REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO. E282 of 2020

(CONSOLIDATED WITH PETITION NOs. 397 of 2020, E400 of 2020, E401 of 2020, E402 of 2020, E416 of 2020, E426 of 2020 and 2 of 2021)

DAVID NDII & OTHERS.....PETITIONERS

VERSUS

ATTORNEY GENERAL & OTHERS.....RESPONDENTS

JUDGMENT

A. PART 1: INTRODUCTION

I. HISTORY OF THE LITIGATION

1. On 18th March, 2018, President Uhuru Kenyatta and Mr. Raila Odinga had what is now famously known as the "Handshake". The President and Mr. Raila Odinga had just come off a hard fought and intensely contested Presidential Elections in 2017 in which they were the main contenders. The first round of Presidential elections was held on 8th August, 2017 and was characterized by allegations of vote fraud leading to its overturning by the Supreme Court. The repeat elections were held on 25th October, 2017. Mr. Raila Odinga boycotted the repeat elections handing the victory to the President.

2. These circumstances, however, hardly cooled the political climate which remained charged. It is on these grounds that the President started an initiative which he described as being "towards a united Kenya." After the famous "Handshake" with Mr. Odinga, the President appointed the Building Bridges to Unity Advisory Taskforce (hereinafter, "BBI Taskforce") comprising of 14 committee members and 2 joint secretaries through Gazette Notice No. 5154 of 24th May 2018. The key mandate of the BBI Taskforce was to come up with recommendations and proposals for building a lasting unity in the country.

3. The Terms of Reference of this BBI Taskforce were to:

> *a) Evaluate the national challenges outlined in the Joint Communique of 'Building Bridges to a New Kenyan Nation, and having done so, make practical recommendations and reform proposals that build lasting unity; [Petitioner's emphasis throughout, unless otherwise stated*
>
> *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.*

4. The BBI Taskforce came up with an interim report in November, 2019. On 3rd January 2020, vide Gazette Notice No. 264, the President appointed the *Steering Committee on the Implementation of the Building Bridges to a United Kenya Taskforce Report* (hereinafter, the "BBI Steering Committee") comprising of 14 members and 2 joint secretaries.

5. The terms of reference of the BBI Steering Committee were stated in the Gazette Notice as follows*:*

> *The Terms of Reference of the Steering Committee shall be to:*
>
> *(a) 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*
>
> *(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.*

6. There is some controversy on how exactly the Report of the BBI Steering Committee, after it was handed over to the President, became the Constitution of Kenya Amendment Bill, 2020 (herein after, "The Constitution of Kenya Amendment Bill"). However, it is not in dispute that the BBI Secretariat then put in motion the process to collect signatures in support of the Popular Initiative associated with the Constitution of Kenya Amendment Bill. Thereafter, the BBI Secretariat submitted the signatures to the Independent Electoral and Boundaries Commission (IEBC), for verification and submittal to the County Assemblies and Parliament for approval.

II. PROCEDURAL POSTURE

7. This Judgment arises from eight consolidated Constitutional Petitions which challenge, in some fashion the Building Bridges Initiative and the resulting Constitution Amendment Bill and its associated Popular Initiative.

8. Seven of the eight petitions herein were consolidated on 21st January, 2021 and the eighth Petition- ***Petition No. E002 of 2021*** was consolidated on 10th March, 2021. ***Petition No. E282 of 2020*** was designated as the lead file. The Court also directed that each party be identified according to their named role in their respective Petition.

9. On 21st January, 2021 the Kenya National Commission on Human Rights and four Law Professors were enjoined as *Amici curiae* in ***Petition No. E282 of 2020***. Kituo Cha Sheria was enjoined as an Interested Party in the same Petition and Phylister Wakesho was enjoined as an Interested Party in ***Petition No. E400 of 2020***. The Court also gave directions to perfect the Consolidated Petitions for hearing.

10. The Consolidated Petitions proceeded for hearing from the 17th of March 2021 to the 19th of March 2021 via video conference.

11. In the next section of this Judgment, we summarize the eight Petitions, their responses and the various briefs filed by the parties in support of their respective positions.

B. **PART 2: THE CONSOLIDATED PETITIONS AND THEIR RESPONSES**:

I. PETITION No. E282 OF 2020

12. The Petitioners in ***Petition No. E282 of 2020*** are civic-minded Kenyans who have brought the Petition in the public interest. They sought the following Orders:

> *I. 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.

II. *A declaration be and is hereby issued 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. *A declaration be and is hereby issued 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. *A declaration be and is hereby issued that the amendment powers under Articles 25 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. *A declaration be and is hereby issued 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.

VI. *Each party should bear its own costs.*

VII. *Any other order that this Honourable Court may deem just and fit in the circumstances.*

13. The Petition is supported by the Affidavits of the Petitioners all sworn on 16/9/2020. It is expressed to have been brought under Article 22(1)(2)(c) of the Constitution.

14. The Petitioners' lead argument is that the legal and judicial doctrines and theory of the Basic Structure of a Constitution, the doctrine of Constitutional entrenchment clauses, unamendable Constitutional provisions, the doctrine of Unconstitutional Constitutional amendments, theory of unamendability of eternity clauses, essential features, supra-constitutional laws in a constitution and the implied limitations of the amendment power in the Constitution are applicable in Kenya to substantively limit the ability to amend the Constitution under Articles 255-257 of the Constitution.

15. The Petitioners want the aforementioned doctrines applied to the Kenyan Constitution with the proposed result that the following chapters of the Constitution of Kenya, 2010 and the provisions therein be declared to be part of the Basic Structure, Entrenchment Clauses and eternity provisions of the Kenyan Constitution 2010 and that, therefore, cannot be amended either under Article 256 by Parliament or through popular initiative under Article 257 of the Constitution: Chapter One on Sovereignty of the People and Supremacy of the Constitution, Chapter Two on the Republic,

Chapter 4 on the Bill of Rights, Chapter Nine on the Executive and Chapter Ten.

16. It is also the Petitioner' case is that the amendment powers reposed in Article 256 and Article 257 of the Constitution of Kenya can only be used to amend the "ordinary provisions" of the Constitution and do not extend to the power to "destroy the Constitution nor does it include the power to establish a new form of government or enact a new Constitutional Order." It is their case that Article 256 and 257 are mere procedural tools which cannot be used to change the Constitution in manner akin to replacing it with a new Constitution. These procedural provisions, they insist, cannot be invoked to create a new constitutional order disguised as an amendment. They argue that the Doctrine of Basic Structure and the corollary doctrines of constitutional unamendability and eternity clauses operate to prevent such a possibility.

17. The Petitioners cited with approval works by Prof. Richard Albert especially his seminal book, ***Constitutional Amendments: Making, Breaking and Changing Constitutions***. In the book, Prof. Albert introduces the concept of the concept of "constitutional dismemberment" as a contrast to the idea of "constitutional amendment". He traces the origins and evolution of unconstitutional constitutional amendment across multiple jurisdictions and explains how the theory and doctrine applies to modern constitutional democracies. He explains that the phenomenon of an unconstitutional constitutional amendment traces its political foundations to France and the United States, its doctrinal origins to Germany, and concludes that it has migrated in some form to modern constitutional democracies in every corner of the world. The Petitioners argue that the history and structure of the Kenyan Constitution leads to the conclusion that the framers and Kenyans intended to import the doctrine to apply to our Constitution even though they did not explicitly state so in the Constitution.

18. The Petitioners further argued that it is the role of Parliament to protect the Constitution against tainted amendment bills and that the Court has the role to declare a constitutional amendment unconstitutional in the event Parliament fails in its role.

19. They relied on various treatises and written works in constitutional law and social contract including the famous writings of John Locke, Hume and Rosseau. They also cited at length the work of Prof Ben. Nwabueze. The primary cases they cited included ***Njoya and 5 Others Vs Attorney General & Others (2004)*** for establishing the juridical status of the doctrine of the Constituent Power in Kenya. They also heavily relied on ***Kesavananda Bharati v State of Kerala & Another (1973) 4 SCC 225*** for establishing the Basic Structure Doctrine and applying it to the Indian context.

20. Applying the Basic Structure Doctrine to the proposed Constitution of Kenya Amendment Bill, the Petitioners argued that the Bill proposes to discard the doctrine of separation of powers and checks and balances first, by threatening to reverse the Presidential system of government, by threatening amend Chapter 9 of the Constitution on the executive, which goes against the decisions and reasoning of the makers on the Constitution.

21. The Petitioners also argued that the proposed Bill threatens to alter the functions of Parliament, the Judicial Service Commission, the County Assemblies as well as oust the mandate of the IEBC. That in view of the Chief Justice's advice to dissolve Parliament, Parliament is improperly constituted to amend the Constitution.

22. In his oral submissions, Mr. Havi, counsel for the Petitioners, reiterated the contents of the Petition and written submissions. He laid emphasis to Paragraph 204 of the Petition in which he pointed out that the Constitution is born mature and that it has no infancy to be fed by anecdotal amendments. He faulted the Respondents' reliance on the ***Rev. Dr. Timothy Njoya vs. Attorney General &***

Others, Misc. App. No. 82 of 2004. in reaching the conclusion that the Basic Structure Doctrine is not applicable in Kenya. In the Petitioners' view, the basic structure of the constitutional order in Kenya is eternal and that it is only the people who can alter the basic structure by replacing the Constitution with a new Constitution in the exercise of their Primary Constituent Power.

23. Describing the Constitution of Kenya 2010 as the most comprehensive rendering of the aspirations of Kenyans, the Petitioners point out that the Constitution has received the judicial recognition by the Supreme Court as a "Transformative Charter" in cases such ***Speaker of the Senate & Another v Hon. Attorney General & Another & 3 Others and The Matter of the Principle of Gender Representation in the National Assembly and the Senate***.

24. The Petitioners further argue that both the history amendments to the retired Constitution between 1963 and 2010 and the history of attempted amendments to the present Constitution since its promulgation provide proof that the Kenyan Parliament lacks clear parameters to guide it in the exercise of authority vested by article 94(3) of the Constitution by which is enjoined to consider amendments to the Constitution. The Petitioners are apprehensive that such an approach is likely to lead to Parliament adopting amendments to the essential features of the Constitution, whose amendability is outside the scope of amendments.

25. The 1st Respondent (the Honourable Attorney General) opposed the Petition *vide* their Grounds of Opposition dated 18th January 2021. The Grounds of Opposition, reproduced verbatim, are as follows:

> 1. *That a declaration that the provisions of the constitution that deal with sovereignty of the people, supremacy of the constitution, the territory of Kenya , the executive, the*

judiciary, the bill of rights form the 'basic structure', 'entrenchment clauses' and 'eternity' provisions of the Kenyan constitution and cannot be amended either under Article 256 of through popular initiative under Article 257 of the Constitution would be against the express provisions of the constitution including Article 255 (1) which will have been rendered otiose.

2. *That the interpretation propounded by the Petitioners runs contrary to the constitutionally prescribed purposive mode of interpretation by negating the express purposes of Articles 255, 256 and 257 of the constitution.*
3. *That the declarations sought by the petitioners seek to give impermissible meaning to the text of the Kenyan constitution.*
4. *That any comparative analysis of foreign jurisprudence cannot be used to either contradict or supplement the text of the constitution of Kenya (a written constitution).*
5. *That the determination of the petitioners' questions as to whether 'legal and judicial doctrines' of 'basic structure', 'eternity clauses', theories of 'constitutional entrenchment clauses' and 'unamendable constitutional provisions' are applicable in the Republic of Kenya in the absence of any current specific factual matrix upon which the questions are to be determined as presented by the petitioners in the present case does not meet the established legal threshold of justiciability on account of want of ripeness.*
6. *That to the extent that the petitioners are seeking from the Honourable Court a determination of what the law would be upon a hypothetical state of facts the Petitioners are for all intents and purposes invoking an advisory opinion jurisdiction which jurisdiction the Honourable*

Court does not have, the same being a preserve of the Supreme Court under Article 163(6) of the constitution.

7. *The petitioners are improperly seeking a judicial declaration on the invalidity of anticipated acts of the legislature or the populace in the absence of cases or controversies of the sort traditionally amenable to and resolved by the judicial process.*
8. *That the petition is improperly entirely premised on comparative analysis of foreign jurisprudence.*
9. *That the petitioners have not made out a case for the application of the doctrines' of 'basic structure', 'eternity clauses', theories of 'constitutional entrenchment clauses' and 'unamendable constitutional provisions to the constitution of Kenya through the technique of comparative method for the following reasons;*
    i. *The Petitioners have fails to take into consideration the distinct and unique cultural, historical, developed constitutional norms and national identity of the Kenyan constitution.*
    ii. *That the petition is entirely premised on the petitioners' arbitrary selection of jurisprudence from a few countries purely on the basis of the petitioners' personal ideologies.*
    iii. *There is no consideration by the petitioners of the limitations on comparative jurisprudence; including lack of sufficient familiarity with the foreign legal systems cited, lack of familiarity with the social, cultural and institutional systems in which the cited decisions are embedded to warrant any confidence in the accuracy or utility of the actual comparisons.*

iv. *That the petition is entirely premised on constitutional borrowing and transplanting of foreign constitutional norms, structures, doctrines, institutions without any evaluation of the dynamics between similarities and differences across the separate constitutional orders.*

v. *That the comparative analysis upon which the petition is premised is not based on common or functionally equivalent concepts and institutions.*

10. *That all related provisions of the Constitution of Kenya provide for absolute sovereignty of the people of Kenya contrary to the theories and doctrines propounded by the Petitioners these include;*

The Preamble to the constitution which provides inter alia 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;"

Article 1(1) of the constitution provides that; All sovereign power belongs to the people of Kenya and shall be exercised only in accordance with this constitution.

Article 1(2) of the constitution provides that; "The people may exercise their sovereign power either directly or through their democratically elected representatives.'

Article 255 (1) of the constitution provides that; "A proposed amendment to this constitution shall be enacted in accordance with Article 256 of 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 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

11. That to the extent that the Petitioners presume contents of future amendments to the content of the constitution without specifying the specific proposed amendments the same is speculative and non-justiciable.

12. That to the extent that the Petitioners rely on previous failed attempts at amending the constitution the same is non-justiciable on account of mootness.

13. That the Petition is without merit

26. The Honourable Attorney General opposes the Petition on two broad grounds: First, he argues that the Doctrine of Basic Structure and the corollary doctrines of constitutional unamendability and

eternity clauses which the Petitioners invoke are inapplicable in Kenya. Second, the Honourable Attorney General argues that the issues raised in the case are not justiciable.

27. On the first issue the Honourable Attorney General asserts that the Petitioners have not made out a case for the application of the Doctrine of Basic Structure and the corollary doctrines of constitutional unamendability and eternity clauses. The Honourable Attorney General argues that the Petitioner's argument fails to consider "the unique cultural, historical developed Constitutional norms and national identity of the Kenyan Constitution." He argues that the Petition is based on arbitrary selection of jurisprudence and further that it fails "to consider the limitations on comparative jurisprudence." The Honourable Attorney General argues that the entire Petition is premised on constitutional borrowing and transplanting of foreign constitutional norms which have no relevance to Kenya since the borrowed concepts are not based on common or functionally equivalent concepts and institutions.

28. The Honourable Attorney General objected to the notion that the borrowed and transplanted doctrines can be used to overcome clear and express provisions of the Constitution allowing the people of Kenya to amend their Constitution enshrined in Articles 255 to 257 of the Constitution.

29. In highlighting the Honourable Attorney General's submissions, Mr. Bitta submitted that the Petitioners did not locate within the Constitution of Kenya the applicability of the Basic Structure Doctrine and its corollary doctrines and which specific articles where a deduction can be made that the doctrine exists.

30. The Honourable Attorney General associated himself with the submissions of the Building Bridges to a United Kenya Taskforce National Secretariat on the issue of the Basic Structure Doctrine, to wit, that the same is not applicable in Kenya. They relied on the

principle set out in the Indian cases of ***AK Gopalan vs the State (1950) SCR 88, 120 (50) A Sc. 27*** and ***Central Province Case 1959 FC R 18 (39) AFC,*** which encouraged the application of the *ut res magis valeat quam pareat* doctrine.

31. It was also the Honourable Attorney General's submission that the ***Timothy Njoya Case***, acknowledged the sovereignty of the people and that the position on the issue can no longer be inferred by the Courts. In his understanding, the ***Timothy Njoya Case*** held that people were free to change their governing charter in a referendum.

32. The Honourable Attorney General submitted that the Constitution must be interpreted purposefully and holistically. He cited the cases of ***Re Matter of the Interim Independent Electoral and Boundaries Commission (2011) eKLR, the Matter of the National Land Commission (2015) eKLR and the Matter of Kenya National Land Commission on Human Rights (2014) eKLR.***

33. On the issue of justiciability, the Honourable Attorney General contends that the Petitioners' case is speculative to the extent that the Petitioners presume the contents of future amendments to the Constitution, without specifying the specific proposed amendments they object to and to the extent that the Petitioners merely base their arguments on previous failed attempts at amending the Constitution. He submitted that the Petition as presented is based on hypothetical scenarios and is devoid of factual matrix that would support the invocation of the Court's jurisdiction. He relied on ***Wanjiru Gikonyo & 2 Others v. National Assembly of Kenya & 4 Others (2016) eKLR, John Harun Mwau & 3 Others v AG and 2 others*, and *Jesse Kamau & 25 Others vs Attorney General Misc. Application 890 of 2004, Coalition for Reform and Democracy & 2 Others v. Republic of Kenya & Another (2015) eKLR, Daniel Kaminja & 3 Others (Suing as Westland Environment Caretaker Group) v. County Government of Nairobi (2019) eKLR, Okiya Omtatah v Communication Authority of Kenya & 8 Others (2018) eKLR***

where, the Honourable Attorney General said, the Courts endorsed the doctrine of justiciability.

34. The Honourable Attorney General also objected to the Written Submissions of the Petitioners because, he said, they traversed issues which were not originally in their pleadings. On the issue of parties being bound by their pleadings, the 1st Respondent relied on the cases of ***Law Society of Kenya Vs Inspector General of Police and Otherrs, Galaxy Paints Company Ltd Vs Falcon Guards Ltd (2000) eKRL and D E N vs P N N (2015) eKLR***, where it was held that a suit and the issues therein must flow from the pleadings.

35. The 2nd Respondent is the Speaker of The National Assembly. The Speaker opposed the Consolidated Petitions through its Grounds of Opposition dated 15th February 2021. The Grounds of Opposition cover all the eight Petitions. They are as follows:

1. *The Petitioners' Petitions are not justiciable for violating the doctrine of ripeness which requires that the factual claims underlying the litigation be concretely presented and not based on speculative future contingencies.*
2. *This Petition is premature and/or speculative and deals with prospective anticipatory circumstances to the extent that it anticipates that the National Assembly will pass the Constitution of Kenya Amendment Bill which Bill is yet to be introduced in Parliament.*
3. *The Petitioners seek to second-guess how the National Assembly will exercise its mandate with respect to the enactment of the Constitution of Kenya Amendment Bill.*
4. *The issues raised in the Petition could be raised by the Petitioners before Parliament during the public participation exercise before Parliament under the Constitution of Kenya and the Standing Orders of the Houses.*

5. *Granting orders gagging the Parliament from debating the said Bill which is an exercise of legislative authority will amount to usurping the powers of the Respondents.*

6. *Additionally, the constitutional scheme contemplates that challenges to the constitutional validity of a bill must await the completion of the legislative process.*

7. *Therefore, Parliament's functions and processes must be allowed to run through to completion before the jurisdiction of the Courts can be properly invoked.*

8. *In any case, Chapter 16 of the Constitution and more particularly Articles 255, 256 and 257 sets in very precise, clear and concise manner in which the Constitution can be amended.*

9. *Under the doctrine of separation of powers & the principles enunciated by the Supreme Court of Kenya in Justus Kariuki Mate & another v Martin Nyaga Wambora & another [2017] KLR, this Honourable Court lacks jurisdiction to intervene during active Parliamentary proceedings.*

36. The gist of their grounds of opposition and submissions is that the Petitioner's case is not justiciable since, he argues, it is based on "speculative future contingencies." They cited ***Commission for the implementation of Justice vs National Assembly of Kenya & 2 Others (2013) eKLR, Doctors for Life International v The Speaker of the National Assembly & Others (2006) ZACC 11 and Robert N. Gakuru & Another v. Governor Kiambu County & 3 Others (2013) eKLR.***

37. The Speaker of the National Assembly also argues that the Constitution of Kenya Amendment Bill is under consideration before Parliament and that, therefore, the Court lacks jurisdiction to intervene in an active Parliamentary process. They rely on the

decision of Supreme Court in ***Justus Kariuki Mate & Another v Martin Nyaga Wambora G another [2017 eKLR*** to urge the Court not to intervene when the matter is pending before Parliament. The Speaker argued that the doctrine of separation of powers requires a mutual respect between the arms of government and counselled that the Court should not take up a matter that is still under consideration in the two houses. The Speaker also cited ***Pevans East Africa Limited and Another v Chairman, Betting Control and Licensing Board 7 Others (2018) eKLR*** in this regard.

38. In the Written Submissions filed and the oral highlights by Mr. Kuiyoni, the Speaker of the National Assembly elaborated on his Grounds of Opposition. On the issue of Amendability of the Constitution, the 2nd Respondent submitted that from the provisions of Articles 255,256 and 257, every part of the Constitution is amendable and the power of the people to amend the Constitution is unlimited. Mr. Kuiyoni cited ***Priscilla Ndululu Kivuitu & Another (suing as the personal representative of Samuel Mutua Kivuitu & Kihara Muttu (deceased) & 22 Others vs Attorney General & 2 Others (2015) eKLR*** where, he said, the Court recognized the power of the People in amending any part of the Constitution.

39. The only limitation to the People's power to amend the Constitution, Mr. Kuiyoni said, was the failure to comply with the Constitution's own procedure. He argued further that the granting of a special procedure to amend the current constitution was as a result of the framers' foresight on the need for future amendment.

40. Turning to the substance of the Petition, Mr. Kuiyoni argued that the Constitution is a living document that needs to respond to new needs and changing societal demand. He urged the Court not to grant the prayer seeking to declare certain parts of the Constitution unamendable because Article 1 recognizes the sovereignty the people who have the unlimited power to decide how they want to be governed.

41. He further submitted that the framers of the Constitution saw the need for amendments and included Article 255, which sets in clear terms how the constitution can be amended. He insisted that all Articles are amendable under Article 255. He also referred to the two modes of amendment provided for, that is, Parliamentary or Popular Initiative and urged the Court to dismiss the Petitions.

42. The 3rd Respondent (Speaker of the Senate) opposed the Consolidated Petitions and filed his Grounds of Opposition dated 10th February 2021 to all the Consolidated Petitions. The Grounds of Opposition cover all the eight Petitions. They are as follows:

1. *THAT the Constitution of Kenya grants the people of Kenya sovereign and an inalienable right to determine their form of governance.*
2. *THAT the Constitution recognizes the sovereignty of the people of Kenya and provides how they can either directly or through their democratically elected representatives. In exercising sovereign power, the people or their democratically elected representatives can amend the constitution.*
3. *THAT the Constitution and more particularly Articles 255, 256 and 257 sets in very precise, clear and concise manner in which the Constitution can be amended.*
4. *THAT Article 255 of the Constitution has already provided for matters that form the "basic structure" of the Constitution which can only be amended by the people exercising their sovereign right directly in a referendum.*
5. *THAT to the extent that the Petitioners challenges the sovereign power of the people to amend certain Chapters of the Constitution, the same is a challenge to the*

validity and legality of the Constitution contrary to the provisions of Article 2(3) of the Constitution.

6. *THAT the Petitioners seek an opinion of the Honorable Court on theoretical questions and not triable legal issues to be addressed by this Honorable Court hence is frivolous, incompetent, vexatious, misconceived and an outright abuse of the Court process.*

7. *THAT the petition does not disclose any right that is being infringed or threatened with infringement as to affect the Petitioners.*

8. *THAT the petition challenges legislative proposals that Parliament considered but were not enacted into law and the mere introduction of Bills in Parliament does not prima facie constitute a violation of the Constitution and as such the Petition herein is an academic exercise.*

9. *THAT the Petition offends the principle of justiciability and hence premature and moot.*

10. *THAT the petition and orders sought are defective and the Court has no jurisdiction to grant the orders as framed as this would amount to prior judicial restraint.*

11. *Based on the foregoing, this Honourable Court lacks jurisdiction to entertain the Petition as drafted and ought to strike out the petition with costs to the 3rd Respondent.*

43. It was the Speaker's contention that the Constitution of Kenya grants the people of Kenya sovereign and an inalienable right to determine their form of governance and provides for how they can amend the constitution either directly or through their democratically elected representatives.

44. The Speaker argued that the Constitution and more particularly Articles 255, 256 and 257, are clear about the way the Constitution can be amended. That Article 255 of the Constitution has already provided for matters that form the "basic structure" of the Constitution which can only be amended by the people exercising their sovereign right directly in a referendum.

45. It is also the Speaker's case that the Petition does not disclose any infringement or threat to any right, and that the mere introduction of Bills in Parliament does not *prima facie* constitute a violation of the Constitution. Consequently, the Speaker argues that the Petition and orders sought are defective and the Court has no jurisdiction to grant the orders as framed as this would amount to "prior judicial restraint."

46. The BBI Secretariat together with Hon. Raila Amollo Odinga filed a joint Statement of Response to the Consolidated Petitions. The list the following consolidated grounds:

> *1)**THAT** the Petitions herein are a mere afterthought, an abuse of the Court process and vexatious.*
>
> *2)**THAT** the Petitions are merely speculative, generalized, hypothetical, and have not been pleaded with specificity and hence they offend the principles of pleading with precision as stipulated in the **Anarita Karimi Njeru vs Republic [1979] KLR CASE.***
>
> *3)**THAT** the Petitions are an abuse of the Court process and an invitation for the Honourable Court to encroach on the legislative mandate of the National Assembly, the County Assemblies, and the Senate, and hence the same offends the doctrines and principles of separation of powers.*

4)***THAT*** *the issues raised in the Petitions herein are res judicata and some offend the doctrine of sub judice hence the provisions of Sections 6 and 7 of the Civil Procedure Act, as they have been heard and determined by Courts of competent jurisdiction with finality and/or some are pending hearing and determination on merits before Courts of competent and concurrent jurisdiction.*

5)***THAT*** *the Petitions are founded on a misinterpretation and misapplication of the Constitution of Kenya, 2010 and various legislation.*

6)***THAT*** *the Petitions herein are speculative and pre-emptive as they are an invitation for the Honourable Court to pre-empt the outcome of an intended legislative process and to encroach on the mandate of the National Assembly, the Senate and the various County Assemblies.*

7)***THAT*** *the Petitions are a mere after thought and offend the political question doctrine, wherein the Petitioners are merely inviting the Honourable Court to encroach and substitute the views of the legislature, the Executive and the people of Kenya.*

8)***THAT*** *the Petitions offend the provisions of Sections 106 and 107 of the Evidence Act on the burden of proof as mere generalized assertions and allegations have been made without any such supporting evidence and hence the Petitions are fundamentally defective.*

9)***THAT*** *no such harm and/or prejudice has been demonstrated in any of the Petitions and none of the Petitioners has adduced any such evidence of violation and/or contravention of the law to warrant the interference and involvement of this Honourable Court in the constitutional amendment process.*

10) ***THAT*** *the Petitions are a mere afterthought as the Petitioners are selectively seeking to exercise their fundamental rights and freedoms to the detriment of the Respondents herein in light of the fact that there have been several attempts to amend the Constitution and none of the Petitioners herein ever sought to challenge and/or impinge the said past processes including, the* ***OKOA KENYA MOVEMENT*** *and the* ***PUNGUZA MZIGO INITIATIVE*** *among others.*

47. The BBI Secretariat and Hon. Raila Amollo Odinga also filed an Affidavit sworn by Dennis Waweru in Response to Petition E282 of 2020. The same is dated 5th February 2021. He depones that the Petitions are an abuse of the Court process. That the issues raised in the Petition lack justiciability since they are speculative and invite the Court to read into non-existent provisions of the Constitution.

48. BBI Secretariat and Hon. Raila Odinga allege that the Petitions are an abuse of the Court process and are vexatious because they are speculative and offend the principles of pleadings with precision as stipulated in ***Anarita Karimi Njeru Vs Republic (1979) eKLR***.

49. They contend that Petitioners are inviting the Court to encroach on the legislative mandate of Parliament which offends the doctrine of separation of powers. That the issues raised in the Petitions are *res judicata* while some offend the doctrine of *sub judice.*

50. It is their case that the Petitions are founded in misinterpretation of the law and are speculative and preemptive. That they offend the Political Doctrine question and Section 106 and 107 of the Evidence Act on a burden of proof as they are mere generalizations.

51. They contend further that the Petitions have not demonstrated or adduced any evidence of violation or contravention of the law to warrant interference by the Court in the Constitutional Amendment

process and the Petitioners are seeking to exercise their fundamental right to the detriment of the Respondents. This they say is because the Petitioners never challenged previous attempts at amending the Constitution.

52. They submitted that the Doctrines of Basic Structure; Unamendability and eternity clauses do not apply in Kenya. They faulted the Petitioners for mixing up the concepts of Basic Structure Doctrine, the Concept of Unamendability and Eternal clause, which they argue must be distinguished.

53. They attributed the origin of the doctrine of basic structure to the Indian decision in ***Kesavananda Bharati Spiradagalvaru v State of* Kerala**. They pointed out that in the said case, the Supreme Court of India appreciated the uniqueness of the Indian Constitution and the applicability of the doctrine within the Indian context.

54. They enumerated the distinguishing factors for the Indian context and argued that a combined reading of Article One, Chapter Sixteen and the Decision in the ***Rev. Timothy Njoya case***, make it explicit that the doctrine is inapplicable in Kenya.

55. They also faulted the doctrine for lacking universal acceptance. They cited the Singaporean cases of ***Teo Soh Lung vs Minister of Home Affairs (1989) 1SLR (R) 461*** and ***Ravi s/o Madasamy vs Attorney General, OS No. 548 of 2017 and Summons Nos. 2619 and 2710 of 2017,*** the Ugandan cases of ***Paul K. Ssemogerere and Others Vs Attorney General: Supreme Court Constitutional Appeal No. 1 of 2002*** and ***Male Mabirizi and Others vs Attorney General of Uganda (Constitutional Petition 49 of 2017 (Consolidated with Petition Nos. 3, 5, 10 and 13 of 2018) (2018) UGCC 4 (26 July 2018)***, the Zambian case of ***Law Association of Zambia and Another vs Attorney General of the Republic of Zambia 2019/CCZ/0013,*** Malaysian case of ***Loh Kooi Choon vs Government of Malaysia (1977)2MLJ 187,*** in and the Tanzanian

case of ***Honourable Attorney General of Tanzania vs Reverend Christopher Mitikila, Civil Appeal No. 45 of 2009.***

56. On the issue of Eternity clauses, Counsel for BBI and Hon. Raila Odinga submitted that the eternity clauses are actual constitutional provisions made in the text of the country's constitution. Counsel concluded that the principle of eternal clauses does not therefore apply in Kenya since the Constitution of Kenya does not contain eternal clauses.

57. On the concept of unamendability, Counsel argued that the concept is an academic one, not supported by Kenyan Constitution. He relied on the ***Timothy Njoya Case*** in which, he argued, the Court affirmed the Indian case of ***Keshava Memon Vs State of Bombay.*** He claimed that the Court warned against the use of the concept. He further argued that Chapter 16 itself is a statement of amendability and that reservation of some matters for the people through a referendum acts as a safeguard.

58. In conclusion, they warned the Court against allowing the prayers in Petition 282. According to them, it would amount to usurping the Powers of Article 255 and offending Article 2(3) of the Constitution.

59. The Amicus Curiae, Kenya Human Rights Commission (KHRC) made both written and oral submissions. Their written submissions are dated 15th March 2021. The submissions were adopted by Kituo Cha Sheria, an Interested Party in the matter.

60. The KHRC sided with the Petitioners on the applicability of the doctrines herein in Kenya reached the conclusion that there was an implied limitation on constitutional amendments.

61. They contended that the proposed constitutional amendments would alter pure Presidential system in the 2010 Constitution as well as the basic structure of the executive, the concept of separation of

powers, undermine the independence of independent commissions and threaten the devolved system of government.

62. The Amicus curiae also supported the Petitioner's argument that Chapters One, Two, Four, Nine and Ten form part of the basic structure of the Constitution, that cannot be amended under Article 256 or 257 and that the BBI steering committee does not fall under the category of citizens' initiative as such, it could not initiate a popular initiative.

63. The Amicus Curiae, therefore, concluded that that spirit and tenor of the Constitution ought to permeate the process of Judicial Interpretation as stated in the matter of the ***Interim Independent and Electoral Commission Constitutional Application No. 2 of 2021.*** They proposed full implementation of the Constitution rather than an amendment

64. Duncan Oburu Ojwang, John Osogo Ambani, Linda Andisi Musumba and Jack Busalile Mwimali were also admitted as Amici based on their expertise in Constitutional law. Their Amici Brief is dated 11th September 2020. In their brief, they offered to assist the Court in adjudicating on the issues raised in the consolidated petitions.

65. They identified what they called "international legal standards of Amendments of Constitutions" by which, they said, Kenya is bound and which apply to this case. They also presented comparative jurisprudence and best practice in respect of the Constitution and standards such as public participation.

66. The Amici brief raised four other issues i.e. the role of the Court in interpretation of the Constitution, the Basic Structure Doctrine, the limits of the Constituent power and state duty in international legal standards.

67. The Amici also filed submissions to the Consolidated Petitions. The same is dated 9th Match 2021. On the issue of the applicability of the legal and judicial doctrines herein, the Amici submitted that the doctrines did not apply to shield the entire specific chapters of the Constitution from unamendability, but rather, to protect amendment of specific provisions to the Constitution, whose effect would either be to interfere with the basic structure or essential features of the Constitution.

68. Ms. Nyiguto made oral submissions on behalf of the Amici, and reiterated the contents of their brief and written submissions. She urged the Court to zealously protect the Constitution from what she called a "hyper-amendment culture" as had been in the past. She reiterated that doctrine of Basic Structure shielded all provisions that form the basic structure of the Constitution and not the specific chapters listed in the Petition.

II. PETITION No. E397 OF 2020

69. The Petitioners in ***Petition No. 397 of 2020***, The Kenya National Union of Nurses, pleaded that following the establishment of the Steering Committee, and upon invitation to the public to submit memoranda by the Steering Committee, the Petitioner duly submitted its proposal on four thematic areas, to wit: The Establishment of an Independent Constitutional Health Service Commission; Recognition of Universal Health Care as a Human Right; Expansion of Free Basic Education; and The Removal of the Salaries and Remuneration Commission. The Petitioners' Proposal was contained in a detailed Memorandum dated 8th August, 2019 and submitted on the 9th August, 2019 and the said proposals we in form of a Bill.

70. After hearing the Petitioner together with other healthcare workers on the above pertinent issues, the Taskforce released a report in October, 2019 in which it fully captured the aspirations of the health care workers

to the extent that it was extremely necessary to transfer the health sector personnel element from the County Governments to an Independent Health Service Commission to enable sharing of the very limited health experts. The meaning, tenor and effect of the said proposal, according to the Petitioners, was that an Independent Health Service Commission could only be achieved by amending the relevant parts of the Constitution. Those amendments would encompass recognizing it as an independent constitutional body with the same status as other constitutional bodies for other professionals and careers such as the Parliamentary Service Commission, The Judicial Service Commission, the Teachers Service Commission and the National Police Service Commission. It was therefore the legitimate expectation of the Petitioner and others within the health care profession and all Kenyans at large that their proposal and aspiration for an Independent Constitutional body that would be in charge of training, recruitment, deployment, transfers, and promotions so that health workers are not at the mercy of Governors would be achieved. Accordingly, the Petitioners legitimately expected that the Taskforce's report of October 2019 would be fully captured in the subsequent report of October 2020 which would then lead into the Amendment Bill.

71. The Petitioners lamented that contrary to the said legitimate expectations, the Steering Committee released a second report in October, 2020 in which it fundamentally altered the October, 2019 report and has now purported to limit the proposed Health Service Commission's mandate to reviewing standards on the transfer of health workers, facilitation of resolution of disputes between employers and health workers and accreditation of health institutions through a proposed bill to amend the Health Act as opposed to a Constitutional framework which would involve amending the Constitution of Kenya and specifically enlisting the Health Service Commission as an Independent Body outside the scope and powers of the Public Service Commission. The proposed statutory framework, it was contended, is glaringly weak, reducing the

commission to a mere advisory panel as opposed to a strong independent and constitutional body.

72. The Petitioners faulted the justification by the Steering Committee in doing so based on purported receipt of divergent views, stating that the decision to remove the proposal to institutionalize an Independent Constitutional Health Service Commission is unreasonable, unlawful and procedurally unfair in blatant breach of Article 47 of the Constitution of Kenya as read with Section 4 of the Fair Administrative Action Act. In their view, the inclusion of these spurious allegations of opposition in the final report was intended to deny their proposals and water them down from a constitutional amendment into an amendment of an Act of Parliament. Accordingly, the self-serving referendum proposed by the principals who set up the Steering Committee ought not to be permitted to stand in the way of real reforms and that it is only just, reasonable and fair that the whole referendum exercise under Chapter 16 of the Constitution be stopped until the documents proposed for referendum are legalized. If not, the whole process now being undertaken will consummate an unconstitutional illegality by the Steering Committee.

73. It was argued that by not giving any attention to the proposal, the Steering Committee's action was an unfair administrative neglect of duty and abuse of powers and that to ignore the proposals of the Petitioner and go only with a few proposals would be a great waste of state resources.

74. In support of their case, the Petitioners relied on ***Coughlan & Ors, R (on the application of) vs. North & East Devon Health Authority [1999] EWCA Civ. 1871, Para 61 to 82*** , ***Republic vs. Kenya Revenue Authority Ex Parte Cooper K-Brands Limited [2016] eKLR***, ***Kenya Revenue Authority vs. Universal Corporation Ltd [2020] eKLR*** and argued its aspirations and wishes together with those of the Health Care fraternity ought to have been captured through the proposed Constitution of Kenya (Amendment Bill), 2020 and not through the Health (Amendment) Bill, 2020. They also relied on ***Republic vs. Public Procurement Administrative Review Board & 2 others Ex-Parte Pelt***

Security Services Limited [2018] eKLR and argued that the decision is blatantly discriminatory and a direct affront to Article 27(1), (2), (3), (4), and (5) of the Constitution and also in breach of National Values and Principles of Governance. Further, the decision to remove their proposals were Wednesbury unreasonable and the legitimate expectations of Health Care workers to have an independent commission were shattered and as such discriminatory under Article 27 of the Constitution.

75. The Petitioners therefore sought the following orders:

> *a. A declaration that the decision of the 1st and 2nd Respondents to omit the Petitioner's Proposal for an Independent and Constitutional Health Service Commission from the October,2020 Report of the Steering Committee on the Implementation of the Building Bridges to a United Kenya Taskforce Report offends Articles 10, 27(1), 27(2), 27(4), 27(5),27(6), 27(8), 41(1),(2),43(1)(2) and 47(1) of the Constitution.*
>
> *b. The 1st and 2nd Respondents be compelled to publish a fresh Constitution (Amendment) Bill inclusive of the Petitioner's Proposal for an Independent Health Service Commission.*
>
> *c. That the 3rd Respondent be directed to stop the process towards any referendum including receiving the signatures, verifying the same, and/or doing any act towards actualizing the process of realizing a referendum and/or from submitting the draft Bill to each County Assembly for consideration until the 1st and 2nd Respondent Publishes the Constitutional Bill including the Petitioner's Proposals.*
>
> *d. This Honourable Court be pleased to issue an Order permanently restraining the 4th and 5th Respondents from receiving copies of the impugned draft bill from the County Assemblies and/or from receiving Certificates approving the draft bill that emanate therefrom and/or from discussing,*

and/or deliberating and/or voting on the same on the floor of the respective Houses in any way or at all.

e. *Costs of the Petition***.**

76. The Petition was opposed by the BBI Steering Committee, which took the view that the Petition herein is a mere invitation by the Petitioner for the Court to usurp the role of Parliament and County Assemblies and substitute their views with that of the Petitioner on what they want and their preferred selfish private interests. It was averred that whereas the Building Bridges Taskforce collected various divergent views on several issues, not all such views could be incorporated and/or accommodated. This is so because the amendment of the Constitution by popular initiative is one of the processes under which a person and/or an institution may amend the Constitution and as such, it choses what to include and what not to include. Being a voluntary process, a party cannot force its views and/or opinion to be included in any such popular initiative.

77. To the BBI Steering Committee, by submitting views to the BBI Taskforce, there was no such legitimate expectation created and/or promise made to the Petitioners as alleged in the Petition. This Court was urged to invoke the doctrine of avoidance as the issues raised by the Petitioners are mere political and policy questions which do not fall within the ambit of the Court. According to the BBI Steering Committee, the proposed constitutional amendment is not a wide open-ended amendment to cure all such issues as proposed by the Petitioners and it is not within the mandate of the Building Bridges Initiative to do so. Further, the Petitioners have not exhausted all such remedies available to them and in any event, it can always Petition Parliament for any such legislative changes they seek. In the BBI Secretariat's view, the Petitioners did not make out a case to warrant the grant of the orders herein and/ or the intervention by the Court.

78. While conceding that the Petitioners indeed appeared and submitted their views to the BBI Taskforce and made suggestions that there be established an independent constitutional health service commission, it was noted that the substratum of the petition is based on the contents of the BBI Report and the Report of October, 2020 by the *Steering Committee on the Implementation of the Building Bridges to a United Kenya Taskforce Report*. From the Report, it was contended the Petitioners' views were duly considered by the Taskforce and Steering Committee as indicated in the Steering Committee's Report, and the Committee concluded that there was need to set up a Health Service 'Commission and provision thereof was made in the Report. The only difference in the Report and the Petitioner's argument is that the Petitioners want the Commission established directly under the Constitution which is unnecessary since under Article 59(5) of the Constitution of Kenya, 2010, one can by statute establish Commissions that have the same powers equivalent to Constitutional Commissions.

79. As regards the allegations of violation of Articles 10, 27 and 47 of the Constitution, it was the Steering Committee's position that the Petitioners have not pleaded with precision and or adduced any such evidence in support of the allegations therein. It was contended that prayers [A] and [B] in this Petition are an invitation by the Petitioner for this Honourable Court to take over the constitutional Amendment Process pursuant to Article 257 while prayers [C] and [D] in this Petition have been overtaken by events and are therefore moot.

80. The Steering Committee submitted that in respect to the conduct of a popular initiative pursuant to Article 257 of the Constitution of Kenya, 2010, the Promoters of the Bill are under no obligation to capture the views of nobody else other than those supporting the initiative. The constitutional recourse for Petitioners if they feel that the proposal is unpopular, is either to lobby County Assemblies, the National Assembly and the Senate to reject the same or mobilize its membership to reject the same during the referendum and that the Petitioners cannot use the

Court to fulfil for them their civic obligations. It was submitted that pursuant to Article 257 (5) and (7) of the Constitution, the County Assemblies and Parliament do not have the powers to alter and or improve the contents of the Constitution Amendment Bill so as to incorporate divergent views raised through public participation. Since Bill did not originate from the County Assembly but from a promoter, the Counties cannot therefore hijack the process and take over such a Bill since by purporting to do so, the Bill would lose its meaning within the meaning of a popular initiative amendment. In any event, it would be a travesty if all County Assemblies would amend any such Bills hence there would be 47 amended Bills leading to lack of clarity as to which one of them would go to Parliament for consideration.

81. Accordingly, if County Assemblies would amend, then it would also mean that even Parliament and the senate would amend and hence the final Bill to be subjected to a referendum would not be the same Bill that was submitted to the IEBC by a promoter.

82. In support of the submission that there is lack of precision, the Steering Committee relied on ***Anarita Karimi Njeru vs. The Republic (1976-80) 1 KLR 1283*** and ***Mumo Matemu vs. Trusted Society of Human Rights Alliance [2013] eKLR***, and contended that the Court ought to have downed its tools once it found that the case was not pleaded with sufficient precision.

83. This petition was similarly opposed by the Attorney General based on the following grounds:

> **1.** *That the mere fact that the Petitioner's particular views did not prevail in the 1st Respondent's report does not justify the invalidation of the 1st Respondent's report.*
>
> **2.** *That there is no legal duty imposed upon the Respondents to unreservedly accept all proposals received through public participation.*

3. *That the issuance of the orders sought would constitute unlawful usurpation of the Respondents discretion.*

4. *That the petition does not evince how the Petitioner's rights under Article 27(1), (2), (4), (5), (6), (8), 41(1), (2), 43(1) (2) and 47(1) of the Constitution was infringed.*

5. *The 1st Respondent's action did not in any way impair the Petitioner's right to initiate and promote its proposal for an Independent Health Services Commission.*

6. *The Respondents cannot be compelled to publish a Constitution of Kenya Amendment Bill with particular content as that would amount to directing the Respondents to exercise discretion in a particular manner.*

7. *The Respondents cannot be compelled to publish a fresh constitutional bill including the Petitioners proposal as there is no legal duty imposed upon the Respondents to publish a constitutional bill in the first instance.*

8. *That the provisions of Article 257(5) of the constitution confers upon the Independent Electoral and Boundaries Commission the responsibility to determine in the first instance whether a proposed amendment of the constitution by way of popular initiative has met the requirements of Article 257 before submitting the draft Bill to each County Assembly for consideration.*

9. *That the Honourable Court lacks the jurisdiction to impose upon a promoter of a Constitution of Kenya Amendment Bill the contents of such a bill.*

10. *That under the constitution of Kenya the power to determine the merits or demerits of the contents of a proposed constitution amendment bill is reposed upon legislative assemblies and the Kenyan voter.*

11. *That the Petition is without merit.*

84. It was submitted by the Honourable Attorney General that Petitioners' claim is premised on a mis-appreciation of the law on public participation as it is erroneously premised that all views of participants in a public fora or in a pre-legislative process must be incorporated into a draft Bill. In support of this position the Attorney General relied on ***Republic vs. County Government of Kiambu Ex Parte Robert Gakuru & Another [2016]*** and ***British American Tobacco Ltd vs. Cabinet Secretary for the Ministry of Health & 5 Others [2017] eKLR***.

85. It was the Attorney General's submission that to the extent that the entire petition is premised on the one ground that the Petitioner's views were not ultimately expressed in the draft constitutional Bill and not on the basis that there was no public participation, the same is without merit and ought to be dismissed. According to him, the provisions of Article 257 allow any person to propose an amendment to the constitution through a popular initiative, the same Article provides that it is the promoter of the popular initiative who shall formulate it into a draft Bill and in the instance case, the Petitioners are not the promoters of the popular initiative and that further, the fact that there is a proposed amendment of the Constitution does not in any way prevent the Petitioners from initiating their own popular initiative to amend the Constitution to include their proposal. The Attorney General further submitted that there is no constitutional or statutory provision of the law that compels the promoters of the ongoing popular initiative process to include the Petitioners' proposal in the manner that they are desirous of and would be amiss if it were the Court to issue the injunctive orders sought in the absence of a legal duty imposed upon the Respondents by express provision of law.

86. The Attorney General argued that the order sought against it are essentially judicial review orders of mandamus and prohibition and submitted that they don't meet the criteria for issuance of such orders. Based on the decisions in ***Republic vs. County Secretary - Nairobi City***

County & another Ex Parte Tom Ojienda & Associates [2019] eKLR, ***Apotex Inc. vs. Canada Attorney General 1993 Can LII 3004 (F.C.A.), [1994] 1 F.C. 742 (C.A.), aff'd 1994 CanLII 47 (S.C.C.), [1994] 3 S.C.R. 1100*** *and* ***Dragan vs. Canada (Minister of Citizenship and Immigration) 2003 FCT 211 (CanLII), [2003] 4 F.C. 189 (T.D.), aff'd 2003 FCA 233 (CanLII), 2003 FCA 233)***. Based on ***Manyasi vs. Gicheru & 3 Others [2009] KLR 687***, it was contended that the promoters of a popular initiative Constitution of Kenya Amendment Bill have the discretion to determine what to include in their proposed Bill and that the Court cannot compel them to exercise their discretion in a particular manner as proposed by the Petitioners.

87. Regarding the allegation of breach of the Petitioners' legitimate expectation, the Attorney General submitted that the petitioner had not established the basis of such expectation and reliance was placed on ***Communication Commission of Kenya vs. Royal Media Services Ltd & 5 Others [2014] eKLR***, ***R (Bibi) vs. Newham London Borough Council [2001] EWCA Civ 607 [2002] 1 WLR 237*** and **De Smith, Woolf &Jowell, *"Judicial Review of Administrative Action"*** 6thEdn. Sweet & Maxwell page 609.

88. In this case it was the Attorney General's submissions that no express promise has been demonstrated to a have been made to the Petitioners and secondly, there is no evidence that the promoters of the Constitution of Kenya Amendment Bill have acted unlawfully in relation to any commitments given to the Petitioners.

89. It was noted by the Attorney General that some of the reliefs sought have been overtaken by events and there is no merit in issuance of the same. In sum, 2nd respondent contended that the instant petition is devoid of merit and ought to be dismissed with costs.

90. The Independent Electoral and Boundaries Commission (the IEBC) similarly opposed the petition. According to it the petition has been overtaken by events to the extent that it challenges a process of a

constitutional character which have already taken place. Having forwarded the Constitution of Kenya Amendment Bill, to the respective county assemblies vide their letter dated 26th January 2021, by which time there were no orders barring it from doing so, prayers being sought against it are moot.

91. It was the IEBC's position that it complied with the verification and conformity mandate and the referendum mandate as enshrined in the Constitution and urged this Court to permit continuation of the activities carried out by the Steering Committee and relied on ***Samson Owimba Ojiayo vs. Independent Electoral and Boundaries Commission (IEBC) & Another [2013] eKLR*** *as well as* ***Diana Kethi Kilonzo & Another v Independent Electoral and Boundaries Commission & 10 Others [2013] eKLR, Titus Alila & 2 Others (suing on their own behalf and as Registered Officials of the Sumawe Youth Group) vs. Attorney General & Another [2019] eKLR.***

92. The National Assembly and the Senate substantially adopted the positions taken by the foregoing Respondents.

III. PETITION No. E400 OF 2020

93. According to the Petitioners in ***Petition No. E.400 of 2020***, there are several proposed amendments on a raft of issues that the impugned Constitution Amendment Bill seeks to amend. In their view, the hurried and rushed launch of the signature collection prior to availing the said Bill to the public for them to study, internalize and understand in details what issues are proposed to be amended is a clear attempt to subvert the people's free will to exercise their sovereign power since there is a likelihood of the public making uninformed choices over such an important exercise. It was contended that a deliberate failure by the state to undertake thorough civic education prior to the collection of signatures in support of the impugned Bill is a blatant compromise on the people's ability to exercise free will which is a violation of National

Values and Principles of Good Governance as espoused under article 10 of the Constitution. To the Petitioners, the public have a right to abundantly understand the issues proposed for amendment and fully participate in matters affecting their governance hence the need to be meaningfully consulted in policy making as opposed to them being coerced using state machinery into embracing a constitutional amendment process.

94. It was averred that the process of endorsement of the Amendment Bill and the collection of signatures thereof is being championed, campaigned for and pushed by the National and the County Governments as well as other state and public officers acting in their official capacities using public resources to finance, marshal and mobilize support for the said Amendment Bill.

95. It is contended that the BBI process that has resulted in introducing the Amendment Bill that was not flagged by the citizens of Kenya and the petitioners took issue with the role of the Government and other state and public officers in matters constitutional amendment within the auspices of Article 255, 256 and 257 of the Constitution. According to them, the BBI process was informed by ulterior motives where the political class usurped the sovereign power of the citizens of Kenya. This was informed by the fact that the object of BBI as spelt out in the terms of reference set out in the Gazette Notice Number 5154 dated 24th May 2018 did not foresee a proposal for amendment of the Constitution. Accordingly, the turn of events in the second appointment of the Steering Committee was an afterthought and a clandestine process to hoodwink Kenyans.

96. Since the recommendation of the BBI Taskforce was in form of an advice to the President, the attempt to formulate constitutional amendment were and are a derogation from its mandate and scope hence the subsequent process of validation of the initial report, formulation and publication of the Amendment Bill is unconstitutional.

97. The Petitioners are aggrieved that the said BBI process was made in total disregard of the national values and principles and in particular, without granting members of the public and/or relevant stakeholders their constitutionally guaranteed opportunity to contribute to the said decision. In their view, the BBI-prompted amendment of the Constitution violates the Sovereignty of the People safeguarded under Article 1 of the Constitution.

98. In this Petition, this Court is being invited to make a determination whether the state, through a government sponsored initiative, for purposes of a constitutional amendment can purport to directly exercise sovereign power by virtue of Article 1 of the Constitution. To the Petitioners, the BBI process violates the spirit of Article 256 and 257 of the Constitution which are the two avenues prescribed in Article 255 by which the constitutional amendment can be initiated. In the Petitioner's view, a Parliamentary initiative as envisaged under Article 256 is a constitutional amendment process where sovereign power of the people is exercised indirectly through the people's democratically elected representatives via Parliament as the legislative arm of Government. On the other hand, a popular Initiative as envisaged under Article 257 is peoples –driven constitutional amendment process devoid of the political class where sovereign power of the people is exercised directly. In this case, the BBI-initiated constitutional amendment process falls in neither of the two processes as the same was not prompted by Parliament nor *Wanjiku* and as such the process derogates from the set out Constitutional principles and procedure.

99. The BBI, it is further contended, having been initiated by the President (an elected representative of the people) violates the sovereign right of the people of Kenya to exercise power directly by proposing an amendment to the constitution that is disguised as a popular initiative when it is not. It was contended that an amendment of the Constitution by a Popular Initiative as envisaged in Article 257 must originate from

the electorate devoid of influence of any representative. In this case, the Steering Committee's recommendation was in form of an advice to the President and any attempt to formulate a constitutional amendment were and are a derogation from its mandate and scope as their operations were not sanctioned by the people of Kenya. This, it is submitted, demonstrates that Kenyans were induced and/or coerced to endorse a document that they were not aware of and that what was availed to the public were signature booklets and not the physical copies of the Bill.

100. It follows, according to the Petitioners, that the Steering Committee's involvement in drafting the impugned Constitution of Kenya Amendment Bill was beyond its scope as it lacked capacity since its operations were not sanctioned by the sovereign will of the people of Kenya in violation of Articles 1(1) and 157 of the. It was the Petitioners' position that elected representatives of the people of Kenya, led by the President have usurped the sovereign power of the people of Kenya by pushing a constitutional amendment in a manner devoid of the principles laid down in the Constitution. In support of their submissions the Petitioners relied on ***Katiba Institute & Another vs. Attorney General & another [2017] eKLR*** and ***Law Society of Kenya vs. Attorney General & another; Mohamed Abdulahi Warsame & another (Interested Parties) [2019] eKLR*** and submitted that, by allowing a process devoid of adherence to the constitutional provisions, the President has violated Article 3 of the Constitution and as such he has failed in his duty to preserve, protect and defend the Constitution.

101. In the Petitioners' view, the power to amend the Constitution through a popular initiative must be exercised directly and not by anyone on behalf of the people. In this case, it was submitted, there is evidence showing that BBI is neither a Parliamentary nor popular initiative but it is an idea conceived by the President, an elected representative of the people who cannot exercise legislative power for or on behalf of the people. According to the Petitioners, the only instance

that the people have reserved legislative authority is on matters of amending the Constitution and that under Article 257 of the Constitution the legislature only plays a ceremonial role.

102. Citing the manner in which the Amendment Bill was passed in some counties such as Siaya, the Petitioners questioned the speed at which the County Assemblies passed the Bill and contended that the process is quite clandestine in nature and if not declared unconstitutional, the provisions will become unchallengeable law as provided under Article 2 of the Constitution.

103. It was submitted that owing to the fact that the President has an oversight role on Parliament, he cannot initiate a process leading to drafting of Bills including the impugned Constitution of Kenya Amendment Bill. In this regard the Petitioners relied on ***Doctors for Life International vs. Speaker of the National Assembly and Others*** and ***Coalition for Reform and Democracy (CORD) & 2 Others vs. Republic of Kenya &10; Others [2015] eKLR.***

104. According to the petitioners, under the third schedule to the Constitution, the President took an oath and solemn affirmation of allegiance to, *inter alia*, obey, preserve, protect and defend the Constitution and all other laws of the Republic and to protect and uphold the sovereignty, integrity and dignity of the people of Kenya. That oath, it was asserted, prohibits him from being involved in a process of altering the current state of the Constitution. This argument is based on the fact that the ordinary English meaning of the word "Preserve" is to maintain something in its original or existing state.

105. It was contended that the Bill contravenes Article 257 of the Constitution in that it is the initiative of the holder of Presidency who is the head of state and government, therefore lacking in form and structure that befits a popular initiative. Having not originated from Parliament, as neither of the two houses' initiated the process, the Bill is devoid of constitutional backing stipulated under Article 257 of the

Constitution and that this was admitted by the President on the 25th November, 2020, during the launch of the Bill where he disclosed that the BBI process culminated from talks between two people with the purpose to stabilize the country and find peace. In the circumstances, the drafting of the Bill, the publication, the launching and distribution and the roll out of signature collection is unconstitutional.

106. It was opined by the Petitioners that by dint of Article 257 (5) and (7) the term "consideration" and "approve" herein provides room to County Assemblies to alter and or improve the contents of a Constitution of Kenya Amendment Bill so as to incorporate divergent views as is always the case in a proper legislative process. In their opinion, the Constitution cannot have envisaged the term approve to mean a blanket acceptance or rejection of the bill as that would claw-back the legislative role of County Assemblies and Parliament.

107. It was further contended that by dint of Article 257(10), the IEBC is constitutionally required to submit to the people all the proposed amendments as distinct and separate 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" questions to the entire amendment bill. In their view, a mere "Yes" or "No" to the entire Amendment Bill violates the Peoples exercise of free will in that it hinders the voter from making a choice between a good amendment proposal from a bad one since the good proposals could be rejected with the bad proposals and vice versa.

108. It was submitted that in the spirit of the Constitution where there are several amendments, as in this case where the impugned Bill has more than 18 amendments touching on different clauses of the Constitution, the IEBC is obliged to formulate several referendum questions as envisaged under Section 49 in 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.

109. This argument was partly based on the fact that a referendum being a costly affair which will cost the taxpayer billions of shillings, the exercise should be undertaken in strict conformity with principles of Public Finance which, under Article 201(d), dictates that public money shall be used in a prudent and responsible way. If the people are given an opportunity to approve specific proposals to the amendments that are acceptable to them and at the same time being afforded a chance to reject the unacceptable ones, no money shall have been used in an imprudent manner as is likely to be case where there is a "No" vote to the entire bill on account of a few proposals that are unacceptable.

110. The Petitioners also aver that the amendment of the Constitution process ought to be guided by legislation right from the drafting of the amendment bill, to the collection and verification of signatures all the way to presentation of the bill to County assemblies as well as Parliament and up to the referendum stage. However, there is no National law on referendum that is to guide on collection, receiving, verification and approval of signatures by IEBC as well as the manner of forwarding and debating of the Amendment Bill by the County Assemblies and Parliament.

111. It was submitted that the IEBC lacks capacity, to receive, verify and approve signatures of the alleged Kenyan voters who endorsed the impugned bill and that Kenyans were not given reasonable time to process the over one thousand paged document, only accessible on the website. Further, it was contended that the County Assemblies, are barred by the Constitution from debating a document whose purpose is to amend the Constitution when the said document is null *ab initio* for failing to meet the provisions of the Constitution. According to the Petitioners, the County Assemblies acted *ultra vires* Article 10 of the Constitution, as majority of the County Assemblies did not carry out public participation and reliance was placed on ***Doctors for Life International vs. Speaker of the National Assembly and Others (CCT12/05) [2006] ZACC 11; 2006 (12) BCLR 1399 (CC); 2006 (6) SA***

416 (CC) and ***Robert N. Gakuru & Others vs. Governor Kiambu County & 3 others [2014] eKLR***.

112. Before us, it was submitted that neither Parliament nor County Assemblies have had guiding principles on how to conduct their business while debating a Bill of great magnitude as an amendment to the Constitution and reliance was placed on ***Republic vs. County Assembly of Kirinyaga & Anor Ex-Parte Kenda Muriuki & Anor (2019) eKLR,*** and ***Nubian Rights Forum & 2 others vs. Attorney General & 6 others; Child Welfare Society & 9 others (Interested Parties) [2020] eKLR***.

113. In addition, since IEBC does not have specimen signatures of the registered voters in Kenya to warrant a comparison for verification and approval of the signatures collected, any attempt to carry out verification is unlawful and/or illegal. To the Petitioners, IEBC ought to demonstrate that it has laid down procedures and mechanisms for signature verification and whether Kenyans shall be accorded opportunity to confirm that they wilfully endorsed the Amendment Bill and whether the citizens of Kenya have been accorded an opportunity to understand the amendments being prompted in the Amendment Bill.

114. In the Petitioner's view, the IEBC has made it clear that it is running away from its constitutional duty to verify that the bill was supported by more than 1 million voters and that verification must connote and include the need to check if the persons named in the list are genuine. They proposed that the provisions under Article 8 on the duty of IEBC in elections and referenda should also be employed in Article 257 because it is a higher duty. This therefore means that verification must include going beyond the names presented. The Petitioners noted the admission by the IEBC that the last time they updated their register was during the Kibra by elections making it obvious that there is a room for malpractice. Since anyone can come up with 1 million names, the IEBC should be not just be satisfied as long as those 1 million names are voters. According to the Petitioners,

whereas Article 86 requires IEBC to put in place systems to eliminate electoral malpractice, it admitted that there is no legal framework on the same.

115. The Petitioners lamented that there are no measurements in place on the part of the Respondents to ensure that the proposed amendments contained in the Amendment Bill shall be the same proposed amendments that will be subjected to Kenyans through referendum.

116. Similar issues were raised by the Petitioners in ***Petition No. 401 of 2020, No. 416 of 2020*** and ***No. 426 of 2020***. According to the Petitioners in ***Petition No. 401 of 2020***, the launch of the drive to collect signatures is without authority under the Constitution or any other law. Since a Government entity exercises a delegated power, it can only exercise its authority in accordance with the Constitution whose edict does not expressly place the duty to pursue or initiate any amendment to the Constitution on the National Executive or any state organ, but on Parliament. The National Executive may therefore only initiate Constitutional amendment by petitioning Parliament, in accordance with the Constitution, the National Assembly and Senate Standing Orders. However, since the National Executive or any of its agents is not a person in the context and meaning of a promoter of a popular initiative as envisaged under the Constitution, the process of signature collection is a violation of the Constitution the potential use of public resources to promote a constitutional amendment initiative under the popular initiative is unconstitutional and amounts to abuse of power, violates the constitutional principles on public finance, and leadership and integrity.

117. As for the Petitioner in ***Petition 426 of 2020***, it was his case that whereas the BBI Taskforce, which in his opinion was established under the spirit of Article 131(1)(e) and (2)(c) of the Constitution did not include proposing constitutional changes, its latter reincarnation, the Steering Committee, whose terms of reference included proposing

constitutional changes, had no constitutional or other legal authority for its establishment. Since it was established by the 1st Respondent, vide Gazette Notice No. 264 dated 3rd January, 2020, the Steering Committee's said proposed constitutional amendment is neither by Parliamentary initiative, pursuant to Article 256, nor is it by popular initiative, pursuant to Article 257. This according to him is because under the Parliamentary initiative, the President has no authority or role whatsoever prior to presentation by the Speakers of Parliament of an enacted Bill on constitutional change to him for assent since a Parliamentary initiative for constitutional change originates with Parliament. Likewise, a popular initiative for constitutional change, as envisaged in Article 257, originates with the populace outside the structures of the State. It does not originate with a State organ, whether Parliament, the executives at both national and county levels, the Judiciary, county assemblies or even constitutional commissions or independent constitutional offices.

118. The Petitioner noted that the attempt by the Steering Committee to convert an illegal Presidential constitutional change initiative into a popular initiative, pursuant to Article 257, falls woefully short of the requirements of Article 257 constitutional change by popular initiative. Therefore, the Steering Committee's promoted constitutional amendment is not a constitutional change by popular initiative, but a purported constitutional change unlawfully initiated by the Steering Committee masquerading as a popular initiative under the provisions of Article 257. However, it was contended that a closer look at Steering Committee's constitutional change process shows that it is indeed an attempt to usurp the role of Parliament in the constitutional change process contrary to Article 256(2)21 of the Constitution.

119. Regarding ***Petition No. 451 of 2018*** alluded to by the Respondents as raising similar issues, the Petitioners contended that the said petition is purely challenging the establishment of the defunct Building Bridges Initiative to a united Kenya Taskforce and has nothing

to do with the amendment of the Constitution of Kenya 2010 and that the Respondents have not shown any nexus between the two petitions. On whether an opportunity for verification of the signatures was afforded by the Independent Electoral and Boundaries Commission, it was deposed that on Thursday, 21st January 2021, the IEBC released what they called an interim Verified List of BBI Supporters asking members of the public whose endorsement of the said BBI might have been captured without their consent to report to it latest 5pm on Monday 25th January 2021 thus only giving the said process a weekend to peruse through the 1.2 million signatures. Three days later the 3rd Respondent, issued a Press statement confirming that they were satisfied that the Amendment Bill had met the requisite threshold having been supported by 1,140,845 registered voters and that they had already submitted the draft bill to each of the 47 County Assemblies for consideration.

120. It was averred that the acts of demanding for incentives by the MCAs and the act of ceding to the said demands by the government is a blatant breach of Article 10 of the Constitution on National values and principles of governance.

121. Regarding the issue whether the Court can grant the reliefs prayed the Petitioners cited the cases of ***Law Society of Kenya vs. Attorney General & Another; Mohamed Abdulahi Warsame & Another (Interested Parties) [2019] eKLR, Doctors for Life International vs. Speaker of the National Assembly and Others (CCT12/05) [2006] ZACC 11*** and ***Institute of Social Accountability & Another vs. National Assembly & 4 Others High Court Petition No. 71 of 2014 [2015] eKLR*** and urged the Court to consider the supremacy of the Constitution as envisaged in Article 2 of the Constitution and also be alive to the provisions of the Preamble of the Constitution that, inter alia, the people of Kenya in enacting the Constitution, exercised their sovereign and inalienable right to determine the form of governance of the country.

122. In opposition to the Petition, the BBI Steering Committee and the BBI Secretariat averred that the BBI Steering Committee was created and mandated with the task of initiating constitutional amendment process.

123. It was their view that the Petitioners have not pleaded with precision and have failed to specify the nature of the infringement and the alleged values and principles infringed, if any. Further, they have failed to adduce any evidence in support of their allegations and that their Petition is fundamentally defective as the evidence therein consists of newspaper cuttings, documents whose source cannot be authenticated or vouched for and illegally obtained letters and communication to which the Petitioners are not party to. According to them, evidence obtained in a way that violates any right to fundamental freedom as envisioned under Article 50(4) of the Constitution shall be excluded if admission of the same would render the trial unfair or would otherwise be detrimental to the administration of justice.

124. In support of the challenge to the authenticity of the annexed documents reliance was placed on the case of ***National Super Alliance vs. The Independent Electoral and Boundaries Commission and Others, NAI High Court JR No. 378 of 2017*** and the Court of Appeal case of ***IEBC vs. National Super Alliance(NASA) Kenya & 6 Others, Civil Appeal 224 of 2017***.

125. It was averred that the Petitioners through ***Nairobi High Court Petition No. 451 of 2018, Thirdway Alliance Kenya vs. Attorney General and Others*** attempted to challenge the establishment of the Building Bridges Initiative to United Kenya Taskforce but the same was dismissed which dismissal was never challenged or appealed against. According to them, no evidence and/or complaints have been received or lodged in support of the allegations that the Taskforce rushed to collect signatures.

126. According to them, no evidence has been adduced to prove the assertions that the Amendment is being championed by the National and County Governments or any state or public officers using public resources. In their view, Petitioners having failed to submit their views to the taskforce cannot be heard to complain that there was no adequate public participation, particularly, as there is no specific complaint by "*Wanjiku*" of being locked out from participating in the process.

127. Having misconstrued the provision of Articles 255 to 257, the Petitioners, according to the said Respondents, cannot purport to impose a pre-condition that a constitutional amendment process by popular initiative is a preserve of specific persons. In their view, Chapter Sixteen of the Constitution of Kenya, 2020 does not in any way specify who may move a constitutional amendment process by Popular Initiative and that the Constitution grants the State the responsibility to undertake any such measures to fulfil its function. According to the them, most of the previous constitutional amendment processes have been initiated and sponsored by the State and that the Constitution under various provisions and mandates requires and/or demands for the State to take legislative and other measures to ensure the achievement of certain constitutional objective for instance Articles 21(2),27(8) and 55 among others.

128. The Petitioners were faulted for adopting a narrow approach wherein they seek to advance their selfish interest in a parallel process through their attempts to amend the Constitution through the *Punguza Mzigo* Bill,2020. Since the Constitution provides a broad and self-executing process in regard to the amendment of the Constitution by popular initiative, it was averred that the Petitioners cannot purport to impose and/ or introduce new terms and /or pre-conditions not expressly stipulated under Article 257 of the Constitution. Further, no evidence had been adduced to support the allegations on the use of billions of shillings.

129. Contrary to the assertions of lack of legal framework, the said Respondents' position was that there exist various Laws and Regulations to govern such referenda in Kenya and that over the years the IEBC has conducted and engaged in similar exercise. It was disclosed that the IEBC put in place mechanisms for signature verification and that it invited members of the public to verify and confirm as evidenced by the Public Notice issued in that regard.

130. In the said Respondents' view, this Petition is a mere invitation for the Court to encroach on the legislative mandate of the National Assembly, the Senate and the County Assemblies. Since the Senate, National Assembly and the County Assemblies were yet to receive, debate and deliberate on the Amendment Bill, and thereafter approve or reject it, is their view was that the Petitioners have prematurely invoked the jurisdiction of this Court.

131. It was submitted that the BBI Secretariat is a voluntary political alliance that can only be judged under Chapter Sixteen of the Constitution and that it is on record that at least one million signatures were collected and there is no suggestion that the process did not conform to the requirements of Chapter Sixteen of the Constitution. It was also submitted that the Court cannot substitute the IEBC's opinion that the process commenced was a popular initiative.

132. According to them, the absence of a legislative framework is not fatal for the Amendment Bill since there is no suggestion that the provisions of Chapter Sixteen of the Constitution of Kenya are inadequate and the Constitution itself does not require any special legislation to be enacted for purposes of implementing Chapter Sixteen. It was further submitted that once the Bill has been approved by at least 24 counties and at least one of the Houses of Parliament, the Commission cannot be barred from conducting a referendum based on the findings in the case of ***Titus Alila & 2 Others (suing on their own behalf and as Registered Officials of the Sumawe Youth Group) vs. Attorney General & Another [2019] eKLR***.

133. Regarding the contention that the Steering Committee is an unlawful entity, it was submitted that this matter is awaiting determination before the Court in the case of ***Kakamega High Court Petition No.12 of 2020 (Formerly Nairobi High Court Petition) Okiya Omtata vs. Attorney General & Another*** and that it is distinct from the BBI National Secretariat which is a promoter of the Amendment Bill.

134. As regards public participation in the constitutional amendment process it was submitted that the draft proposed Constitution of Kenya Amendment Bill, *The Building Bridges to a United Kenya Taskforce Report October, 2020* and *The Building Bridges to a United Kenya from a Nation of Blood Ties to a Nation of Ideas-A Report by the Presidential Taskforce on Building Bridges to Unity, Advisory 2019*, are a product of a wide comprehensive and broad consultative engagement and public involvement all over Kenya, which process entailed voluntary nationwide public participation. Reliance was placed on ***Republic vs. County Assembly of Kirinyaga & Another Ex parte Kenda Muriuki & Another [2019] eKLR*** for the position that the effect of the lack of public participation can only be determined upon the conclusion of the process envisaged in Article 257 of the Constitution.

135. According to the BBI Steering Committee and the BBI Secretariat, there cannot be an omnibus challenge on the issue of public participation as each County Assembly has enacted its own Standing Orders on the process of engaging the public and as such the Petitioners are under an obligation to plead with specificity and adduce evidence on the failure to involve the public and the magnitude of the same can only be ascertained at the end of the entire process once the County Assemblies, Parliament and the Senate have concluded their deliberations. To support this submission, they cited the ***Timothy Njoya Case.***

136. On the issue of verification of signatures, it was submitted that Article 257(4) of the Constitution does not place any 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. According to them, world over, similar initiatives are verified using two main methodologies which are either publishing names for persons who have appended their signatures in support of the initiative to confirm their support towards the initiative or 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 bearers. It was submitted that in the USA sampling of a certain percentage of signatures for verification is used and in other states 100% verification of signatures would be required.

137. Regarding the question whether specific proposed amendments to the Constitution ought to be submitted as separate and distinct referendum questions to the people in the referendum ballot papers, it was submitted that in the absence of a framework to guide this Court or the Commission in carrying out a Referendum, the power and mandate to interpret the procedure to be used in conducting a referendum is specifically granted to the Legislature under Article 94. Therefore, Courts are expected to avoid interpretations that seem to clash with Constitutional values, purposes and principles. It was argued that this Curt cannot purport to interpret a statute which has not been enacted to guide the Commission on how to carry out a referendum and reliance was placed on the case of ***Apollo Mboya vs. Attorney General & 2 Others [2018] eKLR*** for the proposition that the legislature enacts statutes and the judges interpret them.

138. In their view, the purposive interpretation as has been suggested by the Petitioners can only be utilized by this Court in order to reveal the intention of the statute as was appreciated in ***Gatirau Peter Munya vs. Dickson Mwenda Kithinji & 2 Others [2014] eKLR***. As to the considerations in determining the intention of a statute, reliance

was placed on the case of ***Nyeri & Another vs. Cecilia Wangechi Ndungu [2015] eKLR.***

139. Section 49 of the Elections Act, it was submitted, gives the Commission the mandate to frame the question or questions to be determined through a referendum whether or not they would have "*non-separable preference*", or an "*issue by issue*" question or "*sequential voting.*" It was submitted that Issue by Issue referenda or Sequential Voting would be an extremely expensive process compared to instances where there is one composite question and that this Court cannot deal with the issue since it has been held in ***Re: In the Matter of the Interim Independent Electoral Commission [2011] eKLR***, that this Court lacks advisory jurisdiction.

140. On its part the Independent Electoral and Boundaries Commission (the IEBC) contended that in the exercise of its powers under Article 257, it enjoys operational, administrative, decisional and financial independence. Accordingly, it does not seek the direction or permission from any other person or authority in the performance of its constitutional mandate. In buttressing this argument reliance was paced on ***Re: The matter of the Interim Independent Electoral Commission [2011] eKLR, Samson Owimba Ojiayo vs. IEBC & Another [2013] eKLR, Diana Kethi Kilonzo & Another vs. IEBC & 10 Others [2013] eKLR*** and ***Communications Commission of Kenya and 5 Others vs. Royal Media and 5 Others [2014] eKLR*** and the Court was urged to allow the continuation of the activities carried out by the Steering Committee.

141. According to IEBC, this Court's supervisory jurisdiction can only be exercised as against it where it is found that it did not carry out its mandate in accordance with the Constitution. The IEBC was of the view that all the consolidated petitions have failed to link it with the alleged violations to the Constitution. It insisted that it carried out its constitutional mandate of verifying that the initiative was supported by at least 1 million registered voters and proceeded to publish 3 million

signatures. According to it, no one has come out to claim that their names were included fraudulently.

142. It was submitted on behalf of the IEBC that the assertion by the Petitioners that there is no legal framework for verification does not hold any water as the provisions of Article 257 make it possible for the actors to know their obligations. In addition, the Elections Act is sufficient enough as it sets out the steps to be followed in conducting a referendum.

143. On his part, the Attorney General, in response to the Petition argued that since the Constitution recognizes the sovereignty of the people of Kenya and provides for how they can either directly or through their democratically elected representatives amend the Constitution, there is nothing is unconstitutional about the people of Kenya seeking to do so. To the Attorney General, the Constitution of Kenya provides an elaborate process of constitutional amendments with in-built multi-institutional checks throughout the amendment process, which provide competent fora for redressing all the issues raised by the Petitioners herein. The Attorney General further argued that the doctrine of 'constitutional avoidance' is applicable in the circumstances of the present petition and that the Petitioners have failed to apply a contextual analysis of relevant and applicable constitutional provisions. In his view, the Constitution does not expressly preclude a government at the national or county level, a state organ or a public officer from promoting an amendment to the Constitution through a popular initiative. In addition, various provisions of the Constitution place a positive obligation on the state to take legislative and other measures (which may include initiating constitutional amendments) to ensure the achievement of certain constitutional objectives. According to him, the objective of the Constitution in establishing the instrument of amendment by popular initiative was to ensure that any actor, private or public, would have the opportunity to initiate proposals.

144. It was contended that all persons who have signed in favour of the proposed amendment bill are presumed to have read and assented to the contents therein and therefore the legal and evidential onus of proving otherwise is upon the Petitioners who have not discharged the same at all. Further, the allegations that the sovereign power of the citizens of Kenya has been usurped are false since Article 1(2) of the Constitution provides that the people may exercise their sovereign power either directly or through their democratically elected representatives. It was however argued that the entire constitutional amendment process provides various mediums and opportunities for public participation including before County Assemblies, the National Assembly and the Senate and culminating with the ultimate expression of public participation that is a referendum.

145. The Attorney General was of the view that the Petitioners seek to prevent the people of Kenya either directly or through their directly elected representatives from making political choices through Court action. He maintained that the Petitioners will not be prejudiced in any way if the current process proceeds to its logical conclusion since they together with similarly minded citizens have the right to not only campaign against the proposals but vote against them.

146. In the same vein, the Petitioners' right to make and promote their own constitutional amendment initiatives will not be affected by the current process in any way and in addition to this, the Petitioners who are not directly elected representatives of the people cannot purport to be more authoritative in speaking on behalf of the Kenyan people than democratically and directly elected representatives of the people including the President who is not only a democratically elected representative of the people but one whose threshold for election ensures that he has a popular mandate as provided under Article 138(4) of the Constitution. According to the Attorney General, the fact that the process has been endorsed by over one million voters *prima facie* disapproves the premise of the petition that the same has

excluded '*Wanjiku*'. Further, the petitioners' arguments as to what County Assemblies may or may not do and as to which questions or how questions are to be posed in a referendum are speculative, non-justiciable and an affront to the doctrine of separation of powers.

147. The Attorney General contended that the applicability of Articles 255, 256 and 257 of the Constitution is not dependent on any legislative enactment and is clearly not part of the legislation contemplated under Article 261 and the fifth schedule to the Constitution.

148. It was disclosed that there are pending proceedings before the Supreme Court, being Supreme Court Reference No. 3 of 2020 instituted by the County Assemblies of Nandi and Kericho and Supreme Court Reference No. 4 of 2020 instituted by the Governor of Makueni County. The Attorney General submitted that the subject matter of the two references are requests for the Supreme Courts advisory on the process by which the County Assemblies are required to handle a Constitution of Kenya Amendment Bill through a popular initiative under Article 257. The advisory also seeks a determination on the process envisaged by the Constitution in regard to Parliament for the consideration of a Constitution of Kenya Amendment Bill presented under Article 257 and specifically; if the procedure stipulated in Article 256(1) & (3) are the proper and correct procedure that Parliament must use in consideration and passage of the Constitution of Kenya Amendment Bill that relates to the popular initiative under Article 257 of the Constitution.

149. The said Advisory also seeks a determination as regards Bills containing a mixture of matters/issues some requiring referendum under Article 255(1) and others not requiring referendum the implication of the Amendment Bill partly succeeding in a referendum, the basis of a single Constitution of Kenya Amendment Bill proposing to amend numerous provisions of the constitution, whether constitution requires a single or multiplicity of questions to be presented for a vote

at the referendum especially delineated on the basis of provisions sought to be amended, provisions grouped on the basis of subject matter implicated and other objectivity articulable criteria that aligns with the constitutional amendment principle of "unity of content".

150. The Attorney General urged this Court to consider the issues/questions pending before the Supreme Court and the issues for determination before it and specifically to exercise deference to the Supreme Court on the question pending consideration before the Supreme Court respecting the hierarchy of Courts in Kenya as envisaged in Article 163(7) of the Constitution. To further buttress the above contention the Attorney General relied on the decision of ***The Supreme Court in Petition No. 4 of 2019 between the Law Society of Kenya v Attorney General & Another [2019] eKLR.***

151. Based on Article 257 and the decision by Lord Wright in ***James vs. Commonwealth of Australia [1936] A C 578, AK Gopalan vs. The State (1950) SCR 88, 120 (50) A Sc 27, Central Province Case 1959 FC R 18 (39) AFC***, it was submitted that where there is no ambiguity in the section being interpreted, the ordinary meaning ought to be adopted. Accordingly, the Court was urged to find that the Constitution of Kenya does not expressly preclude a government at the national or county level, a State organ or a public officer from promoting an amendment to the Constitution through a popular initiative and taking a lead role in the initiation of an amendment by popular initiative. According to the Attorney General, beyond the National and County Governments, there are a host of other actors in the Constitution such as constitutional commissions and independent offices that could potentially initiate amendments to the Constitution and the Constitution in establishing the instrument of amendment by popular initiative was to ensure that any actor, private or public, would have the opportunity to initiate proposals.

152. It was argued that many of the landmark constitutional amendments in Kenya have been the product of state initiatives. In

2005, for instance, the then government adopted a position in support of the draft constitution. The same situation obtained in 2010, when the Government led the constitutional reform efforts, including supporting the constitutional referendum. It was submitted that various provisions of the Constitution require the state to take legislative and other measures to ensure the achievement of certain constitutional objectives hence the Constitution contemplates that the State can initiate amendments to the Constitution, through popular initiative, to achieve, for example, the objectives of the Constitution and it would not be out of turn for state-initiated amendment proposals to be financed by the State, which may be done, in the context of the principles of public finance management as articulated in the Constitution and in the Public Finance Management Act, 2012, among other laws.

153. For purposes of the Constitution, it was argued that personality is attributed to all entities irrespective of their legal status and that under article 260 the Steering Committee and the Secretariat have the constitutionally conferred personality to initiate and promote a popular initiative after which the population will be given ample opportunity to participate in the constitutional amendment process at the County Assembly stage, at the Parliamentary stage and ultimately at the Referendum stage with promoters of the proposals expected to engage and persuade both the electorate and their directly elected representative at every stage of the process.

154. The Attorney General's view was that 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 document but also political document which must be appreciated as such.

155. On the legality of the formation of Steering Committee and the Secretariat, it was submitted that it is s*ub judice* since it's a subject in

Nairobi Constitutional Petition No. 12 of 2020 ***Okiya Omtata Okoiti vs. the National Executive and others*** and reliance was placed on the case ***Kenya Planters Co-operative Union Limited vs. Kenya Co-operative Coffee Millers Limited & another [2016] eKLR , Stephen Somek Takwenyi & Another vs. David Mbuthia Githare & 2 Others Nairobi (Milimani) HCCC No.363 of 2009, Legal Advice Centre aka Kituo Cha Sheria v Communication Authority of Kenya [2015] eKLR, and Murang'a County Government vs. Murang'a South Water & Sanitation Co. Ltd & another [2019] eKLR*** and this Court was urged to decline an invitation to determine matters pending determination before a competent Court of in pending prior instituted proceedings.

156. It was argued that the President's decision to set out *ad hoc* committees to advise on his constitutionally conferred state functions has been subject of judicial scrutiny and approval based on the decision in ***Thirdway Alliance Kenya & Another vs. Head of the Public Service-Joseph Kinyua & 2 others; Martin Kimani & 15 Others (Interested Parties) [2020] eKLR*** to the extent that the utilization of public funds to facilitate the work of such *ad hoc* taskforces was found to be lawful and *prima facie* not in breach of the principle of public finance under the Constitution. For such allegation to stand in the present case it is incumbent upon the Petitioner to adduce evidence of the same which evidence was not adduced. It was submitted that there was no allegation or proof of any prejudice occasioned to the Petitioners by sole reason of initiation of the amendment process by the Respondents.

157. On the issue of sovereignty, the Attorney General relied on Article (1) (2) (3) and (4) of the Constitution and submitted that it is difficult to understand the Petitioners' submissions that the exercise of executive or legislative authority by elected representatives is an interference with the sovereignty of the people of Kenya, the very same people who have through elections delegated the exercise of sovereignty to their elected

representatives. According to him, a reading of the provisions of Article 257 of the Constitution demonstrates that the Constitution assigns specific roles to the elected representative of the people both at the county and national levels, including the President in the constitutional amendment process and therefore their involvement in the process cannot be said to be a usurpation of the people's power.

158. It was further submitted that the petitioners failed to adduce any evidence to prove the allegation of coercion, and allegations that people were signing on to a process they did know anything about or that the people who signed on to the popular initiative were unable to exercise their free will on the matter. Reliance for this submission was placed on the case of ***Godfrey Paul Okutoyi (suing on his own behalf and on behalf of and representing and for the benefit of all past and present customers of banking institutions in Kenya) vs. Habil Olaka – Executive Director (Secretary) of the Kenya Bankers Association Being sued on behalf of Kenya Bankers Association) & Another [2018] eKLR*** for the principle that he who asserts must prove.

159. The Attorney General similarly took issue with the newspaper reporting as a source of evidence of coercion and made similar submissions on the issue as the Steering Committee and the Secretariat.

160. Regarding the costs, it was submitted that the same ought not to be awarded in public interest litigation, more so not against the tax payer on whose behalf the case is allegedly being brought as in ***Kenya Human Rights Commission & Another vs. Attorney General & 6 Others [2019] eKLR.*** On the other hand, there is no basis for the Kenyan tax payer to be compelled to pay costs to private individuals who out of their own volition have filed a case purportedly on their behalf.

161. The County Assembly of Mombasa, contended that the County Assemblies play a critical role in democracy, governance and decision-

making processes without fundamental violation of the Constitution. Due to the mandatory involvement and participation of County Assemblies in the process in the process of amending a Constitution by way of a popular initiative under Article 257 of the Constitution, it was averred that the County Assemblies play a critical role in the process hence they ought to be allowed to exercise the Sovereign Power of the people as delegated by the people.

162. According to the County Assembly of Mombasa, the Amendment Bill was borne out of the views collected from a majority of Kenyans and that the Constitution does not preclude government, state organ or public officer from taking a leading role in the initiation of amending the Constitution. In its view, a state-initiated amendment proposal could be financed by the State though the same has to be done in strict adherence to the principles of public finance management as articulated in the Constitution and the Public Finance Management Act. According to the Assembly, the said Bill having been brought before the County Assemblies enjoys a presumption of constitutionality as well as that of legality and the same can only be rebutted by cogent evidence. It was averred that the Bill is not ordinary legislation and that the role of the Assemblies is only to approve or reject it within the stipulated 3 months based on the views collected from the residents hence they cannot purport to introduce any clauses. Therefore, the failure to incorporate any suggestions by members of the public or the County Assembly does not amount to violation or abrogation of the right to public participation as the same is legally permitted.

163. On its part, the County Assembly of Nairobi contended that the Constitution requires that a Bill to amend a Constitution by a popular initiative be approved by a majority of the County Assemblies before transmission to Parliament for approval. In this case its view was that the Petitioners have not sufficiently demonstrated the alleged violation of the provisions of the Articles alleged to have been violated by the Respondents as no evidence has been adduced to demonstrate the

same. According to Mombasa County Assembly, it would be premature to make a decision as to the effect of lack of public participation at this stage given the different actors in the promotion and passage of an Amendment Bill. It was contended that it would be necessary to consider the cumulative efforts of public participation before deciding on its sufficiency or otherwise.

164. On behalf of the Law Professors who were granted leave to participate in these proceedings as *amici curiae*, they through Ms Nyiguto urged the Court to find that any constitutional amendments process promoted by entities other than voters or by voters in concert with other entities violates the spirit of popular initiative. Similarly, any process that relies on the support of the State in any way violates the same principle and the prudent use of resources. To learned counsel, any action of the State in furtherance of popular initiative is a violation of the principle of equality and proportionality.

165. On his part, Dr. Khaminwa for Kenya Human Rights Commission, some amicus curiae, invited the Court to take note of the fact that whereas Articles 255, 256 & 257 of the Constitution talk about an amendment in singular – not in plural - the Bill in Parliament are in plural – showing very clearly that the Bill is not in compliance with the Articles 255 – 257. Further, the BBI amendments are not as a result of popular initiative but State initiatives and it is the State that began the process hence unacceptable under the constitutional framework.

166. On the part of the National Assembly, it was submitted by Mr. Kuiyoni that since the only qualification under Article 257 is that the initiative be supported by 1 million signatures, the text does not prohibit any State agent or organ from originating a constitutional amendment. Hence, there is no constitutional foundation to the argument that the President can not originate any amendments he wishes.

167. Regarding the absence of an enabling provision reliance was placed on Sections 49 of the Elections Act as well as the decision in ***Titus Alila & 2 Others (Suing on their own Behalf and as the Registered Officials of the Sumawe Youth Group) vs. Attorney General & Another [2019] eKLR***. It was submitted that any person can petition Parliament to enact any law including the referendum law. It was contended that the issues before the Court are not justiciable since Parliament is still considering the BBI Bill and to decide the issues posed herein would amount to speculating on what Parliament would do. Accordingly, the process should be allowed to run its course before the jurisdiction of this Court can be invoked. Related to this is the doctrine of separation of powers and it was submitted that the Court should allow independent organs to exercise their constitutional mandates before it can act as any attempt to interfere would violate that doctrine.

168. The Petitioners therefore identified the following legal questions arising out the Amendment Bill that require determination this Court pursuant to article 165 (3)(b) and (d) of the Constitution:

i. Whether the President has power under the Constitution, as President, to initiate changes to the Constitution, or is Parliament the only State organ granted authority by or under the Constitution to consider and effect constitutional changes?

ii. Whether the Constitution of Kenya (Amendment) Bill 2020 being a state sponsored initiative qualifies as a Popular initiative as envisaged under Article 257 of the Constitution.

iii. Whether an unconstitutional and unlawful entity, such as deemed in the instant petition of the Steering Committee on the Implementation of the Building Bridges to a United Kenya Taskforce Report, have *locus standi* in promoting constitutional changes pursuant to Article 257 of the Constitution?

iv. Whether the entire BBI process culminating with the launch of the Constitution of Kenya (Amendment) Bill 2020 was done unconstitutionally in usurpation of the Peoples exercise of sovereign power.

v. Whether the Respondents and the interested parties have the legal framework to proceed with their respective roles towards the achievement of the constitutional amendment process.

vi. 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.

vii. 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.

169. It is therefore proposed that this Court grants the following reliefs:

a) The President does not have power under the Constitution, as President, to initiate changes to the Constitution, and that the only State organ granted authority by or under the Constitution to consider and effect constitutional changes is Parliament.

b) A declaration that the entire BBI process culminating with the launch of the Constitution of Kenya (Amendment) Bill 2020 was done unconstitutionally in usurpation of the Peoples exercise of sovereign power in contravention of Articles 1,2,3,10, 255 and 257 of the Constitution of Kenya 2010.

c) A declaration that the Constitution of Kenya (Amendment) Bill 2020 being a state sponsored initiative does not qualify as a Popular

initiative as envisaged under Article 257 of the Constitution hence the same is unconstitutional, unlawful incompetent and flawed.

d) *That an unconstitutional and unlawful entity, such as the Steering Committee on the Implementation of the Building Bridges to a United Kenya Taskforce Report, does not have locus standi in promoting constitutional changes pursuant to Article 257 of the Constitution.*

e) *A declaration that as at the time of Launch of the Constitution of Kenya (Amendment) Bill 2020 and the collection of endorsement signatures, there was no legislation governing the collection, presentation, and verification signatures nor a legal framework or administrative structure to govern the conduct of referenda in the Country.*

f) *A declaration that the 3rd Respondent (IEBC) and the 1st to the 49th Interested Parties cannot exercise their powers under Article 257 of the Constitution to receive, verify and approve the Constitution (Amendment) Bill 2020 in the prevailing circumstances.*

g) *An order of injunction barring the 1st and 2nd Respondent from submitting The Constitution of Kenya (Amendment) Bill 2020 together with the collected signatures to the 3rd Respondent for verification.*

h) *An order barring the 3rd Respondent from receiving, verifying and approving the signatures collected by the 2nd Respondent.*

i) *An order barring the 1st to 49th Interested Parties from receiving and debating the Constitutional of Kenya Amendment Bill, 2020 until all Kenyans have been accorded reasonable time to read and/or have the amendment bill explained to in a language they understand in a meaningful public participation exercise*

j) *A declaration that 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 Constitution of Kenya Amendment Bill so as to incorporate divergent views raised through public participation as is always the case in a proper legislative process.

k) 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.

l) In the alternative an order Compelling the 1st and 2nd Respondents to undertake a meaningful civic education and sensitization of the Constitution of Kenya (Amendment) Bill 2020 for a reasonable period of time prior to collection and submission of endorsement signatures.

m) An order Compelling the 3rd Respondent to immediately upon receipt of the collected signatures publish within reasonable time a list of all endorsers of the Constitution of Kenya (Amendment) Bill 2020 with a clear authentication and response mechanism to address emerging queries from the collected signatures.

n) Costs of this Petition.

IV. PETITION No. E401 OF 2020

170. The Petitioner in ***Petition No. E401 of 2020*** is 254Hope, an unincorporated body suing in the public interest. The Petition seeks the following reliefs:

a. A declaration be issued that Amendment power is delegated Sovereign power and is limited only in accordance the Constitution.

b. *A declaration be issued stipulating that the National Executive or any state organ or Taskforce to not initiate an amendment to the constitution through popular initiative*

c. *A declaration be issued stipulating that in a popular initiative to amend the Constitution, the National Executive may not use public resources.*

d. *A declaration be issued that any amendment to the constitution by any state organ is subject to Article 10 of the Constitution and hit ought to be justified.*

e. *A declaration be issued that any proposed amendments must not violate the textual integrity of the constitution.*

f. *A declaration be issued that some of the proposed amendments in the Proposed amendment Bill are constitutionally defective.*

g. *An Order be issued that any collection of signatures and submission of the same to IEBC with a view of pursuing amendment of the Constitution by the National Executive through a popular initiative is not authorized.*

171. The Honourable Attorney General filed Grounds of Opposition to the Petition and raised the following grounds:

a. *That the Petitioner is a non-existent entity in law; incapable of suing or being sued in the name proposed.*

b. *That the Petition is premised on the wrong premise; that the President's authority is limited to that of being the Head of the executive arm of government thereby totally ignoring the President's role as Head of State and his attendant role of inter alia promoting the unity of the nation.*

c. *That the Petitioner neither sought nor was denied any reasons for any of the proposed amendments by the steering committee.*

d. *That the rationality or otherwise of some of the proposal's in the recommended bill are subject to approval or disapproval by the legislative assemblies and ultimately the Kenyan people as envisaged in the constitutional process.*

e. *That grammatical errors if any cannot threaten the integrity of a constitutional text as alleged or at all.*

f. *That the constitution of Kenya does not preclude any state organ, body, person or public entity from initiating a constitutional amendment.*

g. *That there is no constitutional imperative on the National Executive to petition Parliament for any proposed constitutional amendment.*

h. *That the constitution expressly provides that state may take legislative or other measures to implement some of its envisaged principles and goals.*

i. *That the only requirement for an initiative to be a popular initiative is that it must be signed by at least one million registered voters.*

j. *That the National Assembly and the Senate are the most appropriate fora for determination of the question whether standing orders of either houses have been observed or not.*

k. *That the constitution of Kenya has allocated specific constitutional bodies the primary role on management of public finance, it would be contrary to the constitutional architecture and the doctrine of separation of powers for the*

Honourable Court to exercise primary jurisdiction over the same as proposed by the Petitioner.

l. *There is no proof of any breach of the principles of public finance.*

m. *That the Petition is not merited.*

172. The Petitioner made the following consequential and cumulative arguments in support of his main grounds. First, he argues that the BBI Secretariat is an agent of the National Executive, and that since an agent of the National Executive cannot undertake constitutional amendment, it must be concluded that the BBI amendment process is unlawful and unconstitutional. The Petitioner noted that, the Respondent (BBI Secretariat) does not deny that they were formed in furtherance of the objectives of the National Executive as stated in its Petition. The Petitioner relied on the case of ***Constitutional Petition No. 6 of 2018, at the High Court in Machakos*** for the proposition that the National Executive cannot exercise any power or authority beyond the power given in a positive law.

173. Further, the Petitioner maintains that aside from process, the substance of the constitutional amendment being pursued through the BBI process is unlawful for at least two reasons. First, he argues that the whole process has been done in violation of the Fair Administrative Action Act because the People have not been given a fair opportunity to contest the proposals.

174. Second, the Petitioner argues that the proposed constitutional amendments are unconstitutional because they defy the Basic Structure of the Constitution and because they attempt to take away the sovereignty of the People.

175. The Petitioner submitted that, a decision to amend any provision of the Constitution by any governmental entity falls squarely in the definition of an administrative act because it not only

would affect the interplay of the fundamental rights and freedoms contained in the Constitution, it would affect any legal interests and rights that existed prior to such an amendment.

176. The Petitioner relied on the Court of Appeal in ***Centre for Human Rights and Awareness v John Harun Mwau & 6 Others*** that expounded on the theory of Constitutional Interpretation, holding what has been accepted as good law in Kenya from ***Tinyefuza vs Attorney-General of Uganda*** thus*: "that the entire Constitution has to be read as an integral whole and no one particular provisions destroying the other but each sustaining the other as to effectuate the great purpose of the instrument"*. The Petitioner also relied on the ***Timothy Njoya Case (Supra)***.

177. With this holding in mind, the Petitioner submitted that any change to any one part of the Constitution will inevitably alter the meanings of the whole whether intended or not intended. Any proposed amendments, when carried out by authority that is delegated, must at the very least be justified, and must be necessitated in order to avoid unnecessarily altering the Constitutional framework and integrity. He argued that the proposed constitutional amendments fail this important test and are, therefore, unlawful.

178. In response, the Honourable Attorney General submitted that the Constitution of Kenya does not expressly preclude a government at the national or county level, a State organ or a public officer from promoting an amendment to the Constitution through a Popular Initiative and that, therefore, there is nothing that prevents any of the entities and officers concerned from taking a lead role in the initiation of an amendment by popular initiative.

179. The Honourable Attorney General submitted that it is to be noted that many of the landmark constitutional amendments in Kenya have been the product of state initiatives. In 2005, for

instance, the then government adopted a position in support of the draft Constitution as it did in 2010, when the Government led the constitutional reform efforts, including supporting the constitutional referendum. Further, submitted that Article 21 (2) of the Constitution directs that "State shall take legislative, policy and other measures, including the setting of standards, to achieve the progressive realization of the rights guaranteed under Article 43."

180. The Respondent relied on the following decisional authorities:

a. The Court of Appeal's decision in ***Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others [2013] eKLR*** which, the Honourable Attorney General says affirmed the doctrine of separation of powers and the need for the exercise of deference by the Court to the branch of government or agency which has been granted authority over the matter in question by the Constitution.

b. ***Thirdway Alliance Kenya & another v Head of the Public Service-Joseph Kinyua & 2 others; Martin Kimani & 15 others*** (Interested Parties) **[2020] eKLR** where the Honourable Attorney General says the Court held that the Building Bridges to National Unity Taskforce was constitutionally and legally established.

c. In ***Fedsure Life Assurance v Greater Johannesburg Metropolitan Council,*** where the Court held that budgetary resolutions made by a local authority were clearly legislative and not administrative action and were, therefore, beyond judicial review.

181. The Honourable Attorney General also relied on the following cases: ***Pharmaceutical Manufacturers Association of SA and another: In re Ex parte President of the Republic of South Africa and others In President of the Republic of South Africa and Others v South African Rugby Football Union and Others;***

Independent Electoral and Boundaries Commission (IEBC) v National Super Alliance (NASA) Kenya & 6 others [2017] eKLR.

182. The Interested Party submitted that this Honourable Court should only intervene in circumstances where the Commission steps outside its mandate, particularly where there is a violation of the Constitution, which it has not done. Relied on the case of ***Samson Owimba Ojiayo vs. Independent v Electoral and Boundaries Commission (IEBC) & Another (2013)*** where the Court held that *"it is not for this Court to compel the independent commission to flex its muscles and exercise discretionary powers and least of all dictate to it when and how it is to flex those muscles."*

183. The Interested party submitted that this Hounourable Court lacks an advisory jurisdiction. The advisory opinion of the Supreme Court must be distinguished from interpretive jurisdiction of the High Court. Relied on the case of ***Re: In the Matter of the Interim Independent Electoral Commission (2011) eKLR.***

184. The BBI Secretariat submitted that it is the promoter of the Constitution of Kenya Amendment Bill, 2020 and the associated Popular Initiative. 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.

185. Counsel for the BBI Secretariat further submitted that the controversy over whether the National Executive may use public resources in promoting the Constitution of Kenya Amendment Bill would only arise if the National Executive initiated such a process. Counsel further argued that the Petitioner has not pleaded with any specificity on how much of the resources have been misused, who has misused, in what manner have such resources been misused and in the absence of this information the Court can't make any determination.

V. PETITION No. E402 OF 2020

186. The 1st Petitioner in ***Petition No. E402 of 2020***, Justus Juma, is a resident of Nairobi County and a member of the Justice Freedom Party of Kenya. The 2nd Petitioner is Isaac Ogola who, also lives and works for gain in Nairobi.

187. The Petition is dated 6th December, 2020 and is supported by the affidavit of Justus Juma, on his behalf and on behalf of his co petitioner**.** It is anchored on the Article1, Article 2(1), Article 3(1), Article 10, Article 20, Article 22, Article 23, Article 38, Article 73, Article 88, Article 89, Article 94, Article 95, Article 165, Article 248, Article 255 to 257, Article 258 and Article 259 of the Constitution of Kenya, 2010, and Section 4, and 36 of the IEBC Act and Section 11 of the Statutory Instruments Act.

188. The brief facts of the Petition are that in October, 2020 the report on the Implementation of the Building Bridges to a United Kenya Taskforce was released. This report led to the publishing of the Constitution of Kenya (Amendment) Bill.

189. At Section 10 the Bill proposes to amend Article 89(1) of the Constitution increasing the number of constituencies from 290 to 360, through an additional 70 constituencies.

190. With regard to these created constituencies, the Constitution of Kenya Amendment Bill in the Second Schedule provided for under section 74, the Bill purports to directs the IEBC in three ways: *one,* the manner of the delimitation and distribution of the 70 constituencies to various counties, *two,* in the time frame within this must be done, and *three,* on the criteria that IEBC must apply in the said distribution..

191. The Petitioners contend that the Constitution under Article 89 and the IEBC Act envision that the function of the constituency boundary delimitation is the function of the IEBC, and in any event

there is a pending Bill (The Independent Electoral and Boundaries (Amendment)) Bill 2019, before Parliament that is intended to enact the procedures in conformity with section 36 of the IEBC Act.

192. It is the Petitioners position that the effect of the Constitution of Kenya (Amendment) Bill, 2020, is to compound the issue of boundary delimitation and constitutional authority so as to spearhead boundary delimitation in an irregular, illegal and unconstitutional manner. In any event the apportionment of any constituencies within the counties cannot be done as the IEBC (Amendment) Bill is yet to become law

193. That these provisions in the draft Bill amount to a violation of Article 89 of the Constitution, by supplanting, usurping the powers and roles assigned to IEBC by the same constitution, Article 10, by taking away the right to public participation, which is an indispensable imperative for boundary delimitation. This renders the provisions of the Draft Bill to be illegal, unlawful and unconstitutional

194. The Petitioners argue that that Constituency boundary delimitation is not a purely political matter and that there are Constitutional parameters obligated by the Constitution which have not been followed.

195. The Petitioners further argue that boundary delimitation cannot be done without public participation, before, during and after the IEBC has conducted the same. It is their position that the requisite public participation has not been undertaken rendering the provisions of the Second Schedule of the Constitution of Kenya Amendment Bill to be afoul of the constitution.

196. The Petitioners contend that this Court has jurisdiction to under Article 165(3) (d) (ii) of the Constitution to determine *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; hear any question with respect to whether anything said to be done under the authority of the Constitution or whether any law is inconsistent with or in contravention of the Constitution. To that extent the Court has jurisdiction to determine whether the second schedule of the Constitution of Kenya Amendment Bill is in contravention of the Constitution

197. In addition this Court is also empowered to hear applications relating to the infringement and/or threat to any rights in accordance with Article 23(1).

198. Further, the Court may also grant reliefs such as a declaration of rights, a conservatory order, an injunction, a declaration of invalidity of law, an order for compensation and an order for judicial review in accordance with article 23(3) of the Constitution

199. The Petitioners have therefore filed the present petition challenging the Second Schedule of the Constitution of Kenya (Amendment) Bill, which they contend violates the spirit and letter of the Constitution and they therefore seek the following orders: -

> *a) A DECLARATION THAT the impugned Second schedule to the Constitution of Kenya (Amendment) Bill, 2020 in so far as it purports to set at 70 the number of constituencies is unconstitutional and/or illegal and/or irregular.*
>
> *b) A DECLARATION THAT the impugned Second schedule to the Constitution of Kenya (Amendment)Bill, 2020 in so far as it purports to predetermine the allocation of seventy constituencies (as highlighted in paragraph (a) herein above) is unconstitutional and/or illegal and/or irregular.*
>
> *A DECLARATION THAT the impugned Second schedule to the Constitution of Kenya (Amendment)Bill, 2020 in so far as it purports direct the IEBC in so far as the function of*

constituency delimitation is concerned is unconstitutional and/or illegal and/or irregular.

c) A DECLARATION THAT the impugned 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 to be unconstitutional and illegal for want of Public Participation.

d) THAT AN ORDER be and is hereby issued for the expunging of the impugned Second schedule to the Constitution of Kenya (Amendment)Bill, 2020 in so far any exercise relating to delimitation and apportionment of constituency boundaries and indeed any electoral boundaries are concerned.

e) THAT AN ORDER for costs and incidentals be provided for.

f) *THAT the Honourable Court be at liberty to grant any other orders/reliefs that may be just and expedient.*

200. In the supporting affidavit sworn by Justus Juma and dated 6th December, 2020 the Petitioners state their case as follows:

a) That IEBC is a Chapter 15 Commission whose independence is protected by the constitution and cannot be directed or controlled by any other office or person under the Constitution.

b) That the Constitution of Kenya (Amendment) Bill in its purport to prescribe and instruct the IEBC on the manner of delimitation and allocation the created 70 constituencies among the counties is a threat to the constitutional authority of the IEBC.

c) That the purported Constituency delimitation was a violation of the principle of Separation of Powers.

d) That the Constitution of Kenya Amendment Bill purports to amalgamate the issue of constituency boundary delimitation with the amendment of the constitutional authority to the IEBC, without actually saying so. It is the Petitioners 'position that any such amendment that affects the independence of the IEBC must follow the prescription in the Constitution and be dealt with as an independent question.

e) That unless the impugned second schedule to the constitution amendment bill is quashed, the perception it creates is that the Parliament and politicians have plenary powers which place them in functional control over other constitutional institutions such as the IEBC, causing danger of imminent and irreparable harm to the Constitution.

201. The Respondent in the Petition is the Honourable Attorney General. He filed Grounds of Opposition dated 7th February, 2021. He opposed the Petition on the following grounds:

a) *First*, that the Petition as framed is not justiciable on account of want of ripeness.

b) *Second* that under the doctrine of separation of powers the Honourable Court ought to exercise deference to the County Assemblies, The National Assembly and Senate.

c) *Third* that the Petitioners seek to have the Honourable Court usurp the constitutional function of the legislative branch as provided under the Constitution by pre-empting their consideration of the bill to amend the Constitution.

d) *Fourth*, that to the extent that any amendment seeks to alter the character of existing legal provisions, the proposed Bill cannot be ipso facto unconstitutional for the sole reason that it seeks to change existing constitutional provisions.

e) *Fifth,* tha*t* the that the Petitioners are ignorant of the express provisions of the constitution that recognize the absolute sovereignty of the people to amend their constitution which may be expressed directly as is the case in a referendum or through their directly elected representatives like the County Assemblies, the National Assembly and the Senate.

f) *Sixth*, that the people of Kenya in the exercise of their sovereign power can amend the Constitution and since the IEBC exercises delegated powers, provide for additional constituencies, provide how the additional constituencies are to be allocated.

g) *Seventh* that the decision to approve or reject the contents of the proposed Constitution of Kenya Amendment Bill is the constitutional prerogative of the people in a referendum.

h) *Eighth*, that the petition is in violation of the political question doctrine where the petitioners have invited the Court to determine what essentially is a political question that has been constitutionally reserved for determination by the political organs and the Court ought to exercise judicial restraint

i) *Ninth,* that the Petitioners have other reliefs available to them as the issues raised here , it is may be better addressed in the various legislative Assemblies, and that the Court ought to exercise constitutional avoidance

j) *Tenth*, the petitioners have not joined the Promoters of the Constitution of Kenya Amendment Bill and therefor seek to undermine the principles of democracy through their Petition, while undermining the principle of universal suffrage through the Courts.

k) *Eleventh,* that the claims that there was no public participation in respect to the proposed constitutional amendment are pre mature and can only be properly considered after a referendum.

l) *Twelfth, on costs,* that there is no basis for awarding costs to parties instituting proceedings in the public interest.

202. In their submissions the Petitioners submitted that there were Four (4) questions that should guide this Court in determining the Petition before it and these are as follows;

i. Whether the issues herein are justiciable?

ii. What is the nature and scope of amendment powers generally and in respect of the Constitution 2010?

iii. What is the Constitutional import of the authority granted to the Independent Electoral and Boundaries Commission under the Constitution 2010?

iv. *Whether costs should be awarded to the Petitioners?*

203. Counsel for the Petitioners cited the case of ***Mwende Maluki Mwinzi vs. Cabinet Secretary, Ministry of Foreign Affairs & 2 others [2019] eKLR***, where the Court held that the justiciability doctrine requires that Courts and tribunals at the earliest opportunity should consider whether the facts before them espouse a proper question for determination In buttressing this argument Counsel also cited the Supreme Court case of ***Coalition for Reform of Democracy (CORD) & 2 others vs Republic of Kenya & another***

HCCCP 628 of 2004 [2015] eKLR*,** where the Court while citing with approval the case of ***Patrick Ouma Onyango & 12 others vs AG & 2 others Misc. App. 677 of 2005 endorsed the doctrine of justiciability as stated by Lawrence H. Tribe in his treatise, ***American Constitutional Law, 2nd Ed***. page 92.

204. The Petitioners also relied on ***Petition no. 496 of 2013 Commission for the Implementation of the Constitution vs. National Assembly of Kenya & 2 others [2013] eKLR*** Justice Lenaola held that the High Court had jurisdiction to determine the matter on a proposed constitutional amendment before Parliament despite the question of the doctrine of separation of powers and justiciability.

205. Counsel submitted that the fundamental rules for the effective exercise of state power and protection of individual human rights should be stable and predictable, and not subject to easy change. Constitutional change is, however, necessary in order to improve democratic governance or adjust to political or economic and social transformations. The procedure for changing it becomes in itself an issue of great importance and it can only therefore be amended in accordance with established rules and procedures.

206. Counsel submitted that in a democratic constitutional context there are three kinds of powers namely primary constituent power, secondary constituent power and constituted power. Further, it was submitted that primary constituent power is not part of everyday ordinary politics and that it is unbound by constitutional rules and may create a new constitutional order. Secondary constituent power on the other hand is the track of constitutional politics through which bodies entrusted with authority to amend the constitution may enact, add, annul or amend constitutional provisions. The Constitution cannot restrict the primary constituent power, as it does not reside in it.

207. It was the Petitioners submission that the popular initiative track as well as the legislative method are both constituted powers under the Constitution and that secondary power will manifest in the context of Article 255 where the affirmation of the people is required through a referendum. Both powers are amenable to judicial scrutiny by reason of Article 165.

208. Counsel submitted that the authority of Parliament in Chapter 16, is a solemn responsibility that must be done in concert with others as Parliament shares constitutional amendment responsibilities with other constituted entities. Under the doctrine of Supremacy of the Constitution, Constitutions are seen by modern constitutional theory as expressions of the will of the people, a will which acts as a limit to the day-to-day preferences of ordinary legislatures or any other constituted power.

209. It was further submitted that public participation cements a critical and foundational principle of the Constitution – sovereignty of the people. Article 249(1) (a) of the Constitution, implies that IEBC being one of the Constitutional Commissions is primarily charged with protecting the sovereignty of the people.

210. Counsel submitted that the principle of separation of powers understands that in order to avoid a concentration of power in the hands of a minority in a political system, the three principal constituents of government should be separate and enjoy equal and well defined powers and independence. It was submitted that Chapter 15 commissions are therefore intended to be independent and impartial that is not only outside government, but also outside partisan politics and free from interference by other organs of state.

211. It was submitted that the question of independence of the IEBC is most important and warrants examination and that Article 249 of the Constitution ensures the functional and financial independence of the IEBC. In buttressing this argument Counsel cited the Supreme

Court ***Advisory Opinion Reference No. 2 of 2014, In the Matter of the National Land Commission [2015] eKLR*** where the Court held that these Commissions ought to be identified separately from the other arms of government through the functions they undertake.

212. Further on administrative independence of the IEBC counsel cited the South African Constitutional Case of ***New National Party vs. Government of the Republic of South Africa and Others (1999) ZACC 5; 1999 (3) SA 191; 1999 (5) BCLR 489*** at paras. 74 and 162. where the Court went on to state that any engagement by the Executive or Parliament with Chapter 9 institutions must be done in such a manner that does not interfere with the operations of the institution or the fulfilment of their constitutional obligations.

213. It was the Petitioners' submissions that the promoters of the Constitution of Kenya Amendment Bill, enjoy State support and that the impugned Second Schedule of the Constitution of Kenya Amendment Bill in its current format and as promoted by the State amounts to the interference of the functional authority of the IEBC and it must be found wanting for constitutional infirmity. It was submitted that In ***Re the matter of the Interim Independent Electoral Commission; Supreme Court Advisory Opinion No. 2 of 2011; [2011] eKLR*** the Court stressed on the purpose of "independence clause" and held that its purpose was to safeguard the Commissions against interference by other persons or government agencies.

214. With regards to the question of costs, the Petitioners relied on the South African case of ***Trustees for the Time Being of the Biowatch Trust vs. Registrar, Genetic Resources & 5 Others (CCT 80/08) [2009] ZACC 14; 2009 (6) SA 232 (CC)*** where the Court held that where the State has been shown to have failed to fulfil its duty the State should bear the costs of the successful litigants.

215. It was further submitted that that the applicable doctrine here is that of constitutional supremacy and not the political question doctrine; that that public participation in the context of Article 89 as read together with Article 10, allows the people of Kenya to exercise their sovereign power through the IEBC and if dissatisfied they could come to this Court for review; and that the constitution is a pre-commitment to specific rules aimed at controlling uncontrollable urges by men and that Article 89 is a model which must be adhered to in terms of constitution making.

216. The Petitioners urged the Court ought to conduct an assessment of the Constitution of Kenya Amendment Bill on two grounds that is on the Substantive ground –which is the values of the constitution and Procedural ground –which is the process.

217. The Petitioners submitted that the constitution has separation of powers because it prevents tyranny and this allows for specialization. It was submitted further that no person or organ can be able to act beyond their constitutional authority and that the Hon Attorney General's suggestion that the people could do anything to amend the Constitution provided that the people agree in a referendum was incorrect.

218. The Respondent in submissions dated 11th March,2021submitted that the Constitution of Kenya provides a clear procedure for constitutional amendment; under Article 257 and that the IEBC had established that the BBI Initiative had met the requirements of this provision. It was submitted that the draft bill was submitted to each of the forty-seven (47) County Assemblies for consideration within three months of the date of submission.

219. Further, that at the institution of the petition, the draft Bill had not been submitted to the County Assemblies and that it was to be introduced in Parliament without delay after it was approved by the County Assemblies. It was the Respondent's submission that the

Court ought to decline to exercise jurisdiction over the matter as the issue is pending consideration before the legislative branch of government.

220. In addressing the issue of jurisdiction counsel cited the case of ***Wanjiru Gikonyo & 2 others v National Assembly of Kenya & 4 others [2016] eKLR*** where Onguto, J as he then was held that Courts should only determine matters that are ripe to avoid engaging in abstract arguments require and that the Court ought not to determine a matter prematurely.

221. Counsel also cited the case of ***Coalition for Reform and Democracy (CORD) & 2 Others -v- Republic of Kenya & Another HCCP 628 of 2014 [2015] eKLR***, where the Court cited with approval the case ***Patrick Ouma Onyango & 12 Others –v- AG & 2 Others Misc. Appl No. 677 of 2005*** wherein the Court endorsed the doctrine of justiciability as stated by Lawrence H. Tribe in his treatise *American Constitutional Law, 2nd Ed*. Page 92.

222. The Respondent submitted that it was abundantly clear that at the time of institution of the case there were no guarantees that the Constitution of Kenya Amendment Bill would be approved by the legislative branch and ultimately the people of Kenya and that considering the circumstances of this case and the substratum of the Petitioners' case herein the same is not justiciable on account of want of ripeness. To support the position on ripeness, counsel cited the Court of Appeal case of ***National Assembly of Kenya & another v Institute for Social Accountability & 6 others [2017] eKLR***.

223. It was submitted that the Petitioners have a constitutionally designed and available avenue for challenging the contents of the proposed Constitution of Kenya Amendment Bill and this is both at the County Assemblies and Parliament and finally to the Kenyan voter in the referendum. The Respondent cited the Court of Appeal

case of ***Non-Governmental Organizations Coordination Board v EG & 5 others [2019] eKLR Civil Appeal No. 145 of 2015*** where Waki J held that where the Constitution provides for redress of grievances a party must first exhaust the same before resorting to the Courts. This position was also upheld in the cases of ***Speaker of the National Assembly vs. Karume (2008) 1 KLR 425*** *and* ***Geoffrey Muthinja & Another vs. Samuel Muguna Henry & 1756 others [2015] eKLR***.

224. Counsel submitted that the Supreme Court in the case of ***Justus Kariuki Mate & another v Martin Nyaga Wambora & another [2017] eKLR***, after analyzing various decisions concluded that no governmental agency should burden another agency in an attempt to subvert its constitutional amendments. The Court must therefore practice precaution in determining each case. The Respondent also placed persuasive reliance on the dissent of Hon. Lady Justice Njoki Ndungu of the Supreme in the case of ***Speaker of The Senate & Another vs. Attorney General & Others*** where the Learned Judge held that Courts should only take up matters that are justiciable and that they should exercise caution so as not impede the operation of the other Arms of Government save for what is constitutionally provided.

225. It was submitted that the sovereignty of the people and their constituent power to replace a Constitution was well settled in the celebrated case of ***Njoya & 6 Others V Attorney-General and 3 Others*** .The Respondent submitted that the people of Kenya in the exercise of their sovereignty may amend any provision of the Constitution provided that they follow the prescribed procedure. The Respondent further submitted a reading of Article 255 (1) (g) clearly provides that independent commissions and independent offices to which Chapter Fifteen applies are amendable by way of a Constitution of Kenya Amendment Bill**.**

226. It was the Respondent's submission that the constitution of Kenya must be appreciated not just as a legal document but also as a political document. This calls for deference to constitutionally mandated institutions to deal with the specific roles ascribed to them. In ***Advisory opinion no. 2 of 2013 In the Matter of the Speaker of the Senate & another [2013] eKLR*** Njoki Ndungu JSC stated that "***.... The interpretation of the Constitution, therefore, is not an exclusive duty and preserve of the Courts but applies to all State organs including Parliament."***

227. It was submitted that there are in existent legislative procedures that have given effect to the Constitutional requirement of public participation which the legislative assemblies have been employing in the exercise of their respective legislative mandates. Counsel submitted that the process envisages the ultimate mode of public participation before the proposed amendments become law, that is a referendum and that it is reckless for the Petitioner to allege that the proposed amendments may be enacted without public participation.

228. In buttressing this argument Counsel cited the case of ***Robert N. Gakuru & others v County Government Of Kiambu & another [2016] eKLR*** where the Court while addressing its mind to public participation cited with approval the case *of* ***Doctor's for life International vs. The Speaker National Assembly and Others*** where the Court held that the words public involvement or public participation refers to the process by which the public participates in something. The Court held that the person alleging must show that it was clearly unreasonable for Parliament not to have given them an opportunity to be heard.

229. Counsel also cited the case of ***Commission for The Implementation of the Constitution vs. Parliament of Kenya & Another & 2 Others [*2013] eKLR** where Majanja J held that the

National Assembly has a broad discretion on how it achieves the object of public participation and that this varies from case to case, and what matters is the public has been offered an adequate opportunity to know about the issues and to express themselves on the same.

230. On the issue of costs, the Respondent cited the case of ***Nairobi civil appeal no. 147 of 2015 Kenya Human Rights Commission & another v Attorney General & 6 others [2019] eKLR*** where the Court of Appeal held that Courts are slow in awarding costs in matters that involve public interest.

VI. PETITION No. E416 OF 2020

231. The Petitioner in ***Petition No. E416 of 2020*** is Omoke Morara, a public-spirited lawyer. He filed a petition dated 15th December 2020, against the Hon. Raila Odinga; the Hon. Attorney general, BBI Steering Committee, the National Assembly, the Senate and the IEBC as the Respondents

232. The Petition challenged the actions taken by the President in conjunction with Hon. Raila Odinga and BBI Steering Committee towards amending the Constitution, and sought the following reliefs:

a) *A declaration that in the absence of an enabling legislation operationalizing the provisions of Article 257 of the Constitution of Kenya 2010, there is no legislative and administrative framework within and through which the Constitution of Kenya (Amendment) Bill, 2020 can be submitted to the County Assemblies, delivered to the Speakers of the two Houses of Parliament for consideration and subjected to a referendum.*

b) *To safeguard Article 43, an order is hereby issued stopping the efforts by the Respondents to process the Constitution of Kenya (Amendment) Bill, 2020 more*

specifically the carrying out of a referendum until Covid-19 pandemic is fully combatted by the State.

c) *A declaration that the Constitution of Kenya (Amendment) Bill, 2020 cannot be subjected to a referendum before the 6th Respondent carries out a nationwide voter registration exercise.*

d) *A declaration that the 6th Respondent is not properly constituted and it therefore lacks the required quorum under section 8 of the IEBC Act for consideration and approval of policy matters relating to the conduct of referenda including verification of signatures under Article 257(4); and it is hereby barred from verifying signatures submitted by the 3rd Respondent and from submitting the Constitution of Kenya (Amendment) Bill, 2020 to the County Assemblies.*

e) *A declaration that the President, the 1st and 3rd Respondent violated Articles 7, 10, 33, 35 and 38 of the Constitution by collecting signatures before providing the people with copies of the Interim and Final BBI Report and the Constitution of Kenya (Amendment) Bill, 2020 in English, Kiswahili, indigenous languages, Kenyan Sign language, Braille and other communication formats and technologies accessible to persons with disabilities ; and allowing them reasonably sufficient time to read and understand the said documents.*

f) *An order compelling the President of the Republic of Kenya, H.E Uhuru Kenyatta, the 1st and 3rd Respondent to publish and/or to cause to be published in a Gazette Notice detailed budget and financial statements of all the public funds allocated to and utilized by the 3rd Respondent.*

g) *A declaration that the use of public funds by the President, the 1st and 3rd Respondent to promote their initiative to amend the Constitution is unconstitutional; and the President, the 1st and 3rd Respondents are hereby ordered to jointly and severally refund the national treasury the public monies allocated and utilized by the 3rd Respondent.*

h) *A mandatory injunction directing the President of the Republic of Kenya, H.E Uhuru Kenyatta to comply with the Article 267(7) by dissolving Parliament in accordance with the Chief Justice's Advice to the President Pursuant to Article 261 (7) of the Constitution dated September 21, 2020.*

i) *A declaration that the 4th and 5th Respondents cannot take any steps pursuant to Article 257 (6), (7), (8), (9) and (10) including receiving and passing the Constitution of Kenya (Amendment) Bill, 2020 as it stands to be mandatorily dissolved in accordance with the Chief Justice's Advice to the President issued Pursuant to Article 261(7) of the Constitution dated September 21, 2020.*

j) *A declaration that the authority to prepare and table before Parliament the relevant Bills required to implement the Constitution vests in the Attorney General and thus the 3rd Respondent it is hereby ordered to forthwith cease drafting Bills for Implementation of its envisioned constitutional amendments.*

k) *A declaration that sections 10, 13(a)(i), 33, 37(b), 39, 41 and 44 of the Constitution of Kenya (Amendment) Bill, 2020 are unconstitutional.*

l) That each party bears its own costs.

233. ***Petition No. E416 of 2020*** was supported by the Petitioner's affidavit sworn on 15th December 2020, a supplementary affidavit sworn on 19th February 2021 and written submissions dated 26th February 2021. The Petitioner's case is that the President's decision to establish the BBI Steering Committee with the mandate to implement policy decisions affecting all Kenyans without public participation was in contravention of Articles 2, 3 and 10 of the Constitution. He averred and submitted that Gazette Notice Nos. 5154 of 24th May 2018 and 264 of 3rd January 2020, were also unconstitutional for lack of public participation.

234. The Petitioner also argued that by organizing massive rallies for signature collection during Covid-19 pandemic, was in breach of the Covid-19 regulations set by the Ministry of Health and directives by the President, leading to spread of the disease, a violation of Article 43(1) (a) of the Constitution. In his view, the exercise is a waste of public resources that should be used to combat the Covid-19 pandemic.

235. The Petitioner further argued that the BBI Steering Committee drafted and continues to draft multiple bills to give effect to the proposed constitutional changes without mandate, contrary to Article 261(4) of the Constitution as read with the Fifth Schedule to the Constitution. According to this Petitioner, the First Schedule to the Constitution of Kenya Amendment Bill, there will be a rush to amend hundreds of legislations between six months and one year after passage of the Constitution of Kenya Amendment Bill, which will violate the requirement of public participation. He also argued that the activities being carried out under instructions of the President and Hon. Raila Odinga, to amend the Constitution, offend the principle of public participation.

236. It is also the Petitioner's case, that the Hon. Attorney General breached Article 156(6) of the Constitution by failing to advise the President to use his authority and perform his functions in a constitutional manner, thus violating Articles 129, 131, 73(1), 43(1) and 261(7) of the Constitution. He stated that the President, Hon. Raila Odinga and BBI Steering Committee violated the principle of public finance under Article 201 of the Constitution, by using public funds to pursue private arrangement.

237. It is the Petitioner's further case that there is no legislation operationalizing Article 257 of the Constitution, through which the Constitution of Kenya Amendment Bill can be processed, and that following the Advice by the Chief Justice under Article 261(7) of the Constitution, the current Parliament is unconstitutional and cannot process the Constitution of Kenya Amendment Bill.

238. The Petitioner held the firm view, that Hon. Raila Odinga and BBI Steering Committee violated Article 7 of the Constitution by failing to give the public the Taskforce and Final BBI reports and the Constitutional Amendment Draft Bill in Kiswahili, indigenous languages, braille and sign language, in violation of Articles 10, 27and 35 of the Constitution. He stated that collection of a single set of signatures to endorse all the contemplated constitutional amendments was also a violation of Articles 33 and 38 of the Constitution.

239. According to the Petitioner, the President, Hon. Raila Odinga and BBI Steering Committee posted copies of the interim and final **BBI** reports and the Constitution of Kenya Amendment Bill on the Internet, thereby violating the right of access to information thus hindered public participation. He maintained that the President, Hon. Raila Odinga and BBI Steering Committee collected signatures in preparation for a referendum before the register of voters had been updated, thereby undermining the principle of public participation

and the right of millions of Kenyans to register and vote during the referendum.

240. The Petitioner again averred and submitted that sections 10, 32, 33, 37(b), 39 and 41 of the Constitution of Kenya Amendment Bill are unconstitutional for being either inconsistent with or violate existing provisions of the Constitution and should therefore not be allowed.

241. Regarding Independent Electoral and Boundaries Commission, he argued that it lacks quorum to process the Constitution of Kenya Amendment Bill, and verification of signatures which are policy matters that it discharges under section 8 of the Independent Electoral and Boundaries Commission Act, 2011 (IEBC Act) and the Second Schedule to the Act. According to the Petitioner, **IEBC** cannot discharge this mandate without quorum

242. Honourable Raila Odinga and The Building Bridges Steering Committee filed a replying affidavit by Denis Waweru sworn on 5th February, 2021 and a statement of response to the consolidated petitions of the same date. They also filed written submissions dated 15th March 2021 in opposition to ***Petition No. E416 of 2020.*** It was deposed and submitted that the Petitions are founded on generalized assertions, misinterpretation, misapplication and narrow interpretation and application of the Constitution and legislations. They relied on ***Anarita Karimi Njeru (No.2) v Republic [1979] eKLR***. They contended that no evidence had been adduced to support the allegations in the Petitions and that the Petitions offend the doctrines of *res judicata* and *sub judice;* they are speculative and an encroachment on the mandate of Parliament and the executive.

243. They argued that the validity and legality of ***BBI*** process and use of public funds is *res judicata,* having been determined in the case of ***Third way Alliance case supra)***. They also argued that the legality of Gazette Notice No. 264 of 2020, is pending before Court in the case of ***Omtata case (supra)*** and, therefore, *sub judice.*

244. Honourable Raila Odinga and The Building Bridges Steering Committee maintained that Petitioner in ***Petition E416 of 2020*** neither pleaded with specificity nor adduced evidence on spread of Covid-19 through holding of rallies and public gatherings to be a violation of Article 43(1)(a). According to them, allegations with regard to contravention of Covid-19 directives and regulations, ought to have been reported to the relevant authorities. The Court cannot usurp the roles of the Director of Criminal Investigation, the National Police Service and the Director of Public Prosecutions.

245. Honourable Raila Odinga and The Building Bridges Steering Committee again argued that the Petitioner in ***Petition E416 of 2020*** misinterpreted Article 257 of the Constitution and was using his petition to halt the ongoing legislative process while speculating and preempting the decisions County Assemblies and Parliament may arrive at.

246. On the legality of Parliament to deal with the Constitution of Kenya Amendment Bill, they contended that the allegation in ***Petition E416 of 2020*** that Parliament is unconstitutional, is misplaced and offends the doctrine of *sub judice* since the issue is pending before a Court of competent and concurrent jurisdiction in ***Thirdway Alliance v the Speaker of the National Assembly and others*** (Nairobi High Court Petition No. E 302 of 2020) as consolidated with other suits.

247. Honourable Raila Odinga and The Building Bridges Steering Committee denied violating Articles 7, 27 and 35 of the Constitution on public participation. They contended that the Interim Report, the Final report and the Constitution of Kenya Amendment Bill are a result of wide, comprehensive and broad consultative engagement and public involvement all over the country which entailed voluntary nationwide public participation.

248. It was their submission that the Petitioner in ***Petition No. E 416 of 2020*** is inviting the Court to encroach on the legislative arena and engage in law formulation, which is a preserve of Parliament and the County Assemblies. They also argued that the Petitioner is inviting Court to pre-empt Parliamentary debates and deliberations on the merit of the Constitution of Kenya Amendment Bill, after which a referendum would be held to enable the people decide on it.

249. Honourable Raila Odinga and The Building Bridges Steering Committee termed this Petitioner's arguments as unfounded and baseless apprehensions because the question of, if or when the referendum will be held is not a matter for the Court to determine. They relied on the decision in ***Hon. Kanini Kega v Okoa Kenya Movement & 6 others,*** (***Nairobi High Court Petition No. 427 of 2014, [2014] eKLR***).

250. They also contended that the quorum of the Independent Electoral and Boundaries Commission is *res judicata*, 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 mandate under Article 88(4) of the Constitution.

251. Honourable Raila Odinga and The Building Bridges Steering Committee further argued that the Independent Electoral and Boundaries Commission has administrative procedures for verification of signatures which was adopted in previous attempts to amend the Constitution by ***Okoa Kenya Movement*** and ***Punguza Mzigo*** respectively. According to them, the Independent Electoral and Boundaries Commission has put in place mechanisms for verification and authentication of signatures, which include invitation of members of the public to submit complaints with regard to inclusion

of their names in the list of supporters for any proposed constitutional amendments initiative without their knowledge.

252. Regarding the argument in ***Petition No. E416 of 2020*** that there is no enabling legislation to operationalize Articles 255, 256 and 257, Honourable Raila Odinga and The Building Bridges Steering Committee argued that there is no requirement under Article 261 (1) as read with the Fifth Schedule to the Constitution for such legislation. In their view, the argument by this Petitioner is unfounded and baseless since there are adequate Election Laws and procedures for the conduct of elections and referenda. Nothing stops the Independent Electoral and Boundaries Commission from conducting a referendum. They relied on the decision in ***Titus Alila case (supra)***

253. They maintained that ***Petition No. E416 of 2020*** is inviting the Court to pre-empt the National Assembly, the Senate and the Independent Electoral and Boundaries Commission from discharging their constitutional mandates. They argued that the Petitioner in this Petition had not demonstrated contravention of the Constitution or the law, thus failed to discharge his burden of proof as required under sections106 and 107 of the Evidence Act.

254. The Honourable Attorney General filed grounds of opposition dated 12th March, 2021 and written submissions dated the same day in response to this Petition. The Honourable Attorney General argued that the Constitution recognizes the sovereign will of the people and provides how they can either directly or through their democratically elected representatives, amend the Constitution; provides for the process of constitutional amendment with in-built multi–institutional checks throughout the amendment process and provides competent fora for redressing all the issues raised by the Petitioner in ***Petition No. E416 of 2020.***

255. The Honourable Attorney General contended that this Petitioner had not applied a contextual analysis of relevant and applicable constitutional provisions, and that the Constitution does not preclude the national government or county government, state organ or a public officer from promoting an amendment to the Constitution through popular initiative.

256. The Honourable Attorney General argued that all the people who signed in favour of the Constitution of Kenya Amendment Bill are presumed to have read and agreed with the contents therein. In his view, the Petitioner in ***Petition No. E416 of 2020*** will not be prejudiced if the constitutional amendment process proceeded to conclusion since he will have the right to vote against it.

257. It was the Honourable Attorney General's case that this Petitioner not being a directly elected representative of the people, cannot purport to be more authoritative in speaking on their behalf than the people's democratically and directly elected representatives, including the President. The Honourable Attorney General argued that this Petitioner's concern as to what county assemblies may or may not do and which questions or how the questions are to be posed in a referendum are speculative, non-justiciable and an affront of separation of powers.

258. According to the Honourable Attorney General, the applicability of Articles 255, 256 and 257 is not dependent on any legislative enactment, and is not part of the legislations contemplated under Article 261 and the Fifth Schedule to the Constitution. The only requirement is one million or more voters to endorse constitutional amendment initiative.

259. The Honourable Attorney General contended that the Petition in ***Petition No. E416 of 2020*** is urging the Court to usurp constitutional functions of the legislative branch by pre-empting its

consideration of the Constitution of Kenya Amendment Bill and undermine the principles of democracy and universal suffrage.

260. The Honourable Attorney General maintained that the issue of the formation of the Building Bridges Steering Committee is *res judicata;* that political rights and government processes have not been suspended and that the allegations regarding health were not substantiated. He relied on several decisions to support his position. These included; ***Law Society of Kenya v Inspector General National Police &_others*** (Petition No. 120 of 2020); ***Galaxy Paints Company Ltd v Falcon Guards Ltd*** **[2000] eKLR;** ***DEN v PNN*** **[2015] eKLR;** ***Njoya & 6 others v Attorney General and 3 others*** **[2004] eKLR and** ***Coalition for Reform and Democracy (CORD) & Another v The Republic of Kenya & Another.***

261. The National Assembly also filed grounds of opposition dated 15th February, 2021 to the consolidated Petitions, but and submitted orally in opposition to the consolidated Petitions. The National Assembly contended that the Petitions are non-justiciable for violating the doctrine of ripeness; that the Petitions are speculative for anticipating that it will pass the Constitution of Kenya Amendment Bill which was yet to be introduced in Parliament and the consolidated Petitions were seeking to second-guess how it would exercise its mandate in the enactment of the Constitution of Kenya Amendment Bill. According to the National Assembly, the issues raised in the consolidated Petitions could be raised before Parliament during public participation as provided for in the Constitution and Standing Orders.

262. The National Assembly contended that gagging Parliament from debating the Constitution of Kenya Amendment Bill would amount to usurping its powers, since the constitutional scheme contemplates that challenges to constitutional validity of a bill await completion of the legislative process. According to the National Assembly, Articles 255, 256 and 257 stipulate how the Constitution is to be amended. It

relied on ***Justus Kariuki Mate & another v Martin Nyaga Wambua & another [2017] eKLR***, to argue that the Court lacks jurisdiction to intervene during active Parliamentary process.

263. The Senate also filed grounds of opposition dated 10th February, 2021 in response and adopted the submissions by the National Assembly. It contended that the Constitution grants the people sovereign and inalienable right to determine their form of governance and provides how they can either directly or indirectly through their democratically elected representatives, amend the Constitution, and that Articles 255, 256 and 257 stipulate how the Constitution should be amended.

264. According to the Senate, the issues raised in the consolidated Petitions are non-justiciable and offend the principle of justiciability; the consolidated Petitions do not disclose infringement or threat of infringement of any right; that the orders sought are defective and that the Court lacks jurisdiction to grant orders as framed and the Court should exercise judicial restraint.

265. The Independent Electoral and Boundaries Commission filed a replying affidavit sworn by Michael Goa as well as written submissions dated 12th March, 2021 in opposition to the Petition. The independent Electoral and Boundaries Commission argued that it complied with its constitutional and statutory mandate and verified signatures to confirm compliance with the constitution and was ready to conduct a referendum.

266. On verification of signatures to confirm compliance with constitutional requirements, the Independent Electoral and Boundaries Commission contended that it received the Constitution of Kenya Amendment Bill on 10th December, 2020 and 4.4 Million supporting signatures from the Building Bridges Steering Committee; that it conducted verification and prepared an interim report after

undertaking data cleaning exercise and uploading a list of verified signatures of supporters into its website to enable voters confirm their details.

267. The Independent Electoral and Boundaries Commission maintained that after confirming that that the Building Bridges Steering Committee had met the threshold under Article 257(4) of the Constitution, it forwarded the Constitution of Kenya Amendment Bill to the Speakers of the respective County Assemblies and Parliament for consideration as required by Article 257(5) of the Constitution.

268. Regarding holding of the referendum, the Independent Electoral and Boundaries Commission contended that its mandate can only be invoked when either houses of Parliament fails to approve the Constitution of Kenya Amendment Bill or the Constitution of Kenya Amendment Bill touches on Articles mentioned in Article 255(1) of the Constitution. It also maintained that the issue of its composition had been resolved in the ***Isaiah Biwott case (supra)***.

VI PETITION No. E426 OF 2020

269. By a petition dated 21 December, 2020 filed in this Honourable Court on 18 January, 2021, the Petitioner in ***Petition No. E426 of 2020*** has sought for several declarations and orders which he has framed as follows:

> ***"****HEREFORE your petitioner humbly prays that this Honourable Court-*
>
> 1. *Finds that civil Court proceedings can be instituted against the President or a person performing the functions of the office of President during tenure of office in respect of anything done or not done in the exercise of claimed powers beyond those authorised*

under the Constitution, that is for actions or omissions not authorised under the Constitution.

2. *Finds the President does not have authority under the Constitution, as President, to initiate changes to the Constitution, and that the only State organ granted authority by or under the Constitution to consider and effect constitutional changes is Parliament.*

3. *Finds that the Steering Committee on the Implementation of the Building Bridges to a United Kenya Taskforce Report established by the President as notified in Gazette Notice No. 264 dated 3rd January, 2020 and published in a special issue of the Kenya Gazette dated 10th January, 2020, with terms of reference for considering and promoting constitutional changes, is an unlawful entity under the laws of Kenya.*

4. *Declares that an unconstitutional and unlawful entity, such as the Steering Committee on the Implementation of the Building Bridges to a United Kenya Taskforce Report, does not have locus standi in promoting constitutional changes pursuant to Article 257 of the Constitution.*

5. *Orders that the 1st Respondent make 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 the 1st Respondent, the amount as computed by the Auditor-General.*

6. *Orders that the 2nd Respondent to ensure that other public officers who have directed or authorised 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, the amounts as computed by the Auditor-General.*

7. *Orders that on account of the constitutional amendment process resulting from the Steering Committee on the Implementation of the Building Bridges to a United Kenya Taskforce Report not being in accordance with Article 257 of the Constitution, the Independent Electoral and Boundaries Commission should not submit the resultant draft Bill to any county assembly, and should the draft Bill have been submitted to any county assembly, the same should be recalled from any and all such county assemblies.*

8. *Finds that the 1st Respondent has contravened Chapter 6 of the Constitution, and specifically Article 73(1)(a)(i), by claiming authority in initiating and promoting a constitutional change process, authority that is constitutionally vested in only one State organ, Parliament, and is not vested in the office of President.*

9. *Orders 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 be terminated, and*

thereby save further wastage of public funds in an unconstitutional constitutional change process.

10. *Orders costs against the 1st Respondent. Or that such other orders as this Honourable Court shall deem just."*

270. The petition has combined both the facts and the legal basis upon which it is based; and, to some degree, the petitioner's arguments in support of the petition notwithstanding that he has filed written submissions separately.

271. All that the petitioner has said in his affidavit in support of the petition is this:

> *I, the undersigned, Isaac Aluoch Polo Aluochier, of Suite 1, Behind AA Stores Building, Kamagambo Police Station Road, P.O Box 436-40404, Rongo, and email address aluochier@gmail.com, do affirm and state as follows:*
>
> *"I believe that the facts contained in the accompanying petition dated 21st December, 2020, both those known to me of my knowledge, and those known to me from sources disclosed therein, are true.*

272. It is stated in the petition that vide Gazette Notice No. 5154 of 24 May, 2018, and published in the Kenya Gazette dated 31 May, 2018, Vol. CXX – No. 64, Mr. Joseph K. Kinyua who is the Head of the Public Service informed the public that H.E. Hon. Uhuru Kenyatta, the President of the Republic of Kenya had established a Taskforce known as the Building Bridges to Unity Advisory Taskforce comprising of 14 committee members and 2 joint secretaries. The Terms of Reference of this Taskforce were to:

> *"(a) evaluate the national challenges outlined in the Joint Communique of 'Building Bridges to a New Kenyan Nation,*

and having done so, make practical recommendations and reform proposals that build lasting unity; [Petitioner's emphasis throughout, unless otherwise stated

(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."

273. The terms of reference did not include constitutional amendment proposals but were only limited to "*policy, administrative reform proposals".*

274. By a special issue of the Kenya Gazette of 3 May, 2019, Vol. CXXI – No. 55, the President published his 6th Annual Report, 2018 in which he stated, *inter alia:*

"... Chapter three presents the measures undertaken by public institutions in the realisation of national values and principles of governance. To enhance national unity, H.E. the President and the former Prime Minister signed a Memorandum of Understanding (MoU) symbolized by the 'Hand Shake' to put the country on the path to national unity, reconciliation and enhance nationhood. To implement the MoU, the Presidency established and operationalized a taskforce on Building Bridges Initiative (BBI) aimed at addressing the 9 key challenges identified in the MoU namely, ethnic antagonism and competition, lack of national ethos, inclusivity, devolution, divisive elections, safety and security, corruption, shared prosperity, and responsibility and rights ...

"... 63. To promote reconciliation and harmonious relations, H.E. President Uhuru Kenyatta and H.E. Raila Odinga signed a Joint Communique titled 'Building Bridges to a New Kenyan Nation' to affirm their commitment to work together to find lasting solutions to ethnic antagonism and divisive politics. Further H.E. the President and H.E. Raila Odinga established the 14-member Building Bridges Initiative (BBI) Taskforce whose terms of reference include evaluating national challenges outlined in the joint communique and making practical recommendations and reform proposals to enhance national unity.

"... 932. To enhance national unity, the rule of law, democracy and participation of the people and sustainable development, the Government commits to continue supporting the BBI and to fully implement its recommendations. Public institutions shall align their policies, legislation, programmes and activities with the recommendations of the BBI and other initiatives aimed at promoting national unity and nationhood."

275. According to the implementation matrix, the Presidency, Parliament all Ministries, Departments and Agencies of Government, Independent Offices and Commissions, County Governments and the National Government Administration were to support the Building Bridges to National Unity Initiative (BBI) and implement its recommendations and other initiatives aimed at promoting national unity and nationhood.

276. And in a special issue of the Kenya Gazette published on 10 January, 2020, Vol. CXXII – No. 7, in Gazette Notice No. 264 dated 3 January, 2020, the Head of the Public Service, once again, notified the public that the President had appointed *the Steering Committee on the Implementation of the Building Bridges to a United Kenya*

Taskforce Report comprising of 14 members and 2 joint secretaries. The terms of reference of this particular were stated in the Gazette as follows:

The Terms of Reference of the Steering Committee shall be to:

a) 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

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."*

277. Whereas the BBI's terms of reference did not include proposals for constitutional changes, the Steering Committee on the Implementation of the Building Bridges to a United Kenya Taskforce Report (BBI 2 Steering Committee), included statutory or constitutional changes in its terms of reference.

278. The Petitioner argues that if the original Building Bridges to Unity Advisory Taskforce (BBI 1 Steering Committee), that was gazetted in Kenya Gazette Notice No. 5154 of 24 May, 2018, was established in the spirit of Article 131 (1)(e) and (2)(c) of the Constitution, there was no constitutional or other legal basis upon which the 1st Respondent established the BBI 2 Steering Committee with the expanded mandate to propose constitutional changes. Article 131 (1)(e) and (2)(c) of the Constitution reads as follows:

131. *(1) The President –*

(e) is a symbol of national unity.

(2) The President shall –

(b)…promote and enhance the unity of the

nation.

279. Following its gazettement the BBI 2 Steering Committee proceeded to make statutory and constitutional proposals in the form of a draft Bill and other publications and, among other things, purportedly procured over 4 million registered voters supporters' signatures and handed the same to the Independent Electoral and Boundaries Commission; as at the time of filing the petition, the list of voters was awaiting verification of the said signatories pursuant to Article 257 (4) and (5) of the Constitution and that the National Treasury had approved the expenditure in excess of Kshs. 93 million for the verification exercise.

280. The Constitution, according to the petitioner, has not only been contravened but there is also a threat to further violation. It is for this reason that the Petitioner has invoked Article 258 of the Constitution to bring this petition on his own behalf and also in the public interest.

281. As far as the capacity in which the respondents have been sued is concerned the petitioner has averred that the 1st Respondent is sued because he contravened the Constitution and that he is sued in his personal capacity, and not as President of the Republic of Kenya and Commander-in-Chief of the Kenya Defence Forces. The 2nd Respondent, on the other hand, has been joined to the suit on the basis of Article 156 (4)(b) and (6)5, 2 Article 257 (4) and (5) of the Constitution which essentially provide that the promoters of a popular initiative shall deliver the draft Bill and the supporting signatures to the IEBC, which then has to verify that the initiative is supported by at least one million registered voters. If the IEBC is satisfied that the initiative meets the requirements of this Article, it is to submit the draft Bill to each county assembly for consideration;

the consideration exercise is to be undertaken within three months from the date of submission by the Commission.

282. The 3rd Respondent is sued because it is the constitutionally authorised State organ for conducting referenda pursuant to Articles 88(4)6 and 257 while the interested parties have been included in the petition in this capacity on account of their roles as articulated in Articles 132(4)(a)7 and 229 of the Constitution.

283. The Steering Committee on the Implementation of the Building Bridges to a United Kenya Taskforce Report has been deliberately omitted because, though its activities are material to this petition, it is, according to the petitioner, an unconstitutional and illegal entity under the laws of Kenya, and therefore it "*does not have locus standi before this honourable Court.*"

284. Other provisions which the petitioner has cited in support of his petition are Article 88(4) on the IEBC's obligation to conduct and supervise referenda and elections; Article 132(4)(a) which provides that the President may perform any other executive function provided for in this Constitution or in national legislation and, subject to the Constitution, he may establish an office in the public service in accordance with the recommendation of the Public Service Commission; Article 229 on the functions of the Auditor-General that include auditing and reporting on the accounts of any entity that is funded from public funds and whether those funds have been applied lawfully and in an effective manner; and, Article 50(1) on the resolution of disputes by an independent and impartial tribunal or body.

285. On the specific question whether civil proceedings can be validly instituted in Court against the person occupying the office of President in his personal capacity, the applicant has invoked Article 143(2) of the Constitution; this provision of the law reads as follows:

143. (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.

286. It is the petitioner's argument that while it is true that the 1st Respondent, 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.

287. To illustrate his point, the applicant invoked Article 140(1), 142 (1) and 136 (2) (a) which, in his view, demonstrate circumstances under which the President may be sued while in office. Article 140(1), for instance, provides that a person is permitted to file a petition in the Supreme Court to challenge the election of the President-elect within seven days after the date of the declaration of the results of the Presidential election. Under Article 142(1), the sitting President continues holding office until after the President-elect, has been sworn in and assumed office. According to Article 142(2) there is a possibility that a sitting President may secure a second term as the President-elect while in office.

288. The petitioner's argument is that when a sitting President is sued in circumstances contemplated in Article 140 (1) as was the case when the current President was sued in 2017 after the General Elections conducted in that year, he was so sued in his personal capacity because, so the petitioner urged, seeking the Presidential office in a Presidential election is not an exercise of Presidential powers under the Constitution; indeed any person meeting the requirements of contesting for presidency in a Presidential election

can do so and by so doing the contestant cannot be said to be exercising Presidential powers under the Constitution.

289. With this analogy, it is the petitioner's position that the 1st Respondent has been rightly sued in his personal capacity considering that, in his actions which provoked this petition, the 1st respondent cannot be said to have been exercising his powers under the Constitution. The Petitioner urged this honourable Court to follow its decision in ***Isaac Aluoch Polo Aluochier v Uhuru Muigai Kenyatta & Another [2016] eKLR*** where it was held that the 1st Respondent could indeed be sued for conduct outside the exercise of the Presidential authority.

290. Speaking of the President's authority and his powers, the petitioner cited Articles 129 and 131 as the constitutional basis for these attributes. Even then, Article 131 (2)(a) demands of the President to *"respect, uphold and safeguard this Constitution"* and this, the President did not do when he addressed the nation on 12th December, 2020; in that address he promoted the draft constitutional Bill published by the BBI 2 Steering Committee which, according to the Petitioner, is an affront to the Constitution.

291. On the constitutionality or legality of the establishment of the Steering Committee on the Implementation of the Building Bridges to a United Kenya Taskforce Report (BBI 2 Steering Committee), the Petitioner made reference to Article 132(4)(a) of the Constitution which permits the President to perform any other executive function provided for in the Constitution or in national legislation; under this provision, he is permitted to establish an office in the public service but he can only do so in accordance with the recommendation of the Public Service Commission. It is the Petitioner's case that in establishing BBI 2 Steering Committee, the 1st respondent did not act in accordance this article because there was no recommendation from the Public Service Committee for such a body. The

establishment of the Committee in violation of the constitution means that the 1st respondent acted beyond the authority given to him by the Constitution and therefore Article 143(2) of the Constitution cannot provide him with any refuge.

292. Again, the petitioner urged that the manner in which the Constitution may be amended is provided for in Article 255 of the Constitution; to be precise, it prescribes that it can only be amended in accordance Article 256 or 257. By establishing a committee whose terms of reference included proposals for constitutional changes, the 1st respondent violated these constitutional provisions because the manner in which the 1st respondent has sought to change the constitution is inconsistent with the constitutionally prescribed means; it is neither a Parliamentary initiative under Article 256 nor is it a popular initiative prescribed in Article 257 of the Constitution. The violations of the Constitution in this respect is yet another reason why Article 143(2) cannot come to the 1st respondent's aid.

293. The authority and role of the President under Article 256 is limited to assent to a duly passed Constitution of Kenya Amendment Bill which has been submitted to him by both Speakers of Parliament; he has no role whatsoever in the taking any initiative for conception of such a bill and whatever action is necessary before it is presented to him for his assent.

294. According to the petitioner, a popular initiative for amendment of the Constitution, cannot not originate from a State organ irrespective of whether it is Parliament, the executives of either the national or county Government or any other state organ; such an initiative can only originate from the people themselves outside the structures of the State.

295. Although the proposed constitutional amendments promoted by the BBI 2 Steering Committee have been packaged as a popular initiative, the process by which they have been initiated and

undertaken including the establishment of the BBI 2 Steering Committee that was tasked with making proposals for constitutional changes is alien to the Constitution itself.

296. Article 1 of the Constitution states that all sovereign power belongs to the people of Kenya and according to Article 1(2), the sovereign power may be exercised directly or through their democratically elected representatives. As far as legislative functions are concerned, this power has been delegated to Parliament and the county assemblies; the amendment of the Constitution by a Parliamentary initiative under Article 257 is a clear example of the delegation of this power to Parliament with respect to amendment of the constitution otherwise the people may choose to exercise this power directly as a popular initiative under Article 257 of the Constitution.

297. While stressing the supremacy of the Constitution and the 1st respondent's vulnerability to Court action whenever he breaches the Constitution, the Petitioner has cited Articles 2(1), 2(2) and 2(4) of the Constitution. These provisions are clear on the supremacy of the Constitution and, for this reason, any person, including the 1st respondent is bound by its provisions. It follows that anything done in violation of any of the provisions of the Constitution is not only unconstitutional but it is of no legal effect. The 1st respondent's actions in initiating constitutional changes and establishing a committee for that purpose fall into that category of actions which Article 2(4) of the constitution frowns upon as being invalid to the extent that they are inconsistent with the Constitution. By the same token, nothing legal or valid can come out of the BBI 2 Steering Committee and whatever it has done is of no legal consequence.

298. There cannot, therefore, be any claim that there has been a valid popular initiative to amend the constitution in accordance with Article 257 of the Constitution. It is the petitioner's case that, under

Article 257 (6), the IEBC was bound to satisfy itself that the initiative met the requirements of this particular Article; however, since it is obvious that the Article and other provisions of the Constitution had been infringed, the IEBC ought not to have taken any action on the draft Bill submitted to it in purported compliance with Article 257 (4) of the Constitution.

299. Further, while the National Assembly represents the people of the constituencies and special interests in the National Assembly in accordance with Article 95 (1) of the Constitution, no such power has been given to the 1st respondent and therefore the latter cannot claim to be acting as the peoples' representative in initiating constitutional amendments through means that are unknown in law.

300. It follows that the attempt by the BBI 2 Steering Committee, to convert an illegal Presidential constitutional change initiative into a popular initiative, allegedly in accordance with Article 257, falls short of the threshold in this Article for constitutional change by popular initiative.

301. The BBI 2 Steering Committee constitutional change process is nothing more than an attempt to usurp the role of Parliament in the constitutional change process. Apart from Parliament, no other State organ has been accorded this constitutional authority under Article 256(2) to publicise any Bill to amend the Constitution. Contrary to this provision of the Constitution, the BBI 2 Steering Committee usurped this role of Parliament and used public funds to publicise its draft Bill and facilitate public discussion on the same.

302. Regrettably, Parliament which is enjoined by Article 94(4) to protect the Constitution, woefully failed to protect its own constitutional stature and is going along with the unlawful constitutional change process spearheaded by the BBI 2 Steering Committee.

303. On this question of use of public funds, the petitioner invoked article 226 (5) of the Constitution which provides as follows:

> *226 (5) If the holder of a public office, including a political office, directs or approves the use of public funds contrary to law or instructions, the person is liable for any loss arising from that use and shall make good the loss, whether the person remains the holder of the office or not.*

304. The petitioner contends that the 1st Respondent bears responsibility for public funds that have been used in the unlawful and unconstitutional process of which the BBI 2 Steering Committee is part; following the provisions of this Article, the 1st respondent must make good the loss that may have been incurred.

305. Likewise, the submission by the IEBC of the unconstitutionally promoted draft Bill to the county assemblies has exposed it to liability and it is also required to make good any funds that have been expended on the initiative.

306. It is the petitioner's case that according to Article 73(1) (a) (i) of the Constitution, the authority assigned to a state officer is a public trust and which must be exercised in a manner that is consistent with the purposes and objects of the Constitution. The 1st respondent, the petitioner has argued, has acted contrary to the purposes and objects of the Constitution and therefore he has breached the public trust entrusted to him.

307. The 1st respondent never responded to the petition in any manner but as will become clear in due course the 2nd respondent's response and a large part of his submissions were dedicated to the 1st respondents defence.

308. The 2nd respondent filed grounds of objection; he has opposed the petitioner's petition on the grounds that the 1st Respondent is

currently the President of Kenya of the Republic of Kenya and *ipso facto* cannot be sued in his personal capacity for any acts during the pendency of his Presidency; that the 1st Respondent, may not be sued in his personal capacity during his incumbency as President of the Republic of Kenya; that Petitioner is approbating and reprobating-on the one hand, he has sued the 1st respondent in his personal capacity and on the other hand, he has sued him as the sitting President; and that, this petition is *res judicata* because the issues in respect to the legality and mandate of the Steering Committee have been determined by this honourable Court, in ***Nairobi Constitutional Petition No. 451 of 2018; Third Way Alliance vs The Hon. Attorney General & Others [2020] eKLR***.

309. Other grounds are that the Petitioner has not appreciated the constitutional definition of a 'person; that he has not furnished any material that demonstrates breach of the provisions of Article 73 of the constitution by the 1st Respondent; that this honourable Court has affirmed the constitutionality of the President's functions and the same is *Res Judicata*; that monies expended on the President's constitutional functions fall within the permissible budget; and, that the Petitioner is inviting the Court to perform functions of Auditor-General and find that there has been improper use of government funds and, in any event, there is no evidence of misuse of public funds.

310. Again, the 2nd respondent has objected to the petition on the grounds that it is *sub-judice* because it seeks to litigate over matters pending hearing and determination in **Nairobi High Court Constitutional Petition No. 12 of 2020 between Okiya Omtata Okoiti versus the National Executive of the Republic of Kenya and Others**; that the Petition is premised on misinterpretation of the law; that the petition is premised on generalised assertions with no supporting evidence adduced; and, finally, that the petition is without any merit.

311. In his submissions in support of the 2nd respondent's case, Mr. Bitta, the learned counsel for the 2nd respondent urged that the 1st respondent is protected from Court proceedings by Article 143 (2) of the constitution; as earlier noted, this Article is to the effect that Civil proceedings cannot be instituted in any Court against the President or the person performing the functions of that office during their tenure of office but only in respect of anything done or not done in the exercise of their powers under this Constitution. This Article, it was submitted, confers immunity to the 1st respondent, both in his personal capacity and also as the President of the Republic of Kenya during his tenure.

312. The decision of the Supreme Court of Kenya, in ***Deynes Muriithi & 4 others vs. Law Society of Kenya & another [2016] eKLR*** was cited in support of the 2nd respondent's position; in that decision the Court held that that proceedings commenced by way of constitutional petitions are in the nature of civil proceedings. A similar holding had been made by this honourable Court, sitting in Kisii, in **Peter Ochara Anam & 3 Others vs. Constituencies Development Fund Board & 4 Others, Constitutional Petition No. 3 of 2010; [2011] eKLR.** Cited for the similar position were the decisions in ***Abdul Karim Hassanaly & another vs. Westco Kenya Ltd & 3 others [2003] eKLR; Ferdinand Ndung'u Waititu Babayao vs. Republic [2019] eKLR) and Julius Nyarotho vs. Attorney General & 3 others [2013] eKLR.***

313. It was submitted further on behalf of the 2nd respondent that the Presidency is a creature of the Constitution and according to Articles 1(3) (a), 129 and 130, the executive authority is derived from the people and is exercised in accordance with the Constitution. The presidency is bound to, among others, promote and protect the Constitution; observe national values and principles of governance; observe principles of executive authority; maintain integrity for

leadership; observe legal requirements; and, respect the authority of the judiciary.

314. The 2nd respondent also addressed the question whether judicial review proceedings can be taken against a sitting President and in an attempt to answer it, the learned counsel considered this questions from three perspectives the first of which is the constitutional duty of the President to adhere to, promote and protect the Constitution and all laws made under the Constitution. The second perspective is that judicial review is a public law remedy under the Constitution; and the third is the role of public law.

315. The learned counsel for the 2nd respondent echoed the provisions of the constitution and urged that the Presidency is not only a creature of the Constitution but also that under Articles 1(3)(a), 129 and 130, the executive authority is derived from the people and is exercised in accordance with the Constitution. Accordingly, the presidency should, among other things, adhere to, promote and protect the Constitution; it must observe national values and principles of governance as prescribed in Article 10 of the Constitution; it must observe principles of executive authority; it must maintain integrity for leadership in accordance with Chapter 6 of the Constitution; and, it must observe the rule of law and respect the authority of the judiciary.

316. Counsel urged that if the presidency violates the Constitution in particular and the rule of law generally, the Constitution is not left helpless; it provides a remedy; for instance, Judicial review will lie against an order of appointment made by a sitting President in contravention of the law. This is a public law remedy and will be directed to the state itself if, in making the appointment, the President purported to exercise the executive authority of the state. A narrow and strict interpretation of Article 143 of the Constitution would offend Article 259 of the Constitution which demands a

purposive interpretation in order to give effect to the objects, purposes and values of the Constitution.

317. It was also urged that, according to Article 73 of the Constitution, authority assigned to a state officer is a public trust and for this reason, the executive has a responsibility to serve the people rather than rule them; it has the responsibility, under Article 129 of the Constitution, to be accountable to the people, and respect the rule of law.

318. It is the 2nd respondent's position that strict interpretation of Article 143 of the Constitution without regard to the objects, values, purposes and spirit of the Constitution, as suggested by the Respondents, particularly the Attorney General will first, deprive the public the right to demand for public answerability from the office of the President on the exercise of the sovereign authority they have delegated to the executive; and, second, disparage the Constitution and promote impunity.

319. These matters, according to the 2nd respondent, are placed in the public law of the state as a deliberate constitutional approach in order to enable the Constitution to avoid an absurd state of affairs that would otherwise be created by a narrow interpretation of Article 143. The duty of the Courts is to reconcile the dichotomy of ensuring that there is no violation of the Constitution or the law that goes without a remedy while at the same time maintaining the integrity of the presidency which is a symbol of the Republic of Kenya by simply upholding and protecting the Constitution. In those circumstances, the Attorney General would be the proper party to a suit where the President has to be sued.

320. It was also urged that in countries with robust Constitution, such as Kenya, Courts have questioned actions or inaction by the President in so far as the deed or omission thereof has violated the law. Although in the instances where Courts have invoked judicial

review to right the wrongs by the executive have been equated by some pundits to judicial activism, counsel urged that it is simply a judicial path that is permitted by the Constitution itself as a way of attaining checks and balances within the doctrine of separation of powers. On this point, the learned counsel for the 2nd respondent referred to a case only cited ***BGM HCCC No. 42 OF 2012 [2012] eKLR*** and the case of ***Centre for Rights Education & Awareness & 6 Others v Attorney General Nairobi High Court Petition No. 208 & 209 of 2012.***

321. It was the learned counsel's position that based on his understanding of the law, he is not persuaded by the argument that since a sitting President enjoys immunity from legal proceedings under article 143 of the Constitution, no proceedings in the nature of public remedy should commence to put right a clear violation of the law in the exercise of a public power by the President. The public power is derived by the President from the Constitution and statute law as delegated by the people. Judicial review being a public law remedy is available in the Constitution to ensure due process has been followed, and it will not be rendered ineffective because the impugned exercise of public power was committed by the President. Such proceedings, where it is claimed a state officer acted in contravention of the law, are in the nature of Constitutional remedy under Articles 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.

322. On the question of *sub judice*, the learned counsel for the 2nd respondent urged that the Petitioner unequivocally admitted in paragraphs 26, 27, 28 and 29 of his "replying affidavit' affirmed on

17 February 2021 that all the issues in his petition are *sub-judice* ***Nairobi Constitutional Petition No. 12 of 2020 Okiya Omtata Okoiti versus the National Executive & Others*** which was instituted sometime during the month of January 2020 and amended on 3 August 2020 well before the institution of the present petition.

323. While relying on the decision of Olao, J. in ***Kenya Planters Co-operative Union Limited v Kenya Co-operative Coffee Millers Limited & another [2016] eKLR,*** *counsel* urged that this petition amounts to an abuse of process and ought to be struck out apparently for offending the *sub judice* rule. On this same point, he cited ***Kerugoya Environment and Land Court Civil Appeal No. 60 of 2014***. Counsel also cited section 6 of the Civil Procedure Act, cap. 21 and Black's Law Dictionary 10th Edition on what *sub judice* entails and submitted that a matter which is pending in Court for determination *sub judice* and that is precisely the position with regard to ***Nairobi Constitutional Petition No. 12 of 2020 Okiya Omtata Okoiti versus the National Executive & Others***. It is his contention that a constitutional petition is subject to the *sub judice* rule just like any other civil proceeding particularly considering the inclusion of the words "or proceedings" in Section 6 of the Civil Procedure Act.

324. The decision in **Stephen Somek Takwenyi & Another vs. David Mbuthia Githare & 2 Others Nairobi (Milimani) HCCC No.363 of 2009** was cited for the position it is the inherent jurisdiction of every Court of justice to prevent an abuse of its process and it has the duty to intervene and stop such proceedings as have been instituted in its abuse. The case of **Legal Advice Centre aka Kituo Cha Sheria v Communication Authority of Kenya [2015] eKLR;** the High Court of Uganda decision in **Nyanza Garage vs. Attorney General Kampala HCCS No. 450 of 1993**; **Re the Matter of the Interim Independent Electoral Commission Constitutional Application No. 2 of 2011 [2011] eKLR**; Australian

decision in **Re Judiciary Act 1903-1920 & In re Navigation Act 1912-1920 (1921) 29 CLR 257** were also cited by the learned counsel for the 2nd respondent to augment his position on the doctrine of *sub judice* and the abuse of the process of the Court with particular reference to this petition. In this latter Australian decision, it was held that the word 'matter' in the phrase matter in issue, means not a legal proceeding but rather the subject matter for determination in a legal proceeding. It follows that in determining whether the matter is *sub judice* and therefore an abuse of the process of the Court, it is the substance of the claim that ought to be looked at rather than the prayers sought. This Court was invited to consider **Murang'a County Government v. Murang'a South Water & Sanitation Co. Ltd & another [2019] eKLR** on the same point and decline the invitation to determine matters pending determination before a Court of competent jurisdiction.

325. It was further urged on behalf of the 2nd respondent that, despite offending the *sub judice* doctrine, the petition raises issues that have been determined by this Court in **Thirdway Alliance Kenya & another v Head of the Public Service-Joseph Kinyua & 2 others** and **Martin Kimani & 15 others (Interested Parties) [2020] eKLR.** It is the 2nd respondent's position that the legality and rationality of the exercise of Presidential authority in commissioning a Taskforce to advice the presidency on some of the constitutionally prescribed functions, are matters that have been determined in the former case and, in any case, cannot be said to be unconstitutional. However, the learned counsel for the 2nd respondent admitted that the decision having been made by a Court of concurrent jurisdiction is only persuasive.

326. As far as the question of funding the Steering Committee is concerned, counsel urged that the question of funding such *ad hoc* committees was also disposed of in the **Third Way Alliance** *case* where the Court held that the utilization of public funds to facilitate

the work of ad *hoc* taskforces is lawful and not in breach of the principle of public finance management as stipulated in the constitution. In any case, for the allegation of misappropriation of funds to stand, it was incumbent upon the Petitioner to adduce evidence of such misappropriation; this, according to the 2nd respondent, was not done.

327. Based on the same **Third Way Alliance case**, it was submitted that this honourable Court should decline the invitation to usurp the constitutional functions of the office of the Auditor General and Parliament on public finance.

328. The learned counsel for the 2nd Respondent also submitted that the Constitution does not expressly preclude a government at the national or county level, a State organ or a public officer from promoting an amendment to the Constitution through a popular initiative. Accordingly, nothing prevents any of the entities and officers concerned, including the 1st respondent from taking a lead role in the initiation of an amendment of the Constitution by a popular initiative.

329. The objective of the constitution in establishing the instrument of amendment by popular initiative was to ensure that any actor, private or public, would have the opportunity to initiate proposals and, in amending the constitution, all that matters is that all the procedural requirements for such an amendment have been satisfied.

330. To illustrate his point, the learned counsel for the 2nd respondent noted that many of what he described as 'landmark constitutional amendments' in Kenya have been a product of state initiatives. In 2005, for instance, the then government adopted a position in support of the draft constitution. The same situation obtained in 2010, when the Government led the constitutional reform efforts, including supporting the constitutional referendum.

331. He submitted further that various provisions of the constitution require the state to take legislative and other measures to ensure the achievement of certain constitutional objectives; for instance, Article 21 (2) of the Constitution directs that *"State shall take legislative, policy and other measures, including the setting of standards, to achieve the progressive realization of the rights guaranteed under Article 43*." Again, in Article 27(8), the Constitution directs that "*in addition to the measures contemplated..., the State shall take legislative and other measures to implement the principle that not more than two-thirds of the members of elective or appointive bodies shall be of the same gender."* And, according to Article 55 of the Constitution, the state is enjoined to take affirmative action programs, to ensure that the youth access relevant education and training; have opportunities to associate, be represented and participate in political, social, economic and other spheres of life; access employment; and, are protected from harmful cultural practices and exploitation. These measures, according to the learned counsel, may include initiation of constitutional amendments.

332. Consequently, the existence of such positive obligations on the State to ensure the taking of certain measures can only mean that the Constitution contemplates that the State can initiate amendments to the Constitution, through popular initiative, to achieve the objectives of the Constitution. When this happens, there would be nothing wrong for state-initiated amendment proposals to be financed by the State, as long as this is done in line with the principles of public finance management as articulated in the Constitution and in the Public Finance Management Act, 2012, amongst other laws.

333. The act of amending the constitution, it was urged, is an expression of the sovereignty of the people of Kenya; going by Article 1 of the Constitution, sovereignty may be exercised directly by the people themselves or through their democratically elected

representatives. The import of having at least one million registered voters supporting the initiative is that that number qualifies the initiative as a popular initiative.

334. On the question of breach of the provisions of Article 73 of the constitution, it was submitted that the petitioner has not adduced any evidence to support the allegations abuse of or breach of trust and further, it would be a usurpation of the constitutionally ascribed role of the Ethics and Anti-Corruption Commission for the Honourable Court to exercise primary jurisdiction over these allegations without reference to the Commission.

335. As far as the issue of disclosure of expended funds is concerned, it was submitted that the petitioner never sought any information on this issue and neither has he demonstrated that such information was declined if he ever requested for it and therefore the petitioner's claim, to the extent that it is based on perceived misuse of funds, is premature.

336. And with that the 2nd respondent's learned counsel asked this honourable Court to dismiss the petitioner's petition with costs.

337. Micheal Goa, the Director, Legal and Public Affairs of the IEBC swore a replying affidavit on behalf of the 3rd respondent; he did not dispute the facts that provoked this petition but stated that since IEBC had already forwarded the Constitution Amendment Bill, 2020 to the speakers of the respective County Assemblies for consideration by the County Assemblies vide a letter date 26 January 2021, the prayers sought against it are now moot. In any event, the 3rd Respondent has complied with its constitutional and statutory mandate as far as the initiative to amend the constitution which is the subject of this petition.

338. In particular, the 3rd respondent complied with what has been described as *'verification and conformity mandate'* which is one of the

two limbs of the 3rd respondent's mandate under Article 257. According to Goa, this mandate entails the 3rd respondent's receipt of a proposed amendment Bill accompanied by its supporters' signatures for verification that the same conforms to the requirements in Article 257. The other limb of the mandate is the '*referendum mandate'* when the Bill is subjected to a referendum, for one reason or the other.

339. The 3rd respondent's mandate commenced on 10 December 2020 when the 3rd Respondent received the Constitution of Kenya (Amendment Bill), 2020 and 4.4 million supporters' signatures from the promoters of the popular initiative. The 3rd respondent announced receipt of the Bill and the supporters' signatures through a press release issued on Friday 18 December 2020.

340. The 3rd respondent duly confirmed that the initiative was supported by the signatures of at least one million registered voters in order to ensure compliance with the requirements of Article 257 (4) of the Constitution.

341. Upon completion of the process to confirm that the initiative had been supported by the signatures of at least one million registered voters, the 3rd Respondent prepared an interim report; it also undertook data cleaning exercise by removing incomplete records including missing signature, Identification numbers and names, duplicates and those not in the Register of Voters maintained by the 3rd Respondent. The 3rd Respondent then uploaded a list of verified supporters on its website, to enable them to check and confirm their details. The purpose of uploading the list of verified supporters on the 3rd Respondent's website was to provide anyone who may have been captured as a supporter without their consent, an opportunity to report to the 3rd Respondent by writing to its Acting Commission Secretary indicating their objections. This was a

necessary exercise to rid the 3rd Respondent's exercise of any errors and inadvertent mistakes giving it a clean bill of health.

342. Upon completion of this process, it was established that the initiative had met the requisite threshold as provided for under Article 257(4) of the Constitution. Thus, in conclusion of its mandate as contemplated under the Constitution, the 3rd Respondent forwarded the Constitution of Kenya (Amendment) Bill 2020 to the Speakers of the respective County Assemblies for consideration by the County Assemblies. This was done through a letter dated 26 January 2021 in execution of the 3 Respondent's constitutional mandate as provided for under Article 257(5) of the Constitution.

343. Having submitted the draft Bill to the County Assemblies in line with Article 257(5) of the Constitution, the 3rd Respondent no longer has any other role to play in the subsequent process of consideration by the County Assemblies.

344. The 1st interested party did not file any response and neither were any submissions filed on its behalf.

345. The 2nd Interested Party, on the other hand, filed a replying affidavit and also written submissions. The affidavit was sworn by the Milcah A. Ondiek, who has been described as the '*head of legal at the office of the Auditor General'*. She swore that the Office of the Auditor General does not compute financial statements and reports of auditees but only ensures that public expenditure is in compliance with the Constitution, the Public Audit Act, the Public Finance Management Act and any other legislation relevant to the Auditee in question. At the time of filing her affidavit on 16 March 2021, the 2nd interested party was auditing the finances for the year 2019/2020 and it is possible that the entities in question will be audited in line with Article 229(5) which states that the Auditor General may audit and report on the accounts of any entity that is funded from public funds.

346. In what is clearly a submission on a point of law, though camouflaged as a deposition in an affidavit, the 2nd interested party has urged that it is not in the powers of the Court to order an independent office to exercise its discretion; the deponent went even further and cited the case of ***Samson Owimba Ojiayo vs. Independent Electoral and Boundaries Commission (IEBC) & Another (2013) eKLR*** for this proposition.

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347. On 10th December, 2020, the IEBC confirmed receipt of the Constitution of Kenya Amendment Bill 2020 and signatures in support of the Bill to amend the Kenyan Constitution 2010 by popular initiative.

348. On 18th December, 2020, the Petitioner, MUSLIMS FOR HUMAN RIGHTS (MUHURI), with regard to the signatures so collected, requested the IEB) to provide information whether:

a. There existed Rules to guide and regulate signature verification process;

b. IEBC held specimen signatures of all registered voters;

c. Funds had been allocated and authorized for the conduct of signature verification.

349. By a letter dated 23rd December, 2020, the IEBC responded that:

a) it had developed Procedures for the Verification of Signatures

b) it did not have a data base of all the signatures of registered voters but only held their biographic and biometric data

c) The treasury had authorized Kshs. 93, 729, 800/= to cover expenses relating to signature verification.

d) On 30th December, 2020, the IEBC through its twitter handle informed the public of the launch of signature verification at the Bomas of Kenya.

350. Through a press statement released on 21st January, 2020, the IEBC notified the public that it had published, on its website, the names of persons who had appended their signatures in support of the BBI Bill inviting the public to access the information on the website and incase of any complaint, to write to the commission by Monday, 25th January, 2021.

351. On 26th January 2021 IEBC announced to the public that it had conducted the verification process and the preliminary findings were that the BBI Bill had satisfied the requirements of Article 257 of the Constitution. IEBC proceeded to submit the BBI bill to the 47 counties for consideration, approval or rejection.

352. The Petitioner was concerned that the whole process from the collection of the signatures to the verification process were all not supported and or guided by any regulatory framework. Secondly, that any alleged Procedural Rules or guidelines made and applied by the IEBC to carry out the exercise were in violation of Articles 10, 94 and 249 of the Constitution, as the IEBC does not have legislative powers under the Constitution. .

353. The Petitioner took the view that IEBC had contravened Article 81 of the Constitution by purporting to conduct the verification procedure required by Article 257 (4) and (5) without a that regulatory framework to guide the actual process on how the verification should be undertaken.

354. It was also the Petitioner's case that the so called Administrative Procedures were developed without legal authority and therefor failed to comply with Sections 5, 6 and 11 of the Statutory Instruments Act rendering them legally infirm.

355. The Petitioner also contended that by failing to maintain a database of specimen signatures of registered voters the IEBC was in violation of Article 257 (4) and (5) of the Constitution as it was rendered incapable of discharging its mandate on the signature verification process.

356. The Petitioner's case was supported by the Affidavit of Khelef Khalifa and the annexures therewith.

357. In view of the above the Petitioner makes the following prays: -

i. *THAT A DECLARATION be issued that IEBC cannot undertake the verification process of signatures and registered voters supporting a popular initiative without a legal/ regulatory framework or adequate legal/ regulatory framework to regulate the verification and other processes required under Article 257(4) and (5) of the Constitution.*

ii. *THAT A DECLARATION be issued that any process undertaken by IEBC purportedly under Article 257(4) and (5) in regard to Constitution of Kenya (Amendment) Bill 2020 promoted by the Building Bridges Initiative violates the rule of law under Article 10 for lack of an enabling and guiding legal/ regulatory framework and or adequate enabling and guiding legal/ regulatory framework and is therefore invalid.*

iii. *THAT A DECLARATION issue that Administrative Procedures for the Verification of Signatures in Support of Constitutional Amendment Referendum are illegal because they are made without legal authority and in violation of Article 94 of the Constitution and Sections 5, 6 and 11 of the Statutory Instruments Act, 2013.*

iv. THAT AN ORDER *issue quashing the Administrative Procedures for the Verification of Signatures in Support of Constitutional Amendment Referendum.*

v. THAT AN ORDER *issue quashing all the processes and decisions made by the IEBC purportedly under Article 257 (4) and (5) concerning the Constitution of Kenya (Amendment) Bill, 2020 promoted by the Building Bridges Initiative.*

vi. THAT A PERMANENT ORDER *of injunction do issue permanently restraining IEBC, its Commissioners, staff or agents from forwarding the Constitution of Kenya (Amendment) Bill, 2020 promoted by the Building Bridges Initiative to the County Assemblies.*

vii. THAT A PERMANENT ORDER *of injunction do issue restraining the IEBC from undertaking any processes required under Article 257 (4) and (5) in respect of the Constitution of Kenya (Amendment) Bill 2020 or any other Bill presented to it under Article 257 (4) until the 2nd Respondent herein enacts a comprehensive legal and regulatory framework to regulate and guide the constitutional processes mandated under Article 257 (4) and (5) of the Constitution.*

viii. THAT *in the alternative, this Honourable Court be pleased to suspend the verification process of signatures and registered voters supporting a popular initiative by IEBC and other processes required under Article 257 (4) and (5) of the Constitution until the 1st and 2nd Respondent enacts an adequate statutory and regulatory framework to regulate the verification of signatures and other processes required under Article 257 (4) and (5) of the Constitution.*

ix. *THAT the Respondents file in Court an affidavit detailing the steps they have undertaken in enacting the requisite statutory and regulatory framework regulating the verification of signatures and other processes required under Article 257 (4) and (5) of the Constitution within 21 days of enacting the aforesaid regulatory framework.*

x. *THAT this Honourable Court be pleased to grant such further Order of Orders as may be just and appropriate.*

358. IEBC's response to the Petition was contained in an affidavit dated 22nd January, 2021, sworn by Michael Goa opposing the Petition on the grounds that:

i. *The that IEBC had complied with the Constitution*

ii. *That upon receipt of the Draft Bill and record of registered voters in support of the Bill, from the promoters of the BBI initiative, it notified the public through various media platforms of the launch of the verification exercise of the record of voters in support of the Initiative*

iii. *That in line with Section 55 of the Elections Act and through extensive public participation, it developed administrative procedures for the verification process similar to the administrative procedures used in the verification of signatures in* ***Okoa Kenya*** *and* ***Punguza Mizigo initiatives***

iv. *That upon inviting the public to view the record of voters in support of the initiative on its website and to submit confirmation and complaints if any, it had verified the that the Initiative was supported by more than 1 million registered voters, as no complaints had been submitted;*

v. *IEBC urged the Court to find that since the exercise was at advanced stages and a lot of money had already been used it would be imprudent to stop it*

vi. *That the Petition was sub judice as there were five similar cases ongoing seeking similar remedies.*

vii. *That the petition was immature and lacked merit and should be dismissed with costs as it presumed that Parliament would pass the draft Bill the way it was.*

359. Both the Senate and the National Assembly filed grounds of opposition dated 15th February, 2021. They contended that:

1) *The Petition offends the principle of justiciability for want of ripeness*

2) *The Petition was challenging the legislative proposals to be considered by Parliament and that the mere introduction of the Bills in Parliament does not constitute a violation of the Constitution.*

3) *As per the doctrine of separation of powers, the Court lacks jurisdiction to intervene during active Parliamentary proceedings. To that end the petition violates the doctrine of separation of powers as per the Supreme Court case of* ***Justus Kariuki Mate & Another vs. Martin Wambora & Another [2017] eKLR*** *where the Court held that each arm of government should restrain itself from directing another on how to undertake its mandate.*

4) *The Petitioners would have the opportunity to raise the issues raised in this Petition before Parliament during the public participation exercise as provided for in the Constitution and Standing Orders of the Houses.*

5) *Orders sought would amount to gagging Parliament from debating the Draft Bill hence usurping its Constitutional powers.*

6) *That challenges to the constitutional validity of the BBI Bill were pre mature and would have to await the completion of the legislative process.*

7) *Articles 255, 256 and 257 stipulates the manner in which the Constitution is* to be amended.

360. The Interested Party opposed the Petition vide a replying affidavit sworn on 5th February, 2021 by Dennis Waweru the Co-Chairperson. In answer to the issue of lack of an existing legal framework, it took five positions.

361. One supported by the holding in the case of ***Titus Alila & 2 others (Suing on their own behalf and as the Registered Officials of the Sumawe Youth Group) Vs Attorney General & Another [2019] eKLR*** where the Court held that the Constitution has already set up a proper Legislative Framework for holding a referendum. The IEBC's case was that:

i. There is no lacuna in the law.

ii. The Bills pending in Parliament were merely for the amendment of the Referendum.

iii. There are adequate laws and explicit provisions in the Elections Act which govern the conduct of a referendum in Kenya.

362. The Second position with regard to the procedure to be applied when considering the Draft Bill, that this Court held in ***Republic vs County Assembly of Kirinyaga & another Ex- Parte Kenda Muriuki & Another [2019] eKLR,*** it was upon the County assemblies to employ their own procedures for the consideration and approval of Bills

363. Third, that the jurisdiction of the Court was prematurely invoked as the Senate, National Assembly and County Assemblies were yet to receive and debate on the Draft Bill and thereafter approve or reject the same.

364. Fourth, that Court's jurisdiction is limited to determining whether there is a violation of law and not dictate to Parliament and the IEBC the content of such legislation.

365. Fifth, that the proceedings offend the doctrine of sub judice as the issues raised herein were also raised in Petitions E 400 of 2020 and E416 of 2020 which are alive and pending before a Court of competent jurisdiction.

366. The Petitioner filed submissions dated 12th March, 2021. On the issue whether IEBC requires a database of specimen signatures of all registered voters to verify the Constitution of Kenya Amendment Bill is supported by at least one million registered voters, the Petitioner submitted that by virtue of Article 257 (4) of the Constitution, the IEBC was obligated to verify that a Bill or general suggestion to amend the Constitution through popular initiative is signed by at least one million registered voters. That the terms signatures and signed were not defined by any legislation, neither was the verification process set out in any law.

367. That without a regulatory framework defining the terms "signed" and "signature" required under Article 257 of the Constitution mean, the IEBC contravened Articles 94 and 257(4) of the Constitution by imposing the meaning to be ascribed to the term signature without Parliament's authorization.

368. That by using other identifiers in the verification process other than signatures of registered voters the IEBC was in violation of

Article 257(4) of the Constitution. Without a database of signatures it could not carry out the verification process as required.

369. On the issue whether there is a legal and regulatory framework to regulate the verification process as required under Article 257(4) and (5) of the Constitution, the petitioner's position was that there is no law, regulation or guideline providing for the actual procedure on how verification is to be undertaken. Without a regulatory framework to guide the process on verification procedures, there were many regulatory gaps

370. The Petitioner relied on ***Muslims for Human Rights (MUHURI) & Another vs. Inspector General of Police & 5 others [2015] eKLR*** where the Court held that the principle of constitutionalism and rule of law lie at the root of our system of government, and are fundamental postulates of our constitutional architecture.

371. That the fact that there are pending bills in Parliament on a referendum law means that Parliament, noted that there was a vacuum. That Parliament knows the needs of its people and does not legislate in a vacuum. For this it relied ***Kenya Human Rights Commission vs Attorney General (2015) eKLR***.

372. The Petitioner submitted further that that lack of a regulatory framework makes the verification and certification process unaccountable to any law and unverifiable at every stage in violation of Article 81 of the Constitution.

373. On the appropriate remedy, the Petitioner urged the Court to, inter alia suspend the performance of the verification process until a proper and adequate regulatory framework was put in place.For this the Petitioner relied the case of ***Nubian Rights Forum & 2 others V Attorney General & 6 others; Child Welfare Society & 9 others (Interested Parties) [2020] eKLR*** where the Court held that the biometric data and personal data in NIIMS should only be processed

if there is an appropriate legal framework in which sufficient safeguards are built in to protect fundamental rights.

374. On whether the Administrative Procedures for the verification of Signatures in support of Constitutional Amendment Referendum are illegal, the Petitioner submitted that that Sections 55 of the Elections Act and Section 31 of the IEBC Act did not empower the IEBC to make the Administrative Procedures as Parliament had not enacted laws on verification and certification of signatures as required under Article 257(4) of the Constitution.

375. It was also submitted that IEBC had not provided evidence to demonstrate that the said administrative procedures had been subjected to public participation or that they had the approval by Parliament as required by the Statutory Instruments Act.

376. On the requirement public participation with regard to the making of legislation including subsidiary legislation the Petitioner relied on British American Tobacco Ltd V Cabinet Secretary for the Ministry of Health & 5 others [2017] eKLR and Keroche Breweries Limited & 6 others V Attorney General & 10 others [2016] eKLR.

377. On the argument that the administrative procedures did not have Parliamentary approval, the Petitioner relied on the case of Kenya Country Bus Owners Association (Through Paul G. Muthumbi – Chairman, Tax Network- Africa vs Cabinet Secretary for National Treasury & 2 others [2019] eKLR, Samuel Njuguna – Secretary, Joseph Kimiri – Treasurer) & 8 others vs Cabinet Secretary for Transport & Infrastructure & 5 others JR. No. 2 of 2014 [2014]eKLR where the Court held that the failure to comply with Section 11 of the Statutory Instruments Act rendered the National Transport and

Safety Authority (Operation of Public Service Vehicles) Regulations, 2013 null and void.

378. On the reliefs sought in the Petition, the Petitioner submitted that the respondents had violated the Constitution and that if the Court found that the conduct of the respondents was in contravention of the Constitution, it is mandated to remedy the contravention by granting the appropriate relief as the situation demands. The Petitioner cited the case of Mitubell Welfare Society V Kenya Airports Authority & others, Petition No. 3 of 2018 where the Supreme Court held that in granting a relief, the Court must be creative in fashioning appropriate relief tailored to the circumstances of the case.

379. The IEBC submitted that the constitution should be given a purposive, liberal interpretation and that the provisions of the constitution must be read as an integrated, whole, without any particular provision destroying the other. On this the IEBC relied on Articles 88 and 259 of the Constitution and the Court decision in Council of Governors vs Attorney General & another [2017] eKLR, and In the Matter of Kenya National Commission on Human Rights (2014) eKLR

380. On whether the IEBC had complied with article 257(4) of the Constitution, the IEBC submitted its responsibility was simply to ascertain whether the supporters of the draft Bill was supported by a million signatures of registered voters and not the validity their signatures.

381. On the issue of **whether there is need for a database of specimen signatures for verification to be conducted**, the IEBC submitted it was it was not correct that the signature was the only unique identification to be used for verification under Article 257(4) of the Constitution. This was because Sections 4(2) and (3) of the Elections Act, 2012 and Regulation 8 of the Elections (Registrar of

Voters) Regulations 2012 provides that a register of voters must contain biometric data and particulars set out in Form A. Further, that promoters of the initiative were required to submit the names, ID, constituencies, county, ward, polling station, mobile no and email address of voters in support of the initiative. That it was that these were used in the verification process hence it was not necessary for the IEBC to keep a database of specimen signatures. In addition that there was no law requiring it to maintains a database of signatures for purposes of article 257(4)

382. On the issue of **whether there is a legal framework for verification**, the IEBC submitted that there exists a legal framework on the conduct of elections and referenda. That the fact that Parliament had not exercised its powers under Article 94 of the Constitution did not mean there was a legal vacuum. That the administrative procedures for the verification of signatures in support of constitutional amendment were not illegal**,** as they are not statutory instruments as stipulated in the Statutory Instruments Act. IEBC argued that these were internal procedures which it was empowered to make for the ease of execution of its mandate. It relied on the case of Republic vs Attorney General; Law Society of Kenya (Interested Party); Ex-parte Francis Andrew Moriasi (2019) eKLR where the Court was of the view that not all guidelines, orders, or directions given by the Respondent are legislative in character and therefore statutory instruments, and that there may be guidelines and directions that are purely executive in character, in the sense that their objectives are solely administrative in guiding implementation off standards in laws and policies. The IEBC also submitted that legislations are not perfect as was held in **Law Society of Kenya v Kenya Revenue Authority & Another (2017) eKLR**, where Justice Mativo stated that the Court interprets how legislation should apply in a particular case as no legislation unambiguously and specifically addresses all matters.

383. The **2nd Respondent,** the Senate submitting on whether there is sufficient legal framework to facilitate amendment of the Constitution through a popular initiative, argued that the Constitution and Sections 49- 55 of the Elections Act provide sufficient guidelines and procedures for undertaking Constitutional amendments through popular initiative or referendum. Further that there was no requirement under article 257 of the Constitution for either the National Assembly or the Senate to come up with Legislative framework to guide the IEBC on verification of signatures or to regulate the Constitutional amendment process through a popular initiative.

384. The 3rd Respondent, the National Assembly 's position was that Article 257 of the Constitution and Sections 49-55 of the Elections Act, 2011 give a complete legislative framework for holding a referendum. In any event the issue of the legislative framework was settled in the case of Titus Alila & 2 others (Suing on their own behalf and as the Registered Officials of the Sumawe Youth Group) vs Attorney General & another [2019] eKLR**.**

385. On its part the Interested Party, the BBI Secretariat, submitting **on the verification of signatures and the role of IEBC** Article 257 of the Kenyan Constitution does not impose any requirement for verification of signatures. The Commission's mandate is to verify that an initiative is supported by at least one million votes. Further, that there is no requirement by any law, constitution or regulation to have any specified form of signature.

386.IEBC further argued that unless it was shown that the system it was using for verification was faulty, the Court could not purport to perfect the IEBC's administrative system. And without any allegations that an unconstitutional outcome has resulted from the IEBC's discharge of its mandate, the Court could not interfere.

387. The IEBC further submitted that it was imperative to apply a meaning of the word "signed" within the context of the population upon whom it is being used and the purpose.

C. PART 3: THE ISSUES FOR DETERMINATION

388. After considering all the pleadings in the eight Petitions, the written briefs by the parties and their oral submissions, we have delineated the following questions for determination in the Consolidated Petitions:

i. *Is the Basic Structure Doctrine of Constitutional interpretation applicable in Kenya?*

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?*

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?*

iv. *Should the President and Public Officers who directed or authorized the use of public funds for the BBI Constitutional Amendment Process be ordered to refund the monies so used?*

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?*

vi. *Is there an adequate legislative framework in place to guide constitutional amendments through Popular Initiative; and if not, is that fatal for the on-going constitutional amendment processes?*

vii. *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?*

viii. *Does the Constitution envisage the possibility of a bill to amend the Constitution by Popular Initiative to be in the form of an omnibus bill or must specific proposed amendments to the Constitution be submitted as separate and distinct referendum questions?*

ix. *Was it unlawful for the Promoters of Constitution of Kenya Amendment Bill to leave out the proposal for an Independent Constitutional Health Services Commission from the Constitution Amendment Bill?*

x. *Is it lawful for a Constitution of Kenya Amendment Bill to set a specific number of constituencies under Article 89(1) of the Constitution?*

xi. *Is it lawful for a Constitution of Kenya Amendment Bill to directly allocate and apportion the constituencies it creates without a delimitation exercise using the criteria and procedures as set out in Article 89 of the Constitution?*

xii. *Has the IEBC carried out nationwide voter registration? If not, can the Proposed Referendum be carried out before the IEBC has done so?*

xiii. *Is the IEBC Properly constituted to conduct the proposed referendum including verifying the minimum voter support required for the Popular Initiative and submitting the*

Constitution of Kenya Amendment Bill to the County Assemblies?

xiv. *Is a Legal/Regulatory Framework to regulate the verification and other processes required under Article 257(4) and (5) of the Constitution? If so, does such a Legal/Regulatory Framework exist?*

xv. *Is it a violation of Article 43 Rights for the Promoters of the Constitution of Kenya Amendment Bill and the Respondents to be pursuing constitutional amendments in the midst of COVID-19 Pandemic?*

xvi. *Should an Order issue directing the President to dissolve Parliament pursuant to the Chief Justice's Advice issued pursuant to Article 261(7) of the Constitution?*

xvii. *What Reliefs, if any, should be granted?*

389. Our analysis and determinations based on these framed issues follow.

D. PART 4: ANALYSIS AND DETERMINATIONS

I. THE BASIC STRUCTURE DOCTRINE AND ITS APPLICATION TO KENYA

393. The basic question presented by ***Petition No. E282 of 2020*** is whether the Constitution of Kenya, 2010 comprehends the "Doctrine of Basic Structure" and if so what its implications are for the amendment powers and rights in Articles 255 – 257 of the Constitution. In particular, does the Doctrine of Basic Structure, if it applies to the Constitution of Kenya, import the idea of limitations whether explicit or implicit on the constitutional amendment power?

394. A related question presented by this Petition is whether the Constitution of Kenya contains any specific provisions which are, by text, context or proper interpretation, deemed to be "unamendable" or

could otherwise be described as "eternity clauses": foundational constitutional clauses which are irrevocable; which cannot be amended despite the amendment provisions existing in the Constitution.

395. In order to adequately respond to these defining questions, from the pleadings filed; submissions by the parties; and authorities cited, we have delineated three key lines of inquiry whose cumulative analysis would yield answers to the defining questions. They are as follows:

i. *First*, an understanding of the nature of Kenya's Constitution. This provides the context for understanding the Constitution's various textual and implicit provisions including the constitutional amendment provisions.

ii. *Second*, a brief look at the history of the making of Kenya's Constitution. This, equally, provides historical context which is imperative for giving proper meaning to the constitutional text.

iii. *Third*, the implications for these first two lines of inquiry to the question of interpreting the extent and limits of the constitutional amendment powers under the Constitution.

396. It is now widely accepted that the Kenyan Constitution is a transformative charter. Heinz Klug has described the idea of a transformative constitution as the adoption of "*a constitutional order which is expected to 'transform' the existing pre-constitutional order. To this extent, these constitutions are aspirational and are meant to empower the newly democratized state to make significant changes to the existing social and economic order….[in order] to overcome the legacies of conflict and the social conditions that divided the society*."[1]

397. Or as Karl Klare has described it, transformative constitutionalism is "*an enterprise of inducing large-scale social*

change through nonviolent political processes grounded in law….[deploying a Constitution which is] social, redistributive, caring, positive, at least partly horizontal, participatory, multicultural and self-conscious about its historical setting and transformative role and mission."[2]

398. The Supreme Court has described the transformative nature of our Constitution ***In the Matter of the Speaker of the Senate & another [2013] eKLR*** thus:

> *[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.

399. One of the imports of recognition of the nature of the transformative character of our Constitution is that it has informed our methods of constitutional interpretation. In particular, the following four constitutional interpretive principles have emerged from our jurisprudence:

a. *First*, the Constitution must be interpreted holistically; only a structural holistic approach breathes life into the Constitution in the way it was intended by the framers. Hence, the Supreme Court has stated in ***In the Matter of the Kenya National Commission on Human Rights, Supreme Court Advisory Opinion Reference No. 1 of 2012; [2014] eKLR*** thus (at paragraph 26):

> *But what is meant by a holistic interpretation of the Constitution? It must mean interpreting the Constitution in context. It is 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 the light of its history, of the issues in dispute, and of the prevailing circumstances.*

b) *Second*, our Transformative Constitution does not favour formalistic approaches to its interpretation. It must not be interpreted as one would a mere statute. The Supreme Court pronounced itself on this principle in ***Re Interim Independent Election Commission [2011] eKLR***, para [86] thus:

> *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.

c) *Third*, the Constitution has provided its own theory of interpretation to protect and preserve is values, objects and purposes. As the Retired CJ Mutunga expressed in his concurring opinion in In ***In Re the Speaker of the Senate & Another v Attorney General & 4 Others, Supreme Court Advisory Opinion No. 2 of 2013; [2013] eKLR***. (paragraphs 155-157):

[155] In both my respective dissenting and concurring opinions, In the Matter of the Principle of Gender Representation in the National Assembly and Senate, Sup Ct Appl No 2 of 2012; and Jasbir Singh Rai& 3 Others v Tarlochan Singh Rai and 4 Others Sup Ct Petition No 4 of 2012, I argued that both the Constitution, 2010 and the Supreme Court Act, 2011 provide comprehensive interpretative frameworks upon which fundamental hooks, pillars, and solid foundations for the interpreting our Constitution should be based. In both opinions, I provided the interpretative coordinates that should guide our jurisprudential journey, as we identify the core

provisions of our Constitution, understand its content, and determine its intended effect.

[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, tend to create. The Constitutional text and letter may not properly express the minds of the framers, and the minds and hands of the framers may also fail to properly mine the aspirations of the people. It is in this context that the spirit of the Constitution has to be

invoked by the Court as the searchlight for the illumination and elimination of these legal penumbras.

d) *Fourthly*, in interpreting Constitution of Kenya, 2010, non-legal considerations are important to give its true meaning and values. The Supreme Court expounded about the incorporation of the non-legal considerations and their importance in constitutional interpretation in the ***Communications Commission of Kenya Case***. It stated thus:

> ***[356]*** *We revisit once again the critical theory of constitutional-interpretation and relate it to the emerging human rights jurisprudence based on Chapter Four – The Bill of Rights – of our Constitution. The fundamental right in question in this case is the freedom and the independence of the media. We have taken this opportunity to illustrate how historical, economic, social, cultural, and political content is fundamentally critical in discerning the various provisions of the Constitution that pronounce on its theory of interpretation. A brief narrative of the historical, economic, social, cultural, and political background to Articles 4(2), 33, 34, and 35 of our Constitution has been given above in paragraphs 145-163.*
>
> ***[357]*** *We begin with the concurring opinion of the CJ and President in* ***Gatirau Peter Munya v. Dickson Mwenda Kithinji & 2 Others, Supreme Court Petition No. 2B of 2014 l****eft off (see paragraphs 227-232). In paragraphs 232 and 233 he stated thus:*
>
> > *[232]…References to Black's Law Dictionary will not, therefore, always be enough, and references to foreign cases will have to take into account these peculiar Kenyan needs and contexts.*

> *[233] It is possible to set out the ingredients of the theory of the interpretation of the Constitution: the theory is derived from the Constitution through conceptions that my dissenting and concurring opinions have signalled, as examples of interpretative coordinates; it is also derived from the provisions of Section 3 of the Supreme Court Act, that introduce non-legal phenomena into the interpretation of the Constitution, so as to enrich the jurisprudence evolved while interpreting all its provisions; and the strands emerging from the various chapters also crystallize this theory. Ultimately, therefore, this Court as the custodian of the norm of the Constitution has to oversee the coherence, certainty, harmony, predictability, uniformity, and stability of various interpretative frameworks dully authorized. The overall objective of the interpretative theory, in the terms of the Supreme Court Act, is to "facilitate the social, economic and political growth" of Kenya.*

400. With these interpretive principles in mind, which we will call the Canon of constitutional interpretation principles to our Transformative Constitution, we will presently return to the transcendental question posed in these Consolidated Petitions: *Does the Constitution of Kenya, 2010 comprehend the Basic Structure Doctrine; and does that theory implicitly or explicitly limit the amendment powers in Articles 255-257 of the Constitution?*

401. We think that the appropriate response to this question can only be given after one fully understands the history of the making of the Constitution of Kenya, 2010. That history provides the appropriate context for answering the transcendental question posed.

402. The making of Constitution of Kenya, 2010 has been described as a "model" of "participatory constitution building process."[3] It has been described as "*a story of ordinary citizens striving and succeeding to reject or as some may say, overthrow the existing social order and to define a new social, economic, cultural, and political order for themselves. Some have spoken of the new Constitution as representing a second independence.*"[4]

403. Participatory constitution building encapsulates the idea that the public directly and meaningfully participates in the process of making a constitution. This is contra-distinguished from expert-written Constitutions in the pre- to mid-20th Century. In many pre- and 20th century constitution making processes, it was generally agreed that political leaders who held power would make and write constitutions.[5] Thus the process of drafting the constitution was expert work with the public relegated to giving consent to the final version of the draft before promulgation.[6]

404. To understand the process of and the need for public participation in Kenya one must understand the background of Kenya's constitutional history.[7] The 1963 independence Constitution was negotiated to mark the end of formal colonial rule, establish a government elected by Kenyans and to ensure the devolution of powers among other checks and balances of excessive executive and Presidential power.[8]

405. By 1991 when Kenya officially became a multi-party state after close to a decade of being a *de jure* one-party state, the 1963 Constitution had been amended many times and stripped of most of its initial democratic and social justice protections.[9] By the end of 1980 Kenya had effectively become an authoritarian state. Criticism of the government was forcefully repressed including through detention without trial and abuse of legal process. The system of government was personalized with heavy reliance on patronage, the resources of the State were plundered through massive corruption,

the Police was used as a force of oppression, judicial independence had been severely curtailed and judiciary was subordinated to the executive, and many communities suffered discrimination and marginalization.[10]

406. This turn towards autocracy in Kenya was facilitated through what the *Amici Curiae* (the Law Professors Duncan Ojwang'; John Osogo Ambani; Linda Musumba; and Jack Mwimali) describe in their written brief as a culture of hyper-amendment. They correctly point out that:

> *….[T]his culture of hyper-amendment that existed in Kenya's history left the then Constitution a hollow shell: present but futile. In this era, Parliament could and did amend the Constitution to a point where it lost its supremacy and its identity. The individual amendments, collectively, exceeded the articles of the Constitution itself. The Constitution became a document unable to reflect the desires and aspirations of the People; or to positively affect and….improve the reality of People's lives.*

407. This culture of hyper-amendment mid-wifed in Kenya a constitutional curiosity which Prof. Okoth Ogendo famously described as "Constitutions without constitutionalism"; a culture where the Constitution "underwent changes so profound and so rapid as to alter its value content and significance beyond repair…." It was a culture which reflected, in the words of Duncan Okubasu, a "misuse of constitutional politics that degrades the Constitution into something more akin to a statute."[11]

408. This history is well known and has found description in our past judicial opinions. Maraga, CJ, for example, described the history in ***Council of Governors & 47 Others v Attorney General & 3 Others; Katiba Institute & 2 Others (Amicus Curiae) [2020] eKLR*** in the following words:

> ***[107]*** *Although, like those of most other African States, the Kenyan independence Constitution embraced the doctrine of separation of powers that mainly focused on securing the sovereignty of State and setting up the governance machinery. After that was achieved, shortly after independence, the political elite, driven by greed and selfish ambitions, jettisoned the concept of Constitutional implementation and instead embarked on, and succeeded in, making numerous amendments, the overall objective of which was to consolidate all state power and authority in the Executive arm of Government, and in particular the Presidency. That led to patrimonialism that did not tolerate any form of opposition, and established what, in the Kenyan parlance, is referred to as the 'imperial presidency'.*
>
> **.....**
>
> ***[110]*** *As a result of the said acts of impunity, authoritarianism and skewed development, "Kenyans lost respect for … [their] Constitution and confidence in the political system. Few public institutions enjoyed legitimacy and most [of them] lost the ability to resolve differences among the people or political parties …."* (internal quotations omitted)

409. The effects of the twenty-six constitutional amendments between 1964 and 1991 are pithily described in the CoE Final Report thus:

> *In 1964, the first post-independence government successfully introduced amendments to the Constitution that changed it fundamentally: The Parliamentary system of government was converted to a predominantly Presidential one. The following year the system of devolution was largely dismantled in an amendment backdated to independence.*

> *Further gradual amendments to the Constitution between 1964 and 1982 increasingly concentrated power in the office of the President. 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. An imperial presidency emerged as the positions of the Head of State and Head of Government were unified without the attendant checks that exist in a Presidential system that respects principles of constitutionalism.*

410. It is against this background that Kenya's quest for concrete constitutional reform begun in the early 1980s and peaked in the early 1990s.[12] The drastic changes that took place in the early 1990s including the fall of the Berlin Wall and regime changes in Eastern and Central Europe gave impetus for the clamor to end one-party rule in Kenya which had been established vide a constitutional amendment.[13] Civil society groups such as the Supreme Muslim Council of Kenya (SUPKEM), the National Council of Churches of Kenya (NCCK), the National Convention Executive Council (NCEC) and professional groups such as the Law Society of Kenya (LSK) led the process that made Kenya a multiparty state in December 1991.[14]

411. After initial resistance from the government, the Constitution of Kenya Review Act, 1997 (CAP 3A) was enacted.[15] However, between 1998 and 1999, due to disagreements between the ruling party, the Kenya African National Union (KANU) working with the Raila Odinga-led National Development Party (NDP) on the one hand, and Civil Society Organizations and some opposition MPs led by former President Mwai Kibaki on the other hand, the constitutional reforms process hit a snag.[16] The former group was arguing for a Parliamentary-led process while the latter was arguing for a participatory, citizen-centric process.[17] This dissension led to a

parallel reform process led by Religious organizations (NCCK, SUPKEM, Hindu council, MCC and others). This group met at Ufungamano House in Nairobi to strategize on how to resist KANU's Parliamentary-led reform process. This led to what is now known as the Ufungamano Initiative which established a People's Commission of Kenya (PCK) led by Dr. Oki Ooko Ombaka as chairperson.

412. Meanwhile, the government had gone ahead and appointed Commissioners under the CKRC Act. Prof. Yash Pal Ghai was appointed the Chair by the President. This division between the initial Constitution of Kenya Review Commission (CKRC) commissioners led by Yash Pal Ghai resulted in a 2001 consensus that facilitated a constitutional review process that combined the Moi-appointed commissioners and the Ufungamano Initiative commissioners.[18]

413. In debating the Constitution of Kenya Review Commission Act, President Moi clashed with the Community and grassroots leaders, Civil Society Organizations (CSOs), opposition leaders and religious leaders who preferred a constitution process led by the people and not an appointed commission of experts. It was during this debate that Former President Moi sarcastically and rhetorically asked: "What does Wanjiku know about the Constitution?"[19] This marked the birth of the name "Wanjiku" in Kenyan political lingua as a generic reference to ordinary Kenyans.[20]

414. Earlier in 1994, the NCA had already coalesced into an assertive and popular constitutional reform movement under the auspices of the Citizens Coalition for Constitution Change (4Cs).[21] Thus, a "Wanjiku-driven" process was at the heart of constitutional reforms in Kenya since the mid-1990s. It was the search for legitimacy and need of a people-driven Constitution initiated more robustly by the Ufungamano Initiative that set the stage for a strong people-driven constitutional review process.

415. The appropriate starting point to demonstrate the participatory nature of the making of the Constitution of Kenya, 2010, is the Constitution of Kenya Review Act, 1997 (Cap 3A). By design the Act was set up to be an 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."[22]

416. The CKRC was to be constituted as follows: Chairperson, 13 persons nominated by the political parties to be represented in the Inter-Parties Parliamentary Committee of whom at least 2 shall be women, one person nominated by the Muslim Consultative Council and the Supreme Council of Kenya Muslims, one person nominated by the Kenya Episcopal Conference; one person nominated by the protestant churches on Kenya as represented by: the National Council of Churches of Kenya, the Seventh Day Adventist Church; the Church of God; the Kenyan Indigenous Christian Churches; the Evangelical Fellowship of Kenya, 5 nominated by women's political organizations through the Kenyan Women's Political Caucus of whom 1 shall be a woman with disabilities, 4 persons nominated by the civil society through the National Council of Non-Governmental Organizations, particular regard being had to the youth, the disabled, professional associations in Kenya, of whom at least 1 shall be a person with a disability and 1 a woman, the Attorney-General or his representative who shall be an *ex-officio* commissioner.[23] The Commission also included at least 2 representatives from the 8 provinces in Kenya.[24]

417. The Commission was required to be give preference to persons with relevant professional and technical qualifications, have regard to Kenya's ethnic, geographical, cultural, political, social and economic

diversity, and save for women organization take into account the principle of gender equity.[25]

418. The Commission was also required to conduct and facilitate civic education in order to stimulate public discussions and awareness, collect and collate views of the people of Kenya on proposals to alter the Constitution and on that basis draft a Bill to alter the Constitution presented to the National assembly, carry out or cause to be carried out research and evaluations concerning the Constitution, and to ensure that the people of Kenya gave 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.[26]

419. The Constitution of Kenya Review Act, 1997 also 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.[27] The Act also set up a National Constitutional Consultative Forum comprising of all members of Parliament as *ex-officio* members; all members of the Commission as *ex-officio*, 3 representatives from each district nominated from the district forum 1 of who must be a woman, 2 representatives from political parties, religious organizations, women's organization, and civil society, and other members to represent other interests to be determined by the Commission.[28]

420. It is clear that the design of the constitution making process under the Constitution of Kenya Review Act, 1997 conformed to a "home-grown" process by laying an institutional framework for consultation with ordinary Kenyans and by requiring extensive deliberation among drafters.[29] The Act as designed prevented both Parliamentary and Presidential interference and put a lot of emphasis on broad public participation at every stage of the process.[30]

421. However, despite this participatory design, the Act as implemented by the then-government sought to limit rather than facilitate widespread participation and consultation with community and grassroots community leaders, opposition parties and CSOs.[31] These groups were insistent on wider public participation than was provided in the legislation.[32] These groups, (especially those that had come together under the Ufungamano Initiative described above) wanted and insisted on even more grass-roots public participation in constitution-making. When the Ufungamano Initiative started the collection of views in Kenyan provinces, President Moi decided to kick-start the official constitutional review process by appointing Yash Pal Ghai as chairperson of CKRC.

422. As aforesaid, Prof. Ghai wisely delayed his official appointment to negotiate a merger of the Ufungamano Initiative's Peoples Constitution Review Commission (PCRC) led by Dr. Ooki Ombaka and the formal CKRC.[33] After Prof. Ghai's efforts of reconciliation backed by public pressure, he succeeded in bringing the two sides together in March 2001.[34]

423. The Constitution of Kenya Review Act was amended in May 2001 to accommodate Prof. Ghai's reconstituted commission that included PCRC members.[35] The amended Review Act had guiding principles that included accountability to the people, ensuring that the process accommodates the people's diversity, providing Kenyans with an opportunity to actively, freely and meaningfully participate in generating debates conducted in an open manner and guided by respect for the universal principles of human rights, gender equity and democracy.[36] Furthermore, section 17(d) of the Act required that the Commission ensures that the people give consideration and make recommendations on various issues, including on the compositions and functions of the organs of the State, government structure, constitutional commissions, electoral systems, local commissions, and the Judiciary, Local government, property and land rights,

management and use of public finances, citizenship and socio-cultural obstacles, among others.[37]

424. The CKRC was deeply invested in a participatory process. The Commission prepared civic education materials, including a book authored by Prof. Yash Ghai on an analysis of Kenya's constitutional history, the independence and the then-current constitution and options for reform.[38] Papers and documents originally prepared in English were also translated to Kiswahili and widely distributed to make meaningful civic education possible.[39] Widespread civic education was undertaken by CKRC commissioners, CKRC staff, and a large number of NGOs nationwide. This civic education processes were done at district and constituency forums, and documentation centers to promote education and debate.[40] The CKRC also undertook the following step by step process as required under the Review Act:

a) Civic education: preparing the people for participation;

b) Research, studies and seminars: defining the issues;

c) Public consultations: listening to the people;

d) Writing the report and preparing the draft bill;

e) Debating the Commissioners' Report and Recommendations.

425. 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.[43]

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)).*[44]

427. Despite many political and legal challenges including suits filed against its work, the draft of 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.[45] Despite this commendable progress, President Moi scuttled the constitutional review process before the 2002 general elections by dissolving Parliament.[46]

428. The new political administration that came to power in Kenya following the 2002 General Elections was a coalition of opposition parties which had ousted the ruling KANU regime via the ballot for the first time since independence.[47] The National Rainbow Coalition (NARC) promised a new constitution in 100 days.[48] However, the new President initially reneged on this promise. As a result, the National Constitutional Conference (NCC) to debate the CKRC Draft and Report did not begin until April 2003.[49] The conference met at the Bomas of Kenya theater facility (thus named the Bomas Conference). The Bomas Conference brought together delegates from all over the country. The National Constitutional Conference was an assembly of over 600 members composed as follows: all 223 members of Parliament; 210 representatives of districts elected by county councils; 29 members of the Review Commission as nonvoting members; 41 persons each representing a political party; 12 representatives of religious, professional, and women's groups; trade

unions; nongovernmental organizations; and other interests selected by the Review Commission.[50]

429. The Bomas Conference was often acrimonious in its proceedings but it still delivered a draft of the Constitution in 2004. Part of the division was financial with delegates demanding remuneration to be at the top of the agenda.[51] At Bomas, public participation of women and marginalized groups was also at the fore. The specific examples are ethnic groups such as the Somalis, Nubians, Ogieks and Goans that gave their views.[52] The Commission also provided sign language interpretation to accommodate the needs of persons with disability.[53]

430. The Bomas Draft was, however, never enacted by Parliament or presented to the public for a referendum.[54] Instead, the then President facilitated a process for revision of the Bomas Draft by the political elite. This resulted in amendments to the Bomas Draft enacted through a Parliamentary initiative resulting in the Wako Draft.[55]

431. Just as the Bomas Conference was concluding its work, the High Court of Kenya through a now famous decision in ***Timothy Njoya & Others v Attorney General & Others [2004] eKLR*** held that any new Constitution needed to be ratified through a national referendum. The High Court held that the right to a referendum was a fundamental right of the people in exercise of their constituent power. Ringera J. (as he then was) observed that the right to a referendum essentially derives from the peoples sovereignty and is the basis for the creation of the Constitution.

432. In response to the decision in the ***Timothy Njoya Case***, Parliament amended the Constitutional Review Act to add a provision for a referendum subsequent to Parliamentary ratification of the draft.[56] However, rather than subject the Bomas Draft as it had emerged for the referendum, the Kibaki government tinkered with the Bomas Draft especially on executive power through a series of

retreats that the opposition led by Raila Odinga boycotted.[57] This process led to the emergence of the Wako Draft named after the then Attorney General Amos Wako.[58]

433. The Wako Draft changed the executive structure by weakening the premiership vis-à-vis the presidency, provided for a limited system of devolved government, and added an unspecified number of seats based on a party-list to the National Assembly.[59] These amendments were done by Members of Parliament in Kilifi and in Naivasha.[60] This is the draft that was submitted to a referendum in 2005. It was defeated by a 58 percent vote against with only 42 percent of those voting approving it.[61]

434. Opposition to the Wako Draft gave birth to a new alliance called the Orange Democratic Movement (ODM) that went on to challenge Mwai Kibaki in the 2007 general elections.[62] These general elections turned to be the most contentious that Kenya has ever had and a dispute on the winner of the Presidential contest led to post-election violence on a scale never seen in Kenya before.[63] The violence led to the death of more than 1,100 people and the internal displacement of more than, 600,000 people. It shook the country to the core.[64].

435. The crisis of the 2007 election led the African Union (AU) to lead international support for the resolution of the post-election crisis. The main opposition party Orange Democratic Movement (ODM) had claimed that the President Mwai Kibaki led Party of National Unity (PNU) had rigged the election.[65] The AU constituted a Panel of Eminent African Personalities headed by the former U.N Secretary General Kofi Annan to mediate the dispute between PNU and ODM.[66] The crisis was resolved by a peace agreement entered on February 1, 2008 between the government/Party of National Unity (PNU) and the Orange Democratic Movement (ODM) under the mediation of the Kenya National Dialogue and Reconciliation (KNDR).[67]

436. The KNDR was an outfit bringing together representatives from the two sides of the dispute in order to mediate the conflict.[68] The parties signed an agreement to end the political violence that ensued after the 2007/8 elections.[69] Through the mediation by the African Union's (AU) Panel of Eminent African Personalities the parties agreed to form a coalition government and thereafter undertake far-reaching reforms to secure sustainable peace, stability, and justice through the rule of law and respect for human rights.[70] On March 4, 2008, the parties agreed to form two commissions – the Independent Review Committee (IREC) also known as the Kriegler Commission and the Commission of Inquiry on Post-Election Violence (CIPEV) also known as the Waki Commission.[71]

437. The two would be non-judicial investigatory bodies mandated to investigate and report on different aspects of the problematic issues in the crisis. The Commission of Inquiry into the Post-Election Violence (CIPEV) began its work on 23 May 2007 with an announcement published in the Kenya Gazette Notice No.4473 vol. cx-no.4. The Independent Review Committee (IREC) had eight (8) members. The CIPEV commissioners and key secretariat members was consensually identified and formally appointed by former President Kibaki under the Commissions of Inquiry Act (Cap. 102) and IREC's terms of reference (ToRs) were published in Gazette Notice 1983, Kenya Gazette of 14 March 2008.

438. The KNDR agreement was embedded in the National Accord and Reconciliation Act, 2008. The preamble to the Act acknowledged that the crisis that had hit the country and the need for both sides of the political divide to work together. It acknowledged that there needed to be real power sharing in order to move the country forward.[72] The Act formed a coalition government establishing the office of the Prime Minister to be held by Raila Odinga and that of the President to be held by Mwai Kibaki. The mediation process presented the parties with a framework comprised of four main components:

a) *Agenda One*: Immediate action to stop violence and restore fundamental human rights;

b) *Agenda Two*: Addressing the humanitarian crisis and promoting national reconciliation;

c) *Agenda Three*: Negotiations on how to overcome the current political crisis; and

d) *Agenda Four*: Developing long-term strategies for durable peace.

439. Lack of constitutional reform was identified under Agenda Four at the Kenya National Dialogue and Reconciliation Team (KNDR) meeting in February 2008 as one of the long term issues that caused conflict in Kenya. The principal signatories to the National Accord, President Mwai Kibaki and the Prime Minister Raila Odinga committed themselves to instituting legal and political measures of reform to effectively address all the Agenda Four concerns. Both CIPEV and IREC also recommended constitutional reforms as crucial to ensuring durable peace as part of Agenda Four. Both specifically required undertaking constitutional, legal and institutional reform; tackling poverty and inequality; combating regional development imbalance; tackling unemployment among the youth; consolidating national cohesion and unity; undertaking land reform; and addressing transparency, accountability, and impunity.

440. This catapulted constitutional reform back to the forefront and led to the enactment of the Constitution of Kenya Review Act, 2008. The Act was intended to facilitate the completion of the review of the Constitution of Kenya.[73] The object and purpose of the Act included to: *provide a legal framework for the review of the Constitution of Kenya, provide for the establishment of the organs charged with the responsibility of facilitating the review process, establish mechanisms for conducting consultations with stakeholders, provide a mechanism for consensus-building on contentious issue in the review process, and*

preserve the materials, reports and research gathered under the expired Act.[74]

441. One of the objects and purposes of the revamped constitutional review process was to promote peoples' 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.[75]

442. Importantly, the Constitutional Review Act, 2008 set up 4 organs for the Constitutional Review:

a) The Committee of Experts (CoE);

b) The Parliamentary Select Committee (PSC);

c) The National Assembly;

d) The referendum.[76]

443. The CoE was to comprise 9 persons nominated by the National Assembly and appointed by the President of whom three were to be non-citizens of Kenya nominated by the National Assembly from a lists of five names submitted to the Parliamentary Select Committee by the Panel of Eminent African Personalities, in consultation with the NDRC; six citizens of Kenya nominated by the National Assembly in accordance with a prescribed Schedule to the Act; the Attorney-General and the Director as *ex-officio* members.[77]

444. The CoE was appointed on 23 February, 2009 and constituted Mr. Nzamba Kitonga, as Chairperson, Ms. Atsango Chesoni as Vice Chairperson, Mr. Otiende Amollo, Mr. Bobby Munga Mkangi, Mr Abdirashid Abdullahi, Hon. Njoki Ndung'u; Prof Christina Murray from South Africa, Dr. Chaloka Beyani from Zambia; Prof F. E. Sspembwa from Uganda, Dr. Ekuru Aukot as director, and the

former Attorney-General Amos Wako.[78] The CoE worked by building on the work of the CKRC.[79] The Review Act required the CoE to study all existing Draft Constitutions and such other materials as it may consider appropriate and prepare a report that would identify: the issues that were not contentious and were agreed upon; and the issues that were contentious and not agreed upon.[80]

445. The CoE considered the following documents to identify the contentious issues: The CKRC Draft, the Bomas Draft; the Proposed new Constitution (Wako Draft); the Kilifi Report; the Naivasha Accord; the Kiplagat Report; the Referendum Debates; the Kriegler Report; and the Waki Report.[81]

446. The CoE, 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.[82] Of these, 5,212 were received from organized groups (2073 from CSOs and 107 from women's groups), 88 from political parties, 50 from the private sector, 2969 from religious organizations, and 32 from statutory bodies.[83] The CoE also conducted regional hearings where a further 1,917 presentations were made.[84] The CoE attended hearings in all the 8 provinces of Kenya and had many consultations with various stakeholders directly on specific issues.[85]

447. 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.[86] According to the KHRC, the CoE was limited by time, bureaucratic hurdles, and difficulty in accessing financial resources. The CoE was thus not able to produce enough drafts of the Proposed Constitution of Kenya in Kiswahili, 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.[87] This criticism is an indication of how seriously

Kenyans took the requirement that the Constitution-making process be participatory.

448. The CoE successfully completed the following 12 part-stage process as required under the Review Act, 2008 towards the promulgation of the 2010 Kenya Constitution:

a) It identified the agreed and contentious issues, harmonised those that are agreed, proposed resolutions to the contentious issues and published a harmonized draft constitution (Review Act section 30).

b) After publishing the harmonized draft constitution and a preliminary report, the public was given 30 days within which to give their views (Review Act section 32(a)).

c) The CoE then had 21 days to incorporate the views of the public (Review Act section 32 (c)). It then presented the revised draft to the PSC for deliberation and consensus building on contentious issues (Review Act section 33(1)(c)).

d) The PSC then had 21 days to reach agreement and then return the Constitution with recommendations to the CoE (Review Act section 33(1)).

e) The CoE then revised the draft constitution taking account of the consensus achieved by the PSC and then submit the revised draft and its final report to the PSC within 21 days (Review Act section 33(2)).

f) The PSC then submitted the draft to the National Assembly within 7 days for approval (Review Act section 33(3)).

g) The National Assembly then approved the draft and proposed amendments within 30 days of its tabling to the PSC (Review Act section 33(4)).

h) The Attorney-General then published the Draft Constitution within 30 days of receipt from the National Assembly and was prohibited from effecting any alterations to the draft except for editorial purposes and in consultation with the PSC (Review Act section 34).

i) Within 7 days of the publication of the draft Constitution the Independent Electoral Commission (IIEBC)[88] published the question to be determined by the referendum. The question was framed in consultation with the PSC (Review Act section 37(1)).

j) The IIEC was to organize, conduct and supervise the referendum to be held 90 days after the publication of the Constitution by the Attorney-General. During this 90-day period the CoE was to conduct civic education for a period of 30 days (Review Act, section 35).

k) The IIEC was to publish the results of the referendum within two days of the referendum (Review Act, section 43).

449. If the final result of the referendum was that the people of Kenya ratified the draft constitution, the President was to proclaim the new Constitution to be law not later than 14 days after the publication of the final result of the referendum (section 43A). Failing this, the ratified Constitution would come into effect on the 15th day after the announcement of the result.[89]

450. The referendum to vote in the Revised Harmonized Draft from the CoE and the PSC 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. This was an overwhelming acceptance by Kenyans of the Constitution of Kenya, 2010.

451. What does this history of constitution making in Kenya tell us about the Basic Structure Doctrine and the limits of the powers of constitutional amendment?

452. In the present case, the Petitioners' argument is simple enough: they argue that the Constitution of Kenya, 2010 contains essential features and fundamental characters and foundational values that enjoy transcendental existence, whose derogation is not contemplated in the Constitution by way of constitutional amendments. These, features, they argue, form the Basic Structure of the Constitution and includes the following chapters of the Constitution: 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.

453. The Petitioners argue that while other parts of the Constitution can be subjected to improvements and modifications to meet the needs of all generations, the Basic Structure they have identified cannot be amended. The Basic Structure forms, they argue, eternity clauses or unamendable provisions of the Constitution. We can identify the Basic Structure, the Petitioners argue, by looking at the text, spirit, structure and history of the Constitution.

454. The Petitioners further argue that the Basic Structure can only be altered through the formation of a new Constitution by the people in the exercise of their Constituent Powers; not even a referendum subsequent to Parliamentary action can be used to change the Basic Structure of the Constitution. In their own words which they describe as the core of their Petition, the Petitioners say that:

> *The doctrine [of Basic Structure] holds the argument that after the initial and the first ever promulgation of a constitution especially in emerging democracies, the basic features of that Constitutional order under which the people are governed and to which the people owe allegiance to are*

> *to endure for all time. The Constitution is born mature. The Constitution has no infancy and therefore cannot be fed with amendments founded on the changing political and socio-economic interest.*

455. Arguing that the doctrine of Basic Structure derives directly from the concept of the People's sovereignty and how it is exercised in Constitution-making, the Petitioners argue for the inherent limits in the amending powers in the following words:

> *Certain fundamental provisions enacted and passed by consensus during a constitution making process are therefore non-amendable through the constitutional amending procedures and powers established by the parent Constitution. These "basic structures" of the constitution are given a transcendental position under the Constitution and are kept beyond the reach of the political processes spearheaded either by the people or Parliament.*

456. With respect to the application of the Doctrine of Basic Structure to Kenya, the Petitioners draw their arguments from the structure of the Constitution; the history of its making; and from comparative constitutional jurisprudence and international law. They have also cited cases from India, Germany, Denmark, Hungary as well as other jurisdictions.

457. Turning to our local jurisprudence, the Petitioners argue that the proposition that only the people conferencing as a Primary Constituent Assembly can alter the Basic Structure of the Constitution can be directly gleaned from the holding in the ***Timothy Njoya Case*** (supra). They also point out that our past cases have identified a certain core of the Constitution which the cases have described as "Basic Structure". In this regard, the Petitioners point to ***Commission for the Implementation of the Constitution v National Assembly of Kenya & 2 others [2013] eKLR***.

458. In that case, the Petitioners challenged the constitutionality of Kenya Gazette Supplement No. 100 (National Assembly Bills No. 15) by which the National Assembly published The Constitutional (Amendment) Bill 2013, which had sought to amend Article 260 of the Constitution in respect Of the definition of "State Office" and its 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.

459. In rejecting the suggested amendment, The Learned Lenaola J. (as he then was) held that:

> *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 "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.*

460. Lastly, the Petitioners argue that the Basic Structure Doctrine imputes logical limits to the power of amendment: The Basic Structure Doctrine exists to protect the essential characteristics of the Constitution; in the same vein, the power to amend the Basic Structure is limited because to so amend would be to destroy the essential character of the Constitution. The Petitioners draw their primary authority for this argument from the comparative Indian case: ***Kesavananda Bharati v State of Kerala & Another (1973) 4 SCC 225.*** In that case, the judgment by KS Hedge and AK Mukherjee JJ 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*

461. The Respondents generally agree that the Constitution has a core which the Attorney General agrees can be described as the Basic Structure. They say that the Constitution has explicitly delineated that Basic Structure in Article 255 of the Constitution by signaling the provisions of the Constitution which cannot be amended without subjecting the proposed amendments to a referendum. The provisions listed in Article 255 of the Constitution as requiring a referendum before they can be amended are, the Attorney General argues, the provisions which form the Basic Structure of the Constitution.

462. All the Respondents further argue that it would be a subversion of the people's sovereignty to declare that the people, acting in a referendum, or where allowed, through their representatives in Parliament, cannot amend any provisions of the Constitution. The power to amend, the Respondents insist, is part of the people's sovereignty and is clearly spelt out in Articles 255-257 of the Constitution. Those powers are unlimited except as regards procedures. If the correct procedures are followed, the People can directly, or through their representatives in Parliament where allowed by Article 255, amend all and any provisions of the Constitution.

463. The Respondents argue that the Basic Structure Doctrine articulated in the ***Kessavanda Case*** is not applicable in Kenya because of our different circumstances. They argue that, unlike in India, the amendment authority in the Constitution does not rest with Parliament alone since the people of Kenya have the final say through a referendum.

464. They point out that even in India, the Basic Structure Doctrine is of dubious constitutional standing given the narrow majority that passed it. They say that subsequent commentators have persuasively argued that the *ratio decidendi* of the case misunderstood the relationship between Parliamentary sovereignty and judicial review in the Indian Constitution.

465. Further, the Respondents argue that the Basic Structure Doctrine has not been universally accepted. They cite the following comparative cases from around the world which, they say, explicitly rejected the Basic Structure Doctrine:

a) ***Teo Soh Lung v Minister of Home Affairs [1959 SLR (R) 461*** (where the Singapore High Court stated that the *Kessavananda Doctrine* is not applicable to the Singaporean Constitution.)

b) ***Ravi s/o Madasamy v Attorney General (Singapore High Court O.S. No. 548 of 2017***)(expressing doubts about the applicability of the Basic Structure Doctrine in Singapore given the broader power of amendment under the Singapore Constitution.)

c) ***Paul K. Ssemogerere & Others v Attorney General (Uganda Supreme Court Constitutional Appeal No. 1 of 2002***)(stating that the framers of the Constitution did not put any limitations on the amending power because changes in the Constitution serve the ends of the Constitution and carry out its purposes.)

d) ***Male Mabirizi & Others v Attorney General (Constitutional Petition No. 49 of 2017***)(stating that the Basic Structure Doctrine is still at a nascent stage of its development and has not gained universal acceptance; and that even in India it is considered contentious owing to the circumstances in which it was made.)

e) ***Law Association of Zambia and Another vs Attorney General of the Republic of Zambia 2019/CCZ/0013*** (where the Court stated that Courts in Zambia have historically declined to make pronouncements on allegations that proposed constitutional amendments touch on the Basic Structure of the Constitution.

f) ***Loh Kooi Choon vs Government of Malaysia (1977)2MLJ 187*** (where the Court rejected the doctrine of implied restrictions on the power of constitutional amendments.)

g) ***Honourable Attorney General of Tanzania vs Reverend Christopher Mitikila, Civil Appeal No. 45 of 2009*** (where the Tanzanian Court of Appeal rejected the Basic Structure Doctrine as nebulous and expressly stated that it does not apply to Tanzania.)

466. The Respondents also deny that the Constitution of Kenya contains any "eternity clauses" which cannot be subjected to amendments. They argue that an "eternity clause" is an actual constitutional provision made in the text of the Constitution declaring some provisions to be unalterable and irrevocable. Giving examples from Germany, Turkey, Angola, France, Brazil, and Togo, the Respondents argue that the concept does not apply to Kenya because there is no such explicit text in our Constitution.

467. Similarly, the Respondents reject the notion that any of the provisions of the Constitution of Kenya, 2010 are unamendable

whether explicitly or implicitly. There is no explicit bar to amendability, they argue, and, further that the concept of implicit unamendability was rejected by the Court in the ***Timothy Njoya Case (Supra***). Further, the Respondents argue that the concept of unamendability negates the letter and spirit of the Constitution of Kenya. This is because, they argue, Chapter 16 of the Constitution contains clear rules for the exercise of the Secondary Constituent Power of amendment of the Constitution through a referendum as well as the exercise of the Constituted Power of amendment by Parliament. In this process, the Respondents argue, the Judiciary "cannot invent any roles or any other mechanisms for its involvement outside the provisions of Article 255(2)." The Respondents robustly argue that deploying the concept of the "spirit of the Constitution" to read implicit substantive limits on the power of the people either acting as Secondary Constituent Power (through a referendum) or Constituted Power (through Parliament) to amend the Constitution is a "pervasion" into a "legal theocracy" in which the Judiciary fashions itself into the "conscience of the people" which "exposes the nation to [the] perilous interpretation of every Judge of what legal theology is to be established and followed."

468. We have anxiously considered the rival submissions by all the parties on this transcendental and framing issue. We have also read the copious material the parties have placed before us and have keenly considered all of them. As outlined above, we have also carefully considered the history, text, and structure of the Constitution of Kenya, 2010; the emergent principles of interpretation of the Constitution enumerated above as well as the prevailing circumstances and context. As outlined above, we are required by the Constitution and by binding precedents to consider all these factors in interpreting the Constitution of Kenya, 2010.

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. At every step of the way, Kenyans were clear that they wanted a Constitution in which the ordinary *mwananchi*, Wanjiku, took centre-stage in debating and designing. So clear were Kenyans 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 for four distinct processes:

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.

470. Ringera J. (as he then was) in the ***Timothy Njoya Case*** had specifically theorized about these steps in the exercise of the

Constituent Power (which he described as both primordial and one with juridical status). Ringera J. 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.

471. Indeed, so clear were Kenyans about these detailed, 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.

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). Paraphrased, there are substantive limits on the constitutional

power to amend the Constitution by the Secondary Constituent Power and the Constituted Power.

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. The structure and history of this Constitution makes it plain that it was the desire of Kenyans to barricade it against destruction by political and other elites. As has been said before, the Kenyan Constitution was one in which Kenyans bequeathed themselves in spite of, and, at times, against the Political and other elites. Kenyans, therefore, were keen to ensure that their bequest to themselves would not be abrogated through either incompatible interpretation, technical subterfuge, or by the power of amendment unleashed by stealth.

474. The upshot is that we make the following findings:

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:

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.

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.

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.

f) 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.

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 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.

h) However, three examples would suffice to demonstrate the distinctions between un-amendable and amendable constitutional provisions.

i. The first example is from Article 2 of the Constitution. Article 2(1) of the Constitution provides as follows: *This Constitution is the supreme law of the Republic and binds all persons and all State organs at both levels of government.*

This formulation expresses a core and fundamental principle of the Constitution; a constitutive genetic code of the Constitution. It can be properly seen as expressing an unamendable clause or an eternity clause. A constitutional amendment designed to utilize either the Secondary Constituent Power or the Constituted Power cannot alter this clause. The only mechanism that can properly change this clause is the Primary Constituent Power.

ii. The second example, for symmetrical reasons, is also drawn from Article 2 of the Constitution. Article 2(5) reads as follows: *The general rules of international law shall form part of the law of Kenya.*

This clause is also part of the "Supremacy of the Constitution" and forms the Basic Structure of the Constitution. The "spirit" or "core" meaning or value of that clause cannot, therefore, be changed without involving the Primary Constituent Power. However, its precise formulation in the Constitution is not un-amendable. It may be amended, for example, to clarify what is meant by the term "general rules of international law." For example, an acceptable clarificatory constitutional amendment might seek to

replace the term "general rules of international law" with the term "customary international law" which is a more familiar term in the discipline of Public International Law. Such an amendment can be achieved through the Secondary Constituent Power under Article 255 of the Constitution.

iii. A third example may suffice to make the concept clear. Article 89(1) of the Constitution provides as follows: *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).*

While the foundational structure of Chapter Seven of the Constitution (where Article 89(1) is located) is part of the Basic Structure of the Constitution and its core meaning and import cannot be changed without utilizing the Primary Constituent Power, the exact number of constituencies stipulated in Article 89(1) can be increased or reduced either through Secondary Constituent Power or Constituted Power. Therefore, Article 89(1) is not "un-amendable" though the core import and spirit of Chapter Seven of the Constitution is considered "un-amendable" as part of the Basic Structure.

In the same vein, while Article 89(1) is amendable utilizing the Secondary Constituent Power or Constituted Power, Articles 89(4); 89(5); 89(6); 89(7); 89(10); and 89(12) of the Constitution are "un-amendable" as discussed later in this judgment. This is because, a correct reading of the text, history, functions, and constitutional structure yields the

unmistakable conclusion that Kenyans intended to inoculate the specific principles and process of delimitation of electoral units from revision without triggering the Primary Constituent Power.

II. THE CONSTITUTIONAL REMIT OF POPULAR INITIATIVE

475. It is important to set out at the outset the constitutional provisions dealing with amendments of the Constitution. The power to amend the Constitution is prescribed in Articles 255 to 257 of Chapter 16 of the Constitution as follows:

> *255. (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 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 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.

256. (1) 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;

(c) shall not be called for second reading in either House within ninety days after the first reading of the Bill in that 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.Const2010 Constitution of Kenya, 2010 110

(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.

(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 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.

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 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).*

476. In order to properly understand these Articles, it is important to retrace the genesis of the said provisions in order to place them in historical context. We are enjoined, as was held by the Supreme Court in ***The Matter of the Principle of Gender Representation in the National Assembly and The Senate Advisory Opinion Application No. 2 of 2012,*** and as set out in Part 4(I) of this Judgment, to take into account the agonized history attending Kenya's constitutional reform, a view reiterated by the same Court in ***The Matter of the Kenya National Human Rights Commission, Advisory Opinion No. 1 of 2012; [2014] eKLR***, at paragraph 26 in the following terms:

> *…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 unbridled extrapolation of discrete constitutional provisions into each other, so as to arrive at a desired result.*

477. In the CKRC Final Report, it was acknowledged that apart from Parliament, there was a need for the people 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". Accordingly, it was recommended that Parliament enacts a 'Referendum Act' to govern the conduct of referenda in the country. However, in The Ghai Draft, no provision was made for amendment by popular initiative and only the provision for amendment by Parliament was made. Due to some contradictions and duplications noted in the Ghai Draft, the same was revised and the Zero Draft was generated. This was similarly revised to give way to Revised Zero Draft to remove duplications and inconsistencies, standardize language, present material in a logical order and supply necessary provisions to bridge gaps while at the same time maintaining the principles on which the 'Zero Draft' was based. The issue of amendment of the Constitution appeared as Article 346 in Chapter 19 of this draft titled 'Amendment by the People' and of importance was clause (1) which stated that:

> *An amendment to this Constitution may be proposed by a popular initiative signed by at least one million citizens registered to vote.*

478. The said clause was retained almost verbatim in the subsequent Bomas Draft. Article 304 of the Bomas Draft was also entitled "Amendment by the People". However, in the subsequent revision in the Wako Draft, though the provision on Popular Initiative was maintained, this time, under Article 283 entitled 'Amendment through referendum', clause 1 thereof was reworded 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***.**

479. As narrated above, the Wako Draft Constitution was rejected at the referendum in 2005 after which the process resumed in 2008 following the adoption of the Constitution of Kenya Review Act in December 2008. That Act incorporated the views of the Court in ***Timothy Njoya Case (Supra)*** that *"the sovereign right to replace the*

Constitution with a new Constitution vested collectively in the people of Kenya and shall be exercisable by the people of Kenya through a referendum".

480. As discussed above, in this fresh impetus, it was agreed to harmonise all the previous drafts with only issues identified as contentious being reopened for discussion. After the establishment of The Committee of Experts (CoE) in February 2009, the CoE prepared the 'Revised Harmonized Draft' which was handed to the Parliamentary Select Committee on Constitutional Review. In this Draft, the Clause featured under Article 238 titled 'Amendment by Popular Initiative' and the relevant clause was worded as follows:

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

481. What comes out from this historical discourse is that the Popular Initiative Clause fell among the non-contentious issues as it features substantively unaltered in all the drafts of the Constitution. We also note that the drafters of this Clause intended that it be invoked by the citizen registered voters and civil society groups as opposed to government institutions and officers. Whereas the civil society groups did not find their way into the final documents, the originators were retained as the registered voters thereby maintaining the original intention that the power to initiate constitutional amendment by way of popular initiative was exercisable only by the voters.

482. The Clause as it appears in our Constitution bears resemblance to various clauses in Constitutions of other countries on the issue. This includes countries such as Switzerland; Moldova; Venezuela; and Liechtenstein.

483. According to ***Wikipedia***:

In political science, an initiative (also known as a popular or citizens' initiative) is a means by which a petition signed by a certain minimum number of registered voters can force a government to choose to either enact a law or hold a public vote in Parliament in what is called indirect initiative, or under direct initiative, the proposition is immediately put to a plebiscite or referendum, in what is called a Popular initiated Referendum or citizen-initiated referendum. In an indirect initiative, a measure is first referred to the legislature, and then put to a popular vote only if not enacted by the legislature. If the initiative (citizen-proposed law) is rejected by the Parliament, the government may be forced to see the proposition put to a referendum. The initiative may then take the form of a direct initiative or an indirect initiative. In a direct initiative, a measure is put directly to a referendum. The vote may be on a proposed federal level, statute, constitutional amendment, charter amendment or local ordinance, or to simply oblige the executive or legislature to consider the subject by submitting it to the order of the day. It is a form of direct democracy.

484. Going by that definition and comparative jurisprudence, amendment of the Constitution through Popular Initiative cannot be undertaken by the Government when it is the same entity that is being compelled to undertake the amendment and in default the amendment to be subjected to a referendum.

485. It is therefore clear from our constitutional scheme that there are two ways in which a constitutional amendment can be initiated, either by Parliamentary Initiative or by Popular Initiative. The said provisions are in synch with the provisions of Article 1(2) of the Constitution which provides that:

The people may exercise their sovereign power either directly or through their democratically elected representatives.

486. Since under Article 2(2) of the Constitution, no person may claim or exercise State authority except as authorised under this Constitution, it necessarily follows that, subject to what we have stated elsewhere in this judgement as regards the role of the Primary Constituent Assembly, there is no other constitutionally permissible avenue available to any person to initiate a constitutional amendment save by the prescribed ones, Parliamentary and Popular Initiatives. We shall come back to this issue in due course.

487. We now proceed to deal with the question whether the Constitution Amendment Bill falls within the initiatives contemplated in Chapter 16.

488. It is not in doubt that *vide* Gazette Notice Number. 5154 the President set up ***"The Taskforce on Building Bridges to Unity Advisory"***. As outlined above, the mandate of the Taskforce was to outline the policy, administrative reform proposals, and implementation modalities for each identified challenge area; and conduct consultations with citizens, the faith-based Sector, cultural leaders, the private sector and experts at both the county and national levels. Whereas one may well argue that in setting up the Taskforce the President was undertaking his constitutional mandate under Article 131(2)(c) of the Constitution which enjoins him to promote and enhance the unity of the nation, his subsequent action is, however, the subject of controversy.

489. Pursuant to the Report of the Taskforce, *vide* Gazette Notice Special Issue Number 264 dated 10th January, 2020, *"The Steering Committee on the Implementation of the Building Bridges to a United Kenya Taskforce Report"* was established comprising of the same members of the Taskforce. The Committee's role was expressed to be to conduct validation of the Taskforce Report through Consultation

with citizens, civil society, the faith based organizations, cultural leaders, the private sector and expert and to propose administrative policy of constitutional changes that may be necessary for the implementation of the recommendation contained in the Taskforce Report, taking into account any relevant contribution made during the validation period. The Steering Committee submitted the Report to the President on the 21st of October, 2020 consisting of a raft of proposals on constitutional and legislative amendments as well as Draft Constitution Amendment Bill, Draft Legislative Bills, Administrative measures and other recommendations. With that Report the seed for constitutional amendment process was sowed.

490. From the foregoing, it is clear that the Constitution Amendment Bill is an initiative of the President. It cannot be otherwise since the Taskforce was set up Courtesy of his initiative and the subsequent Steering Committee was tasked with implementing the Taskforce Report and the membership of the two entities remained the same. Under Article 131(1)(b), the President exercises the executive authority of the Republic, with the assistance of the Deputy President and Cabinet Secretaries. 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.

491. As we concluded above, both a textual analysis of our Constitution and a historical exegesis of the clause on Popular Initiative makes it clear that the power to amend the Constitution using the Popular Initiative route is reserved for the private citizen. Neither the President nor any State Organ is permitted under our Constitution to initiate constitutional amendment using Popular Initiative.

492. Beyond the text of the Constitution, there is another reason it is impermissible under our Constitution: in our view to permit the President to initiate such amendments through a Popular Initiative and then sprint to the 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. This is because Article 257(5) of the Constitution provides that if a Bill to amend this 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. In other words, Article 257(5) of the Constitution, arguably, gives the power to the President to determine whether or not a referendum is to be held. In circumstances where 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.

493. Next is the question whether the Constitution Amendment Bill is a State sponsored initiative and whether it qualifies as a popular initiative as envisaged under Article 257 of the Constitution. 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."

494. It has been argued that the President was acting in his personal capacity and not as the Chief Executive of the Republic of Kenya. This argument is, however, betrayed by the very fact that the BBI Steering Committee was established via a Gazette Notice, an official publication of the government of the Republic of Kenya and its report was addressed to *"His Excellency the President of the Republic of Kenya and Commander-in-Chief of the Defence Forces, Hon. Uhuru Kenyatta, C.G.H."*

495. More importantly is the question whether the President can, under the guise of being a private citizen, exercise the powers of amendment reserved under Article 257 of the Constitution. A textual reading of Article 1(2) of the Constitution which we have referred to above reveals that the powers thereunder are exercisable *either directly or through their democratically elected representatives.* The employment of the phrase "either directly or" is a clear manifestation that the drafters of the Constitution intended that there be a distinction between direct and representative exercise of sovereign power. This Court, in interpreting the Constitution, must do so holistically as we have explained above. As was held in ***Tinyefuza vs. Attorney General Const. Petition No. 1 of 1996 (1997 UGCC3)***:

> *The entire Constitution has to be read as an integrated whole, and no one particular provision destroying the other but each sustaining the other. This is the rule of harmony, rule of completeness and exhaustiveness and rule of paramountcy of the written Constitution."*

496. In our view, in interpreting the Constitution holistically as we are enjoined to do, Article 1(2) must be read together with Articles 256 and 257 of the Constitution. When one considers these provisions together 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. Our view is in tandem with the historical genesis of the provision we have set out hereinabove. In other words, the Article 257 route is meant to be invoked by those who have no access to Article 256 route. Those who have access to Article 256 route are, therefore, barred from purporting to invoke the Article 257 route. There is no doubt that the President, if he intends to initiate a constitutional amendment, may do so through the aegis of Parliament. It follows that since the Steering Committee on the Implementation of the Building Bridges to a United Kenya Taskforce Report was a brainchild of the President, it has no *locus standi* in promoting constitutional changes pursuant to Article 257 of the Constitution.

497. 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.

498. The Respondents and some Interested Parties have taken refuge in the fact that there were previous initiatives sponsored by the State in 2005 and 2010 to amend the Constitution as a basis for justifying the role of State organs in popular initiative. It is important to note that the previous initiatives were undertaken under the retired Constitution. At that time there was no provision for two initiatives as

provided under the current Constitution. 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.

499. Therefore, it is our finding that 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 can utilize Article 257 of the Constitution to amend the Constitution.

III. THE LEGALITY OF THE BBI PROCESS

500. In this part of the Judgment, we turn to the various questions raised challenging the legality of the entire BBI Process – from the establishment of the Steering Committee to the implementation of its findings and Report through the Constitution of Kenya Amendment Bill and associated proposed legislations.

501. After considering the Consolidated Petitions, the responses thereto and both oral and written submissions in support of and in opposition to the Consolidated Petitions on the specific issue of the legality of BBI Process, we have come to the conclusion that there is not much of a dispute on what, no doubt, are the facts material to the determination of the questions presented. To begin with, it is not in dispute Mr. Joseph K. Kinyua who is the Head of the Public Service informed the public that H.E. Hon. Uhuru Kenyatta, the President of the Republic of Kenya had established a Taskforce known as the *Building Bridges to Unity Advisory Taskforce* comprising of 14 members and 2 joint secretaries. It is, also, not in dispute that this information was relayed to the public through a government publication, Gazette Notice No. 5154 of 24 May, 2018, and which was published in the Kenya Gazette dated 31 May, 2018, Vol. CXX – No. 64. The Terms of Reference of this Taskforce are also not in dispute

and have been reproduced above. It is worth repeating them owing to their centrality in the issue under consideration. They appear as follows in the gazette notice aforesaid:

> a. *evaluate the national challenges outlined in the Joint Communique of 'Building Bridges to a New Kenyan Nation, and having done so, make practical recommendations and reform proposals that build lasting unity; [Petitioner's emphasis throughout, unless otherwise stated*
>
> 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.*

502. It is also not in dispute that in a special issue of the Kenya Gazette of 3 May, 2019, Vol. CXXI – No. 55, the President published the 6th Annual Report, 2018 in which he remarked, *inter alia:*

> *... Chapter three presents the measures undertaken by public institutions in the realisation of national values and principles of governance. To enhance national unity, H.E. the President and the former Prime Minister signed a Memorandum of Understanding (MoU) symbolized by the 'Hand Shake' to put the country on the path to national unity, reconciliation and enhance nationhood. To implement the MoU, the Presidency established and operationalized a taskforce on Building Bridges Initiative (BBI) aimed at addressing the 9 key challenges identified in the MoU namely, ethnic antagonism and competition, lack of national ethos, inclusivity, devolution, divisive elections, safety and*

security, corruption, shared prosperity, and responsibility and rights …

… 63. To promote reconciliation and harmonious relations, H.E. President Uhuru Kenyatta and H.E. Raila Odinga signed a Joint Communique titled 'Building Bridges to a New Kenyan Nation' to affirm their commitment to work together to find lasting solutions to ethnic antagonism and divisive politics. Further H.E. the President and H.E. Raila Odinga established the 14-member Building Bridges Initiative (BBI) Taskforce whose terms of reference include evaluating national challenges outlined in the joint communique and making practical recommendations and reform proposals to enhance national unity.

… 932. To enhance national unity, the rule of law, democracy and participation of the people and sustainable development, the Government commits to continue supporting the BBI and to fully implement its recommendations. Public institutions shall align their policies, legislation, programmes and activities with the recommendations of the BBI and other initiatives aimed at promoting national unity and nationhood.

503. Again, it is not in dispute that in yet another Kenya Gazette published as a special issue on 10 January, 2020, Vol. CXXII – No. 7, in Gazette Notice No. 264 dated 3 January,2020, the Head of the Public Service notified the public that the President had appointed the Steering Committee comprising of 14 members and 2 joint secretaries whose terms of reference have been reproduced above. The terms of reference included the following:

a) *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

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.*

504. We have had to reproduce these gazette notices because they, by and large, triggered the events that culminated in what turned out to be a deliberate process to amend the Constitution and which has in turn yielded the Constitution Amendment Bill.

505. The overarching question that emerges out of these undisputed facts is whether the process adopted in the attempt to amend the Constitution is consistent with the means prescribed by the Constitution to amend it whenever such an amendment is necessary.

506. But before interrogating this primary question, three issues have been raised by the Honourable Attorney General which must necessarily be disposed of as preliminary points of law. These issues are:

i. *First*, whether the questions presented regarding the legality of the BBI Process are *sub judice*;

ii. *Second*, whether those same questions presented are *res judicata*; and,

iii. *Finally*, whether Mr. Uhuru Muigai Kenyatta can be sued in his personal capacity during his tenure as the President of the Republic of Kenya.

507. The first two issues are related and perhaps for this reason, are respectively covered under sections 6 and 7 of the Civil Procedure Act. Section 6 of this Act states as follows:

6. Stay of suit

No Court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other Court having jurisdiction in Kenya to grant the relief claimed.

508. The rationale behind this provision is that it is vexatious and oppressive for a claimant to sue concurrently in two Courts. Where there are two Courts faced with substantially the same question or issue, that question or issue should be determined in only one of those Courts, and the Court will, if necessary, stay one of the claims. Ordinarily, it is the second suit that will be stayed. **(See T*hames Launches Ltd v Trinity House Corporation (Deptford Strond) [1961] 1 All ER 26; Royal Bank of Scot-land Ltd v Citrusdal Investments Ltd [1971] 3 All ER 558*)**

509. Two obvious pre-requisites necessary to stay a suit under this provision of the law are one, the matter in issue in the subsequent suit must be '*directly and substantially in issue*' in the previously instituted suit and, two, the parties in the two suits must be the same parties or are parties claiming under them or litigating under the same title.

510. The basis of the Honourable Attorney General's argument that the issues raised in ***Petition No. E426 of 2020*** is caught out by this provision of the law is ***High Court Petition No. 12 of 2020*** in which one Okiya Omtata Okoiti is named as the Petitioner. There are five respondents in that Petition. The first is The National Executive of the Republic of Kenya; the second is The National Treasury; the third is The Presidential Taskforce on Building Bridges to a United Kenya

Advisory; the fourth respondent is the Hon. Attorney General; and, the final respondent is the Steering Committee on the Implementation of the Building Bridges to a United Kenya Taskforce Report.

511. Besides the respondents two other parties have been named as Interested Parties and these are Katiba Institute and Muslims for Human Rights (Muhuri).

512. The prayers sought in that Petition have been framed as follows:

A DECLARATION THAT:

a) *Without an enabling and regulating legislation, the President or any other state or public officer CANNOT establish an amorphous body such as the Presidential Taskforce on Building Bridges to Unity Advisory or the Steering Committee on the Implementation of the Building Bridges to a United Kenya Taskforce Report, to exercise the functions and powers which are constitutionally and statutorily assigned to other public entities.*

b) *Even with the express approval of Parliament through an empowering and regulating legislation; the President could NOT, under the Constitution, constitute the Presidential Taskforce on Building Bridges to a Unity Advisory, the Steering Committee on the Implementation of the Building Bridges to a United Kenya Taskforce Report, or a similar body, to undertake the amendment of the constitution through the popular initiative.*

c) *Acting in his official capacity, the President, or any other public officer, CANNOT use public resources, including funds, to start a popular initiative for amending the constitution under Article 257 of the Constitution.*

d) *The President's refusal to work with Parliament to achieve b whatever desired changes to the Constitution he wishes is a grave abuse of power and a gross violation of the Constitution.*

e) *It is an act of discrimination with the meaning of Article 27 of the Constitution for the President or any other public officer to use public resources to initiate and drive a popular initiative while an ordinary voter who wishes to amend the Constitution through a popular initiative must rely on his/her own resources.*

f) *The compositions of the Presidential Taskforce on Building bridges to unity Advisory and the steering committee on the implementation of the Building Bridges to a united Kenya Taskforce Report are is invalid, null and because their its members were not selected through a competitive, merit based, and inclusive process of recruiting persons into public office, which is established in the Constitution, specifically under Article 1, 2, 3, 10, 27, 41 (1), 47 (1) 73 (2), 232 (1) (g), (h) & (i) , 234 and 259 (1).*

g) *The Presidential Taskforce on Building Bridges to Unity Advisory and the Steering Committee on the Implementation of the Building Bridges to a United Kenya Taskforce Report are is invalid, null and void because the decision to establish them is was NOT subjected to public participation as required by the Constitution, specifically under Article 1, 2, 3, 10, 201 (a), 232 (1) (d) & (f), 234, and 259 (1)*

h) *Given its mandate, the President could NOT have used the Commissions of Inquiry Act (CAP 102) to lawfully establish the Presidential Taskforce on Building Bridges to Unity Advisory and the steering Committee on the Implementation of the Building Bridges to a United Kenya Taskforce Report.*

i) *The Presidential Taskforce on Building Bridges to Unity Advisory notified through Gazette Notice no. 5154 dated the 24th May, 2018, published on 31 May 2018 and the steering committee on the implementation of the Building Bridges to a United Kenya Taskforce Report notified through Gazette Notice 264 dated 3rd January 2020, published on 10th January 2020, were was created without the authority of the law, violates the principle of separation of powers , and usurps powers and authority constitutionally and statutorily assigned to other entities of the State and hence it is unconstitutional, invalid, null and void.*

j) *The Presidential Taskforce on Building Bridges to Unity Advisory notified through Gazette Notice No. 5154 dated the 24th May, 2018, published on 31 May 2018 and the steering committee on the implementation of the Building Bridges to a United Kenya Taskforce Report notified through Gazette Notice 264 dated 3rd January 2020, published on 10th January 2020 violates the principles of public finance and in particular their its financing through public funds is unauthorized by law, it is illegal and it is an imprudent use of public resources.*

k) *The purported mandate of the Presidential Taskforce on Building Bridges to Unity Advisory notified through Gazette Notice No. 5154 dated the 24th May, 2018, published on 31 May 2018 and the steering committee on the implementation of the Building Bridges to a United Kenya Taskforce Report notified through Gazette Notice 264 dated 3rd January 2020, published on 10th January 2020, seeking to initiate and facilitate the amendment to the Constitution through popular initiative are is unconstitutional and violates the principle of equality under Article 27 of the Constitution.*

l) *If the Court finds that it is proper the Presidential Taskforce on Building Bridges to Unity Advisory and the steering committee on*

the implementation of the Building Bridges to a United Kenya Taskforce Report to be funded using public funds, then the Government of Kenya should also fund the petitioner's Draft Constitution of Kenya (Amendment) Bill, 2019.

III. AN ORDER:

a) QUASHING the any extension of the mandate and the tenure of Presidential Taskforce on Building Bridges to Unity Advisory, howsoever made, including by the announcement made in the media by the President on 12th December 2019, and through a post on his official website at http://www.President.go.ke /2019/12/12/President-kenyatta-extends-term-of-bbi-taskforce/.

b) QUASHING the Gazette Notice No. 5154 dated the 24th May, 2018 and published on 31st May 2018 and Gazette Notice No. 264 dated 3rd January 2010 and published on 10th January 2020, all activities undertaken by both the steering committee on the implementation of the Building Bridges to a United Kenya Taskforce Report and the Presidential Taskforce on Building Bridges to Unity Advisory including the Report is published on 23rd October 2019 titled Building Bridges to a United Kenya: From a nation of blood ties to an nation of ideals because they were undertaken illegally by an illegal entity. QUASHING the Gazette Notice No. 5154 dated the 24th May, 2018 and published on 31st May 2018 and all activities undertaken by Presidential Taskforce on Building Bridges to Unity Advisory including the Report it published on 23rd October 2019 titled Building Bridges to a United Kenya: From a Nation of blood ties to a nation of ideals because they were undertaken illegally be an illegal entity.

c) PROHIBITION forever restraining the President an the respondents herein, or any public officer or body or their agents or anyone else from on whatsoever way acting or purporting to act under the authority of any content prepared or produced by the Steering Committee on the Implementation of the Building Bridges to a United Kenya Taskforce Report notified through Gazette Notice No. 264 dated 3rd January published on 10th January 2020 and the Presidential Taskforce on Building Bridges to Unity Advisory notified through Gazette Notice No. 5154 of 24th May 2018 and published on 31 May 2018 and in particular on the basis of any content of the Taskforce Report titled Building Bridges to a United Kenya: From a nation of blood ties to a nation of ideals.

d) PERMANENT INJUNCTION restraining the respondents or any public officer or office from authoring any public funds for use by the steering committee on the implementation of the Building Bridges to a United Kenya Taskforce Report and the Presidential Taskforce on Building Bridges to Unity Advisory the taskforce or to pay or facilitate any activities of the taskforce or activities directly or indirectly arising from the work of the Taskforce.

e) IN THE ALTERNATIVE, COMPELLING the Government of Kenya to fund the petitioner's Draft Constitution of Kenya (Amendment) Bill, 2019.

f) COMPELLING the respondents to bear costs of this suit.

IV. Any other relief this Honourable Court may deem just to grant."

513. Going by the prayers sought, there is no doubt, that the matters in issue in ***Petition No. 12 of 2020*** which we will henceforth refer to simply as the Omtatah Petition, are covered in Consolidated Petitions. However, it is also not in dispute that the Consolidated

Petitions cover a wider range of issues than those covered in the Omtatah Petition to such an extent that, due to its wider scope, there would still be a need to hear and determine the Consolidated Petitions even if the Omtatah Petition had been heard and determined.

514. In short, while it is true that the matter in the Omtatah Petition is directly and substantially in issue in these Consolidated Petitions, the matter in issue in these Consolidated Petitions cannot be said to be directly and substantially in issue in the Omtatah Petition: only a segment of it is.

515. That aside, it is also clear that the parties in the two suits are different: the absence of the petitioner in the Omtatah Petition in the present petition stands out.

516. It follows that that the two prerequisites necessary before a Court can order a stay of proceedings under section 6 of the Civil Procedure Act have not been demonstrated to obtain and therefore there would be no reason of staying these Consolidated Petitions pending the determination of the Omtatah Petition.

517. We must add that even if the present suit was on all fours with the Omtatah Petition, the institution of these proceedings would not have been in any way fatal. The furthest this honourable Court could go is to stay these proceedings; and staying of such proceedings is normally necessary to avoid the trial or hearing of the claim taking place, where the Court thinks it is just and convenient to make the order, to prevent undue prejudice being occasioned to the opposite party or to prevent the abuse of process. **(See Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 529).**

518. The Consolidated Petitions being wider in scope than the Omtatah Petition cannot be said to an abuse of the process. Apart

from the fact of filing the Omtatah petition, there is no evidence that any further step has been taken towards prosecution and determination of that Petition yet it cannot be denied that the nature of the dispute in this petition demands an expedient determination. For this very reason, we think that it is also in the public interest that these Consolidated Petitions be resolved at the earliest possible opportunity. Considering the progress that has been made towards its conclusion, culminating in this judgment, it could not have been held in abeyance pending the determination of the Omtatah petition whose programme for determination is unknown. If anything, the determination of this suit may, in one way or the other, help resolve the Omtatah petition.

519. Related to this issue of *sub judice* is the question of *res judicata* which, as earlier noted, is covered under section 7 of the Civil Procedure Act. That section reads as follows:

> *7. Res judicata*
>
> *No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a Court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such Court.*

520. This provision of the law is based on the fundamental doctrine of all Courts that there must be an end of litigation. The doctrine of *res judicata* may be pleaded by way of estoppel so that where a judgment has been given which is a matter of record, an 'estoppel by record' arises.

521. The rationale for the existence of estoppel by record can be summed up in two expressions: that it is in the public interest that there should be an end of litigation otherwise expressed as, *interest reipublicae ut sit finis litium,* and that no one should be proceeded against twice for the same cause.

522. Estoppel by record may take the form of cause of action estoppel or of issue estoppel. It may also be said that the cause of action has merged in the judgment (**see Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/22. JUDGMENTS AND ORDERS/ (2) FINALITY OF JUDGMENTS AND OF LITIGATION/(i) Finality of Judgments and Orders/A. CIVIL JUDGMENTS AND ORDERS/(A) Conclusiveness and Finality/ paragraphs 1154 and 1168)**.

523. Where *res judicata* is pleaded by way of estoppel to an entire cause of action, rather than to a single matter in issue, it amounts to an allegation that the whole legal rights and obligations of the parties are concluded by the earlier judgment, which may have involved the determination of questions of law as well as findings of fact; this is a form of action estoppel. **(See Halsbury's Laws of England (supra), paragraph 1174).**

524. Issue estoppel, on the other hand, means that a party is precluded from contending the contrary of any precise point which, having once been distinctly put in issue, has been solemnly and with certainty determined against him. Even if the objects of the first and second claims or actions are different, the finding on a matter which came directly in issue in the first claim or action, provided it is embodied in a judicial decision that is final, is conclusive in a second claim or action between the same parties and their privies. Issue estoppel will only arise where it is the same issue which a party is seeking to re-litigate. This principle applies whether the point

involved in the earlier decision, and as to which the parties are estopped, is one of fact or one of law, or one of mixed fact and law. (**See Halsbury's Laws of England (supra) paragraph 1179).**

525. The Honourable Attorney General is urging what certainly is issue estoppel. The Honourable Attorney General has not argued that this suit is *res judicata* but that the specific question concerning the legality or constitutionality and the mandate of BBI Steering Committee has been resolved by this Court (Mativo, J) in ***Third Way Alliance Kenya & Another versus Head of Public Service & Two Others*** **(supra).**

526. In that case, the Third Way Alliance Kenya, a political party registered under the Political Parties Act, No. 11 of 2011, which is the Petitioner in ***Petition No. E400 of 2020*** herein, sued Mr. Joseph Kinyua, the Head of Public Service, the Building Bridges to Unity Advisory Taskforce and the Hon. Attorney General. Amongst the prayers sought in that petition was a prayer framed as follows:

> *"a. A declaration that the body being referred to as the Building Bridges to Unity Advisory Taskforce established vide gazette notice No.5154 dated 24th May 2018 is unconstitutional, illegal, null and void***."**

527. The Honourable Attorney General's argument that the constitutionality and the mandate of the BBI Steering Committee is a question that has been resolved is no doubt based on the Learned Judge's determination on issues surrounding this particular prayer and therefore it is necessary to consider what the Judge said in respect of this issue. Some pertinent excerpts from the Learned Judge's decision in respect to this question are as follows:

> *"106. A glance at the facts presented in this case shows that there are several issues at stake in this matter. It is however necessary to explain why the rule of law is the root*

of this matter. A reading of the Petition shows that the Petitioners are aggrieved by the first Respondents decision communicating the decision to appoint the Taskforce. As the Petitioners correctly put it, the Head of the Public service communicated the President's decision to appoint the Taskforce.

143. The Petitioners argument that the establishment and the mandate of the Taskforce duplicates the functions and the mandate of other constitutional commissions fails to appreciate the well accepted and deep rooted cannon of constitutional interpretation which requires constitutional provisions to be construed holistically without lifting one provision over the others or even destroying some as opposed to sustaining each provision so as to get the meaning, purpose and effect of the entire Constitution. The Petitioners' argument ignores the fact that the President's mandate and executive powers are distinct from the powers of independent Commissions or any other bodies established under the Constitution.

528. We must state at the outset that we are conscious that the decision in the ***Third Way Alliance*** case is cited before us not necessarily as a decision from a Court of coordinate jurisdiction persuading us to take any particular position on a point of law and from which we are entitled to depart if there are reasons to do so. Instead, it is presented in the context of a judgment *in rem* binding us on a specific point of law. It is from this perspective that we shall consider it.

529. Of the several questions that we have been asked in these Consolidated Petitions, one question that was not asked in the *Third Way Alliance case* is whether the President can establish a committee, or any other entity for that matter, to initiate the change

or amendment of the Constitution outside the means prescribed by the Constitution itself. To be precise, can the amendment of the Constitution be initiated in any way other than those envisaged in Article 256 and 257? As we understand it, the Petitioner's case in ***Petition No. E426 of 2020*** is that the BBI Steering Committee impermissibly initiated the amendment of the Constitution in the guise of an amendment by popular initiative under Article 257 when, in fact, it is an initiative by the President hiding behind the BBI Steering Committee. The question we are faced with is whether BBI Steering Committee which, in the Petitioner's view, was established with the sole purpose of undertaking an assignment which is contrary to the provisions of the Constitution, is constitutional and, by the same token, whether anything done by such a committee is constitutional.

530. In our humble view, the answer to this question cannot be found in the judgment in the ***Third Way Alliance Party case*** not because the Court in that case was incapable of answering it but because it is a question that was not asked and interrogated. In the words of explanation 3 of section 7 of the Act, it is not a matter '*alleged by one party and either denied or admitted, expressly or impliedly, by the other*'. What is before us is a more specific question that narrows down from the question whether the President can generally form any committee, of whatever form or shape, on any matter to a more specific question whether he can form such a committee to initiate changes or amendment to the Constitution. This was a question not before the Learned Judge in the ***Thirdway Alliance Case***. This is because, in the ***Thirdway Alliance Case***, the BBI Taskforce did not have the mandate to initiate constitutional amendments. However, the BBI Steering Committee has, as one of its terms of reference, the mandate to initiate constitutional changes – which is the exact reason the Petitioner in ***Petition E426 of 2020*** – is challenging its legality.

531. It is for the foregoing reason that we are or of the firm view that we are not estopped from discussing the constitutionality of the BBI Steering Committee and its mandate in so far as the amendment of the Constitution is concerned. In other words, this issue is not *res judicata*.

532. The other question that deserves attention and which we thought should be determined as a preliminary issue is whether Mr. Uhuru Muigai Kenyatta can be sued in his personal capacity and not as the President of the Republic of Kenya. This is because he is named in his personal capacity as the 1st Respondent in Petition No.E426 of 2020. A straight answer to this question is found in Article 143(2) of the Constitution but we think it is better understood in the context of the entire Article. This Article reads 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.

533. A plain reading of this provision of the Constitution reveals the following:

i. Criminal proceedings cannot be taken against the President of the Republic of Kenya during his tenure as President;

ii. As far as civil proceedings are concerned, the President cannot be sued during his tenure 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;

iii. Where proceedings, whether criminal or civil, that may be taken against the President after his tenure are subject to limitation period, time does not run until the expiration of his tenure; and

iv. The President may be prosecuted during his tenure if the crime for which he is prosecuted is defined by a treaty to which Kenya is a party and which prohibits immunity from prosecution.

534. The bone of contention revolves around Article 143(2) on civil proceedings. Only the Honourable Attorney General submitted on this point and his argument is that, it is not that the President cannot be held to account for his actions while in office, but that whenever he has to be sued, the proper procedure to adopt is the judicial review proceedings in which the Honourable Attorney General, rather than the President, would be named in the proceedings as the respondent. The bulk of the Honourable Attorney General's submissions on this point came in the form of reproduction of the Court's decision in ***Julius Nyarotho vs. Attorney General &***

3 others [2013] eKLR. In that case, Gikonyo J. had the following to say on this question:

> *[13] The question to ask is: Whether, there is a legal way the people of Kenya can question any improper exercise of public power vested in the President, especially where the Constitution and Statute law have been violated. I will approach this issue by looking at three important constitutional matters. One, the constitutional duty of the President to adhere to, promote and protect the Constitution and all laws made under the Constitution. Two, judicial review as a public law remedy under the Constitution. Three, the role of public law of the state on these matters.*
>
> *[14] Needless to state that, the Presidency is a creature of the Constitution. According to Articles 1(3) (a), 129 and 130, the executive authority is derived from the people and is exercised in accordance with the Constitution. The presidency should adhere to, promote and protect the Constitution, to mention a few say; observe national values and principles of governance (Article 10), observe principles of executive authority, maintain integrity for leadership (chapter six), observe legal requirements, and respect the authority of the judiciary. If the presidency violates the requirements of due process of the law as laid down in Constitution or any statute law, the Constitution is not helpless, as, it is self-referential and does not suffer a wrong without a remedy. Therefore, judicial review will lie against an order of appointment made by a sitting President in contravention of the law. This is a public law remedy which is directed to the state itself as the President exercised executive authority of state. It is a subject that is governed by the public law of the state. A narrow and strict interpretation of Article 143 of the Constitution would offend*

Article 259 of the Constitution which demands a purposive interpretation in order to give effect to the objects, purposes and values of the Constitution.

[15] According to Article 73 of the Constitution, authority assigned to a state officer is a public trust. On this basis, the Constitution installs a responsibility on the executive to serve the people rather than the power to rule the people; be accountable to the people, and respect the rule of law. See Article 129 also. Strict interpretation of Article 143 of the Constitution without regard to the objects, values, purposes and spirit of the Constitution, as suggested by the Respondents, particularly the Attorney General will; 1) deprive the public the right to demand for public answerability from the office of the President on the exercise of the sovereign authority they have delegated to the executive; 2) disparage the Constitution and promote impunity. These matters are placed in the public law of the state as a deliberate constitutional approach in order to enable the Constitution to avoid an absurd state of affairs that would otherwise be created by a narrow interpretation of Article 143. The Courts reconcile the dichotomy of ensuring that there is no violation of the Constitution or the law that goes without a remedy whilst maintaining the integrity of the presidency which is a symbol of the Republic of Kenya by simply upholding and protecting the Constitution. In such suit as this, the Attorney General is the proper party. In countries with robust Constitution, including Kenya, Courts have questioned actions or inaction by the President in so far as the deed or omission thereof has violated the law. Although in the instances where Courts have invoked judicial review to right the wrongs by the executive have been equated by some pundits to judicial

> *activism, I am convinced, it is simply a judicial path that is permitted by the Constitution itself as a way of attaining checks and balances within the doctrine of separation of powers. See the case of* ***BGM HCCC No 42 Of 2012 [2012] Eklr And The Case Of Centre For Rights Education & Awareness & 6 Others V Attorney General Nbi Hc Pet O. 208 & 209 OF 2012.***

535. It is apparent, therefore, that the Honourable Attorney General is in agreement with the Petitioner in ***Petition No. E426 of 2020***, at least to the extent that according to Article 143(2) of the Constitution, Mr. Uhuru Muigai Kenyatta is subject to civil proceedings during his tenure whenever he either acts outside the parameters of the Constitution or omits to do that which he is bound to do under the Constitution. The Honourable Attorney General's only concern is that it is the Honourable Attorney General himself, rather than the President, who should be named in those proceedings.

536. In these proceedings, both the President and the Attorney General have been named as respondents and therefore the question of non-joinder should not arise. The issue that has been raised by the Honourable Attorney General is that of a misjoinder-that the President ought not to have been made party to these proceedings.

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 a 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 on behalf 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 not to have been sued in his personal capacity, he need not have responded or participated in these 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 on 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.

538. In the ***Isaac Polo Aluochier vs Uhuru Muigai Kenyatta & Another (2014) eKLR*** in which the Mr. Uhuru Muigai Kenyatta had been sued together with the Deputy President in their personal capacities, this Court (Isaac Lenaola, J., as he then was) held that the Honourable Attorney General cannot represent the President whenever the latter is sued in his personal capacity. This being the legal position, the learned counsel for the Hononourable Attorney General could not purport to make any representations that would tend to show that he was representing Mr. Uhuru Muigai Kenyatta.

539. Be that as it may, Order 1 Rule 9 of the Civil Procedure Rules is clear that a suit cannot be defeated for misjoinder or non-joinder and that what the Court should be bothered with is the determination of the rights of the parties; that rule reads as follows:

> *No suit shall be defeated by reason of the misjoinder or non-joinder of parties, and the Court may in every suit deal with the matter in controversy so far as regards the rights and interests of the parties actually before it.*

540. To the extent that this rule is applicable to the petitions such as the one before Court, we can confidently say that regardless of whether the 1st respondent has been properly joined to this suit, this Court is in good stead and ideally placed to '*deal with the matter in*

controversy so far as regards the rights and interests of the parties actually before it.'

541. And if this is the case, nothing much would turn on the question whether or not Mr. Uhuru Muigai Kenyatta ought to have been sued. However, there is something more; the petitioner wants the Court to make a specific finding that '*civil Court proceedings can be instituted against the President or a person performing the functions of the office of the President during the tenure of office in respect of anything done or not done in the exercise of claimed powers beyond those authorised under the constitution, that is for actions or omissions not authorised under the Constitution.*' (Paragraph 1 at page 8 of the Petitioner's Petition).

542. Of course, it has been conceded by the Honourable Attorney General that civil proceedings can be taken against the President during his tenure except that he need not be sued in his personal capacity for the reason the relief claimed against him would ordinarily be a public law remedy and therefore the appropriate proceedings would be Judicial Review proceedings in which the Honourable Attorney General, and not the President, is named as the Respondent. This is the point of departure between the Petitioner in ***Petition No. E426 of 2020*** and the Honourable Attorney General; it is the petitioner's view that where the President acts or omits to act in contravention of the Constitution, then he can not only be personally sued but he should also be held personally responsible for any loss that may have ensued as a result of his action or inaction.

543. It is common ground between the parties that a plain reading of Article 143(2) of the Constitution reveals that civil proceedings can be taken against the President during his tenure. Both the Petitioner and the Honourable Attorney General are in agreement that if the President flouts the Constitution, in one way or the other, then civil proceedings against him, during his tenure, would be quite in order.

The only bar to such proceedings is if whatever the President is sued for having done or omitted to do was done or omitted in exercise of the powers conferred upon him by the Constitution. We think this is apparent from clause (2) of Article 143 when it states:

> *(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).*

544. If it is agreed that civil proceedings may be taken against the President, there is nothing in law that suggests that only a particular form of civil proceedings would be preferred to the others; to be precise, there is no legal basis for the Honourable Attorney General's argument that whenever the President is sued in civil proceedings, the only means by which those proceedings should be taken is by way of an application for judicial review.

545. The petitioner's action is based on what he believes to be a violation of the Constitution by the President and we are of the opinion that there would be no better means through which his grievances can be addressed other than through a constitutional petition such as the one that is now before Court. It must be noted that owing to their history, proceedings by way of judicial view are limited in the nature of reliefs that a Court can grant; not so with a constitutional petition. In any event, according to Article 23(1) and (3) of the Constitution, whenever this Court is exercising its jurisdiction in accordance with Article 165, it can grant a variety of reliefs including reliefs that could be granted in judicial review proceedings; such latitude is only available in proceedings by way of a constitutional petition and not a judicial review application.

546. 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.*'

547. 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.

548. Having disposed of the preliminary issues, we will now turn to the substantive matter at hand which is whether the BBI Steering Committee is a lawful entity.

549. The answer to this question can be traced to the Special Issue of the Kenya Gazette Vol. CXXII-No. 7 published on 10 January 2020. It is in this Gazette that Notice No. 264 was issued notify the general public that the Steering Committee had been formed. Owing to its import to the question at hand, it is necessary that we reproduce the entire gazette notice here. It reads as follows:

> *GAZETTE NOTICE NO. 264*
>
> *THE STEERING COMMITTEE ON THE IMPLEMENTATION OF THE BUILDING BRIDGES TO A UNITED KENYA TASKFORCE REPORT*
>
> *APPOINTMENT*

IT IS notified for general information of the public that His Excellency Hon. Uhuru Kenyatta, President and Commander-in-Chief of the Kenya Defence Forces, has appointed the Steering Committee on the Implementation of the Building Bridges to a United Kenya Taskforce Report, which shall comprise of:

Mohamed Yusuf Haji (Sen.)

Lawi Imathiu (Bishop)

Maison Leshomo

James Matundura

Rose Moseu

Agnes Kavindu Muthama

Saeed Mwaguni (Prof.)

Peter Njenga (Bishop)

Zaccheaus Okoth (Archbishop Emeritus)

Adams Oloo (Prof.)

Amos Wako (Sen.)

Florence Omose (Dr.)

Morompi ole Ronkei (Prof.)

John Seii (Rtd) Major

Joint Secretaries

Martin Kimani (Amb.) Paul Mwangi

1. *The Terms of Reference of the Steering Committee shall be to:*

a)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

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.

2. In the performance of its functions, the Steering Committee shall—

a) appoint its chairperson and vice-chairperson 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 its functions;

f)shall 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 to be responsible for all official communication on behalf of the Steering Committee.

4. The Joint Secretaries may co-opt any other persons 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.

Dated the 3rd January, 2020.

*JOSEPH K. KINYUA, Head of the Public Service. (Emphasis added)***.**

550. The bone of contention here is that term of reference that mandates the Committee to propose "*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*."

551. As discussed at length in this Judgment at Part 4(II), constitutional changes by means of an amendment to the Constitution is a question that is squarely covered by the Constitution itself and this is in Articles 255-257 of the Constitution

552. Article 256 of the Constitution refers to the procedure relating to an amendment initiated by Parliament while Article 257 speaks to an amendment by the citizens themselves or the popular initiative.

553. As discussed in Part 4(II) of this Judgment, there is no provision for the executive in general or the President, in particular, to initiate proposals for amendment of the Constitution in the name of a popular initiative under Article 257 of the Constitution. Yet this is what the BBI Steering Committee portended. As a matter of fact, a Constitution of Kenya Amendment Bill has been drawn and has recently been passed by both houses of Parliament for debate purportedly as a bill arising out of a popular initiative to amend the Constitution.

554. As Gazette Notice No. 264 would show, another body christened BBI Taskforce had earlier been established prior to the establishment of the BBI Steering Committee. Speaking of this earlier BBI Taskforce in his 6th Annual Report, 2018 made pursuant to Article 132(1)(c) of the Constitution, the President noted, *inter alia*, that:

> *…the Presidency established and operationalized a taskforce on Building Bridges Initiative (BBI) aimed at addressing the 9 key challenges identified in the MoU namely, ethnic antagonism and competition, lack of national ethos, inclusivity, devolution, divisive elections, safety and security, corruption, shared prosperity, and responsibility and rights …" (Emphasis added).*

555. It is, therefore, clear, as concluded above in Part 4(II) of this Judgment, that the BBI Taskforce which eventually morphed into the BBI Steering Committee was the President's and not the peoples' initiative. The Bill to amend the Constitution is as result of the proposals of the BBI Steering Committee. It is, therefore, quite clear that what has been presented as a Popular Initiative to amend the Constitution is in reality the Presidency's initiative which is certainly

contrary to Article 257 of the Constitution. To the extent that the BBI Steering Committee was created to perpetuate what is clearly an unconstitutional purpose, it is an unlawful, and at any rate, an unconstitutional outfit.

556. It is also worth noting that according to Article 132(4)(a) of Constitution, the President can only establish an office in the public service on the recommendation of the Public Service Commission. That Article reads as follows:

> *(4) The President may—*
>
> *(a) perform any other executive function provided for in this Constitution or in national legislation and, except as otherwise provided for in this Constitution, may establish an office in the public service in accordance with the recommendation of the Public Service Commission.*

557. There is no evidence that in creating the BBI Steering Committee, the President complied with this provision of the Constitution. It follows that whichever angle one looks at it, the BBI Steering Committee was invalid from the very beginning.

IV. **THE PROPRIETY OF BBI STEERING COMMITTEE PREPARING AND TABLING RELEVANT BILLS IN PARLIAMENT**

558. The Petitioner in ***Petition No. E416 of 2020*** again argued that the BBI Steering Committee, as the promoter of the Constitution of Kenya Amendment Bill, has no legal mandate to draft legislative bills to implement the proposed constitutional amendments. He argued that the BBI Steering Committee continued drafting of multiple bills is unlawful since drafting of bills is a preserve of the Honourable Attorney General under Article 261(4) as read with the Fifth Schedule to the Constitution. According to the Petitioner, section 73 of the

Constitution of Kenya Amendment Bill presents a problem by mandating the Honourable Attorney General and the Kenya Law Reform Commission to prepare relevant bills for tabling before Parliament within a set timeline. He maintained that legislative bills are a preserve of Parliament under Chapter 8 of the Constitution and no one else.

559. We have considered the Petitioner's argument with regard to preparation and tabling of bills before Parliament. Article 94(1) provides that the legislative authority of the Republic is derived from the people and is vested in and exercised by Parliament at the national level. Sub Article (5) places a caveat that no person or body, other than Parliament, has the power to make provision having the force of law except under authority conferred by the Constitution or legislation.

560. A reading of the Constitution is clear that only Parliament can enact legislation. However, that does not mean and should not be read to mean, only Parliament can draft bills. Its mandate is to legislate or enact and, therefore, anybody, including the BBI Steering Committee if lawfully established, as promoter of the Constitution of Kenya Amendment Bill, could draft bills. Such bills must, however, be enacted by Parliament.

561. This view is supported by the fact that Article 257(2) states that a Popular Initiative to amend the Constitution should be in the form of a general suggestion or a draft Bill. The promoter(s) is required to come up with a draft Constitution of Kenya Amendment Bill which is submitted to the IEBC which then sends it to the Speakers of County Assemblies and Parliament for approval or rejection. In the case of normal bills, they must be introduced before Parliament as required by the Constitution, applicable statutes, and Parliamentary Standing Orders. Consequently, we find that if the BBI Steering Committee was lawfully established, there would be no constitutional violation in

its drafting of bills associated with the proposed constitutional amendments.

IV. THE BBI PROCESS AND COMPLIANCE WITH ARTICLES 10 AND 33 OF THE CONSTITUTION

562. The Petitioner in ***Petition No. E416 of 2020*** argued that Articles 7, 10, 33, 35 and 38 of the Constitution were violated, in that the promoters of the Constitution of Kenya Amendment Bill proceeded to collect signatures before providing citizens with copies of the BBI Taskforce Report; the BBI Steering Committee's Final Report and the Constitution of Kenya Amendment Bill, all translated into various languages to enable voters to read and understand the issues before signifying their support thereto. According to the Petitioner, the promoters did not supply reports to the people; did not have the reports translated into Kiswahili, indigenous languages and Braille for ease of reading. The promoters opted to post the document on the Internet which, the Petitioner argues, is not accessible to majority of the populace. This omission, he argued, disenfranchised majority of the voters for lack of information and knowledge on what amendments the promoters were proposing.

563. In response to this argument, the Respondents argued that it would have been premature to conduct public participation prior to the Constitution of Kenya Amendment Bill being submitted to the County Assemblies for consideration. In their view, public participation could not be conducted before the initiative had received the requisite support by voters under Article 257(1) of the Constitution and submitted to the County Assemblies. It was also argued that the Petitioner had neither alleged nor demonstrated that the legislative assemblies did not provide an effective avenue for public participation. It was further contended that the process of constitutional amendment is subject to the referendum which is as a form of public participation. The Honourable Attorney General

maintained that the BBI Steering Committee had adduced evidence of public participation in form of rallies and public meetings which, he argued, the Petitioner had not rebutted.

564. In the Honourable Attorney General's view, public participation should also be seen as a continuum starting from the collection of the 1 million signatures required under Article 257(1) to the presentation of the Constitution of Kenya Amendment Bill to County Assemblies and Parliament and, ultimately, in the referendum. He, therefore, argued that to raise public participation objection at this point is premature. It was also the Honourable Attorney General's contention that the people who signed in support of the Constitution of Kenya Amendment Bill are presumed to have read and agreed with the contents of the Bill, and therefore, the Petitioner would not be prejudiced if the process rolled on to conclusion. The People, he argued, will have the opportunity to vote for or against the Constitution of Kenya Amendment Bill during the referendum.

565. On their part, Hon. Raila Odinga and the BBI Steering Committee argued that the scope of public participation under Article 257, is distinct from that required for ordinary legislation; that it is the people themselves who will make the ultimate decision, and that the effect of public participation can only be determined at the tail end of the process. They relied on the annextures to the Replying Affidavit by Dennis Waweru deponed on 14th March, 2021 showing advertisements by various County Assemblies calling for public participation, to argue that there was adequate public participation. They maintained that the form of public participation would vary from one county to the other, depending on the circumstances of each county. They also argued that the issue of public participation is premature since the process was still ongoing and the IEBC would ultimately conduct civic education before the referendum.

566. We have considered the respective parties' arguments on this issue. Hon. Raila Odinga and the BBI Steering Committee did not

even suggest that copies of the reports and the Constitution of Kenya Amendment Bill were provided to the people and in the form the Petitioner insists the law requires. We must state here though, that there is no legal requirement for the BBI Taskforce and BBI Steering Committee to provide the voters with copies of their reports before seeking support for the proposals to the constitutional amendment. The legal requirement under Article 10 of the Constitution is that in such an exercise, voters must be supplied with adequate information to make informed decisions on the matter at hand as an integral part of public participation. See ***Robert N. Gakuru & Others v Kiambu County Government & 3 others [2014] eKLR.***

567. As Courts have variously held, public Participation is one of the principles of good governance; a constitutional right that must be complied with at every stage of constitutional amendment process. This constitutional principle is now well established in our decisional law as well as in decisions from comparative jurisdictions. In the ***Robert N. Gakuru Case (supra)***, for example, the High Court held that:

> *[P]ublic participation plays a central role in both legislative and policy functions of the Government whether at the National or County level. It applies to the processes of legislative enactment, financial management and planning and performance management.*

568. On appeal, the Court of Appeal, in the same case, held that:

> *The issue of public participation is of immense significance considering the primacy it has been given in the supreme law of this country and in relevant statutes relating to institutions that touch on the lives of the people. The Constitution in Article 10 which binds all state organs, state officers, public officers and all persons in the discharge of public functions, highlights public participation as one of the*

> *ideals and aspirations of our democratic nation…The bottom line is that public participation must include and be seen to include the dissemination of information, invitation to participate in the process and consultation on the legislation*. (emphasis)

See ***Kiambu County Government & 3 others v Robert N Gakuru & others*** [***2017] eKLR***

569. Similarly, in ***Matatiele Municipality & Others v The President of South Africa & Others*** (2) (CCT 73/05 A [2006] ZACC 12; 2007 (1) BCLR 47 (CC), the Constitutional Court of South Africa stated:

> *The representative and participative elements of our democracy should not be seen as being in tension with each other…What our constitutional scheme requires is "the achievement of a balanced relationship between representative and participatory elements in our democracy." The public involvement provisions of the Constitution address this symbolic relationship, and they lie at the heart of the legislative function. The Constitution contemplates that the people will have a voice in the legislative organs of the State not only through elected representatives but also through participation in the law-making process……To uphold the government's submission would therefore be contrary to the conception of our democracy, which contemplates an additional and more direct role for the people of the provinces in the functioning of their provincial legislatures than simply through the electoral process. The government's argument that the provisions of section 118(1)(a) are met by having a proposed constitutional amendment considered only by elected representatives must therefore be rejected.*

570. The right to make political decisions extends beyond the simple act of voting for options; like in this case, appending signatures or not in support of the Constitution of Kenya Amendment Bill. The right to make political decisions means much more and depends on the availability of information to citizens to enable them make informed decisions. In the persuasive authority of ***President of the Republic of South Africa & Others v M & G Media Ltd*** (CCT 03/11) [2011] ZACC 32; the Constitutional Court of South Africa (**Ngcobo, CJ**, writing for the majority) stated:

> *[10]…In a democratic society such as our own, the effective exercise of the right to vote*[14] *also depends on the right of access to information. For without access to information, the ability of citizens to make responsible political decisions and participate meaningfully in public life is undermined.* (emphasis) (internal quotations omitted).

571. What the above cases establish is that public participation as one of the founding principles in a constitutional democracy. It binds all State organs, State Officers, Public Officers and all persons in the discharge of their constitutional and statutory mandates. To meet the constitutional threshold, public participation cannot be a matter of presumption or conjecture. Public participation must not only be real; it must also be effective, to meet the constitutional standard. (See ***Robert N. Gakuru*** (supra).

572. Applying the above principle, we easily conclude that the voters were entitled, at a minimum, to copies of the Constitution of Kenya Amendment Bill to read and understand what the Promoters were proposing to amend. At the very least, the copies ought to have been in the constitutionally-required languages namely, English, Kiswahili, and Braille. The copies also ought to have been made available in other communication formats and technologies accessible to persons with disabilities including Kenya Sign Language as required under Article 7(3)(b) of the Constitution. 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.

573. We note, by way of emphasis, that Article 7 of the Constitution recognizes Kiswahili as the national language, while official languages are Kiswahili and English. The state is also required to encourage use of indigenous languages, sign language, Braille and other communication formats and technologies accessible to persons with disabilities. In such a consequential exercise as constitutional amendment, it would be ideal for the relevant information to be made available by those responsible in indigenous languages in addition to the official languages.

574. It is clear to us that the BBI Steering Committee did not print the Constitution of Kenya Amendment Bill in Kiswahili or any other languages. The only copy annexed to the pleadings is in English. Even in the case of the English Language version, no copies were distributed to the people to read. A copy of the Bill was only posted on the Internet. Even if they had been distributed, those who do not understand English and persons with disabilities would still not have been able to understand the contents of Bill. There can be no doubt, therefore, that there was no effort at all, on the part of the BBI Steering Committee to make copies of the Constitution of Kenya Amendment Bill available to the public

575. As we have said above, the principle of public participation is a founding value in our Constitution. Citizens now take a central role in determining the way they want to be governed, and must be involved in legislative and other processes that affect them at all times. In that regard, for meaningful public participation to be realized, citizens must be given information they require to make decisions that affect them. There is, therefore, an obligation on the part of the promoters of any constitutional amendment process, to produce and distribute copies of a Constitution of Kenya Amendment

Bill in the languages people understand to enable them to make informed decisions whether or not to support it.

576. In the absence of meaningful public participation and sensitization of the people prior to the collection of signatures in support of the Constitution of Kenya Amendment Bill, the exercise of signature collection in support of the amendment bill was constitutionally flawed.

577. 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.

578. In the circumstances, we have no difficulty in agreeing with the Petitioner in ***Petition No. E416 of 2020***, that the BBI Steering Committee, as the promoter of the Constitution of Kenya Amendment Bill, failed to comply with a key constitutional requirement at a very critical stage, to give people information and sensitize them, prior to embarking on the collection of signatures, thus rendering the process constitutionally unsustainable.

V. LEGAL ISSUES ARISING FROM THE PRESIDENT'S INVOLVEMENT IN THE BBI PROCESS

579. Having found that the BBI Steering Committee is an unconstitutional entity, the next question is whether any monies spent on its operations is recoverable and from whom it is recoverable.

580. In answering this question, we must start by saying that no evidence was presented before us on whether the Steering Committee spent any public funds on its operations and if so how much. But we are encouraged by the Auditor General who, in the replying affidavit filed on her behalf in response to ***Petition No. E426 of 2020***, has indicated that the office of the Auditor General may audit not just the operations of the BBI Steering Committee but the entire process of the attempt to amend the Constitution. This, no doubt, is in exercise of the Auditor-General's mandate under Article 229(5) and (6) of the Constitution. The two clauses read as follows:

> *229. (5) The Auditor-General may audit and report on the accounts of any entity that is funded from public funds.*
>
> *(6) An audit report shall confirm whether or not public money has been applied lawfully and in an effective way*

581. Without appearing to pre-empt The Auditor-General's audit and the report that may be subsequently made, we can do nothing more than reproduce here verbatim Article 226(5) of the Constitution on the misuse and recovery of public funds. That Article states as follows:

> *226(5) If the holder of a public office, including a political office, directs or approves the use of public funds contrary to law or instructions, the person is liable for any loss arising from that use and shall make good the loss, whether the person remains the holder of the office or not.*

582. Public funds aside, there remains the question whether in coming up with a committee which, for reasons we have given, is nothing more than an unconstitutional entity, the President has flouted Article 73(1)(a)(i) of the Constitution on the exercise of authority entrusted to a State Officer. This part of the Article is better

understood in the context of the entire Article 73 on leadership and integrity. That Article reads as follows:

> *73. (1) Authority assigned to a State officer—*
>
> *(a) is a public trust to be exercised in a manner that—*
>
> *i. is consistent with the purposes and objects of this Constitution;*
>
> *ii. demonstrates respect for the people;*
>
> *iii. brings honour to the nation and dignity to the office; and*
>
> *iv. promotes public confidence in the integrity of the office; and*
>
> *(b) vests in the State officer the responsibility to serve the people, rather than the power to rule them.*
>
> *(2) The guiding principles of leadership and integrity include—*
>
> *a) selection on the basis of personal integrity, competence and suitability, or election in free and fair elections;*
>
> *b) objectivity and impartiality in decision making, and in ensuring that decisions are not influenced by nepotism, favouritism, other improper motives or corrupt practices;*
>
> *c) selfless service based solely on the public interest, demonstrated by—*
>
> *i. honesty in the execution of public duties; and*
>
> *ii. the declaration of any personal interest that may conflict with public duties;*

d) accountability to the public for decisions and actions; and

e) *discipline and commitment in service to the people.*

583. The authority of the President and the functions attendant to his office are matters that are not left to speculation. They are respectively covered in Articles 131 and 132 of the Constitution. As noted above in this Judgment at Parts 4(II) and 4(III), neither of these Articles says that the President can initiate a proposal to amend the Constitution.

584. What the President did through the BBI Steering committee was a clear attempt to stretch the authority of the President under Article 131(2)(c) to include the power to initiate the amendment of the Constitution. It is necessary to reproduce the entire clause (2) for better understanding. It states as follows:

(*2) The President shall—*

a) Respect, uphold and safeguard this Constitution;

b) Safeguard the sovereignty of the Republic;

c) <u>Promote and enhance the unity of the nation</u>;

d) Promote respect for the diversity of the people and communities of Kenya; and

e) Ensure the protection of human rights and fundamental freedoms and the rule of law. (Emphasis added).

585. It is clear from the President's 6th Annual Report captured in the Kenya Gazette dated 3 May 2019, Vol. CXXI-No.55 that in pitching for the BBI Taskforce and the subsequent BBI Steering Committee, the President consistently employed the language of Article 131(2) (c) on promotion and enhancement of the national unity. This is clear

from the following excerpts of the President's Report, where the President noted, *inter alia,* that:

> *…932. To enhance national unity, the rule of law, democracy and participation of the and sustainable development, the Government commits to continue supporting the BBI and to fully implement its recommendations. Public institutions shall align their policies, legislation, programmes and activities with the recommendations of the BBI and other initiatives aimed at promoting national unity and nationhood.*
>
> *63. To promote reconciliation and harmonious relations, H.E. President Uhuru Kenyatta and H.E. Raila Odinga signed a joint Communiqué titled 'Building Bridges to a New Kenyan Nation' to affirm their commitment to work together to find lasting solutions to ethnic antagonism and divisive politics. Further, H.E. the President and H.E. Raila Odinga established the 14 member Building Bridges Initiative (BBI) taskforce whose terms of reference include evaluating national challenges outlined in the joint communiqué and making practical recommendations and reform proposals to enhance national unity…*
>
> *IV. Support the Building Bridges to National Unity Initiative (BBI) and implement its recommendations and other initiatives aimed at promoting national unity and nationhood.*

586. While the President's efforts to unite the nation are to be lauded and, indeed it his obligation *'to promote and enhance the unity of the nation'* he cannot initiate any move, disguised as a Popular Initiative to amend the Constitution, contrary to the means prescribed by the Constitution itself for such an amendment on the pretext that he is '*promoting and enhancing the unity of the nation*.' Said differently, it is

not within the President's power to initiate proposals to amend the Constitution, ostensibly as a Popular Initiative, under the pretext of promoting and enhancing the unity of the nation. The Constitution can only be amended as prescribed in Articles 255, 256 and 257 of the Constitution.

587. It must be noted that according to Article 132(2)(a) the President is enjoined *'to respect, uphold and safeguard this Constitution'* in exercising his authority.

588. In taking initiatives to amend the Constitution other than through the prescribed means, the President has, without doubt, failed to respect, uphold and safeguard the Constitution and, to that extent, he has fallen short of the leadership and integrity threshold set in Article 73 of the Constitution and, in particular, Article 73(1)(a) thereof. We so find.

589. It goes without saying that considering the illegitimate purpose for which the BBI Steering Committee was conceived, nothing legitimate can come out of that outfit. It is void *ab initio* and whatever it may want to consider as its achievements including the Constitution Amendment Bill are of no legal consequence.

VI. REQUEST FOR DISCLOSURE AND PUBLICATION OF BBI STEERING COMMITTEE'S FINANCIAL INFORMATION

590. The Petitioner in ***Petition No. E416 of 2020*** also urged this Court to compel the President, Hon. Raila Odinga and the BBI Steering Committee to publish or cause to be published details of the budget and money allocated and used in promoting the BBI activities, leading to the Constitution of Kenya Amendment Bill. The Respondents argued that the Petitioner had not complied with the procedure for requesting information under Article 35 of the

Constitution and Access to Information Act (Act No. 31 of 2016) and, that therefore, the request through this Petition is premature.

591. The prayer sought by the Petitioner, as we understand it, is in the form of disclosure of information under Article 35 of the Constitution. Article 35 guarantees every citizen the right of access to information held by the State and information held by another person, which is required for the exercise or protection of a right or fundamental freedom. Access to information is a critical constitutional right for open and democratic conduct of government affairs. The state or state organ responsible is obliged to disclose information to citizens whenever sought. It will not matter the reasons for which such information is sought.

592. In ***Nairobi Law Monthly v Kenya electricity Generating Company & 2 Others [2013] eKLR***, the Court held that the consideration to bear in mind is that the right to information does not only imply entitlement by the citizen to information, but it also imposes a duty on the State with regard to provision of information. (See also ***Trusted Society of Human Rights Alliance & 3 Others v Judicial Service Commission [2016] eKLR***.

593. Although Article 35(3) imposes a duty on the State to publish and publicise any important information affecting the nation, the core of the Article is to provide access to specific information citizens may seek. To implement Article 35, Parliament enacted Access to Information Act, whose section 4(2) is clear that the "*citizen's right to access information is not affected by any reason the person may give for seeking access; or the public entity's belief as to what the person's reasons for seeking information are.*"

594. The Act also provides for the procedure for seeking to access information. Under section 8 of the Act, a citizen who wants to access information has to do so in writing, giving sufficient details and

particulars to enable the public officer know what information is being sought. The Act requires the public entity to give the information sought without delay and at no fee. Section 9 provides that a decision on the request for information should be made and communicated not later than twenty-one (21) days from the date of receipt of the request to access the information. The communication should include whether the public entity has the information and, if it will provide the information.

595. The Petitioner did not demonstrate that he had sought the information he wants the Court to order published. He has the right to seek information from the relevant state entities. The Act provides the procedure for doing so. If access was denied, he would have then approached the Court for a determination whether or not his right of access to information had been violated and, if so, seek appropriate orders. Having not done so, we are of the view that his quest for an order for disclosure through this Petition, is premature.

VII. ADEQUACY OF LEGAL FRAMEWORK FOR CONSTITUTIONAL AMENDMENTS THROUGH A POPULAR INITIATIVE

596. We now turn to the question whether the IEBC, the County Assemblies, the National Assembly and the Senate have the legal framework to proceed with their respective roles towards the achievement of the constitution amendment process. In tracing the history of Chapter 16, it is clear that the framers of the Constitution intended, as shown in the CKRC Report, that Parliament would enact a Referendum Act to govern the conduct of referenda in the country. It is not contested that there is no specific legislation dealing with the conduct of referendum under Chapter 16 of the Constitution. This lacuna is acknowledged by the BBI Steering Committee and the BBI Secretariat who, in their submissions, contended that in the absence of a framework to

guide this Court or the IEBC in carrying out a Referendum, the power and mandate to interpret the procedure to be used in conducting a referendum is granted to the Legislature under Article 94.

597. While we were informed that there is, in the legislative pipeline, a Referendum Bill, it is however argued, firstly, that there is no constitutional requirement for such legislation and secondly, that the Elections Act takes care of the lacuna. The answer to the first issue is very clear. The fact that the Constitution does not provide for its enactment does not necessarily mean that such legislation guiding the conduct of a referendum is unnecessary. The history of Article 257 which we traced in Part 4(II) of this Judgment clearly reveals an intention to have such legislation and by drafting the Referendum Bill, the legislature clearly appreciated the necessity for such legislation. Our reading of Articles 95(3) and 109(1) and (2) of the Constitution reveals that Parliament has the power to generate any Bill necessary for implementation of the Constitution and proper administration of the country. In this case the fact is that in order to orderly carry out the referendum process as contemplated under the Constitution, it is necessary that legislation be enacted along those lines.

598. It is our view that had such Legislation been enacted, probably some of the questions posed before us would have been unnecessary. The said Legislation would have dealt with the issues picked out by the Attorney General as forming the subject of the Petition before the Supreme Court in ***Reference No. 3 of 2020: In the Matter of an Application by the County Assemblies of Kericho and Nandi Counties for an Advisory Opinion Under Article 163(6) of the Constitution*** as consolidated with ***Reference No. 4 of 2020: In the Matter of an Application by the County Assemblies of Makueni County for an Advisory Opinion Under Article 163(6) of the Constitution.*** This includes the manner of

processing of a Constitution of Kenya Amendment Bill by the County Assemblies, including the number of times of reading of the Bill, the manner of public participation before approval, whether the County Assemblies can amend a Constitution of Kenya Amendment Bill to align with the contribution of by Members of the County Assembly as well as to incorporate relevant views received from the public during the process of public participation and whether such a Bill is to be passed by simple majority of all Members of County Assembly or only those present and whether its passage requires a special threshold.

599. Also to be addressed is the process envisaged by the Constitution in regard to Parliament for the consideration of a Constitution of Kenya Amendment Bill presented under Article 257 and specifically; if the procedure stipulated in Article 256(1) & (3) are the proper and correct procedures that Parliament must use in consideration and passage of the Constitution of Kenya Amendment Bill that relates to a popular initiative under Article 257 of the Constitution.

600. The Consolidated Petitions also seek a determination as regards Bills containing a mixture of matters/issues some requiring referendum under Article 255(1) and others not requiring referendum; the implication of the Amendment Bill partly succeeding in a referendum; the basis of a single Constitution of Kenya Amendment Bill proposing to amend numerous provisions of the Constitution; whether the Constitution permits only a single or multiplicity of questions to be presented for a vote at the referendum especially delineated on the basis of provisions sought to be amended; whether the provisions should be grouped on the basis of subject matter involved and other objectively articulable criteria that aligns with the constitutional amendment principle of "unity of content."

601. The issues raised hereinabove are substantial questions that need to be dealt with by national legislation comprehensively addressing the conduct of referenda.

602. As regards the provisions of the Elections Act we have considered Part V thereof which deals with referendum. It is, however, our view that the said part does not adequately cover the processes contemplated in a referendum process. It does not, for example, address the issue of public participation which is a constitutional imperative under Article 10 of the Constitution. It also fails to address the manner in which a referendum Bill is to be handled by the County Assemblies in cases where the Constitution mandates the County Assemblies to debate the Bill. This lacuna, in our view, cannot be addressed by mere reference to the provisions of the Elections Act since a referendum is a very important process in the history of a nation as was contemplated by the drafters of the Constitution. We associate ourselves with Nyamweya, J's opinion in ***Republic vs. County Assembly of Kirinyaga & Anor Ex-Parte Kenda Muriuki & Anor (2019) eKLR*** where the Learned Judge observed at paragraph 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 Independent Electoral and Boundaries Commission, 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 key constitutional and democratic requirements and thresholds in the said procedures. This law should also address the other*

procedural aspects demanded by Article 257 of the Constitution.

603. Though we have found that it is necessary to enact Referendum Act, we do not subscribe to the school of thought that absence of legislation implementing a provision of the Constitution, renders such a provision inoperative and unenforceable. On that finding we agree with the decision in ***Titus Alila & 2 others (Suing on their own Behalf and as the Registered Officials of the Sumawe Youth Group) vs. Attorney General & Another [2019] eKLR*** where it was held that the Constitution has set up a framework for holding a referendum.

604. However, while the Constitution has provided the framework, it requires legislative enactment for its orderly operationalisation as was originally contemplated by the framers of the Constitution.

605. We, therefore, respectfully, disagree that the legislature has already enacted statutes to address the issue of a referendum. As we have stated hereinabove the Elections Act does not meet the intention of the drafters of the Constitution when they recommended that Parliament enacts a Referendum Act to govern the conduct of referenda in the country. An examination of the history of Articles 255-257 of the Constitution as we have set out in this judgement leads us to the conclusion that the provisions of the Elections Act alluding to referendum is not a Referendum Act as historically contemplated. While we agree with the Learned Judge that section 49 of the Elections Act gives the IEBC the discretion to frame the question or questions to be determined through a referendum, it is our view that framing the questions or questions is not the same thing as framing a composite Bill touching on different parts of the Constitution as one question. As appreciated by the Learned Judge:

…it may be logical to have a referendum which addresses one specific issue, rather than an omnibus question. That

could result in the people of Kenya having a clear picture of the exact issue they were being called to vote upon. Such a process would avoid a situation in which a voter was compelled to throw out the baby with the bath water, simply because the omnibus issue contained one or more objectionable matters, which had been lumped together with good amendments.

606. It is, however, our view and we so hold that notwithstanding the absence of an enabling legislation as regards the conduct of referenda, such constitutional process may still be undertaken as long as the constitutional expectations, values, principles and objects are met. In so doing the process must be in strict compliance with, *inter alia*, Article 10 of the Constitution which prescribes the national values and principles of governance. Those values and principles bind all State organs, State officers, public officers and all persons whenever any of them applies or interprets the Constitution; enacts, applies or interprets any law; or makes or implements public policy decisions. We hold that the said principles must be infused at every stage of the process including the process of collection of signatures in support of a Popular Initiative. To purport to collect signatures geared towards a constitutional amendment before the proposal is adequately brought home to those whose signatures are sought by way of civic education and engagement must be frowned upon as being inimical to and a violation of Article 10 of the Constitution.

VIII. THE PROCEDURES FOR POPULAR INITIATIVE BILLS IN COUNTY ASSEMBLIES AND PARLIAMENT

607. That brings us to the question 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 Constitution of Kenya Amendment Bill so as to incorporate divergent views expressed through public

participation. As we have found hereinabove, Popular Initiative is an initiative of the ordinary citizenry as opposed to the law making bodies. It is an initiative meant to be invoked by the citizenry, inter alia, where the law making bodies are unable or for any other reason unwilling to act. To subject such an initiative to the vagaries of unpredictable party politics and political gerrymandering would defeat the purpose and objective for which the initiative was anchored in the Constitution. If such an initiative was to be reopened at the time of the legislative debate with the possibility of alteration of the promoted Bill, it would place the Bill at the whims of sectoral interests. The possibility that the Bill would be mutilated by the very people who are unwilling for whatever reason to accommodate the Bill cannot be far-fetched. That would clearly defeat the object of Article 257 of the Constitution. This Court is enjoined by Article 259(1)(a) in interpreting the Constitution to do so in a manner that promotes its purposes, values and principles. In this regard we associate ourselves with the position adopted in ***United Democratic Movement vs. Speaker of the National Assembly and Others (CCT89/17) [2017] ZACC 21; 2017 (8) BCLR 1061 (CC); 2017 (5) SA 300 (CC) (22 June 2017)*** where it opined that:

> *The Preamble to our Constitution is a characteristically terse but profound recordal of where we come from, what aspirations we espouse and how we seek to realise them. Our public representatives are thus required never to forget the role of this vision as both the vehicle and directional points desperately needed for the successful navigation of the way towards the fulfilment of their constitutional obligations. Context, purpose, our values as well as the vision or spirit of transitioning from division, exclusion and neglect to a transformed, united and inclusive nation, led by accountable and responsive public*

*office-bearers, must always guide us to the correct meaning of the provisions under consideration. Our entire constitutional enterprise would be best served by an approach to the provisions of our Constitution that recognises that they are inseparably interconnected. These provisions must thus be construed purposively and consistently with the entire Constitution***.**

608. A similar view was expressed in ***Ndyanabo vs. Attorney General [2001] 2 EA 485 at 493*** where the Tanzania Court of Appeal held that:

> *The Constitution…is a living instrument with a soul and consciousness of its own as reflected in the preamble and fundamental objectives and directive principles of state policy. Courts must therefore endeavour to avoid crippling it by construing it technically or in a narrow spirit. It must be construed in tune with the lofty purposes for which its makers framed it. So construed, the instrument becomes a solid foundation of democracy and the rule of law. A timorous and unimaginative exercise of judicial power of constitutional interpretation leaves the Constitution a stale and sterile document; (ii) the provisions touching fundamental rights have to be interpreted in a broad and liberal manner, thereby jealously protecting and developing the dimensions of those rights and ensuring that our people enjoy their rights, our young democracy not only functions but also grows, and the will and dominant aspirations of the people prevail. Restrictions on fundamental rights must be strictly construed.*

609. To find that by dint of Article 257(5) and (7) of the Constitution the term "consideration" and "approve" gives room to the legislative organs, whether at the national level or county level, to alter and or "improve" the contents of a Constitution of Kenya Amendment Bill

in the form of a Popular Initiative so as to incorporate divergent views purportedly gathered through public participation would defeat the purposes, values and principles of the Constitution particularly sovereignty of the people in Article 1(1) of the Constitution. We find that Parliament and the County Assemblies or any other State organ cannot under the guise of consideration and approval of the same hijack the process and take over such a Constitution of Kenya Amendment Bill since by purporting to do so, the Bill would lose its meaning in the context of a popular initiative amendment. By doing so, the legislative assemblies would have turned the Constitution of Kenya Amendment Bill fronted through a Popular Initiative into a Parliamentary Initiative in disguise and through the backdoor.

610. In our view the only purpose for consideration of a Constitution of Kenya Amendment Bill by the legislative organs is the proper understanding of the issues raised in the Bill as well as the views gathered from members of a public with a view to informing the members of the said Assemblies on the way to vote by either approving or rejecting the Bill as presented. In other words, the legislative assemblies must either swallow the bill or spit it wholly.

IX. THE FORM OF POPULAR INITIATIVE QUESTIONS FOR REFERENDUM

611. We have been asked to determine 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. In some jurisdictions with similar provisions not only is it permissible to subject referendum questions to a vote separately, but it is recommended that such questions be posed by way of multi-option referendums as opposed to binary referendums. In the latter only two options are available while in the former the options are more than two.

612. The Petitioner in ***Petition No. E416 of 2020*** cited the final ***Report of the Independent Commission on Referendums*** on this question. The Commission has studied this question in depth and released its final report in July, 2018. The Commission was established by the Constitution Unit – an independent, non-partisan research centre based in the School of Public Policy at University College London. In its final report at page 107, the Commission noted that though the majority of referendums worldwide present voters with only two options – usually one change option and one *status quo* option, this sometimes creates problems, particularly in circumstances where supporters of change disagree about what change they would like to see. According to the Report, imposing a binary choice on a non-binary debate makes it difficult for large numbers of voters to express their true preferences. For example, if a referendum is held on a proposed law, those voting "No" are expressing their objection to the law but have no way of expressing their reasons for this. Some "No" voters may think the law goes too far, others that it does not go far enough; voters on opposite ends of the spectrum may be counted as having expressed the same opinion. Therefore, there may be specific circumstances in which a binary question is unable to capture the views of the electorate. Secondly, binary choices can encourage polarisation. Campaigners are incentivised to present the two options as completely opposed to each other, encouraging voters to position themselves as "For" or "Against" with little room for nuance. This can increase the focus on political or even societal divisions, rather than on common goals or positions, and promote an adversarial rather than deliberative approach to debate. Drawing upon evidence from the Swedish multi-option referendum, it was suggested that a multi-option referendum debate may be less divisive than a binary referendum, as opinion will be less polarised. Furthermore, multi-option referendums conducted through preferential voting would offer voters a choice as to what they would be prepared to compromise on should their first choice not win

support. It was however noted that Multi-option referendums are therefore only advisable if they are justified by the underlying spread of opinion. They are most appropriate where a number of distinct, clearly defined options already exist and when opinion is clearly split between them.

613. We have set out the foregoing in order to show that not only is it possible and sensible that proposed amendments be submitted as separate and distinct referendum questions to the people in the referendum ballot paper and to be voted for or against separately but also on occasion, it may even be necessary to conduct Multi-option referendums.

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. For instance, the Constitution of Kenya Amendment Bill under consideration contains at least seventy-four (74) proposed amendments to the Constitution. 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.

For example, a voter might be persuaded that Clause 50 of the Constitution of Kenya Amendment Bill which proposes to amend Article 203 of the Constitution to increase the percentage of funds allocated to county governments from 15% to 35% ostensibly to strengthen devolution and ensure that county governments have adequate funds to carry out their operations merits passage. However, the same voter might be similarly persuaded that Clause 10 as read together with Clause 74 of the Constitution of Kenya Amendment Bill creating seventy additional constituencies and allocating them to specific counties while directing the IEBC on the apportionment criteria is unconstitutional and ill-advised. Such a voter will be forced to vote for an outcome she does not want; and the promoters would have succeeded in laundering Clauses 10 and 74 of the Constitution of Kenya Amendment Bill into passage notwithstanding their cumulative unconstitutionality.

616. In the preamble to the Constitution, the People expressed that in adopting, enacting and giving to themselves and to their future generations the Constitution, the People were, *inter alia*, exercising their sovereign and inalienable right to determine the form of governance of their country. That right belongs to each and every individual who ought to be given an opportunity to have a say in every question that is proposed to be voted upon.

617. We agree with the opinion expressed in ***Olum & Another vs. Attorney General (2) [1995-1998] 1 EA 258*** that the preamble of the Constitution should be given effect wherever it is fairly possible to do so without violating the meaning of the words used.

618. Our view on omnibus amendments is supported by section 49 of the Elections Act which provide as follows:

> *(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.

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.

X. THE IMPORT OF OMITTING THE INDEPENDENT CONSTITUTIONAL HEALTH SERVICES COMMISSION FROM THE CONSTITUTION AMENDMENT BILL

620. The Petitioner in ***Petition No. 397 of 2020*** is The Kenya National Union of Nurses. The main ground upon which the Petition is premised is that though the BBI Taskforce, the forerunner to the BBI Steering Committee, in its report released in October, 2019 fully captured the aspirations of the members of The Kenya National Union of Nurses submitted to the Taskforce, to the extent that it was extremely necessary to transfer the health sector personnel element

from the County Governments to an Independent Health Service Commission. According to the Nurses, the Taskforce recognised the need to transfer the health sector personnel element from the County Governments to an Independent Health Service Commission to enable sharing of the very limited health experts. It did not, from the Nurses' own contention, state that the Health Service Commission was to be anchored in the Constitution.

621. It was contended that in its report released in October, 2020, the BBI Steering Committee, in violation of the Nurses' legitimate expectation, purported to limit the proposed Health Service Commission's mandate to reviewing standards on the transfer of health workers, facilitating resolution of disputes between employers and health workers and accreditation of health institutions through a proposed bill to amend the Health Act as opposed to a Constitutional framework which would involve amending the Constitution of Kenya and specifically enlisting the Health Service Commission as an Independent Body outside the scope and powers of the Public Service Commission.

622. The question for determination in this issue is whether there was a legitimate expectation created by the Taskforce that the Nurses' submissions would be incorporated in the Constitution of Kenya Amendment Bill.

623. A legitimate expectation, according to **De Smith, Woolf & Jowell's *"Judicial Review of Administrative Action"*** 6thEdn. Sweet & Maxwell page 609:

> *…arises where a person responsible for taking a decision has induced in someone a reasonable expectation that he will receive or retain a benefit or advantage.*

624. In this case, *vide* BBI Taskforce had a mandate to outline the policy, administrative reform proposals, and implementation modalities for each identified challenge area; and conduct

consultations with citizens, the faith-based Sector, cultural leaders, the private sector and experts at both the county and national levels. The specific tasks of the Taskforce were to 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; to outline the policy, administrative reform proposals, and implementation modalities for each identified challenge area; and to conduct consultations with citizens, the faith based sector, cultural leaders, the private sector and experts at both the county and national levels.

625. It was upon the presentation of the said Report to the President on the 26th November, 2019 and its subsequent launch that the President appointed the BBI Steering Committee. . The Terms of Reference of the BBI Steering Committee has been reproduced elsewhere in this Judgment. It is the BBI Steering Committee that conceived the Constitution of Kenya Amendment Bill.

626. It is not contended before us that the Steering Committee did not consider the views of The Kenya National Union of Nurses. Rather, the contention is that, the BBI Steering Committee edited the contents of the BBI Taskforce Report by "downgrading the same" as being better dealt with by an Act of Parliament rather than by way of Constitutional amendment. The BBI Steering Committee states that this view was informed by the divergent views received from other stakeholders. Based on the material placed before us, we cannot determine the nature of the material that the BBI Steering Committee received. Our view, however, is that the mere fact that an entity is required to take into account public views does not necessarily mean that those views must find their way into the final decision. As was held in ***Republic vs. County Government of Kiambu Ex Parte Robert Gakuru & Another [2016]:***

> *…[T]he mere fact that particular views have not been incorporated in the enactment does not justify the Court in invalidating the enactment in question. As was appreciated by Lenaola, J in* ***Nairobi Metropolitan PSV Saccos Union Ltd & 25 Others v County of Nairobi Government & 3 Others Petition No. 486 of 2013****, and public participation is not the same as saying that public views must prevail.*

627. Accordingly, and as appreciated by the Court of Appeal in ***British American Tobacco Ltd vs. Cabinet Secretary for the Ministry of Health & 5 Others [2017] eKLR***:

> *Public participation does not necessarily mean that the views given must prevail. It is sufficient that the views are taken into consideration together with any other factors in deciding on the legislation to be enacted.*

628. In the present case, we have not been shown any evidence that either the BBI Taskforce or the BBI Steering Committee made representations to the Kenya National Union of Nurses and the nature of such representation. We cannot, therefore, conclude that the said representations, if any, were that those views would be incorporated in the Constitution of Kenya Amendment Bill.

629. In ***Communication Commission of Kenya vs. Royal Media Services Ltd & 5 Others [2014] eKLR*** the Supreme Court explained that in order for legitimate expectation to arise:

> *…there must be clear and unambiguous promise given by a public authority, the expectation must be clear, the representation must be one which it was competent and lawful for the decision maker to make and there cannot be a legitimate expectation against clear provisions of the law or the Constitution.*

630. Even if we were to assume that representations were made by the BBI Taskforce as alleged, and even if the BBI Steering Committee was a lawful entity (see Part 4(II)) of this Judgment, it has not been demonstrated that the BBI Steering Committee was bound by such representations and as was held in ***South Bucks District Council v Flanagan [2002] EWCA Civ. 690 [2002] WLR 2601 at [18]***:

> *…[U]nless the person making the representation has actual or ostensible authority to speak on behalf of the public body, there is no reason why the recipient of the representation should be allowed to hold the public body to the terms of the representation. He might subjectively have acquired the expectation, but it would not be a legitimate one, that is to say it would not be one to which he was entitled.*

631. It is further contended that The Kenya National Union of Nurses ought to have been afforded an opportunity of being heard before a final decision was arrived at. Had there been a representation made by the BBI Steering Committee that the views of The Kenya National Union of Nurses would be incorporated in the Constitution of Kenya Amendment Bill, The Kenya National Union of Nurses would have been justified in contending that it ought to have been afforded an opportunity of being heard. However, in light of our finding above, the claims based on unreasonableness and fair administrative action must similarly be disallowed. It follows that the relief for a declaration that the decision of BBI Steering Committee and the Honourable Attorney General to omit the Petitioner's Proposal for an Independent and Constitutional Health Service Commission from the October, 2020 Report of the BBI Steering offends Articles 10, 27(1), 27(2), 27(4), 27(5), 27(6), 27(8), 41(1)(2), 43(1)(2) and 47(1) of the Constitution cannot be granted and is disallowed.

632. Similarly, since we have found that a Constitution of Kenya Amendment Bill by way of Popular Initiative is the brain child of the promoters, the BBI Steering Committee and the Honourable Attorney General cannot be compelled to publish a fresh Constitution Amendment Bill inclusive of the Petitioner's Proposal. Consequently, the third relief in this petition cannot be granted in the manner sought. In light of our findings elsewhere in this judgement the fourth prayer is rendered moot.

XI. CONSTITUENCY APPORTIONMENT AND DELIMITATION QUESTIONS IN THE PROPOSED REFERENDUM

633. We now turn to the question of the constituency apportionment and delimitation issue in the Constitution of Kenya Amendment Bill. The Constitution of Kenya Amendment Bill at Clause 10 states in the margins: **"*Amendment of Article 89 of the Constitution*".** It then proceeds to state:

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

634. Section 74 of the Constitution of Kenya Amendment Bill reads in the margin: *'transition and consequential provisions.'* The section states *'the transitions and consequential provisions set out in the Second Schedule shall take effect on the date this Act comes into force'*

635. The Second Schedule of the Constitution of Kenya Amendment Bill is made under section 74. It provides for the Delimitation of the number of constituencies and states 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.

636. The Petitioners' case was that section 10 of the Constitution of Kenya Amendment Bill proposes to amend Article 89 (Delimitation of electoral units) to increase the number of constituencies from the current two hundred and ninety constituencies to three hundred and sixty constituencies. The object stated for the amendment

> *….is to facilitate the attainment of fair representation in The National Assembly and to actualize the aspiration of the equality of the vote principle especially in the currently underrepresented electoral areas.*

637. The Petitioners in ***Petition No. E.402 of 2020*** are aggrieved by these provisions. They sought the following reliefs:

> ***A.*** *DECLARATIONS THAT the impugned Second Schedule to the Constitution of Kenya (Amendment) Bill, 2020 is unconstitutional and/or illegal and/or irregular:*
>
> *i. in so far as it purports to set at 70 the number of constituencies.*
>
> *ii. in so far as it purports to predetermine the allocation of seventy constituencies.*
>
> *iii. in so far as it purports to direct the IEBC in the performance of the function of constituency delimitation.*
>
> iv. *in so far as it purports to have determined by delimitation the number of constituencies and apportionment within the counties.*
>
> v. *In so far as it purports to have determined the delimitation and apportionment of constituencies within the counties without public participation.*
>
> **B.** The Petitioners also sought the following Orders:

i. That the impugned Second schedule to the Constitution of Kenya (Amendment)Bill, 2020 in so far any exercise relating to delimitation and apportionment of constituency boundaries and indeed any electoral boundaries are concerned be expunged.

ii. That they be awarded costs and incidentals be provided for.

iii. *That the Court be pleased to grant any other /reliefs that may be just and expedient.*

638. From the Petition, responses and submissions two issues arose:

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?*

639. The main arguments by the Petitioners on these two issues are that the Second Schedule of the Constitution of Kenya Amendment Bill is proposing an unconstitutional amendment to the Constitution on various grounds:

i. That it amounts to the usurpation and deliberate undermining of the authority of the IEBC.

ii. That the IEBC is a chapter 15 Commission established under Article 88 of the Constitution with specific authority, mandates and functions, which are further extrapolated under the provisions of the IEBC Act no. 9 of 2011.

iii. That the provisions in the Second Schedule of the Constitution of Kenya Amendment Bill amount to a violation of Article 89 of the Constitution, by supplanting and

usurping the powers and roles assigned to IEBC by the same Constitution, and of Article 10, by taking away the right to public participation, which is an indispensable imperative for boundary delimitation.

iv. That the roles and functions of the IEBC, and the mechanisms for delimitation of the constituency boundaries are not amendable in the manner proposed in the Constitution of Kenya Amendment Bill.

640. The Respondents opposed ***Petition No. E402 of 2020*** on grounds of injusticiability for want of ripeness, on the political question doctrine and on the principle of separation of powers arguing that at the time this petition was filed the Constitution of Kenya Amendment Bill was pending before the legislature and there was no real dispute before the Court. Secondly, that the people, in the exercise of their sovereign power can provide for additional constituencies and further, provide how the additional constituencies are to be allocated. In addition that the people can amend the Constitution to change the structure functions and mandate of the IEBC. On these grounds the Respondents urged the Court to exercise both constitutional avoidance and judicial restraint, and decline to exercise jurisdiction.

641. On public participation the Respondent's position is that public participation in respect of the proposed constitutional amendment can only be properly considered as a continuum starting from the publication of the proposals to the time of the passage of the amendments after a referendum, and hence the Petitioners claims on this issues are premature.

642. To answer the questions presented to us as framed above, we have no choice but to look for the answers from the historical backdrop of delimitation of constituencies. As we described above our canons of constitutional interpretation require us to do so.

643. We know from our soul as a nation that the constituency as a unit of representation is at the heart of our electoral process. It goes to the root of the exercise of our democratic right to representation. It is an aspect of the enjoyment of our social and economic rights. This is because we see it as yet another unit for the 'distribution of development', or 'taking development to the people'. This is further evidenced by the fact that we have put in place the Constituencies Development Fund Act, 2013, which at section 4(1) establishes the Fund in the following terms:

> *There is established a fund to be known as the Constituencies Development Fund which shall—*
>
> *(a) be a national fund consisting of moneys of an amount of not less than 2.5% (two and half per centum) of all the national government ordinary revenue collected in every financial year.*

644. As outlined in Part 4(I) of this Judgment, the 2007 General Elections heralded a dark chapter in the history of our nation. It led us as a Nation into deep introspection towards settling the issues that had taken us to the "brink of the precipice."[90]

645. As discussed earlier, as part of our "never again" resolve as a Nation, two Commissions were appointed to process our national trauma into fruitful governance structures. It was in this regard that the Independent Review Commission on the General Elections (IREC) headed by South African Judge Johann Kriegler was appointed on 13th March 2008 to inquire into all the aspects of the General Elections held in Kenya on 27th December, 2007. The Kriegler Report concluded that there existed *gross disparities in the voting populations and gross disparity in the sizes of Kenya's constituencies."*

646. Earlier, on 28th February, 2008 President Mwai Kibaki for Government/Party of National Unity and Hon. Raila Odinga for Orange Democratic Movement, acting together for Kenya signed the

Agreement on the Principles of Partnership of the Coalition Government. To address the long-term issues towards achieving a prosperous Kenya for all, the Coalition Government committed itself to the Kenya Vision 2030 in which under the political pillar, the country's political governance system was to be transformed, including the rule of law, and electoral and political processes. The vision was to *cultivate genuinely competitive and issue-based politics whose strategic themes include introducing laws and regulations covering political parties; enhancing the legal and regulatory framework covering the electoral process; and conducting civic education programmes to widen knowledge and participation among citizens to achieve an informed and active citizenry.*

647. On 12th May 2009 The Interim Independent Boundaries Review Commission (IIBRC) was appointed to exercise the powers conferred by Section 41B(2) of the former Constitution. The IIBRC presented its Report on *Delimitation of Constituencies and Recommendation on Local Authority Electoral Units and Administrative Boundaries for Districts and Other Units*, dated 27th November, 2010 to the then President Mwai Kibaki, Prime Minister Hon. Raila Odinga and Speaker of the National Assembly Hon. Kenneth Marende. The IIBRC Report noted that on the question of delimitation of electoral boundaries in Kenya, the Kriegler Report had pointed out the existence of gross disparities in the voting populations of Kenya's constituencies. The IIBRC Report had noted that this state of affairs breached the fundamental equality principle of democracy clearly articulated and enshrined in Section 42(3) of the then Constitution of Kenya, namely one person, one vote. It was further noted that this long-standing discrimination in itself impaired the integrity of the electoral process, mainly, but not only, in relation to Parliamentary elections. To that end the Commission identified as its underlying task, the "*correction of 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."

648. More specifically the IIBRC was to undertake the functions as provided for under Section 41C of the former Constitution. These included:

> *i. Making 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;*
>
> *ii. Making recommendations to Parliament on administrative boundaries, including the fixing, reviewing and variation of boundaries of districts and other units; and*
>
> iii. *The performance of such other functions as may be prescribed by Parliament.*

649. The IIBRC also reported that it recognised from the beginning of its work that the process of delimitation of boundaries for electoral and administrative units "*was people driven and required close consultations with the public including the key stakeholders."*

650. To enable it effectively carry out its work, the IIBRC identified five internationally accepted principles for delimitation of electoral units which it sought to uphold throughout the delivery of its mandate, in as far as possible within Kenya's circumstances, and, especially the Constitutional parameters for delimitation of electoral boundaries. These principles were listed in the IIBRC Report as:

> i. *community of interest (also known as representativeness);*
>
> ii. *equality of votes (also known as equality of voting strength);*
>
> iii. *independent or impartial boundary delimitation authority (such as the IIBRC as established in Kenya's*

circumstances);

iv. *transparency (implying that the delimitation process should be as transparent as possible, with the methodology and guidelines clearly established and publicized in advance); and*

v. *Non-discrimination (indicating that electoral boundaries should not be drawn in a manner that discriminates against any particular group).*

651. It is noteworthy that these principles are now enshrined in the Constitution of Kenya 2010 at Article 89 where it provides the criteria for the delimitation of electoral areas.

652. With the promulgation of the Constitution of Kenya, 2010, the IIRBC was mandated by the Sixth Schedule at section 27 to continue functioning to carry out the first constituency boundaries review. In doing so, the IIBRC was required to determine the boundaries of constituencies and wards using the criteria set in Article 89 of the Constitution of Kenya, 2010.

653. However, due to legal challenges, including the case of ***John Kimanthi Maingi v Andrew Ligale & 4 Others [2010] eKLR*** where the High Court ruled that the IIBRC did not fully discharge its mandate, the IIBRC could not gazette its Report. However, the IIBRC Report was adopted by Parliament which led to the enactment of the IEBC Act in July 2011.

654. The IEBC would undertake the finalization of the first electoral boundaries review, exercising the powers conferred by Articles 88 and 89 of the Constitution of Kenya, 2010 and the IEBC Act.

655. The IEBC was mandated to '*resolve all issues arising from the First Review relating to the delimitation of boundaries of constituencies and wards'.* These included issues of new constituencies falling outside the population quota as provided for by Article 89(6) of the

Constitution but at the same time ensuring that such a process took into account the provisions of Article 89(7) (b) of the Constitution.

656. The IEBC delimited the 290 constituencies that are now found at Article 89(1) of the Constitution. These are the constituencies that have determined the number of elected members of the National Assembly as per Article 97(1)(a) of the Constitution.

657. With this history sharply in focus, we will now turn back to the Constitution of Kenya Amendment Bill. It was argued by the Respondents that the Constitution of Kenya provides a very clear procedure for constitutional amendment under Article 257. They also argue that the Constitution of Kenya Amendment Bill met the requirements of this provision. The Respondents argued further that at the time of filing the ***Petition No. E402 of 2020***, the Constitution of Kenya Amendment Bill was pending before the County Assemblies for consideration hence there was no real issue for determination before this Court. For this reason, the Respondents urged the Court to exercise judicial restraint.

658. This is not the first time that a bill under consideration before the legislative bodies is challenged before the Court for want of constitutionality. Suffice it to say here that this Court in interpreting the Constitution under its authority donated by Article 165 of the Constitution, is mandated to give relief to both actual violations of the Constitution as well as threatened violations. Our decisional law has consistently held that the correct reading of Articles 22, 165(3)(d) and 258 of the Constitution yield the conclusion that "*a party does not have to wait until a right or fundamental freedom has been violated, or for a violation of the Constitution to occur, before approaching the Court. He has a right to do so if there is a threat of violation or contravention of the Constitution.*" This was the holding in ***Coalition for Reform and Democracy (CORD) & 2 Others v Republic of Kenya & 10 Others [2015] eKLR.***

659. In that case, the Court cited with approval the ***Commission for the Implementation of the Constitution Case (Supra)*** and added the following:

> *113. We take this view because it cannot have been in vain that the drafters of the Constitution added "threat" to a right or fundamental freedom and "threatened ……. contravention" as one of the conditions entitling a person to approach the High Court for relief under Article 165(3) (b) and (d) (i). A "threat" has been defined in Black's Dictionary, 9th Edition as; "an indication of an approaching menace e.g. threat of bankruptcy; a Person or a thing that might cause harm" (emphasis added). The same dictionary defines "threat" as "a communicated intent to inflict harm or loss to another…"*
>
> *114. The use of the words "indication", "approaching", "might" and "communicated intent" all go to show, in the context of Articles 22, 165(3) (d) and 258, that for relief to be granted, there must not be actual violation of either a fundamental right or of the Constitution but that indications of such violations are apparent.*
>
> *115. What is the test to apply when a Court is confronted with alleged threats of violations aforesaid" In our view, each case must be looked at in its unique circumstances, and a Court ought to differentiate between academic, theoretical claims and paranoid fears with real threat of constitutional violations. In that regard, Lenaola J. in Commission for the Implementation of the Constitution vs The National Assembly & 2 Others [2013] eKLR differentiated between hypothetical issues framed for determination in that case and the power of the High Court to intervene before an Act of Parliament has actually been enacted and in circumstances such as are before us where*

the impugned Act has been enacted and has come into force. He stated in that regard that:

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

116. We agree with the Learned Judge and would only add that clear and unambiguous threats such as to the design and architecture of the Constitution are what a party seeking relief must prove before the High Court can intervene.

660. In ***Petition No. E.282 of 2020***, Mrima J. was confronted with a Preliminary Objection raising substantially the same objections as in the present Petition (***Petition No. E.402 of 2020***. In a ruling dated 30th November, 2020, the Learned Judge cited the above case, ***Coalition for Reform and Democracy (CORD)(Supra),*** in holding that the questions presented in the Petition are justiciable and ripe for resolution by the Court. We have no hesitation in extending that holding to the other seven Petitions in these Consolidated Petitions. For that reason, we decline the invitation to exercise "judicial restraint" or to apply the doctrine of "constitutional avoidance" and proceed to consider the merits of the questions presented in the Consolidated Petitions.

661. Neither does the doctrine of separation of powers bar this Court from exercising jurisdiction under Article 165(3)(d)(ii) in the circumstances of this case. We agree with what said in ***Republic v Independent Electoral & Boundaries Commission and Others ex-parte Cllr Elliot Lidubwi Kihusa and Others Nairobi HC KJR Misc Applic. No. 94 of 2012*** that;

The primary duty of Courts is to the Constitution and the law, which they must apply impartially and without fear, favour or prejudice. The Constitution requires the state to

respect, protect, promote and fulfill the rights in the Bill of Rights. Where state policy is challenged as inconsistent with the constitution, Courts have to consider whether in formulating and implementing such policy the state has given effect to its constitutional obligations. If it should hold in any given case that the state has failed to do so, it is obliged by the constitution to say so. In so far as [that actions] constitutes an intrusion into the domain of the executive that is an intrusion mandated by the constitution itself.

662. The Honourable Attorney General argued further that the Court ought to decline to exercise jurisdiction because the Petitioners had not exhausted the existing alternative avenues of redress. In the view of the Honourable Attorney General, the fact that the Petitioners could persuade both houses and the Kenyan people to reject the Constitution of Kenya Amendment Bill is an existing alternative mechanism which they ought to pursue first before approaching the Court.

663. We respectfully disagree. This argument misapprehends the doctrine of exhaustion. It is true that our decisional law has consistently held that where a "*dispute resolution mechanism exists outside Courts, the same be exhausted before the jurisdiction of the Courts is invoked. Courts ought to be fora of last resort and not the first port of call the moment a storm brews."* This was so stated by the Court of Appeal in ***Geoffrey Muthinja Kabiru & 2 Others – Vs – Samuel Munga Henry & 1756 Others [2015] eKLR.*** What is clear from that enunciation by the Court of Appeal is that the doctrine refers to "dispute resolution mechanisms". A party is only debarred from approaching the Court where a statute or policy has created a mechanism for determining a dispute related to the subject matter in question.

664. In the present case, however, the Honourable Attorney General

has not made the argument that any alternative dispute resolution mechanism has been created where the Petitioners can plead their case. Instead, the Honourable Attorney General implies that the Petitioners should take the political route to persuade Members of the County Assembly, Members of Parliament and the Kenyan people at large in the event the questions go for a referendum. The Honourable Attorney General implies that this is the "existing alternative dispute resolution mechanism." However, this is not a dispute resolution mechanism within the meaning of the doctrine of exhaustion. For the doctrine to apply there must exist a specific mechanism for resolution of declared disputes or controversy by a body specifically created or given the mandate to deal with such disputes or controversy. It is not envisaged that the political process can serve as such an alternative dispute resolution mechanism for purposes of the exhaustion doctrine. That forum is not capable of resolving any declared disputes or controversies. The political fora the Honourable Attorney General referred to are certainly available to all citizens to attempt to influence the political processes but not to resolve any specific disputes or alleged violations of rights by specific individuals or alleged contraventions of the Constitution respecting any intended course of action by the Political branches.

665. We will now turn to the two substantive questions presented on the issue of apportionment and delimitation of constituencies as it relates to the Constitution of Kenya Amendment Bill.

666. The first issue is whether it is lawful for a Constitution of Kenya Amendment Bill to set a specific number of constituencies under Article 89(1) of the Constitution.

667. Article 89 provides as follows:

> *(a) 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).*

b) *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.*

c) *The Commission shall review the number, names and boundaries of wards periodically.*

d) *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) It provides for the right to public participation: 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.

668. The first question the ***Petitioner in E402 of 2020*** asks is whether a Constitution of Kenya Amendment Bill can increase or decrease the number of constituencies specifically created by Article 89(1) of the Constitution. Differently put, the question is whether Article 89(1) of the Constitution is part of the Basic Structure, and whether it is an unamendable clause of the Constitution given our definitions of the two concepts in Part 4(I) of this Judgment.

669. We think this is a question that can be easily answered given the text of the Constitution and the history of Article 89 of the Constitution given above. Both the text and the history of the Article makes it clear that Kenyans were very particular about the criteria of the delimitation and apportionment of constituencies. This was because the apportionment and distribution of electoral units has a bearing on both the right to representation (which is a political right) as well as the distribution of national economic resources (which is an economic right). The reason for this, as outlined above, is that a substantial amount of national resources distributed to the regions by the national government is done at the constituency level.

670. Given this history and the text of the Constitution, we can easily conclude that whereas Kenyans were particular 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. Utilizing the Canons of constitutional interpretation we have outlined in this

Judgment, we conclude that Article 89(1) of the Constitution – which provides for the exact number of constituencies – while being part of the Basic Structure of the Constitution, is not an eternity clause: it can be amended by duly following and perfecting the amendment procedures outlined in Articles 255 to 257 of the Constitution.

671. This brings us to the second substantive question asked by the Petitioner in ***Petition E402 of 2020.*** It is the following: *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?*

672. Section 1(1) of the Second Schedule of the Constitution of Kenya Amendment Bill states as follows:

> *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 8 (d) and 87(7).*

673. Section 1(2) of the Second Schedule of the Constitution of Kenya Amendment Bill proceeds 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; Nairobi City Twelve.*

674. Section 1(3) of the Second Schedule of the Constitution of Kenya Amendment Bill provides:

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****. (emphasis ours)*

675. These provisions do *four* things:

a) They create 70 additional constituencies by dint of the Constitution of Kenya Amendment Bill;

b) They direct the IEBC to determine boundaries, and to delimit the seventy created constituencies to specific counties;

c) They stipulate the period within which the IEBC must determine and delimit the boundaries of the seventy created constituencies to be six months from the commencement date of the intended Act; and

d) They stipulate to the IEBC the criteria to use in distributing and delimiting the newly created constituencies.

676. These actions must be examined in light of Articles 88, 89 and 249 of the Constitution, the Basic Structure Doctrine, and the history outlined above.

677. The IEBC is established by Article 88 of the Constitution with very specific roles. Among the specified roles is the delimitation of constituencies and wards (See Article 88(4)(c) of the Constitution). This specific role is further elaborated in Article 89 of the Constitution which we have reproduced above. The delimitation

procedure is further set out and elaborated at section 36 of the IEBC Act.

678. Section 36 of the IEBC Act reads as follows:

> *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—*
>
> *(d) review of the names and boundaries of constituencies;*
>
> *(e) review of the number, names and boundaries of wards;*
>
> *(f)re-distribution of wards affected by any changes in the boundaries of constituencies; and*
>
> *(g) ensuring that the number of inhabitants in each constituency and ward is as nearly as possible, equal to the population quota (defined as 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) 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.

679. On the other hand, Article 249 sets out the objects, authority and funding of the IEBC as an independent Commission. The IEBC is obligated 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.

680. Article 249(2), then, provides that the IEBC, as an independent commission, is:

a) subject only to this Constitution and the law; and

b) [is] independent and not subject to direction or control by

any person or authority.

681. Looking at the provisions of the Constitution and statutory law reproduced above as well as the history we outlined at the beginning of this part of the Judgment, we can, at the outset, state authoritatively that the impugned sections of the Constitution of Kenya Amendment Bill are unlawful and unconstitutional for the following reasons:

a) *First*, they impermissibly direct the IEBC on the execution of its constitutional functions;

b) *Second*, they purport to set a criteria for the delimitation and distribution of constituencies which is at variance with that created by the Constitution at Article 89(5);

c) *Third*, they ignore a key due process constitutional consideration in delimiting and distributing constituencies namely the public participation requirement;

d) *Fourth*, they impose timelines for the delimitation exercise which are at variance with those in the Constitution;

e) *Fifth*, they impermissibly take away the rights of individuals who are aggrieved by the delimitation decisions of the IEBC to seek judicial review of those decisions; and

f) *Sixth,* by tucking 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); 89(5); 89(6); 89(7); 89(10); and 89(12) of the Constitution, the new provisions have the effect of extra-textually amending or suspending the intended impacts of Article 89 of the Constitution which forms part of the Basic

Structure of the Constitution and are, therefore, unamendable.

682. We will briefly look at each of these reasons in turn.

683. *First*, as the text of the Constitution makes clear, the IEBC is an independent Commission. It is required to act independently and not to be subjected to the control or direction of any person or authority. Yet, the provisions in the Constitution of Kenya Amendment Bill on delimitation of constituencies explicitly direct IEBC on how to perform its functions. It directs the IEBC on what to do, how to do it, and when to do it with regard to the newly created constituencies. It requires no belaboured analysis to conclude that this an explicit subversion of the constitutional edict that IEBC shall not be directed on how to perform its functions.

684. *Second*, the Constitution of Kenya Amendment Bill not only unlawfully takes over the functions of the IEBC; but it also allocates constituencies in violation of the constitutional principles set out in Article 89 which IEBC is obliged to adhere to in executing its mandate.

685. The Constitution at Article 89(5); 89(6); and 89(7) clearly sets out that it is the IEBC to conduct the process of delimitation, and also sets the criteria to be used. We have reproduced the procedure and criteria that the IEBC is obligated to use above. Yet, the Constitution of Kenya Amendment Bill directs the IEBC to determine the boundaries of the additional constituencies "by using the criteria provided for in Articles 81(d) and 87(7)". This is section 1(1) of the Second Schedule to the Constitution of Kenya Amendment Bill.

686. On the other hand, section 1(3) of the Second Schedule provides that the IEBC is to "*prioritise the constituencies underrepresented in the National Assembly on the basis of population quota*" and to make delimitation decisions in "*a manner that ensures the number of inhabitants in a constituency is as nearly as possible to the population*

quota."

687. Article 81(d) of the Constitution provides that the electoral system shall comply with the principle that "universal suffrage based on the aspirations for fair representation and equality of vote." Article 87 of the Constitution is about electoral disputes and does not contain sub-article 7.

688. What emerges from the above is that the Constitution of Kenya Amendment Bill:

a) Sets its own criterion on delimitation by citing Article 81(d). This is a criterion unknown as a delimitation consideration in the Constitution;

b) Refers to a non-existent criterion in the form of Article 87(7) of the Constitution;

c) Reduces all the considerations listed in Article 89(5); (6) and (7) to a single one, namely, the population quota as the basis for delimitation decisions with respect to the seventy additional constituencies.

689. By doing these three things, the Constitution of Kenya Amendment Bill seeks to short-circuit Article 89 by apportioning the newly created constituencies to specific counties, and then directing the IEBC to, in essence, delimit the boundaries based on a single criterion. This is as contra-distinguished to the several criteria specifically set out in the Constitution at Article 89(5); (6); and (7). This renders the proposed amendments in this regard irregular, illegal and unconstitutional.

690. 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. These sections provide as follows:

> *36. (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*

692. These provisions are quite clear on the requirement of public participation and stakeholder engagement in the delimitation exercise. Indeed, they require public participation and stakeholder engagement not only during the process of delimitation itself but even after the IEBC has published its preliminary report and before publishing the final one. This robust requirement of public participation and stakeholder engagement only accentuates the requirements in Article 10 of the Constitution.

693. Despite these clear requirements in the Constitution and statutory law, the Constitution of Kenya Amendment Bill ignores the requirement of public participation and stakeholder engagement. This is in conflict with Article 89(7); the national value and principles in Article 10(2); and section 36 of the IEBC Act. This, too, renders the Constitution of Kenya Amendment Bill unconstitutional.

694. The fourth reason the Constitution of Kenya Amendment Bill runs afoul of the Constitution is that it stipulates a timeline for the delimitation which is in conflict with the one created in the Constitution. Section 1(1) requires the IEBC to determine the boundaries of the additional 70 constituencies within 6 months of the commencement of the intended Act. However, Article 89(2) gives the

timelines for the review of boundaries. Among other things it requires the IEBC to review boundaries of constituencies at intervals of not less than 8 or more than 12 years but Article 89(4) requires IEBC to complete the review of boundaries not more than twelve months to the next General Elections if the new boundaries would take effect for purposes of those General Elections.

695. The present Constitution of Kenya Amendment Bill, however, at section 1(6) of the Second Schedule purports to suspend the operation of Article 89(4) of the Constitution by providing that "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 the Intended Act. What the explicit terms of these provisions propose to do is to permit the IEBC to begin and complete the delimitation exercise outside the timelines expressly provided in the Constitution. It only requires the IEBC to do the review within 6 months from the date of commencement of the Act – even if those six months come within the 12 months of the General Elections. These provisions are plainly unconstitutional because they impermissibly purport to suspend the operation of a constitutional provision which, given the history we have provided above, and the 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.

696. It is for this reason that we have also concluded that the procedure and process that the Promoters of the Constitution of Kenya Amendment Bill have used to create, apportion, and delimit the proposed seventy new constituencies amounts to an impermissible extra-textual amendment to the Constitution by stealth. We say it is an attempt to amend the Constitution by stealth because it has the effect of suspending the operation of Article 89 without textually amending it. The implications of such a scheme if

allowed are at least two-fold. First, it creates a constitutional loophole through which the Promoters can amend the Basic Structure of the Constitution without triggering the Primary Constituent Power. Second, such a scheme creates a "constitutional hatch" through which future Promoters of constitutional amendments can sneak in fundamental changes to the governing charter of the nation for ephemeral political convenience and without following the due process of the law.

697. Lastly, the provisions of the Constitution of Kenya Amendment Bill take away, in violation of the Constitution, the rights of individuals who may be aggrieved by the delimitation decisions of the IEBC to seek judicial review of those decisions. That right of judicial review is enshrined in Article 89(10) of the Constitution. The provisions of the Constitution of Kenya Amendment Bill purport to take away this constitutionally-granted right without a substitute. Again, in essence, what the Promoters of the Constitution of Kenya Amendment Bill purport to do is to suspend the operation of Article 89(10) of the Constitution by stealth.

698. The value of Article 89(10) of the Constitution can be seen at work in the decision in ***John Kimathi Maingi v Andrew Ligale & 4 others [2010] eKLR***, where the first attempt at delimitation under this Constitution, done by the IIRBC was declared unconstitutional after a Court challenge.

XII. READINESS AND PROPRIETY OF IEBC TO CONDUCT THE PROPOSED REFERENDUM

a. QUORUM OF THE IEBC

699. The Petitioner in ***Petition No. E416 of 2020*** argued that the IEBC does not have quorum to conduct business of policy nature, including verifying signatures and holding a referendum. The

Respondents, however, contended that the IEBC is properly constituted to conduct its business. In their view, verification of signatures and the conduct of elections or referenda is not a policy decision requiring quorum, but a constitutional mandate under Article 88(4) of the Constitution. They also argued that the issue of composition and quorum of the IEBC was decided in ***Isaiah Biwott Kangwony v Independent Electoral & Boundaries Commission & Another*** **[2018] eKLR** and is, therefore, *res judicata***.**

700. Both the Petitioner and the Respondents were in agreement, that the IEBC is not fully constituted, and that indeed there are vacancies that are yet to be filled. The point of divergence, however, was on whether there was quorum for it 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 threshold of three commissioners and, therefore, it can conduct its business.

701. Article 250(1) of the Constitution provides for composition of Chapter Fifteen Commissions. Each commission should have at least three and not more than nine commissioners.

702. Section 5(1) of the IEBC Act provides that the IEBC shall consist of the chairperson and six other commissioners. Section 8 provides that the conduct of the IEBC's business should be in accordance with the Second Schedule to the Act. Paragraph 5 of the Second Schedule, which is material to this issue, provides that the quorum for the conduct of business at a meeting of the IEBC is at least five members.

703. 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 Kangwony Case (Supra)***. 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.*

704. We have already defined the doctrine of *Res judicata* and its application in Kenya earlier in this Judgment. (See Part 4(III) of this Judgment.)

705. As earlier discussed, to successfully raise the defence of *res judicata*, the issue(s) in dispute in the previous litigation/ suit must have been between the same parties as those in the present suit; must be directly or substantially in issue as was the case before and must have been conclusively determined by a Court of competent jurisdiction.

706. We have read the decision of the Court in the ***Isaiah Biwott Kangwony Case*** (***Supra***). In that decision, the Petitioner sought 4 principal orders:

a) a declaration that the composition of the IEBC was illegal and unconstitutional as a result of the resignation of four of its commissioners and, therefore, it lacked quorum to conduct or carry out its business;

b) a declaration that the IEBC's composition was illegal and unconstitutional as a result of the resignation of its four Commissioners and, therefore, it could not hold or supervise any elections or By-elections that were due for 17th August, 2018;

c) a declaration that the IEBC's composition was illegal and unconstitutional and as a result resignation of four of its

commissioners and therefore any purported By-elections it was to hold would be null and void, and

d) an order to the effect that all administrative actions taken by the IEBC with regard to the preparations for the intended By-elections were illegal, unlawful and null and void and contrary to the provisions of Article 47 of the Constitution.

707. The Court (Okwany, J.), considered the Petition but was not persuaded that the IEBC's composition was unconstitutional and illegal.

708. The challenge in that Petition was on two fronts: failure to comply with the two-third gender principle, and quorum based on the number of commissioners. On the first issue of gender, the Learned Judge concluded that prior to the resignations, the IEBC's composition complied with the requirement of two-third gender principle.

709. The 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 concluded that the IEBC could conduct By-elections because this did not require quorum to decide.

710. 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*.

711. We have considered the arguments by parties and read the decision relied in ***Isaiah Biwott Kangwony*** (***supra***). The prayers that were sought in that decision were declarations that the composition of the IEBC was illegal and unconstitutional following the reported resignation of majority of the commissioners. The Court

did not agree that the Petitioners had proved that there were resignations or vacancies. The Court also found that resignations, if any, only reduced the number of commissioners so as to affect quorum in the event the IEBC was conducting business on policy matters. In the Court's view, conducting By-elections was not affected by lack of quorum since the Court formed the view that conducting by-elections did not involve the making of policy decisions.

712. In the present Petition, the Petitioner's concern is that the IEBC is not properly constituted for purposes of verifying signatures and does not have quorum to conduct a referendum. He is not challenging the constitutionality or legality of the existence of the IEBC as a commission under Article 250(1) of the Constitution. In that regard, we are of the considered view, that the issue before this Court was not conclusively determined in the ***Isaiah Biwott Kangwony Case,*** to render the question of the IEBC's quorum as raised in this Petition, *res judicata.*

713. We begin by noting that while the holding in the ***Isaiah Biwott Kangwony Case*** is that IEBC only needs the quorum required under Paragraph 5 of the Second Schedule to the IEBC Act in order to make policy decisions, that section does not contain any such qualification. The paragraph reads as follows:

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

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

statute requires the IEBC to have the minimum of five commissioners in order to conduct any business. Period.

715. In any event, verifying of signatures and determining whether the promoters of the Constitution of Kenya Amendment Bill met constitutional requirements under Article 257(4), is a threshold question and, therefore, would be, by any definition of the word, a policy issue that would require the IEBC, as a commission, to determine. Such a serious constitutional question, being a policy issue, could not be determined by a committee of the Commission. Only where the IEBC had quorum could it make such a fundamental determination. Similarly, verification of signatures and determination of whether or not they met constitutional requirements was also a question to be determined by the IEBC as a business of the commission, with the necessary quorum and after full and critical considerations. Hence, even under the holding in the ***Isaiah Biwott Kangwony Case***, the verification of signatures and the determination of whether the constitutional threshold had been met for purposes of Article 257(4) of the Constitution, are definitionally policy considerations which required quorum under paragraph 5 of the Second Schedule to the IEBC Act.

716. We say so because one of the IEBC's key mandates under Article 88(4), is to conduct referenda. This mandate is also emphasized in section 4 of the IEBC Act. Section 8 of the Act places composition of the IEBC at seven: the chairperson and six other commissioners. On the other hand, Paragraph 5 of the Second Schedule to the Act, puts the quorum at five commissioners.

717. 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.

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.

719. Taking into account how serious and consequential amendments to the Constitution are, all decisions connected therewith including the verification of signatures in support of a Popular Initiative and the determination whether or not the constitutional threshold under Article 257(4) has been met, we conclude that these decisions could only be taken by a quorate IEBC. We also conclude that the IEBC Act categorically places the quorum of IEBC for purposes of transacting business at five Commissioners. Finally, we conclude that the IEBC did not have this quorum at the time it made the consequential decisions related to the Constitution of Kenya Amendment Bill. It, therefore, follows that all the decisions so made by the IEBC in relation to the proposed constitutional amendment and in particular, the Constitution of Kenya Amendment Bill were invalid, null and void for lack of quorum.

a. LEGAL/REGULATORY FRAMEWORK FOR THE VERIFICATION OF VOTER SUPPORT FOR A POPULAR INITIATIVE

720. The main issue raised in ***Petition No. E02 of 2021*** is whether there is a legal/regulatory Framework to regulate the verification and

other processes required under Article 257(4) and (5) of the Constitution. A related question is whether if such a legal/regulatory framework is required one in fact exists. Finally, the Petition raises the issue whether the IEBC has the required infrastructure for purposes of conducting the verification mandate imposed on it by Article 257(4) of the Constitution.

721. The Respondents have urged the Court to find that the issues in this petition as framed above were settled in two earlier cases: ***Titus Alila Case (Supra)*** and ***Ex-Parte Kenda Muriuki Case***.

722. We begin by considering the holdings in the two cases and how they relate to the main issues presented in ***Petition No. E02 of 2021***. In the ***Titus Alila Case (Supra),*** the main issue was whether there was a legislative framework for the conduct of referendum by the IEBC. The Petitioners in that case had taken the view that there were numerous laws and regulations on how elections are to be carried out, whilst there existed no substantive laws or regulations on referendums. The Petitioners wanted orders directing Parliament and IEBC to initiate the process to enact legislation to give a framework for the holding of constitutional referendums, and, for an order stopping the IEBC from holding a constitutional referendum until legislation was put in place for the conduct of referendum.

724. The Learned Judge held that the Constitution and the existing statutes were sufficient legal framework for purposes of conducting referendums. We have discussed this case earlier in this Judgment. For purposes of the issues at hand, suffice it to say that the ***Titus Alila Case*** dealt with the broader questions of whether a specific legislation to deal with the conduct of referendums was needed, and if so, if such legislation was in place. That is not the issue raised in this Petition. The narrow issue raised in this Petition, as framed above, is whether there exists a legislative or regulatory framework to regulate or guide the verification of signatures under Article 257(4)

and (5) of the Constitution. This is a distinct issue that requires our judicial determination.

725. In ***Ex-Parte Kenda Muriuki Case (Supra),*** the main issue was whether Article 257 had sufficiently prescribed the procedure to be followed by County Assemblies in their consideration of Bills to amend the Constitution. The question arising was whether a legislative framework was needed to regulate procedures of the County Assemblies in considering Popular Initiative bills to amend the Constitution under Article 257 of the Constitution.

726. In her decision, Nyamweya J. held that the legislative bodies had the mandate to determine their own procedures while considering Popular Initiative Bills to amend the Constitution under Article 257 of the Constitution. The Learned Judge, however, recommended that given the national character of the exercise of considering Bills to amend the Constitution through a Popular Initiative, it would be prudent for Parliament to pass a legislation to govern the exercise. In no way did the Learned Judge determine the precise issue presented in this Petition as we have framed it above.

727. The Petitioner argues that the IEBC cannot constitutionally conduct verification under Article 257(4) of the Constitution in the absence of a regulatory framework. The Petitioner further argues that no such regulatory framework exists. The Petitioner points out that whereas Parliament has attempted to pass legislation on Article 257 of the Constitution, it has not been enacted yet. There are two related bills still pending in Parliament. Hence, the Petitioner argues that even Parliament is aware that there is a lacuna.

728. The Petitioner further argues that the IEBC is also aware of the lacuna and has attempted to address it through its *Administrative Procedures for the Verification of Signatures in Support of Constitutional Amendment Referendum* (hereinafter, "Administrative Procedures") first approved on 15th April, 2019 and revised in 2020.

However, the Petitioner contests the legality of the Administrative Procedures on two counts. First, the Petitioner argues that the Administrative Procedures were developed without public participation. Second, the Petitioner argues that the Administrative Procedures are statutory instruments which could not become effective before Parliamentary approval.

729. Consequently, the Petitioner argues that IEBC has no legal/regulatory framework to use in the verification of signatures for purposes of referendum under Article 257(4) of the Constitution. The Petitioner requests for certain reliefs flowing from these arguments including a declaration that the existing Administrative Procedures are invalid and could, therefore, not be used to verify signatures in support of the Constitution of Kenya Amendment Bill.

730. On the other hand, the IEBC's position is that a textual reading of Article 257(4) of the Constitution yields the conclusion that the IEBC is only required to verify that a Popular Initiative to amend the Constitution is supported by 1 Million registered voters and not the signatures. Counsel for IEBC, indeed, submitted that it was not the mandate of the IEBC to verify whether or not the signatures were forgeries or obtained without consent. Its only role, insisted Counsel, is to confirm that the Popular Initiative Bill is supported by 1 Million voters.

731. Consequently, the IEBC maintained that it requires no more legal or regulatory framework than the constitutional provisions in Article 257(4) of the Constitution. Counsel for IEBC described the provisions of Article 257 as "self-executing", which we understand to mean that no further legislation or regulations are necessary to efficaciously implement the constitutional provisions including the verification provisions.

732. In any event, Counsel for IEBC argued, if any further legislation or regulations were needed to implement Article 257 of the

Constitution, then they were already in existence in the form of sections 49 – 55 of the Elections Act and the IEBC Act. Further, Counsel argued that the IEBC developed, under their legal mandate, the Administrative Procedures which includes a form to capture information which corresponds with information in the IEBC's database. Hence, Counsel was of the view that the lack of legislative framework does not stop the IEBC from carrying out its mandate.

733. To address the three related issues framed for ***Petition No. E02 of 2021***, it appears to us that the starting point is to determine what the mandate and role of the IEBC is under Article 257(4) of the Constitution. In particular, the question for determination is whether IEBC's role includes verifying of signatures or whether the role only ends at the proverbial bean-counting: mere technocratic ascertainment that a Promoter of a Popular Initiative has delivered 1 Million voters to the IEBC. If the IEBC's role includes verification of signatures and not mere ascertainment of numbers of registered voters whose signatures accompany the Popular Initiative Bill, it would follow that the IEBC would need some legal or regulatory framework to guide it in its operations. On the other hand, if the IEBC's role is the venial administrative task of ascertaining numbers, then, perchance, no further legal or regulatory framework would be required.

734. In order to answer this question, we turn to the Affidavit of Dennis Waweru sworn on 5th February, 2021. The Affidavit is sworn on behalf of the BBI National Secretariat – one of the Respondents in this Petition. Mr. Waweru has annexed a document entitled: *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 the IEBC on the verification

process carried out by the IEBC with respect to the constitutional amendment initiative known as *Okoa Kenya Initiative* in 2016.

735. The IEBC Verification Report explicitly acknowledged IEBC's role under Article 257(1) and (4) of the Constitution stating at paragraph 8 of the document that:

> *The operative phrase as far as the mandate of the commission under Article 257(4) is concerned is to 'verify that the initiative is supported by at least one million signatures of registered voters'. The questions the Commission posed were what is to verify? How do you verify that a person is a registered voter? How do you go about the entire verification process? (emphasis added)*

736. Applying the definition of *verify* from the Black's Law Dictionary 4th Edition the IEBC Verification Report found that:

> *It appears therefore that to verify is not to casually look at information presented to you but to take steps that will allow one to affirm even under oath the correctness, accuracy, truthfulness or exactness of the information.*

737. On *"whether the Commission was to verify the authenticity of the signatures only or that the supporters are registered voters",* the IEBC Verification Report stated:

> *The Commission's view is that the verification entails confirming that the initiative is supported by registered voters as evidenced by their signatures. After reviewing practices in other jurisdictions… it was clear that a person mandated to verify signatures must satisfy herself or himself that the said signatures belong to the persons whose names appear against them.*

738. 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 it was required to carry out the verification of signatures and the verification that the supporters of the Initiative were registered voters. It determined that the proper sequence to achieve this was:

i. *First*, to confirm that the people supporting the initiative were registered voters; and,

ii. *Second,* move "to the next step of ascertaining the authenticity of [the Supporters'] signatures."

739. At paragraph 13 the IEBC Verification Report states:

> *In the case of Article 257(4) of the Constitution of Kenya it would follow that the Commission has to verify that at least one million registered voters support the initiative. Once the Commission is satisfied that one million registered voters support the initiative it would then proceed to the next step of verifying that the signatures appended thereto are valid signatures of the registered voters. This is the process that the Commission followed in the Okoa Kenya Initiative.*

740. In the case of *Okoa Kenya Initiative* as reported in the IEBC Verification Report, once the IEBC received the Draft Bill and the booklets of signatures it embarked on the first step of verifying that the signatories were registered voters. However, when the number of registered voters fell below the 1 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*."

741. Given this analysis of how IEBC handled the *Okoa Kenya Initiative*, given in sure-footed clarity by IEBC itself and in its own words, etched in its own report, 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 of, first, ascertaining the

numbers of registered voters in support of a Popular Initiative to amend the Constitution, and second, verifying the authenticity of the signatures of the registered voters claimed to be in support of the Popular Initiative.

742. It is, therefore, plainly startling that in the present Petition, the IEBC has taken the clearly disingenuous position that its role is limited to merely ascertaining the numbers of registered voters in support of the Popular Initiative. This position is belied by its own report analysed above. It is also belied by the text and spirit of the Constitution. As the IEBC Verification Report plainly acknowledged, the only reasonable meaning of the term "verify" as used in Article 257(4) of the Constitution includes both the ascertainment of numbers and confirming the authenticity of the signatures submitted.

743. If the importance of the above two-step process of verification of signatures under Article 257(4) of the Constitution is not sufficiently clear yet, a comparative analysis of voter verification for purposes of general elections will clarify it further.

744. Voter verification process for purposes of elections is provided for in section 6A of the Elections Act and Rules 27A and B of the Election (Voter Registration) Rules, 2012.

745. Section 6A of the Elections Act provides for the verification of biometric data in the following terms;

> *(1) The Commission shall, not later than sixty days before the date of a general election, open the Register of Voters for verification of biometric data by members of the public at their respective polling stations for a period of thirty days.*
>
> *(2) The Commission shall, upon the expiry of the period for verification under subsection (1), revise the Register of*

Voters to take into account any changes in particulars arising out of the verification process.

(3) The Commission shall, upon expiry of the period for verification specified under subsection (1) publish—

(a) *a notice in the Gazette to the effect that the revision under subsection (2) has been completed; and*

(b) *the Register of Voters online and in such other manner as may be prescribed by regulations.*

746. Rule 27 of the_Elections (Registration Of Voters) Regulations, 2012, provides for the Inspection of register:

The Commission shall make available the Register of Voters for inspection to the public at all polling stations, by way of public web portal or any other medium the Commission may approve.

747. Rules 27A and 27B, on the other hand, provide further guidelines on the IEBC's obligations on verification and provides the process of verification. The two rules provide as follows:

27A. Verification of Register of Voters

The Commission shall publish a notice of the availability of the register of voters for verification in the Gazette and in at least two newspapers of national circulation and through any other medium as the Commission may determine.

The notice published under sub regulation (1) shall set out—

a statement calling on the public to verify their particulars as captured in the register;

a statement specifying where and within which period the verification may be carried out; and

the hours during which verification may be carried out.

The notice under sub regulation (2) shall be in Form F set out in the Schedule

27B. Process of Verification

A voter may verify the details of his or her registration at the voter's polling station in accordance with regulation 27A.

A voter may, where any of the details of the registration of the voter are incorrect, submit to the registration officer at the voter's polling station a claim form as prescribed by regulation 19.

The registration officer shall consider and determine the claim within three days after submission.

748. These provisions demonstrate that IEBC determined that it was necessary to carry out a verification process for voter registration in the case of elections. The rules provide the time frames within which the voter verification is to be done and the actual process to be followed. They require, among other things, a voter who seeks verification to appear personally before a Registration Officer to verify the information held in the register.

749. This comparative analysis demonstrates what the law requires IEBC to do in the case of voter verification for purposes of elections. There is no doubt that the IEBC takes its role in voter verification as more than a ceremonial exercise. The IEBC has established substantive standards and procedures to ensure the integrity of voter registration and verification regarding elections.

750. 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).

751. The above analysis establishes that the 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.

752. The question that arises, then, is whether the IEBC has any legal or regulatory framework to achieve its mandate under Article 257(4). If the IEBC has a regulatory framework, namely, the Elections (Registration Of Voters) Regulations, 2012, for voter verification for purposes of elections, it follows that it needs a regulatory framework for signature verification under Article 257(4) of the Constitution.

753. Does the IEBC have such a regulatory framework for signature verification for purposes of Article 257(4)? The IEBC argues that the existing statutory framework is sufficient regulatory framework, and further that if it is not sufficient, the Administrative Procedures, adequately cover the signature verification process.

754. As analysed above, the existing statutory framework is not sufficient for verification of signatures under Article 257(4) of the Constitution. Indeed, it is instructive that the Constitutional amendment initiative that came after the *Okoa Kenya Initiative*, namely, the *Punguza Mzigo Initiative*, the IEBC noted that there were no "*statutory procedures or time lines for the verification of supporters of constitutional amendment drives through popular initiative*."

755. To fill in the gap, the IEBC developed Administrative Procedures approved on 15/04/2019. The question that arises, then, is whether the Administrative Procedures are lawful, and if so, whether they

adequately serve the role of providing the required regulatory framework.

756. The Petitioner has urged us to declare the Administrative Procedures invalid for lack of public participation. The IEBC did not contest the fact that the Administrative Procedures were developed without public participation as required under Article 10 of the Constitution. For that reason alone, we would have no difficulty in adjudging the Administrative Procedures invalid.

757. The Petitioner also argued that the Administrative Procedures are invalid because they are statutory instruments and they have not been subjected to Parliamentary approval as required under sections 10 and 11 of the Statutory Instruments Act (No. 23 of 2013).

758. Other than weakly argue that the Administrative Procedures are not statutory instruments, the IEBC has not seriously contested this argument. It requires no belaboured analysis to conclude that the Administrative Procedures are statutory instruments as that term is defined by section 2 of the Statutory Instruments Act. Moreover, the Administrative Procedures were not gazetted as required by section 22 of the same Act.

759. Consequently, the Administrative Procedures are invalid both because of lack of public participation as well as the failure to comply with the provisions of the Statutory Instruments Act.

760. Even if the Administrative Procedures survived this public participation and Statutory Instruments Act scrutiny, we would still find them invalid for purposes of providing the regulatory framework required under Article 257(4) for two other reasons:

a. *First*, the Administrative Procedures were developed and revised without the requisite quorum under section 8 as read together with the Second Schedule to the IEBC Act of this Judgment.

b. *Second,* a perusal of the Administrative Procedures reveals the obvious point that they do not have provisions or procedures for the authentication of signatures which we have found is a necessary step in the verification exercise required under Article 257(4) of the Constitution.

761. In addition, even if the Administrative Procedures had been valid, there is clear evidence that IEBC did not comply with them. For instance, the IEBC published the list on its website on Thursday 21st January, 2021. Members of the public had up to Monday 25th January, 2021 to read the list and raise any issues they had with the list.

762. It is noteworthy that the time period given for information and verification fell short of the time in the IEBC's Administrative Procedures: the Administrative Procedures provided for a two-week period while the IEBC gave only five days (both days inclusive) and including the weekend.

763. In view of the foregoing analysis, we conclude the following:

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.

c. *Third,* the Administrative Procedures developed by the IEBC are invalid for the following reasons:

i. One, they were developed without public participation as required by Article 10 of the Constitution.

ii. Two, they are in violation of the Statutory Instruments Act for want of Parliamentary approval and want of publication.

iii. Three, they were developed without quorum.

d. Fourth, even if the Administrative Procedures had been valid, in the present case, the IEBC violated them.

c. THE REQUIREMENT FOR NATIONWIDE VOTER REGISTRATION

764. The Petitioner in ***Petition No. E416 of 2020*** argued that every person has the right to make political choices and voter registration should supersede constitutional amendment process through a referendum. In his view, the IEBC cannot conduct a referendum before conducting nationwide voter registration.

765. The IEBC contended that no one will be disenfranchised if the proposed referendum was held. According to the IEBC, voter registration did not stop in 2017. The IEBC maintained that in fulfilment of its obligations under the Constitution and the law, it undertakes continuous voter registration and updating of register voters which ended just before the Kibra by election in 2018, with 108,000 more registered voters.

766. Article 38 guarantees every citizen political rights, including the right to free, fair and regular elections, based on universal suffrage and the free expression of the will of the elector. Every adult citizen has the right to be registered as a voter without unreasonable restriction, and to vote in an election or referendum. Article 88 establishes the IEBC, while sub Article (4) confers on it the mandate to conduct referenda and elections; conduct continuous voter registration and regular revision of the voter's roll. This role is also

found in the IEBC Act. Section 4 of that Act requires continuous registration of voters and revision of voters roll.

767. Similarly, section 5 of the Election Act, requires the IEBC to carry out voter registration and revision of the register of voters at all times, except for a stipulated time just before the elections. These requirements are aimed at enabling citizens not only exercise but also realize their political rights guaranteed under the Constitution.

768. The IEBC is under both a constitutional and statutory obligation to register voters and revise voters register at all times. The IEBC did not demonstrate to this Court, in answer to the Petitioner's claim, that it had conducted continuous voter registration and, if so, when voter registration was last conducted. It only stated, without evidence, that it conducts continuous voter registration at constituency headquarters.

769. We begin by noting that every single day, citizens attain the voting age. These new citizens have a right to be registered as voters and to participate in any proposed referendum. There was no evidence placed before this Court that the IEBC has been discharging its constitutional and statutory obligations to enable citizens who have recently attained the voting age to register as voters. The IEBC also stated that the last time the voter register was revised was just before the Kibra By-election. This was a confirmation that it was not discharging its constitutional and statutory mandate to continuously register voters and review the register of voters.

770. There was also no evidence that the IEBC had sensitized citizens that there was continuous voter registration. Holding a referendum without voter registration; updating the voters register, and carrying out voter education, would particularly disenfranchise citizens who had attained voting age but had not been given an opportunity to register as voters, thus violating their constitutional right to vote and make political choices.

771. To register and vote is a right under the Bill of Rights. Article 20 of the Constitution is clear the Bill of Rights applies to all law and binds all State organs and all persons, and every person is to enjoy these rights to the greatest extent consistent with the nature of the right or fundamental freedom. In this premise, Article 21 of the Constitution states that it is a fundamental duty of the State and every State organ (including the IEBC) to observe, respect, protect, promote and fulfil the rights and fundamental freedoms in the Bill of Rights.

772. We are persuaded, and we agree with the petitioner, that holding a referendum without first conducting voter registration would violate the very essence of the right of a class of citizens who have not been given the opportunity to register and vote in deciding their destiny.

d. THE PROPOSED REFERENDUM, COVID-19 PANDEMIC AND ARTICLE 43 RIGHTS

773. The Petitioner in ***Petition No. E416 of 2020*** argued that continuing the constitutional amendment process and, in particular, holding of the referendum, will violate Article 43(1)(a) of the Constitution. It is this Petitioner's argument that the country, and indeed the world, is going through an unprecedented COVID-19 pandemic, which requires resources to combat. He argued that continuing with the constitutional amendment process will not only lead to the spread of the decease, but will also use much needed resources for the referendum, thus deny the people realization of their right to the highest attainable standard of health guaranteed under Article 43(1)(a).

774. Honourable Raila Odinga, The Honourable Attorney General, The BBI Steering Committee, The National Assembly, The Senate and IEBC, were all united in denying this Petitioner's claim. They

maintained that the Petitioner in ***Petition No. E416 of 2020*** did not specifically plead and adduce evidence to support his arguments and, therefore, the prayer should be denied.

775. Article 43(1)(a) guarantees every person the right to the highest attainable standard of health, which includes the right to health care services and reproductive health. Sub Article (3) obligates the State to provide appropriate social security to persons who are unable to support themselves and their dependants.

776. The right to health is not the same as the right to be healthy. The right to health means the right to enjoy a variety of goods, services and conditions that are necessary to one's wellbeing. It is usually based on government programmes and goals that are realized on a long term basis, usually dependent on availability of resources. From the constitutional stand point, a country's difficult financial situation will not absolve it from taking key steps towards realization of this right for its citizens.

777. The argument put forward by the Petitioner in ***Petition No. E416*** of 2020, as we understand it, is that conducting a referendum now will provide an environment for the spread of the Corona virus and, therefore, this Court should stop the government from conducting such a referendum until the pandemic is over. He also argues that the resources that are to be used for the referendum, should be channeled towards fighting the pandemic.

778. We have anxiously considered the argument by the Petitioner in ***Petition No. E416 of 2020*** and those by the Respondents. The issue raised by the Petitioner in ***Petition No. E416 of 2020*** though novel was not properly supported by sufficient evidence. Without such evidence to support the alleged threatened violations of the right to health, we are unable to make the findings the Petitioner craves.

779. We find it necessary to remind the Petitioner and other public-spirited litigants who are keen to enforce social economic rights

enshrined in Article 43 of the Constitution what this Court, differently constituted, stated in ***William Ramogi & 3 Others v The Attorney General & 4 Others [2019] eKLR***:

> *[219] In conclusion, the Petitioners failed to discharge the burden which the law places on them to prove with appropriate specificity the claims of violations of social and economic rights that they made in the Consolidated Petitions. While the Petitioners were successful in demonstrating that the right to a livelihood is inextricably linked to the social and economic rights enumerated in Article 43 of the Constitution, in their averments and arguments, the Petitioners alternately failed to present relevant evidence probative of the claimed violations or presented evidence which was not only inadmissible, but also of no probative value in proving the allegations made that the Impugned Agreement and Impugned Directives made by the Respondents affected and infringed the Petitioners' right to livelihood.*
>
> *[220] We must emphasize the importance of adherence to the rules of evidence – both in terms of presentation (authenticity and foundation) and quality of evidence (credibility and probative value) required to establish violations of fundamental rights and freedoms especially in Public Interest or Strategic Litigation. The rules of evidence apply with equal force to this species of litigation as they do in run-of-the-mill litigation. This is especially true for cases where claimed violations are most appropriately proved by empirical evidence. Such evidence and data are often generated by experts and must be presented in adherence with the rules on presentation of expert evidence. Of course, reliance on empirical data does not detract from the need, in appropriate cases, to present direct evidence of the lived*

realities of the affected people on whose behalf the Public Interest Litigation has been filed.

780. We need not say more on this issue.

e. THE QUESTION OF ALLEGED PARLIAMENTARY INFIRMITY ARISING FROM THE CHIEF JUSTICE'S ADVISORY FOR THE DISSOLUTION OF PARLIAMENT

781. The Petitioner in ***Petition No. E.416 of 2020*** argument was that this Court should compel the President to dissolve the National Assembly and Senate following the advice of the Chief Justice dated 21st September 2020, and further, find that the two houses cannot receive and act on the BBI's Constitution of Kenya Amendment Bill as they stand to be dissolved as advised by the Chief Justice under Article 261(7) of the Constitution.

782. The issue of whether or not the President should dissolve the National Assembly and the Senate is live in ***Milimani High Court Petition No. 302 of 2020 Third way Alliance v Speaker of the National Assembly & Another (consolidated with JR No. 1108 of 2020 and Petition Nos. E291 of 2020 and 300 of 2020.)***, currently pending before another bench of this Court. The prayers the Petitioner seeks in prayers **(h)** and **(i)** in ***Petition No. E416 of 2020*** are subject in those Consolidated Petitions. In that regard, the Petitioner may apply to join those Petitions and urge his reliefs jointly with the Petitioners in those petitions. We decline the invitation to deal with these issues in these Consolidated Petitions.

E. PART 4: CONCLUSIONS AND FINDINGS

783. Having considered all the issues before us in these Consolidated Petitions, we have made, *inter alia*, the following conclusions:

i. The text, structure, history and context of the Constitution of Kenya, 2010 all read and interpreted using the canon of interpretive principles decreed by our Constitution yield the conclusion that the Basic Structure Doctrine is applicable in Kenya.

ii. 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.

iii. The essential features of the Constitution forming the Basic Structure can only be altered or modified by the People using their Sovereign Primary Constituent Power and not merely through a referendum.

iv. 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. 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.

v. The Basic Structure Doctrine protects the core edifice, foundational structure and values of the Constitution but leaves open certain provisions of the Constitution as amendable through the procedures outlined in Articles 255, 256 and 257 of the Constitution in as long as they do not change the Basic Structure.

vi. There are certain provisions in the Constitution which are insulated from any amendment at all because they are

deemed to express categorical core values. These provisions are, therefore, *unamendable* and cannot be changed through the exercise of Secondary Constituent Power or Constituted Power.

vii. The 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.

viii. The power to amend the Constitution through the Popular Initiative route under Article 257 of the Constitution is reserved for the private citizen. Neither the President nor any State Organ is permitted under our Constitution to initiate constitutional amendments using the Popular Initiative.

ix. 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.*'

x. The Constitution Amendment Bill, 2020 which was developed by the BBI Steering Committee and is being promoted by the BBI Secretariat is an initiative of the President. The President does not have constitutional mandate to initiate constitutional amendments through Popular Initiative under Article 257 of the Constitution.

xi. To the extent that the BBI Steering Committee was employed by the President to initiate proposals to amend the Constitution contrary to Article 257 of the Constitution, the BBI Steering Committee is an unconstitutional entity.

xii. Additionally, the BBI Steering Committee is unlawful because the President violated the provisions of Article of 132(4)(a) of the Constitution in its establishment.

xiii. In taking initiatives to amend the Constitution other than through the prescribed means in the Constitution, the President failed to respect, uphold and safeguard the Constitution and, to that extent, he has fallen short of the leadership and integrity threshold set in Article 73 of the Constitution and, in particular, Article 73(1)(a) thereof.

xiv. The history of Article 257 of the Constitution read together Articles 95(3) and 109(1) and (2) of the Constitution yields the conclusion that in order to effectively carry out referendum process as contemplated under our Constitution, it is necessary that a specific legislation be enacted for that purpose.

xv. Notwithstanding the absence of an enabling legislation as regards the conduct of referenda, such constitutional process may still be undertaken as long as the constitutional expectations, values, principles and objects especially those in Article 10 of the Constitution are met.

xvi. Parliament and the County Assemblies or any other State organ cannot under the guise of consideration and approval of a Popular Initiative to amend the Constitution under Article 257 of the Constitution alter or amend the Constitution Amendment Bill presented to them.

xvii. 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.

xviii. Article 89(1) of the Constitution – which provides for the exact number of constituencies – while being part of the

Basic Structure of the Constitution, is not an eternity clause: it can be amended by reducing or increasing the number of constituencies by duly following and perfecting the amendment procedures outlined in Articles 255 to 257 of the Constitution.

xix. The criteria and procedure for delimitation and apportionment of constituencies set out in Articles 89(4); 89(5); 89(6); 89(7); 89(10); 89(12) are unamendable constitutional provisions. They can only be amended by the exercise of Primary Constituent Power.

xx. It is unconstitutional for a Constitution of Kenya Amendment Bill to directly allocate and apportion constituencies in contravention of Article 89 of the Constitution.

xxi. The Independent Electoral and Boundaries Commission (IEBC) cannot conduct any proposed referendum because:

a) It has no quorum: the quorum for the conduct of business by the IEBC is five Commissioners.

b) It has not carried out nationwide voter registration.

c) It has no legal/regulatory framework for the verification of signatures as required by Articles 257(4) of the Constitution.

xxii. In view of (xxi) above, all actions taken by the IEBC with respect to the Constitution Amendment Bill, 2020 are null and void.

F. **PART 6: DISPOSITION**

784. The orders which recommend themselves, which we hereby grant, are the following:

i. **A declaration hereby issues:**

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

   b) **That the Basic Structure Doctrine 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 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.**

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 is unconstitutional, null and void.

ix. **A declaration is hereby made that the Constitution of Kenya Amendment Bill, 2020 cannot 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 is 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 and 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 Honourable Attorney General to ensure that other public officers who have directed or authorised 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.

785. Before concluding we take this opportunity to express our sincere appreciation to the Counsel and parties who appeared in these Consolidated Petitions for their well-prepared pleadings and their well-researched arguments and submissions. If we have not referred to any part of the submissions made or decisions referred to us, it is not out of lack of appreciation for their industry.

Dated, Signed and delivered at Nairobi this 13th day of May, 2021

JOEL M. NGUGI
JUDGE

G. V. ODUNGA
JUDGE

NGAAH JAIRUS
JUDGE

E.C. MWITA
JUDGE

MUMBUA T. MATHEKA
JUDGE

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[7] Robert M. Maxon, *Kenya's Independence Constitution: Constitution-Making and End of Empire* (Fairleigh Dickinson University Press, 2011).

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[10] Yash Pal Ghai and J. P. W. B. McAuslan, *Public Law and Political Change in Kenya: A Study of the Legal Framework of Government from Colonial Times to the Present* (Oxford University Press, 1970); *See also* Makua Mutua, *Kenya's Quest for Democracy: Taming the Leviathan* (Lynne Rienner Publishers 2008); *See also* James T, Gtahii, 'Kenya's Legislative Culture and the Evolution of the Kenya Constitution' in Yash Vyas et al. eds., *Law and Development in The Third World* (1994).

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[42] Stephanie Diepeveen, "The Kenya we don't Want': Popular Thought over Constitutional Review in Kenya (2002) 48:2 The Journal of Modern African Studies, 233.

[43] Ibid.

[44] Report of the Constitution of Kenya Review Commission, p.28.

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[62] Ibid (Kramon and Posner).

[63] Nic Cheeseman, 'The Kenyan Elections of 2007: An Introduction' (2008) 2:2 Journal of Eastern African Studies, 166-184; *see also* David Anderson & Emma Lochery, 'Violence and Exodus in Kenya's Right Valley, 2005: Predictable and Preventable? 2:2 Journal of Eastern African Studies, 328-243.

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[66] Karuti Kanyinga & James D. Long, 'The Political Economy of Reforms in Kenya: The Post-2007 Election Violence and a New Constitution' (2012) 55:1 African Studies Review, 31-51.

[67] Jeremy Horowitz, *Power-sharing in Kenya: Power-sharing Agreements, Negotiations and Peace Processes* (Oslo: Centre for the Study of Civil War, 2008).

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[69] **Jérôme** Lafargue **et Musambayi** Katumanga, 'Kenta in Turmoil: Post-Election Violence and Precarious Pacification' (2008) 38 The East African Review, 11-32.

[70] The Kenya National Dialogue and Reconciliation (KNDR) Monitoring Project Draft Review Report (2011).

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[75] Ibid, section 4.

[76] Ibid, section 5.

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