REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA AT NAIROBI

(Coram: Koome; CJ & P, Mwilu; DCJ & V-P, Ibrahim, Wanjala, Njoki, Lenaola & Ouko, SCJJ)

PETITION NO. 12 OF 2021

(CONSOLIDATED WITH PETITIONS 11 & 13 OF 2021)

–BETWEEN–

THE HON. ATTORNEY-GENERAL .....1ST APPELLANT

INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION .....2ND APPELLANT

MORARA OMOKE .....3RD APPELLANT

–AND–

DAVID NDII .....1ST RESPONDENT

JEROTICH SEII .....2ND RESPONDENT

JAMES GONDI .....3RD RESPONDENT

WANJIRU GIKONYO .....4TH RESPONDENT

IKAL ANGELEI .....5TH RESPONDENT

KENYA NATIONAL UNION OF NURSES .....6TH RESPONDENT

THIRDWAY ALLIANCE .....7TH RESPONDENT

MIRURI WAWERU .....8TH RESPONDENT

ANGELA MWIKALI .....9TH RESPONDENT

254 HOPE .....10TH RESPONDENT

JUSTUS JUMA .....11TH RESPONDENT

ISAAC OGOLA .....12TH RESPONDENT

SPEAKER OF THE NATIONAL ASSEMBLY .....13TH RESPONDENT

SPEAKER OF THE SENATE .....14TH RESPONDENT

THE NATIONAL ASSEMBLY .....15TH RESPONDENT

THE SENATE .....16TH RESPONDENT

THE STEERING COMMITTEE ON THE IMPLEMENTATION OF THE BUILDING BRIDGES TO A UNITED KENYA TASKFORCE .....17TH RESPONDENT

BUILDING BRIDGES TO A UNITED KENYA, NATIONAL SECRETARIAT .....18TH RESPONDENT

ISAAC ALUOCHIER .....19TH RESPONDENT

H.E. UHURU KENYATTA .....20TH RESPONDENT

HON. RAILA ODINGA .....21ST RESPONDENT

PUBLIC SERVICE COMMISSION .....22ND RESPONDENT

THE AUDITOR GENERAL .....23RD RESPONDENT

MUSLIMS FOR HUMAN RIGHTS (MUHURI) .....24TH RESPONDENT

COUNTY ASSEMBLY OF MOMBASA .....25TH RESPONDENT

COUNTY ASSEMBLY KWALE .....26TH RESPONDENT

COUNTY ASSEMBLY KILIFI .....27TH RESPONDENT

COUNTY ASSEMBLY OF TANA RIVER .....28TH RESPONDENT

COUNTY ASSEMBLY OF LAMU .....29TH RESPONDENT

COUNTY ASSEMBLY OF TAITA TAVETA .....30TH RESPONDENT

COUNTY ASSEMBLY OF GARISSA .....31ST RESPONDENT

COUNTY ASSEMBLY OF WAJIR .....32ND RESPONDENT

COUNTY ASSEMBLY OF MANDERA .....33RD RESPONDENT

COUNTY ASSEMBLY OF MARSABIT .....34TH RESPONDENT

COUNTY ASSEMBLY OF ISIOLO .....35TH RESPONDENT

COUNTY ASSEMBLY OF MERU .....36TH RESPONDENT

COUNTY ASSEMBLY OF THARAKA –NITHI .....37TH RESPONDENT

COUNTY ASSEMBLY OF EMBU .....38TH RESPONDENT

COUNTY ASSEMBLY OF KITUI .....39TH RESPONDENT

COUNTY ASSEMBLY OF MACHAKOS .....40TH RESPONDENT

COUNTY ASSEMBLY OF MAKUENI .....41ST RESPONDENT

COUNTY ASSEMBLY OF NYANDARUA .....42ND RESPONDENT

COUNTY ASSEMBLY OF NYERI .....43RD RESPONDENT

COUNTY ASSEMBLY OF KIRINYANGA .....44TH RESPONDENT
COUNTY ASSEMBLY OF MURANG'A .....45TH RESPONDENT
COUNTY ASSEMBLY OF KIAMBU .....46TH RESPONDENT
COUNTY ASSEMBLY OF TURKANA .....47TH RESPONDENT
COUNTY ASSEMBLY OF WEST POKOT .....48TH RESPONDENT
COUNTY ASSEMBLY OF SAMBURU .....49TH RESPONDENT
COUNTY ASSEMBLY OF TRANS NZOIA .....50TH RESPONDENT
COUNTY ASSEMBLY OF UASIN GISHU .....51ST RESPONDENT
COUNTY ASSEMBLY OF ELGEYO MARAKWET.....52ND RESPONDENT
COUNTY ASSEMBLY OF NANDI .....53RD RESPONDENT
COUNTY ASSEMBLY OF BARINGO .....54TH RESPONDENT
COUNTY ASSEMBLY OF LAIKIPIA .....55TH RESPONDENT
COUNTY ASSEMBLY OF NAKURU .....56TH RESPONDENT
COUNTY ASSEMBLY OF NAROK .....57TH RESPONDENT
COUNTY ASSEMBLY OF KAJIADO .....58TH RESPONDENT
COUNTY ASSEMBLY OF KERICHO .....59TH RESPONDENT
COUNTY ASSEMBLY OF BOMET .....60TH RESPONDENT
COUNTY ASSEMBLY OF KAKAMEGA .....61ST RESPONDENT
COUNTY ASSEMBLY OF VIHIGA .....62ND RESPONDENT
COUNTY ASSEMBLY OF BUNGOMA .....63RD RESPONDENT
COUNTY ASSEMBLY OF BUSIA .....64TH RESPONDENT
COUNTY ASSEMBLY OF SIAYA .....65TH RESPONDENT
COUNTY ASSEMBLY OF KISUMU .....66TH RESPONDENT
COUNTY ASSEMBLY OF HOMA BAY .....67TH RESPONDENT
COUNTY ASSEMBLY OF MIGORI .....68TH RESPONDENT
COUNTY ASSEMBLY OF KISII .....69TH RESPONDENT
COUNTY ASSEMBLY OF NYAMIRA .....70TH RESPONDENT
COUNYT ASSEMBLY OF NAIROBI CITY .....71ST RESPONDENT
PHYLISTER WAKESHO .....72ND RESPONDENT
THE NATIONAL EXECUTIVE .....73RD RESPONDENT
DR. DUNCAN OJWANG .....74TH RESPONDENT
DR. JOHN OSOGO AMBANI .....75TH RESPONDENT

DR. LINDA MUSUMBA .....76TH RESPONDENT
DR. JACK MWIMALI .....77TH RESPONDENT
KENYA HUMAN RIGHTS COMMISSION .....78TH RESPONDENT
KITUO CHA SHERIA .....79TH RESPONDENT
BUILDING BRIDGES TO A
UNITED KENYA TASKFORCE .....80TH RESPONDENT

—AND—

PROF. ROSALIND DIXON .....1ST *AMICUS CURIAE*
PROF DAVID E. LANDAU .....2ND *AMICUS CURIAE*
GAUTAM BHATIA .....3RD *AMICUS CURIAE*
PROF. MIGAI AKECH .....4TH *AMICUS CURIAE*
PROF. RICHARD ALBERT .....5TH *AMICUS CURIAE*
PROF. YANIV ROZNAI .....6TH *AMICUS CURIAE*
PROF. CHARLES MANGA FOMBAD .....7TH *AMICUS CURIAE*
DR. ADEM K. ABEBE .....8TH *AMICUS CURIAE*

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*(Being an appeal from the Judgment and Orders of the Court of Appeal at Nairobi (**Musinga; P, Nambuye, Okwengu, Kiage, Gatembu, Sichale & Tuiyott, JJ.A**) delivered on 20th August, 2021 in Civil Appeal No. E291 of 2021 as consolidated with Civil Appeal Nos. E292, E293 & E294 of 2021)*

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

A. INTRODUCTION

[1] On 27th August 2010, in what may be fittingly depicted as a symbol of national rebirth and renewal, Kenya promulgated a new Constitution which has been described world over as progressive. This moment marked a historic transition from the old order to a new one. The Constitution,2010 (**the**

Constitution) represents the people's aspirations, laid out in the text of its Preamble, Articles and Schedules. It is a framework for the realization of a shared vision and common agenda. The Constitution spells out far reaching fundamental institutional and other reforms meant to sustain human rights, equality, freedom, democracy, social justice and the rule of law for the present and future generations.

[2] The history behind the making of the Constitution cannot be buried and forgotten as it continues to reverberate as the debate and discussions around its amendment harks back to the processes and sacrifices that were made by the Kenyan people over many decades during the search for a new constitutional order. Indeed, the Preamble thereto reminds us of "***HONOURING those who heroically struggled to bring freedom and justice to our land***".

[3] It is the attempt to amend the Constitution as proposed in a document dubbed "Constitution of Kenya (Amendment) Bill, 2020" (**the Amendment Bill**) which led to the instant appeals before this Court. The Amendment Bill is at the core of the dispute that has engaged all the superior courts on the question of interpretation and application of the Constitution with regard to not only the provisions of Chapter Sixteen that provides for amendment of the Constitution, but also the entire body thereto as the canons of interpretation provided under Article 259 (3) enjoins courts to *inter alia* consider:

> "***Every provision of this Constitution shall be construed according to the doctrine of interpretation that the law is always speaking …***"

[4] This means that the Constitution is always speaking to the present and future generations. Therefore, in discharging their interpretive mandate within the framework of a legal dispute before them, courts are required to uphold the Constitution by breathing life to all its provisions whilst promoting the dreams and aspirations of the Kenyan people in a manner that is consistent with the Constitution. In addition, it is envisaged that the approach to interpretation of the

Constitution adopted by a court should not render any Article or any provisions thereto superfluous or ineffective. Consequently, as the apex Court in the land and custodian of the Constitution, it is not lost to this Court that we are being called upon to provide an impartial and authoritative determination which will guide and act as an interpretative compass to the courts below, state agencies and all persons with respect to the questions before it.

[5] Before delving into our mandate under Article 163(4)(a) of the Constitution, as invoked by the appellants, it is instructive to place the appeals in context by setting out a brief background to the dispute.

B. BACKGROUND

[6] It is no secret that in striving to promote and strengthen our democracy, a number of attempts have been made to amend the Constitution. Of significance, is that there have been a total of three attempts to amend the Constitution by way of popular initiative under Article 257 of the Constitution. These are: Constitution of Kenya, 2010 (Amendment) Bill, 2015 (**the Okoa Kenya initiative**); Punguza Mizigo (Constitution of Kenya Amendment) Bill, 2019 (**the Punguza Mizigo initiative**); and more recently, the Amendment Bill. The first two initiatives failed for not garnering the requisite support at various stages of the amendment process while the Amendment Bill was subjected to the court process culminating in the instant appeals. Besides the above attempts under the popular initiative, there have been more than a dozen other unsuccessful attempts to amend various Articles of the Constitution since 2011 through the parliamentary initiative route under Article 256.

[7] The instant appeals concern the Amendment Bill whose genesis can be traced to the outcome of the 2017 presidential elections. Following the initial and repeat presidential elections in 2017, His Excellency Hon. Uhuru Kenyatta, the President and Commander in Chief of the Kenya Defence Forces (**the President**) embarked

on uniting a divided Nation, which led to the reconciliation famously known as the *'Handshake'* between Hon. Raila Odinga, the then leader of the opposition coalition, and himself on 9th March, 2018. In line with their mutual commitment to create and foster a united Kenya, the President and Hon. Raila Odinga released a Joint Communiqué known as **Building Bridges to a new Kenyan Nation** highlighting nine problem areas which they deemed as negatively impacting on peace and unity in the Nation**.**

[8] Subsequently, the President established **the Building Bridges to Unity Advisory Taskforce** (**the BBI Taskforce**) vide Gazette Notice No. 5154 dated 24th May, 2018**.** Its mandate was to evaluate the nine identified problematic areas and make policy, administrative and reform proposals that would build lasting unity based on consultations with citizens. Towards that end, on 26th November, 2019 the BBI Taskforce presented its report **'Building Bridges to a United Kenya: from a Nation of blood ties to a nation of ideals'** (**the BBI Taskforce Report**) to the President and Hon. Raila Odinga which was unveiled to the public on 27th November, 2019**.**

[9] Intent on the implementation of the proposals in the BBI Taskforce Report, the President appointed **the Steering Committee on the Implementation of the Building Bridges to a United Kenya Taskforce Report** (**the BBI Steering Committee**) vide Gazette Notice No. 264 dated 3rd January, 2020**.** The main objectives of the BBI Steering Committee were to undertake validation of the BBI Taskforce Report with citizens as well as propose administrative, policy, statutory or constitutional changes it thought necessary for the implementation of the recommendations contained therein**.**

[10] On completing its mandate, the BBI Steering Committee presented its report, '**The Report of the Steering Committee on the Implementation of the Building Bridges to a United Kenya Taskforce Report**' (**the BBI Steering Committee Report**) on 21st October, 2020. Annexed to the report were a number

of documents including a draft Constitution of Kenya (Amendment) Bill, 2020 (**the BBI Steering Committee Draft Bill**) and proposed legislative amendment Bills.

[11] Somewhere along the line, the BBI Steering Committee Draft Bill was reviewed culminating in the Amendment Bill which was published by the Government Printer about a month later on 25th November, 2020. Thereafter, the Building Bridges to a United Kenya, National Secretariat (**the BBI National Secretariat**) put in motion the process of collecting signatures in support of the Amendment Bill. Upon collection of the requisite number of signatures, the BBI National Secretariat submitted the same together with the Amendment Bill to the Independent Electoral and Boundaries Commission (**IEBC**) for verification and thereafter, submission to the County Assemblies and Parliament for approval.

C. LITIGATION HISTORY

(i) At the High Court

[12] While the amendment process was ongoing, eight (8) petitions were filed before the High Court challenging the constitutionality of the process which resulted in the Amendment Bill and the contents thereof. Seven petitions were consolidated on 21st January, 2021 while the eighth one was consolidated with the rest on 10th March, 2021. Kenya Human Rights Commission and four Law Professors, Dr. Duncan Ojwang', Dr. John Osogo Ambani, Dr. Linda Musumba and Dr. Jack Mwimali were joined as *amici curiae;* while Kituo Cha Sheria and Phylister Wakesho were joined as interested parties.

[13] Most of the petitions raised more or less similar issues which can be summarized as follows:

(a) Petition No. E282 of 2020, David Ndii & Others v. Attorney General & Others

[14] The questions raised by David Ndii, Jerotich Seii, James Gondi, Wanjiru Gikonyo and Ikal Angelei (**the 1st to 5th respondents**) were whether the basic structure doctrine and its corollary doctrines were applicable in Kenya as far as amendments of the Constitution are cornered; whether by virtue of the doctrine(s) there was an implied limitation to the powers of amending the Constitution under Chapter Sixteen (Articles 255-257); and whether certain provisions of the Constitution were not amendable under Chapter Sixteen of the Constitution.

(b) Petition No. E397 of 2020, Kenya National Union of Nurses (KNUN) v. Steering Committee of BBI & Others

[15] KNUN was aggrieved by the failure to include its proposal that called for establishment of an independent and constitutionally anchored Health Service Commission in the BBI Steering Committee Report as well as the Amendment Bill. In that regard, it raised the issues; whether the BBI Steering Committee was duty bound to include its proposal; and whether by disregarding the said proposal, the BBI Steering Committee's action was an unfair administrative neglect of duty and abuse of powers.

(c) Petition No. E400 of 2020, Thirdway Alliance Kenya & Others v. Steering Committee of BBI & Others

[16] Of concern to Thirdway Alliance, Mururi Waweru and Angela Mwikali (**the 7th to 9th respondents**) was whether an amendment to the Constitution through a popular initiative could be originated by state actors, in particular, the President; whether a popular initiative could be originated and undertaken without a guiding

legal framework; whether there was need of civic education on the Amendment Bill prior to collection of signatures in support thereof; and whether County Assemblies could alter or improve the contents of an amendment bill.

(d) Petition. E401 of 2020, 254 Hope v. The National Executive of the Republic of Kenya

[17] 254 Hope similarly sought a determination of whether the National Executive or any state organ could commence a popular initiative and utilize public funds in the process.

(e) Petition No. E402 of 2020, Justus Juma & Isaac Ogola v. Attorney General & Others

[18] Justus Juma and Isaac Ogola (**the 11th and 12th respondents**) were aggrieved with the creation of 70 additional constituencies; in particular, the Second Schedule attached to the Amendment Bill which they termed as unconstitutional and a usurpation of IEBC's constitutional mandate.

(f) Petition No. E416 of 2020, Morara Omoke v. Raila Odinga & Others

[19] On his part, Morara Omoke sought a determination of whether IEBC had the requisite quorum to consider and approve policy matters relating to verification of signatures in support of the Amendment Bill and conduct of a referendum; whether the Amendment Bill could be submitted to County Assemblies and Parliament for consideration as well as be subjected to a referendum in the absence of a legal framework facilitating the same; whether the Amendment Bill could be subjected to a referendum before a nationwide voter registration exercise; whether

the use of public funds by the President and Hon. Raila Odinga in the initiation and facilitation of the amendment process was constitutional; and whether Parliament had the requisite capacity to consider the Amendment Bill following the former Chief Justice's, Hon. Mr. Justice David Maraga, advisory opinion to the President to dissolve Parliament for failing to comply with the two thirds gender representation principle.

(g) Petition No. E426 of 2020, Isaac Aluochier v. Uhuru Muigai Kenyatta & Others

[20] In addition to seeking clarification on the President's suitability to initiate a popular initiative, Isaac Aluochier's (**the 19th respondent**) petition also raised issues on whether civil court proceedings could be instituted against the President or a person performing the functions of the office of the President during their tenure of office; and whether the BBI Steering Committee had legal capacity to promote a popular initiative pursuant to Article 257 of the Constitution.

(h) Petition No. 2 of 2021, Muslims for Human Rights (MUHURI) v. Independent Electoral Boundaries Commission (IEBC) & Others

[21] Last but not least, MUHURI's major concern was a determination of whether IEBC could undertake verification of signatures in support of a popular initiative without an enabling legal framework to that effect.

[22] In opposition to the petitions, the competency of the petitions was challenged on the grounds that issues raised were not justiciable since the amendment process was still ongoing and some of the issues were either *res judicata* or *sub judice*. It was argued that the Constitution could be amended as prescribed under Chapter

Sixteen hence the basic structure doctrine and its corollary doctrines were not applicable in Kenya; that there was adequate legal framework regulating the collection and presentation of signatures in support the Amendment Bill as well verification of signatures; that there was no legitimate expectation in favour of KNUN entitling it to the inclusion of its proposal to the BBI Steering Committee Report or the Amendment Bill; and the Amendment Bill had been formulated in accordance with the Constitution.

[23] Based on the foregoing, the High Court outlined thirteen (13) issues for its consideration and ultimately, by a Judgment dated 13th May, 2021 allowed the petitions in part. In that regard, the High Court issued the following Orders:

"

i. *A declaration hereby issues:*

   (a) That the Basic Structure Doctrine is applicable in Kenya.

   (b) That the Basic Structure limits the amendment power set out in Articles 255 – 257 of the Constitution. In particular, the Basic Structure Doctrine limits the power to amend the Basic Structure of the Constitution and eternity clauses.

   (c) That the Basic Structure of the Constitution and eternity clauses can only be amended through the Primary Constituent Power which must include four sequential processes namely: civic education; public participation and collation of views; Constituent Assembly debate; and ultimately, a referendum.

ii. *A declaration is hereby made that civil Court proceedings can be instituted against the President or a person*

performing the functions of the office of President during their tenure of office in respect of anything done or not done contrary to the Constitution.

iii. *A declaration is hereby made that the President does not have authority under the Constitution to initiate changes to the Constitution, and that a constitutional amendment can only be initiated by Parliament through a Parliamentary initiative under Article 256 or through a Popular Initiative under Article 257 of the Constitution.*

iv. *A declaration is hereby made that the Steering Committee on the Implementation of the Building Bridges to a United Kenya Taskforce Report established by the President vide Kenya Gazette Notice No. 264 of 3 January, 2020 and published in a special issue of the Kenya Gazette of 10 January, 2020 is an unconstitutional and unlawful entity.*

v. *A declaration is hereby made that being an unconstitutional and unlawful entity, the Steering Committee on the Implementation of the Building Bridges to a United Kenya Taskforce Report, has no legal capacity to initiate any action towards promoting constitutional changes under Article 257 of the Constitution.*

vi. *A declaration is hereby made that the entire BBI Process culminating with the launch of the Constitution of Kenya Amendment Bill, 2020 was done unconstitutionally and in usurpation of the People's exercise of Sovereign Power.*

vii. *A declaration is hereby made that Mr. Uhuru Muigai Kenyatta contravened Chapter 6 of the Constitution, and specifically Article 73(1)(a)(i), by initiating and promoting a*

constitutional change process contrary to the provisions of the Constitution on amendment of the Constitution.

viii. *A declaration is hereby made that the entire unconstitutional constitutional change process promoted by the Steering Committee on the Implementation of the Building Bridges to a United Kenya Taskforce Report was unconstitutional, null and void.*

ix. *A declaration is hereby made that the Constitution of Kenya Amendment Bill, 2020 could not be subjected to a referendum before the Independent Electoral and Boundaries Commission carries out nationwide voter registration exercise.*

x. *A declaration is hereby made that the Independent Electoral and Boundaries Commission does not have quorum stipulated by section 8 of the IEBC Act as read with paragraph 5 of the Second Schedule to the Act for purposes of carrying out its business relating to the conduct of the proposed referendum including the verification of signatures in support of the Constitution of Kenya Amendment Bill under Article 257(4) of the Constitution submitted by the Building Bridges Secretariat.*

xi. *A declaration is hereby made that at the time of the launch of the Constitutional of Kenya Amendment Bill, 2020 and the collection of endorsement signatures there was no legislation governing the collection, presentation and verification of signatures nor a legal framework to govern the conduct of referenda.*

xii. *A declaration is hereby made that the absence of a legislation or legal framework to govern the collection, presentation and verification of signatures and the conduct of referenda in the circumstances of this case renders the attempt to amend the Constitution of Kenya through the Constitution of Kenya Amendment Bill, 2020 flawed.*

xiii. *A declaration is hereby made that County Assemblies and Parliament cannot, as part of their constitutional mandate to consider a Constitution of Kenya Amendment Bill initiated through a Popular Initiative under Article 257 of the Constitution, change the contents of such a Bill.*

xiv. *A declaration be and is hereby made that the Second schedule to the Constitution of Kenya (Amendment) Bill, 2020 in so far as it purports to predetermine the allocation of seventy constituencies is unconstitutional.*

xv. *A declaration be and is hereby made that the Second schedule to the Constitution of Kenya (Amendment) Bill, 2020 in so far as it purports to direct the Independent Electoral and Boundaries Commission on its function of constituency delimitation was unconstitutional.*

xvi. *A declaration be and is hereby made that the Second schedule to the Constitution of Kenya (Amendment) Bill, 2020 in so far as it purports to have determined by delimitation the number of constituencies and apportionment within the counties is unconstitutional for want of Public Participation.*

xvii. *A declaration is hereby made that Administrative Procedures for the Verification of Signatures in Support of Constitutional Amendment Referendum made by the Independent Electoral*

Boundaries Commission are illegal, null and void because they were made without quorum, in the absence of legal authority and in violation of Article 94 of the Constitution and Sections 5, 6 and 11 of the Statutory Instruments Act, 2013.

xviii. *A declaration is hereby made that Article 257(10) of the Constitution requires all the specific proposed amendments to the Constitution be submitted as separate and distinct referendum questions to the People.*

xix. *A permanent injunction be and is hereby issued restraining the Independent Electoral and Boundaries Commission from undertaking any processes required under Article 257(4) and (5) in respect of the Constitution of Kenya (Amendment) Bill 2020.*

xx. *The prayer for an order that Mr. Uhuru Muigai Kenyatta makes good public funds used in the unconstitutional constitutional change process promoted by the Steering Committee on the Implementation of the Building Bridges to a United Kenya Taskforce Report established by Mr. Uhuru Muigai Kenyatta is declined for reasons that have been given.*

xxi. *The prayer for the orders that the Honorable Attorney General to ensure that public officers who have directed or authorized the use of public funds in the unconstitutional constitutional change process promoted by the Steering Committee on the Implementation of the Building Bridges to a United Kenya Taskforce Report make good the said funds is declined from the reasons that have been given.*

xxii. *The rest of the reliefs in the Consolidated Petitions not specifically granted are deemed to have been declined.*

xxiii. This being a public interest matter, parties shall bear their own costs."

(ii) At the Court of Appeal

[24] Dissatisfied with the determination of the High Court, four appeals were filed before the Court of Appeal namely:

(a) Civil Appeal No. E291 of 2021, Independent Electoral Boundaries Commission (IEBC) v. David Ndii & 82 Others

[25] IEBC vide its twelve (12) grounds of appeal challenged the High Court's findings contending that the court erred by *inter alia* finding that; it lacked quorum to undertake its constitutional and statutory mandate; its role under Article 257(4) entailed verification of the authenticity of the signatures tendered in support of a popular initiative; there was a requirement for it to undertake a nationwide voter registration exercise for the intended referendum; and it had an obligation to ensure that the promoters of the Amendment Bill had complied with the requirement of public participation before transmitting the same to the County Assemblies.

(b) Civil Appeal No. E292 of 2021, Building Bridges to a United Kenya, National Secretariat & Another v. David Ndii & 76 Others

[26] The nineteen (19) grounds of appeal raised by the BBI National Secretariat and Hon. Raila Odinga are rather prolix and repetitive. I will nonetheless summarize them as follows; that the High Court erred for; holding that the basic structure doctrine and its corollary doctrines were applicable; introducing a

mandatory four sequence amendment process unknown to the Constitution; imposing an obligation on the promoters of the Amendment Bill to conduct nationwide public participation exercise prior to collection of signatures in support of the amendment initiative; misinterpreting the role of the President in a popular initiative; misconstruing that Article 257(10) requires separate and distinct referendum questions as opposed to a Bill being put to the people in a referendum; and usurping the people's sovereign power as far as the issue of delimitation and distribution of constituencies was concerned.

(c) Civil Appeal No. 293 of 2021, The Hon. Attorney General v. David Ndii & 73 Others

[27] The Attorney General raised thirty-one (31) grounds of appeal faulting the High Court on similar grounds as IEBC, the BBI National Secretariat and Hon. Raila Odinga. In addition, the appeal was premised on the grounds that the High Court erred in holding that the Amendment Bill was not consistent with the provisions of the Constitution; that the President can be sued in his personal capacity; and that he had contravened Chapter Six of the Constitution and for issuing orders against the President without according him an opportunity to be heard contrary to Article 50(1) of the Constitution.

(d) Civil Appeal No. E294 of 2021, Uhuru Muigai Kenyatta v. David Ndii & 82 Others

[28] The President's seventeen (17) grounds of appeal were centered on the findings made against him. In particular, he took issue with the High Court for condemning him unheard; for misapprehending the scope and extent of presidential immunity enshrined under Article 143 of the Constitution; and

proceeding to hear and determine the issue of legality of the BBI Taskforce and BBI Steering Committee which was *res judicata* by virtue of ***Thirdway Alliance Kenya & Another v. the Head of the Public Service – Joseph Kinyua & 2 Others; Martin Kimani & 15 Others (Interested Parties),*** H.C Constitutional Petition No. 451 of 2018; [2020] eKLR (***Thirdway Alliance Case).***

[29] On 3rd June, 2021 the aforementioned appeals were consolidated and Civil Appeal No. E291 of 2021 was designated as the lead file. Thereafter, the following cross appeals were filed:

(e) Cross Appeal by KNUN

[30] The gist of this cross appeal, which was premised on six (6) grounds, was that the High Court erred by ignoring and misapprehending the doctrine of *stare decisis*; finding that KNUN's petition was unmerited; and failing to take judicial notice of the state of health care in Kenya.

(f) Cross Appeal by 254 Hope

[31] 254 Hope challenged the High Court's decision in part for failing to declare that, proposals made by the National Executive or any of its taskforces to amend the Constitution are subject to Article 47 of the Constitution; and there was violation or at the very least a threatened violation of prudent use of public resources (human and financial) when the National Executive initiated the amendment in issue.

(g) Cross Appeal by Morara Omoke

[32] Mr. Morara Omoke faulted the High Court for declining to direct; the BBI Steering Committee, the President and Hon. Raila Odinga to publish particular details of the budget as well as the public funds allocated and utilized in the promotion of the Amendment Bill; the Auditor General to establish the amount of

public funds utilized in the promotion of the Amendment Bill; and the President to make good public funds utilized in the process which culminated in the Amendment Bill. He also took issue with High Court's failure to declare that Parliament had no legal or constitutional capacity to debate and either approve or disapprove the Amendment Bill in light of the retired Chief Justice's, Hon. Mr. Justice David Maraga, advise for its dissolution.

[33] In determining the aforementioned appeals the Court of Appeal framed twenty-one (21) issues which were considered by a bench of seven Judges who rendered their own individual opinions. However, the conclusions and their findings were pronounced in the lead judgment of *Musinga, (P)* dated 20th August, 2021 as follows:

> *"A. We uphold the judgment of the High Court to the extent that we affirm the following:*
>
> *i. The basic structure doctrine is applicable in Kenya. (Sichale, J. A. dissenting).*
>
> *ii. The basic structure doctrine limits the amendment power set out in Articles 255 – 257 of the Constitution. (Okwengu & Sichale, JJ.A. dissenting).*
>
> *iii. The basic structure of the Constitution can only be altered through the Primary Constituent Power which must include four sequential processes namely: civic education; public participation and collation of views; Constituent Assembly debate; and ultimately, a referendum. (Okwengu, Gatembu & Sichale, JJ. A. dissenting).*
>
> *iv. Civil Court proceedings can be instituted against the President or a person performing the functions of the office of President during their tenure of office in respect of*

anything done or not done contrary to the Constitution. (Tuiyott, J.A. dissenting).

v. *The President does not have authority under the Constitution to initiate changes to the Constitution, and that a constitutional amendment can only be initiated by Parliament through a Parliamentary initiative under Article 256 or through a popular initiative under Article 257 of the Constitution.*

vi. *The Steering Committee on the Implementation of the Building Bridges to a United Kenya Taskforce Report (The BBI Steering Committee) has no legal capacity to initiate any action towards promoting constitutional changes under Article 257 of the Constitution.*

vii. *The Constitution of Kenya (Amendment) Bill, 2020 is unconstitutional and a usurpation of the People's exercise of sovereign power.*

viii. *The Constitution of Kenya (Amendment) Bill, 2020 cannot be subjected to a referendum in the absence of evidence of continuous voter registration by the Independent Electoral and Boundaries Commission. (Sichale, J.A. dissenting).*

ix. *The Independent Electoral and Boundaries Commission does not have the requisite quorum for purposes of carrying out its business relating to the conduct of the proposed referendum, including the verification whether the initiative as submitted by the Building Bridges Secretariat is supported by the requisite number of registered voters in accordance with Article 257(4) of the Constitution. (Sichale, J.A. dissenting).*

x. *At the time of the launch of the Constitution of Kenya (Amendment) Bill, 2020 and the collection of endorsement signatures there was neither legislation governing the collection, presentation, and verification of signatures, nor an adequate legal/regulatory framework to govern the conduct of referenda. (Sichale, J.A. dissenting).*

xi. *County Assemblies and Parliament cannot, as part of their constitutional mandate, change the contents of the Constitution of Kenya Amendment Bill, 2020 initiated through a popular initiative under Article 257 of the Constitution.*

xii. *The second schedule to the Constitution of Kenya (Amendment) Bill, 2020 in so far as it purports to: predetermine the allocation of the proposed additional seventy constituencies, and to direct the Independent Electoral and Boundaries Commission on its function of constituency delimitation, is unconstitutional. (Sichale, J.A. dissenting).*

xiii. *The Administrative Procedures for the verification of signatures in support of the Constitution Amendment Referendum made by the Independent Electoral and Boundaries Commission are illegal, null and void because they were made without quorum and in violation of Sections 5, 6 and 11 of the Statutory Instruments Act, 2013. (Sichale, J.A. dissenting).*

xiv. *A permanent injunction be and is hereby issued restraining the Independent Electoral and Boundaries Commission from undertaking any processes required under Article*

257(4) and (5) in respect of the Constitution of Kenya (Amendment) Bill, 2020.

B. We hereby set aside the following declarations and orders of the High Court:

i. That President, Uhuru Muigai Kenyatta has contravened Chapter 6 of the Constitution, and specifically Article 73(1)(a)(i), by initiating and promoting a constitutional change process contrary to the provisions of the Constitution on amendment of the Constitution.

ii. That Article 257(10) of the Constitution requires all the specific proposed amendments to the Constitution be submitted as separate and distinct referendum questions to the People. (Nambuye, Okwengu & Kiage, JJ.A. dissenting).

iii. The BBI Steering Committee established by the President vide Kenya Gazette Notice No. 264 of 3rd January 2020 and published in a special issue of the Kenya Gazette of 10th January 2020 is an unconstitutional and unlawful entity.

C. The Cross appeals fail and are hereby dismissed.

This being a public interest matter, the parties shall bear their own costs in these appeals and in the High Court."

(ii) At the Supreme Court

[34] The above outcome dissatisfied some parties hence three appeals were filed challenging the same. More specifically, ***Petition No.11 (E015) of 2021- Morara Omoke v. H.E. Uhuru Muigai Kenyatta & 83 Others*** dated 15th

September, 2021 was filed on 23rd September, 2021 by Morara Omoke; ***Petition No. 12 of 2021 (E016 of 2021)- The Attorney General v. David Ndii & 73 Others*** dated 30th September, 2021 was lodged on 1st October, 2021 by the Attorney General; and ***Petition No. 13 Of 2021 (E108 of 2021)- Independent Electoral and Boundaries Commission v. David Ndii & 81 Others*** dated 30th September, 2021 was lodged on 4th October, 2021 by IEBC. These appeals raised several grounds and sought a variety of reliefs.

[35] On 9th November, 2021 this Court consolidated the three appeals designating Petition No. 12 of 2021 by the Attorney General as the lead file; and joined the 1st-8th *amici curiae* to the proceedings. In addition, based on the grounds raised in the consolidated appeal, the Court framed seven (7) issues for determination namely:

(i) Whether the Basic Structure Doctrine is applicable in Kenya; if so, the extent of its application; whether the basic structure of the Constitution can only be altered through the primary constituent power; and what constitutes the primary constituent power;

(ii) Whether the President can initiate changes/amendments to the Constitution; and whether a constitutional amendment can only be initiated by Parliament through a parliamentary initiative under Article 256 of the Constitution or through a popular initiative under Article 257 of the Constitution;

(iii) Whether the Second Schedule to the Constitution of Kenya (Amendment) Bill, 2020 was unconstitutional;

(iv) Whether civil proceedings can be instituted against the President or a person performing the functions of the office of the President during his/her tenure of office with regard to anything done or not done contrary to the Constitution;

(v) *The place of public participation under Article 10 vis-a- vis the role of IEBC under Article 257(4) of the Constitution; and whether there was public participation in respect of the Constitution of Kenya (Amendment) Bill, 2020;*

(vi) *Interpretation of Articles 88 and 250 of the Constitution with respect to composition and quorum of IEBC; and*

(vii) *Whether the interpretation of Article 257(10) of the Constitution entails/requires that all specific proposed amendments to the Constitution should be submitted as separate and distinct referendum questions.*

[36] Parties were directed to file their written submissions and make oral highlights on the above issues while the *amici curiae* participation was restricted to the written briefs they had attached in their respective applications for joinder to the proceedings. Be that as it may, it came to the Court's attention that some of the respondents (Dr. Duncan Ojwang', Dr. John Osogo Ambani, Dr. Linda Musumba, Dr. Jack Mwimali and Kenya Human Rights Commission, (**the 74th, 75th, 76th, 77th and 78th respondents** respectively)) in the consolidated appeal had actually been initially joined at the High Court as *amici curiae* but somehow on appeal to the Court of Appeal they were named as respondents, essentially designating them as parties, to the appeal.

[37] It is well settled that a person admitted as *amicus curiae* is not a party to the proceedings but acts as a friend of the Court and the extent of their participation in the proceedings is limited by the Court. See ***Trusted Society of Human Rights Alliance v. Mumo Matemo & 5 Others***, SC Petition No. 12 of 2013; [2015] eKLR. It follows therefore, *amicus curiae* cannot be converted to a party even at the appellate stage. Having joined the proceedings as *amicus curiae* one remains so at every stage of litigation. Consequently, I concur with the

observations of *Gatembu, J.A* that *amici curiae* who had been joined at the High Court should not have been made parties in the appeals at the Court of Appeal.

[38] It is precisely for that reason that this Court restricted the participation of the 74th, 75th, 76th, 77th and 78th respondents in the appeal before this Court, to their written submissions like the 1stto 8th *amici curiae* herein.

D. PARTIES' SUBMISSIONS

[39] For ease of reference and flow I shall set out the parties' respective submissions starting with the Attorney General and IEBC followed by parties who supported their appeals. I will then set out submissions by parties who partially supported the Attorney General and IEBC. Subsequently, I will set out submissions of Morara Omoke, the 3rd appellant, who opposed the appeals by the Attorney General and IEBC followed by parties who supported his appeal but opposed the appeals by the Attorney General and IEBC. Last but not least, I will set out submissions by *amici curiae*. However, by not setting out the parties' arguments verbatim is by no means discounting their significance but it is meant to simply avoid unnecessary repetition.

(i) Attorney General

[40] The Solicitor General, Mr. Kennedy Ogeto, appeared together with Mr. George Oraro, SC, Mr. Kamau Karori, SC and Mr. Paul Nyamodi for the Attorney General. The Attorney General filed two sets of written submissions dated 24th November, 2021 and 14th January, 2022 respectively.

[41] Concerning the basic structure doctrine, the Attorney General began by submitting that right from its inception as a constitutional theory in France, the doctrine was not applied even in France where it originated. Rather, it acquired

judicial recognition in India through ***Kesavananda Bharati v. State of Kerala***, (1973) 4 SCC 225 (***Kesavananda Case)*** wherein the Supreme Court of India held that despite the Indian Parliament being vested with the power to amend the Constitution it could not make any amendments which affected the basic foundation and structure of the Indian Constitution. Thereafter, the doctrine featured in many jurisdictions where it was either accepted or rejected.

[42] The Attorney General contended that in Kenya the doctrine was adopted through the case of ***Timothy Njoya & 6 Others v. Attorney General & 3 Others***, H.C Misc. Civil Appl. No 82 of 2004 (OS); [2004] eKLR (***Njoya Case***) followed by ***Patrick Ouma Onyango & 12 Others v. Attorney General & 2 Others*** [2008] 3KLR (EP) 84. However, in his view, the doctrine was applied in the above-mentioned cases within the context of the former Constitution wherein under Section 47 thereof, the power to amend the Constitution was exclusively in the hands of Parliament. While the issue of Parliament's power to amend the Constitution resurfaced again under the current Constitution in ***Commission for the Implementation of the Constitution v. National Assembly of Kenya & 2 Others,*** HC Petition No. 496 of 2013; [2013] eKLR (***Commission for the Implementation of the Constitution Case)***, the Attorney General claimed that despite finding that Parliament's power was limited *Lenaola, J*. (as he then was) did not delve into the tenor and effect of amendment provisions in Chapter Sixteen of the Constitution.

[43] The Attorney General went on to argue that thereafter, the substance of Chapter Sixteen had been considered in a number of cases namely; ***Priscilla Ndululu Kivuitu & Another (suing as the Personal Representatives of Samuel Mutua Kivuitu & Kihara Muttu (deceased) & 22 Others v. Attorney General & 2 Others***, HC Petition 689 of 2008; [2015] eKLR (***Priscilla Ndululu Case***); ***Attorney General & Another v. Randu Nzai Ruwa & 2 Others***, Civil Appeal No. 275 of 2012; [2016] eKLR; and ***Senate &***

48 others v. Council of County Governors & 54 Others, Civil Appeal No. 200 of 2015; [2019] eKLR to mention but a few. In summing up the effect of those decisions, he submitted that the superior courts below held a unilateral view that the amendment provisions of the Constitution in Chapter Sixteen are applicable without any limitation thereby disregarding the basic structure doctrine.

[44] According to the Attorney General, abuse of the amendment power vested in Parliament through hyper-amendments of the Constitution without participation or approval of the people, which was prevalent in the previous constitutional order, had since been addressed and tamed by the very design of the Constitution. In his view, the same was evident beginning from the Preamble of Constitution which recognizes the sovereign and inalienable right of the people to determine the form of governance they desire to be subject to; Article 1(1) confirms that all sovereign power belongs to the people and can only be exercised in accordance with the Constitution; the Kenyan people reserved their right to exercise sovereign power directly or through their democratically elected representatives; and the multi-track amendment process set out in Chapter Sixteen of the Constitution.

[45] The Attorney General submitted that the multi-track amendment process by dint of Article 255 distinguishes and delineates the entrenched constitutional provisions. That is, the basic structure (fundamental pillars and structures of the Constitution) form the entrenched provisions. It provides that amendment of the entrenched provisions can be either through a parliamentary initiative under Article 256 or popular initiative under Article 257 save that in both scenarios it prescribes a higher threshold compared to amendment(s) of non-entrenched provisions. In that, there is requirement for public participation, and a referendum. What is more, the threshold of approving such an amendment through a referendum is higher than what is required for the election of the President under Article 138(4) of the Constitution.

[46] Consequently, Counsel urged that the amendment process set out in Chapter Sixteen of the Constitution is in line with the demands and recommendations made by the Kenyan people during the constitutional review process. That is, for multi-track amendment provisions, unlike the single-track provision in Section 47 of the former Constitution; the people's choice to exercise their sovereignty; and their right to effect an amendment to the entrenched provisions only through a referendum. To buttress that line of argument reference was made to the ***Constitution of Kenya Review Commission Report*** dated 10th February, 2005 (**the CKRC Final Report**).

[47] The Attorney General maintained that the amendment powers enshrined in Chapter Sixteen are not amenable to limitation let alone through an imported extra constitutional doctrine, the basic structure doctrine. In any event, he reiterated that where the involvement of the people in the amendment process of entrenched provisions is full-fledged, as in Chapter Sixteen, the four-sequence process of amendment advanced by the superior courts below has no application. In reinforcing this position, it was argued that the basic structure doctrine has predominantly been applied in jurisdictions with Constitutions, which unlike Kenya's, are silent on what constitutes the core structure, pillars, and elements of the Constitution, and which do not provide for the involvement and participation of the people in constitutional amendments through a referendum.

[48] The Attorney General added that the role of courts in judicial review with respect to the amendment process of the Constitution is restricted to ensuring due compliance with the amendment procedures set out thereunder; and does not extend to review of the substance of the amendment which is within the preserve of the people. Towards this end, the Supreme Court's decision in ***Judges & Magistrates Vetting Board & 2 Others v. Centre for Human Rights & Democracy & 11 Others***; SC Petition 13A of 2013 as consolidated with SC Petitions Nos. 14 & 15 of 2013; [2014] eKLR (***Vetting Board Case***) was cited.

Putting it differently, the Attorney General claimed that the substantive determination of an amendment of the Constitution (to approve or reject an amendment proposal) is reserved for the people or their democratically elected representatives as envisaged under Articles 1(2), 255 to 257.

[49] As far as the Attorney General was concerned, the superior courts below contravened the principle on the sovereignty of the people and the supremacy of the Constitution by prescribing that the basic structure of the Constitution could only be amended through the primary constituent power comprising of a four sequential process, which terminologies are not used in the Constitution. Further, in distinguishing the judicial decisions relied upon by the superior courts below in support of the application of the doctrine in Kenya, he contended that none of them related to amendments by referenda or popular initiatives, as contemplated under Articles 255 to 257 of the Constitution.

[50] As to whether the President can initiate changes or amendments to the Constitution, he submitted that the Constitution binds every citizen including the President to respect, uphold and defend the Constitution; and furthermore, Members of Parliament, like the President, take oath of office to obey and defend the Constitution. Nonetheless, there is no doubt that citizens as well as Members of Parliament may initiate amendments to the Constitution. Accordingly, it made no sense to the Attorney General why the President should be precluded from taking part in constitutional amendments yet, Article 257 does not exclude any citizens on the basis of their positions in society.

[51] Besides, the Attorney General went on to urge that Article 1(2) of the Constitution provides that the people of Kenya may exercise their sovereign power either directly or through their democratically elected representatives. Therefore, he submitted that the President as an elected representative may legitimately initiate amendments to the Constitution through a popular initiative. In any event, the Attorney General contended that the fundamental ingredient of the popular

initiative is the support it garners of at least one million registered voters, under Article 257(1) of the Constitution.

[52] As far as the Attorney General was concerned, the superior courts' finding that the President cannot participate in a popular initiative, unlawfully limits the President's rights under Articles 27 and 38 of the Constitution.

[53] Moving to the Second Schedule of the Amendment Bill, the Attorney General argued that the superior courts below misconstrued IEBC's mandate as far allocation or apportionment of new constituencies was concerned. Expounding on that line of argument, the Attorney General submitted that in the former Constitution the mandate of determining the number of constituencies as well as their apportionment was vested in the then electoral body, Electoral Commission of Kenya. However, in the current Constitution the people deliberately excluded that mandate from IEBC and left it to themselves.

[54] The Attorney General maintained that prior to making the proposed amendment in its report, the BBI Steering Committee collected and collated the views of the people. What was more, the proposed amendment was geared towards progressive achievement of the universal principles of fair representation and equality of the vote. In any event, the Attorney General stated that the proposed amendment recognised IEBC's mandate to delimit boundaries of the proposed constituencies. In addition, the Attorney General claimed that the superior courts below disregarded the political nature of apportionment of constituencies. In his view, the process of determining which areas deserve new constituencies is a delicate matter that can only be achieved through political discussions and compromise.

[55] The Attorney General went on to assert that the people in exercise of their sovereignty, have an inalienable right to make, remake and amend the provisions of the Constitution, as they see fit. Accordingly, he urged that the Second Schedule was a proposal and once it was approved as prescribed under Chapter Sixteen it

would have become a constitutional provision hence could not be considered unconstitutional as the superior courts did.

[56] On the issue of civil proceedings against the President, the Attorney General cited Articles 143, 144 and 145 of the Constitution and argued that the rationale for presidential immunity is to simply allow a sitting President to exercise his constitutional duties without fear of civil litigation. Moreover, he asserted that the nature of the various roles the President plays, as the Head of State and Government, the Commander in Chief of the Armed forces and the Chairperson of the National Security Council, require him to have decisional freedom that will enable him safeguard the interest of the country.

[57] The Attorney General contended that the superior courts below failed to undertake a holistic reading of Article 143 of the Constitution. In particular, he submitted that if civil proceedings were to be brought against the President, then Article 143(3) of the Constitution, which otherwise seeks to give effect to Sub-Articles (1) and (2) thereof, would be rendered superfluous. In addition, the Attorney General argued that there was no lacuna with respect to the remedies available for any constitutional infractions or abuse of authority by the President. He went to state that the remedies in question may be obtained through a constitutional petition or judicial review proceedings instituted against the Attorney General as the principal respondent pursuant to Article 156(4) (b) of the Constitution as read with Section 12(1) of the Government Proceedings Act.

[58] On the issue of public participation, the Attorney General argued that the superior courts below ignored the fact that Article 257 has inbuilt mechanisms to ensure public participation at various stages and in turn, they failed to consider the question of public participation as a continuum of the entire amendment process. Further, according to the Attorney General, the superior courts failed to appreciate that the issue of public participation was not ripe for consideration since the amendment process was still at the preliminary stages at the time the petitions

were filed in the High Court. The Attorney General went on to argue that the burden of proof should have been placed on the petitioners before the High Court to demonstrate non-compliance with the public participation processes envisaged in the Constitution.

(ii) IEBC

[59] Prof. Githu Muigai, SC leading Mr. Eric Gumbo, Mr. Justus Munyithia, Ms. Wambui Muiga, Mr. Delbert Ocholla, Mr. Steve Ochieng Wasonga, Mr. Moses Kipkogei and Mr. Ken Melly appeared for IEBC. IEBC filed two sets of submissions dated 25th November, 2021 and 10th January, 2022.

[60] IEBC's submissions were confined to three of the issues framed by this Court namely; its role under Article 257(4) of the Constitution with respect to public participation under Article 10 of the Constitution; its composition and quorum; and the nature of referendum questions required under Article 257(10) of the Constitution.

[61] With regard to public participation, IEBC's Counsel clarified that its appeal was limited to its role by virtue of the provisions of Article 257(4) and that it neither touched on the question of verification of signatures nor adequacy of the legal framework thereof hence, it urged this Court to disregard any arguments to that effect. Towards that end, IEBC contended that contrary to the clear provision of Article 257(4) of the Constitution, the High Court erroneously held that it was under an obligation to ensure that promoters of the popular initiative had undertaken public participation before submitting the Amendment Bill to the County Assemblies. According to IEBC, despite challenging that finding in its appeal, the Court of Appeal failed to determine the same hence left the High Court's finding intact.

[62] In addition, IEBC claimed that *Gatembu, J.A* imposed more onerous obligations upon it without any constitutional or legal basis. In a nutshell, IEBC took issue with the appellate Judge's finding that there was an opportunity for it upon being satisfied that the requisite number of signatures in support of the initiative had been met, to undertake voter education and sensitization on the Amendment Bill.

[63] IEBC maintained that its mandate, as far as voter education is concerned, is limited to ensuring that voters are familiar with the processes governing the referendum as contemplated under Article 257(10) of the Constitution. Further, that the aforementioned role only comes into play once the President issues it with a notice to hold a referendum. Besides, relying on ***Republic v. County Assembly of Kirinyaga & Another*** *Ex-Parte* ***Kenda Muriuki & Another***, HC JR Application No. 271 of 2019; [2019] eKLR (***County Assembly of Kirinyaga Case***), IEBC argued that conceptually, public participation, civic education and voter education are quite different in content, scope and intention.

[64] Therefore, IEBC claimed that the superior courts below misapprehended the provisions of the Constitution with respect to the question of public participation. To buttress its position, IEBC urged that at the point of receipt of the Amendment Bill from the promoters, its mandate under Article 257(4) was limited to verifying that the initiative is supported by at least one million registered voters. It argued that at the point of delivery of the Amendment Bill to the County Assemblies it was not yet seized of the referendum hence could not engage the public. In any case, IEBC expressed doubts that it was expected to conduct civic education over a referendum it would preside over.

[65] IEBC contended that at the core of the issue of its composition and quorum were two decisions rendered by the High Court in ***Katiba Institute & Another v. Attorney General & Another***, Constitutional Petition No. 548 of 2017; [2018] eKLR (***Katiba Institute Case***) and ***Isaiah Biwott Kangowny v.***

Independent Electoral Boundaries Commission & Attorney General, Constitutional Petition No. 212 of 2018; [2018] (***Isaiah Biwott Case***).

[66] IEBC submitted that the ***Katiba Institute Case*** was rendered against a backdrop of a series of amendments to the Independent Electoral and Boundaries Commission Act No. 9 of 2011 (**IEBC Act**), which initially provided that it shall constitute of eight (8) members and the Chairperson while Paragraph 5 of the Second Schedule thereto prescribed the requisite quorum of conducting business in its meeting as five (5). By the Election Laws (Amendment) Act No. 36 of 2016 (**Election Laws Amendment 2016**) its composition was reduced to seven (7) members whilst the quorum of conducting business remained the same. Further, vide Election Laws (Amendment) Act No. 34 of 2017 (**Election Laws Amendment 2017**) the quorum of conducting business was altered to read ***"...be at least half of the existing members of the Commission, provided that the quorum shall not be less than three members."*** IEBC urged that it is the latter amendment which was challenged and declared unconstitutional in the ***Katiba Institute Case***.

[67] According to IEBC, the question that arose was the effect of the declaration of unconstitutionality. In this regard, IEBC stated that three possible scenarios became apparent. The first scenario, retrospective unconstitutionality which demands that once a provision of a statute is repealed and replaced by another provision, the mere fact that the new provision has been annulled does not by itself render the repealed provision revived. To bolster that proposition, reference was made to this Court's decision in ***Mary Wambui Munene v. Peter Gichuki King'ara & 2 Others***, SC Petition No. 7 of 2014; [2014] eKLR (***Mary Wambui Case***).

[68] IEBC went on to demonstrate a second scenario stating that retrospective unconstitutionality is limited to the party who instituted the proceedings before a court. In that, where a court appreciates potential negative effects that a

retrospective declaration of unconstitutionality will have formulates a middle ground. That is, the court directs that the declaration applies retrospectively only in relation to the party who moved the court and prospectively to any other person(s) who seeks to benefit from such declaration. To anchor this argument, IEBC relied on the decision of the Irish Supreme Court in ***Murphy v. Attorney General*** [1982] IR 241.

[69] As for the last scenario, which IEBC referred to as prospective unconstitutionality, it submitted that the declaration of unconstitutionality takes effect from the date of the determination or some future date. By way of illustration, this Court was referred to ***Boniface Oduor v. Attorney General & Another; Kenya Banker's Association & 2 Others***, HC Petition No. 413 of 2016; [2019] eKLR wherein the High Court suspended the invalidity of Section 33B of the Banking Act for a period of one year to enable the Attorney General and Parliament take remedial measures.

[70] Consequently, IEBC maintained that the first scenario, as advanced by *Tuiyott, J.A*, is the correct position. As such, IEBC contended that both the superior courts below erred in relying on Paragraphs 5 and 7 of the Second Schedule of the IEBC Act as the basis of finding that it lacked quorum for purposes of carrying out its constitutional and statutory mandate. This is because, as IEBC posited, the two superior courts erred by relying on repealed and non-existent law as opposed to being guided by the provisions of Article 250(1) of the Constitution.

[71] Without prejudice to the above submissions, IEBC further contended that the issue of quorum was decided in the ***Isaiah Biwott Case***. In giving a synopsis of the said case, IEBC submitted that the High Court found that there was no inconsistency between Paragraph 5 of the Second Schedule of the IEBC Act and Article 250(1) of the Constitution. Moreover, the issue of quorum was not only a matter provided for under the statute but was also a matter of common sense and

construction dependent on the total number of the Commissioners appointed at any given time.

[72] Pointing out that the said decision had not been challenged on appeal, IEBC argued that the question of quorum had already been settled by the ***Isaiah Biwott Case***, which in its view, is a decision *in rem*, and binds the parties before the Court in question, the public at large as well as courts of concurrent jurisdiction. IEBC asked this Court to adopt the aforementioned perspective in order avert forum shopping with attendant consequences on the administration of justice. Therefore, relying on Article 250 and the ***Isaiah Biwott Case***, IEBC argued that it was properly constituted as long as it had a minimum of three (3) Commissioners and was quorate at all material times.

[73] Furthermore, IEBC submitted that in light of the ***Isaiah Biwott Case*** it had undertaken very many serious constitutional obligations most of which cannot be reversed; and any attempt to reverse the same would provoke far reaching consequences. Be that as it may, IEBC argued that even if the Court of Appeal made a merit review of the ***Isaiah Biwott Case*** it should have circumscribed and protected all decisions that were made by IEBC on the basis of the said decision. Likewise, that failure to do so had exposed it to potential challenges now and in the future in a manner that may not be remediable.

[74] On referendum questions, IEBC submissions were in opposition to Morara Omoke's appeal. Its contention was that Part V of the Elections Act No. 24 of 2011 (**Elections Act**) and more specifically, Section 49 thereof places the obligation of framing referendum question(s) on it. Nonetheless, it asserted that, as it pertained to the matter at hand, it was yet to receive any request to hold a referendum hence its mandate of framing questions had not crystalized. Further, IEBC argued that there was no evidence that it had taken a position on the issue. Consequently, there was no live issue before the High Court for it to entertain or make the determination it did; and moreover, the High Court could not purport to render an

advisory opinion which is exclusively reserved for this Court. Finally, IEBC submitted that the Court of Appeal was correct in setting aside the High Court's finding on this issue and urged this Court to uphold the same.

[75] In conclusion, IEBC submitted that each party should bear their own costs regardless of the outcome of the appeals due to the public interest nature of the matter. However, it urged that on account of Morara Omoke's plea for costs, costs should follow the event with respect to his appeal.

(iii) Parties Supporting the Appeals by the Attorney General and IEBC

(a) Speaker of the National Assembly and the National Assembly (13th and 15th respondents)

[76] Learned Counsel, Mr. Josphat Kuyoni and Mr. Mbarak Awadh appeared for the 13th and 15th respondents. They filed joint submissions dated 14th December, 2021.

[77] Beginning with the basic structure doctrine, the respondents submitted that by dint of Chapter Sixteen, all provisions of the Constitution including the basic structure are amendable provided the procedures laid thereunder are adhered to. Besides, to them, if indeed the framers of the Constitution intended that certain provisions could not be amended they would have expressly stated so like in the German, French and Italian Constitutions. Therefore, they contended that the finding by the two superior courts below that the basic structure could only be amended through the primary constituent power was not supported by the provisions of the Constitution; and the same had the effect of overthrowing the Constitution and subverting the sovereign power of the people. In any event, they urged that the Constitution has its own in-built restraint on Parliament's power to

amend the basic structure under Article 255 which is the very essence of the basic structure doctrine.

[78] Supporting the Attorney General, the respondents held the view that nothing precludes an elected representative including the President from initiating a popular initiative under Article 257. Likewise, the respondents urged that the superior courts below failed to appreciate that the issue of public participation should be considered as a continuum of the entire amendment process based on the various stages prescribed under Article 257. Consequently, in their opinion since the process was ongoing the issue of public participation was not ripe for consideration.

[79] They submitted that both Articles 256 and 257 make reference to a Bill that is either approved or rejected by Parliament depending on the subject being amended, hence in that context, there is no requirement for separate and distinct referenda questions.

(b) Speaker of the Senate and the Senate (14th and 16th respondents)

[80] Learned Counsel, Mr. Job Wambulwa appeared together with Ms. Mercy Thanji for the 14th and 16th respondents. The respondents filed joint written submissions dated 10th December, 2021.

[81] It is important to note that the respondents on one hand, in their written submissions indicated that whilst the basic structure doctrine is recognized and applicable in Kenya, they disagreed with the manner in which the two superior courts below applied the doctrine. Conversely, on the other hand, the respondents Counsel in his oral highlight submitted that their position was that the doctrine was not applicable in Kenya.

[82] Be that as it may, the respondents argued that the two superior courts below failed to recognize that Kenya had progressed beyond the ***Njoya Case*** by enacting the current Constitution, which was self-executing and had no shortcomings such as would require application of a foreign doctrine predicated on different circumstances that were not obtaining in Kenya. Furthermore, they contended that the superior court below failed to appreciate that the doctrine had received varied reception in different jurisdictions; and even legal and academic scholars were not in agreement on its applicability as evinced by *amici* briefs on record. In the respondents' opinion, the inclusion of Chapter Sixteen was deliberate and indicative of the framers' intention that all provisions of the Constitution are amendable in accordance with the procedure set thereunder.

[83] According to the respondents, nothing stops the President from initiating a popular initiative, which route is available to the President especially when the parliamentary initiative approach is impractical**.** Further, as far as the issues of public participation and referendum questions were concerned, the respondents expressed similar views as the 13th and 15th respondents.

(c) BBI National Secretariat and Hon. Raila Odinga

[84] Mr. James Orengo, SC appeared together with learned Counsel, Mr. Paul Mwangi, Mr. Jackson Awele, Mr. Arnold Ochieng Oginga, Mr. Winfred Makaba and Prof. Ben Sihanya for BBI National Secretariat and Hon. Raila Odinga. The respondents filed joint submissions dated 7th December, 2021.

[85] In emphasizing the different context in which the basic structure doctrine was applied in India, the respondents submitted that the Indian people, unlike the Kenyan people, delegated the entire amendment power to Parliament without reserving any power for themselves. In addition, in Kenya the amendment power of Parliament is expressly limited as set out under Articles 255 to 257 of the

Constitution; and as such, the express provisions obviate the need for any judicial interventions. Consequently, they urged that any attempts by the courts to carve out any role in so far as the amendment of the Constitution is concerned amounts to double-limitation of the amendment powers and is unconstitutional.

[86] Besides, in their view, the superior courts below misapprehended and conflated the basic structure of a Constitution with the basic structure doctrine. In that regard, the respondents contended that even though the Constitution has certain features which may be perceived to constitute the basic structure, the basic structure is not synonymous with the adoption of the basic structure doctrine.

[87] The BBI National Secretariat and Hon. Raila Odinga, like the Attorney General, urged that nothing prohibited the President from undertaking constitutional changes through the popular initiative route under Article 257 of the Constitution. They held the view that the superior courts' declaration of the Second Schedule as unconstitutional elevated an existing constitutional provision, that is, Article 89 of the Constitution, above any future amendments**.** They equally submitted that the issue of public participation was not ripe for the simple reason that the amendment process was still ongoing.

[88] On quorum of IEBC, the respondents asserted that it is a peremptory principle of the supremacy of the Constitution under Article 2(4) that any law that is inconsistent with the Constitution is void to the extent of the inconsistency. Accordingly, in their view, Paragraph 5 of the Second Schedule of the IEBC Act fell in that category for requiring IEBC's quorum as five (5) members when the Constitution had stated it could be properly composed with three members. They also argued that the extraneous and unconstitutional requirement that separate and distinct referendum questions be put to the people in a referendum rather than a Bill, as advanced by Morara Omoke's appeal, lacked legal foundation and merit.

(d) The President

[89] Mr. Waweru Gatonye, SC appeared with Mr. Mohamed Nyaoga, SC, Mr. Kiragu Kimani, SC and learned Counsel, Ms. Jacqueline Chemng'eno. The President relied on his written submissions dated 22nd December, 2021.

[90] The President submitted that whilst Article 131 (2) (b) of the Constitution places an obligation upon him to promote and enhance national unity, the manner in which he executes the same is left to his discretion. In his view, he cannot initiate amendments to foster unity through Article 256 of the Constitution which is a clear preserve of the Legislature. Rather, the only recourse left for him is through a popular initiative under Article 257 of the Constitution.

[91] The President asked this Court to examine presidential immunity as set out under Article 143 in light of judicial immunity under Article 160(5). According to him, Article 143(1) and (5) expressly provide that the President's immunity against criminal proceedings is limited and does not extend to crimes for which the President may be prosecuted under international treaties ratified by Kenya. Similarly, under Article 160(5) the extent of judicial immunity is expressly prescribed to extend to only acts done in good faith. Therefore, the President urged that the above provisions were a clear demonstration that if the drafters of the Constitution intended to limit the President's immunity with regard to civil proceedings they would have done so in express terms. To buttress his position, the President made reference to this Court's decision in ***Bellevue Development Company Ltd. v. Francis Gikonyo & 3 Others***, SC Petition 42 of 2018; [2020] eKLR (***Bellevue Case***).

[92] The President maintained that Article 143 of the Constitution does not preclude the President from being held personally liable for any unlawful actions during his term of office once he is out of office. However, he submitted that there exist two alternative avenues to challenge the President's actions or omissions

while he is still in office: first, by suing the Attorney General; and second, through impeachment for gross violation of the Constitution or other law pursuant to Article 145 of the Constitution. Last but not least, the President urged that costs should follow the event and that Morara Omoke ought to pay his costs at the Court of Appeal and this Court.

(iv) Parties' Partially Supporting the Appeals by the Attorney General and IEBC

(a) 254 Hope

[93] Dr. Clarence Eboso appeared for 254 Hope and relied on the written submissions dated 10th December, 2021.

[94] 254 Hope began by submitting that the basic structure doctrine is based on the theory of delegation of authority whereby the people are the principal, delegating authority to the government (agent) through the Constitution. It serves as an inherent and constitutional limit on the exercise of constituted power including secondary constituent power in the amendment of the Constitution. In that regard, 254 Hope went on to state that Article 1 of the Constitution asserts that only the people have unfettered power and any organ acting under the Constitution is only exercising a delegated form of authority which is limited. Consequently, 254 Hope argued that the basic structure doctrine is applicable in Kenya to the extent that it is not expressly barred by the Constitution; and serves to limit the exercise of amendment power as a constituent power, when exercised by any authority secondary to the people.

[95] 254 Hope contended that primary constituent power in constitution-making is a manifestation of sovereignty of the people; it is the primordial power to make a constitution that precedes the Constitution hence cannot be limited by the

Constitution; it is the source of the authority and validity of the Constitution; and may be bold and external or assert itself within 'pseudo-constraints' of the existing constitutional norm. Laying emphasis that primary constituent power may be exercised within a preexisting Constitution, reference was made to what 254 Hope termed as a valid and complete exercise of the popular initiative to amend the Constitution under Article 257 of the Constitution. In its view, a popular initiative constitutes a constitutional primary constituent power because it is fully participatory from its initiation by one million signatures of registered voters, through the legislative and constituent assembly processes to the referendum exercise where an amendment relates to certain aspects of the Constitution.

[96] 254 Hope submitted that it was a remiss for the superior courts below to on one hand, assert that primary constituent power is exclusively a supra or extra constitutional entity, unbound by any prior constitutional norms and incapable of limitation by the existing Constitution; and yet, on the other hand, despite being creatures of the Constitution, go ahead to define, with near-surgical precision, a detailed procedure of how the primary constituent power is to be exercised and even specifically direct that other infra constitutional organs may collectively facilitate such a process. In its view, the superior courts below should have simply settled at declaring the exclusive extra or supra constitutional nature of primary constituent power and the applicability of the basic structure doctrine as a limit to the amendment power under the Constitution, as the Supreme Court of India did in the ***Kesavananda Case***.

[97] On whether the President can initiate changes to the Constitution, 254 Hope indicated that the real issue was not whether the President can initiate an amendment, but whether he may propose, promote and support a popular initiative. To that extent, 254 Hope submitted that the President in his official capacity, for instance while exercising his obligation to promote and enhance unity, has implied authority to propose an amendment to the Constitution.

However, he can only make proposals to Parliament or the people and has no capacity to either initiate an amendment under Article 256 or 257 or officially promote or support such process. Nevertheless, according to 254 Hope, in his private capacity the President enjoys his political rights including the right to promote an amendment through a popular initiative but cannot utilize public funds to that end.

[98] On the constitutionality of the Second Schedule to the Amendment Bill, 254 Hope also submitted that the superior courts' declaration of unconstitutionality elevated an existing constitutional provision, that is, Article 89 above any future amendments, without recourse to the doctrines of unconstitutional constitutional amendments, or to the constitutionality of the amending authority and procedure. It was argued that the superior courts below ought to have considered whether the procedure was proper, whether the provision attempted to determine the form of governance hence not amendable by the secondary constituent power or whether the amending authority is an exercise of the primary constituent power.

[99] Similarly, 254 Hope submitted that the President enjoys both functional immunity, like all public officials who perform state duties, which protects them from civil liability for official functions; and sovereign immunity as the Head of State. According to 254 Hope, the only way civil proceedings could be instituted against the President for violations of the Constitution is through the process of impeachment. Reference was made to ***Minister for Internal Security and Provincial Administration v. Centre For Rights Education & Awareness (CREAW) & 8 Others***, Civil Appeal 218 of 2012; [2013] eKLR to support that assertion.

[100] On quorum of IEBC**,** 254 Hope stated that if the Election Laws Amendment 2017, more specifically, Paragraphs 5 and 7 of the Second Schedule were declared unconstitutional due to non-compliance with the enactment procedure, then it would imply that no valid legislation had been competently passed hence no repeal

had taken place. On the other hand, it urged that if the unconstitutionality was on the substance of the amendment, then the provision would remain in the statute books but with no valid effect to the extent of its unconstitutionality. Ultimately 254 Hope, expressed that since Parliament had not reviewed the provisions that had been declared unconstitutional, then it followed that the previous provisions remained in force.

(b) The 19th respondent (Mr. Isaac Aluochier)

[101] Mr. Isaac Aluochier appeared in person, and he basically relied on his written submissions dated 9th December, 2021. He postulated that by dint of Article 2(3) of the Constitution neither a court nor a State organ has the jurisdiction to challenge the legality or validity of the Constitution. As far as he was concerned, the imposition of the basic structure doctrine by the superior courts below amounted to a challenge to the express provisions of the Constitution hence should be set aside.

[102] He went on to assert that the suggestion that the President could promote a popular initiative was untenable under the Constitution. Further, he claimed that presidential immunity under Article 143 does not extend to constitutional violations by the President. However, it was his view that the pronouncement by the superior courts below went beyond what he had sought in his petition before the High Court. He claimed that he had sought a declaration that the President had acted outside the functions of his office by establishing the BBI Steering Committee hence he was liable. Consequently, he urged this Court to revert to his prayer as set out in the High Court and set aside the judgments of the superior courts on this issue.

[103] Regarding the issue on whether IEBC was quorate, Mr. Aluochier wholly associated himself with IEBC's position. According to him, IEBC was wrongly

declared inquorate hence this Court should vacate such orders. He went on to submit that a valid constitutional amendment bill can contain only one amendment. He added that if the promoters of the Amendment Bill desired to propose more than one amendment, it was incumbent upon them to have prepared separate Bills for each proposed amendment and subjected each Bill to the amendment processes under Articles 255 to 257. In other words, he agreed with the High Court's holding on the issue and urged the Court to uphold the same.

(c) Phylister Wakesho (the 72nd respondent)

[104] Learned Counsel, Mr. George Gilbert appeared for the 72nd respondent and relied on her written submissions dated 8th December, 2021.

[105] The 72nd respondent submitted that the substantive provisions of the Constitution are found in Chapter Sixteen; and in her view, it is not by mere coincidence that the said provisions are at the end of the Constitution. She asserted that the real substratum of the Constitution is found under Article 255(1) wherein the Constitution, in her own words, has cherry picked what it considered the most important substratum of the Constitution and laid out special stringent means of amending the same. According to this respondent, Article 255 (1)(a) to (j) form the design and architecture of the Constitution; in other words, the basic structure which can only be amended by referendum.

[106] All in all, the 72nd respondent posited that by dint of Articles 255 to 257 not only is every part of the Constitution amendable but also the peoples' power to amend the Constitution is unlimited. In that regard, the Court was referred to the High Court's decision in ***Priscilla Ndululu Case***. However, she reiterated that amendment of Article 255 has to be in line with the procedure outlined thereunder; otherwise, any amendment to the contrary is unconstitutional and null. Consequently, she faulted the Court of Appeal for importing what she believed was

another basic structure, other than the one delineated under Article 255(1), and finding that the same cannot be amended.

[107] On whether the President can initiate amendments to the Constitution, she asserted that under Article 38 of the Constitution, the President had equal rights as any other citizen to campaign for a political party or cause. The President does not cease being a citizen upon being elevated to presidency and as such, to assume that he could not initiate and promote an amendment to the Constitution through popular initiative without express provisions to that effect is discriminatory. She argued that all the President needed to do was to follow the prescribed procedures.

[108] Moving to the constitutionality of the Second Schedule to the Amendment Bill, it was the 72nd respondent's position that the issue was abstract and moot. She stated that Article 89(4) of the Constitution stipulates that new boundaries shall not take effect for purposes of an election if they are formed within 12 months of the election in question. According to her, by the time this consolidated appeal is determined, the scheduled elections of 2022 will be barely 6 months away hence it is neither possible nor logical for any action to be advanced in relation the boundaries.

[109] As for institution of civil proceedings against the President, she submitted that the President's immunity is limited to private civil matters under Article 143 of the Constitution. Expounding on that line of argument, she contends that the President cannot hide behind immunity when he acts beyond and/or in violation of the Constitution; the High Court by dint of Article 165(3)(b) and (d)(ii) is clothed with jurisdiction to question whether anything said to be done under the authority of the Constitution or any law is inconsistent with the Constitution; and therefore, the President is not immune to constitutional or judicial review proceedings before the High Court which are civil in nature**.**

[110] The 72nd respondent echoed IEBC's position that it has no role in ensuring public participation has taken place under Article 257(4); and its role thereunder

is limited to verification of whether the initiative is supported by at least one million registered voters. Similarly, on composition and quorum of IEBC, she associated herself with IEBC's submissions; that both the superior courts below relied on provisions that had been repealed and had no effect hence reached the wrong conclusion. She added that the IEBC has always been quorate to conduct its mandate since Article 250(1) prescribes that each Commission shall comprise of a minimum of three members.

[111] Opposing Mr. Morara Omoke's appeal, as pertaining to the issue of the referendum questions, the 72nd respondent argued it was not justiciable since the mandate to formulate such questions, which falls within the purview of IEBC, had not yet arisen by the time the matter was filed in the High Court. In her view, this Court while sitting as an appellate court also lacks jurisdiction to entertain the issue based on the doctrine of ripeness.

(v) Parties Opposing the Appeals by the Attorney General and IEBC

(a) Mr. Morara Omoke

[112] Learned Counsel Mr. Morara Omoke appeared in person together with Mr. Topua Lesinko and Mr. Justice Nyagah. His written submissions were dated 24th November, 2021.

[113] Though his appeal centered around the referendum questions, Mr. Omoke also opposed the appeals by the Attorney General and IEBC. In that regard, he submitted that the basic structure doctrine is applicable in Kenya as mirrored in the people's aspiration under Article 1 of the Constitution. He contended that the Constitution does not limit amendment power under Article 257, but it does limit amendment power under Article 256. He therefore stated that the people's intention at the inception of the Constitution was to preserve it for future

generations unaltered. He therefore implored this Court to protect the architecture of the Constitution by upholding the applicability of the basic structure doctrine. On the issues of whether the President can initiate constitutional amendment, presidential immunity, public participation and quorum, Morara Omoke agreed with the findings of the two superior courts below**.**

[114] Challenging the Court of Appeal's decision on the referendum questions, he invited this Court to find that under Articles 255 to 257 of the Constitution, the phrases 'a proposed amendment'; 'the proposed amendment'; 'the amendment'; 'an amendment'; 'a general suggestion'; are used in the singular deliberately. Moreover, he contended that those express terms do not countenance a large number of amendments in a single Bill. In his view, the Constitution restricts a draft Bill to a single amendment and nothing would have been easier than for the drafters of the Constitution to provide for 'amendments' in plural under Article 257, if that was their intention.

[115] Mr. Morara further argued that due to Kenya's troubled constitutional amendment history, the Constitution only permits an amendment at a time as a defence mechanism against its dismemberment through multiplicity of amendments in a single Bill to amend the Constitution either through a parliamentary or popular initiative. According to him, packaging multiple amendments into an omnibus Bill is a violation of Articles 38(3) and 257(10) of the Constitution and takes away the political right of every citizen to weigh each amendment on its own merit.

[116] In other words, he submitted that omnibus Bills undermine the overarching values of democracy and accountability in so far as they do not allow the people to vote for or against specific items within them. He added that the requirement by Articles 10, 82(1)(d) and (2) that referenda should be conducted under a transparent system is informed by the need to ensure that constitutional amendments to every provision of the Constitution should not be hidden in the

midst of other amendments such that they might not be noticed or considered by the people. Consequently, he stated that the Amendment Bill which contained seventy-eight (78) mostly unrelated amendments was a violation of Articles 255 to 257 of the Constitution.

[117] In buttressing his position for single and distinct referendum questions, he propounded that the principle of unity of content or single-subject amendments would prevent the use of omnibus draft Bills for amendments and instead require promoters to propose amendments that focus on one subject alone. In that regard, he cited Michael, Douglas C. ***'Pre-election Judicial Review: Taking the Initiative in Voter Protection'*** California Law Review, vol. 71, no. 4, 1983, pp. 1216–38. Further, he argued that the said unity of content doctrine requires the formulation of multiple referendum questions in cases where a Bill for amendment of the Constitution by way of a popular initiative seeks to effect seventy-eight distinct and unrelated changes across fifteen Chapters of the Constitution. Finally, he prayed for costs of his appeal, to be borne by the President, Hon. Raila Odinga, IEBC and the Attorney General for reasons that their actions or omission necessitated the litigation.

(b) The 1st to 5th respondents

[118] Learned Counsel, Mr. Nelson Havi and Ms. Esther Ang'awa appeared for the 1st to 5th respondents. The respondents relied on their joint written submissions dated 20th December, 2021.

[119] Standing on his feet on behalf of the 1st to 5th respondents, Mr. Havi strenuously argued that a reading of the amendment provision in Chapter Sixteen reveals three features therein. Firstly, Article 255(1) entrenches certain provisions of the Constitution which can only be amended with the approval of the people through a referendum. Secondly, the Chapter codifies a dual track process of

amending the Constitution either through parliamentary or popular initiatives and prescribes the conditions each must satisfy. Thirdly, the Chapter only contains provisions for amendments of the Constitution as opposed to its dismemberment.

[120] Elaborating on the distinction between amendment and dismemberment, Mr. Havi submitted that an amendment is an alteration to the Constitution that corrects or modifies the same without fundamentally changing its nature, that is, it operates within the parameters of the existing Constitution; and the latter which alters constitutional fundamental values, norms and institutions amounts to dismemberment.

[121] To Mr. Havi, the extent of the basic structure doctrine's application can be traced from the history of the constitution-making process in the Commonwealth. In Kenya particularly, the history demonstrates that the Constitution is the final product of the people to constitute a government and limit its powers. It follows therefore, that the basic structure of the Constitution could only be altered through the primary constituent power comprising of the four-sequence process (civic education, public participation, constituent assembly and referendum), which is akin to the powers and procedures that were applied by the people in formulating the current constitutional order. Counsel went on to submit that even in the absence of express codification of the primary constituent power in the Constitution, its existence and application is inherent since it antecedes the Constitution. To buttress that line of argument, Counsel cited the ***Njoya Case*** and the writings of Prof. Ernst-Wolfgang Böckenförde from the book, Mirjam Künkler and Tine Stein (eds), '***Constitutional and Political Theory: Selected writings of Ernst-Wolfgang Böckenförde'*** (2017, Oxford University Press).

[122] Moreover, according to the 1st to 5th respondents, the application of the basic structure doctrine is justified as it acts as a democracy enhancing device that maintains the ultimate power of the people over their elected representatives to

fundamentally alter the entrenched provisions of the Constitution. Towards that end, reliance was placed on the writings by Rosalind Dixon and David Landau, ***'Transnational Constitutionalism and a Limited Doctrine of Unconstitutional Amendment'***, (2015) 13 International Journal of Constitutional Law 606 and ***Minerva Mills Ltd. & Ors v. Union of India*** 1980 AIR 1789, 1981 SCR (1) 206.

[123] According to the 1st to 5th respondents, the Amendment Bill which proposed to effect seventy-four (74) amendments to the Constitution thereby altering the entire system of the government was not only unconstitutional but also destructive of the state of democracy hitherto prevailing in Kenya. As such, in their view, the superior courts below could not be faulted for finding that some of the amendments thereunder required the exercise of primary constituent power.

[124] The 1st to 5th respondents maintained that under Articles 257(9) and Section 49(1) of the Elections Act, the President's role in a popular initiative is limited to assenting to an amendment Bill and referring the same to IEBC for purposes of conducting a referendum. They further urged that based on the history of constitution-making in Kenya, the popular initiative was exclusively for use by voters. As far as they were concerned, there was a deliberate effort to disguise the Amendment Bill which was actually a parliamentary initiative as a popular initiative. In addition, they argued that presidential immunity envisaged under Article 143 of the Constitution does not extend to constitutional violations by the President.

[125] In their view, public participation is a requirement of a social contract and exists both inside and outside of the Constitution. In point of fact, they submitted that the Constitution textualises public participation in Articles 10,118, 124, 174 and 196 in so far as the making of decisions by the government that affect people are concerned. They added that even in the United States of America, where they urged that constitutional amendment by popular initiative originated, public

participation is recognized as mandatory requirement before acceptance of an amendment proposal by the electoral body.

[126] Therefore, they asserted that the contention that public participation was a requirement at the tail end fails to appreciate that a referendum is in respect of only the entrenched provisions of the Constitution. In addition, such erroneous interpretation, to the respondents, translated to exclusion of public participation at any other stage of the amendment processes contrary to the aspirations of the people and the Constitution.

[127] While submitting on the issue of quorum, Ms. Ang'awa was emphatic that a court should always adopt a purposive construction of Article 250 (1) of the Constitution. She argued that the minimum number of Commissioners provided thereto as three must be construed alongside the provisions of Paragraph 5 of the Second Schedule to the IEBC Act, which provided the quorum as five Commissioners. According to Counsel, this reasoning is anchored on the public interest to the effect that all Commissions would perform at optimum capacity, and a quorum of three would mean that at any given time two Commissioners could end up making far reaching decisions that are against public interest. Counsel therefore urged us to uphold and support the finding of the superior courts below that IEBC lacked quorum. In any event, it was the view of the 1st to 5th respondents that the Constitution makes no express provision for quorum and only provides for the minimum and maximum membership. The respondents were also of the view that a valid constitutional amendment Bill can contain only one amendment.

(c) The 7th to 9th respondents

[128] Learned Counsel, Mr. Elias Mutuma appeared together with Ms. Caroline Jerono for the 7th to 9th respondents, who filed joint submissions dated 9th December, 2021.

[129] Mr. Mutuma begun by urging this Court to find that the President is prohibited from pursuing a constitutional amendment through a popular initiative. In that regard, Counsel submitted that firstly, the people delegated legislative power to Parliament and not the President who exercises executive authority. Therefore, to allow the President to initiate a popular initiative would be going against the doctrine of separation of powers. Secondly, the respondents contended that the President is under a social contract with the people; that he took a solemn oath that he would *inter alia* obey, preserve, protect and defend the Constitution of Kenya; that to preserve means to maintain something in its original state; and therefore, the President in attempting to amend the Constitution goes against the very oath he took and violates his duty to the people under Article 131 of the Constitution. Thirdly, the respondents contended that the moment the President took office his private rights were limited by virtue of Article 24 of the Constitution.

[130] Relying on Article 255, the respondents argued that *Wanjiku's* role is not merely endorsement of the constitutional amendment process. Rather, Article 257 demonstrates that the place of public participation under the popular initiative is in a continuum, from the point of initiation of amendment proposals to their final adoption at the referendum. The 7th to 9th respondents contended that public participation must be purposive and meaningful. The burden of ensuring that the information reaches *the people* is upon the promoter of the popular initiative. To support this line of argument, they relied on the case of ***Doctors for Life International v. Speaker of the National Assembly and Others*** (CCT12/05) [2006] ZACC 11; 2006 (12) BCLR 1399 (CC); 2006 (6) SA 416 (CC) ***(Doctors for life international Case***).

[131] It was also the respondents' submissions that IEBC's obligation under Article 257(4) of the Constitution is to not only validate the numeric compliance, but also to ensure that voters are educated on what they are endorsing in

compliance with the voter education requirement under Article 88 (4)(g) of the Constitution. It followed therefore, according to the respondents, that IEBC is bound by Articles 10 and 33 of the Constitution. Therefore, IEBC should not overlook its role in ensuring that public participation is meaningfully and adequately carried out prior to receiving the draft Bill for amendment of the Constitution.

[132] The respondents also urged that a valid constitutional amendment Bill can contain only one amendment. They too believed that it is the element of hyper-amendability that the Constitution sought to prevent under Articles 255 to 257 by prescribing a single amendment in each Bill.

(d) The 11th and 12th respondents

[133] Learned Counsel, Mr. Elisha Ongoya and Mr. Evans Ogada appeared for the 11th and 12th respondents and in addition to relying on their clients written submissions dated 9th December, 2021 they also made oral highlights.

[134] They began by stating that nothing prohibits the President from initiating a popular initiative under Article 257 of the Constitution. They went on to urge that since IEBC had not challenged the superior courts' findings on the Second Schedule of the Amendment Bill, the logical conclusion would be that IEBC agreed with the same. Likewise, the respondents contended that the issue was moot, vestigial and an academic exercise in light of the fact that new boundaries as had been proposed in the Amendment Bill could not take effect due to the general elections which were less than twelve (12) months away.

[135] Be that as it may, they submitted that the proposed constituencies had not been established or apportioned in accordance with the proper procedures laid out under Article 89 hence, gave rise to issues of inequity. To them, the Attorney General's argument that the delimitation was fair begs the questions, who

determined its fairness and were the people consulted? Furthermore, to the respondents, the purported delimitation exercise under the Second Schedule was not only irregular, illegal, and unconstitutional but also amounted to blatant contempt of IEBC's independence**.**

(e) MUHURI

[136] Learned Counsel, Ms. Carolene Kituku appeared for MUHURI and relied on the written submissions dated 6th December, 2021 as well as her oral highlights.

[137] Although Ms. Kituku extensively submitted on the issue of verification of signatures by IEBC and the requisite legal framework thereof, it is instructive to note that, these issues were not the subject of the consolidated appeal. In point of fact, Counsel confirmed as much in her oral highlights that there had been no challenge with respect to the findings on verification of signatures and the requisite framework thereof.

[138] On quorum**,** MUHURI submitted that the ***Isaiah Biwott case*** was not binding on the two superior courts below hence, they could depart freely from it, if they found it had been wrongly decided. It asserted that while appreciating the important mandate of IEBC, Parliament stipulated that the number of Commissioners should be seven (7) while placing its quorum at five (5) members. Moreover, MUHURI submitted that any attempt to reduce the quorum to three (3) through the Election Laws Amendment 2017 was declared invalid in the ***Katiba Institute Case*** which was also a judgment *in rem*.

[139] However, MUHURI contended that an order for prospective application or suspension of the declaration of invalidity could only be available, if firstly, it had been specifically pleaded and secondly, in the event it was not pleaded, the same was granted by the court seized of a matter as the most appropriate remedy. Accordingly, MUHURI submitted that the remedies of prospective applicability or suspension of the declaration of invalidity are not available to IEBC in this

consolidated appeal. MUHURI emphasized that this Court lacked the power to grant such a remedy no matter how attractive or appropriate it may be since it is not sitting on appeal or review of the ***Katiba Institute Case***. Further, it urged that since the provisions of Paragraph 5 of the IEBC Act had not been challenged in this appeal as being inconsistent with Article 250(1) of the Constitution, then Paragraph 5 maintained its legal effect.

(f) Kituo Cha Sheria (the 79th respondent)

[140] Learned Counsel, Dr. John Khaminwa, appeared for the 79th respondent and relied on the respondent's written submissions dated 1st December, 2021.

[141] Arguing on behalf of the 79th respondent, Dr. Khaminwa laid emphasis on the arduous history of constitution-making which was reflected in the High Court's observation that the Constitution was designed to respond to two sets of challenges that had plagued Kenya's constitutionalism; that is, the culture of hyper-amendments wherein the political class amended constitutions with such ease and frequency rendering the same hollow shells; as well as realization of the emphasis on citizen led process of amendment of the Constitution.

[142] As for the application of the basic structure doctrine, the respondent claimed that the answer lies in the Constitution. To the respondent, it was crystal clear from the Preamble of the Constitution that the people's intention was that the basic structure should not be altered without their approval. Moreover, Counsel urged that since its recognition in India the basic structure doctrine has attained universal acceptance hence forms part of the general principles of international law which are applicable in Kenya by dint of Article 2(5) of the Constitution.

[143] The 79th respondent asserted that the President cannot be a promoter of a popular initiative under Article 257 since that would amount to an infringement of Article 10 of the Constitution and is tantamount to usurping the people's power as

well as voiding social contract between the people and the State. It was the respondent's submission that by virtue of the office and the delegated power he holds, the President cannot be considered as 'the people' envisioned under the Constitution. Besides, the respondent claimed that any process by a sitting President to initiate and promote a popular initiative easily turns into populist constitutionalism that can lead to constitutional populism.

(vi) Amici Briefs

(a) Prof. Rosalind Dixon and Prof. David E. Landau (1st and 2nd amici curiae)

[144] With regard to the basic structure doctrine, the *amici'* brief focused on the scope of the constitutional amendment powers under Articles 255 to 257. In their opinion, the Constitution contains limitations on the constitutional power of amendments and several different tiers for constitutional amendment. However, the limitations and different tiers thereunder are not exhaustive rather they were designed to establish a floor as opposed to a ceiling on democratic constitutional entrenchment. In other words, it was the view of the learned Professors that what is provided under Chapter Sixteen reflects certain minimum requirements for a successful constitutional amendment but in no way exhausts or precludes the existence and applicability of the basic structure doctrine in Kenya. Indeed, they provide support or confirmation of the general position that the Constitution was designed to entrench and protect the minimum core of democracy as espoused by the doctrine.

[145] They urged that the above opinion on implied limits on the power of formal constitutional amendment resonates with the decisions of leading constitutional courts such as the Indian Supreme Court and the Colombian Constitutional Court operating in constitutional democracies. In point of fact, they opined that where

courts in other jurisdictions have rejected the doctrine like Malaysia, Singapore, Zambia, Uganda and Tanzania, there exists legal-political differences between such countries and Kenya hence, those authorities are not persuasive.

(b) Gautam Bhatia (the 3rd amicus curiae)

[146] According to the 3rd *amicus*, justification for the basic structure doctrine, as found by courts that have upheld its application (including the superior courts below), rests on certain core principles. These are: constitutional provisions are concrete expressions of a set of underlying principles which constitute the distinct and unique identity of the Constitution; every Constitution prescribes a procedure for its amendment which is distinct from the concept of its repeal or replacement; and the power to create a Constitution or new identity, that is, the primary constituent power is distinct from the power to amend the Constitution using its own provisions, that is, the secondary constituent power.

[147] The 3rd *amicus* went on to submit that, an amendment gives rise to the implicit assumption that what is being amended will retain its identity after the amendment; while repeal or replacement indicates the permanent loss of identity or creation of a new identity. Further, that primary constituent power is a sovereign act which is unbound by any existing legal structure while secondary constituent power flows from the Constitution. Consequently, the 3rd *amicus* urged that the essence of the doctrine is that the basic structure as the expression of constitutional identity acts as a substantive limitation upon the power of constitutional amendment.

[148] He argued that the specific form and content that the doctrine takes in any particular jurisdiction is determined by the jurisdiction's constitutional text, structure and history. Making reference to India, he stated that where the final word on amendments rest with Parliament, the doctrine takes the form of a

prohibition upon amendments that seek to destroy the basic structure of the Constitution. He urged that given Kenya's history, as well as the text and structure of Article 257, which envisages participation of both the people and the representative organs, it would not be appropriate, unlike India, for the application of the doctrine to include a judicial veto on amendments that violate the basic structure. In his view, the role played by the Judiciary must necessarily be a limited and procedural one; that is, adjudication of whether an impugned amendment violates the basic structure; and where it does, require such amendments be ratified under conditions that were equivalent to founding of the existing Constitution, that is, the four-step process set by the superior courts below.

[149] He added that a referendum is not, in itself equivalent to the exercise of sovereign power involved in founding or re-creation of the Constitution. Making particular reference to Article 257, he argued that it carves out a role for direct democracy in constitutional amendments, by stipulating the role of the people at the beginning of a popular initiative and the end (ratification through a referendum). Nonetheless, to him, that role of direct democracy is to complement and act as an alternative to parliamentary initiative hence, it amounts to constituent power as opposed to a primary constituent power. Accordingly, he submitted that the substantive limitations imposed by the basic structure doctrine apply both to representative constitutional amendments as well as constitutional amendments via referendum.

[150] Pertaining to whether the President can initiate changes to the Constitution, the 3rd *amicus* submitted that where a constitution is silent on an issue, as Article 257, a court should follow two principles. These are: if there are two equally plausible textual interpretations of Article 257, the one that maintains the balance between representative and direct democracy ought to prevail over one that undermines or skews it; and where a constitutional question involves a clash of two constitutional principles, the Court should resolve the conflict in a manner in

which both principles are allowed to have a maximum scope, and neither is subsumed by the other.

[151] Based on the two propositions he argued that Article 257 contains an implied limitation upon the President's participation in initiating an amendment through a popular initiative. He further explained that interpretation of Article 257 as allowing the President to initiate an amendment would upset the balance between representative and direct democracy characteristic of the provision. Equally, he submitted that the Court of Appeal's finding that the President's political rights under Article 257 were curtailed as long as he was in office was in line with the afore stated propositions.

[152] On the referendum questions, he argued that the unity of content approach taken by the High Court is the correct position. The 3rd *amicus* went on to contend that the purpose of referenda is to give effect to the people's will, expressed directly through a yes or no vote on a question of national importance. Therefore, in his view, putting several issues unrelated by their content and nature, or several unrelated amendments to the Constitution, or several unrelated provisions of laws to a vote in a referendum as a single issue would deny determination of the actual will of the Nation regarding each significant issue.

(c) Prof. Migai Aketch (the 4th amicus curiae)

[153] In the 4th *amicus'* view, the superior courts below applied selective and erroneous version of the history of constitution-making in Kenya. In turn, the courts disregarded firstly, the role that political compromise and the political elite played in the attainment of the Constitution. Secondly, that the people of Kenya were not only aware of the dangers of the culture of hyper-amendments but were also wary of overly rigid amendment procedures. Thirdly, that the question of how the Constitution would be amended had been extensively deliberated and resolved during the first phase of the constitutional review process.

[154] All in all, he argued that taking into account the history of the Constitution making process, it was clear that, the provisions in Chapter Sixteen are meant to strike a balance between amendment procedures that are not too simple and not too rigid; the people did not intend to immunize any of the provisions of the Constitution from amendment; the people could amend any provisions of the Constitution by exercising their secondary constituent power either by themselves through a popular initiative or by their representatives exercising constituent power, as long as the stringent procedures in Chapter Sixteen are met.

[155] As far the *4th amicus* was concerned, the superior courts' finding that people can only exercise their constituent power through the four mandatory sequential steps had no basis in constitution-making practice or the Kenya's history. In point of fact, he asserted that the Constitution was neither made using all the four steps alluded to nor in the sequence advanced by the superior courts below; and what was more, the draft Constitution that was subjected to a referendum in 2010 had been altered by the political elite through a pact and moreover it was tinkered with by a Committee of Experts who were charged with the responsibility of harmonizing the drafts.

[156] He argued that political settlements on constitutional reform or amendment initiatives, like the BBI initiative and the resulting Amendment Bill, should be encouraged. Therefore, courts should not injunct, stop or refrain any process which leads to a referendum vote. The rationale, as per the 4th *amicus*, is that the people have the capacity and sensibility to reject constitutional amendments they consider not participatory or otherwise faulty, as they did the Wako Draft Constitution in 2005. In other words, he stated that a referendum is an effective constraint on those involved in the constitution-making process because it gives the people the final authority to approve or reject elite settlements.

(d) Prof. Richard Albert (the 5th amicus curiae)

[157] The 5th *amicus curiae* also held the view that there is a distinction between constitutional amendment and dismemberment; and that the Amendment Bill, was a constitutional dismemberment as opposed to an amendment. He contended once a court finds that a proposed amendment is actually a constitutional dismemberment only three options are available. Firstly, it can opt to do nothing about it, and permit constitutional reformers to proceed with their constitutional transformation. Secondly, it can declare that it violates the fundamental presuppositions of the constitution, and ultimately invalidate the proposed constitutional reform on the basis of the basic structure doctrine. Finally, it may declare the proposed reform unconstitutional for violating the basic structure and concurrently offer a road map of how the reformers may lawfully proceed with the intended reforms. According to the 5th *amicus*, the Court of Appeal opted for the third option and advanced the four-stage sequence of amendment, which in his view, was rooted in the rule of mutuality. He went on to submit that the rule of mutuality entails that a democratic constitution may be dismembered using the same procedure that was used to ratify it.

[158] Be that as it may, the 5th *amicus* submitted that while the doctrine of unconstitutional constitutional amendments has received varied reception, Article 165 and its interpretation leans more towards the courts accepting rather than rejecting the doctrine.

[159] In his view, the Constitution is unclear on how to put the referendum question to voters. Nevertheless, he believed that only two options are available for voters in a referendum; voters must either approve or reject the entire package of reforms presented to them or separately approve or reject every single individual reform proposal. Outside of these, he added, a separate option occurs upon the determination by a court that an amendment Bill contains amendment proposals sufficiently related to each other. In his view, the Bill may be put to a single

referendum question in its entirety, as one mega-package, for voters to either approve or reject the multi-subject Bill at once. He urged this Court to find that if an amendment Bill consists of several different subject-matter, the voting management body shall put different sets of related amendments to voters as separate self-standing referendum questions. Thereafter, the voters choose to approve or reject the various proposals as opposed to requiring the voter to reject the entirety of the multi-subject Bill.

[160] He however warned that application of the 'rule of subject-matter relatedness' may attract criticisms that a court is interfering with the constitutional reform process. He urged that the Court may consider applying this 'rule of subject-matter relatedness' in the context of the Amendment Bill if it ultimately upholds this constitutional reform and authorizes it to proceed to a referendum.

(e) Prof. Yaniv Roznai (the 6th amicus curiae)

[161] Discussing the nature of constitutional amendment, the 6th *amicus curiae* argued that a country's amendment formula is significant in balancing between flexibility and rigidity and often gives insights into the intricacies and peculiarities of a country's social and political culture. In that regard, he submitted that some jurisdictions incorporate selective rigidity in the amendment of some of their constitutional provisions which they deem fundamental, either by prescribing a difficult amendment process or out rightly demarcating such provisions as unamendable. Nevertheless, he contended that while the unamendable provisions serve as a mechanism for limiting amendment power they do not and cannot limit the primary constituent power. Putting it differently, he stated that even unamendable provisions are subject to changes introduced by extra-constitutional forces.

[162] In addition, he urged that courts in various jurisdictions have even gone beyond the text of the constitution to recognize the idea of implied limitations on

constitutional amendment power, like the basic structure doctrine. Nonetheless, he contended that whilst there was an increasing prevalence of the unconstitutional constitutional doctrine, it was yet to mature into a universal norm of constitutionalism. As such, in his view, circumstances under which a court may apply doctrines of implied limitations depend on firstly, the flexibility or rigidity of the amendment process; the more rigid the process is, the less need for implied limitation and *vice versa*; secondly, whether one party or the executive controls the amendment process; thirdly, whether a stable political-democratic culture that respects the rules exists; and fourthly, whether a country is part of a strong regional mechanism where there are various machineries to ensure rules and values are respected.

[163] As for the scope of amendment power, the 6th *amicus* submitted that it is a delegated power exercised by special constitutional agents of the people. It is therefore subordinate to the principal power, that is, the primary constituency power, it draws its legal competency from; and cannot be used to destroy the Constitution or its basic principles.

[164] In conclusion, he urged that the basic structure doctrine is applicable in Kenya as several matters can only be amended by the people and not Parliament. Furthermore, he was of the view that the role played by the people under the multiple procedures prescribed in Chapter Sixteen for amending certain provisions in the Constitution including the referendum thereunder, does not amount to an exercise of primary constituent power. He argued that people may be regarded in two distinct capacities; as a source of absolute power (primary constituent power) that may create a new constitutional organ, and as a constitutional organ established by the Constitution for its amendment (secondary constituent power). In other words, that role played by the people in a popular initiative and referendum under Chapter Sixteen is derived from the Constitution hence, cannot be used to destroy the basic structure of the Constitution.

(f) Prof. Charles Manga Fombad (the 7th amicus curiae)

[165] According to the 7th *amicus curiae*, the framers of the Constitution provided three procedures for amending it in Articles 255 to 257; that is, an amendment by Parliament with the special majority; an amendment by Parliament subject to approval at a national referendum; and an amendment by popular initiative subject to approval at a national referendum. He argued that the Judiciary could not introduce a fourth method for amending the Constitution as the superior courts below did.

[166] In his opinion, the doctrines of basic structure, constitutional unamendability and eternity clauses pose risks to constitutionalism, the rule of law, and democracy. Besides, he submitted that the framers of the Constitution intended for the Constitution to be amendable and transformative, otherwise they would have crafted specific clauses on the applicability of the basic structure doctrine. He argued that in limiting constitutional amendments under Article 257 of the Constitution, the superior courts below placed an impermissible constraint on the sovereign power of the people. Furthermore, he urged that considerable caution is necessary when invoking theories and principles developed by non-African scholars since most of those theories are based on western constitutions.

(g) Dr. Adem K. Abebe (the 8th amicus curiae)

[167] In his brief, the 8th *amicus* began by stating that the recognition of the existence of a basic structure in the Constitution does not necessary lead to judicial enforcement of limits on the amendment of such structure. As far as he was concerned, whether or not a basic structure exists and how it should be defended is best left to the regular political process involving the people, civil society, the media, public intellectuals, and political institutions at the national and county levels. He argued that indeed Chapter Sixteen of the Constitution intentionally

specifies what is considered the fundamental core of the political framework and provides for a heightened process of its amendment designed to ensure critical political deliberation, high-level consensus, and a direct say of the people.

[168] Moreover, he stated that unless judicial power is specifically granted or naturally flows from the Constitution, courts should steer away from invoking power to evaluate and replace the considered judgment of the people and political representatives regarding substantive quality of amendments. Accordingly, he submitted that the superior courts below erred in outlining a four-step sequence process of amending the basic structure, which is quintessentially for the sovereign to determine. In any event, he stated that the proposed sequential process has already been given effect through the current constitutional amendment process.

[169] He submitted that the question as to whether amendment proposals should be presented as one, separate or clustered proposals should be left to those proposing the amendment given the interrelations between the various proposals. Further, he urged that had the referendum in respect of the Constitution, which was adopted as a single document, been held on each provision or even clusters of provisions, the outcome would have been widely different. In his opinion, separate presentations of amendment proposal are rare in comparative practice.

(h) Dr. Duncan Ojwang', Dr. John Osogo Ambani and Dr. Linda Musumba

[170] They submitted that the basic structure doctrine as expressed in ***Kesavananda Case*** exists as a concept to limit and guard against irregular constitutional amendments and unconstitutional constitutional amendment processes. In that, while it allows constitutional changes it requires that changes which alter the constitution's identity be effected through the use of constituent power.

[171] According to them, the scope of the basic structure doctrine in Kenya can be gleaned from the ***Njoya Case,*** *the* ***Commission for the Implementation of the Constitution Case*** as well as the ***Thirdway Alliance Case***. It seeks to identify and guard against amendments that dismember, alter or change the basic structure notwithstanding the process used. In that regard, they urged that referendum process prescribed in Chapter Sixteen does not offer one a *carte blanche* to alter the Constitution by bypassing the sequential process identified by the superior courts below. They went on to submit that constitutional provisions that form the basic structure could only be amended through the exercise of primary constituent power (sequential process), which exists outside the Constitution as opposed to secondary constituent power which is a creature of the Constitution.

[172] In their opinion, the history of the constitution-making process justifies the four sequential processes as a balance between rigidity and flexibility in amending the Constitution. Besides, *amici* argued that the interpretation of the Preamble and Article 1 of the Constitution indicates that the Kenyan people intended that the Constitution should be altered using the same process it had been adopted. In other words, they contended that what the people had in mind is that the Constitution would be changed through the exercise of primary constituted power comprised of the four stages as opposed to the secondary constituent power or constituted power.

[173] They submitted that the President as the Head of the Executive and Government cannot be the promoter of a popular initiative under Article 257 based on the social contract of the Constitution, which emphasizes separation of powers, checks and balances. According to them, under the social contract theory, the constituent power belongs only to the private citizens called the people who form the social compact and not those who govern. Consequently, they urged that by virtue of Article 131 (2) of the Constitution, the President must safeguard the

sovereignty of the people and not his sovereignty. Furthermore, Article 38 of the Constitution cannot be used by state officers to capture the people's sovereignty since once a citizen becomes the President, they cease to be an ordinary citizen; and are precluded from simultaneously playing participatory and representative democratic roles.

[174] On the issue of referendum questions, *amici* associated themselves with the findings of the High Court.

(i) Dr. Jack Mwimali

[175] He submitted that a holistic interpretation of the text, spirit, structure, and history of the Constitution leads to the finding that the basic structure doctrine applies in Kenya; and that it implicitly limits the amendment power in Articles 255 to 257. As such, he argued that any fundamental changes to the Constitution must be the subject of the four-step sequential process. According to him, the amendment powers in Articles 255 to 257 are secondary amendment powers derived from the Constitution and subject to the limitations imposed by the prescribed procedure thereunder. The *amicus* went on to urge that Judges may invalidate any exercises of the derivative amendment power that purport to violate the Constitution's basic features.

[176] According to *Dr. Mwimali*, if the Attorney General's argument on presidential immunity was to be upheld, it would have the effect of hoisting the holder of the Office of the President above the law and immunize his conduct from judicial scrutiny.

(j) Kenya Human Rights Commission (KHRC)

[177] KHRC submitted that the basic structure doctrine, eternity clauses and unamendable constitutional provisions are not only applicable in Kenya but can

also be discerned from the Constitution. In particular, it urged that the basic structure doctrine as applied in Kenya protects certain fundamental aspects of the Constitution, which in its view are delineated under Article 255(1), from amendment through the use of either secondary constituent power or constituted power. Moreover, KHRC argued that the basic structure cannot be altered through the multi-tiered process prescribed under Chapter Sixteen of the Constitution.

E. ANALYSIS

[178] As previously observed, the instant consolidated appeal is predicated on Article 163(4)(a) of the Constitution which clothes this Court with jurisdiction to determine appeals from the Court of Appeal on questions of interpretation and application of the Constitution. Although the length and breadth of the pleadings and arguments as summarized above touched on several Chapters of the Constitution, the common denominator is that they are focused on the interpretation and application of Chapter Sixteen of the Constitution. The two superior courts below have given their elaborate views on how these provisions are to be interpreted and applied and in my view therefore, this Court's jurisdiction is properly seized under Article 163(4)(a) of the Constitution.

[179] Having set out the issues framed by the Court for determination beforehand, I will now proceed to deal with them sequentially.

(i) Basic Structure Doctrine

[180] It is pertinent in the circumstances to point out that the basic structure doctrine as articulated by the High Court was also endorsed by the majority Judgment of the Court of Appeal. The sum total of the two decisions being that, beyond the three stipulated pathways for amending the Constitution provided in Chapter Sixteen, there are certain fundamental features in the eighteen (18)

Chapters of the Constitution that are not amendable without first determining on a case by case basis whether a proposed amendment forms part of the basic structure. Further, that any amendment to those particular Articles identified as fundamental features of the Constitution, would follow a four sequential process being civic education, public participation and collection of views, constituent assembly debates, and a referendum. In effect, the two superior courts below concluded that certain provisions of the Constitution are beyond the reach of the enumerated amendment powers stipulated in Chapter Sixteen of the Constitution.

[181] The history of the emergence and evolution of the basic structure doctrine was comprehensively captured in the very detailed judgments of the two superior courts below. Therefore, I will merely mention some of its key features to place my findings in perspective. The basic structure doctrine first received judicial recognition in 1973 in the ***Kesavananda Case,*** a decision of the Supreme Court of India. The case concerned a challenge to the state government of Kerala's attempts, under two land reform Acts, to allow the state government to acquire privately held land to fulfil its socio-economic obligations. Subsequently, the Indian Parliament passed the Constitution (24th Amendment) Act, (25th Amendment) Act, and (29th Amendment) Act which in one way or the other shielded the Kerala State's Land Reform Acts from being challenged in court. It is in this context, that the Supreme Court of India addressed the question of whether there were limits to Parliament's power to amend the Constitution.

[182] In a majority finding by seven (7) Judges, with six (6) Judges dissenting, the Supreme Court of India held that the Constitution (24th Amendment) Act, (25th Amendment) Act, and (29th Amendment) Act passed by Parliament exercising its powers under Article 368 of the Constitution of India were unconstitutional to the extent that they damaged the basic structure of the Constitution. As enunciated therein, the doctrine places substantive limits on the amending power by placing the basic features of the Constitution beyond the Legislature's power to amend the

Constitution. In effect, the Supreme Court of India endorsed the idea that a constitutional amendment can be unconstitutional on substantive grounds.

[183] The particular provision of the Constitution of India that was interpreted by the Supreme Court of India to yield the aforesaid finding was Article 368 which provided that:

> "***An amendment of this Constitution may be initiated only by the introduction of a Bill for the purpose in either House of Parliament, and when the Bill is passed in each House by a majority of the total membership of that House and by a majority of not less than two-thirds of the members of that House present and voting, it shall be presented to the President for his assent and upon such assent being given to the Bill, the Constitution shall stand amended in accordance with the terms of the Bill.***"

It is irrefutable that a reading of the above provision clearly shows that the amendment process under the Constitution of India is exclusively vested in the Legislature. This therefore means, the amendment process of India's Constitution can be described as falling under the flexible model of amendment powers in the flexible-rigid dichotomy used to categorise the nature of amendment powers in a given constitution. And for this preposition, see books by; Zachary Elkins *et al* in ***'The Endurance of National Constitutions'*** (2009, Cambridge University Press) 81; and Richard Albert, ***Constitutional Amendments***: ***Making, Breaking, and Changing Constitutions***' (2019, Oxford University Press) 95.

[184] Subsequently, the basic structure doctrine and the idea of limits on power to amend a constitution have been considered by courts in several jurisdictions across the world and received mixed reception. For example, the basic structure

doctrine and its various variants have been accepted in Bangladesh, Belize, Colombia, Taiwan, Malaysia, Slovakia, and Peru; while courts in France, Georgia, South Africa, Singapore, Zambia, Uganda, and Tanzania have rejected the doctrine. What this state of play demonstrates, which has been recognised by some of the distinguished scholars as reflected in the various materials cited before us, is that the basic structure doctrine has not yet matured into a universal norm of constitutionalism. It is in appreciation of this reality that Richard Albert *et al,* observe in ***'The Formalist Resistance to Unconstitutional Constitutional Amendments'*** (2019) 70 *Hastings Law Journal* 639, at page 642 as follows:

> ***"But we should not take the increasing prevalence of the doctrine of unconstitutional constitutional amendment as evidence of its appropriateness for all constitutional states. It may well be that the doctrine fits in a given constitutional tradition and should be incorporated into its practices of adjudication. But this is a choice for a state and its domestic actors to make according to their own norms of governance. The politics of constitutionalism must remain localized in their particularized social and political circumstances. Otherwise, when combined with the enormous pressure on states in our day to conform to what may appear to be generally accepted standards of global constitutionalism, the trend toward adopting the doctrine of unconstitutional constitutional amendment might overwhelm the capacity of a state to evaluate whether the doctrine is right for itself in light of its own juridical history, political context, and constitutional traditions.***

The doctrine of unconstitutional constitutional amendment is most certainly not a necessary feature of modern constitutionalism, nor even of the narrower idea of modern liberal democracy. It is important for all constitutional actors to know that there is another answer to the question whether an amendment can be unconstitutional. Constitutional designers, adjudicators, and amenders should know that it is an altogether reasonable choice to deny the possibility of an unconstitutional constitutional amendment... [in effect] the doctrine has not yet matured into a global norm of constitutionalism."

[185] Given that the basic structure doctrine has not matured into a universal norm of constitutionalism or a doctrine of general application, courts have adopted the approach of evaluating its 'fit' within their constitutional systems before accepting its applicability in the various jurisdictions where it has been considered.

[186] In the Kenyan context, this Court has already developed an approach which courts are obligated to follow in ascertaining whether to transplant any juridical idea to the Kenyan constitutional system in the post-2010 constitutional order. In the ***Vetting Board Case*****,** this Court grappled with the question of the scope and effect of the ouster of the judicial review power of the High Court by a constitutional ouster clause. Whereas the Court considered similar jurisprudence on ouster clauses from other common law countries that had been inspired by the land mark decisionof the House of Lords in ***Anisminic Ltd. v. Foreign Compensation Commission and Another*** [1969] 2 A.C. 147, the following observation by *Mutunga, CJ* (as he then was) is pertinent:

"[210] ....in interpreting the Constitution, Courts must take cognizance of Kenya's unique historical context which is aptly captured in the majority opinion, and by the dissents of *Murgor and Sichale, JJ.A.* ***In holding that the English case, Anisminic was not applicable to the vetting process,*** *Murgor, J.A* ***observed that where the ouster clause is part of the Constitution itself, most jurisdictions such as the West Indies, India and England have followed the principles set out in Anisminic. The learned Judge held (at paragraph 76) that given Kenya's unique historical circumstances, Anisminic was not applicable "on all fours," in the interpretation of Section 23(2) of the Sixth Schedule to the Constitution; hence that case is to be distinguished.***

...

[218] Although certain jurisdictions, such as India and Germany, have perceived judicial review as an immutable structure of their Constitutions, these jurisdictions do not have Constitutions that are as unique as Kenya's. We must ask whether the foreign jurisdictions we seek reliance upon, have Constitutions and, if they do, whether these Constitutions have provisions akin to Articles 1, 23, 159 and 259 which emphasize the sovereignty of the people; or whether they have principles and values, like the ones found in Article 10, which apply to the interpretation and application of the Constitution; or whether they have legislation similar to our Supreme Court Act, which introduces Kenya's historical context into the interpretation of the Constitution. If the answers to these

questions are in the negative, then the common law doctrines found in other jurisdictions, foreign cases and foreign constitutions, must be interpreted in such a manner as to reflect our modern Constitution, and our unique conditions and needs."

[187] I have considered the above *dictum* in light of the obligation imposed on this Court by Section 3(c) of the Supreme Court Act, No. 7 of 2011 which is to ***"develop rich jurisprudence that respects Kenya's history and traditions and facilitates its social, economic and political growth"***. Accordingly, before declaring the applicability or otherwise of the basic structure doctrine in Kenya's constitutional context, the Court is obligated to take into account our constitutional history especially bearing in mind that the doctrine, which found root in India in 1973, was available when the framers of the Constitution conceptualised the provisions of Chapter Sixteen on amendments. Another way of looking at the matter is to ask a pertinent question as to whether there was a gap identified in particular in regard to the provisions of Chapter Sixteen of the Constitution requiring to be sealed by the basic structure doctrine.

[188] In addition, in evaluating whether the basic structure doctrine is applicable in our constitutional system, a court must take into account the purposive and value-based interpretation decreed by Articles 10, 20(4), 159, and 259(1) of the Constitution. Such an approach to constitutional interpretation begins from and remains rooted in the text of the Constitution whilst interpreting it holistically, giving effect to its values and principles, and never losing sight of the historical context and the backdrop of the provisions being interpreted. Therefore, to comprehend and contextualise whether the Constitution contemplates the basic structure doctrine, the starting point should be the rationale behind the provisions of Chapter Sixteen of the Constitution as documented in the preparatory documents from the constitution-making process.

[189] It is an understatement to say that the Kenyan Independence Constitution endured a legacy of hyper-amendment during the post-independence period. The former Constitution was flexible giving the Legislature wide power and discretion in amending it. As a result, Parliament undertook so many amendments to the Constitution that it lost its original character. The most significant amendments being the merger of the Senate and the House of Representatives to establish a unicameral Legislature; abolition of the quasi-federal (regional) governments that led to the establishment of a unitary State; and alteration of the entrenched majorities required for constitutional amendments making it easier to amend the Constitution. Yet another repulsive amendment was the abolition of the security of tenure for Judges and other constitutional office holders. Ultimately, the amendment that finally broke the proverbial camel's back giving rise to the clamour for a new constitutional order was the one that converted the country from a multi-party democracy to a *de jure* one-party State in 1982.

[190] Informed by this history, Kenyans yearned for a stable constitutional system where the power to amend the Constitution would not be abused for short-term interests by the political elite. The *CKRC Final Report* records at page 74 that Kenyans expressed the view that:

> ***"There is need to protect the Constitution against indiscriminate amendments. If the amendment procedure is too simple, it reduces public confidence in the Constitution. The converse, however, is also true. If the amendment procedure is too rigid, it may encourage revolutionary measures to bring about change instead of using the acceptable constitutional means. Thus, a balance must be struck between these two extremes"*** [my emphasis].

[191] What emerges from the historical account is that there was a strong concern that the country should adopt provisions on amendment power that are able to

protect the constitutional order from abusive amendments. But this was not all. There was also a recognition that the Constitution must remain flexible in order to adjust to political, social, economic, technological and other changes that would take place in the polity. In effect, the overarching imperative that informed the drafting of Chapter Sixteen was the need to find a proper balance between rigidity and flexibility.

[192] The quest for a balance between rigidity and flexibility is evident in the 'tiered' amendment provisions in Chapter Sixteen which stipulates three pathways for amending the Constitution. The first pathway under Article 256 provides for amendment by parliamentary initiative. This process involves public participation and approval by the Houses of Parliament through a vote of endorsement by two-thirds of all the members of each House during the second and third readings of an amendment Bill. The second pathway under Article 257 provides for amendment by popular initiative. This process involves collection of at least one million signatures from registered voters in support of the popular initiative by the promoters of an initiative; approval of the initiative by a majority of the County Assemblies; and passage of the Bill by a majority of the members of each House of Parliament. In this second process, if either House of Parliament fails to pass the Bill, the proposed amendment is submitted to the people in a referendum.

[193] The third pathway stipulated in Article 255 relates to what has come to be known as the entrenched provisions of the Constitution. Some of the Court of Appeal Judges referred to these entrenched provisions as forming the basic structure of the Constitution. Article 255(1) of the Constitution stipulates that in addition to adopting either the parliamentary initiative or popular initiative pathway, where an amendment relates to the following Articles, a Bill to amend those provisions shall be subjected to a referendum:

> ***"the supremacy of the Constitution; the territory of Kenya; the sovereignty of the people; the national values and***

principles of governance referred to in Article 10(2); the Bill of Rights; the term of office of the President; the independence of the Judiciary and the commissions and independent offices to which chapter fifteen applies; the functions of Parliament; the objects, principles and structure of devolved government; or the provisions of chapter sixteen on amendment of the Constitution."

Approval through the envisaged referendum under Article 255(2) must satisfy two conditions. At least twenty percent of the registered voters in each of at least half of the counties should vote in the referendum; and such an amendment should be supported by a simple majority of the citizens voting in the referendum.

[194] A reading of the three pathways for amending the Constitution in Chapter Sixteen clearly shows that Kenyans were alive to the historical legacy of the culture of hyper-amendment in the pre-2010 era and sought to tame any abuse of the amendment power. In particular, Article 255(1) and (2) of the Constitution demonstrates that, alive to the culture of hyper-amendments, the Kenyan people sought to ring-fence the core or fundamental commitments of the Constitution by entrenching them and subjecting the process of their amendment to deepened public participation; as well as imposing a down-stream constraint or veto by stipulating that the entrenched provisions enumerated in Article 255(1) of the Constitution can only be amended through a referendum process. The rationale of entrenching the provisions mentioned in Article 255(1) of the Constitution is, in my view, informed by the very democratic idea that constitutional amendments of a fundamental nature should take place through a deeply participatory process and be ratified by the people, being the ultimate sovereign in the polity, through a referendum.

[195] The approach in balancing flexibility and rigidity in constitutional amendment adopted in Chapter Sixteen reflects and compares favourably with

modern constitutional architecture and design. Drafters of contemporary constitutions pursue the goal of balancing rigidity and flexibility through what has been termed as 'tiered' design of amendment rules. This argument is augmented by a number of articles cited before us, particularly: Rosalind Dixon and David Landau, ***'Tiered Constitutional Design***' (2018) 86 *The George Washington Law Review* 438, 441 and Richard Albert, '***Constitutional Handcuffs'*** (2010) 42 *Arizona State Law Journal* 663, 709.

[196] Under the 'tiered' design model, amendment rules vary with provisions that are core or fundamental to the constitutional system being placed on a higher tier and made more difficult to amend. The amendment rules under the Constitution adopt this modern 'tiered' constitutional design combining the virtues of rigidity and flexibility by having different amendment procedures apply to different parts of the Constitution. The core foundational values, principles and structures of the Constitution have been granted a high level of entrenchment to ensure the stability of the constitutional system. It follows therefore, that Kenyans were conscious of the core constitutional values, principles and structures that they wanted protected from abusive amendments and they protected them through the entrenched provisions in Article 255 of the Constitution. In my view therefore, the framers of the Constitution well aware of the basic structure doctrine, chose to ring-fence some key features from flexible amendments; and if it was their intention to provide for eternity clauses or the basic structure doctrine, nothing would have stopped them from so doing.

[197] The next question that follows is whether it was necessary for the two superior courts below to adopt the basic structure doctrine and thereby devising a fourth pathway for amending the Constitution outside the three pathways stipulated in Chapter Sixteen.

[198] To answer this question requires one to appreciate how the High Court and the majority of the Court of Appeal proceeded to analyse Chapter Sixteen. It was

on the premise that based on the history of hyper-amendment of the repealed Constitution during the pre-2010 dispensation, the Constitution demands heightened procedures beyond the 'tiered' design of the amendment procedures stipulated in Chapter Sixteen that would make the Constitution more difficult to amend. The two superior courts below however did not go into a detailed analysis and to specifically point out the actual shortcomings of the provisions of Chapter Sixteen especially in light of all the twenty-one (21) unsuccessful attempts that have been made over the last ten years to amend the Constitution.

[199] The Court of Appeal in my respectful view had a duty to analyse the findings of the High Court and specifically point our whether there were apparent inadequacies as far as the provisions of Chapter Sixteen were concerned. Looking at the history as stated above, as well as the provisions of Chapter Sixteen, it is clear to me that Kenyans sought to achieve a balance between rigidity and flexibility in the amendment process. Kenyans did not want to shift from one extreme to another extreme in the amendment spectrum, that is, from hyper-amendments to ultra-rigidity in the amendment process. Rather, what Kenyans desired is a balance between rigidity and flexibility as reflected in the 'tiered' amendment process in Chapter Sixteen in the Constitution; with the core or essential features of the Constitution being accorded heightened protection but still open to amendment through an enhanced inclusive and participatory process that culminates in the people exercising their sovereign power through ratification in a democratic process in the form of a referendum.

[200] The High Court and the majority of the Court of Appeal, with tremendous respect, failed to appreciate that the 'tiered' amendment procedure is one of the options available in the menu of constitutional design options for dealing with the practice of abusive amendments just like other design options that limit amendability (for example, eternity clauses and the basic structure doctrine). Therefore, where Kenyans have selected the 'tiered' amendment procedure as their

response to the culture of hyper-amendability, I find it difficult to justify this judicially-created '**fourth pathway'** of amending the Constitution founded on the basic structure doctrine. Unfortunately, there was no justification provided to demonstrate the lacuna in the Constitution and hence, the need to call in aid the basic structure doctrine to enhance the existing tools of interpretation. The pre-2010 history of Kenya is replete with precedents of application of foreign laws and doctrines from the commonwealth and other jurisdictions which was done due to absence of local statutes. Today, I dare say that courtesy of our own Constitution, we have sufficient arsenals that include our own canons of interpretation which we must exhaust before borrowing from other jurisdictions.

[201] Further, I also see a potential conflict within the constitutional system with this judicially-created '**fourth pathway'** for amending the Constitution. This is for the simple reason that in our constitutional dispensation that is people-centered; our nascent democracy that respects the doctrine of separation of powers by vesting legislative power in the Legislature, to create a '**fourth pathway'** within the scheme of amendments would bring into question the place of the participation of the people and the place of Legislature in that scheme. Taking into account where we are at in our constitutional democracy, Kenyans needed to be consulted on whether it is their wish to introduce the '**fourth pathway'** for amending the Constitution. In other words, we, Judges should be vigilant lest we are accused of usurping the sovereign power vested in the people by introducing a constitutional amendment through judicial fiat.

[202] Put differently, the 'tiered' amendment process provided in Chapter Sixteen of the Constitution is a design option for dealing with the problem of abusive amendments and obviates the need for judicially-created limits to amendment power like the basic structure doctrine. This is in line with the view expressed by Rosalind Dixon and David Landau in '***Transnational Constitutionalism and a Limited Doctrine of Unconstitutional Constitutional Amendment'***

(2015) 13(3) *International Journal of Constitutional Law* at page 613 where they remark thus:

> ***"The doctrine of unconstitutional constitutional amendment is useful as a partial solution to these threats. It is not the only possible response: another way in which the problem of abusive constitutional amendments can be dealt with at the level of constitutional design is via the use of some form of "tiered" amendment procedure. A system of tiered amendment thresholds has become a part of the comparative constitutional state of the art: many new constitutions include different amendment rules for different parts of the constitution. The point of these schemes is to require more demanding demonstrations of popular will to amend some parts of the constitutional order as opposed to others, thus raising the costs of dangerous forms of constitutional change"*** [my emphasis].

[203] My take home from this scholarly perspective is that 'tiered' design of constitutional amendment processes is one of the design options used in curbing the problem of hyper-amendment. This tells us that judicially-created basic structure doctrine is not the only option available in the design toolkit for curbing abusive amendment practice. Moreover, the 'tiered' design of amendment provisions is arguably superior to the judicially-created basic structure doctrine given its democratic legitimacy.

[204] Prof. Yaniv Roznai rightly points out in his well-balanced *amicus* brief filed before this Court that the applicability of the basic structure doctrine depends, very much on context. The most important contextual consideration is the balance between flexibility and rigidity of the amendment process. The more difficult the

amendment process is, the less there is a need for a doctrine of implied limits to amendment power. As Yaniv Roznai has observed in ***'Necrocracy or Democracy? Assessing Objections to Constitutional Unamendability'*** in Richard Albert, and Bertil Emrah Oder, (eds) ***'An Unamendable Constitution? Unamendability in Constitutional Democracies'*** (Springer, 2018) at page 45:

> ***"Moreover, the theory of unamendability calls for judicial restraint... Especially if constitutional amendments are adopted through demanding amendment procedures which are multi-staged, inclusive, participatory, deliberative and time-consuming, courts should restrain themselves when adjudicating constitutional amendments."***

[205] The jurisprudential underpinning of this view is that in a case where the amendment process is multi-staged; involve multiple institutions; is time-consuming; engenders inclusivity and participation by the people in deliberations over the merits of the proposed amendments; and has down-stream veto by the people in the form of a referendum, there is no need for judicially-created implied limitations to amendment power through importation of the basic structure doctrine into a constitutional system before exhausting home grown mechanisms. Moreover, I fully agree with the portion of the Judgment of *Sichale, J.A* where she questioned the viability of relying on Judges to interpret on a 'case by case' basis on whether a particular provision of the Constitution is amendable.

[206] To put this into perspective with respect to our constitutional architecture, amendment of the entrenched provisions of the Constitution relating to the matters listed in Article 255(1) of the Constitution through popular initiative route requires: first, there must be public participation throughout the amendment

process by dint of Article 10(2)(a) of the Constitution. Second, collection of one million signatures from registered voters in support of the initiative as stipulated in Article 257(1). Third, support of the initiative through approval of the Bill by a majority of the County Assemblies as stipulated in Article 257(7). Fourth, consideration of the Bill by the bicameral Houses of Parliament by dint of Article 257(10). Fifth, subjection of the Bill to a referendum in terms of Article 255(2), in which at least twenty per cent of the registered voters in each of at least half of the counties vote in the referendum and the amendment is supported by a simple majority of the citizens voting in the referendum. Sixth, it should also be appreciated that the processing of the Bill in the County Assemblies and the bicameral Houses of Parliament is also subject to a further public participation requirement in terms of Articles 196 and 118 respectively. Seventh, Article 88(4)(g) imposes an obligation of voter education on IEBC.

[207] Amendment of the entrenched provisions under the parliamentary initiative route requires: first, by dint of Article 10(2) of the Constitution, public participation must inform the entire amendment process. Second, the amendment Bill has to go through the bicameral Houses of Parliament under Article 256. Third, the Bill shall not be called for second reading in either House within ninety days after the first reading of the Bill in either House as stipulated in Article 256(1)(c). Fourth, the Bill is deemed to have been passed by Parliament when each House of Parliament has passed the Bill, in both its second and third readings, by not less than two-thirds of all the members of that House in terms of Article 256(1)(d). Fifth, the Houses of Parliament are under obligation to publicise the Bill and facilitate public discussion about it pursuant to Articles 118 and 256(2). Sixth, the President is to submit the Bill to IEBC to conduct a national referendum, within ninety days as stipulated in Article 256(5). Seventh, subjecting the Bill to a referendum in terms of Article 255(2), in which at least twenty per cent of the registered voters in each of at least half of the counties vote in the referendum and the amendment is supported by a simple majority of the citizens voting in the

referendum. Eighth, Article 88(4)(g) of the Constitution imposes an obligation of voter (civic) education on IEBC.

[208] Looking at the two pathways for amending the entrenched provisions, it is inescapable to conclude that amending the core or fundamental provisions of the Constitution is a multi-staged, multi-institutional, time-consuming process that ensures that a constitutional amendment process that touches on the core or fundamental aspects of the Constitution is transparent, inclusive and engenders the participation of the people in democratically deciding on their governance. I therefore find that the 'tiered' amendment process under the Constitution meets the set criteria as to when judicially-created basic structure doctrine is inappropriate and undesirable. Therefore, the two superior courts below erred by providing a fourth judicially-created pathway for amending the Constitution which is with respect tantamount to amendment of the Constitution through a judgment.

[209] Indeed, reading Chapter Sixteen leaves me with the impression that Kenyans desired democratic self-government by opting for a balance of rigidity and flexibility. Chapter Sixteen provides citizens with a highly participatory process through which they can democratically reformulate the core aspects of the social contract. It enables them to exercise their sovereign power from time to time to reformulate their core commitments and update constitutional norms to conform to their will at any given time and respond to changing social, political, economic and technological needs and circumstances. This ensures that the Constitution reflects the desires of each generation, not past generations, however wise or well-intentioned. The constitution-making generation should not forever tether the future generations in what they may perceive as suitable for them during the constitution-making period. In addition, this would be tantamount to silencing some Articles against the canon of interpretation that the Constitution is speaking all the time.

[210] In other words, denying people an opportunity to amend their Constitution through a judicially-created ultra-rigid process undermines democratic constitutionalism and self-government by stifling the voice of the present and future generations in governance. It is on this premise that I hold that where the amendment processes incorporate a 'tiered' process and the core or fundamental commitments of the Constitution can only be amended through an onerous process; that is, multi-staged, involving different institutional actors, deliberative, inclusive and participatory process, and involves ratification by the people in a democratically conducted referendum; then a court ought not to import the idea of a judicially-created basic structure doctrine. This is informed by the view that, in a context like Kenya, the Constitution has an explicitly in-built structure to discourage hyper-amendments and tame likely abuses of the amendment process by stealth or subterfuge.

[211] To buttress this point further, the amendment practice in post-2010 Kenya illustrates that the **'tiered'** amendment design is an adequate bulwark against abusive amendments. The attempts to amend the 2010 Constitution during the first decade of its operation and implementation demonstrate that the 'tiered' amendment design has ensured constitutional stability.

[212] As pointed out by *Sichale, J.A* in her dissenting opinion at the Court of Appeal, there have been twenty-one (21) failed attempts to amend the 2010 Constitution during the first decade of its operation. Nineteen (19) of these were through the parliamentary initiative and two (2) were through the popular initiative route. It is also notable that although the Amendment Bill had gone the furthest in the amendment process, it was yet to be subjected to the ultimate down-stream veto of the referendum process. Comparatively, the independence Constitution had undergone twelve (12) major amendments by its tenth birthday. See Kenya Law, *'The Amendments of the Constitution of Kenya from 1963 to 2019'* available at: http://kenyalaw.org/kl/index.php?id=9631. In essence, it is right to

conclude that the resilience of the 2010 Constitution in its first decade is proof that Kenyans attained the goal of balancing flexibility with rigidity in designing the amendment power as reflected in Chapter Sixteen of the Constitution.

[213] It ought to be appreciated that judicial protection of implied limitations to the amendment power, such as through the basic structure doctrine, become increasingly required in contexts where the country has a too flexible constitution that can be amended fairly easily. Therefore, while it was appropriate in the pre-2010 dispensation for the High Court (*Ringera, J.*) in the ***Njoya Case*** to recognize the basic structure doctrine under the former Constitution, there is no such need under the 2010 Constitution. This view is founded on the premise that the risk of abusive amendments has been tamed by the 'tiered' amendment process that entrenches the core or essential provisions through a heightened and elaborate amendment process, which is participatory, inclusive and involves the direct involvement of the people in the ratification of proposed amendments in a referendum.

[214] Considering the progressive nature of the Constitution, a three Judge bench of the High Court (*Korir, Ngugi & Odunga, JJ.*) in the ***Priscilla Ndululu Case*** expressed scepticism as to the continued relevance of the holding in the ***Njoya Case*** on the basic structure doctrine post-2010 Kenya in light of the provisions of Article 255 of the Constitution**.** In contrast, the unique context of India, with a too flexible Constitution that grants the Legislature a wide discretion in amending the constitution, arguably justifies the Judge made basic structure doctrine as developed and practiced in that country in order to stabilize the constitutional order and prevent the practice of abusive constitutional amendment given the low threshold for amendment in the text of the Constitution.

[215] Although l think I have said enough to demonstrate why I disagree with the judgments of the majority of the Court of Appeal bench regarding the application

of the basic structure doctrine in the post-2010 constitutional order, I will briefly, highlight some of the critical aspects which were not considered by the two superior courts; and if the learned Judges had, perhaps done so, they would have arrived at a different opinion.

[216] One, the superior courts below failed to appreciate that the concern with the culture of hyper-amendment had already been taken into account during the drafting of the Constitution. This led to the design of the 'tiered' amendment process that balances flexibility and rigidity in the amendment process and protects the core or fundamental provisions of the Constitution through a heightened onerous, multi-staged, multi-institutional, inclusive, participatory process that culminates in ratification of amendments by the people in a referendum. In such a context, the correct judicial posture ought to be fidelity to the Constitution. This is informed by the reality that the Constitution to a large extent is self-contained and self-regulating in dealing with the legacy of abusive amendments in the former constitutional dispensation. Therefore, there is no justification for courts to go outside the four corners of the Constitution to create a '**fourth pathway**' for amending the Constitution.

[217] Two, the Court of Appeal failed to analyse the provisions of Chapter Sixteen and to arrive at its own independent conclusion on the shortcomings of the three-tiered process and to state clearly whether it was necessary to call in aid a foreign doctrine. Further to take into account the amendment practice in the post-2010 dispensation in their analysis of Kenya's constitutional history, which shows that Chapter Sixteen of the Constitution has brought stability in the constitutional system in contrast to the culture of hyper-amendment under the former Constitution. There have been multiple attempts to amend the Constitution which were all unsuccessful meaning that the amendment process is not flexible as in the Indian Constitution.

[218] Three, the Court of Appeal failed to take into account the fact that Chapter Sixteen is one of the entrenched parts of the Constitution under Article 255(1) of the Constitution. Therefore, it could not be amended by the courts through the created fourth pathway of amending the Constitution without following the constitutionally-ordained amendment process in Article 255(1) of the Constitution.

[219] Four, the Court of Appeal failed to appreciate that Kenyans were aware of the idea around the basic structure doctrine during the constitution-making phase in light of the legacy of the ***Njoya Case***; and yet did not embrace the idea of a veto to the amending power as represented in the basic structure doctrine as well as related doctrines like eternity clauses. The *CKRC Final Report* at page 76 indicates that Kenyans yearned for power to have a say in amending the core or fundamental features of the Constitution through a referendum and an inclusive and participatory process. This was done through the provisions of Article 255 of the Constitution.

[220] Another aspect of the majority Judgment of the Court of Appeal that I need to address relates to how the two courts treated the historical background informing the drafting of Chapter Sixteen. It is evident that the decision on the question of the application of the basic structure doctrine within Kenya's constitutional system has largely turned on historical inquiry to clarify and provide interpretative guidance on the intent of the Kenyan people during the drafting of Chapter Sixteen of the Constitution. While this Court has in the past celebrated the virtues and utility of historical context and the background to the adoption of the Constitution in constitutional interpretation [see ***In the Matter of the National Land Commission***, SC Advisory Opinion No. 2 of 2014; [2015] eKLR (***In the Matter of the National Land Commission***) and ***Communications Commission of Kenya & 5 Others v. Royal Media Services Limited & 5 Others,*** SC Petition Nos. 14. 4A, 14B & 14C

(Consolidated), [2014] eKLR (***Communications Commission of Kenya Case***)], courts must always bear in mind that historical narratives are interpretive and normative hence often informed by value judgments. This makes historical narratives subjective depending on the discretion of the interpreter. It is in appreciation of this that Renáta Uitz in ***'Constitutions, Courts and History: Historical Narratives in Constitutional Adjudication'*** (Central European University Press, 2005) at page 53 has observed that:

> "***...instead of providing objective, external, and neutral points of reference, historical inquiries provide a "history for today." A keen eye might find that arguments from the history and traditions of the polity are normative claims, implying value judgments.***"

[221] Given the subjective nature of historical narratives, courts should endeavour to extract and have in view the complete account of the historical background to the constitutional provision being interpreted. Where a court embraces an account of history that marginalizes, excludes, suppresses or omits some portions of the historical account then such an incomplete or partial account of history is certain to distort rather than illuminate the meaning of the constitutional provision being interpreted hence misleading the court to reaching an erroneous conclusion.

[222] In the instant case, the Kenyan people's desire for a balance between the two extremes of hyper-amendability and ultra-rigidity that informed the drafting of Chapter Sixteen of the Constitution was lost in the superior courts. This happened because the High Court and the majority at the Court of Appeal focused solely on the past problem of hyper-amendability thus losing sight of the Kenyan people's desire for a balance between rigidity and flexibility that is achieved through the 'tiered' design of the amendment provisions in Chapter Sixteen of the Constitution. This ought to serve as a cautionary tale to courts to take into account

exhaustive and complete accounts of historical narratives if historical contexts or background information is to help in illuminating the purpose and meaning of constitutional provisions being interpreted.

[223] Before leaving this part, I will address an argument advanced by learned Counsel, Dr. Khaminwa that the basic structure doctrine is applicable in Kenya pursuant to the provisions of Article 2(5) of the Constitution. The provision reads "***The general rules of international law shall form part of the law of Kenya***." This Court has already provided judicial interpretation of Article 2(5) in ***Mitu-Bell Welfare Society v. Kenya Airports Authority & 2 Others; Initiative for Strategic Litigation in Africa (Amicus Curiae)***, SC Petition No. 3 of 2018, [2021] eKLR (***Mitu-Bell Case***). The Court held at para. 140 as follows:

> ***"In light of the foregoing, we hold that the words general rules of international law in Article 2 (5) of the Constitution refer to customary international norms, including jus cogens"*** [my emphasis].

[224] There is a general acceptance that customary international law requires, in the words of Article 38(1)(b) of the Statute of the International Court of Justice (ICJ), **"*a general practice accepted as law*,"** that is, both a sufficiently widespread and consistent practice and what states have accepted as law (*opinio juris)* accompanying it. Examples of customary international law principles include: the doctrine of *non-refoulement* of refugees, and the granting of immunity for visiting heads of state. Since the basic structure doctrine is a constitutional law principle acceptable in just a number of states and not an international law principle, it does not amount to a *customary international law* principle. Therefore, Article 2(5) of the Constitution cannot be the basis for founding the applicability of the basic structure doctrine in Kenya.

[225] On the four sequential steps recommended in the impugned opinions, just like the two superior courts below, I would wish to observe in *obiter* that Parliament needs to consider the onerous complexity in the implementation and compliance with the obligations in Chapter Sixteen and enact a legislation to guide the constitutional amendment process. This could be formulated in the mould of the Constitution of Kenya Review Act, No. 6 of 2009, which was enacted to guide the review of the repealed Constitution, only that the proposed legislation will provide a more detailed framework to guide the process of amendment according to the three tiered process, or if it is the desire of the people to add a fourth tier as proposed by the two superior courts. Moreover, it is necessary to also note that many of the petitions challenged the impugned amendment process because there was no legislation that was put in place to govern the collection of signatures, the verification, public participation and the conduct of a referendum. In my humble view, it is not at all reasonable to expect citizens to navigate all the numerous steps in the amendment process without a simplified guide drawn from legislation and even perhaps augmented by some rules or guidelines on the amendment process. The time and effort taken in determining this consolidated appeal is a testament that the provisions of Chapter Sixteen are complex and cannot be properly navigated without a legally ordained guide.

[226] For a start, there has been no legislation to guide even public participation which is a key guiding pillar of governance in the post-2010 constitutional order. There is also the need for a comprehensive referendum law to guide the conduct of a referendum as far as Chapter Sixteen is concerned. If the people so desired, I see no problem with the Legislature taking up this recommendation to provide for the four sequential steps in the proposed legislation, given that in their true essence, they are but modalities and sites for deepening public involvement and participation in the amendment process which is already a constitutional requirement under Article 10(2).

[227] In the end, I find that the basic structure doctrine and the four sequential steps for amendments as prescribed by the High Court and the majority of the Court of Appeal are not applicable in Kenya under the Constitution. Any amendment to the Constitution must be carried out in strict conformity with the normative standards and the provisions of Chapter Sixteen of the Constitution.

(ii) Whether the President can initiate amendments to the Constitution through a popular initiative

[228] The question raised was whether the President could initiate the process of amending the Constitution through the popular initiative route as provided in Article 257 of the Constitution. The other related question was who started the process of amending the Constitution through the Amendment Bill?

[229] Like other norm-producing processes, a constitution amendment process starts with an initial decision, that is, the initiation or activation of the process. The 'initiative' speaks to how the amendment process starts. This is what is in question before the Court. It is therefore imperative to start this analysis by tracing the process that led to the formulation of the Amendment Bill.

[230] The story starts with the 8th August, 2017 presidential elections in which the President was declared by IEBC as having been duly re-elected for a second term in office. The presidential elections results were challenged before the Supreme Court by Right Hon. Raila Odinga who had been declared as the runner up in the presidential elections. The Supreme Court annulled the results through a majority decision delivered on 1st September, 2017. The Court ordered for fresh presidential elections to be conducted within 60 days of the nullification of the election. However, Hon. Raila Odinga and his political coalition, the National Super Alliance (NASA), withdrew from participating in the fresh presidential election which took place on 26th October, 2017.

[231] Subsequently, Hon. Raila Odinga and the NASA coalition vowed not to recognize the government that was formed as a result of the fresh presidential election. This led to some incidents of violence that brought about tension in the country. After months of tension, the President and Hon. Raila Odinga in an act of statesmanship, patriotism, and bipartisan accord, emerged on 9th March, 2018 to announce to the public that there was cessation of hostilities between the two political sides in what they called the *'Handshake'*. Through a Joint Communiqué, they promised the two political sides will work towards '**Building Bridges to a New Kenyan Nation**'.

[232] It is in a quest to implement this noble objective of promoting national unity and overcoming other challenges identified in the Joint Communiqué that the President appointed the BBI Taskforce. The terms of reference of the BBI Taskforce were three pronged, being:

(a) evaluate the national challenges outlined in the Joint Communiqué of Building Bridges to a New Kenyan Nation', and having done so, make practical recommendations and reform proposals that build lasting unity;

(b) outline the policy, administrative reform proposals, and implementation modalities for each identified challenge area; and

(c) conduct consultations with citizens, the faith-based sector, cultural leaders, the private sector and experts at both the county and national levels.

[233] On 26th November, 2019 the BBI Taskforce released the BBI Taskforce Report which was unveiled to the public. It had various policy and administrative reform recommendations which included constitutional amendments, policy reforms, statutory enactments, institutional reforms, as well as behavioral and ethical changes amongst the citizens.

[234] On 10th January, 2020 the President appointed the BBI Steering Committee whose terms of reference were to: (a) conduct validation of the BBI Taskforce Report through consultations with citizens, civil society, the faith-based organizations, cultural leaders, the private sector, and experts; and (b) propose administrative, policy, statutory or constitutional changes that may be necessary for the implementation of the recommendations contained in the BBI Taskforce Report, taking into account any relevant contributions made during the validation period. The BBI Steering Committee released the BBI Steering Committee Report on 26th October, 2020 which was accompanied with annextures of twelve (12) Bills including the BBI Steering Committee Draft Bill. Thereafter, the BBI Steering Committee Draft Bill proposing to amend the Constitution was further revised and the final version – the Amendment Bill was unveiled for collection of signatures on 25th November, 2020.

[235] As far as the President's actions with respect to the setting up of the BBI Taskforce and the BBI Steering Committee to further the agenda of promoting national unity were concerned, in my view these actions cannot be faulted. Indeed, they are laudable acts of statesmanship executed within the ambit of the provisions of Article 131(2)(c) of the Constitution. This Article demands nothing less from the President as it directs the holder of that venerable office to ***"promote and enhance the unity of the nation."***

[236] However, it is important to clarify that the legal and constitutional question before this Court does not go to the propriety of the pursuit of the Building Bridges to Unity project. The question before the Court is a narrow one and it relates to whether a constitutional amendment process initiated by the President can be pursued through the popular initiative route prescribed in Article 257 of the Constitution. The relevant provision to call in aid to resolve this question is the same Article 257 which provides:

"***257. Amendment by popular initiative***

(1) An amendment to this Constitution may be proposed by a popular initiative signed by at least one million registered voters.

(2) A popular initiative for an amendment to this Constitution may be in the form of a general suggestion or a formulated draft Bill.

(3) If a popular initiative is in the form of a general suggestion, the promoters of that popular initiative shall formulate it into a draft Bill.

(4) The promoters of a popular initiative shall deliver the draft Bill and the supporting signatures to the Independent Electoral and Boundaries Commission, which shall verify that the initiative is supported by at least one million registered voters.

(5) If the Independent Electoral and Boundaries Commission is satisfied that the initiative meets the requirements of this Article, the Commission shall submit the draft Bill to each county assembly for consideration within three months after the date it was submitted by the Commission.

(6) If a county assembly approves the draft Bill within three months after the date it was submitted by the Commission, the speaker of the county assembly shall deliver a copy of the draft Bill jointly to the Speakers of the two Houses of Parliament, with a certificate that the county assembly has approved it.

(7) If a draft Bill has been approved by a majority of the county assemblies, it shall be introduced in Parliament without delay.

(8) A Bill under this Article is passed by Parliament if supported by a majority of the members of each House.

(9) If Parliament passes the Bill, it shall be submitted to the President for assent in accordance with Article 256(4) and (5).

(10) If either House of Parliament fails to pass the Bill, or the Bill relates to a matter specified in Article 255(1), the proposed amendment shall be submitted to the people in a referendum.

(11) Article 255(2) applies, with any necessary modifications, to a referendum under clause (10).”

[237] To answer the question as to who may initiate an amendment process through a popular initiative, requires that we understand the purpose that is intended to be served by the introduction of the popular initiative as a route for amending the Constitution. This is pursuant to the purposive interpretation decreed by the Constitution at Article 259(1) of the Constitution. The appropriate starting point for this inquiry is the preparatory documents from the constitution making process. It is recorded in the National Constitutional Conference Documents: *The Final Report of Technical Working Committee Group ‘K’ on Constitutional Commissions and Amendments to the Constitution* (2005) at page 4 that:

> “***The committee introduced a novel idea called popular initiative. This is an innovation where the citizens can on their own motion initiate amendment to the Constitution***

<u>by a way of a popular initiative</u> either in the form of a general suggestion or a formulated draft bill. The committee explained that their intention was a starting point towards curbing dictatorship by Parliament" [my emphasis].

[238] The above constitution-making history demonstrates that a popular initiative was a tool curved out exclusively as a route for constitutional amendments by the citizens. In essence, amending the Constitution through a popular initiative was intended to be a citizen-driven and citizen-centered process. The citizen-centric nature of a popular initiative is linked to the fact that it is conceived as a means for direct sovereign power to be expressed as contradistinguished with a parliamentary initiative which lies at the realm of derived or delegated sovereign power. Under this understanding, the popular initiative is supposed to be triggered 'from below' at the initiative of the citizenry as opposed to representative institutions.

[239] In other words, the popular initiative is intended to give citizens, acting outside the institutions of the State, a means to activate or trigger the exercise of their sovereignty. This understanding of the centrality of the citizens in activating a constitutional amendment process through the popular initiative is projected in the book by Joel Colón-Ríos, '***Constituent Power and the Law'*** (2020, Oxford University Press) at pages 150-151 where it has been observed as follows:

"Since constituent power, almost by definition, was exercised against the constituted institutions (in order to alter them or to override an executive, legislative, or judicial decision), it was necessary to ensure that citizens, acting outside of the ordinary institutions of government, had a means of triggering its exercise. A solution ...was the recognition of the right to change the constitution through

popular initiative. <u>This solution was not presented as a means of facilitating participatory democracy but as one of controlling the power of the three branches of government</u>" [my emphasis].

[240] The above position is also reflected in persuasive judicial reasoning, such as, by the Constitutional Court of Hungary in ***Decision 52/1997, On Referenda and Popular Sovereignty***, 14th October, 1997 where the court held as follows in this regard:

> ***"If the Initiative was launched by the representative organs or its 'descendants,' the inclusion of the people serves merely the ex post facto legitimization of the decision of the representative sphere... The expression by the people of their will in this case does not equal the complete, direct exercise of sovereignty by the people. ... [the Popular Initiative] differs from this on the theoretical level as well. Each element of it is under the 'influence' of the voters concerned: <u>the initiation</u>, the formulation of the question as well as the enforceability (provided that the number of signatures necessary has been gathered). <u>The 'people' control the situation with regard to every element of the direct exercise of power</u>"*** [my emphasis].

[241] My analysis of Article 257, the history of the constitution-making process, and the above authoritative but persuasive writings indicates that a popular initiative is an exercise of direct sovereign power; and excludes representative institutions (for example, the Legislature, and the Presidency) which only exercises power that is derived or delegated sovereign power as distinguished in Article 1(2) and (3) of the Constitution. In other words, it is a means of direct democracy; and indeed, direct democracy can only be exercised by the people not their

representatives since that would convolute the form of democracy at play. It follows therefore that a popular initiative in a constitutional amendment process ought to be seen as an avenue through which citizens engage in the exercise of their sovereignty. As such, State organs, not being bearers of direct sovereignty, have no right to activate the popular initiative. This leads to the conclusion that the popular initiative is a preserve of the citizens, '*the Wanjiku'*, in Kenyan popular lexicon.

[242] It ought to be appreciated that the Constitution provides normative markers for how, when, where and by whom particular powers are to be exercised. Article 257 delineates who has the power to undertake what duty or obligation or has a right to undertake specified measures with respect to the constitutional amendment process. It is in appreciation of this, that I need to interrogate the argument that the institution of the presidency has the authority to initiate a popular initiative in light of the overarching leitmotif of the Constitution which is concerned with tempering or limiting the powers of the Presidency.

[243] In its architecture and design, the Constitution strives to provide explicit powers to the institution of the presidency and at the same time limit the exercise of that power. This approach of explicit and limited powers can be understood in light of the legacy of domination of the constitutional system by imperial Presidents in the pre-2010 dispensation. As a result, Chapter Nine of the Constitution lays out in great detail the powers and authority of the President and how such power is to be exercised. In light of the concerns over the concentration of powers in an imperial President that animate the Constitution, I find that implying and extending the reach of the powers of the President where they are not explicitly granted would be contrary to the overall tenor and ideology of the Constitution and its purposes.

[244] Another reason that supports the finding that the President was not envisaged as an initiator of a popular initiative is the role of the President with respect to entrenched matters listed in Article 255(1) of the Constitution. Article

256(5) as read with Article 257(10) of the Constitution grants the President a role that can be typified as serving a 'guardianship' role over the amendment process. In that, where a constitutional amendment Bill is presented for assent, the President has the obligation of reviewing the Bill and referring the Bill to undergo the referendum process where it involves matters listed in Article 255(1) of the Constitution. Such a 'guardianship' role over the amendment process ought not to be undertaken by a player in the amendment process. I therefore endorse, the finding by the two superior courts that the President ought not to be both a player and umpire in the amendment process.

[245] The last reason for finding that state institutions and organs are excluded from using the popular initiative is found in Article 255(3)(b) of the Constitution. This provision states that an amendment by popular initiative under Article 257 of the Constitution is by 'the people and Parliament'. It shows that the Constitution recognizes a distinction between **'the people**' and state bodies like '**Parliament**'. It therefore follows that a state body like the institution of the presidency cannot fall within the rubric of **'the people'** as the very text of the Constitution makes this distinction.

[246] This leads me to the inescapable conclusion that state institutions and state organs, such as the Presidency, cannot initiate a constitutional amendment process using the popular initiative route provided in Article 257 of the Constitution. Such state organs or state institutions are precluded from the initiation and promotion of a constitutional amendment process through the popular initiative route.

[247] Nonetheless, this finding does not dispose of the issue as Counsel for the President and even the Attorney General sustained an argument that barring the President from initiating or pursuing a constitutional amendment process through a popular initiative was a violation of the President's political rights as protected in Article 38(1) of the Constitution. Article 38(1) provides as follows:

"Article 38. Political rights

(1) Every citizen is free to make political choices, which includes the right–

(a) To form, or participate in forming, a political party;

(b) To participate in the activities of, or recruit members for, a political party; or

(c) To campaign for a political party or cause."

[248] Given that a process to amend the constitution is a democratic process which is meant to give effect to self-government, the initiation and promotion of an initiative to change the Constitution is a political choice protected under Article 38(1)(c) of the Constitution. However, there is an additional hurdle in deciding whether a right is applicable in a given factual situation. This is the concern with a right's range of application as found in the edict in Article 20(2) of the Constitution which is to the effect that:

> ***"Every person shall enjoy the rights and fundamental freedoms in the Bill of Rights to <u>the greatest extent consistent with the nature of the right or fundamental freedom</u>"*** [my emphasis].

[249] What I deduce from this provision is that a court is under an obligation to interrogate whether a person alleging a violation of a right is a beneficiary of the right in question. In this context, it is notable that Article 38(1) grants the freedom to make political choices to every citizen. The citizen qualifier speaks to the range of application of the freedom to make political choices, by limiting the right's

enjoyment to citizens. Therefore, for one to be a beneficiary of the freedom to make political choices they must fall within the category of a citizen.

[250] Based on the citizenship qualification, the freedom to make political choices is a right that does not accrue to state organs or institutions. State organs or institutions cannot be citizens because under Chapter Three of the Constitution, citizenship is limited to living human beings excluding state organs and institutions. In a relevant persuasive reasoning in this respect, the High Court (*Majanja, J.*) held in ***Famy Care Limited v. Public Procurement Administrative Review Board & Another***, HC Petition No. 43 of 2012; [2013] eKLR as follows:

> ***"Though the term "citizen" is not defined in Article 260, citizenship is dealt with under Chapter Three of the Constitution, Articles 12 to 18. The purport and effect of these provisions is that citizenship is in reference to natural persons... A juridical person is neither born nor married as contemplated by these Articles. Similarly, the provisions on citizenship by registration and dual citizenship set out in Articles 15 and 16 of the Constitution negative an intention to define a citizen as including a juridical person...***
>
> ***"A reading of the Constitution and an examination of words "person" and "citizen" within the Constitution can only lead to one conclusion: That the definition of a citizen in Articles 35(1) and 38 must exclude a juridical person and a natural person who is not a citizen as defined under Chapter Three of the Constitution."***

The above reasoning which I find to be the correct position in law was also followed by *Mumbi Ngugi, J.* (as she then was) in ***Nairobi Law Monthly Company***

Limited v. Kenya Electricity Generating Company & 2 Others, HC Petition No. 278 of 2011; [2013] eKLR.

[251] Consequently, while the President when acting in his private capacity as a citizen can enjoy the freedom to make political choices, this right does not accrue to the institution of the Presidency which is a state organ. The Presidency and other state organs do not fall under the rubric of citizens. I therefore, find that exclusion of the institution of the Presidency and other state institutions from initiation of a process to amend the Constitution through the popular initiative route does not violate political rights protected under Article 38(1) of the Constitution.

[252] The last aspect of this issue relates to whether it was established through evidence that the process to amend the Constitution through the Amendment Bill was initiated by the President. At the outset, it should be pointed out that the concurrent findings by the two superior courts below was that the President by a number of antecedent acts had initiated the process and the state was the real force behind the amendment process including through the use of state resources to support the process. In a challenge to this finding, it was argued by the Attorney General, and the BBI National Secretariat, that it is the BBI National Secretariat, through Hon. Dennis Waweru and Hon. Junet Mohamed, who were the initiators and promoters of the impugned constitutional amendment initiative and not the President.

[253] An examination of the evidence before the courts reveals a number of things relevant to this factual determination. For starters, the President and the National Executive took certain actions which portray his role in the initiation and promotion of the constitutional amendments. The President did not do those things as a private citizen and this is clearly demonstrated in a number of ways. The President signed off the initial Communiqué of 9th March, 2018 in the official title of President; the Communiqué was published on a paper bearing the coat of arms of the Republic and seal of the President; the President appointed the BBI

Taskforce and BBI Steering Committee through gazette notices 5154 and 264 of 2018 and 2020 respectively; and the President received the official reports through a state function as the President. As a result, it cannot be disputed that the President was involved in the initiation of the Amendment Bill. However, in my considered view, the President cannot be blamed for this, because it is the promoters who took over the Amendment Bill under the auspices of the BBI National Secretariat who erred by invoking the popular initiative route under Article 257 to pursue the amendment process.

[254] It is my finding that the genesis of the Amendment Bill can be traced to the terms of reference of the BBI Steering Committee which included:

> ***"(b) propose administrative, policy, statutory or constitutional changes that may be necessary for the implementation of the recommendations contained in the Taskforce Report, taking into account any relevant contributions made during the validation period"*** [my emphasis].

This is the foundation upon which the BBI Steering Committee formulated the BBI Steering Committee Draft Bill which was an annexure to the BBI Steering Committee's Report. In effect, I find that the BBI Steering Committee was implementing the directive of the President as the Committee's appointing authority. Therefore, the President cannot be delinked from a product that emerged as a natural consequence or result of implementing a task assigned by the President.

[255] In point of fact, the President's written submissions dated 22nd December, 2021 filed before this Court confirm that this is the correct position at page 3, para. 9 where it is indicated as follows:

> ***"The Petitioner (****Isaac Alouchier erroneously cited as* ***the 21st Respondent herein) impleaded the President in his***

personal capacity arguing that the acts done were unconstitutional and that the President was acting in his personal capacity. However, the official documents (the Gazette Notices) clearly shows that they were signed by or on behalf of the 22nd Respondent *(the President)* ***in his official capacity."***

This assertion resonates with the evidence before the Court that all actions by the President leading to the Amendment Bill were undertaken in his official as opposed to his personal capacity. They were actions by the office of the President as a state organ or institution and ought not to be attributed to the person holding that office in personal capacity.

[256] I therefore affirm the factual finding by the two superior courts below that the President was the real force or driving principal behind the Amendment Bill. I particularly endorse the view expressed by *Tuiyott, J.A.* in his Judgment to the effect that:

"...the process of popular initiative must be guarded from abuse. A state actor, who is otherwise barred from initiating a popular initiative, cannot originate a proposal for amendment then hire or sponsor a citizen to formulate it into a Bill and then collect signatures in support. In that instance, the promoter will simply be a surrogate of the State actor. That will not be a truly citizen-driven initiative as it will [be] an enterprise of the State actor. There will be occasion therefore when it will be necessary to look beyond the person who formulates the draft Bill and collects the signatures to discover the hand behind the initiative, only in this way will the true intent of the popular initiative process be protected against manipulation."

[257] I believe I have stated enough to support my conclusion that the President or state organs or institutions are not permitted to initiate or promote a constitutional amendment process through the popular initiative route envisaged in Article 257 of the Constitution. Therefore, the promoters erred by pursuing the Amendment Bill as a popular initiative and this rendered the amendment process unconstitutional.

(iii) Second Schedule to the Amendment Bill

[258] The question for resolution from the above issue is whether the Second Schedule to the Amendment Bill was unconstitutional based on the findings by the two superior courts below that it was unlawful for the Amendment Bill to directly allocate and apportion the seventy (70) constituencies proposed therein.

[259] To put this question in context, it ought to be appreciated that the Second Schedule was intended to serve as a transitional scheme of implementing Clause 10 of the Amendment Bill. Clause 10 which intended to amend Article 89 of the Constitution provided:

> ***"Article 89(1) of the Constitution is amended by deleting the words "two hundred and ninety" and substitute therefor with the words "three hundred and sixty."***

[260] The Second Schedule of the Amendment Bill which provided for the delimitation of the proposed additional seventy constituencies stated that:

> ***"Within 6 months of the commencement of the Act, the IEBC shall, subject to subsection 2 determine the boundaries of***

the additional seventy constituencies created in Article 89(1) using the criteria in Article 81(d) and 87(7) *(sic).*

The seventy constituencies shall be spread among the counties set out in the first column in a manner specified in the second column."

[261] Clause 1(2) of the Second Schedule proceeded to distribute the additional seventy constituencies among the counties as follows: Mombasa Three; Kwale Three; Kilifi Four; Mandera One; Meru Two; Embu One; Machakos Three; Makueni One; Kirinyaga One; Murang'a One; Kiambu Six; Turkana One; West Pokot One; Trans Nzoia Two; Uasin Gishu Three; Nandi One; Laikipia One; Nakuru Five; Narok Three; Kajiado Three; Kericho One; Bomet Two; Kakamega Two; Bungoma Three; Siaya One; Kisumu Two; Nyamira One; and Nairobi City Twelve.

[262] It is necessary to point out that Article 89 of the Constitution provides for delimitation of electoral units, a role that is vested in IEBC. This is what Article 89 provides:

"***Article 89. Delimitation of electoral units***

(1) There shall be two hundred and ninety constituencies for the purposes of the election of the members of the National Assembly provided for in Article 97(1)(a).

(2) The Independent Electoral and Boundaries Commission shall review the names and boundaries of constituencies at intervals of not less than eight years, and not more than twelve years, but any review shall be completed at least twelve months before a general election of members of Parliament.

(3) The Commission shall review the number, names and boundaries of wards periodically.

(4) If a general election is to be held within twelve months after the completion of a review by the Commission, the new boundaries shall not take effect for purposes of that election.

(5) The boundaries of each constituency shall be such that the number of inhabitants in the constituency is, as nearly as possible, equal to the population quota, but the number of inhabitants of a constituency may be greater or lesser than the population quota in the manner specified in clause (6) to take account of — (a) geographical features and urban centres; (b) community of interest, historical, economic and cultural ties; and (c) means of communication.

(6) The number of inhabitants of a constituency or ward may be greater or lesser than the population quota by a margin of not more than— a) forty per cent for cities and sparsely populated areas; and b) thirty per cent for the other areas.

(7) In reviewing constituency and ward boundaries the Commission shall — (a) consult all interested parties; and (b) progressively work towards ensuring that the number of inhabitants in each constituency and ward is, as nearly as possible, equal to the population quota.

(8) If necessary, the Commission shall alter the names and boundaries of constituencies, and the number, names and boundaries of wards.

(9) Subject to clauses (1), (2), (3) and (4), the names and details of the boundaries of constituencies and wards determined by the Commission shall be published in the Gazette, and shall come into effect on the dissolution of Parliament first following their publication.

(10) A person may apply to the High Court for review of a decision of the Commission made under this Article.

(11) An application for the review of a decision made under this Article shall be filed within thirty days of the publication of the decision in the Gazette and shall be heard and determined within three months of the date on which it is filed.

(12) For the purpose of this Article, "population quota" means the number obtained by dividing the number of constituencies or wards, as applicable, into which Kenya is divided under this Article."

[263] It is in the above context that the constitutionality of the Second Schedule directly allocating and apportioning the proposed constituencies to specified counties was challenged. The two superior courts were unanimous in their finding that the Second Schedule to the Amendment Bill was unconstitutional. This finding was based on substantive grounds that the Second Schedule violated the basic structure of the Constitution by purporting to take away the mandate of IEBC, an independent body under the Constitution.

[264] Further, it was contended that the Second Schedule impermissibly directed IEBC on the execution of its constitutional functions; set criteria for the delimitation and distribution of constituencies contrary to Article 89(5); ignored the principle of due process in delimiting and distributing constituencies, namely,

the public participation requirement; imposed timelines for the delimitation exercise contrary to the Constitution; impermissibly took away the rights of individuals who are aggrieved by the delimitation decisions of IEBC to seek judicial review of those decisions; tucked in the apportionment and delimitation of the seventy newly created constituencies in the Second Schedule using a pre-set criteria which is not within the constitutional standard enshrined in Articles 89(4), (5), (6), (7), (10) and (12) of the Constitution; and extra-textually amended or suspended the intended impacts of Article 89 of the Constitution which they found formed part of the basic structure of the Constitution.

[265] It is imperative to begin the analysis on the constitutionality of the Second Schedule of the Amendment Bill by pointing out that given my earlier finding that the basic structure doctrine does not apply under the Constitution of Kenya 2010, my determination of this question rests on the procedural concerns linked to whether there was public participation in coming up with the Second Schedule. This is because the provisions of Article 89 are amendable as long as due process is followed.

[266] It ought to be appreciated that amendments touching on matters falling within the remit of Article 255(1), which are the core or fundamental commitments of the Constitution, ought to be undertaken through a highly participatory and inclusive process. It should be noted that, directly allocating and apportioning constituencies usurps the mandate of IEBC, an independent constitutional commission; removing the possibility of judicial review of the delimitation has an effect on the independence of the Judiciary; the centrality of constituencies as units of political representation in the National Assembly means that they ought to be apportioned and allocated by a neutral and professional actor; much more so, because malapportioned constituencies have the potential of diluting the power of the vote hence threatening the animating goal of fair and effective representation, which is at the heart of the foundational value of democratic governance enshrined

in Articles 4(2) and 10(2)(a) of the Constitution. Further, since constituencies are units of social and economic development through allocation of National Government Constituencies Development Fund (NG-CDF) and the recruitment into disciplined forces, such as the Kenya Defence Forces and the National Police Service, delimitation of constituencies has implications on the constitutional values and principles of equity, and social justice enshrined in Article 10(2)(b) of the Constitution.

[267] It goes therefore without saying that the delimitation of constituencies must be accompanied by a process that is fair and just, which is the golden thread that runs through our constitutional order as elaborated in the preceding paragraphs. Therefore, the process of allocating and apportioning constituencies demands deepened public participation to ensure such a process is not carried out through stealth or subterfuge. Indeed, it is this perspective that informs the specific and in-built requirement of public participation in delimitation of electoral units in Article 89(7)(a) of the Constitution.

[268] This Court set the threshold for assessing whether public participation has been met in ***British American Tobacco Kenya, PLC (formerly British American Tobacco Kenya Limited) v. Cabinet Secretary for the Ministry of Health & 2 Others; Kenya Tobacco Control Alliance & Another (Interested Parties); Mastermind Tobacco Kenya Limited (The Affected Party)***, SC Petition. No. 5 of 2017; [2019] eKLR (***BAT Case***). The Court at para. 96 of the Judgment set the constitutional test for adequate public participation as being the "reasonableness" threshold. The Court observed thus:

> ***"Public participation must be accompanied by reasonable notice and reasonable opportunity. Reasonableness will be determined on a case to case basis."***

Following from this, I will now examine whether reasonable notice and opportunity was afforded to the public for generating views and deliberating on apportioning and allocating of the disputed seventy constituencies.

[269] An examination of the process leading to the BBI Taskforce Report and the BBI Steering Committee Report reflects that there was reasonable participation and involvement of the people in coming up with the recommendations in those two reports. However, it is noteworthy that the BBI Steering Committee Draft Bill, which was annexed to the BBI Steering Committee Report, did not contain any clause dealing with apportioning and allocation of constituencies. It is in the Amendment Bill published on 25th November, 2020 where the impugned Second Schedule first emerged.

[270] There is no evidence of any form of public participation or deliberation between 21st October 2020 and 25th November 2020 when changes to the BBI Steering Committee Draft Bill including the Second Schedule was added that shows public engagement and consideration of the issue of apportioning and allocating the subject seventy constituencies. This leads to the conclusion that the constitutional threshold of reasonable public participation was not met in coming up with the Second Schedule of the Amendment Bill. Consequently, I come to the conclusion that the Second Schedule of the Amendment Bill is unconstitutional for want of public participation, a constitutional obligation that flows from Articles 10 (2)(a) and 89(7)(a) of the Constitution.

(iv) Presidential Immunity

[271] The question before the Court, as I understand it, relates to the nature, scope and reach of protection from civil legal proceedings enjoyed by the President or a person performing the functions of the office of the President under Article 143(2) of the Constitution.

[272] At the outset it is important to point out that given that the Court of Appeal held that the President was not served with HC Petition No. E400 of 2020 in the proceedings before the High Court, in which this question arose, it was improper for the Court of Appeal to proceed and adjudicate the question of interpretation of Article 143(2) of the Constitution. However, as conceded in the President's written submissions filed before this Court, there is a public interest element in the need for this apex Court to clarify and settle the law on the nature and scope of protection of the President from civil legal proceedings considering the findings by the two superior courts below. It is on this basis that I will proceed to determine this issue.

[273] The majority decision of the Court of Appeal (*Musinga, (P), Nambuye, Okwengu, Kiage, Gatembu & Sichale, JJ. A*) upheld the finding of the High Court to the effect that the President can be sued in his personal capacity during his tenure of office for anything done or not done contrary to the Constitution. In their view, it is apparent from Article 143(2) that the President or any other person holding that office is only protected from civil proceedings in respect of anything done or not done in the exercise of their powers under the Constitution. Expressing a different opinion, *Tuiyott, J.A* found that Article 143(2) and (3) read together struck a balance by giving functional immunity to a sitting President during his tenure of office but leaving it open for him to still be held personally accountable once out of office for any act or omission in his official capacity contrary to the Constitution.

[274] Article 143 of the Constitution provides as follows:

"Article 143. Protection from legal proceedings–

(1) Criminal proceedings shall not be instituted or continued in any court against the President or a person performing the functions of that office, during their tenure of office.

(2) Civil proceedings shall not be instituted in any court against the President or the person performing the functions of that office during their tenure of office in respect of anything done or not done in the exercise of their powers under this Constitution.

(3) Where provision is made in law limiting the time within which proceedings under clause (1) or (2) may be brought against a person, a period of time during which the person holds or performs the functions of the office of the President shall not be taken into account in calculating the period of time prescribed by that law.

(4) The immunity of the President under this Article shall not extend to a crime for which the President may be prosecuted under any treaty to which Kenya is party and which prohibits such immunity."

To understand the ambit of protection from legal proceedings envisaged under Article 143(2) of the Constitution requires teasing out of the purpose intended to be served by the above provision and the animating idea underlying it.

[275] It is generally recognised that immunity from legal proceedings usually takes two forms: first, immunity from liability protects officials, not from proceedings being undertaken, but from personal liability at the end of the proceedings which relate to enforcement. Second, immunity from proceedings, is a broader form of immunity that overthrows the court's or tribunal's jurisdiction to hear a matter in question because the party against whom the proceedings are undertaken enjoys immunity. Neither proceedings nor liability may arise from this second form of immunity.

[276] It is also necessary to recognise the distinction between sovereign immunity and functional immunity. Sovereign immunity is the immunity enjoyed by a sovereign state or the heads of states or their representatives who have diplomatic immunity and entails that the holders of such immunity cannot be subjected to the jurisdiction of certain courts, either their own local or foreign courts. In contrast, functional immunity is conferred on state or public officers not to be tried or made liable for acts done (usually in good faith) in discharge of their official functions. The former emanates from the tradition that a sovereign cannot be subjected to its own courts without its consent, while the latter derives from the need to let persons lawfully performing their functions not be subjected to unnecessary suits.

[277] Further, there is absolute and qualified immunity. Absolute immunity (whether functional or sovereign, jurisdictional or enforcement immunity) has no limitations as to its application while qualified immunity usually has limitations like the extent of actions and whether related to the official function or whether done lawfully and in good faith or out of malice or whether it was a discretional act or not. See Charles Manga Fombad and Enyinna Nwauche, ***'Africa's Imperial Presidents: Immunity, Impunity and Accountability'*** (2012)5 *African Journal of Legal Studies* 91,102.

[278] The Constitution contemplates immunity of certain officials in the performance of their functions. Examples include:

(a) Article 160(5) provides that: "***a member of the judiciary is not liable in an action or suit in respect of anything done or not done in good faith in the lawful performance of a judicial function.***"

(b) Article 250(9) provides that: ***"a member of a commission, or the holder of an independent office, is not liable for anything***

done in good faith in the performance of a function of office."

(c) Article 143 (1) provides that: "***criminal proceedings shall not be instituted or continued in any court against the President or a person performing the functions of that office, during their tenure of office."***

(d) Article 143(2) provides that: ***"civil proceedings shall not be instituted in any court against the President or the person performing the functions of that office during their tenure of office in respect of anything done or not done in the exercise of their powers under this Constitution."***

In addition, the Privileges and Immunities Act, and the Parliamentary Powers and Privileges Act, 2017 provide different scopes of immunities for respective individuals.

[279] From a structural reading of the above provisions, there are glaring distinctions that illuminate the nature and scope of presidential immunity envisaged in Article 143(2) of the Constitution. Firstly, all the officials set out above enjoy immunity as persons (holder of office, member of commission) but not their offices; whereas, the President enjoys immunity as both the person in the office, and the office itself. This is evident from the choice of phraseology used in Article 143(2) to the effect that: *"**President or the person performing the functions**."* To make the point clearer, one can contrast the nature of immunity envisaged in Article 143(2) with that in Article 250(9) for a holder of an independent office. The difference in phraseology between these two provisions yields the view that the holder of the office of the Auditor General may not be liable but the office of the Auditor General may be liable, but neither the office of President nor the holder of that office may be liable.

[280] Secondly, the President enjoys immunity from ***proceedings in any court***, whereas the other officials enjoy immunity from liability but not expressly from proceedings that lead up to **liability**. Thirdly, the President's immunity is limited to the duration of their tenure of office whereas that of the other officials would remain beyond even their tenure of office. This is to say, that the person performing the functions of the office of President ceases to enjoy immunity from proceedings once they cease to hold office as President but the other officials continue to enjoy the immunity for the actions they did while they were still in office. Fourthly, the immunity of the President is not qualified by good faith whereas that of the other officials is qualified by the requirement or the assumption that they performed the function in good faith. It is notable that for judicial officers, it is also expected that the act or omission in issue should be within the lawful performance of their functions for them to enjoy the stipulated immunity.

[281] There is a compulsive tone in the protection of the President from proceedings which stems from the use of ***'shall not'*** in Article 143(1) and (2), and a deliberateness in the overthrowing of jurisdiction of any court to try the President or any person performing the functions of the office during the tenure of that office. This only changes with the caveat in Article 143(4) which provision withdraws the entire cloak of immunity when the President (and not any other person) is tried for crimes for which the President may be prosecuted under any treaty to which Kenya is a party, and which prohibits such immunity.

[282] Consequently, this leads to the inescapable conclusion that the immunity of the President is unlike that of the other state actors. The President not only enjoys functional immunity like all public officials who perform state duties, which protects them from civil liability for official functions, they further enjoy sovereign immunity as the Head of State and the single representation of the sovereignty of the Republic. Indeed, it is only sovereign immunity that can immunize anyone against both proceedings and criminal liability because any other immunity would

be related to official functions and therefore would inherently be a 'qualified immunity'. This is the only explanation why all other public officials would be liable to criminal prosecutions even while in office, but the President would not only not have criminal proceedings instituted against them, but also any criminal proceedings that may have been ongoing would be discontinued in the duration of the President's tenure of office. It is this sovereign immunity that the Head of State, like all heads of states, enjoys that makes Article 143(4) relevant in that, the immunity shall be waived by consent of the Republic through ratification of a treaty that forbids such immunity. Likewise, that is also why this immunity (from any proceedings, and especially from criminal liability) is limited to the duration during which the person represents the sovereignty of the Republic, and expires upon expiry of such term.

[283] The two superior courts below, especially the majority opinion of the Court of Appeal, relied on the phrase ***"... in the exercise of their powers under this Constitution"*** in Article 143(2) to emphasize that when the President exercises powers not granted by the Constitution, then the immunity is extinguished. It is true that, that is one of the interpretations one may obtain from a plain reading of the Sub Article, but a purposive interpretation of the phrase yields a different result. Taking into account the logic and animating idea behind Article 143(2) leads to an interpretation of the phrase to mean that the immunity is in relation to the President's official functions and not personal suits.

[284] I am conscious that part of the President's role in the performance of their functions is the interpretation of the Constitution as to whether or not it gives them power to perform particular roles. Upon such interpretation, the President either acts or fails to act in the belief that either that power exists or does not exist. It would follow then that if proceedings were to be instituted against the President after an interpretation which is considered to have been a wrong interpretation, then such proceedings would fall within the immunity contemplated by Article

143(2); in that, it would be within the performance of the President's functions. There is no provision allowing or requiring the President to seek an advisory opinion from the judiciary before exercising their duties or before determining whether they have power to perform any official act; and in any event, this would generally blur the separation of powers.

[285] Further, the two superior courts below held that the President or the person performing the functions of the office of the President is not above the law and should be amenable to the law if they act against the Constitution. The implication of this finding is far reaching and therefore calls for a very careful analysis and consideration by this Court. The submissions and concern of the proponents of the said finding is that total immunity would provide cover for impunity by the President or a person acting in that capacity. Therefore, they argued that there is need to address what I would call the 'accountability gap' concern through a balance between accountability and impunity.

[286] The response to the 'accountability gap' concern is that the Constitution provides for political and legal accountability of the President hence giving effect to the protection from legal proceedings in Article 143(2) would not foster a culture of lawlessness and impunity. Indeed, it should be appreciated that by enshrining the rule of law, accountability, and good governance as national values and principles of governance in Article 10(2), the Constitution recognises that the exercise of public power is a constrained power that cannot be beyond the reach of the law.

[287] It is necessary to state that the Constitution has provided for how the President and the Executive in general can be kept in check through political accountability, with the provision that the President is liable for impeachment under Article 145 of the Constitution. The grounds for impeachment listed under Article 145(1) of the Constitution include gross violation of the Constitution or any

law, commission of a crime under national or international law, or gross misconduct. This means that there is a clear avenue to check the President's conduct as acknowledged by the Court of Appeal in ***Minister for Internal Security and Provincial Administration v. Centre for Rights Education & Awareness (Creaw) & 8 Others***, Civil Appeal 218 of 2012; [2013] eKLR at para. 37 thus:

> ***"There were also issues raised regarding the immunity of the President as provided in the Constitution in respect to civil and criminal litigation, we wish to say no more on this issue as the Constitution is clear, if the President violates the law, he or she can only be subjected to the process of impeachment, however the former Constitution did not have provisions of impeachment."***

[288] With respect to legal accountability, the protection of the President from legal proceedings under Article 143(2) does not mean that a President's actions or omissions cannot be challenged in court. Anybody or party aggrieved by the President's actions or failures can initiate proceedings against the Attorney General who by virtue of being the legal representative of the government in legal proceedings also represents the President, who is the Head of Government. The immunity on the other hand offers protection that shields the President from civil suits being filed against them in their personal capacity. As rightly conceded by the President in his written submissions before this Court:

> ***"....an aggrieved litigant has the option of challenging the President's decision or actions in court by suing the Attorney General."***

As such, pursuant to Article 156(4) of the Constitution, the exercise of public power by the President can be challenged in a court of law by suing the Attorney General through an action of judicial review or constitutional petition wherein the court may issue appropriate remedies. See the High Court's decisions in ***Republic v. Chief Justice of Kenya & 6 Others*** *Ex-parte* ***Moijo Mataiya Ole Keiwua***, Misc. Appl. No. 1298 of 2004; [2010] eKLR; and ***Julius Nyarotho v. Attorney General & 3 Others***, Misc. Appl. No. 36 of 2012; [2013] eKLR (***Nyarotho Case***).

[289] It should also be appreciated that the protection of the President or a person acting in the office of the President from legal proceedings was a clear desire by Kenyans as captured in the *CKRC Final Report* which records at page 425 that:

> "***The President should receive protection from any legal proceedings that may be instituted during his tenure of office.***"

[290] In effect, the finding by the superior courts below had the ramifications of rendering Article 143(2) of the Constitution ineffective or superfluous. This is an interpretive path that, in my view, is not open to the courts. An interpretation of the Constitution that results to an amendment vide a judgment is tantamount to judicial overreach. As pointed out by the Constitutional Court of South Africa in ***Khumalo and Others v. Holomisa*** (CCT 53/01), 2002 (5) SA 401 at para. 32:

> "***We cannot adopt an interpretation which would render a provision of the Constitution to be without any apparent purpose.***"

[291] I therefore agree with the interpretation by *Tuiyott, J.A* in his dissenting opinion which held that the import of Article 143(2) of the Constitution with respect to protection of the President from civil proceedings is as follows:

"

(a) Immunity does not extend to acts or omission of a sitting President done in purely personal capacity not connected with his office.

(b) The immunity is only in respect to acts or omissions connected with the office and functions of that office.

(c) Where an action or inaction/omission is in official capacity but bereft of any constitutional authority or power whatsoever or is in fact done in gross or serious violation of the Constitution then it is actionable against the President in person but only after he leaves office.

(d) For acts and omissions falling under (c) above and which must be questioned or challenged immediately, the President can be sued, not in his personal name, but through the Attorney General."

[292] This leads me to the conclusion that the learned Judges unfortunately fell in error in their interpretation and application of Article 143(2) of the Constitution by holding that civil proceedings can be instituted against the President or a person performing the functions of the office of President during their tenure of office in respect of anything done or not done contrary to the Constitution. I hold that civil proceedings **cannot** be instituted against the President or a person performing the functions of the office of President during their tenure of office in respect of anything done or not done contrary to the Constitution. Such proceedings can be instituted against the President *vide* the Attorney General.

(v) Public Participation

[293] The issue as framed by the Court contains two components. The first relates to the role of IEBC under Article 257(4) of the Constitution and in particular, whether IEBC is under an obligation to ascertain that promoters of a popular initiative have undertaken public participation during the collection of signatures. The second part deals with the broader question as to whether there was public participation in respect of the Amendment Bill. I will deal with these questions in turn; first by revisiting Article 257(4) which is couched in the following terms:

> "***The promoters of a popular initiative shall deliver the draft Bill and the supporting signatures to the Independent Electoral and Boundaries Commission, which shall verify that the initiative is supported by at least one million registered voters.***"

[294] It is clear to me that there is no direct requirement arising from this provision that imposes an obligation on IEBC to ascertain that promoters of a popular initiative have undertaken public participation. Nonetheless, the High Court held that IEBC was obligated to ensure that the promoters of the impugned popular initiative complied with the requirements of public participation. In other words, the High Court found that it was imperative for IEBC to ascertain there was public participation before determining that the Amendment Bill had met constitutional requirements for transmittal to the County Assemblies. The rationale embraced by the learned Judges was that under Article 10(1), IEBC was not only interpreting but also applying the Constitution.

[295] On appeal against this finding, the majority of the Judges of the Court of Appeal did not determine the issue leaving the determination by the High Court intact. It is only *Gatembu, J.A* who addressed the issue peripherally by reasoning that there was an obligation on IEBC to undertake voter education and sensitization on the amendments proposed in a draft Bill to empower the citizenry to engage meaningfully and from a point of information, with their representatives

at the County Assemblies. It is in light of this, that IEBC appealed to this Court seeking clarification on its obligation under Article 257(4).

[296] It is necessary to keep reminding ourselves that IEBC being a creature of the Constitution and statute can only discharge a mandate vested in it explicitly by the law. This is a direction given in Article 10(2) which identifies the rule of law as a national value and principle of governance. In a persuasive *dictum*, the Constitutional Court of South Africa in **Law *Society of South Africa & Others v. Minister for Transport & Another*,** 2011 (1) SA 400 (CC) at para. 32 expressed itself as follows:

> ***"...the rule of law... is a founding value of our constitution. The rule of law requires that all public power must be sourced in law – this means that state actors exercise public power within the formal bounds of the law."***

[297] The same court held in ***Fedsure Life Assurance Ltd & Others v. Greater Johannesburg Transitional Metropolitan Council & Others***, 1999 (1) SA 374 at para. 56 as follows:

> ***"It is a fundamental principle of the rule of law, recognized widely that the exercise of public power is only legitimate where lawful. The rule of law – to the extent at least that it expresses this principle of legality - is generally understood to be a fundamental principle of constitutional law. This has been recognized in other jurisdictions. In The matter of a Reference by the Government in Council Concerning Certain Questions Relating to the Secession of Quebec from Canada the Supreme Court of Canada held that: "Simply put, the constitutionalism principle requires that all government action comply with the Constitution. The rule***

of law principle requires that all government action must comply with the law, including the Constitution. This Court has noted on several occasions that with the adoption of the Charter, the Canadian system of government was transformed to a significant extent from a system of Parliamentary supremacy to one of constitutional supremacy. The Constitution binds all governments, both federal and provincial, including the executive branch (Operation Dismantle Inc. V. The Queen, [1985] 1 S.C.R. 441, at p. 455). They may not transgress its provisions: indeed, their sole claim to exercise lawful authority rests in the powers allocated to them under the Constitution, and can come from no other source."

[298] It follows that IEBC, like all other public bodies, cannot by craft of innovation or interpretation extend its powers to include ascertaining whether a promoter of a popular initiative has complied with the public participation requirements under the Constitution where the law does not explicitly grant it that mandate. The power granted to IEBC under Article 257(4) is limited to ***"verifying that the initiative is supported by at least one million registered voters."***

[299] Equally, courts should not encourage extension of powers by constitutional or statutory bodies. Such bodies must operate strictly within the four corners of their constitutional and statutory mandate. Therefore, where no power conferring legal provision can be pointed to as the basis for founding a mandate, courts should not use interpretive craft to extend the mandate of a public body. Given this view, unless there is a statutory framework enacted that confers power on IEBC to ascertain whether a promoter has undertaken public participation, the exercise of such a mandate would be a mere overreach.

[300] With respect to the finding by *Gatembu, J.A* that there is an obligation on IEBC to undertake voter education and sensitization on the amendments proposed in a draft Bill, it is my finding that the obligation for voter education under Article 88(4)(g) kicks in only after the mandate to conduct a referendum has arisen. This conclusion is founded on the fact that under Article 88(4), voter education is linked to IEBC's role in **"*conducting or supervising referenda and elections*"**. Thus, the obligation to conduct voter education only arises within the context of a referendum. Accordingly, the obligation of voter education arises upon the conclusion of the process in Article 257(10) where the President issues a notice to IEBC to hold a referendum for approval of the Bill. With respect to the Amendment Bill, such an obligation had not arisen at the time the instant cases were filed and adjudicated by the superior courts below.

[301] In the upshot therefore, it is my finding on the first part of the question as framed, that there was no obligation on IEBC to ensure that the promoters of the impugned popular initiative complied with the requirements for public participation before determining that the Amendment Bill had met constitutional requirements for transmittal to the County Assemblies.

[302] The second part of the question as framed relates to whether there was public participation in respect of the Amendment Bill. In determining this question, it ought to be appreciated that while participation of the people has been identified as a foundational value and principle of governance under Article 10(2), it is even more crucial with regard to processes that would lead to constitutional amendment. This is so, since it is the people's acceptance and ownership that grants democratic legitimacy and authority to a constitution. It therefore means that the process of constitutional amendment should be inclusive, enable deep public participation, and promote active involvement of the people during all the stages. Considerations around public participation in constitutional amendment

process ought to be geared towards maximizing public participation and ensuring that people understand the options and choices available to them in the process.

[303] In the ***BAT Case*** this Court emphasized that public participation and consultation is a living constitutional principle that goes to the constitutional tenet of sovereignty of the people. Accordingly, in line with its mandate under Section 3 of the Supreme Court Act, the Court formulated the following guiding principles for public participation:

> *"*
>
> ***(i) As a constitutional principle under Article 10(2) of the Constitution, public participation applies to all aspects of governance.***
>
> ***(ii) The public officer and or entity charged with the performance of a particular duty bears the onus of ensuring and facilitating public participation.***
>
> ***(iii) The lack of a prescribed legal framework for public participation is no excuse for not conducting public participation; the onus is on the public entity to give effect to this constitutional principle using reasonable means.***
>
> ***(iv) Public participation must be real and not illusory. It is not a cosmetic or a public relations act. It is not a mere formality to be undertaken as a matter of course just to 'fulfill' a constitutional requirement. There is need for both quantitative and qualitative components in public participation.***
>
> ***(v) Public participation is not an abstract notion; it must be purposive and meaningful.***

(vi) Public participation must be accompanied by reasonable notice and reasonable opportunity. Reasonableness will be determined on a case to case basis.

(vii) Public participation is not necessarily a process consisting of oral hearings, written submissions can also be made. The fact that someone was not heard is not enough to annul the process.

(viii) Allegation of lack of public participation does not automatically vitiate the process. The allegations must be considered within the peculiar circumstances of each case: the mode, degree, scope and extent of public participation is to be determined on a case to case basis.

(ix) Components of meaningful public participation include the following:

- ***(a) clarity of the subject matter for the public to understand;***
- ***(b) structures and processes (medium of engagement) of participation that are clear and simple;***
- ***(c) opportunity for balanced influence from the public in general;***
- ***(d) commitment to the process;***
- ***(e) inclusive and effective representation;***
- ***(f) integrity and transparency of the process;***
- ***(g) capacity to engage on the part of the public, including that the public must be first sensitized on the subject matter."***

It is against these standards that allegations of lack of public participation ought to be assessed. Importantly, the constitutional threshold is that of reasonableness of notice and opportunity for public participation.

[304] On this question, the Court of Appeal unanimously held that the Constitution amendment process contemplated under Article 257 was continuous with several phases hence, elements of public participation should be understood from that perspective. This is a view that I agree with given that a constitutional amendment process takes place in a series of stages. When we look at the constitutional amendment process as a series of stages, a number of avenues open up to encourage public participation in various ways at different points of the process.

[305] From the provisions of Article 257 it is discernible that there are four stages in the amendment process under the popular initiative route. *The first (initiation) stage:* Collection of signatures under Article 257(1) typically involves the promoters of the initiative setting the referendum agenda. However, this has to be within a context of the constitutionally guaranteed opportunities for citizens to influence the process. It is also not lost to me that an onerous requirement that a promoter conducts public participation before presenting the signatures for verification at this stage would be unreasonable because the whole process may be rejected by IEBC, like it did in the two popular initiatives dubbed as Okoa Kenya and Punguza Mizigo initiatives.

[306] Moreover, unlike subsequent stages where the cost of public participation is borne by public bodies, that is: County Assemblies, Houses of Parliament, and IEBC; at this first stage the cost of public participation will be borne by citizens or a group of citizens. In such a context, I am of the view that the requirement of public participation during the period preceding and during the collection of signatures should not impose onerous requirements on promoters of an initiative.

[307] The *second (passage through the County Assemblies)* stage seems to lend itself more to public participation. This is because the Constitution imposes a normative obligation for public participation in legislative affairs at the County Assemblies under Article 196. Moreover, the timeline of three (3) months within which County Assemblies ought to consider a Bill under Article 257(6) of the Constitution supports a reading that the assemblies ought to solicit for public input. See in this regard the persuasive decision of the High Court (*Nyakundi, J.*) in ***Abe Semi Buere v. County Assembly of Tana River & Another; Speaker of The National Assembly & Another (Interested Parties)***, H.C Petition No. E001 of 2021; [2021] eKLR.

[308] The *third (passage through the Houses of Parliament)* stage is another key stage for public participation. A structural reading would imply that the obligation under Article 256(2) for the Houses of Parliament to publicize any Bill and facilitate public discussion about the Bill, would also apply to a Bill that has come to the Houses of Parliament pursuant to a popular initiative. This is in addition to the general obligation on the Houses of Parliament to promote public participation in the legislative process under Article 118. This is in recognition that deliberations by legislative representatives should promote the goal of allowing public input in deliberations that affect them.

[309] The *fourth (referendum campaign)* stage under Article 257(10), is intended to serve as a national deliberative moment, hence duty bearers including IEBC have an obligation to facilitate a broad participatory process that includes voter education under Article 88(4)(g). The nature of public participation at this stage ought to include civic education to provide objective education on the merits and demerits of the issues presented to the referendum. It is in this context that Section 40 of the Elections Act, which operationalizes Article 88(4)(g) of the Constitution, provides as follows:

"40. Voter education

(1) The Commission shall, in performing its duties under Article 88(4)(g) of the constitution establish mechanisms for the provision of continuous voter education and cause to be prepared a voter education curriculum.

(2) The mechanisms under subsection (1) shall include provision for partnership with other agencies and non-state actors in the provision of voter education."

[310] It is important to reiterate that the requisite mode, degree, scope and extent of public participation or the sufficiency thereof is to be determined based on the peculiar circumstances of each case. Nonetheless, public participation must not be an illusion but a meaningful engagement with the people.

[311] On the question of burden of proof, *Okwengu* and *Kiage, JJ.A* held the view and rightly so, that by dint of Section 112 of the Evidence Act, once there is an allegation of lack of public participation, the burden shifts to the person charged with the responsibility of performing the same to establish adequate public participation. However, *Tuiyott, J.A* arrived at a slightly different conclusion. In his view, the burden could only shift to the promoters of the Amendment Bill if there was evidence to the effect that a person(s) who appended their signature in support of the same was not aware of the content or implication of the Amendment Bill.

[312] The evidence before the Court shows that there was a reasonable attempt at public participation with respect to the impugned initiative. This view is supported by the evidence of Hon. Dennis Waweru, Co-Chairperson of the BBI National Secretariat, in his affidavit sworn on 5th February, 2021 which was in response to HC Petition No. 416 of 2020 by Morara Omoke. He deposed that the BBI Taskforce

Report, BBI Steering Committee Report and the Amendment Bill were a product of comprehensive and consultative public engagement all over Kenya; which process entailed voluntary nationwide public participation. In addition, he annexed to his affidavit invitations, deliberations, reports and memoranda to that effect.

[313] I have also taken time to go through the BBI Steering Committee Report and there is evidence of public participation with regards to the process as documented in page 2 of the report. I reproduce an extract of the report verbatim:

> ***"...***
> ***The validation exercise was conducted through the following content and report implementation methodologies:***
> *Taskforce Report*
> ***Reviewing the contents of the Taskforce Report and this is contained in Section 3 of this Report.***
> *National Stakeholder Validation Fora*
> ***The Steering Committee held a total of 93 stakeholder consultation meetings at the KICC, Laico Regency hotel and at its offices in Nairobi. These fora were attended by representatives from civil society, faith-based organisations, women's groups, youth groups, persons with disability (PWD) groups, cultural leaders and Government.***
> *Regional Delegates' Meetings*
> ***These regional meetings took place across the country to discuss and validate the Taskforce Report. During the meetings, the technical experts who were retained as consultants by the Steering Committee took attendees***

through the Taskforce Report. They received written validation submissions from the leaders at the end of each of the meetings.

Regional Public Meetings

Regional leaders held meetings across the country during which members of the public engaged their leaders on the recommendations of the Taskforce Report. Most of these meetings were attended by one or two Steering Committee members, who received written submissions from Kenyans through their leaders. Rift Valley Governors were hosted at the Steering Committee's offices on 20 March 2020 to present and submit memoranda from their Counties following postponement of a regional meeting due to the Covid-19 pandemic. The Governors submitted memoranda from their respective Counties.

Written Submissions

The Steering Committee publicised its official email and physical address through which written memoranda from members of the public and organisations were delivered. The committee received a total of 124 hand-delivered memoranda and 223 emailed memoranda."

[314] There was no challenge to the contents of the BBI Steering Committee Report and the deposition by Hon. Dennis Waweru. This therefore leads to an unavoidable conclusion that there was reasonable public participation with respect to the Amendment Bill save for the Second Schedule thereto. As far as the Second Schedule of the Amendment Bill is concerned, as I had discussed earlier, it was a late addition to the process. It is worth reiterating that the evidence of public participation runs up to the launch of the Steering Committee Report that took

place on 21st October, 2020 wherein the BBI Steering Committee Draft Bill was attached and unveiled to the public. This version did not have the Second Schedule in question. There is no evidence of public participation between 21st October, 2020 and 25th November, 2020 when the Amendment Bill was published and introduced the Second Schedule for the first time.

[315] Having made the above finding, I need to point out in *obiter* that there is need for Parliament to enact a legislative framework to guide and regulate the process of public participation. While the Constitution sets a broad normative obligation for public participation in various governance processes, there is no legislative framework regulating how this obligation ought to be implemented. It is instructive to note that there have been three bills tabled in the Houses of Parliament with respect to providing a legal framework for public participation, namely:

(a) Public Participation Bill, 2016, Senate Bill No. 175 of 2016; which just underwent the first reading on 15/2/2017;
(b) Public Participation Bill, 2018, Senate Bill No. 4 of 2018; which underwent the first reading 29/3/2018; second reading 11/7/2018 and stopped at the point of the Committee of the Whole House;
(c) Public Participation Bill, 2019, National Assembly Bill No. 69 of 2019; which was read for the first time on 29th October, 2019 and then referred to the select Committee on Parliamentary Broadcasting and Library.

[316] Likewise, there have been attempts to enact legislation on referendum that stipulates or regulates the process of conducting a referendum on a constitutional amendment. They are:

(a) The Referendum Bill, 2020, National Assembly Bill No. 11 of 2020; which underwent the first reading on 2/5/2020; and the second reading on 2/6/2020.

(b) The Referendum (No. 2) Bill 2020, National Assembly Bill No. 14 of 2020; which is yet to even undergo the first reading.

[317] It ought to be appreciated that the Legislature has a duty to fulfil its obligations under the Constitution by enacting legislation to actualize constitutional imperatives. Furthermore, pursuant to Article 10 of the Constitution, the Legislature and other state organs are under a command to implement or help realize the values and principles that the Constitution secures. Taking into account that the Constitution also places an affirmative duty on the Legislature to enact a legislation on the conduct of referenda under Article 82(1)(d), I implore the Legislature to enact comprehensive legislations that will implement these twin constitutional obligations.

[318] In the end, I hold that there that there was reasonable public participation with respect to the Amendment Bill save for the Second Schedule of the impugned Bill.

(vi) Composition and Quorum of IEBC

[319] The above issue was raised in the High Court vide Petition No. E416 of 2020 wherein it was alleged that IEBC lacked quorum for consideration and approval of policy matters relating to the conduct of referenda including verification of signatures under Article 257(4). As at the time the verification process was undertaken, only three (3) Commissioners of IEBC were in office while the other four (4) Commissioners had resigned and had not been replaced.

[320] The High Court was persuaded by the petitioners in the aforementioned case and held that IEBC did not have the requisite quorum for purposes of carrying out its business relating to the conduct of the proposed referendum as well as verification of whether the Amendment Bill was supported by the requisite number of registered voters. This position was affirmed by a majority of the Court of Appeal

bench, with *Sichale, J.A* dissenting. It is in light of this background that this Court is called upon to determine whether IEBC was constitutionally infirm in terms of its composition and quorum at the time it verified that the Amendment Bill was supported by more than one million registered voters.

[321] It ought to be appreciated that the legal regime on the composition of IEBC is regulated by the Constitution. Whilst Article 88 of the Constitution establishes IEBC, provides for eligibility of appointment of its members and its mandate, this provision does not touch on its composition. It is Article 250(1) which provides for the composition of commissions and independent offices. Article 248(2)(c) lists IEBC as one of the commissions and independent offices making Article 250(1) the constitutional provision regulating its composition. The said Article 250(1) provides as follows:

> "***Each commission shall consist of at least three, but not more than nine, members.***"

[322] Section 5(1) of the IEBC Act, which statute according to its long title is ***"an Act of Parliament to make provision for the appointment and effective operation of the Independent Electoral and Boundaries Commission"***, provides as follows on the composition of IEBC:

> ***"The Commission shall consist of a chairperson and six other members appointed in accordance with Article 250(4) of the Constitution and the provisions of this Act."***

[323] Section 5(1) of the IEBC Act appears to have influenced the reasoning of the two superior courts below in resolving the question on IEBC's quorum. To illustrate, the High Court held as follows:

> ***"718. The Constitution placed the minimum number of commissioners of independent commissions at three and***

the highest number at nine members. Parliament, while appreciating the important mandate the IEBC discharges, picked a high number of seven commissioners to constitute it and placed its quorum at five members."

Similarly, at the Court of Appeal, *Musinga, (P),* held as follows:

"***Parliament, well aware of the provisions of Article 250(1) of the Constitution, enacted the IEBC Act and stipulated that the Commission shall consist of a Chairperson and six other members. Appreciating the mandate of the Commission, Parliament fixed the quorum at five members.***"

[324] It is readily apparent that there is the possibility of the provisions of Article 250(1) of the Constitution and Section 5(1) of the IEBC Act being read as imposing different requirements with regard to composition of IEBC. This also leads to the question as to whether an IEBC composed of three Commissioners would be infirm to conduct its constitutional mandate including the verification process provided for in Article 257(4).

[325] My finding on the above question is that Section 5(1) of the IEBC Act should be read in a manner that conforms to Article 250(1) of the Constitution. The reason being that Article 2, which expresses the supremacy of the Constitution, demands that no legal norm, including legislation, should have an effect contrary to that expressed in the Constitution. In other words, provisions of an Act of Parliament cannot override the Constitution. The expressed intention of Parliament in legislation cannot trump the normative command of the Constitution in a legal system where the Constitution is supreme. This constitution-conform approach to statutory interpretation has already been recognised by this Court in ***Hassan Ali***

Joho & Another v. Suleiman Said Shahbal & 2 Others, SC Petition 10 of 2013; [2014] eKLR (***Hassan Joho Case***) at para. 85 as follows:

> ***"As rightly submitted by the appellants, the Court of Appeal interpreted Article 87(2) of the Constitution so as to place it in conformity with the provisions of Section 76(1)(a) of the Elections Act. This is tantamount to elevating a statutory provision above that of the Constitution, and is not tenable, in the light of the provisions of Article 2 of the Constitution. The provisions of the Constitution are superior to any legislation. <u>As such, when interpreting the provisions of an Act of Parliament, the Court must always ensure that the same conform to the Constitution and not vice versa</u>"*** [my emphasis].

[326] This position was reiterated by the Court *in* ***Mumo Matemu v. Trusted Society of Human Rights Alliance & 5 Others***, SC Civil Application No. 29 of 2014; [2014] eKLR. In effect, courts are under an obligation to ensure that statutory interpretation promotes and sustains the normativity of the Constitution. This is done by ensuring that a constitution-consistent meaning is given to statutes and a constitution-infringing interpretation of statutes is avoided. It follows that courts must place the goal of constitution-consistency at the heart of the process of statutory interpretation.

[327] I have also looked at persuasive jurisprudence from apex courts in other jurisdictions which support this approach to statutory interpretation. For example, the Constitutional Court of South Africa has made this point in ***Investigating Directorate: Serious Economic Offences and Others v. Hyundai Motor Distributors: In Re Hyundai Motor Distributors (Pty) Ltd and Others v. Smit NO and Others*** 2001(1) SA 545 (CC) at para. 22 thus:

> ***"The Constitution requires that judicial officers read legislation, where possible, in ways which give effect to its fundamental values. Consistently with this, when the constitutionality of legislation is in issue, they are under a duty to examine the objects and purport of an Act and to read the provisions of the legislation, so far as is possible, in conformity with the Constitution."***

The same position was adopted by the Supreme Court of Ireland in ***McDonald v. BordnagCon*** (No. 2) [1965] IR 217 where the court laid the rule of statutory interpretation thus: *'**where an enactment is capable of bearing two interpretations one of which is compatible with the Constitution and the other incompatible, the Court must adopt the former'**.*

[328] Therefore, the implication is that IEBC is legally constituted when composed of the minimum number of three Commissioners stipulated in Article 250(1) of the Constitution. As such, I find that IEBC was constitutionally and legally composed when it undertook the verification process under Article 257(4) relating to the Amendment Bill.

[329] This now leads me to the issue of quorum of IEBC. The crux of the issue is whether three Commissioners could constitute the legally prescribed quorum at the time of the impugned verification process under Article 257(4) relating to the Amendment Bill. Given that there is no constitutional rule prescribing the quorum for IEBC Commissioners, the question of quorum is regulated by legislation and subsidiary legislation.

[330] Section 8 of the IEBC Act provides for the conduct of business and affairs of the Commission. It states:

> ***"The conduct and regulation of the business and affairs of the Commission shall be as provided for in the Second Schedule but subject thereto, the Commission may regulate its own procedure."***

[331] Paragraph 5 of the Second Schedule of the Act went ahead and fixed the quorum for conducting business at five. The provision provided that:

> ***"The quorum for the conduct of business at a meeting of the Commission shall be at least five members of the Commission."***

[332] Incidentally, and by a strange twist or turn of events, sometimes in 2017, Parliament enacted the Election Laws Amendment 2017 which amongst other provisions amended the law on quorum of IEBC (that is, paragraph 5 of the Second Schedule of the Act) to *"at least half of the commissioners in office and not less than three members"*. This amendment was nonetheless quickly challenged in court in ***Katiba Institute Case*** and the High Court (*Mwita, J.*) held that Parliament's reduction of the quorum of the IEBC to *"at least half of the existing members and not less than three members"* was ***"constitutionally invalid"*** in a Judgment delivered on 6th April 2018.

[333] It is useful to note that the decision in the ***Katiba Institute Case*** was never overturned by a higher court and Parliament did not make any amendments to the statute to replace the provision declared constitutionally invalid. Consequently, a question arises as to whether there was a legal stipulation on the quorum of IEBC at the time it undertook the impugned verification process under Article 257(4) relating to the Amendment Bill.

[334] Article 2(4) of the Constitution provides that:

> "***Any law, including customary law, that is inconsistent with this Constitution is void to the extent of the inconsistency, and any act or omission in contravention of this Constitution is invalid.***"

This makes a declaration of invalidity of any law a remedy that a court ought to grant in case it finds a law to be incompatible with the Constitution. The effect of such a declaration of invalidity is that the law so declared becomes ineffective as though it is not in the statute book. It is in appreciation of this that the Supreme Court of Canada has held as follows with respect to a declaration of invalidity in the case of ***R v. Ferguson*, 2008 SCC 6** at para. 65:

> "***To the extent that the law is unconstitutional, it is not merely inapplicable for the purposes of the case at hand. It is null and void, and is effectively removed from the statute books.***"

[335] Since the declaration of invalidity in the ***Katiba Institute Case*** effectively removed the amendment to Paragraph 5 of the Second Schedule of the IEBC Act, which had been effected through the Election Laws Amendment 2017, from the statute books, the question becomes whether there was a law in existence to regulate question of the quorum. In ***Senate & 2 Others v. Council of County Governors & 8 Others***, SC Petition 25 of 2019; [2022] KESC 7 (KLR) (***Senate & 2 Others Case***) this Court addressed the question of the effect of declaration of invalidity of an amendment to a legislative provision. We held thus at para. 54:

> ***"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. <u>The effect of the courts' declaring the amendment unconstitutional restored section 91(f)</u>" [my emphasis].

It follows that the decision in the ***Katiba Institute Case*** restored the status *ante* before the 2017 amendment with respect to the quorum of IEBC.

[336] However, as explained before, Paragraph 5 of the Second Schedule of the IEBC Act like Section 5(1) of the IEBC Act is drafted on the premise that the Commission will be composed of seven (7) Commissioners on all occasions. A reading of Paragraph 5 of the Second Schedule of the IEBC Act shows that the Legislature did not take into account the terms of Article 250(1) of the Constitution in prescribing the quorum of IEBC.

[337] Since Article 250(1) envisages that an IEBC composed of three (3) Commissioners is competent to discharge its constitutional mandate, an interpretation of Paragraph 5 of the Second Schedule of the IEBC Act that leads to a contrary result will be an affront to the supremacy of the Constitution. In such a context, a court is required to "read down" the statute to ensure conformity with the normative demands of the Constitution. In a relevant persuasive finding, the Supreme Court of Canada has in ***Manitoba (A.G.) v. Metropolitan Stores Ltd.*** [1987] 1 SCR 110 observed at para. 26 as follows:

"Still another meaning of the "presumption of constitutionality" is the rule of construction under which an impugned statute ought to be construed, whenever

possible, in such a way as to make it conform to the Constitution. This rule of construction is well known and generally accepted and applied under the provisions of the Constitution relating to the distribution of powers between Parliament and the provincial legislatures. It is this rule which has led to the "reading down" of certain statutes drafted in terms sufficiently broad to reach objects not within the competence of the enacting legislature: McKay v. The Queen, [1965] S.C.R. 798."

[338] Therefore, IEBC's quorum ought to be construed to reflect the normative expectation flowing from the Constitution that IEBC can discharge its constitutional mandate with at least three Commissioners in office. Flowing from the requirement that a court ought to give effect to a constitutionally conforming interpretation of statutes, I hold that IEBC with three Commissioners had the requisite quorum to undertake the impugned verification process.

[339] There is still another aspect of this question of the quorum that I need to address relating to the significance of the decision of the High Court in the ***Isaiah Biwott Case***. In that case, the petitioner argued that IEBC was unlawfully composed given that only three Commissioners were in the office at the material time; and therefore, it could not supervise the by-elections which were then slated for 17th August, 2018. In a Judgment delivered on 10th August, 2018 *Okwany, J.* dismissed the petition as lacking merit. She reasoned that:

"44. Having regard to the above decision, I do not find any inconsistency between the provision in Paragraph 5 of the Second Schedule of the IEBC Act and Article 250(1) of the Constitution. I find that the Act must have been enacted on the assumption or hope that the Commission will be

constituted with its maximum nine members which is not the case in the instant petition given that only seven commissioners were appointed in the current commission. Since quorum is composed of a clear majority of members of the commission, my take is that quorum cannot be a constant number as it is dependent on the actual number of the commissioners appointed at any given time. The question that we must ask is if quorum would remain five in the event that only three commissioners are appointed because the constitution allows for a minimum of three members. Would the quorum still be five? The answer to this question is to the negative. My take is that the issue of quorum, apart from being a matter provided for under the statute, is also a matter of common sense and construction depending on the total number of the commissioners appointed at any given time because it is the total number of commissioners appointed that would determine the quorum of the commission and not the other way round. In view of the above findings, I do not find Paragraph 5 of the Second Schedule of the Act unconstitutional having found that it was enacted on the belief that the maximum number of commissioners would be appointed."

[340] IEBC argued in this Court, like it did before the two superior courts below, that having been given the go ahead by the High Court that it could transact its mandate with three Commissioners in office, its actions and decisions were immunized from challenge. The two superior courts below gave short shrift to this argument holding that the decision of a High Court Judge did not bind a court of

concurrent jurisdiction under the doctrine of *stare decisis*. Thus, the High Court in the instant case was free to depart from the finding in the ***Isaiah Biwott Case*.**

[341] My view is that common law doctrines like the *stare decisis doctrine* must be interpreted in a manner that promote and give effect to the values and principles of the Constitution. In the instant case, the two superior courts below, unfortunately did not take into account the value and principle of the rule of law enshrined in Article 10(2)(a) that commands compliance with court orders before making a decision that has the effect of penalizing IEBC for relying on a declaratory finding by a High Court. IEBC cannot be faulted as its actions then were supported by the ***Isaiah Biwott Case***. Although the said decision was not binding on the High Court or the Court of Appeal, it created a legitimate expectation by IEBC that carrying out business with three Commissioners complied with the law.

[342] It needs to be appreciated that the value and principle of the rule of law under Article 10(2)(a) of the Constitution demands that public bodies and private individuals comply with court decisions. As pointed out by the Supreme Court of the United Kingdom in ***Craig v. Her Majesty's Advocate (for the Government of the United States of America) & Anor (Scotland)*** [2022] UKSC 6:

> ***"...some general observations about the use of declaratory orders in public law may be helpful. It has been firmly established since the case of M v Home Office [1994] 1 AC 377 that there is a clear expectation that the executive will comply with a declaratory order... The Government's compliance with court orders, including declaratory orders, is one of the core principles of our constitution, and is vital to the mutual trust which underpins the relationship between the Government and the courts... In***

other words, it is because ours is a society governed by the rule of law, where the Government can be trusted to comply with court orders without having to be coerced, that declaratory orders can provide an effective remedy…"

[343] The significance of the above is that where a state organ or private individual acts in compliance with a court decision, like IEBC did in this case, it ought not be punished by a subsequent court's decision declaring such actions illegal based on a differing interpretation of the law.

[344] In circumstances where a High Court in a later case, like in the instant case, disagrees with an earlier finding by another bench of the High court, the best approach is for the court to craft and mount appropriate remedies taking into account contextual considerations like the reliance placed by public bodies and private individuals on earlier court decisions. In such instances, the High Court ought to opt for the remedy of "prospective overruling" or "suspending the declaration of invalidity" and stipulate that the effect of its decision will apply prospectively.

[345] Indeed, this Court has already given guidance and signal to this effect in its decisions in ***Mary Wambui Case*** and ***Suleiman Said Shahbal v. Independent Electoral and Boundaries Commission & 3 Others,*** SC Petition No. 21 of 2014, [2014] eKLR. Such an effect of controlling the consequences of a finding by the court will promote compliance with court decisions and thus promote the rule of law. The contrary approach, like that adopted by the two superior courts below in the instant case, encourages disregard or second guessing of court decisions thus is a threat to the value and principle of the rule of law.

[346] In conclusion therefore, I find that IEBC had the requisite quorum to undertake the impugned verification process under Article 257(4) relating to the Amendment Bill.

(vii) Referendum Questions

[347] On this issue, the High Court determined that Article 257(10) of the Constitution requires all the specific proposed amendments to be submitted as separate and distinct referendum questions to the people in the referendum ballot paper, which are to be voted for separately and distinctively. This finding was affirmed by *Nambuye, Okwengu, and Kiage, JJ.A. Gatembu, J.A* added a qualifier *"subject to the nature of proposed amendment"* to the High Court's finding. *Musinga, (P),* disagreed with the learned Judges of the High Court and held that what is to be subjected to the referendum is the Amendment Bill which the people are to approve or disapprove by answering a question or questions, either in the affirmative or in the negative as framed by IEBC and approved by Parliament.

[348] On his part, *Tuiyott, J.A* held that since IEBC had not received the request to hold the referendum, no occasion had arisen for it to discharge its responsibility of framing the question or questions. What's more, it had not been suggested that IEBC had already determined the manner or formula in which it would frame the question or questions in respect to the referendum touching on the impugned Bill. As a result, it was his finding that there was no live controversy that required the High Court to pronounce itself on and the whole question was not ripe for determination.

[349] The first question for determination is a preliminary one which is whether the question on formulation of referendum questions was ripe for determination. The doctrine of ripeness focuses on when a dispute has matured into and existing

substantial controversy deserving of judicial intervention. ***The Black's Law Dictionary,*** 10th Edition at page 1524 defines ripeness as*:*

> ***"The state of a dispute that has reached, but has not passed, the point when the facts have developed sufficiently to permit an intelligent and useful decision to be made."***

[350] The doctrine of ripeness prevents a party from approaching a court before that party has been subject to prejudice, or the real threat of prejudice, as a result of the legislation or conduct challenged. The doctrine of ripeness is well developed in American jurisprudence as I have found in the persuasive decision of ***Abbott Laboratories v. Gardner*** 387 US 136, 148 (1967) (***Abbott Laboratories Case***) where the United States' Supreme Court held that the rationale behind the ripeness requirement is to enable courts to avoid becoming entangled in determining abstract questions of law that have not matured into live controversies. This is the observation that was made:

> ***"Without undertaking to survey the intricacies of the ripeness doctrine it is fair to say that its basic rationale is to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties. The problem is best seen in a twofold aspect, requiring us to evaluate both <u>the fitness of the issues for judicial decision</u> and the <u>hardship to the parties of withholding court consideration</u>"*** [my emphasis].

[351] It should be noted that at the time of filing the subject petitions, particularly Petition E416 of 2020, the Amendment Bill was yet to be submitted to the County

Assemblies for debate. This means that IEBC was yet to be invited to make a determination on the manner and form of the referendum question(s). Taking into consideration that IEBC's obligation under Article 257(10) of the Constitution had not yet arisen, *Tuiyott, J.A* was right in finding that there was no live controversy before the High Court which ought to have declined to make a determination on this question.

[352] Be that as it may, since the two superior courts below have pronounced themselves on this question although not ripe, I have taken time to consider whether there is need for this apex Court to settle this issue within the rubric of settling this question in the public interest. Adopting such an approach would settle this controversy and provide guidance to the nation and state agencies (including IEBC) on the discharge of the mandate under Article 257(10).

[353] The need to settle the law and offer jurisprudential guidance in public interest in a context such as this has been alluded to by this Court in the past. ***In the Matter of the Speaker of the Senate & Another***, SC Reference No. 2 of 2013, [2013] eKLR ***(In the Matter of the Speaker of Senate),*** *Mutunga, CJ* (as he then was) observed:

> ***"[156] <u>The Supreme Court of Kenya, in the exercise of the powers vested in it by the Constitution, has a solemn duty and a clear obligation to provide firm and recognizable reference-points that lower courts and other institutions can rely on, when they are called upon to interpret the Constitution</u>. Each matter that comes before the Court must be seized upon as an opportunity to provide high-yielding interpretive guidance on the Constitution; and this must be done in a manner that advances its purposes, gives effect to its intents, and illuminates its contents"*** [my emphasis].

[354] Other Courts have also embraced such a standpoint. For example, the Constitutional Court of South Africa in ***AAA Investments (Pty) Limited v. Micro-Finance Regulatory Council & Another*** 2007 (1) SA 343 (CC) held at para. 27 as follows:

> ***"We must however bring into the equation the question of mootness in the process of deciding the interests of justice issue. By the time this case was heard by the SCA, the Exemption Notice had been replaced by a new Exemption Notice which in effect set out the Rules that had been determined by the Council and which are under attack in this case, as rules prescribed by the Minister. The Council's Rules had become the Minister's Rules. The Council's contention in the SCA that this rendered the issue before that court moot was rejected and not raised again in this Court. However the possibility of the issue in relation to the Rules contested in this Court being moot because they have been overtaken by the new Notice is so strong that this factor must be brought into account in the interests of justice analysis. The issues may well be moot. Nonetheless, there are two conflicting judgments on these issues and, if we do not consider this aspect of the case, the judgment of the SCA with all its implications for future regulation would remain binding. In all the circumstances, I would hold that these issues are so crucial to important aspects of government as well as the rights contained in the Bill of Rights that it is in the interests of justice to grant leave to appeal"*** [my emphasis].

[355] The Court of Appeal has also made the same point in ***Public Service Commission & 4 Others v. Cheruiyot & 32 Others,*** Civil Appeal 119 & 139 of 2017 (Consolidated); [2022] KECA 15 (KLR) at para. 54 as follows:

> ***"The above finding on the jurisdiction of the Employment and Labour Relations Court would have been sufficient to dispose of the consolidated appeals. <u>However, owing to the gravity of the remaining issues and the public interest touching on the consolidated appeals, we feel inclined to determine each of the remaining issues"</u>*** [my emphasis].

[356] Having considered the above authorities, I still hold the view that such an approach would not be appropriate in the peculiar circumstances of this case. The question of whether under Article 257 (10) requires all the specific proposed amendments to the Constitution be submitted as separate and distinct referendum questions is a deeply fundamental one and it cannot be dwelt with in an anticipatory manner. This is the first time IEBC came close to conducting a referendum on amending the Constitution but had not had the occasion to discharge its mandate of framing the question or questions for the same.

[357] This therefore lends credence to the arguments that the matter of the conduct of the referendum was not ripe and the two superior courts erred by failing to extrapolate the real meaning of the doctrine of ripeness and its applicability in the instant matter. Ripeness discourages a court from deciding an issue too early. It therefore requires a litigant to wait until an action is taken against which a judicial decision can be grounded and a court is able to issue a concrete relief. This approach shields a court from dealing with hypothetical issues that have not crystalized.

[358] Accordingly, I find that the issue of whether Article 257(10) of the Constitution entails or requires that all specific proposed amendments to the Constitution should be submitted as separate and distinct referendum questions was not ripe for determination.

(viii) Costs

[359] On costs, ideally, costs should follow the event but nonetheless, ultimately, whether or not costs are to be awarded lies within the discretion of the Court. The judicial discretion is not to be exercised capriciously but is meant to accommodate the special circumstances of each case, while being guided by ends of justice. See ***Jasbir Singh Rai & 3 Others v. Tarlochan Singh Rai & 4 Others***, SC Petition No. 4 of 2012; [2014] eKLR. As such, taking into account that the consolidated appeals revolved around the interpretation and application of Chapter Sixteen with respect to amendment of the Constitution, which is in public interest, an order that each party bears its own costs would be most appropriate.

F. SUMMARY OF MY FINDINGS

[360] Based on the foregoing analysis, the position that I take on the issues determined above is that:

1. The basic structure doctrine and the four-sequential steps for amendments as prescribed by the two superior courts below are not applicable in Kenya under the Constitution.
2. The President or state organs or institutions are not permitted to initiate or promote a constitutional amendment process through the popular initiative route provided in Article 257 of the Constitution. That being the case, the Amendment Bill does not pass muster as a popular initiative

under the provisions of Article 257 of the Constitution thus making the amendment process unconstitutional.

3. The Second Schedule of the Amendment Bill is unconstitutional for want of public participation, a constitutional obligation that flows from Articles 10(2)(a) and 89(7)(a) of the Constitution.
4. Civil proceedings cannot be instituted in any court against the President or the person performing the functions of the office of the President during their tenure of office in respect of anything done or not done contrary to the Constitution.
5. There was no obligation on IEBC to ensure that the promoters of the impugned popular initiative complied with the requirements for public participation before determining that the Amendment Bill had met constitutional requirements for transmittal to the County Assemblies. In addition, there was reasonable public participation with respect to the Amendment Bill save for with respect to the Second Schedule of the impugned Bill.
6. IEBC had the requisite quorum to undertake the verification of signatures in support of the Amendment Bill under Article 257(4) of the Constitution.
7. I find the question raised regarding the interpretation of Article 257(10) of the Constitution on whether or not it entails or requires that all specific proposed amendments to the Constitution should be submitted as separate and distinct referendum questions was not ripe for determination.
8. This being a public interest matter, I find that each party should bear their own costs both in this Court and the superior courts below.

JUDGMENT OF P. M. MWILU, DEPUTY CHIEF JUSTICE & VICE-PRESIDENT OF THE SUPREME COURT

[361] The lead Judgment of the Chief Justice and President of the Court comprehensively details the background to this matter, the history of the proceedings, analysis of all the facts, the submissions of all the parties and the various reliefs sought in the consolidated petitions and I need not make any detailed reference to those areas. Herebelow are my personal perspectives and considerations of the issues raised before all the superior courts including this Court.

[362] Democracy is a perpetually contested condition. Within it, through discourse, persuasion, contention, and reconciliation, we are in constant mutability towards improving our condition through perfecting the substance of the norms and agreements by which we agree to co-exist and flourish. Whilst we see this across our courts every day, there are certain matters that accentuate our constant pursuit of social and political perfection; the Appeal before this court is one such. Within the context of our national journey towards perfecting our constitutional democracy, the important role of this Court and all parties to this appeal becomes more apparent.

[363] The crux of this appeal, as I see it, is the extent and nature of constitutional amendment in Kenya. Especially within our nation's history of constitution development and more specifically the experiences and processes that birthed the Constitution of Kenya 2010, any initiative that seeks to change that body of fundamental principles according to which we as Kenyans have agreed to be governed, our Constitution, deserves the utmost attention of all Kenyans, whose duty under Article 3 is to respect, uphold and defend the Constitution, and all state organs who under Article 2 exercise their delegated authority only through and in accordance with that Constitution.

[364] The history of constitutional development in Kenya has been laid out concisely and in detail both in the High Court and Court of Appeal decisions in this matter. This history is most relevant; this Court, the Supreme Court, has on numerous occasions asserted the importance of historical context as a key tool for courts and tribunals in the interpretation of the provisions of our transformative charter. Though a significant factor, it is not and ought not to be the only lens through, or the weightiest factor upon which we consider questions of constitutional interpretation.

[365] Prof. Richard Albert, referred to in both the judgments of the superior courts in this matter, speaks of the "*rise of unamendability*" and the duality of formal amendment rules in terms of their availability for both good and ill as posing a challenge for constitutionalism in that though rules of change are indispensable for the functioning of constitutional democracy, they at once "*…open the door to the demise of constitutional democracy itself*." Therefrom he poses the question, "*How, then, can we protect constitutional democracy from the misuse of its own devices*?" The late Prof. H.W. Okoth Ogendo illuminates this discussion by pointing out that it is pointless having a constitution if constitutionalism is not our concern.

[366] As I stated above, I am most cognisant of our history as a country as well as the history of the development of our much-cherished Constitution. I am also aware of the principles developed by this Court regarding historical context in interpretation of the Constitution, a living document speaking from the past, through the present and to the future. I must, however, state that the role of our courts must remain within the architecture of the Constitution; it is bound by it. The exercise of discretion must be judicious. Though it is the Court's task to breathe life into the Constitution and to ensure that its text is constantly speaking to the transformative and emancipatory ideals therein, on the other hand, the text of the Constitution cannot be seen as devoid of meaning and

content, merely to be filled by ideas and opinions by those on the bench, no matter how laudable and well intentioned they may be. A balance must be maintained, such balance is crucial to the very architecture of our constitutional democracy, for the courts too, must not see themselves as immune to inimical despotic tendencies.

[367] This is especially true in regard to constitutional amendment and the exercise of sovereignty as acknowledged in the Constitution, directly or indirectly, through processes prescribed therein. The courts must seek to steadfastly and purposely defend and protect the constitutional processes through which the people of Kenya express their sovereign power. Not, on the basis of justifiable apprehension and no matter the nobility of the cause, employ judicial craft to read certain moral or doctrinal limits into the exercise of such sovereign power. It is the sovereign, the people who must decide, and responsibility of all state organs to only exercise state authority as delegated by the sovereign, and remove all extra-constitutional impediments to the free exercise of such power. This Constitution has been stretched in its over ten years' existence and perhaps this is the most serious attempt yet to espouse its limits in the wake of attempted amendments.

[368] To demonstrate the magnitude of the case before the Court, while the High Court framed thirteen issues for determination arising out of the consolidated petitions, the Court of Appeal expanded them to twenty-one. This Court, based on its special position and purpose in our constitutional scheme, framed seven issues as the basis upon which to settle any constitutional controversy.

[369] All the above said, I will now proceed to consider the seven issues framed for determination by this Court which are:

> *(i) Whether the Basic Structure Doctrine is applicable in Kenya; if so, the extent of its application; whether the basic structure of the Constitution can only be altered through the*

primary constituent power; and what constitutes the primary constituent power;

(ii) *Whether the President can initiate changes/amendments to the Constitution; and whether a constitutional amendment can only be initiated by Parliament through a parliamentary initiative under Article 256 of the Constitution or through a popular initiative under Article 257 of the Constitution;*

(iii) *Whether the Second Schedule to the Constitution of Kenya (Amendment) Bill, 2020 was unconstitutional;*

(iv) *Whether civil proceedings can be instituted against the President or a person performing the functions of the office of the President during his/her tenure of office with regard to anything done or not done contrary to the Constitution;*

(v) *The place of public participation under Article 10 vis-a- vis the role of IEBC under Article 257(4) of the Constitution; and whether there was public participation in respect of the Constitution of Kenya (Amendment) Bill, 2020;*

(vi) *Interpretation of Articles 88 and 250 of the Constitution with respect to composition and quorum of IEBC; and*

(vii) *Whether the interpretation of Article 257(10) of the Constitution entails/requires that all specific proposed amendments to the Constitution should be submitted as separate and distinct referendum questions.*

(i) Whether the Basic structure doctrine is applicable in Kenya; if so, the extent of its application; whether the basic structure of the Constitution can be altered through the primary constituent power; and what constitutes the primary constituent power

[370] If there were any stand out words emanating from these proceedings, they are "basic structure". ***Petition No. E282 of 2020, David Ndii & Others v. Attorney General & Others*** before the High Court brought the issue of basic structure to the core of these proceedings. The petitioners therein raised three main issues seeking declaratory reliefs imposing the doctrine of the basic structure and its corollary doctrines in Kenya. They specifically sought to protect chapters one, two, four, nine and ten as forming part of the basic structure and therefore not amendable. It was therefore no surprise that Isaac Aluochier, the 19th respondent herein referred to David Ndii as "the champion of the basic structure doctrine".

(a) Basic Structure and Basic Structure Doctrine

[371] What then is the basic structure and is it any different from the doctrine? Our Constitution does not have any reference to the basic structure or basic structure doctrine in its text. It is my considered view that before determining the applicability of a doctrine, it is imperative to first establish and/or locate it. According to the petitioners in Petition No. E282 of 2020, the Constitution has certain fundamental aspects that must be maintained at all times. To them, there are eternity clauses whose amendment cannot be entertained without overhauling the Constitution.

[372]Taking into account the constitution-making process leading to the promulgation of the Constitution of Kenya 2010, there is no doubt that the Constitution had to take a certain configuration. For instance, certain aspects of sovereignty of the people and supremacy of the Constitution, the Bill of rights

which now extended to socio-economic rights, leadership and integrity, devolution and the two levels of government, the executive which was detached from legislature, Judiciary among other provisions were introduced into the Constitution. Following the clamour for constitutional review over the years, the Constitution was promulgated following an elaborate process that was preceded by a largely participatory and people-centric mechanism.

[373] I can therefore comfortably state that the Constitution has a certain structure incorporating the certain provisions as stated above which are termed as basic. This structure takes into account the history of the country and the aspirations of the citizens that are elevated into the Constitution. From the proceedings and the record, the parties commonly agreed that the Constitution does have a basic structure that is inherent therein. This structure may differ from country to country but subsists in all Constitutions.

[374]The point of departure between the parties before us, as I perceive it, is the existence and applicability of a basic structure doctrine in Kenya. That was the direct invitation to the High Court by David Ndii & Others when they first approached court. But first, it is imperative that the basic structure doctrine is identified and defined.

[375]The Constitution of Kenya 2010 neither defines the word 'doctrine', 'basic structure' nor even 'basic structure doctrine.' The only doctrine referred to in the Constitution is on the construing of the Constitution. Article 259(3) provides that every provision of the Constitution shall be construed according to the 'doctrine of interpretation' that the law is always speaking.

[376]A doctrine is defined as "*a belief or set of beliefs held and taught by a church, political party or other group" (refer to* ***Oxford Dictionary*** *12th ed. (2011) Oxford University Press).* ***Black's Law Dictionary*** *11th Edition defines a doctrine as a "principle, especially a legal principle, that is widely adhered to."* In

legal parlance, legal doctrine is the currency of law. In many respects, doctrine, or precedent is the law, at least as it comes from courts. According to Emerson H. Tiller & Anor **"*What is legal doctrine?"*** (2006) 100 Nw.U.L. Rev. 517, a legal doctrine sets the terms for future resolution of cases in an area and it may take many forms – fact-dependent and therefore limited or sweeping in its breadth. It is not debatable then that a doctrine is a legal principle of long usage, which is widely accepted as such. That definition is what I consider a working tool in resolving the present controversy inherent in the existence, and applicability, if at all, of the basic structure doctrine in the circumstances and commands of the Constitution of Kenya, 2010.

[377] The learned Judges of the High Court found that the basic structure doctrine is applicable in Kenya and it protects certain fundamental aspects of the Kenyan Constitution from amendment through the use of either secondary constituent power or constituted power. Accordingly, to the High Court, there are unamendable or eternity provisions that represent certain provisions in the Constitution which are inoculated from any amendment at all because they are deemed to express categorical core values and cannot be changed through the exercise of secondary constituent power or constituted power. To the High Court therefore, the basic structure can only be altered or modified by the people using their primary constituent power and that the text, structure, history and context of the Constitution of Kenya 2010 all read and interpreted using the canon of interpretive principles decreed by the Constitution yield the conclusion that the basic structure doctrine is applicable in Kenya.

[378] By majority, the Court of Appeal (*Sichale, J.A* dissenting) affirmed the High Court decision to the extent that the basic structure doctrine is applicable in Kenya and it limits the amendment power set out in Articles 255-257 of the Constitution (*Okwengu* and *Sichale, JJ.A* dissenting). The Court of Appeal further affirmed the High Court decision to the effect that the basic structure of the Constitution can

only be altered through the primary constituent power which must include four-sequential steps, that is: civic education to equip people with sufficient information to meaningfully participate in the constitution-making or constitution-altering process; public participation and collation of views in which the people – after appropriate civic education – generate ideas on the type of governance charter they want and give their views about the constitutional issues; Constituent Assembly debate, consultations and public discourse to channel and shape the issues through representatives elected specifically for purposes of constitution-making or constitution-alteration; and referendum to endorse or ratify the Draft Constitution or changes to the basic structure of the Constitution. (*Okwengu, Gatembu* and *Sichale JJ.A* dissenting).

[379] What is apparent is that there is no consensus on what this basic structure doctrine is, including its origin and applicability in Kenya. To my mind therefore, it is only upon a proper understanding of the doctrine that would render a proper determination of its applicability, the extent of its application and the amendment of the Constitution in that context.

[380] In their case before the High Court, the proponents of the doctrine merged the basic structure doctrine with the doctrine and theory of unamendability of "*eternity clauses*," the doctrine and theory of "*constitutional entrenchment clauses*" and "*unamendable constitutional provisions*" in seeking a declaration that they are applicable in Kenya. Their lead argument is that the legal and judicial doctrines substantively limit the ability to amend the Constitution under Articles 255-257 thereof. That the amendment powers reposed in Articles 256 and 257 of the Constitution can only be used to amend the ordinary provisions rather than enact a new constitutional order, there being a difference between amendment and alteration. To them, any amendment of what was considered to be part of the basic structure amounted to an alteration, going beyond Articles 255 to 257 of the Constitution.

[381] The proponents of the doctrine traced it from the famous writings of John Locke, Hume and Rousseau. They referred to John Locke's ***Two Treatises of Government*** and Baron De Montesquieu's ***The Spirit of the Laws*** to assert that it is neither emergent nor alien being rooted in antiquity as a feature of democratic governance.

[382] They also employed reliance on scholarly works. At the heart of their submission was the work of Prof. Ben Nwabueze on ***Presidentialism in Commonwealth Africa*** in which the learned author deals with "Constituent Power and Popular Sovereignty." The seminal book, ***Constitutional Amendments; Making, Breaking and Changing Constitutions*** by Prof. Albert Richard was cited to buttress the evolution of unconstitutional constitutional amendments across multiple jurisdictions and how it applies to modern constitutional democracies tracing its political foundations to France and United States, with its doctrinal origins to Germany.

[383] The ***Njoya Case*** was heavily relied upon for the position that it established the doctrine of constituent power in Kenya. The Indian ***Kesavananda Case*** was cited as establishing the basic structure doctrine and applying it to the Indian context. They posit that constituent power did not originate with the ***Njoya Case*** but rather that it is traceable from John Locke, and Montesquieu as earlier enunciated.

[384] To the proponents, even local text affirms the basic structure of our Constitution. They cite John Mutakha Kangu, "***Constitutional Law of Kenya on Devolution***," (Strathmore University Press, 2015) who states that the basic structure of our Constitution should include the sovereignty of the people, the supremacy of the Constitution, the principle of sharing and devolution of power, democracy, rule of law, the Bill of Rights, separation of powers and the independence of the Judiciary.

[385] The opponents of the importation of the basic structure led by the Hon. Attorney General faulted the doctrine just as it has been rejected in many jurisdictions including Malaysia, Singapore, Zambia, Uganda and South Africa. They also faulted the applicability of the ***Kesavananda Case*** determined in 1973 under circumstances radically different from the present case.

[386] Prof. Yaniv Roznai was quoted extensively at the Court of Appeal. He traces the history of the basic structure doctrine and how it was developed in India. This was in response to Prime Minister Gandhi's "*far-reaching attempts to amend the Constitution, leading eventually to the judicial development of the 'Basic Structure Doctrine'*." According to the doctrine, the amendment power is not unlimited. He criticized the ***Kesavananda Case*** for failure to identify the unamendable clauses.

[387] Further criticism of the Indian case was made by Prof. Charles Manga Fombad, *amicus curiae,* that the doctrine of basic structure was developed in India when it was dealing with India's 20th century independence Constitution of the 1950s whereas African Courts are now dealing with African made Constitutions of the 21st century, negating the relevance of the ***Kesavananda Case*** due to the changed circumstances.

[388] To help expound this issue further, the court admitted Professors Rosalind Dixon, David E. Landau, Gautam Bhatia, Migai Akech, Richard Albert, Charles Manga Fombad and Dr. Adem K. Abebe as *amici* on the basis of the briefs filed. I have greatly benefited from their exposition, some of which is right "from the horse's mouth" owing to the fact that their scholarly works had been quoted by the litigants. The *amici* came forth to directly express their views, just in case they had been quoted out of context or misquoted. As expected, the scholarly contest among the *amici* turned out to be an interesting discourse on this issue of the extent of applicability of the basic structure doctrine. This is both from the *amici*

admitted before this Court and those that had participated in the case prior to its hearing before this Court.

[389] The irrefutable conclusion that I make on this issue is that while the Constitution of Kenya has a basic structure as conceded by the parties, the structure is different from the basic structure doctrine and the different parties in this matter, just like the *amici,* had different definitions, origin, components and considerations as to what amounts to the basic structure doctrine. This now leads to the consideration whether indeed the basic structure doctrine applies in Kenya and if so to what extent.

(b) Applicability of the basic structure doctrine in Kenya

[390] A common thread as to what constitutes the basic structure doctrine in Kenya, as argued, is that the doctrine seeks to protect the Constitution from radical amendments especially those perpetuated by the leaders, be they in Parliament or in the Executive. This is based on the past trend where constitutions were amended over time with the aim of diminishing citizens' rights at the expense of entrenching political rights. Considering the history of our country and the process through which the Constitution making process was subjected to, it is imperative that certain provisions which contain the basic structure be upheld and protected from haphazard interference.

[391] What then be the place of this doctrine? As earlier stated, it is not an express provision of the Constitution. There is no uniform and agreed definition of this doctrine. Is it then an implied doctrine and if so from which provisions of the Constitution does it accrue? Article 2 of the Constitution deals with the supremacy of the Constitution. How then does the doctrine mirror in this supremacy equation? Article 1 of the Constitution vests all sovereign power in the people, and it is exercised only in accordance with the Constitution. This is either directly or through democratically elected representatives.

[392] Was this doctrine introduced in Kenya through the ***Njoya Case*** or any other judicial determination so that we are being called upon to merely affirm it? Or is it one of those doctrines of common law – like judicial review, *res judicata*, estoppel and so forth which are aimed at proving inspiration for new legislation to be enacted? Certainly, some of the proponents, including Kenya Human Rights Commission, the 78th respondent, consider it a common law doctrine that is inherent in all Constitutions. Opponents like Prof. Yaniv Roznai dismisses the notion that the doctrine is a common law doctrine in the following terms:

> "***The Kesavananda Case did not provide a precise list of unamendable features that constituted the Constitution's Basic Structure, thus forming a sort of common law doctrine that develops on a case by case basis" and that the Kesavananda Judgment created a "Constitutional quicksand.***"

[393] As stated, the parties did not have consensus on what the doctrine entails. The High Court found the doctrine applicable in Kenya, and that it protected certain fundamental aspects of the Kenyan Constitution from amendment. Differently put, the basic structure doctrine protected the core edifice, foundational structure and values of the Constitution but left open certain provisions of the Constitution as amenable to amendment as long as they did not fundamentally tilt the basic structure. That the basic structure doctrine limited the amendment power set out in Articles 255 – 257 of the Constitution.

[394] The challenge on the applicability of the doctrine in Kenya was manifest at the Court of Appeal. By majority, six of the seven Judges of Appeal agreed with the High Court's conclusion as to the applicability of the doctrine. The Judges would, however, not agree on what the doctrine constituted and identified what is set out under Article 255(1) of the Constitution to form the basic structure. They held that

the basic structure doctrine applies through implication. *Sichale, J.A* was categorical that the doctrine was not supported by the context, structure and history of the Constitution. In relation to the Constitution of Kenya (Amendment) Bill 2020 (*Amendment Bill*), the majority of the Judges of appeal were not in agreement that the Amendment Bill sought to fundamentally alter certain constitutional pillars by way of dismemberment and not as an amendment of the Constitution.

[395] Where do all these unclear positions leave the basic structure doctrine and its applicability in the Kenyan context? One thing for certain is that the doctrine, not being expressly stated in any statute or the Constitution, remains manifest only by necessary implication.

[396] The Attorney General, the 79th respondent, 3rd *amicus curiae* Gautam Bhatia, the 74th to 78th respondents and Kituo Cha Sheria trace the applicability of the basic structure doctrine in Kenya to the ***Njoya Case***. The Attorney General went further to say that this doctrine was followed in the case of ***Patrick Ouma Onyango & 12 Others v AG & 2 Others Misc. Appl No. 677 of 2005*** [2008] 3 KLR (EP) 84.

[397] At the onset, the Attorney General, rightly so, notes that the ***Njoya Case*** was rendered under the repealed Constitution. It therefore behooves the Court to pronounce that that case does not apply in the present circumstances. With respect and viewing the matters in controversy here in proper context, this is clearly not a "Njoya moment." The ***Njoya Case*** was determined on the backdrop of the non-existence of any legal mechanism under the Constitution towards amendment or overhaul of the Constitution, including the conduct of a referendum or referenda.

[398] Following the decision in the ***Njoya Case*** and its ensuing pronouncement on the necessity of a referendum, questions arose on whether there was need to amend the Constitution to provide for referendum or whether amendments to the

operating statute relating to the review of the Constitution would suffice. The basic question at the heart of the ***Njoya Case*** was whether the existing Constitution of Kenya could be extinguished and another given life in its place otherwise than as provided for in the Constitution and on the basis only of the provisions of an ordinary Act of Parliament. This is what informed the enactment of Chapter Sixteen that we currently have in the Constitution, the basis upon which the present dispute should be considered.

[399] Section 3 of the Supreme Court Act gives the objects with respect to the operation of the Supreme Court as a court of final judicial authority to among other things:

> (a) assert the supremacy of the Constitution and sovereignty of the people of Kenya;
>
> (b) provide authoritative and impartial interpretation of the Constitution
>
> (c) develop rich jurisprudence that respects Kenya's history and traditions and facilitates its social economic and political growth;
>
> (d) enable important constitutional and other legal matters, including matters relating to the transition from the former to the present constitutional dispensation to be determined having due regard to the circumstances, history and cultures of the people of Kenya.

This is an important provision that must at all times guide the Court in dealing with matters before it such as the present one.

[400] The inescapable thread that emerges from this matter is that the framers of the Constitution took deliberate steps, at least for Kenya, to ensure the process

of amending the Constitution was strictly regulated. Our Constitution is not referred to as transformative for the sake of it. It is a product of quite an effort made at different levels and by different players to guard the aspirations of the citizens whose participation remains at the core. This is the import of Articles 10 and 259 of the Constitution.

[401] While the ***Kesavananda Case*** might have been jurisprudential and originated this otherwise interesting basic structure doctrine, with respect, the decision is distinguishable in many facets. Firstly, the historical context within which the decision was made is different from Kenya's situation. Kenya did not undergo the same circumstances as those of India. While India's parliament had the sole discretion of amending the constitution, in Kenya the amendability of the Constitution was not of concern. The global dynamics obtaining in the 1970s including the cold war when the decision was made were very different from the current dynamics. Secondly, the juxtaposition of the Constitutional provisions and architecture reveal a discrepancy between the Indian Constitution and the Kenyan one. Thirdly, the political underpinning and democratic spaces between the two countries remain distinguishable.

[402] As noted by the opponents of the doctrine, there were substantial textual and contextual differences between the Kenyan Constitution and the Indian Constitution at the time the Indian Supreme Court developed the doctrine. For instance, under the Indian Constitution, Parliament has the exclusive and final power to amend the Indian Constitution; there is no requirement for approval of an amendment of the Indian Constitution in a referendum; the popular initiative approach is neither provided for nor contemplated under the Indian Constitution; the court's jurisdiction to question parliamentary power to amend the Indian Constitution on any ground is expressly ousted.

[403] It is noted, as was argued before us, that courts in some countries such as Nicaragua, El Salvador, Honduras and Bolivia have over-enforced the basic structure doctrine, while others have applied the doctrine in ways that have had distinctly anti, rather than pro-democratic effects, to for example, remove term limits on the presidency. In addition, it was also submitted that India, Malaysia, Singapore, Belize, South Africa, Taiwan, Uganda, Colombia, Bangladesh and Pakistan, relied upon by the Court of Appeal in support of the application of the Basic Structure Doctrine in Kenya were all in respect of the Parliament's power to amend the Constitution.

[404] Further, that none of the cases related to amendments by referenda or popular initiatives, as is contemplated under Articles 255 and 257 of the Constitution of Kenya. Countries such as Malaysia, Singapore, Zambia, Uganda and Tanzania, stated to have rejected the basic structure doctrine, did so with the courts operating in very different political and legal contexts, often with low levels of judicial independence or insulation from authoritarian actors.

[405] More importantly, it is indubitable that, being a foreign concept and doctrine, the basic structure doctrine should only be considered within our constitutional design and architecture. As we observed in ***Mitu-Bell Case,*** any foreign legal principles must be construed within Article 2(5) of the Constitution and only applied as a fall back when we have no internal recourse to the matter at hand. Moreover, for us to accept the doctrine by implication, it must meet the muster of Article 2(4) to the extent that it must not be inconsistent with or in contravention of the Constitution.

[406] The corollary question to ask myself is whether I can, by any stretch of imagination contemplate that there is a lacuna in our Constitution. This is a path I would be reluctant to take as the Constitution is presumed to be self-contained. Any lacuna identified can only be resolved through amendment or repeal of the

Constitution using the mechanism set out under the very Constitution. The courts retain the authority to interpret and apply the Constitution, in relation to any legislative or other undertakings done under or in the name of the Constitution. The Constitution itself gives the authority to the courts to interpret the Constitution as guided by Article 259.

[407] In my view, whether a Constitution is amendable or not, whether any amendment initiative amounts to an alteration or dismemberment and the procedure to be followed is a matter that would be determined on a case to case basis depending on the circumstances. Articles 255 – 257 just like any other provisions of the Constitution can be interpreted or applied to the circumstances of a relevant case within the Constitution. This may involve invoking the jurisdiction of the High Court under Article 165(3)(b) and (d) with the possibility of appellate process all the way to the Supreme Court as the final arbiter under Article 163(4)(a) of the Constitution in a case involving the interpretation or application of the Constitution.

[408] It is entirely within the rights of any party to submit the basic structure doctrine as they understand it to interpret the provisions of the Constitution. For our purposes, the overarching contention is whether the Constitution can be amended or not, and if so, how such amendments ought to be carried out. The fact that the parties propose the basic structure doctrine as the method of interpreting the clauses of the Constitution does not mean that the Constitution embodies the basic structure doctrine as the method of interpreting the articles of the Constitution. Any departure from or concurrence with the basic structure doctrine as posited by the proponents would thus be purely coincidental rather than consequential.

[409] This position is not specific to the basic structure doctrine but any other prism as may be proposed by a litigant. Several scholars and legal or other

principles were cited to the Court. Just to name a few, some Counsel quoted writers such as Chinua Achebe, scholars such as Prof. B.O. Nabwueze and some of the *amici* in these proceedings, theorists, political analysts, and so on. To extrapolate the point being made is to now start saying just as an example, that Chinua Achebe's principles apply to the Constitution.

[410] Counsel and litigants are at liberty to defer to different and sometimes fancy concepts to articulate their position on any issue. In doing so, the court is not always obliged to take the bait and endorse some of these concepts without a careful interrogation. I am confident that we have a corpus of indigenous, contextual and progressive jurisprudence that informs and guides the courts in their interpretation and application of the Constitution. It is only through such recourse that the court would play its rightful role in developing its own rich jurisprudence that respects Kenya's history and traditions as contemplated under Section 3 of the Supreme Court Act.

[411] To state that the basic structure doctrine is applicable in Kenya is, to say that it has the force of law. That, it does not have in my view. Some judicial reasoning which is what ***Kesavananda Case*** is, cannot be elevated to a doctrine above the Constitution. The basic structure doctrine is not within our Constitution and needless to say, our Constitution is self-sustaining.

[412] The sum total of my finding is that the basic structure doctrine, by whatever machination is not applicable in Kenya.

(c) Whether the basic structure of the Constitution can be altered through the primary constituent power and what constitutes primary constituent power

[413] This issue calls for our determination of the amendability of the constitutional provisions, if there is any limitation on amending certain provisions

and generally how to go about it. The protagonists of the basic structure doctrine called for the unamendability of certain provisions which constitute the basic structure. To them, there exists the doctrine of constitutional entrenchment clauses which insulates certain provisions of the Constitution from amendment either under Article 256 of the Constitution by Parliament or through popular initiative under Article 257. The affected provisions include Chapter One on Sovereignty of the People and Supremacy of the Constitution, Chapter Two on the Republic, Chapter Four on the Bill of Rights, Chapter Nine on the Executive and Chapter Ten on the Judiciary.

[414] The Attorney General challenged the unamendability argument on two grounds – One, that such a doctrine of unamenability was not applicable in Kenya. Secondly, that the issues raised were not justiciable, were speculative and not specific enough. The Speaker of the National Assembly, agreeing with the Attorney General added that the only limitation to the people's power to amend the Constitution was the procedure set out under the Constitution. He further added that under Article 255, provision was made for the basic structure which could only be amended by the people exercising their sovereign right directly through a referendum.

[415] Though the proponents of the basic structure of the Constitution had pinpointed what they construed as comprising the basic structure, the High Court went a step further. The High Court identified the basic structure of the Constitution as consisting of the foundational structure of the Constitution as provided in the preamble, the eighteen Chapters and the six schedules of the Constitution. The High Court took the position that an exhaustive list of eternity clauses was inadvisable in a vacuum. Whether a particular clause consisted an eternity clause or not would be a fact-intensive determination to be made after due analysis of the Constitution, its foundation, structure and other non-legal considerations permitted by Kenya's canons of interpretation of the Constitution.

[416] What I can make from the above position is that the Constitution has to be interpreted cumulatively and not on clause by clause basis. The holding of *Mutunga CJ & P* (as he then was) in ***In the Matter of the Speaker of the Senate*** *inter alia,* that the Constitution does not subvert itself hence their conclusion that it is a peremptory rule of Constitutional construction that no provision of the Constitution is to be segregated from the others. In his concurring opinion, *Mutunga CJ & P* stated:

> "***[156] The Supreme Court of Kenya, in the exercise of the powers vested in it by the Constitution, has a solemn duty and a clear obligation to provide firm and recognizable reference-points that the lower Courts and other institutions can rely on, when they are called upon to interpret the Constitution. Each matter that comes before the Court must be seized upon as an opportunity to provide high-yielding interpretative guidance on the Constitution; and this must be done in a manner that advances its purposes, gives effect to its intents, and illuminates its contents. The Court must also remain conscious of the fact that constitution-making requires compromise, which can occasionally lead to contradictions; and that the political and social demands of compromise that mark constitutional moments, fertilize vagueness in phraseology and draftsmanship. It is to the Courts that the country turns, in order to resolve these contradictions; clarify draftsmanship gaps; and settle constitutional disputes. In other words, constitution making does not end with its promulgation; it continues with its interpretation. It is the duty of the Court to illuminate legal penumbras that Constitution***

***borne out of long drawn compromises, such as ours, tends to create*... ."**

[417] The starting point for interrogating this issue is the place of amendment in contra distinction with alteration. The Constitution does not make any reference in its entire text to its alteration. However, when it comes to amendment, a whole chapter, to wit, Chapter Sixteen is dedicated to it. Article 255 deals with amendment of the Constitution and reserves certain matters to be only amendable by referendum. These are; supremacy of the Constitution; the territory of Kenya, the sovereignty of the people; the national values and principles of governance referred to in Article 10(2)(a) to (d); the Bill of Rights; the term of office of the President; the independence of the Judiciary and the Commissions and independent offices to which Chapter Fifteen applies; the functions of Parliament; the objects, principles and structure of devolved government; or the provisions of the Chapter Sixteen.

[418] An 'amendment' is defined as *"a minor change or addition designed to improve a text, piece of legislation"* (***Black's Law*** and ***Oxford Dictionaries***). On the other hand, an 'alteration' stems from the verb 'alter' which refers to the change in character or composition, typically in a comparatively small but significant way. In relation to a building, to alter is to make structural changes to a building.

[419] What can be gleaned from these provisions is that all provisions of the Constitution are amenable to amendment. The only distinction is on the specific provision sought to be amended as against the process being used. At any rate, nothing prevents any person from challenging any proposed amendment through the judicial process. The test to be met is that pronounced in Article 259 of the Constitution on how to interpret the Constitution. It provides:

"Article 259. Construing this Constitution

(1) This Constitution shall be interpreted in a manner that—

(a) promotes its purposes, values and principles;

(b) advances the rule of law, and the human rights and fundamental freedoms in the Bill of Rights;

(c) permits the development of the law; and

(d) contributes to good governance.

(2) If there is a conflict between different language versions of this Constitution, the English language version prevails.

(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;

(b) any reference in this Constitution to a State or other public office or officer, or a person holding such an office, includes a reference to the person acting in or otherwise performing the functions of the office at any particular time;

(c) a reference in this Constitution to an office, State organ or locality named in this Constitution shall

be read with any formal alteration necessary to make it applicable in the circumstances; and

(d) a reference in this Constitution to an office, body or organisation is, if the office, body or organisation has ceased to exist, a reference to its successor or to the equivalent office, body or organisation."

[420] In ***Commission for the Implementation of the Constitution Case*** *Lenaola, J*. (as he then was) was faced with the task of making a determination on the constitutionality of a proposed amendment. A proposed Constitutional Amendment Bill had been published containing a proposal to amend the definition of a 'state officer' to exclude Members of Parliament, Members of County Assembly, Judges and Magistrates from the designated offices. In disallowing the proposed amendment, the learned Judge stated:

> ***"To my mind, the basic structure of the Constitution requires that Parliamentary power to amend the Constitution be limited and the judiciary is tasked with the responsibility of ensuring constitutional integrity, the Executive, the tasks of its implementation while Independent commissions serve as the "people's watchdog" in a constitutional democracy. The basic structure of the Constitution, which is commonly known as the architecture and design of the Constitution ensures that the Constitution possesses an internal consistency, deriving from certain unalterable constitutional values and principles***."

[421] The learned Judge went further to state:

> *"... **where the basic structure or design and architecture of our Constitution are under threat, this Court can genuinely intervene and protect the Constitution**."*

The court always reserves the constitutional obligation to intervene provided that a party seeking relief proves to the court's satisfaction that there are clear and unambiguous threats such as to the design and architecture of the Constitution.

[422] The prominent role that the people play in the constitutional design was aptly introduced pre-2010 in the ***Njoya Case*** in which *Ringera, J.*, coined the phrase the 'constituent power of the people.' The history of this country had been awash with various attempts to dilute the role of the people in favour of those in authority when dealing with constitutional amendments. As at 2010, the 1969 Constitution had undergone no less than thirty piecemeal amendments some done within one afternoon with far-reaching consequences. The Court stated:

> "***With respect to the juridical status of the concept of the constituent power of the people, the point of departure must be an acknowledgement that in a democracy, and Kenya is one, the people are sovereign. The sovereignty of the Republic is the sovereignty of its people ... The second stop is the recognition that the sovereignty of the people necessarily betokens that they have a constituent power – the power to constitute and/or reconstitute, as the case may be, their framework of government. That power is a primordial one. It is the basis of the creation of the Constitution and it cannot therefore be conferred or granted by the Constitution... The Constitution is not supreme because it says so. Its supremacy is a tribute to its***

having been made by a higher power, a power higher than the Constitution itself or any of its creatures."

This decision resulted in the exercise of the people's sovereign power over the amendment of the Constitution by way of a referendum, the first of which was held on 21st November, 2005.

[423] It was therefore not difficult to fathom that the place of the people as sovereign would find itself in the Constitution. This included the attendant acknowledgement of the referendum process. Indeed, the effective date of the 2010 Constitution under Article 263 was reserved as the date of promulgation by the President or on the expiry of a period of fourteen days from the date of the publication in the Gazette of the final result of the referendum ratifying the Constitution, whichever was earlier.

[424] This did not in any way mean that all the clauses of the Constitution are amendable by way of referendum through the people's direct exercise of power. There is another route as provided in, Article 94(3) of the Constitution provides:

> *"**(3) Parliament may consider and pass <u>amendments</u> to this Constitution**"* [emphasis mine].

[425] The Constitutional design is permeated by reference to the sovereign in different aspects. For instance, the Preamble acknowledges ***"We, the people of Kenya – EXERCISING our sovereign and inalienable right to determine the form of governance of our country and having participated fully in the making of the Constitution."*** Article 1 of the Constitution affirms the sovereignty of the people and provides that all sovereign power belongs to the people of Kenya and shall be exercised only in accordance with the Constitution. Article 1(2) of the Constitution allows the people to exercise their sovereign power either directly or through democratically elected

representatives. Article 10(2) lists national values and principles of governance to include democracy and participation of the people.

[426] Article 22(1) grants every person the right to institute court proceedings claiming that a right or fundamental freedom in the bill of rights has been denied, violated or infringed, or is threatened. This mirrors the provision contained in Article 70(1) on enforcement of environmental rights and Article 258(1) which gives every person the right to institute court proceedings, claiming that the Constitution has been contravened, or is threatened with contravention. Article 255 – 257 in my view are explicit on amendment of the Constitution the extent of which can only be subject to interpretation on a case to case basis.

[427] On the other hand, suffice to note that alteration connotes a more radical approach. As earlier stated, the Constitution of Kenya 2010 does not refer to alteration. Unlike amendment whose process is spelt out, an alteration involves an extra-constitutional process. This may therefore take the form of a coup or any such other Kelsenian theory of *grundnorm* as exemplified in the South Rhodesia case of ***Madzimbamuto v. Lardner-Burke and Another*** (1969) 1A C.645(P.C.) which was concerned with the legality of the Unilateral Declaration of Independence made by Rhodesia in 1965. There was also the decision in ***Uganda v. Commissioner of Prisons,*** *ex parte* ***Michael Matovu*** (1966) EA 514. In applying these cases, *Bwonwong'a, J.* in ***Erickson Rover Safaris v. Peninah Nduku Muli (Suing as Legal Representative of the Estate of Michael Kyalo Wambua (Deceased)*** HCCA No. 56 of 2017; [2019] eKLR acknowledged that a new constitutional dispensation will be upheld even if it came about through violent means.

[428] As there are no hard and fast rules, it may take whichever form provided it results in a new constitutional dispensation. For those who pride themselves as democratic, the process of alteration may take the form of a people centric

approach. An alteration may, in my view, go beyond the parameters set out in Article 255 into changing the form of governance. For example, the sovereign may decide to abandon devolved governments, convert into a presidential, parliamentary or even monarchic system of governance. These are not matters contemplated for referendum under Article 255 of the Constitution.

[429] The question then becomes, when it comes to such matters, what is the governing framework? Is it something that can be found in the Constitution? In my estimation, resulting to the primary constituent power as defined in the ***Njoya Case*** is only one way but not the only way.

[430] In Preston Chitere *et al* ***Kenya Constitutional Documents: A Comparative Analysis CMI Report Kenya Constitutional Documents*** R 2006: 5, the authors identify four options of constitution making process. The first one is the constituent assembly which remains one of the more popular options for resuscitating constitutional review process. The role of such an assembly would solely be to consider and synchronize all the data collected so far in the course of the review process. On the basis of all the already collected sources, the constituent assembly would be required to craft a document largely acceptable by the majority of the people.

[431] The second option involves the enlisting of constitutional experts to write the Constitution. The experts may be local or international. In either event, the terms of reference of these experts would be to coalesce and align the diverse views that have emanated from the debate with a view to producing an acceptable document. Such a document would still require endorsement by the people through a referendum. The third option is that involving Parliament. To the above cited authors, this is the least popular option the review of the constitution by Parliament. They argue that though the current Constitution under Article 94 reserves to Parliament the power to amend the Constitution, it is now widely

accepted that as a matter of law Parliament does not have the power to overhaul the Constitution in the fundamental manner anticipated by the proposed review process. That view has been endorsed by the court decisions in the ***Njoya Case*** and the ***Patrick Onyango Case***.

[432] The final approach is what was adopted by the Constitution of Kenya Review Commission, CKRC. It involved local people through consultations when the CKRC toured the country to hear views and collect information about the new constitution it was to prepare. The CKRC also brought together various stakeholder representatives as well as members of parliament into a constitution-making assembly at the Bomas conference. The process thus emanates from the grassroots in order to evolve a system in which the people feel a genuine ownership of governance.

[433] The process we had as a country in the enactment of the 2010 Constitution buoyed by the decision in the ***Njoya Case*** and having experienced a referendum before; it was almost inevitable that a referendum would be part and parcel of our Constitution making process. The High Court, after undertaking its analysis and having regard to the history of the country's Constitution making process, arrived at the conclusion that sovereign primary constituent power is only exercisable by the people after four sequential processes namely – civic education, public participation and collation of views, constituent assembly debate and ultimately, a referendum.

[434] It appears clear that the Court of Appeal never interrogated the origin, basis or subsequent application of these sequential processes as adopted by the High Court. It is evident that the High Court indeed appreciated that there was a power that existed beyond the amendment power set out in Articles 255 – 257 of the Constitution. This is what the High Court considered as the primary constituent power. Having successfully deployed the same in the making of the 2010

Constitution, it was only logical that the same forms a template for future application unless the Constitution was otherwise overhauled through another radical but accepted process.

[435] The question lingers as to what juridical value this primary constituent power possesses. Is it for any of these processes? If so, what then would be the foundation? The obvious answer, devoid of judicial fancy footwork or ingenuity is that these steps do not have any legal basis. The Constitution does not always contemplate its overthrowing and when the constitutional moment arrives, it can only be dealt with at the time. It is inconceivable for Parliament to legislate for the drastic overhaul of the Constitution. Even if that were to occur, the resulting law would have to surmount the supremacy of the Constitution as contemplated under Article 2 of the Constitution.

[436] Turning to the Amendment Bill, it is evident that it contained far reaching consequences. There is a contestation as to whether the proposed changes amounted to permissible amendments as contemplated under Articles 255-257 or went beyond, into the realm of dismemberment.

[437] In my view, there are two ways of looking at it. Firstly, by looking at each of the amendments as proposed in the Amendment Bill as against the threshold set out in Article 255 to see whether they result in fundamental alteration of the governance structure or are mere amendments. Secondly, looking at the totality of the amendment proposals – the over seventy of them – and the resultant effect in relation to the Constitution as it exists. The answers to either of the two questions would inform the next course. Needless to add, the facts and evidence before the courts points to far-reaching proposals that go beyond the limited realm of amendments – akin to alteration of the basic structure and affecting the existing form of governance stipulated under this Constitution. This necessitates the need

to resort to the primary constituent power or any of the other mechanisms necessary to overhaul the constitutional dispensation.

[438] In conclusion and in summary therefore, the fact that, in considering the text, structure, nature, historical development and context of the Constitution of Kenya 2010, the High Court concluded that " . . . *Kenyans intended to protect the Basic Structure of the Constitution they bequeathed to themselves in 2010 from destruction through gradual amendments*" (para. 472) does not, in my considered view, equate with a conclusion that the basic structure doctrine as espoused by the respondents is applicable in Kenya and thus by extension the basic structure of the Constitution of Kenya, as identified, is unamendable. What the High Court gleaned from the history of our constitution-making process was the meticulous and painstaking attention to the four distinct processes, the four sequential steps, in that constitution-making process and not necessarily regarding future constitution making processes. Why would those who took such attention to detail in the making of the Constitution of Kenya 2010 deliberately fail to expressly import such important instructive provisions into that very constitution regarding its amendment? As I shall express further below, I believe that they are by no means guilty of any such failure. The mechanism expressly imported into the Constitution 2010 to protect it from hyper-amendment, dismemberment, or alteration, is in the process of amendment, and not in the implicit reliance on the basic structure doctrine, theories of constitutional entrenchment clauses, unamendable constitutional provisions, and eternity clauses. I must state here that a reading of the Constitution reveals that all of its provisions are entrenched provisions.

[439] The High Court in its detailed exposition of the long and painful birth of the Constitution 2010, outlined the historical socio-political context of our transformative charter with particular emphasis on the imperative to remedy the ills occasioned by an all-powerful presidency, unrestrained by the democratic canons of self-determination and the rule of law, and as espoused in such

principles as the balance and separation of powers, transparency, and accountability. Framed by this justifiable apprehension and cognizant of the solemn responsibility of the court as custodian and protector of the Constitution, the High Court, in applying the basic structure doctrine to the Constitution 2010 sought to protect the core edifice, foundational structure and values of the Constitution 2010. But in doing so, that superior court, in my humble consideration went beyond the plain reading of the text of the Constitution 2010 and misapplied an extra-constitutional doctrine in the interpretation of the Constitution 2010. There may well be a basic structure, a golden thread of constitutional morality, from which it would be, in current circumstances, difficult to see a more appropriate alternative or configuration. But whilst the existence and, at the very minimum, the form or content, of such basic structure is difficult to specifically identify – and in any case has not been definitively agreed upon during these proceedings – the principle of sovereignty of the people of Kenya and their right to self-determination is foundational and beyond contestation. One cannot read into the Constitution 2010 principles that contradict express and fundamental principles therein. It is elementary that the Constitution cannot subvert itself. The High Court in its decision at para. 476, cited in full an extract from this Court's decision in ***The Matter of the Kenya National Human Rights Commission,*** SC Advisory Opinion No. 1 of 2012; [2014] eKLR as follows:

> "…***a holistic interpretation of the Constitution … must mean interpreting the Constitution in context. It is the contextual analysis of a constitutional provision, reading it alongside and against other provisions, so as to maintain a rational explication of what the Constitution must be taken to mean in light of its history, of the issues in dispute, and of the prevailing circumstances. Such scheme of interpretation does not mean an unbridles extrapolation of discrete***

constitutional provisions into each other, so as to arrive at a desired result."

[440] In outlining the three levels through which the people can exercise their sovereignty in constitution-making, the High Court seems to suggest that a referendum is not a direct exercise in the sovereignty by the people. Is an election the people's direct exercise of sovereign power? If so, is it not so for a referendum? The Constitution 2010 only recognizes two types of exercise of sovereign power: direct and indirect. Article 1(2) states that **"*The people may exercise their sovereign power either directly or through their democratically elected representatives.*"** It is not immediately clear what could constitute a direct exercise of sovereign power but, contrasting it with what is described in the Constitution as the indirect exercise of sovereign power, to wit, through democratically elected representatives, it can be logically inferred that the establishment of such democratically elected representatives, through a voting process, is an example of such exercise of direct sovereign power. Where the people, in a free and fair expression of their will directly determine their preference on a matter related to their governance, such as through a referendum, this too, in my humble opinion, is a direct exercise of sovereign power.

[441] Therefore, and this cannot be overemphasized, the manner and process through which such sovereign power is directly exercised is so very fundamentally important, especially where what is at stake is our constitutional architecture, the very framework through which the people agree to be governed. In my reading, the intention of the framers of the Constitution 2010 and the people of Kenya in bestowing that Charter on ourselves and our future generations was not to implicitly prohibit amendment of its content and structure, whether identified as basic or not; it was to ensure that, through that very Constitution, any process of amendment is undertaken in the finest spirit of our democracy, fully cognizant of our historical context, our present experiences and our aspirations for the future.

In my opinion such protection is found both expressly and implicitly in the provisions attendant to the process of amendment within the Constitution 2010.

[442] It is my considered finding that the High Court erred in extrapolating from the description of the primary constituent process that birthed the Constitution 2010, implied Constitutional principles on how that Constitution ought to be amended. The High Court correctly laid out the progressive principles that have been developed by the courts, including this Court, on constitutional interpretation. I query however, whether some of the issues in this matter lend themselves to such interpretive jurisdiction of this Court.

[443] Recognising the progressive jurisprudence that has been developed by the courts and especially the Supreme Court on constitutional interpretation, such jurisdiction ought to be exercised very reservedly in the face of express provisions of the Constitution; very reservedly in the face of the constitutional exercise in sovereignty by the people; and very reservedly where the substantive import of any action is not what is in contention. And, it is always important to remember that not once does the Constitution 2010 employ the term 'alter' in relation to the changes in the Constitution.

[444] The upshot of my finding is that the Constitution of Kenya 2010 does indeed have a basic structure. That the matter of the Constitution of Kenya 2010, embodying in itself or deriving from it such a thing as a basic structure doctrine is a misnomer for in my view, no such doctrine is derivable from our Constitution and consequently, the basic structure doctrine wherever else it may be found, does not apply in the Kenyan constitutional context. The manner and process through which sovereign power is exercised by the citizens, in its different forms is fundamentally important under our constitutional architecture and the Constitution can be altered through other mechanisms not limited to the primary constituent power.

(ii) Whether the President can initiate changes/amendments to this Constitution; and whether a constitutional amendment can only be initiated by Parliament under Article 256 of the Constitution or through a popular initiative under Article 257 of the Constitution

[445] This issue traces its origin in ***Petition E426 of 2020 – Isaac Aluochier v. Uhuru Muigai Kenyatta***. The substantive argument in this regard is that the President lacked authority to initiate constitutional amendments that were to be undertaken through a popular initiative. In the consolidated appeals, the High Court framed the issue as *"who could initiate constitutional amendments through a popular initiative as provided for under the Constitution."* In the end the High Court found that the Amendment Bill was an initiative of the President. That the power to amend the Constitution using the popular initiative was reserved for the private citizen. Neither the President nor any state organ was permitted under the Constitution to initiate constitutional amendment using the popular initiative option. Further, that allowing the President to initiate constitutional amendments through the popular initiative would have the effect of granting him both the roles of promoter and referee under Article 257(5) which also gives the President power to determine whether or not a referendum is to be held.

[446] The petitioner in ***Petition No. E400 of 2020 – Thirdway Alliance Kenya v. Steering Committee of BBI & Others*** also raised the issue about whether a popular initiative for the amendment of the Constitution of the Republic of Kenya can be commenced by state actors, in particular the President of Kenya. Principally, they sought the relief by way of declaration that the Amendment Bill was not a popular initiative towards the amendment of the Constitution of Kenya.

[447]The High Court found that the Amendment Bill was a State sponsored initiative, having been spearheaded by the President as the Chief Executive of the Republic. The argument that the President was acting in his personal capacity did not find favour with the High Court because of the very fact that the BBI Steering Committee was established by way of publication under the hand of the President in the Kenya Gazette, an official government publication.

[448] On their part, the majority of the Court of Appeal Judges were of the view that the 17th, 20th and 21st respondents, Executive together with Hon. Junet Mohamed and Hon. Dennis Waweru were the promoters. They deemed this to be a culmination of events starting with the handshake, establishment of the BBI taskforce and steering committee all the way to the collection of signatures in support, being a continuous process. Two other Judges of Appeal were of the view that Hon. Junet Mohamed and Hon. Dennis Waweru being the co-chairpersons of the secretariat were the promoters under whose hand they signified their intention to collect signatures by writing to IEBC seeking approval of the format for collecting the signatures. Upon approval by IEBC, these two individuals after the collection of the signatures handed over the Amendment Bill to IEBC.

[449] In answering whether a President can initiate changes or amendments to the Constitution, it is first proper to appreciate who the President is. It is upon this determination that I would proceed to examine the amendment processes as against Article 256 and 257 of the Constitution.

(a) Whether the President can initiate changes or amendment to the Constitution

[450] The President's authority is set out under Article 131 of the Constitution as the Head of State and Government; exercises executive authority of the Republic, with the assistance of the Deputy President and Cabinet Secretaries; the Commander-in-Chief of the Kenya Defence Forces; is the chairperson of the

National Security Council and is a symbol of national unity. Article 130 provides for the structure of the National Executive comprising the President, the Deputy President and the rest of the Cabinet.

[451] The President is elected by registered voters in a national election in a manner specifically set out in the Constitution. So important is this election that the President-elect must receive a 50%+ 1 of votes cast in at least 24 counties. Further, the validity of the election of President, if challenged, can only be determined by the Supreme Court, the apex Court in the Republic exercising original jurisdiction in that regard. Upon election, the President assumes office by a public swearing in before the Chief Justice who is the head of the Judiciary.

[452] The President and his deputy when acting as President are the only State officers under the Constitution that take two oaths or solemn affirmation – the oath or solemn affirmation of allegiance of the President/Acting President and the Deputy President and the oath or solemn affirmation of due execution of office for the President/Acting President. The first oath makes a realization of the high calling that is assumed by the President. It states:

> "***I, ... in full realization of the high calling I assume as President (Acting President/Deputy President of the Republic of Kenya, do swear/solemnly affirm that I will be faithful and bear true allegiance to the Republic of Kenya; that I will obey, preserve, protect and defend this Constitution of Kenya, as by law established, and all other laws of the Republic; and that I will protect and uphold the sovereignty, integrity and dignity of the people of Kenya. (In the case of an oath – so help me God)***" [emphasis mine].

And there is a lot more, including how the President is regarded concerning litigation, a matter that shall be discussed later herein. The magnitude of responsibility and reverence to the office of President is beyond doubt.

[453] The above constitutional underpinning reveals that the President, whilst always being a citizen, ceases to be an ordinary person upon assumption of the office of the President. The question as to whether he is capable of separating his official and private lives is one that is best addressed when considering the immunity of the President as granted by the Constitution. For now, let me consider various aspects of the issue as placed before the courts.

[454] There has been a conflation of several terms, the input of which in my view is significant. What do we mean when we refer to 'Government,' the 'Executive,' the 'President' and/or the 'Presidency'? These terms have been used interchangeably in both judgments of the High Court and the Court of Appeal in reference to the initiation and promotion of the impugned constitutional amendment process. I believe the most important aspect of this question is not so much who initiated and promoted the proposed amendments, but rather the process, the how. Allow me from the onset to state that the President, as I understand, as a citizen of the Republic of Kenya fully possesses of all the Article 38 rights is not precluded from proposing a popular initiative for the amendment of the Constitution, 2010 under Article 257. The issue is the 'how,' and regarding the President of the Republic of Kenya, given the principles of executive authority under Article 129, the authority of the President under Article 131 and the functions of the President under Article 132, the latitude to act in this manner is significantly proscribed and any determination of whether he or she acted within such strictures, must be determined by the court on a case-by-case basis.

[455] Article 256 of the Constitution provides for the amendment of the Constitution through parliamentary initiative. The High Court held that:

> "***Under the Constitution, the President is not a Member of Parliament and therefore cannot directly, purport to initiate a constitutional amendment pursuant to Article 256 of the Constitution. This is because under Article 94(1) of the Constitution, the legislative authority of the Republic at the national level, is vested in and exercised by Parliament. It follows that the President has no power under the Constitution, as President, to initiate changes to the Constitution under Article 256 of the Constitution since Parliament is the only State organ granted authority by or under the Constitution to consider and effect constitutional changes. The President, if he so desires, can however, through the Office of the Attorney General, use the Parliamentary initiative to propose amendments to the Constitution***."

[456] This position is correct but has weighty implications that I must interrogate. The High Court recognizes that the President *cannot directly* purport to initiate an amendment under Article 256 of the Constitution. That is a tacit acceptance that this could very well be done 'indirectly.' Further, the High Court points out that the President has no power under the Constitution, *qua* President, to initiate changes to the Constitution under Article 256. It would appear here too that the High Court recognizes that the President does not exist beyond the functions of the President and within the provisions of Article 38.

[457] It is common knowledge that the President is the party leader of the Jubilee Party, under which he was elected as President. The Jubilee party as of 2017 formed the largest part of the National Assembly with 172 seats; the Speaker of the National Assembly is also a member of the party. As party leader, the President has significant roles in the governing organs of the party and has in the past called for

and hosted parliamentary group meetings for the party's members of parliament to, *inter alia "... better articulate the transformative agenda of the party and the second term of the presidency."* It is clear that there is a relationship between the leader of the party and its members of Parliament, who, in party terms, form a majority of the members of the House. It is not unimaginable therefore that through such influence, which indeed is lawful and in the best traditions of our system of democracy, that the President, as party leader, could propose an amendment of the Constitution through Article 256. If it is not deemed problematic that the President can influence constitutional amendment vide Article 256 through his role and influence as party leader to the majority party in the House.

[458] The High Court found that under the Constitution 2010, it was impermissible for the President to initiate a constitutional amendment through popular initiative because, having regard to the President's duty to assent in due course to any subsequent Bill and request the IEBC to conduct a national referendum for approval of the Bill, the President has the power to determine whether or not a referendum is held, *"the President, whether in his official or personal capacity is the promoter of the Amendment Bill, his role in determining whether or not the Bill is to be subjected to a referendum may well amount to a muddled up conflict of interest. The President cannot be both player and the umpire in the same match."* I respectfully disagree with the superior court on the finding.

[459] The role of the President in this regard is ceremonial. Though an important role, it is a formality. Kenya is a constitutional democracy, and the roles and functions of all persons are subject to the Constitution. The President is not the sovereign, the sovereign in Kenya is the people of Kenya. All the authority exercised by the President is delegated by the sovereign people of Kenya through the Constitution and thus exercised always under and pursuant to the Constitution.

The provisions in Article 256 and 257 on the roles of the President regarding assent and transmission to the IEBC where required, are not discretionary functions. They are mandatory and time-bound and do not give the President any power, as the High Court pondered " *... to determine whether or not a referendum is to be held*." The principle is clearly laid out under Article 115(6) of the Constitution where, regarding ordinary Bills, the same is deemed assented upon expiry of the period within which the President is supposed to take such action and/or fails to do so as were the Election Laws Amendment 2017 challenged in the ***Katiba Institute Case*** referred to elsewhere in this Judgment. This principle is further well established in our constitutional jurisprudence.

[460] The High Court stated that a textual reading of the phrase "either directly or" in Article 1(2) of the Constitution, 2010 clearly showed that the drafters thereof intended that there be a distinction between direct and representative exercise of sovereign power and, reading the *Constitution as an integrated whole, reading* Articles 1(2), 256 and 257:

> " ... ***the only reasonable conclusion is that Article 257 of the Constitution is reserved for situations where the promoters of the Bill do not have recourse to the route contemplated under Article 256 ... In other words, the Article 257 route is meant to be invoked by those who have no access to Article 256 route ... It is our view that a Popular Initiative being a process of participatory democracy that empowers the ordinary citizenry to propose constitutional amendment independent of the law-making power of the governing body cannot be undertaken by the President or State Organs under any guise. It was inserted in the Constitution to give meaning to the principles of sovereignty based on historical past where the reservation of the power of***

amendment of the Constitution to the elite few was abused in order to satisfy their own interests … The provision of two distinct initiatives under the current Constitution lends credence to the fact that the two avenues are distinct and ought not to be muddled up by creation of a hybrid initiative unknown to the Constitution."

[461] On my part, I must respectfully qualify the rationale of the superior court on this question. It is clear to me that an election and a referendum are examples of the direct exercise of sovereignty by the people. The amendment processes under Articles 256 and 257 consist of both direct and indirect exercise of sovereign power. Indeed, on plain reading, there is no pure direct exercise of sovereign power as described by the superior court in any of the processes. The role of legislatures, at both the national and county levels is explicit in the amendment by popular initiative under Article 257. Both the parliamentary route under Article 256 and the popular initiative route under Article 257, considered holistically, are still framed by practices of indirect exercise of sovereign power. Further, access is not, to my mind, the distinguishing factor between these two methods of constitutional amendments.

[462] It is entirely plausible, that an independent Member of Parliament or for that matter an independent head of state, with a proposed amendment but lacking the relevant numbers in Parliament, could seek to initiate a constitutional amendment through popular initiative. Similarly, it is entirely plausible that a civic minded citizen could successfully petition Parliament under Article 119 to initiate an amendment of the constitution through the House. Indeed, Parliament exercising delegated authority and representing the people, ought to be the most accessible avenue for citizens, either directly or through their representatives, to propose laws, amendments to laws and indeed amendments to the Constitution rather than the more laborious task of collecting one million signatures and

pursuing the promotion of a popular initiative! And, it must always be recalled that the determinant of any amendment seeing the light of day, or being forever doomed and sunk, is the sovereign people – the people, who, must vote at the ensuring referendum. Even if difficult and perhaps rare, sitting Presidents have lost referenda, or even worse, re-election at the ballot. It is the people, being the sovereign who wield power.

[463] However, the role the President may play in relation to amendment of the Constitution must of necessity be considered in the context of our constitutional history. As aptly captured by the High Court, the 1963 Constitution at independence marked the end of colonial rule by seeking to establish an elected government, ensure checks and balances, among other measures. Unfortunately, by the end of 1980, Kenya had morphed into an authoritarian state. This was courtesy of a myriad of amendments introduced during that time at the instance of the executive which at the time was inseparable from the legislature. From 1980 to 1991, a total of eight amendments had been made, roughly at the rate of one amendment per year.

[464] For instance, the *Constitution of Kenya (Amendment) Act No.7 of 1982* expressly introduced the provision of Section 2A that limited the country to only one political party, Kenya African National Union. It was only in December 1991 through the *Constitution of Kenya (Amendment) Act No.12 of 1991* that this Section 2A was repealed reinstating multi-partism in Kenya. *Akiwumi J*, as he then was captured this period in ***Charles Kagai Mwihia & Another v. Ndolo Ayah & Another*****;** Civil Case 6287 of 1992; [1992] eKLR as follows:

> "***It is not necessary to say anymore than that as a result of the general feeling in the country expressed in many ways, that Kenya should no longer have a one party system, but***

a multi-party one, a bill was introduced towards the end of 1991 in Parliament to effect the necessary change."

[465] ***History of Constitution Making in Kenya***, a Media Development Association & Konrad Adenauer Foundation publication of 2012 notes that between 1963 and 2005, the Constitution was amended so many times that it could no longer be classified as rigid. Most of the amendments were not intended to improve the quality of the Constitution but to entrench an authoritarian and undemocratic administration. Other amendments were intended to solve political problems facing the government from time to time. Most of the amendments were carried out by a Parliament dominated by members of one political party. There were no checks and balances, the hallmark of constitutionalism.

[466] Prof. H.W.O. Okoth –Ogendo in "***The Politics of Constitutional Change in Kenya Since Independence***," (1963 – 1969) Vol 71 African Affairs 9, underscores the fate of post-independence Constitutions. He writes:

"***Constitutional Systems in Anglophone Africa have not had a happy history, especially during the last decade. Almost without exception the independence documents have either ended up in military dustbins or have undergone change so profound and rapid as to alter their value content and significance beyond recognizance***."

[467] By 1991 when Kenya resumed multi-partism, the Constitution had been stripped off its initial democratic and human rights, transparency and accountability protections. Amending the Constitution was made as easy as passing ordinary legislations. The Independence Constitution had been amended so many times and changed profoundly and rapidly that it had lost its value content and significance, barely remaining a shell of what it had initially been. The raft of amendments had been spearheaded by the Executive.

[468] The advent of multi-partism signaled a renewed attempt by the civil society and human right defenders either individually or through scholarly academic writings or civil societies to restore constitutionalism. Prof. H. W. O. Okoth-Ogendo – in his acclaimed writings observing the c*uriosity of constitutions without constitutionalism* warned us of those who only believed in the right textual contents of the Constitution without exercising the constitutional principles. In his words, the Constitution "*underwent changes so profound and so rapid as to alter its value, content and significance beyond repair*." The Executive was always at the centre of preventing any meaningful engagement in progressive constitutional reforms.

[469] It was not until the decision in the ***Njoya Case*** in 2004 that a semblance of recognition of the people as the sovereign and their direct participation in Constitution amendment was entrenched. Needless to state, the country was also enjoying new governance following an election that placed hitherto members of the opposition into government in the 2002 elections. Finally, concerted and genuine efforts were made towards amendment of the Constitution.

[470] Despite the failure of the first attempt to amend the Constitution through the referendum held in 2005, the fact that a referendum was held signified a new dawn in the citizenry, a fresh start with a renewed sense of worthiness as a citizen. It is no wonder that an elaborate process was set in motion for a second stab at the attempt to overhaul the Constitution, this time round with success. The process leading to the promulgation of the 2010 Constitution was an indicator that Kenyans were for the ordinary citizen taking centre stage in debating and designing the Constitution.

[471] A fact that cannot be ignored is that the 2010 Constitution was to be shielded from destruction through gradual amendments and especially those initiated from within the Executive. Even though Parliament was left with a role in

initiating constitutional amendments, the threshold was made onerous by requiring the Bill to amend the Constitution be passed by each House of Parliament in both its second and third readings by not less than two-thirds of all the members of the Houses. This is the same threshold to be met under Article 145 of the Constitution in the removal of the President vide impeachment.

[472] Given that background in mind, is it not discernible that if there was anyone who is not constitutionally mandated to initiate any amendment of the Constitution, the President would be that person? Is it not manifest that based on our history, background and context, all the provisions relating to the amendment of the Constitution are ring-fenced to the specific exclusion of the President and the Executive at large?

[473] The view I have taken is notwithstanding the noblest of intentions that the President might have had in initiating the amendments. As a symbol of national unity, those in support of the argument in the President's capacity to initiate amendments are of the position that the initiative supported by the President is aimed at fostering national unity, as one of the national values and principles of governance under Article 10(2)(a), and an authority of the President under Article 131 of the Constitution.

[474] As earlier stated, the President's oath of office includes the protection of the sovereignty of ordinary citizens. Based on the social contract theory, the President exercises authority on behalf of the people, in a manner the people have chosen under the Constitution. It should not at the same time be open for him to choose what the sovereign should have in her Constitution.

[475] From the foregoing, there is little doubt that the Constitution is amendable. What the Constitution abhors is its dismemberment, which can only take an extra-judicial form. As earlier stated, the framers, appreciating that a time may come when in the course of implementation or as a result of emerging needs become

necessary considered the necessity of amendments. Chapter Sixteen, short as it is with only three provisions is perhaps the most profound in this Constitution in protecting the Constitution from desecration. In terms of breadth, Chapter One on Sovereignty of the People and Supremacy of the Constitution compares well with Chapter Sixteen.

[476] As I have already stated, the amendment of the Constitution can only be engineered within the Constitution itself. Any attempt to introduce a mechanism outside of Chapter Sixteen should immediately be thwarted by Article 2(2) of the Constitution which forbids any claim or exercise of State authority except as authorized under the Constitution. Chapter Sixteen of the Constitution recognizes the amendability of the Constitution in accordance with Article 256 or 257 of the Constitution, specifically on matters which require a referendum regardless of the method deployed as shall be considered.

(b) The President's Capacity as a Democratically Elected Representative to Initiate constitutional Amendments

[477] There were forceful arguments made on behalf of the President stemming from the contents of Article 1(2) of the Constitution in which the people may exercise sovereign power either directly or through their democratically elected representatives. There is no doubt that the President is elected democratically under the Constitution. In fact, the President is the only representative elected nationally as per Article 136 of the Constitution.

[478] Beyond being elected, nothing seems to suggest that the President can initiate any amendments to the Constitution. The Constitution, being a self-sufficient transformative document contemplates its own amendments under Chapter Sixteen through parliamentary or popular initiative. The only other reference to the power to amend the Constitution is Article 94(3) as a preserve of

Parliament. Moreover, the legislative authority of the people at the national level under Article 94(1) is vested in Parliament.

[479] As considered before, the President's authority and functions are stated in the Constitution itself and none of them expressly sets out the legislative authority of the President. While the President remains part of the National Executive, the President is not clothed with additional functions and authority, more so when such exercise is discretionary and subjective.

[480] Under Article 1(3) of the Constitution, the sovereign power under the constitution is delegated to three state organs – Parliament, the National Executive and Executive structures in the county governments and the Judiciary and independent tribunals. This means that the President does not have any express delegated powers from the sovereign and permitting the President to exercise non-existent powers would be an overreach. To allow the President the power to initiate amendments as argued, is to go against the very grain of constitutionalism as overwhelmingly approved by the people in promulgating the Constitution. National unity may be fostered in many ways, constitutional amendment initiated by the President is the least desirable. Besides, this position is inimical and ironical to the position adopted elsewhere in these proceedings on behalf of the President that the initiative to amend the constitution in issue in these proceedings was not by the President but rather by Hon. Junet Mohamed and Hon. Dennis Waweru.

[481] On this, I am of the view, that the President cannot initiate a constitutional amendment initiative in his capacity as a democratically elected representative.

(c) Amendments through a parliamentary initiative

[482] Article 256 of the Constitution specifically provides for amendment by Parliamentary initiative thus:

"256. (1) A Bill to amend the Constitution –

(a) may be introduced in either House of Parliament;

(b) may not address any other matter apart from consequential amendments to legislation arising from the Bill;

(c) shall not be called for second reading in either House within ninety days after the first reading of the Bill in the House; and

(d) shall have been passed by Parliament when each House of Parliament has passed the Bill, in both its second and third readings, by not less than two-thirds of all the members of that House.

2. Parliament shall publicise any Bill to amend this Constitution and facilitate public discussion about the Bill.

3. After Parliament passes a Bill to amend the Constitution, the Speakers of the two Houses of Parliament shall jointly submit to the President –

(a) the Bill, for assent and publication; and

(b) a certificate that the Bill has been passed by Parliament in accordance with this Article

4. Subject to clause (5), the President shall assent to the Bill and cause it to be published within thirty days after the Bill is enacted by Parliament.

5. If a Bill to amend the Constitution proposes an amendment relating to a matter specified in Article 255(1) –

(a) the President shall, before assenting to the Bill, request the Independent Electoral and Boundaries Commission to conduct, within 90 days, a national referendum for approval of the Bill; and

(b) within thirty days after the Chairperson of the Independent Electoral and Boundaries Commission has certified to the President that the Bill has been approved in accordance with the Article 255(2), the President shall assent to the Bill and cause it to be published."

[483] As the name suggests, this amendment is originated and conducted within the specified Parliamentary process. This stems from the sovereignty clause of the Constitution where the people exercise their sovereign power through democratically elected representatives. Parliament is established under Chapter Eight of the Constitution, 2010 to consist of the National Assembly and Senate. Among the express roles of Parliament under Article 94(3) is to consider and pass amendments to the Constitution. Membership of the National Assembly is also set out in Article 97 of the Constitution to consist of two hundred ninety members, each elected by the registered voters of single member constituency; forty-seven women, each elected by the registered voters of the counties, each county constituting a single member constituency; twelve members nominated by parliamentary political parties according to their proportion of members of the National Assembly in accordance with Article 90, to represent special interests

including the youth, persons with disability and workers; and the Speaker, who is an ex-officio member.

[484] On the other hand, the Senate consists of forty-seven members, each elected by the registered voters of the counties, each county constituting a single member constituency; sixteen women members who shall be nominated by political parties according to their proportion of members of the Senate elected under clause (a) in accordance with Article 90; two members, being one man and one woman, representing the youth; two members, being one man and one woman, representing persons with disabilities; and the Speaker, who shall be an ex-officio. The role of the Senate is to represent counties to protect the interests of the counties and the Government. The Senate also participates in the oversight of State officers by considering and determining any resolution to remove the President or Deputy President from office in accordance with Article 145. Related to this role is that of the National Assembly to review the conduct in office of the President, the Deputy President and other State officers and initiate the process of removing them from office.

[485] The length to which I have gone to reproduce the above simple yet essential provisions of the Constitution demonstrates certain aspects. First, unlike the repealed Constitution when the President, his cabinet and its principal legal advisor, the Attorney General were part of Parliament, the Constitution, 2010 in its transformative nature excluded the Executive from both Houses of Parliament. Secondly, in excluding the Executive from it, Parliament was bestowed with the oversight mandate over the Executive including the President as its head. Third, the Constitution affirmed the separation of power doctrine whereupon Parliament, as the representative of the people, elected as such, had a clear role in oversighting other State actors including those in the Executive as well as addressing concerns of the citizens, in an independent manner. Besides, the constituencies were

expanded to 290 in order to enhance the representation of the citizens who take part in universal suffrage every so often.

[486] Needless to add, the parliamentary initiative of amending the Constitution takes into account the matters reserved under Article 255(1) which must still be subjected to a referendum. The sum total of this analysis demonstrates, both from the textual, contextual and even teleological approach of interpreting the Constitution that the President and the Executive for that matter have no role whatsoever in being involved in the parliamentary initiative of amending the Constitution. This is not to suggest that the President who may have a significant control of any of the Houses of Parliament by virtue of being the leader of the party which comprises the majority of the members of each or both houses of Parliament, may not have an influencing effect.

[487] The President, as party leader may invoke that capacity to try and influence policy and legislative agenda informally or even through his state of the nation address to Parliament. This, however, can only be undertaken outside of the official parliamentary business. The High Court in suggesting that the President can invoke parliamentary initiative, in my view, fell into error for prescribing a route that is not expressly hinged on the Constitution. As stated before, I am prepared to accept that based on the previous experience of the Executive abusing their powers by orchestrating meaningless and sometimes outright undemocratic amendments to the Constitution, the Constitution did not contemplate allowing any constitutional window, however narrow, that the President should invoke and directly control the parliamentary processes in whichever House of Parliament.

(d) Amendment through Popular Initiative

[488] This is specifically set out in Article 257 of the Constitution. Though the Constitution does not expressly define what a popular initiative is, the process is described under Article 257 of the Constitution in the following manner:

> *"**257. Amendment by popular initiative***
>
> ***(1) An amendment to the Constitution may be proposed by a popular initiative signed by at least one million registered voters.***
> ***(2) A popular initiative for an amendment to this Constitution may be in the form of a general suggestion or a formulated draft Bill***
> ***(3) If a popular initiative is in the form of a general suggestion, the promoters of that popular initiative shall formulate it into a draft Bill;***
> ***(4) The promoters of a popular initiative shall deliver the draft Bill and the supporting signatures to the Independent Electoral and Boundaries Commission, which shall verify that the initiative is supported by at least one million registered voters;***
> ***(5) If the Independent Electoral and Boundaries Commission is satisfied that the initiative meets the requirements of this Article, the Commission shall submit the draft Bill to each county assembly for consideration within three months after the date it was submitted by the Commission;***
> ***(6) If a county assembly approves the draft Bill within three months after the date it was submitted by the Commission, the speaker of the county assembly shall deliver a copy of the draft Bill jointly to the***

Speakers of the two Houses of Parliament, with a certificate that the county assembly has approved it;

(7) If a draft Bill has been approved by a majority of the county assemblies, it shall be introduced in Parliament without delay;

(8) A Bill under this Article is passed by Parliament if supported by a majority of the members of each House;

(9) If Parliament passes the Bill, it shall be submitted to the President for assent in accordance with Article 256(4) and (5);

(10) If either House of Parliament fails to pass the Bill, or the Bill relates to a matter specified in Article 255(1), the proposed amendment shall be submitted to the people in a referendum;

(11) Article 255(2) applies, with any necessary modifications, to a referendum under clause (10).”

[489] This issue originated in ***Petition No. E400 of 2020 - Third Way Alliance Kenya & Others v. Steering Committee of BBI & Others***. They sought from the court specific reliefs around this issue as already stated earlier. Their question is whether a popular initiative can be originated from State actors, in particular the President, whether popular initiative can be undertaken without a superintendent legal framework and whether County Assemblies could improve the contents of an Amendment Bill.

[490] ***Petition No. E401 of 2020 254 Hope v. The National Executive of the Republic of Kenya*** also challenged the commencement of a popular initiative by the national Executive or state organ and the attendant utilization of

public funds in the process. ***Petition No. 426 of 2020 Isaac Aluochier v. Uhuru Muigai Kenyatta & Others*** also raised similar concerns but went a step further to challenge the *locus standi* of the BBI Steering Committee to promote constitutional changes pursuant to Article 257.

[491]So, what then is a popular initiative? Is the term merely one of those boilerplate clauses used to fill up the text? In my view, no, it cannot be such. With the paramount nature that the sovereignty of the people is afforded under the Constitution, the role of the people in exercising their direct sovereign power in amending the Constitution was so critical that it had to be specifically secured. This means that while Parliament, as the donee of representative power has the mandate, the people could also be allowed to directly exercise their power. This was in obvious realization that sometimes Parliament may be partial and could be hindered by other interests such as being bound by selfish interest, bound by the Executive or partisan political party politics. It is such eventualities that the people were not to be left feeling helpless but reserved unto themselves the residual power to undertake legislative process in initiating amendments to the Constitution. This is well captured in the preamble to the Constitution in the provisions quoted below:

> "***We, the people of Kenya –***
>
> ***RECOGNIZING the aspirations of all Kenyans for a government based on the essential values of human rights, equality, freedom, democracy, social justice and the rule of law;***
>
> ***EXERCISING our sovereign and inalienable right to determine the form of governance of our country and having participated fully in the making of this Constitution***."

[492] Petitioners in ***Petition No. 2 of 2021 – Muslims for Human Rights v. Independent Electoral Boundaries Commission & Others*** threw in another question, interrogating the role of IEBC in a popular initiative in undertaking the verification of signatures and registered voters without an enabling legal framework.

[493] In answering this issue as framed, it is important to ask the necessary questions, the answers to which will be dispositive of the issue at hand. In doing so, I am mindful that there is no clear referendum law in Kenya to govern the process under Article 257 of the Constitution, 2010. In its about twelve years of existence, there have been at least two previous initiatives to amend the Constitution under Article 257 by way of popular initiative. The ***Report of the Committee of Eminent Persons on the Constitution Review Process*** (***Committee of Eminent Persons Report***) Chaired by Amb. Bethuel A. Kiplagat presented to His Excellency Hon. Mwai Kibaki President and Commander-in-Chief of the Armed Forces of the Republic of Kenya in 2006 noted that the absence of a legislative framework for the conduct of the referendum was a source of concern. The High Court decision in the ***Patrick Onyango Case*** notwithstanding, the Electoral Commission repeatedly underlined that its superintendence of the referendum process was severely constrained by the absence of a statutory framework. It is evident that we are still here over fifteen years later.

[494] The first initiative arose barely four years into the Constitution, 2010. On 7th July 2014, the CORD coalition, held a public rally at Uhuru Park, Nairobi to agitate for a national dialogue to discuss matters of public importance. At that rally, the CORD principals Hon. Raila Odinga, Hon. Kalonzo Musyoka and Hon. Moses Wetangula announced that they were no longer interested in dialogue with the Jubilee government and would instead agitate for amendment of the Constitution by way of popular initiative. A week later, the CORD principals accompanied by

supporters in the civil society and associates convened a meeting at Ufungamano Conference Hall in Nairobi during which they launched an organisation or movement known as *"Okoa Kenya Movement."* This was a vehicle to spearhead and promote the agenda of the CORD Coalition to amend the Constitution by popular initiative under Article 257. Pursuant thereto, on Saturday 23rd August 2014, the CORD principals launched the signature-collection programme.

[495] This attracted a challenge in ***Hon. Kanini Kega v. Okoa Kenya Movement & 6 Others*** Petition 427 of 2014; [2014] eKLR. (***Kanini Kega Case***) In that petition, the petitioner contended five issues:

(a) since there are two modes of initiating constitutional amendments, the popular initiative should only be resorted to once the Parliamentary initiative fails. That Okoa Kenya Movement being an association of political parties, it is not open for it to establish constituent power;

(b) signatures should only be collected once a Bill in question containing the proposed amendments has been formulated;

(c) whether during the transition period the Constitution can be amended. This came from the contention that the transition and implementation framework in schedule 5 of the Constitution allowed Parliament being a transition Parliament to ensure the implementation of the Constitution at least during the transition period, free from amendments;

(d) since there was no prescribed timeline within which a referendum is to be held, Parliament ought to consider public interest and introduce a constitutional amendment so that the referendum be held at the same time as the general election. This

is pursuant to Article 251(d) which mandates prudent and responsible use of public funds, a referendum being a public funded exercise and to avoid the country being permanently on election mode; and

(e) The constitutionality of Part V of the Elections Act 2011 (sections 49 -55) to the extent that it does not provide that a constitutional amendment through a referendum must be on the same day as the General Election.

[496] In his ruling issued on 19th September 2014, *Odunga, J.* made the following observation on the matter, among other reasons, for finding that the court has jurisdiction to determine the Petition as hinged on Article 22 of the Constitution:

> ***"105. I have looked at Article 257(1), (2) and (3) of the Constitution and what they state on their face is that an amendment to this Constitution may be proposed by a popular initiative signed by at least one million registered voters which initiative may be in the form of general suggestion or a formulated draft Bill and where the said initiative is in the form of a general suggestion, the promoters of that popular initiative shall formulate it into a draft Bill. Whereas, it is clear that a general suggestion is at some time required to be in form of a Bill the parties are unable to agree on the stage at which the Bill is formulated ... ."***

The signatures by the Okoa Kenya Initiative proponents were eventually collected and presented to IEBC for verification. The IEBC indicated that the promoters had not met the threshold of getting one million signatures in support. It is at the

verification stage that the initiative was guillotined and buried without much fight by the promoters.

[497] Another attempt was initiated, this time, by Third Way Alliance Kenya, a duly registered political party which was the promoter of the *Punguza Mizigo* (Constitutional Amendment) Bill 2019 pursuant to Article 257 of the Constitution. Unlike the *Okoa Kenya* Initiative, the *Punguza Mizigo* Initiative surmounted the IEBC verification stage and the Bill was submitted to the counties for approval.

[498] An interesting scenario occurred in the proceedings before the County Assembly of Kirinyaga. The *Punguza Mizigo* Bill was submitted to the County Assembly of Kirinyaga which was required to debate and vote on it within three months of receipt from IEBC. Through a gazetted special sitting, the Bill was tabled vide a procedural motion by the county's Leader of Majority. After dispensing with the requirement for notice the Bill was introduced and proposed by the Leader of Majority as a motion for debate and he asked a member of the assembly to second. The member failed to second the motion resulting in the Speaker ruling that the motion stood withdrawn under the standing orders. The promoters were of the view that the County Assembly's actions effectively ousted the constitutional process for the Bill provided for under Articles 257, 10, 174(c) and (d), 196(1)(b) and Part 2(14) of the Fourth Schedule of the Constitution, which require the tabling, debating and voting on the Bill, and that public participation is undertaken. That the process adopted also ousted the County Assembly's own procedure under standing Orders 111, 121 and 122 and hence deposed the natural result of the legal process anchored in Order 54(2).

[499] This occurrence prompted the promoter and a registered voter of Kirinyaga County to institute proceedings before the High Court by way of Judicial Review proceedings in ***Republic v. County Assembly of Kirinyaga & Another*** *ex-parte* ***Kenda Muriuki & Another;*** JR Application No. 271 of 2019; [2019]

eKLR. The *ex parte* applicants asked the court to quash the decision declaring the *Punguza Mizigo* Bill as withdrawn, compel the County Assembly to reintroduce and table the Bill as well as other declaratory reliefs relating to breach of constitutional provisions. The *ex parte* applicants also sought that the orders issued in this matter do apply *in rem* to all the other forty-six County Assemblies.

[500] After dispensing with and surmounting the challenge to the court's jurisdiction, *Nyamweya, J.* (as she then was) made some pertinent observations regarding the interpretation of Article 257 of the Constitution. She observed that there is no provision in the said Article as to the consideration and approval of a Bill to amend the Constitution by popular initiative, and it is therefore left to the County Assemblies to employ their procedures for consideration and approval of Bills. In the court's view, courts were to restrain themselves against legislating as that was a mandate specifically given to the legislature under the Constitution. The learned Judge recommended the enactment of law by Parliament in stating:

> ***"58. While it is not the place of this Court to prescribe what procedures should be adopted by the legislative bodies, it in this regard considers it prudent to recommend that since the passage of a constitutional amendment by popular initiative is a national exercise that affects the IEBC, all County Assemblies and Parliament, the national Parliament needs to develop and enact a law to ensure uniformity in the procedures of consideration and approval by County Assemblies of bills to amend the Constitution by popular initiative, and to ensure the inclusion and insulation of the constitutional and democratic requirements and thresholds in the said procedures. This law should also address other procedural***

aspects demanded by Article 257 of the Constitution" [my emphasis].

[501] Though the Judge did not find merit in the application, she, *inter alia,* directed the Deputy Registrar of that court to forward a copy of the judgment to the Speakers of the National Assembly and Senate, for noting the recommendations on enactment of appropriate legislation on the procedures for transmission, consideration, approval and enactment of Bills to amend the Constitution by popular initiative under Article 257 of the Constitution. It is unfortunate that to date, we still do not have any referendum law though we have a Bill pending at the National Assembly.

[502] I echo the above sentiments and add that as a Court we should be reluctant to venture into matters reserved for other State organs. This is not only good for the sake of preservation of the doctrine of separation of powers but also allows for strengthening of institutions whereupon each constitutional body should be allowed the liberty to carry out its mandate. We aptly captured this position in ***In the Matter of the Speaker of Senate,*** where we stated:

> ***"[249] Just as Parliament is expected to operate within its constitutional powers as an arm of government so must the Judiciary. The system of checks and balances that prevents autocracy, restrains institutional excesses and prevents abuse of power apply equally to the Executive, the Legislature and the Judiciary. No one arm of government is infallible and all are equally vulnerable to the dangers of acting ultra vires the Constitution."***

[503] The Court has continued to underscore the need to uphold the separation of powers under the scheme of our Constitution. This is manifest in our decisions, see ***Justus Kariuki Mate & Another v. Martin Nyaga Wambora &***

another SC Petition 34 of 2014; [2017] eKLR; ***Francis Karioko Muruatetu & another v Republic*** SC Petition 15 as consolidated with 16 of 2015; [2017] eKLR, where the Court gave deference to Legislature on matters legislation. This was also manifest in the Advisory Opinion in ***Council of Governors and 47 Others (Interested Parties); Katiba Institute and 2 Others (Amicus Curiae);*** SC Reference No. 3 of 2019; [2020] eKLR.

[504] On its part, the IEBC submitted that it had developed its own administrative procedures to handle popular initiatives brought to it pursuant to Article 257 of the Constitution. Although I am not privy to the manner in which or the contents of the said administrative procedures developed by IEBC, I shall nevertheless interrogate the role of IEBC, just as that of the other players in this whole process.

[505] While the procedure under Article 257 appears straightforward, every initiative that emerges seems to bring out, through litigation, further areas of contestation and/or lacunae. It is therefore no surprise that the latest initiative involving the Amendment Bill has yielded the present legal challenges. Among the challenges, for purposes of my consideration, is who is a promoter and where does his/her role commence and end?; what is the initiative and how does it become a popular initiative – is it before or upon collection of signatures?; what is the role of IEBC, County Assemblies, Houses of Parliament and finally, the people in general. In considering the challenges, caution is borne in mind to avoid descending into legislative spheres.

[506] In addressing the argument relating to where the initiative to amend the Constitution becomes popular, I ask myself, is it by the promoter coming up with the Bill or general suggestion or is it in the collection of one million in support. It is therefore necessary to evaluate the place of the promoter and the collection of the one million signatures in the whole design of initiating an amendment.

a. Who is a Promoter

[507] In simple English language as per the ***Oxford Dictionary*** 12th ed., a '*promoter'* is someone who is a supporter of a cause or aim. The High Court found that Article 257 of the Constitution was reserved for situations where the promoters of a constitutional amendment Bill did not have recourse to the route contemplated under Article 256 of the Constitution. The High Court held that under Article 257(2) of the Constitution, anybody including the BBI Steering Committee, if lawfully established, could draft Bills and that the promoter of a popular initiative to amend the Constitution was required to come up with a draft Amendment Bill. The High Court imposed an obligation on the promoters of the amendment Bill to conduct a nationwide public participation exercise prior to collection of signatures in support of the constitutional amendment initiative.

[508] The Court of Appeal, by majority, were of the view that the President, the Executive, Hon. Raila, the BBI Steering Committee as well as Hon. Junet Mohamed and Hon. Dennis Waweru were promoters of the Amendment Bill. *Musinga,* (P), was of the position that the promoter was the BBI National Secretariat.

[509] Following from the cases before the High Court, I add that it may be necessary to consider whether a promoter for purposes of a popular initiative under Article 257 needs to proceed within certain parameters. For instance, and not limited to:

(a) should it matter that a promoter is a political party or an association of political parties?

(b) what about the promoter being an active member of whichever House of Parliament who otherwise is also an elected

representative and by implication has the option to pursue parliamentary initiative?

(c) what about a former Member of Parliament and / or the Executive and should it matter if they are still active politically or not?

(d) even if it were a political party as a promoter should it make a difference if the party is currently the majority party or otherwise the governing party from which the President leads;

(e) what about if the party is the dominant opposition party or coalition of political parties?

(f) can a political party be a promoter if it does not have any of the members elected in either of the Houses of Parliament?

(g) What if it were just an individual, an ordinary citizen – is it feasible?

(h) other than the President and the Executive, can any other organ, constitutional office holder or independent commission be the contemplated promoter under the Constitution? and

(i) What about any other body or organ established as a public or private body, whether as a state actor or non-state actor?

These are some of the issues for consideration in regard to legislation and subjected to public participation prior to enactment of any referendum law.

[510] Valid questions abound as to the original intent of the popular initiative to amend the Constitution. Is the initiative aimed at serving public interest especially when embraced by mainstream political players? In his words, Ken Opalo an

Assistant Professor at Georgetown University in an online publication dated 26th January 2016 **"*Constitutional Amendment Through Popular Initiative; Tentative Lessons from the "Okoa Kenya" Campaign"*** at https://constitutionnet.org/news/constitutional-amendment-through-popular-initiative-tentative-lessons-okoa-kenya-campaign, points out that:

> ***"The answers to the second question speak to the original intent of popular amendment provisions. Given their extra-legislative character and the notion that they are supposed to preserve popular sovereignty, it is unclear whether popular amendment provisions maintain their integrity when captured by mainstream political parties that are supposed to operate within the legislature. In other words, the potential exploitation of such provisions to circumvent the outcomes of legislative elections may derogate the electoral process itself. Elections should have consequences for both the ruling and opposition parties."***

In my view, these are among issues that are best considered in a legislative process as opposed to a judicial determination. As the Legislature is also a creature of the Constitution exercising delegated mandate of the sovereign, it would be hoped that it sees the need to conclude this issue at the earliest to, at least provide a starting point on this issue.

[511] What then should the role of the promoter be? The obvious role that comes from the Constitution is under Article 257(3), to deliver the draft Bill and the supporting signatures to IEBC. This means that the promoter must be responsible for either coming up with a general suggestion and/or drafting a Bill which he/she must popularize to the one million signatories who must be voters to gain their

support for the promoter's initiative under Article 257. This support is expressed through signing by the supporters in a manner that is verifiable by IEBC.

[512] The further challenge regards the point at which a popular initiative, is identifiable as such. Is it the initiative coupled with the intent to pursue a popular route prior to the collection of the signatures as held by the High Court and the Court of Appeal, by majority, or is the collection of signatures what makes the initiative popular as was urged by the BBI secretariat? In my view it is fair and prudent to state that the decisive time is that of conceptualization of the intent. It is so because the one million signatories would not by themselves come up with a proposal or the general suggestion or even the Bill. A promoter sits down to conceptualise the proposed amendments either as a Bill or as a general suggestion before setting out to get the support of the one million signatories.

[513] These signatures so obtained in support only go to demonstrate that the promoter is not on a personal frolic but has at least found other people who are in agreement with the promoter's initiative, a deference to the sovereign as it were, and the building of a solid threshold on which to found a constitutional amendment, itself a key solemn endeavour. In addition, should the initiative last its course, it has an impact both in the legislative agenda, political processes and ultimately public resources and on the work of the relevant constitutional body, to wit IEBC in approving and conducting a national referendum.

[514] We were asked to ignore the process prior to the signing by the one million voters and infer that publicity of the initiative is in the endorsement or support of the initiative by the one million voters as verified by IEBC. To do so would be dishonest in my humble view. The seriousness of this issue is that the Constitution expressly tasks the IEBC with the mandate to verify the signatures in support of the initiative. This underscores the importance of the initiative itself as to garner

such support is no mean task. Indeed, one previous attempt by the *Okoa Kenya* Inititative could not surmount this constitutional hurdle.

[515] Juxtaposed with the parliamentary initiative, the parliamentary process does involve the introduction of the Bill to amend the Constitution. The Standing Orders provide for the manner in which a Bill is introduced including having it tabled before the House Business Committee. These preliminary processes towards generation of the Bill cannot be ignored as there must be some level of involvement by the equivalent of the promoters. Focusing only on the front end of the process where the Bill is introduced to Parliament misses a fundamental requisite process in an otherwise solemn constitutional process.

[516] The role of the promoters, I think, is limited to getting the one million signatures in order to meet the constitutional threshold. This involves explaining and/or popularizing the general suggestion or draft amendment Bill to the citizenry with a view to obtaining the at least one million voters in support. And, I have to agree that the process leading to the enactment of the Amendment Bill cannot be segregated.

b. Role of IEBC

[517] Flowing from the role of promoter, once the draft Bill is handed over to IEBC, what is expected of them? IEBC submitted that theirs is to verify that the initiative contained in the draft Bill is supported by at least one million registered voters. As it stands, there is no clearly set out guideline on the manner of collection of signatures yet this is the basis of the verification exercise expected of IEBC. However, I understood IEBC to suggest that they had come up with administrative procedures which presumably take into account the collection of signatures and which in turn help in giving a basis for the IEBC verification exercise.

[518] It is worth noting that the IEBC has no timeline within which to undertake this verification exercise. The constitutional timelines only check in once IEBC submits the Bill to the counties for approval. There has also been the argument whether it is the promoter or the IEBC who should make copies of the Bill for circulation to the County Assemblies. That though should be an administrative process by IEBC as it must ensure each County Assembly gets the same copy of the Bill. This is because first, the IEBC is the constitutional body charged with matters election and it is publicly funded and secondly, the promoter's role, barring any legislation, ends with the submission of the initiative to IEBC. I shall discuss the role of IEBC in relation to public participation later in the Judgment.

[519] As I would not want to venture into the purview of legislation to give clarity to the role of IEBC, I would say no more than state that at the very minimum, the IEBC should not step into the realm of the role of the promoter and the promoter should not yield his or her obligations to the IEBC for that matter. For clarity, I state and declare that the IEBC's roles do not extend to any period prior to the presentation of the Bill to IEBC.

[520] In the end, and having found that the process of initiating a popular initiative to be continuous, I find that in relation to the Amendment Bill, the President played a dominant role in so far he published by way of Kenya Gazette the establishment of the BBI Taskforce and later the BBI Steering Committee with the task of *inter alia* suggesting constitutional reforms. The BBI National Secretariat headed by Hon. Junet Mohamed and Hon. Dennis Waweru, though being the face of the initiative were not the originators, their actions having been consequential to the President's initial action of establishing the taskforce.

[521] The totality of my finding is that the President cannot directly initiate changes or amendments to the Constitution. This is based on our history and the role of the Executive in the hyper-amendability of the previous Constitution and

the need to insulate the Constitution from possible abuse based on our history. An amendment of the Constitution can only be initiated through a parliamentary or popular initiative under Articles 256 and 257 of the Constitution. Consequently, the Amendment Bill is unconstitutional.

(iii) Whether the Second Schedule to the Constitution of Kenya (Amendment) Bill 2020 is Unconstitutional

[522] This issue was raised through ***Petition No. E402 of 2020 – Justus Juma & Isaac Ogola v. Attorney General & Others***. Their main contention is in Section 74 of the Amendment Bill directing IEBC on the manner of delimitation and distribution of the seventy additional constituencies created in various counties, the time frame within which the constituencies had to come into existence and the criteria on how the constituencies would be distributed. The petitioners in this matter argued that the role of creating constituencies and delimiting boundaries was within the mandate of IEBC and could not be done in a pre-determined manner without public participation, that by having the additional seventy constituencies as provided for under the second schedule violated Articles 89(4), 89(5), 89(6), 89(7), 89(10) and 89(12) of the Constitution, with the effect of amending Article 89 of the Constitution, which was part of the basic structure of the Constitution which was unamendable.

[523]This part of the Amendment Bill purported to direct IEBC in three ways - the manner of delimitation and distribution of the seventy constituencies to various counties, the time frame within which this must be done and lastly, the criteria that IEBC must apply in the said distribution. They relied on ***Re the Matter of the Interim Independent Electoral Commission,*** Advisory Opinion No. 2 of 2011; [2011] eKLR, this Court's advisory opinion where we asserted the purpose of the independence clause to safeguard commissions against interference by other persons or government agencies.

[524] In the end, the High Court largely agreed with the petitioners and granted the declaratory reliefs sought by declaring the Second Schedule to the Amendment Bill unconstitutional for want of public participation, in so far as it purports to direct the IEBC on its function of constituency delimitation and in so far as it purports to have determined by delimitation the number of constituencies and apportionment within the counties.

[525] On appeal against the finding, the appellate Judges, by majority, agreed with the High Court that the manner of increasing the constituencies as proposed in the Amendment Bill was unconstitutional. *Sichale, J.A* in her dissent did not find any unconstitutionally since to her, Article 89(1) of the Constitution is amenable to amendment.

[526] The arguments, as I understood them, revolved around whether the issue was abstract or moot, whether Article 89 is amendable and lastly whether the Second Schedule contains proposals that are otherwise unconstitutional mainly for clashing with and / or contravening Article 89 of the Constitution.

[527] Clause 10 of the Amendment Bill, in its marginal note indicates "*Amendment of Article 89 of the Constitution*." The text proceeds to state that:

> "***Article 89(1) of the Constitution is amended by deleting the words "two hundred and sixty***."

Section 74 of the Amendment Bill deals with "*transition and consequential provisions*" declaring that they would take effect once the Amendment Act comes into force. On the delimitation of the number of constituencies, the Second Schedule provides:

> *"**Within 6 months of the commencement of the Act, the IEBC shall, subject to subsection 2 determine the boundaries of the additional seventy constituencies***

created in Article 89(1) using the criteria in Article 81(d) and 87(7) (sic). The seventy constituencies shall be spread among the counties set out in the first column in a manner specified in the second column."

[528] Article 89 of the Constitution deals with delimitation of electoral units and it provides:

"***(1) There shall be two hundred and ninety constituencies for the purposes of the election of the members of the National Assembly provided for in Article 97(1)(a).***

(2) The Independent Electoral and Boundaries Commission shall review the names and boundaries of constituencies at intervals of not less than eight years, and not more than twelve years, but any review shall be completed at least twelve months before a general election of Members of Parliament.

(3) The Commission shall review the number, names and boundaries of wards periodically.

(4) If a general election is to be held within twelve months after the completion of a review by the Commission, the new boundaries shall not take effect for purpose of that election.

(5) The boundaries of each constituency shall be such that the number of inhabitants in the constituency is, as nearly as possible, equal to the population quota, but the number of inhabitants of a constituency may

be greater or lesser than the population quota in the manner specified in clause (6) to take account of-

(a) geographical features and urban centres;

(b) community of interest, historical, economic and cultural ties; and

(c) means of communication.

(6) The number of inhabitants of a constituency or ward may be greater or lesser than the population quota by a margin of not more than –

(a) forty per cent for cities and sparsely populated areas; and

(b) thirty per cent for the other areas.

(7) In reviewing constituency and ward boundaries the Commission shall–

(a) consult all interested parties; and

(b) progressively work towards ensuring that the number of inhabitants in each constituency and ward is, as nearly as possible, equal to the population quota.

(8) If necessary, the Commission shall alter the names and boundaries of constituencies, and the number, names and boundaries of wards.

(9) Subject to clauses (1), (2), (3) and (4), the names and details of the boundaries of constituencies and wards determined by the Commission shall be published in the Gazette, and shall come into effect on the dissolution of Parliament first following their publication.

(10) A person may apply to the High Court for review of a decision of the Commission made under this Article.

(11) An application for the review of a decision made under this Article shall be filed within thirty days on the publication of the decision in the Gazette and shall be heard and determined within three months of the date on which it is filed.

(12) For the purposes of this Article, "population quota" means the number obtained by dividing the number of inhabitants of Kenya by the number of constituencies or wards, as applicable, into which Kenya is divided under this Article."

[529] I have set out the constitutional provisions above for proximity of clarity of the dictates of the Constitution on the mandate of the IEBC in matters delimitation. Our jurisdiction is replete with incidences of judicial intervention on constitutionality or enforcement of fundamental human rights some of which I have already highlighted. I have already noted that the courts have not hesitated to intervene in proposed amendments in instances where a person is aggrieved by an intended amendment for violating or threatening to violate fundamental rights and freedoms. It is worth pointing out that under Article 22 of the Constitution, a

threat to a right or fundamental freedom is sufficient for one to institute court proceedings.

[530] Moreover, Article 165 of the Constitution clothes the High Court with unlimited original jurisdiction. This includes jurisdiction to have any question respecting the interpretation of this Constitution including the determination of the question whether anything said to be done under the authority of the Constitution is inconsistent with, or in contravention of the Constitution (Article 165(ii)). An initiative to amend the Constitution flows from Articles 255 – 257 of the Constitution and remains susceptible to challenge. Anyone who feels aggrieved is free to approach the court. The court faced with that challenge would be in a position to determine the extent of its own involvement in the matter without infringing on the separation of powers and policy matters. This is one of the master pieces of the constitutional design. Accordingly, I am satisfied that the matter at hand is not abstract or moot considering it raises a very fundamental challenge to Article 89 of the Constitution purely based on the text at hand.

[531] In addition, this Court in particular occupies a special place in the constitutional scheme on the interpretation and application of the Constitution. ***In the Matter of the Speaker of Senate*** this position was captured in the following manner:

> "***[54] The context and terms of the new Constitution, this Court believes, vests in us the mandate when called upon, to consider and pronounce ourselves upon the legality and propriety of all constitutional processes and functions of State organs. The effect, as we perceive it, is that the Supreme Court's jurisdiction includes resolving any question touching on the mode of discharge of the legislative mandate.***"

Mutunga CJ & P (Rtd.) in his concurral opinion in the above matter identified the role of the court as:

> "***[161] The Supreme Court has a restorative role, in this respect, assisting the transition process through interpretive vigilance. The Courts must patrol Kenya's constitutional boundaries with vigor, and affirm new institutions, as they exercise their constitutional mandates, being conscious that their very infancy exposes them not only to the vagaries and fragilities inherent in all transitions, but also to the proclivities of the old order*** … ."

[532] Is it premature for the Court to interrogate the Amendment Bill? I do not think so. The moment the Bill is ready and has been verified by IEBC to proceed to the next step, it means the proposal has been crystallized in a manner that can be discerned. At any rate, any member of the public only interacts with that Bill once it is submitted to County Assemblies at the first instance. Anywhere in that process up to and including prior Presidential assent and to referendum, I believe, the Bill remains open to challenge at any stage.

[533] Before turning to the actual text of the Second Schedule whose constitutionality is under challenge, it is important to reiterate that as earlier captured, the Constitution is amendable. Without a doubt this applies to each and every Article thereof without exception, and only in the manner allowable by the Constitution itself. This is to say Article 89 of the Constitution is amendable. The proposed amendment, however, must fit in the context of the rest of the Constitution in harmony and must not be brought in a haphazard and clandestine manner.

[534] Looking at the text of the Amendment Bill, there seems to be no issue with the proposal to increase the number of counties by seventy. The issue for my

scrutiny is on the transition as contained in the Second Schedule. First, it sets a timeline of six months. Second, it directs IEBC to determine the boundaries of the additional constituencies whose number has already been predetermined, and where they ought to be. Third, it directs IEBC to use the criteria set out in Articles 81(d) and 87(7) of the Constitution.

[535] I note that the entire Article 89 is not being proposed for amendment but only 89(1) on the number of constituencies. On the face of it, there seems to be no problem with this as the promoter is free to suggest such an amendment proposal. There was a challenge on the origin of the proposal to have that specific number of constituencies. But for the purposes of determining the issues at hand, nothing turns on that concern. The proposed amendment of Article 89(1) completely overlooked the manner, mandate and procedure set out in Article 89(3) which reviews the number, names and boundaries of wards periodically. The greater challenge is on the timelines and the exact number suggested as against the existing constitutional provisions on this issue.

[536] Article 89(2) contemplates the review of constituency boundaries to be undertaken between eight and twelve years, but at least twelve months before a general election. From the last cycle of boundary review exercise which was undertaken under this Constitution in a process that concluded in 2012, the process took over five years, the IEBC having inherited it from the previous body established under the repealed Constitution. This is because it had to involve factors such as economic ties, geographical features and population quotas. This took into account the prescribed margins set out in Article 89(6) of the Constitution.

[537] More significantly, there are important precondition aspects of consultation with all interested parties, publication in the Kenya Gazette as well as dispute resolution by way of an application to the High Court for review of the

decision of IEBC. It was therefore unconstitutional for the Amendment Bill to purport to alter these provisions on the timelines under the Schedule yet the substantive obtaining Article of the Constitution remained undisturbed. To attempt to direct IEBC on the manner to discharge its constitutional mandate at once unconstitutionally, the obvious intention was to ensure the new constituencies were applicable to the 2022 elections, itself a clear violation of the Constitution under Article 89(4) of the Constitution of Kenya, 2010.

[538] Historically, one of the roles of IEBC is to correct historical injustices in the electoral processes which contributed significantly to the 2007 post-election chaos. In the **Independent Review Commission (IREC) Report ("Kriegler Report")** concluded that there existed gross inequalities in the voting populace and gross disparity in sizes of Kenya's constituencies. With this in mind, any action that appears to set the IEBC into a collision course with the public at large through those affected by the delimitation exercise must be abhorred.

[539] Following the adoption of the Kriegler Report, Parliament enacted the Constitution of Kenya (Amendment) Act, 2008 to establish the Interim Independent Boundaries Review Commission (IIBRC) and provided a legal framework for boundaries delimitation. After the enactment of the Constitution, the mandate of the IIBRC was recast with the transitional provisions to provide the framework for concluding the boundaries delimitation initiated by the IIBRC.

[540] In its **Revised Preliminary Report Volume 1**, the IEBC, on 9th February 2012, on and concurring the proposed boundaries of constituencies and wards, it was noted that IIBRC throughout this exercise observed that many Kenyans needed greater awareness and understanding of the constitutional parameters for delimitation and the special circumstances of the review; members of the public were critical of the alteration of boundaries of constituencies and wards even where the primary objective was to ensure compliance with the

constitutional parameters; electoral boundaries are delimited for the primary purpose of ensuring effective representation. However, there is a general perception that delimitation of electoral boundaries is linked to resource allocation, alignment of electoral boundaries to administrative units. Although the Constitution does not expressly provide for alignment of electoral boundaries to administrative units, Kenyans did not make a distinction of the scope of the current review to be limited to delimitation of boundaries of constituencies and wards. This was influenced by the general trend that resource allocation and access to government services is linked to administrative boundaries and electoral boundaries, the implication of constituencies and wards to the allocation of proportional representation seats based on the party lists under Article 90 of the Constitution led to heightened interest for additional seats.

[541] The above background, including the journey towards the first boundary review under the 2010 Constitution ranging from the post-election chaos of 2007 to the subsequent taskforces are pertinently captured in ***Republic v. Independent Electoral and Boundaries Commission & Another*** *Ex-Parte* ***Councillor Eliot Lidubwi Kihusa & 5 Others,*** HC Misc. Application No. 94 of 2012; [2012] eKLR. To summarise the immense task associated with boundary delimitation, the court stated:

> "***6. We acknowledge that the work of the IEBC has been difficult given that it inherited an incomplete task from the Interim Independent Boundaries Review Commission ("IIBRC") and was required to complete the delimitation process of constituency and ward boundaries within a period of four months. The public demand and expectations on it have been enormous particularly given the legal constraints under which it was to carry out the First Review. The task we are called upon to perform does not in***

any way diminish the value of its work. Our work is an incident of the rule of law and is intended to complement the IEBC in the performance of its constitutional and statutory mandate."

The delimitation exercise was fraught with litigation challenges including, ***Mohamed Abdille & 16 Others v. Attorney General & 6 Others,*** HC Petition No. 82 of 2011 as consolidated with Petition Nos. 74 of 2010, 199 of 2011, 5 of 2013, 58 of 2012, and 101 of 2012; [2013] eKLR**.**

[542]Relatedly, the independence of IEBC as a Chapter Fifteen Commission cannot be more emphasized. This Court has in the past pronounced itself on the proper functioning of the various independent commissions and agencies established under the Constitution. In ***Re In the Matter of the Interim Independent Electoral Commission*** we took judicial notice of the real purpose of the 'independence clause' of commissions established by the Constitution to provide safeguard against undue interference. I also bear in mind, as we did then that the various commissions are required to function free of subjection to 'direction or control by any person or authority' without having to take instructions from organs or persons outside their ambit. This position was also emphasised in ***Raila Odinga & 5 Others v. Independent Electoral and Boundaries Commission & 3 Others,*** SC Petition No. 5, 3 and 4 of 2013; [2013] eKLR at para. 244.

[543] One may argue, that the Second Schedule is, once enacted, part of the Constitution and its directive will then be deriving from the Constitution. That may well be so, but again, for as long as the substantive Articles dealing with delimitation criteria and/or timelines remain abound, and unamended, it is only the proposed amendment that must be weighed against the existing express provisions of the Constitution. Based on the supremacy clause of the Constitution,

any action done in excess of constitutional provisions must suffer the fate of being declared unconstitutional.

[544] The probable way of achieving the objective of the amendment as proposed would have been to incorporate the consequential amendments by amending the applicable Articles by varying the timelines or parameters for which IEBC is to operate. From the foregoing, I see no reason to depart from the holding of the High Court as affirmed by the Court of Appeal, on this point.

[545] The summation of my finding on this third issue is that the issue is that the Second Schedule of the Amendment Bill is unconstitutional in so far as it directs the IEBC on, not only delimitation of the number of constituencies but also the distribution of the proposed new constituencies and the timelines within which to operationalize the same within the existing constitutional parameters of Article 89 of the Constitution.

(iv) Whether civil proceedings can be instituted against the President or a person performing the functions of the office of the President during his/her tenure of office with regard to anything done or not done contrary to the Constitution

[546] This issue emanates from ***Petition No. E426 of 2020 – Isaac Aluochier v. Uhuru Muigai Kenyatta & Others***. Mr. Aluochier sought that the court do find that the President could be sued, during tenure of office, in civil proceedings. He argued that the President lacked the authority to initiate constitutional amendments through popular initiative. He also argued that the BBI Steering Committee established by the President under Gazette Notice No.264 of January 3, 2020 with terms of reference for considering and promoting constitutional changes was an unlawful entity. According to him, while it is true that under Article 143(2) the President, cannot during his tenure as the President be validly sued whether in his official or personal capacities in respect of anything

done or not done in the exercise of their powers under the Constitution, he is not so insulated from court proceedings in respect of actions or omissions outside the Constitution. He urged the court to follow the decision in ***Isaac Aluoch Polo Aluochier v. Uhuru Muigai Kenyatta & Another,*** HC Petition No. 360 of 2013; [2016] eKLR where it was held that the President could indeed be sued for conduct outside the exercise of Presidential authority.

[547] He considered the President's address on 12th December, 2020 wherein the President promoted the Amendment Bill published by the BBI Steering Committee. To him, this was an affront to the Constitution and that it went beyond the President's authority and powers set out in Articles 129 and 131 of the Constitution. In response, the Attorney General made a case for absolute immunity both in his personal and official capacity during his tenure. The Attorney General further submitted that there existed other avenues, in public law, remedy in judicial review proceedings in which the Attorney General rather than the President, would be the named respondent. This is the import of the decision by *Gikonyo, J.* in the ***Nyarotho Case.***

[548] The High Court having found as common ground that civil proceedings may be taken against the President, declared that there is nothing in law to suggest that only a particular form of civil proceedings would be preferred to the others. It made a declaration that civil court proceedings can be instituted against the President or a person performing the functions of the office of President during their tenure of office in respect of anything done or not done contrary to the Constitution. That court noted that in the ***Isaac Polo Aluochier Case*** *[2014]* in which the President and his Deputy had been sued in their personal capacities, the court found that the Attorney General cannot represent the President when the latter is sued in his personal capacity. The court also noted that the President had neither entered appearance nor filed any response to this petition.

[549] On appeal, the matter in contest revolved around the proper interpretation of Article 143(2) and (3) of the Constitution, and the extent of immunity granted to the President and whether the President could be sued in his personal capacity. The Judges of Appeal unanimously agreed with the High Court that the immunity granted to the President while in office is not absolute. *Tuiyott, J.A* on his part added that the Constitution strikes a balance by leaving it open for a President to be held personally accountable, once out of office, for acts or omissions done while serving.

[550] In my view, the question that seeks our resolution, is the proper interpretation of Article 143 of the Constitution. In resolving that issue, I shall address the extent of immunity granted to the President in civil proceedings against him for acts or omissions while in office.

(a) Service and Representation

[551] Before delving into this matter further, I note that there was an issue of service and representation on the part of the President. From the record, it is apparent that he was unrepresented at the High Court. The Judges of the High Court noted as follows in the Judgment:

> ***"537. To begin with, it is worth noting that Mr. Uhuru Muigai Kenyatta did not enter appearance in these proceedings and neither did he file any grounds of objection or replying affidavit to contest these proceedings on the ground of misjoinder, or any other ground for that matter. As much as the Honourable Attorney General has come to his defence, the grounds of objection and the submission filed by the Honourable Attorney General are clearly stated to have been filed of the Honourable Attorney General himself and not Mr. Uhuru Muigai***

Kenyatta. It could be that the Honourable Attorney General has proceeded on the understanding that since Mr. Uhuru Muigai Kenyatta ought to have been sued in his personal capacity, he need not have responded or participated in this proceedings. However, since this is the very question in dispute, we are of the humble view that Mr. Uhuru Muigai Kenyatta ought to have responded to the petition either by himself or by his duly appointed representative and contested his inclusion in the petition or any of the grounds that would be available to him. We find it a bit intriguing that the Honourable Attorney General can file documents for the Honourable Attorney General and proceed to argue Mr. Uhuru Muigai Kenyatta's case."

It is pretty clear that the Judges never engaged with and interrogated the issue of service and why the President did not participate in the proceedings. The court nevertheless noted that the Attorney General, though not appearing for the President raised the point of law relating to the constitutional immunity of the President. To the Judges of the High Court, no analysis was necessary in the wake of the concession by the Attorney General.

[552] At the Court of Appeal, the President instructed Counsel to appear for him. As expected, they invoked Articles 25, 27 and 50 of the Constitution faulting the Judges of the High Court for proceeding to deal with the issue of representation without first dealing with service as required by law to enable the President to respond to the claim against him. It was submitted for the President that the issues of service and representation were preliminary and ought to have been dealt with at the first instance. There was contention that the President, despite being sued in his personal capacity was not served and there was no evidence of service on

record. In the absence of service, it was to be inferred that the claim had been abandoned, Counsel for the President concluded.

[553] Mr. Aluochier contested the argument on service by insisting that he had served as per the affidavit of service dated 16th January 2020 stating that it was impossible to effect personal service and that he effected service by email to cos@president.go.ke.

[554] In ascertaining whether service had been effected, the record shows that the court had served Counsel in the matters by email. The court never made enquiry as to service before proceeding with the virtual hearings. It was therefore not clear whether the email used was the personal email of the President or where it was obtained. Mr. Aluochier simply stated in his affidavit of service that he lodged a service request on the judiciary e-filing platform, and paid the prerequisite fees. Upon checking the outcome of the lodging request the information feedback states that all the parties were served by email. The lead judgment by *Musinga, (P),* of the appellate court did fault the High Court for having failed to interrogate the issue of service.

[555] *Okwengu, J.A* noted that in the consolidated petitions, the President was sued in his official capacity in Petition No. 401 of 2020 by 254 Hope and in his private capacity in Petition No. 426 of 2020 by Mr. Aluochier. She found lack of service of the petition or hearing notice. Having not been served, the President could neither enter appearance nor participate in the proceedings. *Kiage, Gatembu and Tuiyott, JJ.A* concurred. *Tuiyott, J.A* went further to interrogate service under the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, Rules 2 and 1(2) thereof. He found merit in Aluochier's electronic service in view of Covid-19 containment measures and the amended Order 5 Rule 22B of the Civil Procedure Rules providing for service

through electronic mail. That with the anticipated difficulty in personal service to the President, substituted service remained an available avenue for litigants.

[556]In my own assessment of the record and without having to rehash, it is my considered finding that indeed the President was not properly served or at all. This denied him the opportunity to participate in the proceedings in his personal capacity, especially with the finding that the Attorney General could not appear on the President's behalf.

(b) Presidential Immunity

[557] Presidential immunity being a point of law was an issue amenable to a determination by the Court whether or not there was service of process.

[558] The President's immunity is set out in Article 143 of the Constitution which deals with protection from legal proceedings. As relates to civil proceedings Article 143(2) provides:

> *"**(2) Civil Proceedings shall not be instituted in any court and against the President or the person performing the functions of that office during their tenure of office in respect of anything done or not done in the exercise of their powers under this Constitution**."*

[559] The Constitution recognizes three types of immunities – to the Head of State under Article 143, to legislators under Article 117; and extending to freedom of speech and debate and to county assemblies, their committees and members under Article 196. The immunity granted to the President is expressly set out in the Constitution. The other immunities to legislators and members of County Assemblies are left to legislation.

[560] In the same breadth, Article 160 which grants independence to the Judiciary shields a member of the Judiciary against liability in the following terms:

> *"**(5) A member of the Judiciary is not liable in an action or suit in respect of anything done or omitted to be done in good faith in the lawful performance of a judicial function**."*

[561] Can the Constitution in Article 143 be said to be granting absolute immunity from civil proceedings to the President? It behooves me to first identify what civil proceedings are. The Civil Procedure Act by virtue of its Section 1(2) applies to proceedings in the High Court and, subject to the Magistrates' Court Act, to proceedings in Subordinate Courts. The Act defines "suit" to mean all civil proceedings commenced in any manner prescribed. The Act also defines a 'pleading' to include a petition or summons, and the statements in writing of the claim or demand of any plaintiff, and of the defence or counterclaim of a defendant.

[562] Kenya has had two post 2010 Constitution Presidents, Mwai Kibaki who ushered the Constitution by promulgating it in 2010 and Uhuru Kenyatta. There is no evidence of any proceedings of civil nature having been instituted against Hon. Mwai Kibaki during his tenure as President. There is however, evidence of civil proceedings instituted against or by him prior to and after his tenure. In ***Kenya National Commission on Human Rights v. Attorney General & Another***, Petition No. 132 of 2013; [2015] eKLR declaratory reliefs were sought against President Kibaki arising out of his assent to the Presidential Retirement Benefits (Amendment) Act of 2012 for violating the Constitution. The Attorney General appeared for the President.

[563] In ***Deynes Muriithi & 4 Others v. Law Society of Kenya & Another,*** Civil Application No. 12 of 2015; [2016] eKLR, this Court held that proceedings commenced by way of constitutional petitions are in the nature of civil proceedings.

[564] As for the current President, other than Mr. Aluochier who has previously instituted a suit against him, no other civil suit comes to mind. This is not to suggest that the President's official exercise of power is yet to be challenged. The President's actions have been challenged in many cases. These include ***Adrian Kamotho Njenga v Attorney General; Judicial Service Commission & 2 others (Interested Parties),*** Petition No. 369 of 2019; [2020] eKLR and ***Law Society of Kenya v. Attorney General & 2 Others,*** Constitutional Petition No. 3 of 2016; [2016] eKLR relating to the President's failure to appoint Judges following their nomination by the Judicial Service Commission. In ***Law Society of Kenya v. Attorney General & Another; Mohamed Abdulahi Warsame & Another (Interested Parties),*** Petition No 307 of 2018; [2019] eKLR relating to the President's failure to appoint *Warsame, J.A* the 1st interested party, as required by section 15(2)(b) of the Judicial Service Act while in ***Law Society of Kenya & Another v. National Assembly of the Republic of Kenya & 3 Others,*** Petition No 106 of 2018 Consolidated with Petition No 119 of 2018; [2018] eKLR the President's nomination of *Warsame, J.A* for approval by the National Assembly for his appointment to the Judicial Service Commission was successfully challenged. It is worth pointing out that these cases were initiated in the name of the Attorney General and not in that of the President.

[565] The Court of Appeal in ***Commissioner of Lands v. Hotel Kunste Ltd,*** Civil Appeal No. 234 of 1995; [1997] eKLR previously held that in matters of judicial review; the court exercises a special jurisdiction which is neither civil nor criminal.

[566] There is no doubting that the President is no ordinary citizen. The only semblance of the current President shedding off his official capacity was when he publicly handed over the instruments of power to his deputy as he proceeded to answer to the summons at the International Criminal Court where he was facing charges. In the absence of such public display of handover of official capacity as

president, the distinction between official and private capacity of the President remains a matter of conjecture and not one of a legal exactitude.

[567] Does this immunity play any meaningful role in the execution of constitutional and statutory mandate as a President? I think so. At that level of constitutional mandate and authority, the President needs to have the operational confidence to take certain executive measures in order to effectively govern the country without the colloquial sword of Damocles hanging over his head, worrying about the consequences of his actions or omissions when executing his functions as President.

[568] This is evidenced in the constitutional provision that forbids the President from engaging in any other public or state office unlike in the past dispensation where the President was also a Member of Parliament.

[569] Immunity from civil proceedings also shields the President from being pursued for other civil interests by citizens privately in particular through litigation and court process that is largely adversarial in Kenya. Allowing the President to be subject of civil suits inevitably exposes him to court attendances, court testimonies, cross examination and ultimately execution process in the event that the President is found liable to settle civil debts. This may escalate to committal to civil jail as a mode of execution. All these scenarios are as undesirable as they are distracting. As the President of the country, he should be as available as possible to execute his official functions.

[570] Mandhane, Renu **"*Ending impunity: critical reflections on the prosecution of heads of state*"** The University of Toronto Law Journal, vol. 61, No. 1, 2011, pp. 163–71, notes that since 1990, nearly seventy heads of state have been prosecuted for crimes committed while in office. In their book, ***Prosecuting Heads of State*** *(Cambridge University Press, 2009)*, editors Ellen L Lutz and Caitlin Reiger question whether the rule of law can truly be enhanced by

prosecutions inextricably linked to political motivations. The authors conclude by cautioning against the over-reliance on judicial accountability mechanisms in transitional justice contexts. All these demonstrate that prosecution of heads of state upon serving their tenure is nothing unusual, the motives behind such action notwithstanding.

[571] It is similarly expected that the President has the concomitant obligation not to institute civil proceedings during the tenure of office. It is certain that any proceedings that were pending prior to the President assuming office become suspended and time stops running to await the end of his tenure. See Article 143(3) of the Constitution.

[572] In our jurisprudence, there are cases that stalled or have since been instituted against former Presidents once they left office. These include ***Mathingira Wholesalers Company Ltd. v. Kimwatu Kanyungu & 5 Others,*** ELC No. 601 of 2014; [2016] eKLR which involved a parcel of land known as Nyeri Municipality Block 1/94 which was owned by Hon. Mwai Kibaki and others; ***Zulfikar Hassanally and Rustam Hira (suing as the legal representatives of the late Abdul Karim Hassanally & Another v. Westco Kenya Limited and 3 Others,*** Civil Case No. 1388 of 1997; [2016] eKLR relating to breach of contract; ***Mwai Kibaki and Another v. Mathingira Wholesalers Company Limited and 6 Others,*** Civil Appeal No. 6 of 2017; [2018] eKLR in which the former President was not only a litigant but appealed to the Court of Appeal; ***Malcolm Bell v. Daniel Torotich Arap Moi and another,*** Civil Case 14 of 2004; [2013] eKLR and ***Mwangi Stephen Mureithi v. Daniel Torotich Arap Moi,*** Petition No. 625 of 2009; [2016] eKLR the last two cases ending at the Supreme Court.

[573] Does the immunity suggested herein amount to immunity or impunity? Mr. Aluochier forcefully submitted that the courts were 'advocating for absolute

impunity' based on this Court's previous decision in *the* ***Bellevue Case*** which involved the interpretation of the scope of the immunity granted to Judges. In that matter, the court appreciated the functional immunity granted to judges and endorsed absolute immunity to judges, even when acting in excess of jurisdiction.

[574] In any event, the immunity granted to Judges and judicial officers does not take the categorical terms as those for the President's immunity under the Constitution. The former involves the use of terms, such as 'good faith' and 'lawful performance of functions.' To assuage the fears by Mr. Aluochier, the Constitution retains inbuilt mechanism to deal with rogue state officers. This includes removal from office, challenge to the exercise of functions and impeachment in case of the President.

[575] In conclusion, it is my finding that the President was not properly served with the pleadings and was therefore not accorded an opportunity to participate in the proceedings in his personal capacity in which he had been sued. What is more and aptly germane to these proceedings, the President as under Article 143(2) of the Constitution of Kenya, 2010 enjoys absolute immunity from civil proceedings during his tenure in office.

(v) The place of public participation under Article 10 vis a vis the role of IEBC under Article 257(4) of the Constitution; and whether there was public participation in respect of the Constitution of Kenya (Amendment) Bill 2020

[576] This issue arises from ***Petition No. 13 (E018) of 2021 – Independent Electoral and Boundaries Commission (IEBC) v. David Ndii & 81 Others.*** The IEBC questions whether an obligation is imposed on it under Article 257(4) to ensure compliance by the BBI Steering Committee with requirements for public participation; or otherwise by promoters of a popular initiative before forwarding it to the County Assemblies. It submits that both the High Court and

Court of Appeal misapprehended the provisions of the Constitution with respect to the question of public participation. To them, public participation, civic education and voter education are quite different in content, scope and intention as per the findings in ***County Assembly of Kirinyaga of Case.*** IEBC clarified that its appeal does not extend to the adequacy of the legal framework in relation to verification of signatures with respect to public participation.

[577] A common thread that emerges is that under our constitutional dispensation, the sovereignty of the People takes a vital centre stage. Since all sovereign power belongs to the people, they must play a significant constitutional role as contemplated under the Constitution. Participation of the people is one of the recognised national values and principles of governance listed in Article 10 of the Constitution. Public participation permeates the sphere of governance and legislative processes, public access and participation including conduct of Parliament and County Assembly business must all have a measure of public participation.

[578] The South African Constitutional Court in ***Poverty Alleviation Network and Others v. President of the Republic of South Africa & 19 Others,*** CCT 86/08 [2010] ZACC 5 underscores the significance of public participation thus:

> *"... **engagement with the public is essential. Public participation informs the public of what is to be expected. It allows for the community to express concerns, fears, and even to make demands. In any democratic state, participation is integral to its legitimacy. When a decision is made without consulting the public the result can never be an informed decision**."*

[579] Facilitating public participation is necessary to ensure legitimacy of the ensuing law or policy reached. Locally, the High Court in ***Mui Coal Basin Local Community & 15 Others v. Permanent Secretary Ministry of Energy & 17 Others,*** Constitutional Petition Nos 305 of 2012, 34 of 2013 & 12 of 2014; [2015] eKLR enumerated practical principles for ascertaining whether a reasonable threshold was reached in facilitating public participation.

[580] Public participation continues to attract judicial determination and attention from various citizens and players in any policy or legislative process. Though as a country we are , most regretfully, yet to have public participation legislation, the courts have been available to set up various parameters, see decisions such as ***Robert N. Gakuru & Others v. Governor Kiambu County & 3 Others,*** Petition No. 532 Of 2013; [2014] eKLR which made the initial attempt of defining the concept of public participation; and ***Richard Owuor & 2 Others (suing on behalf of Busia Sugarcane Imports Association) v. Cabinet Secretary, Ministry of Agriculture, Livestock, Fisheries and Co-operative & 7 Others,*** Petition No. E263 of 2020; [2017] eKLR which explained the various facets of public participation.

[581] We affirmed in ***Communications Commission of Kenya & 5 Others v. Royal Media Services Limited & 5 Others*** [2014] eKLR that Article 10(2) of the Constitution is justiciable and enforceable immediately as the values espoused under Article 10(2) are neither aspirational nor progressive. This means that violation of this Article is a basis of a cause of action either on its own or in conjunction with other Articles of the Constitution or Statutes as may be appropriate. This position has been asserted in no uncertain terms by the Court of Appeal in ***Independent Electoral and Boundaries Commission (IEBC) v. National Super Alliance (NASA) Kenya & 6 Others*** Petition No. 14 of 2014; [2017] eKLR among other superior courts on which our decision is binding.

[582] This Court has been called upon and issued an authoritative position by laying the legal framework for public participation. In ***British American Tobacco Kenya, PLC (formerly British American Tobacco Kenya Limited) v. Cabinet Secretary for the Ministry of Health & 2 others; Kenya Tobacco Control Alliance & another (Interested Parties); Mastermind Tobacco Kenya Limited (The Affected Party)*** Sup Ct. Pet. 5 of 2017; [2019] eKLR we underscored the place of public participation by stating as follows:

> "***[96] From the foregoing analysis, we would like to underscore that public participation and consultation is a living constitutional principle that goes to the constitutional tenet of the sovereignty of the people. It is through public participation that the people continue to find their sovereign place in the governance they have delegated to both the National and County Governments. Consequently, while Courts have pronounced themselves on this issue, in line with this Court's mandate under Section 3 of the Supreme Court Act, we would like to delimit the following framework for public participation****:*

[583] We went ahead to formulate the guiding principles for public participation as follows:

> ***(i) As a constitutional principle under Article 10(2) of the Constitution, public participation applies to all aspects of governance.***
>
> ***(ii) The public officer and or entity charged with the performance of a particular duty bears the onus of ensuring and facilitating public participation.***

(iii) The lack of a prescribed legal framework for public participation is no excuse for not conducting public participation; the onus is on the public entity to give effect to this constitutional principle using reasonable means.

(iv) Public participation must be real and not illusory. It is not a cosmetic or a public relations act. It is not a mere formality to be undertaken as a matter of course just to 'fulfill' a constitutional requirement. There is need for both quantitative and qualitative components in public participation.

(v) Public participation is not an abstract notion; it must be purposive and meaningful.

(vi) Public participation must be accompanied by reasonable notice and reasonable opportunity. Reasonableness will be determined on a case to case basis.

(vii) Public participation is not necessarily a process consisting of oral hearings, written submissions can also be made. The fact that someone was not heard is not enough to annul the process.

(viii) Allegation of lack of public participation does not automatically vitiate the process. The allegations must be considered within the peculiar circumstances of each case: the mode, degree, scope and extent of

public participation is to be determined on a case to case basis.

(ix) Components of meaningful public participation include the following:

a. clarity of the subject matter for the public to understand;

b. structures and processes (medium of engagement) of participation that are clear and simple;

c. opportunity for balanced influence from the public in general;

d. commitment to the process;

e. inclusive and effective representation;

f. integrity and transparency of the process;

g. capacity to engage on the part of the public, including that the public must be first sensitized on the subject matter.

It is the above principles that inform the courts when dealing with any grievance relating to public participation before the courts. The present dispute shall be considered against the above framework at every stage at which public participation was expected.

[584] So how has this issue of public participation transcended the court hierarchy to land before us? Out of the consolidated petitions before the High Court, three raised the issue of public participation. ***Petition No. 402 of 2020 – Justus Juma & Isaac Ogola v. Attorney General & 4 Others, Petition No. E416 of 2020 – Morara Omoke v. Raila Odinga & Others v. Steering Committee of BBI and Others***. Their arguments stretch to the

Njoya Case on the sovereign and inalienable right to determine the form of governance.

[585] It was contended that Articles 7, 10, 33, 35 and 38 of the Constitution were violated for the reason that the promoters of the Amendment Bill proceeded to collect signatures without first engaging in public participation. In response, it was argued that it would have been premature to conduct public participation prior to achieving the requisite support under Article 257(1) of the Constitution and consideration of the Amendment Bill by the County Assemblies. Further, that public participation was a continuous process starting from the collection of one million signatures in support of the proposed Amendment Bill or general suggestion ultimately to the referendum.

[586] The High Court found that there had been no meaningful public participation and sensitization of people prior to collection of signatures in support of the Amendment Bill. That being one of the principles of good governance, the constitutional right to public participation had to be complied with at every stage of a constitutional amendment process, hence voters were entitled, at a minimum, to copies of the Amendment Bill and at the very least, the copies ought to have been in the constitutionally required languages. This includes making them available in other communication formats and technologies accessible to persons with disabilities including Kenya Sign Language as required under Article 7(3) of the Constitution.

[587] The court also noted that part V of the Elections Act did not adequately provide for the processes contemplated in a referendum process. The inadequacy in law notwithstanding, the court opined that such a constitutional process could still be undertaken in line with constitutional expectations, values, principles and objects under Article 10 of the Constitution.

[588] There was also a contention as to the extent of public participation in so far as divergent views could arise when County Assemblies consider for approval the contents of the Amendment Bill and whether the views could be used to improve the Amendment Bill. The court was categorical that the role of the County Assemblies and Parliament was either to approve or not approve the Bill in its entirety as is. That any attempt to alter the Bill would convert the popular initiative into a parliamentary initiative.

[589] I have already addressed the aspect of public participation touching on whether Parliament or County Assemblies could amend the initiative and the lack of public participation in view of the unconstitutionality of the Second Schedule of the Amendment Bill and the role of the promoters. No purpose would be served by repeating that here.

[590] On appeal, the majority of the Judges agreed with the High Court that there was lack of meaningful public participation before the collection of signatures in support of the Amendment Bill. The Appellate Court disagreed with the High Court's finding on the scope or extent of public participation. To them, Article 257 was continuous with several phases to be understood from that perspective. *Tuiyott, J.A* taking a contrary position, found lack of any evidence before the trial court of a voter who had signed in support of the Amendment Bill without having been provided with a copy of the proposed Amendment Bill.

[591] Similarly, the majority of the Judges of Appeal agreed with the High Court that the administrative procedures developed by IEBC in relation to this exercise were invalid due to lack of public participation, violation of the statutory Instruments Act and that they were developed without quorum of IEBC.

[592] At the onset, it is imperative to clearly delineate the scope of public participation. It is essential to address public participation under the different phases of the popular initiative under Article 257 of the Constitution. Firstly, the

issue of the role of promoter in relation to collection of signatures. Secondly, the role of IEBC once it received the Amendment Bill. Thirdly, the role of the County Assemblies in approving the Amendment Bill. Fourthly, the role of Parliament, incorporating both H ..ouses, in debating and approving the Amendment Bill. There is also the aspect of the inadequacy of Part V of the Elections Act. It is only upon the determination on these aspects that it would be clear whether the Amendment Bill satisfied the requirement of public participation or not.

[593] Legislation on the adequacy of public participation is situation specific and inadequate to a large extent. Article 82 of the Constitution provides for legislation on elections. Accordingly, Parliament is obliged to enact legislation on referendum in the following terms:

> *"**82(1) Parliament shall enact legislation to provide for –***
> ***...***
> ***(d) the conduct of elections and referenda and the regulation and efficient supervision of elections and referenda, including the nomination of candidates for elections; ..."*** [emphasis mine].

Under the Fifth Schedule, the law under Article 82 was to be enacted within one year of the promulgation of the Constitution. The Elections Act was enacted in 2011 and Part V thereof was specific to referendum. A perusal of the said part reveals that the same only addresses the tail end of an initiative to amend the Constitution in the event of a referendum.

[594] What then is the role of IEBC in the event of constitutional amendment process as regards public participation? There is no doubting that the initiative of amending the Constitution under Article 257 – by way of popular initiative remains a continuous one. This continuous process also incorporates different players at the different stages. To what extent therefore can the public participate

meaningfully in this process and whose role should it be to facilitate this participation?

[595] Unlike a Parliamentary initiative of amendment of the Constitution where Parliament shall, under Article 256(2) 'publicize any Bill to amend the Constitution, and facilitate public discussion of the Bill', there is no similar provision for a popular initiative under Article 257 of the Constitution. The logical explanation may be that Parliament by its very nature exercises delegated sovereign power on behalf of the people under Articles 1(2) and 3(a). This makes it obligatory for Parliament to report to the People as well as to facilitate the discussion of the Bill, which allows for amendment and factoring in any useful proposals emanating from the public participation exercise around the Bill prior to its enactment. In addition, Parliament being the constitutional body mandated to legislate is publicly funded and has the mechanism and capacity to undertake this noble exercise of public participation which in any event, is part of their legislative mandate.

[596] A popular initiative starts with a promoter or promoters. Once the promoters make the proposal and it is supported by the one million signatures, there is little room for amendment. Where does this state of affairs leave public participation, a situation already exacerbated by lack of legislation on the issue?

[597] The next body to interact with and move the process forward upon receipt of the Bill is IEBC, for the purposes of verification of signatures. Should it bear the burden beyond verification of signatures as contemplated by the Constitution? Even if it were to do so, to what extent should and can it facilitate public participation more so considering that it is not the promoter?

[598] At the very least the IEBC is obligated under the constitution to verify the signatures. As stated earlier, this is not meant to be a mere formality but an elaborate exercise. IEBC made reference to their Administrative Procedures to

guide the signature verification process. Using the guiding principles set out in the ***BAT Case*** public participation is a constitutional principle under Article 10(2) of the Constitution and it bears on a public officer or in this case a constitutional commission, also a public body to ensure its occurrence. The public participation must be accompanied by reasonable notice and fulfil components of meaningful public participation.

[599] Besides, public participation is not just a mere fulfilment of the constitutional requisite but should be invoked when the participation yields to the consideration of the views emanating therefrom. In this case, the IEBC's role under Article 255 goes no more than to verify signatures in support of the initiative. Nothing was brought to the attention of this Court to depart from the findings of the two superior courts below that the verification exercise was not meaningfully carried out within the constitutional dictates. There was sufficient demonstration that IEBC made an attempt to notify the public at large of the opportunity to confirm their signatures but barely gave the opportunity to the one million signatories or the public at large as the medium of communication used – their website, was fairly restrictive.

[600] Before concluding, the contention that the requirement as to public participation is premature and could only be raised once the referendum was held, that being the last and ultimate participation of the people calls for comment. Having stated that public participation accrues at different phases that the initiative undergoes, it is reasonable that any grievance can be raised at any stage of the phases, and this Court would be in its place in the consideration of the question either as to enforcement or application of the Constitution question. As already stated, Article 10 is a substantive constitutional provision on which a claim can be founded. Unlike a Bill to enact or repeal a statute which can only be operationalized upon enactment, the Bill to amend the constitution cannot be challenged upon promulgation of the Constitution, if successful. The challenge to

any constitutional amendment especially by popular initiative can only be challenged before it becomes operative. The challenge here on public participation is on time, and that is my finding.

[601] Part V of the Elections Act contemplates formation of the referendum committees to spearhead support or opposition of the referendum question, prior to the voting exercise. Those spearheading the support or opposition together with the promoters would therefore be expected to popularize their position by way of civic education, publicizing the Amendment Bill or otherwise popularizing their respective positions as a result of which the public is expected to be better and sufficiently informed by the time they vote. Needless to add that this process is governed by an electoral code of conduct as shall have been stipulated by IEBC.

[602] Public participation in this context will therefore only be limited to accepting or rejecting what would have been presented before them at the poll through the Amendment Bill. This situation was captured in the ***Patrick Onyango Case*** in the following way:

> *"**The referendum does in a way, for a split second give the people executive, legislative and judicial powers to determine whether they were efficiently involved and consulted and whether the final product has the content and the substance, whether the final product was properly framed and whether it is a document they would want to enact. Upon enactment in the referendum they shall have put their final seal of approval.**"*

[603] Public participation must be meaningful. Nothing done by IEBC in this regard renders what would be adequately described as sufficient public participation, hence nothing is shown to occasion a departure from what the two superior courts below found, which I hereby endorse.

[604] My finding therefore on public participation in the issue before us is that it is neither moot nor premature. While public participation is central to the constitutional dispensation, in the context of constitutional amendment initiative through popular initiative, it is a continuous process to be considered at each step. There is no obligation on the promoters to undertake any public participation prior to the presentation of the Amendment Bill as all that is required is to get one million signatures to support it. There was lack of meaningful participation at the verification of signatures by IEBC. It is best left to legislature to enact a law that will address the different roles of the different players in the process ranging from the promoter, IEBC, County Assemblies, Houses of Parliament and the referendum process, the constitution and this Court having laid out the framework. However, until that is done, the courts have rendered sufficient guidelines on the sufficiency or otherwise of public participation. I have no difficulty, in the circumstances of this appeal, to find and hold that at all material stages of the Amendment Bill wherein the constitutional value of public participation was called for, none of the stated value was had. I so find and declare.

(vi) Interpretation of Articles 88 and 250 of the Constitution with respect to composition and quorum of IEBC

[605] This issue emanates from Petition No. E416 of 2020 by Morara Omoke, whom the High Court described as a public-spirited lawyer. He filed a petition dated 15th December 2020, against Hon. Raila Odinga; the Hon. Attorney General, BBI Steering Committee, the National Assembly, the Senate and the IEBC as the Respondents. The petition challenged the actions taken by the President in conjunction with Hon. Raila Odinga and BBI Steering Committee towards amending the Constitution. He argued that IEBC lacked quorum to process the Amendment Bill and verification of signatures which are policy matters that it discharges under Section 8 of the IEBC Act and the Second Schedule to the Act. According to him, IEBC cannot discharge this mandate without quorum.

[606] Hon. Raila Odinga and The Building Bridges Steering Committee opposed the petition. They contended that the issue of the quorum of the IEBC is *res judicata*, the same having been settled in ***Isaiah Biwott Kangwony v. Independent Electoral and Boundaries Commission & Another,*** (Nairobi High Court Petition No.212 of 2018; [2018] eKLR). In their view, verification of signatures and conduct of elections or referenda are not policy decisions requiring quorum, but constitutional mandates under Article 88(4) of the Constitution. They further argued that the IEBC has administrative procedures for verification of signatures which were adopted in previous attempts to amend the Constitution by *Okoa Kenya Initiative* and *Punguza Mizigo Initiative* respectively.

[607] The IEBC in opposition to the petition maintained that the issue of its composition had been resolved in the ***Isaiah Biwott Case.***

[608] Both the petitioner and the respondents were in agreement that the IEBC was at the time not fully constituted. The point of divergence, however, was on whether there was quorum for IEBC to conduct business on policy matters. Whereas the petitioner argued that verification of signatures and conducting referendum are policy issues requiring quorum of the IEBC, the respondents held the opposite view. In the respondents' view, the IEBC meets the minimum constitutional composition threshold of three commissioners and, therefore, it can conduct its business.

[609] Sometime in 2017 after the general elections of that year, several commissioners resigned, leaving only the chairperson and two commissioners in office. In 2018, a petition was filed seeking the Court's determination on whether the IEBC's composition was unconstitutional and illegal. This was the ***Isaiah Biwott Case.*** The petitioner in that case failed to persuade the Court that the IEBC was unconstitutional and illegal by dint of having

only a chairperson and two commissioners. It is on the basis of that decision that the respondents argued in the present case that the current challenge to the composition of the IEBC is *res judicata*.

[610] *Okwany, J.* considered the petition but was not persuaded that the IEBC's composition was unconstitutional and illegal. The learned Judge noted that the challenge in that petition was on two fronts: failure to comply with the two-thirds gender principle, and quorum based on the number of commissioners. The learned Judge concluded that prior to the resignations, the IEBC's composition complied with the requirement of two-thirds gender principle. That court's finding was that occurrence of a vacancy in the IEBC did not invalidate the composition of the commission but reduced the number of commissioners with the result that it limited the IEBC's operations with respect to raising the quorum required for meetings especially when dealing with policy issues. The court found that the IEBC could conduct by-elections because this did not require quorum to decide. This is the decision that the respondents relied on to argue that the issue of composition of the IEBC had been determined and was, therefore, *res judicata*.

[611] The High Court was of the view that in the present petition, the petitioners' concern is that the IEBC was not properly constituted for purposes of verifying signatures and did not have quorum to conduct a referendum. The constitutionality or legality of the existence of the IEBC as a commission under Article 250(1) of the Constitution was not in doubt. In that regard, they concluded that the issue before this Court was not conclusively determined in the ***Isaiah Biwott Case*****,** to render the question of the IEBC's quorum as raised in this petition, *res judicata*.

[612] The High Court made the declarations that IEBC did not have quorum as stipulated by Section 8 of the IEBC Act as read with Paragraph 5 of the Second Schedule to the Act for purposes of carrying out its business relating to the conduct

of the proposed referendum including the verification of signatures in support of the Constitution of Kenya Amendment Bill under Article 257(4) of the Constitution submitted by the BBI National Secretariat, the 18th respondent herein. The court issued a further declaration that the Administrative Procedures for the Verification of Signatures in Support of Constitutional Amendment referendum made by the IEBC are illegal, null and void because they were made without quorum, in the absence of legal authority and in violation of Article 94 of the Constitution and Sections 5, 6 and 11 of the Statutory Instruments Act, 2013.

[613] The issue of quorum was raised in two appeals - ***Civil Appeal No. E291 of 2021***, ***Independent Electoral Boundaries Commission (IEBC) v. David Ndii & 82 Others*** through some 12 grounds of appeal challenging the High Court's findings including that it lacked quorum to undertake its constitutional and statutory mandate; and ***Civil Appeal No. E293 of 2021***, ***The Hon. Attorney General v. David Ndii & 73 Others***. The Attorney General, on his part, raises 31 grounds of appeal on similar grounds as the IEBC and the 18th and 21st respondents. The Attorney General faults the High Court for undermining the principle of harmony and consistency in the interpretation of the Constitution by contradicting the findings of a court of concurrent jurisdiction; and in finding that the IEBC lacked the requisite quorum to make decisions connected with the Amendment Bill.

[614] It was urged that the High Court misconstrued the provisions of Paragraphs 5 and 7 of the Second Schedule to the IEBC Act; the aforementioned provisions ceased to have effect at the time the impugned judgment was rendered, having been declared unconstitutional in the ***Katiba Institute Case.*** The issue of quorum had previously been determined in ***Isaiah Biwott Case*** to be a minimum of three members as provided under Article 250 of the Constitution, which decision had not been overturned on appeal; and therefore, the issue was

not available for consideration by the High Court by virtue of the principle of estoppel.

[615] Conversely, in support of the High Court's findings, it was submitted that there was a distinction between "composition" and "quorum"; the composition of the IEBC and other independent commissions is provided under Article 250(1) of the Constitution as a minimum of three and a maximum of nine; the quorum (the number of commissioners required for it to undertake its business) is set at Paragraph 5 of the Second Schedule to the IEBC Act; the appellants had misinterpreted and misapplied the decision in ***Katiba Institute Case***; and that the circumstances of the ***Isaiah Biwott Case*** were distinguishable from the circumstances in the consolidated petitions before the High Court.

[616] The Court of Appeal considered the issue: *whether the IEBC had requisite quorum to carry out its business in relation to the Amendment Bill.*

[617] Majority of the Judges of Appeal *(Musinga, (P), Nambuye, Okwengu, Kiage, Gatembu & Tuiyott, JJ.A)* agreed with the High Court that IEBC lacked quorum for purposes of carrying out its business relating to the conduct of the proposed referendum including the verification of signatures in support of the Amendment Bill. Their rationale was that the Judgment in the ***Katiba Institute Case*** was a judgment *in rem*, which had not been challenged on appeal. Therefore, the relevant provisions in the Election Laws Amendment 2017, which had been declared unconstitutional on 6th April, 2018 had no effect upon the schedule of the IEBC Act that was sought to be amended or repealed. In essence, the quorum for the conduct of business at a meeting of the IEBC was five members of the commission and Parliament, well aware of the provisions of Article 250(1) of the Constitution as well as the mandate of the IEBC, while enacting the IEBC Act fixed the quorum at five members.

[618]*Tuiyott, J.A's* position was that a declaration of an amendment as constitutionally void does not revive a former provision; and revival of a previous provision of a statute has to be the work of the legislature. That given its important constitutional mandate, IEBC should carry out its functions with all hands on the deck; and to hold that the quorum could be anything less than half of the membership of seven is to weaken the Commission.

[619] Disagreeing with the majority, *Sichale, J.A* relied on Article 250(1) of the Constitution and expressed that it was absurd to expect the IEBC whose composition was allowed to be a minimum of three members under the Constitution to have a quorum of five members. To that end, no one had faulted the IEBC, as was then constituted with only three members, as being unconstitutional;

[620] The finding by the Court of Appeal, affirming the High Court's position on quorum has now been appealed before this Court. The crux of IEBC's appeal is the challenge to its quorum as affirmed by the Court of Appeal. IEBC framed three questions – the effect of the declaration of unconstitutionality of a statutory provision and specifically whether the declaration revives the repealed provision; effect of the decision *in rem* and appropriate remedies to actions of a public body conducted on the basis of a decision and guidance of court. In essence, IEBC seeks to protect the actions carried out on the strength of the ***Isaiah Biwott Case*** should it be found that it lacked quorum. IEBC otherwise maintains that it had quorum to fulfill its constitutional mandate.

[621] In determining these questions, I would have to look at the interpretation of Article 250 of the Constitution – and the resultant legislation in the IEBC Act. I would also bear in mind the previous decisions of the High Court in ***Katiba Institute*** and ***Isaiah Biwott Cases*** to understand their ramifications, if any. This is based on the common knowledge that neither the High Court, the Court of

Appeal nor the Supreme Court is being called upon to sit on appeal or review of the said decisions.

[622] It is common ground that at the time of instituting these proceedings, the IEBC had the chair and two commissioners only out of an initial seven at the time of the 2017 elections. There is no doubt to all the parties that the composition of IEBC as comprising the constitutional minimum of three commissioners is not under challenge.

[623] On 1st September 2017, this Court by majority nullified the Presidential election setting the stage for a re-run, the first under the Constitution. IEBC set the date for the re-run initially on 16th October 2017 and later to 26th October 2017 when the repeat election was eventually held. In the intervening period, Parliament amended the Election Laws, and in particular the IEBC Act in which the quorum for IEBC was varied to half the number of existing Commissioners subject to a minimum of three and that decisions were to be made by a majority of the members present and voting. This law was passed by both Houses of Parliament and it came into force automatically within fourteen days under Article 116(2) of the Constitution, the President having not assented to it.

[624] On 17th October 2017, one of the Commissioners, Dr. Roselyne Akombe made a public statement announcing her resignation. This did not have much effect on the re-run as the same was eventually held despite her departure. In November 2017, Katiba Institute filed its case in the High Court before *Mwita J* challenging the raft of amendments. Part of the laws challenged included Paragraph 5 of Second Schedule to the IEBC Act on quorum. In his decision delivered in April 2018, the amendments were declared as constitutionally invalid.

[625] In the same April 2018, three other Commissioners – Ms. Consolata Maina, Mr. Paul Kurgat, and Ms. Margret Mwachanya publicly announced their resignations from IEBC. Following notification to IEBC by the Speaker of the

National Assembly of vacancies in elective seats, by-elections became due and were scheduled for 17th August 2018 in Baringo South Constituency, Bobasi Chache Ward and North Kadem Ward.

[626] Isaiah Biwott, with the impending by-elections to be conducted by IEBC in mind moved to court in July 2018 seeking a declaration that the IEBC was properly constituted as it had the requisite three commissioners. *Okwany, J.*, well aware of *Mwita, J.'s* earlier decision in the ***Katiba Institute Case*** made her decision on 10th August 2018 in which the court declared IEBC to be validly constituted. The learned Judge made reference to administrative policies under which IEBC's mandate to conduct by-election falls.

[627] Just like in the ***Katiba Institute Case***, no appeal was preferred against the ***Isaiah Biwott Case***. IEBC proceeded to conduct the by-elections and its other operations. It is only towards the end of 2020 that the cases relating to the BBI Constitutional Amendment Initiative were filed, the first petition having been filed on 16th September 2020. The cases raise the issue of IEBC's quorum and the Judges of the Superior Courts below, in making their determination as earlier stated, made reference to Paragraph 5 of the Second Schedule on the quorum of IEBC. This is now the matter before us for determination, the same having transcended the court hierarchy.

[628] In addressing the appeal, I will consider the question of IEBC quorum and the applicable framework; and the place of the ***Katiba Institute*** and ***Isaiah Biwott Cases*** in these proceedings before commenting on the interpretation of Article 250 of the Constitution.

(a) Quorum

[629] The Constitution makes reference to quorum in two aspects. The first is under Article 121 of the Constitution in which it sets the quorum for legislative

sessions at fifty members for the National Assembly and fifteen members, in the case of Senate. Certain thresholds are set for certain motions such as impeachment of the President and constitutional amendment initiatives whereat motions require support by at least two-thirds of all the members present. The second reference to quorum is under Article 200(2)(d) of the Constitution in which Parliament is mandated to enact legislation with respect to ***"the procedure of assemblies and executive committees including the chairing and frequency of meetings, quorums and voting"*** [emphasis mine].

[630] Article 163(2) of the Constitution deals with the composition of this Court in the following terms:

> *"**The Supreme Court shall be properly constituted for the purposes of its proceedings if it is composed of five Judges**."*

This position is replicated in Section 23(1) of the Supreme Court Act thus:

> *"**For the purposes of the hearing and determination of any proceedings, the Supreme Court shall comprise five judges**."*

[631] On the other hand, the Constitution prescribes the composition of various institutions that are established under it. For instance, Article 163 of the Constitution establishes the Supreme Court as consisting of the Chief Justice, Deputy Chief Justice and five other Judges. Articles 130 and 241 set out the parameters of the composition of the National Executive and the command of the Defence Forces to reflect regional and ethnic diversity of the people of Kenya. Articles 97, 98 and 177 provide for the composition of the National Assembly, the Senate and Members of County Assembly, respectively, Article 152 on the Cabinet Article 144(3) on the Tribunals to remove President, the Director of Public Prosecutions (Article 158) and the Chief Justice (Article 168(5)(b)).

[632] Of the Independent Commissions, the Constitution only provides for the composition of seven commissions. This is in Article 127 of the Constitution as it relates to Parliamentary Service Commission, Article 171 of the Constitution on Judicial Service Commission Article 215 on commission on Revenue Allocation, Article 230 on Salaries and Remuneration Commission, Article 233 on Public Service Commission, Article 246 on National Police Service Commission and under the Sixth Schedule on Transitional and Consequential Provisions under Article 262, the Commission for the Implementation of the Constitution. For all other Commissions, the provisions of Chapter Fifteen on Commissions and Independent Offices apply. The provisions of Article 250 of the Constitution apply in respect of composition of commissions. Of note is that each commission must have a chairperson and members of the commission.

[633] So what is quorum? The ***Oxford English Dictionary*** meaning of quorum is "*the minimum number of members of an assembly or society that must be present at any of its meetings to make the proceedings of that meeting valid*." As pertains the Supreme Court, its composition and quorum, we have grappled with the issue time and again. In ***Gladys Boss Shollei v. Judicial Service Commission and Another,*** SC Petition No. 34 of 2014; [2018] eKLR, we underscored the special constitutional mandate that the court has, which cannot be delegated to any other forum in the entire governance set-up. We appreciated the special consideration that must be given to the Court's quorum and approved the doctrine of necessity to allow the minimum number of five as stipulated in the Constitution to remain available to the citizens of this country to fulfill the Court's mandate.

[634] In ***Jasbir Singh Rai & 3 Others v. Tarlochan Singh Rai & 4 Others*** SC Petition No. 4 of 2012 ; [2012] eKLR (***Jasbir Singh Rai Case 2012***), we reiterated the constitutional threshold for a competent bench of this Court as being five Judges and that the unavailability of a Judge to make the minimum five

carries a danger of occasioning a quorum deficit, making it impossible for the Court to discharge its prescribed constitutional functions. In his concurring opinion, *Ibrahim, SCJ* expounded the scenario of a five-judge bench of the Supreme Court being sufficient to determine a matter as follows:

> ***"The total number of the Supreme Court judges in this country can have at any given time under the Constitution is seven. The minimum that must sit is five. This means that the only allowance given by the Constitution, of the judges who may be away for whatever reason, including illness or worse still, death is two. If one of the remaining five is required to disqualify him/herself, it may be argued that out of necessity the Judge would have to sit, to ensure that there will be no failure of justice due to the Bench being below the quorum set by the Constitution."***

[635] In ***Chris Munga N. Bichage v. Richard Nyagaka Tong'i & 2 Others,*** SC Pet. No. 17 of 2014; [2016] eKLR we reiterated the (***Jasbir Singh Rai Case 2016***) that for all practical purposes, the court is properly constituted for the discharge of its constitutional mandate if it has a quorum of five Judges. We indicated that:

> ***"[35] Such germane perceptions make it clear that a five-judge Bench constitutes a practically and rationally valid platform for determining any matter coming up before this Court …"***

[636] Juxtaposing the above findings to the IEBC situation at hand, it is manifest that IEBC has a very specific and non-delegable constitutional mandate under Articles 88 to 90 of the Constitution. Elections and referenda management

are grave issues as can be traced back to our history as a country that necessitated the elevation of the election management body to the Constitution itself.

[637] Prior to the public outcry for reforms on the management of elections, appointment of Commissioners was subject to the whims of the political leadership at the time. No serious thoughts informed the choice, qualifications or abilities of the Commissioners. At some point we had up to twenty-two Commissioners all who wielded executive authority.

[638] The CKRC Final Report captures the recommendations on participatory governance. In relation to management of elections and quorum, it recommended the addition of the words 'independent and impartial' in relation to the Electoral Commission to appear in the Constitution, the appointment to the commission to follow a short-listing mechanism, and vetting by the National Assembly and any appointment should be from within the recommended names. On quorum, the recommendation was to reduce Commissioners to not less than seven and not more than eleven. This was informed by the finding that most countries have found it expedient to do with a smaller commission, much of the detailed work being done by competent staff. These issues were also echoed in the **Independent Review Commission (IREC) Report ("Kriegler Report")** and the report by the Commission of Inquiry on Post-Election Violence (CIPEV), 2008 (***Waki Reports***).

[639] The Interim Independent Election Commission, the predecessor to IEBC had nine members. At inception, the IEBC Act 2011 provided for nine commissioners of IEBC with the quorum was fixed at five. By an amendment made in 2016 to the Act, the composition of IEBC was reduced to seven. The quorum was maintained at five with a rider that decisions would be made by a majority of those present and voting. This had the implication that if minimum members were present in a meeting, any resolutions could be passed by three of them, being the

majority present and voting. This is the position that obtained at the time of the 2017 general elections. There were no legal challenges up to this point.

[640] In October 2017, an amendment was enacted to reduce the quorum further to half the existing number of commissioners, subject to a minimum of three, and that decisions be made by a majority of the members present and voting. This means, since three members could convene a meeting, two of them were sufficient to make a decision on behalf of the entire commission as they would constitute the majority of those present in a meeting. It is this possibility that does not augur well with the petitioners who moved to the High Court to challenge the validity of quorum of IEBC in the proceedings now before us, even if only regarding the Amendment Bill.

(b) The effect, if any, of the decisions in Katiba Institute and Isaiah Biwott Cases

[641] Submissions were made in favour of the doctrine of *stare decisis* in upholding the decisions already made by courts of concurrent jurisdiction in the ***Katiba Institute*** and ***Isaiah Biwott Cases***; and that the same were made *in rem*. Though it was not a whirlwind generated by the parties, suffice to state that decisions of courts of concurrent jurisdiction are not binding horizontally.

[642] In ***Evans Odhiambo Kidero & 4 Others v. Ferdinand Ndungu Waititu & 4 Others,*** SC Petition Nos. 18 and 19 of 2014; [2014], eKLR, the Court drew a distinction between *'vertical precedent'* and *'horizontal precedent'* as follows:

> *"**Article 163(7) of the Constitution constitutionalises the dual doctrine of stare decisis: vertical precedent, which is mandatory and horizontal precedent (at the Supreme Court) which is distinguishable**."*

In the ***Chris Munga Bichage Case*** we expounded on the vertical application of the doctrine by stating as follows:

> *"**48... The vertical and horizontal effects of the Constitutional Court's [of South Africa, the apex court in the Republic under the South African Constitution] decisions have only been reflected (like cases to be decided alike), which has guided to court's judgments**."*

[643] It should not matter whether the decision in issue was made by a numerically superior bench. This is sufficiently appreciated by the High Court and I need not over emphasise it. In ***Harrison Kinyanjui v. A.G. & Another*** Petition 74 of 2011; [2012] eKLR *Majanja, J.* expressed the following:

> *"**It must be remembered that each High Court judge has authority under Article 165 of the Constitution, to determine any matter that is within the jurisdiction of the High Court. Further, and notwithstanding the provisions of the Article 165 (4) the decisions of a three judge bench is of equal force to that of a single judge exercising the same jurisdiction. A single judge deciding a matter is not obliged to follow a decision of the court delivered by three judges**"* [emphasis mine].

In the same breadth, *Odunga, J.* in ***Philip K. Tunoi & Another v. Judicial Service Commission & Another*** Petition 244 of 2014; [2015] eKLR also addressed himself to the issue as follows:

> ***"My view is informed by the fact that the mere fact that a numerically superior bench is empaneled whose decision differs from that of a single judge does not necessarily overturn the single judge's decision. To overturn a decision***

of a single judge one would have to appeal to the court of appeal. Similarly appeals from decisions of numerically superior benches go to the Court of Appeal … it is clear that the only constitutional provision that expressly permits the constitution for a bench of more than one High Court Judge is Article 165 (4). Under that provision, for the matter to be referred to the Chief Justice for the said purpose, the High Court must certify that the matter raises a substantial question of law …"

[644] From ***Katiba Institute*** and ***Isaiah Biwott Cases*** which were adequately referred to by the Superior Courts, two pertinent issues arise. Firstly, with the declaration of constitutional invalidity of Paragraph 5 of the Second Schedule to the IEBC Act 2011 in the ***Katiba Institute Case,*** were the said provisions still available to both the decision in ***Isaiah Biwott Case*** and by the High Court in the present case now on appeal before us? Secondly, with the decision in ***Isaiah Biwott Case***, what is the fate of the decisions and actions undertaken by IEBC on the strength of the said Judgment?

[645] It is common ground that the High Court was neither sitting on appeal nor on review of the two decisions. It is also not in issue that the two decisions are not binding on the High Court. It is further not in contest that the cases are distinguishable. Submissions on the issues of *res judicata* and *sub judice* regarding the cases before the superior courts are just that, submissions and not appeals. Moreover, Counsel conceded that these issues were not appealed to this Court.

[646] The decision in ***Katiba Institute Case*** nullified the amendment comprised in Paragraph 5 of the Second Schedule of the IEBC Act. The Second Schedule is subsidiary legislation. This situation foretells an interesting scenario in the sense that while the composition of IEBC as set out in Section 5 of the IEBC

Act still contemplates the IEBC to consist of a chairperson and six other members, the conduct and regulation of business of affairs is to be as provided for in the Second Schedule as stipulated by Section 8 of the IEBC Act.

[647] This situation is not unique. The provision of Section 14 of the Supreme Court was invalidated in 2012 by the High Court as we acknowledged in ***Samuel Kamau Macharia & Another v. Kenya Commercial Bank Limited & 2 Others*** SC Application No.2 of 2011; [2012] eKLR. In the subsequent case of ***Jasbir Singh Rai & 3 Others v. Tarlochan Singh Rai Estate of & 4 Others,*** SC Petition No. 4 of 2012; [2013] eKLR, *Rawal DCJ & VP* (Rtd.), aware of the lacuna left upon striking out the provision stated:

> "***This could easily be accomplished by taking certain minimal actions, that fall within our constitutional and legislative mandate, such as asking Parliament to take comprehensive steps to address the void left after this Court struck out Section 14 of the Supreme Court Act in*** **the** ***Macharia Case.*****"**

[648] Over ten years later the same remains in our books as the Legislature is yet to address itself to this provision in light of the Court's determination. There are some instances where the courts take it upon themselves to transmit a copy of the decision to Parliament. Again, this does not of itself take away the legislative authority of Parliament or circumvent the law making process.

[649] There are other instances where the court invokes the structural interdict mechanism. This involves court supervision of its decision but again, it may have its challenges as was evident in the ***Mitu-bell Case*** and the ***Muruatetu Case***. This is both in the principle that courts should respect the doctrine of separation of powers in avoiding to infringe on the mandate of other state organs and in the settled jurisprudence that courts should not engage in policy formulation

particularly in areas reserved for other bodies and institutions. [see ***Mitu-bell Case, and Martin Wanderi & 106 others v Engineers Registration Board & 10 others,*** SC Petition No. 19 of 2015; [2018] eKLR.]

[650] Perhaps as the apex Court, it is time we settled this lacuna. Unlike the South African constitution under Article 172(2)(a) that suspends the declaration of invalidity of a statute pending confirmation by the Supreme Court, a similar provision does not exist in Kenya. As such, most declarations nullifying legislative provisions are not even appealed beyond the High Court's determination, as was the case with the ***Katiba Institute*** and ***Isaiah Biwott cases***.

[651] The South African legal system permits the use of reading in as an attempt to rescue provisions from declaration of unconstitutionality. Writing on this South African situation, Du Plessis, L. ***The status and role of legislation in South Africa as a constitutional democracy: some exploratory observations***. *PER* [online]. 2011, vol.14, n.4 [cited 2022-03-15], pp.92-102. observes that:

> ***"Severance and reading-in are judicially more activist remedial measures that can be taken either to restrict or to extend the scope of a statutory provision to rescue it from invalidity on constitutional grounds. Through severance that which is unconstitutional in an impugned legislative text (literally: words and phrases) are cut off from the rest of the text, and struck down, in order to preserve the constitutionally valid remainder of the text. Reading-in, on the other hand, refers to the insertion of words into an impugned legislative text in order to render it constitutional, and thereby avert a declaration of invalidity. Severance and reading-in are constitutional***

remedies -as opposed to reading strategies -commensurate with section 172(1)(b) of the Constitution which allows for "any order that is just and equitable" as an outcome of constitutional adjudication. Severance or reading-in can be ordered on the strength of this provision.

[652] Our Constitution under Article 23 allows courts to grant any other appropriate relief which as can be seen, is different from the South African position. Owing to the challenges cited above and considering that where decisions have already been made and the High Court has become *functus officio*, in my view is that in the absence of any legislation, in reaction to the court decision, there is automatic prospective presumption of unconstitutionality. This means that the invalidity takes effect from the date of judgment moving forward.

[653] In ***Council of Governors & 47 Others v. Attorney General & 3 Others (Interested Parties); Katiba Institute & 2 Others (Amicus Curiae),*** SC Reference No. 3 of 2019; [2020] eKLR**,** while rendering our advisory opinion on the constitutionality of the Appropriations Act, we held that our determination on the constitutional invalidity of the Appropriations Act enacted before the enactment of the Division of Revenue Act as unconstitutional prospectively, in view of the not very precise provisions of the constitution. We expressed ourselves on the matter as follows:

"[101] Thus, Section 39 of the Public Finance Management Act leaves no doubt that the National Assembly, cannot enact an Appropriations Act before enacting the Division of Revenue Act. This conclusion therefore dispenses with any submissions to the contrary. Does this determination mean that the current Appropriations Act is unconstitutional? <u>To this, our response is that, in view of the not very precise</u>

> ***provisions of the Constitution regarding the subject matter, the effect of this determination is prospective and not retroactive. What if Parliament enacts an Appropriation Act before the Division of Revenue Act in future? Our answer is that such an Act, would be of doubtful constitutional validity****"* [emphasis mine].

[654] In ***Senate & 2 others v. Council of County Governors & 8 Others,*** Petition No.25 of 2019; [2022] KSC 7 (KLR) a scenario arose in which an amendment to Section 91(f) of the County Governments Act was declared unconstitutional. We held that the effect of invalidating the amendment restored the initial section in the following terms:

> "***The County Governments Act itself in section 91(f) before it was amended by Section 3 of the Amendment provided for . . . Subsection (f) above was deleted by the amendment . . . The effect of the courts' declaring the amendment unconstitutional restored section 91(f)***" [emphasis mine].

[655] How do we deal with subsequent cases seeking to apply or interpret the very provisions before the courts of concurrent jurisdiction? The ideal way is to require the subsequent courts to maintain consistency in view of the doctrine of *stare decisis*. This is by no means elevating the decisions to the status of binding courts of concurrent jurisdiction. For good measure, where the court is nevertheless persuaded to depart from that decision, the court should endeavor to explain the reasons for departure.

[656] From the foregoing, it is clear that Paragraph 5 of the Second Schedule to the IEBC Act was still available for reference, the same having been restored upon invalidation of the amendments to that provision in the ***Katiba Institute Case***. Just like in the ***Isaiah Biwott Case***, it was open for the High Court in the present

matter to refer to and apply the said provisions to the case before it. In addition, the effect of this finding is that any actions done by IEBC on the basis of the Paragraph 5 of Second Schedule to the IEBC Act must remain valid, the decision not having been reviewed or overturned on appeal, and IEBC having continued to undertake its mandate, *inter alia*, on the strength of that decision.

[657] The issue before Court in the ***Isaiah Biwott Case*** revolved around the validity of IEBC for purposes of conducting a by-election which the court found to be one of those administrative processes, rather than policy, that could be dealt with by IEBC as composed at the time. This is distinguishable from the present case whereupon the superior courts were of the view that a matter relating to the conduct of referendum were constitutional imperatives under Article 88 of the Constitution which comprised policy issues, as propounded in the ***Isaiah Biwott Case***. This is inferred from the petitioners before the High Court challenge on the Administrative Procedures in relation to verification of signatures process, the issue not having been pursued on appeal.

[658] The semblance between policy and administrative procedures can be discerned from the provisions of Section 11A of the IEBC Act. This section addresses the relationship between commissioners and secretariat and it provides:

> *"**For the effective performance of the functions of the Commission –***
>
> ***(a) the chairperson and members of the commission shall perform their functions in accordance with the Constitution and in particular, shall be responsible for the formulation of policy and Strategy of the Commission and oversight; and***
>
> *(b)* ***the secretariat shall perform the day-to-day administrative functions of the commission and***

implement the policies and strategies formulated by the Commission" [emphasis mine].

For our purposes however, no purpose will be served by delving into this distinction between administrative and policy issues.

[659] Having so said, I do not think that the decisions in ***Katiba Institute*** and ***Isaiah Biwott Cases*** had any astonishing impact on the decision by the superior courts as each case was dealing with the specific judicial intervention requested. In any case, statutory provisions relating to the quorum of IEBC, a constitutional commission, can only be derivatives of the constitution itself. It is therefore judicious to briefly consider the issue within the context of Article 250 of the Constitution.

[660] As rightly noted in the ***Isaiah Biwott Case***, and as agreed by the parties, for as long as IEBC had three commissioners, that met the minimum threshold set out under Article 250 of the Constitution. The IEBC Act cannot override the Constitution.

[661] Undertaking a purposive interpretation of Article 250 of the Constitution using the existing constitutional interpretation tenets conclusively resolves the issue of quorum. This is so whether or not there existed any statutory provisions specific to quorum such as Paragraph 5 of the Second Schedule to the IEBC Act as already pointed out.

[662] On my part, I affirm that IEBC, in so far as it had three commissioners including the chairperson, and further that it took unanimous decisions with all the three commissioners present and voting in the deliberations, had quorum. The provisions of the IEBC Act cannot supersede the Constitution as that is the springboard on which laws are launched.

[663] Consequently, the administrative procedures made by IEBC to govern the verification of the signatures exercise, cannot be invalidated on the grounds that they were made without quorum. There was no evidence or demonstration by the parties to suggest that the procedures were made and approved by less than the three commissioners that were in office at the time.

[664] The sum total of my finding is that IEBC had quorum under Articles 88 and 250 in so far as it had at least three commissioners acting in unanimity. I do not think the decisions in ***Katiba Institute*** and ***Isaiah Biwott Cases*** had any substantive impact in this matter. IEBC's actions undertaken on the basis of the decision in ***Isaiah Biwott Case*** are sustained to the extent that they were made with the unanimity of the three commissioners remain valid in law. Consequently, I set aside the decision of the High Court and the Court of Appeal in entirety.

(vii) Whether the interpretation of Article 257(10) of the Constitution requires that all specific proposed amendments to the Constitution should be submitted as separate and distinct referendum questions

[665] The High Court was asked to determine whether Article 257(10) of the Constitution requires all specific amendments to be submitted as separate and distinct referendum questions to the people on the referendum ballot paper. This was through Petition No. E416 of 2020 by Morara Omoke. The petitioner urged for the separation and distinction of referendum questions so that the people can exercise their free will to approve or reject specific proposals to the amendment as opposed to a mere "Yes" or "No" question to the entire Amendment Bill. To him, this was so especially since the Amendment Bill had more than 18 amendments touching on different clauses of the Constitution which obliged IEBC to formulate several referendum questions as contemplated by Section 49 of the Election Act.

[666] The petitioner relied on the ***Final Report of the Independent Commission on Referendums*** released in July 2018. This Report advocates that a multi-option referendum debate may be less divisive than a binary referendum, as opinion will be less polarized. In the end, the High Court found that Section 49 of the Elections Act supported the preposition that omnibus amendments ought to be presented as separate referendum questions and what should be subjected to a referendum was "those questions" and not the entire constitutional amendment Bill. The High Court held:

> ***"614. In our scenario, Article 255(1) of the Constitution provides that "A proposed amendment to this Constitution shall be enacted in accordance with Article 256 or 257…" In our view what the Constitution contemplates is that each amendment to the Constitution shall be considered on its own merit and not within the rubric of other amendments.***
>
> ***615. We opine that the drafters of the Constitution were alive to the fact that a Bill to amend the Constitution may propose different amendments to the Constitution some of which may be agreeable to the voters while others may not. In such event to lump all such proposals together as an omnibus Bill for the purposes of either laundering or guillotining the whole Bill is not permissible under our constitutional architecture. Not only does such a scenario lead to confusion but also denies the voters the freedom of choice… A faithful reading of Article 255(1) of the Constitution yields the conclusion that each of the proposed amendment clauses ought to be presented as a separate referendum question. This not only avoids***

confusion but it also allows the voters to decide on each presented amendment question on its own merit.

619. Our understanding of this section is that what is to be subjected to the referendum is the question or questions as opposed to the Constitution of Kenya Amendment Bill itself. It is, therefore, our finding and, we so hold, that Article 257(10) requires all the specific proposed amendments to be submitted as separate and distinct referendum questions to the people in the referendum ballot paper and to be voted for or against separately and distinctively."

The High Court thus issued a declaration that Article 257(10) of the Constitution required that all the specific proposed amendments to the Constitution be submitted as separate and distinct referendum questions to the people.

[667] Dissatisfied with these findings by the High Court, BBI National Secretariat and Hon. Raila Odinga appealed against it to the Court of Appeal in Civil Appeal No. E292 of 2021 – ***Building Bridges to a United Kenya, National Secretariat & Another v. David Ndii & 76 Others***. The Attorney General in Civil Appeal No. 293 also faulted the High Court's finding on Article 257(10) of the Constitution.

[668] The Court of Appeal by majority (*Nambuye, Okwengu, Kiage & Gatembu, JJ.A*) affirmed the High Court's position. *Musinga, (P)* was of the view that what was subjected to the referendum was the Amendment Bill and left it to IEBC as an independent constitutional body to determine how to referendum should be conducted. *Tuiyott, J.A* relying on Section 49(2) of the Elections Act held that the issue was not live as IEBC was yet to receive a request to hold the referendum.

[669] *Tuiyott, J.A* was persuaded by the submissions of the Attorney General and the IEBC that the High Court encroached, prematurely, onto the IEBC's constitutional and statutory mandate and offended the doctrine of ripeness as there was no live controversy before it and rejected the respondents retort that the High Court was properly moved under Article 165(3) which gives the High Court jurisdiction to determine, not just, whether a constitutional right has been denied or violated but also when it is under threat.

[670] Any proposed amendment to the Constitution, whether by parliamentary initiative or popular initiative, which relates to a matter under Article 255(1) must be referred to a referendum. The manner in which a proposed amendment is to be submitted to the people in referendum is contained in Part V of the Elections Act under which Section 49(2) states that the issue of the referendum shall be framed by the IEBC, which shall determine the question or questions to be determined during the referendum.

[671] As stated in the Judgment of the Court of Appeal, it is a fact that in this instance, the IEBC had not received the request to hold the referendum, it had not discharged its responsibility of framing the referendum question or questions, and it had not determined the manner or formula with which it would frame such referendum question or questions. It is trite law that for an issue to be justiciable, it must be 'ripe' for adjudication. The US Supreme Court outlined the basic rationale of the principle as to:

> "...***prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects***

felt in a concrete way by the challenging parties." (See ***Abbott Laboratories v. Gardner*** 387 U.S. 136)

Our courts have previously held that:

> "...***where a constitution has reposed specific functions in an institution or organs of state, the Court must give those organs sufficient time or leeway to discharge their constitutional mandate and only accept an invitation to intervene when those organs or bodies have demonstrably been shown to have acted contrary to their constitutional mandate or in contravention of the constitution***."

(See *Makau, J.* in ***Law Society of Kenya v. Attorney General & another; National Commission for Human Rights & another (Interested Parties),*** Petition No. 132 of 2020; [2020] eKLR).

[672] *Mativo, J.* in ***Republic v. National Employment Authority & 3 Others*** *Ex-parte* ***Middle East Consultancy Services Limited*** Judicial Review Application No. 171 of 2018; [2018] eKLR, explaining that the principle of ripeness *"...prevents a party from approaching a Court prematurely at a time when he/she has not yet been subject to prejudice, or the real threat of prejudice, as a result of conduct alleged to be unlawful*," cited the South African case of ***Vrynhoek v. Powell No & others*** 1996(1) SA 984 (CC) where the court emphasised that:

> "...***the doctrine of ripeness serves the useful purpose of highlighting that the business of a court is generally retrospective; it deals with situations or problems that have already ripened or crystallised, and not with prospective or hypothetical ones. Although, as Professor***

Sharpe points out and our Constitutional cases are more generous than for ordinary suits, even cases for relief on constitutional grounds are not decided in the air…The time of this Court is too valuable to be frittered away on hypothetical fears of corporate skeletons being discovered."

[673] The late *Onguto, J.* in ***Wanjiru Gikonyo & 2 Others v. National Assembly of Kenya & 4 Others,*** Petition No. 453 of 2015; [2016] eKLR (***Wanjiru Gikonyo Case***) stated that there is a distinct and coherent jurisprudence within our jurisdiction on the 'ripeness' and the justiciability dogma. The learned Judge stated that it is 'settled policy' that:

"…***courts and judges are not advise-givers. The court ought not to determine issues which are not yet ready for determination or is only of academic interest having been overtaken by events. The court ought not to engage in premature adjudication of matters through either the doctrine of ripeness or of avoidance. It must not decide on what the future holds either***."

The court cited the decision in ***John Harun Mwau & 3 Others v. AG & 2 Others*** HC Petition No. 65 of 2011 consolidated with Petitions Nos 123 of 2011 and 185 of 2011; [2012] eKLR where it was found that the:

"…***Court should not deal with hypothetical and academic issues. In our view, it is correct to state that the jurisdiction to interpret the constitution conferred under Article 165(3)(d) does not exist in a vacuum and it is not exercised independently in the absence of a real dispute. It is exercised in the context of a dispute or controversy***."

[674] The Court in ***Wanjiru Gikonyo Case*** also cited the decision in the ***Kanini Kega Case*** where the court explained that whether or not an issue is justiciable depended on the legal principles surrounding the particular act done as discernible from the legal instruments appurtenant to the said action.

[675] We have also expressed ourselves on this issue. In ***Nicholas Kiptoo Arap Korir Salat v. Independent Electoral and Boundaries Commission & 7 Others,*** SC Petition No. 23 of 2014; [2015] eKLR we stated as follows:

> ***"[102] This Court has recently held that it will not take up a matter that is not yet ripe for its admission and determination. In Yusuf Gitau Abdalla v. Building Centre (K) Ltd & 4 Others, Sup. Ct. Petition No. 27 of 2014; [2014] eKLR, Ibrahim SCJ held as follows (paragraph 16):***
>
> > *'This Court can only assume jurisdiction bestowed to it by the Constitution and/or Statute. Just as in the S. K. Macharia case, the Court said that it cannot assume jurisdiction by way of judicial craft; ...The Court's mandate is to do justice, however that justice can only be dispensed through the laid down legal framework. Courts of justice have the jurisdiction to do justice and not injustice. However, the law acknowledges that judges are human and are fallible hence the judicial remedies of appeal and review.'*
>
> ***[103] This ripeness principle is one that we have to zealously guard and avoid falling into the trap of pronouncing ourselves on matters that are not properly before us, more so those that are still finding their way up the judicial hierarchy. (See the discussion of the Supreme***

Court's application of the ripeness doctrine in Godfrey Nathan Kitiwa and Kaira Nabasenge, 'Civil Litigation: Striking the balance between Procedural Technicality and Substantial Justice: A Case Study of the Kenya Supreme Court's Rules and Procedure' The Law Society of Kenya Journal Volume II: 1,2015, pages 27-48)."

[676] The upshot is that, guided by the doctrine of ripeness, the courts retain the discretion, considering the circumstances of the matter, to decide whether such matter is temporally amenable for adjudication.

[677] Our democratic architecture and the principle of separation of powers as contained in the Constitution 2010 requires that all state organs be allowed to freely, independently, and legally, exercise their respective constitutional authority. As such, the courts ought not overstep their constitutional mandate and infringe on the authority of another state organ or entity by prescribing the manner in which they should make decisions; decisions which they have been granted the constitutional authority to make.

[678] To adjudicate based on the prospect that the IEBC may or may not exercise its authority to frame the relevant referendum questions would be to adjudicate based on 'speculative future contingencies' thus offending the doctrine of ripeness as well as the constitutional doctrine of separation of powers between state organs. On the facts of this case, the two superior courts below assumed a jurisdiction they did not have as the issue at hand was not ripe for interrogation by any court. What was placed before court is a hypothetical assertion concerning the nature of the questions from the Amendment Bill to be put to Kenyans in a referendum. I find that this issue is not ripe and is therefore not justiciable. In my view, it would be a complete misuse of precious judicial time to get entangled in such a non-issue as this one. I refrain from such an enterprise.

Summary of Findings:

(i) The Constitution of Kenya, 2010 has a basic structure. The basic structure doctrine is not derivable from our Constitution and consequently, the basic structure doctrine wherever else it may be found, does not apply in the Kenyan constitutional context. The manner and process through which sovereign power is exercised by the citizens, in its different forms is fundamentally important under our constitutional architecture and the Constitution can be altered through other mechanisms not limited to the primary constituent power.

(ii) The President cannot directly initiate changes or amendments to the Constitution. An amendment of the Constitution can only be initiated through a parliamentary or popular initiative under Articles 256 and 257 of the Constitution. Consequently, the Constitution of Kenya (Amendment) Bill 2020 is unconstitutional.

(iii) The constitutionality of the Second Schedule of the Constitution of Kenya (Amendment) Bill 2020 is not moot and the said schedule is unconstitutional in so far as it directs the Independent Electoral and Boundaries Commission on not only delimitation of the number of constituencies but also the distribution of the proposed new constituencies and the timelines within which to operationalize the same within the existing constitutional parameters of Article 89 of the Constitution.

(iv) The President was not properly served with the pleadings and was therefore not accorded an opportunity to participate in the proceedings in his personal capacity in which he had been sued. The President or the person performing the functions of the office of President nevertheless enjoys absolute immunity from civil proceedings during

his tenure in office as it is difficult to distinguish between personal and official capacity.

(v) On public participation in the issue before us is that it is neither moot nor premature. While public participation is central to the constitutional dispensation, in the context of constitutional amendment initiative through popular initiative, it is a continuous process to be considered at each step. There is no obligation on the promoters to undertake any public participation prior to the presentation of the Amendment Bill as all that is required is to get one million signatures to support it. There was lack of meaningful participation at the verification of signatures by Independent Electoral and Boundaries Commission. It is best left to the Legislature to enact a law that will address the different roles of the different players in the process ranging from the promoter, Independent Electoral and Boundaries Commission, County Assemblies, Houses of Parliament and the referendum process, the Constitution and this Court having laid out the framework.

(vi) My finding is that IEBC had quorum under Articles 88 and 250 of the Constitution of Kenya 2010. Its actions undertaken on the basis of the decision in ***Isaiah Biwott Case*** are sustained to the extent that they were made with the unanimity of the three commissioners remain valid in law. Consequently, the decision of the High Court and the Court of Appeal is set aside in entirety.

(vii) Under Article 257(10) of the Constitution of Kenya 2010, the issue of referendum question is premature, not ripe and therefore not justiciable. What was placed before court is a hypothetical assertion concerning the nature of the questions from the Constitution of Kenya (Amendment) Bill 2020 to be put to Kenyans in a referendum. In my view, it would be a complete misuse of precious judicial time to get

entangled in such a non-issue as this one. I refrain from such an enterprise. I therefore do not see the need to go into its merit.

(viii) This being a public interest litigation, each party shall bear their own costs.

[679] I greatly appreciate all Counsel, both senior and young and upcoming for their industry, immense research and the cadre with which they presented the matter before us in this important constitutional matter which inevitably helps the growth of jurisprudence.

[680] The Orders of the Court are those in the final disposition of the Court.

JUDGMENT OF M. K. IBRAHIM, SCJ

A. INTRODUCTION

[681] The Chief Justice and President of the Supreme Court, Hon. Lady Justice Martha Koome, has in the lead Judgment aptly captured the history and background of the appeals before us. She has also pertinently set out the written and oral submissions by all Counsel as well as *amici*, for which I thank her. I see no need to replicate or rehash the same.

[682] On 9th November 2021, the Court framed seven issues for determination, *inter alia:*

(i) *Whether the Basic Structure Doctrine is applicable in Kenya; if so, the extent of its application; whether the basic structure of the Constitution can only be altered through the primary constituent power; and what constitutes the primary constituent power;*

(ii) *Whether the President can initiate changes/amendments to the Constitution; and whether a constitutional amendment can only be initiated by Parliament through a parliamentary initiative under Article 256 of the Constitution or through a popular initiative under Article 257 of the Constitution;*

(iii) *Whether the Second Schedule to the Constitution of Kenya (Amendment) Bill, 2020 was unconstitutional;*

(iv) *Whether civil proceedings can be instituted against the President or a person performing the functions of the office of the President during his/her tenure of office with regard to anything done or not done contrary to the Constitution;*

(v) *The place of public participation under Article 10 vis-a- vis the role of IEBC under Article 257(4) of the Constitution; and whether there was public participation in respect of the Constitution of Kenya (Amendment) Bill, 2020;*

(vi) *Interpretation of Articles 88 and 250 of the Constitution with respect to composition and quorum of IEBC; and*

(vii) *Whether the interpretation of Article 257(10) of the Constitution entails/requires that all specific proposed amendments to the Constitution should be submitted as separate and distinct referendum questions.*

[683] I find myself substantially in agreement with the arguments and conclusions by *Koome, CJ & P* on some issues. Just as well, on some I am of divergent views. I render my opinions and pronouncements on the issues as delineated by the Court.

B. ANALYSIS AND DETERMINATION

(i) Basic Structure and the Doctrine of Basic Structure

[684] There is contestation in the twin issues of whether the Constitution of Kenya, 2010 has a basic structure and what it comprises of as well as whether the basic structure doctrine applies to Kenya. I propose to answer it in four phases: its origin, its applicability to Kenya, whether we have a basic structure and finally whether we can change the basic structure and how.

[685] Doctrine is defined in the ***Black's Law Dictionary***, 11th Edition as: *"a principle especially a legal principle, that is widely adhered to."* While legal principle is defined as "*a background concept that may influence a court's decision despite not being outcome-determinative.*"

[686] ***Chambers Dictionary*** defines doctrine as *"a body of religious, political etc teaching, a guiding principle, belief or precept; teaching."* It also defines principle as *"a source, root, origin; a fundamental or primary cause; a beginning; essential nature; a theoretical basis or assumption form which to argue, etc; an instinct or natural tendency* (as in the pleasure-pain principle*), or a faculty of the mind; a source of action; a scientifically law, esp as explaining a natural phenomenon or a way a machine works; a fundamental truth on which others are founded or from which they spring; a law or doctrine from which others are derived; a general rule that guides one's moral conduct, consistent regulation of behavior according to moral law; the morality or moral aspect of a policy or course of action."*

[687] An uncontentious example of a popular doctrine is that of separation of powers in its tripartite form comprising the Executive, Judiciary and Legislature. We credit French Jurist, Charles Louis de Secondat, Baron de La Brède et de Montesquieu, simply referred to as Montesquieu, as the father of the doctrine. He elaborated it in his 1748 treatise ***The Spirit of the Laws***. However, even as we make reference to the doctrine of separation of powers today, it is not to say that the doctrine has not evolved since 1748 or that it is only Montesquieu who discussed it. In Kenya, we have not only embraced it but incorporated the same into both our Constitution and our domestic laws. Nevertheless, that incorporation was with some modification to suit our peculiar circumstances such as the addition of the independent commissions and offices. Yet, in doing so, we have not explicitly provided for it, or even defined the doctrine of separation of powers in our laws. Still, it is evident that we have applied it.

[688] Much in the same way, our Constitution does not explicitly state that it has a basic structure or that the doctrine of basic structure applies to it. The origin of the doctrine is attributed to the 1973 decision by the Supreme Court of India of in the case of ***Kesavananda Bharati v. State of Kerala & Another*** (1973) 4

SCC 225 where by a majority of 7:6, the Court held that Article 368 of the Indian Constitution *"does not enable parliament to alter the basic structure or framework of the Constitution." Justices KS Hedge* and *AK Mukherjea* further stated that:

> ***"Our Constitution is not mere political document. It is essentially a social document. It is based on social philosophy and every social philosophy like every religion has two features, namely, basic and circumstantial. The former remains constant but the latter is subject to change. The core of a religion always remains constant but the practices associated with it may change. Likewise, a Constitution like ours contains certain features which are so essential that they cannot be changed or destroyed. In any event it cannot be destroyed from within. In other words, one cannot legally use the Constitution to destroy itself."***

[689] The doctrine of basic structure was further elaborated in the case of ***Minerva Mills v. Union of India,*** AIR 1980 SC 1789. Here there was a challenge to the 42nd Amendment through which Parliament sought to bar the Judiciary from questioning any of its amendments. The Court struck down the amendment. It found that since the Constitution had conferred a limited amending power on Parliament, Parliament could not, through the exercise of that limited power, seek to enlarge that very power into an absolute power. The Court held as follows:

> ***"Amend as you may even the solemn document which the founding fathers have committed to your care, for you know best the needs of your generation. But, the***

Constitution is a precious heritage, therefore, you cannot destroy its identity."

[690] However, as *Kiage, J.A* correctly pointed out the doctrine's first foothold in India was in 1967 in the case of ***Golaknath v. State of Punjab*** AIR 1967 SC 1643. The Court however did not accept any limitations on Parliament's power to amend the Constitution. In this case, the argument for implied limitations was advanced by a member of the Bar, M.K. Nambyar. He who owed the argument to the writings of Professor Dietrich Conrad, a German professor. Prof. Conrad, in February of 1965, while on a visit to India, delivered a lecture on implied limits to the power to amend at the Banaras Hindu University, Faculty of Law. He then sent a paper on the same subject to Prof. T.S. Rama Rao, where it then caught the attention of Counsel Nambyar. This connection of the doctrine of basic structure to Germany was acknowledged by the Supreme Court of India years later in the case of ***M. Nagaraj v. Union of India*** (2006) 8 SCC 12 where the Court stated:

"The concept of a basic structure giving coherence and durability to a Constitution has a certain intrinsic force. This doctrine has essentially developed from the German Constitution".

[691] It is easy to see why a German jurist would propagate implied limits to amending power. Article 79(3) of the Basic Law of the Federal Republic of Germany, adopted on 8th May 1949, explicitly bars amendments to provisions concerning the federal structure and to basic principles laid down in Articles 1 and 20 on human rights and the democratic and social set up. The Germans were healing from the Nazi era and it is for that reason that the framers of the Basic Law sought to create a constitution that would safeguard against the emergence of either the Weimar Republic's overly fragmented, multiparty democracy or the Third Reich's authoritarianism. Article 79 provides as follows:

"Article 79 [Amendment of the Basic Law]

(1) This Basic Law may be amended only by a law expressly amending or supplementing its text. In the case of an international treaty regarding a peace settlement, the preparation of a peace settlement, or the phasing out of an occupation regime, or designed to promote the defence of the Federal Republic, it shall be sufficient, for the purpose of making clear that the provisions of this Basic Law do not preclude the conclusion and entry into force of the treaty, to add language to the Basic Law that merely makes this clarification.

(2) Any such law shall be carried by two thirds of the Members of the Bundestag and two thirds of the votes of the Bundesrat.

(3) Amendments to this Basic Law affecting the division of the Federation into Länder, their participation on principle in the legislative process, or the principles laid down in Articles 1 and 20 shall be inadmissible" [emphasis mine].

[692] However, the concept of implied limits to amending powers predates even the Basic Law of the Federal Law of German. There are two constitutional lawyers who are credited with propagating the ideology at the beginning of the 20th Century. First, is German constitutional lawyer Carl Schmitt who developed the concept within the framework of the Weimer Constitution of 1919 in his book *"Verfassungslehre"* published in 1928. One cannot mention Carl Schmitt without acknowledging the controversy surrounding his work due to his support and involvement in the Nazi Regime. That notwithstanding, his work on constitutional theories has had a bearing on advancing the field. He developed his theory from the idea that the constituent power was the basis for all powers. He considered the

constituent power to be a legal entity that exists outside, or in the alternative alongside, a constitution. He further theorized that this constituent power could either be the people or the monarch. For him it is through the will of the constituent power that a constitution comes into being and derives validity. According to him, only the constituent power is able to decide fundamental questions relating to the manner and form of its own political existence, from the form of government, separation of powers as well as introduction of fundamental rights. Noting that the Weimar Constitution provided for amendment under Article 76, he argued that under that provision, only such provisions as constitutional laws could be amended by the amending power as a constituted power. He further argued that the amending power was not permitted to change the norms that made up the constitution in the material sense. He wrote:

> ***"The limits for constitutional amendment follow from the rightly-understood notion of constitutional change. A competence given only by a constitutional law to amend the constitution means that one or several constitutional laws can be changed, but only on the condition that the identity and continuity of the constitution as a whole are preserved."***

[693] Though he did not expressly specify how the people could act as the constituent power, he argued that the use of constituent power was not and could not be subject to a legal process. In line with this, he was opposed to judicial oversight and contended that the role of the '*guardian of the Constitution'* should be the executive branch, specifically the President of the Reich.

[694] Schmitt's theory was considered unique and differed from the popular thinking at the time. Majority of German constitutional lawyers during that time did not recognize the idea of an *almighty constituent power* outside the constitution. However, we must remember this was the onset of the Third Reich in

German history and the beginning of a dark period of the Nazi rule with Adolf Hitler at the helm, having taken office on 30th January, 1933.

[695] Schmitt's work however proved useful during the framing of Germany's Basic Law when entrenching the eternity clause placing limits on constitutional amendment. This provision has been interpreted by the German Constitutional Court in the decision of ***Lisbon BVerfGE*** 123, 267 (343-44) delivered on 30th June 2009. The Court rejected accompanying law to the Treaty of Lisbon for lack of sufficient rights of participation in the law making and treaty amendment procedures. The Court held as follows:

> ***"From the perspective of the principle of democracy, the violation of the constitutional identity codified in Article 79.3 of the Basic Law is at the same time an encroachment upon the constituent power of the people. In this respect, the constituent power has not granted the representatives and bodies of the people a mandate to dispose of the identity of the constitution. No constitutional body has been granted the power to amend the constitutional principles which are essential pursuant to Article 79.3 of the Basic Law. The Federal Constitutional Court monitors this."***

[696] Right next door in France and at around the same time as Schmitt, was Maurice Hauriou, a professor of administrative and constitutional law. He published his two constitutional law treatises ***"Précis de Droit Constitutionnel"*** and ***"Précis Elémentaire de Droit Constitutional"*** in 1923 setting out his theory of implied limits on constitutional amendment. Hauriou argued that constituent power was the founding legislative power that acted in the name of the sovereign nation but was not unbound. Rather, it was subject to certain rules of law. He argued that the genuine constituent power

should be exercised by an organ that was close to the nation itself and for him that organ was a national assembly expressly elected to elaborate the constitution. He also argued that the process could be complemented by submitting the constitution to a national referendum.

[697] Hauriou also considered that due to the special nature of a constitution as the highest law, the amendment should be undertaken by special procedure distinguishable from ordinary legislation. Further he attempted to distinguish between a partial and total revision of the constitution. He argued that total revision of a constitution could, like the enactment of the constitution, only be done by a national assembly specifically elected for this purpose. Consequently, he regarded the amending power as a limited power bound by the relevant amendment provisions unless it was like a national assembly

[698] In addition, Hauriou argued that ideally even a constitutional assembly should be bound by the relevant constitutional limits during the amendment process. Hauriou added that certain principles were so essential that they had a higher rank or legitimacy than the written constitution itself, irrespective of whether those principles were contained in the constitution. He contended that those principles could be derived from the fact that the law itself was an organized system. For him those principles expressed the most important content of the relevant legal system. Those core principles had the highest legitimacy and therefore constituted the constitutional legitimacy. He argued that these principles included the core content of the fundamental rights and the Republican principle, equality, the separation of powers between the administration and the judiciary, and the publication of tax regulations. For Hauriou, a constitutional amendment had to be in conformity with those principles.

[699] Unlike Schmitt, he argued for judicial oversight and considered that a constitutional judge should have the right to annul unconstitutional amendments.

[700] Going even further back in history, over a century before Schmitt and Hauriou had interacted with the concept, the founding fathers of the United States of America were already tinkering with the idea of implicit limits of amendments. Yaniv Roznai in his article "***Unconstitutional Constitutional Amendment; The Migration and Success of a Constitutional Idea",*** *The American Journal of Comparative Law Vol 61, No.3 (2013)* drew attention to the debate of the first American Congress. More particularly, the debate that took place on 13th August 1789 on constitutional amendments. During this debate, Mr. Roger Sherman, one of the delegates in the 1787 Philadelphia Convention that produced the United States Constitution, in opposing the manner of amendment had the following to state:

> ***"The constitution is the act of the people and ought to remain entire. But the amendments will be the act of the State Governments. Again, all the authority we possess is derived from that instrument; if we mean to destroy the whole, and establish a new constitution, we remove the basis on which we mean to build"*** [emphasis mine].

[701] In 1826, before the House of Representatives, Edward Everett, representative from Massachusetts, argued that when making constitutional amendments, it is important to confine the changes to only those necessary to carry the constitutional provision into better operation. He was opposed to changes that alter the essential features of the Constitution. He made the following argument in favour of implicit limitations:

> ***"[T]he distinction still recurs, that to amend is one thing, essentially to change another. To amend is to make changes consistent with the leading provisions of the Constitution, and by means of which those leading provisions will go into happier operation. Can this be the***

same thing as to change . . . those essential provisions themselves?

.....

***One of the two propositions must be maintained, either that these two expressed limitations are the only limitations of the amending power, or, that there is a prior limitation of the amending power, growing out of the nature of the Constitution as a compact. Unless we admit the latter proposition, there is nothing to prevent [the majority required for amendments] . . . from depriving the remainder of the States of any advantage they possess in these provisions of the Constitution, which guaranty the Federal equality, which was not to be touched without unanimous consent. Nay, sir, without this prior limitation of the amending power, there is nothing to prevent the only express limitation which not exists from being itself removed by way of amendment ... I am, therefore, strongly inclined to think, that the principle of this implied limitation must always be consulted; that this must show us in each case how far alterations may go, and that it does dictate to us that amendments must be confined to those changes which are necessary, not to alter the essential provisions of the Constitution, but to carry them into more perfect operation*"** [emphasis mine].

[702] In 1896, George Ticknor Curtis, an American historian and lawyer, was also in favour of implicit limitations on the amending power. For him, the power to amend a constitution should be limited to changing the mode of effecting the

provisions of the constitution. In his 1896 treatise ***Constitutional History of the United States*** *(Harper & Brothers, 1889)* he wrote as follows:

> ***"It seems to me, therefore, that while it is within the amending power to change the framework of the government in some respects, it is not within that power to deprive any state, without its own consent, of any rights of self-government which it did not cede to the United States by the Constitution, or which the Constitution did not prohibit it from exercising. In other words, I think the power of amending the Constitution was intended to apply to amendments which would modify the mode of carrying into effect the original provisions and powers of the Constitution, but not to enable three fourths of the states to grasp new power at the expense of any unwilling state"*** [emphasis mine].

[703] William Marbury, a Justice of the Peace in the District of Columbia, in his article "***Limitations upon the Amending Power***" *33 Harv L. Rev. 223 (1919-1920)* argued against constitutional amendments by delegated power that had the effect of destroying the constitution. He wrote as follows:

> ***"It may be safely premised that the power to "amend" the Constitution was not intended to include the power to destroy it. The purpose of "the people of the United States" in adopting this Constitution, as expressed in the preamble, was, "to form a more perfect Union" of the States -a Union more perfect than the " perpetual" Union which had been established under the original Articles of Confederation. It is not conceivable that the people, when they conferred upon the legislatures of three fourths of the***

states the power to amend this Constitution, intended to authorize the adoption of any measures, under the guise of amendments, the effect of which would be to destroy, wholly or in part, any of the members of this perpetual Union."

[704] Even the U.S. Supreme Court in 1885 in the case of ***Dodge v. Woolsey*** 59 U.S. (18 How.) 331, 347-348 (1885) found that the constitutional amendment power by state organs is a delegated power because it is exercised by agents, and is therefore is limited. The Court stated as follows:

"The departments of the government are legislative, executive, and judicial. They are coordinate in degree to the extent of the powers delegated to each of them. Each, in the exercise of its powers, is independent of the other, but all, rightfully done by either, is binding upon the others. The constitution is supreme over all of them, because the people who ratified it have made it so; consequently, anything which may be done unauthorized by it is unlawful. But it is not only over the departments of [59 U.S. 331, 348] the government that the constitution is supreme. It is so, to the extent of its delegated powers, over all who made themselves parties to it."

The Court however abandoned this approach in the case of ***Dillon v. Gloss***, 256 U.S. 368, 373-374, 41 S. Ct. 510, 65 L. Ed. 994 (1921).

[705] I have gone into rather some detail regarding the origin. Legal doctrines and principles are often traceable to a particular school of thought and more specifically to certain scholars who sought to elaborate them. This is not to make a case for incorporation of all doctrines and legal principles that are in existence. The importance of this is to address the contestation regarding whether the basic

structure doctrine was a creature of judicial craft or even whether the courts are capable of creating doctrines. From this it is evident that the doctrine of basic structure was not invented by the Judiciary in India. Rather, it was conceptualized years before by both civil law and commonwealth systems as a necessity when confronted with difficult moments in their history.

[706] It has been submitted that the doctrine of basic structure has yet to gain universal acceptance, and for that reason, we are asked to find that it is not applicable. I do not think it is necessary, that before application of doctrine or legal principle, the same must have universal application. I say this because not all legal doctrines and principles are universally applicable due to the differences in legal systems, such as civil and common law. This is also because of our unique peculiarities as States due to our historical, cultural and social systems. My thoughts on this are further fortified by our Constitution read together with the Judicature Act, Cap 8 Laws of Kenya, which allow us to apply doctrines that are in line with our laws, more so, if they assist us better interpret and apply them.

[707] On whether the doctrine of basic structure is widely used, Yaniv Roznai in his article ***"Constitutional Amendability and Unamendability in South-East Asia"*** *(HeinOnline 14 J. Comp. L. 188 (2019)* details how the doctrine has *'migrated'* to other countries outside India. Pertinent to our discussion are Malaysia and Singapore. At first instance, they rejected the doctrine for reasons similar to those advanced before us. Then later on, embraced the doctrine.

[708] Malaysia, which at first in the decision of ***Loh Kooi Choon v. Government of Malaysia*** (1977) 2 MLJ 70, the Federal Court held that Parliament was the organ chosen to amend the Constitution and it was not for the courts to question policy amendments adopted by Parliament. In the case of ***Phan Chin Hock Vs. Public Prosecutor*** (1980) 1 MLJ 333, the Federal Court again, was more direct in rejecting the doctrine holding that *"Parliament may amend the Constitution in any way they think fit, provided they comply with all the*

conditions precedent and subsequent regarding the manner and form prescribed by the Constitution."

[709] However, at the beginning of the 21st Century, the Federal Court, in the case of ***Sivarasa Rasiah v. Badan Peguan Malaysia*** (2010) 2 MLJ 333, begun its acceptance of the doctrine. By way of *obiter*, the Court stated that Parliament cannot enact laws that violate the basic structure and that *"it is clear from the way in which the Federal Constitution is constructed there are certain features that constitute its basic fabric. Unless sanctioned by the Constitution itself, any statute (including one amending the Constitution) that offends the basic structure may be struck down as unconstitutional. Whether a particular feature is part of the basic structure must be worked out on a case by case basis."*

[710] The Court was clearer in its adoption of the basic structure doctrine in 2017 in the case of ***Semeyih Jaya Sdn Bhd v. PTD Hulu Langat*** (2017) 3 MLJ 561 when it found that Parliament does not have the authority to amend the Constitution, even when acting in accordance with the amendment procedures, in any way that abrogated or undermined any element of the basic structure. Once more in 2018 in the decision of ***Indira Gandhi Mutho v. Pengerah Jabatan Agama Islam Perak and Others*** (2018) LNS 86, the Federal Court declared that *"power of judicial review is essential to the constitutional role of the courts, and inherent in the basic structure of the Constitution"* and that it *"cannot be abrogated or altered by Parliament by way of constitutional amendment."*

[711] Singapore had a similar approach. In the case of ***Teo Soh Lung v. Minister of Home Affairs*** (1989) 2 MLJ 449, the Supreme Court of Singapore stated that a constitutional amendment is part of the Constitution itself and could not be invalid if it was enacted according to the amendment procedure adding that had the framers of the Constitution intended to impose limitations on the amendment power, they would have done so implicitly. However, twenty six years later, the Court of Appeal in the case of ***Yong Vui Kong v. Public Prosecutor***

(2015) 2 SLR 1158 held that some parts of the Constitution '*are so fundamental and essential to the political system that is established thereunder'* that they form part of the basic structure. However, despite this acknowledgement, the Court of Appeal declined to make a determination on which aspects of the Constitution formed the basic structure.

[712] This demonstrates that we are not the first to be faced with the predicament of application.

(a) Is the Doctrine of Basic Structure Applicable to Kenya?

[713] The basic structure doctrine is not entirely new to our jurisdiction. Much like the other countries, Kenya has had opportunity to grapple with the doctrine of basic structure in our own circumstances. During our journey of constitutional making, we had the Constitution of Kenya Review Commission (CKRC) appointed in November 2000. The Commission, chaired by Prof. Yash Pal Ghai, convened the National Constitutional Conference for discussion, debate, amendment and adoption of its report and draft Bill, famously dabbed the *"Bomas Conference"*. The Bomas Conference was convened and adjourned three times, out of which, a zero draft was amended and adopted by acclamation by the Conference sitting in Plenary on 23rd March, 2004 then handed over the Constitution of Kenya Review Commission.

[714] However, before the Conference was adjourned, there were a number of challenges to the validity and/or legitimacy of the entire constitutional review process and its outcome. One of which was the case of ***Timothy Njoya & Others v. CKRC and the National Constitutional Conference,*** High Court Misc. Application No. 82 of 2004; [2004] eKLR filed before the High Court. The Applicants sought *inter alia* a declaration that certain provisions of the Constitution of Kenya Review Act transferred, diluted and vitiated the constituent

power of the people of Kenya to adopt a new Constitution. The Court held that any new Constitution needed to be ratified through a national referendum as the right to a referendum was a fundamental right of the people in exercise of their constituent power. *Ringera, J. (Rtd.*) who was in the majority concurred with the pronouncements in the ***Kesavananda Case*** that Parliament did not have the power to alter the basic structure of our Constitution. He stated as follows:

> ***"All in all, I completely concur with the dicta in the kessevananda case that Parliament has no power to and cannot in the guise or garb of amendment either change the basic structures of the Constitution or abrogate and enact a new constitution. In my humble view, a contrary interpretation would lead to a farcical and absurd spectacle. It would be tantamount to an affirmation, for example, that Parliament could enact that Kenya could cease to be a sovereign Republic and become an absolute monarchy, or that all the legislative, executive and judicial power of Kenya could be fused and vested in Parliament, or that membership of Parliament could be cooptional, or that all fundamental rights could stand suspended and such other absurdities which would result in there being no "this Constitution of- Kenya." In my judgment, the framers of the Constitution could not have contemplated or intended such an absurdity. And it would not be an answer to that concern to say, as was said by counsel for the Second Respondent, that people can change their Parliament, for if Parliament had a totally free hand, it could even perpetuate itself. All in all, the limitation of Parliament's power was a very wise ordination by the***

framers of the Constitution which is worthy of eternal preservation.

91 Before I leave this aspect of the matter let me comment on the previous amendments of the Constitution of Kenya. Since independence in 1963, there have been thirty-eight (38) amendments to the Constitution.

...

Be that as it may, it is evident that in none of the various amendments did Parliament purport to or in fact abrogate the Constitution or make a new one. Everything was done within the text and structure of the existing Constitution.

....

As regards alterations to the basic structure of the Constitution, that had manifestly been affected, all I can say in that respect is that, fortunately or unfortunately, the changes were not challenged in the courts and so they are now part of our Constitution" [emphasis added].

[715] Application of the doctrine again arose in the case of ***Patrick Ouma Onyango & 12 Others v. AG & 2 Others Misc. Appl No. 677 of 2005*** [2008] 3 KLR (EP) 84. One of the issues that arose was whether Parliament, in its limited delegated role, had the power to debate, alter or amend the Bomas Draft Constitution which was a product of the views of the people. It was also questioned whether that interference by Parliament had the effect of elevating the members of the National Assembly above the people of Kenya as sovereign. The Court, consisting of *Nyamu, Wendoh and Emukule JJ.*, held as follows:

"7. ...We further find and declare that what will give purity to the process is the enactment of the proposals as a

Constitution by the people in the referendum. It is the enactment by the people which gives purity and validity. Yes they are the touchstone of validity – the people. The Applicants in their final written submissions did concede that constituent power cannot be restrained. We exercise judicial power on behalf of the people, and we cannot restrain them in making their choice.

We find and declare that the basic steps in constitution making are:

1. ***Popular consultations***
2. ***Framing of the proposals***
3. ***Referendums/or a Constituent Assembly specially elected and mandated.***

We find the challenged process has satisfied all the three essential steps.

8. We find and declare that the process is not flawed. In our view the real judges of the process are the people of Kenya in view of their past involvement with the process as outlined in the introduction to this Judgment. We find that the referendum does in a way, for a split second give the people Executive, Legislative and Judicial powers to determine whether they were sufficiently involved and consulted and whether the final product has the content and the substance, whether the final product was properly framed and whether it is a document they would want to enact. Upon enactment- in the referendum they shall have put their final seal of approval. This must be correct because upon approval at the referendum the people at the

Referendum shall have put in a place a new structure of government under the new dispensation which shall in turn on behalf of the people exercise thereafter Executive, Legislative and Judicial Power" [emphasis added].

[716] As rightly pointed out by the Attorney General, these decisions were rendered under the repealed Constitution. However, this does not negate their impact.

[717] After promulgation of the Constitution of Kenya, in August of 2010, we had the case of ***Commission for the Implementation of the Constitution v. National Assembly of Kenya & 2 Others*** Petition 496 of 2013; [2013] eKLR where the National Assembly, by the Constitutional (Amendment) Bill 2013, sought to amend Article 260 of the Constitution in respect of the definition of *'State Office'*. The principal objective was to amend Article 260 of the Constitution in order to remove the Offices of the Members of Parliament, Members of County Assemblies, Judges and Magistrates from the list of designated State Offices. In rejecting this amendment, *Lenaola, J.* (as he then was) before elaborately analyzing the doctrine, stated as follows:

"To my mind the basic structure of the Constitution requires that Parliamentary power to amend the Constitution be limited and the Judiciary is tasked with the responsibility of ensuring constitutional integrity and the Executive, the tasks of its implementation while Independent Commissions serve as the "people's watchdog" in a constitutional democracy. The basic structure of the Constitution which is commonly known as the architecture and design of the Constitution ensures that the Constitution possesses an internal consistency,

deriving from certain unalterable constitutional values and principles."

[718] In the case of ***Priscilla Ndululu Kivuitu & Another (suing as the Personal Representatives of Samuel Mutua Kivuitu & Kihara Muttu (deceased) & 22 Others v. Attorney General & 2 Others***, Petition 689 of 2008; [2015] eKLR a three Judge bench (*Korir, Mumbi Ngugi & Odunga, JJ.*) held that amendments under Article 255(1) or Article 257(1) can only be done with the involvement of the citizens by way of a referendum. They held as follows:

"158. We agree with the sentiments expressed by Ringera, J in Njoya 2, that <u>an amendment that upsets the basic structure of the Constitution could not be effected by Parliament without involving the people.</u>

159. In a country like ours which has a history of disrespect for the sanctity of the Constitution, the jurisprudence propagated in the Njoya 2 case was necessary. This may explain why the people of Kenya, aware of the frequent and frivolous amendments to the repealed Constitution, provided in Article 255 of the 2010 Constitution that:

[Article 255 reproduced]…

160. It is clear from the above-cited provision that there are amendments that can only be done with the involvement of the citizens by way of a referendum (Article 255 (1)) or popular initiative involving at least one million registered voters (Article 257 (1)). Even where Parliament has been mandated to amend the Constitution, it can only do so after the amendment Bill has been subjected to public discussion (Article 256 (2)). The voice of the people is a voice that

cannot be ignored when it comes to the amendment of the 2010 Constitution.

161. We wonder whether, in light of the provisions in the 2010 Constitution, the proposition that Parliament cannot amend the Constitution in a manner that may result in the distortion of the basic structure still has a place in our jurisprudence. However, this is not an issue that has been taken up with us and we will say no more about it" [emphasis added].

[719] The Court of Appeal touched on amendment of the Constitution in the case of ***Attorney General & Another v. Randu Nzai Ruwa,*** Civil Appeal 275 of 2012; [2016] eKLR where there was a challenge to the proscription of the Mombasa Republican Council (MRC) which advocated for secession of Coast Province. Here the Court held as follows:

"58. In view of the foregoing, the appellants' contention that the respondents' agenda of secession is unconstitutional has no basis in law. The respondents have a constitutional right to demand secession but that can only be done within the confines of the Constitution as stipulated under Articles 255, 256 and 257 of the Constitution."

[720] The Court of Appeal in ***Senate & 48 Others v. Council of County Governors & 54 Others***, Civil Appeal No. 200 of 2015; [2019] eKLR also mentioned in passing the doctrine as follows:

"48. Given the contestation in this appeal, it is incumbent upon us to re-appraise the provisions of Section 91A of the Amendment Act to determine if indeed it alters the

structure of devolved government and whether such alteration is procedurally contrary to Article 255 (1) (i) of the Constitution.

49. Comparatively, in the Indian case of Kesavananda Bharti -v- Union of India (1973) 4 SCC 225) it was held that the power to amend the Constitution is subject to the basic features of the constitution; and hence, any amendment tampering with these essential features will be struck down as unconstitutional.

50. In this matter, Article 255 (1) (i) of the Constitution expressly states that any alteration to the objects, principles and structure of devolved governments can only be done by way of referendum. If a finding is made that the Amendment Act alters the structure of devolved government, it would follow that the alteration is unconstitutional as no referendum was conducted prior to enactment of the Amendment Act" [emphasis mine].

[721] However, in all those cases, unlike in the present case, the applicability of the basic structure doctrine to Kenya was not a substantive question the Courts were asked to determine. The argument before the High Court, in our present dispute, was that the Constitution contains fundamental characters and foundational values that enjoy transcendental existence; whose derogation is not contemplated in the Constitution by way of constitutional amendments. It was contended that it is those features that form the basic structure of the Constitution and include Chapters One on Sovereignty of the People and Supremacy of the Constitution, Chapter Two on the Republic, Chapter Four on the Bill of Rights, Chapter Nine on the Executive and Chapter Ten on the Judiciary. It was further argued that we can identify those features by looking at the text, spirit, structure

and history of the Constitution. Further that the basic structure can only be altered through the formation of a new Constitution by the people exercising their constituent power. Both the High Court and Court of Appeal agreed with these arguments finding that the doctrine is applicable in Kenya.

[722] We are asked by the Attorney General to find that the doctrine does not apply to Kenya and neither does it limit the amendment powers as set out under Articles 255 to 257 of the Constitution. The Attorney General further asks us to find that the Constitution, including the basic structure, may only be amended strictly in accordance with the provisions of Chapter Sixteen.

[723] Counsel for the 18th and 21st Respondents submitted *inter alia* that the basic structure doctrine is akin to an unruly horse. He further described it as a nebulous doctrine incapable of definition. So perhaps we start there.

[724] Following *Okwengu, J.A*, I am inclined to begin with the definition by *Katureebe, CJ* in the ***Male H. Mabirizi K. Kiwanuka & Others v. Attorney General & Others***, Consolidated Constitutional Appeal No. 2, 3 & 4 of 2018 **(*the Mabirizi appeal*)** where he gave the illustration of a basic structure using the pillar metaphor:

> ***"To my understanding, the basic structure doctrine may be equated to a family house. It must have a strong foundation, strong pillars, strong weight-bearing walls, strong trusses to support the roof. The roof could be grass thatched, as happens in many of our homesteads.***
>
> ***The roof could be iron sheets of particular gauge. The iron sheets could be of different colours. If the wind blew away part or all of the roof, the basic structure should remain and the next day the family can put the roof back. But if the eight bearing pillars were undermined or removed, the***

whole structure will collapse. It would not be a dwelling house anymore."

[725] I am also attracted to the definition ascribed by Yaniv Roznai in his article ***Constitutional Amendments: The Limits of Amendment Power 42-43*** (Oxford University Press 2017) to wit the doctrine is *"a judicial principle according to which even in the absence of explicit limitations on the constitutional amendment power, there are implied constitutional limitations by which a constitution should not be amended in a way that changes its basic structure or identity,"*.

[726] I further noted that the Supreme Court of India in the ***Kesavananda Case*** in applying to doctrine of basic structure, interchangeably used the expressions *"basic structure", "basic elements", "basic framework", "basic features", "fundamental features"* and *"essential features"* throughout the majority decision. I found the interplay of words to be useful in understanding the doctrine of basic structure. The different phrases allow one to find the most appropriate description in order to comprehend application of the doctrine. To quote William Shakespeare in his play Romeo and Juliet *"A rose by any other name would smell as sweet"*. *Mativo, J*. in in the decision of ***Thirdway Alliance Kenya & Another v. Head of Public Service- Joseph Kinyua & 2 Others; Martin Kimani & 15 Others (Interested Parties)*** Constitutional Petition 451 of 2018; [2020] eKLR ***(Thirdway Alliance Case)*** was also not restricted by the choice of phrase in order to understand the doctrine. He stated as follows:

"149. The command in Article 259 is instrumental in shaping the constitutional jurisprudence of in this country. <u>Call it by any name, basic structure or whatever,</u> but Article 259 provides the manner in which the Constitution is to be interpreted to maintain its fabric which cannot be dismantled by any authority created by the Constitution

itself be it the Parliament, the executive or the judiciary" [emphasis added].

[727] In the totality of the evolution as I have outlined above and in light of the ***Kesavananda Case***, as well as the decisions from both the High Court and Court of Appeal, I find the basic structure doctrine to be a legal principle which exists to protect the essential characteristics of the Constitution by implicitly limiting the power to amend a constitution. Under this doctrine, especially in the absence of entrenched provisions, amendments that would destroy the essential character of the Constitution are limited and may only be carried out by the people utilizing their primary constituent power.

[728] Couched in this doctrine are a few crucial aspects. First is that constitutions are considered to be the act of the people as the almighty sovereign. We see this power of the people recognized and documented in the Preamble of our Constitution which begins as follows;

"We, the people of Kenya–

.....

EXERCISING our sovereign and inalienable right to determine the form of governance of our country and having participated fully in the making of this Constitution."

[729] Further, the first Chapter of our Constitution acknowledges the sovereignty of the people, and Article 1(1) provides as follows:

"All Sovereign power belongs to the people of Kenya and shall be exercised only in accordance with this Constitution."

[730] Second, it is through the Constitution that the people determine the nature of state, government, state organs and offices that will govern them and bestow

varying degrees of power to these organs. The holders of these offices in carrying their functions do so through the use of delegated power. We use the term delegated as it is the people who have donated some of their power in order to have a government that serves their needs.

[731] Third, the people in exercise of their sovereign will in creating a constitution, demarcate certain basic elements, or fundamental features which serve as the essential foundation and pillars that prop up our society. Fourth, amendments that alter, destroy or change the identity or basic structure of the Constitution cannot be carried out by delegated authority. As Roger Sherman back in 1789 stated, all the authority that state organs possess is derived from the Constitution. Consequently, an amendment that destroys either part or the whole constitution, removes the foundation upon which the authority and power of state and its organs are predicated upon. The State and its organs cannot utilize their delegated power to oust the will of the people in whose interests they are expected to act. Acting in a delegated capacity, theirs is a fiduciary role and they cannot by their own act either enlarge or diminish the powers vested on them. It is only the people utilizing their primary constituent power who may alter or change the foundation or pillars of our Constitution.

[732] My position on this issue, is further affirmed by the words of George Ticknor Curtis that *"... the power of amending the Constitution was intended to apply to amendments which would modify the mode of carrying into effect the original provisions and powers of the Constitution..."*. I also pay heed to the words of Edward Everett that *"...amendments must be confined to those changes which are necessary, not to alter the essential provisions of the Constitution, but to carry them into a more perfect operation."*

[733] In the peculiarities of our own history, which I must commend the High Court for elaborating, the people of Kenya were framing a constitution after what the CKRC termed to have been a reformulation of the Constitution with the end

result of diminishing separation of powers as well as its checks and balances, replacing the same with a powerful presidency and party. I need not rehash the same but I will point out that CKRC noted that "*the demand for reviewing the Constitution arose from the dissatisfaction with the way in which its valuable aspects had been removed and the nature of political power that had emerged as a consequence"*. It further stated that *"consequence of this concentration of power in the President is that he or she dominates all other organs of the state, negating the principles of separation of powers and checks and balances."* The therefore embarked on restoring constitutionalism in the Country and formulated a constitution that ushered Kenya into the New World Order. The people desired a constitution that placed high value in an open political space, the full establishment of democracy with recognition of fundamental human rights and freedoms and most important, public participation governance that was people driven and centered the people of all decisions. They were careful to establish within the Constitution a democratic system of Government with the three organs, Legislature, Executive and Judiciary. They were also keen to ensure the independence of the arms of government, but also establishing firm checks and balances.

[734] The people of Kenya, however, having the foresight that the day may come when they may need to amend the Constitution, made provision for the same under Chapter Sixteen, Articles 255, 256 and 257 of the Constitution. Amendments may be initiated either by Parliament pursuant to Article 256 or by the people and Parliament pursuant to Article 257 and 255 respectively where the amendments touch on the specific matters delineated in Article 255.

[735] To be clear, I do not find that there are any unamendable provisions in the Constitution of Kenya. What the Constitution provides for is termed, as Prof. Rosalind and Prof. David Landau phrased it, is tiered amendment structure which contains several layers of amendment difficulty. Parties have correctly argued

before us that Article 255 sets out the fundamental features of the Constitution. Key to this, any proposed amendments that touch on these issues, must be submitted to a referendum and have the people have their voices heard on the amendments. While all other amendments are then subjected to Article 256 and 257 of the Constitution.

[736] The fact that the people are then involved at the referendum stage leads to the question of whether, in light of such provision, the doctrine is applicable in such situations. It is easy to state that Parliament or the people may amend the Constitution in any way they think, provided that they comply with all the conditions precedent prescribed by the Constitution or any relevant statute; and of course, provided they subject the same to a referendum.

[737] However, supposing, borrowing from the illustration by *Ringera, J. (Rtd.)* in the ***Njoya Case***, Parliament decides that Kenya needs to cease being a sovereign republic and become an absolute monarch. Or perhaps resolves to fuse the three arms of government into one with the President at the helm. Supposing further, that all the conditions and procedures are followed to the letter including endorsement through a referendum, Can the Courts take a back seat and refuse to intervene? Professor Satyaranjan P. Sathe, a distinguished academic from India, in his book ***Constitutional Amendments (1950-1988)*** did not think such a scenario as far-fetched. He argued in favour of the doctrine of basic structure contending that it was the duty of the court to protect the people's rights against themselves lamenting that in India the *"ignorant masses can be managed, elections can be won, and majorities can rule without any regard for public opinion."* It was that reason that he contended that *"the press, the judiciary and the intelligentsia have to act as restraining forces on democracy"* as *"charisma, religion and other populistic devices can be used for winning elections"* and thus *"the judiciary's role is bound to be much more crucial"*.

[738]Professor Sathe's position has backing from the decision of ***Golak Nath Case*** where the Court held as follows:

> ***"This Court has declared repeatedly that the possibility of abuse is not to be used as a test of the existence or extent of a legal power [See for example, State of West Bengal v. Union of India (1), at page 407]. In the second place, the amending power is a power, of an altogether different kind from the ordinary governmental power and if an abuse occurs,, it occurs at the hands of Parliament and the State Legislatures representing an extraordinary majority of the people, so that for all practical purposes it may be said to be the people, or at least. the highest agent of the people, and one exercising sovereign powers. It is therefore anomalous to speak of 'abuse' of a power of this description. In the last analysis, political machinery and artificial limitations will not protect the people from themselves. The perpetuity of our democratic institutions will depend not upon special mechanisms or devices, nor even upon any particular legislation, but rather upon the character and intelligence and the good conscience of our people themselves. As observed by Frankfurter, 1. in American Federation of Labour v. American Sash & Door Co.(1) "But a democracy need rely on the courts to save it from its own unwisdom. If it is alert-and without alertness by the people there can be no enduring democracy unwise or unfair legislation can readily be removed from the statute books. It is by such vigilance over its representatives that democracy proves itself"*** [emphasis mine].

[739]This is why the High Court was careful to begin its analysis by reminding itself of the transformative nature of the Constitution birthed from a history where the people felt powerless and stifled. CKRC captured this in the views by the people stating that "*the people feel they are subjects, not citizens. At present, they feel disempowered and alienated from the government. They feel that decisions about their lives are being made in places remote from themselves and without consultation with them. They consider that they are discriminated against and that they have been unjustly deprived of their resources. There was a widespread wish for people to take charge of their own lives*." It is why the Supreme Court in its decision in the case of ***In the Matter of the Speaker of the Senate & Another,*** Advisory Opinion Reference 2 of 2013; [2013] eKLR underscored the transformative nature of our Constitution for *inter alia* centering the people in all aspects of governance. The Court stated as follows:

> ***"[51] Kenya's Constitution of 2010 is a transformative charter. Unlike the conventional "liberal" Constitutions of the earlier decades which essentially sought the control and legitimization of public power, the avowed goal of today's Constitution is to institute social change and reform, through values such as social justice, equality, devolution, human rights, rule of law, freedom and democracy. This is clear right from the preambular clause which premises the new Constitution on –***
>
> ***"RECOGNISING the aspirations of all Kenyans for a government based on the essential values of human rights, equality, freedom, democracy, social justice and the rule of law."***
>
> ***And the principle is fleshed out in Article 10 of the Constitution, which specifies the "national values and***

principles of governance", and more particularly in Chapter Four (Articles 19-59) on the Bill of Rights, and Chapter Eleven (Articles 174-200) on devolved government.

[52] The transformative concept, in operational terms, reconfigures the interplays between the States majoritarian and non-majoritarian institutions, to the intent that the desirable goals of governance, consistent with dominant perceptions of legitimacy, be achieved."

[740] The High Court, in the impugned decision, further reminded us that the Constitution being transformative, does not favour formalistic approaches to its interpretation. The Supreme Court reiterated its position in its early decision in the case of ***Re Interim Independent Election Commission,*** SC Constitutional Application No. 2 of 2011; [2011] eKLR where it held as follows:

"The rules of constitutional interpretation do not favour formalistic or positivistic approaches (Articles 20(4) and 259(1)). The Constitution has incorporated non-legal considerations, which we must take into account, in exercising our jurisdiction. The Constitution has a most modern Bill of Rights, that envisions a human rights based, and social-justice oriented State and society. The values and principles articulated in the Preamble, in Article 10, in Chapter 6, and in various provisions, reflect historical, economic, social, cultural and political realities and aspirations that are critical in building a robust, patriotic and indigenous jurisprudence for Kenya. Article 159(1) states that judicial authority is derived from the people.

That authority must be reflected in the decisions made by the Courts."

[741] Further, this is why the words of Article 259 are critical as they provide direction on how to interpret and apply the Constitution and its provisions. It provides as follows:

"259. Construing this Constitution

(1) This Constitution shall be interpreted in a manner that—

(a) promotes its purposes, values and principles;

(b) advances the rule of law, and the human rights and fundamental freedoms in the Bill of Rights;

(c) permits the development of the law; and

(d) contributes to good governance.

(2) .....

(3) Every provision of this Constitution shall be construed according to the doctrine of interpretation that the law is always speaking ....."

[742] *Mativo, J.* in the ***Thirdway Alliance Case*** added his voice to the implication of the words of Article 259 as follows:

"149. The command in Article 259 is instrumental in shaping the constitutional jurisprudence of in this country. Call it by any name, basic structure or whatever, but Article 259 provides the manner in which the Constitution is to be interpreted to maintain its fabric which cannot be dismantled by any authority created by the Constitution

itself be it the Parliament, the executive or the judiciary"
[emphasis added].

[743] By looking at the text, spirit, structure and history of the Constitution, what can the Judiciary do when confronted with the above scenario that claws back all the strides we have taken in moving our democratic society forward. To my mind, the Judiciary cannot fold its arms and find that since the black letter of the law was followed, that all the procedures were followed, then the amendments were valid. As *Lenaola J.* (as he then was) in the case of ***Commission for the Implementation of the Constitution Case*** held that the Judiciary is tasked with the responsibility of ensuring constitutional integrity. The Supreme Court of India in its attempt to find something superior in the constitutional framework to stop a predacious Parliament, breathed life into the doctrine of basic structure. The Court was not inventing the doctrine, but merely identifying and naming a philosophy and concept that has been existence for atleast the last three centuries.

[744]Just like the Supreme Court of India, it is through the application of the doctrine of basic structure that the courts in Kenya would be able to prevent what *Ringera, J. (Rtd)* termed as '*an absurdity not contemplated or intended by the framers of the Constitution*'. In my estimation, the doctrine is not only applicable to Kenya, but was already in application as evidenced by the decisions in the ***Njoya Case***, ***Patrick Onyango Case***, ***Commission for the Implementation of the Constitution Case, Priscilla Ndululu Case*** and ***Thirdway Alliance Case***.

[745]From my standpoint, whenever we are embarking on amending the Constitution, we must always consult the principle of implied limitations. We must do so in order to ensure that we do not alter or destroy the fundamental features of our hard-fought Constitution. Adherence to this will ensure constitutional amendments have the effect of carrying our constitutional provisions into a more perfect operation.

[746] However, as rightly argued by Counsel for the 18th and 21st respondents, the application of the doctrine of basic structure could be subject to abuse. With greater reason looking at the illustration of Nicaragua, El Salvador, Honduras and Bolivia having allegedly relied on the basic structure doctrine, to remove term limits on the presidency, thus allowing dangerous political actors to run for president indefinitely endorsing democratic erosion. For that reason, I go a step further to add two conditions to the application of the doctrine of basic structure. First, the same must serve to develop the law and move us further in the trajectory we have already taken in fully realizing the democratic society that we envisioned while formulating and passing our transformative Constitution.

[747] This leads to me to my second condition, that the application of the doctrine must serve to protect the democratic core norms, which the 1st and 2nd *amici* referred to as fundamental democratic commitments shared by constitutional democracies. We have set out these norms for ourselves throughout the Constitution and included them in our national values and principles of governance under Article 10. These norms include fundamental rights and freedoms; free, fair and regular elections; separation of powers; independent commissions and offices with checks and balances. We can also find these core standards from the regional and international bodies to which Kenya is a member such as the African Union and United Nations which prescribe certain commitments to democracy, rule of law, human rights and protection of minorities.

(b) Do we have a basic structure under the Constitution of Kenya and if so, what does it entail?

[748] From the record as well as submissions, parties appear to be in agreement that the Constitution of Kenya does indeed have a basic structure. There is however divergence on which parts comprise the basic structure. The AG and

IEBC as well as their proponents contend the Constitution has explicitly delineated that basic structure in Article 255 of the Constitution. They argue that the people did this by signaling the provisions of the Constitution which cannot be amended without subjecting the proposed amendments to a referendum. Morara Omoke and his proponents contend that this basic structure comprises Chapter One on Sovereignty of the People and Supremacy of the Constitution, Chapter Two on the Republic, Chapter Four on the Bill of Rights, Chapter Nine on the Executive and Chapter Ten on the Judiciary.

[749]On whether the Constitution of Kenya, 2010 contains a basic structure, the High Court identified certain features at para. 474 (f) of the Judgment as follows:

> ***"From a holistic reading of the Constitution, its history and the context of the making of the Constitution, the Basic Structure of the Constitution consists of the foundational structure of the Constitution as provided in the Preamble; the eighteen chapters; and the six schedules of the Constitution. This structure outlines the system of government Kenyans chose – including the design of the Judiciary; Parliament; the Executive; the Independent Commissions and Offices; and the devolved system of government. It also includes the specific substantive areas Kenyans thought were important enough to pronounce themselves through constitutional entrenchment including land and environment; Leadership and Integrity; Public Finance; and National Security. Read as a whole, these chapters, schedules and the Preamble form the fundamental core structure, values and principles of the Constitution. This fundamental core, the constitutional Petition No. E282 of 2020 (Consolidated). Page 179 edifice,***

thus, cannot be amended without recalling the Primary Constituent Power of the people"

[750] In the ***Kesavananda Case,*** the Supreme Court of India through *Chief Justice Sikri* explained that the concept of basic structure included supremacy of the Constitution; republican and democratic form of government; secular character of the Constitution; separation of powers between the Legislature, Executive and the Judiciary; and federal character of the Constitution. *Justices Shelat* and *Grover* added two more basic features to this list: the mandate to build a welfare state contained in the Directive Principles of State Policy; and unity and integrity of the nation. *Justices Hegde* and *Mukherjea*, identified a separate and shorter list of basic features which included: sovereignty of India; democratic character of the policy; unity of the country; essential features of the individual freedoms secured to the citizens; and mandate to build a welfare state. *Justice Jaganmohan Reddy* stated that elements of the basic feature were to be found in the preamble of the Constitution and the provision into which they translated such as the sovereign democratic republic; parliamentary democracy and the three organs of the state.

[751] Article 255 (1) provides that approval by referendum is required for amendments that relate to the following matters: the Supremacy of the Constitution, the territory of Kenya, the Sovereignty of the people, the national values and principles of governance referred to in Article 10(2)(a) to (d), the Bill of Rights, the terms of office of the President, the independence of the Judiciary and the Commissions and Independent offices to which Chapter Fifteen applies, the functions of Parliament, the objects, principles and structure of devolved government and the provisions of Chapter Sixteen on amendments.

[752] The people of Kenya were giving their views from a backdrop of a culture of hyper-amendments that did not serve their interests. They were also coming from a context of a Parliament, and by extension a government, that did not always

act in their interest. Indeed, these are the constitutional provisions that Kenyans thought were important enough to pronounce themselves on through constitutional entrenchment. It is for this reason that in my view, the provision of Article 255 forms part of our Constitution's basic structure. However, Articles 255 and 257 provide that amendment to the same requires approval by referendum. A referendum is exercise of the People's secondary constituent power. Consequently, if the amendments are not in pursuit of carrying the provisions of the Constitution into more perfect operation, but rather are geared towards an overhaul of the same, then there is need for the people to exercise their primary constituent power. It is only the people who may make such drastic changes to the system of governance. I discuss this further in the final limb of this issue.

[753] In our constitutional system, the Judiciary remains the guardian of the Constitution, tasked with the responsibility of ensuring constitutional integrity. The people of Kenya fought and voted for an independent Judiciary tasked with upholding the supremacy of the Constitution and to protect them from violation of their fundamental rights as well as arbitrary exercise of power. It is thus my considered opinion that it is within the powers of the courts to utilize its discretion to determine any other provision that forms part of our Constitution's fundamental features on a case by case basis.

[754] This leeway for the courts to make a determination, is perhaps the cause of contention by Counsel that the doctrine is nebulous. However, to my mind, this latitude is what allows the courts to find the essential features of a constitution specific to their jurisdiction and society at large. In this way, judges are able to exercise their discretion and take into consideration public policy, social norms and customs that are specific to them. Keeping in mind that societies continue to evolve, this discretion allows the court to keep up with current needs of the people.

(c) Can the basic structure of the Constitution only be altered through the primary constituent power and what constitutes the primary constituent power?

[755] Having already made a finding that the basic structure of the Constitution can only be altered through the primary constituent power, what is left is to define the parameters of primary constituent power.

[756] I begin with a tangent before getting back on the path we set out on. The terms nation and people are often used interchangeably. However, the phrase nation is better understood as it denotes the people unified and capable of political action. The phrase nation carries within it the implication of political consciousness and the will to political existence. The conscious decision to come together to form a society then carries the responsibility of determining the type and form of existence.

[757] Before democracies, monarchies were the main form of state that existed and with it, the implication that the position of monarch was God-given and unquestionable. The monarch had the constitution-making power to determine the type and form of existence of the state. However, since the inception of limited governments finding expression and symbolism in the Magna Carta of 1215, the American Revolution of 1775, the French Revolution of 1789 culminating with the fall of the British Empire, and eventually Kenya finding statehood at its independence, the people's power has slowly but steadily been developing to the fore. Today, modern democracies recognize that it is the people who form a nation and wield the power of sovereignty.

[758] It is then the people, who through exercise of their political will, determine the type and form of existence of state and the same finds expression in the form of a Constitution. The CKRC in its final Report noted that during the general debate in Bomas I, the first issue that received overall support was in regards to the sovereign authority of the people. The Commission noted *"there was a broad*

understanding that the constituent power of the people must be reflected in the design of all aspects of the Constitution…". This understanding was captured as follows in the CKRC Final Report:

> ***"(a) The Sovereign Authority of the People***
> ***The proposition that all constitutional authority must derive from and can only be held and exercised on behalf of the people was upheld by the Conference. There was a broad understanding that <u>the constituent power of the people must be reflected in the design of all aspects of the Constitution</u> and, in particular in:***
>
> - ***the provisions relating to future amendments to the Constitution;***
> - ***the system and process of representation both in political parties and in elective organs of state;***
> - ***appointments, control and dismissal of holders of public office;***
> - ***the regulation of the conduct and exercise of legislative, executive and judicial power at all levels of government;***
> - ***the control, utilization and management of national resources including finance, revenue and land; and***
> - ***the overall supervision of the entire constitutional structure*****"** [emphasis added].

[759] The CKRC Final Report further highlighted that the peoples' sovereign power finds expression through a Constitution which then operates as the ultimate law of the nation. The Report states as follows:

"The Conference accepted the principle that <u>while the people are sovereign, that sovereignty can only be expressed through a Constitution which is accepted and operates as the supreme law of the land</u>. The proposition that the Constitution is supreme means, therefore, that:

- ***all other laws are subordinate to the provisions of the Constitution and are void where inconsistent with it;***
- ***<u>the power to enact a new Constitution or replace the Constitution ultimately rests with the constituent authority i.e. the people;</u>***
- ***the tendency to treat Parliament as supreme must be discarded"*** [emphasis added].

[760] The CKRC in undertaking a comparative analysis of legislatures in other jurisdictions noted that primary functions of legislatures were similar despite variations to type or composition. These similarities include representation of the constituent power.

[761] The parties do not dispute that it is the people who hold constituent power being the authority to make or unmake a constitution. I reiterate that this power of the people is recognized and documented in the Preamble of our Constitution and Article 1(1).

[762] Where there may be dispute is the distinction between primary and secondary constituent power. As we were reminded very recently by Amb. Kimani, one of the joint secretaries to the BBI Steering Committee, with his speech before the United Nations Security Council, "*Kenya and almost every African country was birthed by the ending of empire…"*. We did not choose our borders, but rather the same were "*drawn in distant colonial metropoles of London, Paris and Lisbon,*

with no regard for the ancient nations that they cleaved apart…. At independence, had we chosen to pursue states on the basis of ethnic, racial or religious homogeneity, we would still be waging bloody wars these many decades later. Instead, we agreed that we would settle for the borders that we inherited, but we would still pursue continental political, economic and legal integration. Rather than form nations that looked ever backward into history with a dangerous nostalgia, we chose to look forward to a greatness none of our many nations and peoples had ever known."

[763]At independence we inherited a Constitution from our former colonial masters that was negotiated to mark the end of formal colonial rule. The Constitution of Kenya was amended about twenty-eight times between 1964 and 1997. The amendments redesigned the structure of the Independence Constitution and had the effect of consolidating personal rule, and undermining the integrity and autonomy of the institutions created under the Constitution. The consolidating of power with the effect of creating an imperial presidency created a crisis of legitimacy and diminished supremacy of the Constitution. The effects of the approximately twenty-eight constitutional amendments between 1964 and 1997 are succinctly described in the Committee of Experts Final Report as follows:

> ***"…the cumulative effect of these amendments undermined democracy, eroded the idea of limited government, and removed from the independence Constitution the important principle of checks and balances, which is the hallmark of constitutionalism."***

[764]Kenya's pursuit of constitutional reform begun in 1980s, but really begun to take form in 1990s marked by the enactment of the Constitution of Kenya Review Act of 1997. During this time there was disagreement whether to have a parliamentary led process of a participatory process that centered the people in the process. This disagreement led to duality of purpose with the government going

ahead and appointing CKRC Commissioner while those in favour of a citizen centered process begun the Ufungamano initiative which established the People's Commission of Kenya. Prof. Yash Pal Ghai, the Chair of CKRC, was credited with skillfully uniting the two factions reach consensus.

[765] The CKRC under the leadership of Prof. Yash Pal Ghai begun its work under the Constitution of Kenya Review Act of 1997 (CKR Act). By design, the constitution making process had a framework for wide and extensive consultation and deliberations with ordinary Kenyans as well as amongst the drafters. The CKR Act as amended in 2001 ensured a deeply participatory process marked by widespread civic education, deep and wide research as well as widespread public consultations. I dare say it was the most monumental and widest exercise of public participation ever carried out in Kenyan history. The importance and significance of the CKRC Final Report, particularly considering that it was carried out during our time, must always be recalled when interpreting the Constitution. The High Court underscored this when it stated as follows regarding the exercise:

> ***"The CKRC Commissioners travelled and collected views from all over Kenya, addressed numerous meetings of professional, gender, religious and administrative and social organizations about the reform agenda and the constitution-making process.41 The public response was overwhelming since the Commission received over 35,015 submissions from institutions, groups, and individuals.42 The Commission also conducted hearings in each of 210 constituencies then present in Kenya.***
>
> ***426. In its final Report, the CKRC underlined the importance of the participatory process in its approach "The highest importance is attached to participation by the people. The organs of review must provide the people 'with***

an opportunity to actively, freely and meaningfully participate in generating and debating proposals to alter the Constitution' (section 5(c)(i)). Moreover, they must ensure that the 'final outcome of the review process faithfully reflects the wishes of the people of Kenya' (section 5)(d))."

[766] To say that the people were fully engaged at every step of the process leading to promulgation of the 2010 Constitution is an understatement. It is this involvement that the High Court rightly termed as primary constituent power. Borrowing the words of *Justice Badrul Haider Chowdhury* in the Bangladesh decision of ***Anwar Hossain Chowdhury v. Bangladesh,*** 1989 B.L.D. (SPL) 1, 41 D.L.R. (AD) 165 (1989):

"It does not need citation of any authority that the power to frame a Constitution is a primary power whereas a power to amend a rigid Constitution (ours is a rigid constitution) is a derivative power derived from the Constitution and subject at least to the limitations imposed by the prescribed procedure."

[767] In passing the 2010 Constitution, it showed that the people trusted the Constitution and the constitutional order they had shaped. They had faith that they had created sturdy and independent institutions with sufficient checks and balances. They also trusted that the design of the Constitution reflected their sovereign power in all aspects of their Constitution. They felt certain that in moving forward, decisions were not being made in far off places, but rather institutionalized at the grassroot level, accessible to all. They also made certain to put in place safety measures that ensured their continued involvement. It is for these reasons that the Constitution is described as exhaustive and self-executing with inbuilt safeguards. However, by design, after promulgation, the people's

continued involvement was NOT on the same scale as before the making of the constitution. The people deliberately limited their involvement to mainly, public participation and referendums where necessary.

[768] It is here that we find the difference between the exercise of the peoples' primary and secondary constituent power. It is here that we find that distinction. Before the making of a constitution, the people are fully engaged even before inception of the issues, and are fully participatory until promulgation. Whereas, after promulgation of a constitution, the people play a limited dual role of public participation and a referendum. It is why, in order to unmake, to destroy or to alter the constitutional order, it requires the level of engagement by the people in full exercise of the sovereign power. This is what we term as primary constituent power. It is also for these reasons that the exercise of primary constituent power exists outside or can be termed as being parallel to the Constitution, unbound by constitutional limits.

[769] The 10th respondent posed a pertinent question for the Court to determine: *how do the people act in a manner sufficient as to constitute an exercise of constituent power?*

[770] It is also here that we find the importance of the four sequential steps that are delineated by the High Court. The High Court arrived at the four sequential steps after a detailed review of the historical context before promulgation of the Constitution of Kenya in paragraphs 401 to 475 of their Judgment. The High Court was keen to highlight the participatory nature of the making of the Constitution right from the Constitution of Kenya Review Act of 1997 (CKR Act). This Act was set up to be Act of Parliament *"to facilitate the comprehensive review of the Constitution by the people of Kenya; to provide for the establishment, powers and functions of the Commission (Constitution of Kenya Review Commission (CKRC)), District Constitutional Forums and the National Consultative Forum, and connected purposes."*

[771] The High Court pointed out that the CKRC was required to conduct and facilitate civic education in order to stimulate public discussions and awareness, collect and collate views of the people on proposals to alter the Constitution. In doing so, the Commission was expected to ensure that the people of Kenya gave their views on the organs of the government, examine the federal and unitary systems of government, examine constitutional commissions and offices, examine the electoral system and the Judiciary. Further to this, the CKR Act established a district forum in each district comprising of elected representatives, religious representatives, persons with disabilities, members of Parliament and members of every local authority.

[772] The CKRC ensured that the process was participatory by preparing civic education materials including a book authored by Prof. Ghai on an analysis of Kenya's constitutional history, the independence and the then-current constitution and the options available for reform. The papers and documents were originally prepared in English but were also translated to Kiswahili and widely distributed to make meaningful civil education possible. CKRC, through its commissioners, staff and a large number of NGOs nationwide, ensured that there was widespread civic education. This was done at district and constituency forums, as well as setting up documentation centres to promote education and debate.

[773] The CKRC's efforts were considered to be successful, evidenced by the Commission having received over 35,015 submissions from institutions, groups, and individuals. In its Final Report, the CKRC underscored the importance of the participatory process in its approach noting the following:

> ***"The highest importance is attached to participation by the people. The organs of review must provide the people 'with an opportunity to actively, freely and meaningfully participate in generating and debating proposals to alter the Constitution' (Section 5(c)(i)). Moreover, they must***

ensure that the 'final outcome of the review process faithfully reflects the wishes of the people of Kenya' (Section 5(d))" [emphasis added].

[774] The High Court added that the CKRC Draft Constitution that emerged in October 2002, just before the General Elections, was a reflection of the true will of the people of Kenya, as far as the Commission could tell. The constitutional reform process was derailed for a time, however the 2007 General Elections and the violence that followed compelled us to reprioritize it once again. This time under the Constitutional Review Act, 2008 which was intended to facilitate the completion of the review of the Constitution. One of the objects and purposes of the revamped constitutional review process was to promote people's participation in the governance of the Country through democratic, free and fair elections and the devolution and exercise of power, ensuring the full participation of people in the management of public affairs, and committing Kenyans to peaceful resolution of national issues through dialogue and consensus.

[775] One of the four organs set up for constitutional review was the Committee of Experts (CoE) which was required to study all existing Draft Constitutions and such other materials as it may consider appropriate and prepare a report. The High Court highlighted that the Committee of Experts just like the CKRC before it, collated a total of 26,451 memoranda and presentations from members of the public as compared to the CKRC which received 35,000 written memoranda. Of these, 5,212 were received from organized groups, 2073 from civil society organisations and 107 from women's groups, 88 from political parties, 50 from the private sector, 2969 from religious organizations, and 32 from statutory bodies. The CoE also conducted regional hearings where a further 1,917 presentations were made. The CoE attended hearings in all the eight provinces of Kenya and had many consultations with various stakeholders directly on specific issues.

[776] The High Court pointed out that despite these efforts, a report by the Kenya Human Rights Commission (KHRC) concluded that the CoE did not conduct far-reaching and effective civic education as was possible. According to the KHRC, the CoE was limited by time, bureaucratic hurdles, and difficulty in accessing financial resources. The CoE was castigated for not producing enough drafts of the Proposed Constitution of Kenya in Kiswahili. It was further castigated as the civic education was sporadic and not sustained. In some areas like Turkana, Marakwet, Samburu, and Kuria, due to low literacy levels in English and Kiswahili, never engaged meaningfully with the process. This criticism is an indication of how seriously Kenyans took the requirement that the constitution-making process be participatory. The Referendum to vote in the Revised Harmonized Draft from the CoE and the Parliamentary Select Committee was held on 4th August, 2010. 68.55 percent of Kenyans voted to accept this draft that was officially promulgated on 27th August 2010 as the Constitution of Kenya, 2010. This endorsement by Kenyans culminated a process of more than 20 years of constitutional reform for a Constitution that was for *Wanjiku*.

[777] In its conclusion, the High Court noted that Kenyans were so certain about the need for informed public participation in constitution making, that they ensured that the laws regulating constitution-making contained very detailed and specific requirements delineated in four distinct processes being:

> ***"(a) Civic education to equip people with sufficient information to meaningfully participate in the constitution-making process;***
>
> ***(b) Public participation in which the people – after civic education – give their views about the issues;***
>
> ***(c) Debate, consultations and public discourse to channel and shape the issues through representatives elected***

specifically for purposes of constitution-making in a Constituent Assembly; and

(d) Referendum to endorse or ratify the Draft Constitution."

[778] *Ringera, J. (Rtd.)* in ***the Njoya Case*** had also theorized about these steps in the exercise of the constituent power, which he described as both primordial and one with juridical status. *Ringera, J. (Rtd.)* held that the constituent power of the People could only be upheld in constitution-making process after taking the following steps:

"(a) Collation of views from the people and processing them into constitutional proposals;

(b) Formation of a Constituent Assembly to debate the views and concretize them into a Draft Constitution or Draft Constitutional Amendment as the case may be; and

(c) Conducting a referendum to confirm whether the Draft Constitution or Constitutional Amendment is acceptable to the people and envelops their constitutional expectations."

[779] *Justices Nyamu, Wendoh and Emukule* in the ***Patrick Onyango Case*** also added their voices in the steps needed in constitution making. The court held in part as follows:

"We find and declare that the basic steps in constitution making are:

1. ***Popular consultations***
2. ***Framing of the proposals***

3. Referendums/or a Constituent Assembly specially elected and mandated."

[780] The court added that Kenyans were so clear about the detailed, and participatory processes in constitution making that they rejected the Wako Draft in 2005 because it failed the public participation process test and instead verged on political elite consensus.

[781] I am in agreement with the High Court in its observation regarding how seriously Kenyans took their involvement and participation in the constitution making process. Throughout our entire twenty-year constitutional reform process, Kenyans have been manifestly certain on the need to be well informed, in addition to being meaningfully and fully involved at every stage of the process.

[782] In my Judgment the four sequential steps answer the question posed by the 10th respondent. It is my considered opinion that the four sequential steps are indicators of genuine primary constituent power in action. The four sequential steps act as *'mile-markers'* of the journey to making or unmaking a constitution; or altering the basic structure of a constitution by the people in exercise of their primary constituent power. It is for this reason that I fully endorse the conclusion reached by the High Court on the distinction between primary and secondary constituent power. Any constitution making or unmaking process, that lacks any of these crucial four steps cannot be considered a genuine exercise of primary constituent power of the people. I affirm the conclusion reached by the High Court and which I reproduce thus:

> ***"472. What we can glean from the insistence on these four processes in the history of our constitution-making is that Kenyans intended that the constitutional order that they so painstakingly made would only be fundamentally altered or re-made through a similarly informed and participatory process. It is clear that Kenyans intended***

that each of the four steps in constitution-making would be necessary before they denatured or replaced the social contract they bequeathed themselves in the form of Constitution of Kenya, 2010. Differently put, Kenyans intended that the essence of the constitutional order they were bequeathing themselves in 2010 would only be changed in the exercise of *Primary Constituent Power* ***(civic education; public participation; Constituent Assembly plus referendum) and not through*** *Secondary Constituent Power* ***(public participation plus referendum only) or*** *Constituted Power* ***(Parliament only)"*** [emphasis added].

[783]The question of constituted power exercised by the parliament does not elicit as much debate. As I stated earlier, Parliament and indeed all state organs as well as public and state officers can only exercise the roles and functions assigned to them. Acting in a delegated capacity, theirs is a fiduciary role and they are precluded from, by their own act, either enlarging or diminishing the powers vested on them. They act in accordance with the powers and in the roles assigned to them. Relying once more on the illustration of basic structure by *Katureebe, CJ* using the pillar metaphor; these delegated roles and donated powers exercised, do not involve removing, destroying or denaturing the foundation or the pillars that prop up our Constitution. This is a role demarcated only to the people of Kenya.

(ii) Whether the President can initiate changes/amendments to the Constitution; and whether a constitutional amendment can only be initiated by Parliament through a parliamentary initiative under Article 256 of the Constitution or through a popular initiative under Article 257 of the Constitution

[784] *Gatembu, J.A*, rightly observed that Article 257 makes no qualification of who may or may not promote a popular initiative. Further, there is no explicit bar against any person, including the President, from promoting a constitutional amendment by popular initiative. It is therefore upon the Court to interpret and determine the parameters of the same.

[785] A good place to begin is our historical context and here *Tuiyott, J.A*, was correct in highlighting the fact that the genesis of the popular initiative clause in the Constitution can be traced back to the CKRC Final Report. The Commission noted that although the conference agreed the process of constitutional amendment must not be left entirely to Parliament, different options needed further thought particularly with regard to the exact modalities of engaging the constituent power of the people. The Commission in addressing the issue recommended that "*…citizen and the civil society may initiate Constitutional amendments through a process called "popular initiative*". This was then captured in the zero draft at Article 346 and the same was retained in the Bomas draft as follows:

> ***"An amendment to this constitution may be proposed by a popular initiative signed by at least one million citizens registered to vote."***

[786] The same survived the Naivasha Accord of November 2004 and the Kilifi Accord of June 2005. Even in the rejected Wako draft, the clause persisted under Article 283 as follows:

> ***"An amendment to this Constitution may be proposed by a popular initiative supported by the signatures of at least one million registered voters.***"

[787] The Revised Harmonized Draft of the Constitution as prepared by the Committee of Experts retained the clause under Article 238:

> ***"An amendment to this Constitution may be proposed by a popular initiative signed by at least one million registered voters."***

[788] The objective for popular initiative as captured in the ***Final report of the Technical Working Group 'K' on Constitutional Commission and Amendments to the Constitution*** held up to the creation of the 2010 Constitution. The report had noted: -

> ***"...committee introduced a novel ideal called popular initiative. This is an innovation where the citizens can on their own motion initiate amendment to the Constitution by a way of a popular initiative either in the form of a general suggestion or a formulated draft bill. The committee explained that their intention was a starting point towards curbing dictatorship by parliament"*** [emphasis added].

[789] *Tuiyott, J.A*, was not convinced by the Attorney General's submissions that the intention of the popular initiative was to curb parliamentary monopoly for both people and state organs. He instead found that the historical perspective demonstrated that the popular initiative was a preserve of the citizens. There is merit in this holding. This is further bolstered by the observation by *Kiage, J.A* that born from the Kenyan experience, Parliament as the organ entrusted with law making power, had not always acted in the best interests of the people. The people were responding to their frustrations that Parliament had not always acted in a citizen-centric manner but rather acted in a manner quite inimical to their interests. Therefore, in order to safeguard their rights, the people gave themselves an avenue to directly amend the Constitution in circumstances where Parliament is either unable or unwilling to act. Further, reading Article 256 and 257 together, I agree with the learned Judges of Appeal that it is reasonable to conclude that

Article 257 was created as a pathway for those without access to the standard parliamentary route under Article 256.

[790] It is for that reason that I concur with *Kiage, J.A*, when he concluded that the popular initiative route must be citizen-conceived, citizen-initiated and citizen-driven process and that citizens are the ordinary *mwananchi* whether as individuals or as organized civil groups.

[791] Two pertinent issues arise regarding the assertion that the President can initiate the process of constitutional amendment by way of popular initiative in his capacity as a private citizen. First, is the fact that Article 257 (5) ascribes the President a role in the amendment process. The Article provides that if a Bill to amend the Constitution proposes an amendment relating to matters under Article 255 (1), the President shall before assenting to the Bill, request IEBC to conduct a national referendum within ninety days. The import of this provision is it assigns the President the power to decide whether or not to hold a referendum. To ensure the integrity of the process of constitutional amendment pursuant to Article 257, we cannot have the President playing the role of umpire, who is expected to be neutral and act in the interests of the nation, in a process where he is also a player advocating for his own personal interests and agendas. Clearly, there would be a serious conflict of interest. This would be detrimental to the interests of the people and the nation.

[792] Secondly, the President ceases to be an ordinary citizen the minute he takes office. Article 131 describes him as the Head of State and Government who exercises executive authority of the Republic. He is also the Commander in Chief of the Kenya Defence Forces. He chairs the National Security Council, pursuant to Article 240, which exercises supervisory control over national security organs including the Kenya Defence Forces, the National Intelligence Service and the National Police Service. He is also a symbol of national unity. He plays various powerful roles pursuant to Article 132 including appointing Cabinet Secretaries,

the Attorney General, Principal Secretaries, High Commissioners, ambassadors as well as diplomatic and consular representatives. He is empowered by virtue of Article 132(4)(d) and (e) to declare a state of emergency or declare war, respectively. He may also, pursuant to Article 192, even suspend county governments either in an emergency arising out of internal conflict or war or for any other exceptional circumstances.

[793] By virtue of holding office, the President is accorded immunity in accordance with Article 143, the extent of which is now the subject of this decision. Even on the international stage, the President is taken to be a symbol of the sovereignty of the people and for that reason accorded immunity. He is also accorded special security and residence for the duration of his term. Therefore, it is difficult to divorce the person from the position during his term of office. The present dispute is a clear demonstration of this.

[794] There is contestation regarding the role the President played in the impugned exercise of constitutional amendment and whether or not he was a promoter. The High Court coined the term *'initiator'* in attempting to describe the President's role in the impugned process. The term *'initiator'* does not appear anywhere in the constitutional process and yet the role the President played cannot be overlooked.

[795] This power and control that the President exercises by virtue of his position was evident in the inception of the Amendment Bill as rightly pointed out by the learned Judges of the Superior Courts. It begun right from the *'handshake'* that was between him, as the elected President following the contentious 2017 General Elections and rerun and his competitor and challenger, Hon. Raila Odinga. He then proceeded to appoint the BBI Taskforce vide Kenya Gazette Notice No. 5154 dated 24th May, 2018. The Kenya Gazette is an official government publication. The Taskforce comprised of the following members: Dr. Adams Oloo, Ms. Agnes Kavindu, Sen. Amos Wako, Ms. Florence Omose, Prof. Saeed Mwanguni, James

Matundura, Major (Rtd) John Seii, Bishop Lawi Imathiu, Maison Leshomo, Sen. Mohamed Yusuf Haji, Prof. Morompi Ole Ronkai, Bishop Peter Njenga, Rose Moseu and Arch. Bishop Zacchaeus Okoth. Further, Amb. Martin Kimani and Paul Mwangi were appointed as the Joint Secretaries. On 26th November, 2019, the BBI Taskforce presented its report titled ***"Building Bridges to a United Kenya; from a nation of blood ties to a nation of ideals"*** to the President. The report was subsequently launched on 27th November, 2019.

[796] Shortly thereafter, the President vide Kenya Gazette Notice 264 dated 10th January, 2020 appointed the ***"The Steering Committee on the Implementation of the Building Bridges to a United Kenya Task Force Report"*** comprising the same members and joint secretaries. The BBI Steering Committee submitted its Report to the President on 21st October, 2020 and the same was launched on 26th October, 2020 at the Bomas of Kenya and presided over by the President. The Report contained a draft of the Constitution (Amendment) Bill, 2020 (BBI Steering Committee Draft Bill) as one of the annexures.

[797] During the launch of the BBI Steering Committee Report, the Building Bridges National Secretariat appointed Mr. Dennis Waweru and Junet Mohamed as its co-chairpersons. Subsequent to the launch, the BBI National Secretariat, in a bid to commence the constitutional amendment process, vide letter dated 18th November 2020, wrote to the IEBC for guidance on how the format to utilize to collect signatures. The letter was reproduced by *Sichale, J.A*, as follows:

> ***"18th November 2020***
> ***The Chairperson,***
> ***The Independent Electoral and Boundaries Commission,***
> ***University Way, Anniversary Towers, 6th Floor,***
> ***P.O Box 45371-00100,***
> ***Nairobi.***
>
> ***Dear Sir,***

RE: BUILDING BRIDGES TO A UNITED KENYA: KENYA MOJA.
The Secretariat of the Building Bridges to a United Kenya (Kenya Moja) desires to collect one million signatures in support of the proposed constitution of Kenya (Amendment) Bill 2020.

Attached find a proposed format for the signature collection for your guidance and approval.

Yours Sincerely,
Hon. Dennis Waweru Hon Junet Mohammed
Co- Chairperson Co- Chairperson"

[798] The IEBC vide a letter dated 24th November 2020 addressed to the BBI National Secretariat provided an approved format/template for the roll out of collection of signatures from Kenyans in support of the amendment of the Constitution. *Sichale, J.A*, reproduced the foresaid letter for ease of reference:

"Ref IEBC/CP/REFER/1/VOL 1/56 24th November, 2020
The Co-Chairpersons,
Building Bridges Initiative National Secretariat
NAIROBI.

RE: BUILDING BRIDGES TO A UNITED KENYA; KENYA MOJA
We refer to your letter dated 18th November 2020 on the above subject matter that was delivered to our offices on 23rd November 2020. Further in reference is made to your proposed format for collection of signatures in support of the Constitution of Kenya (Amendment) Bill, 2020 attached therein.

The Commission takes note of your request for guidance as well as approval of your proposed format and provides to you the approved format /template (copy enclosed herewith) that should be used for collection of signatures.

To enable the voter verification process and to ensure completeness of the supporters' records, all the fields in the said approved format should be duly filled as provided.

W.W. CHEBUKATI
CHAIRMAN."

[799] On 25th November, 2020, at Kenyatta International Conference Centre (KICC), His Excellency the President launched the Constitution of Kenya (Amendment) Bill 2020 and the roll out for the collection of signatures. Throughout this entire process there was no submission that the President was acting in any other role other than in an official capacity. The importance of this while discussing issue no. 4 on the extent of the immunity the President has under Article 143. *Kiage JA,* captured the President's involvement pertinently when he stated that the President *"...was the embodiment of State and Government power and authority."*

[800] However, there appears to be a disconnection between the BBI Steering Committee and the BBI National Secretariat. What has not come out clearly is the nature of the BBI National Secretariat, who created it, how it came to be and its composition or mandate. Before the High Court, it was submitted that the BBI Secretariat is the promoter of the Amendment Bill and the associated popular initiative. It was further contended that the BBI Secretariat is a voluntary political alliance of various political players in Kenya. Counsel for BBI Secretariat, Mr. Mwangi argued that the BBI Secretariat is not gazetted and is completely distinct to the BBI Taskforce and BBI Steering Committee. There is some credence to this argument given the fact that the proposed amendments in the Bill launched on 25th November, 2020 differ from the Amendment Bill annexed to the BBI Steering Committee Report launched only a month before on 26th October, 2020.

[801] However, the pleadings before the High Court tell a different story. Thirdway Alliance, in its Petition E400 of 2020, enjoined both the BBI Steering Committee and the BBI National Secretariat as the 1st and 2nd respondents respectively. It then proceeded to describe them thus:

"... 4. The 1st Respondent is the Steering Committee on Implementation of the Building Bridges to a United Kenya Task Force Report established by the President of the Republic of Kenya through the Head of Public Service vide Gazette Notice dated 10th January 2020. Its address of service for purposes of this suit shall be care of the Petitioner's Advocates.

5. The 2nd Respondent is the Secretariat of the 1st Respondent established as an administrative department of the 1st Respondent. The said secretariat is co-chaired by the following individuals:

(i) Hon. JUNET MOHAMED, a sitting member of the National Assembly for Suna East Constituency on the Orange Democratic Party (ODM) ticket and the Minority whip in the National Assembly.

(ii) Hon. Dennis Waweru, a member of Jubilee Party and former member of National Assembly for Dagoretti South Constituency on Jubilee Party ticket."

[802] In response to the Petition was a Replying Affidavit sworn by Hon. Dennis Waweru on 5th February, 2021. Mr. Waweru made no attempt to controvert the description ascribed to the BBI National Secretariat. He only depones thus:

"THAT I am one of the Co-Chairpersons of the Building Bridges to a United Kenya, National Secretariat, and my other co-chairperson being Honourable Junet Mohamed, and duly authorized to swear the instant affidavit both on my behalf, on behalf of my co-chairperson and on behalf of the BBI and Hon. Raila A.

Odinga, the Respondents herein and I swear this Affidavit in opposition to the Consolidated Petitions herein.

2. .....

3. THAT the Building Bridges to a United Kenya was created and mandated with the tasks of initiating a constitutional amendment process and unifying Kenyans, among other functions."

[803] Morara Omoke in his Petition No. E416 of 2020, enjoined only the BBI Steering Committee and not the BBI National Secretariat. Similarly, in response was a Replying Affidavit sworn by Hon. Dennis Waweru on 5th February, 2021, where he deponed the same description as before. Again, making no attempt to controvert the description or trying to distinguish the BBI Secretariat from the BBI Steering Committee.

[804] I am not convinced by the attempt to camouflage the BBI National Secretariat as an amorphous body or as a political alliance of various players in Kenya. I am further not convinced by the attempt to delink it from the BBI Steering Committee as well as the BBI Taskforce. To my mind, the BBI National Secretariat was not a different or separate entity from the BBI Steering Committee. I find further support for my interpretation from the fact that after the launch of 25th November, 2020, some government departments and ministries were involved in the collection of signatures. This was a continuance of the process that the Executive arm of government begun in the constitutional amendment process. *Sichale, J.A*, made reference to a letter dated 1st December, 2020 written by Joe Okudo, **the Principal Secretary, Ministry of Sports, Culture and Heritage** addressed to the Director General in the Ministry and copied to the Cabinet Secretary which I reproduce hereunder. It reads:

"Mr. Pius Metto
Director General
Sports Kenya
Nairobi

BUILDING BRIDGES INITIATIVE CONSTITUTIONAL AMENDMENT BILL 2020 SIGNATURE COLLECTION FORMS- SERIAL NOS 0224407 TO 0224425
The above subject matter refers.
Attached please find the Building Bridges Initiative Constitutional Amendment Bill 2020, signature collection form.
You are required to supervise your staff to fill in the forms and sign appropriately.
Kindly take this exercise seriously and note that the deadline is tomorrow, 2nd December 2020.

Joe Okudo CBS
PRINCIPAL SECRETARY."

[805] None of these facts are contested or controverted. I arrive at the same conclusion as the learned Judges of Appeal, that the process of constitutional amendment was largely driven by the Executive led by the President. It is thus illogical to truncate the actions of the BBI National Secretariat through Hon. Junet Mohamed and Hon. Dennis Waweru from the actions and processes by the BBI Taskforce as well as Steering Committee. It further is evident that the *"Handshake"* triggered a chain of events, which thereafter had a domino effect, one action leading to the next, until the culmination of the launch of 25th November, 2020 by the President launching the Amendment Bill and the collection of signatures.

Though the President may not have been one of the named promoters of the Amendment Bill, his role at every stage cannot be disregarded.

[806] In the end, it is my finding that the path of popular initiative pursuant to Article 257 of the Constitution is strictly reserved only for the ordinary Kenyan.

[807] The differences in the Amendment Bill that was launched on 25th November, 2020 from the Amendment Bill contained in the BBI Steering Committee Report presented to the President on 26th October, 2020 are better contextualized while discussing the place of public participation under Issue No. 5.

(iii) Whether the Second Schedule to the Constitution of Kenya (Amendment) Bill, 2020 was unconstitutional

[808] Section 1(2) of the Second Schedule to the Amendment Bill creates 70 new constituencies and proceeds to distribute them across 28 of the 47 counties. Section 1(1) then directs IEBC, within six months of commencement date of the impugned Amendment Bill, to determine the boundaries of the additional 70 constituencies using the criteria provided for in Articles 81(d) and 87(7) of the Constitution.

[809] Section 1(3) then requires IEBC during the allocation of the additional constituencies to prioritise the constituencies underrepresented in the National Assembly on the basis of population quota. IEBC is also to ensure that the allocation is in a manner that ensures the number of inhabitants in a constituency is as nearly as possible to population quota.

[810] Interestingly, Section 1(6) provides that the requirement of Article 89 (4) does not apply to the review of boundaries for the additional constituencies preceding the first general election from the commencement date of the Amendment Bill.

[811] The High Court undertook a historical account of constituency delimitations in order to demonstrate that the matter was and continues to be a delicate, emotive and often a highly contentious exercise underpinned by what the Kriegler Report termed as *"gross disparities in the voting populations and gross disparity in the sizes of Kenya's constituencies."* The Court also noted that the historical context underscored the importance of public participation and close consultation with stakeholders and interested parties. The CKRC in its Final Report noted at page 168 that the *'delimitation of constituency and other electoral boundaries remains central to fair and free elections so long as elections are based on single member constituencies."* The Commission at page 180 of the Report recommended:

> ***"the process of reviewing or delimiting electoral boundaries should occur every 10 years using the results of the population census as a basic resource; the process should be transparent and opportunity for public consultation, debate and input should be guaranteed; the Constitution should make it difficult for Parliament and/or Executive to be able to change electoral boundaries at will."***

[812] IEBC is established pursuant to Article 88 of the Constitution. Article 88 (4)(c) provides that one of the roles IEBC carries out is as follows:

> ***"The Commission is responsible for conducting or supervising referenda and elections to any elective body or office established by this Constitution, and any other elections as prescribed by an Act of Parliament and, in particular, for — <u>the delimitation of constituencies and wards"</u>*** [emphasis added].

[813]Article 89 elaborates what delimitation of electoral units entails and provides as follows:

> ***"Delimitation of electoral units***
>
> ***(1) There shall be two hundred and ninety constituencies for the purposes of the election of the members of the National Assembly provided for in Article 97(1)(a).***
>
> ***(2) <u>The Independent Electoral and Boundaries Commission shall review the names and boundaries of constituencies at intervals of not less than eight years, and not more than twelve years, but any review shall be completed at least twelve months before a general election of members of Parliament.</u>***
>
> ***(3) The Commission shall review the number, names and boundaries of wards periodically.***
>
> ***(4) If a general election is to be held within twelve months after the completion of a review by the Commission, the new boundaries shall not take effect for purposes of that election.***
>
> ***(5) The boundaries of each constituency shall be such that the number of inhabitants in the constituency is, as nearly as possible, equal to the population quota, but the number of inhabitants of a constituency may be greater or lesser than the population quota in the manner specified in clause (6) to take account of—***
>
> ***(a) <u>geographical features and urban centres;</u>***

(b) community of interest, historical, economic and cultural ties; and

(c) means of communication.

(6) The number of inhabitants of a constituency or ward may be greater or lesser than the population quota by a margin of not more than—

(a) forty per cent for cities and sparsely populated areas; and

(b) thirty per cent for the other areas.

(7) In reviewing constituency and ward boundaries the Commission shall—

(a) consult all interested parties; and

(b) progressively work towards ensuring that the number of inhabitants in each constituency and ward is, as nearly as possible, equal to the population quota.

(8) If necessary, the Commission shall alter the names and boundaries of constituencies, and the number, names and boundaries of wards.

(9) Subject to clauses (1), (2), (3) and (4), the names and details of the boundaries of constituencies and wards determined by the Commission shall be published in the Gazette, and shall come into effect on the dissolution of Parliament first following their publication.

(10) A person may apply to the High Court for review of a decision of the Commission made under this Article.

(11) An application for the review of a decision made under this Article shall be filed within thirty days of the publication of the decision in the Gazette and shall be heard and determined within three months of the date on which it is filed.

(12) ***For the purposes of this Article, "population quota" means the number obtained by dividing the number of inhabitants of Kenya by the number of constituencies or wards, as applicable, into which Kenya is divided under this Article"*** [emphasis added].

[814]This role is further elaborated under Section 36 of the IEBC Act which provides as follows:

"(1) The Commission shall discharge its mandate of the delimitation of boundaries of constituencies and wards in accordance with the Constitution, this Act and any other law.

(2) Subject to the Constitution, matters to be addressed in the delimitation of electoral boundaries are—

(a) review of the names and boundaries of constituencies;

(b) review of the number, names and boundaries of wards;

(c) re-distribution of wards affected by any changes in the boundaries of constituencies; and

(d) ensuring that the number of inhabitants in each constituency and ward is as nearly as possible, equal to the population quota as provided for by Article 89(5) of the Constitution and that such a process—

(i) allows for variation of margin of not more than the limits provided under Article 89 (6) of the Constitution in relation to cities, sparsely populated areas and other areas;

(ii) takes into account the provisions of Article 89 (7) (b) of the Constitution that provides for the progressive realization of the requirement that the number of inhabitants in each constituency and ward to be as nearly as possible, equal to the population quota for the purposes of the each review;

(iii) is subject to the use of enumerated national census figures.

(3) The Commission shall prepare and publish a preliminary report outlining—

a. the proposed delimitation of boundaries for constituencies and wards; and

b. the specific geographical; and

c. demographical details relating to such delimitation.

(4) The Commission shall ensure that the preliminary report is made available to the public for a period of thirty days and invite representations from the public on the proposals contained in the report during that period.

(5) Upon the expiry of the period provided in subsection (4), the Commission shall, within fourteen days, review the proposed delimitation of boundaries considering the views received and submit the revised preliminary report to the Parliamentary Committee.

(6) The Parliamentary Committee shall, within fourteen days of receipt of the revised preliminary report, table the report in the National Assembly together with its recommendations.

(7) The National Assembly shall, within fourteen days of the tabling of the revised preliminary report, consider the report and forward its recommendations to the Commission.

(8) Within fourteen days of the expiry of the period provided for in subsection (7), the Commission shall upon receipt and considerations of the National Assembly and representations from the public, prepare the final report for publication in the Gazette.

(9) Where the National Assembly fails to make recommendations within the period specified in subsection (7), the Commission shall publish its report in accordance with subsection (8).

(10) A person who, being responsible for the publication in the Gazette of the final report submitted under this subsection fails to publish the report within the time required by the Commission after the report has been submitted to that person, commits an offence and is liable to imprisonment for a term of one year.

(11) Notwithstanding any other written law, where the final report is not published in accordance with the provisions of subsection (9) the Commission shall, within seven days of the submission of the said report, cause the report to be published in at least two dailies of national circulation and such publication shall have effect as if it were done in the Gazette".

[815] Further, IEBC is one of the independent commissions named under Article 248 of the Constitution. As such, IEBC's independence is secured and fortified under Article 249 which provides as follows:

"249. Objects, authority and funding of commissions and independent offices

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

(a) protect the sovereignty of the people;

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

(c) promote constitutionalism.

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

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

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

(3) Parliament shall allocate adequate funds to enable each commission and independent office to perform its functions and the budget of each commission and independent office shall be a separate vote".

[816]In so far as the promoters of the Amendment Bill, through the Second Schedule, purport to direct the IEBC in how to proceed to carry out the exercise of delimitation, they run afoul the express provisions of Article 249. The IEBC as an independent commission is subject only to the Constitution and law. It not subject to the direction or control of any person or authority. The Supreme Court has underscored this independence in previous decisions. Given the importance of the matter before us, the same bears repeating. In the decision in ***Re the Matter of the Interim Independent Electoral Commission*** the Court stated as follows:

"[59] It is a matter of which we take judicial notice, that the real purpose of the "independence clause", with regard to Commissions and independent offices established under the Constitution, was to provide a safeguard against undue interference with such Commissions or offices, by other persons, or other institutions of government. Such a

provision was incorporated in the Constitution as an antidote, in the light of regrettable memories of an all-powerful Presidency that, since Independence in 1963, had emasculated other arms of government, even as it irreparably trespassed upon the fundamental rights and freedoms of the individual. The Constitution established the several independent Commissions, alongside the Judicial Branch, entrusting to them special governance-mandates of critical importance in the new dispensation; they are the custodians of the fundamental ingredients of democracy, such as rule of law, integrity, transparency, human rights, and public participation. The several independent Commissions and offices are intended to serve as 'people's watchdogs' and, to perform this role effectively, they must operate without improper influences, fear or favour: this, indeed, is the purpose of the "independence clause".

[817] In the decision in ***Communications Commission of Kenya and 5 Others v. Royal Media Services and 5 Others***, S.C Petition No. 14 of 2014 as consolidated with Petition Nos. 14A, 14B and 14C OF 2014 [2014] eKLR, the Supreme Court considered the meaning of independence in relation to Article 34(5) of the Constitution, which requires the enactment of legislation to provide for an independent body to establish media standards, as well as monitor and regulate the operation of such standards. It held as follows:

"[I]ndependence' is a shield against influence or interference from external forces. In this case, such forces are the Government, political interests, and commercial interests. The body in question must be seen to be carrying

out its functions free of orders, instructions, or any other intrusions from those forces. However, such a body cannot disengage from other players in public governance.

"How is the shield of independence to be attained? In a number of ways. The main safeguard is the Constitution and the law. Once the law, more so the Constitution, decrees that such a body shall operate independently, then any attempt by other forces to interfere must be resisted on the basis of what the law says. Operationally however, it may be necessary to put other safeguards in place, in order to attain 'independence' in reality. Such safeguards could range from the manner in which members of the said body ar21e appointed, to the operational procedures of the body, and even the composition of the body. However, none of these 'other safeguards' can singly guarantee 'independence'. It takes a combination of these, and the fortitude of the men and women who occupy office in the said body, to attain independence."

[818]See also the ***Priscilla Ndululu Case*** where the High court underscored the importance of IEBC in our society:

"162. The question would then be whether the 2008 Amendment of Section 41 distorted the basic structure of the repealed Constitution. If the amendment was in respect of the 2010 Constitution, the answer to that question would, without doubt, be in the affirmative. We say so since Article 255(1)(g) provides that any amendment which relates to "the independence of the Judiciary and the commissions and independent offices to which Chapter

Fifteen applies" should be approved by a referendum. According to Article 248(1), the Independent Electoral and Boundaries Commission is one of the commissions to which Chapter Fifteen applies. The people of Kenya therefore deemed it important that only a referendum can approve any amendment touching on the IEBC. The importance of the IEBC in the functioning of our democracy cannot be overemphasized."

[819] Secondly, the promoters in creating 70 new constituencies, purport to predetermine how many more constituencies the country needs. They do not elaborate the criteria used in arriving at the number 70 or how they chose to distribute those 70 across only 28 of the 47 Counties. They again find themselves infringing Article 10(2) which binds all persons to ensure that national values and principles of governance are infused into every application or interpretation of the Constitution or when making or implementing public policy decisions. Contrary to this, the figure of 70 seems to have been surmised with no sound justification.

[820] Additionally, by arriving at a figure of 70, the promoters were seeking to bypass the elaborate process delineated under Article 89 of the Constitution and Section 36 of the IEBC Act setting out key criteria set out under Article 89(5) such as geographical features and urban centres, community of interest, historical, economic and cultural ties as well as means of communication.

[821] Further, the promoters of the Amendment Bill also sought to direct the IEBC through Section 1(1) to use *'criteria provided for in Articles 81 (d) and 87(7)'*. These two provisions do not provide for criteria that the IEBC can utilize in a boundary delimitation exercise. Article 81 (d) provides that electoral systems are to comply with the principle of universal suffrage based on the aspiration of fair representation and equality of vote. This does not touch on IEBC's role in delimitation of constituencies. Article 87 makes provision for dispute resolution

mechanisms for electoral disputes and does not contain a Sub-Article 7. On this issue, I am in agreement with the superior courts when they found that the Second Schedule was void by citing unknown criteria in the process of delimitation and making reference to non-existent provision.

[822] Finally, Article 89(7) of the Constitution requires that IEBC while reviewing constituency and ward boundaries, to consult all interested parties. Section 36(4) to (11) of the IEBC Act requires IEBC to make a preliminary report available to the public and invite representations on the same. The National Assembly, as a stakeholder also has a chance to debate the preliminary report by IEBC and then forward its views to IEBC. IEBC is then required to consider these views by the public and the National Assembly and prepare a final report. In this way, robust public participation and stakeholder engagement is ensured under the Constitution. The Second Schedule by predetermining the 70 new constituencies and their allocation to several counties circumvent this critical component to delimitation of boundaries, offending not just Article 89 but Article 10 as well.

[823] Lastly, *Musinga, (P)* pointed us to the Report by the Justice and Legal Affairs Department on the Amendment Bill dated 23rd April, 2021. This Report lends credence to my finding of unconstitutionality. The members of JLAC also by a majority found the Second Schedule to the Amendment Bill to be unconstitutional for the following reasons:

> ***"(a) The attempt to oust the application of Article 89(4) of the Constitution, as proposed in the Second Schedule of the Bill, could only be possible if the Article was amended expressly and not by having separate provisions in the schedule. This is because the Schedule does not amend Article 89(4) of the Constitution. Even with the provision, Article 89(4) would still exist and operate. As such, this would create parallel and***

conflicting mandates to review the names and boundaries of constituencies.

(b) The Schedule is predicated on clause 74 of the Bill, which deals with transitional and consequential provisions in the Bill. There is no substantive provision of the Bill dealing with delimitation of constituencies, on which the Second Schedule would be anchored."

[824] I therefore find the sections of the Second Schedule of the Amendment Bill to be unconstitutional for the reasons I have outlined.

(iv) Whether civil proceedings can be instituted against the President or a person performing the functions of the office of the President during his/her tenure of office with regard to anything done or not done contrary to the Constitution

[825] The Constitution of Kenya, 2010 makes provision for presidential immunity under Article 143 as follows:

"143. (1) Criminal proceedings shall not be instituted or continued in any Court against the President or a person performing the functions of that office, during their tenure of office.

(2) Civil proceedings shall not be instituted in any Court against the President or the person performing the functions of that office during their tenure of office in respect of anything done or not done in the exercise of their powers under this Constitution.

(3) Where provision is made in law limiting the time within which proceedings under clause (1) or (2) may be brought against a person, a period of time during

which the person holds or performs the functions of the office of the President shall not be taken into account in calculating the period of time prescribed by that law.

(4) The immunity of the President under this Article shall not extend to a crime for which the President may be prosecuted under any treaty to which Kenya is party and which prohibits such immunity" [emphasis added].

[826] The repealed Constitution provided as follows regarding presidential immunity:

"14. Protection of President in respect of legal proceedings during office:

(1) No criminal proceedings whatsoever shall be instituted or continued against the President while he holds office, or against any person while he is exercising the functions of the office of President.

(2) No civil proceedings in which relief is claimed in respect of anything done or omitted to be done shall be instituted or continued against the President while he holds office or against any person while he is exercising the functions of the office of President.

(3) Where provision is made by law limiting the time within which proceedings of any description may be brought against any person, a period of time during which a person holds or exercises the functions of the office of President shall not be taken into account in calculating any period of time prescribed by that law

which determines whether any such proceedings as are mentioned in subsection (1) or (2) may be brought against that person" [emphasis added].

[827] The Constitution differs from the repealed Constitution in introducing a qualification to the immunity granted to the president. The provision evolved from ***'in respect of anything done or omitted to be done'*** to now the operative phrase in Article 143 (2) is as follows:

"(2) Civil proceedings shall not be instituted in any Court against the President or the person performing the functions of that office during their tenure of office in respect of anything done or not done in the exercise of their powers under this Constitution" [emphasis added].

[828] The CKRC in its final Report noted that regarding presidential immunity, some Kenyans '*want no legal immunity for a former President but others think the Constitution should provide for it*'. The Commission did not make recommendations in that regard.

[829] Counsel for H.E. Uhuru Kenyatta correctly submitted that presidential immunity is not unique to our jurisdiction. It has roots in English common law and can be traced back to the maxim *"the King can do no wrong"*. It has of course evolved right along the notion of limited governments and democracy. Immunity of this nature is also recognized under Customary International Law whereby officials of a state enjoy immunity from both civil and criminal authority. The immunity takes two forms. The first is immunity based on the functions they perform termed functional immunity or immunity *rationae materiae*. In other words, it is immunity for acts performed in an official capacity. The immunity is functional to the work of the official of the state; it attaches to the function and not the individual.

[830] The second and more pertinent to the present deliberation is immunity granted to certain officials because of the office they hold is termed personal immunity or immunity *rationae personae*. It is immunity given to individuals by virtue of the position they hold and is applied to three main offices: heads of state, heads of government or ministers of foreign affairs. This immunity attaches to the individual and covers acts, both private and official, committed prior to and while the official holds office. Further it is considered to be temporary and it takes effect as soon as the official takes office and ceases as soon as they leave office. Even more relevant is the justification for according a Head of State immunity *ratione personae*.

[831] A Head of State is accorded immunity *ratione personae* not only because of the functions he performs, but also because of what he symbolizes, the sovereign state. The person and position of the Head of State reflects the sovereignty of the state and the immunity accorded to him is in part due to the respect for the dignity of the office and of the state which that office represents. This mutual respect is underpinned by the principle of *par in parem non habet imperium* latin for "*equals have no sovereignty over each other*" which is the basis for the immunity of states from the jurisdiction of other states. To arrest and detain the leader of a country is effectively to change the government of that state which is considered to be an extreme form of interference with the autonomy and independence of that foreign state. The notion of independence means that a state has exclusive jurisdiction to appoint its own government.

[832] In the United States, presidential immunity has been the subject of judicial decisions. In the case of ***Halperin v. Kissinger*** 606 F.2d 1192 (D.C. Circ 1979) ***(Halperin v. Kissinger Case)*** the President alongside other Executive branch officials had been taken to task over illegal wiretapping. The Court of Appeals for the District of Columbia Circuit held that the president was entitled only to qualified immunity. The Court in rejecting the notion of absolute immunity

concluded that it was not justified on public policy grounds. The Court held that limited immunity was intended to check executive behavior that threatened constitutional rights and would not hamper effective government. Worthy of note, was that the Court stated that the protection offered by qualified immunity took into account the special time demands whereby, in times of emergency, the president is entitled to consult fewer sources and expend less effort inquiring into the circumstances of a problem, which makes it difficult to impeach a president's good faith immunity. The Court concluded that the doctrine of separation of powers did not require absolute presidential immunity.

[833] In line with this finding on the doctrine of separation of powers, the U.S. Supreme Court in the case of ***Youngstown Sheet & Tube Co. v. Sawyer*** 343 U.S. 579 (1952) had utilized the power of judicial review to check the actions of the then President Trumann finding that he had exceeded his constitutional authority in ordering seizure of the nation's steel mills to avert a nationwide strike. The Court in doing so held that its power to review presidential orders was inherent in the constitutional design. *Justice Jackson* in his concurrence held as follows:

> ***"While the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government. It enjoins upon its branches separateness but interdependence, autonomy but reciprocity."***

[834] The U.S Supreme Court however departed from the previous approaches in the decision in ***Nixon v. Fitzgerald*** 457 U.S. 731 (1982) ***(Nixon Case)*** where the majority of the Court held that the separation of powers principle gives rise to absolute immunity. The Court justified their decision by finding that the President has greater protections than governors and other officials, who have qualified immunity, since he holds a unique position in the structure of government and has uniquely important duties. The Court found that the distractions caused by

defending a civil lawsuit would improperly distract the President from fulfilling his executive function, which would undermine the government more broadly. It was concluded that there was no cause for concern that the President would be above the law, since impeachment and other processes impose checks on his powers. It held as follows:

> ***"Applying the principles of our cases to claims of this kind, we hold that petitioner, as a former President of the United States, is entitled to absolute immunity from damages liability predicated on his official acts. We consider this immunity a functionally mandated incident of the President's unique office, rooted in the constitutional tradition of the separation of powers and supported by our history. Justice Story's analysis remains persuasive:***
>
> > *'There are ... incidental powers belonging to the executive department which are necessarily implied from the nature of the functions which are confided to it. Among these must necessarily be included the power to perform them ... The president cannot, therefore, be liable to arrest, imprisonment, or detention, while he is in the discharge of the duties of his office, and, for this purpose, his person must be deemed, in civil cases at least, to possess an official inviolability.'*
>
> ***3. J. Story, Commentaries on the Constitution of the United States § 1563, pp. 418-419 (1st ed. 1833).***
>
> ***The President occupies a unique position in the constitutional scheme. Article II, § 1, of the Constitution provides that "[t]he executive Power shall be vested in a President of the United States..*** *'This grant of authority establishes the President as the chief constitutional officer of the*

*Executive Branch, entrusted with supervisory and policy responsibilities of utmost discretion and sensitivity. These include the enforcement of federal law – it is the President who is charged constitutionally to "take Care that the Laws be faithfully executed'**;*** ***the conduct of foreign affairs – a realm in which the Court has recognized that*** *'[i]t would be intolerable that courts, without the relevant information, should review and perhaps nullify actions of the Executive taken on information properly held secret' and management of the Executive Branch – a task for which 'imperative reasons requir[e] an unrestricted power [in the President] to remove the most important of his subordinates in their most important duties.'*

....

In the absence of immunity... executive officials would hesitate to exercise their discretion in a way "injuriously affect[ing] the claims of particular individuals," even when the public interest required bold and unhesitating action. Considerations of *'public policy and convenience'* ***therefore compelled a judicial recognition of immunity from suits arising from official acts."***

[835] Turning back to the present dispute, the High Court pointed out that from the provision of Article 143(2) it noted that immunity was limited to the *"...functions of that office..."* as well as *"...during their tenure of office..."*. From this the High Court found that in order to be covered by immunity pursuant to Article 143(2), the person should have to be in office and second the impugned actions would have to have taken place during the tenure of office.

[836] The qualification introduced by the Constitution demarcates the official actions and omissions of the president from the actions and omissions carried out

his personal capacity. Strict interpretation of Article 143 (2) lead to the conclusions that the immunity spelt out:

(a) Applies to the President or anyone performing the actions of that office

(b) Applies only to the actions or omissions done in the exercise of their powers under the Constitution

(c) Is not absolute but rather it is limited for the time the president is in office.

[837] I fully endorse the description of the uniqueness of the presidency ascribed by the U.S. Supreme Court in the ***Nixon Case***. The learned Judges highlighted the fact that the President occupies a unique position in the constitutional scheme exerting executive power having been entrusted with supervisory and policy responsibilities of utmost discretion and sensitivity. They stated that the responsibilities include enforcement of laws; conducting foreign affairs and steering security matters. It is for this reason that it would prejudicial to the balance required under the doctrine of separation of powers to have the President be liable to arrest, imprisonment or detention for his decisions and while in office. I am further persuaded by the reasoning the ***Nixon Case*** that it would be prejudicial for the courts to review and nullify decisions of the President without the relevant information, held in secret and sometimes made in times of emergency.

[838] However, this position notwithstanding, taking a purposive approach as required under Article 259, the President being an office created under the Constitution in order to serve people, cannot be considered to be above the law. The provision on immunity must be read against the backdrop of a historical imperial presidency who, through constitutional amendments, concentrated power in himself. It cannot be that the framers of the Constitution intended that

the President would be above the law and could carry out roles unchecked. I find value in the finding by the Court in the ***Halperin v. Kissinger Case***, that under the doctrine of separation of powers, we do not require absolute presidential immunity. It is through the various systems of checks and balances that check the executive's actions and omissions. The same are however not designed to hamper effective management of government affairs.

[839] I find myself in agreement with the words of *Kiage, J.A*, when he stated as follows:

> ***"Those values and principles, alongside constitutionalism, which denotes limited government, must mean that the office of President, being a creature of the Constitution, is and must be subordinate to the Constitution and its holder must be held to account for his acts and omissions. The President is not above the Constitution or the law and is not a law into himself or herself. In recognition of the pre-eminence and importance of the office of the President, the Constitution grants protection to the holder thereof to the end that he should not be unduly impaired in the performance of his unique duties. That protection cannot, by any stretch of the imagination, be extended to cover any and every act or omission including those outside of or in violation of the Constitution."***

[840] As the High Court pointed out there may come a time when the President acts *ultra vires* or takes actions that are detrimental to the interests of the country. They stated as follows:

> **"*Assuming, in his tenure, the President embarks on a mission that is not only clearly in violation of the Constitution but is also destructive to the nation, would it***

not be prudent that he should be stopped in his tracks rather than wait until the lapse of his tenure by which time the country may have tipped over the cliff?"

[841] In such a situation, as pointed out by Counsel for the 20th respondent, there exist two remedies to an aggrieved party through which they can challenge the president's actions or omissions. First, by suing the Attorney General who pursuant to Article 256 (4) of the Constitution represents the national government in court or other legal proceedings other than criminal proceedings. However, I am not convinced that judicial review is the only remedy as contended by the Attorney General or Counsel for the 20th respondent. In the Supreme Court decision in ***John Florence Maritime Services Limited & Another v. Cabinet Secretary, Transport and Infrastructure & 3 Others,*** SC Petition 17 of 2015; [2021] eKLR, the Court highlighted the differences between judicial review and constitutional petitions finding that judicial review was generally concerned with the legal and procedural validity of a decision which did not allow the court to examine the evidence and form its own views about the substantial merits of the case. Whereas in a constitutional petition the court looks beyond the process and may delve into the merits of a matter. However, the choice is entirely up to the person who so wishes to challenge the actions or omissions of the President as it would be dependent on the circumstances of the challenge.

[842] The alternative is to pursue the President's impeachment for violation of the Constitution or other law pursuant to Article 145 of the Constitution and once successful, the President ceases to be immune and may be pursued for his actions or omissions. To be clear, this is in regards to official actions and omission done in exercise of power under the Constitution.

[843] On the other hand, it would appear that no protection is offered as regards actions or omissions in the President's personal capacity. Using a hypothetical example of a simple lease between a tenant and the landlord being the President,

the immunity afforded under Article 143(2) would not apply as this would be an entirely unofficial dispute.

[844] Against this finding, I examine whether the President was correctly sued in the present dispute. The genesis of the BBI can be traced back to the public declaration to cease hostilities famously dubbed *'handshake'* between H.E. Uhuru Kenyatta and Hon. Raila Odinga that took place on 9th March, 2018. Thereafter, H.E. Uhuru Kenyatta, through Gazette Notice No. 5154 of 24th May, 2018 established an initiative termed the *"Building Bridges to Unity Advisory Taskforce"* with the key mandate of coming up with recommendations and proposals for building a lasting unity in the country.

[845] The BBI Taskforce came up with an interim report in November of 2019. Subsequent to this, H.E. Uhuru Kenyatta through Gazette Notice No. 264 dated 3rd January, 2020 appointed the BBI Steering Committee on the implementation of the Building Bridges to a United Kenya Taskforce whose mandated was to conduct a validation of the BBI Taskforce Report through consultations with the people, civil societies, faith based organization, cultural leaders and private sector then to propose administrative, policy and statutory or constitutional changes that may be necessary for the implementation of the Taskforce Report. Thereafter, on 21st October, 2020 at Kisii State Lodge, H.E. Uhuru Kenyatta and Hon. Raila Odinga received the BBI Steering Committee Report and the BBI Steering Committee draft Bill, among other proposed Bills.

[846] The President, in the submissions made before the Court of Appeal, confirmed that he established both the BBI Taskforce and the BBI Steering Committee pursuant to the functions and obligations conferred upon him by Articles 131 and 132 of the Constitution. It is evident, in the entire process leading up to this challenge, H.E. Uhuru Kenyatta was acting in his official capacity as the head of government and in exercise of his executive role. The correctness or otherwise of the same notwithstanding, the same falls within the parameters of

protection of Article 143 (2) of the Constitution. It was therefore erroneous for him to have been sued in his personal capacity.

[847] This appeal is a clear demonstration that the remedy of constitutional challenge vide petition directed at the Attorney General is sufficient to call to question any actions or omissions by the President in exercise of his powers under the Constitution.

(v) The place of public participation under Article 10 vis-a- vis the role of IEBC under Article 257(4) of the Constitution; and whether there was public participation in respect of the Constitution of Kenya (Amendment) Bill, 2020

[848] A preliminary issue that arose and was determined by the superior courts, was whether the burden of proof should be shifted. Morara Omoke and Thirdway Alliance asserted that public participation did not take place. *Okwengu, J.A* found that pursuant to Section 112 of the Evidence Act, in civil proceedings when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon that party. She further found that in the present case, the question of whether or not public participation was carried out in regard to the popular initiative was within the knowledge of the promoters. *Tuiyott, J.A* on the other hand found that it was necessary for Morara Omoke to have provided evidence of at least one person or people who appended their signatures without the expected information, adding that the BBI Steering Committee was not obligated to do anything until a case was made against it.

[849] With profound respect, as stated by *Musinga, (P)*, the amendment of a country's constitution, more so our Constitution, should be a sacrosanct public undertaking and its processes must be undertaken very transparently and in strict compliance with the country's law. The promoters of the impugned Amendment

Bill collected signatures of their supporters in a process that was not as transparent as it could have been. The names and details of these supporters were then published on the IEBC website for a short and limited period of time. It would be an arduous and laborious task to expect that Morara Omoke or Thirdway Alliance to track down supporters for purposes of verification if indeed they appended their signatures without the expected information. This information is well within the knowledge of the promoters. Given that it is a public undertaking regarding the amendment of the Constitution, the process needed to be in compliance with the national values enumerated under Article 10. I affirm the finding by *Okwengu, J.A* that the promoters were precluded from shifting the burden of proof to prove that there was meaningful public participation before the collection of the signatures in support of the proposed Amendment Bill.

[850] Turning back to the main issue, Article 257 on Amendment by popular initiative provides as follows:

> ***"257. Amendment by popular initiative***
>
> ***(1) An amendment to this Constitution may be proposed by a popular initiative signed by at least one million registered voters.***
>
> ***(2) A popular initiative for an amendment to this Constitution may be in the form of a general suggestion or a formulated draft Bill.***
>
> ***(3) If a popular initiative is in the form of a general suggestion, the promoters of that popular initiative shall formulate it into a draft Bill.***
>
> ***(4) The promoters of a popular initiative shall deliver the draft Bill and the supporting signatures to the Independent Electoral and Boundaries***

Commission, which shall verify that the initiative is supported by at least one million registered voters.

(5) If the Independent Electoral and Boundaries Commission is satisfied that the initiative meets the requirements of this Article, the Commission shall submit the draft Bill to each county assembly for consideration within three months after the date it was submitted by the Commission.

(6) If a county assembly approves the draft Bill within three months after the date it was submitted by the Commission, the speaker of the county assembly shall deliver a copy of the draft Bill jointly to the Speakers of the two Houses of Parliament, with a certificate that the county assembly has approved it.

(7) If a draft Bill has been approved by a majority of the county assemblies, it shall be introduced in Parliament without delay.

(8) A Bill under this Article is passed by Parliament if supported by a majority of the members of each House.

(9) If Parliament passes the Bill, it shall be submitted to the President for assent in accordance with Article 256(4) and (5).

(10) If either House of Parliament fails to pass the Bill, or the Bill relates to a matter specified in Article

255(1), the proposed amendment shall be submitted to the people in a referendum.

(11) Article 255(2) applies, with any necessary modifications, to a referendum under clause (10)" [emphasis added].

[851] The journey to amending the Constitution by way of popular initiative begins pursuant to Article 257(1) with a proposal to amend which needs to meet the minimum threshold of support of one million registered voters. Once the promoter puts together their proposal by way of a draft Bill and the supporting signatures they then deliver the same to the IEBC. IEBC then verifies the initiative is supported by at least one million registered voters. Once satisfied that the initiative meets the requirements of the Article, IEBC then submits the draft Bill to each County Assembly for consideration within three months. If the draft Bill is approved by a majority of the County Assemblies, it is then introduced in Parliament. If Parliament passes the Bill, it shall then be submitted to the President for assent in accordance with Article 256(4) and (5), then finally submitted to the people in a referendum. This ensures that public participation is expected to take place at four main stages which are: at the point of collecting signatures, at the County Assembly level, at the Parliamentary level and finally at a referendum.

[852] Article 10 binds all state organs, state officers, public officer and indeed all persons who, when applying or interpreting the Constitution, enacting, applying or interpreting any law or when making or implementing public policy decisions to apply the national values and principles, key among them public participation. In the decision of ***In the Matter of the National Land Commission*** Advisory Opinion Reference 2 of 2014 [2015] eKLR, former *Chief Justice Mutunga* described public participation as *"a major pillar and bedrock of our democracy and good governance"*. The importance of public participation also finds expression under Articles 118 and 196 which require public participation

in regards to legislation and any other business by Parliament and the County Assemblies, respectively or through their committees.

[853] The Supreme Court in the ***BAT Case*** underscored that public participation and consultation is a living constitutional principle that goes to the constitutional tenet of sovereignty of the people. While the Supreme Court was setting guiding principles for public participation, the Court was keen to point out that lack of a prescribed legal framework for public participation is no excuse for not conducting public participation and placed the onus on the public entity to give effect to this constitutional principle using reasonable means. The Court also included in the guiding principles the requirement that public participation must be purposive and meaningful.

[854] The Court of Appeal in the case of ***Independent Electoral and Boundaries Commission (IEBC) v National Super Alliance (NASA) Kenya & 6 Others*** [2017] eKLR as well as the Supreme Court in the ***BAT Case*** very aptly found that '*the mode, degree, scope and extent of public participation is to be determined on a case by case basis'*. The popular initiative is the pathway set aside for the citizen-led amendment process and this is the backdrop we must examine the question of whether there was public participation.

[855] Article 257 provides for engagement with the people at different stages. At the point of collection of one million signatures in support of an initiative, then while an amendment Bill is being debated at the County Assemblies, at the Parliamentary level and eventually through a referendum. I find myself in agreement with *Okwengu, J.A* that public participation cannot await debate before the County Assemblies and Parliament, but rather it must begin at the very commencement of the initiative because the people, as the sovereign, must know what the initiative entails before they support it. The rest of the amendment process as prescribed by Article 257 sets out an incremental continuum, with the ultimate expression of public participation in the form of a referendum.

[856] The impugned constitutional amendment process begun with the BBI Taskforce appointed in 2018 wherein one of its terms of reference was to conduct consultations with citizens, faith-based sector, cultural leaders, the private sector and expert at both the county and national level. In its Report titled ***"Building Bridges to a United Kenya; from a Nation of Blood ties to a Nation of Ideals"*** dated 23rd October, 2019, at page 135 the Taskforce states that it visited every one of the 47 counties and consulted widely and deeply. It captures this when it states:

> ***"The Taskforce consulted more than 7000 citizens from all ethnic groups, genders, cultural and religious practices and different social and economic sectors. The Taskforce engaged deeply and widely as shown by the 400+ Elected leaders, present and past, prominent local voices from the community and youth who added their voice to citizens in the Counties; 123 individuals representing major institutions, including constitutional bodies and major stakeholders in the civil and private sector spaces; the 261 individuals and organizations who (e)mailed memoranda; and the 755 handwritten submissions during public forums in the Counties."***

[857] The BBI Steering Committee in its terms of reference was expected to conduct validation of the Task Force Report through consultations with citizens, civil society, faith-based organizations, cultural leaders, private sector and experts. From those consultations, it was then expected to *inter alia* propose constitutional changes that may be necessary for the implementation of the recommendations contained in the Task Force Report, taking into account any relevant contributions made during the validation period. In its Report titled the ***'Report of the Steering Committee on the Implementation of the Building Bridges to***

a United Kenya Taskforce Report' dated 16th October, 2020 under Section 2 it laid out its methodology of validation of the Taskforce Report.

[858] It stated that the validation exercise was conducted through national stakeholder validation where the BBI Steering Committee held 93 stakeholder consultation meetings with representatives from civil society, faith-based organization, women's groups, youth groups, person with disability groups, cultural leaders and government. The same were held at KICC, Laico Regency hotel and at its offices in Nairobi. The Steering Committee then replicated the meetings regionally by having delegates meeting where they retained consultant technical experts who took attendees through the Taskforce Report and ended the meetings with receiving validation submissions from the leaders. It states that it also held regional public meetings across the country where the Committee received written submissions from Kenyans through their leaders. It also states that it publicized its official email and physical addresses through which written memoranda from members of the public and organization were delivered. It received a total of 124 hand delivered memoranda and 223 emails containing memoranda.

[859] The Steering Committee states that it also invited experts' engagement and drafters to provide technical information and expertise on various issues, including assistance in drafting and taking various groups through the Taskforce Report. It then undertook desktop review of relevant documents and international good practices to inform and enrich the report. Ultimately, it annexed the BBI Steering Committee Draft Bill to its Report.

[860] It may be argued that there was public participation prior to collection of signatures. However, as I had pointed out earlier, the Amendment Bill that was launched on 25th November, 2020 differed in content from the BBI Steering Committee Draft Bill. One arrives at the conclusion that the engagements and consultations that went into preparing the BBI Steering Committee Report and annexed Amendment Bill did not count or contribute to the public participation

required during the collection of signatures. The new set of proposed amendments launched on 25th November, by the BBI National Secretariat were not subjected to consultations or engagements prior to collection of signatures.

[861] To my mind, the presentation of a different Bill at the stage of launching on 25th November, 2020 flouted the requirement for transparency as one of our national values enshrined under Article 10 of the Constitutional. It greatly compromised the integrity of the entire process calling to question the consistency and coherence of the same. One of the unintended consequences of this change midway was to mislead the public, more so, those who participated in giving their views and submissions as well as attending the various meetings organized by the BBI Taskforce and BBI Steering Committee. The resultant effect is that the engagements cannot be construed as contributing to the public participation mandated by Article 257 of the Constitution.

[862] At the stage of collection of signatures in support of an amendment initiative, the High Court set the ideal standard of public participation. This ideal was to include providing copies of the amendment bill in constitutionally required languages of English, Kiswahili and Braille and also been made available in other communication formats and technologies accessible to persons with disabilities including Kenya Sign Language. The High Court thought that only then would the voters be deemed to have been given sufficient information to enable them to make informed decisions on whether or not to append their signatures in support of the proposed constitutional amendments.

[863] In the present circumstances, as *Kiage* and *Tuiyott JJ.A* pointed out, it would be too onerous and expensive to expect citizens to engage and involve the voters generally, to the broad and extensive elements of public participation as enumerated by the High Court. I find myself in agreement that to expect a full-blown civic education and public participation exercise at the time of signature collection from a truly citizen driven process, is to place a burdensome financial

and logistical hurdle which would be antagonistic to the very essence of the process.

[864] It is common cause that the promoters published an English version of the Amendment Bill on the internet. However, as *Musinga, (P)* noted, the 2019 Kenya Population and Housing Census placed only 22.6% of Kenyans aged 3 years and older with access to internet use while only 10.4% use a computer. Indeed, the act of publication of the Amendment Bill on the internet cannot be termed as having been sufficient or meaningful with such low levels of internet penetration across the Country. While the standard set by the High Court may have been too high, the actions of the promoters were not sufficient. All the more, when considering the fact that the Amendment Bill had 74 proposed amendments. It was necessary for the supporters of the Amendment Bill to understand, in detail, the intent and purport of each of the 74 proposed amendments before appending their signatures in support. I agree with *Tuiyott, J.A* that at this crucial stage, the least the promoters could have done was provide each potential supporter with a copy of the Amendment Bill in a language they understood. As Article 257 sets out an incremental continuum of public participation, at this initial stage, public participation can be limited to the potential supporters from whom the promoters hope to collect signatures.

[865] Once the promoters of an Amendment Bill collect their one million signatures and deliver the draft bill together with the signatures in support to IEBC pursuant to Article 257(4), IEBC is expected to verify that the initiative is supported by at least one million registered voters.

[866] There is much debate as to the full extent and meaning of how IEBC should verify the one million signatures. Perhaps starting with *Sichale, J. A's* dissenting. She found that IEBC role of signature verification did not envisage a forensic examination of the authenticity of the signatures, more so due to not having a repository of signatures. Even if it had, the task would be herculean to undertake.

She added that IEBC had published the list of the supporters of the initiative and it was not difficult for one to say that they did not append their signature.

[867] Before the High Court, the BBI National Secretariat filed an Affidavit sworn by Dennis Waweru on 5th February 2021 annexing a document titled *The Findings Of The Commission On The Process Of The Verification Of Signatures For The Proposed Amendment To The Constitution Of Kenya 2010 Through A Popular Initiative (Okoa Kenya Initiative)* dated 22nd March, 2016 (hereinafter, "IEBC Verification Report"). This was the report of the then chairperson of IEBC on the verification process carried out by the IEBC with respect to the constitutional amendment initiative known as *Okoa Kenya Initiative* in 2016. *Tuiyott, J.A* noted that IEBC did not disown or discredit the report. The report was just like any other material that had been admitted into evidence and it mattered not that it was not produced by IEBC. IEBC did not and even now, does not deny that it made the report nor does it challenge its contents. The IEBC Verification Report explicitly acknowledged and laid out IEBC's role under Article 257(1) and (4) of the Constitution as follows:

> ***"(a) In order to confirm that the Constitution threshold of one million signatures of registered voters had been met, the Commission required the promoters of the initiative to ensure that the booklets containing signatures were duly serialized, bound, paginated and submitted in both hard and electronic format. This information was to be documented in order to guarantee that the data received was accurate.***
>
> ***(b) The Commissioner then reviewed all the entries contained in each booklet of signatures and undertook quality assurance test by group through all the records***

submitted to confirm that the data had been correctly captured. This involved:-

> ***i removing records without signatures;***
>
> ***ii elimination of the records which did not have names, national ID or passport number; and***
>
> ***iii where there were multiple records of the same person the additional records would be eliminated for being duplicates.***

(c) The remaining data would thus be confirmed as clean records ready for verification. <u>During the said verification, the confirmed data would be run as against the Register of Voters thus establishing if the Constitution threshold of one million signatures has been met. Thereafter, the Commission published the records of supporters of the initiative on its website to invite objections from person(s) who in their view may have been included in the list without their prior consent</u>. Additionally, the Commission uploaded a list of verified supporters in its website to enable them check and confirm their details.

(d) <u>The purpose of uploading the list of verified supporters on the website was to provide anyone who had been captured as a supporter without their consent, an opportunity to report, in writing to the Commission by sending a duly signed objection letter containing the Name, ID Number and contact telephone number of the objector</u>.

(e) Upon ascertaining that the initiative had met the requisite threshold as required under Article 257(4) of the Constitution the Commission forwarded the Constitution of Kenya (Amendment Bill, 2020 to the Speaker of the County Assemblies on 26th January 2021 for consideration by the County Assemblies. This was done in execution of the Commission's constitutional mandate as provided for under Article 257(5).

(f) Despite the submission of the Draft Bill upon the County Assemblies, the Commission continued to ascertaining the remaining records of supporters and it completed that exercise on 18th February 2021 whereupon it captured all submitted records of supporters totalling 4,352,037 which had been subjected to scrutiny. At the conclusion of the process, it was confirmed that the initiative had been supported by a total of 3,188,001 registered voters. The Commission issued a press release on 22nd February 2021 in this regard.

(g) The above provision of the Constitution does not place an obligation upon the Commission to verify the authenticity of the signatures but to simply ascertain that at least one million signatures have been provided in support of the initiative. This is to provide an avenue to ascertain that the initiative indeed is an exercise of the will of the people. <u>This process is not a process of forensics to check whether the signatures are valid or not but is</u>

simply to ascertain that the process is supported by the people.

(h) Throughout the world, similar initiatives are verified using two main methodologies:

(i) Publishing names of persons who have appended their signatures in support of an initiative to confirm their support towards the initiative; or

(ii) Requiring the promoters of an initiative to depose affidavits at the pain of perjury and possible criminal indictment where the said signatures were collected without the prior consent of the bearer" [emphasis added].

[868] Therefore, in 2016, with respect to the *Okoa Kenya Initiative*, the first popular initiative to amend the Constitution of Kenya, 2010, the IEBC determined that to accomplish its mandate, was two-fold. First, was to confirm that the people supporting the initiative were registered voters. Second, to ascertain the authenticity of the supporters signatures by inviting objection. In the case of *Okoa Kenya Initiative* as reported in the IEBC Verification Report, once the IEBC determined that when the number of registered voters fell below the one million mark after the first stage of the verification process, the IEBC *"did not consider it prudent to go to the next step of verifying the authenticity of the signatures of the registered voters either by sampling method or otherwise*."

[869] Given this analysis of how IEBC handled the *Okoa Kenya Initiative*, and its clarity on the procedures it is to undertake, there is no doubt that the IEBC understands that its mandate and role under Article 257(4) of the Constitution includes a two-step process.

[870] *Sichale, J.A's* finding that verification of the authenticity of signatures would place near impossible demands on IEBC so as to cripple it is not entirely accurate. One of the roles that IEBC plays is voter verification for purposes of elections in line with Section 6A of the Elections Act and Rules 27A and B of the Election (Voter Registration) Rules, 2012 which establish substantive standards and procedures to ensure the integrity of voter registration and verification regarding elections. The High Court found that there was no doubt that IEBC takes the role of voter verification as more than a ceremonial exercise and further held that if the IEBC is so scrupulous in carrying out its role in voter verification for elections' purposes. It follows that the same standard at the very least should apply in the case of verification of signatures for purposes of constitutional amendments through popular initiative under Article 257(4). I see no reason to depart from this finding given that constitutional amendments, more so 74 proposed amendments, would have far reaching effects if passed.

[871] Ideally it needs a regulatory framework for signature verification under Article 257(4) of the Constitution. However, in the case that it does not, it has existing mechanisms and tools at its disposal that would allow it to undertake the task of verification of signatures in a manner that was transparent, verifiable and acceptable. Namely, the Elections (Registration of Voters) Regulations, 2012, for voter verification for purposes of elections.

[872] I agree with the observation by *Gatembu, J.A* that Article 257 (4) and (5) does not prescribe a timeline within which IEBC must carry out its verification exercise or within which it must submit the draft bill to the County Assemblies. This would allow it to carry out its crucial mandate in the amendment process meaningfully.

[873] In the present case, in a bid to facilitate confirmation, IEBC published the list of persons listed as supporters of the initiative on its website on Thursday 21st January, 2021 and the people were required to have notified IEBC of any complaint

by Monday 24th January, 2021. I agree with *Kiage, J.A*, that with a weekend in between, it would mean that the people of Kenya had only two days to access information available only on a single platform to confirm the accuracy or satisfaction of the list of supporters.

[874] It is not for the Courts to prescribe the mode, scope and depth of public participation but it is for the Courts to test the reasonableness of the same on a case by case basis. One of the guiding principles spelt out in the ***BAT Case*** is the need for reasonable notice and reasonable opportunity for public participation. Can IEBC's choice of publishing the list of supporters on its website only be termed reasonable? Noting the report of the census on the low levels of penetration of internet usage in the Country, publication on its website only cannot be considered reasonable more so in light of the democratic and good governance values enshrined in our Constitution. Can the two weekdays and two weekends allocated for scrutiny of the list of supporters by the public be deemed reasonable? I also answer this in the negative. Further, due to this deficiency in access, the absence of complaints was not an accurate indicator of the correctness of the list of supporters. The period of time fails the test of purposive and meaningful public participation.

[875] From the decision in the ***BAT Case***, the onus of ensuring and facilitating public participation is placed on the public officer or entity charged with performance of a particular duty. The IEBC as the first public entity in the process prescribed under Article 257, has the onus of ensuring and facilitating public participation. While it is not the place of the Court to prescribe for public entities how to carry out its mandate, perhaps a good recommendation would be while IEBC undertakes verification of the one million signatures in support and the Amendment Bill, it would be opportune to use the same as an avenue to carry out some civic education and voter education and notify the general public of the existence of the Amendment Bill and its contents. I note that under Article 88

(4)(g) of the Constitution provides that '*the Commission is responsible for conducting or supervising referenda and elections to any elective body or office established by this Constitution, and any other elections as prescribed by an Act of Parliament and, in particular – voter education*'. Demonstrating that contrary to the submissions by IEBC, voter education is one of its core duties as provided for under the Constitution.

[876] Once IEBC submitted the Amendment Bill to the County Assemblies, the onus then fell to the County Assemblies to ensure and facilitate public participation. Article 257 (5) requires the County Assemblies to consider and debate the Amendment Bill within three (3) months. As rightly observed by the Superior Courts, the County Assemblies debate and either approve or reject the Amendment Bill wholesome, with no avenue to amend the same. This adds importance to the task of ensuring fidelity to the process of debating the same and involving the people to ascertain that the proposed amendments are geared towards serving their interests.

[877] The Court of Appeal highlighted that the Amendment Bill was passed by the County Assemblies without any public participation. A good example is the County Assembly of Tana River which was the subject of litigation in the case of ***Abe Semi Buere v. County Assembly of Tana River & Another; Speaker of the National Assembly & Another (Interested Parties),*** Constitutional Petition E001 of 2021; [2021] eKLR. In this case *Nyakundi, J.* established that the County Assembly of Tana River County passed a Resolution of Tuesday 23rd February, 2021 which approved the Amendment Bill without any public participation. This was despite the fact that the County Assembly had sent out an advertisement on the national dailies and social media that they were to have public hearings and receiving of memoranda on the Thursday 25th February, 2021 on three venues in the three sub counties of Tana River County. *Kiage, J.A* also

pointed out that many County Assemblies made no pretense to involve the residents in their counties.

[878] *Musinga, (P)* and *Kiage, J.A* observed that it was on record that that Members of County Assemblies (MCAs) demanded and were given car grants of Kshs.2 million each shortly before an overwhelming majority of County Assemblies passed the Amendment Bill, paving way for it to be placed before Parliament under Article 257 (7). Whereas it is desirable that MCAs be facilitated in their performance of their legislative work in the county governments and therefore the car grants may have been lawful, but its timing was said to have been deliberately intended to influence them to pass the Amendment Bill. *Kiage, J.A* rightly observed that the Salaries and Remuneration Commission which is usually slow and tight-fisted, despite the well-known fiscal challenges and an ongoing global pandemic, somehow prioritized and approved the funding for the car grants. What followed thereafter was a frenzy by the County Assemblies to pass the Amendment Bill within a few days with no reference to the people.

[879] Once the County Assemblies debate and in the event they approve the Amendment Bill, such as was the case, the same is then submitted to the two houses of Parliament for debate. The Court of Appeal allowed Thirdway Alliance to file additional evidence of Joint Parliamentary Justice and Legal Affairs Committee (JLAC) Report and the Hansard of the Senate on the debate and approval by the Senate of the Amendment Bill. The import of the two documents was to demonstrate that the National Assembly and Senate passed the Amendment Bill on 6th May and 12th May 2021 respectively. The document was not the subject of the case before the High Court, there is not much that this Court can state on the same.

[880] For avoidance of doubt, I agree with the findings of the Court of Appeal, that there was a degree of public participation at the first two levels expected pursuant to Article 257. However, the same was not in accordance in our national

values and principles under Article 10 due to failing to provide reasonable notice and reasonable opportunity. I also find that the promoters as well as the County Assemblies failed to provide real and meaningful opportunities for public participation.

(vi) Interpretation of Articles 88 and 250 of the Constitution with respect to composition and quorum of IEBC

[881] The question of composition and quorum of IEBC are related but separate issues. Article 88 (5) of the Constitution of Kenya provides:

> ***"(5) The Commission shall exercise its powers and perform its functions in accordance with this Constitution and national legislation."***

[882] Article 248 designates IEBC as one of the independent commissions whereas Article 250(1) provides as follows *"Each commission shall consist of at least three, but not more than nine, members."*

[883] I begin with the question of composition. Article 94(3) of the Constitution provides that one of the roles the National Assembly plays is to enact legislation in accordance with Part 4 of Chapter Eight of the Constitution. It is for this reason that there is a general but rebuttable presumption that statutes enacted by Parliament are constitutional, until the contrary is proved. This view is based on the fact that as peoples' representative, Parliament is entrusted with the role of enacting laws to serve people, as it is considered to understand the needs of the people, which laws to enact and the mischief they are intended to solve. Advancing this view is the case of ***Hambardda Dawakhana v. Union of India Air*** (1960) AIR 554, where the Supreme Court of India stated:

> ***"Another principle which has to borne in mind in examining the constitutionality of a statute is that <u>it must</u>***

be assumed that the legislature understands and appreciates the need of the people and the laws it enacts are directed to problems which are made manifest by experience and that the elected representatives assembled in a legislature enact laws which they consider to be reasonable for the purpose for which they are enacted. Presumption is, therefore, in favour of the constitutionality of an enactment" [emphasis added].

[884] Further buttressing this is the Tanzanian decision in ***Ndyanabo v. Attorney General of Tanzania*** (2001) EA 495 where the Court of Appeal stated that "*there is a general presumption that every Act of Parliament is constitutional and the burden of proving the contrary rests upon any person who alleges otherwise*".

[885] In the case of ***Shri Ram Krishna Dalmia vs Shri Justice S. R. Tendolkar*** 1959 SCR 279 by the Supreme Court of India, *Das, C.J.,* observed:

> ***"...that in order to sustain the presumption of constitutionality the court may take into consideration matters of common knowledge, the history of the times and may assume every state of facts which can be conceived existing at the time of legislation."***

[886] Parliament in its wisdom, well aware that Article 250 gave it leeway to appoint between three and nine commissioners, elected by way of statute, being the Section 5 of IEBC Act, to make provision for seven commissioners comprising a chairperson and six members. Parliament placed the composition at seven in order for IEBC to carry out its core business as spelt out under Article 88(4) which includes conducting and supervising referenda and elections.

[887] Some of what may have informed Parliament's decision could have been the events that took place following the 2007 General Elections. Following the post-election violence that ensued after the 2007 General Elections, the political parties committed themselves to undertake far reaching reforms to secure sustainable peace, stability, and justice through the rule of law and respect for human rights. One of the ways they did this was through formation of two commissions. The first was the Independent Review Commission (IREC) dubbed the Kriegler Commission. The Commission in its report of 17th September 2008, highlighted that the Electoral Commission lacked legitimacy and public confidence due to weaknesses in, among other things, its composition. The Commission made the following findings:

> ***"The electoral management process as a whole needs revision.***
>
> ***During the preparation and conduct of the 2007 elections the ECK lacked the necessary independence, capacity and functionality because of weaknesses in its organizational structure, composition, and management systems.***
>
> ***The institutional legitimacy of the ECK and public confidence in the professional credibility of its commissioners and staff have been gravely and arguably irreversibly impaired. It lacks functional efficiency and is incapable of properly discharging its mandate.***
>
> ***The conduct of the electoral process was hampered and the electoral environment was polluted by the conduct of many public participants, especially political parties and the media.***

There were serious defects in the voter register which impaired the integrity of the 2007 elections even before polling started:

- ***it excluded nearly one-third of eligible voters, with a bias against women and young people***
- ***it included the names of some 1.2 million dead people.***

Serious anomalies in the delimitation of constituencies impaired the legitimacy of the electoral process even before polling started.

There was generalised abuse of polling, characterised by widespread bribery, vote buying, intimidation and ballot-stuffing.

<u>This was followed by grossly defective data collation, transmission and tallying, and ultimately the electoral process failed for lack of adequate planning, staff selection/training, public relations and dispute resolution</u>.

The integrity of the process and the credibility of the results were so gravely impaired by these manifold irregularities and defects that it is irrelevant whether or not there was actual rigging at the national tally centre. The results are irretrievably polluted" [emphasis added].

[888] Kriegler Report in its main recommendations endorsed radical reform of the ECK or in the alternative the need to *"create a new electoral management body (EMB), with a new name, image and ethos, committed to administrative excellence in the service of electoral integrity, composed of a lean policy-making and supervisory board, selected in a transparent and inclusive process,*

interacting with a properly structured professional secretariat". Finally, and pertinent to the present dispute, the Commission arrived at the conclusion that the composition and management of the Electoral Commission were flawed. It noted as follows:

> ***"The ECK***
>
> ***The manner of appointment of commissioners and the structure, composition and management system of the ECK are materially defective, resulting in such a serious loss of independence, capacity and functional efficiency as to warrant replacing or at least radically transforming it."***

[889] The Commission of Inquiry on Post-Election Violence (CIPEV), dubbed the Waki Commission of 2008, in its findings in relation to the causes and patterns of the post-election violence, the Commission blamed the politicians for undermining the electoral commission and its processes. It stated as follows:

> ***"5. Some responsibility for the violence must also be laid at the feet of the country's politicians who precipitated the violence by among other actions and omissions:***
>
> ***(i) Conducting the election campaigns in a strident and confrontational manner, thereby creating an atmosphere of tension;***
>
> ***(ii) For party political ends, casting the majimbo debate in ethnically divisive terms; and***
>
> ***(iii) <u>Failing to create confidence among voters around the electoral processes and institutions</u>"*** [emphasis added].

[890] Evidently, structure and composition are critical components to having public confidence and trust in the electoral body in carrying out its mandate. As underscored by *Musinga, (P), Kiage & Tuiyott, JJ.A*, together with our historical circumstances, the role IEBC plays, not only at every General Election cycle, but altogether, is of paramount importance in maintaining a stable society. As stated by *Tuiyott, J.A*, the importance of having consistency in the application of the law, particularly in matters touching on public interest and public bodies charged with carrying out public functions, cannot be minimized. To my mind, it was for this reason that Parliament saw it fit to first put the composition at seven and not a lower number. I also in agreement with *Tuiyott, J.A*, that Parliament ensured to include a robust mechanism to replace commissioners who may leave, by way of death, resignation or removal, as we saw happen following the resignation the four Commissioners after the 2017 General Elections. This is contained under Section 7A of the IEBC Act which provides as follows:

> ***"7A. Vacancy in the office of chairperson and members***
>
> ***(1) The office of the chairperson or a member of the Commission shall become vacant if the holder—***
>
> ***(a) dies;***
>
> ***(b) resigns from office by notice in writing addressed to the President; or***
>
> ***(c) is removed from office under any of the circumstances specified in Article 251 and Chapter Six of the Constitution.***
>
> ***(2) <u>The President shall publish a notice of a vacancy in the Gazette within seven days of the occurrence of such vacancy.</u>***

(3) Whenever a vacancy arises under subsection (1), the recruitment of a new chairperson or member, under this Act, <u>shall commence immediately after the declaration of the vacancy by the President under subsection (2)</u>" [emphasis added].

[891]This urgency in ensuring that IEBC is fully constituted at all times is reflected and/or further activated by Paragraphs 1, 3 and 4 of the First Schedule of the IEBC Act. These provisions elaborate the procedure for appointment of the chairperson and the members and gives short timelines within which vacancies must be filled. The same provides as follows:

"1. Selection Panel

(1) At least six months before the lapse of the term of the chairperson or member of the Commission or within fourteen days of the declaration of a vacancy in the office of the chairperson or member of the Commission under the Constitution or this Act, the President shall appoint a selection panel consisting of seven persons for the purposes of appointment of the chairperson or member of the Commission.

2. ...

3. Selection of nominees

(1) The selection panel shall, within seven days of its appointment, invite applications from qualified persons and publish the names of all applicants and their qualifications in the Gazette, two

newspapers of national circulation and on the website of the Parliamentary Service Commission.

(2) The selection panel shall consider the applications, shortlist and interview the applicants.

(3) The interviews under subparagraph (2) shall be conducted in public.

(4) After conducting interviews under subparagraph (2), the selection panel shall select two persons qualified to be appointed as chairperson and nine persons qualified to be appointed as members of the Commission and shall forward the names to the President for nomination of one person for appointment as the chairperson and six persons for appointment as members.

(5) The President shall, within seven days of receipt of the names under sub-paragraph (4), forward the list of nominees to the National Assembly for approval in accordance with the Public Appointments (Parliamentary Approval) Act.

4. Appointment by the President

The President shall, within seven days of receipt of the names approved by the National Assembly, by notice in the Gazette, appoint the Chairperson and the members of the Commission."

[892] Statutory provisions enacted to give effect to constitutional provisions cannot be ignored and the Court is obligated to interpret the same. Section 5 of the

IEBC Act, makes provision for seven Commissioners, comprising a chairperson and six members. As the High Court stated, this was not a provision placed for cosmetic purposes. It has the force of law and it is for the courts to apply the same, unless it can be shown that the same is inconsistent or in contravention of the Constitution. When Parliament fixed the number of IEBC Commissioners through statute, as it did for the other nine independent commissions, it was not in contravention of Article 250 of the Constitution. Parliament, through statute, was merely activating constitutional provisions for better operation of the law.

[893] It is my considered opinion that to allow the number of commissioners of IEBC, and indeed any of the nine independent commissions under Article 248, to oscillate between three and nine despite clear statutory provisions, is an extremely dangerous precedent. One of the crucial factors that aid in the public having confidence in public institutions is consistency. It is my further belief that the composition is fixed in law to avoid the number being determined by the politics of the day.

[894] Once the four Commissioners of IEBC were confirmed to have resigned following the 2017 General Elections, it was for IEBC to commence recruitment immediately, following a declaration of vacancy by the President, which was to be done within seven days of the resignation. It is certain that the President was required by law to declare the vacancies. Unfortunately, he did not do so. At no time did IEBC, despite being affected by the shortfall of commissioners, request the President to make the declaration to allow it commence recruitment. Instead it went silent and did not take any steps to ensure that the President declared the vacancy. There was inaction as well from the Attorney General, as the principal legal adviser to the government, and the person who would facilitate the declaration of vacancy. He failed to advise the President accordingly that he was in breach of the IEBC Act, and that there were vacancies that required to be urgently filled. Instead, the vacancies persisted for a period of over three years despite clear,

imperative and robust provisions under Section 7A of the IEBC Act. There is no evidence or suggestion that IEBC made any efforts to put pressure on the President or the Attorney General for declaration of the vacancies to allow it commence recruitment. It appears IEBC were content with the prevailing circumstances. I echo *Kiage, J.A's* sentiments that this was a case of institutional dereliction of duty and an act of self-sabotage on IEBC's part.

[895] Turning to the question of quorum, in 2017, there was an introduction of Election Laws (Amendment) Bill, 2017 in Parliament to amend the Elections Act, 2011, the IEBC Act 2011 and the Election Offences Act, 2016. This was passed and became the Election Laws (Amendment) Act No. 34 of 2017. Relevant to the present dispute was Section 4 which amended Paragraphs 5 and 7 of the Second Schedule to the IEBC Act. It had the effect of changing the quorum of the Commission for purposes of meetings making the quorum of the Commissioners to be half the members but not less than three members. After the amendment, the paragraph was to provide that *"the quorum for the conduct of business at a meeting of the commission shall be at least half of the existing members of the commission, provided that the quorum shall not be less than three members."*

[896] These amendments were challenged by Katiba Institute in the ***Katiba Institute & 3 Others v. Attorney General & 2 Others*** HC Constitutional Petition No. 548 of 2017 [2018] eKLR. Here *Mwita, J.* found the amendments to be unconstitutional and rendered himself as follows:

> ***"75. Quorum being the minimum number of Commissioners that must be present to make binding decisions, only majority commissioners' decision can bind the Commission. Quorum was previously five members out of the nine commissioners including the Chairman, a clear majority of members of the Commission. With membership of the Commission reduced to seven, including***

the Chairperson, half of the members of the Commission, or three commissioners now form the quorum. Instead of making the quorum higher, Parliament reduced it to three which is not good for the proper functioning of the Commission. In that regard therefore, in decision making process where decisions are to be made through voting, only decisions of majority of the Commissioners should be valid. Short of that anything else would be invalid. For that reason paragraphs 5 and 7 of the Second Schedule are plainly skewed and unconstitutional."

[897] In 2018, Isaiah Biwott filed a suit being the ***Isaiah Biwott Kangwony v Independent Electoral & Boundaries Commission & another*** Petition No. 212 of 2018; [2018] eKLR, challenging the quorum of the IEBC specifically in carrying out by-elections for Baringo South Constituency, scheduled for 17th August, 2018. The same was determined by *Okwany, J.* who first found that given the provision under Article 250(1) for a minimum of three and maximum of nine, showed that the framers of the Constitution gave the appointing authority the latitude to appoint the number of commissions as long as they did not exceed nine or go below three members. She further found that:

"42. Turning to the issue of the quorum of the commission as stated in Paragraph 5 of the second schedule of the IEBC Act, it is noteworthy that the issue of the quorum of the commission only arises during the conduct of the business of the commission. My humble view is that the issue of the quorum of the commission, even though tied to the commission's membership, is not per se an issue that should lead to a declaration that the commission is improperly constituted as quorum will only be the subject

of a challenge if the policy decisions of the commission are made without the requisite quorum."

[898] In light of the decision in ***Katiba Institute Case*** declaring the 2017 amendments unconstitutional, *Okwany, J.* fell back on the previous construction of Paragraph 5 of the Second Schedule. She rendered herself as follows:

"44. Having regard to the above decision, I do not find any inconsistency between the provision in Paragraph 5 of the Second Schedule of the IEBC Act and Article 250(1) of the Constitution. I find that the Act must have been enacted on the assumption or hope that the Commission will be constituted with its maximum nine members which is not the case in the instant petition given that only seven commissioners were appointed in the current commission. Since quorum is composed of a clear majority of members of the commission, my take is that quorum cannot be a constant number as it is dependent on the actual number of the commissioners appointed at any given time. The question that we must ask is if quorum would remain five in the event that only three commissioners are appointed because the constitution allows for a minimum of three members. Would the quorum still be five? The answer to this question is to the negative. My take is that the issue of quorum, apart from being a matter provided for under the statute, is also a matter of common sense and construction depending on the total number of the commissioners appointed at any given time because it is the total number of commissioners appointed that would determine the quorum of the commission and not the other way round. In

view of the above findings, I do not find Paragraph 5 of the Second Schedule of the Act unconstitutional having found that it was enacted on the belief that the maximum number of commissioners would be appointed."

She further found that the conduct of elections or by-elections was not a matter arising out of the resolutions or decisions made by the commissioners at a meeting of the commission but were dictated by the operation of law following the declaration of vacancies by the speakers in the elective positions that are the subject of the by-elections, pursuant to Sections 16 of the Elections Act.

[899] *Tuiyott, J.A,* raised a pertinent issue that I must address. Once *Mwita, J.* in the ***Katiba Institute Case*** declared the 2017 amendments unconstitutional, what was the legal effect? Did the declaration revive the older provisions or did this mean that was no statutory provision on quorum of the IEBC? *Tuiyott, J.A*, relied on the Supreme Court decision in ***Mary Wambui Munene v. Peter Gichuki King'ara & 2 Others*** Petition No. 7 of 2014 [2014] eKLR where the Court had occasion to consider the effect of a Court's declaration of invalidity of a statute or a statutory provision and held that whether the effect of such declaration ought to be retroactive or proactive depends on a case-to-case basis. *Tuiyott, J.A*, found that that the declaration by *Mwita, J.* operated retrospectively to the date of enactment of the said provision. He further found that such declaration does not revive the former provision holding that the former would have to be revived by legislation, a preserve of the Legislature. He thus found the argument that the High Court relied on non-existing provisions to have some merit. He however, held that the High Court was not handicapped in resolving the matter because the Constitution read in conjunction with the IEBC Act provided a clear answer.

[900] IEBC contends that the issue of quorum has already been settled by a court of competent jurisdiction in the ***Isaiah Biwott Case;*** and is therefore not subject to reconsideration by either a court of concurrent jurisdiction or an appellate court

exercising jurisdiction in a totally different matter. IEBC quoted the High Court decision in ***Abukar G Mohamed v. Independent Electoral and Boundaries Commission***, Constitutional Petition No. 255 of 2017; [2017] eKLR wherein the case of ***Emms v. The Queen*** (1979) 102 DLR (3d) 193 was quoted with approval. Relying on this decision, IEBC contends that the ***Isaiah Biwott Case*** is a decision in *rem*; binds the parties before the Court in question, the public at large as well as courts of concurrent jurisdiction.

[901]Before I deal with the question regarding the effect of the decision in the ***Katiba Institute Case***, there was a question posed regarding the juridical value of decisions from a single judge courts *vis-à-vis* those from multi-judge benches. The doctrine of *stare decisis* is a foundational principle of common law with the purpose of achieving certainty, predictability and coherence in the law. We were referred to Canadian decisions on this question. In the decision of ***Holmes v. Jarret (1993) CanLII 8479,*** *Justice Granger* explored the application of doctrine of stare decisis. He held as follows regarding the subject:

> ***"There are different approaches about whether a judge is bound to follow the decision of another judge of the same court. A strict or authoritative approach is that the doctrine of stare decisis requires that a judge is required to apply the law as previously stated by his or her court. Although the authoritative approach provides certainty in the law, it is unnecessarily restrictive, particularly in situations where a previous decision was given without consideration of a statute or relevant case law. The least restrictive and more flexible approach was that judges ought to follow decisions out of judicial comity and only depart from them when they are wrong. The problem with this flexible approach was that it lacked criteria for***

determining when a previous decision was wrong. Between these approaches lies the proposition that a previous decision should be followed unless there was some indication that the decision was given without consideration of the appropriate statute or that relevant case law was not considered."

[902] Canadian Judge, *Justice Sharpe* in his writing ***"Good Judgment: Making Judicial Decisions"*** (University of Toronto Press, 2018), 168 so aptly stated *"blind adherence to stare decisis may not only perpetuate an unjust rule but may also conflict with the very purpose of the doctrine itself.*

[903] In jurisprudence emerging from our Kenyan Courts, there is the decision by *Majanja, J.* in ***Harrison Kinyanjui v Attorney General & Another*** Petition 74 of 2011; [2012] eKLR where he deliberated on the issue of empanelment of benches and found that singe judge benches of the High Court exercised the same jurisdiction as those of multiple judge benches. He held as follows:

"Therefore, giving meaning to "substantial question" must take into account the provisions of the Constitution as a whole and need to dispense justice without delay particularly given a specific fact situation. In other words, each case must be considered on its merits by the judge certifying the matter. It must also be remembered that each High Court judge, has authority under Article 165 of the Constitution, to determine any matter that is within the jurisdiction of the High Court. Further, and notwithstanding the provisions of Article 165(4), the decision of a three Judge bench is of equal force to that of a single judge exercising the same jurisdiction. A single

judge deciding a matter is not obliged to follow a decision of the court delivered by three judges."

[904] In the case of ***Philip K. Tunoi & Another v. Judicial Service Commission & Another*** Petition No. 244 of 2014; [2015] eKLR, *Odunga, J.* also weighed in on the subject finding that decisions of multi-judge benches did not overturn those of a single judge and vice versa. The only way to overturn a decision of a High Court, irrespective of the number of judges on the bench, was to appeal to the Court of Appeal. He stated*:*

"My view is informed by the fact that the mere fact that a numerically superior bench is empaneled whose decision differs from that of a single judge does not necessarily overturn the single judge's decision. To overturn a decision of a single judge one would have to appeal to the court of appeal. Similarly appeals from decisions of numerically superior benches go to the Court of Appeal … it is clear that the only constitutional provision that expressly permits the constitution for a bench of more than one High Court Judge is Article 165 (4). Under that provision, for the matter to be referred to the Chief Justice for the said purpose, the High Court must certify that the matter raises a substantial question of law …"

[905] *Chitembwe, J.* in the case of ***Mohamed Dame Salim v. County Assembly of Tana River County & 2 Others*** Constitutional Petition No. 11 of 2016; [2016] eKLR upheld the aforestated decisions but advocated for an approach that favoured consistency. He stated as follows:

"I have noted the sentiments by *Justices Majanja* ***and*** *Odunga* ***on the issue of the weight of a judgement of a single High Court judge vis-a-vis that of a panel of three or more judge.***

The leeway to have a matter heard by more than one judge is provided for under Article 165 (4) of the Constitution. The Constitution envisaged that an issue will arise in court that will require to be determined by more than one High Court Judge. The best way forward is for the litigants to pursue such cases upto the Court of Appeal or the Supreme Court. It is true that a three judge bench of the High Court is not binding on a fellow single High Court judge. However, where the decision is made by such a bench, it can be persuasive. A single judge will have to give a contrary opinion on the matter that is totally different from that of his colleagues."

[906] I agree with *Chitembwe, J.*, it would be neater, more cohesive and a show of comity, for a single judge to justify departing from the decision of three judge bench or for a Court, irrespective of composition, to do the same. However, and as highlighted by *Tuiyott, J.A*, not allowing revisit would be stifle judicial debate and growth in jurisprudence. Article 165(4) does not give High Court benches empaneled to hear issues raising substantial questions of law, appellate jurisdiction over single judge benches. I therefore find no reason to depart from the findings of *Justices Majanja, Odunga* and *Chitembwe* on the issue. The decisions by *Mwita, J.* in ***Katiba Institute Case*** and *Okwany, J.* in ***Isaiah Biwott case*** did not bar the High Court from hearing the present dispute.

[907] In any case, there were two points of divergence between the determination by *Okwany, J.* and the present dispute. The first being the question in issue in the ***Isaiah Biwott Case*** was quorum to carry out by-elections, whereas in the present dispute the question was on quorum to carry out a referendum. Second point of divergence, as noted by *Gatembu, J.A*, was the decision by *Okwany, J.* was *per incuriam*. I affirm the finding by *Gatembu, J.A* first for the reason that

Okwany, J. failed to take into consideration clear provision of Sections 5 and 7A of the IEBC Act on the composition of IEBC. Her finding was that the appointment of commissioners was situational with a fluctuating number between three and nine, in clear disregard of Sections 5 and 7 of the IEBC Act.

[908] Second her decision lacked due regard for the law for mixing composition with quorum and for reading *'policy decision'* into Paragraph 5 of the Second Schedule. In doing so, *Okwany, J.* attempted to create a distinction between matters IEBC can carry out with quorum and those it can without quorum. Following this erroneous path, she made a finding that IEBC could carry out a by-election without quorum. This was in clear disregard for Article 88(4) and Section 4 of the IEBC Act that sets out the mandate and functions of the IEBC. Key among these constitutionally mandated roles is conducting elections, irrespective of how the vacancy arose.

[909] Turning back to the dispute on quorum, as the Court of Appeal noted, IEBC plays a crucial role in ensuring stability in a country. As underscored by both the Kriegler and Waki Commission, the structure and composition of the electoral body is a central aspect in gaining public trust and confidence. IEBC not being properly constituted or having the necessary quorum to carry out its constitutional duties could lead to diminished confidence by the people.

[910] The decision by *Mwita, J.* in the ***Katiba Institute Case*** followed by the inaction of Parliament in enacting another provision, left a lacuna on quorum of IEBC. This has foothold in Section 20 of the Interpretation and General Provisions Act, Chapter 2 Laws of Kenya, which provides as follows:

> ***"Repealed written law not revived***
>
> ***Where a written law repealing in whole or in part a former written law is itself repealed, that last repeal shall not***

revive the written law or provisions before repealed unless words are added reviving the written law or provisions."

[911] The IEBC Act does not define quorum anywhere else. The Constitution is also silent. The Interpretation and General Provisions Act, would ordinarily provide assistance in such cases. However, it does not contain a definition of quorum. One of the tools of statutory interpretation that the Courts use is the ordinary meaning. ***Black's Law Dictionary***, 9th Edition defines quorum as follows:

"The minimum numbers of members (usu. a majority of all the members) who must be present for a deliberative assembly to legally transact business."

[912] ***Black's Law online dictionary*** defines quorum as follows:

"When a committee, board of directors, meeting of shareholders, legislative or other body of persons cannot act unless a certain number at least of them are present, that number is called a "quorum." Sweet. In <u>the absence of any law or rule fixing the quorum, it consists of a majority of those entitled to act.</u> See Ex parte Willcocks. 7 Cow. (N. Y.) 409, 17 Am. Dec. 525: State v. Wilkesville Tp. 20 Ohio St 293; ITeiskell v. Baltimore, G5 Md. 125. 4 Atl. 110. 57 Am. Bep. 308; Snider v. Rine hart, IS Colo. 18, 31 Pac. 710" [emphasis added].

[913] George Glover Crocker in his ***Principles of Procedure in Deliberative Bodies*** *(2nd Ed, 1889)* defined quorum as the number of members of an assembly, committee or other body of men as is requisite for the transaction of business. He added the following:

> ***"In the case of bodies composed of a definite number of selected members it is necessary that a majority of the whole number of members should be present at a duly called meeting in order to constitute a quorum."***

[914] George Glover further qualified this definition by stating that in representative organisations where the members, whether elected or appointed, represent others in a fiduciary capacity. As such, they are precluded from changing the quorum as fixed by the common law, unless specially authorized. They cannot by their own act either enlarge or diminish the powers vested on them. In contrast he stated that other organisations such as clubs and societies where the members do not act as agents with delegated powers, can change the number necessary to constitute a quorum as they deem fit and expedient.

[915] In the United States, they have the ***Robert's Rules of Order***, a manual on parliamentary procedures that is used as a guideline in most organisations to govern meetings of a diverse range of organizations, including church groups, county commissions, homeowners' associations, nonprofit associations, professional societies, school boards, and trade unions. The Rules are named after a book published in 1876 by U.S. Army Major Henry Martyn Robert where he modeled the same after the rules of practice in the U.S. Congress. The same is titled ***Robert's Rules of Order Newly Revised***. It is widely accepted and utilised and is now in its 11th edition. The Rules prescribe where there is absence of a stated definition of quorum, a simple majority is deemed to constitute quorum.

[916] From the foregoing, and in the absence of statutory provision on quorum, it is my finding that quorum is the majority of the members with the authority to decide. In the case of IEBC, Parliament set the composition at seven vide Section 5 of the IEBC Act. Majority of seven, is four members. I concur with *Tuiyott, J.A,* that to find the quorum could be anything less than half of the membership of

seven, is to weaken IEBC and the crucial mandate it carries out in ensuring a stable society.

[917] I further find that one of IEBC's key mandates under Article 88(4) is to conduct referenda. This role is reverberated and emphasized by Section 4 of the IEBC Act. In conducting referenda, Article 257 (4) mandates the IEBC to carry out verification of signatures to determine whether promoters of a popular initiative have reached the constitutional threshold of one million supporters. I find that this could not be determined as an administrative function of IEBC. Such a fundamental determination required IEBC to be properly composed and quorate.

[918] For avoidance of doubt, it is my finding on the number required to make quorum for IEBC, in the absence of statute, is four out of the seven commissioners.

[919] The findings by *Gatembu, J.A*, which I affirm, that the decision the ***Isaiah Biwott Case*** was *per incuriam*, did not negate the fact that, before the present suit, it was a decision *in rem* unchallenged by appeal. The decision by the High Court in the present appeal did not have the effect of setting aside the decision in ***Isaiah Biwott Case***. There is merit in IEBC's assertion that while the decision remained unchallenged, it was binding on all parties as well as the public at large. IEBC contends that following the decision in the ***Isaiah Biwott Case***, it undertook many serious constitutional obligations including conducting atleast 30 by-elections, approval of budgets, preparations of Elections Operational Plan and pertinent to the present appeal, verification of signatures pursuant to Article 257 (4).

[920] I concur and adopt the reasoning and conclusion by *Koome, CJ & P* that IEBC cannot be faulted for relying on the decision in the ***Isaiah Biwott Case*** as it was complying with a court decision. I also agree that though the decision was not binding on the High Courts, it created a legitimate expectation for IEBC, that in carrying on its business with three Commissioners, it was in compliance with

the law. For this reason, it is my finding that IEBC's actions in carrying out the verification of signatures were lawful.

[921] As regards the submissions by IEBC that it has since undertaken many serious constitutional obligations most of which cannot be reversed, I am guided by the decision of the Supreme Court in the ***Mary Wambui Case.*** Here the Court found judicial decisions to have retrospective effect to all persons who, prior to the decision, suffered the same or similar wrong, provided of course they are entitled to bring proceedings seeking the remedy. The Court held as follows in that decision:

> ***"We are aware that several constitutional processes have been concluded, and others ensued as a result of the directions of the Courts while handling electoral disputes following the 2013 General Elections. It is our position that, in either of these scenarios, and as a matter of finality of Court processes, parties cannot reopen concluded causes of action. A relevant case in this regard is A v. The Governor of Arbour Hill Prison [2006] IESC 45, [2006] 4 IR 88, (at paragraph 36) where Murray CJ, stated as follows:***
>
> ***"Judicial decisions which set a precedent in law do have retrospective effect. First of all the case which decides the point applies it retrospectively in the case being decided because obviously the wrong being remedied occurred before the case was brought. A decision in principle applies retrospectively to all persons who, prior to the decision, suffered the same or similar wrong, whether as a result of the application of an invalid statute or otherwise, provided of course they are entitled to bring proceedings seeking the remedy in accordance with the ordinary rules of law such***

as a statute of limitations. It will also apply to cases pending before the courts. That is to say that a judicial decision may be relied upon in matters or cases not yet finally determined. But the retrospective effect of a judicial decision is excluded from cases already finally determined. This is the common law position."

[922] Similarly, I apply the above principles. Correspondingly, the apprehension that the finding on quorum and composition may trigger a frenzy of cases, should not arise or be contemplated.

(vii) Whether the interpretation of Article 257(10) of the Constitution entails/requires that all specific proposed amendments to the Constitution should be submitted as separate and distinct referendum questions

[923] As a preliminary issue, *Tuiyott, J.A* declined to render a determination on this issue on account of not being ripe before the Court. He reasoned that Sections 49 and 54 of the Elections Act place the responsibility of framing the referendum question or questions on IEBC. In the present dispute, IEBC had not received the request to hold the referendum and for this reason occasion had not arisen for IEBC to discharge its responsibility of framing the question or questions. He added that it had not been suggested that IEBC had already determined the manner or formula in which it would frame the question or questions in respect to the referendum touching on the impugned Bill, if it got there.

[924] In determining whether a question is ready for determination, the courts look to the principle of justiciability, rooted in the doctrines of ripeness and mootness. This is a necessary examination that the courts must do in order to ensure that they do not overstep their constitutional authority by either

adjudicating on a question too early based on conjecture or too late when its decision would be rendered superfluous.

[925] The doctrine of ripeness has been the subject of litigation in various jurisdictions. The U.S. Supreme Court in its decision in ***Abbott Laboratories v. Gardner*** 387 US 136 (1967) held as follows:

> ***"Without undertaking to survey the intricacies of the ripeness doctrine it is fair to say that its basic rationale is to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies form judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties. The problem is best seen in a twofold aspect, requiring us to evaluate both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration."***

[926] *Kriegler, J.* in ***In Ferreira vs Levin NO & Others; Vrynhoek v. Powell No & Others*** 1996(1) SA 984 (CC) at para. 199 stated:

> ***"The essential flaw in the applicants; cases is one of timing or, as the Americans and, occasionally the Canadians call it. "ripeness" … Suffice it to say that the doctrine of ripeness serves the useful purpose of highlighting that the business of a court is generally retrospective; <u>it deals with situations or problems that have already ripened or crystallised, and not with prospective or hypothetical ones</u>. Although, as Professor Sharpe points out and our Constitutional case are more generous than for ordinary***

suits, even cases for relief on constitutional grounds are not decided in the air. ….The time of this Court is too valuable to be frittered away on hypothetical fears of corporate skeletons being discovered" [emphasis added].

[927] *Onguto, J.* in the case of ***Wanjiru Gikonyo & 2 Others v. National Assembly of Kenya & 4 Others*** Petition 453 of 2015; [2016] eKLR stated as follows regarding the principle of justiciability and the doctrine of ripeness:

"Effectively, <u>the justiciability dogma prohibits the court from entertaining hypothetical or academic interest cases</u>. The court is not expected to engage in abstract arguments. The court is prevented from determining an issue when it is too early or simply out of apprehension, hence the principle of ripeness. An issue before the court must be ripe, through a factual matrix, for determination" **[emphasis added].**

[928] In ***Republic v. National Employment Authority & 3 Others*** *Ex-parte* ***Middle East Consultancy Services Limited*** Judicial Review Application 171 of 2018; [2018] eKLR *Mativo, J.* held as follows:

"47. Ripeness refers to the readiness of a case for litigation; "a claim is not ripe for adjudication <u>if it rests upon contingent further events that may not occur as anticipated, or indeed may not occur at all</u>. The final decision was yet to be made, hence, there is no decision to be quashed. The goal of ripeness is to present premature adjudication; if a dispute is insufficiently developed, any potential injury or stake is too speculative to warrant judicial action" [emphasis added].

[929] The commonality of these decisions is that the principle of justiciability prevents the courts from interfering with the decision making of other bodies, unless and until the facts or the problem crystallise. The doctrine of ripeness works by preventing the courts from answering hypothetical quandaries.

[930] As *Tuiyott, J.A*, noted, the issue before the High Court was not whether the Amendment Bill was unconstitutional for proposing more than one amendment. Rather, what was raised was the question of whether Article 257 (10) required the specific proposed amendments to be submitted as separate and distinct referendum questions to the people. He further highlighted the fact the Petition before the High Court was set against the factual background that the Amendment Bill was yet to be placed before the County Assemblies pursuant to Article 257 (4) of the Constitution.

[931] I concur with *Tuiyott, J.A* that the manner in which the proposed amendment is to be submitted to the people in referendum is not specified in Article 257. Article 257 (10) on a referendum provides that;

> ***"If either House of Parliament fails to pass the Bill, or the Bill relates to a matter specified in 255(1), the proposed amendment shall be submitted to the people in a referendum"*** [emphasis added].

[932] Two observations I would like to make regarding this provision. First is the use of a Bill for deliberation at the County Assembly level as well as the Parliament level pursuant to Article 257. The use of a '*Bill*' at these two levels is relevant as this is the primary form of document that the County Assemblies and the two Houses of Parliament debate and transact with. To my mind, the framers of the Constitution, intended the use of a Bill or Bills to facilitate debate during those two stages. It is my considered opinion that they did not intend to use a Bill or Bills at the referendum stage, bringing me to my second observation. The terminology used in Article 257 changes from *'Bill'* to *'proposed amendment'* under Article

257(10) as I have underlined. It is my view that this is what informed Parliament's wisdom when actualizing the Constitutional provision on referendum, specifically Article 257(10), to enact in Part V of the Elections Act. Sections 49 and 50 therein provide as follows:

> ***"PART V – REFERENDUM***
>
> ***49. Initiation of a referendum***
>
> ***(1) Whenever it is necessary to hold a referendum on any issue, the President shall by notice refer the issue to the Commission for the purposes of conducting a referendum.***
>
> ***(2) Where an issue to be decided in a referendum has been referred to the Commission under subsection (1), the Commission shall frame the question or questions to be determined during the referendum.***
>
> ***(3) The Commission shall, in consultation with the Speaker of the relevant House, lay the question referred to in subsection (2) before the House for approval by resolution.***
>
> ***(4) The National Assembly may approve one or more questions for a referendum.***
>
> ***(5) The Commission shall publish the question approved under subsection (4) in the Gazette and in the electronic and print media of national circulation.***
>
> ***(6) The Commission shall conduct the referendum within ninety days of publication of the question.***
>
> ***(7) The Commission may assign such symbol for each answer to the referendum question or questions as it may consider necessary.***

(8) A symbol assigned under subsection (7) shall not resemble that of a political party or of an independent candidate.

50. Notice of holding referendum

(1) The Commission shall, within fourteen days after publication of the question referred to in section 49 publish a notice of the holding of the referendum and the details thereof in the Gazette, in the electronic and print media of national circulation.

(2) The notice shall specify—

(a) <u>the referendum question or questions</u> and the option of the answer or answers;

(b) the symbols assigned for the answer or answers to the referendum question or questions;

(c) the day on which the referendum is to be held which shall not be less than twenty-one days after the date of the publication of the notice;

(d) the polling time of the referendum;

(e) the day by which the referendum committees shall have registered with the Commission; and

***(f) the day and time by which campaign in support of or in opposition to the referendum question shall start and cease*"** [emphasis added].

[933] These provisions provide clarity on some contestations. Section 49 (1), provides that what the President refers to IEBC for referendum is an issue, not a Bill. Under Section 49(2) once an issue has been referred to IEBC, the Commission

is then required to formulate a question or questions to be determined during the referendum. These question or questions need approval of Parliament pursuant to Section 49 (4) and once approved, IEBC is then expected to gazette the question as well as publish the same in a newspaper with national circulation. After publication of the question, Section 50 (1) and (2) requires IEBC to publish a notice with details on the referendum specifying *inter alia* the referendum question or questions as well as possible answers and the symbols provided. This demonstrates that the answers need not be a simple *'yes'* or *'no'*. It is evident from these provisions that what is presented to the people to vote on is NOT the amendment Bill, but rather referendum question or questions depending on the circumstances.

[934] What is also evident is that it is IEBC's role to formulate the referendum questions to be voted on during a referendum. I note that there is no dispute that at the time of filing the Petitions, the constitutional amendment process was yet to reach the stage where IEBC would be seized of the matter and be required to frame the referendum question. I agree with *Tuiyott, J.A*, that IEBC was yet to receive the request to hold the referendum prompting it to carry out its duties. I further agree that there was no assertion that IEBC had already determined the formula it would utilize in framing the referendum question or questions once the process reached that stage.

[935] I thus concur with *Tuiyott, J.A*, that the petitioners before the High Court did not have an actual grievance against IEBC. To reiterate the words of U.S. Supreme Court in ***Abbot Laboratories Case*** the purpose of the principle of justiciability is "*to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies form judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties."* The Court was being asked to interfere with IEBC mandate before it was seized of the matter and before it could make a

decision on how to formulate the question. Just like *Tuiyott, J.A*, it is my finding that there was no ripe controversy for the High Court to render itself on.

C. COSTS

[936] As regards costs, this being a public interest matter, parties shall bear their own costs of the proceedings in the High Court, Court of Appeal and these appeals.

D. SUMMARY OF FINDINGS

[937] The totality of my conclusions on each issue is as follows:

(1) On the first issue, noting our history, context and constitutional text:

(a) I find that the doctrine of basic structure is applicable to Kenya.

(b) I further find that the basic structure of our Constitution can only be altered or denatured through the primary constituent power.

(c) It is my further finding that primary constituent power is the unbound power of the people to make or unmake constitutions and genuine exercise of the same can be identified by the four sequential steps of civic education; public participation; constituent assembly plus referendum.

(2) On issue number 2: On whether the President can initiate a popular initiative to amend the Constitution under Article 257, it is my finding that he cannot.

(3) On issue number 3: I find the Second Schedule of the Constitution of Kenya (Amendment Bill) 2020 to be unconstitutional.

(4) On issue number 4: It is my finding that pursuant to Article 143 (2), no civil proceedings can be instituted against the President or person performing the functions of the office of the President during their tenure of office with regard to anything done or not done contrary to the Constitution.

(5) On issue number 5: I find that by the time the process was stopped by the High Court, the public participation undertaken was not sufficient, reasonable or meaningful.

(6) On issue number 6: I find that Independent Electoral and Boundaries Commission was not properly composed or quorate while it undertook the verification of signatures pursuant to Article 257 (4) of the Constitution. However, in light of the decision in ***Isaiah Biwott Case***, IEBC's undertakings in compliance with the decision were lawful.

(7) On issue number 7: It is my finding that the interpretation of Article 257(10) on whether the proposed amendments should be submitted to the people as separate but distinct referendum questions was not yet ripe for determination.

(8) On costs, I find that this being a public interest matter, parties shall bear their own costs of the proceedings in the High Court, Court of Appeal and these appeals.

[938] The final Orders of the Court are as contained in the final disposition of the Court.

JUDGMENT OF (Dr.) S. C. WANJALA, SCJ

A. INTRODUCTION

[939] I have had the advantage of reading the lead Judgment by the President of the Court, which accurately reflects the background, procedural posture of the case, and the comprehensive submissions by the various parties, including the distinguished *amici curiae*. I am now in a position to render my opinion on each of the seven issues that were identified by the Court at the outset. I do in the same breath, acknowledge with gratitude, the gallantry and industry invested in this enterprise by our colleagues, both at the High Court and Court of Appeal, as they sought to disentangle the gargantuan labyrinth of legal argument, strewn in their path by the erstwhile protagonists. It is thanks to their efforts, that we now find ourselves in the "fog of the season's end."

B. ISSUES FOR DETERMINATION

[940] Towards this end, I now harken to discuss the first issue as formulated thus:

> ***(i) Whether the Basic Structure Doctrine is applicable in Kenya; if so, the extent of its application; whether the basic structure of the Constitution can only be altered through the primary constituent power; and what constitutes the primary constituent power***

[941] Never, since the promulgation of the Constitution of 2010, have our courts of law been confronted by so polemical, elastic, and indeterminate a notion, as the so called "Basic Structure Doctrine". It all began, when a group of distinguished citizens, aggrieved by what they perceived as an imminent overthrow of the Constitution, sought the intervention of the High Court, which is vested with

jurisdiction to entertain such grievances. And so in exercise of their civic duty, these citizens sought a Declaration *inter alia;* to the effect that:

> *"... the legal and judicial doctrines of "the basic structure" of a constitution; the doctrine and theory of unamendability of "eternity clauses" the doctrine and theory of constitutional entrenchment clauses" and unamendable constitutional provisions" in a constitution are applicable in the Republic of Kenya."*

[942] In seeking this declaration, the petitioners cited as a basis for their prayer, the decision by the Supreme Court of India in ***Kesavananda Bharati v. State of Kerala & Another*** (1973) 4 SCC 225; AIR 1973 SC 1461 (***Kesavananda Case***). To immediately place the issue into perspective, let me revisit, albeit briefly, this case from whence the "the basic structure doctrine", is considered to have sprouted.

[943] Between 1971 and 1972, the Indian Parliament enacted three amendments to the Constitution namely, the 24th, 25th and 29th amendments. These amendments came into force on 5th November, 1971, 20th April, 1972, and 9th June, 1972, respectively. The 24th amendment in particular had inserted the following Clause (1) into Article 368 of the Indian Constitution:

> *"Notwithstanding anything in this Constitution, Parliament may in exercise of its constituent power amend by way of addition, variation, or repeal any provision of this Constitution in accordance with the procedure laid down in this Article."*

[944] The original Clause (1) was consequently re-numbered as Clause (2) to read as follows:

> "*An amendment to this Constitution may be initiated only by the introduction of a Bill for the purpose in either House of Parliament,*

and when the Bill is passed in each house by a majority of the total membership of that House and by a majority of not less than two-thirds of the membership of that House present and voting, ***it shall be presented to the President who shall give his assent to the Bill and thereupon the Constitution shall stand amended in accordance with the terms of the Bill"*** [emphasis mine].

[945] These amendments were challenged in six petitions before the Supreme Court of India. At issue was the constitutionality of the said amendments, and the extent to which Parliament could amend the Constitution, in exercise of its constituent power under Article 368 thereof. As a corollary to the foregoing, the Court was called upon to determine whether there was any limitation upon the powers of parliament to amend the Constitution.

[946] The Supreme Court, by a majority of seven out of thirteen, (*Sikri CJ, Hegde, Mukherjea, Shelat, Grover, Reddy & Khanna, JJ),* held that Article 368 of the Indian Constitution contained not only the procedure, but the power to amend the Constitution. Towards this end, held the Court, Parliament had the power, through the form and manner laid therein, to amend each and every Article of the Constitution.

[947] However, the Court declared that *the power to amend under Article 368, though wide, did not* ***include the power to destroy the identity of the Constitution, abrogate, denude or emasculate the basic elements, or the essential elements in the basic structure, or the fundamental features, or the framework of the Indian Constitution, or to substitute it with a new one****.*

Per Sikri, CJ:

"...The true position is that every provision of the Constitution can be amended provided in the result, the basic foundation and structure of the Constitution remains the same. The basic structure may be said to consist of the following features:

(1) Supremacy of the Constitution;

(2) Republican and Democratic form of Government;

(3) Secular character of the Constitution;

(4) Separation of powers between the Legislature, the executive and the judiciary;

(5) Federal character of the Constitution..." [emphasis mine].

[948] The learned Judges concluded that pursuant to Article 368 of the Indian Constitution, and within the limits delineated, Parliament could amend every Article of the Constitution to fulfill its socio-economic obligations, guaranteed to the citizens under the Preamble.

Per Hedge and Mukherjea, J.J:

"*On a careful consideration of the various aspects of the case, we are convinced that Parliament has no power to abrogate or emasculate the basic elements or fundamental features of the Constitution such as the sovereignty of India, the democratic character of our polity, the unity of the country, the essential features of the individual freedoms secured to the citizens. Nor has Parliament the power to revoke the mandate to build a Welfare State and egalitarian society... **Despite these limitations, however, there can be***

no question that the amending power is a wide power and it reaches every Article and every part of the Constitution. That power can be used to reshape the Constitution… within the limits mentioned earlier, to make it an effective instrument for social good" [emphasis supplied].

[949] On the other hand, ***the Minority of six out of the thirteen*** (*Ray, Palekar, Mathew, Beg, Dwivedi & Chandrachud, J.J*) were of a contrary opinion. The learned Judges declared that there ***were no inherent, express, or implied limitations to the amending power under Article 368****, and no part of the Constitution was expressly exempted from amendment*. It was their further finding that ***Article 368 restricted only the procedure or the manner or form required for amendment but not the kind or the character of amendment.*** The Judges stated that it was not permissible to read or imply into Article 368, words of limitation which had not been contemplated by the drafters.

[950] The gist of the minority opinion was that there is no distinction between essential and non-essential features of the Indian Constitution. As such, the context, nature, object and history of Article 368 left no doubt that it included the power to repeal or abrogate each and every provision of the Constitution. However, the minority acknowledged the reasoning by the majority to the effect that notwithstanding its wide powers of amendment, Parliament could not annihilate the entire Constitution by one stroke of the pen.

Per Dwivedi, J:

"*To sum up, the nature, object and history of the amending power and the context of Article 368, leave little room for doubt that the word "amendment" includes the power of repealing or abrogating each and every provision of the Constitution. It may be that Parliament*

may not be able to annihilate the entire Constitution by one stroke of pen. But it can surely repeal or abrogate all provisions in Part III. Article 368 permits Parliament to apply not only the physician's needle but also the surgeon's saw. It may amputate any part of the Constitution if and when it becomes necessary so to do for the good health and survival of the other parts of the Constitution."

[951] Herein lies the genesis of what is now being referred to as the *"Basic Structure Doctrine of the Constitution"*. So, is such "a doctrine" applicable in Kenya? And if so, to what extent? But how did this seemingly stand-alone question find its ways into our sanctums of judicial adjudication?

(a) The Beginnings

[952] As already indicated in paragraph 940 above, the question of applicability of the "basic structure doctrine" and its corollaries including; constitutional entrenchment clauses, unamendable constitutional provisions; unconstitutional constitutional amendments, theory of un-amendable eternity/sunset clauses; essential features of a Constitution; supra-constitutional laws in a Constitution; and the implied limitations of the amendment power in a Constitution; was raised in only one of the eight petitions filed before the High Court, that is Petition No. E282 of 2020, ***David Ndii & Others v. Attorney General & Others.***

[953] The petitioners therein, (David Ndii, Jerotich Seii, James Gondi, Wanjiru Gakonyo and Ikal Angelei), who are the 1st to 5th respondents before this Court, premised their petition on grounds that the legal and judicial doctrines and theory of the basic structure and its corollary doctrines, were applicable in Kenya as to substantially limit the ability to amend the Constitution under Articles 255-257 of the Constitution.

[954] They urged that Articles 256 and 257 of the Constitution of 2010, did not envisage the exercise of the amendment power therein in a manner that could

destroy the Constitution or establish a new constitutional order. It was their case that the provisions of Articles 256 and 257 of the Constitution, were mere procedural tools, which could not be used to change the Constitution in a manner akin to replacing it with a new one.

[955] Consequently, the High Court delineated issues for its determination as raised by the petitioners before it. The first two issues were on the applicability of the basic structure doctrine in Kenya, which originated from Petition No. E282 of 2020:

> *(i) Is the Basic Structure* ***Doctrine of Constitutional interpretation*** *applicable in Kenya?* [Emphasis mine]
>
> *(ii) If the Basic Structure Doctrine applies in Kenya what are its implications for the amendment powers in Articles 255 to 257 of the Constitution of Kenya?*

In answer to the first issue, the High Court declared as follows:

> "*The text, structure, history and the context of the Constitution of Kenya, 2010 all read and interpreted using the canon of interpretive principles decreed by the Constitution yield to* ***the conclusion that the Basic Structure Doctrine is applicable in Kenya.***"

And in answer to the second issue, the Court pronounced itself thus:

> *"As applied in Kenya, the Basic Structure Doctrine protects certain fundamental aspects of the Kenyan Constitution from amendment through the use of either Secondary Constituent Power or Constituted Power."*

The learned Judges went on:

"*The essential features of the Constitution forming the Basic Structure can only be altered or modified by the People using their Primary Constituent Power.*"

[956] These declarations triggered the appeals that followed all the way through the Court of Appeal to this Court. At the Court of Appeal, the issue as to whether the 'basic structure doctrine' is applicable in Kenya elicited nuanced conclusions by the learned Judges. All in all, the majority of the appellate bench *(Musinga, (P), Nambuye, Okwengu, Kiage, Gatembu, & Tuiyott, JJ.A)* was in agreement with the High Court that indeed, based on the history of the Country's Constitution making process, the basic structure doctrine is applicable in Kenya. On her part, *Sichale, J.A*, held that the application of the basic structure doctrine was not supported by the context, structure and history of the 2010 Constitution. However, unlike the High Court, the majority determined that thematic areas, identified under Article 255(1) constituted the basic structure or the pillars of the Constitution. In this regard, the High Court had declared that the 'basic structure' of the Constitution:

"*... consists of the foundational structure of the Constitution as provided in the Preamble; the eighteen chapters, and the six schedules of the Constitution.*"

[957] In other words, according to the High Court, the basic structure of the Constitution is the entire Constitution. Finally, the majority bench held that the Constitution was amendable by virtue of Articles 255 to 257, save that any amendment thereto was subject to a higher threshold.

[958] Similarly, they concurred with the High Court that the proposed Constitution of Kenya (Amendment) Bill, 2020 ***(the Amendment Bill)*** which sought to fundamentally alter certain constitutional pillars, such as the concept of separation of powers, the independence of the Judiciary, among others, amounted to a dismemberment of the Constitution as opposed to an amendment thereto.

[959] As regards the extent of its application, four of the five Judges *(Musinga, (P), Nambuye, Kiage, & Tuiyott, JJ.A)* held that the doctrine limits the amendment power under Chapter 16 of the Constitution. In their view, the basic structure could only be altered through the primary constituent power, which comprises of four sequential processes namely: civic education; public participation and collation of views; constituent assembly debate; and ultimately, a referendum. The majority's reasoning was that an alteration of the basic structure amounts to abrogation or formation of a new Constitution, which could only be achieved by the people through the exercise of their primary constituent power. *Gatembu, J.A* on the other hand, opined that the thematic areas set out in Article 255 (1) of the Constitution could be amended, in accordance with Article 257 of the Constitution, infused with the national values and principles.

[960] The minority, (*Okwengu & Sichale, JJ.A*) was of a different opinion. *Okwengu, J.A,* while disagreeing with the High Court, nonetheless held that the basic structure doctrine, could be applicable by implication so as to protect the Preamble, being the repository of the spirit and purport of the Constitution. *Sichale, J.A* determined that the Constitution was amendable subject to the clear process and methodology set out in Articles 255 to 257 of the Constitution.

[961] The majority Judgment of the Court of Appeal, upholding the High Court regarding the applicability of the basic structure doctrine, has been challenged in this Court by the Attorney General, supported by other appellants whose particulars are set out in the lead Judgment. The submissions of the parties regarding this question are also set out in detail in the said Judgment. The gist of the Attorney General's argument is that the basic structure doctrine, is usually applied in jurisdictions whose constitutions exclusively vest the power of amending the Constitution in the legislature. Indeed, submits the Attorney General, such was the issue in the ***Kesavananda Case***, in which the basic structure doctrine was applied to temper the language of Article 368 of the Indian

Constitution, which exclusively vests the power to amend the Constitution in Parliament. According to the Attorney General, this contrasts sharply with the Kenyan context, where the 2010 Constitution unambiguously creates different levels and processes of amending the Constitution.

[962] The Attorney General contends that the Constitution of 2010 already limits Parliament's power to amend the Constitution through Articles 255 to 257. In agreement with the majority in the Court of Appeal, the Attorney General submits that Article 255 (1) constitutes what can be regarded as the basic structure of the Constitution. It is his view that the basic structure can only be amended by adhering to the procedure stipulated therein, and that once this is achieved, there can be no room for the application of the doctrine, as declared by the High Court and the Court of Appeal. In this he is supported by other parties as highlighted in the lead Judgment.

[963] On their part, the 1st to 5th respondents urge the Court to uphold the declaration by the two superior courts to the effect that the basic structure doctrine is applicable in Kenya. In their view, the doctrine is a democracy-enhancing device that maintains the ultimate power of the people over their elected representatives. It is their submission that the basic structure of the Constitution is set out in the eighteen chapters thereof.

[964] A number of *amici curiae* weighed in on the nature and applicability of the basic structure doctrine. Towards this end, they submit that the doctrine as expounded in the ***Kesavananda Case,*** exists to limit and guard against irregular constitutional amendments and unconstitutional constitutional amendment processes. They also submit that the rationale of the doctrine is to ensure that amending or altering the Constitution is not the same as abrogating the existing and writing a new Constitution. This doctrine, submit the *amici,* is evident in the decisions by the High Court in the ***Timothy M. Njoya & 6 Others v. Hon. Attorney General & Another;*** Misc Application No. 82 of 2004; [2004] eKLR

(Njoya Case); and ***Commission for the Implementation of the Constitution v. National Assembly of Kenya & 2 Others;*** HC Petition No. 496 of 2013; [2013] eKLR ***(Commission for the Implementation of the Constitution Case)***.

[965] They submit that the doctrine seeks to identify and guard against those amendments that dismember, alter, or change the basic structure of the Constitution. The *amici* further advise that not even the rigid adherence to the procedures under Articles 255 to 257 would save an amendment whose effect is to dismember the Constitution. Such an amendment, can only be actualized through the primary constituent power. They caution against a mechanical reading of the legal text of the Constitution, and urge that courts should be guided by the principles of interpretation in Article 259, which have yielded to the judicial acknowledgement of the reality that, ours is a Transformative Charter. Most of the *amici* are of the view that the basic structure doctrine places implicit limitations on the power of amendment provided for in Articles 255 to 257 of the Constitution. Such a limitation, it is urged, is intended to maintain and sustain the Constitution's identity.

(b) A Worrying Development

[966] How did we find ourselves enmeshed in this kind of theorizing that is ordinarily a *"preserve"* of legal and other social science scholars? Why did the High Court devote a considerable amount of effort (50 pages) analyzing the nature, scope and applicability of a *"doctrine"* in order to determine what it acknowledged as a preliminary issue? Was the determination of this issue upfront necessary for the disposition of the dispute before the Court? I ask these questions because of the rather unusual procedure that appears to have been adopted in invoking the High Court's jurisdiction.

[967] The High Court derives its jurisdiction from the Constitution under Article 165 thereof. Pursuant to Article 165 (3) (d), the High Court has:

> ***"(d) jurisdiction to hear any question* respecting *the interpretation of this Constitution including the determination of—***
>
> *(i) the question whether any law is inconsistent with or in contravention of this Constitution;*
> *(ii) the question whether anything said to be done under the authority of this Constitution or of any law is inconsistent with, or in contravention of, this Constitution;*
> *(iii) any matter relating to constitutional powers of State organs in respect of county governments and any matter relating to the constitutional relationship between the levels of government; and*
> *(iv) a question relating to conflict of laws under Article 191; …"*

[968] The foregoing provisions have to be read together with Article 258(1), which deals with how the Constitution is to be enforced. It provides thus:

> *"Every person has the right to institute court proceedings claiming that this Constitution has been contravened, or is threatened with contravention."*

[969] There can be no doubt that in approaching the Court, the petitioners had been aggrieved by what they perceived as an imminent threat to the Constitution posed by the Amendment Bill. The Bill was a product of what is now famously known as ***"the BBI Process"***. This being the case, it would have been expected that their main prayer, and indeed the prayer of any other party that supported them would be for a declaration of unconstitutionality either of the Amendment Bill or the Process, or both. In support thereof, the petitioners were at liberty to

deploy any arguments, propositions, and analytic tools to convince the Court, that indeed, such a declaration, was warranted.

[970] Instead, and in a fundamental departure from a long established and tested tradition of invoking the High Court's jurisdiction, the petitioners presented the Court with a theoretical construct, a *fait accompli,* whose declaratory validation they sought. The High Court, on its part, elevated the proposition as designed by the petitioners into an issue for determination, even at a preliminary level. The learned Judges formulated the issue thus:

> ***"Is the Basic Structure Doctrine of Constitutional interpretation applicable in Kenya?"***

[971] The jurisdiction of the Court, it must be emphasized, is as provided in Article 165 of the Constitution as read with Article 258 thereof. Anyone petitioning the High Court, would be seeking to enforce the Constitution based on a grievance, either real or perceived, pursuant to these provisions. In exercise of its jurisdiction, the Court no doubt interprets the various provisions of the Constitution, not in a theoretical vacuum, but on the basis of allegations of imminent or actual contravention made by those who have petitioned it for specific reliefs. In so doing, the Court interrogates not just the text of the Constitution, but places the issue before it in context, considering all relevant factors, including non-legal phenomena. But in none of the four corners of its jurisdiction, is it discernible that the High Court can issue a declaration on the applicability or otherwise of a "legal doctrine", a principle even, in Kenya's legal system, as a *sine qua non* for enforcing the Constitution. Yet this is exactly what happened at the High Court in the matter before us. It is at this point that I must pose and ask for the sake of argument, if the High Court and Court of Appeal, would have been able to determine the constitutionality or otherwise of the BBI Process, without responding to the first prayer in Petition Number E282 of 2020.

(c) What is "a doctrine"?

[972] Be that as it may, now that "the applicability of the Basic Structure Doctrine" has snow-balled into a ubiquitous inquiry, we at the Supreme Court may not, without stirring justified indignation, disregard it altogether. But first things, first, what is a doctrine? The term may be viewed differently, from different lenses or disciplines. To a political scientist, the word "doctrine" is an expression of an ideological standpoint, usually couched in dogmatic bombast, intended to solidify a philosophical bias upon which the doctrine is founded. To a religious ideologue, the term "doctrine" is a declaration of transcendental normative prescriptions or creed, to which the faithful must unquestioningly adhere. But to a jurist, nay, a judge, the term "doctrine" is a statement of legal principle, rooted in long usage and wide acceptance as to be easily identifiable in the cosmos of law.

[973] The ***Black's Law Dictionary***, 11th Edition defines "Doctrine" as *"a Principle, especially a legal Principle that is widely adhered to"*. At the ***Cornell Law School Website-law*** Cornell.edu: 'Doctrine' is defined as "*a single important rule or set of rules or principles with such a long history in the law that Lawyers and Scholars have given them the more prestigious label of 'doctrine'"*. ***The Burton's Legal Thesaurus***; 4th Edition, (p.198) captures all the three versions of 'doctrine' in its definition thus: "*belief, canon, credendum, credo, creed, dogma, formulated belief, gospel, maxim, orthodoxy, philosophy, precept, principle, professed belief, rule, system, teaching, tenet, universal principle.*"

(d) When is a doctrine applicable in a legal system?

[974] In legal parlance, a doctrine is said to be "applicable" either in a specific jurisdiction, or to a particular dispute. To be so applicable, the doctrine must have attained the "force of law" in the said jurisdiction. It carries such force of law, when it is so recognized by a country's supreme law or legal system. For example, our Constitution recognizes what is undoubtedly the 'doctrine of the presumption of innocence' in Article 50 (2) (a) thereof. This doctrine acquired its status as such,

due to its long usage and acceptability through the centuries, in the common law world. Likewise, the Constitution confers the force of law upon certain bodies of law. Towards this end, Article 2 provides *inter alia,* that:

> "...
>
> *(5) The general rules of international law* ***shall form part of the law*** *of Kenya.*
>
> *(6) Any treaty or convention ratified by Kenya shall form part of the law of Kenya under this Constitution."*

[975] The expression "shall form part of the law" in Kenya was explained and clarified by this Court in ***Mitu-bell Welfare Society v. Kenya Airports Authority & 2 Others; Initiative for Strategic Litigation in Africa (Amicus Curiae)*** SC Petition No. 3 of 2018; [2012] eKLR (***Mitu-bell Welfare Society Case)***. The Court stated:

> *"[131] It is already clear that in our context, Article 2(5) and (6) of the Constitution embraces both international custom and treaty law. This provision can be said to be both outward, and inward looking.* ***The Article is outward looking in that, it commits Kenya– the State, to conduct its international relations in accordance with its obligations under international law. In this sense, the Article can be considered to be stating the obvious, in view of the fact that, as a member of the international community, Kenya is bound by its obligations under customary international law and its undertakings under the treaties and conventions, to which it is a party****. Yet, reference to international law by a domestic Constitution is evidence of its progressive nature.*

> *[132] On the other hand*, ***Article 2(5) and (6) is inward looking in that, it requires Kenyan Courts of law, to apply international law (both customary and treaty law) in resolving disputes before them, as long as the same are relevant, and not in conflict with, the Constitution, local statutes, or a final judicial pronouncement*** *…"* [emphasis mine].

[976] If therefore a court of law is seized with a dispute that calls into play, a rule or rules of international law, the court would be at liberty to apply such relevant doctrines or principles in order to dispose of the case before it. But a doctrine could also apply directly in Kenya's legal system if it is developed by the judicial organs of a supranational organization, of which Kenya is a member, by virtue of the treaty of membership.

[977] Is what has been repeatedly referred to as "the basic structure doctrine" a doctrine in the sense of the foregoing analysis? Not in a juristic sense, for it lacks the essential attributes of what constitutes a doctrine. It does not possess the "force of law" either under Article 2 of the Constitution, or pursuant to long usage and wide acceptability within the Common law world or other jurisdictions. Indeed, Prof. Richard Albert, in his *amicus* brief, which brief I found most illuminating on this vexed subject, and whose analysis appears to have had a pervasive influence on our colleagues at the High Court and Court of Appeal (nothing wrong or indefensible in that), in a demonstration of scholarly candour, acknowledges the fact that the "doctrine" has not found unqualified acceptability in many jurisdictions, including the Republic of Ireland, the United States, France, the Republic of Georgia, among others. Back here at home, the "doctrine" is neither a product of a supranational treaty norm, nor judicial pronouncement, the ***Njoya Case*** notwithstanding.

(e) Basic Structure: doctrine, text, or school of thought?

[978] The idea or notion of an implied limitation on parliamentary power to amend a Constitution, though jurisprudentially alluring, continues to undergo conceptual refinement. To this date, there are those within the judicial and legal fraternity, who still view this notion as anachronistic to constitutional interpretation. Recall the minority of six in the ***Kesavananda Case***? On their part, Prof. Fombad and Dr. Abebe, in their *amici briefs,* cast serious doubt as to the applicability of the "basic structure doctrine" in Kenya. In Prof. Fombad's view, neither the explicit or implicit language of the Kenyan Constitution, nor its history, or any theory of constitutional interpretation empowers the courts to impose a fourth method (the basic structure doctrine) of amending its provisions.

[979] It is the Professor's argument, that by superimposing the basic structure to limit the peoples' amendment power, both the High Court and Court of Appeal, placed a constraint on the sovereign power of the people, which power is exercisable by the people directly or through their democratically elected representatives, but not through "judicial fiat" [expression mine]. Dr. Abebe submits that whether or not there is a basic structure and how that should be defended, is ultimately a subjective determination best left to the political processes, involving the people, civil society, the media, public intellectuals and political institutions at the national and county levels. It is his view that even if one were to agree that the idea of a basic structure is normatively or practically desirable, the power to identify and defend it resides beyond the strict judicial role.

[980] Let us revisit the origin of what may be considered as the "basic structure of a Constitution". It stems from the majestic pronouncements that were made by the learned Judges in the majority decision in the ***Kesavananda Case,*** to the effect that the Indian Parliament could not amend the Constitution in such a manner as to destroy the "essential features" or "basic structure" of the Constitution. With time, these phrases have been used either interchangeably or

complementarily with others such as the "design of the Constitution" or the "essential character" of the Constitution, or the "basic features" of the Constitution.

[981] In 1976, the Indian Parliament passed the 42nd amendment to the Constitution by adding Clauses 4 and 5 to Article 368 of the Constitution. Clause 4 provided as follows:

> "*No amendment of this Constitution (including the provisions of Part 111) made or purporting to have been made under this Article…shall be called into question in any court on any ground."*

While Clause 5 provided that:

> "*For the removal of doubts, it is hereby declared that there shall be no limitation whatever on the constituent power of Parliament to amend by way of addition, variation or repeal the provisions of this Constitution under this Article."*

[982] The Supreme Court of India, in declaring these clauses unconstitutional in ***Minerva Mills Ltd v. Union of India,*** (1980) 3 *SCC* 625; AIR 1980 SC 1789, stated:

> "*Since the Constitution had conferred a limited amending power on the Parliament, it cannot under the exercise of that limited power enlarge that very power into an absolute power. Indeed,* ***a limited amending power is one of the basic features of our Constitution and therefore, the limitations on that power cannot be destroyed.*** *In other words, Parliament cannot, under Article 368, expand its amending power so as to acquire for itself the right to repeal or abrogate the Constitution or to destroy* ***its basic and essential features…"*** [emphasis mine].

Per Bhagwati, J (concurring):

> *"...the 42nd Amendment in so far as it introduced clause (4) in Articles 368* ***damaged the basic structure of the Constitution in respect of two essential features, viz: (1) the limited amending power of Parliament; and (2) the power of judicial review with a view to examining whether any authority under the Constitution has exceeded the limits of its powers. Both these features form part of the basic structure of the Constitution****"* [emphasis mine].

[983] So then, what is "the basic structure of a Constitution?" is it a doctrine? (I have already concluded it isn't) is it an identifiable set of principles, declarations, or normative prescriptions in a Constitution? Or is it a notion which oozes and derives its visibility from the prism of judicial interpretation of a Constitution? In the reasoning of the High Court, the Basic Structure of the Constitution "*consists of the foundational structure of the Constitution as provided in the Preamble; the eighteen chapters; and the six schedules of the Constitution."* In other words, the basic structure of the Constitution, is the entire Constitution. If that be the case, why should a court of law even be concerned with this expression when, in fact, in interpreting the Constitution, it has to (as it must) consider the entire Constitution?

[984] At the Court of Appeal, the learned Judges weighed in on the question as to what constitutes "the basic structure" of the Constitution. Three of the Judges unanimously opined that what constitutes such structure is to be found in Article 255 (1) thereof. *Okwengu, J.A* concluded that the Constitution of Kenya has a basic structure, identified by way of thematic areas in Article 255(1) of the Constitution.

[985] *Gatembu, J.A* was of a similar view. The learned Judge found that the framers of the Constitution identified matters set out in Article 255(1) of the Constitution as the basic structure of the Constitution, or the core and fundamental pillars that define the Constitution. Likewise, *Tuiyott, J.A* found that what comprises the basic structure of the Constitution was specifically defined by the people of Kenya under Article 255(1) of the Constitution. *Kiage, J.A* was of a slightly different opinion, the learned Judge was of the view that "the entrenched provisions" as stipulated in Article 255(1)(a) to (j) of the Constitution, *either coincides or nearly coincides* with what may be considered to be the basic structure of our Constitution.

[986] *Musinga, (P),* did not expressly determine what constitutes the basic structure of the Constitution. The learned Judge held that the basic structure doctrine is applicable in Kenya and that certain fundamental aspects of the Constitution could not be amended except through the sovereign primary constituent power of the people. However, even though the Judge did not make a finding on what specifically constitutes the basic structure, he indicated that he substantially agreed with the views by *Kiage, J.A* on this issue.

[987] On the other hand, *Nambuye, J.A* upheld the High Court and determined that the basic structure of the Constitution means the '*the Constitution itself and what it contains*'. Finally**,** *Sichale, J.A* determined that the basic structure doctrine was not applicable in Kenya. The learned Judge therefore, may not have found it necessary to delve into the question as to what constitutes "a basic structure" if ever there was any, under our constitutional dispensation.

[988] Even the Attorney General, who is the main appellant in this case, embraces the view that "the basic structure" of our Constitution of 2010 is something to be found in Article 255(1) thereof. Notwithstanding this contention, he submits that "the basic structure doctrine" does not apply to Kenya. But in answer to a question from the bench on why such a dichotomy, and where the thin line lies, one is still

not sure whether by this, the Attorney General means that "such basic structure" is stripped of its doctrinal attributes by the requirement of a referendum in Article 255(2), or that "the doctrine", to the extent that it "impliedly" limits the power of Parliament to amend the Constitution, offends Article 255(1) and (2), which already limits that power, through the requirement of a referendum. In other words, it is not clear, where the "structure" disengages from the "doctrine". On his part, albeit tangentially, Senior Counsel, Professor Githu Muigai (himself a former Attorney General), cautioned against the use of "the language of basic structure" even if referring to the contents of Article 255(1) of the Constitution. The more appropriate phraseology, advised the good Professor (perhaps nostalgically recalling his days as a member of the CKRC), was to be found in the language of "entrenched provisions" of the Constitution.

[989] I find no fault with this rich and diverse array of opinions, so eruditely crafted by some of the finest in our judicial system, legal profession, academic institutions, and from far afield *(amici curiae)*. Indeed, we who are called to adjudicate upon the affairs of men and women, are all the more privileged, when served from such a tantalizing menu of ideas by the bar and bench. Yet my discomfiture, with the manner in which this issue was brought before the High Court in the first instance, still persists. It bears repeating that, in the ordinary scheme of things, a petitioner ought to approach the courts, seeking relief on the basis of a real or perceived violation of the Constitution. But to begin by seeking a declaration that there exists, somewhere in our psyche, beyond and above the Constitution, a doctrine, that is nonetheless applicable in our legal system, and which we have to take cognizance of, even as we embark upon the determination of whether certain actions or omissions have violated the Constitution, is to lead Judges onto a terrain, hitherto uncharted.

[990] It is my firm view that this prolonged debate, has been agonizingly stripped of the discipline of judicial inquiry. First, through the conceptual profligacy of

elevating a "notion" to a legal doctrine, embellishing it with an extra-constitutional force of law, and then, quite inexplicably, attempting to locate "the minted doctrine" in the text of the Constitution. So, on the one hand, we are treated to lyrics of contextualism, while on the other, strung with thuds of textualism. And so, the orchestra goes on, which if not choreographed, could unleash an interpretative odyssey, nay, a maelstrom from which, attempts to wriggle therefrom by those to come after us, could end up in theatrical ignominy.

[991] All this while, scant attention has been paid to what I consider a majestic directive principle in our Constitution, a tool of analysis, that faced with such questions as the ones before us in this matter, a court of law must deploy in the first instance. That is Article 259(1) of the Constitution, the marginal note of which reads, *"Construing this Constitution"*. Instructively, this provision is preceded by another, which I consider as a defensive amour, gifted to our vigilantes of democracy and the rule of law. That is Article 258(1) of the Constitution, the marginal note of which reads, "*Enforcement of this Constitution"*. Now, Article 258(1) provides as follows:

> *"(1)* ***Every person has the right to institute court proceedings,*** *claiming that this Constitution, has been contravened, or is threatened with contravention"* [emphasis mine].

In immediate pursuit, is Article 259 (1) which provides that:

> *"(1)* ***This Constitution*** *shall be interpreted in a manner that–*
>
> ***(a) promotes its purposes, values and principles;***
> ***(b) advances the rule of law and the human rights and fundamental freedoms in the Bill of Rights;***
> ***(c) permits the development of the law; and***
> ***(d) contributes to good governance"*** [emphasis mine].

[992] These two fundamental provisions are preceded by Articles 255, 256 and 257; the interpretation of which, has been at the centre of the appeal before us. The two Articles are the fulcrum upon which the interpretation and enforcement of the Constitution must be anchored. Therefore, the issue to be considered in my view, is whether the Constitution of 2010, contains within it, adequate directive principles, norms, processes and mechanisms that can enable it to withstand any attempts, from whichever quarter, to destroy or abrogate it. A reading of these two Articles and the resultant judicial pronouncements in cases where the courts have been petitioned to protect and enforce the Constitution, leaves little doubt that the Constitution is both internally, and in its architectural design, self-sustaining.

[993] Towards this end, the Supreme Court has on many occasions, in exercise of its interpretative jurisdiction, invoked and applied the provisions of Article 259(1) to make far-reaching pronouncements, aimed at breathing life into and asserting the authority of the Constitution. For example, in ***The Matter of the Principle of Gender Representation in the National Assembly and the Senate;*** SC Advisory Opinion No. 2 of 2012, [2012] eKLR (***Re Matter of Gender Representation*****),** in his dissenting Judgment, *Mutunga, CJ, (Rtd.)* declared that:

> *" ... **A constitution does not subvert itself**. **Deciding that women vying for county representation have rights under constitution while their counterparts vying for Parliament and the Senate are discriminated against would result in that unconstitutional position.** This article read with the provisions of Articles 27(4), 27(8) and 81(b) make it abundantly clear that the two-thirds gender principle has to be immediately realized"* [emphasis mine].

[994] This observation, was later to attain legal sanctity in the majority Judgment of this Court in ***Mohamed Abdi Mahamud v. Ahmed Abdullahi Mohamad***

& 3 Others; Ahmed Ali Muktar (Interested Party); SC Petition No. 7 of 2018; [2019] eKLR (***Mohamed Abdi Mahamud Case***). The Court thus opined:

> *"... the Constitution has to be interpreted holistically and purposively, and that the Constitution, being a living charter, is always speaking, and that in interpreting its provisions,* ***a Court of law must keep in mind that, the constitution cannot subvert itself. Towards this end, every constitutional provision supports the other, and none can be read so as to render another inoperable****"* [emphasis mine].

[995] ***In the Matter of the Speaker of the Senate & another;*** Reference No. 2 of 2013; [2013] eKLR ***(Re Speaker of the Senate)*** the Court rendered an opinion in which it pronounced that:

> *"****Kenya's Constitution of 2010 is a transformative charter****. Unlike the conventional "liberal" Constitutions of the earlier decades which essentially sought the control and legitimization of public power, the avowed goal of today's Constitution is to institute social change and reform, through values such as social justice, equality, devolution, human rights, rule of law, freedom and democracy"* [emphasis mine].

It was further opined that:

> *"The transformative concept, in operational terms,* ***reconfigures the interplays between the States majoritarian and non-majoritarian institutions****, to the intent that the desirable goals of governance, consistent with dominant perceptions of legitimacy, be achieved...."* [emphasis mine].

[996] Similarly, ***In the Matter of the Kenya National Commission on Human Rights,*** Reference No. 1 of 2012; [2014] eKLR (***Re Matter of the***

Kenya National Commission on Human Rights), the Court was categorical that the Constitution could not be interpreted in bits and pieces; it had to be interpreted as one coherent and cohesive whole. At para 26, the Court stated:

> *"... a holistic interpretation of the Constitution...must mean interpreting the Constitution in context...reading it alongside and against other provisions, so as to maintain a rational explication of what the Constitution must be taken to mean in light of its history, of the issues in dispute, and of the prevailing circumstances. Such scheme of interpretation does not mean an unbridled extrapolation of discrete constitutional provisions into each other, so as to arrive at a desired result".*

[997] Pursuant to Article 2(4), courts in this Country, and the High Court in particular, have continued to invalidate various pieces of legislation on grounds that they are inconsistent with the Constitution. By decreeing that our Constitution is a "Transformative Charter", the Supreme Court was alive to the tortured history of Constitution making in this Country. A history punctuated by untold suffering and pain, as so admirably recalled by the High Court in its Judgment. A history bloated with testaments of blood and even death, of those who stood up to agitate for change, as told during the hearing, on the verge of tears, by one of the still surviving Patriarchs of the struggle for liberation, learned Counsel Dr. Khaminwa.

[998] Therefore, the promulgation of the new Constitution on 12th August, 2010, marked a radical paradigm shift in the governance of the Country. By giving the Constitution to themselves and future generations, the people had spoken. They had spoken against an imperial presidency and executive autocracy. They had spoken against a compliant Legislature and Judiciary. They had spoken against the violation of their fundamental rights and freedoms by those who wield State power. All these, would have to be entombed in the urns and sepulchers of eternity.

[999] In this regard, Article 259(1) of the Constitution, is meant to ensure that the "equilibrium of democratic governance" created by the Constitution, endures through judicial creativity and vigilance. Likewise, by declaring that the Constitution cannot subvert itself, this Court had long signaled that courts were to embrace "a purposive interpretation" of the Constitution so as to not only promote its values, purposes and principles, but also to guard against any enactments, including amendments that have the potential to undermine its constitutive authority. This a court of law can do, without seeking to locate "a basic structure" in the text of the Constitution.

[1000] In light of the foregoing analysis, what is to be made of the so called "basic structure doctrine"? In response thereto, and for reasons that are now evident, I refuse to be emasculated, neither do I agree to be pigeonholed, by a formulation of an issue (whether the basic structure doctrine is applicable in Kenya) so obtrusively foisted upon the courts by the petitioners. Speaking for myself from where I sit as a Judge, and deprived of the romanticism of academic theorizing, it is my view that what has been articulated as "the basic structure doctrine", is no doctrine, but a notion, a reasoning, a school of thought, or at best, a heuristic device, to which a court of law may turn, within the framework of Article 259(1) of the Constitution, in determining whether, a proposed constitutional amendment, has the potential to destabilize, distort, or even destroy the constitutional equilibrium.

[1001] Curiously, this appears to have been the approach, initially taken by the High Court when it formulated the issue as follows:

> "*Whether the basic structure '**doctrine of constitutional interpretation'** is applicable in Kenya"* [emphasis mine].

But, in its final disposition of the issue as initially formulated, the Court declared:

"***The Basic Structure Doctrine is applicable in Kenya***" [emphasis mine].

[1002] The words "doctrine of constitutional interpretation" had disappeared from the issue as initially formulated. Instead, the operative words became "the basic structure doctrine". It is this version that was taken up by the Court of Appeal and later escalated to the Supreme Court. The explanation for this discordance, is to be found in what I have decried as an unusual prayer for a declaration, not for any specific relief, but that a certain doctrine is applicable in Kenya. It does no harm to recall the prayer as sought by the petitioners that:

> *"A declaration be and is hereby issued that the legal and judicial doctrines of the "basic structure" of a constitution; the doctrine and theory of unamendability of "eternity clauses" the doctrine and theory of "constitutional entrenchment clauses" and unamendable constitutional provisions" in a constitution are applicable in the Republic of Kenya."*

[1003] As formulated, the "doctrine" whose applicability was being sought, had been rendered as an immutable mantra of "sub-doctrines" and theories, the four corners within which the court was to navigate its interpretative adventure. It is this invitation, which the High Court, regrettably accepted.

Whether the basic structure of the Constitution can only be altered through the primary constituent power; and what constitutes the primary constituent power

[1004] In view of what I have concluded regarding what is referred to as "the basic structure of the Constitution", I would reformulate the foregoing sub-issue as follows:

"*Whether the Constitution of Kenya contains certain 'eternity' or 'sunset' clauses that cannot be amended, notwithstanding the provisions of Articles 255, 256 and 257 of the Constitution.*"

[1005] In addressing this question, the High Court answered in the affirmative. The learned Judges were of the view that the essential features of the Constitution forming the Basic Structure can only be altered or modified by the people using their primary constituent power; which power is only exercisable after four sequential processes have been followed. At page 179, they stated:

> "*...there are certain provisions in the Constitution which are inoculated from any amendment at all because they are deemed to express categorical core values.* ***These provisions are therefore unamendable:*** *they cannot be changed through the exercise of Secondary Constituent Power or Constituted Power. Their precise formulations and expressions in the Constitution can only be affected through the exercise of Primary Constituent Power. These provisions can also be termed as* ***eternity clauses. An exhaustive list of which specific provisions in the Constitution are un-amendable or are eternity clauses is inadvisable to make in vacuum. Whether a particular clause in the Constitution consists of an "unamendable clause" or not will be fact-intensive determination to be made after due analysis of the Constitution, its foundational structure, its text, its internal coherence, the history of the clause and the constitutional history; and other non-legal considerations permitted by our Canon of constitutional interpretation principles"*** [emphasis mine].

[1006] At the Court of Appeal, the majority agreed with the High Court regarding the existence of a basic structure in the Constitution. However, in a

partial departure from the High Court regarding what constitutes the basic structure of the Constitution, a majority of five (*Musinga, (P), Nambuye, Kiage, Gatembu, and Tuiyott, JJ.A)* concluded that such structure was to be found in Article 255(1) of the Constitution as opposed to the entire Constitution. But in agreement with the High Court, regarding the un-amendability of certain clauses, a majority of four (*Musinga, (P) Nambuye, Kiage and Tuiyott, JJ.A)*, held that the doctrine limits the amendment power under Chapter Sixteen of the Constitution. The learned Judges of Appeal, just like the High Court, opined that the basic structure, could only be altered through the primary constituent power, which includes four sequential processes namely: civic education; public participation and collation of views; constituent assembly debate; and ultimately, a referendum. It was the Judges' perception that an alteration of the basic structure, amounts to abrogation or formation of a new Constitution. Such an outcome, reasoned the Judges, could only be legitimately achieved through the exercise of the primary constituent power by the people.

[1007] *Gatembu, J.A* on the other hand reasoned that the thematic areas set out in Article 255 (1) of the Constitution could be amended, in accordance with Article 257 of the Constitution, as long as such amendment had benefitted from an infusion of the national values and principles. It was the learned Judge's opinion that there was no requirement for a Constituent Assembly in order to legitimately effectuate an amendment of the basic structure under Articles 255 to 257 of the Constitution.

[1008] The minority, (*Okwengu & Sichale, JJ.A*) was of a different opinion. *Okwengu, J.A,* though disagreeing with the High Court regarding the existence of un-amendable clauses in the Constitution, nonetheless, opined that the Spirit of the Constitution as revealed in the Preamble, pointed to a latent existence of unamendability within it. According to the learned Judge, the threshold of the implied general un-amendability involves a substantive examination of whether

the purported amendment, deviates from the spirit and purport of the Constitution. Any proposed constitutional amendment must pass both the procedural test as set out in Chapter Sixteen, and the substantive test. The basic structure doctrine, in her view, is therefore applicable to the extent that the exercise of secondary constituent and constituted power to amend the Constitution, is impliedly limited by the Constitution as evident in its spirit and purport.

[1009] On her part, *Sichale, J.A,* held that every clause in the Constitution was amendable subject to the process and methodology set out in Articles 255 to 257. The learned Judge was of the view that the High Court had erred in imposing limitations to the amendment power of Parliament and the people through implication, even as it acknowledged that there were no explicit provisions in the Constitution, decreeing that certain clauses thereto were un-amendable. To the Judge:

> "*The clear text and language of Chapter 16 is that there are explicit provisions in the 2010 Constitution providing for amendment and there is no reason to look outside the Constitution and import the Basic Structure Doctrine on the basis that the Constitution has the unspoken language and/or implicit provisions.*"

[1010] Accordingly, in her opinion, and contrary to the pronouncement by the High Court, a determination of what is amendable should not be left to judicial innovation. Judges, as well as Legislators, could not assume supremacy over the people, who only, are sovereign.

[1011] In the end, the majority on the Appellate bench agreed with the High Court that the proposed Amendment Bill, amounted to a dismemberment of the Constitution as it sought to fundamentally alter important constitutional pillars

such as the separation of powers and the independence of the Judiciary, among others.

[1012] Before us, it was urged by the Attorney General and those in support, that the provisions of Articles 255 to 257 of the Constitution, regarding the nature and process of amending the Constitution, was clear, comprehensive, and self-sustaining. These provisions, submitted the appellant, did not permit of any limitations on the power of Parliament or the People to amend the Constitution. In the circumstances, courts ought to exercise maximum restraint and resist the temptation, to impute an intention on the part of the framers to render certain parts of the Constitution unamendable. In the Attorney General's view, as long as the procedure set out in Articles 255 to 257 of the Constitution is strictly followed, the content of any proposed amendment is beyond judicial scrutiny.

[1013] On the other hand, the proponents of the basic structure doctrine, and the concomitant eternity or sunset clauses, submitted that the limitations on the power of Parliament and the People (in exercise of their secondary constituent power) are embedded in the Constitution, both implicitly and explicitly. As such, they agreed with the High Court that, any amendment whose effect was to alter the basic structure of the Constitution could only be effectuated by the People through the exercise of their Primary Constituent Power. In effect, it was their case that certain clauses in the Constitution, being "eternity" or "sunset clauses" were un-amendable notwithstanding the provisions of Articles 255 to 257.

(a) Interpreting the Constitution

[1014] The starting point of constitutional interpretation is "the text of the Constitution". There can be no higher or superior coordinate from which a court of law, may launch its examination of the meaning, tenor, or import of a constitutional provision, than the text. Only after it has immersed itself in the contents of a constitutional text, only after it has accorded such words their natural

and ordinary meaning, can a court venture into other phenomena, should the nature of the dispute before it so warrants. Now, guided by this time hallowed principle, I may proceed to highlight the contents of Articles 255 to 257 of the Constitution. Article 255(1) provides:

> "***(1) A proposed amendment to this Constitution shall be enacted in accordance with Article 256 or 257, and approved in accordance with clause (2) by a referendum,*** *if the amendment relates to any of the following matters–*
>
> ***(a) the supremacy of this Constitution;***
> ***(b) the territory of Kenya;***
> ***(c) the sovereignty of the people;***
> ***(d) the national values and principles of governance referred to in Article (10) (2) (a) to (d);***
> ***(e) the Bill of Rights;***
> ***(f) the term of office of the President;***
> ***(g) the independence of the Judiciary and commissions and independent offices to which Chapter Fifteen applies;***
> ***(h) the functions of Parliament;***
> ***(i) the objects, principles and structure of devolved government; or***
> ***(j) the provisions of this Chapter."***

[1015] Article 255(2) of the Constitution provides that a proposed amendment shall be approved by a referendum under clause (1) if:

> ***"(a) at least twenty per cent of the registered voters in each of at least half of the counties vote in the referendum; and***

(b) the amendment is supported by a simple majority of the citizens voting in the referendum."

Article 255 (3) in turn provides that:

"***(3) An amendment to this Constitution that does not relate to a matter specified in clause (1) shall be enacted either—***

(a) by Parliament in accordance with Article 256; or
(b) by the people and Parliament, in accordance with Article 257."

Article 256 (1) of the Constitution provides that *a Bill to amend this Constitution:*

"(a) may be introduced in either house of Parliament;
(b) may not address any other matter apart from consequential amendments to legislation arising from the Bill: …"

Article 256 (3) provides that:

"(3) After Parliament passes a Bill to amend this Constitution, the Speakers of the two Houses of Parliament shall jointly submit to the President–

(a) the Bill, for assent and publication; and
(b) a Certificate that the Bill has been passed by Parliament in accordance with this Article."

Article 256 (5) provides that:

"(5) If a Bill to amend this Constitution proposes an amendment relating to a matter specified in Article 255(1)—

(a) the President shall, before assenting to the Bill, request the Independent Electoral and Boundaries Commission to conduct, within ninety days, a national referendum for the approval of the Bill; and

(b) within thirty days after the chairperson of the Independent Electoral and Boundaries Commission has certified to the President that the Bill has been approved in accordance with Article 255(2), the President shall assent to the Bill and cause it to be published."

[1016] A reading of the foregoing provisions leads to the following inescapable conclusions:

[1017] Firstly, the Constitution provides for the power and procedure for its own amendment, as stipulated in Articles 255, 256, and 257 respectively. Secondly, the Constitution provides in mandatory terms that any proposed amendment, relating to the matters identified in Article 255(1) above, must be subjected to a referendum in accordance with the provisions of Article 255 (2) and Article 256 (5) thereof. Thirdly, the Constitution confers upon Parliament the power, to amend any other provision therein (without going through a referendum) *as long as such amendment does not relate to* any *matter stipulated in Article 255(1) thereof* [emphasis added]. And fourthly, the Constitution, ***confers upon the People of Kenya****, the Power to amend any provision of the Constitution, including an amendment relating to any matters stipulated in Article 255 (1) in accordance with the provisions of Article 257 thereof* [emphasis mine].

[1018] In sum, the Constitution provides for a three-tier amendment process namely, a pure parliamentary initiative without a referendum, a parliamentary initiative perfected by a referendum, in accordance with the provisions of Article 255(1) of the Constitution, and a popular initiative with or without a referendum, in accordance with the provisions of Article 257 of the Constitution.

[1019] This is the plain and ordinary meaning that flows from the text of the Constitution as provided in Articles 255 to 257. So where does the notion of un-amendable provisions come from, when the Constitution itself provides that any of its provisions may be amended? According to the High Court, neither Parliament, nor the People in exercise of the *Constituted Power* or *Secondary Constituent Power* respectively, may amend the Constitution in a manner that alters the essential features or basic structure of the Constitution. These can only be modified by the Peoples' *Primary Constituent Power*. The People have to be recalled as a whole to alter or modify the basic structure, so declares the High Court. If neither Parliament, nor the People can amend the Constitution in view of the strictures as postulated by the High Court, then what would they be amending, if at all, under Articles 255, 256, and 257 of the Constitution? According to the High Court, both Parliament and the People can only amend the Constitution in *non-fundamental ways* [emphasis mine]. What are these non-fundamental ways that are envisaged in Articles 255, 256, and 257?

[1020] With tremendous respect to my colleagues on the High Court bench, I must state that I find great difficulty in their standpoint. The reasoning by the Court in my view, is attended by internal-contradiction and general imprecision. For example, the learned Judges hold the view that the "basic structure of the Constitution comprises of the Preamble, the Eighteen Chapters, and the Six Schedules". In other words, the basic structure is, the entire Constitution. At this stage, it is clear that the High Court is in fact no longer entertaining the notion of the basic structure as (to use the learned Judges' own words) *a doctrine of*

constitutional interpretation, but as the entire text of the Constitution. So, does this mean that the Constitution as a whole is un-amendable, unless the People are recalled to exercise their *Primary Constituent Power*? To this, the Court replies:

> "*To be sure, there is no clause in the Constitution that explicitly makes any Article in the Constitution un-amendable. However, the scheme of the Constitution, coupled with its history, structure and nature creates an ineluctable and unmistakable conclusion that the power to amend the Constitution is substantively limited.*"

[1021] What then, are the "eternity" or "sunset clauses" that may not be amendable under Articles 255, 256, and 257 of the Constitution? To this, the Court opines:

> "*These provisions are therefore, unamendable: they cannot be changed through the exercise of Secondary Constituent Power or Constituted Power. Their precise formulations and expressions in the Constitution can only be affected through the exercise of Primary Constituent Power.* ***These provisions can also be termed as eternity clauses. An exhaustive list of which specific provisions in the Constitution are un-amendable or are eternity clauses is inadvisable to make in a vacuum. Whether a particular clause in the Constitution consists of an 'unamendable clause' or not will be a fact-intensive determination to be made after due analysis of the Constitution, its foundational structure, its text, its internal coherence, the history of the clause and the constitutional history; and other non-legal considerations permitted by our Canon of constitutional interpretation principles***" [sic].

[1022] What is one to make of all these? On the one hand, it is acknowledged that the Constitution does not declare any of its provisions un-amendable, yet on the other, it is asserted that the history of the same Constitution substantively limits the power of amendment, which power is granted by the Constitution. Similarly, it is categorically stated that there exist within the text of the Constitution, certain "eternity" or "sunset clauses" that are unamendable save through the Primary Constituent Power of the People. Yet, by the same token it is advised that the said unamendable clauses are not visible, but have to be un-earthed through "a fact-intensive analysis…".

[1023] At the Court of Appeal, it is generally agreed that there indeed exists a basic structure of the Constitution. However, the learned Judges of Appeal do not subscribe to the view that such basic structure comprises of the entire Constitution. According to some of my colleagues on that bench (*Tuiyott, J.A* for example), what constitutes the basic structure is to be found in Article 255 (1) of the Constitution. It is this basic structure which is un-amendable, unless through the exercise of the Primary Constituent Power of the People.

[1024] On the basis of the reasons advanced, I have already expressed my misgivings about the attempts to locate the "basic structure" in the text of the Constitution. In addition to those reasons, it appears to me that characterizing certain provisions as constituting a basic structure of the Constitution, hence unamendable, would be veering away from the canons of interpretation that require courts of law to interpret the Constitution holistically and purposively. Neither am I overly impressed by the language of "entrenched provisions" in reference to Article 255(1) of the Constitution, for strictly speaking, every provision of the Constitution is "an entrenched provision". Were it not so, it would have been relegated to the realm of ordinary legislation.

[1025] The conclusion that I must arrive at is that, contrary to the assertions by my colleagues at the High Court and Court of Appeal, every provision in the

Constitution is amendable. In this regard, I find nothing in the Constitution which leads me to an interpretation that would negate the amendment of the Constitution, either on the basis of its history or context. To hold that there are certain provisions in the Constitution that enjoy attributes of eternity, is to stifle the growth and flowering of the Constitution for the benefit of future generations.

Why for example, would it be objectionable if a proposed constitutional amendment has the intention, potential, and effect of strengthening the Bill of Rights, or the Independence of the Judiciary? Do we have to recall the People in exercise of their Primary Constituent Power, to enact such an amendment even in the face of the permissive provisions of Articles 255, 256 and 257 of the Constitution? I hardly think so. The Constitution is a living and enduring document. It must therefore be interpreted in a manner that sustains its values and purposes, permits the development of the law, protects the rights and fundamental freedoms of the individual and contributes to good governance. This is the constitutional equilibrium against which any proposed constitutional amendment must be measured. Is this not what is meant by Article 259(3) of the Constitution when it provides that:

> *"(3) Every Provision of this Constitution shall be construed according to the doctrine of interpretation that the law is always speaking…"?*

[1026] At the end of the day, the issue is not whether the Constitution can be amended or not, but whether such an amendment can pass the constitutional muster in Article 259 (1) and (3) of the Constitution. In this regard, I am in agreement with the observations by *Okwengu and Gatembu, JJ.A* to the effect that a proposed amendment must pass both the procedural and substantive test. Where I part ways with my two colleagues is at the point at which they base their substantive test not on the constitutional equilibrium in Article 259, but on a basic structure (*Gatembu, J.A*–Article 255(1) and *Okwengu, J.A*–the Preamble). By the same token, I do not agree with the submission by the Attorney General to the

effect that any and every proposed constitutional amendment would be valid as long as it goes through the procedural requirements stipulated in Articles 255, 256 and 257 of the Constitution. Courts of law cannot shut their eyes to a proposed constitutional amendment, if its content has the potential of subverting the Constitution.

(b) The Primary Constituent Power

[1027] Much has been pronounced regarding, the invincibility of *the primary constituent power* of the people to amend the Constitution. But how this primary constituent power is to acquire its juridical form remains a mirage, despite our prodding. Inherent in the argument by the proponents of the primary constituent power, is the dangerous presumption that, a constitutional amendment in exercise of the primary constituent power cannot imperil the Constitution. Likewise, is the connotation that, what the people and parliament may not do to "the basic structure" of the Constitution, the people can do with abandon, as long as they do so in exercise of their primary constituent power! Lost on them, are the many tragic examples in history, where the people have been whipped into frenzies of self-destruction, in exercise of their *primary constituent power*.

(ii) Whether the President can initiate changes/amendments to the Constitution; and whether a constitutional amendment can only be initiated by Parliament through a parliamentary initiative under Article 256 of the Constitution or through a popular initiative under Article 257 of the Constitution

[1028] This issue as framed, stems from the fact that right from the High Court, some petitioners questioned the constitutionality of what they argued, was a presidential involvement in a process that is reserved for the People of Kenya, contrary to the provisions of Article 257 (1) of the Constitution which provides that-

"(1) An amendment to this Constitution may be proposed by ***a popular initiative signed by at least one million registered voters***" [emphasis added].

[1029] Pursuant to this provision, and following a process of what is referred to as the Building Bridges Initiative, the Government published "***The Constitution of Kenya Amendment Bill, 2020.***" As the Preamble reads, this Amendment Bill was intended "to amend the Constitution by popular initiative". A question therefore arose as to whether a sitting President could initiate changes or amendments to the Constitution, under Article 257(1), or whether this route was strictly reserved for the People of Kenya.

[1030] The High Court held that the popular initiative as a means to amend the Constitution under Article 257 of the Constitution is a power reserved for *Wanjiku*. Neither the President nor any state organ, held the Court, can utilize Article 257 of the Constitution to amend the Constitution. At para. 497, the learned Judges stated:

"*It is our view that a Popular Initiative being a process of participatory democracy that empowers the ordinary citizenry to propose constitutional amendment* (sic) *independent of the law-making power of the governing body cannot be undertaken by the President or State Organs under any guise. It was inserted in the Constitution to give meaning to the principles of sovereignty based on historical past where the reservation of the power of amendment of the Constitution to the elite few was abused in order to satisfy their own interests."*

[1031] The Court of Appeal unanimously agreed with the High Court that the popular initiative route of amending the Constitution was intended for ordinary citizens. The learned Judges opined that the process was a citizen-conceived, citizen initiated and citizen driven process. Similarly, the Appellate Court agreed with the High Court that the President could not initiate the process of amendment

of the Constitution through a popular initiative. They reasoned that as long as the President held office as President, he could not operate as an ordinary citizen, so as to avail himself of the provisions of Article 257 of the Constitution.

[1032] On appeal, the Attorney General faults the Appellate Court for its finding that the President was precluded from activating the popular initiative route of amending the Constitution. It is his contention that the President, just as any other citizens is entitled to the political rights guaranteed by Article 38 of the Constitution. Nothing therefore stops the President from initiating constitutional amendments under Article 257 of the Constitution. The Attorney General further argues that the popular initiative route of amending the Constitution does not differentiate between private citizens and State organs. What matters, submits the Attorney General is the one million signatures appended to the draft bill by the registered voters as opposed to the originator.

[1033] Those in support of the Attorney General's position argue that the popular initiative route of constitutional amendment is available to everyone, including the President, and any state organ. It is their contention that the Constitution does not preclude any person, body or class of people, whether public or private from, initiating or promoting constitutional amendments through a popular initiative.

[1034] In opposition to the Attorney General's standpoint, the respondents submit that the process envisaged under Article 257 must be "popular" in the real sense. In this regard, they argue, one cannot conclude that an initiative was popular when the people had no real input in its commencement or its content.

[1035] Therefore, in their view, reference to a "popular initiative" must denote the peoples' involvement in line with Article 1 of the Constitution, which decrees that sovereign authority belongs to the people. They contend that the President cannot be deemed to be an ordinary citizen while he still holds office as President. The President's role in the constitutional amendment processes, they submit, is well defined, and does not involve the power to initiate amendments under Article

257 of the Constitution. They therefore agree with the conclusions by the two superior courts regarding this issue.

(a) What is "a Popular Initiative"

[1036] In order to answer this question, we have to determine what constitutes "a Popular Initiative". The starting point is Article 255 (3) of the Constitution, which provides:

> *"(3) An amendment to this Constitution that does not relate to a matter specified in clause (1) shall be enacted either—*
>
> *(a) by Parliament, in accordance with Article 256; or*
> *(b) by **the people** and Parliament, in accordance with Article 257."*

Article 257 (1) whose marginal note reads "*Amendment by popular initiative",* provides:

> *"(1) An amendment to this Constitution may be proposed by a popular initiative signed by at least one million registered voters".*

Article 257 (10) provides:

> *"(10) If either House of Parliament fails to pass the Bill, or the Bill relates to a matter specified in 255 (1), the proposed amendment shall be submitted to the people in a referendum."*

[1037] The point to immediately note from these provisions is that Article 255(3) of the Constitution, empowers Parliament and the People to propose amendments to the Constitution in the manner stipulated in Articles 256 and 257 respectively. No other constitutional entity or institution, is granted authority to amend the Constitution. Under Article 257 (1) of the Constitution, a proposed constitutional

amendment can only be commenced by a popular initiative, and perfected by a referendum, where the consequential Bill therefrom, fails to attain passage by both Houses of Parliament, or touches on a matter mentioned in Article 255(1) of the Constitution. What then constitutes "a Popular Initiative?"

[1038] The ***Black's Law Dictionary*** defines a "a Popular Initiative" *as an electoral process by which a percentage of voters can propose legislation and compel a vote on it by the legislature or by the full electorate, recognized in some state constitutions. It is also identified as one of the few methods of direct democracy in an otherwise representative system.*

[1039] Gerber, Elisabeth, in her Article, **'*Legislative Response to the Threat of Popular Initiatives*'** American Journal of Political Science, vol. 40, no. 1, [Midwest Political Science Association, Wiley], 1996, pp. 99–128, discusses how an Initiative may allow citizens to constrain the behavior of their elected representatives in America. In particular, she opines that such an initiative provides voters with a means for directly enacting policies they prefer by proposing and voting on initiatives, independent of legislative action.

[1040] Numata, Chieko, in his writing '***Checking the Center: Popular Referenda in Japan'*** Social Science Japan Journal, vol. 9, no. 1, Oxford University Press, 2006, pp. 19–31, observes that local governments of many countries have adopted popular referenda to allow their citizens to directly vote on specific laws. He emphasizes the fact that direct legislation, includes the Initiative and the Referendum, which he argues, educates the people about issues, reduces influence of special interests and more importantly, empowers the people to check the policies of elected officials.

[1041] Denis Galligan, in his Article entitled **'*The Sovereignty Deficit of Modern Constitutions*'** Oxford J Legal studies (2013) 33 (4): 703 expounds on the meaning of "a Popular Initiative". Such initiative, according to him, is one type of direct action by the people. He defines a popular initiative as connoting the

empowerment of people, to act of their own initiative, which, in addition to a referendum, whether on a constitutional or non-constitutional matter, includes initiating, abrogating, or introducing a law.

[1042] In agreement with my Colleagues, both at the Court of Appeal and High Court, it is my firm view that a popular initiative is a people-centered process. Such process excludes any other constitutional entity or institution. The role of Parliament is limited to the "enactment" of the consequential Bill in the first instance, or submission of the Bill to a referendum in the second instance (where Parliament fails to pass the Bill or where the Bill touches on any matter mentioned in Article 255(1)). It is instructive to note that, the people retain a residual power to still pass the Bill through a referendum even if Parliament fails to enact it. The involvement of the Legislature under Article 257 is merely procedural. Therefore, when the people make a proposal to amend the Constitution under Article 257(1) of the Constitution, they are to be regarded as exercising their sovereign power directly under Article 1(2) of the Constitution. Such direct exercise of sovereign power, also comes into play when the people decide to fundamentally break with their unconstitutional past, to adopt and give unto themselves and future generations a new Constitution. This, the People did on 27th August, 2010.

[1043] A proposal to amend the Constitution through a popular initiative comes into being, when there is 'a felt need' for such an amendment by the People. Care must however be taken, as advised by Professor Migai Aketch in his *amicus* brief, not to *"Wanjikunize"* every stage of Constitution making or amendment [the word is mine]. In his comprehensive analysis of the history of Constitution making in Kenya, the good Professor, rightly in my opinion, decried the tendency to under-estimate the role played by what he calls "the political elite" in the making of the Constitution of 2010. A democratic polity comprises of a complex mix of the ordinary, the elite, and the philosopher, each of whom is entitled to meaningfully participate in the popular initiative of constitutional amendment.

[1044] Therefore, this 'felt need' to amend the Constitution, may find expression in various fora, such as our institutions of higher learning, public symposia organized by civil society, religious and community-based organizations (remember the *Ufungamano Caucuses?),* and even public rallies organized by the foregoing formations, independent of the influence of 'the elected political class'. These symposia, caucuses, and rallies would have as their main objective, the need, firstly to clarify the rationale and content of the proposal for amendment, and secondly, to sensitize the general public and harness their support for such a proposal. At the end of the day, this 'felt need' will have undergone such repetition, such notoriety, such refinement, and acquired such stability and coherence, as to be capable of being formulated into a General Suggestion or Bill as stipulated in Article 257(2) of the Constitution.

[1045] It is very clear to me, that at no stage in the popular initiative route of constitutional amendment, is the role of a sitting President contemplated, even remotely. The history of the 2010 Constitution illustrates the fact that the need to involve the people in future changes or amendments to the Constitution, free from the pervasive influence of the Executive or Parliament, remained paramount in the minds of the Framers. Towards this end, all the three versions of the Draft Constitution, namely, *the Bomas*, *Wako and Harmonized Drafts* adopted the language of "amendment by popular initiative", which expression ultimately found itself in Article 257 of the 2010 Constitution.

[1046] It cannot be lost on any casual observer of our painful history, that it was the imperial presidency that mutilated the Independence Constitution through "unchecked amendments", to such an extent that at the end of the day, the Country had lost any pretensions to democracy, rule of law, human rights, or social justice. By the early 1990's the Kenyan people were a terrified, tormented, and dehumanized lot, deprived of any sense of self-actualization in the manner in which they were governed. It was from such despondency that the people would

rise, to demand a new social contract, a new order that would not only restore their dignity, but also prevent the Executive arm of Government (read the Presidency), and to a certain extent, the Legislature, from reversing the new equilibrium through unilateral amendments to the Constitution.

(b) Did the President activate the "popular initiative"?

[1047] And so, to the question posed above, I have no hesitation in holding that the President cannot initiate any Constitutional Amendment under Article 257(1) of the Constitution. This then leads me to consider the question whether, in fact, the President did initiate the process that led to the publication of the Amendment Bill of 2020; which Bill is intended to amend the Constitution "*by popular initiative*".

[1048] It is on record, that *vide* Gazzette Notice Number 5154 dated 24th May, 2018, the President appointed a Taskforce named the BBI Taskforce. The BBI Taskforce was composed of eminent Kenyans whose mandate it was, to address the nine key challenges facing the Country, namely, *ethnic antagonism and competition, lack of a national ethos, inclusivity, devolution, divisive elections, safety and security, corruption, shared prosperity, and responsibility and rights.* These challenges had been identified in a Memorandum of Understanding signed between the President and the Rt. Hon. Raila Odinga, following the disturbances that followed the disputed Repeat General Election of 2017. Thereafter, the President, *vide* Gazette Notice Number 264 published on 10th January 2020, appointed the BBI *Steering Committee;* comprising of a similar membership to that of the Taskforce.

[1049] The Terms of Reference for the Steering Committee were:

> *"1. to conduct validation of the Taskforce Report on Building Bridges to a United Kenya through consultations with citizens, civil society,*

the faith-based organizations, cultural leaders, the private sector, and experts; and

2. to propose administrative, policy, statutory or constitutional changes that may be necessary for the implementation of the recommendations contained in the Taskforce Report, taking into account any relevant contributions made during the validation period" [emphasis added].

[1050] The Taskforce so appointed would later be described as an *unconstitutional out-fit* by the High Court and part of the Appellate Bench. For the avoidance of doubt, I on my part, find that there was nothing unconstitutional, in the appointment or composition of either the Taskforce or the Steering Committee by the President. What remains in issue however, is whether the President can be regarded as having initiated the process, that culminated in the publication of the proposed constitutional amendments, and if so, whether such action was unconstitutional. Put differently, can the Amendment Bill be characterized as a product of "*a Popular Initiative?"*

[1051] It is not in doubt that the President, on diverse dates, did appoint both the Taskforce and the Steering Committee. Nor is it in doubt that the President directed the Steering Committee to *propose administrative, policy, statutory or* ***constitutional changes that may be necessary*** *for the implementation of the recommendations contained in the Taskforce Report*. It was in the fulfillment of this Term of Reference, that the Steering Committee came up with a raft of proposals that were later formulated into the Amendment Bill of 2020. Given this uncontroverted sequence of actions and events, can it be said that this Bill which proposes to amend the Constitution of Kenya in fundamental and far-reaching ways, was a product of "*a Popular Initiative*" whose ingredients I have painstakingly outlined above? Not in my considered opinion.

[1052] If the Bill was not a product of a popular initiative, then whose initiative was it? The answer to this question, lies in the genesis, composition and mandate of the Taskforce, Steering Committee, and the Promoters of the Bill. The Taskforce was conceived and appointed by the President, its Terms of Reference were issued by the President, the Steering Committee was appointed by the President, its Terms of Reference were designed and issued by the President. The Promoters of the Bill, even assuming they were not "appointed" by the President, had his ear. And finally, it is to the President that the Reports of the BBI Taskforce and Steering Committee were handed.

[1053] Throughout this process, where were the people? From the chain of events, it is evident that the People's input was totally missing at the point of the inception of the amendment process. The wording of the respective Terms of Reference, indicates that the People's input into the contents of the Bill was sought at the validation and signature appendage stages. Yet, the popular initiative must precede the collection of signatures, otherwise to what would the People be appending their signatures? In the premises, the inescapable conclusion to which I must arrive, is that the BBI process, which culminated in the publication of the Amendment Bill, was an initiative by and of the President. Even if I were to arrive at a contrary conclusion (which I can't) I would still hold that the BBI process was anything but "*a Popular Initiative*" in terms of the provisions of Article 257(1) of the Constitution.

[1054] Flowing from my earlier conclusion that the President cannot originate any proposal to amend the Constitution under Article 257(1) thereof, it follows that the Amendment Bill being a product of an initiative by the President and not by the People, is unconstitutional. In so finding, I am in complete agreement with my colleagues both at the High Court and Court of Appeal.

(iii) Whether the Second Schedule to the Constitution of the Kenya (Amendment) Bill, 2020 was unconstitutional

[1055] Both at the High Court and Court of Appeal, the constitutionality of the Second Schedule to the Amendment Bill, came into focus. The issue was whether, by amending Article 89(1) of the Constitution, and creating seventy (70) additional constituencies over and above the two hundred and ninety (290) as proposed in the Second Schedule, the promoters of the Amendment Bill had acted in violation of the Constitution.

[1056] Article 89 whose marginal note reads, "*Delimitation of Electoral Units*" provides *inter alia*:

> ***"(1) There shall be two hundred and ninety constituencies for the purposes of the election of the members of the National Assembly provided for in Article 97 (1) (a).***
>
> ***(2) The Independent Election and Boundaries Commission shall review the names and boundaries of constituencies at intervals of not less than eight years, and not more than twelve years, but any review shall be completed at least twelve months before a general election of members of Parliament.***
>
> ***(3) The Commission shall review the number, names and boundaries of wards periodically.***
>
> ***(4) If a general election is to be held within twelve months after the completion of a review by the Commission, the new boundaries shall not take effect for purposes of that election.***

(5) The boundaries of each constituency shall be such that the number of inhabitants in the constituency is, as nearly as possible, equal to the population quota, but the number of inhabitants of a constituency, may be greater or lesser than the population quota in the manner specified in clause (6) to take account of—

(a) geographical features and urban centres;
(b) community of interest, historical, economic, and cultural ties; and
(c) means of Communication.

…"

[1057] Section 1 and 2 of the Second Schedule to the Amendment Bill provide:

"1. Within six months from the Commencement date of this Act, the Independent Electoral and Boundaries Commission shall, subject to subsection (2), determine the boundaries of the additional seventy constituencies created in Article 89 (1) using the criteria provided for in Articles 81(d) and 87 (7).

2. *The additional seventy constituencies shall be spread among the counties set out in the first column in a manner specified in the second column."*

[1058] The High Court found that Sections 1 and 2 of the Second Schedule are plainly unconstitutional because they, and I quote:

"*impermissibly purport to suspend the operation of a constitutional provision which, given the history…text and context of the Constitution, forms the Basic Structure of the Constitution. Indeed, we plainly find that the provisions of Articles 89(4); 89(5); 89(6);*

89(7); 89(10); 89(12) of the Constitution are eternity clauses and are unamendable."

[1059] Suffice it to say that but for the foregoing statement, with which I cannot agree (given my earlier views regarding "the Basic Structure Doctrine" and "Eternity Clauses"), the High Court quite rightly in my view, on the basis of different reasons stated (in para. 681-689) held that the Second Schedule is unconstitutional.

[1060] The Court of Appeal, *(Musinga, (P), Nambuye, Okwengu, Kiage, Gatembu & Tuiyott, JJ.A)* concurred with the High Court. The learned Judges determined that under Article 89 of the Constitution, the power to review the boundaries and names of constituencies, is vested in the Independent Electoral and Boundaries Commission (IEBC). In the circumstances, they opined, the Second Schedule to the Amendment Bill was unconstitutional for purporting to increase the number of constituencies through a conflicting procedure. Dissenting, *Sichale, J.A* was of the view that the Second Schedule to the Amendment Bill, was not unconstitutional as Article 89(1) of the Constitution is amenable to amendment.

[1061] Let me begin by reiterating my argument to the effect that, any provision of the Constitution is amendable, provided that such amendment is enacted in conformity with Articles 255, 256, 257 and 259 of the Constitution; and the judicial edicts of our courts emphasizing the transformative, and enduring nature of the Constitution. However, what the promoters of the Amendment Bill propose to do, is to amend sub-Article 1 of Article 89 while leaving all the other sub-Articles intact. The amendment proposes to increase the number of constituencies from the current two hundred and ninety (290) to three hundred and sixty (360), thus creating an additional seventy constituencies.

[1062] While there is nothing inherently unconstitutional in a proposal to increase (or even to decrease) the number of constituencies under Article 89 of the

Constitution, such increment ought to be based on "a felt need" as expressed by the people, especially if the proposal is promoted as a product of "a Popular Initiative". But most fundamentally, the provisions of the impugned Sections of the Second Schedule, are a blatant violation of the Constitution in three ways. Firstly, Section 1 thereof, introduces a different time-line and criteria, from that provided for under Article 89(2), for the review of constituency boundaries. Secondly, Section 2 thereof purports to direct the IEBC on how to carry out its constitutional mandate of the review and delimitation of constituencies, contrary to Article 88(5) of the Constitution, and thirdly, the two Sections in effect, divest the IEBC of the mandate of reviewing and delimiting constituency boundaries contrary to Article 89 of the Constitution. This mandate, is now unconstitutionally vested in Parliament.

[1063] The proposed amendment of Article 89(1) of the Constitution and the attendant Schedule thereto, if allowed to stand, would definitely lead to the "Constitution subverting itself" contrary to the pronouncements by this Court in ***Re Matter of Gender Representation*** and ***Mohamed Abdi Mahamud Cases.*** Such a proposed amendment cannot be said to be promoting the purposes, values and principles of our Constitution in accordance with Article 259(1) thereof, nor can it be considered as contributing to good governance.

(iv) Whether Civil Proceedings can be instituted against the President or a person performing the functions of the Office of the President during his/her tenure of office with regard to anything done or not done contrary to the Constitution

[1064] It is the Attorney General's submission that both the High Court and Court of Appeal erred in their holding that Civil Proceedings can be instituted against the President or a person holding the office of the President, during his or

her tenure of office for anything done or not done under the Constitution. It is his argument that Article 143 of the Constitution shields the President from all criminal and civil proceedings during the time he or she is in office. The immunity from suit is meant to shield the President from the distractions of court proceedings, while he executes the heavy task of governing the Country. The Attorney General urges the Court to accord a plain and ordinary meaning to the language of Article 143 (2) of the Constitution, and find that the immunity envisaged therein is absolute save as otherwise provided.

[1065] The Attorney General however concedes that the immunity from criminal and civil proceedings granted to the President, only subsists while he holds office and not thereafter. Such proceedings remain frozen but once he is out of office, the President is no longer shielded from litigation. The Attorney General further argues that even in the face of such immunity, the public is not left without a remedy in the event that the Presidents does, or fails to do anything that violates the Constitution. In such an eventuality, the President can be sued by way of Judicial Review proceedings against the Attorney General. Alternatively, he submits, the President can be subjected to impeachment proceedings as provided for under Article 145 of the Constitution.

[1066] On the other hand, those opposed to the submissions by the Attorney General, argue that the President is not shielded from civil proceedings against him while in office. It is their view that such immunity as embodied in Article 143, cannot extend to violations of the Constitution by the President. They submit that there is a difference between "Civil Proceedings" and "Constitutional Proceedings". In this regard, they contend, the President is only shielded from civil proceedings but not from constitutional proceedings. So, if the President acts or omits to act in contravention of the Constitution, then he ought not only be personally sued, but also be personally held responsible for any loss incurred as a result of his actions or omissions. Yet, others submit that the President can always be sued in his

personal capacity as opposed to his official capacity if he violates the law while acting as a private citizen but not as the President. Therefore, the President is immune from civil proceedings only while acting in his official capacity *qua* President, but not otherwise.

[1067] In its finding on the issue as to whether the President can be sued in his personal capacity during his tenure, the High Court held that indeed, he or she could be so sued. The learned Judges of the High Court were of the firm opinion that, there would be no better means through which an aggrieved party, could get redress against the President, other than through a constitutional petition.

In the words of the learned Judges at para. 546-547:

> "*...it is apparent from Article 143(3) that the President or any other person holding that office is* ***only protected from such actions*** *in respect of anything done or not done in the exercise of their powers under this Constitution. The rationale for so holding is simple to see: Assuming, in his tenure, the President embarks on a mission that is not only clearly in violation of the Constitution but is also destructive to the nation, would not be prudent that he should be stopped in his tracks rather than wait until the lapse of his tenure by which time the country may have tipped over the cliff?"*

[1068] At the Court of Appeal, the learned Judges unanimously agreed that the immunity granted to the President by virtue of his office was not absolute. However, the majority (*Musinga, (P), Nambuye, Okwengu, Kiage, Gatembu* and *Sichale, JJ.A*) held that civil proceedings could not be instituted against the President during his or her tenure, if the alleged grievance is based on any act or omission by the President in exercise of the powers conferred upon him or her by the Constitution. On the other hand, the Judges held that the President can be sued during his tenure for anything done or omitted to be done *in his private capacity*.

Tuiyott, J.A (*dissenting*) was of the view that Article 143(2) and (3) of the Constitution grants functional immunity to the President during his tenure, but leaves him or her open to personal suit once out of office.

[1069] Article 143 of the Constitution, whose marginal note reads: "***Protection from legal proceedings***" provides:

> *"(1) Criminal Proceedings shall not be instituted or continued in any court against the President or a person performing the functions of that office, during their tenure of office.*
>
> *(2) Civil Proceedings shall not be instituted in any court against the President or the person performing the functions of that office, during the tenure of office* ***in respect of anything done or not done in the exercise of their powers under this Constitution*** [emphasis added].
>
> *(3) Where provision is made in law limiting the time within which proceedings under clause (1) or (2) may be brought against a person, a period of time during which the person holds or performs the functions of the office of the President shall not be taken into in calculating the period of time prescribed by that law.*
>
> *(4) The immunity of the President under this Article shall not extend to a crime for which the president may be prosecuted under any treaty to which Kenya is a party and which prohibits such immunity."*

[1070] I have carefully considered the foregoing provisions in their plain and ordinary wording. I have also addressed my mind to the opinions expressed by my colleagues both at the High Court and Court of Appeal, regarding the vexed

question of presidential immunity from court proceedings. Having done so, I find considerable difficulty, in appreciating the rationale or basis upon which, first, the High Court found that notwithstanding the clear and unambiguous language in Article 143(2) of the Constitution, the President can still be sued in his personal capacity for acts or omissions, alleged to be in violation of the Constitution. At para. 546, the learned Judges declare:

> "*On the specific question of whether the President can be sued in his personal capacity during his tenure, our answer is in the affirmative* ***because it is apparent from Article 143(3)*** (I think the Judges meant Article 143(2)) ***that the President or any other person holding that office is*** *only protected from such actions* ***in respect of anything done or not done in the exercise of their powers under this Constitution****" [emphasis mine].*

[1071] Why did the High Court introduce the phrase *"only protected"* into the language of Article 143(2) of the Constitution? Was it the learned Judges' understanding that the President could otherwise be personally sued for any act or omission *done or not done outside (*as opposed to *under*) *the Constitution*? And if so, what would *such act or omission* be? It has to be understood that when a President does or omits to do anything in exercise of his power, he or she does so on the presumption that such exercise, is in conformity with the Constitution.

[1072] However, it may turn out as it occasionally happens, that the said act or omission, though presumed to have been done or omitted to be done under the Constitution, actually violates the Constitution. It is such violation or breach against which, the President is personally shielded, during his or her tenure of office. The operative words, are *anything done or not done in exercise of their powers under this Constitution*. The words *under this Constitution,* do not cure the resultant act or omission of its alleged unconstitutionality, otherwise, why would the President be immunized from it under Article 143(2) of the Constitution

in the first place? Therefore, this expression permits no exception. Is it not instructive that the marginal note reads; *"protection from legal proceedings?"* Indeed, Article 165(3) of the Constitution, from which the High Court derives its jurisdiction is even more deliberate; under (3)(d)(ii), it provides:

> ***"(3) Subject to clause (5), the High Court shall have—***
>
> > ***(d) jurisdiction to hear any question respecting the interpretation of this Constitution including the determination of—***
> >
> > > *(ii) the question whether* ***anything said to be done under the authority of this Constitution or any law*** *is inconsistent with, or in contravention of, this Constitution"* [emphasis supplied].

[1073] It stands to reason that in view of the provisions of Article 143 (2) of the Constitution, no civil proceedings under this Article, can be instituted against the President during his tenure of office.

[1074] As for what would happen, if the President embarks on a destructive mission that is violative of the Constitution, as apprehended by the High Court, any aggrieved party can always take out judicial review proceedings, under the realm of public law, against such violation of the Constitution. The institution to be sued following such an eventuality, is the Attorney General. This route has been followed not once, but on numerous occasions when presidential actions and omissions have been successfully challenged at the High Court. In addition, there remains yet another remedy, as provided for under Article 145 of the Constitution, the marginal note of which reads: "*Removal of President by impeachment*. It provides under 1 (a):

"(1) A member of the National Assembly, supported by at least a third of all the members, may move a motion for impeachment of the President–

(a) on the grounds of ***a gross violation of a provision of this Constitution or of any other law…***"

[1075] It is therefore clearly evident, that there exist robust constitutional avenues and mechanisms for challenging presidential action or omission that may be considered as amounting to the violation of the Constitution.

[1076] As for the Court of Appeal's holding to the effect that civil proceedings can be instituted against the President during his tenure of office, for his actions or omissions in his capacity as a private citizen, I, in equal measure, do not find any legal or constitutional basis for such a position. This Court has already held elsewhere, that there is no distinction between "civil" and "constitutional" proceedings in our order of rights enforcement litigation. The President remains as such, until he vacates office. One cannot be a President at one given time and a private citizen at a different time. For the same reason that I have held that the President cannot originate a Constitutional amendment through "a Popular Initiative" notwithstanding his claims of private political rights, so also must I acknowledge the fact that he remains the President until he vacates office. He cannot be defrocked of his presidential garb for the purpose of personally exposing him to litigation during his tenure of office.

[1077] But a more profound legal reason for presidential immunity in both private and official capacity, is to be found in Article 143(3) of the Constitution. It provides:

"(3) Where provision is made in law limiting the time within which proceedings under clause (1) or (2) may be brought against a person, a period of time during which the person holds or performs the

functions of the President shall not be taken into account in calculating the period of time prescribed by that law."

[1078] What law is Article 143(3) of the Constitution referring to? It should be obvious that the law in question, is "a Limitation of Actions Statute". Such as the law of Limitation of Actions Act, Cap. 22 of the Laws of Kenya. The rationale of limitation of actions is well documented. Statutes of Limitation are meant to prevent the resuscitation of stale claims whose adjudication is almost invariably, hampered by the attrition of time. Examples abound where one person's right to institute a contractual or tortious claim against another is extinguished if not brought within a specified period. Limitation of actions is a legal regime that operates to regulate civil ligation in the private sphere. If therefore, the President can be sued in his private capacity during his or her tenure of office, why would Article 143(3) of the Constitution be necessary? Why is the President stripped of the protection of limitation of actions when out of office? Because he cannot be sued in his private capacity during the tenure of his or her office. The time of limitation is frozen during such tenure, but immediately the President vacates office, only then does time start running.

[1079] Likewise, the President is immunized from prosecution for any crime he or she may commit during the tenure of office, except for a crime for which he or she may be prosecutable in international law. For example, a President who commits a crime of genocide is not shielded from prosecution. Article 143(4) of the Constitution aptly provides:

"(4) The immunity of the President under this Article shall not extend to a crime for which the President may be prosecuted under any treaty to which Kenya is a party and which prohibits such immunity."

(v) The Place of Public Participation under Article 10 vis-à-vis the role of IEBC under Article 257(4) of the Constitution; and whether there was public participation in respect of the Constitution of Kenya (Amendment) Bill, 2020

[1080] The Attorney General (and those in support) submits that both the High Court and Court of Appeal erred in their finding that there had been no meaningful public participation before the Amendment Bill, was submitted to the IEBC for onward transmission to the Counties and eventually to both Houses of Parliament. It is his argument that the two superior courts arrived at this conclusion on the basis of insufficient or inconclusive evidence. The issue of public participation could not have been conclusively determined at this stage, given the fact that the process of amending the Constitution through "a Popular Initiative" was yet to be finalized; submits the Attorney General. It is his view that the two superior courts, ought to have appreciated the fact that, the process of amending the Constitution is a continuum; had they so appreciated, he argues, the courts would have declined the invitation to consider the same. In conclusion, the Attorney General submits that the right to public participation, realistically accrues to the people at the time of the referendum, when they exercise their sovereignty directly.

[1081] The respondents opposed to the Attorney General's position on the other hand, submit that public participation, is a key ingredient at each and every stage of the amendment process under Articles 255, 256 and 257 of the Constitution. The reductionist approach by the Attorney General, which considers public participation as a tail-end requirement, submit the respondents, does violence to the Constitution which lays emphasis on the role of the people. The respondents submit that both the promoters of the Amendment Bill and the IEBC, failed dismally to conduct meaningful public participation before escalating the Amendment Bill to the final stages.

[1082] The Constitution lays a lot of premium on the principle of public participation during the process of law and policy making. Article 10 of the Constitution, embodies the over-arching requirement on the part of state organs, state and public officers, and in-deed, any other person to always promote public participation whenever applying or interpreting the Constitution. In particular, the said Article provides:

> "*(1) The national values and principles of governance in this Article bind all State organs, State officers, public officers and all persons whenever any of them–*
>
> *(a) applies or interprets this Constitution;*
>
> *(b) enacts, applies or interprets any law; or*
>
> *(c) makes or implements public policy decisions*
>
> *(2) The national values and principles of governance include–*
>
> *(a) patriotism, national unity, sharing and devolution of power, the rule of law, democracy and participation of the people…"*

In the same spirit, Article 118 of the Constitution provides*:*

> *"(1) Parliament shall–*
>
> *(a) conduct its business in an open manner, and its sittings and those of its committees shall be open to the public; and*
>
> *(b) facilitate public participation and involvement in the legislative and other business of Parliament and its committees.*
>
> *(2) Parliament may not exclude the public, or any media, from any sitting unless in exceptional circumstances the relevant Speaker*

has determined that there are justifiable reasons for the exclusion."

[1083] Taking the foregoing provisions into consideration, when are the promoters of a popular initiative on the one hand, and the IEBC on the other, constitutionally required to facilitate public participation during the amendment process under Articles 255, 256, and 257?

Article 257(3) to (5) thereof, provides:

" ...

(3) *If a popular initiative is in the form of a general suggestion, the promoters of that popular initiative shall formulate it into a draft Bill.*

(4) The promoters of a popular initiative shall deliver the draft Bill and the supporting signatures to the Independent Electoral and Boundaries Commission, which shall verify that the initiative is supported by at least one million registered voters.

(5) If the Independent Electoral and Boundaries Commission is satisfied that the Initiative meets the requirements of this Article, the Commission shall submit the draft Bill to each county assembly for consideration within three months after the date it was submitted by the Commission..."

[1084] What constitutes "public participation"? This question was comprehensively answered by this Court in ***British American Tobacco Kenya, PLC (Formerly British American Tobacco Kenya Limited) v. Cabinet Secretary for the Ministry of Health & 2 Others; Kenya Tobacco Control Alliance and Another (Interested Parties); Mastermind Tobacco Kenya Limited (the affected party),*** SC Petition

No. 5 of 2017; [2019] eKLR ***(BAT Case)***. The Court enunciated *inter alia,* the following guiding principles regarding public participation:

> ***" ...***
>
> ***(i) As a constitutional principle under Article 10(2) of the Constitution, public participation applies to all aspects of governance.***
>
> ***(ii) The public officer and/or entity charged with the performance of a particular duty bears the onus of ensuring and facilitating public participation.***
>
> ***(iii) The lack of a prescribed legal framework for public participation is no excuse for not conducting public participation; the onus is on the public entity to give effect to this Constitutional principle using reasonable means.***
>
> ***(iv) Public participation must be real and not illusory. It is not a cosmetic or public relations act. It is not a mere formality to be undertaken as a matter of course just to fulfil a Constitutional requirement. There is need for both quantitative and qualitative components in public participation.***
>
> ***(v) Public participation is not an abstract notion; it must be purposive and meaningful.***
>
> ***..."***

[1085] Applying the foregoing principles to the issue before us, I now proceed to determine the place of public participation *vis-à-vis* the role of IEBC under Article 257 (4) of the Constitution. The guiding principles issued by this Court, leave no doubt as to the purpose of public participation in the process of governance. The Constitution places the people at the centre of any policy,

administrative, legal or constitutional decision, that may be made from time to time by those whose responsibility it is to govern or serve. The principle of public participation ensures, that the people have a say in the manner in which they are governed.

[1086] Under Article 257(4) of the Constitution, the IEBC is required to verify that a Bill delivered to it by the promoters of a popular initiative, is supported by at least one million registered voters. The verification process is a two-step exercise, which entails the determination of the authenticity of the signatures, and the fact as to whether the signatures, belong to at least one million registered voters. There is no way the IEBC can realistically undertake this task, without interacting with, and interrogating the contents of the Voters' Register.

[1087] In its submissions, the IEBC stated that it satisfactorily undertook this task, by satisfying itself that the names and signatures submitted to it by the promoters of the Amendment Bill, were indeed those in the Voters' Register. This the IEBC did by publishing the said names, in its website and calling upon any member of the public whose name and signature had been published therein, to raise any objection.

[1088] The IEBC consequently submits that having carried out this task, and in the absence of any recorded objections, it was under no further constitutional obligation, requiring it to satisfy itself that the Amendment Bill had been subjected to public participation, before being delivered to it by the promoters.

[1089] While I am alive to the fact that the respondents, questioned the sufficiency of the time and forum accorded to the signatories to raise objections, I am of the view that I must limit myself to determining whether, over and above its constitutional obligations under Article 257(4) of the Constitution, the IEBC was under any additional duty to inquire into the incidence and sufficiency of public participation prior to submitting the Amendment Bill to the counties. My brief answer to this, is that I see nothing in Article 257(4) or any other related provision

of the Constitution that places upon the IEBC an extra obligation to look beyond the names and signatures appended to the Amendment Bill.

[1090] Can the same be said about the promoters of the Amendment Bill? Various respondents, have challenged the constitutionality of the Amendment Bill and the process that led to its publication, on the basis that its promoters, did not carry out any meaningful public participation, before embarking upon the collection of signatures in support thereof. They submit that the promoters have not demonstrated how they conducted civic education to enlighten the general public about the contents of the Amendment Bill.

[1091] The Attorney General in his grounds of opposition to the respondents' petition dated 8th February 2021, contends that all the persons who had appended their signatures in support of the Amendment Bill, are to be presumed to have read and assented to the contents of the Bill. He maintains that the onus of proving otherwise, is upon the respondents. This burden, in his view, has not been discharged. The Attorney General further submits that the Constitution amendment process under Articles 255, 256 and 257, affords members of the public multiple opportunities for participation.

[1092] In support of the Attorney General, the BBI National Secretariat through its Co-Chairperson, *Hon. Dennis Waweru*, submits that there was no violation of the relevant Articles of the Constitution regarding the participation of the public in the process leading the publication of the impugned Amendment Bill. The deponent avers that, the Amendment Bill and the BBI Taskforce Report were products of a wide, comprehensive, and broad consultative engagement of the people from all corners of the Country.

[1093] On its part, the Third-Way Alliance contends that the failure by the Promoters of the Bill to conduct civic education on the contents of the Amendment Bill before the collection of signatures, was a blatant violation of Article 10 of the Constitution. The main objective of Article 10, is to enable the citizens to

meaningfully participate in their governance, yet the Promoters deliberately, in its view, circumvented its requirements. The Alliance argues that there is no way the people can be said to have participated in the initiative to amend the Constitution, without having fully appreciated the meaning and effect of the contents of the Amendment Bill.

[1094] In response thereto, the Speaker of the National Assembly and 48 Others claim that the issue of public participation is not ripe for determination. They urge that it would be premature, to determine the effect of the sufficiency or otherwise, of public participation given different number of stages, that the process of amendment has to go through before passage or rejection of the Amendment Bill at a referendum.

[1095] I have considered the arguments by all the parties regarding the pertinent question of public participation. It is instructive to recall the guiding principles that were enunciated by this Court regarding the meaning and import of public participation in ***BAT Case***. Of crucial importance, was the Court's pronouncement to the effect that *the principle of public participation applies to all aspects of governance.* What would be more critical in terms of governance than the process of amending the very Charter of Governance? In this regard, can it be seriously claimed that the promoters of the Amendment Bill undertook meaningful public participation before embarking on the collection of signatures in support of the Amendment Bill?

[1096] Under Article 257(3) of the Constitution, the promoters of a popular initiative are required to formulate that initiative (read, *proposal),* into a draft Bill before embarking upon the collection of signatures in support of the Bill. Is it not only logical, but also a requirement, that before the people are asked to append their signatures to the Bill, they must not only understand its contents, but also approve of its tenor as being reflective of what they proposed in the first place? Yet all we have on record, is the assertion by the Co-Chair of the BBI National

Secretariat that the promoters undertook comprehensive nation-wide consultations.

[1097] The form, nature, and content of these "consultations" is not addressed at all. In the premises, I am in total agreement with the finding of the High Court and the majority of the Appellate Bench, to the effect that the promoters of the Amendment Bill did not undertake any meaningful public participation before embarking on the collection of signatures in support thereof. Such failure to conduct relevant civic education on the part of the promoters was in breach of Article 10 of the Constitution.

(vi) Interpretation of Articles 88 and 250 of the Constitution with respect to the composition and quorum of IEBC

[1098] A considerable amount of time and effort, was expended to the question whether, the IEBC had the requisite quorum at the time it verified the signatures that had been appended to the Amendment Bill. Both the High Court and Court of Appeal, held that the IEBC was not quorate at the time it embarked upon, and completed the verification exercise. In so holding, the two superior courts agreed with the argument advanced by the respondents herein, to the effect that, being composed of only three, instead of five Commissioners, at the time it verified the signatures, as per the requirement of Paragraph 5 of the Second Schedule to the Independent Electoral and Boundaries Commission Act No. 9 of 2011 (IEBC Act), the Commission had acted in vain.

[1099] The IEBC faults the two superior courts for having arrived at their decision based on a repealed law. It submits that at the time of the impugned decision, the National Assembly had, *vide,* the Election Laws (Amendment) Act No. 34 of 2017 ***(Election Laws Amendment 2017)***, repealed that part of

Paragraph 5 of the Second Schedule to the IEBC Act, which had prescribed the quorum of five. The quorum of IEBC was altered to be *at least half of the existing members of the Commission, provided that the quorum shall not be less than three members*.

[1100] Two decisions of the High Court, touching upon the question of the Electoral Commission's quorum, were to assume centre stage in these proceedings. The first was the High Court's judgment in ***Katiba Institute & Another v. Attorney General & Another,*** Constitutional Petition No. 548 of 2017; [2018] eKLR ***(Katiba Institute Case)***. The Petitioners challenged the constitutionality of the *Election Laws Amendment Act of 2017*. Paragraph 5 was amended to provided that, '*the quorum for the conduct of business at a meeting of the commission* ***shall be at least half of the existing members of the commission, provided that the quorum shall not be less than three members***.' Prior to this amendment, Paragraph 5 provided that, '*the quorum for the conduct of business at a meeting of the commission* ***shall be at least five members of the commission***." Paragraph 7 on the other hand was amended to provide that, '*Unless a unanimous decision is reached, a decision on any matter before the Commission shall be by a majority of the members present and voting'*. The deleted paragraph provided that *unless a unanimous decision was reached, a decision on any matter before the Commission was to be by concurrence of a majority of all the members*.

[1101] Therefore, the issue for determination before the High Court was the *constitutional validity of the Election Laws Amendment 2017*. In a Judgment delivered on 6th April, 2018, *Mwita, J*. determined that the amendments to Paragraphs 5 and 7 of the Second Schedule to the IEBC Act failed the constitutional test of validity. On the basis of the reasons elaborated in his Judgment, the learned Judge declared the said amendments unconstitutional.

[1102] In ***Isaiah Biwott Kangwony v. Independent Electoral & Boundaries Commission & another; Constitutional Petition No. 212 of 2018, [2018] eKLR (Isaiah Biwott Case)*** the petitioners argued that following the resignation of four (4) Commissioners namely; Ms. Roselyne Akombe, Ms. Consolata Maina, Mr. Paul Kurgat and Ms. Margret Mwachanya, the Commission, being composed of only three, instead of seven members, lacked the requisite quorum to conduct business as prescribed by Paragraphs (5) and (7) of the Second Schedule to the IEBC Act.

[1103] In a Judgment dated 10th August, 2018, *Okwany, J.* determined that there was no inconsistency between Paragraph 5 of the Second Schedule to the IEBC Act, and Article 250(1) of the Constitution. The learned Judge opined that by providing a minimum of three and a maximum of nine members of the Commission, the Constitution gives the Appointing Authority considerable latitude, to appoint the number of Commissioners as long as they do not exceed nine or fall below the minimum of three.

[1104] The Court also held that the Commission's membership of three at the time, could not handicap its operations, especially if they were of an administrative nature as opposed to policy making. The learned Judge held that in view of the latitude afforded by the Constitution, the number of members of the Commission required to raise a quorum could not be a constant. In the end, the learned Judge held that Paragraph 5 of the Second Schedule to the IEBC Act, was not unconstitutional. The requirement of five members would only be mandatory, whenever the Commission was fully constituted at seven; ruled the Judge.

[1105] In the instant petition, the High Court distinguished and departed from its holding in the ***Isaiah Biwott Case***, noting that the issue before it, was whether the IEBC was properly constituted for purposes of verifying signatures and whether it had quorum to conduct the referendum. The learned Judges held that, for the Commission to conduct any business, it had to have a quorum of five

given the provisions of Paragraph 5 of the Second Schedule of the IEBC Act. The court saw no distinction between administrative and policy functions of the Commission, contrary to the earlier finding in the ***Isaiah Biwott Case***.

[1106] According to the High Court, the Constitution sets the membership of the Commission at between three and nine. Parliament in its wisdom and exercise of its discretion, had set the composition of the Commission at seven, and the quorum at five. In so doing, the August House was guided by the fact that the Commission, plays a very important role in the governance of the country, and therefore could not be expected to operate at the skeleton minimum of a membership of three. The Court held that considering the seriousness of its role in the processing of proposals to amend the Constitution, the Commission could only validly operate with a quorum of five.

[1107] The Court of Appeal by a majority of six *(Musinga, (P), Nambuye, Okwengu, Kiage, Gatembu & Tuiyott, JJ.A)* upheld the High Court, and held that the IEBC lacked the requisite quorum at the time of the verification of signatures. The Appellate Bench agreed with the High Court that the Commission could not conduct any business with a membership of three, since the quorum of five is prescribed by Paragraph 5 of the Second Schedule to the IEBC Act. The Appellate Court agreed with the conclusions of the High Court in ***Katiba Institute Case.*** *Tuiyott, J.A,* was however of the view that the fact that the High Court had declared the 2017 amendments unconstitutional, could not revive the repealed provisions of Paragraph 5 of the Second Schedule to the IEBC Act. Dissenting, was *Sichale, J.A,* who was of the view that the provisions of Article 250(1) of the Constitution, setting the membership of Commissions at a minimum of three, could not be disregarded by the Court, while determining the quorum of the IEBC. The learned Judge therefore found that IEBC had the requisite constitutional quorum at the time it conducted the verification of signatures.

Quorate or Not?

[1108] Whether the IEBC had the requisite quorum at the time of the verification of signatures or not, depends on the applicable constitutional and legal provisions. Towards this end, Article 250(1) of the Constitution provides that *"each Commission shall consist of at least three, but not more than nine, members."* On the basis of this provision, it is clear that any Independent Commission under Chapter Fifteen of the Constitution is to be regarded as having the requisite legal personality, as long as it is constituted of not less than three, and not more than nine members.

[1109] Before the enactment of the Election Laws Amendment 2017, the IEBC was composed of seven members. Pursuant to Paragraph 5 of the Second Schedule to the IEBC Act, a quorum of five was necessary for the IEBC to validly conduct any business under the Constitution. Following the said amendment, the quorum for IEBC was changed from five to half of the existing members. Paragraph 5 was changed to read:

> "***the quorum for the conduct of business at a meeting of the commission shall be at least half of the existing members of the commission, provided that the quorum shall not be less than three members"*** [emphasis added].

[1110] In the ***Katiba Institute Case***, the foregoing amendment to Paragraph 5 of the Second Schedule to the IEBC Act, was declared unconstitutional by the High Court. Therefore, by the time the IEBC conducted the verification of signatures, the only applicable law relating to its composition, and by implication, it had to be guided by the provisions of Article 250 (1) of the Constitution and the decision of the High Court in the ***Isaiah Biwott Case.*** Paragraph 5 of the Second Schedule had been repealed to the extent that it had set the quorum at five. Likewise, the new paragraph had been declared unconstitutional.

[1111] *Tuiyott, J.A* expressed the view that the declaration of unconstitutionality, could not revive the repealed contents of Paragraph 5. However, the learned Judge, notwithstanding his expressed view, still held that the IEBC did not have the requisite quorum at the material time. Section 20 of the Interpretation and General Provisions Act, Cap 2 of the Laws of Kenya provides as follows:

> *"Where a written law repealing in whole or in part a former written law is itself repealed, that last repeal shall not revive the written law or provisions before repealed unless words are added reviving the written law or provisions."*

[1112] The foregoing provision would appear to lend credence to *Tuiyott, J.A's* opinion, save for the fact that the Provision is addressing the *repeal of a statute by Parliament,* as opposed to *a declaration of unconstitutionality by a court of law*. However, in a recent Decision by this Court, in ***Senate & 2 Others v. Council of County of Governors & 8 Others,*** Petition No. 25 of 2019; [2022] eKLR, it was held that if a latter law repealing the provisions of a former law, is declared unconstitutional, such declaration will operate to restore the provisions of the earlier repealed law. Be that as it may, this Decision (delivered after the cause of action in the instant matter had arisen) does not change my conclusion to the effect that, at the time it undertook the verification of signatures, the law on quorum was in a state of flux.

[1113] This being the status of the applicable law, at the time the two superior courts became seized of the issue, on what basis did they find that the IEBC lacked the requisite quorum? It is clear to me that the courts relied on the provisions of Paragraph 5 of the Second Schedule to the IEBC Act. While the courts may not necessarily be faulted for their stance, one would have expected that before declaring the actions of the Commission null and void for lack of quorum, the learned Judges ought to have been alive to the fact that the IEBC remained validly constituted as per Article 250(1) of the Constitution. How could the contents of a

statutory law, be applied to technically override the majesty of a Constitutional Provision by rendering the IEBC inexistent? In sum, I agree with *Sichale, J.A* in her finding that IEBC had the requisite quorum at the time it undertook and completed the verification of signatures.

(vii) Whether the interpretation of Article 257 (10) of the Constitution entails/requires that all specific proposed amendments to the Constitution should be submitted as separate and distinct referendum questions

[1114] The IEBC submits that the issue regarding the nature of the referendum question/s is not ripe for determination before this Court. The Commission advanced the same argument before the two superior courts. It asserts that although Section 49 of the Elections Act, confers the power of framing referendum questions upon it, it was yet to receive any request from the President to hold a referendum, hence its mandate had yet to crystalize. The Commission urges that courts of law should avoid the temptation of resolving abstract questions. In support of its submissions, the IEBC cites the decisions in ***Matalinga & Others v. Attorney General*** [1972] E.A 578; and ***United Public Workers v. Mitchell,*** 330 U.S. 75 [1974]; as well as the treatise by Lawrence Tribe***, 'American Constitutional Law,*** 2nd Edition Page 92.

[1115] Mr. Morara on the other hand urges the Court to seize the opportunity and uphold the High Court's finding that all specific proposed amendments should be submitted as separate amendment questions. The *amici curiae* have advanced diverse opinions regarding the appropriate procedure of framing referendum questions. On the one hand, some *amici* propose that the Court should be guided by the conventional practice of submitting a single question for approval or

rejection. Others have cautioned against the dangers of submitting a single question in a scenario where the Amendment Bill contains different unrelated proposals.

[1116] Before applying my mind to the question at hand, I am inclined to consider whether this issue is ripe for determination in the first place. It is important to recall that, following the consolidation of the BBI Petitions before the High Court, the County Assembly of Turkana (the 25th Interested Party in Petition No. E400 of 2020) filed a motion dated 28th January, 2021 seeking conservatory orders, barring the County Assemblies (the 3rd - 49th Interested Parties therein) from considering the Amendment Bill submitted to them by the IEBC pursuant to Article 257 (5) of the Constitution, pending the hearing and determination of the consolidated petitions.

[1117] Similarly, Thirdway Alliance, Miruru Waweru and Dr. Angela Mwikali (the petitioners in Petition No. E400 of 2020), by way of a Certificate of Urgency dated 26th January, 2021, sought the determination of two of the legal questions; whether the County Assemblies, National Assembly and Senate had the legal framework to proceed with their respective roles towards the achievement of the constitutional amendment process; and secondly, whether by dint of Article 257(5) and (7) of the Constitution the term "consideration" and "approve" provides room to County Assemblies and Parliament to alter and/or improve the contents of the Amendment Bill so as to incorporate divergent views raised through public participation as is always the case in a proper legislative process.

[1118] This Certificate of Urgency was occasioned by a press statement issued by the Commission on the 26th January, 2021, announcing that the Amendment Bill, had met the requisite threshold for submission to the counties for consideration pursuant to Article 257(5) and (6) of the Constitution.

[1119] The parties asserted that unless the application for conservatory orders was heard, Kenyans risked losing billions of shillings, by participating in a

constitutionally flawed-process. Therefore, they urged, it was in the interest of justice that the operations of the respondents and the interested parties be put on hold pending the hearing and determination of their petitions.

[1120] In a Ruling delivered on 8th February, 2021, the High Court *(Ngugi, Odunga, Ngaah, Mulwa & Mwita, J.J*) granted the Orders as hereunder:

> "*...we hereby order that* ***a conservatory order be and is hereby issued restraining the Independent Electoral and Boundaries Commission from facilitating and subjecting the Constitution (Amendment) Bill, 2020 to a referendum, or taking any further action to advance the Constitution (Amendment) Bill, 2020, pending the hearing and determination of these Consolidated Petitions***."

[1121] The conservatory order issued by the High Court effectively prevented the IEBC from taking any further action in the amendment process, including the framing of any referendum question/s. In the premises, I don't see the reason to accede to the invitation by the respondents to consider a non-issue. To do so would be to engage in an abstract exercise, whose only utility, would be to direct an independent constitutional organ on how to perform its functions. In this regard, I agree with *Tuiyott, J.A* for having resisted this same invitation.

C. CONCLUSIONS

[1122] Having addressed myself to the seven issues as framed by the Court, I am now in a position to make the following determinations:

1. ***The "Basic Structure Doctrine" is not applicable in Kenya since it is not "a doctrine" in a juridical sense. Neither has it acquired "the force of law" as to be "applicable" in our***

legal system. The "doctrine" is a "judicial school of thought" or "heuristic device" to which a court of law in Kenya may turn, within the framework of Article 259 (1) of the Constitution, in determining whether a proposed constitutional amendment is of such nature as to be capable of distorting, destabilizing, or even destroying the "constitutional equilibrium" or "constitutive authority" of the Constitution.

2. ***The four sequential steps of civic education; public participation and collation of views; constituent assembly debate; and ultimately, a referendum prescribed by the two superior courts are not applicable to the process of constitutional amendment as envisaged under Articles 255, 256 and 257 of the Constitution. Such steps, and not necessarily in that order, would become operative in the event of a seismic constitutional moment which dictates that the People must exercise their primary constituent power to make a new Constitution or re-establish the Constitutional Order.***

3. ***The President cannot initiate or activate any constitutional changes through the "Popular Initiative" process envisaged under Article 255 and 257 of the Constitution.***

4. ***The action by the President of initiating the proposed constitutional amendments as published in the Kenya Constitution (Amendment) Bill, 2020 contrary to the***

provisions of Articles 255 and 257 of the Constitution renders the said Bill unconstitutional, null and void.

5. ***The Second Schedule to the Constitution of Kenya (Amendment) Bill, 2020 is unconstitutional.***

6. ***Civil proceedings cannot be instituted in any court against the President or any person performing the functions of that Office during their tenure of office in respect of anything done or not done in the exercise of their powers under the Constitution.***

7. ***The IEBC is not under any obligation to ensure that the promoters of a popular initiative have facilitated public participation before collecting signatures; for onward transmission to the IEBC.***

8. ***No meaningful public participation was conducted by the promoters of the Constitution (Amendment) Bill, 2020 before its onward transmission to the IEBC.***

9. ***The IEBC had the requisite quorum at the time it undertook and completed the verification of signatures appended to the Constitution of Kenya (Amendment) Bill, 2020.***

10. ***Whether the interpretation of Article 257(10) of the Constitution, entails/requires that all specific proposed amendments to the Constitution should be submitted as separate and distinct referendum questions is an issue that***

is not ripe for consideration by this or any other court in Kenya.

D. AN ELEGY TO THE CONSTITUTION

[1123] Before I sign off, my mind races back to those three days in the Tent, during which, I and my colleagues of this Court, led by the President, sat patiently, pensively, and attentively, listening to the impassioned pleas from a Bar, so commandingly assembled. Not that this was the first time I was finding myself, having to endure the perorations of Counsel, some very experienced jurists, and others not so senior. But it was such a moment, when the basics, of a basic structure, were basically, spewed unto us with such aplomb, hitherto unseen, save during the hearing of a Presidential Election Petition.

[1124] It was such an occasion, when we were reminded that our colleagues at the High Court, had built a Foundation. That our brothers and sisters at the Court of Appeal, had constructed a Wall upon it, and that now, it was our turn to paint the Wall. What we were not told however, was with what colours we were to undertake this alluring task. I also remember being urged to roar, roar like lions in the wild, as we asserted the supremacy of the Constitution. Who could fault Counsel for invoking our hallowed symbol of nationhood? Yet at that moment, I could not help but cringe, for the roar of a lion in the world, stirred in me, images of the terrifying language, so beloved by our politicians. The language of Tsunamis and Earthquakes, of Volcanoes, War and Thunder!

[1125] And then I remembered that not so long ago, this Court had in one of its Judgments, and in true Oracular rendition, or so I thought, decreed as follows:

*"**[399]** What of the argument that this Court should not subvert the will of the people? This Court is one of those to whom that sovereign power has been delegated under Article 1(3)(c) of the same Constitution. All its powers including that of invalidating a presidential election is not, self-given nor forcefully taken, but is donated by the people of Kenya. To dishonestly exercise that delegated power and to close our eyes to constitutional violations would be a dereliction of duty and we refuse to accept the invitation to do so however popular the invitation may seem. Therefore, however burdensome, let the majesty of the Constitution reverberate across the lengths and breadths of our motherland; let it bubble from our rivers and oceans; let it boomerang from our hills and mountains; let it serenade our households from the trees; let it sprout from our institutions of learning; let it toll from our sanctums of prayer; and to those, who bear the responsibility of leadership, let it be a constant irritant."*

I rest my case.

JUDGMENT OF NJOKI NDUNGU, SCJ

[1126] The factual background of this matter before the Supreme Court, the Court of Appeal and the High Court, the respective parties' submissions, the *amici* briefs, the list and bundles of authorities have all been meticulously set out in the lead Judgment of my Senior Sister *Martha Koome (CJ & P)*. I will therefore not restate the same background in my Judgment except, in the occasional instances, for the purpose of clarification on any point I may make. I proceed to address the issues delineated by this Court on 9th November, 2021.

Issue one: Is the Basic Structure Doctrine applicable in Kenya?

[1127] The Attorney General submitted that the basic structure doctrine is an emerging doctrine that originated from the ***Kesavananda Bharati v. The State of Kerala*** (1973) 4 SCC 225; AIR (1973) SC 1461 case in India, (***the Kesavananda Case)***. Learned Counsel for the Attorney General argued that the essence of the basic structure doctrine was that, while Parliament had the power to amend every provision of the Constitution, it could not do so in a manner that affected the basic foundation and structure of the Constitution. Therefore, it was argued that the basic structure doctrine limits the amending authority granted to the Indian Parliament under the Indian Constitution.

[1128] On the other hand, learned Counsel appearing for the 1st to 5th respondents argued *inter-alia* that the basic structure doctrine is not an emerging doctrine and can be traced to John Locke's ***"Two Treatises of Government"*** (1689) and the philosophical works of Charles Montesquieu.

[1129] In order to determine whether the basic structure doctrine is applicable in Kenya, there is need to define the term *doctrine* under international law,

establish whether the basic structure doctrine is indeed such a doctrine, and if it is applicable in Kenya.

[1130] What is a doctrine? I recognize that there are differing opinions on the definition of a legal doctrine. ***The Black's Law Dictionary***, 11th Edition defines the term 'doctrine' as:

> ***"A principle, especially a <u>legal principle</u> that is widely adhered to"*** [emphasis added]**.**

[1131] Prof. Emerson H. Tiller et al in ***"What Is Legal Doctrine?"*** (2005) Northwestern Public Law Research Paper No. 05-11, considers a doctrine or precedent to be the law that originates from decisions of courts of law. He suggests that it is judicial opinions that create the rules or standards that comprise a legal doctrine.

[1132] On the contrary, scholars such as Prof. Emilian Ciongaru in ***"Interpretations of Legal Doctrine-Source of Law: Elements of General Theory of Law and Comparative Law"*** (2020) International Journal of Research in Humanities and Social Studies, deems a legal doctrine to include analyses, investigations, interpretations which law specialists give to a legal phenomenon.

[1133] Applying the above definitions, would the basic structure doctrine qualify as a legal doctrine? In this context, the 6th *amicus* in this matter, Yaniv Roznai in ***"Unconstitutional Constitutional Amendments – The Limits of Amendment Powers"*** (2017), defines the basic structure doctrine as:

> *"a judicial principle according to which even in the absence of explicit limitations on the constitutional amendment power, there are implied constitutional limitations by which a constitution should not be amended in a way that changes its basic structure or identity."*

[1134] Similarly, some parties before us submitted that from the ***Kesavananda Case***, the basic structure doctrine can be defined as a concept of implied limitations on Parliament's power to amend the Constitution.

[1135] To my mind, therefore, the basic structure doctrine as presented by the parties to us, is a judge-made law emanating from the municipal court (Supreme Court) in India in the ***Kesavananda Case***. The doctrine nuanced the fact that a national constitution has certain fundamental features which underlie not just the letter, but also the spirit of that Constitution. These features constitute the sacrosanct core of the Constitution which Parliament cannot amend at will. The rationale in the ***Kesavananda Case,*** was that any amendment by Parliament which alters the Constitution in a manner that takes away the sacrosanct features of the Constitution is not an amendment but is, in effect, tantamount to rewriting the Constitution which Parliament has no power to do.

[1136] I acknowledge that the basic structure doctrine has been upheld and relied upon in subsequent decisions in India. I also note that in a few jurisdictions around the world the basic structure doctrine has been applied while in others, it has been rejected.

[1137] Cognizant of the above, it is my considered view that the basic structure doctrine as presented by the parties does not constitute a widely adhered legal doctrine. It is noteworthy that there are many legal doctrines that are internationally applied and widely followed, such as the doctrines of estoppel, *stare decisis,* and *re judicata,* just to name but a few. The basic structure doctrine in my opinion, does not meet this global standard of recognition or prominence.

[1138] The above notwithstanding, I must query, "has the 'basic structure doctrine' as presented by the parties herein attained the status of an international source of law as contemplated under Article 2(5) of the Constitution of Kenya, 2010?"

[1139] Article 38(1) of the Statute of the International Court of Justice provides:

> *"1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:*
>
> *a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;*
>
> *b. international custom, as evidence of a general practice accepted as law;*
>
> ***c. the general principles of law recognized by civilized nations;***
>
> ***d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law"*** [emphasis added].

[1140] According to Prof. Mahmoud Cherrif Bassiouni in **"*A Functional Approach to 'General Principles of International Law*"** (1990) 11 Michigan Journal of International Law, for a rule to be recognized as a general principle under Article 38(1)(c), it must exist in a number of states, but does not have to meet the test of 'universal acceptance'. He further suggests that:

> "*In evidencing a "General Principle," the PCIJ and ICJ have also looked for expressions of principles in the international context. "General Principles" have been identified by examining State conduct, policies, practices, and pronouncements at the international level, which may be different from domestic legal principles.* ***Thus, States' foreign policies, bilateral and multilateral treaties, international pronouncements, collective declarations, writings of scholars, international case law, and international customs, even when unperfected, are valid***

areas of inquiry from which to determine the existence of "principles" within the international context" [emphasis added].

[1141] I recognize that in the **Delimitation *of the Maritime Boundary in the Gulf of Maine Area,*** 1984 I.C.J. 246 ***(Gulf of Maine Case)***, the International Court of Justice, observed that:

> *"The Chamber is requested to decide [the question submitted to it] in accordance with the* ***principles and rules of international law applicable*** *in the matter as between the Parties." The time has therefore come to begin consideration of the problem of ascertaining the rules of law, in the international legal order, which govern the matter at issue in the present case****. In the Chamber's opinion, the association of the terms "rules" and "principles" is no more than the use of a dual expression to convey one and the same idea,*** *since in this context "principles" clearly means principles of law, that is, it also includes rules of international law in whose case the use of the term "principles" may be justified because of their more general and more fundamental character"* [emphasis added].

[1142] Flowing from the above, I am persuaded that the general principles of law as stipulated under Article 38(1)(c) of the Statute of the International Court of Justice and general rules of international law as found in Article 2(5) of the Constitution of Kenya, 2010 is no more than the use of a dual expression to convey one and the same idea.

[1143] From the above guiding principles, it is my observation that the 'basic structure doctrine' has been both applied and rejected. For instance, Nepal, Belize, Malaysia, and Uganda have applied the doctrine; Singapore and Zambia have

rejected it. It is therefore my considered opinion that these States only constitute a small percentage of the countries in the world which have either attempted to apply or applied the doctrine. It is also my observation that there is no evidence of States' conducts embracing the doctrine, policies, or laws formulated by States to adopt and enforce the same. Further, there have been no pronouncements made at the international level, and no international case laws on the same. The only available cases are from domestic courts at the national jurisdiction. Therefore, applying the guiding principles above, it cannot be said that the 'basic structure doctrine' has attained the status of a *general principle* under international law. As such, it cannot be applied by this Court as a *general rule of international law* as contemplated under Article 2(5) of the Constitution of Kenya, 2010.

[1144] Having found that the 'basic structure doctrine' has not attained the status of a general principle of law, can the ***Kesavananda Case*** be considered on its own strength as a source of international law under Article 38(1)(d) of the Statute of the International Court of Justice? Article 38(1)(d) states that the court shall apply:

> ***"subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law"*** [emphasis added].

[1145] Article 59 of the Statute of the International Court of Justice states that:

> ***"the decisions of the Court has no binding force except between the parties and in respect of that particular case"*** [emphasis added].

[1146] In ***S.S. Lotus (France v. Turkey.),*** 1927 P.C.I.J. (ser. A) No. 10 (Sept. 7 ***(The Lotus Case)*** the Permanent Court of Justice (PCJ) *(Now International Court of Justice (ICJ)*) observed as follows:

> "*The Statute of the Court (Article 38), after providing that the Court shall apply (1) international conventions, whether general or special, establishing rules expressly recognized by the States in controversy, (2) international custom, as evidence of a general practice accepted as law and (3) the general principles of law recognized by civilized nations, further provides that the Court shall apply (4) "**judicial decisions** and the teachings of the most highly qualified publicists of the [p74] various nations**", as a "subsidiary means for the determination of rules of law"**. These directions merely conform to the well-settled rule that international tribunals, whether permanent or temporary, sitting in judgment between independent States, **are not to treat the judgments of the courts of one State on questions of international law as binding on other States, but, while giving to such judgments the weight due to judicial expressions of the view taken in the particular country, are to follow them as authority only so far as they may be found to be in harmony with international law, the law common to all countries**"* [emphasis added].

[1147] In view of the above, can the ***Kesavananda Case*** be binding upon this Court as a source of international law? The answer is in the negative. This is because judicial decisions as sources of international law are considered subsidiary and not binding except as between the parties to the dispute. Further, as observed in the ***Lotus Case,*** while considering such judicial decisions as sources of international law, the issue in dispute has to raise questions of international law. The ***Kesavananda Case*** involved questions of the municipal law of India and did not have an international implication capable of binding other States in applying any doctrine developed thereunder. I note, that for such decisions to be considered as such, the law needs to be in common as between the relevant countries. It is also my observation that the process of amendment of the Indian

Constitution is quite different from the process of amendment of the Constitution of Kenya. Therefore, there is no law that is common to the two countries to enable the ***Kesavananda Case*** to be applied in Kenya.

[1148] In probing, the status of judicial decisions of domestic courts, Allain Pellet, *in* ***'The Statute of the International Court of Justice, A Commentary'*** edited by Andreas Zimmerman et al (2012), observed that:

> *"It has sometimes been asked whether judicial decisions of domestic courts were to be included among the jurisprudence as envisaged by Art. 38, para. 1 (d). While eminent commentators sometimes answer in the affirmative, the present writer tends to share the view that* ***these decisions should better be treated as elements of State practice in the customary process or, maybe, as being at the cross-road between evidence of practice and opinio juris****"* [emphasis added].

[1149] I agree with this position that for judicial decisions of domestic courts to be considered in any way as sources of international law, there ought to be elements of, or at least evidence of **general practice among States on the issue and acceptance by States that this practice is required by law**. This acceptance is known by the Latin phrase *opinio juris sive necessitasis* (an opinion of law or necessity) or simply *opinio juris* ("an opinion of law"). I note that the ***Kesavananda Case*** does not exhibit any of these elements. I am also of the opinion that although domestic courts play an important role in the development of the international legal field, they do not create international law. States do this. Consequently, I find that ***Kesavananda Case*** does not meet the threshold of an international source of law as envisaged under Article 38(1)(d) of the Statute of the International Court of Justice and Article 2 (4) of the Constitution of Kenya.

[1150] The above notwithstanding, is the 'basic structure doctrine' as presented by the parties applicable in Kenya? In this regard, the Attorney General, supported

by the 13th to 16th, 18th 19th and 21st respondents, urged that the 'basic structure doctrine' is not applicable in Kenya while on the contrary, the 3rd appellant, 1st to 5th respondents, and the 79th respondents averred that the 'basic structure doctrine' is applicable in Kenya. In my considered opinion, the answer to this question can also be deduced from our constitutional past.

[1151] History reveals to us that the amendment process of the Independence Constitution was for the most part controversial. For the purposes of amendment, the provisions of the Constitution were divided in two categories, ordinary provisions and specially entrenched provisions. The ordinary provisions were amended by an affirmative vote of three quarters of all the members in each house of Parliament. The specially entrenched provisions could only be amended by a vote of three quarters of all the members in the House of Representatives and nine tenths of all Senators. These provisions included the chapters on citizenship, fundamental rights and freedoms, and the Judiciary. In practice though, it proved quite easy to amend the Constitution. In 1965, the government had enough parliamentary support to amend the Constitution and removed the distinction between ordinary and specially entrenched provisions.

[1152] At this juncture, I must pose the question, what is the purpose of entrenched provisions? Prof. Nicholas Barber, in ***'Why Entrench?'*** *(2016) 14 International Journal of Constitutional Law*, opines that entrenchment is a constitutional tool that renders a legal change more difficult.

[1153] Similarly, Prof. Michael Hein, in ***'Impeding Constitutional Amendment: Why are Entrenchment Clauses Codified in Contemporary Constitutions?*** (2019) Acta Politica 54 196-224 observes that:

> *"Almost all contemporary constitutions are entrenched,* ***in other words, harder to amend than ordinary laws****. "Entrenchment clauses" further raise these hurdles. They make amendments to*

certain parts of a constitution or amendments under certain circumstances either more difficult than "normal" amendments or even impossible. Such provisions are common around the world and in all types of political systems. Nevertheless, they are highly controversial from a normative point of view since they may be seen either as adequate means for protecting human rights, democracy, and the rule of law or as illegitimate restrictions on democratic sovereignty" [emphasis added].

[1154] Accordingly, in my view, entrenched provisions act as a vital safeguard of sacrosanct constitutional tenets. My fellow Kenyans share this view as evidenced by the process leading up to the formulation of the Constitution, 2010. Kenyans stressed the fact that they needed a Constitution that had entrenched provisions on certain aspects, one that was not too simple to amend and one that required their participation in terms of amendment. ***The Final Report of the Constitution of Kenya Review Commission*** **(*The CKRC Final Report*)** captures these sentiments at page 75 where the people's voice is summarised:

> ***"(iii) the public should be involved in changing certain provisions of the Constitution through referenda, especially as concerns religions, marriages, divorce and inheritance;***
>
> ***(iv) a distinction should be made between entrenched and non-entrenched provisions of the Constitution, with a stringent mechanism being set up for amending the former entrenched provisions which should include supremacy of the Constitution, the Bill of Rights, land, the Judiciary, security, finance, the system of government."***

[1155] Consequently, it was the Commission's recommendation at page 76 that:

> ***"(i) the new Constitution should have some entrenched provisions – for example, on human rights, that Parliament does not have power to amend;...***
>
> ***(b) The entrenched provisions should include:***
>
> - ***the procedure on amending the Constitution itself;***
> - ***the provisions establishing the Republic of Kenya;***
> - ***the provisions on sovereignty of the people;***
> - ***the provisions on supremacy of the Constitution;***
> - ***the Bill of Rights;***
> - ***separation of powers; and***
> - ***provisions on existence and powers of independent commissions and bodies."***

[1156] These sentiments made it to our current Constitution. Chapter Sixteen of the Constitution of Kenya is unequivocal on how to amend the Constitution. Article 255 (1) of the Constitution provides that:

> ***"255. Amendment of this Constitution***
>
> ***(1) A proposed amendment to this Constitution shall be enacted in accordance with Article 256 or 257, and approved in accordance with clause (2) by a referendum, if the amendment relates to any of the following matters—***
>
> ***(a) the supremacy of this Constitution;***
>
> ***(b) the territory of Kenya;***
>
> ***(c) the sovereignty of the people;***

(d) the national values and principles of governance mentioned in Article 10 (2) (a) to (d);

(e) the Bill of Rights;

(f) the term of office of the President;

(g) the independence of the Judiciary and the commissions and independent offices to which Chapter Fifteen applies;

(h) the functions of Parliament;

(i) the objects, principles and structure of devolved government; or

(j) the provisions of this Chapter."

[1157] Further, Article 255 (2) of the Constitution provides as follows:

"(2) A proposed amendment shall be approved by a referendum under clause (1) if—

(a) at least twenty per cent of the registered voters in each of at least half of the counties vote in the referendum; and

(b) the amendment is supported by a simple majority of the citizens voting in the referendum.

(3) An amendment to this Constitution that does not relate to a matter mentioned in clause (1) shall be enacted either—

(a) by Parliament, in accordance with Article 256; or

(b) by the people and Parliament, in accordance with Article 257."

[1158] It is therefore my considered opinion that it was the intention of the drafters of the Constitution to protect or entrench the specified ten matters in Article 255 (1) of the Constitution by stipulating their specific amendment procedures in Article 255 (2) of the Constitution. If the drafters of the Constitution intended to entrench or protect any other provisions, or deem them eternal or un-amendable, they would have expressly done so.

[1159] Along the same vein, I must point out here that I find it absurd that despite the two superior courts acknowledging that there is no clause in the Constitution that bars amendment to any Article therein, they proceeded to consider factors outside the Constitution to create *un-amendable clauses*! I have continually opined that as an arm of government, the Judiciary must operate within its constitutional powers. As courts, we are called upon to exercise our mandate within the confines of the Constitution, and any attempt by the courts to create the law should be frowned upon. Therefore, it was unnecessary to import, imply, and apply factors not contemplated by the Constitution.

[1160] On my part, I do not consider any Article in the Constitution *un-amendable* or *constituting eternity clauses*. A textual reading of the Constitution confirms this view. No clause or provision expressly alludes to this and with good reason. An '*always speaking transformative charter'* such as ours, must never be the enemy of democratic constitutional change. We must not, eternally, tie and impose our current ideals, values, morals, structures, commissions and organs on future generations who might not aspire to them or need them. Progressive constitutions must always acknowledge that change is inevitable. I am convinced that the drafters of the Constitution bore this in mind and struck the perfect balance between changing or amending the constitution and protecting it. One need only go to the constitutional text.

[1161] Article 255 of the Constitution outlines the protected provisions and expressly provides how to amend them; Article 256 of the Constitution is

categorical on amendment of the Constitution by Parliament and Article 257 of the Constitution provides for the mechanisms that ensure that the popular initiative route of amending the Constitution remains people-centric regardless of how it is initiated. In other words, a constitutional amendment Bill ought to be signed by one million registered voters, approved by a majority of the County Assemblies, and both Houses of Parliament before being subjected to a referendum. It is evident, therefore, that the Constitution ***itself*** expressly provides an inbuilt amendment procedure for any anticipated amendments. Consequently, it is unnecessary to import the so-called 'basic structure doctrine' in Kenya.

[1162] I now briefly turn to the issue of constituent power. The Attorney General submitted that the Court of Appeal erred by finding that the basic structure of the Constitution can only be altered through the primary constituent power which must include four sequential processes namely *civic education, public participation and collation of views, constituent assembly debate, and ultimately a referendum.*

[1163] I note that the learned Justices of the Appeal *Musinga, (P), Nambuye, Kiage, & Tuiyott, JJ.A (*with *Okwengu, Gatembu, & Sichale, JJ.A* dissenting) found that the basic structure of the Constitution can only be altered through the primary constituent power which must include four sequential processes namely: civic education; public participation and collation of views; constituent assembly debate; and ultimately, a referendum.

[1164] What is the primary constituent power? I am persuaded by Yaniv Roznai's definition in ***"Unconstitutional Constitutional Amendments: A Study of the Nature and Limits of Constitutional Amendment Powers"*** (2017), where he defines the notion of primary constituent power as the unlimited power of the people to make a new constitution or to alter the current one. Therefore, in my opinion, constituent power is a power that cannot be limited by any pre-

existing rules, even if such rules purport to regulate replacement of the current Constitution.

[1165] Although the Constitution does not expressly make provision for "primary constituent power" under Article 1 of the Constitution, sovereign power is exercised directly or indirectly through democratically elected representatives. That is why in my view, any Article of the Constitution including 255(1), can be amended either by parliamentary or popular initiative. The only emphasis is that Article 255(2) quoted herein above makes it mandatory for the amendment of the sacrosanct features enumerated under Article 255(1) to be amended through a referendum with at least at least twenty per cent of the registered voters in each of at least half of the counties vote in the referendum: and the amendment is supported by a simple majority of the citizens voting in the referendum. This provision, suggests that the people do exercise their sovereign power by voting through the referendum.

[1166] It is also my finding that the four sequential steps are not expressly provided for in the Constitution and cannot be inferred from Article 257 of the Constitution. As such, the steps cannot be a mandatory requirement when there is no law providing for the same.

[1167] On a separate issue, I must refer to Counsel for the 79th respondent, Dr. Khaminwa's submissions that there were threats or perceived threats anchored on the Preamble of the Constitution. Specifically, that the Peoples rights were under threat. He urged this Court to find that provisions of the Preamble stand supreme in guiding the aspirations of the People of Kenya on how the Constitution can be amended.

[1168] However, the Preamble is not a substantive provision in the Constitution. It is merely aspirational. It has no legal force and cannot be equated to the substantive provisions in the Constitution. In ***Jacobson v. Massachusetts***, 197 U.S. 11(1905), the U.S. Supreme Court held that:

"Although that Preamble indicates the general purposes for which the people ordained and established the Constitution, it has never been regarded as the source of any substantive power conferred on the Government of the United States or on any of its Departments."

[1169] Similarly, in ***District of Columbia v. Heller***, 554 U.S. 570, 578 (2008) the Court observed that in the United States:

"the settled principle of law is that the preamble cannot control the enacting part of the statute in cases where the enacting part is expressed in clear, unambiguous terms."

[1170] Therefore, I am persuaded that the Preamble only serves a general aspirational purpose for which the Constitution was enacted and therefore cannot be used as a substantive provision under the Constitution.

[1171] I now move to the second issue for determination as delineated by this Court.

Issue two: Whether the President can initiate changes/amendments to the Constitution: and whether a constitutional amendment can only be initiated by Parliament through a parliamentary initiative under Article 256 of the Constitution or through a popular initiative under Article 257 of the Constitution.

[1172] The Court of Appeal upheld the High Court's finding that the President, for as long as he held office, could not as an ordinary citizen, move constitutional amendments through a popular initiative on the ground that the same route is intended for ordinary citizens. The Appellate Judges found that the Constitutional (Amendment) Bill, 2020 (***the Amendment Bill***) was not a popular initiative considering the process that culminated in the same; and that the process was led and driven by the Executive (political elite) as opposed to the people of Kenya.

[1173] Some respondents, who urged in support of the superior courts finding stated that the proposals by the ***Building Bridges to Unity Advisory Taskforce*** (***The BBI Taskforce***) could have been taken up by anyone (promoters) to pursue a popular initiative but not the President himself. Having perused carefully through the judgments of the superior courts and also through the Constitution of Kenya, I find this proposition is untenable for several reasons which I shall expound upon.

[1174] However, before I expound on my views, I must state that I am rather disturbed and concerned by the way the superior courts framed their issues for determination. The High Court framed its ***issue (iii)*** for determination and used words not in the constitutional text, attached meaning to them and made a determination on them. At para. 388 of its Judgment, the High Court framed this issue as reproduced below:

> *"(iii) What is the constitutional remit of amendment of the Constitution through a Popular Initiative" This issue further twins into two sub-issues:*
>
> *(a) Who can initiate a Popular Initiative under our constitutional set up"*
>
> *(b) Is the BBI process of initiating amendments to the Constitution in conformity with the legal and constitutional requirements*
>
> *....*
>
> *(v) Was the President in Contravention of Article 73(1)(a) of the Constitution for claiming authority and purporting to initiate constitutional changes through the BBI Process."*

[1175] Similarly, the Court of Appeal, *Musinga, (P),* at para. 50 of his Judgment listed the following issue for determination:

"Whether the President of Kenya can initiate the process of amendment of the Constitution as a popular initiative and who the initiators and promoters of the BBI Initiative were?"

[1176] The learned Judges of appeal unanimously agreed with the High Court that the BBI amendment process under Article 257 of the Constitution was intended for ordinary citizens. Further, they stated that it is a *citizen-conceived, citizen-initiated,* and *citizen-driven process*.

[1177] A lot of time and attention was dedicated to the meaning of certain words. This would not be problematic if these words are found within the body of the Constitution to interpret and give appropriate meaning to them. However, interpretation of words not in the Constitution brings confusion. In my view, a constitutional Court must confine itself to interpretation of the letter of the Constitution and if any word or phrase is "read-in," it must be made clear that this is the rule of interpretation at play.

[1178] The words that I am concerned about include *'initiate'* and *'initiator', 'citizen-initiated'* and *'private citizen*'. These do not appear anywhere in Articles 255 to 257 of the Constitution. The High Court in particular then went on a spirited approach to expound on these terms and paid little attention to the words that actually appear in Chapter Sixteen of the Constitution, which are the words '**promoter'**, **'popular',** and **'initiative'**.

[1179] In construing the popular initiative amendment route, the appropriate question ought to have been "*what is a popular initiative?"* Instead, this question *turned into who can initiate a popular initiative?*' The learned Judges introduced a non-constitutional actor called an initiator, who performs a non-constitutional action – initiate – when the Constitution only provides for a promoter whose definition is vastly different from an initiator. As such, emphasis was laid on the **actor/initiator**. This in my opinion fundamentally changes the import and meaning of Article 257 of the Constitution. I am of the opinion that the correct

approach should have been to *define what a popular initiative* is and *who can be or is a promoter of a popular initiative.*

[1180] The superior courts ignored the fact that the drafters of the Constitution used certain words and went ahead to *read in* words whose effect is to change the entire meaning of the Constitutional text. The tool of reading-in is only applied where the framers have left out a word or phrase from a provision. Further, this *reading-in* must be supported by other connected provisions of the Constitution. Accordingly, *this reading in* caused me to read and re-read the superior courts' Judgments numerous times.

[1181] I have perused the Judgments of the superior courts, trying to find proper reasons for this decision to exclude the President from the amendment process; I looked under the skirts of pronouncements and layers of reasoning and still could not find a logical constitutionally based explanation for the conclusions and findings of the courts on this question. I can only term it as ***interpretational misadventure*** if not ***judicial overreach or at best judicial invention.*** As such, the learned Judges erred fundamentally on this issue, in my very considered view which I shall now expound upon. Specifically, I will look critically at the constitutional amendment process as provided for under Chapter Sixteen, the interpretation of constitutional silences, the exercise of the authority of the people under Article 1, the authority of the President under Articles 131, 132, and 141(3) and political rights under Article 38.

[1182] The Constitution, 2010 provides for two processes through which it can be amended; these are the parliamentary initiative and the popular initiative. I begin by interrogating the popular initiative amendment process.

[1183] Article 257 of the Constitution provides as follows:

> ***"257. Amendment by popular initiative***

(1) An amendment to this Constitution may be proposed by a popular initiative signed by at least one million registered voters."

(2) A popular initiative for an amendment to this Constitution may be in the form of a general suggestion or a formulated draft Bill.

(3) If a popular initiative is in the form of a general suggestion, the promoters of that popular initiative shall formulate it into a draft Bill.

(4) The promoters of a popular initiative shall deliver the draft Bill and the supporting signatures to the Independent Electoral and Boundaries Commission, which shall verify that the initiative is supported by at least one million registered voters.

(5) If the Independent Electoral and Boundaries Commission is satisfied that the initiative meets the requirements of this Article, the Commission shall submit the draft Bill to each county assembly for consideration within three months after the date it was submitted by the Commission.

(6) If a county assembly approves the draft Bill within three months after the date it was submitted by the Commission, the speaker of the county assembly shall deliver a copy of the draft Bill jointly to the Speakers of the two Houses of Parliament, with a certificate that the county assembly has approved it.

(7) If a draft Bill has been approved by a majority of the county assemblies, it shall be introduced in Parliament without delay.

(8) A Bill under this Article is passed by Parliament if supported by a majority of the members of each House.

(9) If Parliament passes the Bill, it shall be submitted to the President for assent in accordance with Article 256(4) and (5).

(10) If either House of Parliament fails to pass the Bill, or the Bill relates to a matter specified in Article 255(1), the proposed amendment shall be submitted to the people in a referendum.

(11) Article 255(2) applies, with any necessary modifications, to a referendum under clause (10).”

[1184] For the popular initiative, ***promoters after collecting the signatures of at least one million registered voters,*** submit signatures and the Amendment Bill to Independent Electoral Boundaries Commission (***The IEBC)***, who sends the Bill to Counties, ***the Bill must be approved by a majority of the County Assemblies and both Houses of Parliament which enables public discussion.*** If Parliament passes the Bill, it is submitted to the President for assent. If either House of Parliament fails to pass the Bill, or the Bill relates to a matter specified in Article 255(1), the proposed amendment is to be submitted to the people in a referendum, which in order to be successful, must garner the support of fifty percent of votes cast.

[1185] Article 257 does not define *popular initiative*. Nevertheless, I am of the considered opinion that the heart of construing the meaning of ‘*popular initiative*’ lies with the numbers. It is proper to lay emphasis on the **numerical value of at**

least one million registered voters, (whose signatures must be collected), the numerical value of half of the Counties, two -thirds of votes in both houses of Parliament, and half of the votes cast by registered voters at the referendum. It is the numbers that count; it is the numbers threshold that the promoter must meet. It is the numbers that makes an initiative popular. In the context of Article 257(1) of the Constitution, a promoter needs at least one million registered voters to support their proposal. This is what triggers the IEBC's verification process. It is therefore my considered view that the popular initiative is primarily about *numbers* that a promoter must attain in order for an amendment to be successful, and not about *who* the promoter or person who brings the amendment is. As such, the superior courts made a fundamental error that the word "popular" relates to who moves the amendment and not to the numerical threshold that the promoter has to attain.

[1186] For example, once the initiative fails to garner signatures of one million registered voters, it collapses through operation of the law. This was evident in the case of the Coalition for Reforms and Democracy (CORD) *Okoa Kenya Bill* of 2016. CORD had embarked on a quest to amend our Constitution through the popular initiative route. However, it failed at the first step of collecting at least one million registered voters' signatures. Therefore, such a process cannot, accurately, be termed as a popular initiative unless at least one million registered voters sign to support it.

[1187] It is also important to note that Article 257 of the Constitution does not in any way specify *who* may move a constitutional amendment process by *popular initiative*. It does not contain any explicit bar against any person from promoting a constitutional amendment by popular initiative. It specifically provides what actions the promoters are tasked with in order to begin and complete an amendment process (such as delivering a draft Bill and the supporting signatures to the IEBC), but it does not state *who* the promoters must be.

[1188] The unsaid is influential in constitutional law. Some matters of constitutional relevance are sometimes left unaddressed. Sometimes, knowingly or unknowingly, the drafters of the Constitution may underappreciate how much power rests in the silence around the text. Constitutional silences are functional and inevitable. Enabled by the lack of very strict textual restraints, constitutions have the capacity to grow with time, experience, societal needs and changes, thus allowing successful constitutions to thrive. In India, for example, courts have used the doctrine of constitutional silence to *expand the ambit of rights and to make democracy substantive.*

[1189] The Supreme Court of India in ***Manoj Narula v. Union of India,* 2014** (writ petition (civil) no. 289 of 2005) observed on the principle of constitutional silence:

> "***The said principle is a progressive one and is applied as a recognized advanced constitutional practice. It has been recognized by the Court to fill up the gaps in respect of certain areas in the interest of justice and larger public interest....***"

Further that:

> ***"Michael Foley in his treatise on The Silence of Constitutions (Routledge, London and New York) has argued that in a Constitution "abeyances are valuable, therefore, not in spite of their obscurity but because of it. They are significant for the attitudes and approaches to the Constitution that they evoke, rather than the content or substance of their strictures (p. 10)."***

[1190] This Supreme Court plays a crucial role in interpreting silences in the Constitution since it is the final interpreter of constitutional provisions. It must be cautious, though, so as to avoid judicial legislation. It must interpret silences

judiciously. Taking recourse to this doctrine, how do we interpret the silence as to who can originate a popular initiative amendment? In my considered view, the first step leads us directly to the constitutional text itself. Article 1 of the Constitution provides:

> ***"1. Sovereignty of the people***
>
> ***(1) All sovereign power belongs to the people of Kenya and shall be exercised only in accordance with this Constitution.***
>
> ***(2) <u>The people may exercise their sovereign power either directly or through their democratically elected representatives.</u>***
>
> ***(3) Sovereign power under this Constitution is delegated to the following State organs, which shall perform their functions in accordance with this Constitution—***
>
> ***(a) Parliament and the legislative assemblies in the county governments;***
>
> ***(b) <u>the national executive and the executive structures in the county governments</u>; and***
>
> ***(c) the Judiciary and independent tribunals.***
>
> ***(4) The sovereign power of the people is exercised at—***
>
> ***(a) the national level; and***
>
> ***(b) the county level."***

[1191] Article 1 of the Constitution is categorical that all sovereign power belongs to the people of Kenya and shall be exercised in accordance with the Constitution. Further, that sovereign power may be exercised either directly or

through their *democratically elected representatives*. The National Executive enjoys delegated sovereign power under clause 3 of Article 1 of the Constitution. According to Article 136(1) of the Constitution, *the President shall be elected by registered voters in a national election conducted in accordance with the Constitution and any Act of Parliament regulating presidential elections*.

[1192] In addition**,** Article 1 of the Constitution of Kenya elaborates the tenets of a functioning Republic anchored by the concept of ***libertas populi*** which defines the characteristics of a functioning Republic. It envisions a system that has responsible citizens who exercise their rights democratically and consciously. A free ***res publica*** is the highest value for all citizens. This Article preserves the exercise of the actual legal authority or power which is exercised by the people directly or through their democratically elected representatives.

[1193] From the foregoing, it is not in doubt that the President is a democratically elected representative of the people, who, under Article 1, can exercise delegated sovereign power of the people. Indeed, this is one of the ways in which constituent power is exercised. I am confounded by the fact that the superior courts addressed the constituent power of the people at length, but for whatever reason failed to take into account that the President is a directly elected representative of the people and who can exercise delegated power on their behalf.

[1194] Furthermore, it is a fundamental right of the Kenyan people to elect their representatives and that those so elected speak on their behalf. To limit the ability of an elected representative to speak, to act, to work on behalf of his or her electorate is in itself a limitation of people's political rights under Article 38 of the Constitution. Such a proposition would amount to Limited Republicanism limiting the extent to which people exercise their powers either directly or through their elected representatives. More poignantly, limiting the powers of the people donated to their representatives reorganizes the architecture of the Constitution's order of delegated governance.

[1195] Article 131 of the Constitution spells out the authority of the President in the following terms:

> ***"(1) The President—***
>
> ***(a) is the Head of State and Government;***
>
> ***(b) exercises the executive authority of the Republic, with the assistance of the Deputy President and Cabinet Secretaries;***
>
> ***(c) is the Commander-in-Chief of the Kenya Defence Forces;***
>
> ***(d) is the chairperson of the National Security Council; and***
>
> ***(e) is a symbol of national unity."***

[1196] It is not in dispute that the President *bears an elevated status* by virtue of his office. The President has additional roles and obligations in comparison to the ordinary Kenyan. In addition, Article 131(2) of the Constitution mandates the President to safeguard the sovereignty of the Republic, promote and enhance the unity of the nation, promote respect for the diversity of the people and communities of Kenya; and ensure the protection of human rights and fundamental freedoms and the rule of law.

[1197] Article 132(1)(c) of the Constitution stipulates one of many mandatory functions of the President. The President must:

> ***"c) once every year—***
>
> ***(i) report, in an address to the nation, on all the measures taken and the progress achieved in the realisation of the national values, referred to in Article 10;***

(ii) publish in the Gazette the details of the measures and progress under sub-paragraph (i); and

(iii) submit a report for debate to the National Assembly on the progress made in fulfilling the international obligations of the Republic" [emphasis added].

[1198] In my considered view, the President is not limited as to the measures he can undertake in the exercise of his functions under Article 132. The said measures can constitute a policy, statutory or constitutional frame. Clearly, in *promoting and enhancing national unity,* the President can *promote constitutional amendments* through popular initiative. This would qualify as a measure taken under Article 132 on which progress achieved can be reported, in the realization of the national values, referred to in Article 10 of the Constitution.

[1199] Constitutional provisions must be construed as a whole in harmony with each other without insubordination of any one provision. I am in full agreement with the holding in ***Olum v. Attorney General of Uganda*** [2002] 2 EA 508, *inter alia*, ***that the entire Constitution should be read as an integrated whole and no one particular provision destroying the other but each sustaining the other***; and *Mutunga CJ*. (*Rtd*) in the ***Speaker of the Senate & Another v. Hon. Attorney General & 3 Others,*** SC Advisory Opinion No. 2 of 2013; [2013] eKLR for determining *inter alia,* that the Constitution does not subvert itself, thus it is a peremptory rule of constitutional construction that no provision of the Constitution is to be segregated from the others.

[1200] In the ***Matter of the Principle of Gender Representation in the National Assembly and the Senate,*** SC Advisory Opinion No. 2 of 2012; [2012] eKLR this Court stated at para. 83 that ***"... the Supreme Court, as a custodian of the integrity of the Constitution as the country's charter of governance, is inclined to interpret the same holistically, taking***

into account its declared principles, and to ensure that other organs bearing the primary responsibility for effecting operations that crystallize enforceable rights, are enabled to discharge their obligations, as a basis for sustaining the design and purpose of the Constitution."

[1201] In ***Re the Matter of Kenya National Human Rights Commission,*** SC Advisory Opinion Reference No.1 of 2012; [2014] eKLR this Court explained 'holistic interpretation of the Constitution' as follows: ***"...But what is meant by a 'holistic interpretation of the Constitution'? It must mean interpreting the Constitution in context. It is the contextual analysis of a constitutional provision, reading it alongside and against other provisions, so as to maintain a rational explication of what the Constitution must be taken to mean in light of its history, of the issues in dispute, and of the prevailing circumstances. Such scheme of interpretation does not mean an unbridled extrapolation of discrete constitutional provisions into each other, so as to arrive at a desired result."***

[1202] Accordingly, by adopting a holistic and contextual interpretation of the constitutional provisions with regards to the powers and exercise of presidential authority to meet constitutional aspirations and values, I conclude that the President can promote constitutional amendments through popular initiative. The President, as a democratically elected representative, exercises sovereign power in so doing.

[1203] I am convinced that when the President takes measures in the exercise of his functions, including a proposal for the amendment to the Constitution, he is bound by the oath prescribed in the Constitution and sworn when he takes office, to act in the best interests of all Kenyans and not to undermine democracy. One need not worry about the President overstepping because the parameters in the

Constitution are sufficient to rein him in. How can I claim this so boldly? This is informed by our constitutional history.

[1204] When one looks at the history of constitution making in this country, it is clear that one of the intentions of the drafters of the Constitution was to discard parliamentary monopoly over the constitutional amendment process and to make it more inclusive. Kenya's journey to a democratic Constitution was arduous taking into account most of the constitutional amendments made in the first President Kenyatta's era. In his 15-year reign, he oversaw sixteen amendments. President Moi, in his twenty four (24) year presidency oversaw fourteen constitutional amendments. Both Presidents were members of Parliament and used Parliament to amend the Constitution in a manner that excluded participatory democracy. The people were not involved directly in any way. By 1992, all key institutions – the Judiciary, Parliament, public service, security forces and provincial administration were instruments of authoritarian control.

[1205] Concentration of power in the President was one of the factors that prompted the demands for a new Constitution. The 2010 Constitution aimed to curb dictatorship by Parliament in the amendment process. Kenyans wanted to have a Head of State who would not whimsically amend the Constitution. They wanted to limit the powers of constitutional amendment by the Head of State, but not to take it away altogether. In other words, the intention was to make it ***difficult*** but not ***impossible, for a President to make a constitutional amendment.*** This is the mischief that the framers of the Constitution sought to address.

[1206] The CKRC Final Report at page 73 reinforces my views because one of the concerns raised was, **"*considering how quickly and fundamentally the independence Constitution was amended, how can we protect new Constitution from similar fate?"*** It was noted that there was need to protect the Constitution against indiscriminate amendments. Therefore, it was

recommended that there be an amendment procedure that is neither too simple nor too complex. The recommendations made concerning the amendment procedure provided at page 76 of the Report as follows:

> ***"... (e) the amendment procedure should make the following distinction:***
>
> ***(i) A Bill seeking to amend an entrenched provision should not be passed unless:***
>
> - ***It receives the support of two thirds of members of Parliament at the second and third reading; and subsequently***
> - ***It receives approval at a referendum.***
>
> ***(ii) The entrenched provisions should include:***
>
> - ***The procedure on amending the Constitution itself;***
> - ***The provisions establishing the Republic of Kenya***
> - ***The provisions on the sovereignty of the people;***
> - ***The provisions on the sovereignty of the Constitution;***
> - ***The Bill of Rights;***
> - ***Separation of powers;***
> - ***Provisions on existence and powers of independent commissions and bodies.***
>
> ***(iii) A Bill seeking to amend those provisions should not be passed unless:***
>
> - ***It receives the support of two thirds of Parliament at the Second and third reading; and***

- ***It receives the support of two thirds of bodies at national and sub-national levels (this is tied to the question of devolution)***

(iv) Non-entrenched but special provisions would include:

- ***Provincial, district or constituency boundaries; and***
- ***Change in the number of constituencies.***

(v) A bill seeking to amend the provisions of the Constitutions should require a two thirds majority at the second and third readings."

[1207] From the CKRC Final Report, there is no mention of involvement or non-involvement of the President in the amendment process. In my considered view therefore, there is no historical evidence that the drafters of the Constitution intended that the President be excluded from the popular initiative amendment route, or that it be limited to a specific class of people to the exclusion of others. If anything, the resultant, very expansive Chapter Four on the Bill of Rights in the Constitution 2010 proves otherwise.

[1208] The President enjoys all the constitutional rights and freedoms like any other Kenyan. A President is first and foremost a Kenyan citizen by birth. A President does not lose his or her political rights under Article 38 rights; he or she does not cease to be a registered voter by virtue of the ascendancy to presidency. No law exists pursuant to Article 24 of the Constitution, to limit the President from enjoying political rights under Article 38, *especially that of campaigning for a political cause* which, in my view, includes constitutional amendments. In addition, trusting citizens with public office does not in any way muzzle them or take away their rights as provided in the Bill of Rights.

[1209] Article 27 (1) of the Constitution provides that every person is equal before the law and has the right to equal protection and ***equal benefit of the law.*** Additionally, equality includes the full and equal enjoyment of all rights and fundamental freedoms. The President, like all Kenyans, is obligated to respect, uphold, and safeguard the Constitution.

[1210] These constitutional provisions buttress my opinion that the President's rights were never intended to be curtailed in any way. It is important to note that constitutions are not perfect, they may from time to time need review. If any Kenyan has the right to initiate a popular amendment to the Constitution, whilst still respecting, upholding and defending the Constitution, so too does the President in his official or personal capacity. It would be restrictive, unjust, unprogressive and unconstitutional to limit this right.

[1211] At this juncture, I find it prudent to comment on the submissions that the President is excluded from promoting changes to the Constitution by popular initiative because he can do so through Parliament. According to Article 256 of the Constitution, the Constitution can also be amended through a parliamentary initiative. Article 256 (a) of the Constitution is silent on who can introduce a Bill to either Houses of Parliament. However, Article 109(5) of the Constitution on the Legislative powers of Parliament states as follows:

> ***"A Bill may be introduced by any member or committee of the relevant House of Parliament, but a money Bill may be introduced only in the National Assembly in accordance with Article 114"*** [emphasis added].

[1212] The membership of the National Assembly is provided for under Article 97(1) of the Constitution, while that of the Senate is stipulated under Article 98 (1) of the Constitution. In both instances, the President is excluded as a member of Parliament. In other words, the President is not a Member of Parliament and by

parity of reason therefore, the President cannot introduce a constitutional amendment through parliamentary initiative.

[1213] In any case, it would be contrary to the principles of harmonious interpretation of the Constitution, for a President to be barred from any participation in a popular initiative process of a political nature since the Constitution is not just a legal contract between the people and their rulers but also a charter that manages political power.

[1214] Apart from making a finding that the President cannot initiate constitutional changes, the superior courts also found that state organs similarly cannot initiate such changes. However, it is important to note that all state organs and state officers form part of the National Executive, County Governments, the Legislature, Judiciary and Independent Commissions and offices. Accordingly, all holders of such office, under Article 1 also, *exercise delegated power* from the people and must perform their functions in accordance with the Constitution. If those functions require measures or policy actions that would require constitutional changes, then they must move such amendments, using their delegated authority to exercise those functions.

[1215] To suggest otherwise will result in absurdity. For example, assume the Chief Justice, who is also the Chairperson of the Judicial Service Commission, finds that there is need for judicial reforms that require constitutional changes. She will put together a draft Bill and present to the IEBC as a promoter. If we are to follow the findings of the superior courts, then a Chief Justice (a state officer) would find her or himself barred from proceeding with the initiative. However, her or his Chief of Staff (who is not a state officer) can take the same draft Bill and would find no hurdles in doing the same, yet the policy issue in that draft Bill has been generated and approved by their superior. By the same token, the Speaker of the National Assembly also the Chairperson of the Parliamentary Service Commission, would be blocked for proposing constitutional amendments relating

to Parliamentary reforms, yet the Clerk of the National Assembly would find no such bar.

[1216] Such similar fate awaits the Chairs of Constitutional Commissions, County Governors, and in fact the entire leadership in Government; Kenyans who, the people have chosen or been appointed to resolve policy issues that afflict them. The result is *leadership without authority*. In a democratic Government, it is an untenable absurdity.

[1217] Article 27 (6) of the Constitution provides that:

> ***"(6) To give full effect to the realisation of the rights guaranteed under this Article, the State shall take legislative and other measures, including affirmative action programmes and policies designed to redress any disadvantage suffered by individuals or groups because of past discrimination."***

[1218] How then, in light of the Judgments of the superior courts, would state organs or public officers deliver such measures? In my opinion, the popular initiative amendment route is not restricted to anyone; not by office, not by role.

[1219] Therefore, it is my position that the popular initiative amendment process is not the preserve of specific persons. ***Any Kenyan*** can originate and promote the popular initiative amendment. The people as defined by the Constitution also means their representatives exercising donated sovereignty. The success of this process is hinged on the people's support through numbers as explained above. The logical conclusion of this process, if it comes to that, is that the people get a chance to vote for or against the proposals in a referendum. As such, it remains ***an inclusive process*** of participatory democracy that empowers ***every person*** to propose constitutional amendments.

Who was the promoter of the Constitution of Kenya (Amendment) Bill, 2020?

[1220] Having found that the President and other state organs can promote a popular initiative, who then was the real promoter of the impugned Bill? The record shows that vide **Kenya Gazette Notice No. 5154** dated 31st May 2018, the President established the ***BBI Taskforce*** whose terms of reference were to: *a) evaluate the national challenges outlined in the Joint Communiqué of 'Building Bridges to a New Kenyan Nation, and having done so, make practical recommendations and reform proposals that build lasting unity;(b) outline the policy, administrative reform proposals, and implementation modalities for each identified challenge area; and (c) conduct consultations with citizens, the faith based sector, cultural leaders, the private sector and experts at both the county and national levels.*

[1221] Consequently, the BBI Taskforce presented to the President a Report *"Building Bridges to a United Kenya* ***(BBI Taskforce Report):*** *from a nation of blood ties to a nation of ideals".* The Report was launched on **27th November 2019.** Through **Kenya Gazette Notice Special Issue No. 264** dated 10th January 2020, the President appointed ***the Steering Committee on the Implementation of the Building Bridges to United Kenya Task Force (BBI Steering Committee)*** whose terms of reference was to conduct validation of the BBI Taskforce Report through consultations with citizens, civil society, the faith-based organizations, cultural leaders, the private sector, and experts; and propose administrative, policy, statutory or constitutional changes that may be necessary for the implementation of the recommendations contained in the BBI Taskforce Report, taking into account any relevant contributions made during the validation period.

[1222] A perusal of the record shows that the BBI Steering Committee presented its Report dated 16th October, 2020 to the President on 21st October, 2020. The

Report was launched on 26th October, 2020. I observe that several constitutional amendments were proposed in the Report. In its Annex B, was a Constitution of Kenya (Amendment) Bill, 2020 **(BBI Steering Committee draft Bill).**

[1223] A perusal of Volume 34, page 226 of Morara Omoke's Record of Appeal, reveals the Replying Affidavit by **Hon. Dennis Waweru** whereby he swears that he and **Hon. Junet Mohamed** are Co-Chairpersons of the Building Bridges National Secretariat created and mandated with the task of initiating a constitutional amendment process and unifying Kenyans among other functions.

[1224] From the record, IEBC's Press Release dated 18th November, 2020, IEBC acknowledges receipt of the Amendment Bill and the 4.4 million supporters' signatures. Volume 34 of Morara Omoke's Record of Appeal discloses the letter from IEBC dated 26th January, 2021, forwarding the Amendment Bill to amend the Constitution by popular initiative to the Speakers of the 47 County Assemblies. In the said letter, IEBC states that the initiative ***was promoted by Hon. Dennis Waweru*** and ***Hon. Junet Mohamed***. It is therefore my conclusion that the Promoters' referred to in the Amendment Bill, dated 25th November, 2020 are ***Hon. Dennis Waweru*** and ***Hon. Junet Mohamed.*** The record speaks for itself.

[1225] Further, having perused the BBI Steering Committee draft Bill, in Annexure B of the Report of the BBI Steering Committee Report of October, 2020, and the Amendment Bill dated 25th November, 2020, the Amendment Bill that was forwarded to the County Assemblies and Parliament, I make the observations that the two Bills are vastly *different* in terms of content and proposed amendments to the Constitution.

[1226] For instance, while the BBI Steering Committee draft Bill, does not propose amendments to Articles 82 (1), 89 (1), 96(3),115(4) (b),168 (2),188 (1) (b) (ii),204, 206, 207(4)(b), 228 (1), and 250 (1), of the Constitution, the Amendment Bill does. The Amendment Bill does not contain some amendments contained in

the BBI Steering Committee draft Bill namely, amendments to Articles 91 (1), 200, and the repeal and replacement of Article 218; insertion of Article 218A, amendments to Articles 221(2), 223(1), and the repeal and replacement of Articles 246, insertion of Article 246A, and 248 and the fourth schedule. In addition, new Articles 108A, 153A, 206A only appears in the Amendment Bill and not in the BBI Steering Committee draft Bill. There are also major differences in the proposals to amend the Preamble, amendments in Articles 11A, 18A, 87, 88, 90, 97, 99(2), 107, 107A 132,152 153, 164, 172A, 177,179, 206A, 230, 237A, 243, 245, 248, and 260. The First Schedule, and the Second Schedule are also substantially different in both Bills.

[1227] It is evident that the BBI Steering Committee Bill and the Amendment Bill have fundamental differences. They are two different documents. None of the superior courts examined this fact leading them to make erroneous conclusions that the BBI Steering Committee, the BBI Taskforce and the promoters were one and the same. Neither Hon. Junet Mohammed nor Hon. Dennis Waweru were part of the BBI Steering Committee or the BBI Taskforce both of which were Gazetted by the President.

[1228] The similarly named initiative in which they were part of has no legal nexus with the two gazetted entities. Further to that, in correspondence between IEBC, Hon. Junet Mohammed and Hon. Dennis Waweru, it is clear that the two engaged the IEBC as promoters as ***individuals*** and were not representing any entity including the President. Therefore, it is evident they and not the President, were the promoters of the Amendment Bill which they submitted, a document completely distinctive from that of the BBI Steering Committee draft Bill.

[1229] As I conclude on this issue, I fault the superior courts for making declarations of unconstitutionality without specifically itemizing the Article of the Constitution that was denied, violated or infringed, or threatened. For instance, the superior courts found the BBI process of initiating amendments to the

Constitution unconstitutional. Which specific article of the Constitution it offended or threatened is still unclear. The superior courts should have dissected this issue to specific actions that were taken against the constitutional provisions against which they could be measured. Instead, it would appear that the focus was on actions, actors and processes which are not within the constitutional ambit and in particular not under Article 257 of the Constitution.

[1230] In summary, my finding on this issue is that the President did not "initiate" the amendment process in dispute, he was not a promoter of the popular initiative under the terms of Article 257 of the Constitution.

Issue three: Is the Second Schedule to the Constitution of Kenya (Amendment) Bill, 2020 unconstitutional?

[1231] Before ascertaining the unconstitutionality of the Second Schedule to the Amendment Bill, ***it is important to interrogate the legal standing of the impugned Bill.***

[1232] The ***Black's Law Dictionary***, 11th Edition defines a 'Bill' as *"**a legislative proposal offered for debate before its enactment**."*

[1233] According to the ***Black's Law Dictionary***, 11th Edition the term 'law' is defined as:

> "*The aggregate of legislation, judicial precedents, and accepted legal principles; the body of authoritative grounds of judicial and administrative action, body of rules, standards and principles that the courts of a particular jurisdiction apply in deciding controversies before them, the law of the land."*

[1234] Further, the ***Black's Law Dictionary***, 11th Edition defines ***statutory law*** as:

*"**the body of law derived from statutes rather than from constitutions or judicial decisions. Also termed statute law, legislative law or ordinary law**."*

[1235] Article 109 (1) of the Constitution provides as follows:

"***Parliament shall exercise its legislative power through Bills passed by Parliament and assented to by the President.***"

In addition, Article 116 of the Constitution provides that:

"116. Coming into force of laws

"(1) A Bill passed by Parliament and assented to by the President shall be published in the Gazette as an Act of Parliament within seven days after-assent.

(2) Subject to clause (3), an Act of Parliament comes into force on the fourteenth day after its publication in the Gazette, unless the Act stipulates a different date on or time at which it will come into force.

(3) An Act of Parliament that confers a direct pecuniary interest on members of Parliament shall not come into force until after the next general election of members of Parliament.

(4) Clause (3) does not apply to an interest that members of Parliament have as members of the public."

[1236] Accordingly, a Bill does not become law until it is passed by the Legislature and the President completes the legislative process by formally assenting or giving his consent to the Bill. The Bill is then published in the Gazette

as an Act of Parliament and acquires the force of law as provided for under Article 116 of the Constitution as reproduced above.

[1237] I recognize that Article 2(4) of the Constitution provides that any law, including customary law, that is inconsistent with the Constitution, is void to the extent of the inconsistency.

[1238] Further, Article 165(2) (d) (i) of the Constitution clothes the High Court with "*jurisdiction to hear any question respecting the interpretation of this Constitution including the determination of the* ***question of whether any law*** *is inconsistent with or in contravention of the Constitution*" [emphasis added].

[1239] Articles 2(4) and 165(2) (d) (i) of the Constitution contemplate scenarios where *laws* are unconstitutional they can be declared such. The Constitution does not provide for pre-enactment mechanisms to determine whether a Bill is constitutional or not. There are other jurisdictions that allow for this, for example, the Constitution of South Africa allows for the referral of Bills to the Constitutional Court for interrogation on their constitutionality before enactment. However, here in Kenya there is no such provision.

[1240] In the instant matter, the learned Judges of the Court of Appeal (with *Sichale, J.A* dissenting) declared the Second Schedule of the Amendment Bill, unconstitutional *inter alia* that it purports to predetermine the allocation of the proposed additional seventy constituencies; and direct IEBC on its function of constituency delimitation.

[1241] Considering that the Amendment Bill had not been promulgated into law, I fault the superior courts' finding on the basis that they did not have jurisdiction to interrogate the constitutionality of the impugned Bill before being passed into law. I reiterate that it is only after a Bill has been enacted and attained the status of 'law' that the courts acquire jurisdiction to entertain the same. Before a Bill is

enacted into law or an Act of Parliament, the courts do not have jurisdiction to determine the same for *lack of ripeness*.

[1242] The ***Black's Law Dictionary*** 9th Edition, defines the term *ripeness* as the *state of a dispute that has reached but has not passed*, *the point when the facts have developed sufficiently to permit an intelligent and useful decision to be made*. This state of ripeness must be reached before a court can decide a controversy.

[1243] In ***Abbott Laboratories v. Gardner***, 387 U.S. 136, 148-49 (1967), which I find persuasive, it was stated that the rationale for the doctrine of ripeness is to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties.

[1244] Having found that the courts below us did not have jurisdiction to determine the constitutionality of the Second Schedule to the Amendment Bill, for lack of ripeness, what of the Supreme Court? Can it proceed to address the same? If yes, under what circumstances?

[1245] In ***Lemanken Aramat v. Harun Meitamei Lempaka & 2 others***, SC. Petition No. 5 of 2014; [2014] eKLR, (***the Aramat Case***) this Court had the following to say concerning its jurisdiction:

> ***"[102]*** *The Supreme Court's jurisdiction in relation to electoral disputes is, in our opinion, broader than that of the other superior courts. We note in this regard that while the Court of Appeal's jurisdiction is based on Section 85A of the Elections Act, with its prescribed timelines,* ***that of the Supreme Court is broader and is founded on the generic empowerment of Article 163 of the***

Constitution, which confers an unlimited competence for the interpretation and application of the Constitution; and this, read alongside the Supreme Court Act, 2011 (Act No. 7 of 2011) illuminates the greater charge that is reposed in the Supreme Court, for determining questions of a constitutional character.

[104] *The foregoing example can only be additional to the jurisdictional competence of this Supreme Court. As already noted,* ***Article 163(7) of the Constitution has specially empowered this Court to give stewardship to the terms of the Constitution, in particular that charter's safeguards for individual rights, and for the scheme of just redress to all matters in dispute.*** *The Constitution's prescription is carried further in the Supreme Court Act, 2011 which requires this Court* ***to "assert the supremacy of the Constitution and the sovereignty of the people of Kenya" [Section 3(a)]; to "provide authoritative and impartial interpretation of the Constitution" [Section 3(b)]; and to "develop rich jurisprudence that respects Kenya's history and traditions and facilitates its social, economic and political growth" [Section 3(c)].***

[105] *The Constitution, by Article 259(1)(c), requires such interpretation of it as "permits the development of the law."* ***The Supreme Court's unconstrained mandate, no doubt, will provide the requisite condition for such interpretation"*** [emphasis added].

[1246] In ***Re the Speaker of the Senate & Another v. Attorney-General & Four Others***, SC. Advisory Opinion No. 2 of 2013; [2013] eKLR ***(Re the Speaker of the Senate Case)*** para. 156 this Court stated as follows:

> ***"Each matter that comes [up] before the Court must be seized upon as an opportunity to provide high-yielding interpretive guidance on the Constitution; and this must be done in a manner that advances its purposes, gives effect to its intents, and illuminates its contents.... [Constitution-making] does not end with its promulgation; it continues with its interpretation. It is the duty of the Court to*** *illuminate legal penumbras that constitutions borne out of long-drawn compromises, such as ours, tend to create"* [emphasis added].

[1247] This Court underscored that the aim of judicial processes is to ensure predictability, certainty, uniformity, and stability in the application of the law. This was reiterated in ***Jasbir Singh Rai & 3 Others v Tarlochan Singh Rai Estate of & 4 Others***, SC. Petition No. 4 of 2012; [2013] eKLR, ***(the Jasbir Case)*** in which the following passage appears para. 42:

> ***"The immediate pragmatic purpose of such an orientation of the judicial process is to ensure predictability, certainty, uniformity and stability in the application of law. Such institutionalization of the play of the law gives scope for regularity in the governance of commercial and contractual transactions in particular, though the same scheme marks also other spheres of social and economic relations."***

[1248] Also, in the same case the concurring opinion of *Mutunga, CJ & P* (Rtd.) para. 81 states:

> *"...**I suggest that going forward it will be good practice for this Court to take every opportunity a matter affords it to pronounce on the interpretation of a constitutional issue that is argued either substantively or tangentially by the parties before it**."*

[1249] In light of this Court's decisions as reproduced above, it is my view that the issue before us is one that cannot be ignored. The Court will determine this issue by applying a two-pronged test on the ripeness issue. First, this Court must evaluate the fitness of the issue for judicial determination; and second, assess the hardship to the parties or the general public if judicial relief is denied at this stage. In other words, is this the kind of question that can only be determined when ripe without occasioning any hardships to the parties or the general public?

[1250] According to Sean Croston in ***"The Petition is Mightier than the Sword: Rediscovering an Old Weapon in the Battles Over 'Regulation through Guidance"*** (2011), the fitness of an issue depends on 'whether judicial intervention would inappropriately interfere with a further administrative action, and whether the courts would benefit from the factual development of the issues presented. In other words, is the issue presented a purely legal one?

[1251] Similarly, Prof. Lu Chunsheng ***"Alaica v Ridge: Is Real Controversy an Element of the Ripeness Doctrine"*** (2002) posits that courts consider several factors in determining whether the fitness requirement of the ripeness test is met. First, is whether the issues involved are legal issues, and second, whether the action at issue constitutes 'a final agency action', a concept usually referred to as finality. On the other hand, the hardship element of ripeness focuses on the practical effect of the agency action and essentially involves balancing of interests involved.

[1252] I take note that the constitutionality of the Second Schedule to the Amendment Bill, is a purely legal question that could apply in many situations, and

therefore, not limited to the specific facts of this case. As such, this issue is appropriate for judicial resolution by this Court. I also recognize that the Constitution is subject to future amendments by Parliamentarians and promoters in view of Articles 256 and 257 of the Constitution. Flowing from the above, it is my finding that the issue of the constitutionality of the Second Schedule to the Amendment Bill meets both the fitness and hardship tests, considering that there is a risk of amendments of substantive provisions of the Constitution being made through a schedule. Therefore, it is pertinent for this Court, being the apex Court, to address the issue.

[1253] I find it necessary to emphasize that this intervention, that of determining an issue that is not ripe, should only be applied by this Court as the apex Court and within the above test.

[1254] Now turning to the issue at hand, I have perused the Second Schedule to the Amendment Bill and note that the implementation of the same would result in amendments to Article 89(2), (3), (4), (5), (6), (7), and (8). However, the actual body of the Amendment Bill itself, although it makes proposed amendments to Article 89(1), does *not* propose the above-stated substantive sub-articles 2 to 8.

[1255] Assuming then that the Amendment Bill was enacted into law, can the said schedule amend an Article of the Constitution?

[1256] The UK Court of Appeal decision in ***R (Maughan) v. Her Majesty's Senior Coroner for Oxfordshire*** [2020] UKSC 46, [2020] 3 WLR1298, Lady Arden observed as follows:

> "*44.* ***It would, moreover, be contrary to drafting conventions for a schedule to the Rules to be used to make what would clearly be a change of some consequence in the law****. Lord Thring, the first Head of the Office of Parliamentary Counsel, states in his Practical Legislation (1877) that:*

As to Schedules - Great care should be taken in the preparation of schedules. It is desirable to include in a schedule matters of detail; ***it is improper to put in a schedule matters of principle****. The drawing [of] the proper line of demarcation between the two classes of matters is often difficult. All that can be said is that* ***nothing should be placed in a schedule to which the attention of Parliament should be particularly directed****; for example, the constitution of an electoral or financial body of persons should be found in the body of the Act; but the mode of conducting the election of the electoral body, and the rules as to proceedings at meetings of the financial body, may not improperly be placed in a schedule"* [emphasis added].

[1257] Flowing from the above, I am persuaded that the Second Schedule to the Amendment Bill even if it were to be enacted into law, cannot amend Article 89 of the Constitution. It would be contrary to the drafting conventions if a schedule to the Constitution were to propose an amendment to a substantive article of the Constitution. In order for the Second Schedule to be constitutionally sound there ought to be substantive amendments to Article 89 (2) (3) (4) (5) (6) (7) and (8) of the Constitution. Therefore, the Second Schedule to the Amendment Bill, is in violation of the Constitution, as it conflicts with the substantive provisions of Article 89 of the Constitution and cannot purport to amend the same.

Issue four: Can the President be sued for performing the functions of his Office?

[1258] With regard to the protection of the President from legal proceedings, Article 143 of the Constitution is instructive, and provides as follows:

"Article 143. Protection from legal proceedings

(1) Criminal proceedings shall not be instituted or continued in any court against the President or a person performing the functions of that office, during their tenure of office.

(2) Civil proceedings shall not be instituted in any court against the President or the person performing the functions of that office during their tenure of office in respect of anything done or not done in the exercise of their powers under this Constitution.

(3) Where provision is made in law limiting the time within which proceedings under clause (1) or (2) may be brought against a person, a period of time during which the person holds or performs the functions of the office of the President shall not be taken into account in calculating the period of time prescribed by that law.

(4) The immunity of the President under this Article shall not extend to a crime for which the President may be prosecuted under any treaty to which Kenya is party and which prohibits such immunity."

[1259] According to Prof. Dapo Akande *et al,* **in *'Immunities of State Officials, International Crimes and Foreign Domestic Courts',*** *The European Journal of International Law,* 2011, a president's immunity falls under the category of immunity known functional immunity (*ratione materiae)* which applies to acts performed in an official capacity, and continues to apply even once the official has left office. I am of the opinion that the rationale for presidential immunity comes from the enormous responsibility bestowed upon a president as the sole source of executive power. Therefore, immunity from legal proceedings is

designed to permit a President to discharge his obligations with as much autonomy as possible without anxiety that court proceedings are probable to disturb, humiliate, or encumber him from focusing on his duties. This protection is also envisioned to shield the dignity of the office of a President and not him personally. Particularly, because he makes far-reaching and sensitive decisions.

[1260] Jurisprudence on this issue from the United States is also persuasive. In the case of ***Nixon v. Fitzgerald***, 457 U.S. 731 (1982), the US Supreme Court expressed itself as follows:

> ***"2. Petitioner, as a former President of the United States, is entitled to absolute immunity from damages liability predicated on his official acts. Pp. 744-758***
>
> > ***(a) Although there is no blanket recognition of absolute immunity for all federal executive officials from liability for civil damages resulting from constitutional violations, certain officials—such as judges and prosecutors—because of the special nature of their responsibilities, require absolute exemption from liability...***
> >
> > ***(b) The President's absolute immunity is a functionally mandated incident of his unique office, rooted in the constitutional tradition of the separation of powers and supported by the Nation's history. Because of the singular importance of the President's duties, diversion of his energies by concern with private lawsuits would raise unique risks to the effective functioning of government. While the separation-of-powers doctrine does not bar every exercise of jurisdiction over the President, a***

court, before exercising jurisdiction, must balance the constitutional weight of the interest to be served against the dangers of intrusion on the authority and functions of the Executive Branch. The exercise of jurisdiction is not warranted in the case of merely private suits for damages based on a President's official acts. Pp. 748-754.

(c) The President's absolute immunity extends to all acts within the "outer perimeter" of his duties of office. Pp.755-757

(d) A rule of absolute immunity for the President does not leave the Nation without sufficient protection against his misconduct. *There remains the constitutional remedy of impeachment, as well as the deterrent effects of constant scrutiny by the press and vigilant oversight by Congress. Other incentives to avoid misconduct may include a desire to earn reelection, the need to maintain prestige as an element of Presidential influence, and a President's traditional concern for his historical stature…"* [emphasis added].

[1261] In my view, presidential immunity can be compared to that of judges. This Court expressed itself with regard to judges' immunity in the case of ***Bellevue Development Company Ltd v. Francis Gikonyo & 3 Others***, SC. Petition No. 42 of 2018; [2020] eKLR. It said that it would be repugnant to the cause of justice if judges would always act in fear of legal actions being brought against them for decisions they make in the course of discharging their mandate. The essence of judicial immunity is to ***protect the reputation and perception of the Judiciary, to maintain the trust of the public and ensure transparency and accountability***. This does not mean that a party alleging misconduct has no remedy.

[1262] On the recourse available to a party aggrieved by an unlawful act or omission of a Judge or a judicial officer, the Court concluded that such a party may trigger proceedings before the Judicial Service Commission, and may ultimately, lead to his or her removal, hence the need for extreme care in the enjoyment of immunity.

[1263] Now coming to the issue at hand, I have considered the parties' pleadings as well as their submissions and it is obvious that the point of divergence is whether the President is immune from *constitutional violations* during his tenure in office. Pursuant to Article 143(2) of the Constitution, civil proceedings shall not be instituted in any court against the President or the person performing the functions of that office '*during their tenure of office in respect of anything done or not done in the exercise of their powers under this Constitution*'.

[1264] So then, were the President's actions in this instance done in the exercise of his constitutional duty? What were these actions? The respondents submitted that the President played a role in initiating amendments to the Constitution via a popular initiative, thereby contravening the Constitution. It is not contested that vide Gazette Notice No. 5154 of 2018, the President appointed the **BBI Taskforce** whose terms of reference, in part, were to:

a. *evaluate the national challenges outlined in the Joint Communiqué of BBI to a new Kenyan Nation, and having done so, make practical recommendations and reform proposals that build lasting unity;*
b. *outline the policy, administrative reform proposals, and implementation modalities for each identified challenge area; and*
c. *conduct consultations with citizens, the faith-based sector, cultural leaders, the private sector, and experts at both the county and national levels.*

[1265] From the record, the President vide Gazette Notice No. 264 dated 3rd January 2020, and published in a special issue of the Kenya Gazette dated 10th

January 2020, appointed the BBI Steering Committee. Its mandate was, first, to conduct validation of the BBI Taskforce Report through consultations with citizens, civil society, faith-based organizations, cultural leaders, the private sectors, and experts. Second, it was to propose administrative, policy, statutory or constitutional changes necessary for the implementation of the recommendations contained in the BBI Taskforce Report, and considering any relevant contributions made during the validation period. On 21st October 2020, the BBI Steering Committee presented its Report, recommending various constitutional, legislative, policy and administrative measures. In its' Annex B, was a document titled BBI Steering Committee draft Bill.

[1266] The President has a unique position in the constitutional scheme. As already discussed above in issue number two, Article 131(2) of the Constitution provides that the President has a duty to; respect, uphold and safeguard the Constitution and the sovereignty of the people of the Republic; *promote and enhance the unity of the nation*; promote respect for the diversity of the people and communities of Kenya; and ensure the protection of human rights and fundamental freedoms and the rule of law. In addition, Article 132(1)(c)(i) mandates the President to, once every year, report in an address to the nation, on all measures taken and the progress achieved in the realization of the national values, referred to in Article 10. In that context, Article 10(2) of the Constitution lists the national values and principles of governance to include, among others, national unity. The President has the constitutional duty to adhere to, promote and protect the Constitution. Therefore, it is my position that if the President moves constitutional amendments as a measure under Article 132(1)(c)(i), it lies squarely within his constitutional functions.

[1267] Consequently, it is my finding that the President, in appointing the BBI Taskforce and the BBI Steering Committee, was discharging his constitutional mandate of *promoting and enhancing the unity of the nation.* For that reason,

there was no basis for concluding that the President's actions contravened the Constitution to deprive him of the immunity provided for under Article 143 of the Constitution. Further, there was no evidence tabled before the trial court to dispute that his actions were not within the four corners of his constitutional mandate of promoting and uniting the country. In my opinion, Article 131 of the Constitution does not specifically prescribe the mode the President can adopt to achieve his constitutional mandate. Therefore, the President's actions or omissions in this instance, entitled him to functional immunity as provided for under Article 143 of the Constitution of Kenya, 2010.

[1268] One may ask, what recourse is available to a party who is aggrieved by a president's actions or omissions that grossly violates the Constitution and is outside his constitutional function. Article 145 (1) provides that any member of the National Assembly, supported by at least a third of all the members, may move a motion for the impeachment of the President on the ground of a gross violation of a provision of the Constitution or any other law.

[1269] Towards that end, I fault the conclusion of the superior courts below that the immunity extended to the President by virtue of his office was not absolute. I particularly disagree with *Tuiyott, J.A*, in his conclusion that Article 143(2) leaves it open for the President to still be held personally accountable, once out of office, for any act or omission done or not done while in office.

[1270] Consequently, it is my finding that the President's actions or omissions in this instance, entitled him to immunity as provided for under Article 143 of the Constitution of Kenya, 2010.

Issue five: Was there public participation with respect of the Constitution of Kenya (Amendment) Bill, 2020?

[1271] In the present appeal, the bone of contention is whether public participation took place under the parameters of Article 257 of the Constitution. Article 10 of the Constitution provides that **State Organs, State Officers, Public Officers**, and **all persons** applying or interpreting the Constitution; enacting, applying or interpreting any law; and making or implementing public policy decisions must ensure participation of the people.

[1272] The importance of public participation was emphasized by this Court in the case of ***Communications Commission of Kenya & 5 others v. Royal Media Services Limited & 5 others***, SC Petition No. 14 of 2014 as consolidated with Petition Nos. 14A, 14B and 14C OF 2014; [2014] eKLR. The Court stated *inter alia*:

> *"[379] ...Public participation is the cornerstone of sustainable development and it is so provided in the Constitution...*
>
> *[381]* ***Public participation*** *calls for the appreciation by State, Government and all stakeholders implicated in this appeal that the Kenyan citizenry is adult enough to understand what its rights are under Article 34. In the cases of establishment, licensing, promotion and protection of media freedom, public participation ensures that private "sweet heart" deals, secret contracting processes, skewed sharing of benefits-generally a contract and investment regime enveloped in non-disclosure, do not happen. Thus, threats to both political stability and sustainable development are nipped in the bud by public participation. Indeed, if they did the word and spirit of the Constitution would both be subverted"* [emphasis added].

[1273] More recently this Court, in the case of ***British American Tobacco Kenya, PLC (formerly British American Tobacco Kenya Limited) v. Cabinet Secretary for the Ministry of Health & 2 others; Kenya Tobacco Control Alliance & another (Interested Parties);Mastermind***

Tobacco Kenya Limited (The Affected Party), SC. Petition No. 5 of 2017; [2019] eKLR ***(the BAT Case),*** emphasized that public participation and consultation is a living constitutional principle that goes to the tenet of the sovereignty of the people and set guiding principles on the same as follows:

> ***"[96] From the foregoing analysis, we would like to underscore that public participation and consultation is a living constitutional principle that goes to the constitutional tenet of the sovereignty of the people. It is through public participation that the people continue to find their sovereign place in the governance they have delegated to both the National and County Governments. Consequently, while Courts have pronounced themselves on this issue, in line with this Court's mandate under Section 3 of the Supreme Court Act, we would like to delimit the following framework for public participation:***
>
> ***<u>Guiding Principles for public participation</u>***
>
> ***(i) As a constitutional principle under Article 10(2) of the Constitution, public participation applies to all aspects of governance.***
>
> ***(ii) The public officer and or entity charged with the performance of a particular duty bears the onus of ensuring and facilitating public participation.***
>
> ***(iii) The lack of a prescribed legal framework for public participation is no excuse for not conducting public participation; the onus is on the public entity to give effect to this constitutional principle using reasonable means.***

(iv) Public participation must be real and not illusory. It is not a cosmetic or a public relations act. It is not a mere formality to be undertaken as a matter of course just to 'fulfill' a constitutional requirement. There is need for both quantitative and qualitative components in public participation.

(v) Public participation is not an abstract notion; it must be purposive and meaningful.

(vi) Public participation must be accompanied by reasonable notice and reasonable opportunity. Reasonableness will be determined on a case-to-case basis.

(vii) Public participation is not necessarily a process consisting of oral hearings, written submissions can also be made. The fact that someone was not heard is not enough to annul the process.

(viii) Allegation of lack of public participation does not automatically vitiate the process. The allegations must be considered within the peculiar circumstances of each case: the mode, degree, scope and extent of public participation is to be determined on a case-to-case basis.

(ix) Components of meaningful public participation include the following:

- ***a. clarity of the subject matter for the public to understand;***
- ***b. structures and processes (medium of engagement) of participation that are clear and simple;***

c. opportunity for balanced influence from the public in general;

d. commitment to the process;

e. inclusive and effective representation;

f. integrity and transparency of the process;

g. capacity to engage on the part of the public, including that the public must be first sensitized on the subject matter."

[1274] To determine whether the Amendment Bill was subjected to public participation within the parameters of Article 257 of the Constitution, we need to examine the steps and inbuilt mechanisms that are provided for therein. In my opinion, the steps are; the submission of the Bill and the minimum one million signatures of registered voters, and verification of signatures by IEBC; consideration by the County Assemblies; consideration by the two Houses of Parliament; and referendum. These inbuilt mechanisms are found under different provisions of the Constitution, the relevant Statutes, and Parliament and County Assembly Standing Orders as will be demonstrated herein below.

[1275] Concerning the first step, Mr. Morara Omoke in his oral submissions urged that upon publication of the Amendment Bill on 25th November, 2020 the promoters ought to have conducted public participation prior to collection of signatures. Further that, IEBC should to have satisfied themselves that there was public participation during collection of signatures. On this, it is my finding that ***collection of signatures is not a constitutional process*** under Chapter Sixteen of the Constitution on amendment of the Constitution, and that the promoters were under no obligation to conduct public participation prior to collection of signatures.

[1276] In order to assess whether public participation has been conducted in accordance with a specific provision of the Constitution, the test which a court ought to apply is against that particular provision. To my mind, Article 257 of the Constitution does not *first,* provide for collection of signatures but submission of a Bill with at least one million signatures. This in my opinion is the first step towards amendment of the Constitution through a popular initiative. Second, it does not make provision for public participation during collection of signatures. Having found that Article 257 of the Constitution does not expressly provide for public participation during collection of signatures, the standard to apply when assessing the same if any, will be lower than when the law expressly provides for public participation.

[1277] As such, I am unable to agree with the Court of Appeal's (*Musinga, (P),* and *Okwengu, JJ.A)* finding that there was a constitutional requirement to conduct public civic education at the point of collection of signatures. I cannot also concur with learned *Nambuye, J.A*'s finding that there was need to give the public, BBI Taskforce Report, the BBI Steering Committee Report, and the impugned Bill in Kiswahili, indigenous languages, braille and sign language before the referendum. With regard to *Kiage, J.A's* finding that the promoters had a duty to sensitize the public with candor and disclosure as opposed to full broadcast in all languages to all voters *before collection of signatures*, I disagree with his finding for two reasons; the Constitution is silent as to whether the promoters must conduct public participation *prior to collection of signatures*, and that putting such a burdensome requirement will discourage prospective promoters from advancing constitutional amendments.

[1278] With regard to *Gatembu, J.A*'s finding, I fault his conclusion that, the constitutional amendment process was driven by the State on the ground that the BBI Taskforce and the BBI Steering Committee were appointed by the President through Gazette Notices. As I have found above, the constitutional amendment

process commences with submission of signatures and the Bill to IEBC. Therefore, anything that may have happened prior, is *outside of* the process set out under Article 257 of the Constitution.

[1279] Having found that the constitutional amendment process commences with submission of signatures together with the Bill to IEBC and that the Constitution is silent on the pre-Bill procedures, it is my considered opinion that the promoters were not required to undertake public participation at this juncture. This notwithstanding, was there public participation during the collection of signatures? Or rather is collection of signatures a form of public participation in itself? In the instant case, when evaluating whether public participation was conducted under Article 257 of the Constitution, the standard that I will apply, as found above for the processes that happened before the collection of signatures, will be lower as there is no law providing for the same.

[1280] It is my considered view that the minimum one million signatures required under Clause 1 of Article 257 are in support of a draft Bill to amend the Constitution through a popular initiative. That is why Article 257(4) reads as follows; *"The promoters of a popular initiative shall deliver the draft Bill and the* ***supporting signatures*** *to the Independent Electoral and Boundaries Commission, which shall verify that the initiative is 'supported' by at least one million registered voters."*

[1281] To '**support,'** under the ***Black's Law Dictionary***, is to **vindicate**, **to maintain**, **to defend**, to **uphold with aid** or **countenance.** In other words, it is to promote the interest or cause of, to argue or vote for, or to provide with substantiation or corroboration. This, in my opinion, is what a supporter does to a draft Bill to amend the Constitution through a popular initiative.

[1282] Coming to the question at hand, can a supporter or a registered voter "support" a draft proposal to amend the Constitution without comprehending its contents? I don't think so. The support being referred to under Article 257 is

demonstrated by way of a signature. A signature, under the ***Black's Law Dictionary***, 11th Edition is defined as a person's name or mark written by that person, or at the person's direction; especially, one's handwritten name as one ordinarily writes it, as at the end of a letter, or a cheque, to show that one has written it. It also means any name, mark, or writing used with the intention of authenticating a document.

[1283] From the foregoing, it is my presumption that before a supporter signs in support of a draft Bill to amend the Constitution, such a supporter must have read, understood, and agreed to the proposed amendments; asked questions about any unclear proposal; and taken a decision to be bound by his or her signature. It therefore goes without saying, that a promoter, before urging for support of his proposal to have the Constitution amended supported by at least one million signatures, must talk to the people, make his or her draft Bill understood by the people, before they could agree to support it.

[1284] As such, I disagree with the superior courts conclusion that there was no public participation during the collection of signatures. From the record, no evidence was tendered to support the allegations that public participation was not conducted during collection of signatures. In the absence of such evidence or a formal complaint from any of the signatories of the Amendment Bill that they did not understand what they were signing, I am constrained to find that indeed there was public participation during collection of signatures.

[1285] The next step in a constitutional amendment through a popular initiative is consideration of the Bill at the County Assemblies. So, was there public participation at the County Assemblies? Once IEBC is satisfied that the initiative meets the requirements of Article 257, it submits the draft Bill to each County Assembly for consideration within three months after the date it was submitted by the Commission. This period in my opinion is reasonable since a County Assembly is to facilitate public participation within its jurisdiction unlike Parliament which

ought to ensure public participation takes place nationally. However, I note that Article 257 is silent on the mode, scope and extent of public participation at the County Assemblies.

[1286] Article 196(1)(b) of the Constitution provides as follows:

> ***"Article 196. Public participation and County Assembly powers, priviledges and immunities***
>
> ***(1) A county assembly shall—***
>
> ***...***
>
> ***(b)Facilitate public participation and involvement in the legislative and other business of the assembly and its committees."***

[1287] Under the County Governments Act, the word "public" when used in relation to public participation means: *the residents of a particular county; the rate payers of a particular city or municipality; any resident civic organization or non-governmental, private sector or labour organization with an interest in the governance of a particular county, city or municipality; or non-resident person who because of their temporary presence in a particular county, city and municipality*. One of the objectives and purpose of the Act under Section 3, is to provide for public participation in the conduct of the activities of the County Assembly as required under Article 196 of the Constitution.

[1288] I take judicial notice that in compliance with the Constitution and the County Governments Act, County Assemblies have Standing Orders with set guidelines on public participation. In that regard, a Bill in a County Assembly, having been read for the first time is committed to the relevant Sectoral Committee which then takes into account the views and recommendations of the public before it reports back to the County Assembly.

[1289] Having perused the record, it is my conclusion that none of the petitioners before the High Court specifically alleged that any of the County Assemblies failed to conduct public participation as provided for by the law. Furthermore, there was no evidence provided that the processes for public participation as provided for under the law did not take place at the County Assemblies. Accordingly, I find that there was public participation at the County Assemblies.

[1290] The subsequent step in a constitutional amendment process under Article 257 (6) is at the two Houses of Parliament. Then, under Article 257 (8) of the Constitution, a Bill is passed if supported by a majority of the members of each House. Again, just like at the County Assembly level, there is no express requirement for public participation under this Article.

[1291] However, Article 118(1)(b) of the Constitution *requires Parliament to facilitate public participation and involvement in legislative and other business of Parliament and of its Committees. It further mandates Parliament to conduct its business in an open manner*. In this context, Parliament, in discharging its legislative duty under the Constitution, has established a framework to ensure that public participation takes place through sovereign power which can be exercised either directly through citizen participation, or indirectly through democratically elected leaders pursuant to Article 1(2) of the Constitution.

[1292] The Standing Orders of Parliament make provisions for the various stages of legislation to ensure adequate public participation takes place. When a Bill has been introduced in the House, and upon referral to the relevant Departmental Committee, first, the Committee advertises in the media a request for public views on the Bill. Second, it facilitates public participation on the Bill through appropriate mechanisms which include inviting submission of memoranda; holding public hearings; consulting relevant stake holders; and consulting experts on technical subjects. The Committee also considers the views and

recommendations of the public while considering the Bill and while preparing its report to the House.

[1293] Additionally**,** Parliament allows the public to engage it and give their views orally or in writing through: petitions as provided for under Article 119 of the Constitution, where the public can petition Parliament on any matter under its authority including enacting, amending or repealing legislation. The public can also engage Parliament through submissions or memoranda. When the National Assembly for instance, is considering Bills, statutory instruments, budget estimates or conducting an inquiry, the general public may make submissions on the subject matters. Likewise, the public may reach Parliament through public forums that is, face to face engagement between members of Parliament and the citizens. In such forums, Parliament can get feedback and observations of State affairs. Committees can also undertake public hearings through meetings in and outside Parliament. Members of the public are allowed to attend Committee meetings.

[1294] From the foregoing analysis, the law anticipates that Parliament shall facilitate public participation at various stages in the lawmaking process. I reiterate my finding elsewhere in this Judgment, that no person complained that their right to participate in the public affairs to wit, Amendment Bill was violated. If any person was aggrieved that Parliament did not conduct public participation, then their pleadings ought to have been specific on it. No evidence was also tendered to prove that Parliament did *not* conduct public participation.

[1295] Therefore, it is my finding that there was public participation at the two Houses of Parliament. Consequently, I fault any contrary finding of the High Court and the Court of Appeal.

Public participation at the referendum stage

[1296] The final step in assessing public participation under Article 257, is at the referendum stage. If either House of Parliament fails to pass the Bill, or the Bill relates to a matter specified in Article 255(1), the proposed amendment shall be submitted to the people in a referendum. Under Article 255(1), if a Bill proposes an amendment relating to a matter specified therein, the President shall before assenting to the Bill, ***request the IEBC to conduct, within 90 days, a national referendum for approval of the Bill.***

[1297] According to Article 88(4) of the Constitution, IEBC is responsible for conducting referenda and elections to an elective body or office established under the Constitution, and any other elections as prescribed by an Act of Parliament. It is also responsible for among other duties, conducting ***voter education pursuant to Article 88(4)(g).*** At Section 40 of the Elections Act, IEBC has the responsibility for continuous voter education and preparation of a voter education curriculum. From the foregoing analysis, it is my finding that it is at the referendum stage that IEBC is required to conduct public participation through voter education. Considering that the President was yet to refer the Amendment Bill to IEBC to conduct a referendum, the question of public participation on the part of IEBC was not ripe for determination. Therefore, the superior courts ought not to have entertained this issue.

[1298] In ***the BAT Case***, one of the principles set out on public participation is that *"allegation of lack of public participation does not automatically vitiate the process. The allegations must be considered within the peculiar circumstances of each case: the mode, degree, scope and extent of public participation is to be determined on a case-to-case basis."* I add that, in case of a proposal to amend the Constitution, a person alleging the lack of public participation ***must specify the stage of the amendment process*** he or she feels there was lack of public participation.

[1299] Lastly, on this question of public participation, I believe that it is time for the Legislature to urgently provide for the parameters of public participation. I recommend that it does so through an enabling statutory framework. Such legislation will provide precision and clarity of the various processes involved and address issues like the mode, extent, stages, proof of public participation; lay out the responsibilities of who conducts public participation and when; and how it is to be funded at its various stages.

Issue six: Does IEBC have the requisite quorum to conduct business?

[1300] In addressing this question two issues fall for determination. First, the composition of IEBC and second, the quorum of IEBC. I will address them sequentially.

Composition of IEBC.

[1301] Article 88 (1) and (5) of the Constitution provides:

> ***"Article 88. Independent Electoral and Boundaries Commission***
>
> ***(1) There is established the Independent Electoral and Boundaries Commission.***
>
> ***...***
>
> ***(5) The Commission shall exercise its powers and perform its functions in accordance with this Constitution and national legislation."***

[1302] Article 250(1) of the Constitution states that:

> ***"250. Composition, appointment and terms of office***

(1) Each commission shall consist of at least three, but not more than nine, members."

[1303] The ***Oxford Advanced Learner's Dictionary,*** 9th Edition defines the word 'composition' as: *"the different parts which something is made up."* On the other hand, the term consist means to be formed from the people or things. From the definitions of the terms *'composition'* and *'consist'*, it is clear that IEBC as a Commission envisaged under Article 250 of the Constitution, should have a minimum of three and a maximum of nine Commissioners. The Constitution does not provide a constant number of Commissioners required in some of the Commissions but gives a range that is acceptable to it, thereby giving a leeway for any number of Commissioners as long as the range provided is adhered to. Therefore, I find no fault in any legislation that gives a number of between three to nine Commissioners as is in the case of IEBC where the Act was amended to provide for seven commissioners, instead of nine as was initially provided for.

Quorum of the IEBC

[1304] I now turn to the issue of the quorum of IEBC to conduct its business. The ***Black's Law Dictionary*** 10th Edition defines quorum as the smallest number of people who must be present at a meeting so that official decisions can be made.

[1305] It is evident that in instances where the drafters of the Constitution intended to specify the quorum for conducting business of certain commissions or any other office(s) established by the Constitution, they did so. For instance, Article 163(1) of the Constitution establishes the Supreme Court consisting of the Chief Justice, Deputy Chief Justice and five other Judges. Sub-article 2 specifies the quorum of the Court to be five for the purpose of its proceedings. Similarly, the Constitution provides for both the composition and quorum of the National Assembly and the Senate. In that context, Articles 97 and 98 provides for the composition of the National Assembly and the Senate respectively. The quorum of

conducting business for both Houses of Parliament is specified as 50 members under Article 121 of the Constitution.

[1306] In my opinion, the composition of IEBC and other Commissions under Article 250 such as the Parliamentary Service Commission and the National Land Commission, is governed by Article 250(1). In the absence of a constitutional provision specifying their quorum, the Statutes that establish such Commissions stipulate the same. In the present case, the relevant Act of Parliament is the IEBC Act.

[1307] The Court of Appeal *(Musinga, (P), Gatembu, Nambuye, Kiage, Tuiyott JJ.A* with *Sichale, J.A dissenting)* found that IEBC did not have the requisite quorum for purposes of carrying out its business relating to the conduct of the proposed referendum, including the verification of signatures in line with Article 257(4) of the Constitution.

[1308] *Musinga, (P),* in agreeing with the High Court decision observed that:

> ***"[371] ...Parliament, well aware of the provisions of Article 250(1) of the Constitution, enacted the IEBC Act and stipulated that the Commission shall consist of a Chairperson and six other members. Appreciating the mandate of the Commission, Parliament fixed the quorum at five members.***
>
> ***[372] The resignation of the four Commissioners took place way back in 2017. It is unfathomable that for almost four years since then, the vacancies have not been filled. Section 7A (2) and (3) of the Act states as follows: - "(2) The President shall publish a notice of a vacancy in the Gazette within seven days of the occurrence of such vacancy. (3) Whenever a vacancy arises under subsection (1), the recruitment of a***

new chairperson or member, under this Act, shall commence immediately after the declaration of the vacancy by the President under subsection (2).”

[373] Parliament did not want vacancies in the Commission to remain for a long period of time. That is why the President is required to publish a notice of a vacancy within such a short period upon occurrence of such a vacancy.”

[1309] On its part, the High Court observed that as follows:

‘[‘714] In our view, the statute is clear: the IEBC requires five commissioners in order to conduct any business. The statute does not distinguish between “policy” and other business. We, therefore, respectfully depart from the holding in the Isaiah Bitwott Kangwony Case that the IEBC can conduct business other than making “policy decisions” when its membership is below the minimum five stipulated in paragraph 5 of the Second Schedule. The Petition No. E282 of 2020 (Consolidated). Page 286 statute requires the IEBC to have the minimum of five commissioners in order to conduct any business. Period.

…

[718] The Constitution placed the minimum number of commissioners of independent commissions at three and the highest number at nine members. Parliament, while appreciating the important mandate the IEBC discharges, picked a high number of seven commissioners to constitute it and placed its quorum at five members.”

[1310] Whereas I agree with the reasoning of the two superior courts that the minimum number of Commissioners be three and the highest number be nine, I disagree with their reasoning on quorum. To my mind, Article 250 (1) of the Constitution only limits itself to the composition of the Commissions. Therefore, as long as Parliament in formulating legislations adheres to the range given in the Constitution in coming up with the composition of Commissions, their actions or the resultant provision or legislation cannot be unconstitutional as it is not inconsistent with the Constitution. In the instant case, the amendment of Paragraph 5 of the Second Schedule is not unconstitutional as it is not inconsistent with any provision of the Constitution. It is my considered opinion, the two superior courts failed to effectively distinguish between composition and quorum thereby arriving at a wrong decision. These are two different concepts that should not be confused. I, therefore, find that Paragraph 5 of the Second Schedule of Independent Electoral and Boundaries Commission Act, 2011 (IEBC Act), as per the Election Laws (Amendment) Act No. 34 of 2017 is constitutional because it neither contravenes any provision of the Constitution nor is it inconsistent with the Constitution.

[1311] The above notwithstanding, it has been submitted that there are two conflicting decisions from the High Court on the quorum of IEBC. In the ***Katiba Institute & Another v. Attorney General & Another,*** Constitutional Petition No. 548 of 2017; [2018] eKLR ***(the Katiba Institute Case),*** Katiba Institute had instituted a petition in the High Court challenging *inter alia* Election Laws Amendment 2017 which amended Paragraphs 5 and 7 of the ***Second Schedule*** to the IEBC Act on the quorum of the Commission for purposes of meetings, making the quorum of the Commissioners to be half the members but not less than three members. Further the amendment provided that unless a unanimous decision is reached, a decision on a matter shall be decided by the majority of those Commissioners present and voting. On 6th April 2018, *Mwita, J.*

declared Paragraph 5 of the Second Schedule to the IEBC Act to be constitutionally invalid.

[1312] In ***Isaiah Biwott Kangwony v. Independent Electoral Boundaries Commission & Attorney General,*** Constitutional Petition No. 212 of 2018; [2018] ***(the Isaiah Biwott Case)***, the petitioner therein filed at the High Court a petition arguing that the composition of IEBC did not comply with the provisions of the Constitution and Sections (4), (5) and (7) of the Second Schedule of the IEBC Act. Therefore, IEBC lacked the requisite quorum to conduct any business and/or to undertake its constitutional mandate following resignation of four commissioners. Vide a Judgment delivered on 10th August 2018, *Okwany, J.* dismissed the petition on among other grounds, that the conduct of elections or by-elections is not a matter that arises out of the resolutions or decisions made by the Commissioners at a meeting. Further, that elections or by-elections are dictated by the operation of the law following a declaration of vacancies by the speakers in the elective positions that are the subject of the elections or by-elections.

[1313] In the instant case, at the High Court it was contended that IEBC was not properly constituted, therefore, it lacked the required quorum under the IEBC Act to consider and approve policy matters relating to the conduct of referenda.

[1314] Before this Court, IEBC argued that it had made decisions based on ***the Isaiah Biwott Case*** and that the decision remains an authoritative pronouncement and can only be overturned by an appellate court. In the instant matter, the High Court was faulted for overturning the finding in ***the Isaiah Biwott Case***. During oral submissions, Mr. Gumbo, learned Counsel for IEBC questioned the manner in which ***courts of coordinate jurisdiction deal with decisions emanating from within their ranks***. In other words, he queried whether the doctrine of *stare decisis* is binding horizontally on those courts that exercise coordinate jurisdiction. Counsel submitted that in Kenya, in relation to

public law questions, the *stare decisis* principle is binding on courts of coordinate jurisdiction.

[1315] He urged that only *Tuiyott, J.A* addressed the issue where the Judge observed that inconsistency in the pronouncement of courts in the area of public law confuses members of the public as to what the law is, and is a recipe for judicial anarchy and mayhem. He stated as follows:

> "***The importance of having consistency in the application of the law particularly, in matters touching on the public cannot be minimized. Both the public and the person or bodies charged with carrying out public functions should be able to tell without difficulty whether the actions or conduct passes legal or Constitutional threshold. To hold that a public body is properly and legally constituted today and to say otherwise the next day may not be good for public administration, so there is much to be gained in legal stability that is brought by stare decisis.***"

[1316] Concerning the case at hand, learned Counsel submitted that *Okwany, J.* found that the IEBC had the necessary constitutional capacity to discharge their duties in terms of quorum, a decision which was overturned by the High Court differently constituted. Counsel also submitted that in cases of conflicting decisions of courts of coordinate jurisdiction, this Court should borrow from the finding of ***R v. Sullivan,*** 2020 ONCA 333 (CanLII) where the Court of Appeal for Ontario observed that courts of concurrent jurisdiction are ordinarily bound by their decisions unless there is overwhelming persuasion that they would want to depart from that decision. Further, that the Attorney General and the public body in issue should be invited to be able to share their comment or their views in relation to that issue, then the later decision is supposed to await the outcome of an appeal.

[1317] In ***Holmes v. Jarrett, 1993*** CanLII 8479 the Ontario Superior Court observed as follows:

> *"There are different approaches about whether a judge is bound to follow the decision of another judge of the same court. A strict or authoritative approach is that the doctrine of stare decisis requires that a judge is required to apply the law as previously stated by his or her court. Although the authoritative approach provides certainty in the law, it is unnecessarily restrictive, particularly in situations where a previous decision was given without consideration of a statute or relevant case law. The least restrictive and more flexible approach was that judges ought to follow decisions out of judicial comity and only depart from them when they are wrong. The problem with this flexible approach was that it lacked criteria for determining when a previous decision was wrong.* ***Between these approaches lies the proposition that a previous decision should be followed unless there was some indication that the decision was given without consideration of the appropriate statute or that relevant case law was not considered.*** *The criteria did not exist in the present case and, as such, Despotopoulos v. Jackson was binding. Accordingly, the insurer's motion for summary judgment should be granted"* [emphasis added].

[1318] In ***Re Hansard Spruce Mills Ltd***, 1954 CanLII 253 (BC SC), Justice Wilson of the Supreme Court of British Columbia stated:

> *"I have no power to override a brother judge. I can only differ from him, and the effect of my doing so is not to settle but rather to unsettle the law, because, following such a difference of opinion, the unhappy*

litigant is confronted with conflicting opinions emanating from the same Court and therefore of the same legal weight."

[1319] *Justice Rowe et al 'A Practical Guide to Stare Decisis'* (2020), observed that trial court judges ordinarily follow decisions of other judges from the same court, absent compelling reasons to the contrary. He suggested that there are three exceptions as to when a judge need not follow a decision of a judge in the same court, namely: the authority of the prior decision has been undermined by subsequent decisions; where the decision was reached without considering a relevant statute or binding authority *(per incuriam*); and where the exigencies of the trial require an immediate decision without opportunity to fully consult authority, and therefore the decision was not fully considered.

[1320] From the above, it is my considered view that even though horizontal *stare decisis* is not binding on courts of equal jurisdiction, trial court judges need to follow decision of other judges of the same court ***unless there are compelling reasons to depart from the same.*** This is to ensure consistency, certainty, predictability, and sound judicial administration. In this context, having found above that Paragraph 5 of the Second Schedule of IEBC Act as per the Election Laws Amendment 2017 is constitutional, it is my finding trial court in ***the Isaiah Biwott Case*** was justified to depart from ***the Katiba Institute Case***. Furthermore, in the present case, I am not persuaded that there existed compelling reasons to warrant the trial court, from departing from the decision in ***the Isaiah Biwott Case.***

[1321] The above finding notwithstanding, what is the effect of the declaration of unconstitutionality in ***the Katiba Institute Case?*** In other words, does it apply prospectively or retrospectively? In this regard, IEBC propounded two scenarios, namely***: retrospective unconstitutionality,*** where it was argued that one cannot go back to revive the initial Statute or provision which had been repealed, and that such application only applies in relation to the party who moved the court;

and ***prospective unconstitutionality***, where it was submitted that the declaration of unconstitutionality takes effect from the date of the determination or some future date, and applies to any other person(s) who seeks to benefit from such declaration.

[1322] On the other hand, the 24th respondent submitted that the South African Constitution grants power to the Constitutional Court to make an order limiting the retrospective effect of the declaration of invalidity or an order suspending the declaration of invalidity. It was submitted that since the court in the ***Katiba Institute Case*** did not grant the remedies of retrospective applicability or suspension of the declaration of invalidity, then the remedies are not available to IEBC in this appeal. It was further submitted, therefore, that this Court lacks the power to grant such a remedy no matter how attractive or appropriate it may be, as it is not sitting on appeal or review of the decision made in that case.

[1323] In ***A v. The Governor of Arbour Hill Prison [2006] IESC 45, [2006]*** *4 IR 88* as quoted in ***Mary Wambui Munene v. Peter Gichuki King'ara & 2 Others*** [2014] eKLR the court observed, at para. 90 that:

> ***"Judicial decisions which set a precedent in law do have retrospective effect. First of all the case which decides the point applies it retrospectively in the case being decided because obviously the wrong being remedied occurred before the case was brought. A decision in principle applies retrospectively to all persons who, prior to the decision, suffered the same or similar wrong, whether as a result of the application of an invalid statute or otherwise, provided of course they are entitled to bring proceedings seeking the remedy in accordance with the ordinary rules of law such as a statute of limitations. It will also apply to cases pending before the courts. That is to say that a judicial***

decision may be relied upon in matters or cases not yet finally determined. But the retrospective effect of a judicial decision is excluded from cases already finally determined. This is the common law position."

[1324] Endorsing the reasoning of this Court in the decision of ***Mary Wambui Case***, I find that retrospective application of an invalid statute will apply to all persons who, prior to the decision, suffered the same or similar wrong, whether as a result of the application of an invalid statute or otherwise, provided of course they are entitled to bring proceedings seeking the remedy in accordance with the ordinary rules of law such as a statute of limitations. It will also apply to cases pending before the courts.

[1325] I am also guided by our decision in ***Senate & 2 Others v. Council of County Governors & 8 Others,*** SC Petition No. 25 of 2019; [2022] eKLR, where we made a finding on the effect of a declaration of unconstitutionality of a law. In that matter we specifically found as follows:

"[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 but not limited to members of the National Assembly and Senate..."

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)" [emphasis added].

[1326] From the above, it is my finding, that the trial court in ***the Isaiah Biwott Case*****,** having been justified to interfere with the finding of ***the Katiba Institute Case***, and having found that the trial court in the instant case was not justified to interfere with the finding in ***the Isaiah Biwott Case***, which decision was upheld by the Court of Appeal, I hold that the effect of ***the Isaiah Biwott Case*** declaration, restores Paragraph 5 of the Second Schedule to the IEBC Act.

[1327] Finally, I note that during oral submissions, IEBC suggested that where there are two conflicting decisions of the High Court on a public law issue, (as was in this instant case), then such a matter should qualify to be a leapfrog appeal. This, they argued would avoid the resultant confusion that is visited on public bodies who have to deal with two different court decisions which affects effective implementation of their public mandate. Learned Counsel submitted that the subsequent court in departing can, first, frame the issue on the public law question, rationalize their decisions as to why they want to depart, and then have the parties appearing before that court to have that matter appealed against to the Supreme

Court directly so that this Court can resolve that issue with finality. He relied on Section 17 of the Supreme Court Act which makes provisions for direct appeals to it. He urged that leapfrog appeals are provided for in the US and in the UK. In the UK, he submitted that leapfrog appeals are provided for in Regulation 6(1) of the House of Lords Practice Directions.

[1328] Indeed, leapfrog appeals are allowed in certain circumstances, not just in the UK, but also in Ireland, South Africa, and India. Here in Kenya, the Supreme Court's appellate jurisdiction is limited under Article 163 (3) (b)(2) and (4) of the Constitution which provides as follows:

> ***"...***
>
> ***(3) The Supreme Court shall have—***
>
> ***(a) exclusive original jurisdiction to hear and determine disputes relating to the elections to the office of President arising under Article 140; and***
>
> ***(b) subject to clause (4) and (5), appellate jurisdiction to hear and determine appeals from—***
>
> ***(i) the Court of Appeal; and***
>
> ***(ii) any other court or tribunal as prescribed by national legislation."***

[1329] Section 17 of the Supreme Court Act, 2011 makes provisions for direct appeals only in exceptional circumstances in the following terms:

> ***"The Supreme Court shall not grant leave to appeal directly to it against a decision made, a conviction entered, or a sentence imposed in proceedings in any court or tribunal, other than the Court of Appeal, unless in addition to being satisfied that it is necessary, in the interests of justice, for***

the Supreme Court to hear and determine the proposed appeal, it is also satisfied that there are exceptional circumstances that justify taking the proposed appeal directly to the Supreme Court" [emphasis added].

[1330] Even though Article 163(3)(b)(2) clothes this Court with jurisdiction to entertain direct appeals, there is no proper statutory framework for it and therefore difficult to invoke. There is need for Parliament to enact legislation to provide for situations when a direct appeal can be made; timelines for such an appeal; and parties who may participate in such an appeal.

Issue seven: Whether the question raised, regarding the interpretation of Article 257(10) of the Constitution on whether or not it entails or requires that all specific proposed amendments to the Constitution should be submitted as separate and distinct referendum questions, was not ripe for determination

[1331] On this issue, the 3rd appellant, (supported by the 1st to 5th respondents, the 7th to 9th respondents, the 19th respondent, the 74th to 76th respondents and the 3rd *amicus curiae*), urged that all specific proposed amendments to the Constitution should be submitted as separate and distinct referendum questions and that a draft amendment Bill ought to only contain a single amendment. However, IEBC, the 13th and 15th respondents, the 18th and 21st respondents, and the 72nd respondent opposed this view maintaining that the issue was not ripe for the courts' determination. The 5th *amicus curiae* urged the Court to consider applying the rule of "subject-matter relatedness" in drafting of referendum questions.

[1332] What is the role of IEBC in a constitutional amendment process through a popular initiative? Under Article 257 of the Constitution, IEBC's role comes into

play at the tail end of a constitutional amendment process. As stated elsewhere in this judgment, the steps for amending the Constitution through a popular initiative are clearly set out under Article 257 as follows: the submission of the minimum one million signatures and the draft Bill to IEBC by the promoters; verification of signatures by IEBC; approval of the draft Bill by County Assemblies; approval of the draft Bill by the two Houses of Parliament; assent of the Bill by the President (if the proposed amendment does not touch on any of the matters listed under Article 255(1); or ***submission of the Bill to IEBC to conduct a referendum, if the Bill concerns matters listed under Article 255(1) or if Parliament fails to pass a Bill proposing constitutional amendments through a popular initiative pursuant to 257(10)***; and assent of the Bill by the President.

[1333] From the above-mentioned steps, it is clear that a referendum is at the conclusion of a constitutional amendment process of a popular initiative. It is not contested that although the Amendment Bill had been approved by the County Assemblies and Parliament, the same had not yet been subjected to a referendum. I therefore do agree with the finding of *Tuiyott, J.A,* to the extent that the referendum question was premature and not ripe for determination by the superior courts, as IEBC had not received a request to hold the referendum. Besides, IEBC had not taken any action which would entitle any party to come before court and allege a denial, a violation, an infringement of or threat to a right or fundamental freedom as provided for under Article 23 of the Constitution.

[1334] As defined elsewhere in this Judgment, a dispute is not ripe when it has reached, but has not passed, the point when the facts have developed sufficiently to permit an intelligent and useful decision to be made. The rationale for the doctrine of ripeness has been articulated elsewhere in this Judgment and I shall not replicate the same here.

[1335] However, as earlier observed in the body of this Judgment, it is the duty of this Court to evaluate both the fitness of the issue for judicial decision, and the hardship to the parties of withholding Court consideration when faced with a question that is not ripe for determination. In the instant case, the ripeness concerns the question of whether the proposed amendments to the Constitution are required to be submitted as *separate and distinct referendum questions* in line with Article 257(10) and in doing so, to interrogate the constitutional soundness of Section 49 of the Elections Act.

[1336] I find that this question meets the fitness and hardship test against ripeness as expounded earlier in this Judgment. It is my opinion that in applying that test, it will not be in the best interest of the general public to withhold a consideration of the constitutionality or otherwise of Section 49 of the Elections Act. It is necessary to interrogate Section 49 of the Elections Act to avert any confusion it may occasion in future referendums. I consider this to be a fitting moment for the Supreme Court to intervene and pronounce itself in a bid to discharge its enormous responsibility of ensuring that the law is not only constitutional but also predictable, certain, uniform, and stable.

[1337] So then, should *all specific proposed amendments to the Constitution be submitted as separate and distinct referendum questions?* I have interrogated Article 257(10) of the Constitution which provides that: "***if either House of Parliament fails to pass*** *the Bill*, ***or the Bill relates to a matter specified under Article 255(1), the proposed amendment shall be submitted to the people in a referendum***."

[1338] There are two instances under which a proposed amendment can end up in a referendum. First, is when a ***proposed amendment to the Constitution concerns matters listed under Article 255(1)***, *whether a proposed amendment is through a popular initiative or a parliamentary initiative*. Second, is when ***either House of Parliament fails to pass a proposed***

amendment to the Constitution through a popular initiative, *whether it touches on matters listed under Article 255(1) or not*. The amendments which ought to be subjected to a referendum under Article 255(1) include: the supremacy of the Constitution; territory of Kenya; sovereignty of the people; national values and principles of governance referred to in Article 10(2)(a) to(d); the Bill of Rights; the term of the President; the independence of the Judiciary and commissions and independent offices to which Chapter Fifteen applies; the functions of Parliament; the objects, principles and structure of devolved government and; the provisions of Chapter Sixteen.

[1339] Article 256(5) provides that if ***a Bill*** to amend the Constitution proposes an amendment relating to a matter specified in Article 255(1), the President shall, before assenting to ***the Bill***, request the IEBC to conduct, within ninety days, a national referendum for ***approval of the Bill***; or within thirty days after the chairperson of IEBC has certified to the President that ***the Bill*** has been approved in accordance with Article 255(2), the President shall assent to the Bill and cause it to be published. Furthermore, Article 257(10) provides that if either House of Parliament fails to pass ***a Bill*** under Article 257, or ***the Bill*** relates to a matter specified in Article 255(1), ***the proposed amendments*** shall be submitted to the people in a referendum.

[1340] Under the Elections Act, a referendum is defined as ***a poll held under Part V of the Act***. Concerning a referendum, Sections 49, 50 and 51 provides as follows:

> ***"49. (1) Whenever it is necessary to hold a referendum on any issue, the President shall by notice refer the issue to the Commission for the purposes of conducting a referendum.***
>
> ***(2) Where an issue to be decided in a referendum has been referred to the Commission under sub-section (1), the***

Commission shall frame the question or questions to be determined during the referendum.

(3) The Commission shall, in consultation with the Speaker of the relevant House, lay the question referred to in subsection (2) before the House for approval by resolution.

(4) The National Assembly may approve one or more questions for a referendum.

(5) The Commission shall publish the question approved under subsection (4) in the Gazette and in the electronic and print media of national circulation.

(6) The Commission shall conduct the referendum within ninety days of publication of the question.

(7) The Commission may assign such symbol for each answer to the referendum question or questions as it may consider necessary.

(8) A symbol assigned under subsection (7) shall not resemble that of a political party or of an independent candidate.

50. (1) The Commission shall, within fourteen days after publication of the question referred to in section 49 publish a notice of the holding of the referendum and the details thereof in the Gazette, in the electronic and print media of national circulation

(2) The notice shall specify—

(a) the referendum question or questions and the option of the answer or answers;

(b) the symbols assigned for the answers to the referendum question;

(c) the day on which the referendum is to be held which shall not be less than twenty one days after the date of the publication of the notice;

(d) the polling time of the referendum;

(e) the day by which the referendum committees shall have registered with the Commission; and

(f) the day and time by which campaign in support of or in opposition to the referendum question shall start and cease."

51. (1) Where a referendum question requires a "yes" or "no"

answer, persons intending to campaign for or against the referendum question shall form such national referendum committees and constituency referendum committees as are necessary.

(2) Where there is more than one referendum question, persons

intending to campaign for or against each referendum question shall, on application to the Commission, form one national referendum committee each and one committee each in every constituency for each referendum question.

(3) A referendum committee shall apply to the Commission for registration in the prescribed form.

(4) An application under subsection (3) shall be accompanied

by information showing that the applicant adequately represents persons campaigning <u>for or against the referendum question</u>.

(5) The national referendum committees shall control and regulate the constituency referendum committees.

(6) A member of a referendum committee shall subscribe to and abide by the Electoral Code of Conduct set out in the Second Schedule" [emphasis added].

[1341] From the above, it is my opinion that the Article 257 of the Constitution refers to a Bill, and therefore, what ought to have been referred to under Section 49(1), (2) and (3) is ***a Bill*** and not an ***'issue'*** or a ***'question'***. It is not clear to me why the Legislators in enacting the Elections Act, departed from the drafting language in the Constitution, that is, "a Bill" to "a Question." Since the constitutional text only refers to a Bill, I disagree with the 3rd appellant's submissions that the Constitution restricts a proposed Bill, to only contain a single issue amendment. There is ***no such provision*** in the Constitution.

[1342] To this extent, I therefore agree with *Musinga, (P)'*s finding that *what is to be submitted to the people is not a question or questions, but a Bill*. I also agree with *Gatembu, J.A'*s finding to the extent that it is the Bill in which an amendment proposal is contained that is submitted to the people to vote on in a referendum by indicating whether they agree or disagree with the amendment proposal. It is therefore my finding that IEBC ought to only present to the people a Bill to amend the Constitution with a "yes" or "no" question for a vote.

[1343] My above conclusion notwithstanding, I find I must address the issue of constitutionality of Section 49 of the Elections Act, in so far as it departs from the

provisions or wording of the Constitution and confers IEBC a non-existent mandate to draft referendum questions.

[1344] I am aware that this is not a specific issue for determination by this Court. I however, reiterate this Court's finding in the ***Aramat Case***, where it was emphasized that the Supreme Court has unlimited competence for the interpretation and application of the Constitution; and this, read alongside the Supreme Court Act, which illuminates the greater charge that is reposed in the Supreme Court, for determining questions of constitutional character. In the foregoing case, this Court also noted that its jurisdiction cannot be defined in restrictive terms, as such, questions as come up in the course of dispute settlement which, itself, is a constitutional phenomenon, especially those related to governance. It was observed that such issues are intrinsically issues importing the obligation to interpret or apply the Constitution and consequently, issues falling squarely within the Supreme Court's mandate under Article 163(4)(1)(a), as well as within the juridical mandate of the Court as prescribed in Article 259(1)(c) of the Constitution, and in Section 3(c) of the Supreme Court Act. Accordingly, in my considered opinion, although tangentially submitted on by the parties, it is an opportune moment, for this Court to pronounce itself on the constitutionality of Section 49 of the Elections Act.

[1345] Consequently, I find and declare Section 49 of the Elections Act, to the extent it departs from the provisions or wording of the Constitution in Articles 256 and 257, unconstitutional. Accordingly, I do recommend that the Legislature take the requisite legislative measures to regularize that inconsistency.

[1346] In conclusion my summary findings on the seven questions raised in this appeal are as follows:

(i) The basic structure doctrine is not applicable in Kenya.

(ii) The President can move amendments to the Constitution, however in this case he did not.

(iii) The Second Schedule of the Constitution of Kenya (Amendment) Bill, 2020, is inconsistent with the provisions of Article 89.

(iv) The President is entitled to immunity from civil and criminal proceedings as provided for under Article 143 of the Constitution.

(v) There was public participation with respect of the Constitution of Kenya (Amendment) Bill, 2020.

(vi) IEBC has the requisite quorum to conduct business.

(vii) The question of referendum questions is not ripe, but invoking an exception to determine the issue, amendments to the Constitution be submitted as one referendum question and Section 49 of the Elections Act, in as far as it departs from the provisions or wording of the Constitution is unconstitutional.

JUDGMENT OF LENAOLA, SCJ

A. INTRODUCTION

[1347] I have read the background to this appeal as rendered by the Hon. Chief Justice and President of this Court and I will adopt it for purposes of my Judgment. I also agree with her reasoning and findings save where I shall express myself to the contrary.

[1348] In that context, when the Kenyan people gave themselves the Constitution 2010, it was a matter of public knowledge that certain parts of it would require amendment at some point in the future. There was however no agreement as to what these parts were and it was left to the political class to raise a number of issues over the years that debatably required amendments. Thirdway Alliance and its officials, the 7th, 8th and 9th respondents in this appeal, for example, initiated the *"Punguza Mizigo" – Lighten the Burden* – attempt at a referendum on a number of issues. It failed.

[1349] Before this Court is the constitutionality or otherwise of the Building Bridges Initiative as well as related issues including the attempt at amending the Constitution 2010 through the Amendment Bill. I have taken into account all the pleadings and submissions on record and now render my opinion as hereunder. In doing so, I shall address each of the seven issues which the Court set out as available for determination.

B. ISSUE NO. (I)

Whether the basic structure doctrine is applicable in Kenya; If so, the extent of its application; whether the basic structure of the Constitution can only be altered through the primary constituent power; and what constitutes the primary constituent power

(i) Arguments by parties opposing applicability of the basic structure doctrine

[1350] The 1st appellant, the Attorney General, in his appeal, argues that the High Court and the Court of Appeal erred in finding that the basic structure doctrine is applicable in Kenya. According to the Attorney General, that doctrine is predominantly applied in jurisdictions where Constitutions are silent on what constitutes their core structure, pillars and elements and also in Constitutions which do not have provisions on the involvement and participation of people in constitutional amendments through a referendum. The Attorney General also argues that the doctrine applies to jurisdictions where Parliament is the one mandated to amend the Constitution and as such, the doctrine only applies where constitutional amendments are not tied to referenda or a popular initiative. This argument was also supported by the 14th and 16th respondents who urge that the basic structure doctrine lacks universal application as all Constitutions have different historical, textual and contextual differences claiming that the court in ***Kesavananda Bharati Sripadagalvaru & Others v. State of Kerala & Anor.*** (Writ Petition (Civil) 135 of 1970), ***(Kesavananda Case)*** dealt with the power of Parliament to amend the Indian Constitution, hence that jurisprudence cannot be applied in Kenya, since our Constitution, unlike the Indian Constitution, expressly limits Parliament's amendment powers.

[1351] This argument was further bolstered by the 18th and 21st respondents, who, while agreeing with the Attorney General that the doctrine is not applicable in Kenya, further articulated the point that the basic structure doctrine refers to

the concept of judicial power to limit the powers of amendment by Parliament and no more.

[1352] These same sentiments were expressed by the 13th and 15th respondents, the Speaker of the National Assembly and the National Assembly, who, though claiming that the basic structure doctrine is not applicable in Kenya, argue that Article 255(1) of the Constitution is what forms the basic structure of the Constitution. In furtherance of that argument, they argue that the doctrine does not limit the power of amendment under the Constitution since Article 255(1) has its own inbuilt restraints on the power of Parliament to amend it. This was also the argument by the 72nd respondent, Phylister Wakesho, who agreed that Article 255(1)(a)-(j) forms the design and architecture of the Constitution and is the basic structure, and can only be amended by referendum. Furthermore, according to the 72nd respondent, the power to amend the Constitution is limitless as long as the procedures set out in the Constitution are adhered to.

[1353] The 18th and 21st respondents, Building Bridges to a United Kenya, National Secretariat and Rt. Hon. Raila Odinga further pushed the argument that the basic structure doctrine has not been universally accepted as a constitutional doctrine, a submission also supported by the Attorney General who termed the basic structure doctrine as a constitutional theory. It is their argument therefore that there is no uniform definition of the basic structure of a Constitution and the High Court, while attempting to define basic structure, ended up finding that the entire Constitution fits such a definition. The two respondents further fault the Court of Appeal which they claim failed to identify what provisions constitute the basic structure in our Constitution.

[1354] Isaac Aluochier, the 19th respondent, while also agreeing that the doctrine is not applicable in Kenya, further notes that its application would limit the sovereignty of the people, hence terming it unconstitutional.

(ii) Arguments by parties supporting applicability of the basic structure doctrine

[1355] It is the submission by 254 Hope, the 10th respondent, that the basic structure doctrine does indeed apply in Kenya, arguing that the doctrine serves to limit the exercise of amendment through the constituent power, but does not limit the exercise of primary constituent power. The 10th respondent thus contends that the doctrine serves as an inherent and constitutional limit on the exercise of all constituted power, including the secondary constituent power in constitutional amendments.

[1356] This is also the argument by Morara Omoke, the 3rd appellant, who also agrees that the basic structure doctrine applies in Kenya since it is part of the aspiration of the people as set out under Article 1 of the Constitution. He argues further that the people's intention at the promulgation of the Constitution was to preserve it for future generations and that the Constitution does not limit amendment power under Article 257 of the Constitution but rather limits the amendment power under Article 256 of the Constitution.The 1st to 5th respondents also submit that the doctrine applies arguing that it is a democracy enhancing device that maintains the ultimate power of the people over their elected representatives. They also argue that the basic structure is the distinctive features of a Constitution, and that in considering the definitions of alter and amendment, the basic structure is that which can only be altered, and any provision that is amendable cannot form the basic structure.

(iii) Findings by the High Court

[1357] The High Court delineated the following questions for determination on this issue: *Is the Basic Structure Doctrine of Constitutional interpretation applicable in Kenya? and; if the Basic Structure Doctrine applies in Kenya what are its implications for the amendment powers in Articles 255 to 257 of the Constitution of Kenya?*

[1358] In determining whether the Kenyan Constitution has a basic structure, the Court considered the principles of interpretation of the Constitution and the history of constitution-making by noting that:

> ***"469. The stable canon of principles of interpretation of the Constitution which have emerged as outlined above are dictated by our constitutional text; its structure; its nature (i.e. the fact that it is a Transformative Charter); our history (which both the Constitution (at Article 259 and 10)), statute (the Supreme Court Act at section 3), and binding precedents) and the context (which is a consideration decreed by the Constitution) and are unique to interpreting Transformative Constitutions such as ours.***
>
> ***These principles of interpretation, applied to the question at hand, yield the conclusion that Kenyans intended to protect the Basic Structure of the Constitution they bequeathed to themselves in 2010 from destruction through gradual amendments. We can discern this doctrinal illumination by correctly interpreting both the history of Constitution-making and the structure of the Constitution Kenyans made for themselves"*** [emphasis mine].

[1359] Though the Court went on to note that nothing in the Constitution explicitly makes any provision of the Constitution unamendable, it went on to state:

> ***"473. To be sure, there is no clause in the Constitution that explicitly makes any article in the Constitution un-amendable. However, the scheme of the Constitution, coupled with its history, structure and nature creates an ineluctable and unmistakable conclusion that the power to***

amend the Constitution is substantively limited." [emphasis mine].

[1360] It was the Court's further holding that the basic structure doctrine applies in Kenya by finding that:

> ***"The text, structure, history and context of the Constitution of Kenya, 2010 all read and interpreted using the canon of interpretive principles decreed by the Constitution yield the conclusion that the Basic Structure Doctrine is applicable in Kenya.***
>
> ***(b) <u>As applied in Kenya, the Basic Structure Doctrine protects certain fundamental aspects of the Kenyan Constitution from amendment through the use of either Secondary Constituent Power or Constituted Power.</u>***
>
> ***…***
>
> ***(d) The essential features of the Constitution forming the Basic Structure can only be altered or modified by the People using their Primary Constituent Power."*** [emphasis mine].

On the exercise of the Primary Constituent Power, the Court expressed itself as follows:

> **"….**
>
> ***(e) The Primary Constituent Power is only exercisable after four sequential processes have been followed:***
>
> ***(i) Civic education to equip people with sufficient information to meaningfully participate in the***

constitution-making or constitution-altering process;

(ii) Public participation and collation of views in which the people – after appropriate civic education – generate ideas on the type of governance charter they want and give their views about the constitutional issues;

(iii) Constituent Assembly Debate, consultations and public discourse to channel and shape the issues through representatives elected specifically for purposes of constitution-making or constitution-alteration; and

(iv) Referendum to endorse or ratify the Draft Constitution or Changes to the Basic Structure of the Constitution."

[1361] At para. 474(f), the High Court identified what provisions may be deemed to be the basic structure of the Constitution by holding:

"From a holistic reading of the Constitution, its history and the context of the making of the Constitution, the Basic Structure of the Constitution consists of the foundational structure of the Constitution as provided in the Preamble; the eighteen chapters; and the six schedules of the Constitution. This structure outlines the system of government Kenyans chose – including the design of the Judiciary; Parliament; the Executive; the Independent Commissions and Offices; and the devolved system of government. It also includes the specific substantive areas

Kenyans thought were important enough to pronounce themselves through constitutional entrenchment including land and environment; Leadership and Integrity; Public Finance; and National Security. Read as a whole, these chapters, schedules and the Preamble form the fundamental core structure, values and principles of the Constitution. This fundamental core, the constitutional edifice, thus, cannot be amended without recalling the Primary Constituent Power of the people" [emphasis mine].

[1362] This finding is confusing to me as it seems to suggest that the entire Constitution is unamendable but I am also alive to the fact that the High Court later qualified the blanket finding as can be seen below. The Court in any event after considering the unamendability of certain provisions, noted that the 2010 Constitution does indeed have eternity clauses by finding thus:

"While the Basic Structure of the Constitution cannot be altered using the amendment power, it is not every clause in each of the eighteen chapters and six schedules which is inoculated from non-substantive changes by the Basic Structure Doctrine. Differently put, the Basic Structure Doctrine protects the core edifice, foundational structure and values of the Constitution but leaves open certain provisions of the Constitution as amenable for amendment in as long as they do not fundamentally tilt the Basic Structure. Yet, still, there are certain provisions in the Constitution which are inoculated from any amendment at all because they are deemed to express categorical core values. These provisions are, therefore, unamendable: they cannot be changed through the exercise of Secondary

Constituent Power or Constituted Power. Their precise formulations and expressions in the Constitution can only be affected through the exercise of Primary Constituent Power. These provisions can also be termed as eternity clauses. An exhaustive list of which specific provisions in the Constitution are un-amendable or are eternity clauses is inadvisable to make in vacuum. Whether a particular clause in the Constitution consists of an "unamendable clause" or not will be fact-intensive determination to be made after due analysis of the Constitution, its foundational structure, its text, its internal coherence, the history of the clause and the constitutional history; and other non-legal considerations permitted by our Canon of constitutional interpretation principles" [emphasis mine].

[1363] In summary, while accepting that the basic structure doctrine is applicable to Kenya, the learned Judges made three fundamental findings to which I shall return later:

(i) The preamble, the eighteen chapters of the Constitution plus the Six Schedules to it – in essence, the whole of the Constitution 2010 – form the basic structure, the core, the edifice, which cannot be amended without recalling the primary constituent power of the people;

(ii) The exercise of the primary constituent power can only be exercised after the four sequential processes outlined above have been followed; and

(iii) There is no clause in the Constitution 2010 that expressly provides for all the above conclusions but it's history, structure and nature

creates an ineluctable and unmistakable conclusion that the power to amend is substantively limited.

(iv) Findings by the Court of Appeal

[1364] At the Court of Appeal, the learned Judges of Appeal addressed the question of *'The Basic Structure Doctrine, unamendability theory and eternity clauses, their applicability in Kenya.'*

[1365] The learned Judges of Appeal arrived at their determinations through various routes but the findings of the majority were that they affirmed the finding of the High Court that: the basic structure doctrine is applicable in Kenya; that Article 255 of the Constitution can be termed as the basic structure of the Constitution, but that the doctrine creates an implicit edict on dismemberment; and that the basic structure of the Constitution can only be altered through the primary constituent power which must include the four sequential processes- civic education, public participation and collation of views, constituent assembly debate, *consultations and public discourse and ultimately, a referendum.*

[1366] Specifically, *Musinga, (P),* in his Judgment, was of the view that the Constitution does have a basic structure and that the Amendment Bill sought to alter fundamental aspects of the basic structure, therefore finding that the Amendment Bill was a constitutional dismemberment. On what constitutes basic structure, the learned Judge proceeded to analyze components of the Amendment Bill that sought to amend what he termed as fundamental aspects of the basic structure of the Constitution. It was his finding at the end that the amendments touching on the independence of the Judiciary, the proposals touching on the concept of separation of powers and the proposal to increase the number of constituencies through delimitation of constituencies, a task that belongs to the IEBC, touched on amendments to the basic structure of the Constitution. He expressed himself as follows:

> ***"It is not all the 74 proposed amendments that seek to fundamentally alter*** **[the]** ***basic structure of the social contract that Kenyans entered into when they gave to themselves the Constitution of Kenya, 2010, after decades of political struggle. But the few that I have highlighted point to attempts to alter fundamental aspects of the basic structure of our Constitution, and that to me is constitutional dismemberment. <u>That is why I would agree with the learned judges that it is necessary that we replicate the same procedure that we used to give to ourselves the 2010 Constitution if we have to fundamentally amend certain provisions of the Constitution"</u>*** [emphasis mine].

He then went on to find that:

> ***"The basic structure doctrine is applicable in Kenya, and that certain fundamental aspects of the Constitution of Kenya, 2010 cannot be amended except through the sovereign Primary Constituent Power of the people."***

[1367] He furthermore affirmed the finding by the High Court that any provision considered to be part of the basic structure may be amended by the people through the exercise of their primary constituent power after civic education, public participation, constituent assembly debate and a referendum.

[1368] *Nambuye, J.A* in also finding that the basic structure doctrine applies, found that though our Constitution does not define what basic structure is, she reaffirmed the finding of the High Court which used judicial craft to imply that the basic structure doctrine applies. She held thus:

"My take on the above rival position starting with applicability or otherwise of the basic structure doctrine issue is that it is common ground that the CoK, 2010 itself does not contain a definition for "a basic structure". Neither did the Judges offer one, hence my association with the definition given above by Prof. Yaniv Roznai that "it is a judicial principle that guide courts in their exercise of their judicial mandate to guard against sanctioning amendments to constitutions likely to have the effect of either dismembering or changing their identity completely." <u>The Judges cannot therefore be faulted for using what appellants have termed judicial craft to imply the applicability of the said doctrine to the CoK, 2010 notwithstanding admitted lack of express provision for its applicability</u>" [emphasis mine].

[1369] *Okwengu, J.A* in her finding concluded that the basic structure of the Constitution is as provided for under Article 255 by finding:

"It appears to me that the framers of the Constitution either consciously or unwittingly identified the basic structure of our Constitution through Article 255. In my view, the thematic areas that have been identified are crucial and form the pillars of the Constitution."

[1370] The learned Judge then notes what should be considered in discerning whether the basic structure doctrine applies by holding:

"The key question in considering whether the basic structure doctrine applies in Kenya, is whether notwithstanding the express provisions for constitutional amendment contained in Chapter 16 of the Constitution

and the limitations imposed therein, additional implied conditions that limit the amendment power, can be inferred relying on the basic structure doctrine, and whether there are any eternity clauses or provisions of the Constitution that are unamendable."

[1371] The learned Judge then notes that the Constitution lacks any provisions that may be deemed as unamendable or 'eternal clauses' by finding:

"The Constitution has not specifically identified any particular clause as an unamendable clause or an eternity clause. Therefore, as admitted by the learned Judges, there are no express eternity clauses or unamendable provision in the Constitution."

[1372] She nevertheless notes that amendments under Chapter Sixteen are restricted by stating:

"However, as already noted there is restriction of amendment power in Chapter 16 of the Constitution, such that under Article 255 to 257, there are procedural and substantive limitation to the amendment power so that amendments involving the specified thematic areas can only be done if there is compliance with the strict procedure provided. It cannot be said that the provisions in the thematic areas are unamendable because, the Constitution has provided for amendability subject to the limitation indicated in Chapter 16."

[1373] Further to this, the learned Judge then discerned when the primary constituent power is exercised by finding:

"[73] I am in agreement that the people in exercise of constituent power can abrogate their Constitution or make a new Constitution, and that the exercise of that constituent power demands the participation of the people through civic education, public participation, constituent assembly debate, consultation and public discourse, and finally a referendum in which the people endorse the new Constitution or the abrogated Constitution. This is the exercise of the primary constituent power as explained by *Prof. Nwabueze* ***and*** *Prof. Roznai****, and applied by*** *Ringera, J****."***

[1374] The learned Judge then posited that, the people exercise their secondary constituent in two ways; delegating their power to Parliament, or reserving the power to amend to themselves. It was her finding that:

"In my view, the people can exercise their sovereignty in constitution making through their secondary constituent power, by either delegating to parliament or reserving to themselves the power to amend the Constitution. This is what the framers of the Constitution did in Articles 255 to 257 by delegating the power to parliament to amend the Constitution under Article 256(1)-(5), through a parliamentary initiative, and allowing the people to exercise their reserved powers to amend the Constitution through a popular initiative under Article 257. This means that the popular initiative is a citizen driven process. In both instances, the people remain involved in both the popular initiative and parliamentary initiative through public participation, and are the ultimate determinant

through the referendum process on whether the amendment is carried."

[1375] On applicability of the basic structure doctrine specifically it was her finding that:

> ***"The basic structure doctrine is applicable in Kenya to the extent that the exercise of secondary constituent power and constituted power to amend the Constitution is impliedly limited by the Constitution as evident in its spirit and purport, and therefore the exercise of amendment powers under Chapter 16 (Articles 255-257) of the Constitution is impliedly limited as such amendment must conform to the spirit and purport of the Constitution"*** [emphasis mine].

[1376] *Kiage, J.A* in his Judgment while commenting on the ***Kesavananda Case*** and whether it contains any unamendable provisions stated thus:

> ***"It is important to note that as the Indian Constitution, just like ours, did not then, and does not now, contain unamendable provisions in its text; it lacks express limitations to its amendability. This is in contrast to some other jurisdictions in which the Constitutions contain provisions prohibiting amendment of certain subjects leading to the terminology, as Roznai notes in his PhD thesis, 'immutable', 'unalterable' 'irrevocable', 'perpetual' or 'eternal' all of which he considers, and I readily agree, to be inaccurate."***

[1377] Further finding that the power to amend as stipulated under Article 255 to 257 is limited and that amendments that essentially go to the core and

fundamental fabric of the Constitution are not amendments but dismemberments, he holds:

> ***"To my mind, that is the cognitive posture that we should adopt in answering the question whether the notion of limitations to the amendment power discussed by so many courts loses any of its logical force by the fact the amendments proposed in the case at bar, and contemplated by Articles 255 to 257 of the Constitution, require approval by the people in a referendum. The conclusion appears to me inescapable that as long as what is contemplated is an amendment, it will ipso facto be limited. The limitation in this case stems from the fact that certain aspects of the proposed amendments unquestionably go to the essential core, and fundamental fabric of the Constitution, thereby purporting to alter irredeemably its character and identity. Such radical alterations are not amendments in the real sense of the word, for there has to be a limitation to what amendments can achieve. And I would think that dismemberment is dismemberment, whether effected through surgical amputation or through rough mutilation."***

[1378] *Gatembu, J.A* while finding that the basic structure doctrine applies first set out on defining what the doctrine is by stating:

> ***"In an article for the Center for Public Interest Law, ...*** *Benson Tusariwe,* ***writes that <u>the doctrine of basic structure holds that the Constitution "has certain basic features which underlie not just the letter but also the spirit of that Constitution. These features constitute the inviolable core</u>***

<u>of the Constitution, and any amendment, which purports to alter the Constitution in a manner that takes away that basic structure, is void and of no effect"; that even without explicit limitations to the Constitutional amendment power, there are implied Constitutional limitations to the nature and scope of Constitutional amendments by which the Constitution should not be amended in a way that changes features of the Constitution that form its basic structure.</u> The doctrine rests on the distinction between original or primary power to make or effect radical changes in the Constitution vis-à-vis secondary power to amend or effect minor changes on the Constitution.

(40) Under the doctrine, the decision to make fundamental changes to the Constitution is a matter solely reserved for the people, the constituent assembly. Courts may invalidate any exercise of the derivative amendment power that proposes to violate the Constitution's basic feature. Constitutional amendments may be found to be infirm because of the actual proposed content of the amendments that will replace the Constitution and not just amend it" [emphasis mine].

[1379] The learned Judge then goes on to note that Article 255(1) is what amounts to the basic structure of the Constitution and that the basic structure doctrine bars dismemberment or abolition of provisions of the Constitution presented as amendments. It is thus his finding that if a proposed amendment presents itself as a dismemberment of the Constitution, then the provisions of Chapter Sixteen shall not apply. However, if the proposed amendment is proper, then the next step should be whether the amendment relates to any of the matters

set out under Article 255(1) of the Constitution, and if so, then the provisions of Article 257 apply. He notes that if not, then the amendment may be pursued as a parliamentary initiative under Article 256. He however added that whether a proposed amendment is proper or attempts to abrogate the Constitution is a question best left for judicial interpretation.

[1380] *Sichale, J.A,* in her Judgment, found that the basic structure doctrine does not apply, upholding the appellant's appeal on the issue, and noting that the High Court erred in imposing a further hurdle on amendments to the Constitution by invoking the spirit of the Constitution. It was her finding that the Kenyan Constitution is amendable, subject to the process and methodology of amendment set out in Articles 255 to 257 of the Constitution. She noted further that if there was limitation to the power of amendment, then the same would have been provided for.

[1381] She further notes that the findings contained in the CKRC Final Report mirror the provisions of Chapter Sixteen of the Constitution noting that a conscious effort was made to ensure that there shall be no hyper-amendments to the Constitution, averting a Constitution that can be amended at will. It was also her finding that the 2010 Constitution framers struck the balance between stability and instability by providing for amendments in Chapter Sixteen.

[1382] While discussing the constituent power, the learned Judge was of the view that the people exercised their constituent power in a referendum by voting in the 2010 Constitution and that the contest of what is amendable or not is not to be left to judicial innovation.

[1383] *Tuiyott, J.A* in his Judgment, was of the view that Article 255(1) is what comprises the basic structure of the Constitution. He stated thus in that regard:

> ***"What comprises the basic structure of the Constitution is therefore specifically defined by the people of Kenya and is***

that in Article 255(1) which even in amendment requires the exercise of constituent power, the secondary constituent power.

That said, the true scope of the basic structure in the Kenyan Constitution becomes clearer still by looking more closely at the words of Article 255(1). They require compliance with Article 257 for any amendment that relates to the matters listed in that Article (Article 255(1)). Save for reference to "Chapter sixteen" and "Articles 10(2)(a) to (d)", the Articles of the Constitution to be protected are not specifically set out. Instead, they are identified by theme. This makes a difference. What comprises the basic structure is what is in respect to those thematic matters. For example, matters on the sovereignty of the people, which power, by dint of Article 3, is delegated to three distinct arms of government extends the protection to the doctrine of separation of power. So, while the doctrine of separation of power is not directly mentioned in Article 255(1), it is part of the basic structure of our Constitution as it is a subset of the wider design on how the Constitution has organised and structured the exercise of sovereign power. I take a view that what comprises the basic structure of our Constitution is easily identifiable. But should a need for judicial inquiry arise as to whether a matter is part of the basic structure of our Constitution, then that inquiry will not be a rudderless or unguided exercise because it is firmly beaconed in Article 255(1)" [emphasis mine].

[1384] From the above excerpts, it is clear to me that there was really no consensus among the learned Judges as to whether the basic structure doctrine applies; what constitutes the structure and how that structure would be identified. It falls on this court to settle all these issues with finality.

C. ANALYSIS AND DETERMINATION OF ISSUE NO.(I)

(i) Basic Structure Doctrine: The Genesis

[1385] The basic structure doctrine, is generally attributed to the evolution of Indian Constitutional Law made by the Supreme Court of India consisting of 13 Judges in the ***Kesavananda Case***. Other scholars have traced it to earlier writings and decisions of other courts. In the ***Kesavananda Case***, the constitutionality of the Constitution (24th Amendment) Act, (25th Amendment) Act and (29th Amendment) Act were challenged. It was the contention by the petitioners that those amendments determined that, despite anything appearing in any provision of the Constitution, Parliament could alter it by way of addition, alteration, or annulment. The petitioners contended that in enacting the amendments, Parliament had exceeded its powers and was purporting to enlarge its limited power of amendment into an unlimited power, by the exercise of which it can damage or destroy the basic elements or fundamental features of the Constitution. The Supreme Court was therefore confronted squarely with the question of the power of Parliament to amend the Constitution.

[1386] The majority of 7 Judges against a minority of 6 unanimously upheld the amendments by holding that Parliament possesses broad power under Article 368 to amend the Constitution, even when the amendment affects fundamental rights.

[1387] However, while discussing Section 3 of the 25th Amendment Act, which stood as Article 31C of the Constitution, it was noted that the amendment in Article 31C empowered Parliament as well as Local Legislatures to enact laws giving effect

to the policy of the State. It was further contended that the Article essentially meant that if the law in question contains a declaration that it is for giving effect to such policy, that law shall not be called in question in any court on the ground that it does not give effect to such policy. The said amendment read as follows:

> ***"Notwithstanding anything contained in Article 13, no law giving effect to the policy of the State towards securing the principles specified in Clause (b) or Clause (c) of Article 39, shall be deemed to be void on the ground that it is inconsistent with, or takes away or abridges any of the rights conferred by Article 14, Article 19 or Article 31; and no law containing a declaration that it is for giving effect to such policy shall be called in question in any court on the ground that it does not give effect to such policy.***
>
> ***Provided that where such law is made by the Legislature of a State, the provisions of this Article shall not apply thereto unless such law, having been reserved for the consideration of the President, has received his assent"*** [emphasis mine].

[1388] The majority then held that there were certain matters which did not come under the scope of the ambit of the power of Parliament to amend by finding that there are certain features of the Constitution which cannot be altered while Parliament exercised its amending power.

[1389] The majority also reasoned that constitutional amendments must respect the basic structure of the Constitution noting that it was doubtful that the founders wished to authorize the destruction of the Constitution by the process of internal amendment. A change in basic constitutional structure, reasoned the majority, should come only from a new constituent assembly.

[1390] I will return to the application otherwise of that decision to the Kenyan context.

(ii) Basic Structure: The ingredients

[1391] Though the Indian Supreme Court held that the power of Parliament to amend the Constitution was impliedly limited by the basic structure doctrine, the Court did not agree on what exactly and precisely constituted the basic structure of the Constitution. *Sikri, CJ*, however identified what he opined consisted the basic foundation and structure of the Constitution by finding as follows:

> ***"The basic structure may be said to consist of the following features:***
>
> ***(1) Supremacy of the Constitution;***
>
> ***(2) Republican and Democratic form of Government.***
>
> ***(3) Secular character of the Constitution;***
>
> ***(4) Separation of powers between the Legislature, the executive and the Judiciary;***
>
> ***(5) Federal character of the Constitution.***
>
> ***The above structure is built on the basic foundation, i.e., the dignity and freedom of the individual. This is of supreme importance. This cannot by any form of amendment be destroyed. 318. The above foundation and the above basic features are easily discernible not only from the preamble but the whole scheme of the Constitution…"***

[1392] *Ray, J.* in his Judgment also discussed what could be discerned as the basic structure of the Constitution by holding:

> ***"620. The basic structure of the Constitution is not a vague concept and the apprehensions expressed on behalf of the***

respondents that neither the citizen nor the Parliament would be able to understand it are unfounded. If the historical background, the Preamble, the entire scheme of the Constitution, the relevant provisions thereof including Article 368 are kept in mind there can be no difficulty in discerning that the following can be regarded as the basic elements of the Constitutional structure. (These cannot be catalogued but can only be illustrated). 1. The supremacy of the Constitution. 2. Republican and Democratic form of Government and sovereignty of the country. 3. Secular and federal character of the Constitution. 4. Demarcation of power between the legislature, the executive and the judiciary. 5. The dignity of the individual (secured by the various freedoms and basic rights in Part III and the mandate to build a welfare State contained in Part IV. 6. The unity and the integrity of the nation…"

[1393] *Reddy, J.* on his part noted thus:

"The elements of the basic structure are indicated in the preamble and translated in the various provisions of the Constitution. The edifice of our Constitution is built upon and stands on several props, remove any of them, the Constitution collapses. These are: (1) Sovereign Democratic Republic; (2) Justice, social, economic and political; (3) Liberty of thought, expression, belief, faith and worship; (4) Equality of status and of opportunity. Each one of these is important and collectively they assure a way of life to the people of India which the Constitution guarantees. To withdraw any of the above elements the

structure will not survive and it will not be the same Constitution, or this Constitution nor can it maintain its identity, if something quite different is substituted in its place, which the sovereign will of the people alone can do."

He then goes on to say:

"What then are the essential features or the basic elements comprising the structure of our Constitution need not be considered in detail as these will fall for consideration in any concrete case where they are said to have been abrogated and made non-existent. <u>The fact that a complete list of these essential elements constituting the basic structure are not enumerated, is no ground for denying that these exist.</u> Are all the elements which make a law void and unconstitutional ever required to be concatenated for the recognition of the validity or invalidity of laws judged on the anvil of the Constitution? A sovereign democratic republic, Parliamentary democracy, the three organs of the State, certainly in my view constitute the basic structure…" [emphasis mine].

[1394] The upshot of the basic structure doctrine as discerned from the ***Kesavananda Case*** therefore was that amendments contrary to what the Court implies as basic structure would be considered as unconstitutional and would be struck down. The Court by outlining the basic structure doctrine, was thus able to lay down the criteria for determining the validity of constitutional amendments.

[1395] *Shelat & Grover, J.J* in their Judgment were furthermore of the view that the definition of the words 'amendment of the Indian Constitution' as used in Article 368 ***"must be such which accords the true intention of the Constitution makers as ascertainable from the historical***

background, the Preamble, its structure and framework and the intrinsic evidence in various Articles including Article 368."

[1396] Further, commenting on whether Parliament has power to abrogate the basic elements or fundamental features of the Constitution, they were of the view that:

> ***"On a careful consideration of the various aspects of the case, we are convinced that the Parliament has no power to abrogate or emasculate the basic elements or fundamental' features of the Constitution such as the sovereignty of India, the democratic character of our polity, the unity of the country, the essential features of the individual freedoms secured to the citizens."***

[1397] The Supreme Court of India thus essentially found that Parliament's constituent power to amend the Constitution was subject to inherent limitations. Parliament could not, in that regard, use its amending powers under Article 368 to damage, destroy, abrogate, change or alter the basic structure or framework of the Constitution.

[1398] In the end result, the majority finding, that can be easily discerned from the Judgment at para. 787 by *Shelat and Grover, J.J* was that:

> ***"(1) The power to amend the Constitution under Article 368 as it stood before its amendment empowered the Parliament by following the form and manner laid down in that Article, to amend each and every Article and each and every Part of the Constitution***
>
> ***...***
>
> ***(3) <u>Though the power to amend the Constitution under Article 368 is a very wide power, it does not yet include the power to</u>***

destroy or emasculate the basic elements or the fundamental features of the Constitution" [emphasis mine].

[1399] Contrary to what I heard from some parties, the ***Kesavananda Case*** was thus not dealing with amendments through a popular initiative, a matter I must return to later in this Judgment but with the power of Parliament to effect amendments that would destroy the basic structure of the Indian Constitution. In our situation, the Amendment Bill is not a creature by Parliament but of initiators and promoters under Article 257 of the Constitution 2010.

(iii) How have other jurisdictions interpreted the Basic Structure Doctrine?

[1400] Prof. Roznai as *amicus curiae,* notes in his submissions before us, that in States where the Constitution does not include unamendable provisions, courts from these jurisdictions have recognized a core of basic principles that are impliedly protected from amendment. He submits further that other Courts have recognized the idea of implied 'basic structure' limitations on the constitutional amendment power, following the ***Kesavananda Case***. He then gives examples of the following States (and I am grateful for his input in that regard):

(a) Taiwan

[1401] That the Constitutional Court of Taiwan in its ***Interpretation No. 499 (2000)*** held that "*any amendment that alters the existing constitutional provisions concerning the fundamental nature of governing norms and order, hence the foundation of the Constitution's very existence destroys the integrity and fabric of the constitution itself."*

(b) Slovakia

[1402] On 30th January 2019, the Constitutional Court of Slovakia in ***PL.US 21/2014-96*** delivered a Judgment in which it declared a constitutional amendment as 'unconstitutional and void'. The constitutional amendment concerned security clearance by the national security authority of judges and judicial candidates. The Court held that *"the Constitution contains an implicit substantive core, which consists of the principles of democracy and rule of law, including the principle of separation of powers and the related independence of Judiciary"*. The Court further held that *"not even constitutional laws may violate this implicit substantive core of the Constitution and the constitutional court has the power to examine constitutional laws for possible violations of the implicit substantive core of the Constitution and if it finds a violation, it has the power to declare unconformity of the respective constitutional law with the implicit core of the Constitution"*.

[1403] It should be noted that the Slovakian Constitution does not contain any explicit unamendable provision and it was the first time a European Court applied in practice, the idea of implicit limits on the constituent power, according to Prof. Roznai.

(c) Malaysia

[1404] Malaysia was initially hesitant to recognize implied limitations on the amending power as limitations on the basic structure doctrine, with the Courts declining to adopt the doctrine by finding that Parliament possesses an unlimited constitutional amendment power. An example is given of the decision in ***Loh Kooi Choon v. Government of Malaysia*** (1977) 2MLJ 187 where the Court held that any provision of the Malaysian Constitution could be amended and that Parliament was the organ chosen for so amending. The Court then held that it was not for Courts to question the policy amendments adopted by Parliament and that any other approach would illegally empower the Courts. A similar finding was made by *Sichale, J.A* in the present case.

[1405] In ***Phang Chin Hock v. Public Prosecutor*** [1980] 1.MLJ 70, the Federal Court, while referring to the ***Kesavananda Case*** held that the basic structure doctrine does not apply in Malaysia. It was also held that Parliament may amend the Constitution in any way it thinks fit, provided they comply with all the conditions precedent regarding the manner and form described by the Constitution itself. Thus, the court accepted that it possessed the power to review a constitutional amendment based on procedural grounds, but rejected the argument that the substance of constitutional amendment *vis-à-vis* the Constitutions' basic structure can be reviewed.

[1406] It should be noted here as pointed out by Prof. Roznai that Malaysian courts however later changed tact and started adopting the basic structure doctrine and in the ***Sivarasa Rasiah v. Badan Peguam Malaysia & Anor*** [2010] 3CLJSEM, the court stated in *obiter* that Parliament cannot enact laws including Acts amending the Constitution that violate its basic structure and that it is clear that from the way in which the Federal Constitution is constructed that there are certain features that constitute its basic fabric. It was also stated that unless sanctioned by the Constitution itself, any statute (including one amending the Constitution) that offends the basic structure may be struck down as unconstitutional and that whether a particular feature is part of the basic structure must be worked out on a case to case basis.

[1407] Further, in the ***Semenyih Jaya Sdn Bhd v. Pentadbir Tanah Daerah Hulu Langat*** [2017] 3 MLJ 561, the court ruled that Parliament does not have the authority, even when acting according to the constitutional amendment procedure, to amend the Constitution in any way which abrogated or undermined any element of the basic structure. Through this doctrine, the court held that the principle of 'constitutional supremacy' must be defended.

[1408] The ***Indira Gandhi v. Pengarah Jabatan Agama Islam Perak & Others*** [2018] 1 MLJ was also cited in which the Federal Court declared that the

power of judicial review is essential to the constitutional role of the courts, inherent in the basic structure of the Constitution, and that it cannot be abrogated or altered by Parliament by way of a constitutional amendment.

(d) Singapore

[1409] Singapore initially rejected the basic structure doctrine. In ***Teo Soh Lung v. Minister of Home Affairs*** [1959] SLR (R) 461, the Supreme Court rejected an argument that Parliament's constitutional amending power was implicitly limited and that a constitutional amendment is part of the Constitution itself and could not be invalid if it was enacted according to the amendment procedure. The court noted that had the framers of the Constitution intended to impose limitations on the amendment power, they would have done so explicitly. The court thus rejected the basic structure doctrine by relying on Malaysian jurisprudence on the issue. This view is shared by *Sichale, J.A*.

[1410] Prof. Roznai however notes that there was later an inclination to adopt the basic structure doctrine citing the case of ***Yong Vui Kong v. Public Prosecutor*** [2010] SCGA 20 where the Court of Appeal endorsed the notion that some aspects of the Constitution are so fundamental and essential to the political system that it is established thereunder that they are part of its basic structure. Notwithstanding this acknowledgment of the concept of basic structure, the Court stated that it would not make any decision on the implications of declaring something to be part of the Constitution's basic structure.

(e) Israel

[1411] In the Supreme Court of Israel in HCJ 5555/18 ***Hassoun v. The Knesset and 14 Other petitions*** while dismissing petitions filed challenging the constitutionality of basic law, the court held that the basic law does not conflict with Israel's democratic character and can stand as a quasi-constitutional Basic Law. It was the opinion of the majority that the Knesset (Israeli Parliament) has a

limited capacity as a constituent authority in which it cannot deny in a basic law that Israel is both a Jewish and democratic state. It was determined that denial of these two pillars would lead to the collapse of the entire constitutional structure.

[1412] It is obvious from the above examples that the doctrine has not attained universal application and is still shrouded in controversy as is also obvious in the instant appeal.

(iv) Amendments under the Constitution 2010

[1413] From all that I have stated above, it becomes apparent that any interpretation of Article 255 of the Constitution and the amendment procedure of the 2010 Constitution must begin with tracing the history of the making of the Kenyan Constitution and how the question of amending the Constitution was addressed by the Constitution of Kenya Review Commission (CKRC).

[1414] I note in the above context, that, at page 73 of the CKRC Final Report, it was stated that the primary reason why the people of Kenya wanted to review the previous Constitution was because they felt that it no longer protected them. The feeling generally was also that, due to the numerous prior amendments, the Constitution was operating like ordinary legislation as opposed to the supreme law of the land.

[1415] Like Prof. Migai Aketch, *amicus curiae,* I am alive to the fact that the National Constitutional Conference (NCC) was aware of the dangers of the culture of hyper-amendments that had defined the Independence Constitution while also equally aware of overly rigid amendment procedures. The NCC in the end made it neither too easy nor too difficult to amend the Constitution and the CKRC Final Report gave due consideration to the matters they wanted entrenched in the Constitution and how the Constitution should be amended. The CKRC Final Report indeed noted that the people sought to limit the power of Parliament to

amend the Constitution and wanted to be directly involved in the changing of certain provisions through referenda.

[1416] The CKRC Final Report after considering what the people said therefore arrived at the conclusion at page 75 that:

> ***"A distinction should be made between entrenched and non-entrenched provisions of the Constitution, with a stringent mechanism being set up for amending the former entrenched provisions which should include supremacy of the Constitution, the Bill of Rights, land, the Judiciary, security, finance, the system of government."***

[1417] The CKRC Final Report then came up with the recommendations that:

> ***(a) The new Constitution should have some entrenched provisions – for example, on human rights, that Parliament does not have power to amend;***
> ***(b) The new Constitution should address the issue of the relationship between the various organs of State and must deal with checks and balances;***
> ***(c) The new Constitution should have a supremacy clause that should state that the Constitution is binding on all the people and all organs of State and at all levels;***
> ***(d) The Constitution should only be amended by at least 75% of members of Parliament; and***
> ***(e) The amendment procedure should make the following distinction;***
>
> ***(i) A Bill seeking to amend an entrenched provision should not be passed unless;***

- ***It receives the support of two thirds of members of Parliament at the second and third reading; and subsequently,***
- ***It receives approval at a referendum.***

(ii) The entrenched provisions should include;

- ***The procedure on amending the Constitution itself;***
- ***The provisions establishing the Republic of Kenya;***
- ***The provisions of sovereignty of the people;***
- ***The provisions on supremacy of the Constitution;***
- ***The Bill of Rights;***
- ***Separation of powers; and***
- ***Provisions on existence and powers of independent commissions and bodies.***

[1418] Again, I am in agreement with Prof. Migai Aketch that, the above recommendations are what morphed into Chapter Sixteen of the 2010 Constitution and that by those provisions, the people attained the right balance between constitutional flexibility and rigidity and provided sufficient and strong safeguards against the culture of hyper-amendability that characterized the independence Constitution. Chapter Nineteen of the Bomas Draft and Chapter Nineteen of the Wako Draft were also identical as to what is contained in Chapter Sixteen of the 2010 Constitution today.

[1419] History has thus shown that the people did not intend to immunize the provisions of the 2010 Constitution; to the contrary, they envisaged that they could amend the provisions of the Constitution by exercising their secondary constituent power provided that the amendment procedure under Chapter Sixteen is strictly

observed. If the people wanted to entrench provisions other than those set out under Article 255 (1) or to immunize any of the provisions of the Constitution from amendment, they would have done so expressly. It is therefore correct to say that Courts should not by judicial craft or innovation impose hurdles to prevent the people from amending the Constitution provided that the procedural requirements under Chapter Sixteen are complied with.

[1420] Contrary to my findings above, Professors Rosalind Dixon and David Landau in their *amici* briefs argue that the Constitution has a basic structure and that Articles 255, 256 and 257 that contain the express limitations and procedures are merely complements to the basic structure and are not themselves the basic structure nor do they contain both the substance and procedure for addressing that structure. It is also their submission that the basic structure doctrine exists to protect democracy and urge the point that courts can and must wield the basic structure doctrine to defend the democratic minimum core.

[1421] They argue further that a best reading of Articles 255, 256 and 257 would show that they were designed to establish a 'floor' and not a 'ceiling' on democratic constitutional entrenchment. They thus argue that these provisions reflect certain minimum requirements for successful constitutional amendment, but do not exhaust these requirements or preclude the existence of a basic structure doctrine in Kenya.

[1422] The submissions by the learned Professors are in line with those of parties opposing the Attorney General's appeal and suffice it to say that they are also in agreement with the findings by the High Court and the majority of the learned Judges at the Court of Appeal. I have shown where my point of departure with them is and will further address the issue below.

(v) Whether the basic structure of the Constitution can only be altered through the primary constituent power

[1423] Prof. Richard Albert as *amicus curiae,* in agreement with the parties opposing the appeal submits that the Amendment Bill is a constitutional dismemberment as it seeks to transform the Constitution in a way that exceeds its present. He argues that the Amendment Bill proposes to amend virtually every major part of the Constitution, affecting the Constitution in its entirety and if adopted, would leave the Constitution as is, changed either expressly or by limitation. For this reason, he labelled the Amendment Bill as a 'constitutional dismemberment' as its ultimate effect was to dismember the Constitution.

[1424] He further argues that the Amendment Bill seeks to override fundamental features of the Constitution using the ordinary procedure of constitutional amendment, yet such constitutional reforms as envisaged by the Amendment Bill cannot be made using ordinary procedures of constitutional amendment. It is therefore his argument that, if such amendments are to be made, then they must be done in conformity with the rule of mutuality. He also submits that, according to the rule of mutuality, a democratic Constitution may be dismembered using the same democratic procedure that was used to ratify it.

[1425] Prof. Roznai also urges that while interpreting Article 255 to 257 of the Constitution, the Court should consider the significance of amendment mechanisms.

[1426] I will later in this Judgment revisit this particular submission and make firm findings on the issue but I must at this point address primary constituent power.

(vi) What constitutes the primary constituent power?

[1427] *Ringera, J.* in ***Timothy M Njoya & 6 others v Attorney General & 3 others***, Misc. Civil Application No. 82 of 2002; [2004] eKLR ***(Njoya Case)*** while defining what constitutes the constituent power adopted the definition by B.

O. Nwabueze, ***Presidentialism in Commonwealth Africa,*** L Hurst & Company, 1974 where the author writes at p. 292:

> ***"The nature and importance of the constituent power need not be emphasized. It is a power to constitute a frame of Government for a community, and a Constitution is the means by which this is done. It is a primordial power, the ultimate mark of a people's sovereignty. Sovereignty has three elements: the power to constitute a frame of Government, the power to choose those to run the Government, and the powers involved in governing. It is by means of the first, the constituent power that the last are conferred. Implementing a community's constituent power, a Constitution not only confers powers of Government, but also defines the extent of those powers, and therefore their limits, in relation to individual members of the community. This fact at once establishes the relation between a Constitution and the powers of Government, it is the relation of an original and a dependent or derivative power, between a superior and a subordinate authority. Herein lies the source and the reason for the Constitution's supremacy."***

[1428] The ***Njoya Case*** brought the concept of constituent power directly into focus during the Constitution review process prior to 2010. The petitioners in that case had challenged the review process claiming that the Constitution of Kenya Review Act (1997) had failed to provide a mechanism through which the people can exercise their constituent power to make and adopt a new Constitution by way of a referendum. The petitioners also contended that the power to adopt a Constitution through a referendum is inherent in them as part of the sovereignty

of the people whilst there was no provision for a compulsory referendum in the final Bill prepared by the CKRC. It was also their argument that the NCC was not a constituent assembly because the people had not directly elected two-thirds of its members.

[1429] The Court in its decision noted that it was called upon to determine the constitutional status of the concept of the constituent power of the people and its implications on the constitutional review process. Two questions for determination arose in that regard: whether Parliament could, in the exercise of its amendment power, repeal a constitution and enact a new one in its place; and whether enactment of a Bill without the participation of the Kenyan people and the exercise of their constituent power rendered the process illegitimate.

[1430] In noting the juridical status of the concept of the constituent power of the people, *Ringera, J.* stated that the most important attribute of the sovereignty of the people is their possession of the constituent power. It was his finding that:

> ***"With respect to the juridical status of the concept of the constituent power of the people, the point of departure must be an acknowledgment that in a democracy, and Kenya is one, the people are sovereign. The sovereignty of the Republic is the sovereignty of its people. The Republic is its people... All Governmental power and authority is exercised on behalf of the people. The second stop is the recognition that the sovereignty of the people necessarily betokens that they have a constituent power – the power to constitute and/ or reconstitute, as the case may be, their framework of government. That power is a primordial one. It is the basis of the creation of the Constitution and it cannot therefore be conferred or granted by the Constitution. Indeed, it is not expressly textualized by the***

Constitution and, of course, it need not be... A sovereign Republic is a sovereign people and a democratic state is one where sovereignty is reposed in the people... The most important attribute of a sovereign people is their possession of the constituent power... The Constitution is supreme because it is made by they in whom the sovereign power is reposed, the people themselves. And as I shall in due course demonstrate the powers of Parliament under S. 47 of the Constitution are a further recognition that the constituent power reposes in the people themselves..."

[1431] *Ringera, J.* thus accepted the argument by the petitioners that the sovereign constituent power to make a Constitution was reposed in the people as a whole, and that the difference between constitution-making and constitutional revision is crucial. He also concurred with the position in the ***Kesavananda Case*** that Parliament has no power to amend or change the basic features of the Constitution, or abrogate and enact a new one.

[1432] It must be remembered however that *Ringera, J.* was addressing a review of the 1969 Constitution with the ultimate aim of promulgating a whole new Constitution which ultimately happened in 2010. He was also addressing the exercise of primary constituent power and the role of Parliament to amend the Constitution under Section 47 of the repealed Constitution. The popular initiative amendment procedure which is in contention today was not an issue at the time as the repealed Constitution did not have a referendum process nor were the people directly involved in the said amendment and later review process under Section 47.

[1433] In the above context, Article 255 of the Constitution provides as follows:

"(1) A proposed amendment to this Constitution shall be enacted in accordance with Article 256 or 257, and

approved in accordance with clause (2) by a referendum, if the amendment relates to any of the following matters—

(a) the supremacy of this Constitution;

(b) the territory of Kenya;

(c) the sovereignty of the people;

(d) the national values and principles of governance mentioned in Article 10 (2) (a) to (d);

(e) the Bill of Rights;

(f) the term of office of the President;

(g) the independence of the Judiciary and the commissions and independent offices to which Chapter Fifteen applies;

(h) the functions of Parliament;

(i) the objects, principles and structure of devolved government; or

(j) the provisions of this Chapter.

(2) A proposed amendment shall be approved by a referendum under clause (1) if—

(a) at least twenty per cent of the registered voters in each of at least half of the counties vote in the referendum; and

(b) the amendment is supported by a simple majority of the citizens voting in the referendum.

(3) An amendment to this Constitution that does not relate to a matter mentioned in clause (1) shall be enacted either—

(a) by Parliament, in accordance with Article 256; or

(b) by the people and Parliament, in accordance with Article 257."

[1434] Any interpretation of Articles 255 to 257 must necessarily begin with a rendition of the Constitutional making process in Kenya. Both the High Court and the Court of Appeal addressed that history most admirably. On my part, suffice it to say that such an interpretation must also begin with the very same Constitution at Article 259(1) which states as follows:

"(1) This Constitution shall be interpreted in a manner that–

(a) promotes its purposes, values and principles;

(b) advances the rule of law, and the human rights and fundamental freedoms in the Bill of Rights;

(c) permits the development of the law; and

(d) contributes to good governance."

[1435] Of relevance is the edict that the purpose, values and principles of the Constitution must never be lost sight of in Article 259(3).

[1436] In the above context, in ***Commission for the Implementation of the Constitution v. National Assembly of Kenya & 2 Others,*** HC Petition No. 496 of 2013; [2013] eKLR ***(Commission for the Implementation of the Constitution Case)***, I addressed the basic structure and amendment of the Constitution by Parliament and not by popular initiative. It was my finding that Parliament may amend the Constitution, but that the Constitution's basic structure limits this amendment mandate by making it difficult to amend without recourse to the processes in Articles 255, 256 and 257. I stated as follows:

"To my mind the basic structure of the Constitution requires that Parliamentary power to amend the Constitution be limited and the judiciary is tasked with the responsibility of ensuring constitutional integrity and the

Executive, the tasks of its implementation while Independent Commissions serve as the "peoples watchdog" in a constitutional democracy. The basic structure of the Constitution, which is commonly known as the architecture and design of the Constitution ensures that the Constitution possesses an internal consistency, deriving from certain unalterable constitutional values and principles…

One must also remember our peculiar history, and the reason why it was necessary to limit the power of Parliament to amend the Constitution or rather make it extremely difficult to do so. I am also alive to the fact that the Independence Constitution was amended very soon after its promulgation and many times thereafter. Successive safeguards for democracy and accountability were thereafter casually removed. The call for a new Constitution was key to the demands for a return of a true constitutional democracy since nothing good was left of our Independence Constitution due to its piecemeal amendments…" [emphasis mine].

[1437] In stating as I did above, I was alive to the fact that the basic structure doctrine was introduced by the Indian Supreme Court as a limitation on the constituent power of Parliament to amend the Constitution and not on the alteration of the Constitution as a whole. It seems to me therefore that, the doctrine was cited in the ***Kesavananda Case*** as a precautionary measure against arbitrary exercise of the constituent power by Parliament, which, in the absence of the doctrine, India's Parliament would have moved to amend the Constitution in any manner it deemed fit.

[1438] This is also because in India, unlike other jurisdictions, the Constitution does not have provisions referring amendment of important provisions of the Constitution to a referendum. In Kenya, the whole Constitution may be changed with the concurrence of the people. It doesn't matter whether the amendment touches on what may be deemed as 'essential features' of the Constitution as the existence of such features will not stand in the way of the same being changed. A new Constitution is also sanctioned by the people by way of a referendum and no other process. That was the reasoning in the ***Njoya* Case** and in enacting Articles 255 to 257, the framers were alive to that fact.

[1439] In that regard, and turning back to India, Articles 368 (1) of the Indian Constitution states that *"(1) Notwithstanding anything in this Constitution, Parliament may in exercise of its constituent power amend by way of addition, variation or repeal any provision of this Constitution in accordance with the procedure laid down in this article"* [emphasis mine].

[1440] *Sikri, J.* in the ***Kesavananda Case*** commented on what in his view, constitutes an amendment by holding that:

> ***"... the expression 'Amendment of this Constitution' does not include a revision of the whole Constitution....In my view that meaning would be appropriate which would enable the country to achieve a social and economic revolution without destroying the democratic structure of the Constitution and the basic inalienable rights guaranteed in Part III and without going outside the contours delineated in the Preamble."***

[1441] The doctrine therefore does not concern procedurally defective constitutional amendments, but only with validly passed amendments. If the Constitution itself provides an express substantive limitation on the exercise of the power, the doctrine is irrelevant in respect of that power. The doctrine is thus

invoked precisely because the power to amend is not substantively limited. If the power to amend is unlimited, an all-powerful Legislature can destroy the Constitution and/or make a new Constitution, an eventuality the original constitution makers in India could not have intended, according to the ***Kesavananda Case***.

[1442] Dunga Das Basu, in ***Shorter Constitution of India*** Vol.2 (Lexis Nexis, 14th Ed, 2009) in that context argues that the identity of a Constitution is derived from its structure of Government and the agreed political, economic and social values and aspirations of the people as a community and a nation enshrined therein. He argues that the basic structure concerns identity by writing:

> ***"The theory of basic structure is based on the concept of constitutional identity. The basic structure jurisprudence is a preoccupation with constitutional identity. The Supreme Court has observed that 'one cannot use the Constitution to destroy itself'. It is further observed that 'the personality of the Constitution must remain unchanged'. Therefore, the Supreme Court while propounding the theory of basic structure, has relied upon the doctrine of constitutional identity. The word 'amendment' postulates that the old Constitution survives without loss of identity despite the change and it continues even though it has been subjected to alteration. To destroy its identity is to abrogate the basic structure of the Constitution. This is the principle of constitutional sovereignty. The main object behind the theory of the constitutional identity is continuity and within the continuity of identity, changes are admissible depending upon the situation and the circumstances of the day. The***

theory of basic structure is based on the principle that a change in a thing does not involve its destruction and destruction of a thing is a matter of substance and not form."

[1443] In Kenya, while we have a basic structure, any interpretation made shall be construed according to the doctrine of interpretation that the law is always speaking. What then is the law telling us about the basic structure of the Constitution as regards Kenya?

[1444] In the ***Commission for the Implementation of the Constitution Case***, I was called upon to determine the question whether the National Assembly could amend Article 260 of the Constitution in order to remove the offices of Members of Parliament, Members of County Assemblies, Judges and Magistrates from the list of designated state officers under that Article. The dispute, much like in the ***Kesavananda Case*** related to the amendment power donated to Parliament under Article 256 and not the popular initiative processes under Article 257 as read with Article 255. I stated that:

"Where the basic structure or design and architecture of the Constitution is under threat, this court can genuinely intervene to protect the Constitution."

[1445] I did not in fact injunct the National Assembly from proceeding with the debate on that particular amendment Bill but stated that the petition was premature and directed as follows:

"(i) Let this Judgment be brought to the immediate attention of the Attorney General for necessary action.

(ii) Copies thereof shall also be delivered to the Clerks of the National Assembly and Senate respectively for necessary action.

(iii) The Petition is ordered to be dismissed but the Petitioner is at liberty to apply later in the legislative process should it be minded to do so."

[1446] In the end, that particular amendment Bill never translated itself into law and the matter died a natural death. I must reiterate that my findings on the basic structure were firmly anchored on my understanding then and now on the mandate of Parliament to effect amendments under Article 256 and that of the people through a popular initiative under Article 257. The processes are obviously different and Article 255 contains the lens by which both must be viewed.

[1447] At the hearing of this appeal, I posed the question; what matters are outside Article 255 and which form the basic structure of our Constitution and which require exercise of the primary constituent power? I got no satisfactory answer, but the express language of Article 255 speaks for itself. The issues that are ring-fenced from Parliament's amendment powers are:

(a) The supremacy of this Constitution;

(b) The territory of Kenya;

(c) The sovereignty of the people;

(d) The national values and principles of governance mentioned in Article 10 (2) (a) to (d);

(e) The Bill of Rights;

(f) The term of office of the President;

(g) The independence of the Judiciary and the commissions and independent offices to which Chapter Fifteen applies;

(h) The functions of Parliament;

(i) The objects, principles and structure of devolved government; or

(j) The provisions of this Chapter.

[1448] What then was the purpose for which Article 255 was enacted? At page 74 of the CKRC Final Report, that purpose is well articulated as being that:

> ***"There is need to protect the Constitution against indiscriminate amendments. If the amendment procedure is too simple, it reduces public confidence in the Constitution. The converse, however, is also true. If the amendment procedure is too rigid, it may encourage revolutionary measures to bring about change instead of using the acceptable constitutional means. Thus, a balance must be struck between these two extremes."***

[1449] In addition to the above, the framers created a distinction between "entrenched provisions" and "non-entrenched provisions" leading to the enactment of Article 255 to contain the entrenched and the rest of the Constitution to contain the non-entrenched. The bottom line is therefore that; the Constitution 2010 is amendable using the two processes established by the same Constitution; by Parliament – in non-entrenched provisions and by popular initiative as regards entrenched provisions. To that extent, I reiterate Prof. Migai Aketch's submission that no immunization was intended by the framers and this submission finds favour in my eyes.

[1450] Elsewhere in this Judgment I noted the submission by some *amici curiae* that, non-progressive Judiciaries have rejected the notion that the basic structure of a Constitution is and can be found outside the language of the Constitution and is reposited in an implied framework to which Judges could occasionally resort to on a case to case basis. I categorically reject such a proposition as being incapable of rationalization in the context of our constitutional design and architecture.

India for example, noted as a progressive jurisdiction, has a totally different design in Article 368 and three fundamental differences can be gleaned from its Constitution *vis-à-vis* our Article 255, 256 and 257:

i. *Parliament can amend by way of addition, variation or repeal any provision of the Indian Constitution;*
ii. *Where an amendment involves an entrenched provision, then it must be ratified by not less than one half of State Legislatures; and*
iii. *No amendment shall be called into question in any court on any ground.*

[1451] Of course, ***Kesavananda*** clarified that, even though the above position obtains as a matter of fact and law, there are certain things that Parliament cannot do. It cannot, in the language of the learned Judges, amend the Constitution so as to destroy "several basic elements or fundamental features of the Constitution." As to what those features are, they stated that, as regards clause (3) of the 25th Amendment, because it empowered *"the Parliament and the State Legislatures to pro taunt amend certain human freedoms guaranteed to the citizens by the exercise of their ordinary legislative power"* then the amendment was invalid. And therein lies the fundamental difference between the Indian and Kenyan Constitutions. In Kenya, Parliament cannot in exercise of '*its ordinary legislative power*' amend the entrenched provisions in Article 255 without the sequential steps in Article 257 being:

1. *Collection of one million signatures by the promoters of a popular initiative;*
2. *Verification of signatures by IEBC;*
3. *Submission of an amendment Bill to County Assemblies for consideration;*

4. *Introduction of the Bill to the two Houses of Parliament for debate if it has been approved by a majority of County Assemblies, (they are 47 in number);*
5. *If the Bill passes, then it is submitted to the President for assent;*
6. *It is then submitted to a referendum by IEBC; and*
7. *If however, both Houses fail to pass the Bill or if it touches to any matter in Article 255(1) it shall still be submitted to a referendum.*

[1452] This process is unknown to India and therefore the submission that India is a good case study as relates to the matter at hand was correctly answered by Mr. Lesinko who responded to my question at the hearing by distinguishing the Indian situation.

[1453] Furthermore, contrary to submissions by some parties, I declined to use the terms 'Basic Structure Doctrine' in ***Commission for the Implementation of the Constitution Case*** and referred to basic structure and not doctrine. This clarification is utterly important.

[1454] In that context, what is a doctrine? ***The Cornell Law School website – law. Cornell.edu*** – has defined it as:

> ***"A single important rule or set of rules that is widely followed in a field of Law. In general, doctrines are simply rules or principles with such a long history in the law that Lawyers and Scholars have given them the more prestigious label of 'doctrine'."***

[1455] ***Black's Law Dictionary***, 9th Edition at page 553 also defines a doctrine as:

"A principle, esp. a legal principle, that is widely adhered to."

[1456] There are doctrines that have developed and their principles widely accepted and incorporated into civil law by various jurisdictions. These include the doctrine of separation of powers which signifies the division of powers between various organs of the state; Executive, Legislature and Judiciary; the doctrine of judicial discretion where judges exercise their discretion in applying the law; the doctrine of judicial review which grants Courts the authority to declare laws or actions of government officials unconstitutional if the acts are done beyond the powers granted by the Constitution or Statute; the doctrine of natural justice which signifies that no person shall be condemned unheard; the doctrine of *res judicata* which provides that once a matter is finally decided by a competent court, no party can be permitted to reopen it in a subsequent litigation.

[1457] Other doctrines of law whose principles have also been widely applied include the doctrine of laches which states that a court will only assist people who are vigilant and not the indolent and the doctrine of harmonious construction which states that a provision of the constitution or statute should be interpreted or construed not in isolation but as a whole, so as to remove any inconsistency or repugnancy.

[1458] Has the basic structure doctrine met the criteria for recognition? I think not. Some of its most ardent proponents, such as Professors Richard Albert and Prof. Roznai whose writings including **"*Constitutional Amendment and Dismemberment*,** (2018) Vol. 43 Yale Journal of International Law 1 and **"*Unconstitutional Constitutional Amendments",*** (Oxford University Press, 2017) and who have shown a remarkable understanding of the issues before this Court, have never claimed that the doctrine is widely followed and in fact Prof. Roznai has, in his *amicus* brief, shown the disagreement among Judges and Scholars on its applicability from country to country. Malaysia for example cannot

be cited as having wholly embraced the doctrine and the *obiter* in the ***Sivarasa Case*** cannot be an authority in that regard. I should also revisit India and indicate that only a thin majority in the ***Kesavananda Case*** embraced the doctrine in the unique circumstances of that country.

[1459] Speaking for myself, at a purely intellectual and theoretical level, I am attracted to the doctrine as a useful tool in interpretation generally but as I have stated, it has to be read alongside our constitutional text and history for a conclusive decision as whether our Constitution has clauses that cannot be amended because of the basic structure doctrine or simply, that our Constitution has a basic structure that Parliament cannot amend without the input of the people in all the processes that I have detailed out above leading to a final decision at a referendum.

[1460] This then leads me to my opinion on primary constituent power. I have carefully read the Judgment of the High Court and also that of my learned brothers and sisters at the Court of Appeal. I have also taken note of the submissions made before us by Mr. Havi who repeated all his submissions at the High Court and Court of Appeal particularly on the writings of Prof. Nwabweze including ***"Presidentialism in Common Wealth Africa"*.** I am also alive to John Locke's **"*Two Treatises of Government*"** and Montesquieu's **"*The Spirit of the Laws*"**. I shall leave out Mr. Havi's references to the Bible as an authority on the subject. Mutakha Kangu's **"*Constitutional Law of Kenya on Devolution*"** (Strathmore University Press, 2015), has also been cited in relevant parts although it deals largely with devolution.

[1461] At para. 474 of the High Court Judgment, the learned Judges expressed the view that:

> ***"(c)The sovereignty of the People in constitution-making is exercised at three levels:***

(i) The Primary Constituent Power is the extraordinary power to form (or radically change) a Constitution; the "immediate expression of a nation and thus its representative". It is independent of any constitutional forms and restrictions and is not bound by previous constitutional rules and procedures. In Kenya, the Primary Constituent Power is exercisable in four sequential processes listed in paragraph (e) below.

(ii) The Secondary Constituent Power is an abbreviated primordial Constituent Power exercisable by the whole polity in an abbreviated process to alter the constituting charter (Constitution) in non-fundamental ways, that is, without altering the Basic Structure. In Kenya, the Secondary Constituent Power to amend the Constitution is exercisable through a referendum subsequent to public participation and Parliamentary process. It, also, can only be perfected by following the amending procedures in Articles 255-257 of the Constitution.

(iii) The Constituted Power is created by the Constitution and is an ordinary, limited power; a delegated power derived from the Constitution, and hence limited by it. In Kenya, the Constituted Power is exercised by Parliament, which has limited powers to amend the

Constitution by following the procedures set in Articles 255-257 of the Constitution."

[1462] The opening words above should indeed be the beginning of an understanding of this issue; the learned Judges stated that; ***"The sovereignty of the people in constitution-making is at three levels".*** I completely agree with this expression of the law and indeed prior to the Referendum of 2005 in which the *'NO'* side succeeded and in 2010 when the *'YES'* side succeeded, the process of constitution-making was as follows:

> ***"(i) The review of the Constitution of Kenya was to be conducted through the CKRC the District Forums and the National Constitution Consultative Forum – See Section 2B of Constitution of Kenya Review Ac 1997. In addition, the National Assembly in Section 16A of that Act had a role in the process. Subsequently, the Electoral Commission would be the body to conduct the resultant referendum.***
>
> ***(ii) The Constitution of Kenya Review Act, 2008 which created the Committee of Experts in Section 30(1) of the Act directed the Experts to invite representations from "the public, interest groups and experts on contentious issues...." and then present a harmonized draft Constitution to the Parliamentary Select Committee which could revise it before tabling it before the National Assembly and then to a referendum conducted by the Electoral Commission. The Constitution 2010 was thus born. "***

[1463] All the above processes must be understood in their context; the Kenyan people, through the organs created by statute and with their participation, were engaged in constitution-making; the doing away of the old Constitutional order and creating/making of a new one – the Constitution 2010. The High Court and the Court of Appeal were thus correct in finding that the four sequential steps are required in such a process. They listed them to be:

(i) Civic Education;

(ii) Public participation and collation of views;

(iii) Constituent Assembly debate – in fact, this stage is not necessarily only by way of a Constituent Assembly as a National Convention, National Conference etc are the other titles used elsewhere; and

(iv) Referendum.

[1464] My point of departure with my learned colleagues is that the process presently in dispute was squarely anchored on Article 257 as read with Articles 255 and 256. I shall return to the question whether the Amendment Bill was in fact a complete overhaul of the present constitutional order or whether it was an amendment as envisaged by these Articles. Suffice it to say that, should the Kenyan people, in their sovereign will choose to do away with the Constitution 2010 and create another, then the sequential steps above are mandatory and our constitutional history will be the reference point.

[1465] Having so said, Article 1 of the Constitution is headed ***"Sovereignty of the* people"**. The people in the Preamble concede that they exercised their sovereignty and **"*inalienable right to determine the form of governance of our country and having fully participated in the making of [the] constitution",*** adopt and give **"*this Constitution to ourselves and future generations*".** In furtherance of these objectives, Articles 2(1) commands that

the Constitution is the Supreme Law of the Republic and binds all persons and all state organs at both levels of Government – devolved and national.

[1466] To my mind, all courts, in addressing all disputes before them, must therefore, always, begin with the Constitution and ensure that they act within its boundaries and edicts before recourse to other jurisdictions and laws. What then was the dispute before the High Court as regards the issue at hand?

[1467] In Petition No. E282 of 2020, the bone of contention was that the Amendment Bill was unconstitutional for attempting to breach the basic structure doctrine and was in effect proposing not an amendment but a dismemberment of the Constitution. The net effect of this contention is that the Amendment Bill went outside the purview of the amendment procedure crafted in Article 257 as read with Article 255 and for that purpose an extra – constitutional doctrine, the basic structure doctrine, widely accepted and followed by scholars, judges and lawyers must be invoked to invalidate it.

[1468] I have already addressed part of this question but I must now turn to amendments squarely under our Constitution. In doing so, I must reiterate that, Article 255 must be read in the context of the whole Constitution, first, and if there be need for reference to other laws, then that must be done using the direction given by Article 259.

[1469] I must also reiterate my finding that, the learned Judges of the High Court seemed to suggest that all Eighteen Chapters of the Constitution together with its schedules are unamendable using the basic structure doctrine. Of course, that is a fallacy, with respect and I notice that, later in the same Judgment, a measure of clarity as to their understanding of the amendment process was made.

[1470] I however agree with them and the learned Judges of the Court of Appeal that every Constitution has pillars and building blocks without which it cannot stand. However, looking at Article 255 against the whole Constitution, it directly

speaks to these pillars and building blocks by identifying them, not in abstract but by their importance as such. They are:

(i) *The supremacy of the Constitution itself – that should there be an amendment to this hallowed provision, there must be a separate amendment;*

(ii) *The territory of Kenya – the boundaries etc;*

(iii) *Sovereignty of the people – the overriding and all important principle codified in Article 1;*

(iv) *The national values and principles of governance – the guiding spirit in all the affairs of Kenyans;*

(v) *The Bill of Rights – the inalienable rights starting with the right to life;*

(vi) *The term of office of the President – the symbol of national unity inter alia;*

(vii) *Independence of the Judiciary and Commissions and Independent Offices – the watchdogs against bad governance and malfeasance;*

(viii) *The functions of Parliament – the representatives of the people in law making and in checking the Executive;*

(ix) *Devolved government – governance at the grassroots; and*

(x) *Amendment chapter – Article 255 as a guard against amendment to itself.*

[1471] I have elsewhere above set out the sequential steps in Articles 257 to which all the above pillars and building blocks must be subject to, if they were to be amended. What justification would any court ordained to be bound by the

Constitution 2010, have to ignore those steps and resort to steps, ordinarily used, not in amendment of a Constitution but in the making of [a] Constitution? Why would any court ignore the pillars and create others, known and unknown? Why would any court interpret our solemn Constitution by implication when it has specific tools for its interpretation and in-built mechanisms? Why would dismemberment take centre stage when the issue before the courts below was amendment?

[1472] Where does the express language of Article 255(1) create dismemberment? But that is not the end of the matter as dismemberment must still be addressed, it having arisen as a substantive issue at the hearing.

[1473] Prof. Richard Albert, in his *amicus* brief refers to his own definition of a constitutional dismemberment as follows:

> ***"A constitutional dismemberment entails a fundamental transformation of one or more of the constitution's core commitments. A dismemberment is incompatible with the existing framework of the Constitution because it seeks to achieve a conflicting purpose. It intends deliberately to disassemble one or more of a constitution's elemental parts. An amendment does not go nearly as far because, properly defined, it keeps the altered constitution coherent with its pre-change identity, rights, and structure. To use a rough shorthand, the purpose and effect of a constitutional dismemberment are the same: to unmake a constitution. See Richard Albert, and Changing Constitutions (Oxford University Press, 2019), at 84."***

[1474] One can hardly argue with this definition and indeed, with the reasoning of the learned Judges in the courts below as to the import of dismemberment.

Neither can I argue with the conclusion that, in making constitutions, the old must be dismembered to create the new. That is what the Kenyan people did in 2010. Indeed, an often forgotten Article 264 of the Constitution 2010 provides as follows:

> ***"..for the avoidance of doubt, the Constitution in force immediately before the effective date shall stand repealed on the effective date."***

[1475] Prof. Albert, in comparing an amendment to dismemberment, has argued that an amendment, properly defined, keeps the altered Constitution coherent, with its pre-change identity, rights and structure. Is the Amendment Bill a dismemberment of the Constitution 2010 or an amendment?

[1476] The Bill has 74 Clauses and two Schedules. The memorandum of objects and reasons explains each proposed amendment. I would have expected each and every such amendment to be subjected to scrutiny by the parties that proclaim it to be unconstitutional. None, in my reading of the pleadings and submissions did so and even applying their test to the Bill, I never heard any party claiming the unconstitutionality of an amendment that proposes:

(i) *Clause 2 – regional cohesion and integration;*
(ii) *Clause 3 – economy and shared prosperity;*
(iii) *Clause 5 – protection of personal data;*
(iv) *Clause 6 – enactment of legislation to require Parliament to provide mechanisms to strengthen the fight against corruption through expeditious investigation, prosecution and trial of cases relating to corruption and integrity;*
(v) *Clause 7 – relating to Party lists and to ensure that they comply with the principle that not more than one-third of candidates are of the same gender;*
(vi) *Clause 68 – to include the Director of Public Prosecutions as an independent office; and*

(vii) Clause 69 – to reduce the number of Commissioners in Independent Commissions because of huge expenditure incurred by the public.

[1477] I have picked on these seven to isolate them from all the clauses that relate to; i) the expanded executive and ii) the Judiciary iii) Revenue Allocation and iv) others. Some Judges of the Court of Appeal for example, picked on Clause 44 on the Judiciary Ombudsman, Clauses 29, 32 and 33 removing the requirement for vetting of Cabinet Secretaries, Secretary to the Cabinet and Principal Secretaries by the National Assembly; Clause 31 on the creation of Deputy Ministers and Clauses 10 and 74 on increase of Constituencies as issues that require more than the processes envisaged by Articles 255 to 257. In the learned Judges' view, these matters attack the basic structure of the Constitution and invoking the doctrine related to that structure, declared the entire Amendment Bill invalid.

[1478] By what lens outside the Constitution can any court make such a declaration? The High Court was dealing with the matter before it because under Article 258(1) any person can ***"institute proceedings claiming that [the] Constitution has been contravened, or is threatened with contravention"*** Article 165(3)(d)(ii) also grants that court jurisdiction to determine any question ***"whether anything said to be done under the authority of [the] Constitution is inconsistent with, or in contravention of [the] Constitution"***. The parameters of that jurisdiction are clear and unequivocal. I did not hear any party submit that there is a higher law to which recourse must be had even in the face of the clear language of the Constitution neither did I hear any party refer to Article 2(5) with regard to general rules of international law to which specific enjoinment in the present case ought to be made. And if that higher law is the basic structure doctrine, I have explained why I find it difficult to accept the arguments made in that regard. In any event, how can a doctrine not anchored anywhere in the Constitution be used to declare any act unconstitutional?

[1479] Yet another question must be addressed; the history of Kenya is replete with constitutional amendments by Parliament which led to erosion of democracy and the rule of law. What mechanism has the Constitution 2010 provided to ensure that no such amendments occur ever again without the input of the sovereign – the people. Two mechanisms were created for that purpose:

(i) Amendments by Parliament – Article 256; and

(ii) Amendment by popular initiative – Article 257.

[1480] One of the most important steps in (ii) is the role of the sovereign – the people – in the entire chain of events I outlined elsewhere above. That role arises squarely from Article 1(1) which provides that the exercise of sovereignty is either directly or through their democratically elected representatives. This exercise of direct power need not be implied as suggested by some parties. It is direct because it is exercised in that manner by constitutional edict and not by reference to any other legal regime - real or implied.

[1481] How then is direct sovereignty exercised in Article 257? The language used in that Article as regards this question requires no more than a literal interpretation. It is exercised by:

(i) Collection of one million signatures – Articles 257(1);

(ii) Participation in civic education prior to a referendum – Articles 256(5), 257(10) as read with Article 88(4)(g); and

(iii) Voting in a referendum – Articles 256(5)(a) and 257(10).

Indirect participation is through the elected representatives at the County Assemblies and Parliament.

[1482] To say that the people therefore have no role or say in an amendment process or that they have no capacity to make decisions to their benefit is an affront to their sovereignty, more so in this century.

[1483] Having so said, I must return to India and to the Judgment of *Ray, J.* in ***Kesavananda.*** He delineated the sacrosanct provisions that cannot be amended by Parliament without the input of the people. Similar or near similar provisions are set out in Article 255 of the Constitution as amendable by the people in a referendum. By what tool of interpretation would I deny Article 255 and refer to ***Kesavananda?*** I submit none. *Sichale, J.A* was thus correct in refusing the invitation to embrace judicial craft and judicial innovation in implying doctrines and principles that are obviously outside the constitutional text and which ignore our context and history.

[1484] An interesting question must also necessarily arise in the present context; if indeed the basic structure can be amended under Article 257 as read with 255, how far should such an amendment go? Can an amendment Bill for example amend the Constitution and do away with Article 25 and all the rights therein that may not be limited? The answer lies in the in-built processes in Article 257 ending with a referendum where such a fundamental amendment would be determined. Civic education is the mechanism by which the dangers of such an amendment would be pointed out among other processes in that Article. The people will have the final word at the referendum.

(vii) Finding on Issue No. (i)

[1485] From my analysis above, my finding on Issue No.(i) is that the basic structure doctrine does not apply in Kenya in the manner suggested by the 1st to 5th respondents and that the four sequential steps set out by the High Court and the majority of the Court of Appeal only apply when a new Constitution is being made and not in any amendment process under Article 257 of the Constitution. In addition, based on our history, the text of the Constitution and the context as outlined above, it is the legislation such as the Constitution of Kenya Review Act 2008 and its 1997 predecessor that the four sequential steps should be anchored

when and if the people ever want to change their constitutional order as they previously did in 2010.

D. ISSUE NO. (II)

> ***Whether the President can initiate changes/amendments to the Constitution; and whether a constitutional amendment can only be initiated by Parliament through a parliamentary initiative under Article 256 of the Constitution or through a popular initiative under Article 257 of the Constitution***

[1486] The Attorney General maintains that the President can initiate a popular initiative for a number of reasons. One, the President took an oath to obey and defend the Constitution just as Members of Parliament who can initiate amendments to the Constitution did and therefore, nothing hinders the President from also initiating such amendments. Two, that Article 257 does not exclude certain registered voters or citizens from taking part in constitutional amendments by virtue of their positions in society by discriminating between a private citizen, state organ or public officer as pertains to who can be a promoter. Three, that Article 1(2) states that the people of Kenya may exercise their sovereign power through their duly elected representatives, and the President being an elected representative, may legitimately initiate amendments to the Constitution through a popular initiative. Fourth and lastly, the Attorney General claims that a finding that the President cannot participate in a popular initiative limits the rights of the President under Articles 27 and 38 of the Constitution. This argument is also supported by the 14th, 16th, 18th and 21st respondents.

[1487] The 20th respondent in addition to the above, has submitted that he, as President, under Article 131(2)(b) is obligated to promote and enhance national unity, but that how he undertakes this mandate, is left to his discretion. It was Counsel's argument that since the Constitution provides for a presidential system,

then the only way the President can initiate amendments is through Article 257 as Article 256 is a clear preserve of the Legislature. Most importantly, the 20th respondent argues that he enjoys political rights as a citizen of Kenya and is also entitled to the right to equality from discrimination under Articles 27 and 38 of the Constitution.

[1488] The 10th respondent, though agreeing that the President does indeed enjoy political rights which cannot be limited and that Article 131 allows the President to initiate amendments, nevertheless argues that the President can only make proposals but cannot in his official capacity, initiate an amendment under Article 257.

[1489] Also in opposition is the 19th respondent who strongly argues that the President is not authorized under the Constitution to initiate constitutional amendments. He also strongly urges that the Gazette notices signed by the President establishing the BBI Steering Committee are in violation of Article 2(2) which prohibits the use of state machinery in changing the Constitution.

[1490] The 1st to 5th respondents on the other hand, argue that each step of the Bill was attained under the watch and guidance of the National Executive, neither of which can be equated to being a popular nor parliamentary initiative. They urge that the popular initiative was exclusively for use by voters and cite Clauses 302 and 304 of the Bomas Draft to support their argument. In that regard, they argue that the attempt by the BBI Secretariat and Hon. Raila Odinga, and now the Attorney General to seek a distinction between an initiator and promoter of a popular initiative is an invitation to this Court to shut its eyes to the plain reality of the President's patronage and involvement in the entire enterprise to amend the Constitution under the guise of a popular initiative.

[1491] Furthermore, they argue that there was a deliberate effort to disguise a parliamentary initiative as a popular initiative without recognizing or by blurring with premeditation, the parallels between the two and the justification thereof.

[1492] The 7th, 8th and 9th respondents were also of the same view and further added that the Bill, though branded as a popular initiative, was actually a presidential initiative.

(i) Findings by the High Court

[1493] The High Court crafted the present issue for determination as follows:

> *What is the constitutional remit of amendment of the Constitution through a Popular Initiative? This issue further twins into two sub-issues:*
>
> *(a) Who can initiate a Popular Initiative under our constitutional set up?*
>
> *(b) Is the BBI process of initiating amendments to the Constitution in conformity with the legal and constitutional requirements?*

[1494] In deciding whether the Amendment Bill falls within either the parameters of a parliamentary initiative or popular initiative, the High Court, after tracing the origin of the Amendment Bill came to the conclusion that the same was an initiative of the President and not anyone else. The High Court was also of the view that amendments of the Constitution through a popular initiative cannot be undertaken by the Government.

[1495] The High Court furthermore determined that the President cannot be the promoter and initiator of a popular initiative since, under the provisions of Article 257(5), before the President assents to the Bill, he requests the IEBC to conduct a referendum for approval of the Bill. The Court held thus:

> ***"492. Beyond the text of the Constitution, there is another reason it is impermissible under our Constitution: <u>in our view to permit the President to initiate such amendments through a Popular Initiative and then sprint to the</u>***

finishing lane to await and receive it and to determine its ultimate fate would have the effect of granting to him both the roles of the promoter and the referee" [emphasis mine].

[1496] On deciding the question whether the Bill is a State sponsored initiative and whether it qualifies as a popular initiative as envisaged under Article 257 of the Constitution, the Court noted that it was the President who spearheaded this process. The Court held thus in that regard:

> ***"From the discussion above, it is clear that the initiative to amend the Constitution was conceived after the Taskforce presented its report to the President, who, then, appointed the Steering Committee. That process was spearheaded by the President as the Chief Executive of the Republic of Kenya, who then appointed the Steering Committee and included in its terms of reference the following term: "to propose administrative, policy, statutory or constitutional changes that may be necessary for the implementation of the recommendations contained in the Taskforce report taking into account any relevant contributions made during the validation period"*** [emphasis mine].

[1497] On the question whether the President was acting in his personal capacity and not as the Chief Executive of the Republic of Kenya, the High Court was of the view that Article 257 is invoked by the people who cannot amend the Constitution as per the provisions of Article 256. It was therefore the Court's finding that the President only has recourse under Article 256 and initiate any amendment through Parliament.

(ii) Findings by the Court of Appeal

[1498] *Musinga, (P),* addressed the question "*who were the initiators and promoters of the Constitution of Kenya (Amendment) Bill 2020?"* and after tracing the genesis of the Amendment Bill, it was his finding that the President was the initiator of the said Bill, having gazetted the BBI Taskforce and the BBI Steering Committee.

[1499] On who is the promoter of the Amendment Bill, it was the learned Judge's finding that the BBI National Secretariat was the promoter. In arriving at this finding, he reasoned thus:

> ***"The record of appeal contains a letter dated 18th November 2020 by Hon. Dennis Waweru and Hon. Junet Mohamed as the Co-Chairpersons of the BBI Secretariat addressed to the chairperson of the IEBC, indicating their intention to collect one million signatures in support of the proposed Amendment Bill. The same was acknowledged by a letter dated 24th November 2020 by the Chairperson of the IEBC. It is also in the public domain that on 10th December 2020, the BBI Secretariat Co-Chairpersons handed the signatures and the Bill to the IEBC Chairperson, Mr. Wafula Chebukati. There is therefore no dispute that the promoter of the Amendment Bill was the BBI National Secretariat."***

[1500] On the issue of the legality of the BBI Steering Committee and its Report in the constitutional amendment process and whether it was a popular initiative, it was *Musinga, (P)'s* finding that the Amendment Bill was not a popular initiative, but an Executive led and driven initiative. It was his further finding that the BBI Steering Committee lacked the constitutional mandate to initiate constitutional changes under Article 257 of the Constitution, disguised as a popular initiative. He then rendered himself as follows:

"It is clear in my mind that amendment of the Constitution by the popular initiative was intended for ordinary citizens who are registered voters... It was submitted that the President enjoys all the constitutional rights and freedoms like any other Kenyan, including equality and freedom from discrimination under Article 27 and political rights under Article 38. That is correct, but as it has been held in a plethora of authorities, the Constitution must be read as a whole and in a manner that promotes its purposes, values and principles. The President, through the office of the Attorney General, can use the parliamentary initiative to propose amendments to the Constitution, if he so wishes, but cannot initiate a process for dismemberment of the Constitution disguised as a popular initiative.

I hold and find that under our constitutional architecture, the President cannot initiate the process of amendment of the Constitution as a popular initiative. The President's intentions in initiating the process were noble, but the process of its execution was not in line with the Constitution."

[1501] *Nambuye, J.A* in answering the question on who were the initiators and promoters of the BBI initiative found that the President and Hon. Raila Odinga were the initiators and promoters of the BBI initiative.

[1502] On the issue whether the President can initiate the process of amendment of the Constitution as a popular initiative, it was the learned Judge's finding that nothing under Article 257 bars the Government or state organs from initiating

amendments to the Constitution but that Article 257 has inbuilt mechanisms to ensure that the popular initiative route remains people centric. She held as follows:

> ***"It was therefore erroneous for the judges to assume that popular initiative will necessarily and always be commenced in opposition to the government of the day. It also stands faulted for failure to take into account a relevant consideration that Article 257 of the Constitution has inbuilt mechanisms to ensure that the popular initiative route remains people centric, regardless of how it is initiated, namely, the bill to be signed by one million registered voters, approved by a majority of the County Assemblies and both Houses of Parliament and the Senate before being subjected to a referendum. There is therefore nothing in the said provision to bar the Government and State organs from initiating amendments to the Constitution."***

[1503] *Okwengu, J.A* addressed this issue under various headings. The first was the *'meaning and purport of a popular initiative under Article 257 and its constitutional remit'*. In addressing the meaning of an initiative, it was the learned Judge's finding that the President cannot initiate an amendment through a popular initiative under Article 257 and neither can he be its promoter.

[1504] The other question was on the *'legality of the BBI process and the President's involvement'*. The learned Judge, in her analysis, was of the view that the process leading to the handshake between the President and Hon. Raila Odinga, the formation of the BBI Taskforce, the BBI Steering Committee and the consequent Bill, were similar to the National Accord or peace initiative that was signed on 25th February, 2008 between former President Mwai Kibaki and his

erstwhile rival Hon. Raila Odinga, with a view to implementation of a reform agenda to bring peace and address the recurrent conflict in the Country.

[1505] It was also her view that the issue of legality or constitutionality and the mandate of the BBI Steering Committee had been resolved in ***Thirdway Alliance Kenya Case***, where *Mativo, J.* held that the President had the power to appoint the BBI Taskforce and that the President's authority under Article 131 and 132 of the Constitution is conferred upon him to give him room to fulfil his executive functions, and should not be constrained through the principle of legality and rationality, provided the President has acted in good faith and has not misconstrued his powers. The learned Judge further noted that *Mativo, J* considered the exercise of powers conferred upon the President by the Constitution in regard to the appointment of the BBI cTaskforce or the BBI Steering Committee and was of the view that the finding by the High Court on the issue of the legality of the BBI process was *res judicata*.

[1506] *Kiage, J.A* in his analysis on popular initiative came to the conclusion that a popular initiative is a citizen involving process and that the President chose the wrong initiative by holding:

> ***"From my reading of the literature on these subjects, I am fully fortified in my view, which coincides with that of the learned judges, that a popular initiative is a citizen-conceived, citizen initiated and citizen-driven process. The citizens are the ordinary Mwananchi whether as individuals or as organized in civil groups. They are by definition non-governmental. That being the case, they necessarily exclude Parliament and the Presidency as the initiator of the process. If the initiative is born of presidential fiat, no matter how well intentioned, it ceases to be a popular initiative and must be recognized and***

named a State or Presidential initiative. In the case before us there really can be no serious argument but that the President, while facially motivated by the most laudable nationalistic intention of fostering peace and inclusion by way of building bridges to a united Kenya, chose the wrong process or mechanism for attaining the right ends. I doubt not that the President with his wide array of powers and influence could have used the Parliamentary initiative through his party and others with which he works or could work in a coalition of the willing to bring about the changes to the Constitution that he seeks…"

Furthermore, he expressed himself thus:

"During the entire process there was no suggestion that the President was acting in any capacity other than the usual official capacity. He was the embodiment of State and Government power and authority. Not once was he acting as an ordinary citizen, which he was not and will not be, as long as he holds office. Like Machiavelli's Prince, the President's conduct is different from that of ordinary citizens. In acknowledging this plain and indisputable fact one does not thereby curtail the President's enjoyment, one might say deployment, of his political rights. All it means is that the space upon which he elected to exercise his rights is reserved for ordinary citizens, the common populace of the Republic of Kenya, and it is not open to the President. It is out of bounds to him."

He concluded by stating as follows:

"That remains the position, in my opinion, and does not change by way of consideration of the hypothetical case of the President being unable to persuade an unfriendly Parliament to initiate constitutional changes. The question is first of all hypothetical but, more, to my mind, the President does not shoulder any obligation to initiate constitutional changes. He takes office under and in accordance with the Constitution and his duty is to obey and defend it in keeping with the oath of allegiance, not to change it."

[1507] On the issue of the legality of the BBI process, it was *Kiage, JA's* finding that the BBI process was never a popular initiative as it did not involve citizens from the beginning.

[1508] *Gatembu, J.A* addressed the question whether amendment of the Constitution by popular initiative is a preserve of the citizen by finding that under Article 257, there is no qualification of who may or may not promote an initiative and that there is nothing barring any person including the President from promoting a constitutional amendment by popular initiative. However, he affirmed the High Court's finding that amendments by popular initiative are preserved for ordinary citizens. He was also of the view that though the President is entitled to enjoy his rights under the Bill of Rights, some of those rights are curtailed by finding thus:

"In reaching this conclusion I am cognizant of the provisions of Articles 19, 20, 22, 24 and 38 of the Constitution and the contention that, the holder of the office of President, like every citizen, is entitled to enjoy of rights under the Bill of Rights. However, it seems to me that the curtailment, in certain respects of those rights in

relation to the holder of the office of the President, is sanctioned by the Constitution given the Constitutional role assigned to the holder of the office in the amendment process."

[1509] On the question of who the promoters of the BBI process were, it was his finding that all the players in the process qualify as promoters by finding that:

"As to who the promoters are with respect to the Constitution Amendment Bill, I take the view that the process began with the handshake, followed by the establishment by the President of the Task Force. Thereafter the President established the BBI Steering Committee whose mandate included proposing Constitutional reforms. The BBI Steering Committee generated the Constitution Amendment Bill. The President and the Hon. Raila Odinga then flagged off the signature collection. The Constitution Amendment Bill and the list of voters supporting was then delivered to the IEBC by Hon. Junet Mohammed and Hon. Dennis Waweru as the co-chairs of BBI National Secretariat. It is a continuous process. A continuum. It is unnecessary in my view to attempt to split that process to justify the claim that the process towards initiating the popular initiative began with the delivery of the draft Amendment Bill and supporting signatures to IEBC and to ignore what preceded that. The delivery of the draft Amendment Bill and supporting signatures to IEBC was part of a process that had begun before the generation of the draft amendment Bill by the Steering Committee. In my view all

<u>the players in that process, beginning with the President, the Hon. Raila Odinga, the BBI Steering Committee and the Hon. Junet Mohammed and Hon. Dennis Waweru qualify as promoters in a continuum that preceded the delivery of the Bill to IEBC by the Hon. Junet Mohammed and Hon. Dennis Waweru</u>" [emphasis mine].

[1510] *Sichale, J.A* while considering the issue of the role of the President in the BBI process, was also of the view that the process leading to the formulation of the Bill was largely driven by the Executive and noted:

> ***"From the above, it is evident that the process leading up to the formulation of the Constitution of Kenya (Amendment) Bill, 2020 was largely driven by the executive and it is difficult to truncate the BBI Taskforce and the BBI Steering Committee from the submissions of the letter by Hon. Junet Mohamed and Hon. Waweru, as promoters of the Constitution of Kenya (Amendment) Bill, 2020. It is clear that one thing led to the other until the culmination of the letter of 18th November, 2020 by Hon. Junet Mohamed and Hon. Waweru to the IEBC seeking approval of the format to be used in the collection of signatures. Article 256 and 257 of the 2010 Constitution provide for amendments by way of a Parliamentary initiative and a popular initiative. The proposals by Hon. Junet and Hon. Waweru would best have been channeled through a Parliamentary process as they were heavily laden with the executive arm. The route of popular initiative was not open to them as this was not a Wanjiku driven process."***

[1511] She further went on to find that the President cannot initiate changes to the Constitution through a popular initiative and on the legality of the BBI Taskforce and the BBI Steering Committee, *Sichale, J.A* agreed with the findings by *Okwengu, J.A* that the BBI Taskforce and the BBI Steering Committee were not illegal outfits by affirming the decision in ***Thirdway Alliance Kenya Case***, where *Mativo, J.* considered the President's power to appoint a taskforce such as the BBI Taskforce, and came to the conclusion that the President acted within his powers under Article 131 and 132 of the Constitution in doing so.

[1512] *Tuiyott, J.A,* discussed the issue of the constitutional remit of a popular initiative and was of the view that both the people and Parliament are participants in a popular initiative process. He was however of the finding that the popular initiative route is a preserve of ordinary citizens by finding:

> ***"Parliament cannot initiate or promote an amendment pursuant to Article 257. Clearly it is a people-centric process in which the people own and drive the crucial roles of initiating the amendment, promoting the Bill and voting at the referendum."***

[1513] While further finding that the President or any other Government and state organs may not initiate amendments to the Constitution through a popular initiative, it was his finding that:

> ***"It is true that reading Articles 130(2)(e) with Article 132 of the Constitution, the President has the responsibility of promoting and enhancing the unity of the nation. Indeed, the President is a symbol of national unity. However, a wholesome reading of the Constitution does not lend itself to an outcome that one way in which the President can promote and enhance national unity is by leading a constitution amendment by way of popular initiative. The***

President can use the avenues permitted by the Constitution. The President must not, however, in this noble duty expand his mandate beyond that contemplated by the Constitution.

This is the conclusion I reach notwithstanding the further contention that in some countries like Switzerland, the Government and State organs initiate amendments to constitutions through popular initiative. While it may be true that the text of the Swiss constitution bears some similarity with that of our Constitution, that text does not have the language of our Article 255(3) which strongly underscores that the popular initiative of Article 257 is a citizen driven process in undelegated form. In addition, the historical basis for Articles 255, 256 and 257 alluded to makes the Kenyan process people-centric to the exclusion of State actors. While a comparative study of constitutions of other jurisdictions may help us unpack our Constitution, the dissimilarity in text and the historical journey of our popular initiative clause is far too illuminating to be ignored."

[1514] While deciding on who was the promoter of the Amendment Bill, it was the learned Judge's finding that the BBI Taskforce and BBI National Secretariat were the promoters of the Amendment Bill and not the President.

E. ANALYSIS AND DETERMINATION OF ISSUE NO.(II)

(i) Tracing the origin of the BBI Taskforce and the BBI Steering Committee

[1515] On 9th March, 2018, the President in a widely publicized speech communicated that, together with Hon. Raila Odinga, they would start the process of working together as leaders to find solutions that bind the Kenyan people, a move that was later coined in the term 'BBI' – Building Bridges Initiative. In the speech, the President stated *inter-alia*:

> ***"And this is why me and my brother (Raila) have agreed that starting today, we will begin the process of bringing our people together. That we will begin a process of discussing what ails us and what creates division amongst us."***

[1516] Following this Communiqué, Gazette No. 5154 dated 24th May 2018 was issued by Mr. Joseph K. Kinyua, Head of the Public Service with the heading 'Establishment of Taskforce on Building Bridges to Unity Advisory'. The terms of reference of the Taskforce were listed as to:

> ***"1. (a) evaluate the national challenges outlined in the Joint Communiqué of 'Building Bridges to a New Kenyan Nation, and having done so, make practical recommendations and reform proposals that build lasting unity;***
>
> ***(b) outline the policy, administrative reform proposals, and implementation modalities for each identified challenge area; and***
>
> ***(c) conduct consultations with citizens, the faith based sector, cultural leaders, the private sector and experts at both the county and national levels.***
>
> ***2. In the performance of its functions, the Taskforce –***

(a) shall regulate its own procedures including appointing revolving co-chairs from among its members;

(b) regulate its own procedure while working within confines of the Constitution;

(c) shall privilege bipartisan and non-partisan groupings, forums and experts;

(d) shall form technical/working groups as necessary;

(e) shall outline the policy, administrative reform proposals, and implementation modalities for each identified challenge area;

(f) shall consider and propose appropriate mechanisms for coordination, collaboration and cooperation among institutions to bring about the sought changes;

(g) shall pay special attention to making practical interventions that will entrench honorable behavior, integrity and inclusivity in leading social sectors;

(h) shall hold such number of meetings in such places and at such times as the committee, in consultation with its secretaries, shall consider necessary for the proper discharge of its functions;

(i) shall solicit, receive and consider written memoranda or information from the public; and

(j) may carry out or cause to be carried out such assessments, studies or research as may inform its mandate;

3. The Joint Secretaries will be responsible for official communication on behalf of the Taskforce.

4. The Joint Secretaries may co-opt any other persons, as and when necessary, to assist in the achievement of the terms of reference.

5. The Taskforce shall make periodic written recommendations for action by the Government and will submit its comprehensive advice not later than twelve (12) months from the date of its official launch. His Excellency the President may, if necessary, extend the period."

[1517] As can be seen, the BBI Taskforce had no mandate towards a specific amendment to the Constitution. The Taskforce then came up with an interim report in November 2019 which was presented to the President as the BBI Taskforce Report. To enable the implementation of the interim report, Gazette Notice No. 264 dated 10th January, 2020 with the heading *'The Steering Committee on the Implementation of the Building Bridges to a United Kenya Task Force Report'* was published. The terms of reference of the BBI Steering Committee were:

"(a) Conduct validation of the Task Force Report on Building Bridges to a United Kenya through

consultations with citizens, civil society, the faith based organizations, cultural leaders, the private sector, and experts; and

(b) Propose administrative, policy, statutory or <u>constitutional changes</u> that may be necessary for the implementation of the recommendations contained in the Task Force report, taking into account any relevant contributions made during the validation period.

2. ***In the performance of its functions, the Steering Committee shall—***

(a) appoint its chairperson and vice-chairpersons from among its members;

(b) regulate its own procedure within confines of the law and the Constitution;

(c) privilege bipartisan and non-partisan groupings, forums and experts;

(d) form technical working groups as may be, required in the achievement of its terms of reference;

(e) hold such number of meetings in such places and at such times as the it shall consider necessary for the proper discharge, of functions;

(f) solicit, receive and consider written memoranda or information from the public; and

(g) may carry out or cause to be carried out such assessments, studies or research as may inform its mandate.

3. The Joint Secretaries shall be responsible for all official communication on behalf of the Steering Committee.

4. The Joint Secretaries may co-opt any other person as may be required to assist in the achievement of the terms of reference of the Steering Committee.

5. The Steering Committee shall submit its comprehensive advice to the Government by 30th June, 2020 or such a date as the President may, by notice in the Gazette, prescribe."

[1518] On 16th October, 2020, the BBI Steering Committee presented to the President, the BBI Steering Committee Report which was later launched on 26th October, 2020 by the President in the presence of Hon. Raila Odinga at the Bomas of Kenya.

[1519] Hon. Dennis Waweru and Hon. Junet Mohamed were then appointed as the Co-Chairpersons of the BBI National Secretariat. This is confirmed in the affidavit sworn by Hon. Waweru on 5th February, 2021 where he affirms himself and Hon. Junet Mohamed as the Co-Chairpersons of BBI National Secretariat by stating:

> *"1. THAT I am the Co-chairperson of the building BRIDGES TO A UNITED KENYA, NATIONAL SECRETARIAT, one of the Applicants herein, and my other co-chairperson being HONOURABLE JUNET MOHAMED, and duly authorized to swear the instant Affidavit both on my behalf, on behalf of my co-chairperson and on behalf of the BBI and Hon. Raila Amolo Odinga, the Respondents herein, in opposition to the consolidated petitions herein."*

[1520] Upon their appointment and following the launch of the BBI Steering Committee Report, Hon. Dennis Waweru and Hon. Junet Mohamed, acting in

their said capacity wrote to the IEBC in a letter dated 18th November, 2020 requesting the IEBC's approval for the proposed format to be used in signature collection. The said letter is reproduced as follows:

> ***"18th November 2020***
> ***The Chairperson,***
> ***The Independent Electoral and Boundaries Commission,***
> ***University Way, Anniversary Towers, 6th Floor,***
> ***P.O Box 45371-00100,***
> ***Nairobi.***
>
> ***Dear Sir,***
> ***RE: BUILDING BRIDGES TO A UNITED KENYA: KENYA MOJA.***
> ***The Secretariat of the Building Bridges to a United Kenya (Kenya Moja) desires to collect one million signatures in support of the proposed Constitution of Kenya (Amendment) Bill 2020.***
>
> ***Attached find a proposed format for the signature collection for your guidance and approval.***
>
> ***Yours Sincerely,***
>
> ***Hon. Dennis Waweru*** ***Hon Junet Mohammed***
> ***Co- Chairperson*** ***Co- Chairperson"***

[1521] The Chairman of the IEBC, W.W. Chebukati then responded in a letter dated 24th November, 2020 attaching a template/format to be used in the collection of signatures. The said letter is reproduced as hereunder:

> ***"Ref IEBC/CP/REFER/1/VOL 1/56***
> ***24th November, 2020***

The Co-Chairpersons,
Building Bridges Initiative National Secretariat
NAIROBI.

RE: BUILDING BRIDGES TO A UNITED KENYA; KENYA MOJA

We refer to your letter dated 18th November 2020 on the above subject matter that was delivered to our offices on 23rd November 2020. Further in reference is made to your proposed format for collection of signatures in support of the Constitution of Kenya (Amendment) Bill, 2020 attached therein.

The Commission takes note of your request for guidance as well as approval of your proposed format and provides to you the approved format /template (copy enclosed herewith) that should be used for collection of signatures.

To enable the voter verification process and to ensure completeness of the supporters' records, all the fields in the said approved format should be duly filled as provided.

W.W. CHEBUKATI
CHAIRMAN."

[1522] This communication is important because this is the first time that any record of a popular initiative and collection of signatures is mentioned and the body seeking to do so is the BBI National Secretariat led by Hon. Dennis Waweru and Hon. Junet Mohamed. The language of the communication is equally important for reasons to be seen shortly.

(ii) Definition of the terms 'popular' and 'initiative'

[1523] ***Black's Law Dictionary***, 11th edition defines an initiative as:

> "***An electoral process by which a percentage of voters can propose legislation and compel a vote on it by the legislature or by the full electorate. Recognized in some state constitutions, the initiative is one of the few methods on direct democracy in an otherwise representative system."***

[1524] As per the ***Cambridge English Dictionary***, an initiative is defined as:

> ***"the ability to initiate or begin something. the power of opportunity to act before others do. Fresh strategy intended to resolve or improve something."***

[1525] A promoter on the other hand in the ***Black's Law Dictionary***, 11th Edition is defined as:

> ***"Someone who encourages or incites."***

[1526] Maija Setala ***"On The Problems of Responsibility and Accountability in Referendums"*** (2006) 45(4) European Journal of Political Research, 699-721 defines a popular initiative as:

> "***Popular initiatives mean that a certain number of citizens can demand a referendum by signing a petition for a referendum on a legislative change promoted by the sponsors of the initiative. Because the agenda-setter and the initiator of the referendum are the same political actor, popular initiatives are decision-promoting referendums according to*** *Uleri's* ***classification. Popular initiatives seem to provide an alternative to the representative system as a decision-making method and thus they can be seen as a part of popular self-government. In particular, they***

provide citizens with an opportunity to raise issues on the political agenda. Popular initiatives are rather rare institutions in national-level politics."

[1527] Kaufman, Buchi & Braun, 2010: ***Guidebook to Direct Democracy in Switzerland and Beyond. Marburg: The Initiative & Referendum Institute Europe*** offer a definition of what a popular initiative is by way of classification of types of direct democracy:

> ***"There are three main procedures in Swiss direct democracy. Firstly, there is the obligatory referendum: if parliament wishes to add something to the constitution, or amend it, the constitution itself lays down that the draft amendment or supplement has to be approved (or rejected) in a national referendum vote.***
>
> ***Secondly, there is the facultative, or optional, referendum: new laws or changes to laws, which have been passed by parliament, are subject to the facultative referendum, which means that they also have to receive final approval or rejection in a referendum vote – if 50,000 voters support a demand for this.***
>
> ***Thirdly, there is the citizens' initiative: citizens have the right to make legislative proposals which must be decided in a referendum vote if the proposal gains the support of 100,000 voters. This allows a part of the electorate to place before the whole electorate issues which parliament does not wish to deal with, or which have not even occurred to parliament. Officially validated citizens' initiatives (i.e. ones which satisfy all the statutory requirements) will proceed to the referendum vote if that is what the initiative***

sponsors want, regardless of the wishes of either government or parliament."

[1528] Duff Conacher, ***Power to the People: Initiative, Referendum, Recall, and the Possibility of Popular Sovereignty in Canada***, (1991) 49 (2) University of Toronto, Faculty of Law Review 193 defined an initiative as:

"Initiative is the right of a stated percentage of the voters in any municipality, province, or at the federal (or national) level to propose both constitutional amendments and legislative provisions, and to require that if the council or legislature does not enact them, they shall be submitted to the voters for passage."

[1529] I will adopt all the above definitions in answering the question before me.

(iii) History of popular initiative in Kenya

[1530] The term popular initiative can be traced to the Bomas Draft, 2005. It initially came up in the "***Final Report of Technical Working Group 'K'*** at the NCC on Constitutional Commissions and Amendments to the Constitution which was the Working Group mandated to discuss, amend, recommend and propose additions as regards independence and efficiency of constitutional commissions as well as amendments to the Constitution. The Committee noted as follows on popular initiative:

"The committee introduced a novel idea called popular initiative. This is an innovation <u>where the citizens can on their own motion initiate amendment to the Constitution</u> by a way of a popular initiative either in the form of a general suggestion or a formulated draft bill. The committee explained that their intention was a starting

point towards curbing dictatorship by Parliament" [emphasis mine].

[1531] This was carried into the CKRC Final Report where the report of *'TWC 'K – Constitutional Commissions and Constitutional Offices and Amendment to the Constitution'* was given at page 449 with the recommendation on popular initiative being:

> ***"That citizens and the civil society may initiate Constitutional amendments through a process called 'popular initiative.'***
>
> ***That Parliament should enact a 'Referendum Act to govern the conduct of referenda in the Country***" [emphasis mine].

[1532] As can be seen, the initiative was deliberately crafted as a tool of amendment by citizens – the common man and civil society as opposed to Parliament.

(iv) Procedure of amendment to the Constitution that touch on matters listed under Article 255(1)

[1533] Under Article 256(5) on a parliamentary initiative to amend the Constitution, it is provided that:

> ***"(5) If a Bill to amend this Constitution proposes an amendment relating to a matter specified in Article 255 (1)—***
>
> ***(a) the President shall, before assenting to the Bill, request the Independent Electoral and Boundaries Commission to conduct, within***

ninety days, a national referendum for approval of the Bill; and

(b) within thirty days after the chairperson of the Independent Electoral and Boundaries Commission has certified to the President that the Bill has been approved in accordance with Article 255 (2), the President shall assent to the Bill and cause it to be published."

[1534] Article 257 (10) on popular initiative provides that:

"(10) If either House of Parliament fails to pass the Bill, or the Bill relates to a matter specified in 255(1), then the proposed amendment shall be submitted to the people in a referendum."

[1535] In the above context, and having taken into account submissions before us, and in agreement with the Hon. the Chief Justice, I have no hesitation in holding that the President cannot and should not initiate amendments to the Constitution under Article 257. Like *Tuiyott, J.A,* I am certain that a popular initiative is people centric and while the President has certain rights as a citizen, there are certain other things that are constitutionally curtailed for him. As regards a popular initiative, he cannot initiate the process by collecting one million signatures and crafting an Amendment Bill and then retire to await the same Bill under Articles 257(9) and assent to it as President. That is an absurdity that could not have been the intention of the framers. Neither can he initiate a Bill under Article 256(5)(a) and (b*) "request the IEBC to conduct within ninety days, a national referendum for approval of the Bill"* and also assent to the same Bill.

[1536] The point I am making is that the President has specific roles in a popular initiative process and those roles do not include initiating the same.

[1537] I will say very little about the amendment process under Article 256 as that is the preserve of the Legislature and as indicated above, the powers of the Legislature to craft amendments to the Constitution were deliberately limited by the enactment of Article 255 and 256. Parliamentary processes *vis-à-vis* the President do not require a discussion here but suffice it to say that, as Party Leader, the President has other political mechanisms through Parliament to do what he considers best, without encroaching on the sacred people-centric process under Article 257.

[1538] But a more fundamental, factual question must necessarily arise; did the President initiate the Amendment Bill? Did he even promote it? Article 257 has specific processes and players, each with a distinct role to play. My own reading of the BBI process generally has led me to two distinct processes:

(i) The handshake and its related processes, the BBI Taskforce and Steering Committee; and

(ii) The Constitutional /popular initiative under Article 257 – The BBI National Secretariat led by Hon. Dennis Waweru and Hon. Junet Mohamed.

[1539] When the President and Hon. Raila Odinga decided to shake hands, only a stranger to Kenya would not recall the circumstances under which they did so. Kenya was not in a good place at all and violence was looming large. Article 131(1) (e) refers to the President as "a symbol of national unity" and Article 131 (2)(e) enjoins him "to promote and enhance the unity of the nation".

[1540] The handshake can only but be viewed in this context; he had to act to maintain the unity of Kenya after the contested 2017 Presidential election. The formation of the BBI Taskforce and the BBI Steering Committee are matters that were settled by *Mativo, J.* in the ***Thirdway Alliance Case*** and so the High Court in the present case should not have revisited their legality. On this issue I am on all fours with *Okwengu, J.A.*

[1541] It has however been argued that by directing the BBI Steering Committee to engage in constitutional changes, the President had turned himself into an initiator and promoter of the popular initiative. I disagree. A popular initiative is commenced with the collection of a million signatures and prior to, or simultaneously with the general suggestion or a formulated draft Bill. In the present case, the letter dated 18th November 2020 to the Chairperson, IEBC, clearly shows who the collectors of the signatures were; 'the Secretariat of the Building Bridges to a United Kenya -Kenya Moja' led by Hon. Dennis Waweru and Hon. Junet Mohamed. In his response, the Chairperson did two significant things:

(i) He approved the format for collecting signatures; and
(ii) He took note of the Amendment Bill, 2020.

[1542] Nowhere does the President appear in this process and it is a matter of public notoriety that he publicly signed the signature template as did Hon. Raila Odinga. He did so as a citizen entitled to do so but not as the initiator or promoter of the popular initiative and I see no illegality in that action. He also votes at a general election and is equally entitled to vote at a referendum as a citizen.

(v) Finding on Issue No.(ii)

[1543] I have read the Judgment of the Hon. Chief Justice and I adopt, in addition to my reasoning above, her rendition of the question.

[1544] My finding therefore, on this issue is that the President cannot and should not initiate or promote a popular initiative under Article 257 but can use his parliamentary party muscle in Parliament to initiate amendments under Article 256 of the Constitution if he so wishes. I have however also found that in the present case, I am unable to find that the President was the initiator or promoter of the popular initiative. Hon. Dennis Waweru and Hon. Junet Mohamed were. I have also held that the President in this case was not the initiator or promoter of the Amendment Bill.

F. ISSUE NO. (III)

Whether the Second Schedule to the Constitution of Kenya (Amendment) Bill, 2020 was unconstitutional

[1545] It is the Attorney General's contention that the High Court's finding on this issue was erroneous: as it purports to set a criteria and timeline for the delimitation and distribution of constituencies which is at variance with Article 89(5) of the Constitution; that it ignores a key due process of constitutional consideration in delimiting and distributing constituencies, namely public participation; and that it takes away the rights of individuals who are aggrieved by the IEBC's delimitation decisions to seek judicial review.

[1546] It was his further contention that a constitutional amendment by the people which directs the IEBC on how to perform its functions does not amount to the type of control or direction prohibited by the Constitution with regard to its independence under Article 249(2) of the Constitution. Besides, by dint of Article 1(3) of the Constitution, IEBC exercises delegated sovereign power, on behalf of the people.

[1547] The 11th and 12th respondents also argue on the other hand that, under Article 89 of the Constitution, new boundaries cannot take effect for purposes of an election which takes place within 12 months of completion of the delimitation. They furthermore argue that the Amendment Bill, by dictating the number of constituencies, fails to use the proper procedures laid down under Article 89 and brings about inequity as delimitation is both a scientific process and political decision. Further, that, IEBC is an Independent Commission and that the purported delimitation exercise under the Second Schedule to the Amendment Bill is irregular, illegal, unconstitutional and amounts to blatant contempt of express constitutional edict on the IEBC's authority and a violation of Articles 1(1) and Article 2(1) and (2).

[1548] On public participation, the two respondents argue that the appellants have not brought before this Court any matters of law with regards to public participation in the context of constituency boundary delimitation. They thus claim that this Court can only interrogate public participation from a legal perspective and not from a factual perspective and urge this Court to leave the finding on public participation from the Court of Appeal untouched. They further claim that failure to conduct public participation as required under Article 89 (7) of the Constitution renders invalid all the provisions relating to constituency boundary delimitation in the Amendment Bill.

(i) Findings by the High Court

[1549] The High Court addressed this issue as '*constituency apportionment and delimitation questions in the proposed referendum*.' The court then identified the two issues that arose from the petition as:

i. *Is it lawful for a Constitution of Kenya Amendment Bill to set a specific number of constituencies under Article 89(1) of the Constitution?*

ii. *Is it lawful for a Constitution of Kenya Amendment Bill to directly allocate and apportion the constituencies it creates without a delimitation exercise as set out in Article 89 of the Constitution?*

[1550] The High Court in answering the twin questions found that the impugned Sections of the Amendment Bill were unlawful and unconstitutional for reasons that IEBC is an Independent Commission and not subjected to the control or direction of any person or authority and that the Amendment Bill was directing IEBC on how to perform its functions of delimitation of constituencies. Secondly, that the Amendment Bill was purporting to allocate constituencies in violation of the provisions of Article 89 that clearly sets out that it is the IEBC that ought to conduct the process of delimitation, and also the criteria to be used which IEBC is

obliged to adhere in executing its mandate. Thirdly, that the Amendment Bill purported to create a process of delimitation which ignored public participation, stakeholder engagement and consultation of interested parties. Fourthly, that the Amendment Bill stipulated a timeline for the delimitation which is in conflict with Article 89(2) and (4) of the Constitution. Lastly, that the Amendment Bill purported to take away the rights of individuals who may be aggrieved by the delimitation decisions of the IEBC to seek judicial review of those decisions in violation of the Constitution.

[1551] On the requirement of public participation before delimitation of constituencies, it was the High Court's finding that:

> ***"The third reason the provisions on apportionment and delimitation of the additional constituencies are unconstitutional is that they purport to create a process of delimitation which ignores an irreducible constitutional consideration: public participation, stakeholder engagement and consultation of interested parties.***
>
> ***691. There is no doubt that the Constitution requires IEBC to conduct public participation, consult interested parties and engage all affected stakeholders when carrying out its delimitation mandate. Article 89(7)(a) is explicit in requiring the IEBC to "consult all interested parties." This is further elaborated in section 36(4) to (11) of the IEBC Act."***

(ii) Findings by the Court of Appeal

[1552] *Musinga, (P),* addressed this issue as *'whether it was constitutional for the promoters of the Amendment Bill to create 70 constituencies*.' It was his finding that the task of delimiting constituencies is assigned to the IEBC and that

the Second Schedule to the Amendment Bill, in so far as it purported to pre-determine the allocation of 70 constituencies, is unconstitutional.

[1553] *Nambuye, J.A* on her part posed the question as to *'whether it was constitutional for the promoters of the Amendment Bill to create 70 constituencies and allocate them*.' It was the learned Judge's finding that Section 10 of the Amendment Bill proposed to amend Article 89(1) of the Constitution on delimitation of electoral units in violation of the principles set out in Article 89(5) of the Constitution which include population quota, number of inhabitants etc.

[1554] *Okwengu, J.A* with regard to this issue, adopted the majority finding and held:

> ***"That the Second schedule to the Constitution of Kenya (Amendment) Bill, 2020 in so far as it purports to: predetermine the allocation of proposed additional seventy constituencies; and to direct the Independent Electoral and Boundaries Commission on its function of constituency delimitation, is unconstitutional."***

[1555] *Kiage, J.A* framed the issue as '*constituency apportionment and delimitation'*. It was his finding that the provisions of the Amendment Bill were an unconstitutional attack on the independence of IEBC and sought to alter the delimitation scheme set out in Article 89(1) of the Constitution.

[1556] *Gatembu, J.A* addressed *'constituency apportionment and delimitation of boundaries.'* The learned Judge associated himself with the findings of *Musinga, (P),* in relation to the provisions of the Amendment Bill on the allocation and apportionment of constituencies. It was his finding that:

> ***"In as far as the proposal in the Constitution Amendment Bill to directly allocate and apportion the constituencies is concerned I associate myself with reasons and conclusion***

reached by Justice Musinga in upholding the decision of the High Court in this regard."

[1557] *Sichale, J.A*, while finding contrary to the majority, was of the view that the Bill only sought to increase the number of constituencies, which in her view, was not unconstitutional. It was the learned Judge's finding that:

"Having so recognized, was it unconstitutional for the Constitution of Kenya (Amendment) Bill, 2020 to purport to create 70 more constituencies? The (Amendment) Bill in Schedule 2 paragraph 1 subparagraph 3 provides that:

> ***"(3) The allocation of additional constituencies among the counties specified under subsection (2) shall –***
>
> ***(a) Prioritize the constituencies underrepresented in the National Assembly on the basis of population quota; and***
>
> ***(b) Be made in a manner that ensures the number of inhabitants in a constituency is as nearly as possible to the population quota".***

The purpose was to:

"The allocation of additional constituencies among the counties specified under subsection (2) shall –

> ***(c) Prioritize the constituencies underrepresented in the National Assembly on the basis of population quota; and***
>
> ***(d) Be made in a manner that ensures the number of inhabitants in a constituency is as nearly as possible to the population quota."***

In my view, once we appreciate that Wanjiku can seek to amend any provisions of the Constitution as long as the procedure set out in Articles 255 – 259 of the Constitution is adhered to, then the Kenyan people have the right to reduce or increase the number of Constituencies to ensure there is no underrepresentation. They can even vary the mandate of the IEBC" [emphasis mine].

[1558] *Tuiyott, J.A* was of the view that amendments to the Constitution that relate to the number of constituencies and their delimitation can only be amended by way of a popular initiative. In this regard, he stated thus:

"I did not hear the appellants suggest that the provisions of the Constitution touching on the number of constituencies and their delimitation (Article 89) can be amended in any way other than by popular initiative. And this really is the position because how constituencies are delimited has an implication on fair representation and equitable distribution of the country's resources, matters related to the Bill of Rights. There is therefore a concession that the provisions on delimitation of constituencies are entrenched provisions under the cover of Article 255(1). As a corollary, I would think, amendments that destroy or abrogate provisions on delimitation must be put to the people in their primary constituent power."

[1559] It was also the learned Judge's finding that the Transitional and Consequential provisions of the Amendment Bill sought to ensure that delimitation occurred without the procedure set out under Article 89 being followed.

G. ANALYSIS AND DETERMINATION OF ISSUE NO.(III)

[1560] I have reflected on this matter and it is not in dispute that Article 89 (1) and (2) of the Constitution provides for the procedure to be followed by IEBC in the review of names and boundaries of constituencies. Article 89 (1) and (2) provides:

> "***Delimitation of electoral units***
>
> ***(1) There shall be two hundred and ninety constituencies for the purposes of the election of the members of the National Assembly provided for in Article 97(1)(a).***
>
> ***The Independent Electoral and Boundaries Commission shall review the names and boundaries of constituencies at intervals of not less than eight years, and not more than twelve years, but any review shall be completed at least twelve months before a general election of members of Parliament."***

[1561] Furthermore, Section 36 of the IEBC Act provides for the procedure to be followed in the delimitation of electoral boundaries and how IEBC should discharge this mandate. Section 36 provides:

> ***"36. Procedure for delimitation of electoral boundaries***
>
> ***(1) The Commission shall discharge its mandate of the delimitation of boundaries of constituencies and wards in accordance with the Constitution, this Act and any other law.***

(2) Subject to the Constitution, matters to be addressed in the delimitation of electoral boundaries are—

(a) review of the names and boundaries of constituencies;

(b) review of the number, names and boundaries of wards;

(c) re-distribution of wards affected by any changes in the boundaries of constituencies; and

(d) ensuring that the number of inhabitants in each constituency and ward is as nearly as possible, equal to the population quota as provided for by Article 89(5) of the Constitution and that such a process—

(i) allows for variation of margin of not more than the limits provided under Article 89 (6) of the Constitution in relation to cities, sparsely populated areas and other areas;

(ii) takes into account the provisions of Article 89 (7) (b) of the Constitution that provides for the progressive realization of the requirement that the number of inhabitants in each constituency and ward to be as nearly as possible, equal to the population quota for the purposes of each review;

(iii) is subject to the use of enumerated national census figures.

(3) The Commission shall prepare and publish a preliminary report outlining—(a) the proposed delimitation of boundaries for constituencies and wards; and (b) the specific geographical; and (c) demographical details relating to such delimitation.

(4) The Commission shall ensure that the preliminary report is made available to the public for a period of thirty days and invite representations from the public on the proposals contained in the report during that period.

(5) Upon the expiry of the period provided in subsection (4), the Commission shall, within fourteen days, review the proposed delimitation of boundaries considering the views received and submit the revised preliminary report to the Parliamentary Committee.

(6) The Parliamentary Committee shall, within fourteen days of receipt of the revised preliminary report, table the report in the National Assembly together with its recommendations.

(7) The National Assembly shall, within fourteen days of the tabling of the revised preliminary report, consider the report and forward its recommendations to the Commission.

(8) Within fourteen days of the expiry of the period provided for in subsection (7), the Commission shall upon receipt and considerations of the National

Assembly and representations from the public, prepare the final report for publication in the Gazette.

(9) Where the National Assembly fails to make recommendations within the period specified in subsection (7), the Commission shall publish its report in accordance with subsection (8).

(10) A person who, being responsible for the publication in the Gazette of the final report submitted under this subsection fails to publish the report within the time required by the Commission after the report has been submitted to that person, commits an offence and is liable to imprisonment for a term of one year.

(11) Notwithstanding any other written law, where the final report is not published in accordance with the provisions of subsection (9) the Commission shall, within seven days of the submission of the said report, cause the report to be published in at least two dailies of national circulation and such publication shall have effect as if it were done in the Gazette."

[1562] I have set out the above provision *in extenso* to emphasize the point that delimitation of boundaries is to be done by IEBC and through the procedure set in the IEBC Act. Furthermore, Section 36(8) provides that there should be public participation in the delimitation of constituency boundaries.

[1563] It is thus obvious to me that any attempt at delimiting boundaries by amending Article 89(1) without consequential amendments to Article 89(2) to (12) and following the procedure in Section 36 defeats not just logic but is blatantly unconstitutional. I have no hesitation therefore in agreeing with the majority at

the Court of Appeal and their composite reasoning cannot be faulted. Furthermore, I have read the Judgment of the Hon. Chief Justice and I am in complete agreement with her reasoning on this issue but I shall only address one corollary question as set out below.

(i) Whether the procedure under Article 89 of the Constitution and Section 36 of the IEBC Act was followed under the Amendment Bill

[1564] The BBI Steering Committee Report that was presented to the President also included the BBI Steering Committee Draft Bill. The Second Schedule of the annexed BBI Steering Committee Draft Bill was as follows:

> ***"SECOND SCHEDULE***
>
> ***(Section 70)***
>
> ***TRANSITIONAL AND CONSEQUENTIAL PROVISIONS***
>
> ***1. Independent Electoral and Boundaries Commission.***
>
> ***(1) The vacant positions in the membership of the Independent Electoral and Boundaries Commission shall be filled within sixty days of the commencement of this Act.***
>
> ***(2) Despite Article 251 of the Constitution, within thirty days from the commencement of this Act, the members of the Independent Electoral and Boundaries Commission who were in office on the commencement date shall be vetted to determine their suitability to continue serving in accordance with the values set out in Articles 10 and Chapter Six.***

(3) The President shall appoint a vetting panel for purposes of section (2), which shall consist of the following five members—

(a) a chairperson who shall be qualified to be a Supreme Court judge;

(b) two members nominated by political parties, one from the majority party and one from the minority party, represented in the National Assembly; and

(c) two members nominated by a joint forum representing religious organisations.

(4) The Public Service Commission shall provide secretariat services and facilities required by the vetting panel in the performance of its functions.

(5) The vetting panel shall determine its own procedure.

(6) The vetting panel shall consider information gathered in the course of personal interviews, summary of the complaints, if any, from the public against the members, as well as their records.

(7) The vetting panel shall within fourteen days of finalizing the vetting, inform the concerned member, in writing, of the outcome of the vetting.

(8) A member shall continue to serve for the remainder of their term where the vetting panel determines the member to be suitable to continue holding office.

(9) Once informed of the decision of unsuitability to continue holding office under subsection (8), the member shall be deemed to have been removed from office.

(10) The vetting panel shall stand dissolved upon the finalization of the vetting."

[1565] The Second Schedule of the Amendment Bill as was published on 25th November, 2020 is as follows:

"SECOND SCHEDULE

(Section 74)

TRANSITIONAL AND CONSEQUENTIAL PROVISIONS

1. Delimitation of number of Constituencies

(1) Within six months from the commencement date of this Act, the Independent Electoral and Boundaries Commission shall, subject to subsection (2), determine the boundaries of the additional seventy constituencies created in Article 89 (1) using the criteria provided for in Articles 81 (d) and 87 (7).

(2) The additional seventy constituencies shall be spread among the counties set out in the first column in a manner specified in the second column.

County	***Additional Constituencies***
Mombasa	***Three***
Kwale	***Three***
Kilifi	***Four***
Mandera	***One***
Meru	***Two***
Embu	***One***
Machakos	***Three***
Makueni	***One***
Kirinyaga	***One***

Murang'a	***One***
Kiambu	***Six***
Turkana	***One***
West Pokot	***One***
Trans Nzoia	***Two***
Uasin Gishu	***Three***
Nandi	***One***
Laikipia	***One***
Nakuru	***Five***
Narok	***Three***
Kajiado	***Three***
Kericho	***One***
Bomet	***Kakamega***
Bungoma	***Three***
Siaya	***One***
Kisumu	***Two***
Nyamira	***One***
Nairobi City	***Twelve***

(3) The allocation of additional constituencies among the counties specified under subsection (2) shall —

(a) prioritise the constituencies underrepresented in the National Assembly on the basis of population quota; and

(b) be made in a manner that ensures the number of inhabitants in a constituency is as nearly as possible to the population quota.

(4) The creation of additional constituencies in Article 89(1) shall not result in the loss of a constituency existing before the commencement date of this Act.

(5) For greater certainty, any protected constituency in the counties of Tana River, Lamu, Taita Taveta, Marsabit, Isiolo, Nyandarua, Nyeri, Samburu, Elgeyo/Marakwet, Baringo, Vihiga and Busia shall not have their protected status impaired by the delimitation of additional constituencies mentioned in this schedule.

(6) The requirement in Article 89 (4) does not apply to the review of boundaries for the additional constituencies preceding the first general election from the commencement date of this Act."

[1566] As can be seen, the Schedule has attempted to mitigate the problem I have identified above, by directing IEBC to use the criteria in Article 89(7) to delimit the boundaries for the proposed seventy constituencies. Two constitutional questions then arise:

(i) What criteria was used to create the new Constituencies and what was the input of IEBC in doing so?

(ii) Specifically, was there public participation in doing so and where is the evidence in that regard?

[1567] Like the superior courts below, I can only but answer both questions in the negative. I have combed the record and it is unclear to me how the BBI Steering Committee reached the decision to create the new constituencies but somehow the Bill had them. Granted, an amendment Bill may have whatever issues its promoters would like to put into it but on a matter as important as this one, to take

away the constitutional mandate of the IEBC in an amendment process then purport to direct it on how to do its mandate is blatantly unconstitutional.

[1568] On public participation, I cannot say more than this; the creation of the constituencies was made without input from anyone outside the BBI Steering Committee. Constituencies are such an emotive issue in Kenya that, creation of new ones without an elaborate process to involve the people – those who support and those who do not – is a dead-on arrival matter. There being absolutely no evidence of public participation on this question, then there is no way that this Court can validate the process.

(i) Finding on Issue No. 3

[1569] My opinion on the issue at hand is therefore that, in inserting the Second Schedule to the Amendment Bill and amending only Article 89(1) without amending all other Sub-Articles, then the limitations of the Bill created an absurdity and fundamentally, it is unclear what criteria was used to delimit new constituency boundaries without the input of affected persons. The delimitation was thus a boardroom affair and not even a vote at the referendum could legalize that action.

[1570] It would be remiss of me not to conclude by stating that, in the future, it would be quite permissible to restart the process, follow the criteria in Article 89, involve the IEBC and the people and should the constitutional and other processes be adhered to, then the beneficiaries of the additional constituencies will have their day as would those in protected constituencies in the Second Schedule at Clause (5).

H. ISSUE NO. (IV)

Whether civil proceedings can be instituted against the President or a person performing the functions of the President

during his/her tenure of office with regard to anything done or not done contrary to the Constitution

[1571] The Attorney General submits that presidential immunity allows a President to exercise constitutional duties without the fear of civil litigation. The Attorney General further contends that there are remedies available to constitutional infractions or alleged acts of abuse of authority committed by the President through a constitutional petition or judicial review with the Attorney General being named as the principal respondent in those suits, pursuant to the provisions of Article 156(4)(b) of the Constitution and Section 12(1) of the Government Proceedings Act. The Attorney General also argues that a person aggrieved by any action undertaken by the President or the Executive in violation of the Constitution can file proceedings in any Court against the Attorney General and seek public law remedies by virtue of Articles 22(1), 23, 165 and 258(1) of the Constitution.

[1572] The 20th respondent, also argues that Article 143(2) shields the President from civil suits during his tenure of office and in respect of actions or omissions done in the exercise of power under the Constitution. To the contrary, he invites this Court to contrast judicial immunity granted pursuant to Article 160(5) as opposed to presidential immunity in criminal proceedings. He argues that judicial immunity only extends to acts done in good faith while presidential immunity against criminal proceedings does not extend to crimes under international treaties. He therefore submits that if the drafters of the Constitution intended to limit the President's immunity under civil proceedings, then it would have stated so in express terms.

[1573] The 10th respondent also argues that, just like public officials, the President enjoys functional immunity and is protected from civil liability as regards official functions, and also sovereign immunity as the Head of State. He is

also of the view that the only way proceedings may be brought against the President is directly through the process of impeachment.

(i) Findings by the High Court

[1574] The High Court addressed this issue by considering whether the current President can be sued in his personal capacity and not as the President of the Republic of Kenya. It was the High Court's finding that under Article 143(3) of the Constitution, the President can be sued in his or her personal capacity during his or her tenure in office except for actions or omissions "*in respect of anything done or not done in the exercise of his or her powers under the Constitution.*" The court reasoned thus:

> ***"On the specific question of whether the President can be sued in his personal capacity during his tenure, our answer is in the affirmative because it is apparent from Article 143(3) that the President or any other person holding that office is only protected from such actions*** *'in respect of anything done or not done in the exercise of their powers under this Constitution.'*
>
> ***The rationale for so holding is simple to see: Assuming, in his tenure, the President embarks on a mission that is not only clearly in violation of the Constitution but is also destructive to the nation, would it not be prudent that he should be stopped in his tracks rather than wait until the lapse of his tenure by which time the country may have tipped over the cliff? We think that in such circumstances, any person may invoke the jurisdiction of this Court by suing the President, whether in his personal or in his official capacity; whichever capacity he is sued may very***

well depend on the nature of the violation or threatened violation and will certainly depend on the circumstances of each particular case."

(ii) Findings by the Court of Appeal

[1575] *Musinga, (P)*, while deciding on whether civil proceedings can be instituted against a sitting president was of the view that the President does not enjoy absolute immunity against civil proceedings during the tenure of office and neither is the President above the law as he is subject to the Constitution. It was his finding that if the President does anything contrary to the Constitution or Statute, civil proceedings can be instituted when his or her term ends. It was however his view that if the President violates the Constitution while exercising his constitutional duties, he can be sued in his governmental or official capacity through the Attorney General.

[1576] *Nambuye, J.A* in considering this issue, answered the question whether civil proceedings can be instituted against a sitting President and was also of the view that the President cannot be sued during his tenure of office if whatever he is sued for is something done or not done in the exercise of the powers he is clothed with by the Constitution. It was thus her finding that the actions of the President with regard to the BBI process were done pursuant to his official function as the President and he could therefore not be sued in his personal capacity.

[1577] *Okwengu, J.A* though affirming the finding of the High Court that the President is subject to civil proceedings during the tenure of his office, was however of the view that the immunity is only afforded to the President in regard to acts done in pursuance to the Constitution. She was however of the view that whenever the President acts outside the parameters of the Constitution or omits to do that which he is bound to do under the Constitution, then he can be sued.

[1578] *Kiage, J.A* was also of the view that the President is not immune from a suit in his personal capacity for acts done outside his constitutional powers and in contravention of the Constitution. He noted that the issue of immunity that was before the Court was not the one enjoyed by the President with regard to official acts, as the president is immunized from civil suits in this regard.

[1579] *Gatembu, J.A* while determining whether the President enjoys absolute immunity under the Constitution also affirmed the High Court's finding that the President can be sued in his personal capacity during his tenure because the protection afforded under Article 143(3) of the Constitution extends to anything done or not done in the exercise of his powers under the Constitution. The earned Judge relied fully on the finding in ***Kenya Human Rights Commission & Another v. Attorney General & 6 Others,*** Civil Appeal No. 147 of 2015; [2019] eKLR, where the Court of Appeal held that under Article 143(2), the immunity in civil proceedings is only limited to suits instituted against the President during the term of office in respect to acts done or not done in the exercise of power as the President of Kenya. Further, it was his finding that the provisions of Article 143(2) are instructive in that, to be covered by the immunity, first, the person should be in office and secondly, the impugned actions should have taken place during the tenure of office and that therefore, immunity would not extend to acts or omissions not connected to the office or carried out before or after the term of office.

[1580] *Sichale, J.A*, was also of the view that anyone aggrieved by the actions of the President while exercising his duties under the Constitution can file a suit against the Attorney General under judicial review or follow the route of impeachment under Article 145 of the Constitution. The learned Judge further found that for actions done by the President outside his official duties, then the President is liable to have civil proceedings brought against him.

[1581] *Tuiyott, J.A* was of the view that under Article 143(2) with respect to civil proceedings, the President may be sued for acts or omissions that contravene the Constitution, not in his personal name, but through the Attorney General. He however found that the President may still be held personally liable for any acts done in his personal name once he is out of office.

I. ANALYSIS AND DETERMINATION ON ISSUE NO.(IV)

(i) Institution of Civil Proceedings against the President

[1582] Article 143 (1) and (2) provides that the President enjoys immunity from criminal and civil proceedings and states:

> ***"143. (1) Criminal proceedings shall not be instituted or continued in any court against the President or a person performing the functions of that office, during their tenure of office.***
>
> ***(2) Civil proceedings shall not be instituted in any court against the President or the person performing the functions of that office during their tenure of office in respect of anything done or not done in the exercise of their powers under this Constitution."***

[1583] Article 143 (1) therefore stipulates that the President shall not be sued in any criminal proceedings during his/her tenure of office, with Article 143 (4) being the only exception to such immunity under criminal proceedings.

[1584] The question to be addressed is whether the President can be sued in his personal name and as a party to constitutional proceedings. The question has been addressed by the Courts in a number of cases. *Gikonyo, J.* in ***Julius Nyarotho v***

Attorney General & 3 others, Misc. Application No. 36 of 2012; [2013] eKLR ***(Nyarotho Case)*** for example held as follows in this regard:

> ***"[12] I take the view that Article 143 of the Constitution protects a sitting President from legal proceedings. The Constitution has however, under sub-article (4) of Article 143, created an exception to the protection offered with regard to legal proceedings against the President for which the President may be prosecuted under any treaty to which Kenya is a party and which prohibits such immunity. In other words, except in those exceptions allowed under the law, a sitting President cannot ever be made a party to any legal proceeding in court. Any argument that would suggest a possibility of enjoining a sitting President as a party so that orders of judicial review can issue, to say the least, would be quite blind to the provisions of Article 143 of the Constitution. But it should be understood that the immunity in Article 143 of the Constitution only lasts for the time the President is in office"*** [emphasis mine].

[1585] This was also the position adopted by the Employment and Labour Relations Court in ***Okiya Omtatah Okoiti v. President of Kenya & 4 interested parties; Re; Kibwana & 4 Others;*** ELRC Petition No. 19 of 2016; [2019] eKLR where, while addressing the question of whether proceedings can be instituted by the President the Court held:

> ***"As for the 1st Respondent pursuant to Article 143(2) the Constitution of Kenya 2010, proceedings shall not be instituted in any Court against the President or the person performing the function of that office during their***

tenure of office in respect of anything done or not done in exercise of their powers under the Constitution."

[1586] The question was also again addressed by the High Court in ***Katiba Institute v. President of Republic of Kenya & 2 Others and Judicial Service Commission & 3 Others (interested parties)***, HC Petition No. 206 of 2020; [2020] eKLR where the Court addressed the question whether the President may be named as a party in proceedings and whether he should be sued through the Attorney General. The Court found:

"Closely related to that is the question as to whether the 1st respondent should be named as a party in proceedings of this nature, or whether he should be sued through the 2nd respondent, for it is one thing to have the decisions or actions or inactions of the 1st respondent challenged through judicial review or constitutional petitions, and it is another to have him named as a party in the proceedings…

We have not come across any other decision or decisions, of a Kenyan court on Article 143, where a contrary view is held or expressed, to effect that the 1st respondent should be made or named as a party in civil or constitutional proceedings, where his action or inaction is the subject-matter. It would follow from the above decisions, therefore, that although there is immunity for the 1st respondent from prosecution, the same does not bar prosecutions of a civil or constitutional nature being mounted, which challenge exercise of power by the 1st respondent, save that such proceedings ought not to be commenced against the 1st respondent, whether as the

individual occupant of the office or in his official capacity, but rather the same ought to be against the 2nd respondent. That way there is compliance with Article 143 of the Constitution. To that extent, it can be said that there was a misjoinder of the 1st respondent, and the 1st respondent ought not to have been named as or made a party in these proceedings."

[1587] The finding by the courts above remains persuasive and I agree that, although the President enjoys immunity, there is nothing barring institution of constitutional proceedings challenging the exercise of presidential powers. Indeed, Article 258 (1) of the Constitution states that *'Every person has the right to institute court proceedings, claiming that this Constitution has been contravened, or is threatened with contravention.'*

[1588] However, Article 258(1) is qualified by the provisions of Article 143(2) on institution of court proceedings against the President. From the findings by the courts in the above cases, the Attorney General is the one to be sued whenever the President has contravened the provisions of the Constitution. The Constitution furthermore provides for remedies for violations committed by the President by ensuring that there are safeguards to ensure that any misconduct by the President in relation to the Constitution will be checked. Like any other official, he remains accountable to the people. Remedies for constitutional violations include suing the Attorney General under Article 156(4) or impeachment of the President for violations of the Constitution under Article 145(1) of the Constitution.

[1589] Article 156(4) provides that:

"(4) The Attorney-General—

(a) is the principal legal adviser to the Government;

(b) shall represent the national government in court or in any other legal proceedings to which the national government is a party, other than criminal proceedings; and

(c) shall perform any other functions conferred on the office by an Act of Parliament or by the President."

[1590] The Attorney General is therefore mandated to appear as the principal legal adviser to the Government and to represent the National Government including the President in Court when proceedings arise from acts done in his or her capacity while performing the actions of the office of the President. This was the position by *Gikonyo, J.* in the ***Nyarotho Case*** where he held that such suits can be legally instituted against the Attorney General. He stated as follows:

"Such proceedings where it is claimed a state officer acted in contravention of the law are in the nature of Constitutional remedy under article 22 and 23 of the Constitution, and are legally instituted and maintained against the Attorney General unless the Constitution or an Act of Parliament governing the particular state office provides otherwise, or where liability is of a criminal nature. These proceedings are not proceedings against the President but against the State itself and any ensuing liability would certainly be liability of the State within the public law of the State. The Attorney General is not sued on vicarious liability but under Article 156(6) as the defender of the rule of law and public interest."

[1591] This is also the position in ***Isaac Aluoch Polo Aluochier v. Uhuru Muigai Kenyatta & Another,*** HC Petition No. 360 of 2013; [2014] eKLR

where, while determining an application by the Attorney General to represent Uhuru Kenyatta and William Ruto who were sued in their personal capacities, I held that the Attorney General can only represent the National Government and not the two respondents sued in their personal capacity, as they did not qualify to be the 'National Government'. It was my reasoning then that:

> ***"I have taken time to reflect on the matter and regarding representation by the Attorney General in Court proceedings, certainly Article 156(4) (b) is crystal clear; that he shall represent the National Government in legal proceedings other than criminal proceedings. The proceedings before me are not against the National Government because the Respondents by whatever measure and whatever the significance and importance of their respective offices, cannot be 'the government'. 'Government' has been defined as 'to signify the established system of political rule, the governing power of the Country consisting of the executive and the legislature considered as an organized entity and independently of the persons of whom it consists from time to time' – per*** *Dixon, J.**, in*** *Burns vs Ransley [1949] A.L.R. 817."*

[1592] I must clarify that the issue before me in that case was representation and not immunity. Once a party had sued the President in his personal name, the Attorney General could not represent him and just like in this case, the President had to hire his lawyers to represent him. However, for actions touching on his mandate as President, then the President should not even be sued in his personal name and his remedy lies in costs should he be so sued. This Judgment must also serve therefore to settle this issue with finality. Furthermore, if the President

violates the law, Article 145(1) of the Constitution lays down an elaborate procedure for his removal through impeachment. Article 145(1) states:

> ***"Removal of President by impeachment***
>
> ***145. (1) A member of the National Assembly, supported by at least a third of all the members, may move a motion for the impeachment of the President—***
>
> ***(a) on the ground of a gross violation of a provision of this Constitution or of any other law;***
>
> ***(b) where there are serious reasons for believing that the President has committed a crime under national or international law; or***
>
> ***(c) for gross misconduct"*** [emphasis mine].

[1593] In the above context, the immunity envisaged under Article 143(2) does not exist to shield the President from any wrongdoing but nevertheless points to the direction that the President cannot be sued in any proceedings for violation of the Constitution in his/her personal capacity. It is also important to note that, at this juncture, what remains critical is that the framers of the Constitution, as is understood, intended that the President should not be sued in his personal capacity for acts done in contravention of the Constitution during his tenure in office, and for this reason, I am of the view that the High Court erred in finding that the President can be sued in such a capacity and not as the President of the Republic of Kenya.

[1594] Perhaps a discussion on judicial immunity is also of importance in comparison to presidential immunity. Common law courts granted absolute immunity to Judges and Legislators from civil liability for activities done within their scope of official functions. Two reasons suffice for this. First, it is argued that it would be too harsh if a well-intentioned official making discretionary decisions

would be subjected to suits for merely performing their role. Second, that there is bound for fear to arise that a threat of civil liability would deter an official in such a role from making controversial decisions for fear of repercussions of consistent civil suits for acts done in their official roles.

[1595] Article 160(5) of the Constitution touches on the immunity enjoyed by Judges and provides that:

> ***"(5) A member of the judiciary is not liable in an action or suit in respect of anything done or omitted to be done in good faith in the lawful performance of a judicial function."***

[1596] *Kiage, J.A* in ***Bellevue Development Company Ltd v Francis Gikonyo & 7 Others***; CA Appeal no. 239 of 2017, [2018] eKLR ***(Bellevue Case)*** was of the view that Judges enjoy absolute immunity and are immunized from any action or suit on account of the performance of a judicial function. Though being of the honest view that Judges are fallible human beings, the learned Judge duly noted that there does exist mechanisms through which errors committed by judicial officers in the discharge of their judicial functions may be corrected. He went on to note that Judges cannot be sued in court in their personal capacities while discharging their judicial functions. He held thus:

> ***"Being of that persuasion, I cannot accept, less still lend approval to the appellants ill-advised path of dragging the Judges into court by way of litigation against them in their personal capacities for their rulings delivered in the course and in the context of their lawful discharge of their judicial functions... It is quite clear to me that the notion and spectre of judges being sued for discharging their judicial functions must be firmly resisted as a serious threat to judicial independence, the integrity of the judicial process,***

the sanctity of the rule of law and the liberty of all citizens which cannot be countenanced in a rational society and a constitutional democracy such as ours. Indeed, I see in an attempt such as was made here yet another portentious and alarming sign that a certain class of litigants, thankfully still few, and hopefully confined to the fringes of our otherwise law-abiding Wananchi, see courts and judges as a nuisance to be chained, lynched or quartered. Such moves to sue or punish judges with whose determinations, decisions and judgments a litigant is disenchanted ignore the critical, indispensable role a free, fair, fearless and fiercely independent judiciary plays as the defender of the Constitution and the arbiter of justice between parties, be they mighty or weak, and the last bastion of liberty for all citizens. As citizens expect judges to dispense justice without fear or favour, so must they let judges be Judges not defendants and respondents to spend their days and fortunes answering nuisance, ill-advised plaints, summons, petitions, motions and applications on account for the decisions they make in their judicial capacity."

[1597] The Supreme Court upheld the above reasoning and the conclusion that immunity attaches during the tenure held by Judges for decisions rendered and that they cannot be sued in their personal capacity is sound. Contrasting the ***Bellevue Case*** to this case, it would be incomprehensible to find that Judges are protected from being personally sued under Article 160(5) of the Constitution, then find to the contrary, that the President can be sued in his personal capacity for acts done during his tenure in office despite Article 143(2) of the Constitution.

[1598] Seeing as the President was sued in his name, and with the High Court having erroneously found that the President can be sued in his personal capacity, the submission by the Attorney General that the remedy available to the President, should he successfully defend his claim having being improperly sued lies in costs, is sound.

(ii) Finding on Issue No.(iv)

[1599] My conclusion on this issue is that the President cannot be sued in his personal name for alleged violations of the Constitution and should he be sued for whatever reason, then the proper respondent should be the Attorney General and not the President in his personal capacity. The prayer for costs in favour of the President for having been improperly sued in his private capacity in this case will however not be granted as this is the first time that this issue is being settled with finality and public interest also outweighs the grant of such an order.

J. ISSUE NO. (V)

The place of public participation under Article 10 vis-a-vis the role of IEBC under Article 257(4) of the Constitution; And whether there was public participation in respect of the Constitution of Kenya (Amendment) Bill, 2020

[1600] It was the Attorney General's argument that the issue of public participation was not ripe for consideration since the amendment process was still at the preliminary stages at the time the constitutional petitions were filed at the High Court. He thus argues that public participation happens at various stages under Article 257 with inbuilt mechanisms to ensure it happens. Therefore, the Attorney General argues that the High Court should have applied the law on public participation to the continuum of the entire process contemplated under Article 257.

[1601] IEBC also argues that the High Court erred in holding that it was obligated to ensure that the promoters of the Amendment Bill should have undertaken public participation by misapprehending the provisions of the Constitution on public participation. IEBC further contends that its singular role under Article 257(4) was limited to 'verifying that the initiative is supported by at least one million registered voters'. IEBC therefore faults *Gatembu, J.A* for holding that there was an opportunity for IEBC upon being satisfied that the requisite number of signatures of supporters of the initiative had been met, to undertake voter education and sensitization on the Amendment Bill. To the contrary, IEBC argues that at the point of delivery of the Amendment Bill to the County Assemblies, it was not yet seized of the referendum process and could not therefore engage the public in any meaningful way.

(i) Findings by the High Court

[1602] The High Court, while discussing the role of IEBC under Article 257(4) on verification of signatures in constitutional amendments held that IEBC is first required to ascertain the number of registered voters supporting the popular initiative and second, verify the authenticity of the signatures by the registered voters.

[1603] On whether the process complied with Articles 10 and 33 of the Constitution on public participation, it was the High Court's finding that under Article 10, voters are to be supplied with adequate information as part of public participation throughout the process.

[1604] It was also the High Court's finding that IEBC had an obligation to ensure that the BBI Steering Committee had complied with the requirements of public participation by finding:

> ***"Additionally, the IEBC was also under obligation to ensure that the BBI Steering Committee had complied with***

the requirements for public participation before determining it had met constitutional requirements for transmittal to the County Assemblies for voting. This is because under Article 10(1), the IEBC was not only interpreting but was also applying the Constitution. It was, therefore, bound to ensure that the BBI Steering Committee had complied with the requirements for public participation."

[1605] On the issue whether IEBC has any legal or regulatory framework to help it achieve its mandate under Article 257(4) on signature verification, the High Court found that no such framework exists. It was thus the Court's finding that:

"a. First, a legal/regulatory framework for the verification of signatures under Article 257(4) of the Constitution was required.

b. Second, the legal/regulatory framework required does not exist and the convergence of existing statutes does not adequately form the requisite regulatory framework required under Article 257(4) of the Constitution."

(ii) Findings by the Court of Appeal

[1606] *Musinga, (P),* considered the issue whether there was public participation in the initiation and promotion of the Amendment Bill and held that the degree of public participation in the same was not in accordance with the national values and principles under Article 10 of the Constitution.

[1607] On the issue of the role of the IEBC in the amendment process by popular initiative, it was the learned Judge's finding that IEBC's role is to verify the initiative is supported by a million signatures and no more.

[1608] On whether there was a legal/regulatory framework for verification of signatures, the learned Judge differed with the High Court's finding that IEBC's role includes the ascertaining of the number of voters and verifying the signatures, noting that there is no constitutional requirement for a legal framework for verification of signatures but that there is need for a legal/regulatory framework for verification of registered voters.

[1609] *Musinga, (P),* also addressed the issue whether the IEBC was under an obligation to conduct a nationwide voter registration exercise before the referendum and it was the learned Judge's finding that the IEBC had no obligation to carry out such a registration. He rendered himself thus on that issue:

> ***"I find and hold that there is no constitutional or statutory requirement for the IEBC to carry out a "nationwide voter registration" before any proposed referendum, but the Commission is under a constitutional and statutory obligation to do a continuous registration of voters in each constituency. I further find and hold that in view of that constitutional and statutory obligation, the IEBC should continually sensitize Kenyans about its role, and encourage them to continually register as voters, except at such periods as specified by statute when voter registration should not be done."***

[1610] *Nambuye, J.A* also addressed the issue of public participation and asked the question '*whether the proposed amendments as contained in the Constitution Amendment Bill, 2020 were by popular initiative and whether there was public participation*? The learned Judge affirmed the High Court's finding that the

popular initiative flouted constitutional provisions and was of the view that Article 10 provides for participation of the people in governance matters affecting them which also included the proposed amendments. It was thus her holding that:

> ***"Article 10 of the CoK, 2010 provides for among others, participation of the people in governance matters affecting them which would demand civic education on the proposed amendments to explain to the people through sensitization on what they are to sign up for. Second, to explain to them in details the intend and purport of the 74 proposed amendments for them to know the ramification of each of them. It was therefore imperative for the promoters to provide meaningful opportunities for that exercise which the Judges find were lacking as explained in the impugned judgment and which were not rebutted. I therefore, find no basis for flouting the Judges finding that the impugned Bill was not a popular initiative in terms of the constitutional provision interrogated above."***

[1611] *Okwengu, J.A* also considered the issue of whether there was public participation in the popular initiative and was of the view that public participation starts at the commencement of the initiative and not at the County Assembly level and Parliament level. To this end, it was her finding that:

> ***"The matter in issue is whether a constitutional amendment through popular initiative calls for public participation, if so, what is the nature of public participation? and at what stage? As I have already stated elsewhere, a constitutional amendment by a popular initiative is a citizen driven process. While a promoter may come up with a proposed amendment, he/she cannot move***

without the support of citizens. The Constitution has put the initial threshold at 1 million registered voters. Therefore, the public participation cannot await the participation provided for during legislation in the County Assemblies or the two houses of parliament. It must start at the very commencement of the initiative.

A popular initiative is anchored on the exercise of the people's sovereign power. The initiative must therefore start with sensitization and engagement with the people. This is important because the people must know what the initiative entails before they can support it."

[1612] It was her further finding that public participation is one of the principles of good governance under Article 10 and must be complied with at every stage, while emphasizing the importance of public participation at the initial stages of the popular initiative.

[1613] While also deciding on who had the responsibility of proving whether there was any public participation, it was her finding that the appellants at the Court of Appeal had the burden of proving so and held:

"The appellants argued that it was for the respondents who were alleging that there was no public participation, to prove this fact. However, under Section 112 of the Evidence Act, it is provided that in civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon that party. If there was public participation carried out in regard to the popular initiative, this was a fact that was within the special knowledge of the appellants who were promoting the Amendment Bill, 2020.

The appellants cannot therefore, shift the blame on to the respondents. No evidence was laid before the court to prove that there was any meaningful public participation before the collection of signatures in support of the proposed Constitutional Amendment Bill, 2020. To the contrary there was evidence that the public administration through the chiefs were involved in the collection of signatures without any program for civic education or sensitization on the Bill. I therefore uphold the finding of the learned Judges that the BBI Steering Committee as the promoter of Kenya Constitutional Amendment Bill failed to comply with the key constitutional requirement of giving people information and sensitizing them prior to the collection of signatures, and this rendered the process constitutionally unsustainable."

[1614] *Kiage, J.A* while also addressing the question of public participation considered its importance as one of the principles of national values and governance under Article 10 of the Constitution. In doing so, he reasoned that:

"The law on public participation on this country is settled. The Constitution, itself a product of super-participation on the part of the people of Kenya, recognizes participation of the people as one of the national values and principles of governance. It is listed in Article 10(2) (a) alongside patriotism, national unity, sharing and devolution of power, the rule of law and democracy. I have no hesitation holding that participation of the people is what gives meaning to and serves as the guarantor to the tangible realization of the other values and principles of

governance. It is what gives substance and brings to life as a present reality the idea that democracy is a system of government of the people, by the people, for the people as famously put by U.S. President Abraham Lincoln in his Gettysburg Address of November 19, 1863, which he hoped shall not perish from the earth.

Participation by the people in the matters that concern them, when done in a deliberate, substantive manner, acknowledges the sovereignty of the people and treats them as master of their own destiny…"

[1615] In further affirming the High Court's finding, he was of the view that the ability to make political decisions is not limited to voting alone but extends to the decision to or to not append signatures in support of the Amendment Bill and as to whether there was a legal regulatory framework for constitutional amendments by popular initiative, it was his finding that there is need for a law that governs national referenda with regard to popular initiatives.

[1616] While also addressing the question of the role of the IEBC under Article 257(4), the learned Judge agreed with the High Court's finding that its role was not merely to count the signatures, but to also verify the signatures, hence the need for an existing framework to govern signature verification.

[1617] *Gatembu, J.A* discussed the role of IEBC under Article 257(4) upon receiving the Amendment Bill from the promoters and proceeding to verify the signatures with respect to public participation and whether IEBC discharged its duty on public participation. It was his finding that:

"Under Article 257(4) of the Constitution, the IEBC becomes seized of the draft Bill when the same, and the supporting signatures of those supporting the popular

initiative, is delivered to it. IEBC is then required to verify that the initiative is supported by at least one million registered voters before submitting the draft bill to the county assemblies. No time frame is prescribed in Article 257 within which IEBC must submit the draft Bill to the county assemblies after satisfying itself that the threshold of one million registered voters support the initiative. There is opportunity for IEBC, after satisfying itself that the threshold is met, to undertake voter education and sensitization on the amendments proposed in the draft Bill to empower the citizenry to engage meaningfully, and from a point of information, with their representatives at the county assemblies. It is of course not for the court to direct IEBC on how to discharge its Constitutional and statutory function of voter education and public participation, but it is certainly for the court to consider whether it has reasonably discharged its duty.

I am therefore in agreement with the High Court that there is a legal requirement under Article 10 of the Constitution for voters to be supplied with adequate information to make informed decision. There is no evidence that that was not done in this case…"

[1618] On the issue whether there is need for a legal or regulatory framework for verification of signatures by IEBC and whether IEBC discharged its verification mandate under Article 257(4), it was his finding that IEBC failed to discharge this duty effectively. In so saying, it was his view that the High Court was partially correct in finding that IEBC's role under Article 257(4) involved both the ascertainment of numbers of registered voters in support of a popular initiative to

amend the Constitution as well as verification of the authenticity of those signatures further adding that the same can only be achieved if there is a legislative/regulatory framework on matters relating to Article 257.

[1619] The learned Judge, however disproved the finding by the High Court that the absence of a legislation or legal framework to govern the collection, presentation and verification of signatures and the conduct of referenda renders the attempt to amend the Constitution of Kenya through the Amendment Bill, flawed. It was his view to the contrary that, the absence of the legal framework did not mean that IEBC could not discharge its mandate under Article 257.

[1620] *Tuiyott, J.A* also, while considering the role of IEBC under Article 257(4), was of the view that IEBC's responsibility was verification and authentication of signatures only. He held thus:

> ***"Given the explanation by IEBC as to the actual exercise they undertook, can it be said that it did not perceive one of its duties as the need to authenticate the signatures? I reach a conclusion that the manner in which IEBC sought to verify the BBI signatures is testimony that it clearly understood that its mandate under Article 257(4) was to verify the authenticity of the signatures of the registered voters claimed to be in support of the popular initiative."***

[1621] It was then the learned Judge's further finding that there is need for a legal or regulatory framework regarding not just the verification of signatures under Article 257(4) but for the whole process. It was his finding that:

> ***"The regulation, conduct and supervision of a referendum does not start and end with the voting day. It is a continuum, triggered by the one million threshold. There is need for a legal or regulatory framework regarding each***

phase, not in the least the verification of signatures. The legislation must be simple, transparent, and special needs sensitive as directed by Article 82(2) of the Constitution. The legislation is so critical and cannot be left to in-house or boardroom administrative guidelines developed and formulated by the Commission without public participation and interface."

[1622] On whether there was public participation, the learned Judge differed with the finding of the High Court that there was lack of meaningful public participation and sensitization of the people prior to collection of the signatures. He was of the contrary view that public participation at the stage of signature collection need not be an involved or intricate activity as the information on the draft bill is only limited to the people from whom the signatures are being collected and not the country at large. The learned Judge then held that the burden to prove whether the signatures were appended without any information lay with the respondent who had alleged so.

K. ANALYSIS AND DETERMINATION ON ISSUE NO. (V)

(i) Public participation

[1623] On my part, as was held in the ***British American Tobacco Kenya, PLC (formerly British American Tobacco Kenya Limited) v. Cabinet Secretary for the Ministry of Health & 2 Others,*** SC Petition No. 5 of 2017; [2019] eKLR **(*BAT Case)***, public participation is entrenched in our Constitution as a national value and a principle of governance under Article 10 of the Constitution and is binding on all state organs, state officers, public officers and all persons whenever any of them: *(a) applies or interprets the Constitution; (b) enacts, applies or interprets any law; or (c) makes or implements public policy decisions*. The Court also went on to find that public participation is anchored on

the principle of sovereignty of the people which, under Article 1(4) of the Constitution, is exercised at both the national level and the county level.

[1624] In that case, this Court laid down the guiding principles for public participation as follows:

> *"**Guiding Principles for public participation***
>
> ***(i) As a constitutional principle under Article 10(2) of the Constitution, public participation applies to all aspects of governance.***
>
> ***(ii) The public officer and or entity charged with the performance of a particular duty bears the onus of ensuring and facilitating public participation.***
>
> ***(iii) The lack of a prescribed legal framework for public participation is no excuse for not conducting public participation; the onus is on the public entity to give effect to this constitutional principle using reasonable means.***
>
> ***(iv) Public participation must be real and not illusory. It is not a cosmetic or a public relations act. It is not a mere formality to be undertaken as a matter of course just to 'fulfill' a constitutional requirement. There is need for both quantitative and qualitative components in public participation.***
>
> ***(v) Public participation is not an abstract notion; it must be purposive and meaningful.***
>
> ***(vi) Public participation must be accompanied by reasonable notice and reasonable opportunity.***

Reasonableness will be determined on a case to case basis.

(vii) Public participation is not necessarily a process consisting of oral hearings, written submissions can also be made. The fact that someone was not heard is not enough to annul the process.

(viii) Allegation of lack of public participation does not automatically vitiate the process. The allegations must be considered within the peculiar circumstances of each case: the mode, degree, scope and extent of public participation is to be determined on a case to case basis.

(ix) Components of meaningful public participation include the following:

a. clarity of the subject matter for the public to understand;

b. structures and processes (medium of engagement) of participation that are clear and simple;

c. opportunity for balanced influence from the public in general;

d. commitment to the process;

e. inclusive and effective representation;

f. integrity and transparency of the process;

g. capacity to engage on the part of the public, including that the public must be first sensitized on the subject matter."

[1625] As can be discerned, public participation is therefore the mechanism through which the public is allowed to participate in decision making processes and applies to all aspects of governance. What these principles also have in common is a commitment to accountability, responsiveness and openness in government as they envisage a democracy that is not only representative but also participatory. The Constitution specifically calls for public participation in the making of laws by both the County Assemblies and Parliament.

(ii) Duty of IEBC to facilitate public participation

[1626] The High Court found that over and above the role of IEBC of *'verifying that the initiative is supported by atleast one million registered voters',* the IEBC was also under obligation to ensure that the BBI Steering Committee had complied with the requirements for public participation before determining it had met the constitutional requirements for transmittal of the Amendment Bill to the County Assemblies for voting.

[1627] In that context, the role of IEBC has been clearly explained under Article 257(4) as:

> ***"(4) The promoters of a popular initiative shall deliver the draft Bill and the supporting signatures to the Independent Electoral and Boundaries Commission, which shall verify that the initiative is supported by at least one million registered voters"*** [emphasis mine].

[1628] In interpreting this specific role, it is evident that nothing in the provision gives the IEBC the mandate to perform any other function except to verify the one million signatures in support of the initiative. The Constitution has not placed any

burden on IEBC to ensure that the promoters of a Bill have met the requirements of public participation. To hold otherwise would be an error on the part of any Court.

[1629] How else is public participation supposed to be achieved under amendment of the Constitution by way of a popular initiative? Constitutional amendments as envisaged under Article 257 of the Constitution are also amenable to public participation, having found that public participation applies to all aspects of governance. The Attorney General argues that whether or not there was public participation can only be determined by considering the continuum of the entire process and not just specifically at the stage of signature collection. This submission stands true.

[1630] In my view, there are four identifiable stages of public participation on amendment of the Constitution by way of popular initiative under Article 257 of the Constitution. The first stage is under Article 257(1) which states:

> ***"An amendment to this Constitution may be proposed by a popular initiative signed by at least one million registered voters."***

[1631] By appending their signatures to the proposed initiative therefore, the public has participated in the process. The second stage is at Article 257 (5) and (6) upon receipt of the Bill by the County Assembly which states:

> ***"(5) If the Independent Electoral and Boundaries Commission is satisfied that the initiative meets the requirements of this Article, the Commission shall submit the draft Bill to each county assembly for consideration within three months after the date it was submitted by the Commission.***

(6) If a county assembly approves the draft Bill within three months after the date it was submitted by the Commission, the speaker of the county assembly shall deliver a copy of the draft Bill jointly to the Speakers of the two Houses of Parliament, with a certificate that the county assembly has approved it."

[1632] The public indirectly participates at this stage through their representatives. The third stage is under Article 257 (7) and (8) of the Constitution, which provides:

"(7) If a draft Bill has been approved by a majority of the county assemblies, it shall be introduced in Parliament without delay.

(8) A Bill under this Article is passed by Parliament if supported by a majority of the members of each House."

[1633] The participation is also indirect through their elected Members of Parliament. In that regard, Article 118 of the Constitution provides for public access and participation in the making of laws to be carried out as follows:

"Public access and participation

(1) Parliament shall-

(a) conduct its business in an open manner, and its sittings and those of its committees shall be open to the public; and

(b) Facilitate public participation and involvement in the legislative and other business of Parliament and its committees."

[1634] The provisions governing public participation by Parliament are mirrored in the provisions governing County Assemblies on public participation under Article 196 which provides:

> ***"196. (1) A county assembly shall—***
>
> ***(a) conduct its business in an open manner, and hold its sittings and those of its committees, in public; and***
> ***(b) facilitate public participation and involvement in the legislative and other business of the assembly and its committees.***
>
> ***(2) A county assembly may not exclude the public, or any media, from any sitting unless in exceptional circumstances the speaker has determined that there are justifiable reasons for doing so."***

[1635] Public access to a Bill purporting to amend the Constitution is a fundamental part of public participation. It enables members of the public to familiarize themselves with the law-making process and thus be able to effectively participate at the referendum stage which is the last and fourth stage when the Bill is submitted to the people for voting. The best way that this is achieved is through the opportunity to submit representations and submissions, to ensure that the public has a say in the law-making process.

[1636] However, a determination on whether there was public participation can only be done by an analysis of evidence showing or disproving the fact that there was public participation and in that regard, a review of the findings of the High Court and the Court of Appeal on lack of public participation would lead me to the conclusion that there is no justification for such a finding as there was no evidence placed before them proving that the voters who signed the signatures for the proposed Amendment Bill did so without being accorded a chance to study the Bill,

or that any of their submissions or representations were not taken into consideration. This is on the first stage of public participation.

[1637] On the other three stages, the finding by *Nyamweya, J.* (as she then was) in ***Republic v. County Assembly of Kirinyaga & Another*** *Ex-Parte* ***Kenda Muriuki & Another***, HC J.R Application No. 271 of 2019; [2019] eKLR while deciding on whether there was public participation in a popular initiative before the process was concluded remains persuasive. It was her finding that:

> ***"The effect of such lack of public participation can however only be determined upon the conclusion of the process envisaged in Article 257 of the Constitution, given the double decision-making processes that are required to take place at the county assemblies and Parliament, and indeed, will be dependent on whether the majorities required in the county assemblies is met. The prevalence or lack of public participation as a contributing factor to the attainment or otherwise of such majority. It is therefore premature to make a decision as to the effect of such lack of public participation at this stage and in the circumstances of this application. In addition, given the different actors in the promotion and passage of a bill to amend the constitution by popular initiative, it may be necessary to consider the cumulative efforts at public participation before deciding on its sufficiency or otherwise."***

[1638] I agree with the learned Judge and would only add that in the present case, one cannot fault IEBC or the promoters of the initiative at all because at the point that the High Court stopped the process, IEBC had not yet been seized of the voter education mandate prior to the referendum. The promoters had also not started popularizing their Bill prior to the said referendum.

[1639] I should also state that, I heard confusing statements from Counsel as to the 'process'. The process is simply this; from the collection of signatures to the referendum. What happened prior to those processes cannot qualify as 'the process'. Having so said therefore, I completely agree with *Tuiyott, J.A* that a finding that there was no public participation in 'the process' was erroneous.

[1640] Lastly, *Gatembu* and *Tuiyott, JJ.A* stated there is need for a legal/regulatory framework to govern not just the process of verification of the signatures, but also governing all the stages of an amendment Bill under Article 257, from the point of collection of signatures, to the verification of those signatures by IEBC, the discussion and passage of an amendment Bill by the County Assemblies, the process of passing of a Bill by Parliament, the receipt of the Bill by the President and on transmission of the assented Bill by the President to the IEBC for voting in a referendum.

[1641] The requirement for the legal framework is also in line with the provisions of Article 82(1)(d) of the Constitution which states:

> ***"Article 82. Legislation on elections***
>
> ***(1) Parliament shall enact legislation to provide for—***
>
> ***...***
>
> ***(d) the conduct of elections and referenda and the regulation and efficient supervision of elections and referenda, including the nomination of candidates for elections; ..."***

[1642] Without this legal framework, the confusion as to what amounts to proper and legitimate public participation will continue dragging our courts. The legislation should cover all aspects of the popular initiative and that is all to say on that matter.

(iii) Finding on Issue No. (v)

[1643] On this issue, noting the evidence placed on record, the stage at which the popular initiative was stopped by the High Court, I am unable to find that there was no public participation at the initiation and the promotion of the said initiative. My findings on the Second Schedule would of course create an exception to this finding because I have already declared it unconstitutional for *inter alia* lack of public participation.

L. ISSUE NO. (VI)

Interpretation of Articles 88 and 250 of the Constitution with respect to composition and quorum of IEBC

[1644] IEBC argues that the finding by the superior courts that it had no quorum to conduct the verification of signatures with regard to the Amendment Bill was in error. First, they argue that IEBC is one of the Independent Commissions listed under Article 248 and that courts should exercise judicial restraint in dealing with such bodies unless there is just cause for interference.

[1645] Secondly, that a declaration on quorum has more far reaching consequences than what the court purported to determine. Thirdly, they argue that in relying on the decision in ***Katiba Institute & Another v. Attorney General & Another,*** Constitutional Petition No. 548 of 2017; [2018] eKLR ***(Katiba Institute Case),*** the superior courts erred in upholding the provisions of Paragraphs 5 and 7 of the Second Schedule to the IEBC Act despite the same being declared unconstitutional by the High Court and no appeal filed that varied or set aside that order.

[1646] IEBC also on its part argues that the effect of declaring Paragraphs 5 and 7 of the Second Schedule of the IEBC Act to be unconstitutional meant that the declaration was prospective and that the provisions ceased to apply. They also

argue that since the amendment was found to be constitutionally void, then the declaration did not revive the former provisions on quorum and that there was thus nothing to revert to on quorum. IEBC therefore contends that, since there was no law on quorum, the provisions of the Constitution in Article 250 applied. That provision states that quorum is three members for Independent Commissions. To this end, they argue that IEBC had three members at the material time and therefore the superior courts erred in finding that it was unconstitutionally constituted.

[1647] IEBC further argued that, in ***Isaiah Biwott Kangwony v. IEBC & Another***, HC Petition No. 212 of 2018; [2018] eKLR ***(Isaiah Biwott Case)*** the High Court found that the existence of a vacancy did not affect the constitutional functions of IEBC and that there was no inconsistency between Paragraph 5 of the Second Schedule of the IEBC Act and Article 250(1) of the Constitution if properly read on the issue of quorum. It is thus their contention that the finding was a decision *in rem* and it was not open for a Court of concurrent jurisdiction to overrule it by holding otherwise. IEBC further submits that it remained guided by the decision in that case on the issue of quorum and therefore it was always properly constituted at the time it verified signatures in the present case.

[1648] The 1st to 5th respondents on the other hand, insist that IEBC was not quorate. They argue that Article 250(1) sets the composition of commissions at a minimum of three and a maximum of nine and that the quorum of the Commission is set by their respective enabling legislation.

[1649] They are also of the view that the term composition was not the same as quorum. Ms. Ang'awa for the 1st to 5th respondents indeed maintained that the specific composition of the IEBC is set out at Paragraph 7 of the Second Schedule of the IEBC Act and the quorum, which is the number of members required for it to undertake its business, is set at Paragraph 5 of the Second Schedule aforesaid.

[1650] It was further proposed that a purposive interpretation of Article 250(1) of the Constitution and Paragraph 5 of the Second Schedule of the IEBC Act anchored on the public interest to have all commissions perform at optimum capacity, supports the finding of superior courts that the IEBC lacked quorum for the conduct of business meetings in which decisions on the Amendment Bill were made by three instead of five members.

[1651] They also oppose the argument by IEBC that Paragraph 5 of the Second Schedule to the IEBC Act was repealed in the ***Katiba Institute Case*** arguing that the High Court, in declaring the amendment unconstitutional, had the effect of sustaining the quorum at five, and not repealing Paragraph 5 at all.

(i) Findings by the High Court

[1652] The High Court considered the question whether IEBC had the requisite quorum to conduct verification of signatures and to determine whether the promoters of the Amendment Bill had met constitutional requirements under Article 257(4). The Court found that the two issues were policy issues and could only be determined if IEBC had the quorum to make such a fundamental determination. The trial court departed from the finding in the ***Isaiah Biwott Case*** that the IEBC can conduct business other than making "policy decisions" when its membership is below the minimum five stipulated in Paragraph 5 of the Second Schedule.

[1653] It was also the High Court's finding that IEBC having lacked quorum and, all decisions made in relation to the Amendment Bill were invalid, null and void. In so finding, the Court stated thus:

> ***"The fact that the IEBC did not have the quorum of five members when it conducted verification of signatures and determined that the BBI Secretariat had met the constitutional threshold under Article 257(4) of the***

Constitution to move the process to the next stage is not in doubt. Equally not in doubt is the fact that the statute requires that quorum. This statutory provision was not inserted for cosmetic purposes. It underlines the critical constitutional roles placed on the shoulders of the IEBC. If the Constitution placed the threshold of voters to support a Constitution of Kenya Amendment Bill at one million, to be verified by the IEBC, such a high threshold could not be determined by an organ that did not have the statutory quorum."

(ii) Findings by the Court of Appeal

[1654] *Musinga, (P),* in considering whether the IEBC had the requisite quorum, first discussed the effect of the Judgment in the ***Katiba Institute Case*** noting that the Judgment was *in rem* and having declared the amendments to the IEBC Act unconstitutional, then the quorum of IEBC remained five.

[1655] *Nambuye, J.A* also affirmed the finding by the High Court that the IEBC was not quorate and could not conduct the constitution amendment process to its finality. She rendered herself thus:

"My take on the position taken by the Judges on the impugned Judgment is that their position that Okwany J's sanctioning of IEBC to conduct the by election was because it was not a policy issue as such IEBC could conduct the by election as they were quorate, which according to the Judges and correctly so in my view did not touch on policy issues falling within the mandate of IEBC. The second major consideration and which I also agree with is the

magnitude and serious impact of the intended constitutional amendment process which could not be entrusted to IEBC without their being quorate. I therefore find no fault in the Judges conclusion and would affirm it and hold that IEBC was not quorate and could not therefore be allowed to conduct the constitutional amendment process to its finality."

[1656] *Okwengu, J.A* agreed with the finding of the majority on the issue of quorum, finding:

"That the Independent Electoral and Boundaries Commission does not have the requisite quorum for purposes of carrying out its business relating to the conduct of the proposed referendum including the verification of signatures in support of the Constitution of Kenya Amendment Bill under Article 257(4) of the Constitution submitted by the Building Bridges Secretariat."

[1657] *Kiage, J.A* also affirmed the High Court's finding that IEBC lacked quorum hence all decisions made by it were invalid, null and void. In his Judgment, he noted that the IEBC Act provides that the quorum should be five and that the High Court was right in departing from the finding in the ***Isaiah Biwott Case***.

[1658] *Gatembu, J.A* also agreed with the High Court's finding that the quorum of IEBC for purposes of transacting business should be five, hence IEBC lacked the proper quorum to make consequential decisions related to the Amendment Bill. In distinguishing between composition and quorum, it was his finding that Article 250 cannot fill the gap that was created by the declaration of unconstitutionality of

the provisions amending Paragraphs 5 and 7 of the Second Schedule in the ***Katiba Institute Case*** and sought to distinguish the two.

[1659] *Sichale, J.A* in addressing the question of quorum was of the view that Article 250 sets the minimum members of a Commission as three, and that it was of no sense to require IEBC to have a quorum of five members, despite the Constitution setting the minimum number at three. In so finding, she held:

> ***"It is common ground that a Commission can operate with a composition of three (3) members being the minimum number provided by the Constitution. It is also common ground that a Commission with 3 members is constitutionally compliant. To that end, no one has faulted the Commission as currently constituted with only three (3) members as being unconstitutional. If this be the case, how is it expected that a Commission, such as IEBC with a composition of three (3) members, the minimum constitutional requirement, can be expected to have a quorum of five (5) members? To say that a Commission that is Constitutionally compliant (by having a composition of three members) must have a quorum of 5 members is in my view, absurd."***

[1660] *Tuiyott, J.A* on his part, considered the import of the finding in the ***Katiba Institute Case*** and was of the view that the effect of the decision therein was that the former provisions on quorum were not revived. In so saying, it was his finding that:

> ***"Given my appreciation of the law, I would reach an outcome that, although the effect of the decision in Katiba Institute & Another (Supra) was to render the new***

provisions of paragraph 5 to be ineffective and a nullity, the decision did not revive the former provisions."

[1661] In then determining the question of quorum, it was his finding that, whether IEBC was quorate must be seen against the full composition of seven required by the IEBC Act and was of the view that IEBC was not quorate since membership of the IEBC that was less than half of the membership of seven weakens the Commission.

M. ANALYSIS AND FINDINGS ON ISSUE NO.(VI)

(i) Role of the IEBC as a Chapter Fifteen Commission and as a body through which the people can exercise sovereign authority

[1662] IEBC is one of the commissions created under Article 248 of the Constitution and whose functions is as provided for under Article 88. Article 88(4) provides that:

"The Commission is responsible for conducting or supervising referenda and elections to any elective body or office established by this Constitution, and any other elections as prescribed by an Act of Parliament..."

[1663] Article 249 (1) states the objects of the commissions to be:

"(a) protect the sovereignty of the people;

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

(c) promote constitutionalism."

[1664] This Court ***In the Matter of the National Land Commission***, Reference No. 2 of 2014; [2015] eKLR discussed the concept of sovereignty vested

on commissions and independent offices as regards the nature and constitutional identity of the said bodies. The Court held:

> ***"The wording of Chapter 15 of the Constitution, in our perception, does not signal the vesting of the sovereign power of the people in commissions and independent offices. This is not to say that commissions and independent offices are excluded from exercising public power. Indeed, as State organs, they are part of Government, and one of their core mandates is to protect the sovereignty of the people; so they ought to protect the sovereign power of the people, from which the Executive, the Judiciary and the Legislature derive their authority: hence the depiction 'people watchdogs' or 'constitutional watchdogs'. They are to be distinguished from the three arms of Government through the functions they discharge."***

[1665] Article 249 (2) states that commissions and the holders of independent offices:

> ***"(a) are subject only to this Constitution and the law; and***
> ***(b) are independent and not subject to direction or control by any person or authority."***

[1666] Further, ***In the Matter of the Interim Independent Electoral Commission,*** SC Advisory Opinion No. 2 of 2011; [2011] eKLR this Court addressed the independence clause of Commissions and held:

> ***"[T]he real purpose of the 'independence clause', with regard to Commissions and independent offices established under the Constitution, was to provide a***

safeguard against undue interference with such Commissions or offices, by other persons, or other institutions of Government."

[1667] The Court again ***In the Matter of the National Land Commission*** went on to discuss the independence of commissions as provided for under Article 249 (2) and came up with principles in relation to the object of independence in a Commission by holding as follows:

"Functional independence: this entails commissions exercising their autonomy through carrying out their functions, without receiving any instructions or orders from other State organs or bodies. This has also been referred to as administrative independence (See JSC v. Speaker of the National Assembly and Others; and the South African Constitutional Court decision in New National Party of South Africa.) Functional independence is in line with the general functions and powers of commissions, as provided under Articles 252 and 253 of the Constitution.

- ***Operational independence: this includes functional independence, and is a safeguard or shield for independence, manifested through the procedure of the appointments of commissioners; composition of the commission; and procedures of the commission. Article 255(1)(g)_provides an elaborate procedure for the amendment of the Constitution in matters dealing with the independence of the Judiciary, as well as***

commissions and independent offices to which Chapter 15 applies.

- ***Financial independence: it means that a commission has the autonomy to access funds which it reasonably requires for the conduct of its functions. However, according to Article 249(3) of the Constitution, Parliament is mandated to set for the commission the budget considered adequate for its functions.***
- ***Perception of independence: this means the commissions must be seen to be carrying out their functions free from external interferences. In*** *CCK and Independent Policing Oversight Authority & Another****, this Court and the High Court respectively held that the perception of independence is crucial in showing proof of independence.***
- ***Collaboration and consultation with other State organs: it emerges from precedent, that independence of commissions and independent offices does not, perforce, entail a splendid isolation from other State organs…"***

[1668] Of relevance is the independence clause defined as 'operational independence' or otherwise, functional independence where commissions are allowed to enjoy independence by having the autonomy to regulate the procedure of appointment of Commissioners, composition of the Commission or its procedures.

[1669] Article 88 (5) provides that IEBC shall ***'exercise its powers and perform its functions in accordance with this Constitution and***

national legislation'. The legislation in question is the IEBC Act, among other legislations including the Elections Act.

[1670] In the ***Katiba Institute Case,*** the constitutionality of the Election Amendment Laws 2017 that sought to amend the IEBC Act was challenged. Of relevance was Section 4 of the Election Laws Amendment 2017 which sought to amend Paragraphs 5 and 7 of the Second Schedule to the IEBC Act on quorum of the Commission. *Mwita, J.* while discussing the issue of quorum of IEBC noted that prior to the impugned amendments before the court, Paragraph 5 of the Second Schedule to the Act provided that the quorum was five and stated that; ***'the quorum for the conduct of business at a meeting of the Commission shall be at least five members of the Commission'***. The amendment sought to amend Paragraph 5 by providing that; ***'the quorum for the conduct of business at a meeting of the Commission shall be at least half of the existing members of the Commission, provided that the quorum shall not be less than three members'***. It was then his finding on quorum that:

> ***"Quorum being the minimum number of Commissioners that must be present to make binding decisions, only majority commissioner's' decision can bind the Commission. Quorum was previously five members out of the nine commissioners including the Chairman, a clear majority of members of the Commission. With membership of the Commission reduced to seven, including the Chairperson, half of the members of the Commission, or three commissioners now form the quorum. Instead of making the quorum higher, Parliament reduced it to three which is not good for the proper functioning of the Commission. In that regard therefore, in decision making process where decisions are to be made through voting,***

only decisions of majority of the Commissioners should be valid. Short of that, anything else would be invalid. For that reason, paragraphs 5 and 7 of the Second Schedule are plainly skewed and unconstitutional."

[1671] From the above, it can be discerned that the learned Judge was of the view that Parliament erred in decreasing the number of Commissioners required to attain quorum to three, being of the view that they should have increased the quorum to more than five for the proper functioning of the Commission. This is despite Parliament acting within the provisions of Article 250 (1) of the Constitution which provides that a Commission should consist of *'at least three, but not more than nine members'*.

[1672] In my view, and with respect, by finding that the amendments on quorum were not good for the proper functioning of the Commission, the learned Judge went over and above the provisions of Article 250(1) of the Constitution, as the effect of the pronunciation was that the amendments to the Second Schedule were inconsistent with the provisions of Article 250 (1). The learned Judge therefore interfered with the functional independence of the Commission by purporting to make a finding on quorum based on what he thought would be the best number to form quorum, instead of interpreting the amendments and confirming whether they were in conformity with the provisions of the Constitution.

[1673] The High Court in the ***Isaiah Biwott Case*** on the other hand also discussed the issue. The petitioners in that case had sought a declaration to the effect that the IEBC was illegal and unconstitutional for lack of quorum due to resignations by some members. In deciding whether the amendment to Paragraph 5 of the Second Schedule of the IEBC Act was inconsistent with the provisions of Article 250(1), *Okwany, J.* held that Paragraph 5 of the Second Schedule was not unconstitutional as was held in the ***Katiba Institute Case.*** In so saying, it was her finding that:

> ***"Having regard to the above decision, I do not find any inconsistency between the provision in Paragraph 5 of the Second Schedule of the IEBC Act and Article 250(1) of the Constitution. I find that the Act must have been enacted on the assumption or hope that the Commission will be constituted with its maximum nine members which is not the case in the instant petition given that only seven commissioners were appointed in the current commission."***

[1674] Section 5 of the IEBC Act speaks to composition and appointments of the Commission and at Section 5(1) states that:

> ***"(1) The Commission shall consist of a chairperson and eight other members appointed in accordance with Article 250(4) of the Constitution and the provisions of this Act."***

[1675] Quorum is defined by the ***Black's Law Dictionary*** (9th Edition 2009) 1370 as:

> ***"The minimum number of member (usu. a majority of all members) who must be present for a deliberative assembly to legally transact business."***

[1676] The Supreme Court of India in the case of ***Punjab University, Chandigarh v. Vijay Singh Lamba Etc*** 1976 AIR 1441 held as follows as regards quorum:

> ***"Quorum' denotes the minimum number of members of any body of persons whose presence is necessary in order to enable that body to transact its business validly so that its acts may be lawful. It is generally left***

to committees themselves to fix the quorum for their meetings…" [emphasis mine].

[1677] Going by this definition, IEBC's argument that quorum should be examined against the constitutional composition stated at Article 250 (1) where the Commission had three members at the time of verification of the signatures is correct, in my view. This is because IEBC had the minimum number of members present to enable it transact its business validly. This is also the position taken by *Okwany, J*. in the ***Isaiah Biwott Case*** in her finding that:

> ***"Since quorum is composed of a clear majority of members of the commission, my take is that quorum cannot be a constant number as it is dependent on the actual number of the commissioners appointed at any given time. The question that we must ask is if quorum would remain five in the event that only three commissioners are appointed because the constitution allows for a minimum of three members. Would the quorum still be five? The answer to this question is to the negative. My take is that the issue of quorum, apart from being a matter provided for under the statute, is also a matter of common sense and construction depending on the total number of the commissioners appointed at any given time because it is the total number of commissioners appointed that would determine the quorum of the commission and not the other way round. In view of the above findings, I do not find Paragraph 5 of the Second Schedule of the Act unconstitutional having found that it was enacted on the belief that the maximum number of commissioners would be appointed."***

[1678] I completely agree with the learned Judge and find as she did, that IEBC was quorate at the material time. In addition, to subjugate Article 250(1) to the Legislation created by dint of Article 88(5) is to read the Constitution in a skewed manner. Ms. Ang'awa's submission on this point, while spirited and attractive, does not find favour in my eyes.

[1679] On the effect of the nullification of laws relating to IEBC by *Mwita J.*, in the ***Katiba Institute Case***, and despite the lucid and detailed submissions by Ms. Kituku on that issue, once I have found that IEBC was quorate, the same would no longer require engagement.

(ii) Findings on Issue No.(vi)

[1680] From the above analysis, I can only conclude that IEBC was quorate at all material times and all its actions were lawfully undertaken during the relevant period. A contrary finding would have been made had its membership dropped below the Article 250(1) figure of three. It did not.

N. ISSUE NO. (VII)

Whether the interpretation of Article 257(10) Of the Constitution entails/requires that all specific proposed amendments to the Constitution should be submitted as separate and distinct referendum questions

[1681] On whether it is a *'question'* or a *'Bill'* that is submitted to the people in a referendum, it is the Attorney General's argument that what is submitted to the people is not a question but a Bill either to be approved or not approved by the people. The Attorney General further contends that it would be a usurpation of power for the court to prescribe the manner in which a referendum can be carried

out or the form of the referendum questions, a task left to IEBC under Article 49 of the Elections Act.

[1682] This is also the position of the 13th, 14th, 15th and 16th respondents who argue that Articles 256 and 257 refer to the 'Bill' that is either approved or rejected by Parliament depending on the subject being amended. They contend that in this context, there is no requirement for separate and distinct referendum questions.

[1683] It was further the submission by the 14th and 16th respondents that the issue is in any event premature because IEBC had not reached the point of addressing that issue and therefore by the High Court or the Court of Appeal pronouncing themselves on matters which were not yet ripe, then they were sitting in another jurisdiction and offering an advisory opinion, rather than sitting on real matters of facts that would require determination.

[1684] The 18th and 21st respondents on their part argue that it is an extraneous and unconstitutional requirement that separate and distinct referendum questions be put to the people in a referendum rather than a Bill. That such an argument is thus without merit and any legal foundation.

[1685] The 72nd respondent argues that the issue is not justiciable since the mandate to formulate such questions which falls under IEBC's mandate had not yet arisen by the time the matter was filed in the High Court. In her view, this Court, while sitting as an appellate court, also lacks jurisdiction to entertain the issue.

[1686] The 3rd appellant on the other hand, disputes this argument. He invites the Court to find that under Articles 255, 256 and 257 of the Constitution, the phrases 'a proposed amendment'; 'the proposed amendment'; 'the amendment'; 'an amendment'; 'a general suggestion'; are used in the singular deliberately. Consequently, he contends that these express terms do not admit of a large number of amendments in a single Bill.

[1687] The 19th respondent is also of the view that a valid constitutional amendment Bill can contain only one amendment. He argues therefore that, if the promoters of the Amendment Bill desired to propose more than one amendment, it was obligatory upon them to have prepared separate Bills for each proposed amendment and subjected each Bill to the amendment processes under Articles 255 to 257. He argues that if it was the intention of the drafters of the Constitution to provide for 'amendments' in plural under Article 257 nothing would have been easier than to do so. It is also his view that, packaging multiple questions into an omnibus Bill is a violation of Article 38(3) and 257(10) of the Constitution and takes away the political right of every citizen to weigh each amendment on its merit. Therefore, it is his submission that the Amendment Bill which contains 74 mostly unrelated amendments is a violation of Articles 255 to 257 of the Constitution. He further contends that a single-subject rule for constitutional amendment would prevent the use of omnibus draft Bills for amendments and would instead require promoters to propose amendments that focus on one subject alone.

(i) Findings by the High Court

[1688] The High Court with regard to this issue determined that Article 257(10) of the Constitution requires all the specific proposed amendments to be submitted as separate and distinct referendum questions to the people in the referendum ballot paper and to be voted for or against separately and distinctively.

[1689] Further, after considering the provisions of Section 49 of the Elections Act, it was the Court's view that it is the question (s) to be subjected to the referendum as opposed to the Bill. The Court observed:

> ***"Our understanding of this section is that what is to be subjected to the referendum is the question or questions as opposed to the Constitution of Kenya Amendment Bill***

itself. It is, therefore, our finding and, we so hold, that Article 257(10) requires all the specific proposed amendments to be submitted as separate and distinct referendum questions to the people in the referendum ballot paper and to be voted for or against separately and distinctively."

(ii) Findings by the Court of Appeal

[1690] *Musinga, (P),* in disagreement with the finding of the High Court, was of the view that Article 257 stipulates that the proposed amendment should be presented to the people as a Bill and not as a question or questions. In so saying, he reasoned thus:

> ***"A plain reading of Article 257 requires that the proposed amendment be reduced into a Bill, which is then submitted to the people in a referendum. What is to be submitted to the people is not a question or questions, it is a Bill...***
>
> ***A Bill is a proposed legislation and may contain more than one proposed amendments. As stated by the learned judges, the drafters of the Constitution were alive to the fact that a Bill to amend the Constitution may propose different amendments. The Bill ought to be subjected to a proper public participation where each and every proposed amendment is explained, debated upon and well-informed views taken before the people eventually vote on the Bill. That notwithstanding, it is***

improper to lump together 74 proposed constitutional amendments in a Bill.

I do not therefore agree with the learned judges that what is to be subjected to the referendum is a question or questions, it is the Amendment Bill, but the people are to approve or disapprove of the Bill by answering a question or questions as framed by the IEBC and approved by Parliament."

[1691] *Nambuye, J.A* while also affirming the High Court's finding, held that Article 257(1) requires all specific proposed amendments to be submitted as separate and distinct referendum questions.

[1692] *Kiage, J.A* who also affirmed the High Court's finding, was of the view that each amendment should be presented separately and distinctly to be voted upon differently. It was also his finding that the specific proposed constitutional amendment under Article 257 must be presented as a single amendment and not as a multi-option referendum, as provided for under Section 49 of the Elections Act.

[1693] *Gatembu, J.A* on his part made a finding that Article 257 envisages that the Bill is based on a single thematic topic related to the provisions in the draft Bill. It was his finding that:

"Ultimately, it seems to me that to put a single binary question or multiple question is a matter to be informed by the nature of amendment proposed. It may well be that certain proposed amendments may require separate and distinct referendum questions to be framed. What in my view Article 257(10) of the Constitution does not contemplate is the submission to

the people in a referendum of an omnibus amendment Bill, a hotchpot of an amendment Bill, such as the Constitution Amendment Bill in this case. The argument that it would be impractical on account of logistical difficulties to formulate over 70 separate and distinct questions is perhaps more the reason that an omnibus amendment Bill should never be entertained."

[1694] *Tuiyott, J.A* was of the view that since IEBC had not received the request to hold the referendum, no occasion had arisen for it to discharge its responsibility of framing the question or questions. Furthermore, it was his finding that IEBC had not yet determined the manner or formula in which it would frame the question or questions in respect to the referendum touching on the impugned Amendment Bill. Thus, it was his finding that there was no live controversy that required the High Court to pronounce itself on. He stated as follows in that regard:

"The manner in which the proposed amendment is to be submitted to the people in referendum is not specified by the provisions of the Constitution. However, Part V of the Elections Act are provisions on referendum and if there is any doubt that those provisions where intended to cover referenda other than that under Articles 255 and 257, then the doubt is removed by section 54 which reads: ...

Section 49 of the Elections Act on initiation of a referendum reads: -

...

These provisions, and more specifically sub section (2), places the responsibility of framing the referendum question or questions to be determined during the

referendum on IEBC. In this instance, IEBC had not received the request to hold the referendum and occasion had not arisen for it to discharge its responsibility of framing the question or questions. Further, it has not been suggested that IEBC had already determined the manner or formula in which it would frame the question or questions in respect to the referendum touching on the impugned Bill, if it got there. It cannot therefore be fairly said that the petitioners had an actual grievance against IEBC either arising from the conduct of IEBC or one which was threatened. I take a view, and so hold, that there was no live controversy that required the High Court to pronounce itself on."

O. ANALYSIS AND FINDINGS ON ISSUE NO.(VII)

(i) Presentation of amendments to the people under Article 257(10) of the Constitution

[1695] The High Court and the majority at the Court of Appeal held that what is to be subjected to the people for voting in the referendum is the question or questions as opposed to the Bill itself. This finding was justified by the provisions of Section 49 of the Elections Act and not the text of the Constitution itself.

[1696] A reading of Articles 255, 256 and 257 on amendments to the Constitution would, in my view show that it is 'a Bill to amend the Constitution' that is the medium of amendment. Article 256(1) in the above context reads:

"(1) <u>A Bill</u> to amend this Constitution–

(a)....

(b)...

(2) Parliament shall publicise any <u>Bill</u> to amend this Constitution, and facilitate public discussion about the <u>Bill</u>.

(3) After Parliament passes a Bill to amend this Constitution, the Speakers of the two Houses of Parliament shall jointly submit to the President—

(a) the <u>Bill</u>, for assent and publication; and

(b) a certificate that the <u>Bill</u> has been passed by Parliament in accordance with this Article.

(4) Subject to clause (5), the President shall assent to the <u>Bill</u> and cause it to be published within thirty days after the <u>Bill</u> is enacted by Parliament.

(5) If a <u>Bill</u> to amend this Constitution proposes an amendment relating to a matter mentioned in Article 255 (1)—

(a) the President shall, before assenting to the <u>Bill</u>, request the Independent Electoral and Boundaries Commission to conduct, within ninety days, a national referendum for approval of the <u>Bill</u>; and

(b) within thirty days after the chairperson of the Independent Electoral and Boundaries Commission has certified to the President that the <u>Bill</u> has been approved in accordance with Article 255 (2), the President shall assent to the <u>Bill</u> and cause it to be published" [emphasis mine].

[1697] Similarly, the wording in Article 257 refers only to a 'draft Bill' or 'Bill'. The provision state:

"(2) A popular initiative for an amendment to this Constitution may be in the form of a general suggestion or a formulated draft Bill.

(3) If a popular initiative is in the form of a general suggestion, the promoters of that popular initiative shall formulate it into a draft Bill.

(4) The promoters of a popular initiative shall deliver the draft Bill and the supporting signatures to the Independent Electoral and Boundaries Commission, which shall verify that the initiative is supported by at least one million registered voters.

(5) If the Independent Electoral and Boundaries Commission is satisfied that the initiative meets the requirements of this Article, the Commission shall submit the draft Bill to each county assembly for consideration within three months after the date it was submitted by the Commission.

(6) If a county assembly approves the draft Bill within three months after the date it was submitted by the Commission, the speaker of the county assembly shall deliver a copy of the draft Bill jointly to the Speakers of the two Houses of Parliament, with a certificate that the county assembly has approved it.

(7) If a draft Bill has been approved by a majority of the county assemblies, it shall be introduced in Parliament without delay.

(8) A Bill under this Article is passed by Parliament if supported by a majority of the members of each House.

(9) If Parliament passes <u>the Bill</u>, it shall be submitted to the President for assent in accordance with Articles 256 (4) and (5).

(10) If either House of Parliament fails to pass <u>the Bill</u>, or <u>the Bill</u> relates to a matter mentioned in 255 (1), the proposed amendment shall be submitted to the people in a referendum." [emphasis mine].

[1698] The language of the Constitution is therefore that, a Bill in the singular is what is ultimately presented in a referendum. The third appellant pursuing that line of thought argues that, since the language of the Constitution talks of 'a Bill' and 'amendment' in the singular, then every single amendment to the Constitution should be on one thematic area with one single Bill dealing with each separate singular amendment. This was also the finding by *Gatembu, J.A.*

[1699] On my part and as demonstrated above, the language of the Constitution in Articles 256 and 257 consistently refers to a 'Bill' and not 'Bills'. Finding otherwise would be in contravention of the Constitution. Similarly, the CKRC Final Report while considering amendments to the Constitution, recommended that the Constitution should have entrenched provisions whose amendment shall be by way of a Bill. At page 76, the recommendations read:

"(e) the amendment procedure should make the following distinction:

(i) <u>A Bill</u> seeking to amend the entrenched provision should not be passed unless:

...

(iii) <u>A Bill</u> seeking to amend these provisions should not be passed unless:

..."

[1700] It therefore follows that the drafters of the Constitution also intended to have a Bill for amendment to the Constitution to the people. The language of 'question' or 'questions' was however introduced in Section 49 of the Elections Act to operationalise the above provisions.

[1701] That Section reads thus:

> ***"49. Initiation of a referendum***
>
> ***(1) …***
>
> ***(2) Where an issue to be decided in a referendum has been referred to the Commission under subsection (1), the Commission shall frame the question or questions to be determined during the referendum.***
>
> ***(3) …***
>
> ***(4) The National Assembly may approve one or more questions for a referendum.***
>
> ***(5) The Commission shall publish the question approved under subsection (4) in the Gazette and in the electronic and print media of national circulation.***
>
> ***(6) The Commission shall conduct the referendum within ninety days of publication of the question.***
>
> ***(7) The Commission may assign such symbol for each answer to the referendum question or questions as it may consider necessary"*** [emphasis mine].

[1702] A casual reading of the above provision would show that it was inelegantly drafted. Any attempt to operationalize Article 257 should have begun with a clear demonstration that there exists 'a Bill' to amend the Constitution. Thereafter, the

issue as to what should go to the referendum under Article 257(10) is "the proposed amendment". Section 49 would then pick up the matter from there and without creating the confusion it has now brought forth, either stick to "a proposed amendment" or as is the practice in the world, clearly demarcate when "a question" is to be put to the people on that proposed amendment or when "questions" ought to be put.

[1703] Section 49(4) instead merely speaks to "one or more questions for a referendum" but in other Sub-Sections provides for "the question" – in singular – and "or questions" – in multiple form. That is why for example, *Musinga, (P),* stated that, in the language of the Constitution it is "a Bill" and not question or questions that are put to the people in a referendum. He was deliberately avoiding the pitfalls created by Section 49 and understandably so.

[1704] Despite my opinion above, a more fundamental issue was raised by *Tuiyott, J.A* and at the hearing, I raised the same issue with the parties; whether the issue at hand was ripe for determination by the High Court and later the Court of Appeal and this Court.

[1705] *Tuiyott, J.A* held that under Section 49(2) of the Elections Act, the IEBC is the body mandated to frame the question or questions to be determined during the referendum. It was also his finding that IEBC had however not had the occasion to discharge this duty of framing the question and therefore, the petitioner before the High Court had no actual grievance against IEBC in relation to their conduct as regards the framing of the question or questions for the referendum. This is in line with the common law doctrine of ripeness.

[1706] This was also the argument by the 14th and 16th respondents before this Court, who argued that the matter was not yet ripe and that the High Court and the majority of the Court of Appeal erred in determining it.

(ii) Doctrine of justiciability on ripeness and mootness; Its applicability

[1707] ***Black's Law Dictionary***, 9th Edition at p. 943 defines justiciability as:

> ***"the quality or state of being appropriate or suitable for adjudication by a court."***

[1708] Therefore, for a matter to be justiciable, it has to be ripe for it to be properly before the court. The ***Black's Law Dictionary***, 9th Edition defines the term "ripeness" at page 1442 as follows:

> ***"The state of a dispute that has reached, but has not passed, the point when facts have developed sufficiently to permit an intelligent and useful decision to be made."***

[1709] Cora Hoexter ***Administrative Law in South Africa*** 2nd Ed. (2012) at page 585 also defines the doctrine of ripeness as follows:

> ***"The idea behind the requirement of ripeness is that the complainant should not go to court before the offending action or decision is final, or at least ripe for adjudication. It is the opposite of the doctrine of mootness, which prevents a court from deciding an issue when it is too late. The doctrine of ripeness holds that there is no point in wasting the courts' time with half-formed decisions whose shape may yet change, or indeed decisions that have not yet been made."***

[1710] The High Court of South Africa in ***Afriform NPC and Others v. Eskom Holdings SOC Limited and Others*** 3 All SA 663 (GP) at para. 104 to 109 further discussed the doctrine of justiciability, mootness and ripeness and held as follows:

"The parties' debate about mootness engages the broader question of justiciability. Not every constitutional argument raised by litigants is deserving of judicial consideration. The doctrine of justiciability permits courts to avoid rendering decisions where an insufficient legal interest is impacted. Justiciability is not a legal concept with fixed content. Courts apply it in response to subtle pressures regarding the appropriateness of the issues for decision and the actual hardship to the litigants of denying them the relief sought.

The doctrine teaches that the courts should decide only cases entailing a real, earnest and vital controversy between litigants and not entertain merely hypothetical cases or cases that are only of academic interest. The business of a court is generally retrospective; it deals with situations or problems that have already crystallised, and not with prospective or hypothetical ones. Any claim to be justiciable must present a real and substantial controversy which unequivocally calls for the adjudication of the rights asserted. Litigants should not approach a court if they have not been actually subjected to prejudice or face the real threat of prejudice as a result of legislation or conduct alleged to be unconstitutional or illegal.

The rules regarding mootness and ripeness are sub-rules of the doctrine which relate to the timing of an application – ripeness discourages a court from deciding an issue too early, mootness prevents a court from deciding an issue when it is too late. Ripeness requires a litigant to wait until

a judicial decision can be grounded in concrete relief. A case is moot if it no longer presents an existing or live controversy. The rules apply equally in constitutional and administrative law".

The Court went on to state that:

"The mootness barrier therefore usually arises from events arising or occurring after an adverse decision has been taken or a lawsuit has got underway, usually involving a change in the facts or the law, which allegedly deprive the litigant of the necessary stake in the pursued outcome or relief. The doctrine requires that an actual controversy must be extant at all stages of review and not merely at the time the impugned decision is taken or the review application is made.

The ripeness barrier arises usually in applications for anticipatory relief. Courts are often reluctant to grant declaratory or interdictory relief without a clearly defined record to assure informed and narrow adjudication. The courts must be astute to distinguish between a fear resting on speculative apprehensiveness and a probable threat of specific future harm; and should refuse to give advance expressions of legal judgment upon issues which remain unfocused "because they are not pressed before the court with that clear concreteness provided when a question emerges precisely framed and necessary for a decision from a clash of adversary argument exploring every aspect of a multi-faceted situation embracing conflicting and demanding interests."

It concluded on this issue as follows:

> ***"Courts therefore avoid giving advisory opinions on matters in the abstract. In applications for declaratory relief, mootness and ripeness are considered against the statutory requirement that the relief sought must have its basis in an existing, future or contingent right or obligation."***

[1711] The doctrine of ripeness was further discussed again by the High Court of South Africa in the case of ***Mgabadeli and Others v. African National Congress and Others*** [2017] ZAECGHC 131 where the Court stated:

> ***"Relevant for present purposes is the doctrine of ripeness. Ripeness is a Constitutional doctrine that forms part of our law. It aims at ensuring that the Court decides cases "entailing a real, earnest, and vital controversy between the litigants and not entertain hypothetical cases, or cases that are only of academic interest." In*** *Ferrerra v. Levin* ***the purpose of the doctrine was described as "highlighting that the business of a court is generally retrospective; it deals with situations or problems that have directly crystallized and not with prospective or hypothetic ones." It is a principle that stems from what is said to be the higher level principle of avoidance, that is, the resolution of a dispute raised without direct recourse to the Constitution."***

It concluded by stating thus:

> ***"The concept of ripeness includes, but is wider, more flexible and less formalistic than the common law duty to***

first exhaust a domestic remedy that has been agreed to contractually. To ensure that a dispute is a "real dispute" a "problem that has already crystallised" requires a court to be satisfied that the facts have sufficiently developed so as to present the issues for decision with clarity, precision and certainty, thereby avoiding the premature adjudication of abstract, hypothetical or contingent questions. This will in my view require the Court to make a determination of the fitness of the issues for judicial decision, and any prejudice which the parties may suffer should the issues presented for decision not be adjudicated. The application of the doctrine is fact based and may vary according to the dictates of the case. In short, the ripeness doctrine allows a court to apply a pragmatic test to determine whether the unlawfulness of what is complained of is sufficiently binding and clear in scope and implication to be susceptible to judicial determination in the form in which the dispute raised is presented" [emphasis mine].

[1712] The common finding, from these Judgments appears to be that courts should only handle disputes where the cause of action '*has crystallized and not with prospective or hypothetical actions'*. Like *Tuiyott, J.A* and besides my findings on the problematic Section 49, it is not in dispute that at the time of filing of the petitions before the High Court, the Amendment Bill had not been presented to the people in a referendum under Article 257(10) of the Constitution. The issue whether the specific proposed amendments to the Constitution should be submitted as separate and distinct referendum questions was therefore not ripe for adjudication before the High Court and the IEBC should have been given the opportunity to address that issue and only after it has done so, would any party

have reason to create a justiciable issue. Courts should exercise restraint where a mandate given by the Constitution has not been exercised by the body granted that mandate. To take over the IEBC's mandate in the manner that the High Court did and later, the majority at the Court of Appeal would only but defeat that express mandate to conduct a referendum and determine all issues around such a referendum.

(iii) Finding on issue No.(vii)

[1713] For the above reasons, and in agreement with *Tuiyott, J.A* it is my finding that the issue whether it is a Bill, a question or questions that are submitted to the people in a referendum, is premature and no court should have entertained it. This is the first time, to my knowledge, that the IEBC was on the verge of conducting a referendum by popular initiative. By orders of the High Court, it was stopped in its tracks. Should there be another opportunity to do so in the future, let IEBC take note of my concerns regarding Section 49 as read with Article 257, harmonise the two provisions, determine the issues now before me and only then would any party have a legitimate dispute, if at all, to take to Court.

P. SUMMARY OF FINDINGS

1. On the basic structure doctrine, it is my finding that the doctrine as enunciated in the ***Kesavananda Case*** has not attained wide acceptability and cannot certainly be applicable to Kenya noting our history, context and constitutional text. The four sequential steps identified by the High Court as necessary in an amendment process are also not applicable save in the creating of a new constitutional order.

2. On whether the President can initiate a popular initiative to amend the Constitution under Article 257, it is my finding that he cannot but in any event, in the present dispute, he did not.

3. On whether the Second Schedule to the Constitution of Kenya (Amendment) Bill, 2020 was unconstitutional in purporting to delimit Constituency boundaries without the input of IEBC, without amending Article 89 (1) to (2) and without involving affected persons and the public at large, I have held that it is indeed unconstitutional.

4. On whether civil proceedings can be instituted against the President during his/her tenure of office, I have held that such proceedings cannot be instituted in the President's name and any proceedings alleging violation of the Constitution should be instituted in the name of the Attorney General and in any direct suit against the President, the remedy lies in costs awardable to the President.

5. On public participation during the impugned process, at the time the said process was stopped by the High Court, my finding is that there is no evidence that the initiators/promoters nor the IEBC had failed to undertake public participation to the expected levels.

6. On the quorum of the IEBC at all material times, I find that IEBC was quorate and all its undertakings were lawful.

7. On the question whether, at a referendum, single or multiple questions should be put to the people by IEBC, I find that the matter was premature and was not ripe for determination.

8. On costs, the public interest exhibited in this matter would lead me to the conclusion that each party should bear its costs.

JUDGMENT OF W. OUKO, SCJ

A. INTRODUCTION & BACKGROUND

[1714] This appeal, consolidating two others marks the first time in the history of the Supreme Court of Kenya, to determine the remit of constitutional amendment through a popular initiative under Article 257 of the Constitution. The Article provides that:

> ***"257. (1) An amendment to this Constitution may be proposed by a popular initiative signed by at least one million registered voters.***
> ***(2) A popular initiative for an amendment to this Constitution may be in the form of a general suggestion or a formulated draft Bill.***
> ***(3) If a popular initiative is in the form of a general suggestion, the promoters of that popular initiative shall formulate it into a draft Bill.***
> ***(4) The promoters of a popular initiative shall deliver the draft Bill and the supporting signatures to the Independent Electoral and Boundaries Commission, which shall verify that the initiative is supported by at least one million registered voters.***
> ***(5) If the Independent Electoral and Boundaries Commission is satisfied that the initiative meets the requirements of this Article, the Commission shall submit the draft Bill to each county assembly for consideration within three months after the date it was submitted by the Commission.***

(6) If a county assembly approves the draft Bill within three months after the date it was submitted by the Commission, the speaker of the county assembly shall deliver a copy of the draft Bill jointly to the Speakers of the two Houses of Parliament, with a certificate that the county assembly has approved it.

(7) If a draft Bill has been approved by a majority of the county assemblies, it shall be introduced in Parliament without delay.

(8) A Bill under this Article is passed by Parliament if supported by a majority of the members of each House.

(9) If Parliament passes the Bill, it shall be submitted to the President for assent in accordance with Articles 256 (4) and (5).

(10) If either House of Parliament fails to pass the Bill, or the <u>Bill relates to a matter mentioned in 255 (1), the proposed amendment shall be submitted to the people in a referendum.</u>

(11) Article 255 (2) applies, with any necessary modifications, to a referendum under clause (10)" [my emphasis].

[1715] The emphasis (underlined) are important in seeking to answer the seven (7) questions framed in this appeal, namely:

"(i) Whether the Basic Structure Doctrine is applicable in Kenya; if so, the extent of its application; whether the basic structure of the Constitution can only be altered through the primary constituent power; and what constitutes the primary constituent power;

(ii) Whether the President can initiate changes/amendments to the Constitution; and whether a constitutional amendment can only be initiated by Parliament through a parliamentary initiative under Article 256 of the Constitution or through a popular initiative under Article 257 of the Constitution;

(iii) Whether the Second Schedule to the Constitution of Kenya (Amendment) Bill, 2020 was unconstitutional;

(iv) Whether civil proceedings can be instituted against the President or a person performing the functions of the office of the President during his/her tenure of office with regard to anything done or not done contrary to the Constitution;

(v) The place of public participation under Article 10 vis-a-vis the role of IEBC under Article 257(4) of the Constitution; and whether there was public participation in respect of the Constitution of Kenya (Amendment) Bill, 2020;

(vi) Interpretation of Articles 88 & 250 of the Constitution with respect to composition and quorum of IEBC; and

(vii) Whether the interpretation of Article 257(10) of the Constitution entails/requires that all specific proposed amendments to the Constitution should be submitted as separate and distinct referendum questions."

[1716] The facts and background to this dispute as well as the attendant history of constitution-making in Kenya, is sufficiently presented in the lead opinion of the Chief Justice and the President of the Supreme Court and therefore, no useful purpose will be served to rehash them here.

[1717] Secondly, as a Bench, we are in agreement that the Court's jurisdiction to entertain this appeal has properly been invoked under Article 163(4)(a). By this Article, we have jurisdiction to examine the validity or *vires* of any constitutional amendment on the touchstone of limitations imposed by Articles 255 to 257 of the Constitution.

[1718] In the exercise of this jurisdiction and in terms of Section 3 of the Supreme Court Act, this Court, as a court of final judicial authority must, among other things, assert the supremacy of the Constitution and the sovereignty of the people of Kenya; provide authoritative and impartial interpretation of the Constitution; and; develop rich jurisprudence that respects Kenya's history, traditions and facilitates its social, economic and political growth.

[1719] The road travelled by Kenyans since 1991 in search of a new Constitution, culminating in the 2010 document has been sinuous and meandering. A road characterized by violent demonstrations, protests, mass action and even loss of lives. Like the Biblical narrow road, which "leadeth unto life", it was the way; the only way to a new beginning. And so, at 10.26am on Friday 27th August, 2010, with a single stroke of his pen, President Mwai Kibaki endorsed the draft Constitution, and there was a dawn of a new era. Before an ecstatic Kenyan people and as canons broke into a 21-gun salute, the President released white doves as a sign of peace, love, and hope, marking the birth of the second republic. He then declared:

> ***"As Kenyans, we should be proud for making history, as one of the few nations in the world that have successfully replaced their Constitution in an atmosphere of peace. I salute the Kenyan people for their courage, patience and***

determination during this long and sometimes painful journey.

This Constitution will fundamentally transform our nation politically, economically and socially. Some of the changes will be immediate and we must be ready to support them. Other changes will take time. We must remain resilient and focused as we work towards their fulfilment…Our resolve to complete the journey of our nation's transformation must remain firm."

[1720] The President also promised that:

"The Grand Coalition Government has provided the required leadership for delivering the New Constitution. We are ready and fully committed to providing continued leadership in the implementation of this Constitution. We have a unity of purpose in enacting all the laws required to give full effect to the New Constitution."

[1721] Finally, like millions of Kenyans, the President shared his aspirations, saying:

"I am confident that this Constitution will endure and stand the test of time. The dawn of a new era is upon us. Let us seize the moment with courage because the birth of the Second Republic holds great promise for the Kenyan people."

[1722] With that, Kenyans ushered in a new progressive and transformative constitutional dispensation, earning regional and international acclaim not only for the peaceful and democratic vote, supported by nearly 69% of voters, but more

so for the content of the document, which includes far reaching changes to the system of governance, devolution, a system of checks and balance between the three branches of Government, a Bill of Rights that seeks to protect and promote social, economic and political rights, emphasis on leadership and integrity, and many others. And of course, praised too was the process leading to this accomplishment; directly involving the people.

[1723] Having emerged from this phase, Kenya embarked on building constitutionalism, giving meaning to the terms and values of the supreme law to which Kenyans must turn to for protection in times of need. It was time for the people to read meaning into its words. It is only through its robust enforcement, application and interpretation by courageous citizens, lawyers, the Legislature, Executive and even more so the Judges, that the Constitution will be safeguarded to realize the Kenyan dream in the Preamble:

> ***"RECOGNISING the aspirations of all Kenyans for a government based on the essential values of human rights, equality, freedom, democracy, social justice and the rule of law: PROUD of our ethnic, cultural and religious diversity, and determined to live in peace and unity as one indivisible sovereign nation…"***

[1724] For this Court in particular, it is significant to emphasize that appeals to it from the Court of Appeal, lie as of right where the interpretation or application of the Constitution is involved. This function exemplifies the role of the Court, as a guardian and interpreter of the Constitution, the final arbiter in interrogating the legislative authority of Parliament and the exercise of executive authority. Our duty, as Judges is to the Constitution and the law which, according to the Oath of Office of Judge, we must apply, in the name of God, impartially and without fear, favour, prejudice, or any influence whatsoever.

[1725] To paraphrase *Chief Justice John Marshall* in ***Marbury v. Madison***, 5 U.S. 137 (1 Cranch) 137 (1803), the Supreme Court of America, like ours today, had a responsibility to overturn any unconstitutional legislation as a necessary consequence of the Judges sworn duty, in the exercise of their judicial functions, ***"to at all times protect, administer and defend"*** the Constitution. According to him ***"that oath could not be fulfilled any other way. It is emphatically the province of the judicial department to say what the law is."***

[1726] And so, with the difficult history of constitution-making enumerated in the lead Judgment of the Chief Justice, have the Kenyan people stayed true to the promise in the Preamble that: **"*We, the people of Kenya— ADOPT, ENACT and give this Constitution to ourselves and to our future generations.*"**

[1727] While there is no doubt that there have been milestone achievements in the implementation of the Constitution, in this appeal, we have been asked to interrogate if we have kept the last promise after giving to ourselves the Constitution; that is, to respect, uphold and defend it for the sake of the future generations. Contrast thirty-three (33) amendments to the former Constitution, between 1963 and 2010, with twenty-one (21) attempts to amend the present one since 2010. The appetite to change the law came hardly three (3) years into its promulgation; nineteen (19) attempts were through a parliamentary initiative whilst two (2) *(Okoa Kenya in 2016 and Punguza Mizigo in 2019),* were through a popular initiative. Both failed.

[1728] It was the 1st to 5th respondents who took out before the High Court Petition No. E282 of 2020 for a declaration, among other reliefs, that the doctrine of 'basic structure of a Constitution is applicable to the Constitution of Kenya.'

B. ANALYSIS AND DETERMINATION

[1729] The first framed issue to which I now turn, sought answers to the following questions:

> ***(i) Whether the Basic Structure Doctrine is applicable in Kenya; if so, the extent of its application; whether the basic structure of the Constitution can only be altered through the primary constituent power; and what constitutes the primary constituent power***

[1730] In the last 50 years, since the Supreme Court of India decided the ***Kesavananda Bharati Sripadagalvaru & Others v. State of Kerala & Anor,*** (Writ Petition (Civil) 135 of 1970)***, (Kesavananda Case***), the name *Kesavananda* has been synonymous with the basic structure doctrine, and although the term basic structure has been used in a few cases in this country in the past, it is during the hearing of this case, from the High Court, the Court of Appeal and finally to this Court, that it became a household name; a catchphrase. I suppose, knowing Kenyans and our unique habits, there may be children now called *'Basic Structure'* (For instance, *Basic Structure George Ochola*), just as there may be those born in India around 1973 who were given that massive name, '*Kesavananda'*, after the Hindu spiritual leader, who lent his name to the iconic case as the petitioner. Unfortunately, *Kesavananda* passed away on 6th September, 2020 at the age of 79 years.

[1731] Of all the issues argued before the three superior courts, none has taken so much space and attracted lengthy and very substantial research and arguments like the basic structure doctrine. In India, in the ***Kesavananda Case,*** the argument around the doctrine took 12 Judges to resolve, with a razor thin majority of a 7-6 verdict; argued for 68 days and culminated with a 700-page Judgment. That is how controversial the doctrine is.

[1732] The broad question posed before us, as indeed was before the two courts below, is whether this doctrine is applicable to the Kenyan Constitution. In its full

text, the petition before the High Court had asked the Court to make the following declarations:

> ***"I. ...that the legal and judicial doctrines of the "basic structure" of a constitution; the doctrine and theory of unamendability of "eternity clauses" the doctrine and theory of "constitutional entrenchment clauses" and "unamendable constitutional provisions" in a constitution are applicable in the Republic of Kenya.***
>
> ***II. ...that Chapter ONE on Sovereignty of the People and Supremacy of the Constitution, Chapter TWO on The Republic, Chapter FOUR on the Bill of Rights, Chapter NINE on the Executive and Chapter TEN on the Judiciary and the provisions therein forms part of the "Basic structure"; "Entrenchment Clauses" and "eternity" provisions of the Kenyan Constitution 2010 and therefore cannot be amended either under Article 256 by Parliament or through popular initiative under Article 257 of the Constitution.***
>
> ***III. ...that taking guidance from the doctrine of the "basic structure of the Constitution, the constituent power" and the doctrines of "unconstitutional constitutional amendments", "the limits of the amendment power in the constitution" and the theory of unamendability of "eternity" clauses, there is an implicit or implied limitation to constitutional amendments in Kenya.***
>
> ***IV. ...that the amendment powers under Articles 255 and 257 are implicitly limited to the extent that Parliament cannot pass an amendment which destroys the basic***

structure of the Kenyan Constitutional foundation, to wit; Chapter ONE on Sovereignty of the People and Supremacy of the Constitution, Chapter TWO on The Republic, Chapter FOUR on the Bill of Rights, Chapter NINE on the Executive and Chapter TEN on the Judiciary and the provisions therein.

V. ...that Kenyan Parliament cannot pass any laws that alters the basic structure of the Kenyan Constitutional foundation, to wit; Chapter ONE on Sovereignty of the People and Supremacy of the Constitution, Chapter TWO on The Republic, Chapter FOUR on the Bill of Rights, Chapter NINE on the Executive and Chapter TEN on the Judiciary and the provisions therein."

[1733] Save for the conclusion that there are eternity provisions in the Constitution, the Court of Appeal in the majority was in agreement and also declared that the basic structure doctrine is applicable in Kenya; that the basic structure doctrine limits the amendment power set out in Articles 255 to 257 of the Constitution; that the basic structure of the Constitution can only be altered through the primary constituent power which must include four sequential processes namely: civic education; public participation and collation of views; constituent assembly debate; and ultimately, a referendum; and that the amendments proposed by the Amendment Bill were so far-reaching in character, scope and content as to shake the foundation and alter the identity and character of the Constitution, effectively dismembering it.

[1734] The thrust of the 1st to 5th respondents' argument has been throughout that the chapters and the provisions of the Constitution specified in the petition and reproduced above are part of the basic structure, entrenched clauses and eternity provisions of the Constitution; that they cannot be amended either under Article

256 by Parliament or through popular initiative under Article 257 of the Constitution; and that the amendment powers reposed in Articles 256 and 257 of the Constitution of Kenya can only be used to amend the 'ordinary provisions' of the Constitution. It was their case that Articles 256 and 257 are mere procedural tools which cannot be used to change the Constitution in a way that is tantamount to replacing it with a new Constitution. They argued, therefore that the doctrine of basic structure and the corollary doctrines of constitutional unamendability and eternity clauses operate to prevent such a possibility.

[1735] To support these arguments, the 1st to 5th respondents cited Prof. Richard Albert's seminal book, ***Constitutional Amendments: Making, Breaking and Changing Constitutions;*** in ***Timothy M. Njoya & 6 Others v. Attorney General & 3 Others,*** Misc Civil Application No.82 of 2004 (OS); [2004] eKLR (***Njoya Case)*** but relied heavily on the ***Kesavananda Case***.

[1736] The Attorney General, in opposition has argued that, from the provisions of Articles 255, 256 and 257, it is explicitly expressed that every part of the Constitution is amendable and the power of the people to do so is unlimited; that the doctrine of basic structure and the corollary doctrines of constitutional unamendability and eternity clauses are inapplicable in Kenya as they are against the express provisions of the Constitution; and that comparative analysis of foreign jurisprudence cannot be used to either contradict or supplement the clear text of the Constitution.

[1737] In view of the divergence in its application in different jurisdictions, as shown in numerous cases and other literature, the 1st appellant submitted that the doctrine lacked universal application. As an example of this lack of universal acceptability, they cited the Singaporean cases of ***Teo Soh Lung v. Minister for Home Affairs*** (1989) 1SLR (R) 461 and ***Ravi s/o Madasamy v. Attorney General,*** [2017] SGHC 163; the Ugandan cases of ***Paul K. Ssemogerere and Others v. Attorney General*** (Constitutional Appeal 1 of 2002), [2004] UGSC

10 (***Paul K. Ssemogerere Case)*** and ***Male Mabirizi and Others v. Attorney General of Uganda (Constitutional Appeal 2 of 2018)*** [2018] UGCC 4 (***Male Mabirizi Case***); the Zambian case of ***Law Association of Zambia and Another v. Attorney General of the Republic of Zambia*** [2019] ZMCC 18; Malaysian case of ***Loh Kooi Choon v. Government of Malaysia*** (1977) 2 MLJ 187; and the Tanzanian case of ***Attorney General v. Reverend Christopher Mtikila***, [2010] TZCA 3 (***Reverend Christopher Mtikila Case)***

[1738] The Speakers of the National Assembly and of the Senate, the BBI National Secretariat and Hon. Raila Odinga are in agreement with those submissions.

[1739] On their part, they have relied on ***Re Matter of the Interim Independent Electoral and Boundaries Commission***, Constitutional Application No. 2 of 2011; [2011] eKLR, ***the Matter of the National Land Commission*** Advisory Opinion Reference 2 of 2014; [2015] eKLR and the ***Matter of Kenya National Commission on Human Rights,*** Reference 1 of 2012; [2014] eKLR for the proposition that the Constitution must be interpreted purposefully and holistically; ***Priscilla Ndululu Kivuitu & Another (suing as the personal representative of Samuel Mutua Kivuitu & Kihara Muttu (deceased) & 22 Others v. Attorney General & 2 Others;*** Petition No**.** 689 of 2008; [2015] eKLR, (***Priscilla Ndululu Case***) where the Court recognized the power of the people in amending any part of the Constitution. In the ***Priscilla Ndululu Case*** where *Odunga, J*. was a member of a three-judge bench, the High Court, after referring to basic structure doctrine and ***Kesavananda Case***, expressed strong reservations over its relevance to the Kenyan Constitution, reasoning that the people of Kenya, aware of the problems associated with frequent and frivolous amendments to the repealed Constitution,

made provision in Article 255 of the 2010 Constitution. In the end their Lordships said that:

> ***"161. We wonder whether, in light of the provisions in the 2010 Constitution, the proposition that Parliament cannot amend the Constitution in a manner that may result in the distortion of the basic structure still has a place in our jurisprudence."***

[1740] The combined effect of the submissions by all the respondents who are opposed to this appeal and who are in support of the conclusions of the courts below, on the specific issue under consideration, is that Articles 255, 256 and 257 were not designed to circumvent the people's right to exercise constituent power; that material change to the Constitution could only be effected through the same authority, rigorous and open process that created the 2010 Constitution, and that there is need for the exercise of constituent power and the four sequential processes, which arise from our history, constitutional design and text; that the basic structure doctrine as expressed in the ***Kesavananda Case*** exists as a concept to limit and guard against irregular constitutional amendments and; that the basic structure doctrine therefore, applies to Kenya and implicitly limits the amendment power in Articles 255 to 257.

[1741] The 1st, 2nd and 3rd *amici curiae* – Prof. Rosalind Dixon, Prof. David E. Landau, leading scholars and professors of constitutional law and Dr. Gautam Bhatia, an expert on matters relating to constitutional amendments, have submitted in their briefs that the Constitution contains a basic structure whose primary purpose is to protect democracy, and that Articles 255 to 257 are complements to it. In their view, jurisdictions that have rejected the basic structure doctrine, operate in a unique political and legal context with low levels of judicial independence or insulation of the courts from authoritarian actors.

[1742] They posit further that every Constitution stipulates a procedure for amendment, distinct from the concept of repeal or replacement; that an amendment implies that the amended clauses retain their identity before and after the proposed amendments, while 'replacement' or 'repeal' means a permanent loss or extinguishment of identity and the imposition of a new one and; that the power to amend, does not entail effacing, extinguishing, or erasing the identity of the Constitution. They conclude that the Constitution of Kenya contains implied limitations on its amendment as well as a limitation on the ability of the President to propose amendments outside the procedures set out in Articles 255 to 257. Therefore, failure to follow the amendment procedures laid down in the Constitution would be a ground for invalidating any amendments.

[1743] For the 4th *amicus curiae* – Prof. Migai Aketch, an Advocate of the High Court of Kenya and an Associate Professor of Law at the University of Nairobi's School of Law specializing in public law, the superior courts below applied a selective and erroneous reading of the history of the making of the 2010 Constitution, denigrating the role played by political elites in its attainment; and that the process largely involved compromise and negotiations from all stakeholders, including the political leadership.

[1744] Prof. Richard Albert, the 5th *amicus curiae*, brings to this appeal his experience, expertise and knowledge of the global constitutional amendments. He contends that the Amendment Bill sought to change the Constitution in a way that exceeds the permitted boundaries and, therefore amounts to a constitutional dismemberment.

[1745] Prof. Yaniv Roznai the 6th *amicus curiae*, whose works around the exercise of power to amend the Constitution and the limits on such powers has attained international acclaim, has submitted that the amendment formula in Articles 255-257 of the Constitution is 'a safety valve', which allows the Constitution to stand the test of time. While unamendable provisions serve as a

mechanism for limiting the amendment power, they do not—and cannot—limit the primary constituent power. Even unamendable provisions are subject to changes introduced by extra-constitutional forces. The basic structure doctrine, in his opinion is applicable in the Kenyan context.

[1746] The 7th *amicus curiae,* Prof. Charles Manga Fombad, a renowned scholar who has researched and authored many books and articles in the areas under consideration in this appeal, submits that the framers of post–1990 modern African constitutions intended them to be amendable and transformative. That is why they have deliberately included provisions designed to ensure that the process of constitutional amendments is strictly regulated and controlled to prevent past abuses. He urges the Court to rely on the reasoned decisions which explicitly or implicitly reject any implied limitations on constitutional amendment based on the basic structure doctrine, which may provoke unnecessary conflict and temptation to alter the Constitution through extraconstitutional means.

[1747] Dr. Adem K. Abebe, the 8th *amicus curiae*, is an expert in governance, comparative constitutional design, and human rights and democratization in Africa. Whether there is a basic structure and how to defend the same, he argues, is ultimately a subjective determination best left to politics. Courts should be hesitant to outline specific constitutional amendment procedures.

[1748] The High Court in determining the existence of the basic structure in the Constitution identified them ***"in the Preamble; the eighteen chapters; and the six schedules of the Constitution."*** They also included land and environment; leadership and integrity; public finance and; national security. These provisions, the court held, are therefore unamendable: they cannot be changed through the exercise of secondary constituent power or constituted power. Their precise formulations and expressions in the Constitution can only be affected through the exercise of primary constituent power. These provisions, they added, can also be termed as eternity clauses and an exhaustive list of which specific

provisions in the Constitution are un-amendable or are eternity clauses is inadvisable to make in vacuum. Whether a particular clause in the Constitution consists of an 'unamendable clause' or not will be a fact-intensive determination to be made after due analysis of the Constitution, its foundational structure, its text, its internal coherence, the history of the clause and the constitutional history; and other non-legal considerations permitted by the canon of constitutional interpretation, they concluded.

[1749] One of the thematic issues framed by the Court of Appeal was ***"whether the basic structure doctrine, eternal clauses and unamendability doctrines applies [sic] in Kenya".*** I have set out briefly in the previous paragraphs the majority decision of the Court of Appeal agreeing that, although all the 'core' parts of the Constitution are amendable under Chapter Sixteen, there is an implied limitation that amendment of the Constitution will only be permissible if compliant with the purport and spirit of the Constitution; and that the Constitution of Kenya, 2010 has a basic structure hence the basic structure doctrine legitimately applies to it. They, however rejected the finding that there are eternity and unamendable clauses in the Constitution.

[1750] The learned Judges, on the basis of the foregoing, also, like the High Court came to the ultimate conclusion that the Amendment Bill as structured and presented, violated the Constitution's basic structure.

[1751] That being the case, the only ground to be determined is, whether the basic structure doctrine is applicable to the Constitution of Kenya, and whether the provisions listed in Article 255(1) cannot be amended either under Article 256 by Parliament or through popular initiative under Article 257 of the Constitution on account of an implicit or implied limitation.

[1752] The origin of the basic structure doctrine has largely been attributed to the Indian Supreme Court Judgment in the ***Kesavananda Case*** with very little or no acknowledgement at all of Prof. Dietrich Conrad's contribution. Yet it is this

German scholar, who exported it to India. Though opinion is divided as to the true inspiration behind the doctrine, with some insisting that it was first used in a Judgment of *Chief Justice Alvin Robert Cornelius* in the Pakistan Supreme Court case of ***Fazlul Quader Chowdhury v. Mohd Abdul Haque*** (1963) PLC 486, this latter school of thought occupies the minority view on the origins of the doctrine and the dominant view considers Prof. Conrad as the author and brainchild of the doctrine in Asia. Of course, Prof. Conrad himself refined earlier theories of Schmitt and Hauriou, German and French constitutional lawyers, on the subject. But it is Prof. Conrad, who influenced the Indian basic-structure doctrine. This is how he did it.

[1753] One of the lawyers arguing the case of ***I.C. Golaknath & Ors v. State of Punjab & Anr,*** 1967 AIR 1643; 1967 SCR (2762), where the doctrine was first tested in the Supreme Court of India, relied on a paper delivered by Prof. Conrad in February 1965 at the Banaras Hindu University in India, where he had been invited to give a lecture on the topic, ***'Implied Limitation of the Amending Power'***, to illustrate how the *Nazi* regime defaced the *Weimar* Constitution in its quest for power, and to highlight the dangers of an easily amendable Constitution. Though the Court was not persuaded by the argument, the majority accepted that it had substantial force and would be invoked if a proper and real situation of Parliament attempting to destroy the structure of the Constitution were to arise.

[1754] The occasion indeed presented itself when the Constitutional (24th Amendment), Act 1971 and the Constitutional (25th Amendment), Act 1972 were challenged before the Supreme Court in the ***Kesavananda Case***. The challenge was grounded on the interpretation of the power of Parliament to amend the Constitution in terms of Article 368 of the Indian Constitution.

The Article provides as follows:

> ***"368. Power of Parliament to amend the Constitution and procedure therefor***

"(1) Notwithstanding anything in this Constitution, Parliament may in exercise of its constituent power amend by way of addition, variation or repeal any provision of this Constitution in accordance with the procedure laid down in this article.

(2) An amendment of this Constitution may be initiated only by the introduction of a Bill for the purpose in either House of Parliament, and when the Bill is passed in each House by a majority of the total membership of that House present and voting, it shall be presented to the President who shall give his assent to the Bill and thereupon the Constitution shall stand amended in accordance with the terms of the Bill:

Provided that if such amendment seeks to make any change in:

- ***(a) Article 54, Article 55, Article 73, Article 162 or Article 241, or***
- ***(b) Chapter IV of Part V, Chapter V of Part VI, or Chapter I of Part XI, or***
- ***(c) any of the Lists in the Seventh Schedule, or***
- ***(d) the representation of States in Parliament, or***
- ***(e) the provisions of this article, the amendment shall also require to be ratified by the Legislature of not less than one half of the States by resolution to that effect passed by those Legislatures before the Bill making provision for such amendment is presented to the President for assent.***

(3) Nothing in Article 13 shall apply to any amendment made under this article.

(4) No amendment of this Constitution (including the provisions of Part III) made or purporting to have been made under this article whether before or after the commencement of Section 55 of the Constitution (Forty second Amendment) Act, 1976 shall be called in question in any court on any ground.

(5) For the removal of doubts, it is hereby declared that there shall be no limitation whatever on the constituent power of Parliament to amend by way of addition, variation or repeal the provisions of this Constitution under this article ....”

[1755] This last limitation (Clause 5) on the power of the courts to review any Act of Parliament to amend the Constitution is important to note. No amendment of the Constitution made by Parliament pursuant to the provisions of the Constitution can be called in question in any court on any ground, because the power to amend the Constitution is reposed in Parliament and Parliament alone.

[1756] In construing this provision, and the foregoing limitation notwithstanding, the Supreme Court held that, although the Article donates exclusive power to Parliament to amend any provision of the Constitution in accordance with the procedures in that Article, the powers could not be used to ‘damage’, ‘emasculate’, ‘destroy’, ‘abrogate’, ‘change’ or ‘alter’ the ‘basic structure’ or the framework of the Constitution.

[1757] The powers to amend the Constitution, it must be stressed, is exclusively vested in Parliament with the President, in Clause 2 of Article 368, exercising peripheral and ceremonial role of assent before the law takes effect. The doctrine has grown in India after the ***Kesavananda Case*** by leaps and bounds over the

years. It has been affirmed in the case of ***Indira Nehru Gandhi v. Shri Raj Narain & Anr***, 1975 AIR 865; 1975 SCR (3) 333 (***Indira Gandhi Case***); ***Minerva Mills ltd & Ors. v. Union of India and Ors,*** 1980 AIR 1789; ***Waman Rao And Ors v. Union of India (Uoi) And Ors,*** (1981) 2 SCC 362; ***S.P. Gupta v. President of India And Ors,*** AIR 1982 SC 149*;* ***S.P. Sampath Kumar Etc v. Union of India & Ors,*** 1987 AIR SC 386; ***Kihoto Hollohan v. Zachillhu And Others,*** 1992 SCR (1) 686; 1992 SCC Supl. (2) 651; ***P. V. Narsimha Rao v. State (CBI/SPE),*** AIR 1998 SC 2120; and in 2007, a nine Judge bench once more delivered a unanimous verdict in ***I.R. Coelho (dead) by L.Rs. v. State of Tamil Nadu and Others***, (1999) 7 SCC 580, upholding the basic structure doctrine, and the authority of the Judiciary to review any such laws which destroy or damage the basic structure, while at the same time checking on the amending power of Parliament.

[1758] Prof. Conrad's theory, which was applied in the ***Kesavananda Case*** postulates that there are implied limits on the power of Parliament to amend certain protected provisions of the Constitution, called the basic structure. As indicated above, the theory was itself influenced by Germany's political and constitutional history. Under Germany's original Constitution, the *'Weimar Constitution'* Parliament had the power to amend the constitution with the procedural restraint that required 2/3 votes of the members of its Parliament to pass an amendment. Article 76 read as follows:

> ***"The Constitution may be amended by law, but acts amending the Constitution can only take effect if two thirds of the legal number of members are present and at least two thirds of those present consent."***

[1759] Adolf Hitler, (1933-1945), that well known but reviled figures in history, using this procedure, a procedure anchored in the Constitution, effortlessly overhauled the entire *Weimar* Constitution and arbitrarily took away rights to

freedom of speech and expression, association and *habeas corpus*. He then declared a state of emergency. Again, acting within the procedure under Article 76, Parliament enacted laws which vested enormous power in the Executive branch of Government to exercise legislative functions parallel to Parliament. This experience was to inform Germany's constitutional reforms. In their new Constitution, *Grundgesetz* (the 'Basic Law') substantive limits have been introduced to the amending power of Parliament. Article 79 of the Basic Law explicitly barred any amendment to the provisions concerning the basic principles laid down in Articles 1 to 20. The principles include federalism, democracy, rule of law and separation of powers. Those provisions are called the 'eternity clauses'. Similar provisions are found in Article 89(5) of the France Constitution, Article 112(1) of the Norwegian Constitution and Article 139 of the Italian Constitution. Eternity or unamendable clauses are provisions in a Constitution or constitutional principles that are immune from amendment. Any amendment that violates those clauses are deemed to be unconstitutional. The clauses may be explicitly included in the text of the Constitution, or implicit. From the decisions around the world, it can also be said that there are judicial eternity clauses, that is, implicit eternity clauses, which are identified through the process of interpreting the Constitution by the courts.

[1760] With this background, it is now easy to understand why certain jurisdictions have introduced in their Constitutions eternity clauses or what in some places is called unamendable constitutional provisions, while others have resorted to the doctrine of basic structure, based on their individual histories and past experiences. The sole aim of such provisions in recent Constitutions is to create assurance that amendment of the Constitution will never again be used to repeat past atrocities.

[1761] Our own history is equally replete with examples and instances that led to agitation for constitutional reforms, as the former Constitution was in no better

ranking than the Indian Constitution or the *Weimar* Constitution. The former Constitution provided alteration, as opposed to amendment of the Constitution under Section 47 as follows:

> ***"47. (1) Subject to this section, Parliament may alter this Constitution.***
>
> ***(2) A Bill for an Act of Parliament to alter this Constitution shall not be passed by the National Assembly unless it has been supported on the second and third readings by the votes of not less than sixty-five per cent of all the members of the Assembly (excluding the ex officio members)"*** [my emphasis].

[1762] It is interesting that Sub-Section 6(b) makes no distinction between alterations and amendments, and clarifies that:

> ***"...references to the alteration of this Constitution are references to the amendment, modification or reenactment, with or without amendment or modification, of any provision of this Constitution."***

What is common in the former Constitution, the Indian and the *Weimar* Constitutions is the fact that the amendment power is solely vested in Parliament, which can change it at will and in any manner whatsoever without the involvement of the people. This was the view held and expressed by the minority in ***Kesavananda Case*** and by *Kubo, J.* in his dissenting opinion in the ***Njoya Case***, where the learned Judge rendered himself as follows:

> ***"I am of the considered opinion that section 47 of the Constitution of Kenya does not limit the power of Parliament to amend or repeal the Constitution and***

replace it with a new Constitution. The words in Section 47 do not in my respectful view impose any limitations as contended by the applicants.

....

In view of sections 47(6)(b) and 123(9)(b) of the Constitution of Kenya, it is my respectful view that it is legitimate to interpret Parliament's alteration power under section 47 to mean that, if Parliament can alter one provision, it can alter more; and if it can alter more, it can alter all. And this conclusion flows from the Constitution itself."

[1763] In Kenya, as indeed in many African states, there have been indiscriminate amendments of the Constitution. We have seen in **paragraph 1727** above that in Kenya between 1963 and 2010, there were 33 amendments to the former Constitution. Prof. H.W.O Okoth–Ogendo writing on ***"The Politics of Constitutional Change in Kenya Since Independence,*** (1963 – 1969) Vol. 71 ***African Affairs 9"*** reminds us of the history of African states post-independence Constitutions:

"Constitutional Systems in Anglophone Africa have not had a happy history, especially during the last decade. Almost without exception the independence documents have either ended up in military dustbins or have undergone change so profound and rapid as to alter their value content and significance beyond recognisance."

[1764] Similarly, the CKRC Final Report also documents the reasons and motive behind some of the amendments. The changes were not intended to improve the quality of the Constitution or the welfare of the citizens, but to entrench an authoritarian and undemocratic administration, to concentrate power in the

Executive. The system of checks and balances envisaged in the independence Constitution was clearly weakened. The Judiciary was not spared. The security of tenure provisions for the Judges were removed, as were those of the Attorney General and the Controller and Auditor General, who could, with those amendments, be removed from office by the President at will. The amendments were directed at ensuring political advantages for the ruling party or to deal with political dissidents. The rights of individuals were diminished. Detention without trial became common. The Constitution ceased to be a fundamental charter and was so frequently amended, more like a statute. In some instances, the amendments applied retrospectively. Though all these amendments had far-reaching ramifications on the general populace, there was no attempt at all to engage the people.

[1765] These indiscriminate amendments were possible because of the existing simple amendment procedure. There was growing concern over the trajectory of some of these negative developments. Agitation to reverse the trend and save the Constitution began in earnest, with the process of repairing the Constitution commencing in 1990 as a result of intense local and international pressure. That year, the Government published a Bill to amend the Constitution. It made far-reaching proposals, the most crucial and relevant in so far as this appeal is concerned, was the provision proposing the holding of referenda on certain fundamental constitutional issues, for the first time involving the people in the constitutional amendment process. [See Prof. Githu Muigai, ***Amending the Constitution: Lessons from History, the Advocate,*** Vol. 2 No. 3**,** February, 1993]. Though progressive, the Bill was never enacted into law.

[1766] Immediately after this, the next phase for reforms saw an intensified pressure with mass protests and civic disobedience. The activities coalesced around the opposition parties, civil society, diplomatic community and religious groups.

[1767] In 1997, the opposition parties negotiated with the Government a minimum reform package through the Inter Parties Parliamentary Group (IPPG), the result of which was the enactment of the Constitution of Kenya Review Act, 1997 to create a legal framework to carry out the reforms. The Act was later amended by the Constitution of Kenya Review (Amendment) Act, 1998. Public participation was recognized as a principle of the review process. In October 1999, a Parliamentary Select Committee on Constitutional Review was formed to collect and collate views from Kenyans on the review of the Constitution. Parliament adopted the Select Committee's report in April 2000. Soon after the report, the draft Constitution was presented in September 2002, the National Assembly was dissolved effectively suspending the process.

[1768] After the change of regime in 2002, there were only piecemeal reforms until the National Constitutional Conference was convened in April 2003, and two subsequent ones in 2004 at the Bomas of Kenya. This was a high participatory process at which, for the first-time communities and marginalised groups were involved. The climax of this process was the presentation of the Draft Constitution to the Attorney General. The Constitution of Kenya Review Act, 2004 provided for a mandatory referendum to ratify the new Constitution, in accordance with the decision in the ***Njoya Case,*** confirming the key role of the citizens in the adoption of a new constitution through a referendum. A package vote of '*Yes*' or '*No'* at the referendum was conducted on 21st November, 2005 in which the proposed Constitution was rejected. The vote was seen, not as a vote to retain the former Constitution, but a dream paused, because thereafter the agitation resumed.

[1769] The contentious issues which led to the rejection of the proposed Constitution would later be the starting point in the subsequent initiatives. Those issues included devolution of power in regions, the powers of the Executive, the land tenure, the creation of the Kadhis courts, whether to have single or two chamber Parliament and the abolition of provincial administration. It must be

stressed that the procedure for constitutional amendment was not identified as contentious. Following the rejection of the proposed Constitution in 2005, the Government showed no interest or urgency in kick-starting and completing the initiative. It took the bungled 2007 presidential elections and the resultant scale of national violence and crisis for the Government to go back to the drawing board.

[1770] Parliament simultaneously enacted two cardinal legislations to recommence the review process; the Constitution of Kenya Review Act (2008) and the Constitution of Kenya (Amendment) Act 2008. The latter sought to entrench in the constitution the political agreements arrived at by the Kenya National Dialogue and Reconciliation Committee, established through an international and regional mediation following the post-election violence. The Act introduced a new Section 47A to the existing Constitution, setting out the procedure for the replacement of the old Constitution with a new one through the process of a referendum. The first Review Act, on the other hand was meant to facilitate the completion of the reform process.

[1771] Charged with midwifing this process were the Committee of Experts (CoE), the Ministry of Justice, National Cohesion and Constitutional Affairs, the Parliamentary Select Committee on Constitutional Review and Parliament itself. The Referendum of 4th August 2010 was, of course the culmination the process, and on 27th August, 2010 the people of Kenya gave to themselves a brand-new Constitution. While it is evident that the elite and politicians played a major role in this process, the people, no doubt had their critical place on the table.

[1772] Why is this history important? Just like India and Germany, where the seed of the basic structure doctrine was planted, it is their unique history that influenced the path of constitutional reforms and the decision of the courts in applying the doctrine. Constitutions the world over reflect the uniqueness and specificity of each society, even if lessons or experiences can be drawn from those places. To paraphrase Prof. Okoth-Ogendo in the article, ***Politics of***

Constitutional Change in Kenya Since Independence, constitutions reflect a country's historical experiences, history, cultures, traditions, and hopes for the future. In other words, a Constitution must be sufficiently dynamic to reflect the past, to address the present and to anticipate the future.

[1773] In the Kenyan situation, drawing from the past, informed by the present and focusing on the future, the 2010 Constitution has set up a framework which returns Kenya to the path of democratization. Today, the Executive cannot turn back the clock to the period when the Constitution was used as a tool of oppression due to limitations imposed by the prescribed procedure under the old constitutional dispensation, not to mention stronger and independent governance institutions. At the same time, Parliament will no longer be used to pass amendments to the Constitution in the manner it did before 2010 because of the current inbuilt mechanisms and safeguards as well as the complex and elaborate procedures in the Constitution.

[1774] In the ***Kesavananda Case,*** the Supreme Court of India was dealing with Article 368, which has, to the extent relevant to this appeal been reproduced earlier in this Judgment. The following five factors extracted from Article 368 are important. First, the Constitution expressly declares that there is no limitation on the power of Parliament to effect amendment to any of its provisions: Second, Parliament in exercise of this power can amend the Constitution by way of addition, variation or repeal of any provision: Third, amendments can only be introduced in compliance with the procedure laid down in Article 368, by a Bill which must be passed in each House by a majority of the total membership of that House present and voting or, if the amendment relates to certain specific provisions in Clause (2)(a) to (e) of Article 368, it must be ratified by the Legislature of not less than one half of the States before being presented to the President for assent. Fourth, is the uniqueness of Clause (4) which provides that:

> ***"(4). No amendment of this Constitution (including the provisions of Part III) made or purporting to have been made under this article whether before or after the commencement of Section 55 of the Constitution (Forty second Amendment) Act, 1976 shall be called in question in any court on any ground."***

And fifth, Clause (5) reaffirms that:

> ***"(5). For the removal of doubts, it is hereby declared that there shall be no limitation whatever on the constituent power of Parliament to amend by way of addition, variation or repeal the provisions of this Constitution under this article ..."***

[1775] With a sense of imagery, *Justice Dwivedi* in the minority in the ***Kesavananda Case*** described the very wide power of Parliament to amend the Constitution as follows:

> ***"The phrase 'amendment of this Constitution' is the nerve-center of Article 368. The words "this Constitution" in the phrase embrace the entire Constitution. Further, the denial of power to make radical changes in the Constitution to the future generation would invite the danger of extra Constitutional changes of the Constitution...it may be that Parliament may not be able to annihilate the entire Constitution by one stroke of pen. But it can surely repeal or abrogate all provisions in Part III. Article 368 permits Parliament to apply not only the physician's needle but also the surgeon's saw. It may amputate any part of the Constitution if and when it becomes necessary so to do***

for the good health and survival of the other parts of the Constitution."

Thus, a momentary majority of total membership of each House present and voting can serve to abrogate the entire Constitution. And this is what was sought to be prevented in the ***Kesavananda Case***; the fear that, if unchecked, Parliament with complete abandon and impunity, but exercising its legislative power under Article 368 of the Constitution, can amend any provision of the Constitution, repeal or even abrogate the entire Constitution.

[1776] The underlying apprehension of the majority bench was that elected representatives could not be trusted to act responsibly. No words can convey this apprehension more eloquently than these of *Sikri, C.J* as he explained how the basic structure doctrine can be a useful guard against abuse of parliamentary majority and warned of the likely consequences of such abuse. He stated:

"...a political party with two-thirds majority in parliament for a few years could so amend the constitution as to debar any other party from functioning, establish totalitarianism, enslave the people, and after having effected these purposes make the Constitution unamendable or extremely rigid. This would no doubt invite extra- constitutional revolution."

[1777] These fears were not far-fetched. The passage of the 39th Amendment by the Indian National Congress' majority in central and state legislatures indeed proved the fears. With the amendment in 1975, Indira Gandhi was able to impose a state of emergency and tried to suppress her prosecution. The Supreme Court in the ***Indira Gandhi Case,*** applying the basic structure doctrine struck down the 39th Amendment, despite the ouster provision in Clauses (4) and (5) of Article 368.

[1778] The situation the Supreme Court of India was addressing in the ***Kesavananda Case***, ***Indira Gandhi Case*** and all other related cases are unique to India, based on the specific provision of the Indian Constitution, Article 368, their experience and history generally. Therefore, in relying on ***Kesavananda*** hook, line and sinker, to address the peculiar circumstances of Kenya, the courts below ought to have exercised caution and followed the guidance repeatedly emphasized by this Court, for example, in the case of ***Judges & Magistrates Vetting Board (JMVB) & 2 Others v. The Centre for Human Rights & Democracy & 11 Others,*** SC Petition No. 13A, 14 & 15 (consolidated); [2014] eKLR**,** where the Court stressed that:

> ***"[218] Although certain jurisdictions, such as India and Germany, have perceived judicial review as an immutable structure of their Constitutions, these jurisdictions do not have Constitutions that are as unique as Kenya's. We must ask whether the foreign jurisdictions we seek reliance upon, have Constitutions and, if they do, whether these Constitutions have provisions akin to Articles 1, 23, 159 and 259 which emphasize the sovereignty of the people; or whether they have principles and values, like the ones found in Article 10, which apply to the interpretation and application of the Constitution; or whether they have legislation similar to our Supreme Court Act, which introduces Kenya"s historical context into the interpretation of the Constitution. If the answers to these questions are in the negative, then the common law doctrines found in other jurisdictions, foreign cases and foreign constitutions, must be interpreted in such a manner as to reflect our***

> ***modern Constitution, and our unique conditions and needs"*** *(per Mutunga, C. J. (Rtd.))*.

Mutunga, C.J (Rtd.), once more in ***Jasbir Singh Rai & 3 Others v. Estate of Tarlochan Singh Rai & 4 Others,*** SC Petition 12 of 2012; [2013] eKLR, repeated the same caution in the following words:

> ***"[100] In the development and growth of our jurisprudence, commonwealth and international jurisprudence will continue to be pivotal. However, the Supreme Court will have to avoid mechanistic approaches to precedent. It will not be appropriate to pick a precedent from India one day, Australia another day, South Africa another, the US yet another, just because they seem to suit the immediate occasion. Each of those precedents has its place in the jurisprudence of its own country."***

See also ***Gatirau Peter Munya v. Dickson Mwenda Kithinji & 2 Others,*** SC Petition 2B of 2014; [2014] eKLR.

[1779] There was justification to rely on ***Kesavananda*** in interpreting Section 47 of the former Constitution in the ***Njoya Case*** because at the time our constitutional framework was more or less similar to Article 368 of the Indian Constitution, in the sense that the power to amend the Constitution reposed in Parliament and Parliament alone. There was no provision granting the people the power to amend the Constitution by a popular initiative or to Parliament and the people to do so together. That is why in ***Njoya***, *Ringera, J. (Rtd.)*, categorically held that under the former Constitution, Parliament could not, even under the guise or garb of amendment, abrogate that Constitution and enact in its place a new one. It could not change the basic features of the Constitution. All the people did, in exercise of their sovereign power, was to delegate to Parliament expressly

in Section 47 of the former Constitution, the power to amend it only, and no more. The people retained for themselves the power to replace it with a new one.

[1780] After the ***Njoya Case***, it took some six years to develop a constitutional firewall, a ring-fence around those provisions which were considered the main framework and foundation of the Constitution, the amendments of which would require special amendment mechanisms and Parliament would no longer have exclusive power to, on its own effect any changes to the Constitution. It is important to outline the route to this stage because from it the intention of the framers will be clear.

[1781] Throughout the constitution-making process from the Bomas Draft Constitution, the Wako Draft Constitution, the Revised Harmonized Draft and the proposed Draft Constitution, it was made abundantly clear that, since the Constitution embodies the will and aspirations of the people, they must be central to its amendment. When presenting the views on constitutional amendment gathered from the people to the plenary at the Bomas of Kenya on 5th June, 2003 Mr. Keriako Tobiko, who was then a Commissioner and chaired one of the thematic groups of the Constitution of Kenya Review Commission at Bomas of Kenya reported their findings to the plenary regarding the history of constitutional amendment in the following words:

> ***"...the lesson we have learned in this country from the history and experience in constitutional amendment, in my view, is a painful lesson...Hardly eight months into the new independence Constitution, and the Government of the day felt that "No, this Constitution was unworkable." And that therefore, there was urgent need for constitutional amendment. And the first thing then was, to amend the amendment procedures...so as to make it***

easier, to amend the Constitution henceforth. And that actually was attained in 1965."

[1782] He went on to outline all the indiscriminate amendments that followed, culminating with the abolition of the Senate, the Regions and many others, ending up with the cannibalization of the independence Constitution. He emphasized, in conclusion that:

> ***"In all these amendments I must say, there was no participation or involvement of the people. When we went out to collect views of the people, obviously that was a major concern. And the people wanted to know, in view of our history, in view of the fact that the Independence Constitution was easily, quickly and fundamentally amended, what mechanisms should be put in place to ensure that the new Constitution does not suffer the same fate? For a good reason the public was concerned, apprehensive that the Commission might come up with a beautiful document, a comprehensive document, but then if it is not secured, then in the next few years, we will be back to where we began.***
>
> ***So, what did the people then propose?...Firstly, they proposed again that there should be a distinction between entrenched provisions and ordinary provisions. So, let us go back to the independence Commission and distinguish between ordinary and entrenched provisions. The entrenched provisions should include Chapters on Supremacy of the Constitution, the Bill of Rights, land, Judiciary, Security, Finance and Systems of Government.***

In the views that we collected, those were the provisions that the people wanted entrenched. And they went further to say that stringent mechanisms must be put in place for the amendment of these entrenched provisions; and what was that mechanism? They said, it would require 75% vote of each House, and in addition must be referred to the people through a referendum. So 75% plus a referendum.

As regards the non-entrenched provisions, the views of the people was this: That it was sufficient just to require 75% votes in each House."

[1783] Chapter 27 of the CKRC Final Report contained these aspirations and concluded that:

"The amendments to the Constitution relating to the supremacy of the Constitution, territory of Kenya; sovereignty of the people; principles, values and goals of the Republic; the Bill of Rights, term of office of the President; the independence of the Judiciary and Constitutional Commissions and Offices; functions of Parliament, values and principles of devolution; and the chapter on Amendments to the Constitution should be approved by the people in a Referendum."

In tow, following these recommendations, Article 255(1) of the Constitution, in Chapter Sixteen, came with similar provisions:

"Article 255. Amendment of this Constitution

(1) A proposed amendment to this Constitution shall be enacted in accordance with Article 256 or 257, and

approved in accordance with clause (2) by a referendum, if the amendment relates to any of the following matters—

(a) the supremacy of this Constitution;

(b) the territory of Kenya;

(c) the sovereignty of the people;

(d) the national values and principles of governance mentioned

(e) the Bill of Rights;

(f) the term of office of the President;

(g) the independence of the Judiciary and the commissions and independent offices to which Chapter Fifteen applies;

(h) the functions of Parliament;

(i) the objects, principles and structure of devolved government; or

(j) the provisions of this Chapter.

(2) A proposed amendment shall be approved by a referendum under clause (1) if—

(a) at least twenty per cent of the registered voters in each of at least half of the counties vote in the referendum; and

(b) the amendment is supported by a simple majority of the citizens voting in the referendum."

[1784] This was the clearest manifestation that past repression had steeled the people's resolve to fully participate in the Constitution amendment process. With Chapter Sixteen, the people sought to strike a balance; to have a Constitution that is flexible enough for posterity and unforeseen needs but rigid enough to prevent the abuse hyper-amendments experienced in the past.

[1785] Since the promulgation of the Constitution, the courts have been consistent and unanimous that all provisions of the Constitution are amendable, even Article 255 itself, procedure for doing so being followed. Some of those opinions include, ***The Attorney General & another v. Randu Nzai Ruwa & 2 Others,*** Civil Appeal No. 275 of 2012; [2016] eKLR, where the Court of Appeal, *(Musinga, Ouko, Kiage, M' Inoti & J. Mohammed, JJ.A)* held that the people may amend the 2010 Constitution by a referendum to alter the territory of Kenya; ***Senate & 48 Others v. Council of County Governors and 54 Others,*** Civil Appeal No. 200 of 2015; [2019] eKLR**,** *(Waki, Kiage, Gatembu, Odek and Sichale, JJ.A)* to the effect that an amendment to alter the structure of the devolved governments can only be effected by way of a referendum); ***In the Matter of the Speaker of the Senate & Another,*** Reference 2 of 2013; [2013] eKLR, this Court explained that the only other way for the Senate to expand its mandate, is to initiate an amendment of the Constitution through referendum under Article 255(1). See also, ***Non-Governmental Organizations Co-Ordination Board v. EG & 5 Others,*** Civil Appeal No. 145 of 2015; [2019] eKLR, ***Titus Alila & 2 Others suing on their own behalf and as the Registered Officials of the Sumawe Youth Group v. Attorney General & Another,*** Constitutional Petition No. 22 of 2018; [2019] eKLR ***(Titus Alila Case)*** and ***Martha Kerubo Moracha v. University of Nairobi,*** Petition 459 of 2016; [2016] eKLR.

[1786] Unlike India where the ***Kesavananda Case*** and subsequent judicial decisions continue to be used as coordinates for amendments, and to test which

provisions offend the basic structure of their Constitution, through Chapter Sixteen of the Kenyan Constitution, the courts here do not have to go through such an exercise. The restriction on the amending power in Kenya is constitutional, whereas in India and those jurisdictions like Belize, Bangladesh and Pakistan, Parliaments are limited in their powers to amend the Constitution by restrictions not found in the text of written Constitutions but by parameters developed through court decisions. In India specifically, the courts have from time to time imposed new restrictions over and above those identified in ***Kesavananda***.

[1787] Now to answer the framed question; does the basic structure doctrine have any application to the amendment process of the Constitution of Kenya? Depending on the answer to this question, the next related question is the extent of the doctrine's application in Kenya and whether the basic structure (not doctrine) of the Constitution can only be altered through the primary constituent power; and what constitutes the primary constituent power.

[1788] Is basic structure doctrine a doctrine in the strict legal sense? Is it a source of law and does it have the force and binding effect of the law, or is it the spirit of the law? Is it a rule of law or merely a philosophical postulate, a guide to assist the court dealing with an amendment or a proposed amendment, to determine whether the amendment abrogates or repeals the Constitution? To these rhetorical questions, I do not intend to proffer an answer, since they were not specifically asked, raised or argued before the courts below or before us. Just food for thought.

[1789] Because the doctrine is not defined in any of the constitutions of the countries that have embraced and applied it and since the courts have merely described what they understand it to mean and not given a definition, for the purpose of this appeal, I will adopt a more inclusive description of the term as devised by Prof. Roznai; that, in its classic formulation, the doctrine provides that regardless of the existence or absence of an express limitation, there is an implied and substantive limitation to a constitutional amendment, the objective of which

is to protect the "basic structure" or the "core element" of a Constitution. See Yaniv Roznai (2014) ***Unconstitutional Constitutional Amendments: A Study of the Nature and Limits of Constitutional Amendment Powers.*** PhD thesis, London School of Economics and Political Sciences.

[1790] In other words, some aspects of a constitution are unamendable; and that these aspects can only be changed through a mechanism outside of the Constitution itself. But what is not in doubt about this doctrine is the fact that there is no unanimity on its application or universality of its application. While it has been accepted and applied in some jurisdictions, it has equally been rejected in others. In this region, until the decisions of the two courts below in this matter, the decisions of the neighbouring jurisdictions had not been in harmony. For example, in the ***Reverend Christopher Mtikila Case*** the Court of Appeal in Tanzania described it as a "nebulous" doctrine without any "agreed yardstick" of what constitutes it. ***"In short, there are no basic structures....There is nothing like basic structures in our Constitution...What are provided for are safeguards"***, the learned Judges concluded.

[1791] In Uganda, the Supreme Court in 2004 in the ***Paul K. Ssemogerere Case***, declared that:

> ***"Kesavananda case was misunderstood and, therefore, misapplied to the facts of the petition. The provisions of our constitution override that case."*** *Per Tsekooko JSC.*

The debate continued in ***Male Mabirizi Case***. While there was broad unanimity among the Justices as to the rejection of the applicability of the basic structure doctrine in Uganda, they were divided on what constitutes the basic structure of the Ugandan Constitution.

[1792] Before these cases, the courts in Uganda held the view in ***Dr. Rwanyarare and Had Sadim Degulo v. Attorney General,*** Constitutional

Petition No.5 of 1999 and in ***Uganda Law Society and Justin Semuyaba v. Attorney General,*** Constitutional Petition No.8 of 2000, that they could only entertain a challenge to constitutional amendments that are alleged to have been enacted in contravention of the procedure for enacting constitutional amendments.

[1793] Even as I draw these comparisons, I am alive to the fact that the respective constitutions of these countries may not between themselves or with ours have similar provisions on the amendment procedures. Since the two superior courts below heavily relied on ***Kesavananda*** to arrive at the conclusion that: (1) the basic structure doctrine is applicable in Kenya, (2) the basic structure doctrine limits the amendment power set out in Articles 255 to 257 of the Constitution, and (3) the basic structure of the Constitution can only be altered through the primary constituent power which must include four sequential processes namely: civic education; public participation and collation of views; Constituent Assembly debate; and ultimately, a referendum, it is necessary to determine the *ratio decidendi* in ***Kesavananda***. Arguments have emerged that, after all, there was no majority decision in ***Kesavananda*** with regard to the doctrine. Senior Advocate T. R. Andhyarujina in his book, ***The Kesavananda Bharati Case: The Untold Story of Struggle for Supremacy by Supreme Court and Parliament,*** has argued that, what has been ritualistically repeated as the *ratio decidendi* in the case, that Parliament cannot amend the basic structure of the Constitution was in fact only in the conclusion of *Justice Khanna's* Judgment.

[1794] The truth, reading all the eleven judgments, is that *Chief Justice Sikri* and four other Justices identified inherent and implied limitations under Article 368; six other Justices did not find any limitations on amending power of Parliament under Article 368 and one Judge, *Justice Khanna* took a lone position, rejecting the view of *Chief Justice Sikri* and four other justices that there were "inherent or

implied limitations on the amending power" he held that any amendment should not leave the existing Constitution unrecognisable.

[1795] Nonetheless, in the view of the majority, the power to amend the constitution did not extend to the basic structure of the Constitution. In other words, the court accepted that even though Parliament had the power to pass amendments affecting even the fundamental rights set out in the Indian Constitution, it could pass no amendments in defiance of the basic structure of the Constitution. This was the *ratio decidendi,* that has been applied in testing the validity of any challenged constitutional amendment in India.

[1796] How was this *ratio* applied in this dispute by the two courts below? The learned Judges of the High Court were satisfied that:

> ***"473. ...there is no clause in the Constitution that explicitly makes any article in the Constitution un-amendable...; and that, the scheme of the Constitution, coupled with its history, structure and nature creates an ineluctable and unmistakable conclusion that the power to amend the Constitution is substantively limited."***

[1797] Up to that stage, I am carried along because it is common factor that every single part of the Constitution is amendable, subject to restraints in Articles 255(2), 256 and 257. But the Judges did not stop there. They held ultimately that:

> ***"474. (a) The text, structure, history and context of the Constitution of Kenya, 2010 all read and interpreted using the canon of interpretive principles decreed by the Constitution yield the conclusion that the Basic Structure Doctrine is applicable in Kenya.***

(b) As applied in Kenya, the Basic Structure Doctrine protects certain fundamental aspects of the Kenyan Constitution from amendment through the use of either Secondary Constituent Power or Constituted Power.

(c) The sovereignty of the People in constitution-making is exercised at three levels…"

[1798] The three levels are identified as, the primary constituent power, the secondary constituent power and the constituted power. The Court further explained that the essential features of the Constitution forming the basic structure can only be altered or modified by the people using their primary constituent power which is only exercisable after four sequential processes have been followed:

"(i) Civic education to equip people with sufficient information to meaningfully participate in the constitution-making or constitution-altering process;

(ii) Public participation and collation of views in which the people – after appropriate civic education – generate ideas on the type of governance charter they want and give their views about the constitutional issues;

(iii) Constituent Assembly Debate, consultations and public discourse to channel and shape the issues through representatives elected specifically for purposes of constitution-making or constitution-alteration; and

(iv) Referendum to endorse or ratify the Draft Constitution or Changes to the Basic Structure of the Constitution."

[1799] As to what specifically constitutes the basic structure of the Constitution of Kenya, the court found that it consists of the foundational structure of the

Constitution as provided in the Preamble; the Eighteen Chapters; and the Six Schedules of the Constitution. Literally, the Constitution in its entirety. They, however clarified that:

> ***"(g) While the Basic Structure of the Constitution cannot be altered using the amendment power, it is not every clause in each of the eighteen chapters and six schedules which is inoculated from non-substantive changes by the Basic Structure Doctrine. Differently put, the Basic Structure Doctrine protects the core edifice, foundational structure and values of the Constitution but leaves open certain provisions of the Constitution as amenable for amendment in as long as they do not fundamentally tilt the Basic Structure. Yet, still, there are certain provisions in the Constitution which are inoculated from any amendment at all because they are deemed to express categorical core values. These provisions are, therefore, unamendable: they cannot be changed through the exercise of Secondary Constituent Power or Constituted Power. Their precise formulations and expressions in the Constitution can only be affected through the exercise of Primary Constituent Power. These provisions can also be termed as eternity clauses. An exhaustive list of which specific provisions in the Constitution are un-amendable or are eternity clauses is inadvisable to make in vacuum. Whether a particular clause in the Constitution consists of an "unamendable clause" or not will be fact-intensive determination..."***

[1800] For its part the majority of the Court of Appeal, in its final disposition upheld the foregoing conclusion by the High Court, affirming that:

> ***"(i) The basic structure doctrine is applicable in Kenya.***
>
> ***ii. The basic structure doctrine limits the amendment power set out in Articles 255 – 257 of the Constitution.***
>
> ***iii. The basic structure of the Constitution can only be altered through the Primary Constituent Power which must include four sequential processes namely: civic education; public participation and collation of views; constituent assembly debate; and ultimately, a referendum."***

[1801] From the last four passages reproduced above, the High Court and the Court of Appeal were both persuaded by the ***Kesavananda Case***, our history, the culture of hyper-amendments, the text, structure, and context of the Constitution, that the basic structure doctrine limits the amendment power set out in Articles 255 to 257 of the Constitution. Put another way, that there are implied limitations to the amendment of the Constitution imposed by the basic structure doctrine.

[1802] But, was it not this apprehension and historical experience, as demonstrated in the earlier part of this judgment that drove the framers to deliberately enact the entire Chapter Sixteen of the Constitution to include provisions designed to ensure that the process of constitutional amendments is strictly regulated and controlled to prevent the abuses of the past? At all material times, in the course of constitution-making process, there was always concern over how to deal with past problems posed by hyper-amendments of the Constitution. According to the conclusion in this respect, the CKRC Final Report in paragraph 7.2.1 stated:

> ***"There is need to protect the Constitution against indiscriminate amendments. If the amendment procedure is too simple, it reduces public confidence in the Constitution. The converse, however, is also true. If the amendment procedure is too rigid, it may encourage revolutionary measures to bring about change instead of using the acceptable constitutional means. Thus, a balance must be struck between these two extremes."***

[1803] This balance was achieved by clear, unambiguous, and distinct 'tiered' design model codified in Chapter Sixteen. It is generally accepted that one of the ways to address the problem of abusive constitutional amendments is the constitutional design, which would include the 'tiered' amendment procedure. This design combines the values of rigidity and flexibility, applying different procedures of amendment for different provisions of the Constitution. See David Landau and Rosalind Dixon's, ***Tiered Constitutional Design***, 86 GEO. WASH. L. REV. 438 (2018).

[1804] The amendment process under Chapter Sixteen is multi-staged; the first stage is itself onerous as the promoters of the process must obtain support of one million voters. Together with the signatures of one million voters, the promoters must draft a Bill to be submitted to the IEBC. The voters who support the proposal must be verified by the IEBC. The next stage is in County Assemblies, where a majority of all the 47 County Assemblies must approve the draft Bill before it moves to Parliament (National Assembly and Senate), where the Bill can only pass if a majority of members from each House vote in its favour. And that is not all. From Parliament, it goes to the people for ratification at the referendum. A valid referendum under Article 255, on the other hand requires 20 percent turnout in at least half of the counties, and support by a simple majority of the citizens voting in

the referendum. Even the parliamentary initiative under Article 256 that is meant mostly for non-controversial amendments is still quite elaborate. It requires significant public participation, spells strict timelines and a support of two-third members of each House of Parliament– a critical number that requires significant parliamentary mobilisation. But amendment through a popular initiative is the most onerous and complex, as demonstrated above.

[1805] Attempts to utilize both initiatives have failed in the past due to the 'tiered' constitutional design in Chapter Sixteen. The *Okoa Kenya Bill of 2016* sponsored by the Coalition for Reform and Democracy (CORD) failed at this first step. Thirdway Alliance's *Punguza Mizigo Bill of 2019* similarly failed but this time at the second step when only one County Assembly supported it.

[1806] The timeline for passing an amendment that is not controversial cannot be less than nine to ten months from the date the draft Bill is submitted to IEBC with one million signatures to Presidential assent.

[1807] In view of the explicit, long, complex and in most cases unpredictable process of amending the Constitution, it can be said that there are no implied constitutional limitations by which the Constitution should not be amended in any way. There are sufficient safeguards to ensure that those provisions ring-fenced in Article 255(1) are secured against unwarranted amendments. What is in a name? Call them basic structure, fundamental structure, essential features, basic elements, basic frame-work, basic features, constitutional pillars, foundational values, essential features, salient features, constitutional fabric and other like variations, the structure in Article 255(1) is so sacred that it can only be amended in a particular way or manner. To this extent, even the two courts agree; that Article 255(1) embodies the basic structure of the Constitution of Kenya.

[1808] The people of Kenya by a deliberate, painstaking and conscious act identified and embedded in the Constitution, a whole chapter on amendment and identified ten thematic provisions in the Constitution which they considered

fundamental for the protection and preservation of the Constitution, against random amendments.

[1809] The holistic construction of the Kenyan Constitution, paying due regard to values espoused in it and the nation's history, yield the conclusion that the basic structure, not doctrine, domiciles in Article 255(1) of the Constitution.

[1810] The basic structure doctrine was devised by India and those jurisdictions that have adopted it to address the exclusive power of Parliament, following its own procedures to alone '***amend by way of addition, variation or repeal any provision of this Constitution.***' The power to amend the textual document lies in the hands of the Parliamentarians in terms of Article 368 of the Indian Constitution. The mischief for which basic structure doctrine was devised was to curb abuses that would come with the limitless exercise of such wide powers. The distinction between the Kenyan and Indian Constitutions ought to be clearer from this analysis. While the latter relies on implied limitations on the amending power, the former has express limitations.

[1811] I, with respect agree with the submissions that throughout the period of constitution-making process in this country, from the 1990s to 2010, the doctrine of basic structure was already being cited in cases in Kenya, for example, the ***Njoya Case***, and was generally known to exist. If therefore the framers had intended to make certain provisions or even those specified in Article 255(1) unamendable, or subject to the basic structure doctrine, nothing would have been easier to so state expressly. To propose as suggested by the High Court and the Court of Appeal that the doctrine can be applied to impose implied limitations to the amendment provisions under Chapter Sixteen is to, in effect amend the Constitution by introducing a method for amending it that the framers did not contemplate. The application of the doctrine would go against the intention of the people that the amendment to the Constitution should be flexible enough for posterity and unforeseen needs but sufficiently rigid to prevent abuse like those

experienced in the past. If adopted, over and above the existing procedure, the doctrine will make amendments overly rigid with the courts playing the roles allocated in the express terms of the Constitution to the people directly or delegated to their elected representatives. The future generation will never change some of its provisions regardless of their unique needs.

[1812] The fallacy of importing into and imposing an implied on an express provision of Constitution was aptly expressed by George Helm Yeaman in 1871 in the book ***The Study of Government*** (Little, Brown and co., 1871), which has been cited by Prof. Fombad in his written submissions in the following words:

> ***"We cannot have two constitutions, one of the letter and one of the spirit, the letter amendable and the spirit not. Letter, spirit and approved judicial construction all go to make up the Constitution. That Constitution by its own terms is susceptible of amendment, and the amendments, when adopted in the way pointed out, are binding and must be obeyed."***

[1813] The Constitution of Kenya is exclusive and the words in Chapter Sixteen mean what they express, because without explicit limitations, no other limitations can exist to override the express. Strictly speaking, an amendment to the Constitution is part of the Constitution itself. While the power to amend the Constitution under Article 257(10) of the Constitution flows directly from the sovereign people, pursuant to Article 1(1) and (2) of the Constitution, the basic structure doctrine, on the other hand is an implied limitation to the amendment power which tends to contradict the people's power to amend the Constitution in the manner expressly reserved in Article 257 for the people themselves in a popular initiative and under Article 256 for Parliament through the people's delegated mandate.

[1814] The most difficult part of the two Judgments and the dilemma flowing from them is clearly the imprecise scope and extent of the basic structure doctrine. Which provisions in the Constitution of Kenya, for example, are not amendable through the procedure in Chapter Sixteen? What does it mean, for instance when the High Court accepts in the one hand that all Articles in the Constitution are amendable in accordance with the constitutional procedures provided, but on the other hand qualifies the statement by declaring that the basic structure of that very Constitution cannot be altered using the amendment power in the Constitution? What does it mean when the trial court proceed to assert that the basic structure consists of the Preamble, the Eighteen Chapters and the Six Schedules of the Constitution? Does that mean that the Constitution in its entirety is a basic structure? But the court does not stop there. It asserts that:

> ***"...an exhaustive list of which specific provisions in the Constitution are un-amendable or are eternity clauses is inadvisable to make in vacuum; whether a particular clause in the Constitution consists of an "unamendable clause" or not will be fact-intensive determination."***

[1815] This conclusion was affirmed by the Court of Appeal, save for the part on eternity clauses. This conclusion seems to me to suggest that, for one wishing to initiate an amendment, the services of some deity, *Oracle of Delphi*, for instance, has to be sought beforehand, or is it the courts to give the green light by approving beforehand the proposed amendments? How is the court to be moved?

[1816] In the Judgment of the Court of Appeal it is apparent that, apart from all the learned Judges acknowledging the existence of the basic structure in Article 255(1), and besides *Musinga, (P),* citing Articles 89 and 172 of the Constitution, there is no clear or unanimous guidance on what, besides the provisions listed in Article 255(1) constitutes the basic structure that can only be changed through the exercise of primary constituent power. *Musinga, (P)'s* statement to the effect that:

"it is not all the 74 proposed amendments that seek to fundamentally alter basic structure…But the few that I have highlighted point to attempts to alter fundamental aspects of the basic structure" did not help the situation. Neither was *Kiage, J.A's* analogy of a house with its bare essentials, while *Okwengu, J.A's* formula of ascertaining breach of the doctrine by placing it side by side with the proposed amendment, equally does not offer a solution to the ordinary citizen, who may wish to invoke Article 257 to bring a popular initiative.

[1817] Constitutional vagueness is dangerous for constitutional survival, said Andrew Friedman in his article, ***Dead Hand Constitutionalism: The Danger of Eternity Clauses in New Democracies,*** (2011) Vol. 4 No.1 Mexican Law Review 77.

He cautions:

> ***"If an eternity clause that is extremely vague is included, it gives the (often unelected) judiciary a tremendous amount of power while tying the hands of the elected branches. Judicial review is not only a common element of new democracies, it is an imperative one; however, that review cannot be allowed to completely control policy choices by the executive or legislative branches.***
>
> ***While conflict between the branches of government is inherent in any regime with a set of checks and balances, tremendous conflict, such as that brought about by vagueness in India, could trigger greater problems elsewhere in the developing world."***

[1818] In India today, because of the nebulous nature of implied limitations to constitutional amendment, since the ***Kesavananda Case***, every court has

attempted to identify, by listing some of the essential structural elements of the Constitution that in their individual perceptions constitute the basic structure of the Indian Constitution, on a case by case basis. It has been suggested that post the ***Kesavananda Case***, the Supreme Court of India alone has utilized the doctrine in at least 345 of its decisions, with yet no clear delineation of the doctrine. See Jasdeep Randhawa, ***Understanding Judicialization of Mega-Politics: The Basic Structure Doctrine and Minimum Core,*** (2011) *6 Jus Politicum.*

[1819] In interpreting the Constitution, courts must provide pragmatic solutions without adding confusion to the controversy that the parties have brought to them for resolution in the first place. I must repeat that, amending the Constitution is not a simple matter, therefore, limitations to its amendment must sufficiently be specific and unambiguous. The argument approved in the opinions of the two superior courts that there are principles above the literal terms and plain language of the Constitution, is to enter a constitutional morass. As impartial adjudicators of disputes, courts must strongly lean against a construction of the Constitution, whose effect may lead to holding that some parts of the Constitution are exempt from the scope of Chapter Sixteen.

[1820] We have been told time without number that the Constitution is a living document and that as we construe its provisions, we do so bearing in mind that it is always speaking. Nothing therefore, could be more inconsistent with these conceptions than an unamendable amendment.

[1821] Writing in 1816, Thomas Jefferson expressed the view that the Constitution should be rewritten every generation, on the theory that without frequent constitution-making there would be too little participation by the people in the affairs of government; that moderate imperfections in the Constitution can be tolerated; and that laws and institutions must go hand in hand with the progress of the human mind. He then concluded with his famous statement that:

> ***"Some men look at constitutions with sanctimonious reverence, and deem them like the ark of the covenant, too sacred to be touched. They ascribe to the men of the preceding age a wisdom more than human, and suppose what they did to be beyond amendment.... Let us not weakly believe that one generation is not as capable as another of taking care of itself . . ."***

[See Thomas Jefferson, A letter to Samuel Kercheval, 12 July 1816, as reproduced at https://teachingamericanhistory.org/document/letter-to-samuel-kercheval/]

[1822] Prof. Roznai in ***Unconstitutional Constitutional Amendments*** shares in these sentiments. He stresses the necessity for amendment to allow future generations to respond to various political, economic, social, and other changes, as well as changes in the society's system of values; and further that an amendment procedure is a means to correct imperfections in the existing document. For those reasons he concludes, in reference to Hanna Fenichel Pitkin's ***"The Idea of a Constitution"*** (1987) 37 Journal of Legal Education 167, that:

> ***"... constitutions are made, not found...[T]hey are human creations, products of convention, choice, the specific history of a particular people, and (almost always) a political struggle in which some win and others lose...: we (re)shape it all the time through our collective activity."***

[1823] The limitations in Chapter Sixteen, it has been demonstrated, were no mere accidents. They are indeed an acknowledgement by the framers that the Constitution would not be perfect and would require change from time to time, in recognition that ultimately each generation would have to govern itself, if not by rewriting the Constitution afresh or, by amending it.

[1824] It ought to be clear up to this stage that my view is that the basic structure doctrine does not apply, for the reasons advanced, to the Constitution of Kenya, as framed today. I however acknowledge the existence in Article 255(1) of certain essential features of the Constitution; the basic structure, considered so sacred that can only be amended through a special procedure and with the involvement of the people in a national referendum.

[1825] In their respective dispositive pronouncements, both the High Court and the Court of Appeal made a further declaration that the basic structure of the Constitution *"can only be amended through the Primary Constituent Power which must include four sequential processes namely: civic education; public participation and collation of views; Constituent Assembly debate; and ultimately, a referendum."*

[1826] What is the juridical basis for this condition? The answer to this question should be able to dispose of the rest of the remaining limbs of the first framed issue. Whether the basic structure is what is specified in Article 255(1) or the implied limitations, what is the procedure for amending them?

[1827] According to Article 255(2), amendments relating to matters contained in Article 255(1) must be approved by a referendum if:

> ***"(a) at least twenty per cent of the registered voters in each of at least half of the counties vote in the referendum; and***
>
> ***(b) the amendment is supported by a simple majority of the citizens voting in the referendum."***

Chapter Sixteen exhaustively sets out the process of initiating an amendment to the protected provisions leading to a referendum. The process has timelines, votes in the County Assemblies and in Parliament by elected representatives exercising delegated powers as well as in a referendum by the citizens, as the sovereign. Does

this process involve the exercise of a primary constituent power? Does it include four sequential processes, civic education; public participation and collation of views; constituent assembly debate; and a referendum?

[1828] While it is not in doubt that, apart from being constitutional imperatives, public participation and civic education, are specifically provided for in Chapter Sixteen. Generally, the IEBC is responsible for conducting or supervising referenda and elections, and in particular it is responsible for, *inter alia,* voter education. Parliament, in the conduct of its business is similarly enjoined to facilitate public participation and involvement of the people ***'in the legislative and other business of Parliament and its committees'*** [See Article 118]. Civic education and public participation are employed in both constitution-making or amendment. Under Chapter Sixteen, referendum is the climax of the process. The importance of a referendum as an effective forum in which the people and the political elite express their opinions through a vote cannot be gainsaid. The rejection of the draft Constitution in Kenya in 2005 through a referendum is part of the national's history. It is a demonstration that a referendum can provide the best mechanism for the people, exercising their constituent power, to make, remake and unmake the Constitution.

[1829] Therefore, the suggestion by *Kiage, J.A*, that a referendum **"*would be no more than a ritual naming of a product*"** that is not the people's, with respect, cannot be accurate, if our history of constitution-making is the yardstick. For the process to have been recognized by the framers as an essential step for amendment of the Constitution, it was not intended to be a superficial step, merely to meet some optics.

[1830] The world over, referenda are a widespread mechanism for the citizenry to participate and express opinion on policy, constitutional and legal proposals that are likely to affect them. Referenda are common features in the constitutions of several European or Commonwealth countries. The post-World War II

constitutions of France and Italy made referenda obligatory for constitutional amendments. Similarly, in Ireland and Australia, it is compulsory for all constitutional changes. Several countries in Africa and Asia have also incorporated provisions in their constitutions which are intended to promote closer citizen participation in Government.

[1831] Being of the view that, from the text and purposive reading of the Constitution, the amendment process must involve public participation ending with a national referendum, the remaining question is; at what point, if at all, in the scheme set out in Chapter Sixteen, is a constituent assembly debate held? At what point is the primary constituent power exercised?

[1832] The CKRC Final Report contained what the people saw as their role in the amendment process. They said that, apart from Parliament, there was need for them:

> ***"...to exercise their constituent power in any matter relating to the amendment of the Constitution. It was therefore recommended that citizens and the civil society be enabled to initiate constitutional amendments through a process called popular initiative"*** [my emphasis].

This aspiration found expression in the 'Revised Zero Draft' in which Article 346 in Chapter Nineteen was titled: *'Amendment by the People'* and Clause 1 thereof read:

> ***"An Amendment of this Constitution may be proposed by a popular initiative signed by at least one million citizens registered to vote."***

It was retained in the subsequent drafts and ultimately in the present Article 257(1).

[1833] Although the term constituent assembly is not expressly used in the Constitution or any of the relevant statutes, the lack of its express mention by name does not deny it its juridical status. As a matter of fact, (or Constitution) its existence and validity is proclaimed in the Constitution itself. ***"We, the people of Kenya"***, declared in the Preamble and the expression there too that ***"EXERCISING our sovereign and inalienable right to determine the form of governance of our country and having participated fully in the making of this Constitution:***

ADOPT, ENACT and give this Constitution to ourselves and to our future generations", are attributes of a sovereign people in possession of the constituent power. Further, that:

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

[1834] The sovereign power may be exercised by the people directly or through the people's elected representatives. That power is delegated to specific state organs, which can only perform their functions in accordance with the Constitution. The Constitution on the other hand, is supreme because it is made by those in whom the sovereign power is reposed, the people themselves.

[1835] A constituent assembly, also known in some jurisdictions as a constitutional convention, constitutional congress, or constitutional assembly, is a body assembled for the purpose of drafting or revising a constitution. The High Court in the ***Njoya Case*** rendered itself as follows on the attributes of a constituent assembly:

> ***"In that regard I agree with counsel for the respondents and the amicus curiae that whatever name is given to the vehicle is unimportant. It could be a conference, platform,***

constituent assembly, or even Parliament especially constituted as a constituent assembly as shown by the histories of Ghana, Uganda and Tanzania in the 1960's. What matters is the fact that the body concerned should have the people's mandate to make a Constitution."

[1836] Richard Stacey in ***Constituent power and Carl Schmitt's theory of Constitution in Kenya's Constitution-making Process,*** International Journal of Constitutional Law, Volume 9, Issue 3-4, October 2011, says that:

> ***"... the most important attribute of a sovereign people is their possession of the constituent power. And lest somebody wonder why, the supremacy of the Constitution...is not explicable only on the basis that the Constitution is the supreme law, the grundnorm on Kelsenian dictum; nay, the Constitution is not supreme because it says so: its supremacy is a tribute to its having been made by a higher power, a power higher than the Constitution itself or any of its creatures. <u>The Constitution is supreme because it is made by they in whom the constituent power is reposed, the people themselves"</u>*** [my emphasis].

Prof. Yash Ghai, ***"The Role of Constituent Assemblies in Constitution-Making",*** (a Paper commissioned by IDEA (Institute for Democracy and Electoral Assistance), in the clearest terms analyses the place of constituent assembly in the constitution-making process. [See also Yash Ghai and Jill Cottrell, ***"Constitution-making and democratization in Kenya",*** (2000-2005',)]. According to the learned authors constitutions today are virtually always a negotiated document, a pact among the society's diverse communities and regions. Of relevance, they write:

> ***"The distinguishing characteristic of a constituent assembly is that it is established to make a constitution, or at least that this is its primary role. The constituent assembly is still the most common mode of making a constitution. Unlike past times, a constitution is no longer accepted as an imposition by a victor or dominant group over others (or a grant by a monarch or a president), or even that the military would promulgate the constitution (though both these situations happened in the last few decades)."***

[1837] It is James McClellan in his book, ***Liberty, Order, and Justice*** (1989), cited approvingly by Prof. Roznai (***Unconstitutional Constitutional Amendments)*** who said of the American Constitution, and the wide discretion of the people in exercise of their constituent power, that:

> ***"...even foolish amendments, however, are constitutional, and it is the prerogative of the American people under Article V to make fools of themselves and to abolish their form of government and replace it with a new system if that is their wish. It is the prerogative of the people to change their system of government, but this cannot be made through the amendment procedure. This should be "the people's exercising their constituent power, not the old constitution's benediction, that validates the new order."***

These words were echoed by *Justice Chandrachund* in the ***Kesavananda Case*** as follows:

> ***"The basic structures theme song is amend as you may, even the solemn document which the founding fathers have committed to your care, for you know best the needs of***

your generation. But the Constitution is a precious heritage, therefore you cannot destroy its identity."

[1838] Therefore, it is true to say that it is the prerogative of the people to change their system of government, but only by the people's exercise of their constituent power and not through the amendment procedure. And that is the difference between primary and secondary constituent powers, the former is the power to build a new structure by the people themselves and the latter, the power to amend an existing constitution. Today, under Chapter Sixteen, this power is exercised by the people and their elected representatives.

[1839] Prof. Migai Akech has in his *amicus* brief argued though, that the Draft Constitution that was subjected to a referendum in 2010 was not a product of the people's constituent assembly; that at least the Bomas process through the National Constitutional Consultative Forum had characteristics of a constituent assembly, although the people did not directly elect most of its members; similarly, that the National Accord too did not have such an organ; that it only established a body of experts, (the Committee of Experts - CoE) to generate a draft constitution through a consultative process. The *amicus,* for these reasons has argued that it is fair to conclude that the 2010 Constitution was not a product of a constituent assembly. The CoE was only to build onto what had already been prepared by the National Constitutional Conference (NCC) and the CKRC; their mandate was merely to resolve issues identified as 'contentious' from the earlier processes so as not to reinvent the wheel, as it were. In the process, they nonetheless carried out regional public hearings for purposes of receiving presentations on the contentious issues and engaged in thematic and sectoral consultations with various stakeholders and interest groups.

[1840] It is fair to say that, despite the many challenges it faced, the CKRC produced a Draft Constitution, which was subsequently amended by the NCC in January 2004 after three sessions held in 2003 and 2004 at the Bomas, hence the

Bomas draft. The Conference was seen as the representative forum, and the process described as "people-driven". Richard Stacey in ***Constituent power and Carl Schmitt's Theory of Constitution in Kenya's Constitution-making process***, records that President, Mwai Kibaki, described the Bomas forum as a "gathering of the whole nation" and likened it to a "constituent assembly." But was it a constituent assembly strictly speaking?

[1841] *Ringera, J.* (Rtd.) provided the answer in the ***Njoya Case*** when he declared that:

> ***"Did the NCC have such a mandate? The applicants' complaint is that it did not because none of its membership were directly elected by the people for the purpose of making a new Constitution is not without merit. The entire membership consisted of 629 delegates. Out of those only the 210 elected Members of Parliament could claim to have been directly elected by the people. Although they were not directly elected for the specific purpose of making a new Constitution, it is a notorious fact of which the court may take judicial notice that one of the issues in the general elections of 2002 was the delivery of a new Constitution. To that extent the elected members could claim to have had the direct mandate of the people to participate in the making of a new Constitution. The other categories of membership were all unelected directly by the people. 210 of them represented Districts (whose councils were constituted into electoral colleges for purposes of selecting them) and the rest (209) consisted of 12 nominated Members of Parliament, 29 CKRC Commissioners, and 168 members representing such diverse interests as trade unions, non-***

governmental organizations, women organizations, religious organizations and special interest groups. Thus, on the whole, only one third of the membership of the NCC were directly elected by the people. Can such a body be said to be representative of the people for purposes of Constitution making? Strictly speaking one cannot be a representative of another if the latter has not elected him to do so. That being so it could be to turn logic on its head to describe a body largely composed of unelected membership as a representative one. So the NCC fails the test of being a body with people's mandate to make a Constitution and the applicant's case that they have been denied the exercise of their constituent power by means of a constituent assembly is in my view, unassailable. All I would want to add to that is that, as counsel for the applicants conceded, in a constituent assembly it is perfectly permissible to have some unelected membership... Accordingly there is need to have a representation of various interests...Be that as it may, the bottom line is that a majority of the membership must trace their roots to direct election by the people in whose name they are participating in Constitution making" [my emphasis].

[1842] It is common knowledge that this decision was never challenged on appeal. Indeed, it became the reference point for future constitution-making processes. Having declared NCC incompatible with the tenets of a constituent assembly, it cannot be argued that the CoE was itself a constituent assembly on account of that history and qualification to be a constituent assembly. To the extent that the CoE did not meet the threshold of a constituent assembly in the terms laid

down in ***Njoya***, I, with respect, agree with Prof. Migai that the Draft Constitution that was subjected to a referendum in 2010 was not a product of the people's constituent assembly. It was a product of a committee of ten experts, none of whom could claim to have been elected by the people to represent their interest in the process.

[1843] The *ratio decidendi* in ***Njoya*** is that Parliament could not, under the former Constitution use Section 47, an amendment provision to make a new Constitution or to replace the old one, or to abrogate it, a fact acknowledged by the Committee of Eminent Persons on the Constitution Review Process chaired by Amb. Bethuel A. Kiplagat in its Report dated 30th May 2006, where it observed that:

> ***"As matters now stand, the Constitution of Kenya must be read in light of the ruling of the Njoya Case. The varied interpretations of Section 47 have already been canvassed above. To settle the debate around section 47, there is arguably need to amend the Constitution to specifically recognize the inherent right of the people to replace their Constitution. This is important on account of lessons learnt from the review process."***

And Section 47 was accordingly amended and introduced Section 47A, providing an elaborate process for the replacement of the old Constitution.

[1844] Prof. B.O. Nwabueze in his book, ***Presidentialism in Commonwealth Africa,*** (1975) in Chapter XIII headed *"Presidentialism and Constituent Power"* notes that apart from Botswana, all presidential regimes in Commonwealth Africa, have adopted new Constitutions since independence. He confirms that the process of adoption of a new Constitution should entail:

> ***"...the framing of proposals for a Constitution, popular consultation, formalized discussion of the proposals in an assembly of the people (i.e. constituent assembly) and, lastly, final adoption by the constituent assembly or by the people as a plebiscite."***

[1845] The process of making the first constitution of India commenced on 9th December, 1946 with a constituent assembly. The outcome of their work was the most elaborate Constitution in the world celebrated for accommodating India's diversity. Next door, the constitutions of both Tanzania and Uganda are a product of constituent assemblies. Both constitutions acknowledge this in their respective preambles.

[1846] It ought to be apparent from the foregoing that, I must come to the conclusion that a constituent assembly is an organ for constitution-making. An amendment of the Constitution under Chapter Sixteen does not recognize constituent assembly as one of the organs for the process. This Constitution, like the former Constitution does not contemplate its replacement.

[1847] It must equally follow that in the context of amendment of the Constitution, under Article 257, the people do exercise constituent power, even though the Constitution only refers to sovereign power. ***"1. (1) All sovereign power belongs to the people of Kenya"***, are the opening words in the Constitution. The involvement of the people in the constitution- making or amendment process is a constitutional principle.

Thomas Jefferson succinctly wrote:

> ***"I know no safe depository of the ultimate powers of the society but the people themselves, and, if we think them not enlightened enough to exercise their control with a wholesome discretion, the remedy is not to take it from***

> ***them but to inform their discretion by education. This is the true corrective of abuses of constitutional power."*** *See the Letter cited above.*

Only to the extent provided for under Chapter Sixteen and explained above, the so-called four sequential steps are alien to constitutional amendment.

[1848] The last matter under this ground is to consider the unanimous conclusion by both superior courts that the proposed amendments in the Amendment Bill amounted to dismemberment of the Constitution. Besides the number of Articles sought to be amended, the courts were concerned about their overall effect; that they were so far-reaching in character, scope and content ***"as to shake the foundation and alter the identity and character of the Constitution as to effectively dismember it."*** The learned Judges variously defined the word dismemberment to mean doing any of the following to the Constitution; "*unmake" "replace" "disassemble" "completely change identity" "abolish" "tear apart" "amputation"* and *"rough mutilation*".

[1849] Therefore, the question to be determined here is whether the proposed amendments would lead to such egregious outcome. That they had the effect of repudiating essential elements of the Constitution—concerning its structure, identity, or core fundamental rights—and replacing them with the opposite features; a momentous constitutional change.

[1850] Drawing a distinction between amendment and dismemberment, Richard Albert in ***Constitutional Amendment and Dismemberment*** and in ***Constitutional Amendments: Making, Breaking and Changing Constitutions,*** (Oxford University Press, 2019) states that, in simple terms, an amendment is resorted to, as they would say in Latin, *ēmendāre*, that is, to remove errors or to improve the constitution. An amendment must therefore be designed to help the Constitution better achieve its purpose, values and objects.

[1851] The converse of this is dismemberment of the constitutional structure. There has been some criticism of the theory of unconstitutional constitutional amendment or constitutional dismemberment for ignoring the fact that historically and in some instances today, the so-called constitutional dismemberment through amendment have served as a "safety-valve" to provide a legal avenue to achieving constitutional change–however radical and far-reaching–to obviate a revolution. See Professor John R. Vile's article "***Limitations on the Constitutional Amending Process,"*** (1985) published by University of Minnesota Law School.

[1852] There may be instances where, in the course of amendment, the old constitution is preserved, while just one, crucial aspect of it is changed -and changed in a way that fundamentally "improves" the previous document without "destroying" it. Is that dismemberment? Asks Roberto Gargarella, ***Constitutional Amendments and Democracy: A View from Latin America,*** Revista Derecho del Estado, No. 48, pp. 371-389, 2021.

[1853] Would it be regarded dismemberment if the amending process was more democratic and the proposals more beneficial to the larger public than the previous provisions? Would it have been a constitutional dismemberment in amending Australia's 1890 Constitution, to permit *Aborigines* and women to vote or, in apartheid South Africa to provide for freedoms against discrimination in the Constitution through an amendment, when during the periods in question the amendments would have been considered dismemberment?

[1854] Prof. Vile wonders what would have happened had a reactionary United States Supreme Court struck down, as being unconstitutional, the progressive Reconstruction Amendments which abolished slavery and extended both human rights and the suffrage to African-Americans. In other words, is it permissible to amend the Constitution in such a drastic but yet transformational manner without offending the dismemberment theory?

[1855] Dr. Abebe in his *amicus* brief argues that the theory of dismemberment should be approached contextually, recalling that the theory was founded on the idea that amendments should not be inconsistent with the framework and values of the existing constitution. To him therefore, there is no rationality or logic in protecting the implicit, if at all it exists, more than the explicit.

[1856] The Constitution of Kenya specifically outlines the values and frameworks for amendments, invoking popular participation and national referenda in addition to other stringent procedures. An amendment will only be regarded as inconsistent with the Constitution if it fails the preconditions in Chapter Sixteen. In my very humble view, it is not the number of proposed amendments but rather adherence to the procedure that meets the threshold of Chapter Sixteen can pass the constitutional muster.

[1857] Prof. Albert referring to what he terms **Rawlsian view** in ***"Constitutional Amendment and Dismemberment"*** states that:

> ***"The conventional understanding in the field of constitutional change: either a constitution is amended consistently with the constitution; or the alteration is so transformative that we cannot call it an amendment and we must instead recognize that conceptually, it creates a new constitution"*** [my emphasis].

[1858] Do the proposed amendments in the Amendment Bill create **"*a new Constitution*?"** The verbs, "*unmake" "replace" "disassemble" "completely change identity" "abolish" "tear apart" "amputation"* and *"rough mutilation*" employed by learned Judges to describe the proposals in the Bill and to suggest that the proposals were a dismemberment of the Constitution are, in my most respectful view, an overkill, and the sledgehammer employed to deal with it, disproportionate.

[1859] The proponents of the amendments argue that the proposals in the Amendment Bill were to provide significant benefits to Kenyans; that the Executive power would be shared to make it more inclusive and thereby reduce the perennial post-election conflicts and their destabilizing impacts. Even opponents of the initiative must agree that dealing with the country's divisive politics and the resultant ethnic tensions every election cycle is a public policy imperative, because everyone would like to see a united country. The Amendment Bill has made proposals on the thorny two-third gender issue, representation of persons with disability, the youth; the right to privacy to include protection of personal data; enlarged time to settle disputes arising from presidential election; the enhancement of Equalization Fund; the introduction of Constituency Development Fund and Ward Development Fund; the introduction of the Youth Commission; the recognition of the Office of the Director of Public Prosecutions as the third independent office, among many others. These proposed changes amount to what Roberto Gargarella refers to as changes in a way that "improve " the previous document without "destroying" it. As a matter of fact, some of these proposals can be realized through a parliamentary initiative under Article 256. But what is important to bear in mind is that, even though some of these proposals do not conceptually, create a new constitution, or have the effect of replacing the present one, all these changes, no matter how beneficial, must be undertaken within the dictates of the Constitution.

[1860] I end this ground where I started. However great, however progressive a written Constitution may be, history, experiences and changes in society would necessitate corresponding changes to the written text of the Constitution, with each generation having the right and freedom to determine the law under which they wish to live, and no generation should bind the course, aspirations, constitutional expectations, values, principles and objects of generations to come. However, the Constitution as a charter, made to endure for ages to come, cannot be lightly altered for temporary political, cosmetic and other expediencies. The less

rigid the procedure for its amendment the more the temptation to alter it. The converse is equally true; that a Constitution which is unduly rigid might invite its own overthrowal by revolutionary means when a genuine need for change has arisen but cannot be affected constitutionally because of its rigidity.

[1861] It is evident from the history of the long quest for constitutional change that the people of Kenya did not intend to immunize any of the provisions of the Constitution from amendment. Informed by this history, the people's expressed intention was to be able to amend any of the provisions of the Constitution in exercise of their constituent power, directly by a popular initiative or through a constituted power donated to their elected representatives. The people provided in Chapter Sixteen an elaborate amendment procedure. They had the freedom and opportunity to expressly entrench provisions other than those stipulated in Article 255(1), or to immunize any of the provisions of the Constitution from amendment, if they so wanted.

[1862] The language of Chapter Sixteen is clear and plain leaving no room for conjecture, inference or implication. Neither the explicit nor the implicit language of the Constitution, the history of constitution-making or any principles of constitutional interpretation in this country permits the courts to do what the courts have accused previous Parliaments of perpetrating; to undertake indiscriminate and radical amendment to the Constitution by imposing an alien method of amending it.

[1863] The proposed amendments contained in the Amendment Bill are truly amendments and not dismemberment of the Constitution.

[1864] In the result, I would set aside the Judgment of the Court of Appeal and hold that, to the extent that the basic structure doctrine limits the amendment power contrary to the express terms of Chapter Sixteen of the Constitution, it does not apply to the Constitution of Kenya; and that the Constitution has a basic structural posture ring-fenced in Chapter Sixteen; that there are no four sequential

steps for the amendment of the Constitution other than the steps outlined in Chapter Sixteen; that those steps are not a replication of constitution-making process, which is distinct and do not mirror the process adopted in the making of the 2010 Constitution, but approximates it.

[1865] Finally, given the jurisprudential importance of the host of issues raised in this ground of appeal, presented in the well-researched but divergent arguments, the deep scholarly opinions by *amici*, the length and width of this Judgment and the Judgments of the two courts below, explains the importance, novelty and complexity of the question of constitutional amendment. If it is of any consolation, in the ***Kesavananda Case***, this single question, and it was only one issue, was resolved by the largest ever 13-judge bench of the Supreme Court who heard it for 68 days. 93 lawyers argued the case and a divided 700- page judgment of a 7-6 majority decided the question.

(ii) Whether the President can initiate changes/amendments to the Constitution; and whether a constitutional amendment can only be initiated by Parliament through a parliamentary initiative under Article 256 of the Constitution or through a popular initiative under Article 257 of the Constitution

[1866] This question, to me, is the real nub of this dispute. It seeks to answer the issues of legality, legitimacy and constitutionality of the process leading to the formulation of the Amendment Bill, based on the true construction of Article 257, which I have reproduced in the first paragraph of my Judgment, being **paragraph 1714**. If the process was flawed, like a cookie, it crumbles away.

[1867] To the extent relevant to this ground, the Article provides that a popular initiative can only be initiated by, first collecting at least one million signatures of registered voters. Thereafter, the promoters of the initiative must deliver the draft

Bill and the supporting signatures to the IEBC, which must verify that the initiative is indeed supported by at least one million registered voters. From this stage on, the promoters have no further direct role, save perhaps only towards the tail end, during public participation or at a vote in the referendum. They may also lobby the County Assemblies and the two Houses of Parliament to pass the Bill.

[1868] Three petitioners in the High Court, Third Way Alliance in Petition No. E400 of 2020, Isaac Aluochier in Petition No. E426 of 2020, and 254 Hope in Petition No. 401 of 2020 sought to know whether the President can, under this Article initiate a constitutional amendment by a popular initiative; whether the BBI Steering Committee Report was unconstitutional; and whether the BBI Steering Committee had *locus standi* to promote constitutional changes pursuant to Article 257 of the Constitution.

[1869] The High Court, after a detailed consideration, was persuaded and declared that the President does not have authority under the Constitution to initiate changes by way of amendment; that a constitutional amendment can only be initiated either by Parliament through a parliamentary initiative under Article 256 or by a popular initiative under Article 257 of the Constitution; that the BBI Steering Committee was an unconstitutional and unlawful entity; that its Report could not, for that reason, be the basis for initiating any action towards promoting constitutional changes under Article 257; that the entire BBI process culminating in the draft Bill was unconstitutional and amounted to a usurpation of the people's exercise of sovereign power; and finally, that the President contravened Chapter Six of the Constitution, specifically Article 73(1)(a)(i), by initiating and promoting a constitutional change process contrary to the Constitution.

[1870] Save for the setting aside of the orders by the High Court declaring that the President had contravened Chapter Six of the Constitution, and that the BBI Steering Committee was an unconstitutional and unlawful entity, the learned

Justices of the Court of Appeal in a unanimous decision, agreed with and affirmed the rest of the conclusions above.

[1871] This determination aggrieved the 1st appellant who has proffered this appeal on 5 grounds, which were summarized and highlighted before the Court along the lines outlined in the seven framed issues. It has been submitted that the Court of Appeal erred in failing to find that the President can initiate constitutional amendment, and by failing to appreciate that the mere taking of an oath of office, does not hinder the President from being involved in constitutional amendment processes.

[1872] It has further been submitted that Article 257 does not exclude any registered voters or citizens from taking part in constitutional amendment on the basis of their positions in society. In any case, the 1st appellant submits, Article 3(1) of the Constitution binds every person to respect, uphold and defend the Constitution, which suggests that no citizen is precluded from proposing a popular initiative to amend the Constitution; that a popular initiative does not discriminate between a private citizen, state organs or public officers as pertaining to who can initiate or promote the amendment to the Constitution; that the people of Kenya may under Article 1(2) exercise their sovereign power either directly or through their democratically elected representatives and various state organs, which include the National Executive and the executive structures in the County Governments; and that the only fundamental ingredient of a popular initiative is the support of at least one million registered voters, as opposed to the person who initiates it. A finding, like that made by the two courts below, according to the 1st appellant that the President cannot participate in a popular initiative, amounts to a limitation of the rights of the President under Articles 27(1), (2) and 38 of the Constitution.

[1873] The 13th and 15th respondents; 14th and 16th respondents; 18th and 21st respondents; 20th respondent and the 72nd respondent who support this appeal

have submitted that the President can initiate amendments to the Constitution; that the maxim ***'everything which is not forbidden is allowed'*** is applicable since the President, as a citizen and an elected representative is not precluded from initiating a popular process. They have further emphasized that some of the past landmark constitutional amendments have been the product of State initiatives. For example, the Government steered the 2005 initiative and the 2010 constitutional reform efforts leading to the two referenda. They cite the ***Njoya Case*** to reinforce the proposition that the act of constitution-making can only be performed by representation.

[1874] The 1st to 5th respondents in urging the Court to reject the appeal submitted, first that, as a matter of fact the President initiated the amendment process; that under Article 257(9) and Section 49(1) of the Elections Act, his role in a popular initiative is limited to assenting to the Amendment Bill and referring it to the IEBC for purposes of conducting a referendum. They agree with the superior courts below that amendments may only be commenced through a parliamentary initiative or a popular initiative under Articles 256 and 257 of the Constitution, adding that an amendment to the basic structure must comply with four conditions enunciated in the Judgments of the two courts below namely, civic education; public participation and collation of views, constituent assembly debate and referendum.

[1875] Because each step of the amendment process was attained under the watch and guidance of the National Executive, the respondents urge that that was a usurpation of the voters' role; and that Clauses 302 and 304 of the Bomas Daft were in fact about **"*Amendment by the People*"**. These respondents have submitted too that a combination of the President, acting through the Head of Public Service, the BBI Taskforce and the BBI Steering Committee, could not constitute a constituent power; and that constitutionalism shuns proposals by those in power to usurp the constituent power of the people in the pretext of

constitutional reforms. They relied on the writings of Prof. B. O. Nwabueze, ***Presidentialism in Commonwealth Africa*** (Rutherford Madison Teaneck Fairleigh Dickson University); ***Constitutionalism in the Emergent States*** (Rutherford Madison Teaneck Fairleigh Dickson University Press 1973); De Smith and Stanley A, ***Constitutional and Administrative Law*** (Harmondsworth, Penguin 1981) pp.15 to 26; Okoth-Ogendo HWO, ***Constitutions without Constitutionalism: Reflections on an African Political Paradox*** (Oxford University Press, 1993); Albert L Sturn, ***Methods of state Constitutional Reform*** (University of Michigan Government Studies No. 28 Ann Abbor University of Michigan Press 1954); the ***Njoya Case***; and the ***CKRC Final Report.***

[1876] Agreeing with those submissions, Kituo Cha Sheria, expressed the view that the Constitution envisions a President that cannot be considered as '*the people'* in the structural and normative sense; he is the head of the Executive branch of Government, Commander in Chief of the Defence Forces and the Party Leader of the ruling party.

[1877] Dr. Duncan Ojwang', Dr. John Osogo Ambani and Dr. Linda Musumba, have similarly argued that, as the head of the Executive branch and Government, the President cannot be the promoter of a popular initiative under Article 257 based on the doctrine of separation of powers; that the constituent and sovereign power under Article 1 (1) belongs only to the private citizens, the people and not those who govern as discernible from the Preamble of the Constitution that begins with the words, "**We, the people…"**; that under Article 131 (2) of the Constitution, the President must safeguard the sovereignty of the people and not his own sovereignty; and finally, that Article 38 of the Constitution on political rights cannot be used by state officers to capture the people's sovereignty. They have relied on the decisions of ***J. Harrison Kinyanjui v. Attorney General***

& Another, Constitutional Petition 74 of 2011; [2016] eKLR, and the ***Njoya Case***.

[1878] The 7th, 8th and 9th respondents are in support of these submissions, but added that the people have only delegated legislative power to Parliament and not the President, in their view, his is the executive power.

[1879] Turning to *amici curiae's* brief*,* though Gautam Bhatia points out that Article 257 is silent on the question, he contends however that when a constitution is silent on an issue, the court should follow set principles, which were recently restated in the Supreme Court of the United Kingdom, in a landmark Judgment, in ***R (Miller) v. The Prime Minister,*** [2019] UKSC 41, so that in case of two equally plausible textual interpretations of Articles of the Constitution, the one that maintains the balance between representative and direct democracy ought to prevail over one that undermines or skews it; and further, that where a constitutional question involves the clash of two constitutional principles, the Court should resolve the conflict in a manner in which both principles are allowed to have a maximum scope, and neither is subsumed by the other. Based on these principles, the *amicus curiae* argued that Article 257 contains an implied limitation upon the President's participation in initiating an amendment through a popular initiative. If Article 257 was to be interpreted to permit the President to initiate an amendment, the balance between representative and direct democracy characteristic of the provision would be undermined. It is contended that a top-down, President-led or influenced process, as opposed to a bottom-up process originating from the people, would then feature representative involvement in all stages other than the final referendum stage and negate the carefully crafted scheme of the provision.

[1880] The 1st appellant supported by the 2nd appellant and some respondents have taken issue with the learned Judges' finding on the constitutional remit of the popular initiative and specifically their conclusion that only the people, and not the

President or any state organ can utilize the popular initiative to promote constitutional change. The twin questions to be resolved from my reading of the submissions are, whether the President can initiate the process under Article 257 and secondly, whether he in fact did initiate the process.

[1881] Friday afternoon March 9, 2018, which was the same day the Justices of the Court of Appeal elected me as their President at Safari Park Hotel, will be remembered as one of the many defining moments in the history of Kenya. It was on that day that, in move that took many by surprise the President and his political opponent, Hon. Raila Odinga, with whom he had recently engaged in fiercest and bare-knuckle political contest met and agreed, in what has come to be known as the "*handshake*", to end their political rivalry that had been witnessed in the previous elections. The last political contest between the two was so fierce that at the end of it both laid claim to the Presidency. On 30th January 2018, as part of these activities, Hon. Raila Odinga publicly swore himself in as '*the People's President*'. There was fear that if unchecked, the tension would give in to civil unrest. These events led to economic slowdown not to mention high national anxiety. It will of course be remembered that this Court had nullified the 8th August, 2017 Presidential election results and ordered it to be repeated. This repeat election was boycotted by Hon. Raila Odinga, who refused to recognize H.E. Uhuru Kenyatta as the President, and instead embarked on mass protests and a range of actions including mass civil disobedience which were met with deadly force by the police. Innocent lives were lost and several people left brutalized.

[1882] It would appear the "*handshake*" re-traced the journey of conflict transformation that started in 2008 with the Kenya National Dialogue and Reconciliation Committee following another crisis-packed 2017 General Elections, which was a call on Kenya's political leadership to bear the responsibility of creating long-lasting peace, national cohesion and integration. From this perspective, it can be argued that the President and Hon. Raila Odinga, both well

meaning, intended to ease the seething tension and restore peace, unity and tranquility in the country. To realize this objective and as an understanding of the *"handshake",* the two agreed to pursue a 9-point agenda, national ethos; responsibilities and rights of citizenship; ethnic antagonism and competition; divisive elections; inclusivity; shared prosperity; fight against corruption; devolution, and safety and security-styled the Building Bridges Initiative, (the BBI). See BBI Taskforce Report, November 2019.

[1883] By a Gazette Notice published on 31st May 2018, the President appointed a 14-member team known as the **BBI Taskforce** with 2 Joint Secretaries. It was required to:

(i) evaluate the national challenges outlined in the Joint Communique of Building Bridges to a new Kenyan Nation, and having done so, to make practical recommendations and reform proposals that build lasting unity.

(ii) outline the policy, administrative reform proposals, and implementation modalities for each identified challenge area and; -

(iii) conduct consultations with citizens, the faith-based sector, cultural leaders, the private sector and experts at both county and national levels.

[1884] By a subsequent special *Gazette Notice* dated 10th January 2020, the Head of Public Service, Mr. Joseph Kinyua notified the public that the President had appointed the same members of the Task Force to an outfit now known as the **BBI Steering Committee** whose main task, as the name suggests, was to implement the report of the BBI Taskforce, and specifically to:

(i) conduct validation of the BBI Taskforce Report through consultations with citizens, civil society, the faith-based organizations, cultural leaders, the private sector and;

(ii) *propose administrative policy of* ***Constitutional changes*** *that may be necessary for the implementation of the recommendation contained in the BBI Task Force Report, taking into account any relevant contribution made during the validation period.* [my emphasis].

[1885] The BBI Steering Committee completed this task and presented a comprehensive report to the President on 21st October 2020. The report was subsequently launched on 26th October 2020 at the Bomas of Kenya in an event presided over by the President. A third entity, **the BBI National Secretariat**, whose origin is not clear to me, since I have not been able to get on record an appointment letter or a Gazette Notice confirming this. However, it was established and co-chaired by Hon. Dennis Waweru, a former Member of Parliament for Dagoretti and Hon. Junet Mohamed, a sitting Member of the National Assembly representing the people of Suna East. On 25th November 2020, at Kenyatta International Conference Centre (KICC), the President launched the Amendment Bill and rolled out the collection of signatures to support the initiative.

[1886] With this brief background I turn to the first question; whether the initiative was promoted by the President. Although Article 257 is reproduced at paragraph **1714** of this Judgment, it is important, once again, in pertinent part, to set it out for conceptual and greater coherence of the present analysis:

> ***"257. (1) An amendment to this Constitution may be proposed by a popular initiative signed by at least one million registered voters.***
>
> ***...***
>
> ***(3) If a popular initiative is in the form of a general suggestion, the promoters of that popular initiative shall formulate it into a draft Bill.***

> ***(4) The promoters of a popular initiative <u>shall deliver the draft Bill and the supporting signatures to the Independent Electoral and Boundaries Commission</u>, which shall verify that the initiative is supported by at least one million registered voters"*** [my emphasis].

The key things to note, as highlighted, are that, this was a popular initiative, as acknowledged in the Amendment Bill's short title:

> ***"A Bill for***
> ***AN ACT to amend the Constitution by <u>popular initiative</u>"***
> [my emphasis].

[1887] A popular initiative for an amendment to the Constitution, according to the above provision, is commenced by the promoters drafting a Bill and getting at least one million registered voters to support it. This is signified by their signatures. A popular initiative may either be in the form of a general suggestion or a formulated draft Bill. It is the promoters, once again as the initiators of the process who must formulate the draft Bill or convert the general suggestion into a draft Bill. The promoters are thereafter required to deliver the draft Bill and the supporting signatures to the IEBC. From this point the process is self-executing, along the lines enumerated in Chapter Sixteen.

[1888] The term popular initiative has not been defined in the Constitution. The learned Judges of the High Court relied on the definition from ***Wikipedia***, *inter alia,* to the effect that a popular initiative is a means by which a petition signed by a certain minimum number of **<u>registered voters</u>** can force a government to choose to either enact a law or hold a public vote in Parliament under direct initiative, before holding a plebiscite or referendum, in what is called a popular initiated referendum or citizen-initiated referendum.

[1889] The learned Justices of the Court of Appeal, who attempted to find the meaning of the term popular initiative, resorted to different sources of definition. For instance, *Musinga, (P*), used ***Legal – dictionary-the free dictionary.com*** and understood the term to mean, a process of a participatory democracy that empowers **the people** to propose legislation and to enact or reject the laws at the polls, independent of the law-making power of the governing body. *Okwengu, J.A* sourced the meaning, not of "popular initiative" but of "initiative" from ***Black's Law Dictionary,*** 11th Edition which she believed conveyed the same meaning as that relied upon by the High Court from ***Wikipedia***, namely an electoral process by which a percentage of voters can propose legislation and compel a vote on it by the Legislature or by the full electorate, for instance in a plebiscite or referendum. For his part *Gatembu, J.A* relied on the meaning from the ***Concise Oxford English Dictionary*** and ***Miriam Webster Dictionary*** for the word "popular" to include, respectively, "intended for or suited to the taste or means of the general public", and "of or relating to the general public." While *Sichale, J.A* did not define popular initiative, *Tuiyott, J.A* turned to the interpretation of the provisions of Articles 1(3) as read with 255(3) to arrive at the inference that ***"the amendment by popular initiative exercise is an exercise of undelegated power of the people. It is an occasion when the people exercise their sovereign power directly. The process cannot be initiated or promoted by State actors."***

[1890] Though there are emerging trends of ***Wikipedia*** citation as a resource in judicial opinions all over the world, including the United States, United Kingdom, India and even Kenya lately, questions have been asked as to its accuracy and authenticity. In Kenya it has been relied on, for instance in the cases of ***Imran Limited v. Central Bank of Kenya*** Miscellaneous Civil Application No. 43 of 2016; [2020] eKLR and ***P K M & G S M v. Nairobi Women's Hospital & Mutinda*** Civil Case 186 of 2009; [2018] eKLR and I believe many others. I would personally be hesitant to encourage its use, especially in complex matters, in view

of its potential abuse, questionable accuracy, impartiality and permanence of information contained on the website. It can easily be edited by any internet surfer. Where the Constitution or statute provides definition of words, there would be no reason to rely on an open source online. Because it is so convenient, sometimes, many people have found it readily available and useful in the definition of simple words, ordinary and straightforward terms.

[1891] For a Judgment of this magnitude the proper approach, where words and phrases are not defined in the Constitution or statute, is to turn to traditional sources like those adopted by *Kiage, J.A*, who relied on scholarly writing, which are themselves based on empirical research. Although the learned Judge arrived at the same meaning as those who relied on ***Wikipedia***, he used a conventional approach. He used the works of Winston W. Crouch, ***"The Constitutional Initiative in Operation"*** 33 Amer Pol, Sci Rev; 634-45 (Aug. 1939), George Lutz's ***"Switzerland; Citizens' Initiatives as a Measure to Control the Political Agenda'*** in Maya Setale and Theo Schiller (Eds); ***Citizens Initiatives in Europe Procedures and Consequences of Agenda-Setting by Citizens***; and a paper by Miguel Sousa Ferro titled ***"Popular Legislative Initiative in the E.U."***

[1892] In this case, however, the sources are unanimous regarding the definition of the term popular initiative; as an initiative by the general public; in common parlance, simply, the people. The citizen, who was described by *Madan, J*. (as he then was) in ***Githunguri v. Republic*** (1986) KLR 1, as ***"the man in the market, the man on the Pangani bus or a housewife…"***

[1893] On the other hand, the word "promoters" in the Constitution is used only in Article 157. It is apparently a term of art in the context of amendment to the Constitution, describing persons, not in the company law or colloquial sense, but those who initiate or champion constitutional change. Besides that definition,

there is history behind the process, and applying purposive interpretation to Article 257, the genesis and intendment of the framers will be clear.

[1894] Under Section 47 of the former Constitution, the Legislature had the sole power to amend, modify, re-enact, suspend or repeal any provision of the Constitution, without reference or recourse to the public, and yet the Legislature made far-reaching alterations that had direct impact on the ordinary citizen, the donee of Parliament's legislative power. It was as a result of this experience and in response to citizens' frustrations that popular initiative started to gain root, as a mechanism for the people to exercise direct authority in the amendment of the Constitution.

[1895] Prof. Charles Fombad correctly captures this situation in the passage below from an article ***"Some perspectives on durability and change under modern African constitutions"*** published in International Journal of Constitutional Law, Volume 11, Issue 2, April 2013, page 382:

> ***"The Burkina Faso, Kenya, and DR Congo constitutional provisions provide*** *(sic)* ***an important way of dealing with one of the major obstacles to constitutional change; a refusal by the government to bring a request for change before the legislature, which in constitutional theory, represent the sovereign will. Allowing petitions by a specified number of citizens is certainly good for ensuring that governments do not have the absolute discretion to determine whether or not a proposed constitutional amendment should go before the legislature…"***

Similarly, the CKRC Final Report acknowledged that, apart from Parliament, it was necessary for the people, in exercise of their constituent power, to be involved in constitutional changes. The Report, for this reason recommended specifically that citizens and the civil society be accorded the space to initiate constitutional

amendments through a process called "popular initiative". It is recorded thus in the report:

> ***"4.2.1 The Spirit of the Review Act***
>
> ***We have already seen that:***
>
> ***The Independence Constitution was not made directly by the people. When Kenya became independent, it was negotiated at Lancaster House in London between the British government and representatives of Kenya's political parties who were members of the Legislative Council.***
>
> ***The people of Kenya were not consulted and the Constitution itself was adopted by the British Parliament, not by Kenya's Legislature.***
>
> ***Since then, the Constitution has been changed many times, though some changes have been reversed. The people had no say in the making of these changes, most of which were rushed through Parliament; no public discussion was allowed.***
>
> ***The spirit and approach of the Review Act was fundamentally different. The Act placed people at the centre of the review process, referred to in popular terms as 'people- driven'. It aimed to be a participatory and inclusive process"*** [my emphasis].

On amendment of the Constitution the Report rendered as a recommendation that:

> ***"...citizen and the civil society may initiate Constitutional amendments through a process called 'popular initiative'."***

[1896] The rationale for this course, premised on experience, was explained further in the Final Report of the Technical Working Group K of the CKRC as follows:

> ***"...the committee introduced a novel ideal called popular initiative. This is an innovation where <u>the citizens can on their own motion initiate amendment to the Constitution</u> by a way of a popular initiative either in the form of a general suggestion or a formulated draft bill. <u>The committee explained that their intention was a starting point towards curbing dictatorship by parliament</u>"*** [my emphasis].

This was the origin of the term "popular initiative", that ultimately found its place in Article 257. The intention was clear, and categorically explained in the report, to give the people a chair on the table where decisions on constitutional amendments are made and to address what were generally considered to be the weaknesses of the former Constitution.

[1897] Unfortunately, as noted elsewhere in this Judgment, Chapter Nineteen of the Ghai Draft, dealing with amendments to the Constitution, dropped this milestone and instead the old provision granting amendment to Parliament reinstated. To its credit the provision introduced entrenched clauses whose amendment would require ratification by the people in a referendum. The Ghai Draft was revised and the Zero Draft that followed was itself reviewed giving way to Revised Zero Draft. The amendment provision recognizing popular initiative found its way back as Clause 346 in Chapter Nineteen. It was headed '*Amendment by the People*'. Clause (1) is of critical importance. It stated that:

"An amendment to this Constitution may be proposed by a popular initiative signed by at least one million citizens registered to vote."

This Clause was retained in Clause 304(1) of the subsequent Bomas Draft, once more headed "Amendment by the People". The Wako Draft substantially reproduced the provision on popular initiative as Clause 283 save for the sub-heading now entitled "*Amendment through referendum*".

[1898] After the Wako Draft was rejected in the 2005 Referendum, the Clause was reintroduced in the 'Revised Harmonized Draft' prepared by the Committee of Experts and carried to the end in the Constitution in its present form. And with that, the history of constitutional review in this country was rewritten, and for the first time the people got their voice. With that history there cannot be any debate as to the target of Article 257 – the People. It must equally be remembered that popular initiative clause was not one of the contentious issues and consistently featured unaltered in all the drafts of the Constitution.

[1899] It is common factor as shown in the unanimous conclusion of both courts that the authority and functions of the President under Articles 131 and 132 of the Constitution, respectively include promoting and enhancing the unity of the nation, besides being the symbol of national unity. They are also in agreement that President's intentions in initiating the "*handshake*" and all that followed it were noble.

[1900] This is buttressed by the 9 point-agenda set out earlier. However, by and by it appears to me that some of these values were lost and the focus flipped. He also chose the wrong vehicle, someone else's vehicle, to realize the original objective. That vehicle belonged to *Wanjiku* and *Wanjiku* alone. The review process did not contemplate the situation the President put himself in. It is critical to trace, as the *Igbo* proverb would say, '*when the rain began to beat the process*.'

[1901] The process definitely started with the *handshake*, followed by the BBI Taskforce whose appointment was officially gazetted in the official government publication, the Kenya Gazette on 31st May, 2018. The gazette notice was signed by Joseph K. Kinyua, the Head of the Public Service, who under Article 154 of the Constitution is also the Secretary to the Cabinet. When it concluded its work, the BBI Taskforce presented the report to the President. The report has an acknowledgment that leaves no doubt as to the origin and source of the Taskforce's authority:

> ***"This report is structured to respond to the nine major national challenges to a united Kenya that were contained in the Joint Communiqué issued following the famous 'Handshake' of 9 March 2018."***

[1902] Thereafter, by gazette notice dated 3rd January, 2020, Joseph K. Kinyua yet again, appointed the BBI Steering Committee, which similarly submitted its report to the President. It is instructive to note that although the BBI Taskforce and the BBI Steering Committee were gazetted by the Head of Public Service and Secretary to the Cabinet, they presented their respective reports directly and personally to the President.

[1903] Before us, as indeed before the two superior courts below, the Attorney General and those who support him have argued that the initiative was promoted by Hon. Dennis Waweru and Hon. Junet Mohamed. Is that borne out of the pleadings and proceedings? What did the two gentlemen say at the High Court? In opposition to Petition No. E402 of 2020, Hon. Waweru, on behalf of himself and his Co-chairperson, swore as follows in an affidavit dated 5th February 2021:

> ***"1. THAT I am the Co-chairperson of the building BRIDGES TO A UNITED KENYA, <u>NATIONAL SECRETARIAT</u>, one of the Applicants herein, and my other co-chairperson being***

HONOURABLE JUNET MOHAMED, and duly authorized to swear the instant Affidavit……

(5) THAT the Building Bridges to a United Kenya was created and mandated with the task of initiating a constitutional amendment process and unifying Kenyans, among other functions.

(6) THAT the Building Bridges Initiative Taskforce and Secretariat conducted a robust nationwide public engagement and collection of views on a wide array including meeting professionals and professional bodies among others.

(7) THAT upon receiving the varied views on various issues, it made various legislative, policy and constitutional amendment proposals in various fields affecting various Kenyans" [my emphasis].

[1904] From the blues, as it were, the BBI National Secretariat appears in the scene, for the first time. Although it does not disclose its origin, its ancestry, family tree and gene cannot be concealed. The affidavit says it all. **The great grandfather is the *handshake* (BBI), grandfather is the Taskforce and its father is the Steering Committee. The surname for all of them is Building Bridges Initiative, *alias* BBI.**

[1905] On 18th November 2020 both Hon. Waweru and Hon. Junet, as Co-Chairpersons of the BBI National Secretariat wrote to the Chairperson of IEBC seeking approval of the form proposed as a format for the signature collection. The approval was granted and conveyed by a letter dated 24th November, 2020. The Amendment Bill which the BBI National Secretariat presented together with the signatures to the IEBC, was clearly, so-to speak, inherited from the BBI Steering Committee. It is almost a replica of the Bill annexed to the BBI Steering

Committee's Report to the President. Curiously the Amendment Bill is signed as follows:

> ***"Dated the 25th November 2020***
> ***<u>Building Bridges Initiative</u>***
> ***The Promoters"*** [my emphasis].

[1906] The promoters, at this stage appear to be the Building Bridges Initiative, not Hon. Waweru and Hon. Junet or even the BBI National Secretariat. They did not, before any court, explain how they went about collecting those signatures. But on record, at least there is evidence that the State was involved, to some extent in the collection of signatures. On 1st December, 2020 the Principal Secretary, State Department for Sports wrote to the Director General, Sports Kenya, on the subject: ***Building Bridges Initiative Constitutional Amendment Bill, 2020: Signature Collection Forms.*** Attached to the letter was the signature collection form and the Amendment Bill. The addressee was required to supervise the staff in the organization to complete the forms and sign appropriately. It came with the caution:

> "***Kindly take this exercise seriously and note that the deadline is tomorrow, 2nd December, 2020."***

[1907] Although the BBI National Secretariat denied any connection with the Taskforce or the BBI Steering Committee, the nexus and the evolution from the BBI Taskforce, the BBI Steering Committee and finally to the BBI National Secretariat is too obvious to deny from the chain of events outlined in the preceding paragraphs. They are one and the same. Hon. Junet, a sitting member of National Assembly and the Minority Whip in the National Assembly did not have to scramble with the ordinary citizens to promote the amendment under Article 256 while he has a distinct special path as a Member of Parliament under the parliamentary initiative.

[1908] The conclusion I reach, as should be apparent, on the first limb of this ground, is that the President, as a matter of fact, spearheaded the process, from its conception and only passed on the baton to the two Co-chairpersons when it was too late in the day; that the President is ineligible to directly or indirectly initiate a constitutional amendment to the Constitution under any of the prescribed circumstances; that he cannot act as an ordinary citizen because he is not; and that all actions taken in his name and on his behalf were all in the official capacity, as the President of the Republic of Kenya. He is under Article 131 the Head of State and Government; he exercises the Executive authority of the Republic; is the Commander-in-Chief of the Kenya Defence Forces; the chairperson of the National Security Council; and overall, he is a symbol of national unity, plus a host of other functions under Article 132.

[1909] To emphasize; the Executive authority derives from the people of Kenya and is only exercisable in accordance with the Constitution. [See Article 129]. Article 257 envisages amendments that originate outside of the Legislative and Executive and even the Judicial branches of Government. Any attempt to delink the Executive (read the President) from the Amendment Bill and the process preceding it must fail. It was one transaction and the process a continuum, with bodies like the BBI Steering Committee and the BBI National Secretariat only employed as decoys and agents of an ascertainable principal. This was not a popular but an Executive initiative.

[1910] The place of the citizens in the amendment scheme by a popular initiative is a route that has been traveled before. In 2015 the opposition, the Coalition for Reforms and Democracy (CORD) under the umbrella of *Okoa Kenya Movement* used it. Though rejected at the stage of signature verification and despite its other flaws, it is an example of what the framers intended with Article 257. Another popular initiative attempt came in 2019, promoted by the Thirdway Alliance Kenya, whose Chairman signed the Memorandum of Objects and reasons. Unlike

Okoa Kenya initiative, the *Punguza Mizigo* Bill, 2019 was approved by the IEBC but encountered headwinds in the County Assemblies, where it failed to get approval by the requisite number of assemblies. From those two previous initiatives and the instant, there are several lessons to be drawn for any future initiative.

[1911] Turning to the second limb, the answer sought is to the question, whether the President, like any other Kenyan is entitled to enjoy all the constitutional rights including political rights under Article 38 and equality and freedom from discrimination under Article 27. Differently asked, does the conclusion by the two courts, that the President is disqualified from initiating an amendment to the Constitution abridge his rights as a citizen?

[1912] By Article 24(1), a right or fundamental freedom cannot be limited except by law, and even then, only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.

[1913] Right away I can say that the claim of violation of the President's rights to equality and freedom from discrimination, under Article 27 has not been proved. It is not enough to merely allege violation to the Constitution without specifying how. Looking at all the facets of the rights and fundamental freedoms under this Article, I cannot see any that could be breached by asking the President to stay on his lane of constitutional amendment process.

[1914] Regarding political rights, the guarantees recognized are specific. Article 38. (1) provides as follows, in the pertinent part:

> ***"38. (1) Every citizen is free to make political choices, which includes the right—***
>
> **...**

(2) Every citizen has the right to free, fair and regular elections based on universal suffrage and the free expression of the will of the electors for–

...

(3) Every adult citizen has the right, without unreasonable restrictions—

(a) to be registered as a voter;

(b) to vote by secret ballot in any election or referendum."

In respect of all the political rights under this Article and in the context of this dispute, it is apparent that the President's rights were not breached. It has not been suggested that the President's right recognized by Article 38(3)(a) and (b) ***"to be registered as a voter"*** *or* ***"to vote by secret ballot in any election or referendum"****,* was violated. As a matter of fact, the process had not reached the stage of voting in a referendum.

[1915] The President's role in the constitutional review process remains intact. The power to assent to a draft Bill passed by Parliament pursuant to Chapter Sixteen is an essential cog in the process; and should a Bill to amend the Constitution propose an amendment relating to any of the matters mentioned in Article 255 (1), it is the President's prerogative, before assenting to the Bill, to request the IEBC to conduct a national referendum for approval of the Bill, another indispensable role. Apart from these, the President, as indeed any voter, is entitled to support a popular initiative by signing it, and in fact he did so in public. Indeed, nothing stops the President from campaigning for or against the initiative.

[1916] In the scheme of Article 257, each party has a clearly defined mantle. Like a relay race, the athletes run only one leg each. It is impractical to start and finish for the team. Under Article 257, the people start as the promoters, hands the baton

to the IEBC; IEBC to the County Assemblies and Parliament, and then the President before the referendum, where the results are declared.

[1917] Although the text of Article 257 does not specifically preclude the President from promoting the popular amendment of the Constitution, into that silence must read the written text that is specific as to who can promote a popular initiative. In it too we must include the nation's history defined by hyper-amendments which were promoted by the Executive branch in conjunction with Parliament. The framers' intention, guided by that background, was to provide a check against a future imperial presidency, by deliberately limiting presidential power in the process to the extent explained elsewhere in the Judgment; to give consent to the Bill and to request the IEBC to conduct a national referendum. The President; the Head of State and Government; the Commander-in-Chief of the Kenya Defence Forces; the chairperson of the National Security Council; and the symbol of national unity cannot be the man on the Pangani bus. He certainly cannot simultaneously exercise his functions under Chapter Sixteen and initiate the process at the same time as an ordinary citizen. **He cannot, as they say, run with the hare and hunt with the hounds.**

[1918] Professors Yash Ghai and JPWB McAuslan in their widely read book, ***"Public Law and Political Change in Kenya: A Study of the Legal Framework of Government from Colonial Times to the Present"*** (1970) Oxford University Press, p. 223, have argued that one of the features of the culture of hyper-amendments under the independence constitution was to take away power from other state organs, and centralize it in the Presidency, thereby establishing an imperial presidency. This, they argued was one of the factors that prompted the demand for constitutional review.

[1919] The constitutional popular initiative introduced in the 2010 Constitution seeks to give to the people a more complete control over the review of the Constitution than they have had in the past. In the past, all the review initiatives

were tied to parliamentary monopoly, without an avenue for the public to participate. Talk of the Lancaster Constitution, and even the subsequent amendments, negotiating a constitution has always been the province of political leaders, while the drafting its text has been expert work. Today the people are involved, not just at the end of the process in a referendum, but also at the point of initiation.

[1920] The role of the people in decision-making is secured by international and regional instruments which, in a sense have helped shape this trend. For example, Article 25 of the International Covenant on Civil and Political Rights (ICCPR), which came into force in 1976, (year of accession by Kenya being 1992) declares that citizens have the right, without unreasonable restrictions *"to take part in the conduct of public affairs, directly or through freely chosen representatives."*

In the region, Article 13 of the African Charter on Human and Peoples' Rights (ACHPR), of 1981 (the Banjul Charter) repeats the language of Article 25 of the ICCPR, that **"***Every citizen shall have the right to participate freely in the government of his country, either directly or through freely chosen representatives"*. See also Article 21 of the Universal Declaration of Human Rights (UDHR).

[1921] From the totality of this analysis, a constitutional amendment can only be initiated by Parliament through a parliamentary initiative under Article 256 or through a popular initiative under Article 257 of the Constitution. This is the essence of Article 255(1) that:

> ***"a proposed amendment to this Constitution shall be enacted in accordance with Article 256 or 257, and approved in accordance with clause (2) by a referendum, if the amendment relates to any of"*** *the matters listed under (a) to (j). This is confirmed by Article 255 (3) that* ***"an amendment to***

this Constitution that does not relate to a matter mentioned in clause (1) shall be enacted either—

(a) by Parliament, in accordance with Article 256; or

(b) by the people and Parliament, in accordance with Article 257."

[1922] For the reasons stated, I agree with the learned Judges that, to the extent that the President took certain steps and actions at the inception of the popular initiative process as explained, the entire process was irredeemably flawed. I would, in the result affirm the conclusion of the Court of Appeal.

(iii) Whether the Second Schedule to the Constitution of Kenya (Amendment) Bill, 2020 was unconstitutional

[1923] Justus Juma and Isaac Ogola petitioned the High Court in Petition No. E402 of 2020, to challenge the constitutionality of clause 10 of the Amendment Bill which had proposed to amend Article 89(1) of the Constitution so as to increase the number of constituencies from 290 to 360, translating to 70 additional constituencies. Also challenged is the Second Schedule to the Amendment Bill made pursuant to clause 74 of the Amendment Bill. Apart from situating the Schedule as part of Transitional and Consequential Provisions, the schedule itself was faulted for distributing the proposed 70 constituencies as follows: ***Mombasa (3); Kwale (3); Kilifi (4); Mandera (1); Meru (2); Embu (1); Machakos (3); Makueni (1); Kirinyaga (1); Murang'a (1); Kiambu (6); Turkana (1); West Pokot (1); Trans Nzoia (2); Uasin Gishu (3); Nandi (1); Laikipia (1); Nakuru (5); Narok (3); Kajiado (3); Kericho (1); Bomet (2); Kakamega (2); Bungoma (3); Siaya (1); Kisumu (2); Nyamira (1);***

Nairobi City (12). On the delimitation of the number of constituencies, the Schedule directs the IEBC to determine, within six months from the commencement date of the Act, the boundaries of the new constituencies using the criteria provided for in Articles 81(d) and 87(7).

[1924] The two respondents' grievance, from the foregoing, are threefold; that the amendment purports to direct the IEBC on the manner of the delimitation and distribution of the 70 new constituencies; to limit the time frame within which this must be done, and finally; to direct the criteria to be applied in the distribution of the newly created constituencies. According to the respondents, under Article 89 constituency boundary delimitation is the sole function of the IEBC, and that in any event, there was at the time the proposals were made, a pending Bill (The Independent Electoral and Boundaries (Amendment)) Bill 2019, before Parliament whose object was to enact the procedures in conformity with Section 36 of the IEBC Act, to streamline the second review of constituencies and wards. Therefore, if the Amendment Bill was to be enacted into law, it would, not only compound the issue of boundary delimitation but also undermine constitutional authority of the IEBC on the question of boundary delimitation.

[1925] The respondents argued further, that the Second Schedule was in violation of Article 89 of the Constitution, for supplanting and usurping the powers and roles assigned to IEBC by the same Constitution, by taking away the right to public participation contrary to Article 10; that without public participation, and an opportunity for those affected by the delimitation to seek review in a court of law, rendered the proposals on delimitation unconstitutional; and that constituency boundary delimitation is not a purely political matter as there are constitutional parameters to be considered in its conception and implementation. For these reasons, the respondents sought the Second Schedule to be declared unconstitutional, illegal and irregular for purporting to set at seventy the number of new constituencies, for predetermining the distribution of seventy

constituencies; for directing the IEBC on its function regarding constituency delimitation; and for determining, by delimitation the number of constituencies and apportioning them within the counties without public participation.

[1926] The only two issues identified by the High Court were:

> *(i) Whether it was lawful for the Bill to set a specific number of constituencies under Article 89(1) of the Constitution; and*
>
> *(ii) Whether IEBC could be directed, as proposed in the schedule to allocate and apportion the constituencies without a delimitation exercise as set out in Article 89 of the Constitution.*

On the first question the court found that, from the history of constitution-making and the text of the Constitution, it was to them clear that, whereas Kenyans were keen to entrench the process, procedure, timelines, criteria and review process of the delimitation of electoral units, they were not so particular about the determination of the actual number of constituencies. Therefore, Article 89(1) of the Constitution which provides for the exact number of constituencies, though a basic structure of the Constitution, is not an eternity clause and can be amended by duly following the amendment procedures in Articles 255 to 257 of the Constitution.

[1927] Turning to the second question, the learned Judges expressed the view that the Amendment Bill was unlawful and unconstitutional for the reasons that it directs the IEBC on its constitutional functions; that it purports to set a criteria for the delimitation and distribution of constituencies which is at variance with that created by Article 89(5) of the Constitution; that in enacting the Second Schedule there was no public participation; that the timelines imposed for the delimitation exercise in the Second Schedule are at variance with those in the Constitution; and finally that, by tucking away the apportionment and delimitation of the seventy newly-created constituencies in the Second Schedule, the new provisions have the

effect of extra-textually amending or suspending their intended impact on Article 89 of the Constitution which forms part of the basic structure of the Constitution and are, therefore, unamendable.

[1928] On a first appeal to the Court of Appeal, the appellants and some of the respondents having been aggrieved, that court, in a majority decision 6:1 agreed with the High Court and upheld the conclusion that the Second Schedule, in so far as it purports to predetermine the distribution of the proposed additional seventy constituencies, and to direct the IEBC on its constitutional function with respect to constituency delimitation, is unconstitutional.

[1929] Although the decision was in relation to the IEBC's constitutional mandate, the IEBC itself has not complained. Instead it is the Attorney-General who has approached the Court seeking that the decision be overturned. When the Court sought to know from learned Counsel representing IEBC what position they hold on the matter, Prof. Githu Muigai, SC's response was merely that:

> ***"Our position is very straight forward. Our powers are not what some of my colleagues are calling basic structure. I am calling them entrenched provisions. The power of IEBC, its mandate is not entrenched. Its mandate can vary, can be amended, can be modified by Parliament in its wisdom by the referendum process, so that we did not feel that it was necessary for us…"***

[1930] Before this Court, on behalf of the BBI National Secretariat and Hon. Raila Odinga, it was submitted that a proposal to amend that which is amendable cannot be unconstitutional and that the effect of the courts' holding somewhat elevated Article 89 of the Constitution to an unamendable clause and put IEBC above the Constitution.

[1931] Submitting in support of the determination of the two courts, the 11th and 12th respondents contend that the proposed boundary delimitations as envisaged by the Amendment Bill is moot, vestigial and is an academic exercise, since by the provisions of Article 89, new boundaries cannot take effect for purposes of an election to be held within 12 months of completion of the delimitation. Apart from that, the 11th and 12th respondents agree with the courts below that the Second Schedule fails to use the proper procedures laid down under Article 89 of the Constitution; that that failure is likely to bring about inequity; that since the decision on delimitation is both scientific and political, it was in error to pre-determine the distribution of the constituencies in the manner proposed in the Schedule; and that IEBC being a Chapter Fifteen commission is independent and impartial from government and other state organs in the discharge of its functions.

[1932] The framed issue on this ground seeks the answer to the question whether the Second Schedule to the Amendment Bill, was unconstitutional. In the preceding paragraphs, I have set out the specific provisions of the Second Schedule that the 11th and 12th respondents challenged before the High Court and the submissions in support and in opposition.

[1933] The number of constituencies today, by dint of Article 89(1), stands at two hundred and ninety constituencies. Because it is the axle upon which the question under consideration turns, it is apposite to reproduce the exact language of Clause 10 of the Second Schedule. It states that:

> ***"10. Article 89(1) of the Constitution is amended by deleting the words "two hundred and ninety" and substituting therefore the words "three hundred and sixty."***

As expressed above, the superior courts below properly directing their mind to the text of the Constitution and the canons of interpretation that demands a purposive and holistic approach, were unanimous in their conclusion, that Article 89(1) is

amendable in accordance with Chapter Sixteen, hence it was constitutional to amend it in order to increase the number of constituencies as proposed.

[1934] The quarrel with the Second Schedule relates to Paragraph 1(1), (2) and (3) that reads:

> ***"(1) Within six months from the commencement date of this Act, the Independent Electoral and Boundaries Commission shall, subject to subsection (2), determine the boundaries of the additional seventy constituencies created in Article 89 (1) using the criteria provided for in Articles 81 (d) and 87 (7).***
>
> ***(2) The additional seventy constituencies shall be spread among the counties set out in the first column in a manner specified in the second column.***
>
> ***(3) The allocation of additional constituencies among the counties specified under subsection (2) shall —***
>
> > ***(a) prioritise the constituencies underrepresented in the National Assembly on the basis of population quota; and***
> >
> > ***(b) be made in a manner that ensures the number of inhabitants in a constituency is as nearly as possible to the population quota"*** [my emphasis].

What the above paragraph does is to set its own timelines, introduces a new criterion on delimitation, and distributes the new constituencies across some 28 counties.

[1935] The entire Article 89(1) to (12) of the Constitution deals exclusively with delimitation of electoral units. After delimiting the constituencies for the National

Assembly to 360, it sets out the manner and period of review of the names and boundaries of constituencies and wards. This task, in terms of the Constitution, is donated to the IEBC, the period being at intervals of not less than eight years, and not more than twelve years, but on condition that any review must be completed at least twelve months before a general election of members of Parliament. Furthermore, if a general election is to be held within twelve months after the completion of a review, the new boundaries cannot be used in that election.

[1936] Clauses (5) and (6) have an elaborate formula, criteria and specific considerations on the delimitation. For instance, the boundaries of each constituency must be such that the number of inhabitants in the constituency is, as nearly as possible, equal to the population quota, but the number of inhabitants of a constituency may be greater or lesser than the population quota taking into account:

> ***"(5)...***
>
> ***(a) geographical features and urban centres;***
>
> ***(b) community of interest, historical, economic and cultural ties; and***
>
> ***(c) means of communication.***
>
> ***(6) The number of inhabitants of a constituency or ward may be greater or lesser than the population quota by a margin of not more than—***
>
> ***(a) forty per cent for cities and sparsely populated areas; and***
>
> ***(b) thirty per cent for the other areas."***

[1937] Besides the duty of the IEBC as a state organ under Article 10 to uphold national values and principles of governance which include participation of the

people, it is specifically enjoined by Article 89(7) to consult all interested parties as it embarks on the boundaries review exercise. Finally, under Clause (10) any person who is aggrieved by the boundaries delimitation exercise may apply to the High Court to review the outcome.

[1938] The Second Schedule, by providing only for a single criterion, the population quota, as the basis for delimitation is clearly incongruous with Article 89 aforesaid. It was also irregular for the promoters to distribute the newly created 70 constituencies to specific counties, and then direct the IEBC to delimit their boundaries based on that single criterion. The Schedule ignored the irreducible constitutional consideration and the existing criteria in Article 89(5), (6) and (7). It is apparent to me that the 70 proposed constituencies were a random guesswork backed by no scientific consideration or driven by the needs of the people expressed through public participation, stakeholder engagement and consultation of interested parties, against Article 89(7). This is because, looking at the record, it is apparent that the first version of the Amendment Bill published on 21st October, 2020 did not provide for the delimitation of constituencies. However, in the subsequent Amendment Bill published, just a month later on 25th November 2020, the Second Schedule to the Amendment Bill popped up for the first time. There was no explanation how it came to be, or who sought for the constituencies as there was no evidence of public participation between 21st October and 25th November, 2020.

[1939] The Second Schedule stipulates a timeline for the delimitation of boundaries that is completely incompatible with the timeline set out in the Constitution itself. While Article 89(2) draws the timeline for the IEBC to review boundaries of constituencies at intervals of not less than 8 or more than 12 years, Paragraph 1(1) of the Schedule drastically reduces this period for the purpose of those additional 70 constituencies to a mere 6 months of the passage of the Bill into law. To cure these conflicts and contradictions, the Amendment Bill

ingeniously at Paragraph 1(6) of the Second Schedule proposes to suspend the operation of the substantive law, Article 89(4) by providing that "the requirement in Article 89(4) does not apply to this particular review for the additional constituencies".

[1940] This infraction together with the procedure and process proposed for the creation, distribution, and delimitation of the proposed 70 constituencies were properly found by the courts below to be flawed. The illegality of this amendment did not escape the eyes of the Joint Justice and Legal Affairs Committee of Parliament. In their Report, ***Joint Report of the National Assembly Departmental Committee on Justice and Legal Affairs and the Senate Standing Committee on Justice, Legal Affairs and Human Rights*** dated April 2021, **(Joint JLAC Report)** after considering the Bill as a whole, and after acknowledging that the task of constituencies delimitation, reviewing their names and boundaries is assigned to the IEBC by the Constitution, they noted that:

> ***"The Committee however, found that the Second Schedule to the bill is unconstitutional, for the following reasons-***
>
> ***a) The attempt to oust the application of Article 89(4) of the Constitution, as proposed in the Second Schedule of the Bill, could only be possible if the Article was amended expressly and not by having separate provisions in the Schedule. This is because the Schedule does not amend Article 89(4) of the Constitution. Even with the provision, Article 89(4) would still exist and operate. As such, this would create parallel and conflicting mandates to review the names and boundaries of constituencies.***
>
> ***b) The Schedule is predicated on clause 74 of the Bill, which deals with transitional and consequential provisions in the Bill. There is no substantive provision of the Bill dealing***

with delimitation of constituencies, on which the Second Schedule would be anchored."

[1941] The only other observation to make before concluding is in respect of the special nature of Transitional and Consequential provisions in a statute or in the Constitution. The courts in numerous cases have considered the place of Transitional and Consequential provisions. See ***Timothy Njoya & 17 Others v. Attorney General & 4 Others,*** Petition 137 of 2011; [2013] eKLR (not to be confused with the ***Njoya Case*** of 2004, to which repeated reference has been made in this judgment). ***Dennis Mogambi Mong'are v. Attorney General & 3 Others,*** Civil Appeal No. 123 of 2012; [2014] eKLR and ***Law Society of Kenya v. Centre for Human Rights and Democracy & 13 Others,*** Civil Appeal No. 308 of 2012; [2013] eKLR. See also the South African Constitutional Court in ***Executive Council of the Western Cape Legislature and Others v. President of the Republic of South Africa and Others*** (CCT27/95) [1995]. The *ratio decidendi* in these decisions can be summarized as follows:

(i) That transitional provisions are as much a part of the Constitution and as much an expression of the sovereign will of the people as the Constitution itself.

(ii) They must be interpreted in context of the principles contained in the Constitution.

(iii) They are intended to assist in the transition from the old into the new order; the bridge between the two constitutional dispensations.

(iv) They are used in the Schedule so as to avoid encumbering the Constitution with provisions that would cease to be of any purpose after they are fully implemented.

(v) That the Constitution must be read as an integrated whole, and that where there is a conflict, then the substantive provisions of the Constitution would prevail.

[1942] Article 262 of the Constitution gives effect to the Transitional and Consequential Provisions that are set out in the Sixth Schedule. The provisions in the Schedule are therefore part of the Constitution. The Transitional and Consequential provisions in the Sixth Schedule have the effect of, *inter alia*, suspending the application of some provisions, extending the application of certain provisions of the former Constitution and specifying interim provisions that would apply during the transition period.

[1943] According to Clause 74 of the Amendment Bill, the transition and consequential provisions set out in the Second Schedule were to take effect on the date of the enactment into law of the Amendment Bill. Without amending the substantive provision, Article 89 or Article 262 or the Sixth Schedule, and by tucking away the amendment in the Schedule and suspending Article 89, the intention was ulterior and in bad faith, to sidestep the constitutionally recognized process of constituencies delimitation; to bypass the constitutional time limits and fast track the process by targeting the next general elections which were not far at the time, but now due in just a few months.

[1944] In conclusion, boundaries by their very nature have political, economic, social and cultural implications. They define geographical areas for the political leaders and their constituents, and therefore allocate political power; define the level of access to and distribution of both human and capital resources. It defines the identities of a people with shared (common) interests. This is perhaps the explanation why boundary delimitation remains one of the most emotive and sensitive processes in a democracy. Boundary conflicts and disputes over resources are experienced between local neighbours, constituencies, and even between nations.

[1945] The history of electoral units' creation in Kenya started with recommendation of the Royal Commission appointed in 1962 to carry out an inquiry into creating 100 constituencies for the newly created nation of Kenya. It recommended the creation of 117 constituencies in 1963. The next reviews were in 1966 and 1986. This phase culminated in the creation of 210 Constituencies in 1996. Even as early as this period, the processes for delimitation employed various methodologies, formally established structure and a set of rules in carrying out the delimitation exercise. This included the participation of the public.

[1946] The next phase came with the infamous 2007 elections conflict. The Independent Review Commission on the General Elections (IREC) was appointed on 14th March, 2008 and chaired by a renowned South African jurist, Johann Kriegler, after whose name the commission's Report was called, (the ***Kriegler Report***). It was to investigate all aspects of 2007 presidential election and to make recommendations to improve electoral process, among others. On the delimitation of electoral boundaries in Kenya, the Report concluded that there were gross disparities in the voting populations of Kenya's constituencies; that this state of affairs breached the fundamental equality principle of democracy which was clearly articulated and enshrined in Section 42 (3) of the former Constitution, namely one person, one vote; and that this long-standing discrimination in itself impaired the integrity of the electoral process. On the basis of its conclusions, the Report recommended, among other interventions, that:

> ***"(a) ...the basic principle for the delimitation of constituencies should be the equality of the vote and the maximum departure from that principle should be clearly defined in the law (equality of the voting strength should be aimed at in all cases, although in rare specially justified circumstances a 5 to 20% deviation range could be accepted). Criteria such as density of population,***

population trends, means of communication, geographical features and community of interests should be retained but they should interfere minimally with the basic principle of equality of voting strength;

(b)the process of delimitation be made accessible to the public through a consultation process and enough time provided for citizens to discuss and challenge the then ECK decisions. That the process should be as transparent as possible."

[1947] The Interim Independent Boundaries Review Commission (IIBRC) ***(the Ligale Commission***) was established on 12th May, 2009, pursuant to section 41(B)(2) of the former Constitution and the Constitution of Kenya (Amendment) Act No. 10 of 2008, as one of the Agenda 4 reform instruments created as part of Government's commitment to implementing electoral reforms. One of its mandates was to make recommendations to Parliament on the delimitation of Constituencies and local authority electoral units and the optimal number of Constituencies on the basis of equality of votes. The Commission's underlying task was to correct historical injustices and gerrymandering of the past in the electoral process which highly contributed to the 2007 chaos as singled out by the ***Kriegler Report***. In its Report of 27th November, 2010, ***the Ligale Commission*** came up with the names and boundaries of two hundred and ninety (290) Constituencies. These were arrived at through a thorough, long- drawn and technical process that lasted nearly 1½ years, fighting fierce battles both in court and in Parliament. That is the genesis of today's Article 89 and the two hundred and ninety (290) Constituencies.

[1948] I have given this background to emphasize the need for an inclusive and extensive consultation of all stakeholders from all arms of government, private sector, citizens, civil society and all interested parties in the delimitation process.

Secondly, to emphasize that delimitation exercise is based on logical framework and a near mathematical formula intended to make the outcome of the exercise equitable and to assure the equality of the vote. It is not based on hypothetical or random notion, picking numbers (70) from the air but rather on empirical formula.

[1949] It was, perhaps sufficient to amend Article 89 (1) and increase the constituencies from two hundred and ninety to three hundred and sixty. Beyond this, everything the promoters proposed in respect of delimitation of constituencies amounted to inter-meddling. After taking a political decision to increase the constituencies to 70, from that stage, it was the IEBC's forte as the technical body charged with the next mandate to take over. Instead, the Second Schedule doled out the 70 Constituencies like candies to 28 counties, leaving out 19, without sufficient explanation. While some counties were allocated up to 12 Constituencies, some stood to get only 1, others 2, 3, 5 and so on.

[1950] On mootness of the question of delimitation in view of the constitutional time limits, I agree that indeed under Article 89 of the Constitution, any new boundaries cannot take effect for purposes of an election which takes place within 12 months of completion of the delimitation. Logically, the delimitation of new constituencies cannot take place now in view of the impending general elections in less than four months. But the issue having been pleaded, argued and determined by the two courts below, and bearing in mind that this question is of public interest, its determination on merit is well-deserved. In any case at the time it was raised in the High Court, there may have been some time to do so. Justification for this course has been provided in a long line of past decisions, for example; the ***National Assembly of Kenya & Another v. Institute for Social Accountability & 6 Others,*** Civil Appeal No.92 of 2015; [2017] eKLR**,** ***Mohamed Abdi Mahamud v. Ahmed Abdullahi Mohamad & 3 Others; Ahmed Ali Muktar (Interested Party),*** SC Petition 7 of 2018; [2019] eKLR,

Chris N Bichage v. Richard Nyagaka Tong'i & 2 Others, SC Petition 17 of 2014; [2017] eKLR.

[1951] In view of all the foregoing, the inescapable conclusion is that I am, respectfully in agreement with the learned Justices that the Second Schedule to the Amendment Bill was inconsistent with the Constitution, to which extent it was correctly so declared. I would reject this ground of appeal.

(iv) Whether civil proceedings can be instituted against the President or a person performing the functions of the office of the President during his/her tenure of office with regard to anything done or not done contrary to the Constitution

[1952] A fundamental tenet of modern constitutionalism is that nobody, regardless of his or her status in society, is above the law. Most Constitutions recognize the need to extend to certain persons or group of persons in the service of governments some degree of protection against civil or criminal actions that do not ordinarily apply to all citizens. Historically, in the era of absolute monarchs, the monarchs were granted absolute immunity because they were seen as personification of the State, hence the Common Law maxim, *"the King can do no wrong*."

[1953] Immunity of rulers was a wide-spread and accepted phenomenon. In the case of ***Nixon v. Fitzgerald***, 457 US 731 (1982) ***(Nixon Case)*** the Supreme Court of the United States of America explained the rationale for this. It held that a sitting President enjoys complete immunity from civil liability for actions taken while in office, reasoning that the President must be able to make decisions and take actions for the nation without fear of civil liability. The key phrase is ***actions taken while in office***. So that in all other acts that are completely unconnected with official duties, the President is not immune from civil action as demonstrated

in ***Clinton v. Jones***, 520 U.S. 681, 117 S. Ct. 1636 (1997), where an action for private damages was brought against a sitting President for sexual advances that allegedly took place before his term of office began. The defence of immunity was rejected on the ground that the acts complained of were unofficial and outside the protection envisaged in the Constitution. It is plain from this exposition, that the United States of America practices qualified presidential immunity in civil proceedings, and only for acts done in the discharge of official duties.

[1954] Some of the justifications for immunity provisions are; to ensure the unimpeded performance of public functions and bar any targeted prosecutions; shield the office holder against frivolous and vexatious litigation or political persecution; and avoid the likelihood of distraction and embarrassment. The office holder will be reluctant to make a decision or exercise discretion for fear of attracting liability should the decision or discretion turn out to be erroneous. But even as the immunity is extended to certain officeholders, including in our case, the President, that immunity must be balanced with responsibility and accountability. According to Charles Manga Fombad and Enyinna Nwauche, in their publication carried in ***African Journal of Legal Studies*** 5 (2012) 91–118 titled ***Africa's Imperial Presidents: Immunity, Impunity and Accountability***, extensive abuse of presidential powers in Africa can be attributed to:

> ***"...lack of effective constitutional measures of accountability and the numerous presidential immunities which enable leaders to escape from responsibility for their crimes."***

This is how the question presently under review arose.

[1955] It is important to set it out clearly in order to understand the precise relief and the context of the relief Mr. Aluochier, who raised it, had sought. In his H.C. Petition No. E426 of 2020, ***Isaac Aluochier v. Uhuru Muigai Kenyatta &***

Others, Mr. Aluochier asked the court to determine, in so far as they are relevant here:

> *(i) Whether the President can lawfully initiate a Constitutional amendment through a popular initiative process; establish the Steering Committee, and whether the Steering Committee had locus standi to promote constitutional changes pursuant to Article 257; and*
>
> *(ii) Whether civil court proceedings can be instituted against the President or a person performing the functions of the office of President during the tenure of office in respect of anything done or not done in excess of powers donated by the Constitution.*

[1956] Mr. Aluochier believed that the President lacked the capacity to initiate the amendment of the Constitution through a popular initiative; that his actions of appointing the BBI Steering Committee for this purpose was equally illegitimate, unconstitutional and void; that for the President's involvement in an illegality in which funds from the Exchequer were expended, he was liable in his personal capacity to restitute the public coffers. The following two reliefs sought against the President are germane. Mr. Aluochier prayed that the court may find that:

> *(a) Civil Court proceedings can be instituted against the President or a person performing the functions of the office of President during tenure of office for acting without authority under the Constitution in initiating changes to the Constitution.*
>
> *(b) That the President contravened Chapter 6 of the Constitution, specifically Article 73(1)(a)(i), for initiating and promoting a constitutional change process without authority.*

[1957] I should make it clear that the petition was brought against ***Uhuru Muigai Kenyatta & Others***. Uhuru Muigai Kenyatta, not as the President of

the Republic of Kenya, but in his personal capacity. That perhaps explains why the learned Judges of the High Court in their Judgment referred to the President by his name and not his designated official title. This position is also reflected on the heading of this judgment, just as it was in the proceedings and Judgments of the two superior courts.

[1958] In considering the questions posed to them by Mr. Aluochier, the learned Judges of the High Court agreed with him and declared in their final interdict that:

> *(i) Civil Court proceedings can be instituted against the President or a person performing the functions of the office of President during their tenure of office in respect of anything done or not done contrary to the Constitution.*
>
> *(ii) The President does not have authority under the Constitution to initiate changes to the Constitution,*
>
> *(iii) That the entire BBI Process culminating with the launch of the Constitution of Kenya Amendment Bill, 2020 was done unconstitutionally and in usurpation of the People's exercise of sovereign power, and*
>
> *(iv) That Mr. Uhuru Muigai Kenyatta contravened Chapter 6 of the Constitution, and specifically Article 73(1)(a)(i), by initiating and promoting a constitutional change process contrary to the provisions of the Constitution on amendment of the Constitution.*

[1959] An appeal to the Court of Appeal challenging these findings partially succeeded, with the Court affirming that:

> *(i) The President does not have authority under the Constitution to initiate changes to the Constitution; and*
>
> *(ii) Civil court proceedings can be instituted against the President or a person performing the functions of the office*

of President during their tenure of office in respect of anything done or not done contrary to the Constitution.

[1960] It is instructive to note that the Court of Appeal set aside the orders declaring that the President was in contravention of Chapter Six of the Constitution. It faulted the High Court for making adverse orders against the President when it was obvious from the record that he had not been served with Mr Aluochier's petition in which a declaration of his personal liability had been sought.

[1961] I am myself satisfied from the record and analysis of the facts by each of the learned Justices of the Court of Appeal that the President was not served, heard or represented by Counsel throughout the hearing in the High Court; that at the hearing an attempt by the Attorney General to step in for him was rejected, because the action had been brought against the President in his personal capacity. The learned Justices properly, therefore set aside all the orders made against the President in that capacity. All the other petitions where the President's actions were challenged, the Attorney General was sued, on behalf of the State, I believe, because it was acknowledged that the actions complained of were official.

[1962] Before this Court, the President's contention is that the superior courts' finding on his immunity is contrary to the Constitution; and that on a plain reading, Article 143(2) of the Constitution provides that civil proceedings cannot be instituted against a president or a person performing the functions of that office during the tenure of office, and in respect of actions or omissions done in the exercise of their power under the Constitution. Accordingly, the provision is intended to shield a sitting president from civil suits.

[1963] We have been invited to examine this ground by drawing a parallel between the President's immunity under Article 143 (1) and (4), and judicial immunity in Article 160 (5). The only limitation to the President's immunity, according to the President, is with regard to crimes under international treaties

which expressly prohibit immunity. Judicial immunity, on the other hand only extends to acts done in good faith. Therefore, if the drafters of the Constitution intended to limit the President's immunity, they would have done so in express terms. The President cited in support of this assertion our own decision in ***Bellevue Development Company Limited v. Francis Gikonyo & 7 Others,*** SC Petition 42 of 2018; [2020] eKLR, (***Bellevue Case***) the cases of ***Nixon Case, Mississippi v. Johnson*** 71 US (4 Wall.) 475 (1867), and ***Motsaledi v. Botswana Democratic Party and Others*** (2010) 3 LRC 394.

[1964] Accordingly, it is further submitted, there are only two alternative remedies to challenge the President's actions or omissions: first, by suing the Attorney General who, pursuant to Article 256(4) of the Constitution represents the national government in court or other legal proceedings, other than criminal proceedings; and the second option is to move a motion for the impeachment of the President pursuant to Article 145 of the Constitution. On costs, the President submits that, since costs follow the event, and because he was improperly sued in his individual capacity, he is entitled to costs in this Court and the Court of Appeal to be borne by Mr. Aluochier.

[1965] The 10th respondent, 254 Hope, has submitted that the President enjoys functional immunity like all public officials who perform state duties, in addition to sovereign immunity. The former protected him from civil liability for official functions, while he enjoys sovereign immunity as the Head of State. Because of this, they submit that the only way civil proceedings may be instituted against the President for violations of the Constitution is through the process of impeachment. The Judgment of the Court of Appeal in ***Minister for Internal Security and Provincial Administration v. Centre for Rights Education & Awareness (CREAW) & 8 Others***, Civil Appeal 218 of 2012; [2013] eKLR (***Minister for Internal Security and Provincial Administration Case***) was relied on to support this postulation.

[1966] Mr. Aluochier, on his part submitted that under Article 143(2) the President is personally responsible for acts done during his term of office but outside the confines of the Constitution and therefore can be sued. For this statement he cites the ***Isaac Aluoch Polo Aluochier v. Uhuru Muigai Kenyatta & Another,*** HC Petition No. 360 of 2013; [2014] eKLR an action Mr. Aluochier himself instituted against the President and the Deputy President in their names, whose *ratio* is not relevant to the question of immunity but relates to representation of the President when sued in an individual capacity.

[1967] Before us while highlighting his written submissions, Mr. Aluochier complained that the two superior courts below made pronouncements that were wider than his original prayers before the High Court, where he had only sought a declaration that the President had acted outside the functions of his office by unlawfully establishing the BBI Steering Committee, for which he ought to have been held liable. For this reason, he has urged us to revert to his prayer as set out in his petition at the High Court, set aside the Judgment of the Court of Appeal on this issue and declare that the President engaged in an illegality for which he ought to be held personally liable. This plea was made from the Bar, since Mr. Aluochier has not challenged the decision on appeal. In any case, I respectfully agree with the Court of Appeal that the President was condemned unheard. That aside, Mr. Aluochier draws a distinction between the President's immunity in civil proceedings and in constitutional proceedings, contending that the immunity does not extend to the latter. Mr. Morara and Ms. Wakesho, were in agreement with the last part of Mr. Aluochier's submissions.

[1968] I have considered these submissions. In paragraph **1956** above, I have set out what Mr. Aluochier had sought in the High Court, and which he has reiterated in his submissions before us. I have also stated that, according to him, both courts below misunderstood his plea and as a result made erroneous pronouncements. He addressed the Court as follows:

"I now turn to the issue which is generating a bit of some controversy here, Presidential immunity. I am the one through my Petition in the High Court E426 of 2020 who brought or dragged the President to Court and I asked for the orders that I asked for based on Article 143(2). The pronouncement that came from the High Court as affirmed by the Court of Appeal was not exactly what I asked for. I simply said that you can bring, institute civil proceedings against the President for actions that he undertakes or omissions outside his functions of office. In other words, Article 143(2) protects him, gives him immunity while he is performing the functions of office as President.

So I asked for clarification you can bring a suit against the President if it touches on a matter outside the functions of the Presidential office. And I basically said when he was busy setting out Kenya Gazette Notices establishing the BBI steering committee, he was acting outside the functions of office. Because there is nowhere where *(sic)* ***the Constitution authorizes him to engage himself in constitutional change matters outside Article 256. Yet here he was establishing a public body to consider the change of the Constitution. Because he had acted outside the functions of his office Article 143(2) did not prohibit us from instituting an action against him and that is basically what I had asked for.***

But what the High Court came up with was that you can sue him for any conduct his actions or omissions that are contrary to the Constitution. The pronouncement of the

Court was wider than what I had asked for. I had confined myself to conduct outside his functions of office. But if you apply what the High Court said, you can sue him for anything that he does and its unconstitutional. Unconstitutional includes both functions within his office and functions outside his office and that is the bit that I disagree with. I am saying that particular order was wider than my prayer. I am urging this Court to revert to my prayer and not go beyond my prayer to what the Court, High Court and as affirmed by the Court of Appeal."

[1969] Understood, as it were, from the horse's mouth in that context, the question was, one, whether the President was personally liable for acting outside the functions of his office by unlawfully establishing the BBI Steering Committee and for all the actions flowing from that appointment; and two, if he was liable could he, together with all public officers who authorised the expenditure of public funds on the unlawful process be ordered to restitute?

[1970] While the High Court rejected the prayers to direct the President and public officers to restitute the funds used in the exercise, the Court of Appeal, on its part set aside the finding by the High Court that the President had contravened Chapter Six of the Constitution.

[1971] The Court of Appeal, having arrived at the conclusion that the President was not heard in his defence on allegations of breaching Chapter Six of the Constitution, it was moot to consider whether the President was properly sued in his personal capacity, all the orders made against him in that capacity having been set aside. Consider too that both courts nullified the popular initiative on the ground that the President was not qualified *qua* President to initiate it, confirming that his actions, the gazette notices, and so on, were official.

By Article 143:

" Article 143. Protection from legal proceedings

...

(2) Civil proceedings shall not be instituted in any court against the President or the person performing the functions of that office during their tenure of office in respect of anything done or not done in the exercise of their powers under this Constitution."

[1972] Mr. Aluochier's question was answered; that no civil proceedings could be instituted against the President in his personal capacity in respect of his role in the proposed amendments. That would have been sufficient to conclude this ground, but for the arguments as to whether or not the President enjoys absolute immunity.

[1973] This appeal is not concerned with immunity of the President in criminal proceedings under Article 143(1) (4), which is a fairly clear provision; that other than crimes for which the President may be prosecuted under any treaty to which Kenya is party and which prohibits such immunity, the President's immunity to criminal acts under municipal law is absolute. This contrasts with Section 14 of the former Constitution where no criminal proceedings **"whatsoever"** could be instituted or continued against the President while he held office. Clause (4) above now qualifies the immunity in respect of crimes under international treaties.

[1974] The appeal relates to immunity of the President under Article 143(2) in so far as civil proceedings are concerned. This Court has finally clarified in ***Deynes Muriithi & 4 Others v. Law Society of Kenya & Another,*** SC Civil Application No. 12 of 2015; [2016] eKLR**,** contrary to the submissions by Aluochier, 254 Hope and Wakesho, that proceedings commenced by way of constitutional petitions, though under special jurisdiction, are nonetheless in the nature of civil proceedings.

[1975] I cannot agree more that the route taken by the High Court and the Court of Appeal in responding to Mr. Aluochier's contention was slightly overboard. Their determination of matter in the manner they did has, however presented a chance to this Court to express itself directly on the question for the first time.

[1976] Under Article 131 of the Constitution, the people of Kenya acknowledging the immensity and enormity of the office, declared that the President shall not hold any other State or public office, except that of President. This is because the President has been ordained and designated the President of the Republic of Kenya, the Head of State and Government; the Commander-in-Chief of the Kenya Defence Forces; the chairperson of the National Security Council; and above all, a symbol of national unity. In the discharge of the authority of his office, the President is enjoined to respect, uphold and safeguard the Constitution; to safeguard the sovereignty of the Republic; to promote and enhance the unity of the nation; to promote respect for the diversity of the people and communities of Kenya; and to ensure the protection of human rights and fundamental freedoms and the rule of law. Because of the magnitude and exacting nature of these responsibilities, the Constitution grants the President immunity to enable him or her to discharge the functions enumerated above with as much freedom, flexibility and peace of mind as possible.

[1977] From my reading of Article 143, there are two scenarios to consider for the purpose of this ground: the liability of a sitting President and the liability of a former President, for anything done or not done during the presidency. There are also two kinds of acts to consider: official acts which arise from the exercise of the duties of a President, and personal or private acts which are outside the President's official duties.

[1978] By issuing the two notices appointing both the BBI Taskforce and the BBI Steering Committee, the President was acting not in his private capacity but as the President of Kenya. Both the High Court and the Court of Appeal rejected any

suggestion that the President was acting as an ordinary citizen. Plainly, by parity of reasoning, civil proceedings could not be instituted against the President ***in his personal capacity*** during the tenure of his office in respect of the things he did in respect of constitutional amendment. The immunity under Article 143 is granted to the President to insulate him from any type of civil action that may be instituted against him, in person, for any transgressions while in office.

[1979] The actions or omissions of the President during the tenure of office must be presumed to be done or not done in the exercise of the powers under the Constitution because ultimately the intention of the framers of the Constitution was to protect him from civil suits for personal liabilities while serving the nation, performing official functions. The CKRC Final Report at para. 27.14.4, page 425 recommended that the "***President should receive protection from any legal proceedings that may be instituted during his tenure of office.***"

[1980] The extent to which the President's immunity extends is in respect to official actions while in office for which no civil proceedings can be brought against him ***in his personal capacity, in his name***. Because the President's actions while in office are actions of the State and not personal, any person who is aggrieved by his exercise of state power has a recourse. The first recourse is to challenge the action or omission in court by naming the Attorney General, as a respondent in a judicial review application or a constitutional reference. This has been done in innumerable instances. The Attorney General is sued by virtue of not only being the principal legal adviser to the Government but also because under Article 156 (6) he is enjoined to ***"promote, protect and uphold the rule of law and defend the public interest"***. He is not sued on vicarious or agency capacity of the President and judicial review proceedings will not amount to proceedings against the President but against the State itself with any ensuing liability being made against the State within the realm of public law.

[1981] Long before the Judgments of the two courts in this matter, it is observed that Kenyan courts had in a long line of decisions consistently established that, while the President could not be sued in his personal capacity for actions or omissions connected to the performance of the office, he could nonetheless be held accountable through judicial review proceedings. [See ***Jean Kamau & another v. Electoral Commission & 2 Others*** Misc. Application No.193 of 1998; ***Republic v. Chief Justice of Kenya & 6 Others Ex-parte Moijo Mataiya Ole Keiwua,'*** Misc Civil Application 1298 of 2004; [2010] eKLR; and ***Abdul Karim Hassanaly & another v. Westco Kenya Ltd & 3 others,*** HCCC No. 1338 of 1997; [2003] eKLR], all decided under Section 14 of the former Constitution, which bears striking resemblance to the present Article 143. The following decisions are based on Article 143: ***Julius Nyarotho v. Attorney General & 3 others,*** Misc. Civil Application 36 of 2012; [2013] eKLR; ***Kenya Human Rights Commission and Another v. Attorney General & 6 Others,*** Civil Appeal No. 147 of 2015; [2019] eKLR and ***Katiba Institute v. President of Republic of Kenya & 2 Others; Judicial Service Commission & 3 Others (Interested Parties),*** Constitutional Petition No. 206 of 2020; [2020] eKLR. In the latter the High Court stated that:

> ***"It would follow from the above decisions, therefore, that although there is immunity for the 1st respondent*** *(the President)* ***from prosecution, the same does not bar prosecutions of a civil or constitutional nature being mounted, which challenge exercise of power by the 1st respondent, save that such proceedings ought not to be commenced against the 1st respondent, whether as the individual occupant of the office or in his official capacity, but rather the same ought to be against the 2nd respondent*** *(the Attorney-General)****. That way there is compliance with Article 143 of the Constitution. To that extent, it can be said***

that there was a misjoinder of the 1st respondent, and the 1st respondent ought not to have been named as or made a party in these proceedings" [my emphasis].

[1982] Similarly, in the ***Minister for Internal Security and Provincial Administration Case,*** where the Gazette Notice being challenged was issued by President Mwai Kibaki, appointing 47 County Commissioners pursuant to the provisions of Section 17 of the 6th Schedule of the Constitution of Kenya 2010, the action challenging the appointments was instituted against the Attorney General. In fact, the first prayer in the Judicial Review application sought an order of *certiorari* ***"removing to this Honourable Court for purposes of being quashed and to quash the decision of His Excellency the President of the Republic of Kenya, Honourable Mwai Kibaki, carried out or published in the Kenya Gazette Notice…"***. No reliefs were sought specifically and personally against President Kibaki.

These decisions remain persuasive.

[1983] The second recourse is for the party aggrieved by the President's alleged violation of the Constitution or of the law for acts done or omissions made by the President not in his or her official capacity, to institute civil action at the end of his or her tenure, because Article 143(3) holds the time from running for wrongful actions committed while in office until he or she leaves office. It is clarified that this Article only applies to civil wrongs of a personal nature not connected with the office. That must have been the intention of the framers. Why would the President be sued for acts done officially once he leaves office, when he is an ordinary citizen?

[1984] Finally, in addition or as an alternative to the foregoing, where there is a basis to conclude that the President has engaged in gross violation of the Constitution, or law, or where there are serious reasons for believing that the President has committed a crime under national or international law; or is guilty

of gross misconduct, under Article 145, an impeachment motion may be moved in Parliament against the President.

[1985] To conclude, immunity of the President in Article 143, like those extended to the other two branches of government; the Legislature and the Judiciary is in the public interest. Immunity under Article 143 is intended to insulate the officeholder of the presidency from the fear of personal liability for official actions and omissions. It is essentially meant to protect the dignity of the office of the President and not the person of the President. The President will only lose immunity if he leaves office or is impeached. See the ***Bellevue Case***.

[1986] From the foregoing the President does not enjoy absolute immunity. An absolute immunity would hoist the office of President or the holder above the Constitution against the true intendment of Article 2 of the Constitution. The Court of Appeal fell into error in the manner it interpreted Article 143 of the Constitution and in the process arrived at a wrong conclusion whose effect is to stripe the President of protection guaranteed by the Constitution.

[1987] I would, in the circumstances, and for the reasons given, set aside the Judgment of the Court of Appeal to the extent explained above.

[1988] Regarding costs, it is trite that costs follow the event. However, they are discretionary and are not awarded as a matter of course, the discretion being exercised judiciously. Having earlier noted that the route taken by both superior courts below went beyond what Mr. Aluochier had originally sought, it would be against the interest of justice to award costs against him in favour of the President this being a public interest litigation, I would not award costs.

(v) The place of public participation under Article 10 vis-a- vis the role of IEBC under Article 257(4) of the Constitution; and

whether there was public participation in respect of the Constitution of Kenya (Amendment) Bill, 2020

[1989] As framed, this issue seeks two answers; what is the place of public participation under Article 10 *vis-a-vis* the role of IEBC under Article 257(4) of the Constitution; and two, whether there was public participation in respect of the Amendment Bill. Because the latter question is broad in scope and in order to determine it is important to contextualize it.

[1990] Out of the eight petitions filed in the High Court, three raised different aspects of public participation. In Petition No. E402 of 2020, Justus Juma and Isaac Ogola were concerned with public participation in the constituencies delimitation exercise and prayed that the Second Schedule to the Amendment Bill be declared unconstitutional and illegal for want of public participation.

[1991] Morara Omoke, filed Petition No. E416 of 2020**,** to complain that the appointment of the BBI Taskforce and BBI Steering Committee members were done without public participation; that the debate of the Amendment Bill in the assemblies was hurried in a manner that disregarded the sovereignty of the people and public participation; that there was no public participation prior to the collection of signatures from the public; that the BBI National Secretariat failed to provide hard copies of the BBI Reports and the Amendment Bill to the public; and that by publishing the reports and the Bill online, the people were disenfranchised. For these reasons, Mr. Morara sought a declaration that the process violated Articles 10, 33, 35 and 38 of the Constitution; that signatures were collected before providing the people with copies of the Interim and Final BBI Reports; and that the Amendment Bill was not in, Kiswahili, indigenous languages, Kenyan Sign language, Braille and other indigenous communication formats and technologies accessible to persons with disabilities.

[1992] The third Petition No. E400 of 2020, was brought by Thirdway Alliance Kenya raising similar questions as those raised by Mr. Morara, for instance,

whether there was adequate civic education and public participation prior to the collection of signatures in support of the Amendment Bill; and that by holding their meetings in city hotels, the BBI Steering Committee alienated the public and gave prominence to political leaders.

[1993] In response the Attorney General, the BBI Steering Committee, the BBI National Secretariat, Hon. Raila Odinga, and those respondents who are opposed to the petition submitted that the issue of public participation was not ripe at this stage as the process had several different stages with elements of public participation; from the collection of signatures, at county assemblies, in Parliament, to a referendum; that the cumulative effect and sufficiency of public participation could only be assessed at the end of the process. The BBI Steering Committee, the BBI National Secretariat and Hon. Raila Odinga, for their part insisted that notwithstanding the submissions to the contrary, there was comprehensive voluntary public participation in the deliberations of the Taskforce where all persons were invited; some participated by attending, and others by submitting written memoranda. Thirdway Alliance's failure to take part could not be visited on the promoters. Thirdway Alliance was accused of presenting generalized allegations and failing to plead with specificity any examples of any persons who had complained of being excluded from the process, or whose views were ignored or rejected, or who were prevented from making their submissions to the BBI National Secretariat, or who signed the form in support without knowing what they were signing.

[1994] In relation to the issue at hand, the High Court framed this single issue:

> ***"Is it permissible for County Assemblies and Parliament to incorporate new content into or alter existing content in a Constitution of Kenya Amendment Bill through a Popular Initiative following Public Participation exercises?"***

[1995] The Court had been asked to consider whether County Assemblies could incorporate views received during public participation. Could the assemblies, for example, amend the Amendment Bill on the basis of those views. The court was clear that the process being a popular initiative by dint of Article 257(5) and (7) of the Constitution there is no room for County Assemblies and Parliament to incorporate any new views expressed through public participation. The Court of Appeal agreed and there is no further challenge before us.

[1996] In its final disposition, the High Court only pronounced itself on the issue of public participation with regard to delimitation of constituencies and declared that the delimitation of the number of constituencies and their apportionment within the counties was unconstitutional for want of public participation.

[1997] It will be apparent from the foregoing that not all the issues relating to public participation as raised by different parties, were answered by the court. Even the issue framed did not encapsulate the specific grounds upon which the three petitions were premised.

[1998] The real arguments regarding public participation, however, were directed at the promoters and IEBC. In a majority opinion the Justices of Appeal faulted the promoters of the Amendment Bill for not carrying out civic education and public participation. According to the issue framed by *Musinga, (P),* in the lead Judgment, which was adopted by all the Justices except *Gatembu, J.A*, the court set out to determine the question:

> ***"Whether the proposed amendments as contained in the Constitution Amendment Bill, 2020 were by popular initiative and whether there was public participation."***

For *Gatembu, J.A* the issue was:

"The scope of popular initiative under Article 257 of the Constitution and the place of public participation in that regard."

[1999] In the end, both framed issues sought to answer the question, whether there was public participation in the process. The nature of the process as a popular initiative under Article 257 is not in doubt. Five of the seven Justices of Appeal were in agreement that:

(i) *There was no evidence to demonstrate that from the collection of signatures, the process was conducted transparently, nor was there civic education conducted where each of the 74 proposed amendments were explained to the people and where they understood and appreciated the ramifications of each of them; neither was the Bill published and distributed;*

(ii) *There was need to distribute to the public the Task Force and Final Steering Committee reports and the impugned Bill in Kiswahili, indigenous languages, braille and sign language before the referendum and that the collection of a single set of signatures to endorse all the contemplated constitutional amendments was in violation of the Constitution;*

(iii) *There was no evidence that there was public participation before the collection of signatures in support of the proposed Bill; and*

(iv) *Under* ***Chapter Sixteen*** *of the Constitution and* ***Article 88*** *of the Constitution, it is the role of IEBC, which has resources, to conduct or supervise referenda and elections as well as voter education, and not the promoters who are ordinary citizens.*

[2000] While *Sichale, J.A* did not express herself one way or the other on this question, *Tuiyott, J.A* on the other hand, walked a different path alone, finding error in the decision of the High Court, especially that there was lack of meaningful

public participation and sensitization prior to the collection of signatures in support of the Bill. In his view, no such conclusion could be arrived at without evidence proving that any voter who signed to support the proposed amendments had signed without having been provided with copies of the Amendment Bill or without knowing what they were signing for; considering too that a copy of the Amendment Bill had been posted on the internet; that to insist on a country-wide civic education and public participation exercise at the time of collection of the one million signatures is to place a burdensome financial and logistical obligation on the promoter; and that for the purpose of collection of signatures, the promoters needed not to collect signatures from the country at large or conduct a nation-wide public participation.

[2001] The Court of Appeal, like the High Court does not, in its final disposition make a specific declaration on whether the Amendment Bill was subjected to public participation, and roles of the promoters and IEBC in the process. It does, though make a declaration regarding public participation in two instances, that the basic structure of the Constitution can only be altered through four sequential steps which include public participation and secondly, that the delimitation of constituencies in the Second Schedule was done without public participation.

[2002] Before this Court, the very arguments in the courts below were repeated, and no purpose will be served in regurgitating them here. The main arguments, on the one hand are that the Court of Appeal misapplied the law of public participation under Chapter Sixteen by insisting that it was lacking at the point of signature collection and for holding that the IEBC was duty-bound to be satisfied at the point of receiving signatures and the Amendment Bill that the promoters had conducted public participation. The other team argued that in the context of Chapter Sixteen, public participation is a continuous process whose efficacy or lack thereof can only be assessed by evaluating each stage at the end of the exercise. They further submitted that there was no proof of any voter who was aggrieved by the manner public participation was conducted.

[2003] Based on these arguments, the twin questions before us are specific; the place of public participation under Article 10 in relation to the role of IEBC under Article 257(4) of the Constitution; and whether there was public participation in respect of the Amendment Bill.

[2004] Public participation is today a constitutional imperative, recognized as one of the principles of good governance and accountability. It runs through the entire Constitution, and is a mandatory requirement in all legislative processes, constitutional amendment and constitution-making.

[2005] This Court in the ***British American Tobacco Kenya, PLC (formerly British American Tobacco Kenya Limited) v. Cabinet Secretary for the Ministry of Health & 2 Others,*** SC Petition No. 5 of 2017; [2019] eKLR***, (BAT Case)*** after an extensive review of both local and foreign judicial authorities on public participation, which suggest that there is a style on which public participation is to be modeled, set out the following parameters and legal framework:

> ***"[96] From the foregoing analysis, we would like to underscore that public participation and consultation is a living constitutional principle that goes to the constitutional tenet of the sovereignty of the people. Consequently, while Courts have pronounced themselves on this issue, in line with this Court's mandate under Section 3 of the Supreme Court Act, we would like to delimit the following framework for public participation:***
>
> ***Guiding Principles for public participation***
>
> ***(i) As a constitutional principle under Article 10(2) of the Constitution, public participation applies to all aspects of governance.***

(ii) The public officer and or entity charged with the performance of a particular duty bears the onus of ensuring and facilitating public participation.

(iii) The lack of a prescribed legal framework for public participation is no excuse for not conducting public participation; the onus is on the public entity to give effect to this constitutional principle using reasonable means.

(iv) Public participation must be real and not illusory. It is not a cosmetic or a public relations act. It is not a mere formality to be undertaken as a matter of course just to 'fulfill' a constitutional requirement. There is need for both quantitative and qualitative components in public participation.

(v) Public participation is not an abstract notion; it must be purposive and meaningful.

(vi) Public participation must be accompanied by reasonable notice and reasonable opportunity. Reasonableness will be determined on a case to case basis.

(vii) Public participation is not necessarily a process consisting of oral hearings, written submissions can also be made. The fact that someone was not heard is not enough to annul the process.

(viii) Allegation of lack of public participation does not automatically vitiate the process. The allegations must be considered within the peculiar circumstances of each case:

the mode, degree, scope and extent of public participation is to be determined on a case to case basis.

(ix) Components of meaningful public participation include the following:

a. clarity of the subject matter for the public to understand;

b. structures and processes (medium of engagement) of participation that are clear and simple;

c. opportunity for balanced influence from the public in general;

d. commitment to the process;

e. inclusive and effective representation;

f. integrity and transparency of the process;

g. capacity to engage on the part of the public, including that the public must be first sensitized on the subject matter."

I am accordingly guided by these principles in answering the framed questions.

[2006] Under Article 257 (4) of the Constitution:

"The promoters of a popular initiative shall deliver the draft Bill and the supporting signatures to the Independent Electoral and Boundaries Commission, which shall verify that the initiative is supported by at least one million registered voters."

Plainly, the role of IEBC from this Article is clear, that upon receipt of the Amendment Bill and the one million signatures, it shall *"**verify that the initiative is supported by at least one million registered voters**."*

[2007] The courts below seem to suggest, with respect, erroneously, that what is to be verified are the signatures, yet Article 257 (4) is specific that what is to be verified is **"*that the initiative is supported by at least one million registered voters*"**. Since the issue of verification is not a ground of appeal before us, I deviate briefly and say only the following in that regard.

[2008] By Article 88(4) IEBC is responsible for conducting or supervising referenda and elections to any elective body or office established by the Constitution, and, in particular, it is responsible for the continuous registration of citizens as voters and the regular revision of the voters' roll, among other functions. Because it is the repository of voters' particulars, it is true that only the IEBC can verify that those whose particulars and signatures are submitted as evidence of support of the process are indeed voters who are registered according to their records.

[2009] Remember, that prior to the collection of signatures, IEBC, had upon request by the BBI National Secretariat approved the form for collection of signatures. From that form IEBC would be able to ascertain and confirm the correctness of the details supplied against the signatures.

[2010] According to an affidavit filed in the High Court in response to one of the petitions, the IEBC confirmed that indeed it maintains a Register of Voters that contains biometric data and other particulars of every registered voter. The IEBC also has a record of all Form As' for each registered voter. That form contains a provision for the signature or thumbprint of a voter, the voter's constituency, county, ward, registration centre, surname, other names, identity card number or Kenyan passport number, date of birth, sex, residential address, contact telephone, postal address, email, and particulars of any disability a registered voter may have.

[2011] In that form the voters in support of the proposed amendments are required to indicate their names, identity card number or passport number, constituency, county, ward, polling station, mobile telephone number, email address and signatures or thumb print. It is from these particulars that the IEBC was required to verify the one million supporters of the initiative. It is in the discretion of the IEBC to use whatever method to verify the authenticity of the information supplied in the form. They have done it before in both *Okoa Kenya* and *Punguza Mizigo* initiatives. Whatever method it used in the present exercise, the IEBC was able to certify that 3.1 million registered voters expressed support for the initiative, 2.1 million more than the threshold of Article 257(4). As a matter of fact, no one has doubted this or identified any flaw with that outcome. The IEBC confirmed that in the course of verification, names without signatures, signatures without names, National ID or passport numbers and duplicated names were removed. That is why from a total of 4.4 million people who are alleged to have given their support for the amendments, only the details of 3.1 million could be verified. This could only be possible through a verification exercise. The IEBC also asked the promoters to deposit affidavits to confirm that the information and signatures were collected with consent of the parties. The verification process, in my considered view will only involve forensics examination of signatures where doubt has been raised as to their authenticity.

[2012] Therefore, while I agree with the submissions that public participation in respect of a proposed constitutional amendment should be seen as a continuum, from collection of signatures all the way to the referendum, it is equally true that public participation must be conducted at each stage where it is required; that it is illogical to wait until the process is concluded to ascertain whether it was effective or done according to the law.

[2013] I have already in the previous paragraphs found, in agreement with the two courts, in respect of delimitation of constituencies, that there was no public participation, the absence of which, among other reasons rendered that exercise

and the proposed delimitation fatally flawed. I have also expressed my satisfaction with the aspect of public participation in what the two courts labelled "four sequential steps" to constitutional amendment.

[2014] Under Article 257(4) read with (5) the role of IEBC, after receiving the draft Bill and the signatures, is two-fold; to verify that the initiative is supported by at least one million registered voters and to be satisfied that the initiative meets the requirements of Article 257. It is only upon these two elements being met that IEBC will submit the draft Bill to each of the 47 County Assemblies for consideration.

[2015] Does this mandate involve enquiring whether the promoters, in the course of collecting the signatures to support their initiative, carried out public participation?

[2016] To begin with, Clause (5) of Article 257 requires, in mandatory language, the IEBC to be ***"satisfied that the initiative meets the requirements of this Article"***. ***"This Article"*** means Article 257. There is no obligation whatsoever under Article 257 imposed upon IEBC to go behind the draft Bill and the list of voters to enquire if the promoters conducted public participation before the collection of signatures. If it was to do that, it would be in breach of Article 2 (2) of the Constitution which directs that **"*no person may claim or exercise State authority except as authorised under this Constitution.*"**

[2017] The inescapable answer, looking at the Constitution as a whole is that, IEBC could not, even under Article 10 interrogate events preceding the presentation of the draft Bill and signatures. It is equally not part of its mandate at the stage the draft Bill and signatures are presented to it, to carry out another round of public participation. At the assemblies and in the two Houses of Parliament, public participation is a mandatory legislative requirement, by dint of Articles 196(1)(b) and 118(1)(b).

[2018] With this conclusion, it can only follow that the promoters are expected, indeed required, to carry out public participation before the collection of signatures. This is the only logical sequence. The promoters under Article 257 on their own volition make a proposal to amend the Constitution. As a popular initiative, the promoters represent, initially the one million voters, whose concurrence they must obtain. After persuading one million Kenyans, the promoters must also convince the assemblies and Parliament about the prospects of the initiative and ultimately at least twenty percent of the registered voters in each of at least half of the counties and supported by a simple majority of the citizens voting in a national referendum. It is the promoters' burden; it is their baby.

[2019] According to the BBI National Secretariat, BBI Steering Committee, both Houses of Parliament, some county assemblies and Hon. Odinga, there was public participation prior to and in the course of signature collection. The BBI Taskforce Report dated 23rd October, 2019 records, in relevant part, that:

> ***"We conducted comprehensive public consultations that included meetings with citizens in all 47 counties, hearing from elected leaders at the National and County levels, senior state officers, constitutional commissions, civil society and professional organisations, cultural leaders, the private sector, and subject-matter experts.***
>
> ***The Face of Kenya was captured in this process: more than 7,000 citizens from all ethnic groups, genders, cultural and religious practices, and different social and economic sectors were consulted. The Taskforce heard from more than 400 elected leaders past and present; prominent local voices from the community; and young people who added their voice to citizens in the Counties; 123 individuals***

representing major institutions, including constitutional bodies and major stakeholders in the public and private sectors; 261 individuals and organisations who sent memoranda via (e)mail; and 755 citizens who offered handwritten submissions during public forums in the Counties" [my emphasis].

The Report also lists groups representing different categories of Kenyans, the youth, different faith-based organizations, elders and persons with disability. *"Annex 3: Public Participation"* to the Report, also gives a long list of participants.

[2020] Subsequent to this, the BBI Steering Committee in its Report to the President of 26th October, 2020 also affirmed that:

"We conducted comprehensive validation of the Task force Report using the following approaches: Reviewing the contents of the Taskforce Report; holding a total of 93 stakeholder validation meetings at the K.I.C.C., Laico Regency Hotel and at our offices in Nairobi. These meetings were attended by representatives from civil society, faith-based organisations, women's groups, youth groups, persons with disability (PWD) groups, cultural leaders and government institutions; participated in regional delegates' meetings where we received written validation submissions from the leaders at the end of each of the meetings; participated in regional public meetings where we received written submissions from Kenyans through their leaders.

Your Excellency, the committee also hosted governors from the Rift Valley region in Nairobi on 20th March, 2020 where they presented memoranda from their counties

following postponement of a regional meeting due to the Covid-19 pandemic. The committee also processed a total of 124 hand-delivered memoranda and 223 emailed memoranda, invited external experts and drafters to provide technical information, and also undertook desktop review of relevant documents and international good practices to inform and enrich the report" [my emphasis].

[2021] The collection of signatures was formally launched at the KICC on 25th November 2020, with fanfare. In attendance was the President, Hon. Raila Odinga and a host of Kenyans. Those who wished to append their signatures digitally were encouraged to do so by logging into ***bbisignatures.org.*** On the link was the BBI report, the Amendment Bill and a provision for endorsement by signing if one was in agreement.

[2022] On 4th December, 2020 Hon. Raila Odinga declared the end of signature collection drive to pave way for the verification exercise by the IEBC. On 10th December, 2020 the BBI National Secretariat submitted 4,352,037 million signatures in support of the Amendment Bill to IEBC. On 22nd February, 2021 IEBC through a press release confirmed that upon verification of the records the Amendment Bill had been supported by 3,188,001 registered voters, meeting the threshold required for transmission to the 47 county assemblies. *[See* ***Joint JLAC Report*** at pg. 12 summary of IEBC press release].

[2023] On record, there is evidence of hard copies of the full Amendment Bill and the BBI Steering Committee's Report in English and the highlights of two in both English and Kiswahili. There is however no such evidence with regard to Kenyan languages, sign language, braille and other communication formats and technologies accessible to persons with disabilities being circulated before the collection of signatures.

[2024] Subsequent to the verification of the support for the Amendment Bill, it was submitted to the counties. 43 counties submitted their certificates of approval of the Amendment Bill; 3 rejected it and 1 abstained. These decisions were forwarded to the National Assembly and the Senate in accordance with Article 257(6) of the Constitution. See ***Joint JLAC Report***.

[2025] One of the complaints by Thirdway Alliance was the speed at which some County Assemblies passed the Amendment Bill, arguing that, at that rate there was no public participation at all or no adequate public participation. The simple answer to this is that, the certificates submitted by the county assemblies to the two Speakers of Parliament are conclusive evidence of the propriety of the procedures undertaken by the assemblies with regard to the Amendment Bill prior to its introduction in Parliament.

[2026] From the ***Joint JLAC Report*** it is also apparent that the first county assembly to forward its decision to Parliament did so on 23rd February, 2021 (approximately 1 month from date of receipt by the assembly of the Amendment Bill) while the last county assembly forwarded its decision on 17th March, 2021 (approximately 1 ½ months after receiving the Amendment Bill). This cannot constitute unacceptable haste or dispatch, in my estimation.

[2027] Upon receipt of the Amendment Bill from the County Assemblies, the two joint committees of Parliament, by an advertisement published in the Daily Nation and Standard Newspapers on Friday 5th March, 2021 invited interested organizations and members of the public to submit any views or make representations on the Amendment Bill. The representations were to be received by post, hand delivery to the office of the Clerk, or by electronic mail.

[2028] The ***Joint JLAC Report*** records further that the committees held public hearings on the draft Bill on Thursday 11th March, 2021, Tuesday 16th March, 2021 and Wednesday 17th March, 2021 at which the committees received submissions from diverse groups, organizations and members of the public. In total, the

committees received written and oral submissions from 65 organizations and individuals. 9 other organizations attended the public hearings but did not present any submissions or did so as part of some umbrella organizations or consortia. The Report also shows that the Committees heard from the IEBC, Kenya National Bureau of Statistics (KNBS) and Kenya Law Reform Commission (KLRC).

[2029] Chapter 3 of the Report (page 44) provides a full list of those organizations and individuals that presented their submissions to the joint committee. They include, the Judicial Service Commission on its own behalf and for the entire Judiciary.

[2030] Whether or not there was public participation is a matter of evidence. *Affirmati non neganti incumbit probatio*, the burden of proof always is upon him who affirms - not on him who denies. The burden was upon those who alleged that there was no public participation to prove that allegation. Apart from a bare assertion that the promoters and those charged with some roles by the Constitution did not conduct public participation, not a single person was presented to support the statement and to rebut the evidence by the BBI National Secretariat, Hon. Raila Odinga, the BBI Steering Committee and the ***Joint JLAC Report*** that there was public participation. Secondly, public participation under Article 257 must be interpreted in context. If the promoters are able to convince one million registered voters to support their initiative, the requirement of Article 257 will have been attained. As a popular initiative in the manner I have found, citizens', and *Wanjiku's* initiative, it would be punitive and unconscionable to require or expect them to do more than this.

[2031] The only other critical observation to make is that the **Joint JLAC Report** had not been released during the hearing of the petitions in the High Court between 17th and 19th March, 2021. The Report was released in April 2021 after the judges had retired to consider the arguments. It was introduced as additional

evidence in the Court of Appeal pursuant to leave granted by that court in a ruling dated 25th of June, 2021.

[2032] Of interest too, is a recommendation to Parliament to enact legislation to provide a framework for, among other things, public participation. I will consider this issue shortly as I conclude this ground.

[2033] And I conclude this ground by stating the following. From the uncontested evidence on record, which was availed to the Court of Appeal, there was sufficient public participation in respect of the Amendment Bill. The Court of Appeal ought to have so found.

[2034] The second point relates to what *amicus* Bhatia calls in his brief "an internal tension" within Article 257; that on the one hand, it is generally accepted that public participation is particularly vital, especially in the context of Article 257, given that it is an instance of direct democracy; on the other hand, given that the promoters are the people, ordinary people "(small-p)", who lack resources, how will they be able to conduct public participation on a national scale, in order to collect the signatures. It is the picturesque language of *Gatembu, J.A* to describe this tension that is charming. His Lordship said:

> ***"For it might appear that by one hand, Wanjiku is given a vehicle by the Constitution to propose amendments to the Constitution, but the vehicle is then taken away by the other hand, by making it impossible for Wanjiku to drive that vehicle by reason of want of resources."***

[2035] Situations like those may inhibit a popular initiative. There are questions around them whose answers I do not have. Would it, for instance be open to the promoters to be funded by the State (the National Treasury?). Can public participation at this stage be taken as one of the responsibilities of IEBC to undertake on behalf of the promoters once the latter declare the intention to initiate the process? One of Bhatia's prescriptions is that the burden of public

participation should be borne by the State – or State organs – and not by *"Wanjiku"*.

[2036] The third point to make, and about which the two courts below and this Court in the ***BAT Case*** have expressed concern is the need for a legal framework on public participation to guide the constitution amendment process. Similarly, there is no legal framework generally for the conduct of referenda. We have been told that there are pending Bills before both Houses of Parliament on public participation.

[2037] Regarding a referendum law, it will be recalled that through the CKRC Final Report, the framers of the Constitution directed Parliament to enact a Referendum Act for purposes of Chapter Sixteen of the Constitution. This lacuna has been acknowledged by the BBI Steering Committee and the BBI National Secretariat in their reports.

[2038] We are aware, though that there is a Referendum Bill that has also, like those on public participation, been pending passage before Parliament. It is this lacuna that has led to varying interpretations of Chapter Sixteen, especially on the process of a popular initiative. Is the procedure in Article 256(1) & (3), for instance the same one to be used to initiate the process under Article 257?

[2039] The ball is in the Legislature's court. It should be no consolation that the courts below in this case and in the ***Titus Alila Case*** have found that the absence of an enabling legislation on the conduct of referenda does not render the Article inoperative and unenforceable. Parliament is still bound as a matter of constitutional duty to enact the law.

[2040] Now therefore, guided by the principles laid down in the ***BAT Case***, my overall assessment of the twin issues, the place of public participation and the role of IEBC under Article 257(4) of the Constitution, I hold the view that there was public participation in the process of promoting the Amendment Bill. When the courts below contend that there was no "adequate" or "meaningful" public

participation, are they not confirming that there was public participation? What is the measure or yardstick of "adequate" or "meaningful" public participation? The South African Constitutional Court, *Sachs, J* aptly said, in the case of ***Minister for Health and Another v. New Clicks South Africa (Pty) Ltd and Others*** (2006) (2) SA 311, that:

> ***"The forms of facilitating an appropriate degree of participation in the lawmaking process are indeed capable of infinite variation. What matters is that at the end of the day a reasonable opportunity is offered to members of the public and all interested parties to know about the issue and to have an adequate say. What amounts to a reasonable opportunity will depend on the circumstances of each case."***

[2041] The Constitution has not vested any power in IEBC to either carry out public participation under Article 257(4) or to ensure that it is done by the promoters. For these reasons, I would set aside the determination of the Court of Appeal on the question of public participation.

[2042] It is common factor that the IEBC was not fully constituted when the Amendment Bill and the signatures were presented to it. Not fully constituted in the sense that it did not have its full complement. The vacancies started with the departure of Commissioner Roselyn Akombe who fled the country and announced her resignation while abroad on 18th October, 2017. On 16th April 2018, Commissioners Margaret Mwachanya, Dr. Paul Kibiwott Kurgat and Consolata Maina Nkatha, who was the Vice Chair held a press conference at which they announced their immediate resignation from the IEBC, leaving only the Chairman and two Commissioners.

[2043] By a Gazette Notice dated 14th April, 2021 the President formally declared the four vacancies. The vacancies were not filed until September, 2021, nearly four

years from the date of resignation of the first Commissioner and one month after the decision of the Court of Appeal the subject of this appeal.

[2044] Mr. Morara had asked the High Court to declare that IEBC was not properly constituted and therefore lacked the required quorum under Section 8 of the IEBC Act to consider and approve any policy matters relating to the conduct of referenda, including verification of signatures under Article 257(4); and that for that reason it ought to have been barred from verifying the signatures submitted by the promoters and from submitting the Amendment Bill to the County Assemblies.

[2045] The 1st and 2nd appellants, the BBI National Secretariat and Hon. Raila Odinga asked the trial court to reject the petition for being *res judicata* in view of the decision in the ***Isaiah Biwott Kangwony v. IEBC & Another,*** HC Petition No. 212 of 2018; [2018] eKLR ***(Isaiah Biwott Case).*** They also argued that verification of voters who supported the initiative and the conduct of elections or referenda are not policy decisions that would normally require quorum in Section 8 aforesaid to be met; and that the IEBC met the constitutional threshold of three members.

[2046] Section 5(1) of the IEBC Act provides that the IEBC shall consist of the chairperson and six other commissioners, while Section 8 provides that IEBC's business will be conducted in accordance with the Second Schedule to the Act. Paragraph 5 of the Second Schedule sets the quorum for the conduct of business to at least five members. As a result of the diminishing numbers at IEBC a petition was taken out before the High Court in the ***Isaiah Biwott Case*** in which the court was asked to find that, as constituted, the IEBC was not competent to conduct the by-elections that were due to be held across the country. The court (*Okwany, J.*), rejected the invitation and dismissed the petition, holding that a vacancy in the IEBC membership did not invalidate its composition, and that a by-election was not one of those activities that would require a quorum to decide. It is on the basis

of that decision that the respondents argued before the High Court that a second challenge on the same issue would be *res judicata*.

[2047] The High Court was, however of the view that the issues before it was not conclusively determined in the ***Isaiah Biwott Case***, to render the question of the IEBC's quorum *res judicata*. The Judges noted that Section 5 of the IEBC Act or Paragraph 5 of the Second Schedule to the Act do not contain any distinction between policy or any other business of the IEBC. In departing from the ***Isaiah Biwott Case***, the Judges concluded that, in view of the seriousness of the issue, being a proposal to amend the Constitution, it was imperative that a quorum of five commissioners be present before transacting that business. With that, all the decisions made by the IEBC in respect of the Amendment Bill were declared invalid, null and void for lack of quorum.

[2048] The Court of Appeal took the cue from this and, in agreeing with the High Court, reiterated the declaration that the IEBC was not quorate in terms of Section 8 of the IEBC Act as read with Paragraph 5 of the Second Schedule to conduct the business of verification of signatures or to take part in all the subsequent steps.

[2049] The determination of this issue depends on the interpretation of Articles 88 and 250 of the Constitution, on the one hand, and Sections 5 and 8 of the IEBC Act as well as Paragraph 5 of the Second Schedule to the IEBC Act, on the other hand. Articles 250 is a provision of general application to all the Chapter Fifteen Commissions, dealing with their composition, appointment and terms of office, and stipulates that:

> ***"(1) Each commission shall consist of at least three, but not more than nine, members."***

[2050] The membership threshold for all the ten Commissions, according to this Article cannot exceed nine members or be less than three, depending on the legislation. In the case of the IEBC, Section 5 of the IEBC Act has fixed the membership at seven, the chairperson and six members. For the conduct and

regulation of business and affairs of the IEBC Section 8 of the Act refers to the Second Schedule, which at Paragraph 5 in turn reads as follows:

> ***"5. The quorum for the conduct of business at a meeting of the Commission shall be at least five members of the Commission."***

[2051] In 2017 this paragraph was amended by Election Laws Amendment 2017 by deleting five and substituting it with three, reducing the quorum from five to three. The amendment was challenged in the ***Katiba Institute & 3 Others v. Attorney General & 2 Others,*** Constitutional Petition No.548 of 2017; [2018] eKLR ***(Katiba Institute Case)*** where *Mwita, J.* declared the amendment unconstitutional.

[2052] To answer the question in contention, and asking it differently; was the IEBC properly constituted for the business that was before it at the time in question? There are also four significant numbers; ***nine***, the constitutional upper limit; ***seven,*** the statutory limit, ***three,*** the possible minimum and ***five,*** the quorum for the business of the IEBC.

[2053] As stated earlier, this question was raised by Mr. Morara in the context of Article 257(4); that IEBC was not properly constituted to consider and approve the conduct of the referendum and to verify that the initiative was supported by the requisite number of registered voters. A similar question was raised in the ***Isaiah Biwott Case*** where *Okwany, J.* expressed her satisfaction that the conduct of elections or by-elections is not a matter that arises out of the resolution or decision made by the commissioners at a meeting so as to require a quorum of five members. Therefore, despite the quorum of three, the learned Judge concluded that IEBC was quorate to conduct and supervise the by-elections that were slated for 17th August, 2018.

[2054] Turning to the ***Katiba Institute Case*** which was decided earlier than the ***Isaiah Biwott Case***, and where *Mwita, J.* in declaring the amendment to reduce the quorum to three from five unconstitutional, stated that;

> ***"Quorum being the minimum number of Commissioners that must be present to make binding decisions, only majority commissioners' decision can bind the Commission. Quorum was previously five members out of the nine commissioners including the Chairman, a clear majority of members of the Commission. With membership of the Commission reduced to seven, including the Chairperson, half of the members of the Commission, or three commissioners now form the quorum. Instead of making the quorum higher, Parliament reduced it to three which is not good for the proper functioning of the Commission. In that regard therefore, in decision making process where decisions are to be made through voting, only decisions of majority of the Commissioners should be valid. Short of that anything else would be invalid. For that reason paragraphs 5 and 7 of the Second Schedule are plainly skewed and unconstitutional."***

Quorum, according to *Mwita, J.* means that there is a minimum number of Commissioners that must be present at a formally convened meeting to make binding decisions.

[2055] The relevance of these two decisions will be apparent shortly. But at this stage it is necessary to interrogate the role of IEBC in so far as popular initiative amendment of the Constitution is concerned. Under Article 257 (4) it is IEBC's mandate to:

(i) verify that the initiative is supported by at least one million registered voters.

(ii) submit the draft Bill to each county assembly for consideration, and

(iii) submit the draft Bill to the people in a referendum.

[2056] There were three Commissioners when the Amendment Bill and signatures were presented to IEBC. As shown previously in this Judgment, IEBC in exercise and fulfilment of its function under (1) above verified that the proposal had support of at least one million registered voters. It proceeded to submit the Amendment Bill to all the 47 County Assemblies, in terms of its mandate in (2) above. The stage to submit the Amendment Bill to the people in the referendum had not been reached. As a matter of fact, there were, at this time two court orders; a conservatory order in High Court Petition E282 of 2020 restraining the IEBC from facilitating or subjecting the Amendment Bill to a referendum, or taking any further action to advance it, pending the hearing and determination of the petition. The second order barred the President from assenting to the Amendment Bill, should it be approved by the two Houses of Parliament, and should the President assent to the Bill, the amendments would not come into force until the determination of the petition challenging the process.

[2057] In view of the fact that the two orders did not impede IEBC from verifying the signatures or from submitting the Amendment Bill to the assemblies, it went ahead and completed this phase of the process. Was it incompetent for it to do so? The IEBC, like all Chapter Fifteen Commissions is by Article 253 declared;

> ***"(a) ... a body corporate with perpetual succession and a seal..."***

[2058] The attributes of IEBC based on this provision is that any change in its membership will not affect its status in the scheme of the Constitution. Death, even of all the Commissioners, God forbid, or mass resignation of all of them would not

have any effect on the continuity of IEBC, because there is a distinction between the Commission and the Commissioners. The life of the Commission does not depend upon the Commissioners, and *vice versa*, I believe. But the Commission can only function legitimately, if it has the minimum number of Commissioners allowed by the Constitution or law.

[2059] Contrast the situation at IEBC where there were three Commissioners in office with what obtained at the Ethics and Anti-Corruption Commission (EACC) in May, 2015 when the Chairperson, the Vice Chairperson and all the commissioners resigned. Investigation reports prepared and presented by the Commission's Secretary to the Director of Public Prosecutions (DPP) during this period were found by the Court of Appeal in the case of ***Michael Sistu Mwaura Kamau v. Ethics & Anti-Corruption Commission & 4 Others,*** Civil Appeal No. 102 of 2016; [2017] eKLR to be irregular and unlawful because the commission was not constituted at all under the Constitution, as there were no Commissioners in the office and no decision could be taken by the Commission under the circumstances. Under Section 4 of the Anti-Corruption and Economic Crimes Act, the EACC consists of a chairperson and four other members, a total of five Commissioners.

[2060] Reading Articles 88 and 250 alongside the Second Schedule, one cannot fail to see the obvious tension. Whereas the Constitution provides that the IEBC is properly constituted with as few as three Commissioners, the Second Schedule introduces a phenomenon of quorum for the conduct of its business that is higher than three.

[2061] The question before us as was indeed before the other two courts has **not** been whether the Second Schedule is inconsistent with the Constitution, but whether IEBC was properly constituted at the time the draft Bill and signatures were submitted to it.

[2062] I have observed elsewhere in this Judgment that a schedule made under an Act of Parliament has a binding force just as the Act itself and forms part of the Act. It is as much an enactment, as any other part of the Act. However, in terms of hierarchy, if any part of a schedule is in conflict with the statute then the former must give way. See ***Njoya Case*** and ***Executive Council of the Western Cape Legislature and Others v. President of the Republic of South Africa and Others*** (CCT27/95) [1995].

[2063] At the same time, sight must not be lost of the canon that demands a holistic interpretation of the Constitution and further that the Constitution is to be construed purposively, in a manner that promotes its purposes, values and principles; all the time bearing in mind that the law is always speaking. This Court has now firmly settled the question of holistic construction of the Constitution in cases such as ***In the Matter of the Kenya National Human Rights Commission,*** SC Advisory Opinion Reference No. 1 of 2012; [2014] eKLR and ***Communication Commission of Kenya v. Royal Media Services and 5 Others,*** SC Petition No.14A as consolidated with 14B & 14C of 2014; [2014] eKLR, where it explained that holistic interpretation of the Constitution entails doing so within its context, and in its spirit, that:

> *"…**it is the contextual analysis of a constitutional provision, reading it alongside and against other provisions, so as to maintain a rational explication of what the Constitution must be taken to mean in light of its history, of the issues in dispute, and of the prevailing circumstances"*** [my emphasis].

[2064] Constitutions are made and laws enacted to address specific mischiefs in the society. By settling for three Commissioners as the bare minimum, as opposed to any other number, the framers were obviously well aware of the onerous functions and far-reaching powers of the IEBC under Article 88(4) and Section 4 of the IEBC Act, when they set the minimum establishment at three

commissioners. Bearing this number in mind and in their wisdom the framers saw it necessary to establish a secretariat headed by the secretary, who is the chief executive officer of the Commission. The secretariat is made up of professional, technical and administrative officers. It is further supported by other staff members, directorates, field offices, units, divisions and committees.

[2065] Section 11A delineates the relationship between the Commissioners and Secretariat, and states that:

> "***For the effective performance of the functions of the Commission—***
>
> ***(a) the chairperson and members of the Commission shall perform their functions in accordance with the Constitution and in particular, shall be responsible for the formulation of policy and strategy of the Commission and oversight; and***
>
> ***(b) the secretariat shall perform the day-to-day administrative functions of the Commission and implement the policies and strategies formulated by the Commission"*** [my emphasis].

[2066] The IEBC, whether fully constituted at 7 members or with the minimum numbers of 3 is responsible for the formulation of policy and strategy as well as providing oversight. The secretariat and the supporting units, directorates, divisions and committees, being the professional and technical arm of IEBC perform the day-to-day administrative functions of the Commission and implement the policies and strategies formulated by the Commissioners.

[2067] The gravamen of Mr. Morara's petition was to have the High Court declare, and it did, that, because IEBC was not properly constituted it lacked the required quorum to consider and approve any policy matters relating to the

conduct of the referendum including verification of signatures under Article 257(4) or even to submit the Amendment Bill to the County Assemblies.

[2068] Mr. Morara did not, however identify which policy decision under Article 257 was to be undertaken by IEBC nor does he suggest that the verification of the voters supporting the proposed amendments is a function of the full complement of the Commissioners as opposed to the professional and technical teams of the Commission.

[2069] The framers, guided by the history of past electoral bodies, best practices elsewhere and views gathered from the public and other bodies, believed that three could do what seven could do. According to Paragraph 7 of the Second Schedule to the IEBC Act, unless the decision of IEBC at a meeting is unanimous, a decision is to be by the concurrence of a majority of all the members ***"present and voting."*** No doubt whatsoever that, there can be a valid and clear majority vote involving three people.

[2070] It is therefore a contradiction of terms for the Court of Appeal and the High Court to say, in the same breath that IEBC was properly constituted with three Commissioners but lacked quorum to transact business and conduct its affairs.

[2071] We summon history once again to help us understand the mischief. On the Management of Elections, the CKRC in its report recommended that the number of commissioners should be reduced to not less than seven and not more than eleven. The recommendation was based on a study which showed that ***"most countries have found it expedient to do with a smaller commission, much of the detailed work being done by a competent staff"***.

[2072] A glimpse of the *Hansard* recording the debate on the Election Laws Amendment 2017 which was the subject of the ***Katiba Institute Case*** captures the history, the intention and the mischief.

Hon. Duale, MP and Leader of Majority in the National Assembly (2013-2020) on the second reading of the Bill, explained:

> ***"Allow me to go to Clause 4 of the Bill. This clause seeks to amend the Second Schedule of the IEBC Act, with regard to the quorum required for the conduct of business of the IEBC and the threshold required for decision-making at the Commission.***
>
> ***That Committee reduced the number from nine to seven. Unfortunately, they did not also reduce the quorum. When the commissioners were nine, the quorum was five. When that Committee reduced the number of the commissioners from nine to seven, they still also maintained the quorum at five. That was a big anomaly. Therefore, this amendment is meant to rectify that, so that we do not again maintain a higher quorum level while we have reduced the number of commissioners from nine to seven. That is the essence of that proposed amendment under Clause 4....***
>
> ***We are reducing that so that <u>at least you have not less than three members present who will vote to make a decision</u>"*** [my emphasis].

This was supported by **Hon. Murugara MP** who added that:

> ***"Clause 4 seeks to ensure that there is quorum for the Commission while discharging its duties. Here, it was the considered view of the Members that we did not give a specific number. We decided to give a percentage of 50 per cent so that even if membership goes up or down, it***

> ***remains a percentage. We also considered decision-making where we looked at Article 250 of the Constitution and said that in every constitutional commission, membership ought not to be less than three and not more than nine. That is why <u>we decided that at any instance of decision- making, the membership will not go lower than three"</u>*** [my emphasis].

Finally, contributing **Hon. Ms. Waruguru, MP** said:

> ***"Hon. Speaker, we also want to confirm that the quorum---There have been problems with the Commissioners of IEBC. There are some people who have been thinking that if there are wrangles within the institution, the chairman will not attain the necessary quorum. We are going to give them*** *"muarubaini"* ***this afternoon. The quorum shall be three members".***

[2073] It appears to me, from the whole debate that Parliament in seeking to amend the Second Schedule intended to align it with Article 250 (1) of the Constitution. Again, as part of history, Section 41 of the former Constitution established an Electoral Commission consisting of a chairman and ***"not less than four and not more than twenty-one members appointed by the President".*** Even with such a large number of 21 members, the framers fixed the minimum number of members at only 4.

[2074] In enacting the IEBC Act itself the Legislature took note of international best practices, citing India and Australia as examples of nations with large populations yet have lean electoral bodies of only 3 members. During the debate, from the ***National Assembly Hansard Report of 4th May 2011,*** it is clear what informed the Legislators' decision on the minimum and maximum

membership of IEBC. It is necessary to set out here part of the debate in so far as it is relevant.

Judah Ole Metito: (The Assistant Minister for Regional Development Authorities, MP.) (Mover of the bill):

> ***"Clause 5 of the Bill talks about the composition and appointment of the Commission. We have countries with bigger populations and bigger territorial jurisdictions, which have very few commissioners. In India, there has been one electoral commission for a long time with three commissioners. Australia also has three commissioners. In the Kenyan fashion, we seem to have very large commissions. Even though the Constitution provides that this Commission should have a minimum of three commissioners and a maximum of nine commissioners, there is no need for us to always go for the highest number. <u>We can even have three commissioners for an efficient Commission</u>. There have been considerably big problems with big commissions. We have problems of expenses and slowing down decision-making. There is greater factionalism in bigger commissions than in small commissions. Mr. Temporary Deputy Speaker, Sir, there is the issue of always trying to satisfy the diversity of our country. It is important to appreciate the fact that a diversity of more than 40 ethnic groups cannot be accommodated by the nine positions provided for by the Constitution.....<u>In this case, we need a lean policy-making commission with a membership of three.</u> We can make all the three full-time commissioners....In my view,***

three commissioners can provide good service to this country…." [my emphasis].

Agreeing with the mover, **Francis Chachu Ganya, MP**:

> ***"In the past, we have had very powerful commissioners. In fact, it was tantamount to having 10 Chief Executive Officers (CEO) running one institution. That kind of system did not work in Kenya, and it does not work anywhere else in the world. Therefore, I strongly support the idea of having a very powerful secretariat. I do not think there is any problem in some commissioners serving on part-time basis. If you look at our case critically, you will appreciate that we have elections once every five years. In the fifth year, the commissioners are very active and heavily engaged, but what will the commissioners, whom we will be paying so much money, be doing in office in the first four years?"*** *[my emphasis].*

Subsequent to this debate, the IEBC Act (No. 9 of 2011) was enacted on 5th July 2011 with the composition of the chairperson and eight other members. This was, of course, later on amended to chairperson and six members.

[2075] The Second Schedule to the Act set the quorum for the conduct of business at five. After the High Court in the ***Katiba Institute Case*** declared as unconstitutional the amendment to reduce the quorum to three from five, the debate turned on whether the effect of the declaration was to revive the former provision, reverted to *status quo ante*, that is, 5 Commissioners, or whether the amendment also did away with 5 Commissioners leaving a lacuna to be filled by Article 150 (1) of the Constitution by way of a fall back. Learned Judges of the High Court and the majority of the Justices of Appeal proceed on the assumption that

the quorum reverted to "not less than 5", insisting, on that basis, that the IEBC could not undertake any of its functions under Article 257(4) with three Commissioners. This controversy is irrelevant on account of the following three reasons.

[2076] The decision in the ***Isaiah Biwott Case*** finding that the IEBC was quorate with three Commissioners to conduct the by-elections was not challenged on appeal. The bench of the High Court in the instant appeal could not, being a court of coordinate jurisdiction, overturn it. It remained a decision made in public law and was a judgment *in rem*, to the extent that with the three Commissioners IEBC was sufficiently quorate to carry on its functions.

[2077] The IEBC relying on this finding, made by a competent court, took solace that it was properly constituted and proceeded, in that legitimate belief and understanding, to undertake its constitutional mandate. For example, it has averred that it has undertaken very many serious constitutional obligations most of which cannot be reversed. It has, for instance overseen the preparation of the Elections Operations Plan (EOP) which sets out all the elections planning initiatives such as the strategic procurements and policy decision. It has approved the budget proposals for inclusion in the national estimates and in the respective Appropriations Act for the 2018 – 2019, 2019 – 2020 and 2020 – 2021 financial years which has been implemented and may be impractical to reverse. It has conducted, during this period at least 30 by-elections for various elective positions. It also has undertaken the continuous registration of citizens as voters, approved a series of internal policies, recruited and disciplined staff and generally run its day to day operations as expected and mandated by the Constitution and the law.

[2078] Secondly, as I have said in relation to the issue of referendum question, courts do not engage in abstract disputes. There must a real grievance. It was never demonstrated that IEBC held any meeting at which business to do with the amendment of the Constitution was transacted and at which a quorum of five was

required but met. The quorum under the Second Schedule is a requirement only for the conduct of business at a meeting of the Commission.

[2079] Thirdly, and for my earlier reason, the constitutional threshold must triumph over that set by a schedule to a statute, especially with the very clear history of the framer's intention.

[2080] It is inevitable, for all the reasons proffered, that I must arrive at the conclusion that, with three Commissioners the IEBC was properly constituted, quorate and competent to carry out all its constitutional and statutory duties. In the result, I would set aside the conclusion by the Court of Appeal that the IEBC lacked the necessary quorum to conduct any of its business under Article 257 of the Constitution.

(vii) Whether the interpretation of Article 257(10) of the Constitution entails/requires that all specific proposed amendments to the Constitution should be submitted as separate and distinct referendum questions

[2081] The final question in this appeal, whether Article 257(10) of the Constitution requires that proposed amendments to the Constitution be submitted as separate and distinct referendum questions, was raised in Petition No. 400 of 2020, by Mr. Morara. He had asked the High Court to make a *"declaration that Article 257(10) requires all the specific proposed amendments of the constitution to be submitted as separate and distinct referendum questions to the people in the referendum ballot paper."*

[2082] It was his contention that by Article 257(10), it was a constitutional role of the IEBC to submit to the people all the proposed amendments as distinct and separate referendum questions to either approve or reject specific proposed amendment as opposed to a mere "*Yes*" or "*No*" questions to the entire

Amendment Bill. He argued that the latter option would hinder the voter from making a choice between good and bad proposals and that good proposals may be rejected with the bad proposals and *vice versa*.

[2083] Mr. Morara suggests that, in the spirit of the Constitution where there are several amendments, as is the case with the Amendment Bill, which, according to him has more than 18 proposed amendments, it was for the IEBC to formulate several referendum questions as envisaged under Section 49 of the Elections Act, so as to give a chance to the people of Kenya to choose which of each proposed amendment they would vote in support of or against.

[2084] The 1st, 2nd appellants and some of the respondents disagreed with that position and argued that Section 49 of the Elections Act gives the Commission the mandate to frame the question or questions for the referendum, whether or not they would have "*non- separable preference*", or an "*issue by issue*" question or "*sequential voting*." However, they warned that "*issue by issue*" referenda or sequential voting would be an extremely expensive venture compared to one composite question; and that it was premature and speculative to seek to determine the issue of a referendum question at the point it was raised because the process had not reached that stage.

[2085] Based on these submissions, the High Court set out for itself this question for determination:

> ***"Whether Article 257(10) requires all the specific proposed amendments to be submitted as separate and distinct referendum questions to the people in the referendum ballot paper"*** [my emphasis].

It answered that question thus:

> ***"619. Our understanding of this section is that what is to be subjected to the referendum is the question or questions as***

opposed to the Constitution of Kenya Amendment Bill itself. It is, therefore, our finding and, we so hold, that <u>Article 257(10) requires all the specific proposed amendments to be submitted as separate and distinct referendum questions</u> to the people in the referendum ballot paper and to be voted for or against separately and distinctively" [my emphasis].

[2086] I have highlighted the words in both passages to try and understand the source for the finding that a separate and distinct referendum questions are what must be taken to the referendum. The court relied on Article 257(1) and Section 49 of the Elections Act in arriving at this determination. Framing of a question or questions to be put to the people in a referendum is not part of Article 257(10). It is found in Section 49 aforesaid, to which I shall shortly revert.

[2087] On appeal to the Court of Appeal, the conclusions by the seven Justices are interesting. *Musinga, (P),* held the exact converse view maintaining that it is the draft Bill that is to be presented and not question or questions. *Nambuye, Okwengu & Kiage, JJ. A,* on their part agreed with the High Court that each of the proposed amendment clauses ought to be presented as separate referendum questions. Though *Gatembu, J.A* was generally, like the three Justices in agreement with the High Court, he qualified that position by adding the words ***"subject to the nature of proposed amendment."*** In other words, whether or not to present to the people in a referendum separate and distinct question or questions will depend on the nature of the proposed amendment. *Sichale, J.A* did not express any opinion on the issue. On the other hand, *Tuiyott, J.A* held the view that there was no live controversy on this question; and that the High Court ought to have so found as the question was premature.

[2088] In the final disposition, taking into account all the opinions of each Justice, the Court of Appeal purported to set aside the determination of the High Court on this issue and said:

> ***"We hereby set aside the following declarations and orders of the High Court:***
>
> ***...***
>
> ***ii. That Article 257(10) of the Constitution requires all the specific proposed amendments to the Constitution be submitted as separate and distinct referendum questions to the People. (Nambuye, Okwengu & Kiage, JJ.. dissenting)."***

[2089] This conclusion was based on the assumption that four members of the bench disagreed with the High Court. This was clearly an anomaly considering the opinions of each Justice set out in the preceding paragraph. *Nambuye, Okwengu & Kiage, JJ.A* were unequivocal that Article 257(10) requires all the specific proposed amendments to the Constitution to be submitted as separate and distinct referendum questions to the people. It can also be said that *Gatembu, J.A* agreed with them. The qualification does not change that fact, in my view.

[2090] Yet *Nambuye*, *Okwengu & Kiage, JJ.A* were identified in the dispositive declaration of the court as dissenting. *Musinga, (P), and Tuiyott, J.A* categorically, for different reasons faulted the High Court, while *Sichale, J.A*, took no side. The majority decision was clearly to uphold, and not to disturb the High Court, with clear dissenting voices being that of *Musinga, (P),* and *Tuiyott, J.A*.

[2091] That outcome would have satisfied Mr. Morara because his grievance had been addressed in his favour. Before us, however he explained that he had sought, by his letter of 24th August, 2021 to the President of the Court of Appeal, to have the anomaly corrected. But the response to the effect that there was no

inconsistency in the votes of the members of the court left him with no option except to lodge this appeal. Perhaps it would have helped had Mr. Morara formally moved the court with an application, say, for review instead of a letter. Judicial decisions are challenged or corrected through legal procedures.

[2092] That apart, to address the question in this appeal, regard must be had to Chapter Sixteen of the Constitution read wholly, Sections 49 and 54 of the Elections Act, the experience from the history arising from previous proposals to amend the old Constitution or make the present Constitution, and more importantly whether the issue was mature for determination. Indeed, this latter issue is overriding the rest of the considerations, since it is a question that ought to have been decided by the trial court *in limine* and, indeed it did in the manner I will show shortly.

[2093] Starting with Article 255 a proposed amendment to the Constitution of any of the matters listed in clause 1(a) to (j) of Article 255 must be ***"enacted in accordance with Article 256 or 257, and approved in accordance with clause (2) by a referendum, if the amendment relates"*** to any of the matters listed in Article 255(1)(a) to (j). However, an amendment to the Constitution that does not relate to any of these matters mentioned can be ***enacted*** either:

(a) by ***Parliament***, in accordance with Article 256; or

(b) by the ***people*** and ***Parliament***, in accordance with Article 257.

[2094] An amendment by a parliamentary initiative under Article 256 must equally be commenced only by a ***Bill***, just as a popular initiative under Article 257 (2) (3) may be in the form of a general suggestion or a formulated draft ***Bill***. If, however it is in the form of a general suggestion, the promoters must formulate it into a draft ***Bill***.

[2095] Whether by parliamentary or popular initiative the route to propose an amendment to the Constitution is through Parliament because it involves the enactment of appropriate law, hence the use of the word **"*enact*"** throughout Articles 255, 256 and 257. The word **"*Bill*"** alone, in reference to a draft law, has been mentioned 27 times in Chapter Sixteen. Enactment in relation to law is the parliamentary process by which a law is made. Parliament exercises its legislative power only through Bills which it passes and are assented to by the President. See Part 4 of Chapter Eight (Article 109) of the Constitution. Article 94 (3) vests in Parliament the people' legislative authority which authority only Parliament alone may exercise to pass amendments to the Constitution.

[2096] Both courts, as I have noted earlier were specific and categorical that the requirement to have all the specific proposed amendments submitted as separate and distinct referendum questions to the people is contained in Article 257(10), or perhaps, that the holistic reading of the Constitution yields this interpretation and conclusion.

Article 257 (10) reads:

> ***"(10) If either House of Parliament fails to pass the Bill, or the Bill relates to a matter specified in 255 (1), the proposed amendment shall be submitted to the people in a referendum."***

The proposed amendment ***"shall be submitted to the people in a referendum."***

[2097] Pursuant to the CKRC Final Report, recommending the enactment of a referendum law, Article 82 commands Parliament to enact legislation to provide for the ***"conduct of elections and referenda and the regulation and efficient supervision of elections and referenda."*** This has not been done.

[2098] Be that as it may, this Article, to borrow the simile used by *Madan, JA*. (as he then was), is as plain as a pikestaff. See ***Choitram v. Nazari***, Civil Appeal No. 8 of 1982; [1984] eKLR. The only gap I see is on the manner or mode of submitting the proposed amendment to the people in a referendum. This is not specified in the entire Constitution. Clause 10 of Article 257 only states that the proposed ***"amendment shall be submitted to the people in a referendum"***. What does the IEBC tell the people to do with the draft Bill when submitting it to them?

[2099] In a multi-subject proposal like the Amendment Bill, how does the IEBC present such a document to the people in a referendum? Prof. Richard Albert, the 5th *amicus curiae* in his brief offers some solutions, and identifies two options according to the conventional wisdom, but adds a third one. The first option, now called the Hobson's choice, after Thomas Hobson, an English businessman who ran a horse rental business in Cambridge, England. His customers, who were mainly students from Cambridge University could only hire the horse nearest the stable door. The choice they were given was *"this or none"*; quite literally, not their choice but Hobson's choice. According to this choice, the voters must either approve or reject the entire package of proposals presented to them in an omnibus Bill; or two, voters have a choice to separately vote to approve or reject every single individual proposed amendment. The third option for a multi-subject constitutional referendum is for "*related*" proposals to be grouped together in the Bill. This last option spares voters the potential Hobson's choice of having to approve or reject the entirety of the proposed changes in an omnibus bill. It also spares voters from the impracticality of having to cast a vote to approve or reject on each and every proposal no matter the number. Prof. Albert recommends this option, the rule of "*subject-matter relatedness*" also known as unity of content, but appreciates its weakness.

[2100] What is, however important for me from this argument is that the three options are available, and that each one of them have strong and weak attributes.

It is in the discretion of the IEBC to decide on the most suitable, practical and efficacious option in the circumstances of each proposed amendments.

[2101] Dr. Duncan Oburu Ojwang', Dr. Linda Andisi Musumba, Dr. John Osogo Ambani and Dr. Jack Busalile Mwimali on their part suggested that the interpretation to be given to the issue at hand must depend on the meaning to be given to the language used in Articles 255 to 257. They cited words and phrases such as "*an amendment*"; "*matter*"; "*general suggestion*"; "*a bill to amend*"; and "*a bill to amend may not contain any other…"*, used in singular form to denote just one thing, one amendment. From the language, "*a general suggestion*" or a "*a bill to amend*", must mean, according to them, that an amendment must be limited to "*a proposed amendment*" or "*an amendment*". *Amicus* Gautam Bhatia agrees with that argument.

[2102] They contend in this regard, that it is impractical for an amendment bill to contain more than one matter or issue of amendment; and that Section 49 does not create a contradiction, but simply supports the position that the Constitution allows for only a singular matter or issue amendment to be contained in a Bill to amend the Constitution. They, however agree that "***there are times, when it is at least notionally possible, that more than one question will be presented at a referendum."***

[2103] I return where I started, and ask the question; was this issue ripe for consideration? The answer is dependent on the stage the process had reached. I reiterate that this is a jurisdictional question. If the issue was not ripe then it was not justiciable and the trial court ought to have downed tools. If it did not, the Appellate court ought to have set aside its decision on this point as one arrived at without jurisdiction. Courts of law are not moot courts. They resolve real grievances in the society, and again only when those grievances are ripe. They do not entertain hypothetical apprehensions. They do not pronounce opinions on abstract questions of law when there is no dispute yet calling for a resolution. Only

the Supreme Court exercises special jurisdiction under Article 163(6) of the Constitution, to give an advisory opinion only to the national government, any state organ, or any county government with respect to any matter concerning county government and only at their request and upon meeting certain pre-conditions.

[2104] The High Court declined the invitation to apply the doctrine of ripeness to this question, and went ahead to consider, on merit, whether all the specific proposed amendments to the Constitution must be submitted as separate and distinct referendum questions to the people in a referendum. In the Court of Appeal *Musinga, (P), Nambuye, Kiage, Gatembu and Tuiyott, JJ.A* agreed with the High Court while *Tuiyott, J.A* held the opinion that the issue offended the principle of ripeness.

[2105] The doctrine of ripeness has been considered in this jurisdiction in a number of cases, before and after the promulgation of the Constitution. See ***Njoya Case, Matalinga and Others v. Attorney General*** [1972] E.A. 578, ***Jesse Kamau & 25 Others v. Attorney General,*** Misc. Application 890 of 2004, ***Wanjiru Gikonyo & 2 Others v. National Assembly of Kenya & 4 Others,*** Petition No. 453 of 2015; [2016] eKLR, ***National Assembly of Kenya & another v. Institute for Social Accountability & 6 Others,*** Civil Appeal No. 92 of 2015; [2017] eKLR and ***John Harun Mwau & 3 Others v. Attorney General & 2 others***, Constitutional Petition Nos. 65, 123 & 185 of 2011; [2012] eKLR. The first three were decided before 2010 and the rest, after. In the latter the court stated as follows:

> ***"We also agree with the submissions of Prof. Ghai that this Court should not deal with hypothetical and academic issues. In our view, it is correct to state that the jurisdiction to interpret the constitution conferred under Article 165(3) (d) does not exist in a vacuum and it is not exercised***

independently in the absence of a real dispute. It is exercised in the context of a dispute or controversy."

[2106] On the principle of ripeness, these decisions are highly persuasive. The distinction between decisions made before and after the promulgation of the Constitution is important to bear in mind because of the provisions of Articles 22 (1), 23, 165 and 258, all of which guarantee every person:

"Article 22. Enforcement of Bill of Rights

(1) ...the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened" [my emphasis].

Article 23(3)(d) is on the powers of the court to declare any law invalid for denying, violating, infringing, or ***threatening*** a right or fundamental freedom in the Bill of Rights. In all those situations the High Court by Article 165(3)(b) has jurisdiction to determine if indeed a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or ***threatened***.

[2107] Having so said, on the facts and in the circumstances of this case, I find that, to the extent that the Amendment Bill had not been returned to the IEBC from Parliament, it was difficult to foretell how the question or questions would be framed by the IEBC, whose duty it is, with absolute discretion, to frame the question or questions to be put to the people in a referendum. No right or fundamental freedoms were threatened. At least none was shown. Sight must also not be lost of the fact that the IEBC had been restrained by an order of injunction in High Court Petition E282 of 2020 from facilitating and subjecting the Amendment Bill to a referendum, or taking any further action to advance it, pending the hearing and determination of the petition.

[2108] Before I conclude, it must be stressed that some of these issues would not have ended up before the courts had the offices and institutions concerned played their constitutional roles. The CKRC Final Report, long before the passage of the Constitution had recommended the enactment of a referendum law. Article 82 itself commands Parliament to enact legislation to provide for the ***"conduct of elections and referenda and the regulation and efficient supervision of elections and referenda"***. This, Parliament has not done.

[2109] The complaint on the form of presentation of the Amendment Bill to the people in a referendum clearly offended the doctrine of ripeness and the High Court ought to have downed tools on the question at once. It did not. The Court of Appeal ought to have set aside the conclusion by the High Court but did not.

[2110] I would, for that reason alone set aside the declaration by the Court of Appeal majority that Article 257(10) of the Constitution requires all the specific proposed amendments to the Constitution to be submitted to the people in a referendum as separate and distinct referendum questions.

C. SUMMARY OF FINDINGS

(i) Basic Structure Doctrine

(a) The Constitution has a basic structural posture ring-fenced in Article 255(1) of the Constitution.

(b) To the extent that the basic structure doctrine limits the amendment power to amend the Constitution contrary to the express terms of Chapter Sixteen of the Constitution, it does not apply to the Constitution of Kenya.

(c) There are no four sequential steps for the amendment of the Constitution other than the steps outlined in Chapter Sixteen; those steps are not a replication of constitution-making process, which is

distinct and do not mirror the process adopted in the making of the 2010 Constitution.

(d) Primary constituent power is the power to build a new structure by the people themselves and the secondary constituent power is, the power to amend an existing constitution. Under Chapter Sixteen, this power, called in Article 1(1), the sovereign power, belongs to the people of Kenya and is exercised by them people in a popular initiative or donated by them to elected representatives in a parliamentary initiative.

I would set aside the conclusion by the Court of Appeal on this issue.

(ii) Initiation of a popular initiative by the President

(a) The President is ineligible to directly or indirectly initiate a constitutional amendment either through a parliamentary initiative under Article 256 or a popular initiative under Article 257. He cannot act as an ordinary citizen because he is not; and that all actions taken in his name and on his behalf in the amendment process were all in the official capacity, as the President of the Republic of Kenya, therefore null and void.

(b) A constitutional amendment can only be initiated through two avenues: by Parliament through a parliamentary initiative under Article 256 or through a popular initiative under Article 257 of the Constitution.

I would uphold the decision of the Court of Appeal.

(iii) Constitutionality of the Second Schedule to the Constitution of Kenya (Amendment) Bill, 2020

The Second Schedule to the Constitution of Kenya (Amendment) Bill, 2020 was inconsistent with the Constitution for the reasons that:

(a) It only provided for a single criterion, the population quota, as the basis for delimitation which was clearly incongruous with Article 89.

(b) It unilaterally distributed the newly created 70 constituencies to specific counties, and then directed the IEBC to delimit the boundaries based on that single criterion.

(c) It ignored the irreducible constitutional consideration and the existing criteria in Article 89(5), (6) and (7).

(d) It randomly apportioned the 70 proposed constituencies without any scientific consideration or basing it on the needs of the people expressed through public participation, stakeholder engagement and consultation of interested parties, against the requirement of Article 89(7).

I agree with the Court of Appeal that the Second Schedule to the Constitution of Kenya (Amendment) Bill, 2020 was inconsistent with the Constitution.

(iv) Presidential Immunity

(a) The President does not enjoy absolute immunity. An absolute immunity would hoist the office of President or the holder above the Constitution against the true intendment of Article 2 of the Constitution.

(b) The extent to which the President's immunity extends is in respect to official actions while in office for which no civil proceedings can be brought against him in his personal capacity, in his name. The President's actions while in office are actions of the State and not personal.

(c) Any person who is aggrieved by his exercise of state power has a recourse:

(i) to challenge the action or omission in court by naming the Attorney-General, as a respondent in a judicial review application or a constitutional reference;

(ii) to institute civil action at the end of the President's tenure under Article 143(3), which holds the time from running for wrongful actions committed by President while in office until he leaves office; and

(iii) to institute an impeachment motion in Parliament under Article 145.

I would set aside the conclusion reached by the Court of Appeal.

(v) Public Participation

(a) IEBC could not, under Article 10 interrogate events preceding the presentation of the Constitution of Kenya (Amendment) Bill, 2020 and signatures. It is equally not part of its mandate at the stage the Constitution of Kenya (Amendment) Bill, 2020 and signatures are presented, to carry out another round of public participation.

(b) Under Article 257(4), the role of the IEBC is limited to the verification that at least one million persons whose signatures and other particulars appear in support of the initiative are registered voters.

(c) Public participation in respect to a proposed constitutional amendment should be seen as a continuum, from collection of signatures to referendum. But it must be conducted at each stage where it is required.

(d) The burden of explaining the proposed amendments lies with the promoters who are required to carry out public participation before the collection of signatures.

(e) Whether or not there was public participation is a matter of evidence. The uncontested evidence on record, which was availed to the Court of Appeal, indicates that there was sufficient public participation in respect of the Constitution of Kenya (Amendment) Bill, 2020.

I would set aside the decision of the Court of Appeal on this issue.

(vi) Composition and Quorum of IEBC

(a) The decision in the ***Isaiah Biwott Case*** finding that the IEBC was quorate with three Commissioners to conduct the by-elections was not challenged on appeal. It remained a decision made in public law and was a judgment *in rem*, to the extent that with the three Commissioners the IEBC was sufficiently quorate to carry on its functions.

(b) The holistic and purposive reading of the Constitution, the text and context of the relevant Articles and statute, international best practices as well as our history yields the conclusion that, with three Commissioners, the IEBC was properly constituted, quorate and competent to carry out all its constitutional and statutory duties.

For that reason, I would set aside the decision of the Court of Appeal.

(vii) Separate and distinct referendum questions

(a) The language of Chapter Sixteen is that it is the draft Bill that is to be presented to the people in a referendum.

(b) The stage for framing the question or questions having not been reached and in view of restraining orders against IEBC from taking any steps in the process, this issue was not ripe for consideration by the High Court.

The Court of Appeal erred in failing to so find, with the result that I would set aside its finding confirming the decision of the High Court.

[2111] This being a matter of public interest, each party shall bear their own costs.

FINAL DISPOSITION OF THE COURT

[2112] Before the final disposition of the Court, allow us to express the Court's appreciation to all Counsel, parties and *amici* appearing in this matter for their erudite and well researched oral and written submissions. The Court notes in a special way the galaxy of legal luminaries, among them distinguished legal scholars, professors of Constitutional law from Kenya and other jurisdictions who joined this case to enrich our Judgment. We found their views very useful although they were varied and divergent especially on the applicability of the issue of the basic structure doctrine and whether it had acquired international application under the provisions of Article 2(5) of the Constitution. The Court's decision has been enriched and benefited a great deal from the arguments advanced by all the parties who appeared before us. We also wish to thank our Law Clerks for their research and exceptional industry in support of the Court.

[2113] That said, in the course of writing this Judgment, the Court observed with concern some commentaries on the pending Judgment carried out in the social media by some Counsel, some of whom are appearing in this matter. The contents of those social media commentaries were in our view meant to influence, intimidate or scandalize the Court. This unfortunate practice is emerging and unless it is checked it will erode the confidence and dignity of the Court; it would also amount to unprofessional conduct especially by Counsel appearing in this matter and even Counsel who were not in this matter know very well that they cannot comment on a matter that is pending judgment. It is a well-established practice that Counsel and indeed parties should refrain from directly or indirectly trying to improperly influence the Court to rule in their favour.

[2114] Once judgment had been reserved and Judges had retreated to consider the submissions and write the judgment, learned Counsel Mr. Nelson Havi and Ms. Esther Ang'awa, who appeared for the 1st to 5th respondents, took to social media (Twitter) on different occasions; 19th February, 2022 and 15th February 2022 to cast aspersions on the Court. For Counsel to appear before the apex Court then proceed to hurl unnecessary diatribe, insults, and speculations on a pending judgment amounts to unethical conduct on the part of the advocate concerned. The use of social media to disparage the Court with the intention of lowering the dignity and authority of the Court or influencing the outcome of a case pending before the Court trespasses the bounds of legitimate advocacy and moves to the realm of professional misconduct. This is in line with Section 60(1) of the Advocates Act, Chapter 16 Laws of Kenya; that defines professional misconduct as: ***"includes disgraceful or dishonourable conduct incompatible with the status of an Advocate***."

[2115] Equally culpable is the conduct of Senior Counsel Ahmednasir Abdullahi, who though not Counsel appearing in the instant matter, took the lead role in disparaging and besmirching the Court as evident from his posts on Twitter on 8th February, 2022, 15th February, 2022 even as late as yesterday, the 29th March, 2022. Section 17 of the Advocates Act envisages the rank and dignity of Senior Counsel is conferred on the basis of irreproachable professional conduct and exemplary service to the legal and public service in Kenya. These standards are expected to continue even after conferment of the rank and dignity of Senior Counsel. Therefore, for a Senior Counsel to engage in conduct that threatens to lower public confidence in the courts thereby threatening the "rule of law", a constitutional value and principle enshrined in Article 10(2) of the Constitution, amounts to professional misconduct as it is an unbecoming conduct.

[2116] Advocates should familiarise themselves with the Code of Standards of Professional Practice and Ethical Conduct, Gazette Notice No. 5212 and strive to conduct themselves in a manner that preserve and strengthen the dignity, honour

and ethics of the profession. Consequently, advocates should restrain from conduct that amounts to indirectly attempting to influence decisions pending before courts. Relevant to the use of social media, we draw the attention of Advocates to Standard of Professional Practice and Ethical Conduct No. 10 that stipulates thus:

> ***"Inappropriate use of social media, particularly in a manner that undermines the standing and dignity of the legal profession, is professional misconduct. Material and content drawn from social media sites may be taken into account by regulatory authorities in dealing with a charge of professional misconduct."***

This caution should always play in the mind of advocates when tempted to utilize social media to advance their cause.

[2117] Having considered the seven (7) issues framed by this Court for determination the final Orders are as follows:

(i) ***(a) The basic structure doctrine is not applicable in Kenya.*** *(Ibrahim, SCJ dissenting).*

(b) In order to amend the Constitution of Kenya 2010, the four sequential steps as pronounced by the two superior courts below are not necessary. *(Ibrahim, SCJ dissenting).*

(ii) ***(a) The President cannot initiate Constitutional amendments or changes through the popular initiative under Article 257 of the Constitution.*** *(Njoki Ndungu, SCJ dissenting).*

(b) The President initiated the amendment process in issue *(Njoki Ndungu & Lenaola SCJJ dissenting).*

(c) Consequently, under Article 257 of the Constitution, the Constitution (Amendment) Bill, 2020 is unconstitutional *(Njoki Ndungu & Lenaola SCJJ dissenting).*

(iii) The Second Schedule of the Constitution of Kenya (Amendment) Bill, 2020 is unconstitutional for being in breach of Articles 10(2) and 89(7)(a) of the Constitution of Kenya 2010 for lack of public participation. *(Unanimous).*

(iv) Civil proceedings cannot be instituted in any court against the President or the person performing the functions of the office of the President during their tenure of office in respect of anything done or not done under the Constitution of Kenya 2010. *(Unanimous).*

(v) (a) There was no obligation under Article 10 and 257 (4) of the Constitution, on IEBC to ensure that the promoters of the Constitution of Kenya (Amendment) Bill, 2020 complied with the requirements for public participation. *(Unanimous).*

(b) There was public participation with respect to the Constitution of Kenya (Amendment) Bill, 2020. *(Mwilu; DCJ & V-P; Ibrahim and Wanjala, SCJJ dissenting).*

(vi) IEBC had the requisite composition and quorum to undertake the verification process under Article 257(4). *(Ibrahim, SCJ dissenting)*

(vii) The question raised regarding the interpretation of Article 257(10) of the Constitution on whether or not it entails or requires that all specific proposed amendments to the Constitution should be submitted as

separate and distinct referendum questions was not ripe for determination. *(Njoki Ndungu, SCJ concurring).*

(viii) Each party shall bear their own costs, this being a public interest matter.

[360] Consequently, the consolidated appeal is determined as follows:

(1) The appeal is allowed on the issue No. 1; *The basic structure doctrine is not applicable in Kenya.*

(2) The appeal is allowed on issue No. 4; *Civil proceedings cannot be instituted in any court against the President or the person performing the functions of the office of the President during their tenure of office in respect of anything done or not done contrary the Constitution of Kenya, 2010.*

(3) The appeal is allowed on issue No. 5; *There was no obligation under Article 10 and 257 (4) of the Constitution, on IEBC to ensure that the promoters of the Constitution of Kenya (Amendment) Bill, 2020 complied with the requirements for public participation. And there was public participation with respect to the Constitution of Kenya (Amendment) Bill, 2020.*

(4) The appeal is allowed on issue No. 6; *The IEBC had the requisite composition and quorum to undertake the verification process under Article 257(4).*

(5) The appeal is allowed on issue No. 7; *The question raised regarding the interpretation of Article 257(10) of the Constitution on whether or not it entails or requires that all specific proposed amendments to the Constitution should be submitted as separate and distinct referendum questions was not ripe for determination.*

(6) The appeal is disallowed on issue No. 2; *The President cannot initiate Constitutional amendments or changes through the popular initiative under Article 257 of the Constitution; that the President*

initiated the amendment process in issue. Consequently, under Article 257 of the Constitution, the Constitution (Amendment) Bill, 2020 is unconstitutional.

(7) The appeal is disallowed on issue No. 3; *The Second Schedule of the Constitution of Kenya (Amendment) Bill, 2020 is unconstitutional for being in breach of Articles 10(2) and 89(7)(a) of the Constitution of Kenya, 2010.*

(8) Each Party shall bear their own costs.

DATED and **DELIVERED** at **NAIROBI** this **31st** day of **March, 2022**

.....

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

.....

P.M. MWILU
DEPUTY CHIEF JUSTICE &
VICE 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

…… ……

I.LENAOLA **W. OUKO**
JUSTICE OF THE SUPREME COURT **JUSTICE OF THE SUPREME COURT**

I certify that this is a true copy of the original

REGISTRAR
SUPREME COURT OF KENYA