REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA

(Coram: Koome; CJ & P, Ibrahim, Wanjala, Njoki & Ouko, SCJJ)

PETITION NO. 25 OF 2019

–BETWEEN–

THE SENATE.....1ST APPELLANT

THE NATIONAL ASSEMBLY.....2ND APPELLANT

THE SENATOR OF MOMBASA COUNTY &
49 OTHER SENATORS.....3RD-49TH APPELLANT

-AND-

COUNCIL OF COUNTY GOVERNORS.....1ST RESPONDENT

BARASA KUNDU NYUKURI.....2ND RESPONDENT

ALBERT SIMIYU WAMALWA.....3RD RESPONDENT

PHILIP WANYONYI WEKESA.....4TH RESPONDENT

THE SPEAKER OF NAKURU COUNTY ASSEMBLY &
46 OTHER SPEAKERS.....5TH-51ST RESPONDENTS

CLEMENT NYAMONGO .....52ND RESPONDENT

THE ATTORNEY GENERAL .....53RD RESPONDENT

THE COMMISSION FOR THE IMPLEMENTATION
OF THE CONSTITUTION.....54TH RESPONDENT

KATIBA INSTITUTE.....55TH RESPONDENT

(Being an appeal from the Judgment and Orders of the Court of Appeal in ***Nairobi Civil Appeal No. 200 of 2015*** *(Waki, Kiage, Gatembu, Sichale, & Odek, JJA) delivered on the 7th* ***June, 2019****)*

JUDGMENT OF THE COURT

A. INTRODUCTION

[1] Purely, by the design and architecture of the Constitution and by the clear language of Article 1 (3) and (4) of the Constitution, the people of Kenya intended that their sovereign power be exercised at two levels of government; the national and county levels. The Constitution also declares that the two levels are distinct but inter-dependent. They are expected, indeed, bound to conduct their mutual relations on the basis of consultation and cooperation. However, to avoid gridlock in their operations, even as they consult and cooperate, the two levels of government must perform their functions and exercise their powers in a manner that respects the functional and institutional integrity of each other. At the county level, the county government consists of a county assembly and a county executive. The executive authority at the county is vested in, and exercised by a county executive committee, consisting of the county governor, the deputy county governor and members appointed by the county governor, while the county assembly exercises legislative authority at that level. See Articles 6 (2), 189 (1), 176(1), 177 and 179(1) of the Constitution.

[2] Of significance is the fact that, the form, content and timing of budgets of the national and county governments must be coordinated through consultations. To actualize this, Article 220 (2) (c) of the Constitution prescribes the enactment of a national legislation to provide for;

> **"(a) the structure of the development plans and budgets of counties;**
>
> **(b) when the plans and budgets of the counties shall be tabled in the county assemblies; and**
>
> **(c) the <u>form and manner of consultation between the national government and county governments in the process of preparing plans and budgets</u>".** (Our Emphasis)

[3] It has been suggested in this Appeal, just like it was suggested in the two superior courts below that, pursuant to the foregoing, Parliament enacted the County Government Act. In 2014, the Act was amended and the County Governments (Amendment) Act No. 13 of 2014, (the amendment) introduced Sections 91A, 91B and 91C, as follows;

> **"91A (1). There is established, for each county, a board to be known as the County Development Board, consisting of the following persons-**
>
> **(a) the member of the Senate for the county elected under Article 98(1)(a) of the Constitution, who shall be the chairperson of the Board and convener of the Board's meetings;**
>
> **(b) the members of the National Assembly elected under Article 97(1)(a) of the Constitution representing the constituencies located in the county;**
>
> **(c) the woman member of the National Assembly for the county elected under Article 97 (1) (b) of the Constitution;**
>
> **(d) the governor, as the chief executive officer of the county government, who shall be the vice-chairperson of the Board, and in his absence, the deputy governor of the county shall be the vice-chairperson;**
>
> **(e) the deputy governor of the county;**
>
> **(f) the leader of the majority party in the county assembly;**
>
> **(g) the leader of the minority party in the county assembly;**
>
> **(h) the chairperson of the county assembly committee responsible for finance and planning;**
>
> **(i) the chairperson of the county assembly committee responsible for budget;**

(j) the chairperson of the County Public Service Board, who shall be an *ex-officio* member;

(k) the County Secretary, who shall be the secretary of the Board and shall also provide Secretariat services to the Board, as an *ex officio* member;

(l) the County Commissioner, as an *ex-officio* member; and

(m) the head of a department of the national government or the county government or any other person invited by the Board to attend a specific meeting of the Board.

(2) The County Development Board, for each county, shall-

(a) provide a forum, at the county level, for consultation and coordination between the national government and the county governments on matters of development and projects in accordance with the Constitution and, more specifically, Article 6(2), Article 10 and Article 174 of the Constitution

(b) consider and give input on any county development plans before they are tabled in the county assembly for consideration;

(c) consider and give input on county annual budget before they are tabled in the county assembly for consideration;

(d) consider and advise on any issues of concern that may arise within the county.

.....

91B. The operational expenses in respect of the County Development Board shall be provided for in the annual estimates of the revenue and expenditure of the respective county government.

91C. Any person who knowingly and unlawfully obstructs, hinders, undermines or prevents the County Development Board from discharging its functions under this Act commits an offence and is liable, on conviction, to

punishment by a fine not exceeding one million shillings or imprisonment for a term not exceeding one year, or both".
(Our emphasis).

The effect of the amendment was the establishment for each county, a County Development Board, (the Board(s)). The operational expenses of the Boards were to be provided for in the annual estimates of the revenue and expenditure of the respective county government; and finally, the amendment created an offence prohibiting any person who **"knowingly and unlawfully obstructs, hinders, undermines or prevents the County Development Board from discharging its functions".** Such a person, if found guilty would be liable, on conviction, to punishment by a fine not exceeding one million shillings or imprisonment for a term not exceeding one year, or both.

It is this amendment that triggered the litigation that has culminated in this Appeal.

B. BACKGROUND

i. At the High Court

[4] The respondents filed two petitions, *Petition Nos. 381* and *430 of 2014,* which were consolidated, and in which they challenged the constitutionality of the amendment, contending that it was inconsistent with Articles 6 (1) and (2), 95, 96, 174(1), 175, 179 (1), 179 (4), 183 (1), 185 (3) and 189 (1) of the Constitution.

In opposing the petition, the appellants insisted that the amendment neither violated any of these provisions of the Constitution nor altered the structure of devolution, but simply created a forum for consultation; that pursuant to Article 189 (2) of the Constitution, members of the national assembly, though part of the national government, can participate in the affairs of the county government without violating the Constitution; that Article 189 (2) enjoins the two levels of government to cooperate in the performance of their functions; and that in order

to achieve this, the two levels of government are required to set up joint committees and joint authorities.

[5] Having considered the pleadings and the parties' submissions, a three-judge bench of *Lenaola, M. Ngugi (as they then were) and Odunga, JJ.*, in a Judgment delivered on 10th July, 2015, declared the amendment unconstitutional, for the reasons that the composition and mandate of the Boards upset the devolution and separation of powers framework in the form intended by the Constitution; that the amendment contravenes Articles 1(3)(b), 1(4), 6(2), 10(2), 179(4), 183, 185(1), 189(1) and 225(1) (i) of the Constitution; and that the involvement of the Senate, the National Assembly and the national executive in the Boards violates constitutional tenets and principles; and that it interferes with and compromises the roles of these organs in the exercise of their oversight functions over counties functions and revenue utilization.

ii. At the Court of Appeal

[6] Aggrieved, the Senate, National Assembly and some of the Senators (the Appellants) filed in the Appellate Court, Nairobi Civil Appeal No. 200 of 2015 on the grounds that the learned Judges erred;

i. *in holding that the County Governments (Amendment) Act was unconstitutional, null and void without specifying the particular Articles of the Constitution contravened by the Act;*

ii. *in holding the County Governments (Amendment) Act was unconstitutional on* ubiquitous*, broad and fluid grounds;*

iii. *in finding that the County Governments (Amendment) Act had the effect of altering the structure of devolution;*

iv. *in construing Article 2 (2) of the Constitution to mean that if a certain power is granted to a specific organ, body or level of government then no other entity can lawfully exercise that power;*

v. *in holding that by involving the Senators in the formulation of plans and budgets for counties, the same plans and budget would thereafter be subject to scrutiny by the Senate in its oversight role;*

vi. *in failing to appreciate that the Boards were intended by Parliament to be consultative and coordination forums between the two levels of government within the provisions of Articles 6 (2), 189 and 220 (2) (c) of the Constitution; in finding that Section 91A of the County Governments (Amendment) Act creates an oversight role for the national government in counties;*

vii. *in failing to find the Constitution does not provide for pure separation of powers; in failing to adhere to the provisions of Article 259 (1) (a) and (d) of the Constitution;*

viii. *in finding that Section 13A of the Government Proceedings Act is inconsistent with Article 48 of the Constitution; and*

ix. *in finding that proceedings challenging the constitutionality of an Act of Parliament or alleging violation of constitutional rights are not civil proceedings subject to Section 12 (1) of the Government Proceedings Act.*

[7] After isolating a single issue which it considered central in the determination of the controversy, namely whether it was erroneous for the trial court to declare the amendment unconstitutional, the learned Judges answered that question by considering five related issues drawn from the nine grounds listed above. They asked whether failure by the trial court to cite the provisions of the Constitution that were allegedly violated by the amendment was fatal; whether there was any basis for holding that the amendment altered the structure of devolution; whether

the court wrongly construed Article 2 (2) of the Constitution; whether or not a constitutional petition is a civil proceeding subject to Sections 12 and 13A of the Government Proceedings Act; and finally, whether Kenya is a federal, as opposed to a unitary State.

[8] In a Judgment delivered on 7th June, 2019, the Court of Appeal upheld the decision of the High Court and dismissed the appeal as lacking in merit. The Judges, for themselves, were satisfied that the correct principles were applied by the High Court in determining whether the amendment met the test of constitutionality. They further expressed satisfaction that the Judges specified Articles 1 (3) (b), 1 (4), 6 (2), 10 (2), 179 (4), 183, 185 (1), 189 (1) and 225 (1) (i) of the Constitution as the provisions that were violated by the amendment.

[9] On the structure of devolution, the learned Judges once again agreed with the High Court that Sections 91A and 91B of the amendment contravened the Constitution and were antithetical to the oversight role of the Senate under Article 96 (2) and (3) read together with the legislative power of the county assembly in Article 185 (1) of the Constitution; and that Sections 91A (2) and 91B of the amendment violated the functional integrity of county governments and are contrary to Articles 179 and 185 of the Constitution.

[10] On the question whether Article 2 (2) of the Constitution was not properly construed, the Appellate Court found that the statement by the learned Judges that, if a power is granted to a specific organ, then no other entity can lawfully exercise it, was a general rule that is subject to exceptions; and that one such exception is where delegation of powers or functions is expressly permitted.

On the application of the Civil Procedure Rules and the Government Proceedings Act, they held that a constitutional petition is a procedure *sui generis* by virtue of Article 22 (3) and (4) of the Constitution and therefore is not mandatorily subject to the Government Proceedings Act or ordinary rules of procedure in civil cases.

Finally, on the submission by Katiba Institute (the 55th respondent) that Kenya is a federal state with a federal constitution, the judges dismissed the argument as a misreading and misapprehension of the Constitution holding that the Constitution retained a unitary system of government and that the county governments are not independent but semi-autonomous.

iii. At the Supreme Court

[11] Again, dissatisfied by this decision, the appellants have now brought this Appeal pursuant to Rules 9 and 33(1) (a) & (2) of the Supreme Court Rules, 2012 (now repealed), challenging the entire Judgment on sixteen (16) grounds, while the 55th Respondent has filed a Cross-Appeal challenging the determination that Kenya is a unitary rather than a federal State. We condense the sixteen (16) grounds into nine (9) as follows:

That the learned Judges erred in holding that:

i. *The Judges of the High Court applied the correct methodology or an integrated and harmonious approach to interpretation of the Constitution;*
ii. *Section 91A(1)(a) & (b) is antithetical to and violates the provisions of Article 179(4) of the Constitution as the composition and role of the Boards show the domination by politicians and subordination of governors to senators;*
iii. *Section 91A (1)(a) drastically and impermissibly alters the hierarchical structure of a county government by making the governor the vice chair and that it was unlawful and unconstitutional to cause the governor to deputise the Senator in a County organ;*
iv. *Section 91A(1)(a) & (b) (c) and (l) violates the provisions of Articles 176(1), 179 (6) and 185 of the Constitution; and that the amendment did not respect the structure of devolved government under Article 176(1),*

as well as the functional aspects of the doctrine of separation of powers by the involvement of senators, members of the National Assembly and Woman Member of the National Assembly in County affairs;

v. *the involvement of the senators, members of the National Assembly and Woman representative of the County in the Boards, created a conflict of interest between the oversight role of the senate, the functions of the Board and the mandate of the county assembly and the county executive committee;*

vi. *the amendment restricts the functional independence of the County Assembly as it makes it an offence, under Section 91C, for the County Assembly to consider and approve its budget or a development plan before the same is tabled before the Board;*

vii. *the coercive nature of Section 91C transform the Board into a decision-making organ violating the administrative, legislative and decision-making power and authority of the County Executive Committee, the County Assembly and the position of governors as the Chief Executive Officers of the counties;*

viii. *Sections 91A (2) and 91B are unconstitutional to the extent that they enact and impose functional restrictions on the County Executive and County Assembly;*

ix. *Parliament has through the amendment overreached itself beyond what the people authorized in the Constitution.*

[12] In the result, the appellants pray that:

i. *The Appeal be allowed with costs to the Petitioners;*

ii. *The judgement and orders of the Court of Appeal dated 7th June 2019 be set aside and substituted with an order allowing the appeal; and*

iii. *The Court be pleased to declare that the amendment is consistent with the Constitution, valid and enjoying the full effect of the law.*

[13] In its Notice of Cross Appeal, the 55th respondent is urging that the learned Judges erred in holding that Kenya's devolution model is unitary and not federal in disregard of Articles 1(1), 2 (1, 2 &4), 3(2), 6(2), 10 (1), 94(1, &4), 96 (2&3), 163(6), 174(1), 175, 176(1), 183(3), 185(1), 189(1) and 191 of the Constitution and for failing to find that the Boards introduced through the impugned amendment, upset "the federal system" of the devolved government. It seeks, for those reasons, that the appeal be dismissed and further that the Court considers departing from its earlier decisions to the contrary by declaring that Kenya's model of devolution is federal.

C. PARTIES' SUBMISSIONS

i. The Appellants

[14] From the written submissions, the combined effect of appellants' and 55th respondent's challenge of the Judgment of the Appellate Court is that the courts below erred in their interpretation of the Constitution with regard to the composition of the Boards, the structure of county governments, the oversight powers of the Senate, the doctrine of separation of powers, and the devolution model.

[15] The appellants have submitted that the Appellate Court erred in its ubiquitous and omnibus approach to constitutional interpretation. They add that the court ought to have placed the impugned amendment side by side with the Constitution so as to test its constitutionality. For this approach, they have sought to persuade us to apply the decision of the Supreme Court of America in ***United States vs Butler*** 297 US 1 (1936) as approved by the High Court in ***National Conservative Forum vs AG***, [2013] eKLR, ***Kenya Small Scale Farmers Forum vs R***, [2013] eKLR and in ***Commission for the Implementation of the Constitution vs Parliament of Kenya & others***, [2013] eKLR. They have submitted too that had the two courts below approached the question of

interpretation properly, it would have been established that the impugned sections are in complete harmony with the Constitution.

[16] The appellants further submit that in search of constitutional compliance, the court must establish the objects of the legislation in question. According to them, the legislative objective in the memorandum of objects and reasons for the amendment, was to create a consultative and advisory forum, with no executive functions; that the literal and plain reading of the amendment will show that Parliament in line with Articles 6 and 189 of the Constitution only created a consultative and coordination forum between the two levels of government on development and projects planning at the county level.

[17] According to the appellants, an integrated, wholistic and harmonious approach to constitutional interpretation is what the courts below were expected to adopt, as settled in cases like ***The Matter of the Principle of Gender Representation in the National Assembly and the Senate***; Advisory Opinion, [2012] eKLR *para 33;* ***In the Matter of Speaker of the Senate & Another vs Attorney-General & 4 Others;*** Advisory Opinion, [2013] eKLR and ***Judges & Magistrates Vetting Board & 2 Others vs Centre for Human Rights & Democracy & 11 Others***, *[2014] eKLR*.

[18] On the composition, structure and functions of the Boards, the appellants submit that the Boards do not in any way contravene the constitutional powers and functions of the Governors, county executive committees or the county assembly; that the amendment only creates a talk-shop and an opportunity for elected leaders both at the national and county levels to contribute towards county development plans, projects and annual budgets; and that such a forum is in line with best practice in the corporate sector as it vests management and policy functions to the chairman of the Board and policy implementation to the Chief Executive Officer.

[19] The amendment, they further submit, does not interfere with the constitutional structure of the county governments, but only creates an advisory forum, whose advice or recommendation do not bind the counties. Indeed, they argue, there are no penal consequences to the devolved units if they do not comply with the Board's recommendations; and that all the provisions in the amendment are complementary and supplementary to the provisions of sections 125 and 126 of the Public Finance Management Act.

[20] The appellants hold the view that the Boards are the equivalent of other statutory forums created by statutes such as: the County Budget and Economic Forum created pursuant to Section 137 of the Public Finance Management Act, the Intergovernmental Budget and Economic Council established under Section 187 of the Public Finance Management Act, the County Intergovernmental Forum under Section 54 (2) of the County Government Act, 2012 and the National and County Government Co-Coordinating Summit created under Section 7 of the Intergovernmental Relations Act, 2012. The amendment is therefore, according to them, enacted in accordance with section 91 (f) of the County Government Act, 2012 which obligates the county governments to facilitate the establishment of structures, for citizen and members of National Assembly and Senate to participation in the counties' affairs that impact their lives.

[21] On the oversight powers, the appellants contend that the amendment does not, in any way, interfere with the supervisory power and authority of the county assemblies; that there can be no debate as to the authority of the Senate as the only constitutional organ mandated to provide appropriate nexus between the county and the national governments in approving funds for the counties; and that the Boards provide an appropriate forum for the Senators to obtain firsthand information at the county level on the county financial requirements, to inform the annual Division of Revenue Bill and County Allocation of Revenue Bill debates.

[22] Pertaining to the argument that the creation of the Boards distorts separation of powers, the appellants submit that the Boards do not exercise any executive or legislative authority. Therefore, the conclusion by the courts below that the Boards' structure and composition compromise the principle of separation of powers was arrived at in error.

[23] The appellants however emphasize that the constitutional design encompasses the concept of interdependency, cooperation and consultations between the two levels of government as this Court pointed out in ***Re matter of the National Land Commission***, *[2014] eKLR* and in ***Re Matter of the Interim Independent Electoral Commission***, *[2011] eKLR*. Quoting *Jacqueline Martin & Chris Turner* in, ***Unlocking Constitutional and Administrative Law',*** Hodder Education, 2010 at pages 79-80 and *S.A de Smith* in ***Constitutional and Administrative Law'*** 2nd Ed. the appellants have argued that the concept of pure separation of power is not practically achievable.

[24] Finally the appellants opposed the cross appeal and relying on the decisions in ***National Assembly of Kenya & Another vs Institute of Social Accountability & 6 Others***; [2017] eKLR**,** and ***Re the Matter of Interim Independent Electoral Commission*** *[Supra]* and **Article 4 (2)** of the Constitution, they insist that Kenya is a unitary State.

1st Respondent

[25] The 1st respondent submits, first, that the amendment violates the principle of separation of powers enshrined in Articles 1 (3) (4), 90, 95, 96, 130, 152 (3)159, 174, 175 (a), 179, 183, 185 and 189 of the Constitution as the Board's composition and mandate upset the devolution and separation of powers constitutional frameworks by allowing members of the national assembly and senators to make

executive decisions in the counties, and to be part of the budget-making process at the counties instead of playing an oversight role at the Senate level.

[26] On the second issue, the 1st respondent submits that Section 91A (2) of the amendment vests in members of the National Assembly power to exercise an oversight authority over the counties' legislative authority contrary to the Constitution; and that it also ousts the Governors' executive authority and the County Assembly oversight authority over the County Executive Committees contrary to Article 185 (3) and (4) of the Constitution and Sections 117 and 134 of the Public Finance Management Act.

[27] Thirdly, it is submitted that any amendment or enactment that alters the objects, principles and structure of devolution, must be passed in accordance with the provisions of Article 255 (1) of the Constitution, through a referendum. It is urged that the amendment alters the structure of devolution by placing a senator at the apex of the Boards against the clear provisions of Articles 6 (2) and 179 (4) which provide that the Governor is the chief executive of the county government.

[28] Finally, 1st respondent, in opposing the cross-appeal, has urged us not to depart from the settled position that the Constitution creates a unitary State.

The 2nd, 3rd, 4th & 52nd -54th Respondents did not file submissions.

The 5th to 51st Respondents

[29] The 5th to 51st respondents concur that the amendment contravenes Articles 174 (1), 175 (a) and 185 (3) of the Constitution, and undermines devolution by purporting to involve the national government in the performance of county functions. It is their case, just like the 1st Respondent, that the National Assembly's involvement in the development of county projects and plans and the consideration of budget proposals before they are tabled in the County Assembly offends the principle of devolution and amounts to usurpation of the county assemblies' functions of oversight over the county executive contrary to Articles

185 (3) and (4) of the Constitution. It is their argument that mutual cooperation and consultation as contemplated under Article 6 (2) of the Constitution should never amount to usurpation of constitutional roles and functions.

[30] They further submit that Section 91C is coercive in its application and in effect undermines the administrative, legislative and decision-making powers and authority of the County Executive Committee, County Assembly and the position of the Governor. Relying on the Indian Case of ***Rai Sahib Ram Jawaya Kapur & Others vs State of Punjab,*** 1955 SC 549, the 5th to 51st Respondents submit that the doctrine of separation of powers does not contemplate assumption by one organ of functions that essentially belong to another organ; that for that reason Sections 91A of the amendment is in contravention of the constitutional structure of the county government set out under Article 179 (4) and 185.

The 55th Respondent

[31] The 55th Respondent opposes the main appeal and argues in support of the cross-appeal. It urges the Court to analyse, not only the scope of the impugned provisions of the amendment but also the composition of the Boards as constituted and their functions, purpose and effect, or both. See ***R vs Big M Drug Mart***, [1985] 1S.C.R. 295 (at paragraphs 78-93) and ***Samuel H. Momanyi vs Attorney General and Another*** [2016] eKLR. It further argues that the Constitution envisages division of functions between the two levels of government in matters of budget and oversight; that the principle of cooperation and consultation requires each level of government to respect the status, institutional autonomy and functions of each level; that to insist that county development plans and annual budgets can only be tabled before the County Assembly after consideration and input by Board is to restrict the functional autonomy of county assemblies.

[32] The 55th Respondent submits that it is a wasteful venture to establish the Boards in addition to existing structures, such as County Intergovernmental Forum, the National and County Coordinating Summit and the Intergovernmental Budget and Economic Council, whose functions are duplicated by the Boards.

[33] In respect of the form of devolution, the 55th Respondent maintains that the Constitution altered Kenya's constitutional design from unitary to federal; that the dispersal of legislative, executive and taxing powers through devolution under Articles 1(1), 2 (1, 2 &4), 3(2), 6(2), 10 (1), 94(1, &4), 96 (2&3), 163(6), 174(1), 175, 176(1), 183(3), 185(1), 189(1) and 191 and Schedule 4 of the Constitution are clear demonstration that a federal as opposed to a unitary system was intended by the framers of the Constitution. This, according to the 55th Respondent is supported by *Prof Ronald Watt* in his book ***'Comparing Federal Systems in the 1990s'***, McGill University, 1996 at page 6. In view of that position the 55th Respondent has urged the Court, in line with its decisions in ***Jasbir Singh Rai & 3 others v Tarlochan Singh Rai Estate of & 4 others***, [2013] eKLR and ***Council of Governors & 47 Others vs AG & 3 Others*** [supra], to consider departing from its "*obiter dictum*" in the ***Matter of Interim Independent Electoral Commission*** [supra] which was applied by the Court of Appeal in ***National Assembly of Kenya & Another vs Institute of Social Accountability & 6 Others*** [supra].

D. ISSUES FOR DETERMINATION

[34] On the basis of the pleadings and the foregoing submissions by the parties, we consider the following two broad issues to fall for our consideration and determination;

i. *the constitutional validity of the County Governments (Amendment) Act; and*

ii. whether Kenya's devolution model is unitary or federal.

E. ANALYSIS

i. *Jurisdiction*

[35] Although the parties did not raise the question of the jurisdiction of the Court to entertain this appeal, the Court is itself bound to independently be satisfied that its jurisdiction has been properly invoked. Just as the court cannot expand its own jurisdiction through judicial craft or innovation, parties too cannot, by consent or acquiescence, confer jurisdiction upon a Court. So as to bring the appeal within the terms of Article 163 (4) (a) under which it has been brought, it must be demonstrated that the issues of contestation revolved around the interpretation or application of the Constitution. It is the interpretation or application of the Constitution by the Court of Appeal that forms the basis of a challenge to this Court. So that, where the dispute has nothing or little to do with the interpretation or application of the Constitution, this Court under Article 163 (4) (a) will have no jurisdiction to entertain an appeal brought under this Article. See ***Lawrence Nduttu & 6000 Others v. Kenya Breweries Ltd & Another***, [2012] eKLR.

[36] We entertain no doubt, however, that this appeal meets the frontiers of the appellate regime of the Court embodied in Article 163 (4) (a). To begin with, the two consolidated petitions before the High Court sought a declaration that the amendment violates Articles 6 (1) and (2), 95, 96, 174(1), 175, 179 (1), 179 (4), 183 (1), 185 (3) and 189 (1) of the Constitution. Both superior courts below were persuaded and gave judgment in favour of the Respondent. It is correct therefore to say that, right from the High Court through to this Court, the central issue has been around; whether the amendment to the County Governments Act is inconsistent with the principles of the Constitution.

We come to the conclusion on the question of jurisdiction that this appeal falls within the ambit of Article 163(4) (a) of the Constitution and that we have jurisdiction to consider it.

ii. The principle of cooperation and consultation and constitutionality of the amendment

[37] As we consider this appeal, we shall bear in mind the following constitutional principles contained in Articles 1(4) 2, 6 and 189 of the Constitution, to the effect that the sovereign power of the people is exercised, both at the national and county levels; that the Constitution as the supreme law, binds all persons and all State organs at both levels of government; that no person may claim or exercise State authority except as authorised under the Constitution; that the territory of Kenya is divided into 47 counties specified in the First Schedule; that the government at either level will perform its functions, and exercise its powers, in a manner that respects the functional and institutional integrity of government at the other level; and finally that, though the two levels of government are distinct and inter-dependent, they conduct their mutual relations on the basis of consultation and cooperation. To achieve that purpose, they are enjoined to set up joint committees and joint authorities.

[38] Under Article 220 of the Constitution, as we have observed in paragraph 2 above, the form, content and timing of budgets of the national and county governments are similar. To synchronize these processes, a national legislation is proposed to prescribe for;

> **"(a) the structure of the development plans and budgets of counties;**
>
> **(b) when the plans and budgets of the counties shall be tabled in the county assemblies; and**

(c) the form and manner of consultation between the national government and county governments in the process of preparing plans and budgets".

One of the legislative frameworks towards the realization of cooperation and consultation between the national and county governments is the County Government Act, which was enacted specifically, according to the Preamble, to give effect to Chapter Eleven of the Constitution on "Devolved Government".

[39] The amendment introduced three new provisions. Section (91A) establishes, for each county, a County Development Board, section 91B provides for the operational expenses for the Boards and section 91C creates an offence for unlawful obstruction, or undermining of the Board from discharging its functions.

[40] Both the Court of Appeal and the High Court were in agreement that the impugned amendment did not meet the test of constitutionality and were in violation of Articles 1 (3) (b), 1 (4), 6 (2), 10 (2), 179 (4), 183, 185 (1), 189 (1) and 225 (1) (i) of the Constitution as they were antithetical to the oversight role of the Senate, interfered with the legislative power of the county assembly, violated the functional integrity of county governments and introduced unnecessary penal sanctions. For these reasons the courts were unanimous and declared the amendment unconstitutional, void and invalid.

[41] And that is where we start. Any law, including customary law, that is inconsistent with the Constitution, is void to the extent of the inconsistency, and any act or omission done or not done in contravention of the Constitution is also outrightly invalid. Once declared invalid, a statute or statutory provision, to the extent of the declaration, ceases to be law. See Article 2(4).

[42] What principles guide the court in determining whether a statute or statutory provision is inconsistent with the Constitution or not? Before we answer that question, it is necessary to bear in mind the dictum of this Court in the case of

Mohammed Mahamud Ali v Independent Electoral and Boundaries Commission; Sup Ct. Petition No. 31 of 2018, [2019] eKLR, that questions entailing the interpretation and application of the Constitution must for good order and efficiency in the administration of justice commence at the High Court, with the effect that the interpretation of the Constitution by both the Court of Appeal and the Supreme Court are limited to the appellate stages.

[43] The principles for consideration in construing whether a statute or statutory provision offends the Constitution have been laid down in a long line of cases. For example, in the ***Law Society of Kenya v Attorney General & another***, Sup Ct. Petition 4 of 2019; [2019] eKLR the Court said that;

> **"[37] … In construing whether statutory provisions offend the Constitution, courts must therefore subject the same to an objective inquiry as to whether they conform with the Constitution. That is why in *Hamdarddawa Khana vs Union of India and Others* 1960 AIR 554 ……**
>
> **[38] In addition to the above, and to fully comprehend whether a statutory provision is unconstitutional or not, its true essence must also be considered. This gives rise to the second principle which is the determination of the purpose and effect of such a statutory provision. In other words, what is the provision directed or aimed at? Can the intention of the drafters be discerned with clarity? These were our sentiments expressed in Gatirau Peter Munya vs. Dickson Mwenda Kithinji & 2 others, Supreme Court Petition No. 26 of 2014 [2014] eKLR, where we opined that a purposive interpretation should be given to statutes so as to reveal the intention of the Legislature and the Statute itself…"** [Our Emphasis]

[44] In other words, for the purpose of this Appeal, both the purpose and effect are relevant in determining whether or not the amendment was constitutional; an unconstitutional purpose or an unconstitutional effect can lead to the invalidation of a legislation. The words used and the language of the provision or provisions in

question must be given literal meaning and the court must seek to identify the mischief sought to be remedied by considering the historical background of the legislation.

[45] It is equally significant to bear in mind the provisions of Article 259 which require, as far as it relates to the matters under review in this appeal, that the Constitution be interpreted in a manner that promotes its purposes, values, principles, and contributes to good governance.

It goes on to state that;

> **"(3) Every provision of this Constitution shall be construed according to the doctrine of interpretation that the law is always speaking and, therefore, among other things—**
>
> **(a) a function or power conferred by this Constitution on an office may be performed or exercised as occasion requires, by the person holding the office".**

[46] To test the constitutionality of the amendment, we summarize below the three alleged offending sections, which we have reproduced *in extenso* in **paragraph 3.** The Board's membership consist of, among others, the Senator, the member of the National Assembly, the Woman Representative, the Governor and the Deputy, the Leaders of the Majority and Minority parties in the County Assembly, the Chairperson of the County Assembly Committee responsible for finance and planning and that responsible for budget, the County Commissioner, and the head of a department of the national government or the county government or any other person invited by the Board to attend a specific meeting of the Board.

The Senator is designated the chairperson of the Board and convener of the Board's meetings, the Governor is to deputize him, while the County Secretary is the secretary of the Board.

[47] The main object for the establishment of the Boards is expressed in the amendment to be a forum for consultation and coordination between the national and the county governments on matters of development and projects. The forum has been described by the appellants in their submissions as a "talk-shop" for leaders elected to represent the counties, either in the Senate or in the National Assembly and members of the executive branch of national and county governments.

[48] Applying the constitutionality test to these amendments, and looking at the purpose and effect, it seems to us that the intention was informed by Articles 6(2), 10, 174, 220(2)(c) and 232 of the Constitution that stipulates that;

> **"(2) The governments at the national and county levels are distinct and inter-dependent and shall conduct their mutual relations <u>on the basis of consultation and cooperation</u>".** (Our emphasis).

[49] This signifies the commonality of purpose of the two levels of government and the need to ensure harmony in the discharge of their respective functions, which can only be achieved through consultation and cooperation. The two levels are bound by national values and principles of governance espoused in Article 10 and guided by the objects of devolution in Article 174. In the process of budgeting and planning, consultation between the national government and county governments is a key requirement under Article 220(2) (c). The form and manner of such consultations are provided for in the national legislation. One of the values and principles of public service under Article 232 is that, in the process of policy making, the people must be involved.

[50] Public participation or consultation are, therefore, constitutional imperatives. For example, Article 196 (1)(b) of the Constitution demands of the County Assemblies, in their legislative duties, to facilitate public participation and

involvement. On the other hand, Article 201 requires that in all matters of public finance, there must be openness and accountability, including public participation.

[51] Years of deeply entrenched disparities between regions in Kenya; low level of responsiveness and accountability by the government to citizens, must had led to the enactment of sections 87 to 115, 125, 128, 131 and 137 of County Government Act, sections 47, 91, 99 and 100 of the Public Finance Management Act 2012 and sections 21 and 22 of the Urban Areas and Cities Act, all of which emphasize the need for public participation in national and county planning, budget priorities and accountability.

[52] The establishment of the Boards was therefore driven by an honest and noble purpose; to provide a forum, at the county level, for engagement, consultation and coordination of national and county governments' development programs. Laying the amendment side by side with the Articles of the Constitution which are said to have been violated, does the former square with the latter?

iii. The Board's Composition and membership

[53] The amendment has been faulted on three fronts; the Board's composition, function and penal provision.

The specific grievance about the composition is twofold; that by including members of parliament and the national executive in the membership of the Board, the amendment upsets the doctrine of separation of powers, and secondly that it distorts the principles of devolution by having members of Parliament and national executive controlling the devolved units.

We do not see any merit in the argument that by mere participation of members of parliament in the Boards, the doctrine of separation of powers is breached. No merit because the Constitution itself decrees that the governments at the national

and county levels must conduct their mutual relations on the basis of **"consultation and cooperation"**; that the two levels of government must co-operate in the performance of their functions and in the exercise of their powers and, that **"for that purpose, they may set up joint committees and joint authorities"**; and "**that the form and manner of consultation between the national government and county governments"** in the process of preparing plans and budgets shall be prescribed by national legislation. These are express provisions of Articles 6 (2), 189(2) and 220 (2)(c) of the Constitution.

[54] The County Governments Act itself in section 91(f) before it was amended by Section 3 of the Amendment provided for modalities, platforms, town hall meetings, budget preparation and validation fora for citizen to participate in the activities of the Counties and enjoins the Counties to;

> **".....facilitate the establishment of structures for citizen participation including—**
>
> **.....**
>
> **(f) avenues for the participation of peoples' representatives including <u>but not limited to members of the National Assembly and Senate</u>...".** (Our Emphasis).

Subsection (f) above was deleted by the amendment effectively removing the peoples' representatives; members of the National Assembly and Senate from the County platforms envisaged by that section. We suppose this was informed by the fact that their participation had been moved to a new platform, the Board. With the deletion of (f) above, the modalities and platforms that were to be established under the section were reserved for citizen participation. Indeed, the entire PART VIII is devoted to citizen participation in counties. The effect of the courts' declaring the amendment unconstitutional restored section 91(f).

[55] The point we are making with the analysis above, is that there is nothing irregular in the members of parliament and national executive engaging, consulting, cooperating and coordinating with the devolved units for the sake of protecting devolution and achieving its objects. There are many examples of such entities as we demonstrate in the next few paragraphs. But we stress that the engagement, consultation, cooperation and coordination envisaged must be done **"in a manner that respects the functional and institutional integrity,.... the constitutional status and institutions of the county government"**, as decreed by Article 189 (1) of the Constitution.

[56] The first illustration of joint committees or entities created in law for purposes both levels of government to coordinate their activities is the "consultative forum for the co-ordination of development activities" established by Section 54 of the County Governments Act, as amended by Statute Law (Miscellaneous Amendment) Act, Act (No. 7), 2016. It has, among its membership **"the heads of departments in the county and heads of recognised professional bodies in the county "**. The emphasis "**heads of departments in the county"**, in our view means, heads of departments of both the national and county governments. It is chaired by the Governor. In that capacity and by the provisions of section 41(1)(d) of the National Police Service Act, the Governor is authorized to receive regular briefings from the county security committee. Other members are drawn from, among other institutions, the National Intelligence Service and the National Police Service.

[57] The National and County Government Coordinating Summit, an apex body for intergovernmental relations, is yet another forum created by section 7 of the Intergovernmental Relations Act, 2012 as a framework for consultation and coordination of activities and functions of the two governments, among other functions. It is chaired by the President, while the chairperson of the Council of Governors serves as the vice chairperson. All the Governors of the forty-seven

counties are members. Its functions include, evaluating the performance of national or county governments and recommending appropriate action; receiving progress reports and providing advice as appropriate; monitoring the implementation of national and county development plans and recommending appropriate action as well as coordinating and harmonizing development policies of both governments.

[58] The other two intergovernmental forums for consultation and cooperation between the two levels that are relevant to this aspect of the appeal are, first, the Inter-Governmental Budget and Economic Council created under Section 187 of the Public Finance Management Act, 2012, chaired by the Deputy President, while members include the Cabinet Secretary, a representative of the Parliamentary Service Commission; a representative of the Judicial Service Commission; the Chairperson of the Commission on Revenue Allocation; and the Chairperson of the Council of County Governors. As a consultative forum, the Council considers the contents of the Budget Policy Statement, the Budget Review and Outlook Paper as well as the Medium-Term Debt Management Strategy; matters relating to budgeting, the economy and financial management and integrated development at the national and county level; any proposed legislation or policy which has a financial implication for the counties; and recommendations on the equitable distribution of revenue between the national and county governments and amongst the county governments themselves.

[59] The second one is a creature of Section 137 of the Public Finance Management Act. The County Budget and Economic Forum, is a medium for county budget consultation process in preparation of county plans, the County Fiscal Strategy Paper and the Budget Review and Outlook Paper. It is chaired by the Governor, while members include the county executive committee members and

representatives of persons nominated by organisations representing professionals, business and labour movement.

Finally, under section 4A (3) of the Urban Areas and Cities Act, 2011, the Cabinet Secretary may appoint *ad hoc* committee members from the Independent Electoral and Boundaries Commission, national and county governments to delineate the boundaries of urban areas or cities.

[60] These are all examples of the existence in the law of multi-stakeholder platforms or forums which are set up as vehicles to promote harmonious coexistence between the two levels of government so as to have a holistic edifice. The two levels must embrace devolution architecture by displaying collaborative coexistence and interdependence so as to avoid any possible constitutional discord. At all times, we emphasize, this arrangement must maintain a balanced structure, where national government does not usurp, undermine or interfere with the mandate of or with matters which exclusively fall within the domain of county governments.

[61] The above limitations must be borne in mind even as the special role of the Senate in the devolved governance system is acknowledged. Under Article 96(1), the Senate represents the counties and serves to protect their interests. The Senate participates in the law-making function of Parliament by considering and approving Bills concerning counties. It has the power to determine the allocation of national revenue among counties, and to oversight over the use of those resources. To discharge these responsibilities, the Senate is not expected to relocate to the counties to exercise supervisory powers at that level. That would be intrusive into the functional and institutional integrity of the county government and unacceptable overreach. It must not be involved in the administrative nitty-gritty details of the counties. Its oversight as indeed its legislative roles, are to be exercised in accordance with the Constitution and the law.

[62] If, as suggested by the appellants, the presence of members of parliament and representatives of the national executive in the Boards is merely to contribute by way of public participation in matters affecting counties, there would be no concern as their giving views *per se* cannot violate the Constitution. We have elaborately explained in the preceding paragraphs, the centrality of public participation as a constitutional imperative. Construing section 91A(2)(b) and (c) of the amendment, that the Board will;

> **"(b) consider and give input on any county development plans before they are tabled in the county assembly for consideration;**

and to,

> **"(c) consider and give input on county annual budget before they are tabled in the county assembly for consideration;**

The word "before" highlighted above, taking everything into context, can only connote a condition antecedent, a precondition to the tabling of the county development plans and county annual budget.

To that extent, we respectfully agree with the courts below that the amendment donated excessive powers to the Board beyond what the Constitution permits, thereby subordinating county organs.

iv. The Senator as Chairperson and Convener of the Board

[63] The second grievance is the role of the governor, vis-à-vis, the Senator for the county. The latter, as we have stated earlier, is the chairperson of the Board and convener of the Board's meetings, according to section 91A(1)(a). The Governor, though the chief executive of the county government, is named as the vice-chairperson, to deputize the Senator in the Board.

[64] The Constitution does not contemplate a situation where the chief executives of the counties, the Governors are inferior in rank to Senators in the execution of county functions. For this reason, Section 91A (1) (a) and (d) is antithetical to Articles 179 (4) (5) and (6) of the Constitution to the extent that it alters the hierarchical structure of the county government. The governor is the chief executive of the county, and the only time someone else besides him can exercise the functions of that office is when he is absent. Article 179 (5) of the Constitution permits the deputy county Governor, in the circumstances to step in and act in the office of Governor.

Members of the county executive committee, on the other hand are only accountable to the county Governor for the performance of their functions and exercise of their powers.

[65] Therefore, it is inconceivable as it is absurd to have a Senator whose functions are clearly delineated by the Constitution, and who is expected to provide oversight of the county government, to at the same time take charge of a Board which is essentially a county organ. This is legislative overreach that does not honour the constitutional guardrails that donates specific and distinct powers to the Senate and to the devolved units. In ***Mumo Matemu vs Trusted Society of Human Rights Alliance & 5 Others*** [2013] eKLR, the Court of Appeal said on separation of powers as follows;

> **"It is not in doubt that the doctrine of separation of powers is a feature of our Constitutional design and pre-commitment in our Constitutional edifice. However, separation of powers does not only proscribe organs of Government from interfering with the other's function. It also entails empowering each organ of Government with countervailing powers which provide checks and balances on actions taken by other organs of Government. <u>Such powers are however not a licence to take over functions vested elsewhere.</u>"** (Our emphasis).

See also our decision, ***In the matter of the Interim Independent Electoral Commission*** [2011] eKLR.

Article 186 demands that a function or power not assigned by the Constitution or national legislation to a county is a function or power of the national government, and *vice versa*.

[66] The amendment, in purporting to impose on the Governor a principal, fails to meet the test of cooperation, coordination and consultation. It fails to respect the functional and institutional integrity of the county government, its institutions and its constitutional status, as stipulated in Article 189.

In conclusion of this ground, we, like the courts below, are in agreement that, to the extent explained, Section 91A of the amendment is inconsistent with and in breach of Articles 96 (2) and (3), 179 and 185 of the Constitution, and are, to that extent, void and invalid. Though the intended purpose for the amendment was virtuous, its implementation is bound to produce an unconstitutional effect.

v. The Penal Sanction

[67] We turn to consider the third and final issue, the penal clause in the amendment. It is an offence under Section 91C to knowingly and unlawfully obstruct, hinder, undermine or prevent the Board from discharging its functions. The offence is punishable, upon conviction, by a fine not exceeding one million shillings or imprisonment for a term not exceeding one year, or both. Because of the coercive nature of Section 91C, the Respondents have argued that it undermines the administrative, legislative and decision-making powers and authority of the county executive committee, county assembly and the position of the Governor.

The Court of Appeal agreed that the section is indeed, a fetter restriction and limitation to the devolved units.

[68] The introduction of criminal penalties and sanctions in civil legislations are an increasingly common feature in our legislation today. The Environmental Management and Co-ordination Act No. 8 of 1999, the Leadership and Integrity Act No. 19 of 2012 and the Physical and Land Use Planning Act No. 3 of 2019, are some of the examples of such laws. By imposing penal sanctions upon persons who contravene such laws, the Legislature seeks to ensure compliance with the key provisions of its statutes. Their presence in a civil legislation *per se* does not invalidate them.

[69] But the question we are to determine is whether the offence created in section 91C is proportionate to what it seeks to deter; whether the end it seeks to achieve could be pursued by less drastic means. But more importantly, we shall also seek to ascertain whether section 91C is, in the circumstances of the amendment, compatible with the Constitution.

We are unable to find the nexus between the offence created by section 91C and the amendment which only establishes the Boards. We cannot similarly discern any mischief the provision was intended to cure. We can only hypothesize, on our earlier finding, that the provision was intended to transform the Board into a decision-making organ whose authority, if undermined or hindered, is punishable in law. This appears to elevate the Board to a pedestal higher than the Governor, County Executive and County Assembly. So that any action or omission to act in a certain way by any of these county organs would be interpreted to constitute obstruction or hinderance so as to attract criminal sanction. If the Board's input or advise on the county development plans and the annual budget are not taken on board at the time they are tabled in the county assembly for consideration, those

involved including the county assembly and the County Executive Committees may be in violation of section 91C and risk punishment.

This, in our view, will undermine the constitutional administrative, legislative and decision-making powers and authority of the Governors, County Assemblies and the County Executive Committees.

[70] No such outcome was intended by the Constitution when it created different offices in the counties or when it decreed consultation between the national and county governments in the process of preparing plans and budgets. Section 91C, therefore, not only fails the test of proportionality, but is also outrightly excessive, arbitrary, unfair and is based on irrational and unknown considerations.

For these reasons, we once again, respectfully agree with the decisions of the courts below, that section 91C of the amendment is inconsistent with Article 189(1)(a) of the Constitution.

vi. Operational expenses of the Boards

[71] Section 91B provides that the operational expenses in respect of the Boards be charged on the vote of the county governments. While both the High Court and the Court of Appeal did not specifically consider and express their views on section 91B, we have been asked by counsel for the Respondents to find that, since the Boards duplicate the functions already assigned to other organs, the operational expenses under this section will translate to financial burden to Kenyan. While we take this concern seriously, and whereas there is a duty on all public offices under Article 201 (d) to use public money in a prudent and responsible way, for our part, so long as the establishment and functions of the Boards can be justified, there would be nothing objectionable for the county governments to meet the Boards' operational expense.

vii. Unitary or Federal State

[72] The next and final issue is whether Kenya is a unitary and not a federal State. Because this Court and the courts below have on numerous occasions pronounced themselves on this issue, maintaining that the devolution design created by the Constitution is a unitary model, the 55th Respondent insists that the decisions were made *per incuriam* and ought to be given fresh consideration by the Court. Consequently, it seeks, in the cross appeal that we depart from these decisions and declare that Kenya's devolution model is federal.

[73] ***In the Matter of Interim Independent Electoral Commission***, [2011] eKLR this Court expressed its opinion on this question stating that;

> **"On the question whether election date is a matter of "county government', we have taken a broader view of the institutional arrangements under the Constitution as a whole; and it is clear to us that an independence of national and county governments is provided for through a devolution-model that rests upon a unitary, rather than a federal system of government....[We] have taken note too that the Senate (which brings together County interests at the national level) and the National Assembly (a typical organ of national government), deal expressly with matters affecting county government; and that certain crucial governance functions at both the national and county levels...dovetail into each other and operate in unity."** (Our Emphasis).

Next was, ***In the Matter of the Principle of Gender Representation in the National Assembly and the Senate***, [2012] eKLR, where once again this Court restated its early decision in; ***In the Matter of Interim Independent Electoral Commission*** (supra) that the Constitution did not alter Kenya's constitutional design from unitary to federal. Further, ***In the Matter of the Speaker of the Senate & another***, [2013] eKLR the Court reiterated that;

> **"[265] It is important from the onset to put into context, the structure of the county unit within the model of devolution crafted under the Constitution. The devolved system in Kenya is based on a unitary system of Government that decentralizes key functions and services to the county unit. The Kenyan State model is not federal in nature and does not envisage the workings of a county as a politically and financially independent state."**

[74] Finally, bound by these decisions, both the Court of Appeal and the High Court have also reaffirmed this position. In ***National Assembly of Kenya & another v Institute of Social Accountability & 6 others*** [2017] eKLR the Court of Appeal reaffirmed that position in the passage below:

> **"[24] It is quite obvious and indeed clear…that although Kenya is a constitutionally devolved State, <u>it does not have a federal constitution and that the county governments are not independent but semi-autonomous and an integral part of the unitary State,</u> exercising delegated sovereign power for purposes of governance".** (Our Emphasis).

See also the High Court's judgment in ***Royal Ballon Ltd v County Government of Narok*** [2018] eKLR, where the ratio enunciated in these cases was also applied.

[75] In the cross – appeal, we are essentially being invited to declare that, contrary to the previous decisions enumerated above, the Constitution creates a federal state in Kenya; and that these decisions were made *per incuriam*. If we apply the arguments in **Jasbir Singh Rai** (supra), the suggestion is that the earlier decisions by this Court were reached through ignorance or mistake, or that the Court was ill informed about the applicable law; and that had the Court reviewed the facts, it could have reached a different outcome. While the Court may depart from its previous decision if it is shown that such decision was given *per incuriam*, it is a serious suggestion that the apex court made a decision through ignorance or

was ill informed about the applicable law. This is how the Court explained the context of departure in the case of ***Jasbir Singh Rai*** (supra);

> **"[51] Comparative judicial experience shows that the decision of a superior Court is not to be perceived as having been arrived at *per incuriam*, merely because it is thought to be contrary to some broad principle, or to be out of step with some broad trend in the judicial process; the test of *per incuriam* is a strict one – the relevant decision having not taken into account some specific applicable instrument, rule or authority. A decision *per incuriam* is one rendered in ignorance of a constitutional or statutory prescription, or of a binding precedent: but if a decision be such, this, by and of itself, does not, perforce, render it "inappropriate", or "mistaken", or "wrong" – for the decision could still rest upon its own special merits, and be in every respect sustainable as a matter of principle".**

It cannot be said that in arriving at the conclusion that the Constitution does not create a federal government, the Court did not take into account some specific applicable instrument, rule or authority, or that all those decisions were rendered in ignorance of a constitutional or statutory prescription.

[76] By Article 163(7) of the Constitution, all courts, other than the Supreme Court itself, are bound by the decisions of the Supreme Court. Save for the "slip rule" in Section 21(4) of the Supreme Court Act, neither the Constitution, nor the Supreme Court Act confers upon the Supreme Court, powers, to review its decision. As the final Court, the Supreme Court will not review its own judgments, rulings, or orders, except in circumstances contemplated by Section 21(4) aforesaid, to correct any oversight or clerical error of computation or other error apparent on such judgment, ruling or order; that once it makes a final decision, the Court becomes *functus officio*, and will not entertain requests for further re-consideration of its decision, because litigation must come to an end. That is the general rule, To it the

Court has identified certain exceptions as explained in the case of ***Fredrick Otieno Outa v Jared Odoyo Okello & 3 others*** [2017] eKLR as follows;

> **"……the Court is clothed with inherent powers which it may invoke, if circumstances so demand, to do justice. The Constitution from which this Court, and indeed all Courts in the land, derive their legitimacy decrees that we must do justice to all… However, in exercise of its inherent powers, this Court may, upon application by a party, or on its own motion, review, any of its Judgments, Rulings or Orders, in exceptional circumstances, so as to meet the ends of justice. Such circumstances shall be limited to situations where:**
>
> **(i) the Judgment, Ruling, or Order, is obtained, by fraud or deceit;**
>
> **(ii) the Judgment, Ruling, or Order, is a nullity, such as, when the Court itself was not competent;**
>
> **(iii) the Court was misled into giving Judgment, Ruling or Order, under a mistaken belief that the parties had consented thereto;**
>
> **(iv) the Judgment or Ruling, was rendered, on the basis of a repealed law, or as a result of, a deliberately concealed statutory provision."**

[77] Though not bound by its decisions, the Supreme Court, being the apex court, will not lightly depart from or review its previous decisions, save to the extent explained in the highlighted passage above. Just as it is a serious matter to suggest that the decision of this Court was made *per incuriam,* it is equally not a simple matter for the Court to depart from its decisions that have been, over time applied as *ratio decidendi,* binding the courts below. We also restate the dictum in ***Samuel Kamau Macharia and Another v. Kenya Commercial Bank and 2 Others****,* [2012] eKLR that;

> **'[60]….the decisions of Kenya's Supreme Court, which ought always to be arrived at only after the most**

conscientious and detailed consideration, will stand as the binding reference-point in the norms governing the judicial process. Such a position is vital for the maintenance of the certainty, predictability, and jurisprudential standards that sustain the principles of the Constitution, and the rights and duties flowing from the legal set-up, and which provide sanctity for the legitimate actions of the people.

[61] As times, values, perceptions, and yardsticks of legitimacy and right, keep evolving, however, the Supreme Court retains a competence and discretion, when properly moved, and on weighty grounds, to reconsider its precedents, and to vary them as may be appropriate.'

This decision is also important for another reason. For the Court to reconsider its decision, it must not only be appropriately moved but also the grounds upon which it is moved must be weighty.

[78] Although the Court did not expressly direct what the phrase, '*when properly moved*' entails, it left no doubt that for the Court to depart from its previous decision, or for it to review its decision, it can only be moved by a formal application. This view was expressed in ***Fredrick Otieno Outa v Jared Odoyo Okello & 3 others*** [supra].

[79] How did this issue arise?

It is apparent from the judgment of the High Court, that the 55th Respondent was joined in the proceedings as an *amicus curiae*. It presented one specific argument; that the amendment and the Boards established pursuant to it were unconstitutional for the reasons that they offend the constitutional principle of division and separation of powers and secondly, that the conceptualisation and passage of the amendment was inimical to the constitutional principles of good governance and rule of law. There is no mention or consideration at all in that judgment, of the question before us, whether the Kenyan state created by the Constitution is federal or unitary in nature. The High Court, obviously for this

reason, did not express any opinion on the issue. Yet it has firmly stated by this Court, for instance in the case of ***Mohammed Mahamud Ali v Independent Electoral and Boundaries Commission***, [supra], that questions entailing the interpretation and application of the Constitution must for good order and efficiency in the administration of justice commence at the High Court, with the effect that such a question can only be raised before the Court of Appeal and the Supreme Court as an appeal from the decision of the High Court and eventually to this Court as a challenge to the determination of the Court of Appeal.

That process was not followed. Instead it is in the Court of Appeal that the 55th Respondent contended, for the first time, that the devolved system of government in Kenya is federal. In the judgment of that court, Mr. Dudley Ochiel, learned counsel for the 55th Respondent is recorded as having submitted, in one sentence, that the amendment **"violates the federal structure of the Constitution and interferes with the constitutional scheme of the two levels of government".** In one sentence, counsel for the appellant replied that **"it was erroneous for the 55th respondent to allege that Kenya has a federal constitution - the Constitution did not establish a federal state nor is it a federal constitution".** Counsel on both sides neither presented reasoned arguments nor cited any authorities. It was the court itself, in rejecting the contention, in one paragraph, that relied on the two decisions we have cited above, ***In The Matter of Interim Independent Electoral Commission*** [supra] and the ***National Assembly of Kenya & another -v- Institute of Social Accountability & 6 others*** [supra].

[80] Looking at this background, we do not think the issue, though important, was diligently prosecuted. It is now settled that, to move the Court to reconsider its previous decisions, an appropriate formal application must be made to it. Had the 55th Respondent considered this question to be important, it ought to have raised it in the first instance before the High Court, or taken out a motion before this

Court which would have afforded all parties sufficient opportunity to respond comprehensively to the contention. Raising the question for the first time in the Court of Appeal, we do not see how the 55th Respondent expected the Court of Appeal to overturn our two decisions which bind it in terms of Article 163(7) of the Constitution.

That said, the Court has laid down the following principles when considering an invitation to depart from its earlier decision.

[81] In ***Chris Munga N. Bichage v Richard Nyagaka Tong'i & 2 others;*** Petition No. 17 of 2014, [2016] eKLR, where the sole question was whether a quorum of more than five Judges is required to determine an application that seeks an order that the Court departs from its previous decision made by a bench of five judges. While the Court acknowledged as a good practice to have a larger bench to reconsider a precedent laid by a smaller bench, it noted that different practical considerations have conditioned the practice in some jurisdictions. In our situation, given the Court's numerical strength, limited to seven Judges, which on occasions may not sit as such, but as a five-Judge or seven-Judge Bench, the Court reiterated the position enunciated in ***Jasbir Singh Rai*** case (supra), that only in the most exceptional circumstances should the Court depart from the principle of *stare decisis;* that the Court will depart from its previous decision, for good cause, and only after taking into account legal considerations of significant weight;

> **"The Supreme Court Act has no specific provision requiring that on reviewing [the Court's] decision a greater number of Judges should sit….. and that it may sit, whether with its minimum quorum of five Judges or more".** (*per Ibrahim SCJ, in* ***Jasbir Singh Rai)***

[82] Further the Court has been categorical as noted earlier that, whereas it is essentially in public interest that a final judgment of the apex Court in the land should not be open to challenge, a departure from that principle may be justified only when circumstances of a substantial and compelling character make it

necessary to do so or where to decline a request to reconsider the judgment would be oppressive or occasion irremediable injustice.

[83] On the main question raised in the cross-appeal, we underline and affirm the principles in our past decisions on the issue in ***The Matter of Interim Independent Electoral Commission***, (supra), ***In the Matter of the Principle of Gender Representation in the National Assembly and the Senate***, (supra) and ***In the Matter of the Principle of Gender Representation in the National Assembly and the Senate***, (supra), that no additional material has been presented to us to reconsider the position consistently held by the Court in these decisions, that the Constitution does not create a federal state.

We add also that the preamble to the Constitution sums up as follows, the true expression of the will of the people of Kenya on the systems of government it creates;

> **"PROUD of our ethnic, cultural and religious diversity, and determined to live in peace and unity as one indivisible sovereign nation"**

The Constitution retains its supremacy, the sovereignty and unity of the people, as well as the oneness and indivisibility of the nation.

F. THE COUNTY GOVERNMENT (AMENDMENTS) Bill, 2021

[84] Although this appeal was argued on 7th July, 2021 none of the parties drew our attention to the existence of the County Governments (Amendments) Bill 2021, Senate Bill No. 38 of 2021, which had been introduced in the Senate by Senator Moses Kajwang' on 27th May 2021, a month before the hearing. The Bill, it appears to us to be an attempt to address the concerns brought about by the amendment and to comply with the courts decisions. The Bill, according to Senate Bill Tracker Portal, after its introduction in Senate on 27th May, 2021, it went through the 1st reading on the 14th July, 2021, and was referred to the Devolution and Inter-

Governmental Relations Committee of the Senate. It was scheduled for the 2nd reading on the 12th August, 2021. We do not know the current status of the Bill.

It is interesting to note that the Bill has renamed the Board, "County Leaders Forum". It makes the Governor the chairperson and the Senator the vice-chairperson of the Forum. The language used in describing the functions of the forum are carefully chosen to avoid the impression that the Forum has any executive mandate. The functions are purely advisory. The fate of Sections 91B and 91C is unclear as the Bill, in so far as this Petition is concerned only amends section 91A. What is significant however is that legislative steps are being taken to align the amendment to the Constitution.

G. CONCLUSION

[85] In conclusion, we underscore the constitutional principle of public participation as a national value. Participation permits citizen to take part in decision-making in matters that affect them. Members of Parliament (National Assembly and Senate) have specific and defined roles in the Constitution and relevant statutes, vis-à-vis, the counties. Senators represent and protect the interests of the counties through their law-making function by considering and approving Bills concerning counties. They also determine the allocation of national revenue among counties, in addition to providing oversight over national revenue allocated to the counties.

[86] Whereas the Senators play these roles in the Senate, at the national level, the county assembly plays an oversight role over the county's fiscal management at the county level.

[87] While the two levels of government must work in consultation and cooperation with each other, the Senators cannot oversight the County governments at the county level. That role is reserved for the County Assembly.

They cannot be involved in the co-coordination of programs that are purely county programs, or county project approvals or actual implementation of county projects as these are county executive functions. It is equally untenable for Senators, who oversight county resources from the national government, to convene and chair county committees. That is why the Constitution proclaims that, as between the two levels of government, there must be respect for the functional and institutional integrity.

[88] Parliament, as the institution with the legislative powers, is constitutionally bound to enact laws that assists and strengthens the county governments in the discharge of their roles. Laws made pursuant to that power must never have the effect of undermining the running of the county governments. Conversely, other organs of the national government must keep to their lanes as drawn by the Constitution and utilize the structures and channels in the Constitution to carry out their legislative and oversight duties and to trust the competence of the county governments' structures and organs to discharge theirs functions.

[89] Public participation is encouraged as a constitutional principle and as a national value. It permits the citizens and their political representatives to take part in decision-making in matters that affect them, like county planning, budget priorities and accountability.

[90] In enacting County Governments (Amendment) Act the Legislature may have had the noblest of intentions. However, that intention and the effect it produced has not met the constitutional test of validity.

[91] For the reasons above, we find no merit and reject both the main appeal and cross appeal.

H. ORDERS

Consequent upon our conclusion above, we finally order that;

i. ***The appeal dated 12th July, 2019 and the cross-appeal dated 21st January, 2020 are hereby dismissed.***

ii. ***Given the nature of this matter, being one of public interest, we order that each party shall bear their own costs.***

Orders accordingly.

DATED and **DELIVERED** at **NAIROBI** this **17th** Day of **February**, **2022.**

.....

M. K. KOOME
CHIEF JUSTICE & PRESIDENT
OF THE SUPREME COURT

.....
M.K. IBRAHIM
JUSTICE OF THE SUPREME COURT

.....
S. C. WANJALA
JUSTICE OF THE SUPREME COURT

.....
NJOKI NDUNGU
JUSTICE OF THE SUPREME COURT

.....
W. OUKO
JUSTICE OF THE SUPREME COURT

I certify that this is a
true copy of the original

REGISTRAR
SUPREME COURT OF KENYA