km² with a population of 962,141.

Unit 5: We are putting together Turkana, West Pokot, Marakwet, Trans Zoia, Keiyo, Baringo, Koibatek, Usian Gishu and Nandi. This gives you a total area of 100, 145Km² with a population of 3,223,699.

Unit 6: We are proposing Kericho, Buret, Bomet, Kajiado, Narok, and Trans Mara and Nakuru with a total area of 52,037Km² with a population is 3,388,603.

Unit 7: We are proposing Kisii Central, Gucha, Nyamira, Homa Bay, Kisumu, Kuria, Migori, Rachuonyo, Siaya, Suba, Bondo and Nyando with a total area of 12,546Km² with a population of 4,392,136.

Unit 8: We are proposing Kiambu, Thika, Muranga, Maragua, Nyandarua, Nyeri and Kirinyaga with an area of 13,220Km² with a population of 3,724, 159.

Unit 9: We are proposing Bungoma, Teso, Lugari, Busia, Kakamega, Vihiga, Butere, Mumias and Mt. Elgon with an area of 8,264Km² with a total population of 3,358,776.

Unit 10 is Nairobi with an area of 696Km² and a population of 2,143,254. So that is Option 1.

For Option 2, we are saying that we can modify Option 1 to create a total of 13 units. These will be achieved by creating an additional unit out of Units 5 and 6, which we have already mentioned above. Another one will be created out of Unit 2, which we mentioned above and yet another one out of Unit 7. We do so as follows:

Unit 5 then becomes Turkana, West Pokot, Marakwet, Trans Nzoia, Keiyo, Baringo and Koibatek with a total area of 93,918km² with a population of 2,022,243.

We shall create an extra unit 6 there, which has Usian Gishu, Nandi, Kericho, Buret, Bomet with an area of 11,175 with a population of 2,369,625.

Unit 11 will be Kajiado, Narok, Trans Mara and Nakuru with an area of 47,089Km² with a population of 2,129,434.

Unit 2 will now remain Makueni, Machakos, Kitui and Mwingi with an area of 44,679Km² and a population of 2,497,439.

Out of the initial Unit 2, we will have another Unit 12 which will have Mbeere, Meru Central, Meru South/Nithi, Meru North, Tharaka and Embu, with an area of 12,409Km² and a population of 1,858,522.

Unit 7 which I said will also be subdivided will leave us with Kisii Central, Gucha and Nyamira with an area of 2,206km² with a population of 1,450,827.

Unit 13 will be Homa Bay, Kisumu, Kuria, Migori, Rachuonyo, Siaya, Suba, Bondo and Nyando with an area of 10,340Km² and a population of 2,941,309.

Option 3: We are proposing 18 units and they will be made up as follows:

Unit 1: We have Kwale, Mombasa and Taita Taveta with a total area of 25,653Km² and a population of 1,407,822.

Unit 2 will have Kilifi, Lamu, Tana River and Malindi with an area of 35,825Km² and a population of 1,502,889.

Unit 3 will be Makueni, Machakos, Kitui, and Mwingi which I believe you can see the figures there. Isn't it?

Unit 4 will have Mbeere, Meru Central, Meru South/Nithi, Meru North, Tharaka and Embu. The respective figures are there.

Unit 5 will have Isolo, Marsabit, Moyale, Samburu, Laikipia and you can look at the figures.

Unit 6 is one of the units we were saying you do the correction, it is Garissa and Ijara whose figures are there.

Unit 7 is Mandera and Wajir. Their figures are there.

Unit 8 is Turkana, West Pokot, Marakwet and Trans Nzoia. You will look at the figures.

Unit 9 is Keiyo, Usian Gishu, Nandi and Baringo whose figures can be seen. We had said that you add there Koibatek; that is on Unit 9

Unit 10 we have Kericho, Buret, Bomet and Nakuru.

Unit 11 we have Kajiado, Narok, Trans Mara and Kuria

Unit 12 we have Homa Bay, Kisumu, Miigori, Rachuonyo, Siaya, Suba , Bondo and Nyando

Unit 13 we have Kisii Central, Gucha and Nyamira.

Unit 14: Kiambu Thika Muranga and Maragua

Unit 15: Nyandarua, Nyeri and Kirinyaga

Unit 16: Bungoma, Teso, Lugari, Mt. Elgon

Unit 17: Busia, Kakamega, Vihiga and Butere-Mumias

Unit 18: Nairobi

Those are the options we are proposing and as I said earlier, we looked at other options. There is a time we looked an option of 12 units and there is a time we looked at an option of 14,15, 16 and we had an option of 27 Units and I said that if the Committee will want to look at how we had grouped those ones, we will make that available at the Committee stage.

Secondly, for the full document you will get, we have tried to draw the Kenyan map to reflect these options we have given you so that when you look at it at a glance, you can see how it will look like on the map. So when you get the full document, you will look at those maps and see whether they make sense or not. So those are the proposals we are making on how to sub-divide the sub-national level or to create the units at the sub-national level and they are therefore for your consideration.

The next issue is the Distribution of Functions. Before I go to that, I would want to mention that for those units we are proposing related to the factors we said we are considering, you will need to note that they will make sense if you look at the factors in combination. If you single out one factor, you might start saying, “.. but look, there is this disproportion.”, and so on, but if you look at all the factors, then you might be able to see how and why we may have arrived at some of these proposals. So, I advise you to try and consider all the factors that we have put.

On the Distributions of Functions, the draft has provided lists but we have tried to consider a number of principles that have to be taken into account when distributing functions in a Devolved system where we are saying that to be able to successfully distribute functions, we must appreciate that a workable system of devolution must emphasize the concept of shared-rule and self-rule; shared rule at the national level and self-rule at the devolved level. That combination must also be such that you do not create an opportunity for any level of Government to impose its own position on the rest. So mechanisms for consultation and negotiation among the different levels of government have to be created and therefore the distribution of functions must take that factor into account. You will need to create something like what, in Germany, they call ‘an Interlocking system of Government.’ In South Africa, they call it ‘a Cooperative system of Government’. They are partners cooperating in the business of running the government of the Country and so functions are allocated to different levels to create that interdependency. In S. Africa they say ‘the spheres of the government are distinct, interdependent and inter-related.’ So you have some distinct nature of a level but it is interdependent another levels and they are all interrelated so they work as a unit to maintain some sense of a synergy, taking into account what Wanjiku talked about; maintaining the unity of the Country. So the distribution of functions needs to bear that in mind.

Number two, we also are saying that in distributing functions there can be two approaches, depending on where each country started from. These are the Integrative and Devolutionary approaches. In an Integrative system, you get a situation where units begin as independent entities then finally agree to come together to form one country, and therefore it is the units that were initially independent that give up some of their functions to the national level of government. In such an arrangement, if there are any functions that are not expressly stated in the Constitution, they are normally said to reside with the units, because they are the ones that had the functions and relieved some to the center. In a Devolutionary system, you begin with a country, which is then divided into units and then the centre releases some of its functions to the units. In such a system if there are any function that are not expressly stated in the Constitution and a dispute arises as to which level of government is supposed to deal with those functions then the approach is to say those functions reside with the centre because it is the one that gave them up, and so what is not expressly given to the lower levels must remain with the centre. Having taken that into account, you also need to note that to avoid that such a situation you must be very clear in your Constitution how if such a situation or dispute arises, it is to be resolved. The Constitution must provide mechanisms for the resolution of such a dispute.

Number three; in distributing functions you again have to bear in mind the relationship between legislative and Executive functions. In some systems, they say that level which has the legislative power on a certain matter must also have the Executive power on that matter so that each level that legislates should be in a position to implement what it has legislated. That approach encourages the autonomy of the units and legislates. In other systems you can get a situation where the national level of government is given more legislative powers but the implementation powers are given to the devolved units, so that the national level legislates but it is the devolved units that implements, and in that event, you require arrangements for consultation so that the national government does not pass on to the units legislations that are not capable of implementation. So the units need to be consulted when legislation is taking place because they are the ones that will be doing the implementation function.

Number four, in some such systems you may find the national government is allowed to pass what are called framework legislations but then leave the issue of details to the devolved units.

The devolved units can then legislate for the details but based on the framework that has been laid by the national legislature, that has to be taken into account. Now, in doing the distributive function, it is also important to recognize the distinction that is normally drawn between or among exclusive functions or powers, shared or concurrent powers and residual powers. Exclusive powers are those that are exclusively assigned to a particular level of government and another level cannot interfere with that. The shared or concurrent functions are those that are done by two or more levels of government concurrently and again you need to be careful so that you don't just say 'concurrent' and then the different levels of government start fighting over a function because the Constitution is not clear as to which aspect of the concurrent functions belongs to the one level and which one belongs to the other.

The residual ones are those that are not clearly or expressly stated in the Constitution and they relate to what I have mentioned earlier. In the approaches that are used in many places that is to say when you leave a lot of functions in the residual arena, you create the possibility of conflicts and disputes among the different levels of government. Therefore, to avoid that, the more you eliminate the Constitution expressly the functions of each level of government, the narrower the area of residual powers becomes and therefore the possibility for you to avoid areas of conflict. So when distributing functions we will need to ask ourselves: Do we want to leave a lot of functions in the residual area and therefore lead to confusion and disputes? Or, do we want to go into details and enumerate most of the functions, clearly assigning them to each level of government? We need to think about that.

Then there is the question of the style to be used in enumerating the functions in the Constitution. Some Constitutions use the approach of putting a list by way of a schedule, say, these are the exclusive functions of the national level, this are exclusive functions of the sub-national level and this are concurrent functions. That approach has the tendency of again, particularly in the area of concurrent functions, creating confusion because if you say education is a concurrent function, questions will arise which aspects of education are to be performed by the national level of government and which ones are to be performed by the lower level of government, so confusion will arise. So other Constitutions have taken the approach of stating the functions in the substantive body of the Constitution so that you clearly say in educational for instance, these aspects, if they are policy and standard-setting, will be national, but the

management of the institutions and delivery of the educational services will be for the devolved unit. That way you avoid confusion. One Constitution that has taken that route is the Swiss Constitution. It specifies on each function the aspects for each level and I think Honourable Delegate Kiriro had some document which also takes that approach. So, in style we will have also to make a decision on which style we want to use to avoid confusion.

Now, generally you will all note that in most countries, Foreign Affairs, Economic Policy, Defence and things of that kind are given to the National level, but in other countries there are some aspects in which even the devolved units are involved in matters of foreign affairs. Like in Germany, the Landers are now involved in matters of EU affairs and sometimes the national level is required to consult them if matters are going to be passed in the EU which are going directly to affect the Lander. So you will need to consider, if we say foreigner affairs national, are there some aspects of foreign affairs that the national level may be required to consult the unit before they enter into arrangements.

Questions of foreign trade, international trade, should we allow units to engage in some of those aspects or not? So those are issues that we need to consider and be able to come up with the specific distributions of functions.

I now come to the fourth power of the State, the distribution of the financial power of the State. As I mention earlier, it is very crucial to the success of any devolution you are going to talk about. If we don't assign this area properly then the whole thing will have failed.

Now, on the financial power of the State, the importance of this area is that, if you give functions to a unit without resources for performing those functions, then you have missed the point. They will not be able to perform those functions. So the general principle is that funds must follow functions, and in this area there is a relationship between finances and functions. You may allocate a national level of government functions to legislate on certain areas but in the process of legislating, the national level of government may start reassigning functions to lower levels of government without reassigning finances. So we must be very clear that no level of government should easily reassign its own functions to another level without the accompanying finances that

are required to discharge those functions. That will have to be noted and you will see the relationship.

In dealing with finances, another issue that has to be addressed is that imbalances, both vertical and horizontal, should be avoided. No level of government should be given more functions and less finances. No units of devolution should be given more functions and less finances. We should try as much as possible to match the revenues to the functions that each level is supposed to perform.

So, vertical imbalances must be avoided. We should not let the national level of government retain all the finances and then leave the regional units with functions but without finances to perform those functions. That is the problem we are already suffering with the local authorities; they have functions but they don't have finances. In the document that you were informed we received recently, the information there clearly shows that the local authorities only receive 5% of the total national revenues that are collected through what is called LATF and yet they have a lot of functions to perform. We want to deal with finances in a manner that avoids that. Those imbalances will always be there, because some of them are based on the natural endowment with resources in the country, things which you may not be able to do anything about.

Others may be there because of the past governance, investment and development policies so they must be considered. In dealing with the question of the financial power of the State, I want to emphasize that a good Constitutional design must be able to distinguish up to three aspects of the financial power of the State: the power to raise, administer and to spend revenue.

I want to add that last night I was thinking after I read the document that we received yesterday and I noted that there is a fourth aspect, the power to control and audit revenue. So four aspects of the financial power must be clearly understood and distinguished. This is because you may find that a proper design that will be workable may have to differentiate in the manner it distributes these four different aspects of the financial power of the state.

The power to raise revenue concerns the question of which level of government has power to legislate over which tax. For instance, if you talk about VAT which level of government has

power to legislate that VAT will now be 16% and not 18%. It does not however mean that level of government which raises the revenue by legislating is the one that receives all that revenue. You may legislate there will be 16% VAT, but not all that revenue accrues to your level of government. It may be that just part of it accrues to that level but part will accrue to a different level of government.

Number two, the power to administer revenue deems with a question of who has the power to collect the revenue once it has been legislated? One level may be the one that legislates but it will not be the same level that actually does the collection and if you appreciate that, you will realize that when you are at your initial stages of devolution, you may find that most devolved units have not yet developed capacity to administer or collect revenue but that does not mean that they should not be given some power to raise revenue. They should be given power, you could allow them to raise revenue but assign the function of administering that revenue or collecting that revenue to a national body that collects the revenue on behalf of the lower levels as an agent. So you need that distinction.

Number three, the power to spend revenue confirms the question of to whom does revenue accrue for purposes of spending ? and it takes me back to the earlier question I said of raising revenue, that one level of government may raise revenue, may legislate 16% of VAT but that VAT may be shared. The Constitution may be able to say, this VAT is shared between the national level of government and the sub-national levels of government.

When you share out, then what each level receives as its share to spend is what you will call the power to spend revenue. I want to emphasize that the area of the power to spend revenue includes the power of procurement of public goods and services. You will all agree that centralization of the financial power in our country has included centralization of procurement and has been the cause of the corruption you have been crying about. (*Clapping*)

When you have a small clique of people doing all the procurement of public goods and services and you need to know that in most countries, government is the largest consumer of goods and services. Therefore it has a very huge spending power.

When you have a small clique of people in control of that procurement power then you can find that clique is captured by a group of corrupt people and the country gets into a mess. So when you distribute the spending power properly you will be able to say we raised so much, the national level has so much to spend, the regions or whatever units will have so much to spend, Each unit is given its own money to spend. You will be able to sit down and determine priorities and work out its own budget. They will have their own tendering board and I do not see how the Coast Province tendering board will sit and give tenders to someone from Western Province unless they can proof that there is nobody in Coast Province who can supply those goods. *(Clapping)*. So once you do that, you start reducing the area and opportunity for corruption therefore, we need to be very clear on that.

Number four, which I was thinking about last night is the power to control and audit revenue. The current situation has a lot of problems because that institution that allocates and approves expenditure is the same institution that is supposed to audit. You cannot audit yourself.

Number two, the audit mechanisms are such that we audit certification and just records. Are your books balancing or not? We hardly audit efficiency and effective use of finances. So we need to reconsider the question of audit and how we should provide for it, how we should avoid mixtures there are today that open the loopholes for the losses that we have been suffering....

Com. Mosonik arap Korir: Ladies and gentlemen, an announcement to Convenors and Rapporteurs of Technical Working Committees to remain behind when the Conference breaks for lunch for some information to be given to them from the Rapporteur General.

Secondly, the lunch break is scheduled from one to two, now it is five minutes past one so you come back at five minutes past two please. Commissioner Mutakha Kangu can conclude then, after which we will go to the Plenary discussions. *(Clapping)*

Meeting was adjourned at 1.05 p.m

After Lunch

Meeting reconvened at 2.15 p.m.

Prof. Yash Pal Ghai: Would the Delegates please take their seats and if you are standing by the door, could you please tell Delegates outside to come in so that we can start. We still have a lot of ground to cover. I will give the floor to Doctor Mosonik Arap Korir to continue with the facilitation.

Com. Mosonik Arap Korir: Ladies and gentlemen we shall request Commissioner Mutakha Kangu to continue and complete his presentation.

Com. Mutakha Kangu: Ladies and gentlemen let us pick up from where we left this afternoon. We were talking about the role of the financial power of the state in the devolution arrangement we ought to design. We had identified four aspects of that financial power and having dealt with that, the next issue on those finances that we need to address is the question of the sources of Government revenue. Many of you will be surprised to note that you may not have bothered at anytime to find out what the sources of Government revenue are and when you are arguing about auditing, sometimes you end up just auditing what is allocated for expenditure but you may not be auditing the whole kitty of the Government resources.

Generally all over the world, there are several ways through which Governments raise revenue.

- The first one is through taxation of its citizen.
- The second one is through production by Government running parastatals and other institutions that charge for services.
- The third one is through borrowing.

Now if you look at the taxation as a source, the approach in many devolved systems is that certain taxes are identified and assigned to different levels of Government for purposes of raising for purposes of administration and for purposes of expenditure. You perhaps may need to note that sometime last month, the Commissioner General of Revenue Authority on 30th July released a statement which indicated that over the last financial year 2002 to 2003 ,they had been able to raise up to 200 billion Kenya shillings. I personally sought to find out from which source and the information I got from the statement was that, that 200 billion was from only four taxes. Those were customs and excise, income tax, VAT and road transport. Four taxes raised 200 billion.

You will also need to remember that sometime in June, the Honourable Minister for Finance when presenting the Budget, had the Budget coming to about I think 350 billion or so. You may therefore need to know, whether those are the only taxes from which we raise revenue or there are other taxes.

Our research indicates that Kenya has a long list of taxes. We have VAT, co-operate profit taxes, personal income tax, customs and excise tax, sales tax, tax on natural resources, termed duty, import declaration fees, Kenya Bureau of Standards levy, refinery out put, licenses under transport licensing act, forest and mining revenue, airport revenue, aviation revenue, investment revenue, loaning receipt, loan redemption receipt, exchange control receipts, essential supplies revenue, payroll taxes, business registration, court fines, forfeitures and fees, vehicle registration taxes, driving licenses, road maintenance, entertainment tax, casino tax, hotel and restaurant, liquor licensing, dating and taxes, on fare. At the local level there is even business permit, rent taxes, cess, user fees, billboards, preservation costs, hire charges and rates. Now the question is, if four of all those taxes can raise for us 200 billion and our Budget is 350 billion what will stop us from giving aid to other countries? (*Clapping*)

If we manage the financial power of the state properly, we need not follow people to give us money. In fact we should be followed to give money to other people. (*Clapping*). We need to in our Devolution structure be able to clearly provide for taxation as a mechanism of raising revenue and to see which taxes to allocate at which level and I will come to those details at a later stage and how to control and administer and so on.

The second source of Government revenue is production. In addition to all those taxes I have mentioned, the Government runs a number of state parastatals which are ideally supposed to operate on the basis of profit making and the profit ought to be part of Government revenue. So can we be able to identify all the sources. Some of those sources of production. The Central bank itself, does it ever make any profit? And if so where does it go?

The third aspect or source of revenue is borrowing. The Government borrows and as we speak now, that is one of our biggest problems. We have over borrowed. How are we going in a devolved system to deal with the borrowing aspect as a source of revenue? Should we allow the

devolved units some power to borrow? And if so, should we put some controls and what kind of controls should we put on borrowing? In some places devolved units are not allowed any power to borrow, particularly from foreign sources. In other places some limited power of borrowing is allowed to the devolved units but with stringent controls. For instance in South Africa the provinces are only allowed to borrow to finance short-term financial deficits and the loan must be repaid within 12 months and no more.

In other places, they say no Government or level of Government should be allowed to borrow to finance recurrent expenditure. They should only be allowed to borrow to finance capital investment for long-term projects and the reasoning is that it is for purposes of intergenerational equity. It is said that this generation should not borrow to finance recurrent expenditure and pass over the debt to the future generation. Similarly they say that if you are borrowing to invest in capital things, long-term things from which the future generations will benefit, then there is no harm. You can borrow, repay a little because you are benefiting from the investment and the future generations will clear the balance because they are also benefiting from the investment. It is just like a parent at home. If you borrow to go and drink and then tomorrow they want to sell the family land and you want your children to participate in repaying, they will ask you 'but what did you do with the money?' So for capital investment, borrowing can be allowed but stringed conditions must be put for control so that regions do not put the entire nation into heavy debt. So that is another issue we have to address in devolution.

Now, having captured all those issues, the next question that we need to address is the question of, how do we therefore address the design question on finances in Kenya? Under this I want to say that to be able to deal with this successfully, we must first identify the philosophy of governance that we want to vote.

We may be guided by comparative studies from other countries to be able to see which one is the best philosophy of governance we need to follow because for you to deal with those four aspects of the finance and power, you may find that some may need more decentralization and others less, because you want to achieve different things.

Under the comparative level, the Germans have a governance philosophy that says that “the State seeks to provide all its citizens wherever they are within the territory, with uniformity of living standards.” On the other hand, the Canadians have a governance philosophy that says “the State seeks to provide its citizens wherever they are in the territory with reasonably equivalent public services at reasonably equivalent tax rates”. Now, if you look at those philosophies, you will find that a number of things are incorporated in them. Incorporated in those two philosophies which are almost similar is first, the issue of mutual assistance and solidarity among the citizens generally and the devolved unit in particular.

You are saying as a nation, that we want to live together as a people but we must be willing to mutually assist each other and the reason you want to do that, is because different units may have different capacities in terms of generating revenue to support themselves. Inherent in that, is the concept of insurance because you are saying, I have today, let me give you because tomorrow, I do not know whether you will be the one who will have and I do not have. And that is necessitated by the very dynamic fluctuations of economics. The economic systems, sometimes fluctuates and things may change overnight, in the sense that today, you may be saying that Western Kenya we have sugar and we can make our money from sugar and then tomorrow the international prices for sugar or whatever else you are exporting collapse and you realize you need support from another unit. Or we may sit here today and say, you see North Eastern has nothing and then tomorrow they strike oil and we want to share in that. So mutual assistance is insurance because you do not know what will happen tomorrow and we want to avoid the situation where people are saying, this is our resource so nobody else should touch it and that is the problem Nigeria is having now. The oil producing regions trying to say, all these belong to us. So we must guard against such approaches.

Inherent in that therefore, is the concept of redistribution of resources which even the UNDP has introduced as the new concept of development. The UNDP in defining development, has said we must move away from the narrow definition that looks at development from the point of view of economic growth and is measured by one single instrument called per capita income and moved to a definition that is broad and that talks of human development including redistribution, health services, education and so on. They are saying, that to measure development in terms of economic growth using per capita income is misleading because you can find a country that has a

very high per capita income, with that per capita income in the hands of just a few when the majority are languishing in poverty.

So the governance philosophies in Canada and Germany incorporates redistribution mechanisms and in redistributing resources, the mechanics that have been developed for doing that is what has been called equalization financing, equalization transfers. So there will be need for us to clearly understand the mechanics of equalization, if we are going to design a devolution arrangement that will be workable.

In contrast to the philosophies of the two countries I have mentioned, there is the American philosophy of governance, which emphasizes their autonomy of the individual States, the liberty and freedom of individual States to do as they please. Incorporated in that approach, is the contempt of competition. Let the States be free to compete and do what they want and in that principle, there is no room for mutual assistance, there is no room for insurance, there is no room for redistribution. So the Americans will approach it by saying, assign every State its own functions, let it raise its own revenue and finance its own function. The end result, is extreme competition that exacerbates the disparities that exist in a country.

So if you are a country that is coming from a past that has disparities, then you may find that following a governance philosophy that is nearer the Canadian and German philosophy will be the best thing to do because if you do not do that then you will encourage the disparities. The situation in Kenya therefore, is that, the kind of past we have or what kind of past do we have? If you look at the situation in Kenya, you will notice that at the moment we have a lot of disparities with Nairobi which has 7% of the Kenyan population having 47% of the Kenyan GDP. So you can see the levels of the disparities and if therefore you say, let every level raise its own finances and run its own affairs, then you will get in a situation that is not workable and the bigger problem you will get is because the finances that you are saying people should raise some of the taxes are on what are called mobile factors that cannot be strictly pinned down to a specific region.

For instance Corporation tax, a company is something mobile. It can move from one region to another. It could have its headquarters in Nairobi but the activities that generate income for it

may be in Kericho so which region do you pin the income on? Something like income tax, personal income tax, people who earn the income move from one place to another place but you may find that most of the income earners in one place have roots in other places, so how would you deal with that? Things like VAT, those are consumer taxes, the consumers of the goods are again people who move from one place, to another place. If you go the American style, you get into a problem and I think you need again, if we go back to the statistics of the Kenya Revenue Authority to be able to note that the 200 Billion we talked about. The statement of the Commissioner General says, that they divide this country into three tax regions, there is the Northern Region, the Southern Region and the Western Region.

The Northern Region, covers mainly Nairobi and Central Province and out of that 200 Billion, the Northern Region raised 66.6% of that tax which is 137 Billion. The Southern Region which the Commissioner says covers the Coastal side, raised 26.6% of that 200 Billion which is 55 Billion and the Western Region which covers parts of Rift Valley, Western and Nyanza, raised only 6.8% which is 14 Billion. If you look at the taxes we have referred to, there are those mobile taxes we are talking about and you may find that the majority of the people who paid income tax in Nairobi are people who were born and prepared as human resources in those other regions that have raised little.

So, in choosing the philosophy of governance, we must appreciate that there are already existing disparities that need to be equalized and if you go into the history of the disparities in our country, you will find that some of them can be traced to the governance, development and investment policies of our past governments starting with the colonial government which came here with the sole purpose of serving the interests of the markets back home in Britain and the interests of the White Settlers. Therefore, their governance, development and investment policies were geared towards that. They were not bothered with serving the general population of the Kenyan people and because the markets back at home, were not interested in all the economic sectors of these country, the colonial government did not have any business with investing in the sectors of the economy that were not benefiting the markets back home and that is how disparities started in our country.

They then said that because the interest of their markets back home were more associated with agriculture and agriculture is laid on the platform of land, they had a lot of interest in land so they decided to come up with a governance policy that involved zoning land in terms of high potential, medium potential and low potential and assigning the high and medium potential land to the White Settlers and pushing the African natives to the low potential lands. Having done that, the development and investment policies therefore were focused on the high potential and medium potential lands and therefore enhancing the disparities. The only interest they had in the low potential areas was the production and preparation of cheap labour, which once after it has been prepared, would be uprooted to go and serve in the high potential areas and that is how the idea of rural – urban migration started. People moving from what were considered low potential areas to work in the high potential areas, and therefore enhancing disparities by taking away from the low potential areas their high potential human resources, so that you leave them with those low potential land and low potential human resources therefore enhancing the disparities.

So by the time the colonialists went, we were already in disparities that required redressing and our independent government therefore needed to do that but if you look at Sessional Paper Number 10 of 1965, you will be shocked to find that, that is not what was done, in fact we enhanced the disparities. Paragraph 133 of that paper which deals with provincial balance and social inertia, is very interesting and I would want to read it to you.

It says. “One of our problems is to decide how much priority we should give in investing in less developed provinces to make the economy as a whole grow as fast as possible, development money, should be invested where it will yield the largest increase in output.

This approach will clearly favour the development of areas having abundant natural resources, good land and rainfall, transport and power facilities, and people receptive to and active in development. A million pounds invested in one area may raise net output by twenty thousand pounds while its use in another, may yield an increase of a hundred thousand pounds. This is a clear case in which investment in the second area is the wise decision because the country is eighty thousand pounds per annum better off by so doing, and is therefore in a position to aid the first area by making grants or subsidized loans. That is paragraph 133 of Sessional paper number 10 of 1965.

So we decided, if we have money to invest, let us put it in the already developed area to generate quick income, therefore enhancing the disparities by ignoring the areas that were already left behind by the colonial policies. That was not enough, paragraph 134 of that sessional paper goes further and says, the purpose of development is not is not to develop an area but to develop and make better of the people of the area. If an area is deficient in resources this can best be done by investing in the education and training of the people whether in the area or elsewhere. Investing in the health of the people and encouraging some of the people to move to areas richer are in resources, and of course developing those limited resources that are economic.

With education and training and some capital, the people of a province can make the best of limited resources. If the potential for expansion is small, medical services, education and training will qualify the people to find employment elsewhere. So we encouraged the migrations again. Train the people in the low potential areas and then migrate them to the high potential areas for employment. Therefore continuing the process of denying the low potential areas their are high potential human resources. These are some of the things we have to address in devolution.

Therefore if you look at that we have disparities but if you look at the vision part of sessional paper number ten you will see that in the effort to define African socialism, the paper was very clear that we want to adopt a governance philosophy that will encourage redistribution, that will create social responsibility, so that everybody takes responsibility for the welfare of the other. Therefore this paper in vision encouraged mutual assistance, it can be likened to the governance philosophy of Germany and Canada. But in application it went wrong and that is what now we have to address. I want to say that it is at the level of application that we have always gone wrong. At the level of vision we were correct but at the level of application we went wrong. A lot of efforts have been made which have not been successful because may be we don't think very clearly.

That paper tried to talk about equalization grants and so on but not well applied. If you look at our history you will find we came up with district focus which did not seem to work. Now we have a Constituency Development Fund, we have a Constituency Road Levy, we have the

Constituency Aids Committee and so on. I want to say that all these are attempts to do away with these disparities but which are not well thought out and therefore they don't succeed. Take for example the District Focus system assigned districts planning functions, but it did not assign them finances to implement their plans, because the finances at the districts are still controlled from the centre. The District Development Committee is controlled by Provincial Administration and so on, so we cannot make it.

If you look at the Constituency Levy again we have a problem. The problem is that we are trying to adopt strategies that are used in a devolved system and trying to use them in what is purely a centralized system. In a devolved system you divide the county into geographic units, you assign each unit governance functions both political and development, then you assign the units the finances to perform those functions. If you look at the Constituency Development Fund for example, under our Constitutional arrangement the Constituency is a unit for political representation in Parliament. It is not a unit for development with clearly assigned development functions. Therefore there is no institution for the management of those funds. So when you now say let us now give a constituency development funds, and you have not identified the development functions of the Constituency, you have not put in place the institutions for the management of those funds and the institutions that would be subject to audit for use of those funds, then you miss the game.

Then another question arises. We assign money to Ministries, we allocate to lying Ministries, now you give a Constituency a Road Levy Fund, what is the relationship between the funds allocated to the Ministry of roads and the funds allocated to the Constituencies for roads? Which roads belong to the Constituency Levy Funds and which ones to the Ministry? You find you create a situation of passing the ball. One unit doesn't do its functions it blames the other, and the other one blames the other, and we miss the ball. Are we together? Take for example the Constituency Development Fund and the Ministry funds, which are the development functions of the Constituency as compared to the development functions of the line Ministries? We miss the point. So if we want to use those mechanics let us design a proper devolution system: create units assign them development functions and then give them money, and we must have institutions in place for the management of that money. *(Clapping)*

If that is the case we are coming from a past of disparities, we must therefore clearly understand equalization mechanics because we will need them in distribution of finances. If this is the case the answer you will get is that, if you have disparities then the major taxes in the country should be assigned to the national level of Government to raise, because it is those major taxes that can be used for equalization purposes, for redistribution, taxes like income tax, VAT, corporation tax and so on. Those ones, the power to raise them should be to the centre but with a clear provision in the Constitution that the centre raises but it does not own all the money it raises. That money has to be shared out and we must the clear mechanics of sharing out and the factors to be taken into account. On that, in trying to understand equalization we have looked at the mechanics in Australia, you will find it in the document. Australia started equalization mechanics way back in 1933 and they distribute finances by looking at the needs of every state, at the population in the state, compare the ability of one state financially with the other to be able to arrive at what is reasonable for every state.

In most places you first set minimum standards of services you want across the entire country. Be able to say, for every state to be able to provide this minimum standard it needs at least a minimum of so much finances. Therefore equalization must seek to put every state or unit at that minimum. If others are little higher because they can raise more there is no problem but it will not be good to leave some below the minimum standard set. So that is what is done and Australia has very good mechanics. They put in place in 1933 what they call the Commonwealth Grants Commission which is an independent Commission. It is that Commission that works out a formula for sharing from time to time to ensure that every year when a budget is done the money is allocated to every level and to every unit, on a very objective criteria that is laid down.

Canada also has mechanics of equalization, it put these in its Constitution in 1982 demanding equalization. Mechanics of equalization have been put in place. They start with what they call the Canada Health and Social Services Transfer Fund, which may be distributed on the basis of the par capita based on the population. If they say we are allocating to every individual a hundred shillings, then they say Nyanza province has three million people times a hundred. Coast province has two million people times a hundred and then they get the sum. Then they realized that is not enough, Nyanza province may be twelve thousand square kilometers and if we are saying that we want to put health services closer to the people, if Nyanza province is

twelve thousand square kilometers, they can do with two huge hospitals, but North Eastern is one hundred and twenty eight thousand square kilometers; they may have a small population but to make hospital accessible to everybody they may want a lot of little hospitals dotted all over for them to be accessible. So that has to be taken into account to equalize.

Some regions may have populations that are vulnerable, the aged and so on, the young, those who are still going to school, how do you deal with that? Population that are not producing but which are independent. How do you deal with that? They take into account. Then there are those regions, if you look at roads, some places will have shorter distances to cover for roads, others have longer distances. In some places weather conditions are such that they roads in Tana River are being washed away by rains every other year. How do you deal with that? Because the cost of maintenance of roads there is higher than in another place. So these are taken into account and so Canada comes up with another fund. After giving the Canada health and social services transfer, they come to next fund called equalization transfer which takes into account these factors. Then they say there are those Northern provinces that have even harsher conditions like the Northern Province and territory of (inaudible) and so on. They said they have a third fund that targets those particular ones that have specific problems. So at the end of the day every region is able to have sufficient funds to give services to their citizens at a minimum standard laid in the whole country.

Switzerland also has equalization mechanics. South Africa which is near us has put equalization mechanics in their Constitution. Article 214 talks in terms of equitable shares of revenue and it says, “an act of Parliament must provide for the equitable division of revenue raised nationally among the national, provincial and local spheres of government.” The determination of each province’s equitable share of the provincial share of that revenue and any other allocations to provinces, local government or municipalities from the national government’s share of that revenue and any conditions on which those allocation may be met.

Then this Article again says that the Act referred to may be enacted only after the provincial government organized local government and the Financial and Fiscal Commission, have been consulted and any recommendations of the Commissions have been considered and must take into account the following factors:-

- a) The national interest, any provision that must be made in respect of the national debt and other national obligations.
- b) Needs and interests of the national government determined by objective criteria.
- c) The need to ensure that the Provinces and Municipalities are able to provide basic services and perform the functions allocated to them.
- d) The physical capacity and efficiency of the Provinces and the Municipalities.
- e) Development and other needs of Provinces, Local government and Municipalities.
- f) Economic disparities within and among the Provinces.
- g) Obligations of the Provinces and the Municipalities in terms of National Legislation.
- h) The desirability of stable and predictable allocation of revenue shares and the need for flexibility in responding to emergencies or other temporary needs and other factors based on similar objective criteria.

So they have set out the factors that the Financial and Fiscal Commission should take into account when proposing a formula for sharing of finances, first, vertically among the different levels of government and then secondly, horizontally among the Provinces and then among the Municipalities and then so on.

And having taken this into account, some Scholars, Professor Christine Murray and Professor Richard Simons, have written an Article called “South African’s Financial Constitution, Towards Better Delivery.” And they say in this Article about the division of revenues the following:-

- “Dividing the pie among the Provinces and determining the equitable share for each is driven by the stark reality of massive disparities not only among races and classes in South Africa but also among Provinces. The goal of sharing is thus to achieve a significant measure of equalization. To achieve this, extensive effort has been devoted to developing formula that fully take into account both Provincial needs and their resource capacities.
- The division is based on the demographic and the economic profiles of the Provinces.
- It includes an education share, a health share, a social security share, a basic share linked to the Provinces population. A backlog component related to Provinces relative under development.

- An economic activity component which is a proxy for Provincial tax revenue.
- An equally divided institutional component which is based on the need to develop Provincial management capacity.

The result is that the division in the words of the national department of Finance, has a strong equity component recognizing the needs of poorer areas. This is especially evident in the back log component which recognizes the need to develop infrastructure in rural areas by taking into account each Province's share of the rural population."

Three of the poorest Provinces which are; The Eastern Cape, Kwazulu Natal, and Northern Provinces together, take up over sixty percent of the back log component of the Provincial equitable share. And I want to show you the statistics of the sharing of the money in the last financial year in South Africa.

They started with the total expenditure of two hundred and sixty seven billion rands. So the first sharing, is what they call the vertical division of revenue. The first thing they do, is to say from that total, we remove the debt service cost, so they removed fifty one billion. Then they remove contingency reserve, which was two billion and that left them with two hundred and seven billion for sharing vertically.

Then they said that the national equitable share, should be a hundred billion which is forty eight point six percent. And out of this a hundred billion, eighty seven billion goes to the National Departments or to the National Ministries and then thirteen billion is in fact again used by the national government, to give conditional grants to the Provinces and the Municipalities. Which means that effectively, the National government only retains eighty seven billion.

Thirteen billion has again to go to the Provinces as conditional grants then Provincial equitable shares, was put at one hundred and five billion which is fifty point six percent of the total. Then the local government equitable share, was two point one billion which is one percent.

So they start with the vertical sharing among the levels of government. Once they have finished that, they now take the Provincial share of one hundred and five billion and now address it on a

horizontal sharing among the nine Provinces and what ended up in this year was that Eastern Cape, received sixteen billion as its equitable share and one billion as its conditional grant, making a total of seventeen billion.

The Free State, received six billion as equitable share because the Free State is a little ahead of the rest and eight hundred million, as its conditional grant. Making a total of seven billion.

The Gauteng area which is around Johannesburg, Pretoria and Serenewille, one of the richest areas but because it has a very high population and it also houses a lot of National institutions that serve even other Provinces, it received an equitable share of fourteen billion and a conditional grant of two point nine billion, making a total of seventeen point two billion.

Kwazulu Natal, which is one of the poorest and for your information, is an opposition zone because it is controlled by the Inkatha Freedom Party, received the highest amount, eighteen billion as equitable share, and two billion as conditional grant making a total of twenty one point one billion.

Mpunga Land received six billion as equitable share and five hundred million as conditional grant making a total of six point nine. Northern Cape which is very rich received two billion as its equitable share and one hundred and eighty million as the conditional grant making a total of two point four billion. Northern Province which is one of the poorest received twelve billion plus conditional grants of one billion making thirteen billion. North West also very poor received eight billion and then six hundred million making a total of eight point six. Western Cape received nine billion plus one billion making a total of ten billion.

You can see that they are taking into account objective criteria that is aimed at addressing the past imbalances and the conditions on the ground. That is why Provinces are receiving different sums, because they want to give every citizen at least a certain minimum measure of services because in other Provinces, they are still trying to put in place infrastructure. So some of them are receiving money for infrastructure establishment. So, if we look at that you will be able to see that if we design our financial mechanisms in the devolution properly, that is the only way we are going to solve the problems of this country. There is no other way in my view. That should rest the question of finances in the governmental relationships.

If you establish a system of devolution, you must put in place mechanics in the governmental relationships and we started devolution by saying it is a system under which we want to combine shared rule and self rule. And therefore, where there is shared rule, we must have mechanics for negotiations and consultations.

In many systems, people use both formal and informal mechanics. And I think that is the best approach. In some places, they put in place formal mechanics and the Second Chamber at the institutional level in many places becomes one of the formal mechanics for purposes of negotiation between the national level and the devolved levels of government. Because as I said earlier, power sharing is emphasized at the vertical level. The government has to be run in a shared manner between the national level and the lower levels of government.

So, power has to be shared all aspects of power including the legislative power of the state. So what is done is that therefore the second Chamber of Parliament is supposed to be created not for the sake of being created but for the sake of providing the devolved units with the infrastructure through which they can share in legislative policy making at the national level.

The point is that the devolved units therefore, participate in legislation twice. They legislate in the areas assigned to them, legislations that apply to their own geographic units, but number two, they are also supposed to participate in legislation at the national level so that the national level, does not impose on them legislations that are not acceptable. Therefore, to create infrastructure for that, most Constitutions and particularly the German one and the South African one. The South African in this arrangement borrowed from Germany. They say the Lower House is the infrastructure through which the national level of government participates in national legislation.

But the Upper House, is the infrastructure through which the devolved units share in that legislation policy making and so at the Lower House level, the Members of Parliament are elected by the citizens so either through direct election or through direct elections or through proportional representation to represent citizens in the country generally. But the Upper House, is supposed to represent the interest of the regions of the Provinces. So people who go to the Upper House, are elected either by the Legislatures of the region or the Province or the

Executives of the region. In many places there are different mechanics. At that level, you will find there is normally an effort to create some kind of equal or near equal representation of all regions in that Upper House. So that in the US, the Senate represents the interest of the States and that is why every State is entitled to two Senators in the Senate.

So in the US, it is the citizens in the State who directly elect the two Senators. If you go to Australia, it is the legislature of the State which appoints those who will go in the Second Chamber.

If you go to Germany, it is the Executives of the Landers, who appoint from among themselves who will represent them in the Second Chamber. If you go to South Africa, they have established a Second Chamber known as a National Council of Provinces. And that Council, the people who go there are a delegation headed by the Premier of the Cabinet of the region because they have a kind of Governor at the Provincial level called a Premier. He appoints his own Cabinet from the members of the local legislature so he goes with other delegates appointed or elected by the legislature of the Province. They go there as representatives of the Province.

And in the voting mechanics in Germany and South Africa, you do not go there to vote as an individual, you carry instructions from your region. So when something has to be voted on it first comes to the region, the region discusses and makes a decision and you are only required to carry that decision to the second chamber. So that effectively involves the lower levels in the management of the affairs at the top level. And it is very important a devolved arrangement as a mechanic of inter-governmental relationships.

There is also the concept of the Constitutional Court, in settling disputes in a devolved arrangement, and when it comes to that, the issue we will need to determine is the Constitutional Court or the Supreme Court as we have proposed. Should it be established purely as part of the judiciary as a Supreme Constitutional organ, or should it be both part of the judiciary and a separate independent Constitutional organ?

If it is established as purely part of the judiciary, then the allocation of jurisdiction to it, is restricted to judicial functions and in most cases it is not supposed to be involved in major policy

decisions and politics. It is purely judicial. But if it is both part of the judiciary and a separate Constitutional organ, then it is allowed to participate in policy matters and politics and therefore the allocation of functions or jurisdiction to it will be in two parts:-

One part that is purely in the nature of the judiciary and another one that is in the nature of a separate Constitutional organ that can settle disputes among different levels of government and among different units in the government and organs in the government. So we need to consider that, and there are many informal arrangements; linkages as the last part.

If we do this in devolution how does it affect the other chapters of the draft? I have looked at a number of things; we have looked at a number of things. In many places, devolution if it is put there, it is mainstreamed in the whole document so that at every chapter, you can see it being reflected. If you look at our draft, devolution stands alone and other chapters stand alone. So there is no proper linkage and we are saying that if we look at other Constitutions, you will see that in some Constitutions, they start with mentioning devolution in the preamble. Like the German Constitution mentions all the sixteen Landers that form Germany in the preamble. If you look at the South African Constitution, after dealing with the preamble and then the founding provisions, they go to chapter three which addresses what is called principles of cooperative government which then introduce the concept of devolution and how government is established at different levels.

So we will need to re-look at that chapter of ours, Chapter one, and see what to do about it. We have a chapter that deals with the sovereignty of the people and the supremacy of the Constitution. And one question we will need to ask is; If you look at that chapter, we have an Article that tries to assign the sovereign power of the people to four organs of state. The Legislature, the Executive, the Judiciary and the Constitutional Commissions. And what we need to consider is horizontal assignment of the sovereign authority of the people. If we are devolving power then we also need to recognize in that chapter the horizontal assignment of the sovereignty of the power of the people. And a good example is the South African constitution of which says government is constituted as national, provincial, and local. Now if we move with that to the chapter on the republic we may again need to consider in our chapter on the republic, we only constitute the State. We do not constitute government.

Can we capture devolution in that chapter by saying we are constituting the State but we also constitute government at this level, that level and that level? The way the South Africans have said government is constituted as National, Provincial and Local. Now, back to the supremacy of the Constitution, the binding effect of a supreme Constitution must be stated to apply even to legislations that will be passed by devolved units so that devolved units do not pass legislations that are inconsistent with the national Constitution.

Now back on the republic, I think I have mentioned the republic. Now on the issue of the republic there is the question of the republic and religion. We may need, and yesterday people were talking about culture and the views of local languages. We may need to consider whether some of the local languages can be official languages at the devolved level of government. That is something you may need to consider. Now on the values, we may also need to incorporate the fact that the obligations we put in the chapter on the National goals, Values and Principles, are not just obligations on the national government alone, they are obligations being put on all levels of government. So we need to rephrase those goals to show that those obligations bind all levels of government.

On the question of Citizenship, we may want to consider whether devolve levels of government can be involved particularly at the level of issuing identification documents to citizens.

Do we need to involve devolved units or not?

Number one, on the Bill of Rights, the Article 72 (1), which deals with the application of the Bill of Rights, we again need to state there that the Bill of Rights in particular and the constitution in general binds all levels of government not just one level of government.

Number two, the Bill of Rights may also be used to protect the interest of minorities in the devolved units. The Bill of Rights has provided for a lot of basic rights. And if the assignment of functions to the regions, we may need to identify which level of government is supposed to perform which services. So that when someone is complaining about infringement of the rights under the Bill of Rights, he goes to the correct level of government that has the obligation to perform that particular function. On the representation of the people, the question of the

electoral system, we will need to ask ourselves, do we use the same electoral system at the national level as well as the devolved levels or can we have different electoral systems at different levels?

Number three we need to ask ourselves the qualifications required for participation in elections, should they be the same at all levels of government or can we have differentiation?

Number four, on those elections, should we hold those elections at the same time or can we separate them so that the devolved levels could hold them at different times?

On the question of political parties, the Draft says that the parties must have a national character and so on. If we are providing for devolution, should we insist on everybody who wants to form a party to have a national character? And what of if you just want to run your politics at the local level? Those are questions we will need to address.

On the question of the Legislature, at the conceptual we will go back to what I said that the legislative power at the national level is supposed to be shared between the national level and the devolved levels. So the creation of the institutions of legislation - the Lower House and the Upper House - should be seen in that context. Whether or not the Upper House is providing an infrastructure for the lower level to participate in legislation at the national level so that the government is negotiated and is consultative. So that has to be addressed.

If we look at the Chapter on the Executive, that is again an area where we need to re-conceptualize and the question is, a lot of constitutions assign executive functions to devolved levels of government, but when they come to dealing with the Executive, they deal with it as if the Executive is established at the national level alone. So do we need to work out our Chapter in a manner that reflects both horizontal and vertical sharing of executive power or not? Because it would be strange to allocate executive powers to the lower levels of government but fail to recognize that there should be executive institutions at those lower levels. And if we do recognize, what are the linkages, the relationships, between the national executive and the provincial executives? If we borrow from the Legislature, shall we be able to say that the lower level executives should also have some role to participate in the national level executive affairs

should they be consulted on some of the things, or not? If you go to South Africa you will find they have what they call the Budget Forum which brings together the National Minister for Finance and the Provincial Ministers for Finance to sit as a Budget Forum so that they can negotiate and agree on the budget. So we need to create some linkages, and how do we deal with that?

Now if that is appreciated, the vertical sharing, the next question will be we have proposed a horizontal sharing of Executive power at national level - President and Prime Minister, should the regions be allowed to participate in the approval of the Prime Minister? The Draft now says the President shall propose and the National Assembly, which is the Lower House approves. But if we are saying the second chamber represents the regions, would it not be reasonable to say that the second chamber should also play a role in approving the appointment of the Prime Minister so that you have a Prime Minister who has support across all the regions (*clapping*) And this is more important because if we take the German and South African example where the second chamber members carry a vote of the region, they do not vote in their personal capacity but they carry instructions for the region, it will be more important because then the region will sit and deliberate and say we want to support so and so and we are sending you to vote for this. So it will be a Prime Minister who actually has support from every region that has voted for him (*clapping*).

The question of the Judiciary, we will need again to address the question of: do we devolve the Judiciary or do we deal with it at the national level? Our Draft suggests – I am just about to finish – our Draft suggests that the Judiciary should not be devolved, but some people were saying elders at the lower level should have some power to settle disputes at the local level. So should we devolve some aspects of the Judiciary or should we simply delegate certain aspects of the Judiciary? In Uganda, they have devolved even the Judiciary, including assigning the lowest level of government criminal jurisdiction. And the evidence coming from there is that some of those tribunals at the lower level are conducting those proceedings in a manner that is completely contrary to the Rule of Law and people are worried about it. So we need to think very carefully whether there is need to devolve the Judiciary or not or how we should handle it. Number two, the role of the Supreme Court, I have already mentioned: do we want to assign it jurisdiction as a

court or also jurisdiction as an independent constitutional organ for purposes of settling disputes among other organs of government and levels of government?

The issue of Land and Environment, we again need to consider: should certain aspects of land be devolved or not, so that they are dealt with by lower levels of government? Number two, if you look at our Draft – and a lot of you kept questioning us, why haven't you mentioned agriculture in the Constitution? I have looked at the Swiss Constitution and it has a chapter that deals with the economy which is very interesting. It covers matters like Principles of Economic Order, Private Economic Activity, Competition Policy, Consumer Protection, Banking and Insurance, Monetary Policy, Policy on Economic Development, Foreign Trade, Supply of Essential Goods, Structural Policy and so on. And I was wondering, maybe we should deal with land and natural resources and environment under a chapter entitled the Economy. So that we deal with land from the perspective of its role in the economy and we will have a clause on agriculture - the role of Agriculture in our economy. We deal with environment from the perspective of the economy, we deal with the natural resources from the perspective of the economy. I don't know, but those are questions that may need to be considered.

Public Finance is the chapter that will be fundamentally affected and I have said a lot about Public Finance so I need not go back to it but one thing to note - and I know one of the Honourable Delegates has been writing articles in the newspapers about the fact that we have not sought to limit the power of the State to tax the citizens. And I will want to refer you to Article 127 of the Swiss Constitution which deals with general principles of taxation, trying to limit the power of the State in taxation and so on. There is Article 128 which is also useful on that and so on. We may need to have a clause that addresses the question of Principles of Taxation. Number two, the Draft talks of no taxes being raised without authorization by Parliament and the question is: if we are devolving power and we are going to assign devolved units some power to raise revenue we can not keep that clause in the form; we must be able to say that even lower levels of government can also authorize taxation. So we need to rephrase that.

The question of a Consolidated Fund which my colleague referred to, we talk in our Draft about a Consolidated Fund. But if we are going to devolve power to units and assign them financial powers including the power to spend revenue, the revenue must go into some fund at the local

level. We need to establish some kind of Consolidated Fund at the local level. The South African Constitution establishes a National Revenue Fund and also establishes a Provincial Revenue Fund for each province, so that all the money each province receives goes into that fund and all the expenditures of the province come from that fund and that fund is subject to audit.

Then we need to also address the Chapter on Public Service. Do we want to have a single National Public Service or do we want to have separate Public Service Commissions? If we are going to have one, should the appointment process and the representation in that Public Service Commission include representatives of devolved units or not? That is something to be addressed. Question number two, should we have common standards applying for all public servants or should we differentiate? Number three, how do we ensure that if a public servant moves or transfers from one province to another one that his pension is also transferred? Those are questions to be addressed. We also need to address the question of the composition of the National Public Service. How should the positions up there be shared, and on this I want to refer you to the German Constitution which insist on proportional sharing. Article 36 of the German Basic Law says, 'civil servants of the Supreme Federal Authorities shall be drawn from all Lander on a proportional basis. People employed by other federal authorities should as a rule be drawn from the land where those authorities are located. Military Service Laws shall inter alia take into account both the division of the federation into Lander and the regional ties of their populations. So we do not want a situation where we say we are devolving power then you are in your region but the National Government has all civil servants coming from one region or one unit (*clapping*).

Finally, defense and national security, those again are questions that will be addressed: do we need to separate? If we want to involve the devolved units in some security matters like police, then we many need to separate because defense may need to remain at the national level. So if we are going to assign some police functions to the devolved units, then we need to rethink that.

Number two, even if defense remains at the national level, recruitment to it: can we apply those German standards or how do we go about it? There is the chapter on the commissions, there is the chapter on interpretation, amendments and so on; all those will have to reflect on devolution. I would like to stop at that. Thank you, (*clapping*).

Hon. Delegate Bonaya Godana: All the others have done their presentation?

An Hon. Delegate: Yes.

Hon. Delegate Bonaya Godana:(Inaudible). (*Noise*).

Com. Mosonik Arap Korir: Ladies and Gentlemen, the applause is self-explanatory. I would like just to inform you that the two colleagues of mine sitting here have ploughed through this document which in single spacing is almost two hundred pages between them.

Hon. Delegate John P. Nyakundi: Point of order.

Hon. Delegate Bonaya Godana: We will come to your point of order, will you sit down for now, let him just wind up his speech.

Com. Mosonik arap Korir: The document was due to be printed and supplied to Delegates some time today, I think the secretariat will be able to deliver it shortly and then it should be available in the library but also for the particular Technical Working Committee.

Otherwise Delegates already this morning received the summary of the Devolution Report which was distributed this morning at the entrance and I would urge that you recall what you may have read from it already or simply look at it. We were supposed to go through it at the end, but there is no way of summing up what they have said and you have the copies. There is what you said at the Conference, there are the principles of devolution and please when you think of the linkages with other chapters, think also from the point of view of the principles not just design.

There are those levels which have been mentioned including Local Government and then there are the details about the three options of units of devolution including the factors that were taken into consideration and which we were advised by Mr. Mutakha Kangu to take as a totality and not to look at any single one of them only.

Having said that, it is now my pleasure to request Professor Ghai to wind up this particular session before we go into discussion.

Prof. Yash Pal Ghai: Let me make a few comments and then we will open the discussion to the floor. Because of time I am not going to say a great deal, I would like to make two or three points.

One is that, there is a level of Government which we have not discussed at all. We had a brief discussion in the Commission when we were drafting our document which in the end the document does not reflect that particular level, and the level I have in mind of course is the integration of East Africa level. We have a treaty of East African Co-operation and those of you who have read the treaty will notice that it provides for very wide-ranging integration of our economies and social policies, and under the treaty we shall have and already they do have indeed new institutions. We have legislative body at the East African level, we have a kind of executive authority which will no doubt grow as more subjects are a consulate to these central authorities, we have a court operating at that level, and indeed at the COMESA level the treaty co-operation assumes mobility of labour within East Africa so people will be able to travel freely from one country to another and seek employment in those countries.

One difficulty about accommodating that level in the Constitution is that many of these objectives in the treaty of co-operation have still to be implemented. But it seems to me there would be value in having one or two general provisions which enable the Parliament through legislation to give effect to decisions of the community institutions to recognize another layer of courts to acknowledge that Parliament may give certain rights to citizens of our neighboring countries which fall short of citizenship but doing truth to certain rights which we normally think of as restricted to citizens. And I hope that the committee will discuss this a little bit and realize that it is not appropriate to have a large number of provisions on that, but I think we should have some enabling provisions so we can broaden our co-operation with our neighbors.

The second point I would like to make is that of course what the two presenters have given us is a framework within which devolution can operate but within that framework we shall need to make a large number of decisions. We have had detailed exposition on the question of finances

that we have then to decide precisely what kind of taxes can be levied at what kind of level and so on and this is through division of powers and many other matters. And so one question that we shall have to examine is how far we put the detail in the Constitution and how far we put the detail in legislation to be enacted following the Constitution.

I think we also need to discuss - and this is perhaps something that belongs to the committee on transition - what time period do we allow for the full implementation of the system of devolution. It is something that cannot be brought into being overnight and what is the time spent for that.

And the final point I want to make is one of caution. I myself am a devolutionist at heart and I believe that devolution is a good way to enable the participation of people at different levels of the Government in public affairs and in getting accountability to the people at those levels. But I also want to caution you that the system of devolution or federalism is a very complicated system. It is a very legalistic system in which one has frequently to resort to courts for definition or clarification of rights. It requires of course a great deal of money because we shall have many more institutions to fund, legislative institutions and executive institutions. We shall need very highly skilled people. A devolution system, federal system, requires constant negotiations between different levels of Government. And that requires both an awareness on the part of public servants and ministers as to the precise jurisdiction reach of the powers. It also requires coordination, requires a large number of highly trained civil servants.

So most countries have found it quite difficult to implement complex schemes of devolution. So I would just like to caution ourselves that as we begin to design the detail of the system, we should pay very close attention to the questions of costs, possible conflict between different levels of Government and the burdens that it would place upon public servants. And we should try to work out a system which eases the co-operation between different levels of Government.

And the final point is, of course let us not get too starry-eyed about devolution. Corruption in most countries is more rampant at the local levels than it is at the national levels and that is a fact which is evident in many countries. Local politics can be as divisive as national politics. So I

think we need to have a certain degree of realism when we get down to the detailed arrangements that we would adopt as part of the scheme for devolution. Thank you very much. (*Clapping*).

Hon. Delegate Bonaya Godana: I will now give the floor to a district Delegate from the next block.

Hon. Delegate: Point of Order! Point of Order!

Hon. Delegate Bonaya Godana: What is your point of order, number 182?

Hon. Delegate Nick Salat: Thank you Chair, for giving me this opportunity. My point of order here is, are you treating some Delegates more special than others, because we find that you have already rang the bell when a Delegate is speaking, giving us his credentials that we are all aware of. Can you treat us equally?

Hon. Delegate Bonaya Godana: Honourable Salat, all Delegates are equal--

Hon. Delegates: No! No! No!

Hon. Delegate Bonaya: --and he was no more special than Honourable Salat to be recognized out of merit. Next, is from this block here, number 377. I hope you are a District Delegate.

Hon. Delegate Okiya David: My name is Okiya David, District Delegate Lugari. First of all I should thank Commissioner Kangu--

Hon. Delegate Bonaya Godana: Delegate number 599, what is the point of order and it had better be a point of order.

Hon. Delegate Leslie Mwachiro: It is Chairman. I am Delegate number 599, Leslie Betawa Mwachiro. I want to ask Commissioner Mutakha Kangu whether he is going to give us a Swahili version of what he has presented as well as the summary.

Hon. Delegate Bonaya Godana: It is not a point of order, you know.

Hon. Delegate Leslie Mwachiro: No, but it is.

Hon. Delegate Bonaya Godana: Certainly it is not a point of order!

Hon. Delegate Leslie Mwachiro: It is.

Hon. Delegate Bonaya Godana: It is not. You are making a request and certainly it is not a point of order.

Hon. Delegate Leslie Mwachiro: Chairman, I can explain it like this. Every document which has been given in this Conference should come in English and Swahili.

Hon. Delegate Bonaya Godana: Good, the point has been made, the Secretariat will have to discuss that.

Hon. Delegate Leslie Mwachiro: Secondly, Chair, and do not cut me short--

Hon. Delegate Bonaya Godana: Order! Order! Order!

Hon. Delegate Leslie Mwachiro: I am asking about page 22. There is a fundamental mistake there Chair, on page 22. He is talking about--

Hon. Delegate Bonaya Godana: Order! Order! Order! You would rather ask to be given the floor and seek those clarifications. When you rise on a point of order, you are being unfair to the person who has the floor, because you are interrupting his trend of thoughts. You better be sure it is a point of order and I rule it is not a point of order!

Hon. Delegate Leslie Mwachiro: I have been seeking to be given permission from the beginning.

Hon. Delegate Bonaya Godana: Please continue, 377.

Hon. Delegate Okiya David: I have said I am Delegate number 377, District Delegate Lugari. First of all, I must thank Commissioner Kangu for having presented the whole issue in the best manner possible and I would say all he presented was so clear and that we are now refining the Devolution Chapter, I looked at the second option on the formation of the units and I found out that the second and the third schedule or option is more based on tribal and ethnic formations than on economic, geographical and their viabilities. I think I would opt for the first option.

There is also one thing we should not forget, especially the seats of ministries. I would propose that ministries should also be decentralized to various regional units. I am giving an example, say Agriculture on unit 8, Livestock on unit 3,4 or 5, Tourism on unit 1, Environment on unit 2 or 1, Education on unit 7 or 9, Judiciary and Finance in Nairobi. I am saying this because this will help to develop other regions and cement interregional relations so desired in this developed government both horizontally and vertically. There should also be a provision to allow the neighbouring units to negotiate and emerge either temporarily or permanently. My view on Education, is that it should remain centralized for the time being at least before we think of developing it.

The last one is a request for all the Delegates, I feel that the Commission should liaise with the media houses to produce video cassettes for the speeches made especially those edited ones and distribute to the Delegates at a reasonable price or fee. Thank you very much.

Hon. Delegate Bonaya Godana: In the next block, I find there are two requests. Delegate number 286 from what category are you?

Hon. Delegate Isa Ileri Ngunia: Thank you, Mr. Chairman. I am a District Delegate Mr. Chairman. My name is Isa Ileri Ngunia from Mbeere. I will also start by saying that I have enjoyed the presentation made by Mr. Kangu. I listened to him and I think I am more educated before I listened to him, through out his lecture which was quite impressive. One question that I am still having is, whether the districts are still the principle levels of devolution, because when we came here in Bomas I, the Draft actually gave us the impression that the Districts were the

principle levels of devolution, where the powers of local governance were supposed to be devolved, but the units that we have going through here and I am in favour of the second set of units which goes up to 13, looks to be sort of the level that we need to devolve to. Although if we do that then of course there are some, the district aspect of the devolution will be lost and is also a problem mainly because these units put several people together, like the Mbeere are put with the Meru and the Embu and Tharaka, which is quite impressive, but if we were to be devolved at that level then it means that the Legislature of those units is likely to have people of one tribe having more people than the other. So I still think that even though we are devolving to those units, we should have the Districts operating as kind of separate governments of some nature. So I do not know and that is why I have stood to seek clarification and also seek to understand as to how we are going to have these units operating when the Districts are also operating.

Again, another question that arises - this so called sub-national level of government, the provincial one, if it is going to have representatives, it is not even in the Draft, it is not defined very well as to where the representatives at the province were to come from. Again even in the District units like the ones we were talking about in the Bomas I, we were wondering where the governors at the District were going to have representatives to the District legislature. It does not come out very well and I think it should also appear in the Constitution, other than being left to Parliament to decide as to where the representatives of the district would come from. I think we should be definitive by the time we are through with this Constitution as to every other level where, the representatives are going to come from. Am I short of time?

Hon. Delegate Bonaya Godana: Just warning of time, yeah.

Hon. Delegate Isa Ireri Ngunia: Yeah, what I am saying is that, it should be very clear in the Constitution as to where every level of governance is to draw its representatives who are going to be either in the Legislature or in the Executive. Thank you, Mr. Chairman.

Hon. Delegate Bonaya Godana: Thank you very much. At this stage, let me seek the indulgence to announce, to avoid doubt in response by Honourable Kivutha Kibwana asking the Chair to clarify to the Conference whether this document on Devolution which has just been

presented is an official document of the Commission and I want to confirm, yes, it is an official document of the Commission (*Clapping*).

Next category, I am looking for non-MP and non-District Delegate category. I am trying to be fair to all. I can see Delegate number 364. What category are you? NGO?

Hon. Delegate Osoi Kamwende Daniel: Thank you Mr. Chairman. I am Osoi, number 364.

Hon. Delegate Bonaya Godana: What category?

Hon. Delegate Osoi Kamwende Daniel: District Delegate.

Hon. Delegate Bonaya Godana: No! No! No! Mr. Osoi, No. I think to be fair I said non-District Delegate, non-MP. You will be the third District Delegate. No! No! No! somebody in that block who is not a District Delegate and who is not an MP? Number -613, what is your category?

Hon. Delegate Mike Oliewo: Thank you. My name is Mike Oliewo from Political Parties. That is non-District and non-MP. *Laughter*.

Mr. Chairman, I am very happy with the presentation that was done here by the Commissioners and I have gone through the general principles--

Hon. Delegate Bonaya Godana: Who is that? Is that Kivutha Kibwana?

Hon. Delegate Mike Oliewo: --and they ar--

Hon. Delegate Bonaya Godana: Yes, 057, what is your point of order?

Hon. Delegate Kivutha Kibwana: I did not question the report that has been presented. What I had asked was the one single sheet of a document, which says how many people favour Federal System? How many favour whatever and I wanted to know whether that is an official document of the Conference?

Hon. Delegate Boyana Godana: It is a page of the main document on Devolution.

Hon. Delegate Kivutha Kibwana: Is it?

Hon. Delegate Bonaya Godana: Yes. It is attached. It is a part of that. I am assured that it is a part of that. It is they who prepared it as a summary. Okey? Good. *Laughter*

Hon. Delegate Mike Oliewo: Thank you very much, Mr. Chairman.

Hon. Delegate Bonaya Godana: Please continue.

Hon. Delegate Mike Oliewo: I am continuing. Mr. Chairman, it did not come out clearly from the presenter about the linkage between the principles of Devolution as articulated here and the statute of our country and I would like Commissioner Mutakha Kangu to tell us more about how we will harmonize the statutes that are currently governing our country now with the principles of Devolutions, so that there can be no lapse when we start implementation of the principles and the Chapter as it is hereby explained. Mine was just that brief. Thank you Mr. Chairman.

Hon. Delegate: Bonaya Godana: Thank you. Thank you. Next block. 406?

Hon. Delegate Shakeel Shabbir: Just a guidance--

Hon. Delegate Bonaya Godana: Order. Order. Is there a point of order? I am giving you the floor on the point of order.

Hon. Delegate Shakeel Shabbir: Yes Sir. Just a point of order. Sir, we just want to guide that this Red is for MP's.

Hon. Delegate Bonaya Godana: I have got it now. Thank you very much. I have just received it, yes.

Hon. Delegate Shakeel Shabbir: Very good. Thanks. So that we don't have confusion.

Hon. Delegate Bonaya Godana: Thank you very much. Thank you. Now I will go for a Green. Right behind Mayor Shakeel. 579. Which category? Oh! Again?

Hon. Delegate Daniel M. Rasugu: Mr. Chairman, my name is Rasugu --

Hon. Delegate Bonaya Godana: They seem to be more active. So, what do I do? (*Uproar and noise among the Delegates*)

Hon. Delegate Daniel M. Rasugu: Mr. Chairman, my name is Daniel Rasugu. Delegate Number 579. Of course Political Parties.

Mr. Chairman, just like other Delegates, I want to express my satisfaction in the manner in which the presentation was done by our brother Com. Mutakha Kangu and realizing that we are human beings, I would like to state that Devolution is a very important Chapter that calls for ample time to deliberate on so that we can give the Technical Committee addressing this matter some guidance. When we came in, Mr. Chairman, we requested that each Delegate be provided with a copy of the Hansard so that as we go back to our areas of residence, we could easily be updated properly on where reached the last time we were here in matters pertaining to Devolution.

Secondly, being human beings, I realized that this Chapter calls for more time so that we can give it a more practical bearing on the morrow. So what I am saying in effect is that, you consider giving each Delegate a copy of the Hansard so that when we face similar situations, we can be able to have enough areas of reference. Thank you.

Hon. Delegate Bonaya Godana: Thank you. 603. 228, what is your point of order?

Hon. Delegate Raphael Livu Kilonzo: Hounarable Chair, with all due respect, I think the third person that you have given a chance to speak now, is the third consecutive Political Party representative that you have given the chance to and I think, we need to balance and be fair in these representations.

Hon. Delegate Bonaya Godana: Thank you. Thank you. Point well taken. I did actually comment and I did not want to ask him to sit down after I had given him the floor. But I am trying to be fair between the principle categories and the problem is the Green Category has a lot sub-Categories and it is difficult for me to know who is who. But for now, 603. Is that another Political Party? Is that the one?

Hon. Delegate Winston Ogola Adhiambo: Thank you very much Mr. Chairman. I am Winston Ogola Adhiambo. The Chairman of the Federal Party of Kenya *Laughter*. I am very happy because I have suffered a lot about Federalism and now it is a happy day, people are accepting Federalism. (*Clappin*). What I can say about Federalism is that Draft-- Sorry, I forget to thank Com. Kangu for his good work.

Devolution of Power could be at the District level so that the District becomes the principle level of the Devolution of Power. But I did introduce the point of devolving power to a bigger unit. So, I said however, making the ethnic level, the principle level of Devolution of Powers would create fewer units, many of which would be bigger and more viable to implement bigger projects. The relatively smaller units would be assisted through the National Government *inter alia*. This later plan is in line with the British, German, Belgium, Switzerland, India and others who have done it along the ethnic lines. This one is actually in line with the famous speeches of one of our great people, Chief Obafeni Awolowo. After a long experience, he said that in any large country, I mean large in area, and a multi-ethnic country, there is need for Federalism so that some powers are devolved to local areas so that they may feel that they are also part of the whole thing.

We know that right from the start, I should tell you one thing. In the world where we are staying now, it is rather ridiculous that some Africans are still supporting unitary form of government. Let me inform you all once and for all. That Federalism may be called Devolution, is the system of government in the whole of that Asian continent and in the whole of that European continent and in the whole of that American continent, which country is a single unit country? So, the big people should not be mischievous because unitary form of government is just a way of exploiting people. It is the form of the dictators. It was invented by the dictatorial Europeans and when

they found it bad, they discarded it. So, we would like Federalism so that people would feel that they belong and we get and participate fully because we are for participatory democracy. I think-

Hon. Delegate Bonaya Godana: Thank you.

Hon. Delegate Winston Ogola Adhiambo: I Excuse me. My recommendation is that the principle level of power should be the ethnic groups as it is done in all other countries. Even in India, they are using the former ethnic kingdoms as the state. So, thank you very much.

Hon. Delegate Bonaya Godana: Well eh! Next category, I think I will go back to the MP's. Next block. 016. The next will be a District Delegate in the next block.

Hon. Delegate Nicholas Biwott: Thank you Mr. Chairman. First of all, let me congratulate the team that brought this paper.

Hon. Delegate Bonaya Godaya: Please identify yourself?

Hon. Delegate Nicholas Biwott: My name is Honourable Nicholas Biwott. Member for Keiyo South.

(Interjection - inaudible)

Hon. Delegate Nicholas Biwott: Well, that is what it is sometimes - it is politics. *Laughter.* Let me congratulate the team that brought this paper because it is very clear. It is very exhaustive and it actually captures the subject matter. Let me also thank the Committee for making it easy for us to deliberate on the Devolution by avoiding the words province or region and using the word sub-national which later of we will have to christen to a proper name.

Mine are a few clarifications. The presentation was so clear that I do not need to say much about except to seek some clarification. One has already been mentioned by Professor Ghai about the East African Community because the Treaty governing the East African Community was a

problem. We had to domesticate it in order to make it workable. I think it should be included in the linkages showing exactly how we, as a nation will cede some of our sovereignty to the East African Community and because of the globalisation, we also need to capture the ever presence of globalisation because there are so many laws and regulations on international which again should be linked into the making of our Constitution.

I would also like a clarification on the borrowing powers. You know, the borrowing of funds because that is very essential. We need to know at what level and whether the regions that will come later on will also have power to borrow externally. And this is important in view of the need to promote small and medium enterprises. There is a lot of funding which is coming for small-scale industries and that is necessary for the development of our own country. How are we going to capture that in order to enable all the parts of the country to benefit equally?

I also support the idea of clarity especially on the taxation so that there is no conflict and every region will know exactly what to expect and also the minimization from equities especially on the residual powers unspecified areas so as to make it easy.

Otherwise I would like to congratulate the Presenters and especially Com. Mutakha Kangu because it was so clear that I think if most of it had not been in terms of questions e.g. shall we do this thing, I think we would have really gone along way. Thank you very much *Clapping*.

Hon. Rita Katamu Ombito: Thank you very much. My names are Rita Katamu. Delegate Number 381 from Butere/Mumias. I am so happy with the presentation of the dear Commissioner. Actually, I am looking at the options we were given. We have three options for Devolution of Powers. It is true that people wanted power devolved. I am tempted to look at or to agree with the option three. But my worry is, it might need me to consult with my people because it is likely to make some movement or some consultation so that people know that they are in this group, because if I have to decide on it alone from this Conference or two of us, it might not be so good. So, my question is, shall we be allowed to consult our people on the options to take as per the Devolution of Powers? Thank you.

