REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CONSTITUTIONAL & HUMAN RIGHTS DIVISION

CONSTITUTIONAL PETITION NO. 3 OF 2016

(Coram: Mwongo PJ, K orir,Ngugi,Odunga and Onguto jj)

IN THE MATTER CONCERNING THE STATUTE LAW (MISCELLANEOUS) (AMENDMENT) ACT 2015

IN THE MATTER CONCERNING ALLEGED VIOLATIONS OF ARTICLES 1(1), 1(3), 2(1), 2(2), 2(4), 3(2), 6(2), 10(1), 10(2), 131, 132, 160, 166 (1) (A), 256(3), 243, 248, 249(1), 249(2), 255(1), 259(1) AND 259(11) OF THE CONSTITUTION OF KENYA

IN THE MATTER

BETWEEN

LAW SOCIETY OF KENYA..……..……..PETITIONER

-VERSUS-

THE ATTORNEY GENERAL.…….....1ST RESPONDENT

NATIONAL ASSEMBLY…….…….…….....……2ND RESPONDENT

AND

CENTRE FOR ENHANCING DEMOCRACY .

AND GOOD GOVERNANCE……..….....……1ST INTERESTED PARTY

CONSTITUTION AND REFORM EDUCATION

CONSORTIUM….....2ND INTERESTED PARTY

KATIBA INSTITUTE…….....…….....…..3RD INTERESTED PARTY

KENYA HUMAN RIGHTS COMMISSION….....4TH INTERESTED PARTY

NATIONAL CIVIL SOCIETY CONGRESS.....….....5TH INTERESTED PARTY

JUDICIAL SERVICE COMMISSION....….....…..6TH INTERESTED PARTY

THE INTERNATIONAL COMMISSION

OF JURISTS.....……..…1ST AMICUS CURIAE

KITUO CHA SHERIA…….....….....…….2ND AMICUS CURIAE

THE KENYA NATIONAL COMMISSION

ON HUMAN RIGHTS…….....….....…….3RD AMICUS CURIAE

JUDGEMENT

Introduction

1. The Petitioner herein, the **Law Society of Kenya** is established under the ***Law Society of Kenya Act*** No. 21 of 2014. According to the Petitioner, it is Kenya's premier bar association with membership of all practicing Advocates with the mandate to advise and assist members of the legal profession, the government and the larger public in all matters relating to the administration of justice in Kenya.
2. The 1st Respondent, **the Attorney General**, is established by Article 156 of the Constitution of Kenya and he is the Chief Legal Adviser of the Government with the mandate of *inter alia* promoting, protecting and upholding the rule of law and defending public interest.
3. The 2nd Respondent, **the National Assembly**, is established by Article 93 of the Constitution of Kenya as one of the two Houses of Parliament.
4. The 1st interested party herein, **Centre for Enhancing Democracy and Good Governance** also referred to **CEDGG** is described as a grass roots Civil Society Organization (CSO) with its office in Nakuru County and founded in 2001. It works to enhance democracy and good governance, including empowering vulnerable and marginalized citizens to claim their rights in local development and governance.
5. The 2nd interested party herein, **Constitution and Reform Education Consortium** also referred to as **CRECO** is described as a consortium formed in 1998 by 23 organizations drawn from both rural and urban based non-governmental organizations (NGOs) working across Kenya on civic education for reforms and human rights advocacy and is committed to promoting constitutionalism, democratic governance and institutional excellence through coordination and capacity building.
6. The 3rd interested party herein, **Katiba Institute**, referred to as KI is stated to have been established in January 2011 with the mission to promote the understanding and full implementation of the Constitution of Kenya (2010) through research, education and strategic litigation.
7. The 4th interested party herein, **Kenya Human Rights Commission** or **KHRC** is described as an independent NGO established in 1992 with a mission to promote, protect and enhance the enjoyment of human rights by every individual and group in Kenya.
8. The 5th interested party herein, **National Civil Society Congress**, **SC** is described as an umbrella organization that brings together Civil Society Organizations from different parts of Kenya in pursuit of diverse interests which has over the years mobilized Civil Society Organizations across the country to take part in different governance and anti-corruption campaigns.
9. The 6th Interested Party, the **Judicial Service Commission**, (also hereinafter referred to as "**the Commission**" or "JSC") is a Constitutional Commission established under Article 171 of the Constitution tasked with amongst other functions, recommending the appointment of persons to be appointed *inter alia* as the Chief Justice and the Deputy Chief Justice to the President of the Republic of Kenya.
10. The 1st *amicus curiae,* **The International Commission of Jurists**, *is* a global non-governmental

organisation involved *inter alia* in the promotion, protection and enhancement of the enjoyment of human rights in Kenya and elsewhere in the World.

11. The 2nd *amicus*, **Kituo Cha Sheria** or Legal Advice Center, describes itself as a non-governmental organization whose mission is to empower the poor and the marginalised people to effectively access justice and realise their human and people's rights through advocacy, networking, lobbying, legal aid, legal education, representation and research.
12. The 3rd *Amicus Curiae*, **The Kenya National Commission on Human Rights**, is an independent Commission within the meaning of Chapter 15 of the Constitution.

The Petitioner's Case

13. What provoked these proceedings was the enactment of the ***Statute Law (Miscellaneous Amendment) Act***, 2015 (also hereinafter referred to as "the Amendment Act"). The precursor to the Amendment Act was the ***Statute Law (Miscellaneous Amendment) Bill, 2015*** (also hereinafter referred to as **"the Bill"**), which was published on 18th September 2015 by the National Assembly which Bill sought to make minor amendments to various statutory enactments. With respect to the ***Judicial Service Act***, 2011 (No 1 of 2011) (hereinafter referred to as **"the Act"**) the Bill as published sought to amend the Act to prescribe timelines for transmission of names to the President after recommendation by the Commission.
14. According to the Petitioner, the Bill as published was subjected to public participation conducted by the 2nd Respondent. It was however contended that the said public participation was conducted in a manner that was neither meaningful nor qualitative as most Kenyans were not given adequate opportunity and notice to participate in the consideration of the issues in the Bill.
15. It was the Petitioner's case that the Bill that was published on 18th September 2015 did not contain the impugned amendments and that the amendments were introduced later on, on the floor of the House, further denying the public an opportunity to participate in the passage thereof.
16. On the 1st day of December, 2015, the National Assembly debated and passed the Bill which was forwarded to the President for assent which assent was duly given, giving rise to the Amendment Act.
17. The Amendment Act had the effect of inter alia amending section 30(3) of the Act by deleting the previous subsection (3) of section 30 and substitution therewith a new section 30(3). It is this amendment that provoked these proceedings.
18. It was averred that the new section 30(3) of the Act contradicts the provisions of Article 166(1)(a) of the Constitution in that while Article 166 empowers the Commission to forward one name for each position, the new law takes away this constitutionally guaranteed power by requiring the Commission to forward three names. To the Petitioner, an Act of Parliament cannot broaden nor limit a constitutional mandate. It is its view that if the National Assembly is of the legislative wisdom that the President ought to be given a meaningful role in the appointment of the Chief Justice and the Deputy Chief Justice, the proper procedure is to amend Article 166 of the Constitution. It was contended that Article 171 of the Constitution of Kenya established the Commission with the sole purpose of removing from the president the power to appoint judges and thus safeguard the independence of the Judiciary. By allowing such amendments, it was contended that the Judiciary will be perceived by the public to be an appendage of the executive.
19. The Petitioner asserted that the said amendments are meant to achieve a collateral purpose of limiting the independence of the Commission and the Judiciary, which collateral purpose is evidenced by the fact that the amendments only affect the Chief Justice and the Deputy Chief Justice but not the Judges of the Court of Appeal and the High Court who are appointed in similar manner.
20. It was further averred that the Memorandum of Objects and Reasons of the Bill published in a Special Issue of the Kenya Gazette – **Supplement No. 164 (National Assembly Bills No. 57)** stated that the Bill was in keeping with the practice of making minor amendments which do not merit the publication of a separate Bill. However, the Petitioner's view was that the Bill contained extensive controversial and substantial amendments affecting the constitutional independence of the Commission. Furthermore, the amendments made to section 30 of the Act by the Amendment Act have far reaching implications and having been passed by an omnibus miscellaneous

amendment, it has consequently deprived the public of their right of participation and debate.

21. It was reiterated that the Bill as published on 18th September 2015 never contained the impugned amendments and that these far reaching amendments were only introduced later on, on the floor of the House. Therefore the public was deprived of an opportunity to participate as required by the Constitution.
22. In the Petitioner's view, the Amendment contains provisions that affect county governments, yet as a Bill it was never submitted to the Senate for debate and approval as required by Article 96 as read with Article 110 of the Constitution.
23. It was submitted on behalf of the Petitioner that this Petition raises the following constitutional issues for determination by this court:

a. **Whether the Amendments to the Judicial Service Act, 2011 by the Statute Law (Miscellaneous Amendment) Act, 2015 are consistent with the provisions of Articles 166 (1) and 259 (11) of the Constitution?**
b. **Whether there was public participation in the passage of the Amendments to the Judicial Service Act, 2011 by the Statute Law (Miscellaneous Amendment) Act, 2015?**
c. **Whether the Statute Miscellaneous Amendment Bill, 2015 ought to have been referred to the Senate for consideration and approval?**

24. With respect to the issue whether the amendments to the Act by the Amendment Act are consistent with the provisions of Articles 166(1) and 259(11) of the Constitution, it was contended that Article 171 of the Constitution establishes the Judicial Service Commission as an independent Commission with the primary role of promoting and facilitating the independence and accountability of the Judiciary. It was contended that Article 166 of the Constitution on the other hand prescribes the mode of appointment of the Chief Justice and the Deputy Chief Justice with Article 166(1)(a) providing that the President shall appoint the Chief Justice and Deputy Chief Justice in accordance with the recommendation of the Commission, and subject to the approval of the National Assembly.
25. It was the Petitioner's case that empowering the Commission with the role of recommending persons for appointment by the President was aimed at ensuring the institutional and decisional independence of the Judiciary. In arriving at this position, the Petitioner relied on ***"Judicial Independence: An overview of Judicial and Executive Relation in Africa"***, an article by **Muna Ndulo.**
26. According to the Petitioner the Constitution has given guidance on how it is to be interpreted in Article 259 wherein the Court is required, in considering the constitutionality of any issue before it, to interpret the Constitution in a manner that promotes its purposes, values and principles, advances the rule of law, human rights and fundamental freedoms in the Bill of Rights and that contributes to good governance. Further, the Court is enjoined to give it a liberal purposive interpretation and in this respect the Petitioner relied on the decision of the Supreme Court in **Re The Matter of the Interim Independent Electoral Commission Constitutional Application No 2 of 2011 a**t paragraph 51 in which the Court adopted the words of **Mohamed A J** in the Namibian case of **S. vs Acheson, 1991 (2) S.A. 805** (at p.813).
27. It was further contended that the Court is required, in interpreting the Constitution, to be guided by the principle that the provisions of the Constitution must be read as an integrated whole, without any one particular provision destroying the other but each sustaining the other based on **Tinyefuza vs. Attorney General of Uganda Constitutional Petition No. 1 of 1997 (1997 UGCC 3)**. Further reliance was placed on the decision of the US Supreme Court in **U.S vs Butler, 297 U.S. 1[1936]** in which the Court expressed itself as follows:

> ***"When an Act of Congress is appropriately challenged in the courts as not conforming to the constitutional mandate, the judicial branch of the government has only one duty; to lay the article of the Constitution which is invoked beside the statute which is challenged and to decide whether the latter squares with the former. All the court does, or can do, is to announce its considered judgment upon the question. The only power it has, if such it may be called, is the power of judgment. This court neither approves nor condemns any legislative policy. Its delicate and difficult office is to ascertain and declare whether the***

legislation is in accordance with, or in contravention of, the provisions of the Constitution; and, having done that, its duty ends."

28. In the Petitioner's view, the impugned amendments contradict the provisions of Article 166(1) of the Constitution since by giving the President the power to cherry pick holders of the office of Chief Justice and Deputy Justice, the same goes against the provisions of Article 160 of the Constitution that entrench the principle of judicial independence. It was asserted that since the Chief Justice and the Deputy Chief Justice sit as President and Vice President of the Supreme Court which under Article 163(3)(a) of the Constitution has exclusive original jurisdiction to hear and determine disputes relating to the elections to the office of President, removing the recruitment and selection role from the President further entrenches the independence of the Supreme Court in the determination of election disputes. It was therefore the Petitioner's case that the impugned amendments deal a death blow to the strides the country has made in its electoral reform process yet for the first time in the history of the nation, candidates had confidence to file a presidential election petition at the Supreme Court with the faith and hope it would be impartially determined.
29. With respect to the issue whether there was public participation in the passage of the Amendments to the Act by the Amendment Act, it was reiterated that the amendments to the Act were introduced on the floor of the House on 1st December 2015 without affording the public an opportunity to review and contribute meaningfully to the same. According to the Petitioner, the place of public participation in the enactment of legislation was best captured by **Majanja J** in **Association of Gaming Operators-Kenya & 41 Others versus Attorney General & 4 Others [2014] eKLR**, **Lenaola J** in **Nairobi Metropolitan PSV Saccos Union Limited & 25 Others versus County of Nairobi Government & 3 Others [2013] eKLR** and **Odunga, J** in **Robert N. Gakuru & Others versus Governor Kiambu County & 3 Others [2014] eKLR, in which the Court adopted the decision of the South African Constitutional Court** in **Doctor's for life International vs. The Speaker National Assembly and others (CCT12/05) [2006] ZACC 11**.
30. The Petitioner contended that so sacrosanct is the principle of public participation in our Constitution that the Court in **Kenya Union of Domestic, Hotels, Education and Allied Workers (Kudhehia Workers) vs. Salaries and Remuneration Commission, Petition No. 294 of 2013** observed that:

"Public participation as a national value is recognized under Article 10 of the Constitution. The Constitution at Article 94 has vested legislative authority of the people of Kenya in Parliament and Article 118 has provided for public participation and involvement in the legislative business."

31. **Since the impugned amendments were not subjected to public participation, the Petitioner averred that the same ought to be declared null and void.**
32. **On the issue whether t**he Bill ought to have been referred to the Senate for consideration and approval, the Petitioner referred to the decision of the Supreme Court in **The Speaker of the Senate & Another vs. The Hon. Attorney-General & Others [2013] eKLR where it was held that:**

"The Court's observation in Re the Matter of the Interim Independent Electoral Commission is borne out in an official publication, Final Report of the Task Force on Devolved Government Vol. 1: A Report on the Implementation of Devolved Government in Kenya [page. 18]:

"The extent of the legislative role of the Senate can only be fully appreciated if the meaning of the phrase 'concerning counties' is examined. Article 110 of the Constitution defines bills concerning counties as being bills which contain provisions that affect the functions and powers of the county governments as set out in the Fourth Schedule; bills which relate to the election of members of the county assembly or county executive; and bills referred to in Chapter Twelve as affecting finances of the county governments. This is a very broad definition which creates room for the Senate to participate in the passing of

bills in the exclusive functional areas of the national government, for as long as it can be shown that such bills have provisions affecting the functional areas of the county governments. For instance, it may be argued that although security and policing are national functions, how security and policing services are provided affects how county governments discharge their agricultural functions. As such, a bill on security and policing would be a bill concerning counties."

33. It was contended that since the Bill contained amendments to legislations that have a bearing on county functions such as ***The National Police Service Act***, 2011 (No. 11A of 2011), it ought to have been forwarded to the Senate for its consideration. Failure to do so, it was averred makes the Bill in its entirety a nullity for violation of laid down constitutional principles.
34. It was contended that the Chief Justice is due to leave office in June, whereas the Deputy Chief Justice is awaiting the determination of an appeal against the decision of the High Court in **Kalpana H Rawal versus Judicial Service Commission & 3 Others [2015] eKLR** that made a determination she ought to have vacated office having attained the age of 70 years. This, it was contended implies that the Commission will soon be engaged in the process of recruiting a Chief Justice and his Deputy (depending on the outcome of the appeal filed by **Lady Justice Kalpana Rawal**) and there is a real danger that in the event this Court does not grant the orders sought by the Petitioners, the Chief Justice and his Deputy will be appointed in a manner that contravenes the letter and spirit of Article 166 (1) and 259 (11), and further prejudice the Petitioner in its role of fostering advocacy and the rule of law
35. With respect to supremacy of the Constitution, the Petitioner relied on **Coalition for Reform and Democracy (CORD) & Another versus the Republic of Kenya & Another (2015) eKLR**.
36. It was therefore the Petitioner's case that the Respondents violated the Constitution. In support of this position it asserted that to the extent that the Amendment Act has amended the provisions of section 30(3) of the Act by requiring that the Commission submits names of three persons for appointment to the position of Chief Justice and Deputy Chief Justice, the provisions of Article 166(1)(a) of the Constitution were violated. Secondly, to the extent that the National Assembly effected far-reaching amendments to the ***Statute Law (Miscellaneous Amendment) Act, 2015*** as published on 18th September 2015 (specifically by introducing an amendment to section 30(3) of the ***Judicial Service Act*** 2011) without subjecting the same to meaningful and qualitative public participation the provisions of Article 118 (1) (b) of the Constitution were violated. Finally, to the extent that the National Assembly debated and passed the ***Statute Law (Miscellaneous Amendment) Bill, 2015*** without referring it to the Senate for consideration and approval, the provisions of Article 96 as read with Article 111 of the Constitution were similarly violated.
37. In the result the Petitioner sought the following orders:

1. **A declaration that section 166 (1) (a) of the Constitution does not require that the Judicial Service Commission submits to the President three names for appointments to the position of Chief Justice or Deputy Chief Justice.**
2. **A declaration that in accordance with the provisions of Article 166 (1) (a) of the Constitution, the Judicial Service Commission is mandated to submit only one name for appointment to the position of Chief Justice or Deputy Chief Justice as the case may be.**

In the alternative

2A. A declaration that the power to submit one name or more names for the appointment of Chief Justice or Deputy Chief Justice as the case may be in accordance with the provisions of Article 166 (1) (a) of the Constitution, is an exclusive power that is exercised at the Commission's discretion. It cannot be limited, defined or broadened by a statutory enactment.

3. **A declaration that in accordance with the provisions of Article 259 (11) of the Constitution, the President is bound by the recommendation of the Judicial Service Commission made under Article 166 (1) (a) of the Constitution.**
4. **A declaration that the amendments made on Section 30 (3) of the Judicial Service Act, 2011**

by the Statute Law (Miscellaneous Amendment) Act 2015 are inconsistent with Article 166 (1) (a) of the Constitution and are null and void.

5. **A declaration that the attempt by the National Assembly to limit the constitutional mandate of the JSC by requiring it to forward THREE names to the president is a violation of the Constitution and the independence of the Judicial Service Commission.**
6. **A declaration that the amendments made on Section 30 (3) of the Judicial Service Act, 2011 by the Statute Law (Miscellaneous Amendment) Act 2015 were done without meaningful and qualitative public participation.**
7. **A declaration that Section 30 (3) of the Judicial Service Act, 2011 as amended by the Statute Law (Miscellaneous Amendment) Act 2015 is unconstitutional on account of violations of Article 118 of the Constitution of Kenya.**
8. **A declaration that the entire amendments contained in Statute Law (Miscellaneous Amendment) Act 2015 are unconstitutional on account of violations of Article 118 of the Constitution of Kenya.**
9. **A declaration that the entire amendments contained in Statute Law (Miscellaneous Amendment) Act 2015 are unconstitutional on account of violations of Article 96 (2) as read with Article 109-113 of the Constitution of Kenya.**
10. **That there be no order as to costs.**

1st Respondent's Case

38. The Application was opposed by the 1st Respondent.
39.
40. In support of his case, the 1st Respondent reiterated the contents of the replying affidavit sworn by **Njee Muturi** on 2nd February 2016 together with the relevant portions of the submissions in opposition to the Notice of Motion and the relevant authorities filed thereto.
41. Based on Article 259 of the Constitution, it was submitted that the Constitution should be interpreted in such a manner as to create certainty in the law so as to achieve good governance. To this end it was contended that the provisions of the Constitution should not be inferred or implied but must be express and that the Court must give effect to its express provisions. In addition, in promoting the principle of the rule of law and good governance, this Court was urged to consider the manner in which other constitutional office holders are appointed and endeavour uniformity in appointment as there should be no sacred cows.
42. To the 1st Respondent, pursuant to Article 259(3) of the Constitution, every provision of the Constitution should be construed according to the doctrine of interpretation that the law is always speaking and that therefore a function or power conferred by the Constitution on an office should be performed or exercised by the person holding the office. In light of this provision, it was the 1st Respondent's case that the Court's interpretation must make a clear distinction between the appointing authority and the recommending authority and ought not to take away the appointing authority from the office upon whom the Constitution has bestowed such Authority. Similarly the office or body given the power to recommend must do just that and no more. On the other hand, pursuant to Articles 259(11) of the Constitution, if a function or power on a person is exercisable only on the advice or recommendation or approval or on consultation with another person, then the power will only be exercised on that advice or recommendation or approval. To the 1st Respondent, this provision clearly delineates the appointing authority with the person whose advice or recommendation or advice must be obtained.
43. In support of this submission, the 1st Respondent relied on the Supreme Court Advisory Opinion No. 2 of 2013 - **The Speaker of The Senate & Another vs. Honourable Attorney General & Others [2013] eKLR,** in which the Honourable Chief Justice at paragraph 184 quoted the Ugandan Case of **Tinyefuza vs. Attorney General Const Petition No. 1 of 1996 (1997 UGCC3)** where it was held that:

> "***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."

44. Based on the foregoing, it was submitted that the Court cannot look at section 30(3) of the ***Judicial Service Act*** as amended with Article 166(1)(a) of the Constitution in isolation of all other statutory and constitutional provisions regarding the appointment of holders of other constitutional offices and that they must be looked at as a whole to achieve a consistent legal regime of appointment. In support of this position, the 1st Respondent relied on **The Speaker of The Senate & Another vs. Honourable Attorney General & Others** (supra) where it was held at paragraph 197 that:

> ***"One of the cardinal principles of the Constitution that can be gleaned from its architecture and wording is "the more checks and balances the better" for good governance."***

45. It was therefore contended that in enforcing and enshrining this principle, the Court should ensure that the appointment of the Chief Justice is not hijacked by one entity, be it the Presidency, National Assembly or Judicial Service Commission but rather is shared by all three organs and relied on the decision of **Njoki Ndungu, SCJ** in the same case of **The Speaker of The Senate & Another vs. Honourable Attorney General & Others** (supra) at paragraph 242 where the learned Judge cited the United States of America Supreme Court decision of **US vs. Butler 297 US1 1936, at paragraph 242** on the role of the Court when the Constitutionality of Legislation is challenged.
46. It was argued that all this Honourable Court can do is to see whether the Amendments complained of infringe the specific Articles of the Constitution as alleged and no more.
47. Moving on to the specific issue of whether the amendment to section 30(3) of the ***Judicial Service Act 2011*** by ***The Statute Law (Miscellaneous Amendment) Act 2015*** is a violation of Article 166(1)(a) of the constitution as read with article 259(11) thereof, it was submitted that the answer is in the negative. In the 1st Respondent's submission, the express wording of Article 166(1)(a) is that the President shall appoint the Chief Justice and Deputy Chief Justice in accordance with the recommendation of the Commission and subject to the approval of the National Assembly hence the appointing authority is the President and nobody else. All the Commission can do is recommend but not appoint. Similarly the National Assembly can only approve the President's appointee but it cannot appoint the Chief Justice or Deputy Chief Justice. It was contended that since the amendment to section 30(3) of the ***Judicial Service Act*** retains the President as the sole appointing authority, to this extent there is no infringement of Article 166(1)(a).
48. It was submitted that since the said Article does not require the Commission to send only one name to the President as recommendation for appointment, the amended section 30(3)(a) of the ***Judicial Service Act 2011*** which requires the Commission to recommend the names of three qualified persons to the President for appointment to the offices of Chief Justice and Deputy Chief Justice is therefore not an infringement of the said Article as the Article does not specify the number of names to be recommended to the President. In the 1st Respondent's view, even the repealed section 30(3) of the ***Judicial Service Act, 2011*** did not require the Judicial Service Commission to recommend only one name to the President for appointment of a Chief Justice and Deputy Chief Justice and that in fact the section was silent on the number of names to be recommended although the use of the word "person" in the old subsection (2) clearly shows that Parliament intended more than one name to be recommended to the President for appointment.
49. The 1st Respondent urged the Court to interpret the Constitution according to its express wording when it is clear and there is no ambiguity. In its view, Article 166(1)(a) does not provide for the recommendation of only one name to the President for appointment of a Chief Justice and Deputy Chief Justice and the court cannot insert such a provision as to do so would amount to amending the Constitution without following the procedure set out in Articles 255, 256 and 257. In espousing this position, the 1st Respondent argued that the principle of legislative intent ought to apply and that had the writers of the Constitution or the people of Kenya who passed it and the National Assembly that enacted it intended that the Commission should recommend only one name to the President for appointment of the Chief Justice and Deputy Chief Justice, they would have clearly said so in Article 166(1)(a). Similarly, had the National Assembly in its legislative

wisdom intended that the Commission should recommend only one name to the President for appointment of a Chief Justice and Deputy Chief Justice, then it would have clearly said so in the repealed section 30(3) and the new 30(3) of the ***Judicial Service Act, 2011***.

50. It was submitted that although the current Chief Justice and Deputy Chief Justice were appointed by the then **President H. E Mwai Kibaki** after only one name for each office was recommended to him by the Commission for appointment, there was no provision in the Act that only one name be recommended to the President and there was also no such limitation in Article 166(1)(a) of the Constitution. In fact, it was contended, the President was not bound by any law to appoint the single names recommended by the Commission.

51. The 1st Respondent asserted that the independence of the Judiciary has not been undermined by the new section 30(3) of the ***Judicial Service Act 2011*** since the President cannot appoint the Chief Justice or Deputy Chief Justice without the recommendation of the Commission. The only difference is that the Commission is now required to recommend three names. Further, by virtue of the new section 30(3), all the three persons who are recommended have to be "qualified" meaning that all of the three persons are qualified for the position. In addition, the requirement that three names be recommended to the President for appointment has the effect of creating an elaborate system of checks and balances between the Commission, the President and the National Assembly as none of the three organs involved in the appointment of the Chief Justice and Deputy Chief Justice will have an exclusive role that is not checked by the other organs and that this is in keeping with the dictum of **Hon. Chief Justice Willy Mutunga** in ***The Speaker of The Senate Case*** **(Supra)** that "the more the checks and balances the better for good governance".

52. The 1st Respondent's view was that none of the three organs will be able to "cherry pick" a candidate. Since the Commission has to recommend three names they cannot manipulate the process by picking a favoured candidate. Even though the President will nominate one of the three names for appointment such nominee must still be approved by the National Assembly hence the issue of "cherry picking" does not arise.

53. It was averred that the amended law also serves to promote practicality in the appointment process by saving time and resources. Where only one name is recommended to the President and the President rejects the person the process has to start again. If the President accepts the one name but the person is subsequently not approved by the National Assembly the entire process will similarly have to start again which will mean more time and resources being spent.

54. By parity of reasoning, it was contended that the requirement of recommending three names to the President for appointment is not unique to the office of Chief Justice and Deputy Chief Justice since the Chairpersons of Commissions and Independent offices established under Article 248 are also appointed from a list of three names recommended to the President for appointment. The 1st Respondent proceeded to cite some other examples of similar appointment procedures such as section 7(9) of the ***Salaries and Remuneration Commission Act 2011***, which provides for the forwarding of three names to the President for appointment to the position of chairman; section 6(4)(e) and (g) of the ***National Police Service Commission Act, 2011*** which provides for a list of three names to be forwarded to the President for appointment of a Chairman; section 6(5)(e) and (g) of the ***Ethics and Anti-Corruption Act, 2011*** which provides for three names to be forwarded to the President for appointment of a Chairman; and that the current holder of the office of Director of Public Prosecution was appointed after the Public Service Commission had forwarded three names to the President. This was despite the fact that Article 157 of the Constitution does not provide the number of names to be forwarded to the President.

55. It was therefore submitted that a declaration that the Commission can only recommend one name to the President for appointment of a Chief Justice and Deputy Chief Justice is an infringement of Articles 1 and 166(1)(a) of the Constitution.

56. To the 1st Respondent, Article 1 of the Constitution provides that sovereign power belongs to the people and that such sovereign power is exercised either directly or through their democratically elected representatives. The people's elected representatives are the President, the Deputy President, Parliament (National Assembly and Senate) and the legislative assemblies in the Counties. In keeping with the principle of sovereignty of the people of Kenya, the Constitution has ensured that appointment to state offices and Constitution offices, including the Chief Justice, is done by the President upon approval by Parliament, both of whom are directly elected by the people.

57. It was therefore contended that a declaration that the Commission can only send one name to the President would in essence vest appointing authority on the Commission and render the President and Parliament a rubber stamp contrary to Article 1 and 166 (1) (a) of the Constitution yet the Constitution only allows the Commission to recommend an appointment. In the 1st Respondent's view, the amendment to section 30(3) of the ***Judicial Service Act, 2011*** ensures the body empowered to recommend retains that power to recommend, the body empowered to appoint still exercises that power to appoint and the body empowered to approve retains the power to approve and that this is in consonance with the text and spirit of the Constitution.
58. With respect to the issue whether the entire ***Statute Law (Miscellaneous Amendment) Act, 2015*** is unconstitutional for being an infringement of Article 118 of the Constitution, it was submitted that Article 118 of the Constitution relates to public participation in the legislative process. In this case the replying affidavit sworn on behalf of the 2nd Respondent, it was averred, has given in detail the several steps and stages taken before the National Assembly enacted the ***Statute Law (Miscellaneous Amendment) Act 2015***.
59. To the 1st Respondent, the National Assembly is an independent organ of Government and Courts should exercise extreme caution and judicial restraint in interfering with the internal workings of the National Assembly. The 1st Respondent in support of this position relied on the dissenting opinion if **Ndungu Njoki, JSC** in **Speaker of The Senate & Another vs. Attorney General & Others** (supra) in which the learned Judge relied on the **Interim Independent Electoral Commission case** (supra), **U.S vs. Butler 297 US.1 (1936)** and **Asif Hameed & Others vs. State of Jammu & Kashmir & Others (1989) AIR 1899, 1989 SCR (3) 19s.**
60. This Court was therefore urged in view of the above not to interfere with the internal workings of Parliament as to the process of passing the impugned Act.
61. On the issue whether the entire ***Statute Law (Miscellaneous Amendment) Act, 2015*** is unconstitutional for violating Article 96(2) of the constitution as read with articles 109 -113 of the Constitution, it was argued that by virtue of Article 95 the National Assembly enacts legislation that governs the entire country and that by virtue of Article 96 the Senate represents the counties and participates in the law making function of Parliament by considering debating and approving bills that affect the counties as provided or defined in Article 109 to 113 of the Constitution. In the 1st Respondent's estimation, the impugned Act does not fall within a bill concerning County Governments as defined under Article 110 of the Constitution.
62. In conclusion, the 1st Respondent held the view that the Petitioner failed to prove any of its ground and urged the Court to dismiss the Petition with costs.

The 2nd Respondent's Case

63. According to the 2nd Respondent, the ***Statute Law (Miscellaneous Amendments) Bill, 2015*** was published on 18th September, 2015, sponsored by **Hon. Adan Duale**, the leader of the majority party and was read for the first time in the National Assembly on 7th October, 2015, and subsequently committed to the Departmental Committee on Justice and Legal Affairs (hereinafter referred to as "the Committee"), pursuant to Standing Order 127(1) of the National Assembly Standing Orders. The e Bill was also referred to each Departmental Committee to consider the relevant sections of the Bill since it sought to amend various laws.
64. It was averred that pursuant to Article 188(1)(b) of the Constitution as read with Standing Order 127 which require public participation, the Clerk of the National Assembly, published in *The Nation* and *The Standard* newspapers a request for submission of memoranda from members of the public on the Bill on 9th October, 2015. Pursuant thereto the Committee received a memoranda on the Bill from Parliamentary Initiatives Network, the Commission for Implementation of the Constitution (CIC), the Independent Legal Medical Unit and the Commission on Administrative Justice. The Committee also received a letter dated 13th October, 2015 from an advocate, **Nathan Tororei**, based in Eldoret seeking amendments to fourteen pieces of legislation through the same Bill including the amendment to the ***Judicial Service Act, 2011*** to require the Judicial Service Commission to forward to the President, five (5) names of qualified candidates. The proposal was based on the need to align the nomination and appointment process in the ***Judicial Service Act,***

2011 to that in other constitutional commissions and also to allow for quicker and easier nomination of an alternative in case of rejection of a nominee by Parliament. There were other communications on the same matter from other people.

65. According to the 2nd Respondent, there was no mention on the Committee of Experts Final Report as to the number of nominees to the position of the Chief Justice and the Deputy Chief Justice. In its view the amendments to the Judicial Service Act, 2011 were done in accordance with Article 166 of the Constitution because a legislative framework is necessary to determine how the two positions can be filled. It was therefore the 2nd Respondent's view that the new section 30(3) in the said Act is not an infringement of Article 166(1) of the Constitution because the said Article does not provide the number of names to be forwarded to the President, a criterion that has now been provided for by the National Assembly through its legislative roles hence the amendment is valid and legal.
66. It was contended that after considering all the proposed amendments to the entire ***Statute Law (Miscellaneous Amendments) Bill, 2015***, the Committee compiled its report and tabled it in the House on 28th October, 2015, which Bill passed through the Second Reading, the Committee Stage and was passed at the Third Reading on 1st December, 2015 and thereafter forwarded to the President for assent.
67. While reiterating the foregoing, it was submitted on behalf of the 2nd Respondent that the Amendment Act went through the requisite procedures of the constitutional legislative process hence its passage was sound.
68. Based on **Robert N Gakuru & Others vs. Governor Kiambu County & 3 Ohers [2013] eKLR** and **Kiambu County Government & 3 Others vs. Robert N. Gakuru & Others Civil Application No. 97 of 2014 [2014] eKLR**, it was submitted that there was compliance with the principle of public participation.
69. The 2nd Respondent further contended that this Court lacks the jurisdiction to entertain these proceedings. This submission was based on the doctrines of Parliamentary privilege and separation of powers. It was submitted that Article 117 of the Constitution as read with section 12 of the ***National Assembly (Privileges and Immunities) Act*** grants immunity to Parliament with respect to its decisions and proceedings. In support of this position the 2nd Respondent relied *inter alia* on **R. vs. Chaytor & Others [2010] UKSC 52**, **Erskine May**, ***Parliamentary Practice***, 23rd ed (2004) at pp 110-111, **Frank Mulisa Makola vs. Felix G.Mbiuki and Others EP No. 5 of 2013**, **R vs. Richards exp Fitzgerald and Browne [1955] HCA 36**, **Raila Odinga vs. Francis Ole Kaparo and the Clerk of the National Assembly Nairobi HCCC No. 394 o 1993**.
70. To the 2nd Respondent the said immunity operates as a safeguard of the separation of powers and the sovereignty of Parliament. It was therefore submitted that this Court's hands are tied as it cannot exercise powers in respect of the proceedings of Parliament.
71. The 2nd Respondent, while appreciating that this Court's jurisdiction is only limited to the question of constitutionality of decisions taken by the National Assembly, submitted that it lacks the jurisdiction to give the orders sought by the Petitioner, since the amendment to the ***Judicial Service Act, 2011*** was done in accordance with the Constitution.
72. Accordingly, the Court was urged to dismiss this Petition with costs.

The Case for the 1st to the 5th interested parties

73. The 1st to the 5th interested parties (hereinafter referred to as "**the Civil Societies Organizations**") made joined submissions.
74. According to the civil societies, upon review of section 30(3) of the Act, the Constitution, and the National Assembly Standing Orders, they concluded that the amendment is unconstitutional because it usurps the powers of an independent constitutional commission and/or interferes with the independence of the judiciary.
75. It was submitted that in its Memorandum of Objects and Reasons the Bill noted that "*[its] in keeping with the practice of making minor amendments which do not merit the publication of a separate Bill and consolidating them into one Bill*". The Memorandum further noted that with regard to the Act, "*the Bill seeks to amend the Judicial Service Commission Act, 2011 so as to*

prescribe timelines for transmission of names to the president after recommendation by the Judicial Service Commission".

76. After identifying what in their view were the issues for determination in this petition, the civil society organizations

77. submitted that on 5th August 2010, by way of referendum, with the approval of nearly 70% of the voters, Kenyans adopted a new Constitution which became operational on 27th August 2010.This marked the end of a long struggle by Kenyans to radically reform the political, social, and economic cornerstones of the country. The new Constitution reversed the system of control and authority established by the colonial powers which was perpetuated by successive regimes since independence. Two major, interrelated and defining features of that system were the centralisation of power in the President and the misuse of state coercive power. In their view, the abuse of powers by the central government, the erosion of the powers of local authorities, the excesses of the provincial administration and administrative police and the victimisation of communities and districts opposed to the regime, led to the struggle for the reform of the state.

78. It was submitted that an important outcome of the reform movement and the new Constitution was the restructuring and expansion of independent constitutional commissions and provisions to promote integrity within the judiciary through vetting and provisions to safeguard the independence of the judiciary. To the civil society organizations, the court is given a specific mandate under Article 159(e) of the Constitution to promote the purpose and principles of the Constitution and that in exercising its jurisdiction in relation to this case, this Court should be guided by the principles set out in Article 259. In this regard the purposeful, value and principle based interpretation required by Article 259 would be the one that protects the values and principles of governance set out in Article 10, that adheres to principles of judicial authority under article 159, the nature of the presidency under the Constitution, which on certain issues it is executive and on others (such as appointment of the Chief Justice and judges) is ceremonial as clearly reflected in Article 166, and the functions of the Judicial Service Commission under article 172.

79. To the civil society organizations, both Articles 2(4) and 165(3)(d)(i) give this Court the power to invalidate any law, act or omission that is inconsistent with the Constitution. In support of this position, they sought support from **Samuel G. Momanyi vs. The Hon. Attorney General and Another, Petition No. 341 of 2011**, in which this Court struck down a provision of section 45(3) of the ***Employment Act 2007*** because it was inconsistent with the Constitution; **Johnson Muthama, vs. Minister for Justice and Constitutional Affairs & another Petition No 198 of 2011 Consolidated With Petition No. 166 of 2011 and 172 of 2011, in which this Court declared sections** 22(1)(b) and Section 24(1)(b) of the ***Elections Act, 2011***, which barred persons not holding a post-secondary school qualification from being nominated as candidates for elective office or for nomination to Parliament, to be unconstitutional; **Coalition for Reform and Democracy (CORD) & 2 Others vs. Republic of Kenya & 10 Others [2015] eKLR**, in which this court struck down several provisions of the ***Security Laws (Miscellaneous Amendment) Act, 2015***, an omnibus bill providing for amendments to various security and related laws, for violating the Bill of Rights. This court has also voided entire legislations for breach of the Constitution such as the ***County Development Act***, **No. 30 of 2013,** in **Institute of Social Accountability & Another v National Assembly & 4 Others [2015] eKLR** and the ***County Governments (Amendment) Act, 2014*** in **Council of Governors & 3 Others vs. Senate & 53 Others [2015] eKLR** where the Court found that among others, both laws violated the principles of rule of law and separation of powers.

80. It was contended that the power of the Court to invalidate laws that are unconstitutional is consistent with the obligation of the Court to be the final custodian of the Constitution. Courts have a *sui generis* role in protecting and defending the Constitution by ensuring that acts, omission or laws that violate the Constitution are invalidated. According to the civil society organisations, this role of the Court to protect the Constitution has gained currency in many jurisdictions in the world. They cited the decision of the South African Constitutional Court in ***Minister of Health and Others vs. Treatment Action Campaign and Others* (2002) 5 LRC 216, 248 .**

81. A more drastic step, it was contended was undertaken by the Supreme Court of Canada in **Reference Re Language Rights under s. 23 of Manitoba Act, 1870 and s. 133 of Constitutional Act, 1867, [1985] 1 S.C.R. 721,** where it held that all the legislation of Manitoba

Province were invalid because of a failure to respect the constitutional rule about publishing it in French as well as English, but suspended the order for 2 years. Similarly, the Hong Kong courts also grant declarations of invalidity. See, **Koo SzeYiu vs. Chief Executive (2006) 9 HKCFAR 441.** They also referred to **Jayne *Mati & Another vs. Attorney General and Another* - Nairobi Petition No. 108 of 2011 in which the Court cited the Judgement of the Supreme Court of Kenya in The Matter of the Interim Independent Electoral Commission** (supra).

82. It was submitted that the principle of supremacy of the Constitution, which is contained in Article 2 of the Constitution, and explained in ***Jayne Mati Case*** (supra), means that this Court is obligated to invalidate an act, omission or any law which contravenes the Constitution and that the conceptualisation and passage of the Amendment Act, particularly with regard to section 30(3) contravene the Constitution and as such it should be struck down to the extent of its inconsistency.

73. It was further submitted on behalf of the civil society organisations that Articles 166(1)(a) and 172 are the critical provisions in regard to the appointment, approval and selection of the Chief and Deputy Chief Justice. In their view, there are three distinct processes accorded to different State organs by the Constitution in Article 166(1)(a) as read together with Article 172(1)(a) in relation to the process of having in place a Chief or Deputy Chief Justice. These are the selection, approval and appointment process, and the selection process is accorded to the Commission as clearly reflected in Article 172(1)(a) and 166(1)(a). In their view the phrases "in accordance with the recommendation of the Judicial Service Commission" (in Article 166) and "recommend to the President persons for appointment as judges" means that the power to select who should become Chief or Deputy Chief Justice is reposed by the Constitution in the Commission. According to them, the phrase "in accordance with the recommendation" makes it unequivocal that the President has no powers relating to selection and is constitutionally obligated to appoint the candidate recommended by the Commission without more.
74. The second phase, it was submitted, relates to approval – a power given to the National Assembly. The power to approve means that while the National Assembly may reject - on the basis of articulated constitutional or statutory grounds – a candidate selected by the Commission, it has no power to choose or select who else is an appropriate candidate for appointment as Chief or Deputy Chief Justice. Finally the President has the power to appoint. It is critical that the power to appoint is only ceremonial and does not give the President any executive abilities to decide or select who becomes the Chief or Deputy Chief Justice.
75. It was therefore contended that the requirement that more than one name be presented to the President means that the President does more than appoint and is effectively involved in the selection process. To that extent, the amended section 30(3) of the Act is unconstitutional because it conflates the powers/roles of different State organs/offices and illegally and unconstitutionally allows the President to effectively participate in the selection of who becomes Chief or Deputy Justice and therefore assigning the President more powers than those provided for in or contemplated by the Constitution. The effect of section 30(3) is therefore to amend the Constitution through an unconstitutional means.
76. It was further contended that section 30(3) is unconstitutional because it effectively erodes the independence of the Commission and by extension the judiciary by allowing the President to usurp the powers of the Commission in deciding who becomes the Chief or Deputy Chief Justice and/ or allowing the President to participate in the selection process.
77. It was submitted that the Constitution has established detailed provisions on independence of the judiciary. Reference was made to Articles 1(3), 160(1), 161, 166(1)(a), 172(1), and 249(2) of the Constitution which provide that the constitutional commissions and holders of independent offices are independent and not subject to direction or control by any person or authority. This buttresses the critical role of the judiciary and independent commissions in the constitutional order. Article 255(1) on the amendment of the Constitution provides that if an amendment relates to the independence of the judiciary and the commissions, it must be passed by way of a referendum, a testament of the critical role the Constitution attaches to the concept of independence in relation to the judiciary and independent commissions.
78. The civil society organizations appreciated that whereas the Constitution does not have an explicit provision stating that the principle of separation of power is to be observed, the structure and spirit of the Constitution in its entirety firmly establishes the principle of separation of powers. The

Constitution provides for the traditional three arms of the government; the legislature, the executive and the judiciary. Indeed, the Constitution creates legislative organs at both the national and county levels that are separate and independent from the executive; it creates executive organs at both the national and county levels that are separate and independent from the legislature; and a unitary judiciary that is separate and independent from the legislature and the executive. *More importantly, it was submitted that the Supreme Court* ***In the Matter of the Interim Independent Electoral Commission*** **Constitutional Application No. 2 of 2011** *confirmed that our Constitution provides for separation of powers by holding in paragraph 53 that:*

> ***"Separation of powers is an integral principle in Kenya's Constitution: for instance, Chapter 8 is devoted to the Legislature; Chapter 9 to the Executive; and Chapter 10, on the Judiciary, provides (Article 160(1)) that:***
>
> **In the exercise of judicial authority the Judiciary as constituted by Article 161, shall be subject only to this Constitution and the law and shall not be subject to the control or direction of any person or authority".**

79. Similarly, this Court has held that our Constitution recognizes the principle of separation of powers in the case of ***Jayne Mati*** (supra) where the Court stated in paragraph 31 that:

> ***"At this juncture I must emphasise that separation of powers between the judiciary, executive and legislature is one of the hallmarks of our Constitution. Each body or organ of state is bound by the Constitution and should at all times acquaint itself of its provisions as it works within its sphere of competence. Constitutional interpretation is not the sole preserve of the judiciary but the judiciary has the last word in the event of a dispute on the interpretation and application of the Constitution."***

80. The civil society organizations further took the view that this Court also reached the same but even more emphatic conclusion in ***The Institute of Social Accountability Case*** (supra) when it stated in paragraph 124 that

> ***"The design and architecture of our Constitution is one that is founded on the principle of separation of powers. There is a clear separation of powers between the legislature, executive and the judiciary."***

81. In support of this position they relied on Articles 1(3), 2(2), 93-96, 129, 130 and submitted that most importantly, and relevant to the case at hand, the functions of the National Assembly relative to the judiciary and the Judicial Service Commission are spelt out in Articles 166(1) in approval of the person recommended for the post of Chief Justice and Deputy Chief Justice by the Commission, Article 172(2)(h), approval of two persons to represent the public in the Commission, and Article 251(2) and (3) in considering a petition to remove a member of a Commission from office. To them, the above role of the National Assembly is to act as a check on the use of power by the Commission and that does not lend itself to passage of laws that proscribe the independence of the judiciary or alters the functions of the Commission other than through the procedure provided for under the Constitution by Article 255(1). In fact, the civil societies contend that such action undermines the principle of rule of law required under Article 10 of the Constitution. They cited paragraphs 187 - 211 of the Supreme Court advisory opinion in the ***National Land Commission Case*** (supra) for a discussion of the roles of separation of power and the doctrine of checks and balances vis-à-vis independent commissions.
82. According to the said interested parties, the principle of separation of powers is relevant in understanding the nature of independent commissions, and they relied on **Professor Laurence Tribe's *American Constitutional Law*** Vol 1, 3 ed. (Foundation Press, New York 2000) at 127) .
83. Applying this to the Constitution of Kenya, it was contended that with respect to the concept of separation of powers, the indicative provision is Article 1(3). A further consideration is what the actual constitutional allocation of power is, and this takes place in the substantive chapters and articles of the Constitution, including particularly, chapters 8, 9, 10 and 15. On the argument that

independent commissions expand on the traditional separation of powers, they cited the American author **Bruce Ackerman** in his article ***The New Separation of Powers*** 2000 113 Harvard LR 634, at 714 in which he wrote:

> ***"A better understanding of the separation of powers would recognize that agencies like the FEC [Federal Election Commission of the US] deserve special recognition as a distinct part of the system of checks and balances. Call it the "democracy branch." The powers delegated to this branch will depend, of course, on the particular conception of democracy embraced at the constitutional convention. … However the governing ideal is defined, it only makes sense for the constitution to provide a mechanism to ensure the continuing force of its ideal of democracy despite the predictable efforts by reigning politicians to entrench themselves against popular reversals at the polls".***

84. They therefore urged this Court to fully adopt the comments of **Professors Tribe** and **Ackermann** and find that its inquiry on separation of power principle is limited by the concept of separation of power particularized in the Kenyan Constitution which elevates independent commissions to near another arm of government. That, as the South African Constitutional Court stated in **Glenister vs. President of the Republic of South Africa and Others (CCT 48/10) [2011] ZACC 6,** the Constitution should be the Court's "**starting point**" on an inquiry on what type/extent of separation of powers is, in an instant case. Reliance was similarly placed on **Prof. Ben Sihanya's** ***The Presidency and Public Authority in Kenya's New Constitutional Order*** (Society for International Development, Constitution Working Paper No. 2, 2011) pp. 12-3 thus:

> ***"Article 248 of the 2010 Constitution establishes nine commissions and independent offices…These commissions differ from commissions in the 1969 Constitution because they have an express provision outlining their independence from other arms of government and they are administratively and financially delinked from the executive. The commissions and independent offices check presidential and public authority at two levels. The first is that the general constitutional mandates of all commissions under Article 249 are to protect the sovereignty of the people, secure the observance by all state organs of democratic values and principles, and promote constitutionalism. Second, the constitutional commissions have been mandated with specific constitutional powers that under the 1969 Constitution were presidential powers, or were statutory powers commandeered, usurped or abrogated by the President."***

85. The said interested parties however appreciated that the Supreme Court in its advisory opinion in the ***National Land Commission Case*** (supra) disagreed with the preceding arguments of independent commissions in Kenya forming a fourth arm of government when it found at paragraph 175 that:

> ***"Thus, while the Constitution provides for several State organs, including commissions and independent offices, the people's sovereign power is vested in the Executive, Legislature and Judiciary."***

86. However, the court found that commissions are independent and no person or authority may control them. It was therefore submitted that the motivation to create independent commissions was to provide an additional check on use of state power. The purpose of independent commissions as envisaged in the CKRC report was articulated at page 311 as "these bodies independently seek to protect and enforce the constitutional provisions as laid out in the Constitution and further ensure their implementation. In order to do so, the commissions must be seen to be totally independent from the influence of the State organs in all aspects."
87. It was their contention that the Constitution in Article 249 is the source of the independence of the various commissions and this is in terms of appointment, operation and security. However, independence of operation is the most complex of these. The constitutional statement is that commissions "are independent and not subject to direction or control by any person or authority". The essence of this provision relates to the exercise of the decision making power of the

commission. Like the courts, a commission is given power to make certain decisions. Those decisions, which may affect the personal interests of individuals, and even the political fortunes of some, are to be made by the commission alone, without any sort of pressure being brought to bear on those who make the actual decision. It does not mean the commission; its staff and members are not bound by the ordinary law and in making decisions they must observe the normal rules of fairness enshrined in the Constitution of Kenya Article 47. But the decisions on the factual, legal and policy matters that are to inform the decisions are to be made by the commission alone. This independence of decision making is the core of the matter: the decisions that are appropriately theirs must be made by them and by them without any influence from those to whom the decision making power is not given.

88. According to the said 5 interested parties, the exercise of legislative power is subject to the Constitution. No other institution can be assigned a function that is constitutionally assigned to some other body. The responsibility assigned to the legislature, the executive and the courts is clear, and in the case of the Commission, similarly, the scope of its constitutional responsibilities is clear. Moreover, in regard to the Commission, the civil society organisations submitted that the principle of decision is clear: what is the responsibility of the Commission is not the responsibility of anyone else. The Constitution explicitly requires the Commission and assigns it specific functions. Based on this constitutionally protected mandate, and the principle of rule of law, the National Assembly cannot assign duties that are already assigned to an independent commission to the presidency/executive. From the foregoing, it was submitted that a general principle that can be applied in resolving this matter thus far is: A function already given to the Commission by the Constitution cannot be assigned through legislation to the executive.

89. The civil society organizations relied on Articles 1, 10, 94 and 118(b) of the Constitution which make public participation a national value and are specific on the role of the people in relation to parliament and public participation. In support of this submission reliance was placed on **Doctors for Life case** (supra) as explained by **Czapanskiy**, **Karen** and **Manjoo**, **Rashida** in ***The Right of Public Participation in the Law-Making Process and the Role of the Legislature in the Promotion of this Right (2008***), Duke Journal of Comparative & International Law, Vol. 19, No. 1, 2009 where they note that communication is a two way street. In a participatory democracy, as opposed to a representative democracy, legislators must come face to face with those who are affected by the decisions they make and must ask them their opinion. Legislators may reject those opinions, but cannot do so without having exposed themselves first to those arguments, the feelings and the insights of those affected by the decision.

90. They also cited **Robert N. Gakuru & others vs. Governor Kiambu County & 3 Others**, ***CORD Case*** (supra) and the decision of the Chief Justice in his concurring opinion in the advisory opinion, **In the Matter of the National Land Commission [2015] eKLR**. They also relied on **Trusted Society of Human Rights Alliance vs. Attorney General & 2 Others [2012] eKLR**, Petition No.229 of 2012 at Paras. 97-98 and **Law Society of Kenya vs. Attorney General & 2 others [2013] eKLR.**

91. Additionally, the said interested parties contended that the Act is also unconstitutional because the National Assembly violated its own Standing Orders and thus acted outside its constitutional mandate. Article 93(2) states that the ***"National Assembly and the Senate shall perform their respective functions in accordance with this Constitution"*** and the Constitution requires that Parliament discharge its functions in accordance with Standing Orders since Article 124(1) of the Constitution requires the House to make its own rules of procedure and provides that ***"[E]ach House of Parliament ….shall make Standing Orders for the orderly conduct of its proceedings."*** Additionally, Article 109 (3) and (4) refer to the passing of Bills in accordance, inter alia, with the Standing Orders. It was therefore their contention that since the Constitution circumscribes how Parliament operates by reference to Standing Orders, the House has no power to act other than in accordance with its own rules (Standing Orders). Where Parliament fails to follow its own Standing Orders it, in effect, violates the constitutional provisions that requires it to be guided by Standing Orders, but also violates the constitutional provisions delegating sovereign power to it and specifically Article 1(1) which provides that sovereign power "shall be exercised only in accordance with this Constitution".

92. In this case, the said interested parties submitted, the National Assembly illegally departed from the Standing Orders: Standing Order No. 120 provides that ***"No Bill shall be introduced unless***

such Bill together with the memorandum referred to in the Standing Order 117 (Memorandum of Objects and Reasons), has been published in the Gazette… a period of fourteen days, beginning in each case from the day of such publication, or such shorter period as the House may resolve with respect to the Bill has ended". Standing Order No. 127(3) states that ***"The Departmental Committee to which a Bill is committed shall facilitate public participation and shall take into account the views and recommendations of the public when the committee makes its report to the House."***

93. However, it was submitted that further amendments to the Bill were introduced by the Departmental Committee on Justice and Legal Affairs. From the ***National Assembly, Official Report, Thursday, 29th October, 2015***, the Committee noted that:

> ***"the committee considered the appropriateness of this clause, and it is, therefore, seeking to move further amendments. The amendments that we seek to introduce arise from experience. When this House was considering the appointment of the Deputy Chief Justice in 2013, we were constrained to reject a name because we realised that she had been appointed and she was nearing retirement at that time. The difficulty of the committee was that if we had rejected and the position had been vacant for too long, it would have taken another year for another name to be brought up...The other issue in which we had a lot of difficulties in 2013 is the fact that only one name was presented to the president by the JSC. As a matter of deference to the appointing authority, you must give him the latitude to make a choice."***

94. By failure to subject the amendments introduced by the Departmental Committee on Justice and Legal Affairs to public participation, it was submitted, it means that the manner in which section 30(3) of the Act was processed was inimical to and violates public participation requirements of the constitution.
95. According to the said interested parties, Statute Laws (Miscellaneous Amendment) legislations also known as omnibus bills should deal with minor and non-controversial amendments. In support of this position they relied on ***Western Australia, Legislative Council, Standing Committee on Uniform Legislation and Statutes Review, Report 21, October 2007, pp. 5-6; Canadian Miscellaneous Statute Law Amendment Program;*** **Louis Massicotte**, ***Omnibus Bills in Theory and Practice*****, Canadian Parliamentary Review, Vol. 36 No. 1 2013, p. 14**; and the 1901 American case of C**ommonwealth vs. Barnett (199 Pa. 161)**
96. It was therefore appreciated that whereas there are legitimate grounds for use of omnibus bills such as the Statute Law Miscellaneous Amendment Bills, there seems to be some reasonable argument that such bills should deal with minor and non-controversial amendments. Whereas the ***Statute Law Miscellaneous Amendment Bill 2015*** stated that its purpose was to make minor amendments to various laws, the content of some of the amendments, particularly section 30(3) of the Act signify that the amendments were of a substantial nature in relation to the functions of the Commission and were definitely controversial. The question is therefore whether the public interest is best served by having such substantial and controversial amendments in such a bill especially where meaningful public participation is lacking.
97. To the civil society organizations, if the National Assembly was in violation of the Constitution in its process, so was the President in giving his assent to the Bill. In deciding whether or not to give his assent to a Bill, the President must act in accordance with his obligations under Article 131(2) of the Constitution which obliges him to respect, uphold and safeguard this Constitution; safeguard the sovereignty of the Republic; promote and enhance the unity of the nation; promote respect for the diversity of the people and communities of Kenya; and ensure the protection of human rights and fundamental freedoms and the rule of law. Because of these obligations, the President should have considered whether correct procedures were followed by the National Assembly in enacting the Bill, particularly public participation, and whether the Assembly had constitutional authority to legislate the subject matter under consideration, section 30(3) of the Act.
98. It was the 1st to the 5th interested parties' position that the foregoing demonstrates that section 30(3) of the Act is unconstitutional for lack of public participation and it directly offends articles 10, 159, 166 and 172 of the Constitution and this Court was urged to invoke its powers conferred

to it by articles 165(3)(d)(i) and (ii) and to find that section 30(3) of Act is null and void.

6th Interested Party's Case

99. According to the 6th interested party, **the Commission** is a creature of the Constitution at Article 171 thereof whose mandate includes the promotion and facilitation of the independence and accountability of the judiciary and efficient, effective and transparent administration of justice.
100. It was its contention that the requirement under Article 166(1)(a) of the Constitution that the President is to appoint the Chief Justice and the Deputy Chief Justice in accordance with the recommendation of the Commission and subject to the approval of the National Assembly is to ensure that the independence and accountability of the judiciary is upheld to remain beyond reproach.
101. It was the Commission's position that the effect of the impugned amendments was to annihilate the constitutional mandate of the Commission as provided under the aforesaid Article. In the Commission's view, under Article 255(1) of the Constitution, a proposed amendment to the Constitution relating to the independence of the Judiciary and the Commissions and independent offices in Chapter Fifteen of the Constitution is mandatorily required to be approved in a referendum. This procedure was however not followed hence the 2nd Respondent chose to instead short-change a constitutional safeguard through an Act of Parliament. Further, the Commission's view was that the effect of the said Amendment was an attempt to amend salient and fundamental provisions of the Constitution through an Act of Parliament.
102. According to the Commission the said amendments go to the root of the accountability and independence of the judiciary by taking away the constitutional discretion of the Commission to nominate a person to serve in the said two positions and vesting, instead, that discretion on the President in outright disregard of Article 166(1)(a) of the Constitution.
103. It was averred that the doctrine of separation of powers and independence of the judiciary shall be greatly whittled down if the courts at its top echelon were allowed to harbour political inclinations.
104. It was further averred that contrary to Article 118(1)(b) of the Constitution, in debating the aforesaid amendments, the 2nd Respondent never adhered to the principles of public participation as the impugned amendment was never proposed and passed on the floor of the House.
105. Considering the positions of the Chief Justice and the Deputy Chief Justice as Judges of the Supreme Court with the exclusive original jurisdiction to determine presidential election petitions, it was contended that it would be undesirable to give the Presidency the powers to choose the preferred persons to preside over the aforestated Court in the event of such a dispute.
106. The Commission was therefore of the view that this Court ought to intervene and protect the independence of the judiciary by declaring the said amendments to section 30 of the Act unconstitutional.
107. It was further submitted by the 6th interested party that Article 166(1)(a) of the Constitution of Kenya provides that the **Judicial Service Commission** shall recommend one name to the President for appointment as the Chief Justice or the Deputy Chief Justice subject to the approval of the National Assembly, whereas the said ***Statute Law (Miscellaneous Amendment) Act, 2015*** provided that the 6th Interested party herein would instead forward to the president three (3) names for each vacant position to be filled. However, the ***Statute Law (Miscellaneous Amendment) Bill, 2015***, published on 18th September 2015 did not contain the aforementioned impugned amendments which amendments were introduced later on the floor of the house devoid of any public participation.
108. According to the Commission, Article 1(1) of the Constitution stipulates that sovereign power belongs to the people of Kenya and it shall be exercised in accordance with the Constitution. The preamble to the Constitution on the other hand provides that the people will exercise their sovereign and inalienable right to determine the form of governance of this country. Further, public participation is one of the national values and principles of governance enshrined under Article 10 (2) of the Constitution and Article 94(4) of the Constitution obliges Parliament to protect the Constitution and promote democratic governance of the republic.
109. It was therefore submitted that public participation is very imperative as it forms one of the key

pillars in the Constitution and ensures that the will of the people is reflected in the laws of this Country. In support of this position the Commission relied on **Law Society of Kenya vs Attorney General & 2 Others [2013] eKLR.**

110. It was submitted that by introducing the said amendments on the floor of the House, the public was denied the opportunity to be informed and consequently their inalienable right to participation. The Commission relied on **Commission for the Implementation of the Constitution vs. Parliament of Kenya & 5 Others [2013] eKLR.**

111. The Commission further based its submissions on **Coalition for Reform and Democracy (CORD) & Another vs. Republic of Kenya & Another [2015] eKLR** where the court at paragraphs 170 and 171 underscored the importance of compliance with constitutional requirements by the legislature.

112. It was the position of the Commission that the amendment to section 30 of **Judicial *Service Act, 2011*** is a substantive amendment that has the cumulative effect of negating independence of the judiciary and the separation of powers doctrine. It sought support for this position from the South African Supreme Court's decision of **King and Others vs. Attorneys Fidelity Fund Board of Control and Another (561/2004) [2005] ZASCA 96** in which the Court at paragraph 19 found that:-

> ***"…That founding value, so far as it relates to the conduct of the National Assembly, finds expression in the Constitution's requirement that its rules and orders for the conduct of its business must be made with due regard not only to representative democracy but also to participative democracy…"***

113. It was contended that Article 255(1) of the Constitution of Kenya 2010 makes it mandatory that any amendment relating to the Independence of the Judiciary and the independence of the commissions and independent offices shall be through a referendum. Therefore with regard to the foregoing, it was contended that the amendment to section 30 of the ***Judicial Service Act, 2011***, not only affects the independence of the judiciary, but also national values and principles of governance hence required a mandatory and elaborate participation of the people through a referendum.

114. The Commission averred that it is established under Article 171 of the Constitution and it is an independent commission under Article 248(2)(e). To further foster the independence of the judiciary and separation of power, the Chief Justice and Deputy Chief Justice would be appointed by the President only with the recommendation of the Commission, which under Article 248(2) of the Constitution is only subject to the Constitution and is not subject to direction or control of any person or authority. To the Commission, in so far as Article 166(1)(a) of the Constitution of Kenya provides, the Judicial Service Commission shall recommend one name to the President for appointment as the Chief Justice or Deputy Chief Justice subject to the approval of the National Assembly.

115. The provisions of Articles 171 and 166 of the Constitution, it was averred were aimed at safeguarding the institutional and decisional independence of the Judicial Service Commission and the Judiciary. Based on Articles 259(1) and (11) of the Constitution, the Commission asserted that nowhere does the Constitution provide that it should submit three names to the President for him to pick one, and that giving the President discretion to preference one person from three persons forwarded to him is inconsistent with Article 160 of the Constitution which states that the Judiciary shall not be subject to the direction or control of any person or authority. It was therefore its position that by amending the ***Judicial Service Act, 2011*** vide the ***Statute Law (Miscellaneous Amendment) Act, 2015*** the National Assembly stipulates and restricts the manner in which the Commission is to perform its constitutional mandate and power. It relied on paragraph 49 of the **Commission for the Implementation of the Constitution vs. Parliament of Kenya & 5 others [2013] eKLR** (ibid) for the proposition that the Constitution has to be interpreted holistically, within its context, and in its spirit. The same position, the Commission added was adopted **In Matter of the Kenya National Human Rights Commission, Advisory Opinion No. 1 of 2012; [2014] eKLR.**

116. It was the Commission's case that the history of Article 166(1)(a) of the Constitution so far has been that the previous President, **Mwai Kibaki** appointed the current Chief Justice after receiving

only one name from the Judicial Service Commission and the same position applied to the Deputy Chief Justices **Nancy Baraza** and **Kalpana Rawal** appointments.

117. It was argued that top on the list of the envisaged reforms in Kenya under the Constitution was a new and restructured Judiciary. The Judicial Service Commission was/is expected to play a key role in recruitment especially of the top leadership in the Judiciary which role as provided for under Article 166 is to recommend a person who is to be the Chief Justice of Kenya and another to be the Deputy Chief Justice. However, the amendment requiring three (3) names instead of one constrains the function/power of the **Judicial Service Commission** in having a determination as to who should be Kenya's next Chief Justice and Deputy Chief Justice and this immensely affects the independence of the judiciary.

118. Citing Article 163(3)(a) of the Constitution, the Commission averred that it would be undesirable for the President to have the powers to select the person to head the Supreme Court, especially since the country is set to conduct its general elections in the month of August 2017.

119. To the Commission, the doctrine of separation of powers is very vital to the public. This is also the backbone to independence of the judiciary as stipulated in Article 160 of the Constitution of Kenya. Based 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) (17 August 2006)**, it was submitted that the principle of constitutionality of legislation cannot be a blanket for Parliament not to obey the Constitution.

120. In the Commission's view, if the 2nd Respondent saw it wise to grant the President a more involving role in the appointment of the Chief Justice and Deputy Chief Justice, the proper procedure would have been to amend Article 166 of the Constitution, which procedure is provided for in the Constitution. However, the said Article cannot be amended by the 2nd Respondent through a statute. It also relied on **Republic vs. Public Procurement Administrative Review Board & Another Ex Parte Selex Sistemi Integrati (supra)**.

121. Further to that it relied on **Martin Nyaga Wambora v Speaker County Assembly of Embu & 5 others [2014] eKLR** where the court expressed itself at page 5 as hereunder:

> ***"…In this case, this Court is acutely aware that the three arms of Government that is to say the Executive, the Legislature and the Judiciary have their respective mandates clearly set out in the Constitution and that as far as possible, each arm of Government must desist from encroaching on the functions of the other arms of Government. In fact, the Court's position has always been that it can only interfere with the exercise of the Executive and the Legislature's mandates if it is alleged and demonstrated that they have threatened to act or have acted in contravention of the letter and spirit of Constitution…."***

122. To the Commission, the said amendments were done in clear contravention of Articles 1, 10, 159, 160, 166 (1) (a), 255 (1) and 259 (11) and are therefore unconstitutional. It was averred that every person, including the Respondents have an obligation to respect, uphold and defend the Constitution as stipulated under Article 3(1) of the Constitution of Kenya 2010. At Article 165(3) (d)(i), this Court is given the jurisdiction to determine the question whether any law is inconsistent with or in contravention of the Constitution. The jurisdiction of the Court to invalidate laws that are unconstitutional is in harmony with its duty to be the custodian of the Constitution, which pronounces its supremacy at Article 2(4) of the Constitution.

123. In conclusion the Commission submitted that the nation has made great achievements with the promulgation of the 2010 Constitution and that the independence of the judiciary, which is now in jeopardy, was one of the main facets conveying this achievement. To the Commission, ***Statute Law (Miscellaneous Amendment) Act, 2015*** is a blatant violation of the Constitution that ought not to be allowed to stand. Further, the rushed nature of events portrayed after its publication by sneaking vital amendments to the ***Judicial Service Act, 2011*** is unconstitutional and such eventuality should not be tolerated by this Court whose mandate is to honour and uphold the values and stipulations enshrined in our Constitution. Such an amendment that is in total disregard to these values and stipulations should therefore be frowned upon.

124. The Judicial Service Commission therefore urged this Court to grant the following orders:

1. **A declaration that in accordance with Article 259 (11) of the Constitution the president is**

bound by the recommendation of the Judicial Service Commission made under Article 166(1) (a) of the Constitution.

2. **A declaration that the amendments made to section 30(3) of the *Judicial Service Act, 2011* by *Statute Law (Miscellaneous Amendment) Act 2015* are inconsistent with Article 166(1)(a) of the Constitution and are therefore null and void.**
3. **Declaration that the amendments made on section 30(3) of the *Judicial Service Act, 2011* by the National Assembly attempts to limit the Constitutional mandate of the Judicial Service Commission and it is therefore a violation of the Constitution and limits the independence of the Judicial Service Commission and is therefore null and void.**
4. **A declaration that the amendments made on section 30(3) of the *Judicial Service Act, 2011* by *Statute Law (Miscellaneous Amendment) Act 2015* are inconsistent with Article 118 of the Constitution and therefore null and void.**
5. **A declaration that the amendments made on section 30(3) of the *Judicial Service Act, 2011* by *Statute Law (Miscellaneous Amendment) Act 2015* were done without reasonable, meaningful and qualitative public participation and are therefore a nullity ab initio.**
6. **A declaration that Article 166 (1)(a) of the Constitution does not require that the Judicial Service Commission submits to the president three names for the appointment to the position of Chief Justice or Deputy Chief Justice.**
7. **A declaration that in line with Article 166(1)(a) of the Constitution of Kenya the Judicial Service Commission shall recommend only one name to the President for appointment of the Chief Justice/ Deputy Chief Justice as the case may be.**

1st *Amicus Curiae*'s Case

125. According to the 1st *amicus*, The International Commission of Jurists**,** and based on **Dr Julie Oseko's** PHD thesis '***Judicial Independence in Kenya; Constitutional challenges and opportunities for reform',*** the term judicial independence is used by scholars, judges, lawyers and members of the public to mean different things but all those usages allude to constitutionalism, rule of law and democracy and that in Africa judicial independence is considered a core element of Constitutionalism, democracy and a good government. To the author, judicial independence is defined in very broad terms by all concerned treaties and principles as the protection of courts and judicial officers from actual and apparent interference of any kind.
126. It was therefore submitted that the independence of the judiciary is therefore demonstrated in two fronts; first, institutional independence and secondly, personal independence of judicial officers. Institutional independence is where a judge is able to work in an independent environment and system. In this way a judge doesn't worry about their tenure, promotion, security and even legitimacy coming from the power and goodwill of the executive. It is only when this institutional independence is possible that judges will be able to have personal independence, where they can take action without fear or interference and where they are able to pronounce decisions based on law and their convictions on the notion of justice. These two fronts are dependent on each other. One can't stand without the other.
127. It was submitted that the independence judiciary in Kenya was in many ways structured like the colonial judiciary, where judicial officers were appointed and held office at the pleasure of the President. In the colonial times, judicial officers were appointed by the Governor in consultation with the colonial office. Specifically the Chief Justice was appointed by the Governor General acting on the advice of the Prime Minister and in concurrence with the Presidents of not less than 4 regional assemblies. After independence the Chief Justice was appointed by the President directly as a result of which the office of the Chief Justice lacked impartiality and a majority of Kenyans as late as in the year 2005 believed that the Chief Justice was not independent. The Commission which came up later was just like in the former Constitution, limited to advising the President on the appointment of judges. Therefore up to the year 2010 the President of Kenya had the prerogative in the selection of judges on the advice of the Commission. The Commission was however composed of political appointees who were directly appointed by the President. In one way or the other this indicates that the President appointed members of the Commission and also appointed the Chief Justice and thus had great sway on who became judges and on who became the Chief Justice. It was therefore submitted that the process of appointment was neither

transparent nor accountable to the public interest as no vacancies were advertised and a perception existed that persons were selected based on political, ethnic and partisan interests. To the *amicus*, there was a problem of quality as the Constitution neither required experience in practice or academia: all one had to be was an Advocate of the High Court of 7 years' experience. As a consequence of earlier revisions to the independence Constitution there was an attempt to concentrate power in the executive at the expense of weakening other arms such as the judiciary as was the case when section 61 and 62 of the Constitution of 1963 was amended stripping off judges their security of tenure.

128. While outlining the various methods of appointment of judges, the *amicus* submitted that Kenya has adopted a merit selection, where judges apply for positions and are selected through commissions empowered under the law in order to deal with the numerous challenges of pre 2010 years. To the *amicus*, the executive method of selection seems to only flourish in strong and mature democracies such as the United States of America as the democratic culture in those countries surpass by far our country's democratic space. In its view, the new dispensation on the appointment of judges generally sought to cure a mischief of the executive influencing the judiciary, which is the bastion of justice.

129. It was submitted that in a democracy, judges are thought and portrayed or should be independent non-political actors. This can only be achieved if the role of political actors in the process of appointment is limited as much as possible and appointments are almost entirely based on merit. Though most of the times it is not easy, the 3rd method of selection significantly reduces and insulates the justice system of the consequences of a partisan judiciary.

130. It was therefore contended that since Kenya codified the 3rd method of merit based selection, allowing the President to select a name from 3 names submitted to him is tantamount to allowing the candidates who have been evaluated on merit to be taken through another process which would be based on extraneous factors other than merit and competence which would in turn undermine the entire threshold set out above.

131. It was submitted that the Constitution establishes a robust, independent and functional judiciary. Article 160(1) of the Constitution provides that in the exercise of judicial authority, the judiciary shall be subject only to the Constitution and the law and shall not be subject to the control or direction of any person or authority. Further, the process of appointment of the Chief Justice, as laid down in Article 166 (1) of the Constitution, serves as a model for an appointment process, which provides an important safeguard that ensures public accountability and responsiveness to the people of Kenya and in respect of good governance. The said Article is aimed at ensuring sufficient checks and balances within the three arms of government. It eliminates the possibility of the President treating the judiciary as a subordinate entity rather than an equal. In support of this submission reliance was sought from **B O Nwabueze**, ***Presidentialism in Commonwealth Africa*** 435 (1974) and it was submitted that it is the restraint provided for in Article 166(1), which the Amendment Act seeks to sidestep. Further, the Amendment Act seeks to dissolve and dissipate the constitutional limitation upon the executive raiding and in-subordinating the Judiciary. It seeks to permit the executive to act as a superordinate branch of government with tentacles that stultify the other branches. It seeks to free the President from the constitutional borders set up by Article. 166 (1) and to dissipate the separation of powers. It was the view of the *amicus* that the Amendment Act seeks to involve the executive in the formal process of appointment of the Chief Justice, thereby permitting the executive a measure of control on the person who becomes the Chief Justice thus subordinating the Judiciary to the executive.

132. It was submitted further that since Article 166(1) of the Constitution requires the President to appoint the Chief Justice and the Deputy Chief Justice in accordance with the recommendation of the Judicial Service Commission, and subject to the approval of the National Assembly, from a constitutional interpretive approach, the appointment of the Chief Justice and Deputy Chief Justice ought to and must only be done within the prescribed procedure outlined in the Constitution. Since the Constitution is the supreme law within its domain, the textual analysis of the words of the Constitution must be within the interpretive principle ***verbislegis non estrecedendum,*** without departure from the express words of the law. To the *amicus*, the unambiguous textual expression of "*…appointed by the President in accordance with the recommendation of the Judicial Service Commission...*" provides the basis for interpretation of the manner in which the Judicial Service Commission may recruit the Chief Justice. If the intention of the Constitution were to envision a

situation where the President is supplied with several names, then the drafters would have used permissive language, for example the phrase *'on the advice of'*. However, the Constitution is emphatic that in the choice of words, *'in accordance with'*, which has plain and unambiguous meaning. The *amicus* drew comparison from Article 142(1) of the Uganda constitution which provides that:

> ***The Chief Justice, Deputy Chief Justice, the principal judge, a justice of the Supreme Court, a justice of Appeal and a judge of the High Court shall be appointed by the President acting on the advice of the J.S.C and with approval of Parliament.***

133. Further comparison was made with respect to the South African scenario where Article 174(3) provides for appointment of judges as follows:

a. ***The president and the Deputy President of the Constitutional Court after consultation with the Judicial Service Commission and the leaders of parties represented in the National Assembly.***
b. ***Chief Justice and Deputy Chief Justice after consulting the Judicial Service Commission.***
c. ***Judges of the Constitutional Court are appointed by the President, after consultation with the President of the Constitutional Court and the leaders of parties represented in the National Assembly, in accordance with the following procedure.***

134. Apart from the supremacy clause in Article 2(1) of the Constitution, it was submitted that the Constitution in Article 2(6) underscores the relevance and influence of international norms and standards. Therefore it is thus helpful to turn to other international norms and standards that also deal with the matter of appointment of judges since they can assist with the understanding and interpretation of the values that are reflected in the Constitution. To the *amicus*, the ***Commonwealth Latimer House Principles,*** adopted by the Commonwealth Heads of Government in Abuja in 2003, identifies best practices under the Commonwealth Principles on the Accountability of and the Relationship between the Three Branches of Government. To the *amicus*, the ***Commonwealth Latimer House Principles*** recommend that best practice would require that the Judicial Service Commission be empowered to present the executive with a single, binding recommendation for each vacancy in the judiciary. Alternatively, if the executive has a legal power to reject the Commission's recommendation, then it should be required to provide reasons for doing so. The ***Commonwealth Latimer House Principles*** caution that in systems where the Judicial Service Commission is required to present the executive with a shortlist of recommended candidates, a combination of legal safeguards and a settled culture of political neutrality are indispensable requirements in order to be a reliable and legitimate means of appointing judges.

135. The *amicus* also relied on the ***UN Basic Principles on the Independence of the Judiciary*** as offering helpful guidance on particular institutional arrangements that could shed light on the matter under consideration. The said principles require the procedures for nomination, election and appointment of judges to be transparent and provide appropriate safeguards against nominations, elections and appointments motivated by improper considerations. Further reliance was sought from Article 9 of the ***Universal Charter of the Judge***, developed and approved by the International Association of Judges (IAJ) which provides that the appointment of judges must be carried out by an independent body according to objective and transparent criteria based on proper professional qualification. The *amicus* in addition relied on the ***AU Resolution on the Respect and Strengthening of the Independence of the Judiciary*** which calls upon African countries to have a strong and independent judiciary enjoying the confidence of the people for sustainable democracy and development. The Resolution requires African countries to repeal all their legislation which are inconsistent with the principles of respect of the independence of the judiciary, especially with regard to the appointment and posting of judges; incorporate in their legal systems, universal principles establishing the independence of the judiciary, especially with regard to security of tenure; and refrain from taking any action which may threaten directly or indirectly the independence and the security of judges and magistrates.

136. While on the same subject the *amicus* also cited the ***Council of Europe's Recommendation on the Independence of Judges*** which offers illuminating comparative lessons in the recognition,

protection and promotion of the independence of judges. Principle 2(b) of the Recommendation states that the independence of judges must be guaranteed by inserting specific provisions in constitutions or other legislation and that "the executive and legislative powers should ensure that judges are independent and that steps are not taken which could endanger the independence of judges."

137. It was therefore submitted that the Constitution of Kenya enjoys a place of pride in the company of international principles, norms and standards that require judges to be appointed on the basis of clearly defined criteria and by a publicly declared process that conveys a fundamental commitment to transparency. This means that, at a minimum, and in the first instance, the public must be informed of the characteristics that qualify persons for judicial office and, in the second place, the procedures that are followed when an individual is considered for appointment. To the *amicus*, this commitment to transparency is dimmed at the tail end by the new amendments yet the modern commonwealth practice endorsed by the Constitution of Kenya requires a diminished role of the executive in the appointment of the Chief Justice and other judicial officers. In Kenya, particularly, the constitutional architecture and design allows the President to sit both as the head of government and state. The formal appointment of a person to the office of the Chief Justice is thus, within the terms of the Constitution, a formal act performed by, or in the name of, the Head of State.

138. However, it was submitted this formal responsibility does not mean that the executive will have any say in who is appointed. There are many ways in which the executive can play a part in the selection and appointment of judges without having sole responsibility of appointing the Chief Justice. In fact, the executive plays at least some part in the appointment of judges through its representation in the Judicial Service Commission. The Attorney General, who is the government's legal advisor, and one woman and one man representing the public, appointed by the President, sit in the Commission.

139. It was the *amicus*' case that it is not a requirement of the law, and indeed it would be inconceivable and imprudent, illegal and unlawful, that the Commission would nominate qualified persons over and above the declared vacancies for the President to pick and choose.

140. It was contended that the framers of the Constitution of Kenya infused into the Constitution, the concept of separation of powers on a two-pronged approach. State power has been separated and dispersed both vertically and horizontally. Vertically, this power has been divided, separated and dispersed in terms of the different levels of governance; namely, the National government and the County government. The different governments control each other; at the same time that each is controlled within itself. In addition, power at the national level of governance is further divided, separated and dispersed horizontally into different departments of government in terms of the traditional three organs of state; namely, the legislature, executive and judiciary.

141. It was submitted that each of the three branches has a corresponding identifiable function of government and each must be confined to the exercise of its own function and not allowed to encroach upon the functions of the other branches. Furthermore, the composition of these three branches of government must be kept separate and distinct with no individual being allowed to be a member of more than one branch at the same time. For instance, Article 152(1) of the Constitution provides that the composition of the Cabinet shall consist of the President, the Deputy President, the Attorney General and not more than twenty-two Cabinet Secretaries, none of whom shall be an elected Member of Parliament. Parliament, on the other hand, enjoys legislative competence and is not subject to control or directions from any arm of government when positively legislating. In addition, the Constitution takes a plural approach to the organization of the legislature in the form of a bicameral institution thus creating a further dispersal of power.

142. The judiciary is designed as a distinct arm of government free from manipulation from the executive. The Constitution envisages a robust, independent and functional judiciary. Article 2(3) of the Constitution proclaims that the judiciary draws its powers from the sovereign under the Constitution. Article 159(1) of the Constitution provides that the judicial authority is derived from the people and vests in, and shall be exercised by, the courts and tribunals established by or under this Constitution. In particular the Constitution supports an independent, impartial, honest and competent judiciary and recognizes that an independent, effective and competent legal system is integral to upholding the rule of law, engendering public confidence and dispensing justice. Article 160(1) of the Constitution provides that the in the exercise of judicial authority, the

judiciary shall be subject only to the Constitution and the law and shall not be subject to the control or direction of any person or authority. Accordingly, the executive makes and implements public policy decisions while Parliament enacts legislation, and the judiciary interprets the law independently.

143. It was submitted that closely related to the concept of Separation of Powers is the doctrine of the Rule of Law, which is one of the most important political ideals of all time. It is one of a cluster of ideals constitutive of modern political morality. The rule of law is a fragile but crucial ideal, one that is appropriately invoked whenever governments try to get their way by arbitrary and oppressive action or by short-circuiting the norms and procedures laid down in a country's laws and the Constitution.

144. The rule of law is multi-faceted but most conceptions give central place to a requirement that people in positions of authority should exercise their powers within a constraining framework of public norms rather than on the basis of their own preferences, their own ideology, or their own individual sense of right and wrong. The rule of law is violated when the institutions that are supposed to embody these procedural safeguards are undermined or interfered with. It is in this way that the rule of law has become associated with political ideals such as the separation of powers and the independence of the judiciary.

145. Accordingly, it was submitted that the amendment to give the President the latitude to determine the head of another arm of government is a clandestine manoeuvre to undermine the principle of separation of power. The amendment does not inspire confidence that the constitutional guarantee of the independence of the judiciary as a separate and distinct arm of the government has been preserved.

146. The *amicus* asserted that Kenya's peculiar history of weakening key institutions of governance is well documented. It was however its position that the judiciary has been basking in the glory of a robust, independent and functional institution and that the Kenyan Judiciary has acted in an exemplary manner since the Constitution came into operation in 2010 by observing the high standards that are maintained by democracies.

147. It was submitted that the apex court in the land, the Supreme Court of Kenya, is particularly tasked with presiding over presidential election petitions. One of the reasons why the Supreme Court was called upon to determine the presidential election petition was the overwhelming public confidence in the independence and impartiality of the judiciary. However if the ascension to the Office of the Chief Justice and President of the Supreme Court of Kenya is deferred to the discretion of the head of the political wing of government, then a new momentum of executive dominance in the judiciary has commenced. Although the Constitution still provides for the independence of the judiciary in the exercise of its powers, the risk of executive interference with the independence of the judiciary cannot be overlooked. The amendments, it was contended are a subtle but effective way to outmanoeuvre the principle of separation of powers. Logically, the public can be expected to be reasonably apprehensive that when the President unilaterally appoints the Chief Justice from a pool of recommended candidates, the successful candidate is arguably indebted to the executive and susceptible to executive patronage.

148. To the *amicus*, a historical inquiry into Kenya's constitutional architecture reveals that the independence constitution, although not perfect, was a highly detailed one, squarely addressing the persistent problems of constitutionalism, separation of powers and checks and balances, but was altered over the years occasioning a new momentum in the Executive's dominance in the political and constitutional set-up. The consequence of the concentration of power in the presidency was that the President dominated all other organs of the state, reducing the principles of separation of powers and effective checks and balances. To the *amicus*, there is a strong relationship between the past constitutional amendments and the unfolding attempts to amend the Constitution by statute: the systematic weakening of key institutions of government, removal of the principle of separation of powers, and the inevitable collapse of the rule of law.

149. In the *amicus*' view, the amendments to the ***Judicial Service Act*** are not happenstance but must be understood in the context of Kenya's peculiar history of reversing constitutional gains. The inescapable consequence of allowing the President greater latitude in determining who becomes the Chief Justice is the deletion of the principle of separation of powers from Kenya's constitutional set up.

150. It was further submitted that the Constitution establishes the Judicial Service Commission as an

independent constitutional commission under Article 248(2). It draws the authority to execute its functions from the Constitution. Article 172(1) of the Constitution provides for the functions of the Judicial Service Commission, including especially, appointment of judicial officers. Article 249(2) provides that the constitutional commissions and the holders of independent offices are subject only to the Constitution and are independent and not subject to direction or control by any person or authority. In executing its functions, the Commission is to be guided only by the Constitution and the law.

151. It was reiterated that on appointment of the Chief Justice, Article 166 (1) (a) of the Constitution provides that the Chief Justice and the Deputy Chief Justice shall be appointed by the President in accordance with the recommendation of the Judicial Service Commission, and subject to the approval of the National Assembly. Section 30 (3) of the ***Judicial Service Act***, before the amendment, provided for a transparent recruitment of the Chief Justice. From a functional independence perspective, the provisions of the ***Judicial Service Act*** before the amendment were thus consistent with the functional independence of the Judicial Service Commission. However, the ***Statute Law (Miscellaneous Amendments) Act, 2015*** that amended the ***Judicial Service Act*** by deleting section 30(3) thereof, and inserted a new provision in its place has altered the design of the operations of the Judicial Service Commission by requiring the Secretary of the Commission to forward three names of the persons nominated for recommendation for appointment to the position of Chief Justice to the President.

152. It was the position of the *amicus* that in essence, the role of the Judicial Service Commission in respect of the appointment of the Chief Justice has been significantly reduced to an errand body to scout for possible candidates for the President to pick and choose in a manner that fundamentally alters its functional independence. According to the *amicus*, the argument that the President needs not be a rubber stamp is both constitutionally offensive and fundamentally flawed. The Constitution is unequivocal on the role and functional independence of the Judicial Service Commission. The power to determine the holder of the Office of the Chief Justice has been unconstitutionally re-assigned by statute from the Judicial Service Commission to the presidency. The clawing of one of the core functions of Judicial Service Commission and re-assigning it to the presidency is thus not only unconstitutional but also impedes the functional independence of the Judicial Service Commission.

153. On public participation, it was submitted that in the order and practice of governance, public participation is an indispensable ingredient. Indeed the Constitution endorses participatory approach to governance and governance processes. Article 10 of the Constitution outlines the principles of governance to include especially, inclusivity and public participation.

154. In terms of judicial appointments, it was its view that the Constitution infuses public participation as an integral part of the process and procedure. In formulating the membership to the Judicial Service Commission, the Constitution is careful to include members of the public. Article 171(2) of the Constitution provides that the Commission shall consist of (*a*) the Chief Justice; (*b*) one Supreme Court judge; (*c*) one Court of Appeal judge; (*d*) one High Court judge and one magistrate; (*e*) the Attorney-General; (*f*) two advocates; (*g*) one person nominated by the Public Service Commission; and (*h*) one woman and one man to represent the public. This introduces the first level of public participation. To the *amicus*, the provision for lay membership in the Judicial Service Commission is intended to give the Commission a credibility and balance which a judicial membership cannot hope to achieve on its own. The system for fair appointment of the lay members is also very important and well anchored in the Constitution. Article 171(1) (h) provides that the President nominates one woman and one man to represent the public, not being lawyers, with the approval of the National Assembly.

155. To the *amicus*, the second level of public participation occurs during the selection process of judicial officers since section 9 of the Act requires the Judicial Service Commission to issue a press release announcing the names of the applicants; publicize and post on its website the place and approximate date of the Commission meeting for interviews; cause the names of the applicants to be published in the Kenya *Gazette*; invite any member of the public to avail, in writing, any information of interest to the Commission in relation to any of the applicants; and interview any member of the public who has submitted any information on any of the applicants, and such information shall be confidential.

156. The third level of public participation, according to the *amicus*, is during the parliamentary

vetting of the nominee to the Office of the Chief Justice. Article 118 (1) (b) requires Parliament to facilitate public participation and involvement in the legislative and other business of Parliament and its committees. The democratic process of appointing the Chief Justice provides the justification for public confidence in the judiciary and reinforces personal, institutional and functional independence of judicial officers and the judiciary at large.

157. This process was contrasted with the one in England and Wales where the Lord Chief Justice of England and Wales is chosen by a specially appointed committee convened by the Judicial Appointments Commission while the justices of the Supreme Court in England and Wales are chosen by a specially constituted committee. Thereafter the name is forwarded to the Prime Minister who forwards it to the Queen for formal appointment. The roles of the Prime Minister and the Queen, it was submitted are purely ceremonial.

158. The 1st *amicus* therefore was of the opinion that the amendments to the ***Judicial Service Act 2011*** that give the President the option and room to choose one name among three for the post of Chief Justice or Deputy Chief Justice, is unconstitutional as it seeks to amend the Constitution through statute.

The 2nd *Amicus Curiae*'s Case

159. According to the 2nd *amicus*, **Kituo Cha Sheria**, previously judicial appointments were a function solely confined to the executive and due to the executive patronage, the ability of the judiciary to be fair and independent remained questionable, leading to grievous human rights violations, lack of access to justice and breakdown of the rule of law. That system, it was submitted resulted into serious violence in the year 2007/2008 which left the country on the brink of a precipice. It was these circumstances that necessitated the establishment of the Commission as a Constitutional Commission in the Constitution of Kenya, 2010. In support of this position the *amicus* relied on **Timothy Njoya & 17 Others vs. Attorney General & 4 Others [2013] KLR** and **Commission on Administrative Justice vs. Attorney General & Another [2013] KLR**, **Bruce Ackerman** in his article ***The New Separation of Powers*** 2000 113 Harvard LR 634, **Prof. Ben Sihanya's *The Presidency and Public Authority in Kenya's New Constitutional Order*** (supra) and **Prof. Lumumba and Prof Franceschi**, ***The Constitution of Kenya, An Introductory Commentary***,

160. It was submitted that given the employment of the word "shall" in Article 166(1) of the Constitution, the effect of the impugned amendment is to give the President a discretion not contemplated by the Constitution. To the *amicus* the wording in the Article (recommendation) being singular as opposed to plural (recommendations), it clearly limits the idea of recommending several names to the President hence comparison with the appointment of Chairpersons of Commissions is erroneous. In its view, to argue to the contrary would also imply that the President would be entitled to given three times the number of vacancies for judge in order for the President to appoint a third of them.

161. The *amicus* asked the Court to adopt the mischief rule as well as a purposive approach which would be to limit the whims and discretion of the Presidency in the appointment of the Chief Justice and the Deputy Chief Justice which the said amendments are aimed at enhancing.

162. Based on **Stephen Mwai Gachiengo vs. Republic [2000] eKLR**, it was submitted that giving the President the discretion to appoint the Chief Justice and the Deputy Chief Justice from three candidates interferes with the independence of the Commission in the appointment process as contemplated in the Constitution. In line with Article 2 of the Constitution, the Court was urged to avoid an interpretation that would give rise to constitutional problems. It was submitted that Parliament cannot enact any legislation that is inconsistent with the Constitution hence the Court is obliged to invalidate such legislation. In support of this submission the *amicus* relied on **The Canadian Supreme Court in the R vs. Big M Drug Mart Ltd., [1985] 1 S.C.R. 295** and contended that the impugned section 30(3) of the Act if implemented will bring an unconstitutional effect in that it will give the executive a discretion that was not intended by the Constitution.

163. On public participation, the *amicus* cited Articles, 10 and 118 of the Constitution, **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), Institute of Social**

Accountability & Another vs. National Assembly & 4 Others High Court Petition No. 71 of 2014 [2015] eKLR, Minister of Health and Another NO vs. New Clicks South Africa (Pty) Ltd and Others 2006 (2) SA 311 (CC) at para. 630, and submitted that the public participation conducted was not qualitative considering the short period within which the Bill was passed and the fact that the impugned section was introduced on the floor of the House.

164. This Court was therefore urged to uphold the rule of law and declare the impugned amendments unconstitutional.

The 3rd *Amicus Curiae*'s Case

165. On the part of the 3rd *amicus curiae*, **The Kenya National Commission on Human Rights**, it was submitted that the provisions governing the structural framework as well as the process for constitution of the Judiciary are to be found under Chapter 10 of the Constitution. Article 159 acknowledges judicial authority as being derived from the people of Kenya which authority is vested in and is to be exercised by the courts and tribunals established under the Constitution. In exercising this authority, courts and tribunals are to be guided by principles of justice to all irrespective of status, non- delay of justice and non - restriction to procedural technicalities, among many other considerations. Addressing the aspect of independence of the judiciary, it was contended that Article 160(1) declares that the judiciary is to be subject only to the Constitution and the law and is not to be subject to the control or direction by any person or authority.

166. It was contended that Article 166(1), which provides the procedure of appointment of the Chief Justice and the Deputy Chief Justice, states that the Chief Justice and the Deputy Chief Justice shall be appointed by the President upon recommendation by the Judicial Service Commission and subject to the approval of the National Assembly. Sub-Article 3 thereof provides for the qualifications to be met by persons from among whom the Chief Justice and other judges of the Supreme Court shall be appointed. Article 171 of the Constitution on the other hand establishes the Commission and sets out its composition while Article 172(1) places on the Commission the responsibility of promoting and facilitating the independence and accountability of the judiciary and the efficient, effective as well as the onus of guaranteeing transparent administration of justice. Under the said Article, one of the measures for achieving the above standards is by the Commission playing the role of recommending to the President persons for appointment as judges.

167. It was averred that prior to the above amendment, the phrase '*names of persons nominated*' appeared in the ***Judicial Service Act*** only in reference to the appointment of Judges under the first schedule to the Act. The reference to *'names of persons nominated'* is, however, not expressly mentioned in the initial/original Act in reference to the appointment of the Chief Justice and the Deputy Chief Justice save that section 30 (3) – now deleted by the amendment – stated that the provisions of section 30 shall apply to the appointment of the Chief Justice and the Deputy Chief Justice – thus acknowledging the applicability of the procedure as provided for under the First schedule to the Act. It is, therefore, worthy to note that the first schedule to the Act prior to this amendment, still made reference to **'***names of persons nominated…'*only that this express phrased had not been employed under the substantive section of the law (section 30(3) now deleted).

168. According to the 3rd *amicus*, it would be convincingly said that this amendment does not, thus, fundamentally change the purport and tenor of the rules on the process of appointment as captured in the First Schedule to the Act in so far as the appointment of judges – the Chief Justice and the Deputy Chief Justice included – is concerned. The amendment only, now, expressly provides under the section addressing the appointment of the Chief Justice and the Deputy Chief Justice, for the forwarding of *three names of persons* nominated for recommendation for appointment to the President, thus in consonance with Article 166 of the Constitution, the ***Judicial Service Act*** still solely mandates the Commission to determine who qualifies for appointment. The only difference now is that the Act prescribes three as the number of nominees to be forwarded to the President. The President selects one name and forwards it to the National Assembly for approval. Upon approval, the President appoints the person to the office of Chief Justice or Deputy Chief Justice, as the case may be. In the event of disapproval by the National Assembly of the President's first selection, then the President is obliged to submit the name of his second favourable nominee of the Commission, followed by the name of his last favourable nominee of the Commission. In the event of rejection by Parliament of all three nominees, then the Commission interviews fresh

candidates and resubmits three new names to President.

169. To the *amicus*, it would thus be argued that this amendment does not take away from the Commission the power to determine, by way of recommendation, individuals who are likely to become the Chief Justice or Deputy Chief Justice. The only change is that the Act now prescribes the number of recommended nominees to the President. Therefore, the power to determine the person(s) who deserve (s) to become Chief Justice or Deputy Chief Justice lies with the Commission. The power to determine who eventually becomes the Chief Justice or Deputy Chief Justice, as it were, first lies with the President and, finally, the National Assembly. They shall do so only from a restricted source. The President will play a part in selecting a candidate from the three names supplied by the Commission. Parliament will have the last word in determining who ultimately becomes the Deputy/Chief Justice.

170. It was submitted that the requirement that the Judicial Service Commission be the sole determiner of suitability of candidates for the two offices is the constitutional safeguard for guaranteeing an independent judiciary at the hiring level. The selection for appointment, by the President, of one candidate from amongst three nominees does not impinge on the independence of the judiciary because the suitability of the nominees will have already been established by the Judicial Service Commission. In view of the above analysis, the amendment to section 30(3) of the Judicial Service Act, therefore, does not violate Article 116 (1) of the Constitution.

171. It was contended that according to ***Oxford Advanced Learners Dictionary*** (4th Edition), the word **'***recommendation'* means a suggestion or proposal as to the best course of action, especially one put forward by an authoritative body. It may mean advice, counsel, guidance, direction, suggestion, proposal, commendation, endorsement, good word, favourable mention, or testimonial. "*Appointment*" on the other hand is defined by the same dictionary as the act of placing in a job or position. To the *amicus*, the expectation under Article 166(1) of the Constitution, therefore, is that the Commission will make a recommendation to the President, which recommendation will be forwarded to the National Assembly, which reserves the power to approve or disapprove the recommended name placed before it. A plain reading of Article 166(1) of the Constitution, it averred, means that the President only appoints based on what the Commission recommends. To the amicus, the Article neither prescribes the number of names to be forwarded to the President nor implies that the Judicial Service Commission should forward one name to the President. In its view, the Article guards the independence of the Commission by limiting the President to forwarding to the National Assembly only the name of the person or persons recommended to him by the Commission. To the *amicus*, it means that the President cannot come up with a name and forward the same to the National Assembly for approval, unless the same emanates from the Commission. The *amicus* relied on Article 259(11) of the Constitution which provides that if a function or power conferred on a person under this Constitution is exercisable by the person only on the advice or recommendation, with the approval or consent of, or on consultation with, another person, the function may be performed or the power exercised only on that advice, recommendation, approval or consent, or after that consultation, except to the extent that this Constitution provides otherwise. To the *amicus*, since Article 259 (11) of the Constitution binds the President to table before the National Assembly a name submitted to him by the Judicial Service Commission, a violation would only arise where the President tables a name from sources other than the Commission.

172. With respect to the process and mode of enactment of the ***Statute Law (Miscellaneous Amendment) Act of 2015,*** it was submitted that Article 255(1)(a), (c), (d), and (e) provides that constitutional amendments that relate to the supremacy of the Constitution, sovereignty of the people, national values and principles of governance and the Bill of Rights among others done by either parliamentary or popular initiative must be through a national referendum. This inbuilt Constitutional fortification, it was contended, was aimed at ensuring that the executive or legislature does not erode the people's constitutional gains and aspirations as had been the case prior to 2010. It was further intended to ensure that the voice of the people, popularly known as "*Wanjiku*'' is sought, heard, taken into legislative consideration and respected at all times, including during judicial interpretations.

173. The *amicus* noted that the Memorandum of Objects and Reasons of the ***Statute Law (Miscellaneous Amendment) Bill 2015*** published in a Special Issue of the Kenya Gazette – Supplement No. 164 (National Assembly Bills No. 57) stated that the Bill was in keeping with the

practice of making minor amendments which do not merit the publication of a separate Bill. A careful analysis of the Bill and the consequential amendments in the Act, however, reveals extensive, controversial and substantial amendments to various Statutes. In reality, the provisions of the Bill sought to make fundamental changes to the ***National Police Service Act*** with a view to significantly re-designing some objects of the Constitution of Kenya relating to gender parity. Furthermore, the amendments made to section 30 of the ***Judicial Service Act, 2011*** by the Amendment Act, it was contended, have far reaching implications despite having been passed by an omnibus miscellaneous amendment. The amicus reiterated the argument that the ***Statute Law (Miscellaneous Amendment) Bill, 2015*** that was published on 18th September 2015 did not contain the impugned amendments and that these far- reaching amendments were only introduced later , on the floor of the house.

174. In the *amicus* view, if it is found that the ***Statute Law (Miscellaneous Amendment) Act 2015*** contains provisions that affect county governments, then the same ought to have been submitted to the Senate for debate and approval as required by Article 96 as read with Article 110 of the Constitution.

175. On public participation, it was contended that the principle is a national value and principle enshrined under Article 10(2)(a) of the Constitution which is a sacred expression of the sovereignty of the people articulated in Article 1 of the Constitution. It is a golden and sacred thread running throughout the entire Constitution from the preamble and includes Article 94 which vests legislative authority of the people of Kenya in Parliament. Similar principles are expressed in Article 118 of the Constitution.

176. In the *amicus* view, legislation is important to enhance law and order. It has the power to effect great transformation especially for those who are poor, vulnerable and marginalised. Limitations in the law making process including technical advisory and people's participation may impact negatively on the content and form of the legislation or bill. It is, therefore, imperative that a participatory, open, transparent and accountable legislative process is insulated and followed to the letter to enhance democratization, development and social integration especially in states like Kenya where historical marginalization , poverty and vulnerability are recognized and entrenched in the Constitution to enhance equity and equality. This argument was based on Article 10(2)(b) and (c) of the Constitution which provides human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalized on one hand and good governance, integrity, transparency and accountability on the other. On comparative study to critique and share best practices on participatory legislative reform the *amicus* cited the study undertaken by University of Oxford titled ***A Comparative Survey of Procedures for Public Participation in Law Making Process-Report of the National Campaign for People's Right to Information (NCPRI), April 2011)*** which reviewed bills and policy making in South Africa, Switzerland, Canada, United Kingdom, United Nations of America and The European Union. It also relied on the South African case of **Matatiele Municipality and Others vs. President of the Republic of South Africa and Others (2) (CCT73/05A) [2006] ZACC 12; 2007 (1) BCLR 47 (CC)**, in which the court noted and pronounced that the legislature has the discretion of developing new and innovative public participation procedures that go beyond the formal requirements or notice and public hearings. In the *amicus*' view, this is a practice that Kenya needs to consider given the history of marginalization and special interest groups and the principles of affirmative action that have been inbuilt in the Constitution. Further reliance was placed on **Doctors for Life International vs. Speaker of the National Assembly and Others (supra)** from which the *amicus* cited in extensor paragraphs relating to public participation and posed the questions whether the people of Kenya did exercise their sovereign power directly and effectively; whether they had the necessary information to effectively participate in the public forums in Nairobi City County; whether the legislature facilitated public participation; whether the elected representatives adequately represented the people of Kenya; whether "*Wanjiku's''* voice was heard and taken into account by the National Assembly; whether the disempowered and marginalized communities' voices participated; whether their views were taken into consideration; and whether the Kenyan situation and context was too urgent to warrant and justify the legislative timetable that was accorded to the process.

177. In its view, whereas the nature and extent of public participation may depend on the nature of what is at hand, that does not permit the complete blackout of the public from participation. On the

authority of **Hugh Glenister vs. President of the Republic of South Africa and Others** it was submitted that the interested parties must be given adequate time to prepare for a hearing and that the time or stage when the hearing is permitted must be before the final decision is taken in order to ensure that meaningful participation is allowed. It must be an opportunity capable of influencing the decision to be taken and the question whether the notice given in a particular case complies with these principles will depend on the facts of that case.

178. The *amicus* then submitted on the principle of the presumption of constitutionality. In its view, the principle of Presumption of Constitutionality dictates that courts should only be able to strike down a statute as unconstitutional if there is an "irreconcilable variance" between the statute and the Constitution. Otherwise, a statute should be upheld. It relied on **Ndyanabo vs. Attorney General [2001] EA 495**, where it was stated that there is a general presumption that every Act of Parliament is constitutional and the burden of proving otherwise lies on the person who alleges its unconstitutionality. The effect of the strict application of the Presumption of Constitutionality is to uphold legislation that would otherwise be pronounced unconstitutional; thus by upholding legislation despite its unconstitutionality, the presumption places legislation above the Constitution, and treats the Constitution as something less than the "Superior Paramount Law."

179. Lastly, the *amicus* relied on **Nyamu, J's** (as he then was) decision in **Republic vs. Public Procurement Administrative Review Board & Another Ex Parte Selex Sistemi Integrati Nairobi HCMA No. 1260 of 2007 [2008] KLR 728** where the learned Judge pronounced himself as follows:

> ***"The other reason why this Court cannot blindly apply the so called ouster clauses is that, unlike the English position where judges must always obey, or bow to what Parliament legislate, is, because Parliament is the supreme organ in that legal system. Even there judges have refused to blindly apply badly drafted laws and have in some cases filled the gaps in order to complete or give effect to the intention of the legislature. In the case of Kenya it is our written Constitution which is supreme and any law that is inconsistent with the Constitution is void to the extent of the inconsistency (see s 3). Our first loyalty as judges in Kenya is therefore to the Constitution and in deserving cases, we are at liberty to strike down laws that violate the Constitution."***

Analysis and Determinations

180. We have considered the pleadings and submissions of the parties, as well as the issues that the parties propose as falling for determination. In our view, however, the main issues for determination are the following:

1. **Whether the entire Statute Law (Miscellaneous Amendments) Act 2015 is unconstitutional, null and void for violation of Article 96(2) of the Constitution as read with Articles 109 -113 of the Constitution with respect to the role of the Senate in the enactment of the passage of the said amendments?**
2. **Whether the entire Statute Law (Miscellaneous Amendments) Act 2015 is unconstitutional null and void for offending the provision of Article 118 with respect to facilitation of public participation and involvement in its legislative and other business.**
3. **Whether the amendments to the Judicial Service Act, 2011 by the Statute Law (Miscellaneous Amendment) Act, 2015 was properly effected by way of miscellaneous amendments.**
4. **Whether there was public participation in the passage of the Amendments to the Judicial Service Act, 2011 by the Statute Law (Miscellaneous Amendment) Act, 2015?**
5. **Whether the impugned amendments interfered with the independence of the judiciary**
6. **Whether the amendment to Section 30(3) of the Judicial Service Act 2011 by the Statute Law (Miscellaneous Amendment) Act 2015 is null and void for being in violation of or inconsistent with Article 166(1)(a) as read with Article 259(11) of the Constitution?**

181. Before dealing with the merits of the petition, however, we propose to deal with the preliminary issues that the 2nd Respondent raised. These relate to the twin doctrines of parliamentary privilege

or immunity and separation of powers.

Parliamentary Privilege

182. It was contended that since the proceedings of both Houses of Parliament are privileged pursuant to Article 117 as read with section 12 of the ***National Assembly (Powers and Privileges) Act***, this Court has no power to enter into an investigation of the said parliamentary proceedings. On this issue we wish to refer to Article 2 of the Constitution which provides that:

> ***(1) This Constitution is the Supreme law of the Republic and binds all persons and all state organs at both levels of government.***
>
> ***(2) No person may claim or exercise state authority except as authorised under this Constitution.***

183.Further, we defer to the words of **Kasanga Mulwa, J** in **R vs Kenya Roads Board exparte John Harun Mwau HC Misc Civil Application No.1372 of 2000** that:

> ***"Once a Constitution is written, it is supreme. I am concerned beyond peradventure that when the makers of our Constitution decided to put it in writing and by its provision thereof created the three arms of Government namely the Executive, the Legislature and the Judiciary, they intended that the Constitution shall be supreme and all those organs created under the Constitution are subordinate and subject to the Constitution."***

184.We agree and would add that when any of the state organs steps outside its mandate, this Court will not hesitate to intervene. The Supreme Court has ably captured this fact in **Re The Matter of the Interim Independent Electoral Commission Advisory Opinion No.2 of 2011** where it expressed itself as follows:

> **"The effect of the constitution's detailed provision for the rule of law in the process of governance, is that the legality of executive or administrative actions is to be determined by the courts, which are independent of the executive branch. The essence of separation of powers, in this context, is that in the totality of governance-powers is shared out among different organs of government, and that these organs play mutually-countervailing roles. In this set-up, it is to be recognized that none of the several government organs functions in splendid isolation."**

185.Subsequently, the same Court in **Speaker of National Assembly -vs-Attorney General and 3 Others (2013) eKLR** stated that:

> ***"Parliament must operate under the Constitution which is the supreme law of the land. The English tradition of Parliamentary supremacy does not commend itself to nascent democracies such as ours. Where the Constitution decrees a specific procedure to be followed in the enactment of legislation, both Houses of Parliament are bound to follow that procedure. If Parliament violates the procedural requirements of the supreme law of the land, it is for the courts of law, not least the Supreme Court, to assert the authority and supremacy of the Constitution. It would be different if the procedure in question were not constitutionally mandated. This Court would be averse to questioning Parliamentary procedures that are formulated by the Houses to regulate their internal workings as long as the same do not breach the Constitution. Where however, as in this case, one of the Houses is alleging that the other has violated the Constitution, and moves the Court to make a determination by way of an Advisory Opinion, it would be remiss of the Court to look the other way. Understood in this context therefore, by rendering its opinion, the Court does not violate the doctrine of separation of powers. It is simply performing its solemn duty under the Constitution and the Supreme Court Act. "***

186.The Court went on to state as follows;

> ***"Whereas all State organs, for instance, the two Chambers of Parliament, are under obligation to discharge their mandates as described or signalled in the Constitution, a time comes such as this, when the prosecution of such mandates raises conflicts touching on the integrity of the Constitution itself. It is our perception that all reading of the Constitution indicates that the ultimate judge of "right" and "wrong" in such cases, short of a resolution in plebiscite, is only the Courts."***

Separation of Powers

187.The doctrine of separation of powers was dealt with by **Ngcobo, J** in **Doctors for Life International vs. Speaker of the National Assembly and Others** (supra) in the following manner:

> ***"The principle underlying the exclusive jurisdiction of this Court under section 167(4) is that disputes that involve important questions that relate to the sensitive areas of separation of powers must be decided by this Court only. Therefore, the closer the issues to be decided are to the sensitive area of separation of powers, the more likely it is that the issues will fall within section 167(4). It follows that where a dispute will require a court to decide a crucial political question and thus intrude into the domain of Parliament, the dispute will more likely be one for the exclusive jurisdiction of this Court. It seems to me therefore that a distinction should be drawn between constitutional provisions that impose obligations that are readily ascertainable and are unlikely to give rise to disputes, on the one hand, and those provisions which impose the primary obligation on Parliament to determine what is required of it, on the other. In the case of the former, a determination whether those obligations have been fulfilled does not call upon a court to pronounce upon a sensitive aspect of the separation of powers. An example of such a provision that comes to mind is a provision that requires statutes to be passed by a specified majority. The criteria set out are clear, and a failure to comply with them would lead to invalidity. When a court decides whether these obligations have been complied with, it does not infringe upon the principle of the separation of powers. It simply decides the formal question whether there was, for example, the two-thirds majority required to pass the legislation."***

188.The learned Judge then continued:

> ***"It seems to me therefore that a distinction should be drawn between constitutional provisions that impose obligations that are readily ascertainable and are unlikely to give rise to disputes, on the one hand, and those provisions which impose the primary obligation on Parliament to determine what is required of it, on the other. In the case of the former, a determination whether those obligations have been fulfilled does not call upon a court to pronounce upon a sensitive aspect of the separation of powers. An example of such a provision that comes to mind is a provision that requires statutes to be passed by a specified majority. The criteria set out are clear, and a failure to comply with them would lead to invalidity. When a court decides whether these obligations have been complied with, it does not infringe upon the principle of the separation of powers. It simply decides the formal question whether there was, for example, the two-thirds majority required to pass the legislation. By contrast, where the obligation requires Parliament to determine in the first place what is necessary to fulfil its obligation, a review by a court whether that obligation has been fulfilled, trenches on the autonomy of Parliament to regulate its own affairs and thus the principle of separation of powers. This is precisely what the obligation comprehended in section 72(1)(a) does."***

189.The Court went on to state as follows:

> ***"While it imposes a primary obligation on Parliament to facilitate public involvement in its***

legislative and other processes, including those of its committees, it does not tell Parliament how to facilitate public involvement but leaves it to Parliament to determine what is required of it in this regard. A review by a court of whether Parliament has complied with its obligation under section 72(1)(a) calls upon a court to intrude into the domain of a principal legislative organ of the state. Under our Constitution, this intrusion is reserved for this Court only. A construction of section 167(4)(e) which gives this Court exclusive jurisdiction to decide whether Parliament has complied with its constitutional obligation to facilitate public involvement in its legislative processes is therefore consistent with the principles underlying the exclusive jurisdiction of this Court. An order declaring that Parliament has failed to fulfil its constitutional obligation to facilitate public involvement in its legislative process and directing Parliament to comply with that obligation constitutes judicial intrusion into the domain of the principle legislative organ of the state. Such an order will inevitably have important political consequences. Only this Court has this power. The question whether Parliament has fulfilled its obligation under section 72(1)(a) therefore requires this Court to decide a crucial separation of powers question and is manifestly within the exclusive jurisdiction of this Court under section 167(4)(e) of the Constitution."

190. We are duly guided and this Court, vested with the power to interpret the Constitution and to safeguard, protect and promote its provisions as provided for under Article 165(3) of the Constitution, has the duty and obligation to intervene in actions of other arms of Government and State Organs where it is alleged or demonstrated that the Constitution has either been violated or threatened with violation. In that regard, as this petition alleges a violation of the Constitution by the Respondents, it is our finding that the doctrine of separation of power does not inhibit this Court's jurisdiction to address the Petitioner's grievances so long as they stem out of alleged violations of the Constitution. To the contrary, the invitation to do so is most welcome as that is one of the core mandates of this Court.
191. We hold that this Court has the power to enquire into the constitutionality of the actions of Parliament notwithstanding the privilege of *inter alia*, debate accorded to its members and its proceedings. That finding is fortified under the principle that the Constitution is the Supreme Law of this country and Parliament must function within the limits prescribed by the Constitution. In cases where it has stepped beyond what the law and the Constitution permit it to do, it cannot seek refuge in illegality and hide under the twin doctrines of parliamentary privilege and separation of powers to escape judicial scrutiny.
192. In our view the doctrine of separation of powers must be read in the context of our constitutional framework and where the adoption of the doctrine would clearly militate against the constitutional principles the doctrine must bow to the dictates of the spirit and the letter of the Constitution. This is our understanding of the work of **Professor Laurence Tribe** in ***American Constitutional Law*** Vol 1, 3 ed. (Foundation Press, New York 2000) at 127) where he opines that:

"What counts is not any abstract theory of separation of powers, but the actual separation of powers operationally defined by the Constitution. Therefore, where constitutional text is informative with respect to a separation of powers issue, it is important not to leap over that text in favour of abstract principles that one might wish to see embodied in our regime of separated powers, but that might not in fact have found their way into our Constitution's structure."

193. We now wish to deal with the substance of the petition. Before we do so, we will revisit the historical basis for the current constitutional and legislative provisions in so far as they relate to the Judiciary.

Historical Background

194. In **Judges & Magistrates Vetting Board & 2 Others vs. Centre for Human Rights & Democracy & 11 others [2014] eKLR**, the Supreme Court expressed itself *inter alia* as hereunder:

"The Judiciary, in the run-up to the promulgation of the current Constitution on 27th August, 2010 was an institution largely distrusted by members of the public. Thus an official document, 'The peoples choice: The Report of the Constitution of Kenya Review Commission' (September, 2002) thus records (at page 52):

"The judiciary rivals politicians and the police for the most criticised sector of the Kenyan public society today. For ordinary Kenyans the issues of delay, expense and corruption are the most worrying. For lawyers, there is concern about competence and lack of independence."

It is to be recognized that the Constitution of Kenya, 2010 was a radical departure from the earlier norms of governance. Article 1 provides that all sovereign power belongs to "the people". And Chapter 10 contains elaborate provisions on judicial authority and the legal system, with Article 159 declaring that judicial authority is derived from the people and vested in Courts and tribunals established under the Constitution…the Judiciary was considered one of the most important institutions to ensure the Constitution is upheld; it was perceived as the main arbiter, in instances where interpretation or application of the Constitution was essential."

195. This was noted in ***The Final Report of the Constitution of Kenya Review Commission*** (CKRC) at page 311 in the following unflattering terms:

"the Judicial Service Commission is no longer regarded as truly independent, so the Judiciary is seen as vulnerable to government pressures"

196. The reason for this as stated at page 312 of the same Report was that under the 1969 Constitution, "appointments were made by the President, dismissals were initiated by him/her and their (commissions) finances were controlled by government ministries. The ***Constitution of Kenya Review Act***, Cap. 3A, provided in section 17(d)(iv) that under its mandate the CKRC was to among others, ensure the people of Kenya *"examine and recommend the composition and functions of the organs of state, including the Executive, the Legislature and the Judiciary and their operations, to maximise their mutual checks and balances and secure their independence"*. Therefore the establishment and improvement of the judiciary and constitutional commissions was seen as a way of promoting constitutionalism.

197. Our system then was not too dissimilar to the South African one during the apartheid regime as propounded by **Andrews Penelope E** in ***'The South African Judicial Appointment Process'*** [2006] Osgoode Hall Law Journal 565 at 572 that:

"The drafters of the first Constitution, in keeping with the newly adopted principles of transparency and accountability in South Africa's political and legal culture, appreciated that the old system of appointing judges was no longer appropriate in this new dispensation. A shift from past practices was therefore essential. The process of appointing judges under the system had been at the discretion of the President on the recommendation of the Minister of Justice. The appointment process did not require input from the judiciary, notably the Judge Presidents, nor from members of the legal profession or the civil society. Public scrutiny was excluded entirely. The new system reflects a complete rejection of that which persisted under apartheid."

198. It is therefore clear that some of the thinking which informed the reforms in the judiciary was the need to have an independent judiciary. In 2007/2008 this country went through one of, if not its worst episode(s) in its independent history. This was as a result of the disputed presidential election results of 2007 when a section of the politicians declined to take their grievances for determination by the courts on the basis that the courts as then composed were not amenable to dispensation of justice.

199. Before delving into the issues raised before us it is important in our view to set out some the basic ingredients of an independent judiciary relevant to the matters before us.

200. According to ***Commonwealth (Latimer House) Principles on the Three Branches of Government***, November, 2003:

> ***"Jurisdictions should have an appropriate independent process in place for judicial appointments. Where no independent system already exists, appointments should be made by a judicial services commission (established by the Constitution or by statute) or by an appropriate officer of state acting on the recommendation of such a commission. The appointment process, whether or not involving an appropriately constituted and representative judicial services commission, should be designed to guarantee the quality and independence of mind of those selected for appointment at all levels of the judiciary."***

201. In the Constitution of Kenya, 2010, one must necessarily start from the presumption that the provisions dealing with the judiciary were meant *inter alia* to correct the historical deficiencies that rendered the judiciary as then constituted unable to meet the expectations that the people of the Republic of Kenya had in it. As was held in **Commissioner of Income Tax vs. Menon [1985] KLR 104; [1976-1985] EA 67,** it is one of the canons of statutory construction that a court may look into the historical setting of an Act, to ascertain the problem with which the Act in question has been designed to deal. Similarly, in **Njoya & 6 Others vs. Attorney General & Others (No. 2) [2004] 1 KLR 261; [2004] 1 EA 194; [2008] 2 KLR**, a majority of the Court held that quite unlike an Act of Parliament, which is subordinate, the Constitution should be given a broad, liberal and purposive interpretation to give effect to its fundamental values and principles.

202. In the case of **Institute of Social Accountability & Another vs. National Assembly & 4 Others (supra)**, the Court stated as follows:

> ***[57] "[T]his Court is enjoined under Article 259 of the Constitution to interpret the Constitution in a manner that promotes its purposes, values and principles, advances the rule of law, human rights and fundamental freedoms in the Bill of Rights and that contributes to good governance. In exercising its judicial authority, this Court is obliged under Article 159(2)(e) of the Constitution to protect and promote the purpose and principles of the Constitution.***
>
> . . .
>
> ***[I]n determining whether a Statute is constitutional, the Court must determine the object and purpose of the impugned statute for it is important to discern the intention expressed in the Act itself (see Murang'a Bar Operators and Another v Minister of State for Provincial Administration and Internal Security and Others Nairobi Petition No. 3 of 2011 [2011]eKLR, Samuel G. Momanyi v Attorney General and Another (supra)). Further, in examining whether a particular statutory provision is unconstitutional, the court must have regard not only to its purpose but also its effect."***

203. With regard to the purpose and effect of legislation, the Court cited the decision of the Canadian Supreme Court in **R v Big M Drug Mart Ltd., [1985] 1 S.C.R. 295** in which the Court enunciated the principle that:

> ***'Both purpose and effect are relevant in determining constitutionality; either an unconstitutional purpose or an unconstitutional effect can invalidate legislation. All legislation is animated by an object the legislature intends to achieve. This object is realized through impact produced by the operation and application of the legislation. Purpose and effect respectively, in the sense of the legislation's object and its ultimate impact, are clearly linked, if not indivisible. Intended and achieved effects have been looked to for guidance in assessing the legislation's object and thus the validity.'***

204. The Court in the **Institute of Social Accountability** case concluded as follows at paragraph 59 0f its decision:

Fourth, the Constitution should be given a purposive, liberal interpretation...Lastly and fundamentally, it is the principle that the provisions of the Constitution must be read as an integrated whole, without any one particular provision destroying the other but each sustaining the other (see Tinyefuza v Attorney General of Uganda Constitutional Petition No. 1 of 1997 (1997 UGCC 3)). We are duly guided by the principles we have outlined and we accept that while interpreting the impugned legislation alongside the Constitution, we must bear in mind our peculiar circumstances. Ours must be a liberal approach that promotes the rule of law and has jurisprudential value that must take into account the spirit of the Constitution."

205. That purposive approach as explained 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,** ought to take into account the agonized history attending Kenya's constitutional reform. In **Murungaru vs. Kenya Anti-Corruption Commission & Another Nairobi HCMCA No. 54 of 2006 [2006] 2 KLR 733**, it was held that our Constitution must be interpreted within the context and social, and economic development keeping in mind the basic philosophy behind the particular provisions of the Constitution. The same view is expressed **In Matter of the Kenya National Human Rights Commission, Advisory Opinion No. 1 of 2012; [2014] eKLR**, at paragraph 26 where the Supreme Court opined that:

"…But what is meant by a holistic interpretation of the Constitution? It must mean interpreting the Constitution in context. It is the contextual analysis of a constitutional provision, reading it alongside and against other provisions, so as to maintain a rational explication of what the Constitution must be taken to mean in light of its history, of the issues in dispute, and of the prevailing circumstances. Such scheme of interpretation does not mean an unbridled extrapolation of discrete constitutional provisions into each other, so as to arrive at a desired result."

206. It is therefore our view that the constitutional provisions dealing with the judiciary are partly steeped in historical context. This view has in fact acquired jurisprudential recognition by the Supreme Court which **In the matter of the Interim Independent Electoral Commission - Constitutional Application No. 2 of 2011 [2011] eKLR** paragraph 86, stated:

"The rules of constitutional interpretation do not favour formalistic or positivistic approach (Article 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 court".

207. It is with that historical context in mind that we will endeavour to unravel the issues raised before us. This must necessarily be so due to the fact that under Article 259(a) and (c) of the Constitution this Court is expected to interpret the Constitution in a manner that promotes its values, purposes and principles and permits the development of the law. We therefore associate ourselves with the views expressed by **Mohamed A J** in the Namibian case of **S. vs Acheson, 1991 (2) S.A. 805** (at p.813) to the effect that:

"The Constitution of a nation is not simply a statute which mechanically defines the structures of government and the relationship between the government and the governed. It is a 'mirror reflecting the national soul'; the identification of ideals and…aspirations of a nation; the articulation of the values bonding its people and disciplining its government. The spirit and the tenor of the Constitution must, therefore, preside and permeate the

processes of judicial interpretation and judicial discretion."

208. Having disposed of the background and the preliminary issues we now intend to deal with the substantive issues raised in this petition.

Whether the entire Statute Law (Miscellaneous Amendments) Act 2015 is unconstitutional, null and void for violation of Articles 96(2) and 109-113 of the Constitution?

209. In the Petitioner's view, the Amendment contained provisions that affect county governments, yet as a Bill it was never submitted to the Senate for debate and approval as required by Article 96 as read with Article 110 of the Constitution. According to the Petitioner, since the Bill contained amendments to legislations that have a bearing on County functions such as ***The National Police Service Act***, 2011 (No. 11A of 2011), it ought to have been forwarded to the Senate for its consideration. Failure to do so, it was averred makes the Bill in its entirety a nullity for violation of laid down constitutional principles.

210. It ought to be appreciated that Statute Law (Miscellaneous Amendment) Bills by their nature traverse the length and breadth of the body of legislation. Accordingly, it is to be expected that some of the amendments may touch on the functions of County Governments hence would constitutionally be required to be considered by the Senate as well. However, one cannot make a board statement that the Amendments ought to have been subjected to the Senate consideration. It is upon the petitioner to identify and pinpoint the specific amendments that ought to have been so subjected so that the Court can direct its attention to those specific provisions. Such direction must be specific and ought not to be by mere examples as the petitioner purported to have done in this petition. In such cases the orders to be granted by the Court, to paraphrase **Republic vs. Judicial Commission of Inquiry into the Goldenberg Affair, Honourable Mr. Justice of Appeal Bosire and Another ex Parte Honourable Professor Saitoti [2007] 2 EA 392; [2006] 2 KLR 400** ought to be like so much straw into a burning fire consume only the offending provisions and like guided missiles hit only the targeted provisions. This is what, in our view, Article 2(4) of the Constitution contemplates when it provides that:

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

211. We agree with the holding of the Supreme Court in **The Speaker of the Senate & Another vs. The Hon. Attorney-General & Others [2013] eKLR (supra) where it expressed the view that:**

"With a good Speaker, the Senate should be able to find something that affects the functions of the counties in almost every bill that comes to Parliament, making it a bill that must be considered and passed by both Houses."

212. It is however our view that, the parties did not sufficiently address us on any particular provisions of the Amendment Act that ought to have been referred to the Senate for consideration to enable us grant the omnibus order that the petition sought in respect of the nullification of the whole Act.

Whether the entire Statute Law (Miscellaneous Amendments) Act 2015 offended Article 118 with respect to facilitation of public participation and involvement in its legislative and other business

213. Public participation in governance is an internationally recognised concept. This concept is reflected in international human rights instruments. ***The Universal Declaration of Human Rights of 1948*** proclaims in **Article 21** that everyone has the right to take part in the government of his country, directly or through freely chosen representatives. ***The International Covenant on Civil and Political Rights (ICCPR)*** affirms at **Article 25**, that:

"Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in Article 2 and without unreasonable restrictions;

a. ***To take part in the conduct of public affairs, directly or through freely chosen representatives;***
b. ***To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors;***
c. ***To have access, on general terms of equality, to public service in his country."***

214. The right to public participation is based on the democratic idea of popular sovereignty and political equality as enshrined in Article 1 of the Constitution. Because the government is derived from the people, all citizens have the right to influence governmental decisions; and the government should respond to them. Therefore, participation must certainly entail citizens' direct involvement in the affairs of their community as the people must take part in political affairs. This principle was captured by **Majanja J** in **Association of Gaming Operators-Kenya & 41 Others versus Attorney General& 4 Others** (supra) when the learned Judge held that:

"Public participation as a national value is an expression of the sovereignty of the people articulated in Article 1 of the Constitution. The golden thread running through the Constitution is one of the sovereignty of the people of Kenya and Article 10 that makes public participation a national value is a form of expression of that sovereignty."

215. Similarly, **Lenaola J** in **Nairobi Metropolitan PSV Saccos Union Limited & 25 Others versus County of Nairobi Government & 3 Others** (supra) expressed himself on the issue as follows:

"The Preamble of the Constitution sets the achievable goal of the establishment of a society that is based on democratic values, social justice, equality, fundamental rights and rule of law and has strengthened this commitment at Article 10(1) of the Constitution by making it clear that the national values and principles of governance bind all state organs, state officers, public officers and all persons whenever any of them enacts, applies or interprets any law or makes or implements policy decisions. Article 10(2) of the Constitution establishes the founding values of the State and includes as part of those values, transparency, accountability and participation of the people. It is thus clear to me that the Constitution contemplates a participatory democracy that is accountable and transparent and makes provisions for public involvement. Consistent with this, Article 174(c) of the Constitution provides for the principles of devolved government and has given powers to the people to enhance self-governance and enhance their participation in decisions that affect them. Clearly, the making of county laws by members of County Assembly is, in my view, an essential part of public participation."

216. It was on the same premises that the Court in **Robert N. Gakuru & Others versus Governor Kiambu County & 3 Others (supra) while adopting the decision of the South African Constitutional Court** in **Doctor's for life International vs. The Speaker National Assembly and others (supra)**, held that:

"The international law right to political participation encompasses a general right to participate in the conduct of public affairs and a more specific right to vote and/or be elected into public office. The general right to participate in the conduct of public affairs includes engaging in public debate and dialogue with elected representatives at public hearings. But that is not all; it includes the duty to facilitate public participation in the conduct of public affairs by ensuring that citizens have the necessary information and effective opportunity to exercise the right to political participation…The international law right to political participation reflects a shared notion that a nation's sovereign authority is one that belongs to its citizens, who 'themselves should participate in government –

though their participation may vary in degree.'…This notion is expressed in the preamble of the Constitution, which states that the Constitution lays "the foundations for a democratic and open society in which government is based on the will of the people." It is also expressed in constitutional provisions that require national and provincial legislatures to facilitate public involvement in their processes. Through these provisions, the people of South Africa reserved for themselves part of the sovereign legislative authority that they otherwise delegated to the representative bodies they created…The very first provision of our Constitution, which establishes the founding values of our constitutional democracy, includes as part of those values "a multi-party system of democratic government, to ensure accountability, responsiveness and openness." Commitment to principles of accountability, responsiveness and openness shows that our constitutional democracy is not only representative but also contains participatory elements. This is a defining feature of the democracy that is contemplated. It is apparent from the preamble of the Constitution that one of the basic objectives of our constitutional enterprise is the establishment of a democratic and open government in which the people shall participate to some degree in the law-making process…"

217. Public participation ought not to be seen as a derogation from Parliamentary representation or representation at the County Assembly level. **Ngcobo, J** recognised this in **Doctors for Life International vs. Speaker of the National Assembly and Others** (supra) by expressing himself as follows:

"***In the overall scheme of our Constitution, the representative and participatory elements of our democracy should not be seen as being in tension with each other. They must be seen as mutually supportive. General elections, the foundation of representative democracy, would be meaningless without massive participation by the voters. The participation by the public on a continuous basis provides vitality to the functioning of representative democracy. It encourages citizens of the country to be actively involved in public affairs, identify themselves with the institutions of government and become familiar with the laws as they are made. It enhances the civic dignity of those who participate by enabling their voices to be heard and taken account of. It promotes a spirit of democratic and pluralistic accommodation calculated to produce laws that are likely to be widely accepted and effective in practice. It strengthens the legitimacy of legislation in the eyes of the people. Finally, because of its open and public character it acts as a counterweight to secret lobbying and influence peddling. Participatory democracy is of special importance to those who are relatively disempowered in a country like ours where great disparities of wealth and influence exist. Therefore our democracy includes as one of its basic and fundamental principles, the principle of participatory democracy. The democratic government that is contemplated is partly representative and partly participatory, is accountable, responsive and transparent and makes provision for public participation in the lawmaking processes. Parliament must therefore function in accordance with the principles of our participatory democracy……."***

218. Article 118(1)(b) of the Constitution enjoins Parliament to facilitate public participation and involvement in the legislative and other business of Parliament and its committees. This provision is in fulfilment of the national values and principles of governance decreed in Article 10 of the Constitution.

219. This view is reinforced by the decision in **Matatiele Municipality and Others vs. President of the Republic of South Africa and Others (2),** (supra) where **Ngcobo, J** expressed himself *inter alia* as follows:

"Our constitutional democracy has essential elements which constitute its foundation; it is partly representative and partly participative. These two elements reflect the basic and fundamental objective of our constitutional democracy. The provisions of the Constitution must be construed in a manner that is compatible with these principles of our democracy. Our system of government requires that the people elect representatives who make laws on

their behalf and contemplates that people will be given the opportunity to participate in the law-making process in certain circumstances. The law-making process will then produce a dialogue between the elected representatives of the people and the people themselves."

220. Therefore apart from the debate that takes place in Parliament the people must be directly involved in the legislative process and this was recognised in ***Matatiele Case*** where it was held that:

"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..."

221. To paraphrase ***Gakuru Case*** (supra), public participation ought to be real and not illusory and ought not to be treated as a mere formality for the purposes of fulfilment of the Constitutional dictates. It behoves Parliament in enacting legislation to ensure that the spirit of public participation is attained both quantitatively and qualitatively. It is not enough to simply "tweet" messages as it were and leave it to those who care to scavenge for it. Parliament ought to do whatever is reasonable to ensure that as many Kenyans are aware of the intention to pass legislation. It is the duty of Parliament in such circumstances to exhort the people to participate in the process of the enactment of legislation by making use of as many fora as possible such as churches, mosques, temples, public *barazas*, national and vernacular radio broadcasting stations and other avenues where the public are known to converge to disseminate information with respect to the intended action. In **Hugh Glenister vs. President of the Republic of South Africa and Others (supra),** it was held that:

"For the opportunity afforded to the public to participate in a legislative process to comply with section 118(1), the invitation must give those wishing to participate sufficient time to prepare. Members of the public cannot participate meaningfully if they are given inadequate time to study the Bill, consider their stance and formulate representations to be made. Two principles may be deduced from the above statement. The first is that the interested parties must be given adequate time to prepare for a hearing. The second relates to the time or stage when the hearing is permitted, which must be before the final decision is taken. These principles ensure that meaningful participation is allowed. It must be an opportunity capable of influencing the decision to be taken. The question whether the notice given in a particular case complies with these principles will depend on the facts of that case."

222. Whereas the Respondents were accused of not having subjected the Bill to adequate public participation, in this case the replying affidavit sworn on behalf of the 2nd Respondent, set out the steps which were taken by the Respondents in respect of the Bill before it was tabled before the House and before the enactment of the ***Statute Law (Miscellaneous Amendment) Act 2015***.

223. With respect to public participation, it was held in **Commission for the Implementation of the Constitution vs. Parliament of Kenya & 5 Others [2013] eKLR,** (supra) in which the Court while dealing with the question of the constitutionality of the ***Leadership and Integrity Act, No. 19 of 2012*** observed at paragraph 74 as follows:

"The National Assembly has a broad measure of discretion in how it achieves the object of

public participation. How this is effected will vary from case to case but it must be clear that a reasonable level of participation has been afforded to the public. Indeed, as Sachs J observed in* Minister of Health and Another NO vs New Clicks South Africa (Pty) Ltd and Others 2006 (2) SA 311 (CC) at para. 630, *"The forms of facilitating an appropriate degree of participation in the law-making process are indeed capable of infinite variation. What matters is that at the end of the day a reasonable opportunity is offered to members of the public and all interested parties to know about the issues and to have an adequate say. What amounts to a reasonable opportunity will depend on the circumstances of each case."

224. The same position was adopted in **Doctors for Life International vs. The speaker of the National Assembly and Others** (supra) applied with approval in **Robert N. Gakuru & Others vs. Governor, Kiambu County [2014] eKLR** where the court held that:

"Parliament and the provincial legislatures must be given a significant measure of discretion in determining how best to fulfil their duty to facilitate public involvement. This discretion will apply both in relation to the standard rules promulgated for public participation and the particular modalities appropriate for specific legislative programmes".

225. Therefore, as appreciated in ***Doctors for Life Case*** (supra):

"Whether a legislature has acted reasonably in discharging its duty to facilitate public involvement will depend on a number of factors. The nature and importance of the legislation and the intensity of its impact on the public are especially relevant. Reasonableness also requires that appropriate account be paid to practicalities such as time and expense, which relate to the efficiency of the law-making process. Yet the saving of money and time in itself does not justify inadequate opportunities for public involvement. In addition, in evaluating the reasonableness of Parliament's conduct, this Court will have regard to what Parliament itself considered to be appropriate public involvement in the light of the legislation's content, importance and urgency. Indeed, this Court will pay particular attention to what Parliament considers to be appropriate public involvement. What is ultimately important is that the legislature has taken steps to afford the public a reasonable opportunity to participate effectively in the law-making process. Thus construed, there are at least two aspects of the duty to facilitate public involvement. The first is the duty to provide meaningful opportunities for public participation in the law-making process. The second is the duty to take measures to ensure that people have the ability to take advantage of the opportunities provided. In this sense, public involvement may be seen as "a continuum that ranges from providing information and building awareness, to partnering in decision-making...There may well be circumstances of emergency that require urgent legislative responses and short timetables...When it comes to establishing legislative timetables, the temptation to cut down on public involvement must be resisted. Problems encountered in speeding up a sluggish timetable do not ordinarily constitute a basis for inferring that inroads into the appropriate degree of public involvement are reasonable. The timetable must be subordinated to the rights guaranteed in the Constitution, and not the rights to the timetable."

226. **Ngcobo, J** in **Doctors for Life International vs. Speaker of the National Assembly and Others** (supra) expressed himself on the issue as hereunder:

"...where the obligation requires Parliament to determine in the first place what is necessary to fulfil its obligation, a review by a court whether that obligation has been fulfilled, trenches on the autonomy of Parliament to regulate its own affairs and thus the principle of separation of powers. This is precisely what the obligation comprehended in section 72(1)(a) does. While it imposes a primary obligation on Parliament to facilitate public involvement in its legislative and other processes, including those of its committees,

it does not tell Parliament how to facilitate public involvement but leaves it to Parliament to determine what is required of it in this regard. A review by a court of whether Parliament has complied with its obligation under section 72(1)(a) calls upon a court to intrude into the domain of a principal legislative organ of the state. Under our Constitution, this intrusion is reserved for this Court only. A construction of section 167(4)(e) which gives this Court exclusive jurisdiction to decide whether Parliament has complied with its constitutional obligation to facilitate public involvement in its legislative processes is therefore consistent with the principles underlying the exclusive jurisdiction of this Court. An order declaring that Parliament has failed to fulfil its constitutional obligation to facilitate public involvement in its legislative process and directing Parliament to comply with that obligation constitutes judicial intrusion into the domain of the principle legislative organ of the state. Such an order will inevitably have important political consequences. Only this Court has this power. The question whether Parliament has fulfilled its obligation under section 72(1)(a) therefore requires this Court to decide a crucial separation of powers question and is manifestly within the exclusive jurisdiction of this Court under section 167(4)(e) of the Constitution."

227. The law however is not that all persons must express their views or that they must be heard and that the hearing must be oral. Similarly, the law does not require the proposed legislation must be brought to each and every person wherever the person might be. What is required is that reasonable steps be taken to facilitate the said participation. Once this is done the Court will not interfere simply because due to peculiar circumstances of an individual, he or she failed to get the information. In other words, what is required is that a reasonable opportunity be afforded to the public to meaningfully participate in the legislative process. Therefore even in cases where there are oral public hearings the mere fact that a particular person has not been so heard does not necessarily warrant the whole process being nullified. It was therefore held by **Ngcobo, J** in the above case that:

"Where Parliament has held public hearings but not admitted a person to make oral submissions on the ground that it does not consider it necessary to hear oral submissions from that person, this Court will be slow to interfere with Parliament's judgment as to whom it wishes to hear and whom not. Once again, that person would have to show that it was clearly unreasonable for Parliament not to have given them an opportunity to be heard. Parliament's judgment on this issue will be given considerable respect. Moreover, it will often be the case that where the public has been given the opportunity to lodge written submissions, Parliament will have acted reasonably in respect of its duty to facilitate public involvement, whatever may happen subsequently at public hearings. However, for citizens to carry out their responsibilities, it is necessary that the legislative organs of state perform their constitutional obligations to facilitate public involvement. The basic elements of public involvement include the dissemination of information concerning legislation under consideration, invitation to participate in the process and consultation on the legislation. These three elements are crucial to the exercise of the right to participate in the law-making process. Without the knowledge of the fact that there is a bill under consideration, what its objective is and when submissions may be made, interested persons who wish to contribute to the lawmaking process may not be able to participate and make such contributions."

228. However the caution expressed by **Sachs, J** in **Merafong Demarcation Forum and Others vs. President of the Republic of South Africa and Others (CCT 41/07) [2008] ZACC 10; 2008 (5) SA 171 (CC); 2008 (10) BCLR 968 (CC)** must always be kept in mind. In that case the learned Judge of the Constitutional Court of South Africa pronounced himself thus:

"The passages from the Doctors for Life majority judgment, referred to by the applicants, state reasons for constitutionally obliging legislatures to facilitate public involvement. But being involved does not mean that one's views must necessarily prevail. There is no authority for the proposition that the views expressed by the public are binding on the

legislature if they are in direct conflict with the policies of Government. Government certainly can be expected to be responsive to the needs and wishes of minorities or interest groups, but our constitutional system of government would not be able to function if the legislature were bound by these views. The public participation in the legislative process, which the Constitution envisages, is supposed to supplement and enhance the democratic nature of general elections and majority rule, not to conflict with or even overrule or veto them. To say that the views expressed during a process of public participation are not binding when they conflict with Government's mandate from the national electorate, is not the same as cynically stating that the legislature is not required to keep an open mind when engaging in a process of that kind. Public involvement cannot be meaningful in the absence of a willingness to consider all views expressed by the public. It is the specific conjunction of these three factors which, in my view, must guide the evaluation of the facts in this matter. Civic dignity was directly implicated. Indeed, it is important to remember that the value of participation in governmental decision-making is derived not only from the belief that we improve the accuracy of decisions when we allow people to present their side of the story, but also from our sense that participation is necessary to preserve human dignity and self-respect…Given that the purpose of participatory democracy is not purely instrumental, I do not believe that the critical question is whether further consultation would have produced a different result. It might well have done. On the facts, I am far from convinced that the outcome would have been a foregone conclusion. Indeed, the Merafong community might have come up with temporising proposals that would have allowed for future compromise and taken some of the sting out of the situation. For its part, the Legislature might have been convinced that the continuation of an unsatisfactory status quo would have been better even if just to buy time for future negotiations than to invite a disastrous break-down of relations between the community and the government. Yet even if the result had been determinable in advance, respect for the relationship between the Legislature and the community required that there be more rather than less communication…There is nothing on the record to indicate that the Legislature took any steps whatsoever even to inform the community of the about-turn, let alone to explain it. This is not the sort of information that should be discovered for the first time from the newspapers, or from informal chit-chat."

229. On our part, having considered the rival positions taken by the parties hereto with respect to the opportunity afforded to the public to participate in the legislative process before the Bill was tabled in Parliament we disagree with the contention that in respect of the entire ***Statute Law (Miscellaneous Amendment) Act, 2015*** the opportunity provided did not lend itself to meaningful public participation.

Whether the amendments to the Judicial Service Act, 2011 by the Statute Law (Miscellaneous Amendment) Act, 2015 were properly effected by way of miscellaneous amendments

230. This brings to the fore the question of the circumstances under which statutory amendments ought to be effected by way of Statute Law Miscellaneous legislation. That such a procedure ought to avail only in cases of minor non-controversial amendments was appreciated by the 2nd Respondent when it indicated in the Memorandum of Objects and Reasons of the Bill published in a Special Issue of the Kenya Gazette – Supplement No. 164 (National Assembly Bills No. 57) that:

The Statute Law (Miscellaneous Amendments) Bill, 2015 is in keeping with the practice of making <u>minor amendments</u> which do not merit the publication of a separate Bill and consolidating them into one Bill. [Emphasis added].

231. That this is the practice is clearly discernible from the practice adopted in most jurisdictions, though the practice is not consistent. According to the ***Western Australia, Legislative Council, Standing Committee on Uniform Legislation and Statutes Review, Report 21, October 2007, pp. 5-6***:

"An omnibus bill is an avenue for making general housekeeping amendments to legislation. It is designed to make only relatively minor, non-controversial amendments to various acts and to repeal acts that are no longer required. Omnibus bills assist in expediting the government's legislative program and parliamentary business by reducing the number of separate amendment bills that deal with relatively minor amendments and repeals. They also help to weed out spent or redundant legislation from the statute book. The Department of the Premier and Cabinet has overseen the preparation of the bill to try to ensure that amendments about which there is some contention or complexity, or that make some substantive change to the law, are not included".

232. This position is similar to that adopted by the Canadian Legislature in regard to omnibus bills as expounded in ***Canadian Miscellaneous Statute Law Amendment Program*** that only minor, non-controversial amendments are allowed to be made to a number of federal statutes at once in one bill. According to the program, to qualify, a Bill must not be controversial, not involve the spending of public funds, not prejudicially affect the rights of persons, or create new offences or subject a new class of persons to an existing offence. However, the practice in the United States of America as stated by **Louis Massicotte**, ***Omnibus Bills in Theory and Practice***, Canadian Parliamentary Review, Vol. 36 No. 1 2013, p. 14, is varied with some states permitting omnibus bills and other restricting bills to a single issue. This was the position in a 1901 American case of **Commonwealth vs. Barnett** (199 US. 161) where it is stated that:

"Bills, popularly called omnibus bills, became a crying evil, not only from the confusion and distraction of the legislative mind by the jumbling together of incongruous subjects, but still more by the facility they afforded to corrupt combinations of minorities with different interests to force the passage of bills with provisions which could never succeed if they stood on their separate merits".

233. While we appreciate that there is no internationally accepted position on the legality of omnibus bills, the reality is that they are used in many jurisdictions. We wish to take note of the observations of **Louis Massicotte** (supra) that:

"From the point of view of the government, omnibus bills have plenty of advantages....First, they save time and shorten legislative proceedings by avoiding the preparation of dozens of distinct bills necessitating as many second reading debates. Second, omnibus bills generate embarrassment within opposition parties by diluting highly controversial moves within a complex package, some parts of which are quite popular with the public or even with opposition parties themselves. [On why omnibus bill are objectionable] The real question, however, beyond the convenience of the government or of the opposition parties, may well be: is the public interest well served by omnibus bills? Take for example the clause-by-clause study in committee. When a bill deals with topics as varied as fisheries, unemployment insurance and environment, it is unlikely to be examined properly if the whole bill goes to the Standing Committee on Finance. The opposition parties complain legitimately that their critics on many topics covered by an omnibus bill have already been assigned to other committees. The public has every interest in a legislation being examined by the appropriate bodies."

234. It is therefore clear that both on policy and good governance, which is one of the values and principles of governance in Article 10 of the Constitution, which values and principles form the foundation of our State and Nation as decreed in Article 4(2) of the Constitution, omnibus amendments in the form of Statute Law Miscellaneous legislations ought to be confined only to minor non-controversial and generally house-keeping amendments.

Whether there was public participation in the passage of the Amendments to the Judicial Service Act, 2011 by the Statute Law (Miscellaneous Amendment) Act, 2015

235. In this case, it was contended that the precursor to the Amendment Act was the ***Statute Law***

(Miscellaneous Amendment) Bill, 2015 (hereinafter referred to as "the Bill"), which was published on 18th September 2015 by the National Assembly which Bill sought to make minor amendments to various statutory enactments. With respect to the ***Judicial Service Act***, 2011 (No 1 of 2011) the Bill sought:

> ***"to amend the Judicial Service Act, 2011 so as to prescribe timelines for transmission of names to the President after recommendation by the Commission."***

236. Pursuant to the foregoing, what was published in the Bill provided that subsection (3) of section 30 of the Act was to be substituted with the following:

> ***(3) The provisions of this Section shall apply to the appointment of the Chief Justice and Deputy Chief Justice except that-***
>
> a. ***The Secretary shall, within three days of the Commission's vote, forward the names of the persons nominated for recommendation for appointment to the President.***
> b. ***In such case, a person shall not be appointed without the necessary approval by the National Assembly.***

237. The petitioner asserted that it was that Bill which was published and was subjected to public participation conducted by the 2nd Respondent though it was its view that the said public participation was conducted in a manner that was neither meaningful nor qualitative as most Kenyans were not given adequate opportunity and notice to participate in the consideration of the issues in the Bill.

238. It is however not in dispute that it was **not** that exact Bill that was debated and passed by the National Assembly. To the contrary, the published Bill did not contain the impugned amendments which were introduced later on, on the floor of the House.

239. It is true that Article 93(2) enjoins the National Assembly and the Senate to perform their respective functions in accordance with this Constitution and in so doing they are enjoined by Article 124(1) to make Standing Orders for the orderly conduct of their proceedings. Article 109 (3) and (4) obliges Parliament to pass the Bills in accordance, *inter alia*, with the Standing Orders. That Parliament must comply with its own procedures, in this case the Standing Orders, was emphasised in Uganda **Constitutional Court Constitutional Petition [2014] UGCC 14** - **Oloka-Onyango & 9 Others vs. The Attorney General** where the Court expressed itself as follows:

> ***"Parliament as a law making body should set standards for compliance with the Constitutional provisions and with its own Rules. The Speaker ignored the Law and proceeded with the passing of the Act. We agree with Counsel Opiyo that the enactment of the law is a process and if any of the stages therein is flawed, that vitiates the entire process and the law that is enacted as a result of it. We have therefore no hesitation in holding that there was no Coram in Parliament when the Act was passed, that the Speaker acted illegally in neglecting to address the issue of Coram…Failure to obey the Law (Rules) rendered the whole process a nullity. It is an illegality which this Court cannot sanction."***

240. Back home the issue has been addressed in **Law Society of Kenya vs Attorney General & 2 Others [2013] eKLR** where the **Court** observed at paragraph 57 as follows:

> ***"In order to determine whether there has been public participation, the court is required to interrogate the entire process leading to the enactment of the legislation; from the formulation of the legislation to the process of enactment of the statute. I am entitled to take judicial notice of the Parliamentary Standing Orders that require that before enactment, any legislation must be published as a bill and to go through the various stages in the National Assembly. I am entitled to take into account that these Standing Orders provide for a modicum of public participation, in the sense that a bill must be advertised and go through various Committees of the National Assembly which admit public hearings***

and submission of memoranda."

241.In this respect, Standing Order No. 120 provides that

> ***"No Bill shall be introduced unless such Bill together with the memorandum referred to in the Standing Order 117 (Memorandum of Objects and Reasons), has been published in the Gazette… a period of fourteen days, beginning in each case from the day of such publication, or such shorter period as the House may resolve with respect to the Bill has ended."*** Standing Order No. 127(3) states that:
>
> ***"The Departmental Committee to which a Bill is committed shall facilitate public participation and shall take into account the views and recommendations of the public when the committee makes its report to the House."***

242.Additionally, Standing Order No. 133(5) states as follows:

> ***"(5) No amendment shall be permitted to be moved if the amendment deals with <u>a different subject</u> or proposes to <u>unreasonably or unduly expand the subject of the Bill</u>, or is not appropriate or is not in logical sequence to the subject of the Bill"*** [emphasis]

243.The question that arises therefore is whether a Bill that has undergone the process of public participation can be unilaterally altered or amended on the floor of the House beyond the scope contemplated by the Standing Orders as was done in this case. The justification for this position as expressed by the Departmental Committee on Justice and Legal Affairs was that "***as a matter of deference to the appointing authority, you must give him the latitude to make a choice."***

244.This Court dealt with such a scenario in the ***Gakuru Case*** (supra) as follows:

> ***"In this case, it is not in doubt that there was an earlier Bill which was tabled before the Assembly which Bill was rejected. According to the respondents there were certain recommendations which were made by the Assembly which recommendations were taken into account in the Bill which gave rise to the Act. The Respondents' position is that there was no necessity for the subsequent Bill to be subject to further public participation. In fact it is not claimed that the said subsequent Bill was so subjected. According to the petitioners who were consulted earlier what was contained in the said subsequent Bill was not what had been agreed upon during the earlier consultation. In my view where a Bill has been rejected by the Assembly and a fresh Bill introduced as opposed to mere amendments, the principle of public participation must equally apply. Unless this is so the principle may be defeated by the Assembly simply rejecting a Bill in which the public has had an input with its own Bill disregarding the input by the public and not subjecting it to public participation. That in my view would defeat the very principle of public participation."***

245.Whereas it is true that what were introduced on the floor of the House were amendments as opposed to a fresh Bill, it is our view that for any amendments to be introduced on the floor of the House subsequent to public participation, the amendments must be the product of the public participation and ought not to be completely new provisions which were neither incorporated in the Bill as published nor the outcome of the public input. This position is supported by the views expressed in ***Merafong Case*** (supra) to the effect that:

> ***"Once structured processes of consultation were put in place, with tangible consequences for the legislative process and of central importance to the community, the principle of participatory democracy required the establishment of appropriately formal lines of communication, at least to clarify, if not to justify, the negation of those consequences. In my view, then, it was constitutionally incumbent on the Legislature to communicate and explain to the community the fact of and the reasons for the complete deviation from what the community had been led to believe was to be the fruit of the earlier consultation, and to***

pay serious attention to the community's response. Arms-length democracy is not participatory democracy, and the consequent and predictable rupture in the relationship between the community and the Legislature tore at the heart of what participatory democracy aims to achieve…I would hold that, after making a good start to fulfil its obligation to facilitate public involvement, the Legislature stumbled badly at the last hurdle. It ended up failing to exercise its responsibilities in a reasonable manner, with the result that it seriously violated the integrity of the process of participatory democracy. In choosing not to face the music (which, incidentally, it had itself composed) it breached the constitutional compact requiring mutuality of open and good-faith dealing between citizenry and government, and thereby rendered the legislative process invalid."

246.To **Sachs, J** in the above case:

"Given that the purpose of participatory democracy is not purely instrumental, I do not believe that the critical question is whether further consultation would have produced a different result. It might well have done. On the facts, I am far from convinced that the outcome would have been a foregone conclusion. Indeed, the Merafong community might have come up with temporising proposals that would have allowed for future compromise and taken some of the sting out of the situation. For its part, the Legislature might have been convinced that the continuation of an unsatisfactory status quo would have been better even if just to buy time for future negotiations than to invite a disastrous break-down of relations between the community and the government. Yet even if the result had been determinable in advance, respect for the relationship between the Legislature and the community required that there be more rather than less communication…There is nothing on the record to indicate that the Legislature took any steps whatsoever even to inform the community of the about-turn, let alone to explain it. This is not the sort of information that should be discovered for the first time from the newspapers, or from informal chit-chat."

247. As earlier noted , the scope of the published Bill as stated in its Memorandum and Objects was to deal with "**timelines for transmission of names to the President.**" The amendments debated went further to a different subject , contrary to Standing Order 133 by introducing over and above the subject of timelines the contentious issue of the number of names to be submitted to the President by the Commission.

248.It may be argued that where the action taken is in consonance with the Constitution in its formal aspects then the mere fact that there was no public participation ought not to nullify such otherwise legal action. However, we agree with the manner in which **Ngcobo, J** dealt with the issue in **Matatiele Municipality and Others vs. President of the Republic of South Africa and Others (2),** (supra) when he stated:

*"**The obligation to facilitate public involvement is a material part of the lawmaking process. It is a requirement of manner and form. Failure to comply with this obligation renders the resulting legislation invalid. In my judgment, this Court not only has a right but also has a duty to ensure that the law-making process prescribed by the Constitution is observed. And if the conditions for law-making processes have not been complied with, it has the duty to say so and declare the resulting statute invalid. Our Constitution manifestly contemplated public participation in the legislative and other processes of the NCOP, including those of its committees. A statute adopted in violation of section 72(1)(a) precludes the public from participating in the legislative processes of the NCOP and is therefore invalid. The argument that the only power that this Court has in the present case is to issue a declaratory order must therefore be rejected."***

249.It is similarly our view that this Court not only has the power but the obligation to determine whether a particular legislation was in fact and in substance enacted in accordance with the Constitution and not to just satisfy itself as to the formalities or the motions of doing so.

250.Therefore by introducing totally new and substantial amendments to the ***Judicial Service Act, 2011*** on the floor of the House, Parliament not only set out to circumvent the constitutional

requirements of public participation but, with due respect, mischievously short-circuited and circumvented the letter and the spirit of the Constitution. Its action amounted to a violation of Articles 10 and 118 of the Constitution.

Independence of the Judiciary and constitutionality of section 30(3) of the Judicial Service Act 2011

251. It is our considered view that the independence of the judiciary is not to be determined based on one event but the whole process starting from the manner in which the judicial officers are appointed, how they are to carry out their mandate and the manner of their removal from the office. All these must be cumulatively considered in order to determine whether the judiciary is independent and the extent of such independence. Independence is therefore a culmination of several factors. Where therefore any stage of the process of appointment is shrouded in mystery without a clear formula that is both transparent and accountable on how such appointment is to be made, doubts may be cast as to what factors dictated such appointments. We associate ourselves with the position adopted in the ***Compendium and Analysis of Best Practice in the Appointment, Tenure and Removal of Judges under Commonwealth Principles*** to the effect that:

> ***"...the process of appointment must also be legitimate in the eyes of the public, if the courts are to build and retain trust and secure the voluntary co-operation of the public in sufficient numbers to ensure the orderly administration of justice...A legitimate process may be achieved in part through the demonstrable quality of those who are appointed, but it will also be influenced by other factors, including who decision-makers are, how transparent the selection process is, and what provision is made for scrutiny and review in individual cases."***

252. Accordingly we agree that if due to the process adopted, the possibility of interference by third parties is real, the independence of the judicial officers and by extension the judiciary may be cast into serious doubt. We therefore associate ourselves with the decision of the five judge bench in the Constitutional Court of Uganda in **Karahunga vs. Attorney General [2014] UGCC** where it was held that:

> ***"The fact that the Judicial Service Commission is placed within Chapter 8 of the Constitution – a chapter which deals with the judiciary – is not a mere coincidence. As a body created for purposes of supporting the Judiciary, the Judicial Service Commission must, like it is with the Judiciary, be supported by all institutions/branches of the state, to independently carry out its mandate without interference. The duty/authority to initiate the appointment of a Judicial Officer lies exclusively with the Commission and should not be interfered with by either the Executive or the Legislature."***

253. It is therefore our view that the actions and processes of the Judicial Service Commission and by extension the Judiciary ought not to unnecessarily attract suspicion from either the public, the Legislature or the Executive.

254. Article 166(1)(a) of the Constitution provides that:

> ***The President shall appoint—***
>
> ***(a) the Chief Justice and the Deputy Chief Justice, in accordance with the recommendation of the Judicial Service Commission, and subject to the approval of the National Assembly.***

255. Article 172(1)(a) provides:

> ***(1) The Judicial Service Commission shall promote and facilitate the independence and accountability of the judiciary and the efficient, effective and transparent administration of justice and shall—***

(a) recommend to the President persons for appointment as judges;

256. According to the Respondents, the fact that the above provision talks of "*amongst persons"* as opposed to "*a person"* implies that the drafters of the Constitution had in mind more than one nominee for the said positions. With due respect that interpretation amounts to unnecessarily stretching the said provision. In our view what the provision means is that whoever is nominated must be from the pool of persons who meet the qualifications. Therefore the phrase '*persons'* refers to the applicants rather than to the nominee. If we were to agree with the Respondents' position, it would lead to a ridiculous situation in which where only one applicant meets the qualifications, the Commission would not be able to send that person's name until another one or more qualified persons are nominated. To allege that this was the intention of the drafters of the Constitution would in our respectful view be absurd.

257. Prior to the enactment of the ***Statute Law (Miscellaneous Amendments) Act 2015***, section 30 of the ***Judicial Service Act, 2011*** provided that:

> ***(1) For the purposes of transparent recruitment of judges, the Commission shall constitute a selection panel consisting of at least five members.***
>
> ***(2) The function of the selection panel shall be to shortlist persons for nomination by the Commission in accordance with the First Schedule.***
>
> ***(3) The provisions of this section shall apply to the appointment of the Chief Justice and Deputy Chief Justice except that in such case, a person shall not be appointed without the necessary approval by the National Assembly.***

258. Paragraph 14(1) of the First Schedule to the Act provides that:

> ***The Commission shall, within seven days of the conclusion of interviews, deliberate and nominate the most qualified applicants taking into account gender, regional, ethnic and other diversities of the people of Kenya.***

259. Paragraph 15 of the First Schedule to the Act on the other hand provides as follows:

> ***(1) The Secretary shall, within seven days of the Commission's vote, cause the applicants to be notified by telephone or electronic means, about the Commission's decision.***
>
> ***(2) Despite subparagraph (1), the Secretary shall cause to be transmitted to each applicant, a written notice of the Commission's decision.***
>
> ***(3) The names of the persons nominated for recommendation for judicial appointment may be posted on the Commission's website and placed in its press release.***

260. What was substituted in place of section 30(3) of the Act now provides that:

> ***(3) The provisions of this Section shall apply to the appointment of the Chief Justice and Deputy Chief Justice except that-***
>
> c. ***The Secretary shall, within three days of the Commission's vote, forward the names of three qualified persons for each vacant position to the President;***
> d. ***The President shall, within fourteen days of receipt of the names forwarded select the person to fill each vacant position and forward the name of the person to the National Assembly for approval;***
> e. ***The National Assembly shall, within twenty-one days of the day it next sits after receipt of the name of a person nominated for appointment to the post of Chief Justice or Deputy Chief Justice vet and consider the person;***
> f. ***Where the National Assembly approves the appointment of a person to the post of Chief***

Justice, the Speaker of the National Assembly shall forward the name of the person to the President for appointment;

g. ***Where the National Assembly rejects the nomination of a person for appointment to the post of Chief Justice or Deputy Chief Justice, the Speaker shall within three days communicate its decision to the President and request the President to submit a fresh nomination;***
h. ***Where a nominee is rejected by the National Assembly, the President shall within seven days, submit to the National Assembly a fresh nomination from amongst the three persons shortlisted and forwarded by the Commission under paragraph (a); and***
i. ***If the National Assembly rejects all of the subsequent nominees submitted by the President for approval the Commission shall constitute a different selection panel and conduct the recruitment afresh.***

261. It is clear from what we have stated hereinabove that the published Bill did not contain the offensive words "***three qualified persons for each vacant position".*** It is also not in dispute that these words were introduced on the floor of the House.
262. It was suggested on behalf of the Respondents that the submission of three names saves the Commission the necessity of having to conduct a recruitment process every time its nominee is rejected in the event that only one name is submitted. However, theoretically, nothing stops Parliament from rejecting all the three names though the Respondents were of the view that that would be unlikely.
263. As appreciated by all the parties, the appointment of the Chief Justice and the Deputy Chief Justice is a three tier process which starts with the selection of the person qualified for the respective positions by the Commission, who are then submitted to Parliament for approval in the second stage and then culminating in the appointment by the President. Each of the three stages, it is clear, is demarcated for a different arm of the government. In our view, this was a deliberate system designed to ensure that none of the three arms of the Government had the exclusive or upper role in the determination of who becomes the Chief Justice or the Deputy Chief Justice. The President in our view was meant to play no role at all in determining the name of the person to be submitted to Parliament for approval. The 1st Respondent is of the view that "*the President was not bound by any law to appoint the single names recommended by the Commission*" and that "*where only one name is recommended to the President and the President rejects the person the process has to start again*". In our view, the only way in which the names presented to the President can be reconsidered, and if so by the Commission itself, is pursuant to paragragh 16 of the First schedule to the ***Judicial Service Act, 2011*** which provides that:

> ***The Commission shall not reconsider its nominees after the names are submitted to the President except in the case of death, incapacity, or withdrawal of a nominee.***

264. Taken to its logical conclusion, it would mean that even with respect to the other judges, the President ought to be given several names over and above the persons the Commission seeks to recruit in order for the President to decide which ones are suitable for appointment as Judges and which ones to reject.
265. To us, such a proposition would fly in the face of the spirit of the current Constitution with respect to the appointment of judges in which the people of the Republic of Kenya wanted a radical departure from the old system where the appointment of Judges could not be traced to any particular criteria. To accede to the position adopted by the Respondent would amount to this Court giving a clean bill of health to the proposition to take the people of Kenya back to an era discarded by them when they enacted for themselves the current Constitution. The people of Kenya shall have been disappointed by the course adopted by this Court. Their hopes and aspirations in this temple of justice shall have been thwarted and downtrodden. Kenyans, in enacting the current Constitution, were optimistic that their aspirations would forever hold sway and this was expressed in the judgement of this Court in **Federation of Kenya Women Lawyers (FIDA-K) & Others vs. Attorney General & Others Nairobi HCCP No. 102 of 2011 [2011] eKLR** where a three judge bench expressed itself *inter alia* as follows:

"Only last year and in our early maritime history we constructed a great ship and called it our new Constitution. In its structure we put in the finest timbers that could be found. We constructed it according to the best plans, needs, comfort and architectural brains available. We tried to address various and vast needs of our society as much as possible. We sent it to the people who ratified it. It was crowned with tremendous success in a referendum conducted on 4th August 2010. We achieved a wonderful and defining victory against the "REDS". We vanquished them. The aspirations and hope of all Kenyans was borne on 27th August 2010. We achieved a rebirth of our Nation. We have come to revere it and even have an affection for it. We accomplished a long tedious, torturous and painful chapter in our history. We all had extraordinary dreams. It is a document meant to fight all kinds of injustices. It is the most sophisticated weapon in our maritime history. As Kenyans we got and achieved a clean bill of constitutional health."

266. We therefore disabuse the Respondents of any notion that the President has a discretion to decide whether or not to submit the name(s) submitted by the Commission to the National Assembly. Such a trajectory, if upheld would, in our view, negate the constitutional interpretation principles decreed in Articles 259 which enjoins the Court to interpret the Constitution in a manner that promotes its purposes, values and principles, advances the rule of law, human rights and fundamental freedoms in the Bill of Rights and that contributes to good governance.
267. By therefore opening a window for the President, even in a small way, to decide whose name is to be submitted to Parliament, the clear distinction in the roles of the three organs would clearly be blurred.
268. Understood holistically, the Respondents' position seems to be that the President's role in the appointment of the Chief Justice and the Deputy Chief Justice is not merely ceremonial but that he must exercise a measure of discretion in such appointments. One must understand that Kenya has now adopted a Presidential system of government in which the President is not a Member of Parliament. Accordingly, there is a possibility that at one point the party that nominates the President may not have the majority in Parliament. In that event the President, even were he minded to do so, would not be able under the current legal framework to dictate who becomes the Chief Justice or the Deputy Chief Justice since even if he were to be given three or more names Parliament might still reject the same. In other words, though the President is the appointing authority, his discretion in the said appointment is limited. Whereas we appreciate that where the Legislature is in a state of collision with the Executive, the Legislature may hold the Executive at ransom by delaying the approval of the recommended persons for appointment, it is our view that the solution lies elsewhere other than in the amendment of the Act. The Legislature cannot therefore resort to a short cut to resolve such an eventuality but must revert to the people by seeking to amend the *grundnorm* itself, the Constitution.
269. This is not to say that the President has no role at all to play in the whole process. We agree that there are two ways in which the executive plays a part in the selection and appointment of judges without having sole responsibility of appointing the Chief Justice. This is through its representation in the Judicial Service Commission. The Attorney General, who is the government's legal advisor, and one woman and one man representing the public, are appointed by the President, sit in the Commission. The second instance is when the President appoints the nominee approved by Parliament. This position is clearly supported by ***Compendium and Analysis of Best Practice in the Appointment, Tenure and Removal of Judges under Commonwealth Principles*** where it is stated that:

"...the executive plays at least some part in the appointment of judges in every commonwealth jurisdiction, since the formal appointment of a person to judicial office is usually an executive act, commonly performed by, or in the name of, the Head of State."

270. It is our view, however that once the members of the Commission, who include the nominees of the President select the candidates in question, the President cannot, as it were, have a second bite at the cherry. It was argued that since the decision of the Commission is a collegiate decision, it cannot be said that the interests of the Presidency is necessarily reflected in the nomination. In our view the nomination is meant to reflect a broad spectrum of interests as shown by the diversity of

the composition of the Commission as opposed to only the interests of a section of the society. Once a particular candidate carries the day, that person must be deemed to have been nominated by all the diverse interests of the Commission and not merely some of them. That is how democratic systems operate and according to the preamble to our Constitution as read with Article 4(2) of the Constitution, ours is a democratic State.

271. We reiterate that by coming up with this system of the appointment of the head of the Judiciary, it is our view that the people of the Republic of Kenya wanted a clear break from the old system in which the appointment of the Chief Justice and by extension Judges of the Superior Courts was in substance a prerogative of the President with the Judicial Service Commission merely playing a formal role.

272. To provide for a mandatory three names to be submitted to the President in our view opens an avenue for manipulation of the process and even horse-trading. To do so would open the process to contamination by the ills that informed the transformation in which Kenyans discarded the old process of appointment of judges which was besmirched with partisanship, nepotism, negative ethnicity and tribalism, cronyism, patronage and favouritism with the current one that is meant to espouse the values and principles of governance set out in Article 10 of the Constitution which include non-discrimination, good governance, integrity, transparency and accountability. In other words, the people of the Republic of Kenya set out to eradicate all the negative tenets of appointment of Judges which in their view had hitherto impacted negatively on the integrity of the judicial system.

273. There was an argument by the Respondents that the submission of three names is meant to avoid a situation where the Commission would have to go to the drawing board every time its nominee is rejected. That argument, as attractive as it sounds, does not answer what the magic is in three names.

274. However, there was an attempt to explain the number three by parity of reasoning with respect to other Commissions and independent offices. In our view this argument with due respect fails to appreciate the role of the Judiciary and by extension the constitutional position of the Commission vis-à-vis the other constitutional commissions and independent offices. Under Article 1(3) of the Constitution sovereign power is delegated to three State organs – Parliament, the Executive both at national and county level and the Judiciary, without any particular order of priority. One cannot therefore equate the Judiciary to Constitutional Commissions or independent offices dealt with under Chapter Fifteen of the Constitution.

275. It is further important to note that whereas the Commission is named as one of the Constitutional Commissions in Article 248 of the Constitution, Article 250 which dictates the composition of Constitutional Commissions does not apply to it since its composition is provided for in Article 171 of the Constitution.

276. Apart from the constitutional provisions, the Respondent sought to support their arguments for plurality of nomination by citing paragraph 14(1) of the First Schedule to the ***Judicial Service Act, 2011*** which provides that:

> ***The Commission shall, within seven days of the conclusion of interviews, deliberate and nominate the most qualified applicants taking into account gender, regional, ethnic and other diversities of the people of Kenya.***

277. This provision, in our view, ought to be read with the provisions of section 3(4) of the ***Interpretation and General Provisions Act***, Cap 2 Laws of Kenya which provides that:

> ***In every written law, except where a contrary intention appears, words and expressions in the singular include the plural and words and expressions in the plural include the singular.***

278. It is therefore our view that whether the use of words and expressions in the plural applies to singular depends on the particular legal provisions and the context in which the same expression is being used. In our view the use of the expression *applicants* is not to be necessarily construed to be plural even where only one vacancy is to be filled unless there is an express provision to that effect in the legal instrument concerned. In light of our finding hereinabove that such necessity

does not exist with respect to the nomination of the Chief Justice and the Deputy Chief Justice we decline to adopt the interpretation that the expression "applicants" must necessarily imply more than one name must be submitted by the Commission to the President.

279. It is our view that the selection process, a process exclusively within the mandate of the Commission, starts from the point when the vacant positions are advertised and does not end until the names of the qualified persons are submitted to the President. Within that stage the mandate is constitutionally reposed in the Commission and neither the executive not the Legislature can dictate to the Commission on how to carry out its said mandate. Therefore by enacting a legislation whose effect amounted to in effect directing the Commission on how to carry out its mandate contrary to the express provisions of the Constitution, we agree with the interested parties that the action amounted to a conflation of the powers/roles of different State organs/offices.

280. On our part, we find the views expressed in ***"Judicial Independence: An overview of Judicial and Executive Relation in Africa"***, an article by **Muna Ndulo**, apt when he observes that*:*

> ***"In order to guarantee the independence and impartiality of the Judiciary, best constitutional practices and International law require States to appoint Judges through strict selection criteria and in a transparent manner…Judicial Service Commissions remain responsible for overseeing judicial appointments in most African Countries…But where the Chief Justice is appointed by the President, the issue of possible excessive presidential influence in the appointment of Judges arises…Even with a suitably constituted JSC, there remains the question of its role in the appointment process itself. Many African Constitutions provide that the President must appoint "after consultation with the Judicial Service Commission". This is the weakest formulation, for the President is not bound by the Commission's views. A stronger approach is one that requires the President to act "on the advise of" or "on the recommendation of" the JSC. This is the approach in the new Kenya Constitution adopted in 2010. This approach implies that the appointment by the President is a purely formal function."***

281. The effect of the amendments to section 30(3) of the ***Judicial Service Act*** is that the Commission would be obliged to forward to the President three names even if in its view, it would have only nominated one. The President would then submit any of the three names to the National Assembly since the amended provisions state in section 30(b) and (c) *inter alia* that:

> ***(b). The President shall, within fourteen days of receipt of the names forwarded select <u>the person</u> to fill each vacant position and forward the name of the person to the National Assembly for approval;***
>
> ***(c) The National Assembly shall, within twenty-one days of the day it next sits after receipt of <u>the name</u> of a person nominated for appointment to the post of Chief Justice or Deputy Chief Justice vet and consider the person;*** [Emphasis ours].

282. In our view, this means that the President would be conducting a sub-nomination of the person to be appointed as the Chief Justice or the Deputy Chief Justice. This effect is clear from a reading of section 30(3)(e) and (f) which provide that:

> ***(e) Where the National Assembly rejects the nomination of a person for appointment to the post of Chief Justice or Deputy Chief Justice, the Speaker shall within three days communicate its decision to the President and request the President to submit <u>a fresh nomination</u>;***
>
> ***(f) Where a nominee is rejected by the National Assembly, the President shall within seven days, submit to the National Assembly <u>a fresh nomination</u> from amongst the three persons shortlisted and forwarded by the Commission under paragraph (a).*** [Emphasis ours].

283. In other words, the discretion on which names to be submitted to the National Assembly will no

longer rest with the Commission but would be at the sole discretion of the President. In our view this system limits or restricts the sole and unfettered discretion given to the Commission by the Constitution to select the person whose name is to be submitted by the President to National Assembly.

284. We agree that the effect of this would be to alter both the letter and spirit of the Constitution which in our view granted the power of selection to the Commission. In effect the purported amendment to section 30(3) of the ***Judicial Service Act*** amounts to an amendment of Article 166(1) of the Constitution through the back-door.

Whether the Court can grant the orders sought in this petition

285. The next question for determination is whether this Court can in light of the foregoing grant the orders sought herein. The bone of contention here is the presumption of constitutionality of legislation. Reliance for this proposition is placed on the celebrated case of **Ndyanabo vs. Attorney General [2001] EA 495** a judgment of the Court of Appeal of Tanzania, as well as the English case of **Pearlberg vs. Varty [1972] 1 WLR 534**. In the former, the Court held that:

> ***"Until the contrary is proved, a legislation is presumed to be constitutional. It is a sound principle of constitutional construction that, if possible, a legislation should receive such a construction as will make it operative and not inoperative"***

286. We agree, as found by the Court in **Ndyanabo**, that the principle of presumption of constitutionality is a sound principle. However, like any other legal presumption, it has exceptions and in our constitutional set up the example that immediately comes to mind is to be found in Article 24(3). With respect to legislation that is alleged to violate provisions of the Constitution other than the Bill of Rights, the obligation is on the petitioner to establish that the legislation violates a provision(s) of the Constitution. This was the view taken by the Court in the case of **Coalition for Reform and Democracy (CORD) vs Attorney General and Others [2015] eKLR** in which it stated:

> ***"We have been called upon to declare SLAA in its entirety, or at the very least certain provisions thereof, unconstitutional for being in breach of various Articles of the Constitution. In considering this question, we are further guided by the principle enunciated in the case of Ndyanabo vs Attorney General [2001] EA 495 to the effect that there is a general presumption that every Act of Parliament is constitutional. The burden of proof lies on any person who alleges that an Act of Parliament is unconstitutional."***

287. However, the Constitution itself qualifies this presumption with respect to statutes which limit or are intended to limit fundamental rights and freedoms. Under the provisions of Article 24 there can be no presumption of constitutionality with respect to legislation that limits fundamental rights: it must meet the criteria set in the said Article. The criteria in such circumstances was set in **Lyomoki and Others vs. Attorney General [2005] 2 EA 127** where the Constitutional Court of Uganda set out the following principles:

i. **The onus is on the petitioners to show a *prima facie* case of violation of their constitutional rights.**
ii. **Thereafter the burden shifts to the respondent to justify that the limitations to the rights contained in the impugned statute is justified within the meaning of Article 43 of the Constitution. Both purposes and effect of an impugned legislation are relevant in the determination of its constitutionality.**
iii. **The constitution is to be looked at as a whole. It has to be read as an integrated whole with no particular provision destroying another but each supporting the other. All provisions concerning an issue should be considered together so as to give effect to the purpose of the instrument.**
iv. **Where human rights provisions conflict with other provisions of the Constitution, human rights provisions take precedence and interpretation should favour enjoyment of the human**

rights and freedoms.

288. The same position was adopted in **Institute of Social Accountability & Another vs. National Assembly & 4 Others High Court Petition No. 71 of 2014 [2015] eKLR**.

289. That now brings us to the issue of the kind of remedies that this Court can grant. The Respondent urged the Court to exercise extreme caution and judicial restraint in interfering with the internal workings of the National Assembly. The 1st Respondent in support of this position relied on **Speaker of The Senate & Another vs. Attorney General & Others** (supra) in which the learned Judge expressed herself as follows:

> "***the court preference is for Judicial restraint. If Judges decided only those cases that meet certain Justifiability requirements, they respect the spheres of their co-equal branches, and minimize the troubling aspects of counter majoritarian Judicial review in a democratic society by maintaining a duly limited place in government...This Court neither approves nor condemns any legislative policy. Its delicate and difficult office is to ascertain and declare whether the legislation is in accordance with or in contravention of, the provision of, the Constitution, and having done that its duty ends...this is a clear indication that the Courts ought not to indiscriminately take up all the matters that come before them but must exercise caution to avoid interfering with the operation of the other Arms of Government save for what they are constitutionally mandated. In line with this reasoning it is my considered view that this Court is not mandated by any provision in the Constitution other than on the face of it Article 261(6) and (7) of the Constitution, to direct the process by Parliament."***

290. We appreciate that where a body is constitutionally empowered to legislate, Courts will not ordinarily interfere with the exercise of the legislative authority of the body concerned in line with the doctrine of separation of powers since Courts do not make the law and only interpret the same. This principle was recognised in **Republic vs. Judicial Commission of Inquiry Into The Goldenberg Affair, Honourable Mr. Justice of Appeal Bosire and Another Ex Parte Honourable Professor Saitoti [2007] 2 EA 392; [2006] 2 KLR 400** where it was held:

> ***"The doctrine of separation of powers is aimed at ensuring that the three arms of government namely the Legislature, the Executive and the Judiciary maintain the necessary checks and balances. This doctrine is recognised in the framework of the Constitution in that the Executive Powers are vested in the President as the head of the Executive Arm of the Government and the Legislative Power is vested in Parliament. Similarly, though not so expressed in the Constitution, the judicial power vests in the Judiciary. In addition it is important to state that our Constitution is founded on the rule of law and in order to maintain the intended constitutional balance, the three arms of government do have separate and distinct roles with only a few known overlaps depending on the degree of separation."***

291. The same position was adopted in **Mumo Matemu vs. Trusted Society of Human Rights Alliance & 5 Others Civil Appeal No. 290 of 2012 [2013] eKLR** where the Court of Appeal citing **Democratic Alliance vs. The President of the Republic of South Africa & 3 Others CCT 122/11 [2012] ZACC 24** stated:

> ***"The rational basis test involves restraint on the part of the Court. It respects the respective roles of the Courts and the Legislature. In the exercise of its legislative powers, the Legislature has the widest possible latitude within the limits of the Constitution. In the exercise of their power to review legislation, courts should strive to preserve to the Legislature its rightful role in a democratic society. This equally applies to executive decisions".***

292. However, the rational basis test is not an absolute test as was recognised by **Lenaola, J** in **Njenga Mwangi & Another vs. The Truth, Justice and Reconciliation Commission & 4**

Others Nairobi High Court Petition No. 286 of 2013 where he was of the view that:

> ***"……..under section 29 of the National Assembly (Powers and Privileges Act) (Cap 6), Courts cannot exercise jurisdiction in respect of acts of the Speaker and other officers of the National Assembly but I am certain that under Article 165(3)(d) of the Constitution, this Court can enquire into any unconstitutional actions on their part".***

293. It must therefore be recognised that under Article 2(4) of the Constitution, any law, including customary law, that is inconsistent with the Constitution is void to the extent of the inconsistency, and any act or omission in contravention of the Constitution is invalid. Under Article 165(3)(d)(i) and (ii) the High Court is clothed with the jurisdiction to hear any question respecting the interpretation of the Constitution including the determination of the question whether any law is inconsistent with or in contravention of the Constitution and the question whether anything said to be done under the authority of the Constitution or of any law is inconsistent with, or in contravention of, the Constitution. Therefore whereas the legislative authority vests in Parliament and the County legislative assemblies where a question arises as to whether an enactment is inconsistent with the Constitution or is passed in contravention of the Constitution the High Court is the institution constitutionally empowered to determine such an issue subject to the appellate jurisdiction given to the Court of Appeal and the Supreme Court. This is in recognition of the fact that there is nothing like supremacy of the legislative assembly outside the Constitution since, under Article 2(1) and (2), the Constitution is the supreme law of the Republic and binds all persons and all State organs at both levels of government and no person may claim or exercise State authority except as authorised under the Constitution. Therefore there is only supremacy of the Constitution and given that the Constitution is supreme, every organ of State performing a constitutional function must perform it in conformity with the Constitution. So, where any State organ fails to do so, the High Court, as the ultimate guardian of the Constitution, will point out the transgression. The contrary argument, in our view, runs counter to the constitutional provisions with respect to the jurisdiction of this Court. The jurisdiction of the Court to invalidate laws that are unconstitutional is in harmony with its duty to be the custodian of the Constitution, which pronounces its supremacy at Article 2. Similarly, the general provisions of the Constitution, which are set out in Article 258 contain the express right to every person to ***"…*** *institute court proceedings, claiming that this Constitution has been contravened, or is threatened with contravention*."

294. Our position is supported by the decision in **Coalition for Reform and Democracy (CORD) & Another vs. the Republic of Kenya & Another** (supra) where the court stated *inter alia* at paragraph 125 that:

> ***"Under Article 1 of the Constitution sovereign power belongs to the people and it is to be exercised in accordance with the Constitution. That sovereign power is delegated to Parliament and the legislative assemblies in the county governments; the national executive and the executive structures in the county governments; and the Judiciary and independent tribunals. There is however a rider that the said organs must perform their functions in accordance with the Constitution. Our Constitution having been enacted by way of a referendum, is the direct expression of the people's will and therefore all State organs in exercising their delegated powers must bow to the will of the people as expressed in the Constitution… Article 2 of the Constitution provides for the binding effect of the Constitution on State Organs and proceeds to decree that any law, including customary law that is inconsistent with the Constitution is void to the extent of the inconsistency, and any act or omission in contravention of this Constitution is invalid…"***

295. We would add that when any of the state organs steps outside its mandate, this Court will not hesitate to intervene. The Supreme Court has ably captured this fact in **Re The Matter of the Interim Independent Electoral Commission** (supra) where it expressed itself at paragraph 54 as follows

> ***"The Effect of the Constitution's detailed provision for the rule of law in processes of***

governance, is the legality of executive or administrative actions to be determined by the Courts, which are independent of the Executive branch. The essence of separation of powers, in this context, is that the totality of governance-powers is shared out among different organs of government, and that these organs play mutually countervailing roles. In this set-up, it is to be recognized that none of the several government organs functions in splendid isolation...It was submitted that these sentiments apply with equal force to the legislature and legislative processes for the Constitution has ushered in a new era, not of Parliamentary supremacy but one of supremacy of the Constitution. The superintendents of the Constitution are the courts of law which recognise that each organ in its own sphere working in accordance with law not only strengthens the Constitution but ensures that the aspirations of Kenyans are met."

296. Subsequently, the Supreme Court in **Speaker of National Assembly vs. Attorney General and 3 Others [2013] eKLR** stated as follows;

> ***"Parliament must operate under the Constitution which is the supreme law of the land. The English tradition of Parliamentary supremacy does not commend itself to nascent democracies such as ours. Where the Constitution decrees a specific procedure to be followed in the enactment of legislation, both Houses of Parliament are bound to follow that procedure. If Parliament violates the procedural requirements of the supreme law of the land, it is for the courts of law, not least the Supreme Court, to assert the authority and supremacy of the Constitution. It would be different if the procedure in question were not constitutionally mandated. This Court would be averse to questioning Parliamentary procedures that are formulated by the Houses to regulate their internal workings as long as the same do not breach the Constitution. Where however, as in this case, one of the Houses is alleging that the other has violated the Constitution, and moves the Court to make a determination by way of an Advisory Opinion, it would be remiss of the Court to look the other way. Understood in this context therefore, by rendering his Opinion, the Court does not violate the doctrine of separation of powers. It is simply performing its solemn duty under the Constitution and the Supreme Court Act. "***

297. The Court went on to state as follows:

> ***"Whereas all State organs, for instance, the two Chambers of Parliament, are under obligation to discharge their mandates as described or signaled in the Constitution, a time comes such as this, when the prosecution of such mandates raises conflicts touching on the integrity of the Constitution itself. It is our perception that all reading of the Constitution indicates that the ultimate judge of "right" and "wrong" in such cases, short of a resolution in plebiscite, is only the Courts."***

298. It was in the same spirit that it was held in **Doctors for Life International vs. Speaker of the National Assembly and Others** (supra) in paragraph 38 that:

> ***"But under our constitutional democracy, the Constitution is the supreme law. It is binding on all branches of government and no less on Parliament. When it exercises its legislative authority, Parliament 'must act in accordance with, and within the limits of, the Constitution', and the supremacy of the Constitution requires that 'the obligations imposed by it must be fulfilled.' Courts are required by the Constitution 'to ensure that all branches of government act within the law' and fulfil their constitutional obligations. This Court 'has been given the responsibility of being the ultimate guardian of the Constitution and its values.' Section 167(4)(e), in particular, entrusts this Court with the power to ensure that Parliament fulfils its constitutional obligations. This section gives meaning to the supremacy clause, which requires that 'the obligations imposed by [the Constitution] must be fulfilled.' It would therefore require clear language of the Constitution to deprive this Court of its jurisdiction to enforce the***

Constitution."

299. In other words, where something is alleged to have been undertaken under the Constitution, it is the Court to determine whether this is in actual fact so and where a person alleges that the action taken is not in accordance with the Constitution it falls upon this Court to investigate and determine that issue since to fail to do so would amount to this Court shirking its constitutional responsibility. In our view this position resonates with the opinion held by the South African Constitutional Court in ***Minister of Health and Others vs. Treatment Action Campaign and Others*** **(supra) at** paragraph 99 where the Court explained its understanding of the role to protect the integrity of the Constitution thus:

> ***"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 fulfil 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 constitutes an intrusion into the domain of the executive that is an intrusion mandated by the Constitution itself."***

300. As this Court held in **The Council of Governors and Others vs. The Senate Petition No. 314 of 2014**:

> ***"this Court vested with the power to interpret the Constitution and to safeguard, protect and promote its provisions as provided for under Article 165(3) of the Constitution, has the duty and obligation to intervene in actions of other arms of Government and State Organs where it is alleged or demonstrated that the Constitution has either been violated or threatened with violation. In that regard, the Petition before us alleges a violation of the Constitution by the Respondent and in the circumstances, it is our finding that the doctrine of separation of power does not inhibit this Court's jurisdiction to address the Petitioner's grievances so long as they stem out of alleged violations of the Constitution. In fact the invitation to do so is most welcome as that is one of the core mandates of this Court".***

301. Similarly in **Nation Media Group Limited vs. Attorney General [2007] 1 EA 261** it was held that

> ***"The Judges are the mediators between the high generalities of the Constitutional text and the messy details of their application to concrete problems. And Judges, in giving body and substance to fundamental rights, will naturally be guided by what are thought to be the requirements of a just society in their own time. In so doing, they are not performing a legislative function. They are not doing work of repair by bringing an obsolete text up to date. On the contrary they are applying the language of these provisions of the Constitution according to their true meaning. The text is "living instrument" when the terms in which it is expressed, in their Constitutional context invite and require periodic re-examination of its application to contemporary life."***

302. It is therefore clear that the mere fact that the legislative assembly enacts an Act that is not the end of the matter.

303. **Mbogholi Msagha, J** on his part in **Macharia vs. Murathe & Another Nairobi HCEP No. 21 of 1998 [2008] 2 KLR (EP) 189 (HCK)** expressed himself *inter alia* as follows:

> ***"The learned counsel cited several authorities from the English jurisdiction to advance his submission that the Courts have no jurisdiction to question whatever takes place in Parliament. Britain does not have a written Constitution hence the sovereignty of Parliament. But in Kenya we have a Constitution whose supremacy as set out therein is***

unambiguous and unequivocal. In a democratic Country governed by a written Constitution, it is the Constitution which is supreme and sovereign...it is no doubt true that the Constitution itself can be amended by the Parliament, but that is possible because...the Constitution itself makes provision in that behalf, and the amendment of the Constitution can be validly made only by following the procedure prescribed by the... [Constitution]. That shows that even when Parliament purports to amend the Constitution, it has to comply with the relevant mandate of the Constitution itself. Legislators, Ministers and Judges take an oath of allegiance to the Constitution for it is by the relevant provisions of the Constitution that they derive their authority and jurisdiction and it is to the provisions of the Constitution that they owe their allegiance. Therefore, there can be no doubt that the sovereignty which can be claimed by the Parliament in England, cannot be claimed by any Legislature...in the literal absolute sense."

304.As **Ngcobo, J** expressed himself in **Matatiele Municipality and Others vs. President of the Republic of South Africa and Others (2),** (supra) where:

"I have found that the NCOP failed to fulfil its constitutional obligation comprehended in section 72(1)(a) in relation to the CTOP Amendment Bill and the THP Bill. Pursuant to section 172(1)(a) of the Constitution, this Court is obliged to declare that the conduct of the NCOP in this regard is inconsistent with the Constitution and is therefore invalid. The respondents did not contend otherwise. A declaration to that effect must accordingly be made. The question which was debated in the Court is whether the CTOP Amendment Act and the THP Act must as a consequence be declared invalid. Counsel for the respondents contended that this Court has no power to declare the resulting statute invalid. To do so, it was submitted, would infringe upon the doctrine of separation of powers. This Court has emphasised on more than one occasion that although there are no bright lines that separate its role from those of the other branches of government, 'there are certain matters that are pre-eminently within the domain of one or other of the arms of government and not the others. All arms of government should be sensitive to and respect this separation.' But at the same time, it has made it clear that this does not mean that courts cannot or should not make orders that have an impact on the domain of the other branches of government."

305.The Judge added:

"When legislation is challenged on the grounds that Parliament did not adopt it in accordance with the provisions of the Constitution, courts have to consider whether in enacting the law in question Parliament has given effect to its constitutional obligations. If it should hold in any given case that Parliament has failed to do so, it is obliged by the Constitution o say so. And insofar as this constitutes an intrusion into the domain of the legislative branch of government, that is an intrusion mandated by the Constitution itself. What should be made clear is that when it is appropriate to do so, courts may – and if need be must – use their powers to make orders that affect the legislative process. Therefore, while the doctrine of separation of powers is an important one in our constitutional democracy, it cannot be used to avoid the obligation of a court to prevent the violation of the Constitution. The right and the duty of this Court to protect the Constitution are derived from the Constitution, and this Court cannot shirk from that duty. As O'Regan J explained in a recent minority judgment, 'the legitimacy of an order made by the court does not flow from the status of the institution itself, but from the fact that it gives effect to the provisions of our Constitution.' In order for the founding values that lie at the heart of our Constitution to be made concrete, it is particularly important for this Court to afford a remedy, which is not only effective, but which should also be seen to be effective. The provisions of section 172(1)(a) are clear, and they admit of no ambiguity; '[w]hen deciding a constitutional matter within its power, a court...must declare that any law or conduct that is inconsistent with the Constitution is

invalid'. This section gives expression to the supremacy of the Constitution and the rule of law, which is one of the founding values of our democratic state. It echoes the supremacy clause of the Constitution, which declares that the 'Constitution is supreme...; law or conduct inconsistent with it is invalid'. It follows therefore that if a court finds that the law is inconsistent with the Constitution, it is obliged to declare it invalid…"

306. We are satisfied that we can grant the orders sought in the petition, where appropriate, or appropriate orders in accordance with Article 23(3).

Summary of Findings

307. We have dealt in the preceding sections with the issues which were raised before us in this petition. What remains is to summarise our findings in this judgment and our disposition of the petition. Consequently we find that:

1. **It was improper for the amendments affecting the manner of appointment of the Chief Justice and the Deputy Chief Justice, the top most positions in the Judiciary, an arm of the Government, to be effected in a Statute Law Miscellaneous Amendment legislation.**
2. **To the extent that the amendments to section 30(3) of the Judicial Service Act compelled the Judicial Service Commission to submit three names to the President for appointment of the Chief Justice and the Deputy Chief Justice respectively, the said amendments violated the letter and the spirit of Article 166(1) of the Constitution.**
3. **By introducing the said amendments on the floor of the House when the same were not the subject of the Bill that was published and was subjected to public participation, that action was contrary to the letter and spirit of Article 10 as read with Article 118 of the Constitution.**

Disposition and Remedies

308. The Petitioners have sought various orders and declarations from the Court with regard to the acts of the respondents. However it is our view that the determination of this petition rests on the constitutionality or otherwise of the amendments to section 30(3) of the ***Judicial Service Act***, 2011.

309. Based on our findings hereinabove, we make the following orders:

1. **We declare that the amendment to section 30(3) of the Judicial Service Act,2011 vide Statute Law Miscellaneous Amendment Act, 2015 was unconstitutional, null and void.**
2. **As the issues raised herein were issues of great public interest not restricted to the Petitioners, we make no order as to costs.**

Dated and Signed at Nairobi this 26th Day of May 2016

R MWONGO

PRINCIPAL JUDGE

W. KORIR

JUDGE

MUMBI NGUGI

JUDGE

GV ODUNGA

JUDGE

J L ONGUTO

JUDGE

Delivered on 26th day of May, 2016

R MWONGO

PRINCIPAL JUDGE

J L ONGUTO

JUDGE

In the presence of: