Thirdway Alliance Kenya & another v Kinyua & 2 others; Kimani & 15 others (Interested Parties) (Constitutional Petition 451 of 2018) [2020] KEHC 7887 (KLR) (Constitutional and Human Rights) (4 March 2020) (Judgment)

Thirdway Alliance Kenya & another v Head of the Public Service-Joseph Kinyua & 2 others; Martin Kimani & 15 others (Interested Parties) [2020] eKLR

Neutral citation: [2020] KEHC 7887 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CONSTITUTIONAL AND HUMAN RIGHTS

CONSTITUTIONAL PETITION 451 OF 2018

JM MATIVO, J

MARCH 4, 2020

BETWEEN

THIRDWAY ALLIANCE KENYA ..... 1ST PETITIONER

DR. EKURU AUKOT ..... 2ND PETITIONER

AND

HEAD OF THE PUBLIC SERVICE-JOSEPH KINYUA ..... 1ST RESPONDENT

BUILDING BRIDGES TO UNITY ADVISORY TASKFORCE 2ND RESPONDENT

THE HONOURABLE ATTORNEY GENERAL ..... 3RD RESPONDENT

AND

AMB. MARTIN KIMANI ..... INTERESTED PARTY

PAUL MWANGI ..... INTERESTED PARTY

ADAMS OLOO ..... INTERESTED PARTY

AGNES KAVINDU ..... INTERESTED PARTY

SEN. AMOS WAKO ..... INTERESTED PARTY

FLORENCE OMOSE ..... INTERESTED PARTY

SAEED MWANGUNI (PROF) ..... INTERESTED PARTY

JAMES MATUNDURA ..... INTERESTED PARTY

MAJOR (RTD) JOHN SEII ..... INTERESTED PARTY

BISHOP LAWI IMATHIU ..... INTERESTED PARTY

MAISON LESHOOMO ..... INTERESTED PARTY

SEN MOHAMMED YUSUF HAJI ..... INTERESTED PARTY

MOROMPI OLE RONKAI ..... INTERESTED PARTY

BISHOP PETER NJENGA ..... INTERESTED PARTY

ROSE MUSEO ..... INTERESTED PARTY

ARCHBISHOP ZACHEUS OKOTH ..... INTERESTED PARTY

The establishment and funding of Building Bridges to Unity Advisory Taskforce (BBI Taskforce) is constitutional.

The main issue before the court was whether the President's decision to appoint the Building Bridges to Unity Advisory Taskforce, the selection process and the composition of its members and their gazettement was done in a manner that was constitutionally impermissible. The High Court held that the constitutional scheme gave the President a special power to appoint the Taskforce. The appointment constituted an executive action and not administrative action. The authority in articles 131 and 132 of the Constitution was conferred in order to provide room for the President to fulfil executive functions and ought not be constrained any more than through the principle of legality and rationality. The exercise of the powers ought not infringe any provision of the Bill of Rights and as was implicit in the Constitution. The President had to act in good faith and ought not misconstrue the powers. Those were significant constraints upon the exercise of the President's power. There was nothing to show that the President misconstrued his powers or acted in bad faith.

Reported by Chelimo Eunice

Constitutional Law *- interpretation of the Constitution – principles and approaches applicable in interpreting constitutional provisions - what was the difference between interpretation of constitutional provisions and interpretation of statutes - whether courts needed to adopt constitutional interpretation approach that conformed to article 259 of the Constitution – interpretation of general constitutional provisions vis-à-vis specific provisions dealing with the same subject matter - interpretation of articles 132 and 252 of the Constitution – whether the provisions of article 132 of the Constitution on functions of the President contradicted the provisions article 252 of the Constitution on general powers and functions - Constitution of Kenya, articles 131, 132 and 259.*

Constitutional Law*– Executive - presidency - functions and powers of the President - implementation of national values and principles of governance - what was the difference between the President's administrative actions vis-à-vis executive actions – factors to consider in determining whether a function or power was administrative or executive in nature - whether the President's decision to appoint the Building Bridges to Unity Advisory Taskforce was an administrative or executive action - what were the President's powers and functions under article 131 of the Constitution - Constitution of Kenya, articles 89, 90, 91 and 131.*

Constitutional Law *– national values and principles of governance - public participation - whether the Constitution imposed an obligation on the President to facilitate public participation before issuing all directives – where the President issued a directive for the establishment of the Building Bridges to Unity Advisory Taskforce – Constitution of Kenya, articles 10, 129, 131 and 132.*

Constitutional Law *- constitutional doctrines and principles - what were the constitutional doctrines and constraints governing the exercise of public power - what was the standard of constitutional review to which all executive decisions had to be subjected - principle of legality – meaning of the principle of legality– principle of rationality – meaning and import of the principle of rationality - principle of proportionality – what was the test of proportionality - whether the President's decision to appoint the Building Bridges to Unity Advisory Taskforce was*

rational - whether the President's decision to appoint the Building Bridges to Unity Advisory Taskforce conformed to the doctrine of legality - Constitution of Kenya, article 132.

***Constitutional Law** - public finance - principles of public finance - whether if a function fell within the scope of the President's constitutional functions, any monies used towards the function in question could not be said to be a transgression of the provisions of article 201 of the Constitution and the Public Finance Management Act - whether the funding of the Building Bridges to Unity Advisory Taskforce offended the principles of public finance - Constitution of Kenya, article 201.*

***Constitutional Law** - financial officers – Auditor-General – functions and mandate of the Auditor-General – where the court had been requested to find that there had been an improper use of government funds by the Building Bridges to Unity Advisory Taskforce - whether courts would perform functions of the Auditor-General - Constitution of Kenya, articles 226 and 229.*

***Constitutional Law** - constitutional doctrines and principles - doctrine of separation of powers - what was the purpose of the doctrine of separation of powers – what was the role of the Judiciary vis-à-vis the role of the Executive.*

Brief facts

The petitioners challenged the constitutional validity of the President of the Republic of Kenya's decision to appoint the Building Bridges to Unity Advisory Taskforce (the Taskforce), including the selection process, composition of its members, and their subsequent gazettement. Central to their challenge was the argument that the President's decision was made without the requisite prior public participation as mandated by the Constitution.

The petitioners further contended that Gazette Notice No. 5154, which established the Taskforce, was fundamentally unconstitutional because it was based on a personal and private agreement between two individuals. They argued that such private arrangements could not be validly imposed upon the general public in contravention of established constitutional procedures. Additionally, the petitioners maintained that the appointment of Taskforce members violated constitutional requirements as they were neither competitively selected nor properly vetted in accordance with constitutional mandates.

In opposing the petition, the respondents advanced several constitutional arguments in defense of the President's actions. They contended that the establishment of the Taskforce was entirely constitutional, grounded in the President's specific constitutional function under article 132(1)(c) of the Constitution. This provision, they argued, empowers the President to publish in the Kenya Gazette details of measures and progress made in realizing the national values enshrined in article 10 of the Constitution.

The respondents further argued that the President possesses wide latitude in determining appropriate measures for the realization of national values. They characterized Gazette Notice No. 5154 not as an unconstitutional act, but rather as a legitimate tool and mechanism designed to assist the President in executing his constitutional mandate under article 131(1) and (2) of the Constitution. In their view, the Taskforce represented a proper exercise of executive authority within the President's constitutional powers.

Issues

i. What were the principles and approaches applicable in interpreting constitutional provisions?
ii. What was the scope and manner of the exercise of executive powers conferred upon the President by the Constitution?
iii. What was the difference between the President's administrative actions *vis-à-vis* executive actions?
iv. Whether the President's decision to appoint the Building Bridges to Unity Advisory Taskforce was an administrative or executive action.
v. Whether the President's decision to appoint the Building Bridges to Unity Advisory Taskforce, the selection process, and the composition of its members and their gazettement were done in a constitutionally impermissible manner.
vi. What were the constitutional doctrines and constraints governing the exercise of public power?

vii. Whether the Constitution imposed an obligation upon the President to facilitate public participation before issuing directives.

viii. Whether the funding of the Building Bridges to Unity Advisory Taskforce offended the principles of public finance.

ix. Whether the Building Bridges to Unity Advisory Taskforce usurped the functions of other constitutional commissions.

Relevant provisions of the Law

Constitution of Kenya, 2010

Article 131 - Authority of the President

(1) The President—

(a) is the Head of State and Government;

(b) exercises the executive authority of the Republic, with the assistance of the Deputy President and Cabinet Secretaries;

(c) is the Commander-in-Chief of the Kenya Defence Forces;

(d) is the chairperson of the National Security Council; and (e) is a symbol of national unity.

(2): The President shall—

(a) respect, uphold and safeguard this Constitution;

(b) safeguard the sovereignty of the Republic;

(c) promote and enhance the unity of the nation;

(d) promote respect for the diversity of the people and communities of Kenya; and

(e) ensure the protection of human rights and fundamental freedoms and the rule of law.

Held

1. Article 259 of the Constitution introduced a new approach to the interpretation of the Constitution. The article obliged courts to promote the spirit, purport, values and principles of the Constitution, advance the rule of law, human rights and fundamental freedoms in the Bill of Rights, and contribute to good governance. That approach had been described as a mandatory constitutional canon of statutory and constitutional interpretation. The duty to adopt an interpretation that conformed to article 259 of the Constitution was mandatory.
2. Constitutional questions had to be determined in a formidable manner, guided by certain constitutional principles that transcended the instant case and applied to all comparable cases. Court decisions could not be *ad hoc* but had to be justified and perceived as justifiable on more general grounds reflected in previous case law and other authorities that applied to the instant case.
3. A constitutional order was a document *sui generis* to be interpreted according to principles suitable to its particular character and not necessarily according to the ordinary rules and presumptions of statutory interpretation.
4. A constitution was a legal instrument giving rise, amongst other things, to individual rights capable of enforcement in a court of law. Respect had to be paid to the language which had been used and to the traditions and usages which had given meaning to the language. Constitutional provisions had to be construed purposively and contextually. Courts were constrained by the language used. Courts could not impose a meaning that the text was not reasonably capable of bearing. The interpretation ought not be unduly strained but should avoid excessive peering at the language to be interpreted without sufficient attention to the historical contextual scene, which included the political and constitutional history leading up to the enactment of a particular provision.
5. In constitutional construction, no one provision of the Constitution was to be segregated from the others and to be considered alone, but all the provisions bearing upon a particular subject were to be brought into view and be interpreted as to effectuate the greater purpose of the instrument.

6. Answering the question whether the President's decision to appoint the Taskforce was an administrative or executive action was important since if it amounted to an administrative action, it was subject to a higher level of scrutiny in terms of the Fair Administrative Action Act. On the other hand, if it were an executive action, it was subject to the less exacting constraints imposed by the principle of legality.
7. Since the Constitution proclaimed the rule of law as one of the values upon which the Republic of Kenya was founded, and that all law or conduct inconsistent with the Constitution was invalid, executive decisions were subject to constitutional review in terms of the rule of law and the principle of legality. That did not mean the existence of parallel systems of review, but generally, the review standard as set by the Fair Administrative Action Act was generally recognised as the more exacting standard.
8. The doctrine of separation of powers was implicit in the Constitution in order to prevent the concentration of power in one branch of government while at the same time preventing the branches of government from usurping power from one another. That doctrine meant that the Judiciary had to exercise due caution when reviewing a decision of the Executive. While it had to play an oversight role on the use of executive power, it had to not be seen to usurp the function of the Executive.
9. Public bodies, no matter how well-intentioned, would only do what the law empowered them to do. That was the essence of the principle of legality, the bedrock of Kenya's constitutional dispensation, which was enshrined in the Constitution. As such, the President's decision communicated by the Head of the Public Service ought to conform to the doctrine of legality. Put differently, a failure to exercise that power where the exigencies of a particular case required it would amount to undermining the legality principle, which was inextricably linked to the rule of law. The doctrine of legality, which required that power had to have a source in law, was applicable whenever public power was exercised. Public power could be validly exercised only if it was clearly sourced in law.
10. Courts were similarly constrained by the doctrine of legality, which was to exercise only those powers bestowed upon them by the law. The concomitant obligation to uphold the rule of law and, with it, the doctrine of legality, was self-evident. In that regard, the 1st respondent was constrained by that doctrine to ensure that his decisions conformed to the Constitution. The 1st respondent had not only a statutory duty but also a moral duty to uphold the Constitution.
11. The task for the courts in evaluating whether a decision was illegal was essentially one of construing the content and scope of the instrument conferring the duty or power upon the decision-maker. The instrument would normally be the Constitution or statute or regulations. Courts, when exercising that power of construction, were enforcing the rule of law by requiring public bodies to act within the four corners of their powers or duties. They were also acting as guardians of Parliament's will, seeking to ensure that the exercise of power was in accordance with the scope and purpose of instruments conferring the power. Where discretion was conferred on the decision-maker, courts also had to determine the scope of that discretion and therefore needed to construe the empowering provision purposefully. It could be assumed that the Constitution intended its provisions to be interpreted in a meaningful and purposive way, giving effect to its basic objectives.
12. The general rule was that when any duty was cast by the Constitution upon the President, unless the Constitution required him to personally perform the duty, it would be exercised by him through the head of the appropriate department, whose acts, if performed within the law, thus became the President's acts. The President's duty in general required his superintendence of the administration; yet he could not be required to become the administrative officer of every department and bureau, or to perform in person the numerous details incident to services which, nevertheless, he was, in a correct sense, by the Constitution and laws required and expected to perform.
13. The decision under challenge was a presidential decision performed on his behalf by the Head of the Public Service. That raised the question whether the impugned decision was an administrative decision

which was subject to judicial review jurisdiction of the court or whether it was an executive decision which had to conform to the principle of legality.

14. Article 131 of the Constitution provided for the powers and functions of the President, whereas article 129 of the Constitution stipulated the principles of executive authority. Article 130(1) of the Constitution, on the other hand, defined the National Executive to comprise the President, the Deputy President and the rest of the Cabinet. More fundamental was the fact that executive powers were, in essence, high-policy or broad direction-giving powers. The formulation of policy was a paradigm case of a function that was executive in nature. The initiation of legislation was another.

15. By contrast, administrative action was the conduct of the bureaucracy, whoever the bureaucratic functionary would be, in carrying out the daily functions of the State, which necessarily involved the application of policy, usually after its translation into law, with direct and immediate consequences for individuals or groups of individuals. Administrative powers were, in that sense, generally lower-level powers, occurring after the formulation of policy. The implementation of legislation was a central example. The verb implement, which also appeared in article 10(1)(c) of the Constitution, served as a useful guide. Administrative powers usually entailed the application of formulated policy to particular factual circumstances. Put differently, the exercise of administrative powers was a policy brought into effect, rather than its creation.

16. In determining the nature of a power, it was helpful to have regard to how closely the decision was related to the formulation of policy, on the one hand, or its application, on the other. A power that was more closely related to the formulation of policy was likely to be executive in nature and, conversely, one closely related to its application was likely to be administrative. The President's power to appoint a Taskforce was closely related to his broad, policy-formulating function, hence it was an executive power. It was a mechanism whereby the President could obtain information and advice so as to achieve his desired goal, in that case of promoting and ensuring national unity among the other terms of reference for the Taskforce.

17. Where a power flowed directly from the Constitution, that could indicate that it was executive rather than administrative in nature, as administrative powers were ordinarily sourced in legislation. Special care had, however, be exercised when reliance was placed on that factor. While administrative powers more commonly flowed from legislation, the Fair Administrative Action Act's definition of administrative action expressly contemplated that the administrative power of organs of State would derive from several sources, including the Constitution. Conversely, an executive power would be sourced in legislation. That feature of a power was thus only useful in that context, if at all, as a tentative signpost; constitutional powers were often wide-ranging and direction-giving, while statutory powers were generally more narrow and the concretization of formulated policy.

18. The constraints imposed on the power ought to be considered. The fact that the scope of a functionary's power was closely circumscribed by legislation would be indicative of the fact that the power was administrative in nature. A functionary would, for example, be afforded a considerable discretion in the exercise of a certain power simply because its exercise was heavily dependent on the factual circumstances that obtained in a particular case. Context was thus crucial in assessing the relevance of that factor. It ought to be considered whether it was appropriate to subject the exercise of the power to the higher level of scrutiny under administrative-law review. It would be that the level of scrutiny was not appropriate, given that the power was exercised on particularly sensitive subject matter or policy matters for which courts had to show the executive a greater level of deference.

19. If a power were more closely related to the formulation of policy, that would render it executive in nature, but if it were the implementation of legislation, that would make it administrative. Underpinning that enquiry was the question of whether it was appropriate to subject the power to the more rigorous, administrative-law review standard. The other pointers, the source of the power and the

extent of the discretion afforded to the functionary, were ancillary in that they were often symptoms of these bigger questions.

20. The Constitution, premised as it was on the doctrine of constitutional supremacy, attempted to reconcile two conflicting goals: to establish a State system with enough power to govern, and to find ways of constraining and regulating that power so that it was not abused. The Constitution provided that the supremacy of the Constitution and the rule of law were among the principal values upon which Kenya was founded. The rule of law, and the related principles of legality and accountability, were the central constitutional doctrines governing the exercise of public power. That was therefore the standard of constitutional review to which all executive decisions had to be subjected.

21. As per articles 129 and 131 of the Constitution, respecting, upholding and safeguarding the Constitution, safeguarding the sovereignty of the Republic, promoting and enhancing the unity of the nation, promoting respect for the diversity of the people and communities of Kenya and ensuring the protection of human rights and fundamental freedoms and the rule of law were the primary constitutional duties required of the President. To underscore the seriousness and importance of the above duties, article 132(1)(c)(i) of the Constitution obligated the President once every year to report, in an address to the nation, on all the measures taken and the progress achieved in the realisation of the national values referred to in article 10 of the Constitution. The President was also required to publish in the Gazette the details of the measures and progress.

22. Article 10 of the Constitution expressly provided that national unity, the rule of law and public participation were some of the national values and principles of governance that bound all State organs, State officers, public officers and all persons whenever any of them applied or interpreted the Constitution, enacted, applied or interpreted any law or made or implemented public policy decisions. Those values and principles of governance were the foundation of the Republic of Kenya as expressly provided by article 4(2) of the Constitution. Those were some of the values the President was obligated to report once every year on all the measures taken and the progress achieved in the realisation of the national values.

23. Executive powers had to be understood and interpreted in the light of the provisions of the Constitution and the doctrine of separation of powers implicit therein. Executive powers usually entailed high-policy or broad direction-giving powers. The executive authority was essentially involved with the preparation, initiation and implementation of legislation, the development and implementation of national policies, and the coordination of the functions of State departments. Under the constitutional scheme, it was the responsibility of the Executive to develop and implement policy. It was not for the court to disturb political judgments, much less to substitute the opinions of experts. The function of the Executive was, therefore, to coordinate the formulation of policies which would lead to the making of laws, and to oversee the implementation of laws and policies by Government departments. In that way, the Executive was meant to promote effective and efficient governance. It stood to reason, therefore, that courts, being free to apply democratic constitutional principles, would strive to give as much content as possible to evidently nebulous concepts, such as the rule of law.

24. The terms of reference of the Taskforce were, among others, to evaluate the national challenges, build bridges to a new Kenyan nation, and having done so, make practical recommendations and reform proposals that build lasting unity. The Taskforce was also mandated to "outline the policy, administrative reform proposals, and implementation modalities for each identified challenge; and conduct consultations with citizens, the faith-based sector, cultural leaders, the private sector and experts at both the county and national levels. Of relevance was the fact that national unity was one of the core values in article 10 of the Constitution and also one of the duties required of the President under article 131(2)(c) of the Constitution. The Constitution required the President to promote and enhance the unity of the nation. How to accomplish that was left to him. Public participation was

also one of the values in article 10 of the Constitution. It followed that national unity and public participation, which were article 10 values were the subject of the issue under consideration.

25. The power that the President exercised was an executive power under the Constitution which required particular consideration. The exercise of executive power ought not be constrained by the requirements that were essentially the hallmark requirements of administrative action. The exercise of the power in question constituted executive action and not administrative action which was only constrained by the principle of legality and by the requirement of rationality.

26. The rule of law required that the exercise of public power by the Executive and other functionaries ought not be arbitrary. Decisions had to be rationally related to the purpose for which the power was given; otherwise, they were in effect arbitrary and inconsistent with that requirement. While the courts could not interfere with a decision simply because they disagreed with it, that applied only to rational decisions. It would be strange if a court did not have the power to set aside a clearly irrational decision. To say that the wielders of public power had to act within their powers, in good faith and without misconstruing their powers, was to summarise a considerable number of well-established administrative law grounds. Legality, an implicit principle in Kenya's constitutional ordering, required the President to act in accordance with the law and in a manner consistent with the Constitution. That meant that the power conferred ought not be misconstrued.

27. The second constraint of rationality required the decision to be rationally related to the purpose for which the power was given. Article 132(2)(c) of the Constitution obligated the President to promote and enhance the unity of the nation. That constitutional obligation did not end there. Article 132(1)(c)(i) obligated the President to once every year report, in an address to the nation, on all the measures taken and the progress achieved in the realisation of the national values, referred to in article 10 of the Constitution, national unity being one of the values. That being the position, the rationality requirement was thus also met.

28. The Constitution required a new approach and that new approach was the test of proportionality. Proportionality was the legal doctrine of constitutional adjudication that stated that all laws enacted by the Legislature and all actions taken by any arm of the State, which impacted a constitutional right, ought to go no further than was necessary to achieve the objective in view.

29. The test of proportionality, which began as an unwritten set of general principles of law, constituted the dominant best practice judicial standard for resolving disputes that involved either a conflict between two right claims or between a right and a legitimate government interest. It had become a centrepiece of jurisprudence across Common Law jurisdictions. It had been raised to the rank of fundamental constitutional principle and represented a global shift from a culture of authority to a culture of justification. The test of proportionality stipulated that the nature and extent of the State's interference with the exercise of the right had to be proportionate to the goal it sought to achieve.

30. In a constitutional democracy where there was constitutionalism and not just the existence of a Constitution, the exercise of power, whether executive, legislative or judicial, was no longer based simply on the idea of having the power to do what one was authorised to do but was also accompanied by justifications for decisions and actions. That was why judges gave reasons for their decisions. In the context of constitutional challenges, justification was required of the executive and legislative arms of Government. Simply put, proportionality was about accountability.

31. The President was obligated by the Constitution to ensure national unity was realized. He had the power to appoint the Taskforce to advise him on, among other things, the means of realizing that constitutional requirement. In that regard, the legality constraint was thus adhered to. The President could not be said to have acted *ultra vires* the Constitution. He acted *intra vires* in taking steps to achieve that noble constitutional requirement. The President's decision met both the proportionality and rationality tests which were core requirements for the decision to pass the principle of legality test.

32. The members of the Taskforce were *ad hoc* in nature and its members were not public officers, hence it could not be argued that they were not subjected to competitive appointment and vetted.
33. The Constitution had to be given a purposive, liberal interpretation. The provisions of the Constitution had to be read as an integrated whole, without any one particular provision destroying the other but each sustaining the other. The spirit of the Constitution had to preside and permeate the process of judicial interpretation and judicial discretion. In interpreting the Constitution, courts had to adopt a holistic approach. Courts could not adopt an interpretation that would lift one value in article 10 of the Constitution over the other values. All were important, just like the functions conferred upon the President in articles 131 and 132 of the Constitution.
34. Public participation in the legislative process was crucial in a democratic society, generally. However, the Constitution did not impose an obligation upon the President to facilitate public participation before issuing the instant directive. If such an obligation were to exist every time the President was to exercise his executive authority, especially in the most urgent of situations, as could arise from time to time, it would be difficult for him to utilize his executive powers. However, if a directive violated any constitutional provision, it ought to be challenged in court, as the President was bound by the provisions of the Constitution and his actions had to be within the four corners of the Constitution.
35. It was not the intention of the Constitution that any time the President performed his function under the various articles of the Constitution, he was required to subject his decision to public participation. Such an interpretation would amount to unnecessarily constraining his constitutional functions. Executive decisions such as the one under consideration did not have to be subjected to public participation. But once the decision was reduced into a policy or legislation, then the policy or legislation, regulation or decision had to be subjected to public participation. The impugned Gazette Notice showed that the mandate of the Taskforce factored in the element of public participation.
36. Striking a balance between the need to respect executive autonomy on one hand, and the right of the public to participate in the decision and policy-making processes on the other, was crucial. The mandate of the Taskforce had carefully factored in the requirement for public participation. In any event, at that stage we would be dealing with an executive decision which could only be challenged on the principle of legality once the decision was reduced into a policy or legislation, then the policy or legislation, regulation or decision had to be subjected to public participation.
37. The constitutional scheme gave the President a special power to appoint the Taskforce. The appointment constituted an executive action and not an administrative action. The authority in articles 131 and 132 of the Constitution was conferred to provide room for the President to fulfil executive functions and ought not be constrained any more than through the principle of legality and rationality. The exercise of the powers ought not infringe any provision of the Bill of Rights and as was implicit in the Constitution. The President had to act in good faith and ought not misconstrue the powers. Those were significant constraints upon the exercise of the President's power. There was nothing to show that the President misconstrued his powers or acted in bad faith.
38. The exercise of public power had to comply with the Constitution, which was the supreme law, and the doctrine of legality, which was part of that law. The doctrine of legality, being an incident of the rule of law, was one of the constitutional controls through which the exercise of public power was regulated by the Constitution. It entailed that both the Legislature and the Executive were constrained by the principle that they would exercise no power and perform no function beyond that conferred upon them by law. In that sense, the Constitution entrenched the principle of legality and provided the foundation for the control of public power. The exercise of such power had to be rationally related to the purpose for which the power was given.
39. As long as the impugned decision, viewed objectively, was rationally related to the legitimate Government purpose, a court could not interfere simply because it disagreed with it or considered the decision to be inappropriate.

40. When an action undertaken by the State was challenged as violative of the Constitution, judicial inquiry focused on the existence of an express constitutional provision or a proper legislative purpose and a demonstrable relationship between that purpose, the Constitution and the governing legislation or regulation enacted to effectuate it.
41. If a function fell within the scope of the President's constitutional functions, any monies used towards the function in question could not be said to be a transgression of the provisions of article 201 of the Constitution and the Public Finance Management Act. Since the instant function fell within the President's mandate, the costs incurred properly fell within the permissible budget, and if any abuse was found to exist on the actual amounts used, then the Auditor General was legally mandated to audit the accounts in conformity with article 226(3) of the Constitution.
42. Courts could not perform the functions of the Auditor General and find that there had been an improper use of Government funds, yet the function in question fell within the President's constitutional mandate. As to the question of the actual amounts used, the court was inclined to respect the constitutional mandate of the Auditor-General for various reasons. It was a constitutional imperative that the constitutional independence of the Auditor-General had to be respected. The court would be trespassing into the Auditor-General's constitutional mandate if it made a finding either way that could prejudice his work before he performed an audit as required under the Constitution. Further, if the court fell into such a trap, then it would not only have prejudiced the audit, but also it would have fallen into an awkward position should the audit become the subject of a court challenge in the future.
43. The prayer for an order requiring the respondents and the interested parties jointly and severally to refund to the National Treasury the public monies expended on the operations of the Taskforce was not granted because it had not been established that the function in question was outside the constitutional mandate of the President. Further, it had not been shown that there had been misuse of public funds.
44. The petitioners argument that the establishment and the mandate of the Taskforce duplicated the functions and the mandate of other constitutional commissions failed to appreciate the well accepted and deep rooted cannon of constitutional interpretation which required constitutional provisions to be construed holistically without lifting one provision over the others or even destroying some as opposed to sustaining each provision to get the meaning, purpose and effect of the entire Constitution. The President's mandate and executive powers were distinct from the powers of independent commissions or any other bodies established under the Constitution. The petitioners' argument, if accepted, would amount to suggesting that the provisions of article 132 of the Constitution contradicted the provisions article 252 of the Constitution. Such an argument was legally frail and unsustainable because the Constitution could not contradict itself.
45. In determining the interrelation between the provisions of article 132 of the Constitution and article 252 of the Constitution, there were two principles of interpretation that were relevant. The first was that where there were provisions in the Constitution that appeared to conflict with each other, the proper approach was to examine them to ascertain whether they could reasonably be reconciled. The provisions had to be construed in a manner that gave full effect to each. Provisions in the Constitution ought not be construed in a manner that resulted in them conflicting with each other. Rather, they had to be construed in a manner that harmonized them. It was not to be assumed that provisions in the same Constitution were contradictory and that the two provisions ought, if possible, to be construed in such a way as to harmonize with one another.
46. Where there were two provisions in the Constitution dealing with the same subject, with one provision being general and the other being specific, the general provision ought ordinarily to yield to the specific provision. In that regard, it was useful to recall that the title to article 252 of the Constitution read general functions and powers as opposed to the heading of article 131 of the Constitution which read

authority of the President and article 132 of the Constitution, which read functions of the President. A reading of the titles to articles 131 and 132 of the Constitution showed that the authority and functions conferred upon the President were specific, while the heading to article 252 of the Constitution showed that the functions of the commissions were general.

47. A general provision would not normally prevail over the specific and unambiguous provisions. The specific provision had to be construed as limiting the scope of the application of the more general provision. If a general provision was capable of more than one interpretation and one of the interpretations resulted in that provision applying to a special field which was dealt with by a specific provision, in the absence of clear language to the contrary, the specific provision had to prevail should there be a conflict.

48. There was no contradiction in the provisions of articles 131 and 132 of the Constitution and 252 of the Constitution. Articles 131 and 132 were specific, while article 252 was general. The general provision yielded to the specific provisions. At the time the drafters of the Constitution enacted article 252, they were already aware of the specific provisions of articles 131 and 132, hence the wisdom in the title to article 252.

49. Article 165(3)(d) of the Constitution conferred vast jurisdiction to the court to hear any question respecting the interpretation of the Constitution including, *inter alia,* the determination of the question whether any law was 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 was inconsistent with, or in contravention of, the Constitution. However, the vast jurisdiction conferred by the said article did not confer power to the court to destroy or emasculate the basic elements or fundamental features of the Constitution. The basic foundation of the Constitution was to be protected and brought out by adhering to the great command in article 259 of the Constitution. Additionally, the court was obliged under article 159(2)(e) of the Constitution to protect and promote the purposes and principles of the Constitution. The Constitution ought to be given a purposive, liberal interpretation. The provisions of the Constitution had to be read as an integrated whole, without any one particular provision destroying the other, but each sustaining the other. The Constitution was an effective document that was the basis of the laws of Kenya.

50. The command in article 259 was instrumental in shaping the constitutional jurisprudence of article 259 provided the manner in which the Constitution was to be interpreted to maintain its fabric, which could not be dismantled by any authority created by the Constitution itself, be it the Parliament, the Executive, or the Judiciary. The power to interpret the Constitution was a power given by the Constitution to the court, and nevertheless, it was a power within and not outside the Constitution.

Petition dismissed with no orders as to costs.

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3. *Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others* Petition 14, 14A, 14B & 14C of 2014 (Consolidated); [2015] KESC 13 (KLR) - (Followed)
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5. *Diani Business Welfare Association and others v County Government of Kwale* Petition 39, 45, 61 & 63 of 2014; [2015] KEHC 1968 (KLR) - (Explained)

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17. *Matemu, Mumo v Trusted Society of Human Rights Alliance, Attorney General, Minister of Justice & Constitutional Affairs, Director of Public Prosecutions, Kenyan Section of the International Commission of Jurists & Kenya Human Rights Commission* Civil Appeal 290 of 2012; [2013] KECA 445 (KLR) - (Explained)
18. *Mureithi ,Benson Riitho (Suing On His Behalf and on Behalf of the General Public v J. W. Wakhungu Cabinet Secretary Ministry of Environment, Water and Natural Resources& Attorney General* Petition 19 of 2014; [2014] KEHC 7650 (KLR)
19. *Murungaru v Kenya Anti-Corruption Commission & another* ? 54 of 2006; [2006] KEHC 3526 (KLR); [2006] 2 KLR 733 - (Explained)
20. *Mwangi, Anthony Ritho and another v Attorney General* Criminal Appeal 701 of 2001; [2002] KEHC 131 (KLR) - (Explained)
21. *Ndora, Stephen v Minister for Education & 2 others* Petition 464 of 2012; [2015] KEHC 3437 (KLR) - (Explained)
22. *Okoiti, Okiya Omtatah v Joseph Kinyua, Public Service Commission & Attorney General* Petition 51 of 2018; [2018] KEELRC 1750 (KLR) - (Explained)
23. *Speaker of the Senate & another v Attorney-General & another; Law Society of Kenya & 2 others (Amicus Curiae)* Advisory Opinion Reference 2 of 2013; [2013] KESC 7 (KLR) - (Explained)
24. *Speaker, Nakuru County Assembly & 46 others v Commission on Revenue Allocation & 3 others* Petition 368 of 2014; [2015] KEHC 6974 (KLR) - (Explained)

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Tinyefunza v Attorney General of Uganda [1997] UGCC 3 - (Mentioned)

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2. *Democratic Alliance v President of the Republic of South Africa & 3 others* [2012] ZACC 24; 2012 (12) BCLR 1297 - (Explained)
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12. *Minister of Defence and Military Veterans v Motau and others* [2014] ZACC 18; 2014 (8) BCLR 930 - (Mentioned)
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2. *Justice K Puttaswamy (Rtd) and anr v Union of India* (2017) 10 SCC 1; AIR 2017 SC 4161 - (Followed)
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Kenya

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2. Fair Administrative Action Act (cap 7L) In general - (Cited)
3. Political Parties Act (cap 7D) In general- (Cited)
4. Public Audit Act (cap 412B) section 7(1)- (Interpreted)
5. Public Finance Management Act (cap 412A) In general- (Cited)

Advocates

Mr Mutuma for the petitioners.

Mr Thande Kuria for the respondents.

Mr. Awele for the interested parties

JUDGMENT

The Parties

1. The first petitioner, Thirdway Alliance Kenya is a political party registered under the provisions of the *Political Parties Act*.[1]

2. The second petitioner, Dr. Ekuru Aukot is the party leader of Third-way Alliance Kenya. He brings these proceedings in his capacity as the Party leader of Thirdway Alliance Kenya and also as a citizen of Kenya.

3. The first respondent, Mr. Joseph Kinyua is the Head of the Public Service appointed by the President of Kenya pursuant to article 132 (4) (a) of the *Constitution*. His responsibilities include managing and coordinating the civil service on behalf of the President.

4. The second respondent is the Building Bridges to Unity Advisory Taskforce (herein after referred to as the Taskforce) established vide Gazette Notice No. 5154 dated May 24, 2018. The first and the second Interested Parties are its joint secretaries.

5. The third respondent is the Hon. Attorney General. Under article 156(4) of the *Constitution*, the Hon. Attorney General is the principal legal adviser to the Government. He represents the national government in court or in any other legal proceedings to which the national government is a party,

[1] Act No 11 of 2011.

other than criminal proceedings. He performs any other functions conferred on the office by an Act of Parliament or by the President.

6. The first to the sixteenth interested parties are the members of the said Taskforce.

Factual Matrix

7. The petitioners case is that Vide Gazette Notice dated May 24, 2018, the first respondent notified the public that H.E. Uhuru Kenyatta, President of the Republic of Kenya had established a body known as the Building Bridges to Unity Advisory Taskforce comprising of the first to the sixteenth Interested Parties whose terms of reference were to:-

   (1).

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

   b. Outline the policy, administrative reform proposals, and implementation modalities for each identified challenge area; and

   c. Conduct consultations with citizens, the faith based Sector, cultural leaders, the private sector and experts at both the county and national levels.

Legal foundation of the Petition

8. The petitioners assert that article 2 (1) of the *Constitution* provides for the supremacy of the *Constitution* and that the *Constitution* binds all persons and all State organs at both levels of Government including the Respondents. They state that article 2(2) of the *Constitution* provides that no person may claim or exercise State authority except as authorized under the *Constitution*. They further state that article 2(4) of the *Constitution* provides that any law, including customary law that is inconsistent with the *Constitution* is void to the extent of the inconsistency, and any act or omission in contravention of the *Constitution* is invalid.

9. They also state that article 3 of the *Constitution* places an obligation on every person to respect, uphold and defend the *Constitution*, and any attempt to establish a government, otherwise than in compliance with the *Constitution* is unlawful. Additionally, they state that article 10 of the *Constitution* stipulates national values and principles of governance which bind all State officers, State Organs and Public Officers, and, that, all persons are required to apply the national values and principles of governance, including inter alia the rule of law, participation of the people, social justice, equity, and non-discrimination, protection of the marginalized, good governance, integrity, transparency, accountability and sustainable development.

10. They state that the decision to constitute the Taskforce was made in total disregard of the national values and principles of governance and in particular, without affording members of the public and/or relevant stakeholders their constitutionally guaranteed opportunity to contribute to the decision.

11. Additionally, they state that the impugned decision violates the spirit of article 132 of the *Constitution* and the provisions of Chapter 15 of the *Constitution* which establishes Commissions and independent offices because the Taskforce is usurping the functions and roles of the already established commissions and independent offices which are mandated to undertake the same functions that the Taskforce purports to undertake.

12. They further state that the Gazette Notice No. 5154 establishing the Taskforce is unconstitutional since it is pursuant to a personal and private agreement between two individuals, which was never subjected to public participation as required under article 10 of the *Constitution*. They maintain that such an agreement cannot be imposed on the general public because it amounts to imposing the objectives of two individuals against the laid down procedures under the *Constitution*.

13. In addition, the petitioners state that by gazetting the Taskforce without taking into consideration the contributions of stakeholders, the first respondent acted unfairly and unlawfully. They state that the respondent's decision was biased, predetermined and unfounded in law, and it offends the letter and spirit of the *Constitution*. They also state that the Taskforce offends article 201 of the *Constitution* on prudent management of Public Funds.

14. The petitioners state that they and the general public are aggrieved by the operationalization of the agreement between the President and Hon. Raila Odinga which has occasioned expending of public funds and added unnecessary financial burden on Kenyans in a cause that is not in the public's best interests. Additionally, they state that the Members of the Taskforce were not vetted as required by article 10(c) and Chapter 6 of the *Constitution*, hence, the failure to vet them before their appointment is unconstitutional and goes against the very fabric of the provisions of article 10 and Chapter 6 of the *Constitution*.

15. Further, the petitioners state that the *Constitution* has established constitutional Commissions and Public bodies, which were formed under the *Constitution* and relevant laws including but not limited to the national cohesion and integration commission; the Ethics and Anti-corruption Commission; National Police Service Commission; Independent Electoral and Boundaries Commission and the Kenya National Commission on Human Rights, hence, the Taskforce usurps and interferes with the roles of these existing Constitutional Commissions, thus undermining their Constitutional mandate.

16. They also state that any findings under its terms of reference will undermine the previous findings and recommendations by the constitutional commissions. In addition, they state that the Taskforce as per its terms of reference purports to establish what allegedly 'ails" our country, yet, what perennially ails our country has already been established and documented in a raft of reports and previous Taskforces.

17. The petitioners state that to allow the Taskforce to undertake its purported functions would be to sweep under the carpet atrocities that have been repeatedly committed every electioneering period. They state that the Taskforce is institutionalizing the commission of electoral offences, politically instigated ethnic antagonism and it excuses political perpetrators thus creating impunity in the management of elections.

Reliefs Sought

18. The petitioners pray for the following orders:-

    a. A declaration that the body being referred to as the Building Bridges to Unity Advisory Taskforce established vide Gazette NoticeNo.5154 dated May 24, 2018 is unconstitutional, illegal, null and void.

    b. An Order of judicial review to remove into this Honourable Court and quash the decision of the Head of Public Service made on May 24, 2018 or thereabouts to Gazette the establishment of a body being referred to as the Building Bridges to Unity Advisory Taskforce Gazetted on May 24, 2018 vide Gazette notice No. 5154 hence setting aside the Gazettement.

c. An order compelling the first & second respondents and the first and second interested parties to publish and supply to the petitioners a detailed budget and financial statements of all the public funds allocated and expended for use by the second respondent.

d. An order requiring the respondents and the interested parties jointly and severely to refund to the national treasury the public monies expended on the operations of the said Taskforce.

e. An order declaring any report produced by the said Taskforce illegal and unconstitutional.

f. An order compelling the Directorate of Criminal Investigations to commence investigations into irregularities and illegalities committed during the 2017 General election.

g. An order compelling the Office of the Director of Public Prosecutions to commence investigations and prosecutions of individuals who may have ignited political violence in the country as a result of the 2017 General elections.

h. Any other order that the court may deem fit and just to grant.

i. The costs of and occasioned by this Application.

First and Third Respondents' Grounds of Opposition

19. On April 5, 2019, the first and third respondents filed grounds of opposition stating:-

a. That the petitioners have not demonstrated how the first and third respondents violated the principles and framework of Public Finance in article 204 (b) (iii) of the *Constitution*.

b. That the petitioners have not demonstrated the unconstitutionality of the formation of the Taskforce or how it offends article 201 of the *Constitution*.

c. That the petitioners have not shown the extent to which the formation of the Taskforce is not in consonant with the powers and functions of the President.

d. That the issues cited on the validity of the formation of the Taskforce have no merit because under article 132 (1) (c) (i) & (ii) of the *Constitution* the President has a mandatory duty to ensure the realization of the national values under article 10 of the *Constitution*.

e. That the President is mandated by the *Constitution* to take specific measures to ensure the realization of the national values, and, that such measures can take any form as long as the actions are within the *Constitution*.

f. That this Petition is misplaced in law because the purpose and objects of establishing Taskforce has a constitutional underpinning in that in exercising his authority, the President under article 131 (2) of the *Constitution* is expressly commanded by the *Constitution* to respect, uphold and safeguard the *Constitution*, safeguard the sovereignty of the Republic of Kenya, promote and enhance the unity of the nation, promote respect for diversity of the people and the communities of Kenya and ensure the protection of human rights and fundamental freedoms and the rule of law.

g. That this Petition has no merit and nothing in the contents of Gazette Notice establishing the Taskforce promotes an unconstitutional purpose.

h. That the Taskforce is only a tool and mechanism to assist HE the President to execute his mandate under articles 131 (1) (2) and 132 (1) (c) (ii) & (ii) of the *Constitution*.

Second Respondent's Replying Affidavit

20. The second respondent, Mr. Paul Mwangi, swore the replying affidavit dated May 31, 2019 in opposition to the Petition, but, largely responding to the application for conservatory orders. In response to the Petition, he deposed that the Petition is an ill-conceived attempt by the petitioners to monopolize political discourse and public opinion on how and by whom change for a better Kenya is to be effected because the Petitioners were also pursuing a referendum initiative.

First Interested Party's Replying Affidavit

21. Amb. Martin Kimani, the first interested party and a member of the Taskforce swore the replying affidavit dated January 28, 2019 in opposition to the Petition on behalf of all the Interested Parties in his capacity as one of the joint secretaries and official spokesperson for the Taskforce. He deposed that the Petition consists of generalities, is devoid of essential particulars of the breaches complained of or the constitutional provisions breached and that it discloses no justiciable constitutional question requiring this honourable court's intervention. He averred that article 130 (2)(e) of the *Constitution* establishes the President as a symbol of national unity and mandatorily enjoins him to *inter alia* respect, uphold and safeguard the *Constitution*, promote and enhance the unity of the nation and to promote respect for the diversity of the people and communities of Kenya. He also averred that under article 132 (1) (c) (i) & (ii) of the *Constitution*, the President has a mandatory distinct and/or independent role of ensuring the realisation of the national values prescribed in article 10 of the *Constitution* and to take specific measures to ensure their realisation. Additionally, he averred that the President is constitutionally obligated to report to the nation in a national address and in the Kenya Gazette all the measures he has taken to realise the national values.

22. Amb. Kimani also averred that the President's constitutional role under the said provisions is independent of similar roles constitutionally assigned to various persons and institutions including independent commissions. He deposed that it is for this reason that article 254 of the *Constitution* mandates independent commissions to render their own reports for similar functions. He averred that the President's role and those of independent commissions are not mutually exclusive, and, that the *Constitution* contemplates collegiality, mutual co-operation and collaboration for the promotion and advancement of national values and principles. He also averred that article 2(1) of the *Constitution* binds every person to the provisions of the *Constitution* while article 3(1) enjoins every person to uphold, respect and defend the *Constitution*.

23. Amb. Kimani deposed that restricting the duty of promoting the values and principles of the *Constitution* to a few persons and institutions is retrogressive and antithetic to the principle that a Constitution is a living document that ought to be liberally interpreted and applied in order to meet the changing demands of society. He deposed that the establishment of the Taskforce was in the public interest and a legitimate step taken by H.E. the President to discharge his independent Constitutional mandate of spearheading the réalisation of the national values listed in article 10 of the *Constitution* which include but not limited to national unity.

24. He deposed that an objective reading of the Taskforces' terms of reference show that its mandate is advisory and concerns matters of national importance that continually evolve with time and which require broad-based methodologies which include :-

    a) Evaluating the National challenges outlined in the joint communique of Building Bridges to a New Kenyan Nation and having done so make practical recommendations and reform proposals that build lasting unity;

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

c) Conduct consultations with citizens, the faith based sector, cultural leaders, the private sector and experts at both the county and National levels.

25. Amb. Kimani deposed that attaining the national values and principles in article 10 of the *Constitution* is the target of existing laws, independent commissions and other institutions, and, it requires the collective effort of all Kenyans. He averred that H.E. the President holds a unique responsibility, and, to succeed he requires continued re-evaluation from multiple vantage points and views of the challenges and weaknesses that hinder a full and effective realization of the said values and principles.

26. He deposed that it is a matter of public record that corruption, negative ethnicity and lack of inclusivity are continuing challenges as manifested in the current and past criminal prosecutions for hate speech and corruption, and the frequent national debates on the distribution of national resources and inclusivity. He averred that the challenges and consequences of divisive politics have also been the subject of innumerable number of constitutional petitions and court decisions, and, in all the cases, the courts have postulated that the effective réalisation of the national values is ever continuing. He averred that the *Constitution* making does not end with its promulgation but is continuing and requires compromise, and, that political and social demands of compromise mark constitutional moments.

27. Additionally, Amb. Kimani deposed that constitutional text and letter may not properly express the minds of the framers, and the minds and hands of the framers may also fail to properly mine the aspirations of the people hence requiring the invocation of the spirit of the *Constitution* as the searchlight for the illumination and elimination of these legal penumbras.[2].He recalled the words of Rtd. Chief Justice Dr. Willy Mutunga[3] that in order to maintain a rational explication of what the *Constitution* must be taken to mean and in order to mine the aspirations the people, the prevailing circumstances are relevant and key considerations that have to be taken into account. He deposed that as the embodiment of the symbol of national unity, the President bears the responsibility of spearheading the realization of this noble objective.

28. He deposed that the mandate of the Taskforce was informed by the prevailing circumstances in the country which include the deteriorating political, social and economic circumstances, hence, the formation of the Taskforce was a deliberate effort on the part of H.E. the President to find real and practical recommendations to enable him to realise national values and principles for the national good. He also averred that the role of the Taskforce is compatible with the principle of executive authority i.e. service to the people of Kenya for their well-being and benefit. He deposed that the Taskforce having arisen from a singular act of seeking unity and accommodation it reflects the *Constitution*'s letter and spirit, and it embodies the aspirations for unity, compromise and inclusion that the *Constitution* requires H.E. the President to pursue.

29. Amb. Kimani averred that whereas the Building Bridges Initiative was borne out of a political compromise, the appointment of the advisory Taskforce is fundamentally and legally anchored on the constitutional executive authority and prerogative of H.E. the President. He deposed that the Taskforce is not a state office *per se* and its membership have no power to make decisions or issue instructions in their own right, but, it is an advisory unit to the executive and the President. He deposed that like any other person and/or authority discharging public functions, its membership is subject

2 The deponent referred to *Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others* and *Re the Speaker of the Senate & Another v Attorney General & 4 Others,* Supreme Court Advisory Opinion No. 2 of 2013; {2013} eKLR

3 Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others [supra],

to the *Constitution*. He also averred that the rationale of the Taskforce is not a unique phenomenon in Kenya, but rather, it is a widely accepted principle of executive authority that the President may employ advice from a wide variety of sources to solve problems of extraordinary nature that require urgent and/or specialised intervention in the public interest.

30. He also averred that it is a matter of public record that the issues identified in the Joint Communiqué of Building Bridges to a New Kenyan Nation reflect ongoing challenges to the fullest realisation of the kind of republic Kenyans have pursued through the promulgation and continuing implementation of the 2010 Constitution. Further, he deposed that given the widely known divisive events leading to the act of unity and cohesion that was the 9th March handshake, the challenges the Taskforce seeks to provide advice are urgent and touch on the peace, security and continuity of Kenya. He deposed that finding solutions to the said matters through a process of consultation and deliberation means that the establishment of the Taskforce was a legitimate presidential action.

31. Further, he averred that given the clear mandate of the Taskforce to inter-alia conduct consultations with citizens, the faith-based sector, cultural leaders, the private sector and experts at both the county and national levels and further bearing in mind that the Taskforce's role is merely advisory, the petitioners' fears of exclusion are unfounded and pre-emptive. He averred that it is a settled constitutional precept of separation of powers that executive decisions should be set aside only if they are irrational and may not ordinarily be set aside because they are merely unreasonable or procedurally unfair. He further averred that no evidence has been submitted to demonstrate that any of the members of the Taskforce lacks integrity, competence or suitability to serve in the said positions or that the said appointments were influenced by improper motives, favouritism, nepotism or corrupt practices.

32. Amb. Kimani deposed that the contention that there exists reports documented by previous Taskforces and commissions on 'what perennially ails our country' is an unreasonable attack on the discretion and Judgment of the President in discharging executive authority. He averred that the said reasoning is flawed in light of the principle of separation of powers. He deposed that the reports cited by the petitioners were triggered by facts and circumstances that preceded the current constitutional dispensation, and, that, while they provide critical performance indicators for review of future interventions, they cannot rationally justify adoption of new strategies for the same purpose.

33. Lastly, he averred that the petitioners' contentions are fallacious, retrogressive and antithetical to principles stipulated in article 259 of the *Constitution*, and that the Petition is speculative, unfounded, frivolous and argumentative.

Interested Parties Grounds Of Opposition

34. The interested parties filed grounds of opposition dated January 29, 2019 describing the Petition as made up of generalities and devoid of essential particulars of the breaches complained of. They stated that the Petition discloses no justiciable constitutional question(s) requiring the honorable court's intervention. They also stated that by dint of article 2 of the *Constitution*, the duty to promote and develop national values and principles enshrined under article 10 of the *Constitution* is universal and not the exclusive preserve of independent commissions, any person or groups of persons and/or offices.

35. Further, they stated that the issues identified in the Joint Communiqué of Building Bridges to a New Kenyan Nation raise serious public policy questions of national concern and that the establishment of the Taskforce was a legitimate presidential gambit for national good. Further, they stated that like any other person(s) and/or authority discharging public functions, the membership of the Taskforce is not above the law, hence, they are subject to the prescribed checks, balances and counterchecks of the Judiciary, legislature and other oversight bodies established within our constitutional framework.

36. Additionally, they stated that given the clear mandate of the Taskforce to *inter alia* conduct consultations with citizens, the faith based sector, cultural leaders, the private sector and experts at the County and National levels and bearing in mind that the Taskforce's role is merely advisory, the Petitioners' fears of exclusion are unfounded and at best premature.

37. Further, they stated that no evidence has been submitted to justify the assertion that members of the Taskforce or any of them lacks integrity, competence or is unsuitable to serve or that their appointments were influenced by improper motives, favoritism, nepotism or corrupt practices. Lastly, they stated that the Petition is frivolous, speculative and otherwise antithetical to the public interest objectives of the Taskforce.

Petitioners' Supplementary Affidavits

38. Dr. Ekuru Aukot swore the supplementary Affidavit dated February 16, 2019. He averred that at the time of making the decision to appoint the Taskforce, the first respondent did not consult or involve the relevant stakeholders and or members of the public as mandatorily required by article 10 of the *Constitution*. He also averred that the decision was as a result of an agreement between two individuals which is not individually and or collectively representative of the 46 million people of Kenya. Further, he deposed that the respondents admit that the agreement to establish the Taskforce was as a result of "a political compromise," yet the compromise did not involve other stakeholders, yet, it is being forced onto the 46 million Kenyans who were not consulted. He averred that had the public been consulted, their opinion would have been different.

39. Dr. Aukot also deposed that the Gazette Notice does not disclose how the operations of the Taskforce would be funded in outright contravention of the clear provisions of the law. He deposed that the National budget is made through public participation process and the operations of the Taskforce were not incorporated in the National budget.

40. Dr. Aukot deposed that the Taskforce has been conducting public hearings secretly in some parts of the country, yet it failed to publicize its itinerary for the public hearings making it possible to mobilize pre-selected groups and or individuals to participate in the process. He deposed that the Taskforce does not have a publicly known physical office where members of the public or interested parties can reach out to them to drop memoranda an indication that it is operating in a manner that smacks of clandestine activities.

41. He also averred that they had difficulties locating its physical office when they needed to serve them with correspondences forcing them to make enquiries at Harambee House, Kenyatta International Conference Centre (KICC) and finally Harambee House Annex where a lady who purported to work for the Taskforce took their messenger to KICC where she officially received the Interested Party's letters. Dr. Aukot deposed that the second respondent does not have a website and or any public information portal/avenue where members of the public could seek information regarding their activities, and, that, the Taskforce as per its terms of references purports to establish what allegedly 'ails" our country, yet, what perennially ails our country has already been established and documented in the *Constitution* and a raft of reports/documents by previous tasks forces as well as commissions including but not limited to the following:-

    a. Truth Justice & Reconciliation Commission (TJRC) report of 2013.

    b. Final Report of the Taskforce on Judicial Reform (the Ouko report), July 2010.

    c. Report of the National Taskforce on Police Reforms of October 2009.

d. Report of the Independent Review Commission on the General Elections held in Kenya on December 27, 2007 (the Kriegler report) of September 17, 2008.

e. Report of the Commission of Inquiry into Post-Election Violence, CIPEV (the Waki report of October 2008).

f. The Ndungu Commission on Illegal/Irregular Allocation of Public Land, 2004.

g. Report of the Committee of Eminent Persons on the *Constitution* Review Process.

h. Akiwumi Commission of Inquiry into Tribal Clashes of July 1998.

i. The Kennedy Kiliku Parliamentary Select Committee on Tribal Clashes report of 1992.

j. The Various Auditor General reports including but not limited to the most recent ones of the last 6 years of Jubilee government Administration.

42. Dr. Aukot averred that the Taskforce is therefore repetitive and seeks to establish that which has already been established by the above cited reports; and, also it is usurping the roles of existing Constitutional Commissions, thus undermining them. He deposed that the *Constitution* has established constitutional Commissions and Public offices, including but not limited to: - The National Cohesion and Integration Commission (NCIC); The Ethics and Anti-Corruption Commission (EACC); National Police Service Commission (NPSC); Independent Electoral and Boundaries Commission (IEBC) and The Kenya National Commission on Human Rights (KNCHR).

43. He also deposed that the mandate of the said bodies covers all the issues raised in the Taskforce communiqué between the President and H.E Raila Odinga. In particular, he averred that:-

a. The establishment of the Building Bridges Taskforce was made pursuant to an undated Joint Communiqué between the President of Kenya on the one hand and H.E Raila Odinga on the other hand as an agreement between the two individuals to roll out a programme that will implement their shared objectives, an agreement which the first Respondent's office has no legal mandate to implement.

b. The Building Bridges Taskforce is unconstitutional in that it offends the principle of public participation enshrined under article 10 of the *Constitution* of Kenya.

c. The Building Bridges Taskforce is unconstitutional in that its operationalization has added unnecessary financial burden on Kenyans due to an agreement that did not include the public and is contrary to management and prudent use of public funds in pursuit of public interest which is envisioned in article 201 of the *Constitution*.

d. The members of the Taskforce were never vetted to establish their compliance with the requirements of such leadership and to satisfy the provisions of article 10(c) of the *Constitution* and Chapter 6 respectively.

e. The said Taskforce usurps the functions and roles of existing Constitutional Commissions, thus undermining the said Constitutional Commissions because the Taskforce's purported functions are duplicitous and repetitive of functions that Kenyan tax payers have already invested in.

f. The joint communiqué is a personal agreement between the president and an individual which is not enforceable as a public cause and thus should not be treated as one.

44. He averred that the Taskforce has a constitutional and statutory duty to consult with all relevant stakeholders to ensure it does operate to the detriment of the general public. He deposed that the first Respondent is in breach of the *Constitution* in his decision to Gazette the Taskforce, and unless the orders sought are granted, the rights of millions of Kenyans to have decisions made by their leaders in their best interest will be infringed. Lastly, he averred that unless the orders sought are granted, the Taskforce will continue to offend the *Constitution* and also expend public funds in pursuit of the two individuals' so-called "shared" objectives.

45. Mr. Miruru Waweru, the first petitioner's Chairperson swore the supplementary Affidavit dated December 2, 2019 annexing the Taskforce's report dated October 2019.

Issues for Determination

46. Upon considering the diametrically opposed positions presented by the parties, I find that the following three issues distil themselves for determination:-

    a. Whether the decision to appoint the Taskforce, the selection process and the composition of its members and their Gazettement was done in a manner that is constitutionally impermissible.

    b. Whether the funding of Taskforce offends the principles of public finance.

    c. Whether the Taskforce usurps the functions of other constitutional commissions.

a) Whether The Decision To AppoinT The Taskforce, the selection process and the Composition Of Its Members And Their Gazettement Was Done In A Manner That Is Constitutionally Impermissible.

47. The petitioners' assault on the constitutional validity of the decision to appoint the Taskforce, the selection process and composition of its members and their Gazettement is premised on four fronts. First, they argue that prior to the decision to appoint the Taskforce, there was no public participation as required under article 10 (2) of the *Constitution*. Mr. Mutuma, counsel for the petitioners argued that public participation is of immense significance considering the primacy it has been given in the *Constitution* and in the statutes. To fortify his argument, he relied on an Article entitled Improving the Quality of Citizens Engagement in Kenya; Promise, Reality and Prospect[4] which states public participation is a civic right and responsibility and also a key in reconfiguring skewed power relations, restoring power to the communities and promoting transparency, accountability and equity.

48. Second, Mr. Mutuma submitted that the Gazette Notice No. 5154 establishing the Taskforce is unconstitutional because it was pursuant to a personal and private agreement between two individuals which cannot be imposed on the general public against the laid down procedures under the *Constitution*. He argued that the agreement was never subjected to public participation as required under Article 10 and by gazetting the Taskforce without taking into consideration the contributions of stakeholders, the Respondents acted unfairly and unlawfully. He relied on *Association of Gaming Operators-Kenya & 41 others v Attorney General& 4 others*[5] which held that public participation as a national value is an expression of the sovereignty of the people articulated in article 1 of the *Constitution*. He added that the golden thread running through the *Constitution* is one of the sovereignty of the people of Kenya.

[4] Society for International Development.

[5] {2014} e KLR.

49. Mr. Mutuma submitted that article 10 makes public participation a national value as a form of expression of that sovereignty and relied on *Diani Business Welfare Association and others v County Government of Kwale*[6]which emphasized that public participation is attained when the members of the public are given the opportunity to know about the issue at hand and to have an adequate say. He observed that the importance of public participation has been emphasised worldly and cited the Indian the Supreme Court decision in *Secretary, Ministry of Information and Broadcasting Government of India & others v Cricket Association of Bengal & another*[7] which held that:-

> " The democracy cannot exist unless all citizens have a right to participate in the affairs of the policy of the country. The right to participate in the affairs of the country is meaningless unless the citizens are well informed on all sides of the issues in respect of which they are called upon to express their views. One sided information, misinformation and non-information, all equally create an uninformed citizenry which makes democracy a farce when medium of information is monopolized either by a partisan central authority or by private individuals or oligarchy organizations. This is particularly so in a country like ours where about 65% of the population is illiterate and hardly 1½ percent of the population has an access to the point media which is not subject to pre-censorship."

50. He also relied on *Doctors for Life International v Speaker of the National Assembly and others*[8] for the holding that at least two elements are encompassed by the duty to facilitate public involvement; first, to provide meaningful opportunities for public participation in the law-making process, and secondly, to make sure that people have the ability to take advantage of the opportunities provided. He submitted that public participation must include and be seen to include the dissemination of information, invitation to participate in the process and consultation on the legislation. He submitted that Public participation is part and parcel of the national values and the failure by the president to comply with this obligation renders the resulting activity invalid.

51. Third, Mr. Mutuma argued that the members of the Taskforce were not competitively appointed. He cited *Benson Riitho Mureithi v J. W. Wakhungu & 2 others*[9]] which held that:-

> " There is no evidence that there was a competitive process that would enable public participation in the process and show the transparency and accountability required under the *Constitution*, thereby giving legitimacy to the appointment of the petitioner. Like his successor, the petitioner was appointed on the basis of a Gazette Notice; the basis of the appointment, the criteria followed in appointing him and the other members of the Tribunal was, from all appearances and regrettably so, more in keeping with the old order that preceded and indeed gave impetus to the clamour for the new Constitution when public officers were appointed at the whim of the Minister or President. To uphold the appointment of the petitioner would be to give a seal of approval to the old order. It is imperative that all public appointments are made in accordance with constitutional values and principles.

6 {2015} e KLR.

7 {1995} 2 SCC 161

8 (CCT12/05) [2006] ZACC 11; 2006 (12) BCLR 1399 (CC); 2006 (6) SA 416 (CC).

9 {2014} eKLR.

52. Fourth, Mr. Mutuma submitted that the members of the Taskforce ought to have been vetted as required by Chapter 6 and article 10(c) of the *Constitution*. He argued that the lack of vetting prior to their appointment is unconstitutional and goes against the very fabric of the provisions of articles 10 and 73 (2) of the *Constitution*. He cited article 232(1) of the *Constitution* which requires transparency, accountability and fair competition and merit as a basis of appointments. He placed further reliance on *John Mining Temoi & another v Governor of Bungoma County and 17 others*[10] for the holding that merit and fair competition demands that nominees must be interviewed and selected in the specific positions they have applied and been interviewed. He submitted that the principles of article 232 on fair recruitment must be complied with. He maintained that the courts have power to review appointments in situations where the appointments do not adhere to the laid down principles. For this proposition, he relied on the Indian Supreme Court case of *Centre for PIL and another v Union of India and another*[11] in which the court adopted the approach that judicial review of appointments must scrutinize not only the appointment process but also adherence to the eligibility criteria. He submitted that lack of vetting before appointments of the interested parties is unconstitutional and goes against the very fabric of the provisions under article 10 and Chapter 6 of the *Constitution*.

53. Mr. Thande Kuria counsel for the respondentssubmitted that the President in exercising his authority under article 131(2) of the *Constitution*, he is expressly commanded by the *Constitution* to respect, uphold and safeguard the *Constitution*, the sovereignty of the Republic of Kenya and to promote and enhance the unity of the nation etc. He argued that the contents of the impugned Gazette Notice is merely a tool and a mechanism to assist the President to execute his constitutional mandate under article 131 (1) (2) of the *Constitution*.

54. He argued that the establishment of the Taskforce is not unconstitutional because the President has a specific constitutional function under article 132 (1) (c) of the *Constitution* to publish in the Kenya Gazette details of the measures and progress made in the realization of the national values in article 10 of the *Constitution*. He argued that the Article grants the President a wide latitude of measures to take in realization of national values in article 10. He relied on Okiya Omtata Okoiti v Joseph Kinyua, Public Service Commission & Attorney General[12] for the holding that the President as head of state and government has the overarching role over state organs and that the commission includes part of the Public Service and is therefore answerable to the President.

55. He argued that the President exercised his authority delegated by the people of Kenya as a symbol of national unity. He relied on *Murungaru v Kenya Anti-Corruption Commission & another*[13] and In the Matter of the Kenya National Human Rights Commission for the proposition that the constitutional interpretation must be both contextual and holistic. He also relied on *In the Matter of the principle of Gender Representation in the National Assembly and Senate*[14] for the proposition that the *Constitution* embodies the values of the Kenyan Society as well as their aspirations, dreams and fears as espoused in article 10. Additionally, he relied on *Joseph Kimanui Gathingu v Attorney General & 5 others*[15] for the holding that the 2010 Constitution is dominated by social orientation as the main theme, rights,

10 {2014}e KLR.

11 Petition Writ No. 348 of 2010.

12 ILRC Pet. No. 51 of 2018.

13 HCMCA No. 54 of 2006, {2006} e KLR.

14 SC Advisory Opinion No. 2 of 2012.

15 Constitutional Reference No. 12 of 2010.

welfare, empowerment and that the *Constitution* offers these values as reference points in governance functions.

56. He submitted that although public participation is a constitutional edict, the petitioner has wrongfully invoked it in the instant case. He argued that the impugned gazette notice stipulates that the public would be involved in the process, and, that, in the performance of its functions, the Taskforce is empowered to solicit, receive and to consider written memorandum or information from the public in compliance with the provisions of article 118 of the *Constitution*. He argued that the Taskforce cannot be unconstitutional or offensive to public participation because the Gazette Notice has an in built mechanism to ensure adherence to the principle of public participation in compliance with article 10 of the *Constitution*. He relied on *Consumer Federation of Kenya v Attorney General and 2 others*[16] for the proposition that public participation can take many forms, and, that public participation does not mean that the public takes over the execution of government functions or that it must be involved in conducting negotiations.

57. Additionally, Mr. Kuria submitted that every case must depend on its peculiar circumstances to determine the degree and extent of public participation. For this proposition he relied on *Minister of Health and another v New Clicks (Pty) Limited and others*[17] in which the constitutional court of South Africa stated that "the forms of facilitating an appropriate degree of participation are indeed capable of infinite variation, and, 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, and, what amounts to a reasonable opportunity will depend on the circumstances of each case.

58. Lastly, on the question of vetting, Mr. Kuria argued that there is no mandatory requirement for the exercise and argued that no evidence has been provided that the persons appointed do not meet the threshold established by the *Constitution* on leadership and integrity.

59. Mr. Awele counsel for the interested parties argued that the Taskforce affords the people an invaluable platform to offer their views that will no doubt enrich the manner of discharge of the President's Constitutional mandate in promoting and enhancing the unity of the nation. He submitted that the exercise of public power is regulated by the *Constitution* in different ways, and, that Public administration, which is part of the executive arm of government, is subject to a variety of constitutional controls.

60. Mr. Awele argued that determining whether the President's decision to appoint the Taskforce should be characterized as falling within the ambit of the values in article 10 (1) (a) of the *Constitution* depends primarily upon the nature of the power. He argued that a series of considerations may be relevant to decide which side of the line a particular action falls. He submitted that the source of the power, though not necessarily decisive, is a relevant factor, so too is the nature of the power, its subject matter, whether it involves the exercise of a public duty, and how closely it is related on the one hand to policy matters, which are not administrative, and on the other to the application or implementation of the *Constitution* or legislation.

61. Mr. Awele also argued that as a jurisdictional challenge, this Petition is barred by what he described as the political question doctrine. He argued the Petition involves the examination of the exercise of the prerogative powers of the executive, and, that, it is an attempt by the Petitioners to have the court substitute its opinion on the most suitable means of achieving the ideals of the *Constitution*. He invited the court to find that the issues raised in the Petition are non-justiciable because their nature and subject

16 *H*igh Court Petition No. 11 of 2012.

17 CCT 59/2004, {2005} ZACC 14.

matter are such as not to be amenable to the judicial process otherwise known as the political doctrine question. He relied on *Council of Civil Service Unions v Minister for the Civil Service*[18] which held that a challenge is referred to as being non-justiciable because its nature and subject matter is such as not to be amenable to the judicial process. He submitted that the "justiciability" doctrine is rooted in both constitutional and prudential considerations and evince respect for the separation of powers, including a properly limited role of the courts in a democratic society. He argued that the "political question" doctrine—requires that courts should not adjudicate certain controversies because their resolution is more proper within the political branches. To further buttress his argument, he cited the Court of Appeal decision in *Kenya Airports Authority v Mitu-Bell Welfare Society & 2 others*[19] where the court cited *Marbury v Madison*[20] which held that "The province of the court is solely, to decide on the rights of individuals and not to enquire how the executive or executive officers perform duties in which they have discretion."The court went further to cite *Ndora Stephen v Minister for Education & 2 others*[21] for the holding that the formulation of policy and implementation thereof are within the province of executive and that questions which are in their nature exclusively political should never be adjudicated upon by courts.

62. Mr Awele submitted that the two main criteria that will influence the justiciability of an issue or otherwise are firstly, whether there is a clear constitutional mandate to a particular government organ to make a decision on the issue, and secondly, even where such a constitutional mandate exists, whether the nature of the issue and dispute is such that it is more effectively resolved by conventional political methods of decision-making rather than by a deliberative constitutional judgment which includes situations where a court lacks the capacity to develop clear and coherent principles to govern litigants' conduct.

63. Mr. Awele submitted that though the petitioners are driving a constitutional review process touching on some of the governance questions being addressed by the respondentsand interested parties, they believe the said initiative is a better substitute for the Taskforce hence the attempt to use the courts to stifle any alternative and legitimate exercise of executive decision making authority. He argued that this Petition is a veiled political contest for which judicial review is not amenable.

64. On whether the President has legal authority to establish the Taskforce and/or appoint its members, Mr. Awele submitted that setting up the Taskforce and appointing its membership was an exercise of executive authority and prerogative of the President under articles 131(2) (c) and 132(1) (c) (i) as read together with articles 2(1), 3(1) and 10 of the *Constitution*. He argued that under article 131(2) (c), the functions of the President include to promote and enhance the unity of the nation. He submitted that article 132(1) (c) (i) of the *Constitution* confers the President with a distinct and/or independent mandate of ensuring the realization of the national values in article 10 of the *Constitution* and as such requires him to take specific measures to ensure the realisation of the national values. He submitted that the *Constitution* provides the President to "once every year— (i) report, in an address to the nation, on all the measures taken and the progress achieved in the realization of the national values, referred to in article 10..."

65. He submitted that the above provisions do not stipulate and/or attempt to direct the President on how he is expected to discharge the stated functions. He argued that the omission was deliberate and well

18 {1984} 3AII ER 935.

19 (2016) e KLR.

20 5 US. 137.

21 Nairobi High Court Petition No. 464 of 2012.

in accord with the principle of separation of powers the aim being to allow the Presidency the latitude to make executive decisions in a manner that in his estimation effectively facilitates the discharge of his constitutional functions. He argued that the President does not and is not expected to discharge them in his individual capacity, hence, articles 131(2) (c) and 132(1) (c) (i) of the *Constitution* entitles the President to exercise a reasonable degree of discretion to *inter alia* appoint such person and/or do such things as are reasonably incidental to the discharge of his mandate as he did in the instant case. He argued that on parity of reasoning independent commissions established for the same purpose are endowed with discretion to appoint such persons and/or do such things as are reasonably incidental to discharge of their mandate as they deem fit.

66. Mr. Awele argued that viewed from the foregoing perspective, the Petition essentially challenges the exercise of executive prerogative and is otherwise an invitation to the court to substitute its views on how the President ought to discharge his mandate under inter-alia articles 131(2)(c) and 132(1)(c)(i) of the *Constitution*. He submitted that to that extent the prayers sought offend the principle of separation of powers which inter-alia obligates the court to exercise restraint and to accord the executive sufficient latitude to discharge its mandate under the *Constitution* and the law. He relied on *Mumo Matemu v. Trusted Society of Human Rights Alliance and 2 others*[22] which considered the scope of application of the separation of powers doctrine. He argued that the President exercised his prerogative in public interest and that no evidence has been adduced to demonstrate any prejudice that outweighs the public interest in the work of Taskforce and indeed none has been occasioned.

67. On whether the establishment of the Taskforce violates the principle of public participation, he argued that by the very nature of the Taskforce's advisory role, it is not a state office and neither are its member's state officers whose appointments are subject to the vetting and approval processes of Parliament. He submitted that the appointing authority has not mandated it as such and no authority or provision of the law has been cited to justify the argument that vetting requirements apply to its members. He argued that no allegation has been made nor proven that the membership of the Taskforce violates any of the principles of leadership and integrity or that any member of the Taskforce lacks integrity, competence or suitability to serve as such or that the President's decision to appoint the said members was influenced by nepotism, favoritism or improper motives or corrupt practices. He submitted that the generality of the Petition on this issue falls short of the specificity standard of Constitutional Petitions, and, that, the petitioners bear the burden of demonstrating how and why the membership of the Taskforce violates the provisions of article 73(2) of the *Constitution*.

68. Mr. Awele argued that the exigencies that informed the establishment of the Taskforce are of general public notoriety which he invited the court to take judicial notice of. He argued that the implementation of the *Constitution* is ever continuing and relied on *Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others*[23] and *Re the Speaker of the Senate & Another v Attorney General & 4 others,* Supreme Court Advisory Opinion No. 2 of 2013[24] which held that Constitution making does not end with its promulgation but is continuing and requires compromise.

69. He argued that since its promulgation nine years ago, the implementation of the *Constitution* has encountered several challenges that have hindered its full realization. He argued that it is a matter of public record that corruption, negative ethnicity, lack of inclusivity and distribution of national resources as outlined in the Joint Communique are continuing monumental challenges that have led to divisive politics and have also been the subject of innumerable number of Constitutional Petitions

22 {2013} e KLR.

23 {2014} e KLR.

24 {2013} e KLR.

and decisions. He submitted that these challenges required urgent intervention and effective solutions, hence, the President's decision to seek the views of Kenyans on how best to tackle them was legitimate and anchored on the principle of inclusive compromise. He argued that the Petitioners invitation to the court to interfere with this noble mandate is in bad faith, regressive and antithetical to the principles and values of the *Constitution*.

70. Mr. Awele relied on *Mumo Matemu vs Trusted Society of Human Rights Alliance & 5 others*[25] which cited with approval the South African case of *Democratic Alliance vs. The President of the Republic of South Africa & 3 others*[26] on the test to be applied whenever the court is invited to invoke its countervailing powers to probe the actions of the executive. He also relied on *Council of Civil Service Unions v Minister for Civil Service*[27] in which Lord Diplock defined of irrationality and posed the question whether the establishment and mandate of the Taskforce is incompatible with the text and sub text of the *Constitution* so as to lead to no other conclusion but that it is irrational and submitted that it does not. He invited the court to consider the provisions of articles 2, 3, 130, 131(2) and 132(1)(c)(i) and 259 of the *Constitution* and conclude that the establishment of the Taskforce is not irrational. He also relied on In the matter of the principle of gender representation in the *National Assembly and the Senate.*[28]

71. Determining the issues raised in this Petition involve interpreting the various articlesof the *Constitution* which are implicated. It is therefore important to recall the relevant guiding principles.[29] A convenient starting point is article 259 of the *Constitution* which introduced a new approach to the interpretation of the *Constitution*. The article obliges courts to promote 'the spirit, purport, values and principles of the *Constitution*, advance the rule of Law, Human Rights and fundamental freedoms in the Bill of Rights and contribute to good governance. This approach has been described as 'a mandatory constitutional canon of statutory and Constitutional interpretation.' The duty to adopt an interpretation that conforms to article 259 mandatory.

72. It is important to mention that constitutional questions must be determined in formidable terms guided by some constitutional principles that transcend the case at hand and which are applicable to all comparable cases. Court decisions cannot be *had hoc* but must be justified and perceived as justifiable on more general grounds reflected in previous case law and other authorities that apply to the instant case.[30] A constitutional order is a document *sui generis* to be interpreted according to principles suitable to its particular character and not necessarily according to the ordinary rules and presumptions of statutory interpretation.

73. A Constitution is a legal instrument giving rise, amongst other things, to individual rights capable of enforcement in a court of law. Respect must be paid to the language which has been used and to the traditions and usages which have given meaning to the language. The recognition of the sanctity of the *Constitution* and its special character calling for special rules of interpretation was captured in *Anthony*

25 {2013} e KLR

26 6 CCT 122/11 [2012] ZACC 24

27 *{*1984} 3AII ER 935.

28 Supreme Court Advisory Opinion No. 2 of 2012

29 See The Institute of Social Accountability & others vs The National Assembly & others, Pet No. 497 of 2014

30 See Wechsler, {1959}. *Towards Neutral Principles of Constitutional* Law, Vol 73, Havard Law Review P. 1.

Ritho Mwangi and another v The Attorney General[31] where the court stated that "our Constitution is the citadel where good governance under the rule of law by all three organs of the state machinery is secured. The very structure of separation of powers and independence of the three organs calls for judicial review by checking and supervising the functions, obligations and powers of the two organs, namely the executive, and the legislature. The judiciary though seems to be omnipotent, is not so, as it is obligated to observe and uphold the spirit and the majesty of the *Constitution* and the rule of law."

74. Constitutional provisions must be construed purposively and in a contextual manner. Courts are simultaneously constrained by the language used. Courts may not impose a meaning that the text is not reasonably capable of bearing. In other words, the interpretation should not be "unduly strained"[32] but should avoid "excessive peering at the language to be interpreted without sufficient attention to the historical contextual scene," which includes the political and constitutional history leading up to the enactment of a particular provision.[33]

75. It is by now trite that the issues raised in this case is an invitation to this court to interpret the scope and the manner of the exercise of execute powers conferred upon the President by the *Constitution*. As we do so, we must seek to promote the spirit, purport and objects of the *Constitution*. We must prefer a generous construction over a merely textual or legalistic one in order to afford the fullest possible constitutional guarantees. In searching for the purpose, it is legitimate to seek to identify the mischief sought to be remedied. We must understand the provision within the context of the grid, if any, of related provisions of the *Constitution* as a whole, including its underlying values. Although the text is often the starting point of any construction, the meaning it bears must pay due regard to context. This is so even when the ordinary meaning of the provision to be construed is clear and unambiguous.

76. Therefore, in construing the provisions implicated in this case, we are obliged not only to avoid an interpretation that clashes with the Constitutional values, purposes and principles but also to seek a meaning of the provisions that promotes constitutional purposes, values, principles, and which advances rule of law, human rights and fundamental freedoms in the Bill of Rights and also an interpretation that permits development of the law and contributes to good governance. We are also obliged to be guided by the provisions of article 159 (e) which requires us to promote and protect the purposes and principles of the *Constitution*.

77. It is an elementary rule of constitutional construction that no one provision of the *Constitution* is to be segregated from the others and to be considered alone, but that all the provisions bearing upon a particular subject are to be brought into view and be interpreted as to effectuate the greater purpose of the instrument.[34]

78. Guided by the above principles, I now turn to confront the issue under consideration. At the centre of this issue are intricate questions on the constitutional validity of the President's decision communicated on his behalf by the Head of The Public Service- Mr. Joseph Kinyua through the impugned Gazette Notice appointing the Taskforce. The Petitioners cited four grounds in support of

31 Nairobi Criminal Application no. 701 0f 2001

32 *Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors (Pty) Ltd and Others: In re Hyundai Motor Distributors (Pty) Ltd and Others v Smit NO and Others* [2000] ZACC 12; 2001 (1) SA 545 (CC); 2000 (10) BCLR 1079 (CC) at para 24

33 *Johannesburg Municipality v Gauteng Development Tribunal and Others* [2009] ZASCA 106; 2010 (2) SA 554 (SCA) at para 39, which quoted *Jaga v Dönges, N.O. and Another; Bhana v Dönges, N.O. and Another* 1950 (4) SA 653 (A) at 664G-H.

34 *Smith Dakota vs. North Carolina,* 192 US 268(1940)

their sustained effort to persuade this court to find tHat The Decision To Appoint The Taskforce Is constitutionally invalid.

79. The grounds as I understood them are: - First, whether the President's decision to appoint the Taskforce without subjecting his decision to public participation is constitutionally impermissible. Second, whether the failure to subject the appointment or selection of the members of the Taskforce to a competitive process renders their appointments unconstitutional. Third, whether the failure to subject the members of the Taskforce to vetting prior to their appointment to determine their suitability to serve is an affront to the *Constitution*. Fourth, whether the impugned decision having been conceived by the President and the Hon. Raila Odinda ought to have been subjected to public participation.

80. At the center of the above questions is a fundamental issue, namely, whether the President's decision is an administrative or executive action? Answering this question is important. If it amounts to an administrative action, it is subject to a higher level of scrutiny in terms of the *Fair Administrative Action Act*.[35] On the other hand, if it is an executive action, it is subject to the less exacting constraints imposed by the principle of legality.

81. Since the *Constitution* proclaims the rule of law as one of the values upon which the Republic of Kenya is founded, and that all law or conduct inconsistent with the *Constitution* is invalid, executive decisions are subject to constitutional review in terms of the rule of law and the principle of legality.

82. I am not suggesting the existence of parallel systems of review in our jurisdiction, but generally, the review standard as set by the *Fair Administrative Action Act*[36] is generally recognised as the more exacting standard. The doctrine of separation of powers is implicit in the *Constitution* in order to prevent the concentration of power in one branch of government while at the same time preventing the branches of government from usurping power from one another. This doctrine means that the judiciary must exercise due caution when reviewing a decision of the executive. While it must play an oversight role on the use of executive power it must not be seen to usurp the function of the executive.

83. It is an established position that public bodies, no matter how well intentioned, may, only do what the law empowers them to do. That is the essence of the principle of legality, the bedrock of our constitutional dispensation, which is enshrined in our constitution. As such, the President's decision communicated by thee Head of the Public service must conform to the doctrine of legality. Put differently, a failure to exercise that power where the exigencies of a particular case require it, would amount to undermining the legality principle, which, is inextricably linked to the rule of law. Guidance can be obtained from the South African case of *AAA Investments (Pty) Ltd vs Micro Finance Regulatory Council* and another where the court held as follows:-

> " the doctrine of legality which requires that power should have a source in law, is applicable whenever public power is exercised . . . Public power . . . can be validly exercised only if it is clearly sourced in law"[37]

84. Courts are similarly constrained by the doctrine of legality, i.e to exercise only those powers bestowed upon them by the law.[38] The concomitant obligation to uphold the rule of law and, with it, the doctrine

35 *Act No. 4 of 2015*

36 Ibid.

37 AAA Investments (Pty) Ltd v Micro Finance Regulatory Council {2006} ZACC 9; 2007 (1) SA 343 (CC

38 *National Director of Public Prosecutions vs Zuma, Harms DP*

of legality, is self-evident. In this regard, the first respondent is constrained by that doctrine to ensure that his decisions conform to the *Constitution*. The first respondent has not only a statutory duty but also a moral duty to uphold the *Constitution*.

85. The task for the courts in evaluating whether a decision is illegal is essentially one of construing the content and scope of the instrument conferring the duty or power upon the decision-maker. The instrument will normally be the *Constitution* or statute or Regulations. The courts when exercising this power of construction are enforcing the rule of law, by requiring public bodies to act within the "four corners" of their powers or duties. They are also acting as guardians of Parliament's will, seeking to ensure that the exercise of power is in accordance with the scope and purpose of instruments conferring the power. Where discretion is conferred on the decision-maker, the courts also have to determine the scope of that discretion and therefore need to construe the empowering provision purposefully.[39]One can confidently assume that the *Constitution* intends its provisions to be interpreted in a meaningful and purposive way giving effect to its basic objectives.

86. The general rule, is that when any duty is cast by Constitution upon the President, unless the *Constitution* requires him to personally perform the duty, it may be exercised by him through the head of the appropriate department, whose acts, if performed within the law, thus become the President's acts. The President's duty in general requires his superintendence of the administration; yet he cannot be required to become the administrative officer of every department and bureau, or to perform in person the numerous details incident to services which, nevertheless, he is, in a correct sense, by the *Constitution* and laws required and expected to perform.

87. The key point to note is that the decision under challenge is a presidential decision performed on his behalf by the heard of the public service. This raises a valid question, whether the impugned decision is an administrative decision which is subject to judicial review jurisdiction of this court or whether it is an executive decision which must conform to the principle of legality. With this question in mind, I will first discusses Petitioners grounds of assault on the issue under consideration and the rejoinder by the Respondent's and the Interested Parties.

88. I undertake this enquiry in three stages. First, I will consider the President's powers and functions under article 131 of the *Constitution*. Second, I will set out the means by which we should assess the nature of the power in question. Third, I will apply the principles that emerge to the facts of this case.

89. Article 131 of the *Constitution* provides that (1) The President— (a) is the Head of State and Government; (b) exercises the executive authority of the Republic, with the assistance of the Deputy President and Cabinet Secretaries; (c) is the Commander-in-Chief of the Kenya Defence Forces; (d) is the chairperson of the National Security Council; and (e) is a symbol of national unity.

90. Article 129 of the *Constitution* stipulates the principles of executive authority. It provides that: - (1) executive authority derives from the people of Kenya and shall be exercised in accordance with this Constitution. Sub-article (2) provides that executive authority shall be exercised in a manner compatible with the principles of service to the people of Kenya, and for their well-being and benefit. Article 130 (1) of the *Constitution* defines the national executive of the Republic to comprise of the President, the Deputy President and the rest of the Cabinet.

91. More fundamental is the fact that executive powers are, in essence, high-policy or broad direction-giving powers. The formulation of policy is a paradigm case of a function that is executive in nature. The initiation of legislation is another.

[39] Sir Rupert Cross, Statutory Interpretation, 13th edn. (1995), pp.172–75; J. Burrows, Statute Law in New Zealand, 3rd edn. (2003), pp.177–99. For a recent example in *Canada see ATCO Gas and Pipelines Ltd vs Alberta (Energy and Utilities Board)* [2006] S.C.R. 140

92. By contrast, administrative action is the conduct of the bureaucracy (whoever the bureaucratic functionary might be) in carrying out the daily functions of the state, which necessarily involves the application of policy, usually after its translation into law, with direct and immediate consequences for individuals or groups of individuals. Administrative powers are in this sense generally lower-level powers, occurring after the formulation of policy. The implementation of legislation is a central example. The verb "implement," which also appears in article 10 (1) (c) of the *Constitution* may serve as a useful guide: administrative powers usually entail the application of formulated policy to particular factual circumstances. Put differently, the exercise of administrative powers is policy brought into effect, rather than its creation.

93. In determining the nature of a power, it is helpful to have regard to how closely the decision is related to the formulation of policy, on the one hand, or its application, on the other. A power that is more closely related to the formulation of policy is likely to be executive in nature and, conversely, one closely related to its application is likely to be administrative. The President's power to appoint a Taskforce is closely related to his broad, policy-formulating function, hence it is an executive power. It is a mechanism whereby the President can obtain information and advice so as to achieve his desired goal, in this case of promoting and ensuring national unity among the other terms of reference for the Taskforce.

94. It may be useful to consider the source of the power. Where a power flows directly from the *Constitution*, this could indicate that it is executive rather than administrative in nature, as administrative powers are ordinarily sourced in legislation. For this proposition I am fortified by Moseneke DCJ's holding in the majority decision in *Masethla v President of the Republic of South Africa*[40] where he said that the President's power to dismiss the Director-General of the National Intelligence Agency was sourced in and flowed from the *Constitution*. This was partly the basis for the conclusion that the power under consideration was an executive power as contemplated in the *Constitution* of South Africa.

95. Special care must, however, be exercised when reliance is placed on this factor. While administrative powers more commonly flow from legislation, the *Fair Administrative Action Act*'s[41] definition of administrative action expressly contemplates that the administrative power of organs of state may derive from a number of sources, including the *Constitution*. Conversely, an executive power may be sourced in legislation. This feature of a power is thus only useful in this context, if at all, as a tentative signpost: constitutional powers are often wide-ranging and direction-giving, while statutory powers are generally more narrow and the concretization of formulated policy.

96. The constraints imposed on the power should be considered. The fact that the scope of a functionary's power is closely circumscribed by legislation might be indicative of the fact that a power is administrative in nature. A functionary may, for example, be afforded a considerable discretion in the exercise of a certain power simply because its exercise is heavily dependent on the factual circumstances that obtain in a particular case. Context is thus crucial in assessing the relevance of this factor. It should be considered whether it is appropriate to subject the exercise of the power to the higher level of scrutiny under administrative-law review. It may be that this level of scrutiny is not appropriate given that the power bears on particularly sensitive subject matter or policy matters for which courts should show the Executive a greater level of deference.

97. In summary, the important question in this context is whether the power is more closely related to the formulation of policy, which would render it executive in nature, or the implementation of

40 Case CCT 01/07 [2007] ZACC 20.

41 *Act No. 4 of 2015*.

legislation, which would make it administrative. Underpinning this enquiry is the question whether it is appropriate to subject the power to the more rigorous, administrative-law review standard. The other pointers – the source of the power and the extent of the discretion afforded to the functionary – are ancillary in that they are often symptoms of these bigger questions.

98. As Currie points out "the *Constitution*, premised as it is on the doctrine of constitutional supremacy, attempts to reconcile two conflicting goals: to establish a state system with enough power to govern, and to find ways of constraining and regulating that power so that it is not abused."[42] the *Constitution* provides that the supremacy of the *Constitution* and the rule of law are among the principle values upon which the Republic of Kenya is founded. The rule of law, and the related principles of legality[43] and accountability[44] are the central constitutional doctrines governing the exercise of public power.[45] This is therefore the standard of constitutional review to which all executive decisions must be subjected.

99. With the above principles in mind, I proceed to examine the operative constitutional provisions which loom large in the resolution of the issue under consideration. It is thus expedient to render a brief account of the main features of the relevant constitutional provisions before deciding the issues I have to confront. First, article 129 of the *Constitution* discussed above provides the principles of executive authority. I need not repeat the principles here. The test, as I understand it is that executive authority can only be exercised in accordance with the *Constitution* and for the wellbeing and benefit of the people of Kenya. Article 131 (1) of the *Constitution* provides the authority of the President as follows:-

(1) The President—

(a) is the Head of State and Government;

(b) exercises the executive authority of the Republic, with the assistance of the Deputy President and Cabinet Secretaries;

(c) is the Commander-in-Chief of the Kenya Defence Forces;

(d) is the chairperson of the National Security Council; and (e) is a symbol of national unity.

100. Article 131(2) provides that the President shall—

(a) respect, uphold and safeguard this Constitution;

(b) safeguard the sovereignty of the Republic;

(c) promote and enhance the unity of the nation;

(d) promote respect for the diversity of the people and communities of Kenya; and

(e) ensure the protection of human rights and fundamental freedoms and the rule of law.

101. From the above articles, it is clear that respecting, upholding and safeguarding the *Constitution*, safeguarding the sovereignty of the Republic, promoting and enhancing the unity of the nation,

42 6 Currie I, *The promotion of administrative justice Act in context* (Cape Town: Siber Ink, 2007) 10.

43 See *President of the Republic of South Africa and Others v South African Rugby Football Union and others* 2000 1 SA 1 (CC) para 148 (SARFU)

44 See *Rail Commuters Action Group and Others v Transnet Ltd/t/a Metro Rail and Others* 2005 2 SA 359 (CC) para 73-78; *AAA Investments (Pty) Ltd v Micro Finance Regulatory Council and another* 2007 (1) SA 343 (CC) para 89.

45 Ibid.

promoting respect for the diversity of the people and communities of Kenya and ensuring the protection of human rights and fundamental freedoms and the rule of law are the primary constitutional duties required of the President under article 131 (2) of the *Constitution*.To underscore the seriousness and importance of the above duties, article 132 (1) (c) (i) obligates the President once every year to report, in an address to the nation, on all the measures taken and the progress achieved in the realisation of the national values, referred to in Article 10. The President is also required to publish in the Gazette the details of the measures and progress under sub-paragraph (i).

102. Article 10 (1) of the *Constitution* provides that "The national values and principles of governance bind all State organs, State officers, public officers and all persons whenever any of them— (a) applies or interprets this Constitution; (b) enacts, applies or interprets any law; or (c) makes or implements public policy decisions. Sub-article (2) (a) and (c) provides that "The national values and principles of governance include— (a) patriotism, national unity, sharing and devolution of power, the rule of law, democracy and participation of the people; (c) good governance, integrity, transparency and accountability.

103. It is clear that article 10 of the *Constitution* expressly provides that national unity, the rule of law and public participation are some of the national values and principles of governance that bind all State organs, State officers, public officers and all persons whenever any of them applies or interprets the *Constitution*, enacts, applies or interprets any law or makes or implements public policy decisions. These values and principles of governance are the foundation of our Republic as expressly provided by article 4(2) of the *Constitution*. These are some of the values the President is obligated to report once every year on all the measures taken and the progress achieved in the realisation of the national values.

104. As discussed above, executive powers must be understood and interpreted in the light of the provisions of the *Constitution* and the doctrine of separation of powers implicit therein. Executive powers usually entail high-policy or broad direction giving powers.[46] The executive authority is essentially involved with the preparation, initiation and implementation of legislation, the development and implementation of national policies, and co-ordination of the functions of State departments. Under our constitutional scheme it is the responsibility of the executive to develop and implement policy. It is not for the court to disturb political judgments, much less to substitute the opinions of experts.[47] The function of the executive is therefore to coordinate the formulation of policies which may lead to the making of laws, and to oversee the implementation of laws and policies by government departments. In this way the executive is meant to promote effective and efficient governance. It stands to reason, therefore, that now, courts, being free to apply democratic constitutional principles, will strive to give as much content as possible to evidently nebulous concepts, such as the rule of law.

105. It is common ground that the terms of reference of the Taskforce are "to evaluate the national challenges outlined in the Joint Communiqué of 'Building Bridges to a New Kenyan Nation, and having done so, make practical recommendations and reform proposals that build lasting unity." The Taskforce is also mandated to "outline the policy, administrative reform proposals, and implementation modalities for each identified challenge area; and conduct consultations with citizens, the faith-based Sector, cultural leaders, the private sector and experts at both the county and national levels. Relevant to the issue under consideration is the fact that national unity is one of the core values in article 10. It is also one of the duties required of the President under article 131 (2) (c). Simply put, the *Constitution* requires the President to promote and enhance the unity of the nation. How he does so is left to him. Also relevant to the issue under consideration is that public participation is also one of the values in article

46 See *Minister of Defence and Military Veterans v Motau and others*, 2014 (5) SA 69 (CC)

47 See *Hugh Glenister v President of the Republic of South Africa and others,* 2011 (3) SA 347 (CC) para 67.

10. It follows that national unity and public participation, which are article 10 values are the subject of the issue under consideration.

106. A glance at the facts presented in this case show that there are several issues at stake in this matter. It is however necessary to explain why the rule of law is the root of this matter. A reading of the Petition shows that the petitionersare aggrieved by the first respondents decision communicating the decision to appoint the Taskforce. As the petitioners correctly put it, the Head of the Public service communicated the President's decision to appoint the Taskforce.

107. However, the power that the President exercises is an executive power under the *Constitution* which requires particular consideration if I may borrow the words of the majority decision in *Masethla v President of the Republic of South Africa*.[48] The exercise of executive power should not be constrained by the requirements which are essentially the hallmark requirements of administrative action.[49] The exercise of the power in question constitutes executive action and not administrative action which is only constrained by the principle of legality and by the requirement of rationality.

108. Jurisprudence from South Africa on the issue under consideration is useful because our Constitution was heavily borrowed from the South African Constitution. In *Fedsure Life Assurance v Greater Johannesburg Metropolitan Council*[50] the Court held that budgetary resolutions made by a local authority were clearly legislative and not administrative action. In *Pharmaceutical Manufacturers Association of SA and another: In re Ex parte President of the Republic of South Africa and others* [51] the impugned decision was the presidential proclamation which brought into force a statute which regulated the sale and possession of medicines before certain essential schedules and regulations were ready. The Constitutional Court of South Africa rejected the argument that the President's decision was an administrative action. The court held that the President's decision required a "political judgment," and thus lay closer to the legislative than to the administrative process. In *President of the Republic of South Africa and others v South African Rugby Football Union and others*[52] the court found that the President's decision to appoint a commission of inquiry was executive rather than administrative.

109. In the above jurisprudence, the actions in question, in each case were held to be executive, and the court reviewed such actions against the requirements of the principle of legality. In so doing the courtgave content to the principle of legality. A further development of the principle of legality was seen in *Pharmaceutical Manufacturers Association of SA and another: In re Ex parte President of the Republic of South Africa and others*.[53] In this case, the court held that rationality was a "minimum threshold requirement applicable to the exercise of all public power." Chaskalson P, explained as follows:-

> "It is a requirement of the rule of law that the exercise of public power by the Executive and other functionaries should not be arbitrary. Decisions must be rationally related to the purpose for which the power was given, otherwise they are in effect arbitrary and inconsistent with this requirement. It follows that in order to pass constitutional scrutiny

48 Case CCT 01/07 [2007] ZACC 20

49 Ibid.

50 1999 (1) SA 374 (CC)

51 2000 (2) SA 1 (CC).

52 Case Number: CCT16/98C. Citations: [1999] ZACC 11.

53 2000 (2) SA 1 (CC).

the exercise of public power by the Executive and other functionaries must, at least, comply with this requirement. If it does not, it falls short of the standards demanded by our Constitution for such action."[54]

110. It appears that the real question before this court is not whether the impugned decision is administrative in nature, but whether a clear abuse of public power has taken place or an irrational decision has been made. As Hoexter points out that "while the courts could not interfere with a decision simply because it disagreed with it, this applied only to rational decisions."[55] The following dictum by Chaskalson P, in *Pharmaceutical Manufacturers* (*supra*) is instructive in this respect: "... it would be strange indeed if a court did not have the power to set aside a decision that is clearly irrational."[56] To say that the wielders of public power must act within their powers, in good faith and without misconstruing their powers is to summarise a considerable number of well-established administrative law grounds. Legality, an implicit principle in our constitutional ordering, requires the President to act in accordance with the law and in a manner consistent with the *Constitution*. This means that the power conferred must not be misconstrued.

111. The second constraint of rationality requires the decision to be rationally related to the purpose for which the power was given. Article 132 (2) (c) of the *Constitution* obligates the President to promote and enhance the unity of the nation. This constitutional obligation does not end there. Article 132 (1) (c) (i) of the *Constitution* obligates the President to once every year report, in an address to the nation, on all the measures taken and the progress achieved in the realisation of the national values, referred to in article 10. As observed above, one of the national values in article 10 is national unity. This being the position, the rationality requirement was thus also met.

112. The time has now come for our courts to take a clear and unambiguous position on the matter. It is my view that our Constitution requires a new approach and that new approach is the test of proportionality. What is proportionality? It is the legal doctrine of constitutional adjudication that states that all laws enacted by the legislature and all actions taken by any arm of the state, which impact a constitutional right, ought to go no further than is necessary to achieve the objective in view.

113. The test of proportionality, which began as an unwritten set of general principles of law, today constitutes the dominant "best practice" judicial standard for resolving disputes that involve either a conflict between two rights claims or between a right and a legitimate government interest. It has become a "centrepiece of jurisprudence" across common law jurisdictions. It has been raised to the rank of fundamental constitutional principle, and represents a global shift from a culture of authority to a culture of justification. The test of proportionality stipulates that the nature and extent of the State's interference with the exercise of the right must be proportionate to the goal it seeks to achieve.[57]

114. Thus in a constitutional democracy where there is constitutionalism and not just the existence of a Constitution, the exercise of power, whether executive, legislative or judicial, is no longer based simply on the idea of having the power to do what one is authorised to do but is also accompanied by justification for decisions and actions. This is why judges give reasons for their decisions. Now, in the

54 At para 85

55 Hoexter (2004) 182

56 At para 5

57 See Dr Dhananjaya Chandrachud J in *Justice K Puttaswamy (Rtd) and anr v Union of India* Writ Petition (Civil) NO 494 of 2012 (delivered September 26, 2018). His Lordship said at paragraphs 197 – 198.

context of constitutional challenges, justification is now required of the executive and legislative arms of government. Simply put, proportionality is about accountability.

115. It is not in dispute that the President is obligated by the *Constitution* to ensure national unity is realized. It is not in dispute that the has the power to appoint the Taskforce to advise him on among other means of realizing this constitutional requirement. In this regard, I have no doubt that the legality constraint was thus adhered to. The President cannot be said to have acted *ultra vires* the *Constitution*. He acted intra vires in taking steps to achieve this noble constitutional requirement. The President's decision meets both the proportionality and rationality tests which are core requirements for the decision to pass the principle of legality test.

116. The other ground of attack mounted by the petitionersunder the issue consideration is that the Members of the Taskforce were not subjected to competitive appointment nor were they vetted. I find myself in agreement with Mr. Awele's submission that the members of the Taskforce is an ad hoc in nature and its members are no public officers.

117. The next question is whether the decision offends the requirement for public participation. the *Constitution* should be given a purposive, liberal interpretation. 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.[58]The spirit of the *Constitution* must preside and permeate the process of judicial interpretation and judicial discretion.[59] *In the Matter of Kenya National Human Rights Commission*,[60] the Supreme Court held that in interpreting the *Constitution*, the court should adopt a holistic approach. In *Institute of Social Accountability & anor. vs. National Assembly & 4 others*[61] the High Court had this to say:-

> " 56. First, this courtis 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*."

118. As pointed earlier, national unity and public participation are listed in article10 as some of the national values and principles of governance. We cannot adopt an interpretation that will lift one value in article10 over the other values. All are important just like the functions conferred upon the President in articles 131 & 132 of the *Constitution*.

119. The question whether the *Constitution* imposes an obligation upon the President to facilitate public participation before issuing a directive in circumstances similar to the instant case was addressed with sufficient detail and clarity by Lenaola J (as he then was) in *Kenya Legal and Ethical Network on HIV &*

58 See *Tinyefunza vs A G of Uganda*, Constitutional Petition No. 1 of 1997 { 1997}, UGCC 3

59 These words were expressed in the Namibian case of State vs Acheson{1991} 20 SA 805

60 Supreme Court Advisory Opinion Ref. No.1 of 2012,

61 [2015] eKLR

AIDS (KELIN) & 3 others v Cabinet Secretary Ministry of Health & 4 others.[62] Because of its relevancy to the instant case, I profitably quote extensively from the said detail:-

> "It is further not lost to me that public participation in the legislative process is crucial in a democratic society generally and the question I set out to answer elsewhere above is whether the *Constitution* imposes an obligation on the President to facilitate public participation before issuing a directive like the one before me. I can only answer that question in the negative. ...
>
> I should add that if such an obligation were to exist every time the President was to exercise his executive authority, especially in the most urgent of situations as they will arise from time to time, it would be difficult for him to utilize his executive powers. In stating so, I am conscious of the fact that an executive directive is a serious order and the President ought to issue one in the most deserving of situations and upon taking into consideration the full effect of the directive on the well being of the people of Kenya. It is for that reason that the President has an adviser – the Attorney General, who is mandated under article 156(4)(a) to be the Principal Legal Adviser to the Government and to ensure that the Executive, including the President, always act within constitutional parameters. Be that as it may, if a directive violates any Constitutional provision, it ought to be challenged in courtas there is no doubt that the President is bound by the provisions of the *Constitution* and his actions must be within the four corners of the *Constitution*. ...
>
> I am in agreement and given that what is before me is a policy directive and as I said earlier there is no obligation imposed on the President to ensure there is public participation, I shall not get into the issue as to whether the participation was adequate or not. The obvious issue that should arise in this Petition is therefore whether the directive violates any of the fundamental rights and freedoms as alleged. I now turn to examine that issue."

120. I entirely agree with the learned judges findings in the above decision whose facts are on all fours to the instant case. I do not think that it was the intention of the *Constitution* that any time the President performs his function under the said Articles he is required to subject his decision to public participation. Such an interpretation would amount to unnecessarily constraining his constitutional functions. Simply put, executive decisions such as the one under consideration do not have to be subjected to public participation. But once the decision is reduced into a policy or a legislation, then the policy or legislation, regulation or decision must be subjected to public participation.

121. I note that a reading of the impugned Gazette Notice shows that the mandate of the Taskforce factored in the element of public participation as follows:-

> 2. In the performance of its functions, the Taskforce shall:-
>
> i. Regulate its own procedures including appointing revolving co-chairs from among its members;
>
> ii. Regulate its own procedure while working within confines of the *Constitution*;
>
> iii. Shall privilege bipartisan and non-partisan groupings, forums and experts;
>
> iv. Shall form technical working groups as necessary;

[62] {2016} e KLR.

v. Shall outline the policy, administrative reform proposals, and implementation modalities for each identified challenge area;

vi. Shall consider and propose appropriate mechanisms for coordination, collaboration and cooperation among institutions to bring about the sought changes;

vii. Shall pay special attention to making practical interventions that will entrench honourable behaviour, integrity and inclusivity in leading social sectors;

viii Shall hold such number of meetings in such places and at such times as the committee, in consultation with its secretaries, shall consider necessary for the proper discharge of its functions;

ix. Shall solicit, receive and consider written memoranda or information from the public; and

xi. May carry out or cause to be carried out such assessments, studies or reach as may inform its mandate;

122. Striking a balance between the need to respect executive autonomy on one hand, and the right of the public to participate in the decision and policy making process on the other, is crucial. In this case, I note that that the mandate of the Taskforce has carefully factored in the requirement for public Participation. In any event, at this stage we are dealing with an executive decision which can only be challenged on the principle of legality as stated above, once the decision is reduced into a policy or a legislation, then the policy or legislation, regulation or decision must be subjected to public participation.

123. In *Masethla v President of the Republic of South Africa*[63] the majority of the Constitutional Court of South Africa opted for an interpretation that frees the President from adherence to the demands of procedural fairness when exercising certain constitutional powers. The same interpretation was adopted by Lenaola J (as he then was) in *Kenya Legal and Ethical Network on HIV & AIDS (KELIN) & 3 others v Cabinet Secretary Ministry of Health & 4 others*[64] cited above. I am not persuaded that there is reason for me to depart from the said reasoning which to me reflects the correct interpretation of the law. I can only add that it is clear that the Constitutional scheme gives the President a special power to appoint the Taskforce. The appointment constitutes an executive action and not administrative action. The authority in articles 131 and 132 of the *Constitution* is conferred in order to provide room for the President to fulfil executive functions and should not be constrained any more than through the principle of legality and rationality. The exercise of the powers must not infringe any provision of the Bill of Rights and as is implicit in the *Constitution*, the President must act in good faith and must not misconstrue the powers. These are significant constraints upon the exercise of the President's power.[65] There is nothing before me to show that the President misconstrued his powers or acted in bad faith.

63 Case CCT 01/07 [2007] ZACC 20

64 {2016} e KLR.

65 *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* 2000 (1) SA 1 (CC); 1999 (10) BCLR 1059 (CC) at paras 141-143 (SARFU).

124. The exercise of public power must therefore comply with the *Constitution*, which is the supreme law, and the doctrine of legality, which is part of that law. The doctrine of legality, which is an incident of the rule of law, is one of the constitutional controls through which the exercise of public power is regulated by the *Constitution*. It entails that both the Legislature and the Executive 'are constrained by the principle that they may exercise no power and perform no function beyond that conferred upon them by law. In this sense the *Constitution* entrenches the principle of legality and provides the foundation for the control of public power. The exercise of such power must be rationally related to the purpose for which the power was given. As long as the impugned decision, viewed objectively, is rationally related to the legitimate government purpose, a court cannot interfere simply because it disagrees with it or considers the decision to be inappropriate.

b. Whether the funding of Taskforce offends the principles of public finance.

125. Mr Mutuma argued that article 201 of the *Constitution* provides for the principles of public finance which include openness, accountability and public participation in financial matters. He submitted that the objective of prudent and responsible use of public funds as per the *Constitution* cannot permit unnecessary financial burden on Kenyans in a cause that is not in the public's best interests. To buttress his argument, Mr. Mutuma cited *Speaker, Nakuru County Assembly & 46 others v Commission on Revenue Allocation & 3 others*[66] in which the court held that public resources must be used in a prudent manner for progressive purposes.

126. He submitted that allowing the Taskforce to continue being in place offends the provision of article 201 of the *Constitution* and also it implicates unbearable financial burden on taxpayers. He argued that despite demands to disclose their source of funding and how much the Taskforce is expected to spend in this process, there has been no willingness to provide this information.

127. Mr. Kuria's rejoinder was that the petitioners have not demonstrated how the respondents violated the principles of public finance. He argued that this issue was not pleaded with precision in the Petition. He cited *Downer Connect Pty Ltd v McConnel Dowell Construction (Aust) Pty*[67] and *Hoh v Frosthollow Pty Ltd and others*[68] for the proposition that crafting of good pleadings calls for precision in drafting, diligence in the identification of the material facts, understanding of the legal principles which are necessary to formulate complete causes of action and judgment and courage to shed what is unnecessary. He submitted that the Petition does not meet the threshold and established principles of law to grant any relief for violation of rights. In support of this proposition he relied on *Anarita Karimi Njeru v Republic* (No. 1)[69] and *Mumo Matemu v Trusted Society of Humn Rights Alliance*.[70]

128. Mr. Awele's submission was the allegation that the formation of the BBI offends the provisions of article 201 of the *Constitution* is unfounded and/or speculative. He submitted that the Petition does not disclose, with sufficient and/or reasonable specificity the violations and/or rational connection between the work of the Taskforce and the cited principles of public finance management to enable the Respondent substantively respond and/or for the court to appreciate the justiciable issue that would warrant a remedy.

66 {2015} e KLR

67 {2008} VSC 77

68 {2014} VSC 77

69 {1979} KLR 154

70 {2014} e KLR.

129. He argued that the Petition does not meet the basic test of specificity of constitutional Petitions because the Petition fails to set out with reasonable precision the basis of the allegation that the expenses are funded by public funds and more importantly how, if at all, the said expenditure fails the 'prudential test.' He placed reliance on *Anarita Karimi Njeru v Republic*[71] for the holding that a person seeking redress in a matter involving reference to the *Constitution* should set out with a reasonable degree of precision the matters complained about, the provisions said to be infringed, and the manner in which they are alleged to be infringed. He submitted that the establishment of the Taskforce was in the public interest as stipulated in the relevant gazette notice and the Joint Communiqué. He argued that the meaning ascribed by the Petitioners to the principles of openness and accountability in the management of public funds is flawed as it appears to suggest micro management of the financial affairs of state officers.

130. Mr. Awele argued that properly construed, accountability in public financial matters denotes responsibility on the part of the relevant public office or officer to ensure compliance with the law relating to management of public funds. He also submitted that openness on the other hand denotes citizens' free access to information about the financial activities of the State. He argued that holistically construed, accountability and openness denote management of public funds by way of precisely formulated laws and regulations and that the system of collecting, processing, and releasing data relating to the financial affairs of the state should be transparent, reliable and accessible so as to provide the true picture of the financial situation of the State and of the economy. He argued that it is against these laws and regulations that it is possible to deduce standards to be used to objectively categorize 'responsible and irresponsible' public finance management.

131. Mr. Awele argued that the Public Finance Management[72] as read together with the *Public Audit Act*[73]provide extensive and precise laws and regulations for the collection, use and accounting of public funds. He submitted that under section 7(1) of the *Public Audit Act*[74] as read together with article 229 of the *Constitution*, it is the function of the Auditor General to inter alia undertake independent audit activities in state organs and public entities to confirm whether or not public money has been applied lawfully and in an effective way, to satisfy himself or herself that all public money has been used and applied to the purposes intended and that the expenditure conforms to the authority for such expenditure. He argued that the invitation to the court to probe the expenditure of the executive, particularly without sufficient or any basis as in this case is pre-emptive and an undue encroachment on the independence and functions of the Auditor General contrary to articles 248(3) (a) and 249(2) (b) of the *Constitution*. He submitted that without the auditors' report and/or evidence of breach of the relevant public finance management laws, any other attempt to micro-manage expenditure of a state organ would be unlawful and with respect, extraneous.

132. When action undertaken by a state is challenged as violative of the *Constitution*, judicial inquiry focuses on the existence of an express constitutional provision or a proper legislative purpose and a demonstrable relationship between that purpose, the *Constitution* and the governing legislation or regulation enacted to effectuate it. The first question posed is whether unconstitutional action can exist where the act or conduct complained of falls within the scope of the constitutional mandate conferred upon the state functionary. The second question raised by these cases relates to the standard of review.

71 Miscellaneous Criminal Application 4 of 1979 {1979} e KLR.

72 *Act No. 18 of 2012*.

73 *Act No. 34 of 2015*

74 Ibid.

I have already addressed the standard of review in cases of this nature and concluded that the decision executive decisions can only be challenged for failure to comply with the principle of legality.

133. The narrow question for determination is whether if the function falls within the scope of the President's constitutional functions, can any monies used towards the function in question be said to be a transgression of the provisions of article 201of the *Constitution* and the *Public Finance Management Act*.[75] If the function falls within the president's mandate as I have found, the costs incurred properly fall within the permissible budget and if any abuse is found to exist on the actual amounts used, then, the Auditor General is legally mandated to audit the accounts in conformity with article 226 (3) of the *Constitution*.

134. This court is being invited to perform the functions of the Auditor General and find that there has been an improper use of government funds yet the function in question falls within the President's constitutional mandate. I decline the said invitation. As to the question of the actual amounts used, this court is inclined to respect the constitutional mandate of the Auditor-General for three reasons, (a) it is a constitutional imperative that the constitutional independence of the independence of the Auditor-General must be respected. The court will be trespassing into his constitutional mandate if it makes a finding either way which can prejudice his work before he performs an audit as required under the *Constitution*. (b) should the court fall into such a trap, then it will have not only prejudiced the audit, but also it will have fallen into an awkward position should the audit become the subject of a court challenge in the future..

135. I note that the petitioners pray for an order requiring the respondents and the interested parties jointly and severely to refund to the national treasury the public monies expended on the operations of the Taskforce. Such a prayer is not available for two reasons. First, it has not been established that the function in question is outside the constitutional mandate of the President. Second, there is no material before me to suggest there has been misuse of public funds.

c.Whether The Taskforce Usurps The Functions Of Other Constitutional Commissions

136. Mr. Mutuma submitted that the Taskforce usurps and interferes with the roles of existing Constitutional Commissions, thus undermining them. He argued that Commissions are intended to address situations where ordinary Government departments may fail the neutrality test. Further, he submitted that the *Constitution* has established constitutional Commissions and Public bodies, including but not limited to the national cohesion and integration commission, the ethics and anti-corruption commission; National police service commission; Independent Electoral and Boundaries Commission; The Kenya national commission on human rights. He cited article 249 of the *Constitution* which provides as follows:-

> (1) the objects of the commissions and the independent offices are to—
>
> (a) Protect the sovereignty of the people;
>
> (b) Secure the observance by all State organs of democratic values and principles; and
>
> (c) Promote constitutionalism.
>
> (2) The commissions and the holders of independent offices—
>
> (a) Are subject only to this Constitution and the law; and
>
> (b) Are independent and not subject to direction or control by any person or authority. "

[75] *Act No. 18 of 2012*

137. He argued that the foregoing provision establishes two broad principles. Firstly, it asserts the duty of the commissions and independent offices to protect the sovereignty of the people to ensure that all State organs adhere to and observe the democratic values and principles, and promote constitutionality. Secondly, the *Constitution* ordains that the commissions, and the holders of independent offices, are subject only to the *Constitution* and the law, and are independent, and not subject to the direction or control by any person or authority. He cited the *Constitution* of Kenya review commission Report (page 79) and argued that the reason for the formation of the constitutional commissions was to introduce the element of independence from the influence of other arms of Government.

138. Mr. Mutuma submitted that the mandate and the terms of reference of the said bodies specifically covers the issues raised in the Taskforce Communiqué between the President of the Republic of Kenya and H.E Raila Odinga, hence, the Taskforce does nothing but to undermine the existing commissions and the previous findings and recommendations of the said constitutional commissions. He relied on the Supreme Court decision *in The Matter of the Independent Electoral and Boundaries commission of Kenya*[76] which emphasized that the several independent Commissions and offices are intended to serve as 'people's watchdogs' and to perform this role effectively, they must operate without improper influences, fear or favour. To fortify his arguments he cited *Communications Commission of Kenya and 5 others v. Royal Media Services and 5 others*[77] which considered the meaning of independence under the *Constitution* and held that the independence' is a shield against influence or interference from external forces.

139. Mr. Mutuma also cited *In the Matter of National Land Commission*[78] where the Supreme Court stated that independence is a pivotal feature in the commissions and independent offices and emphasized the following principles, namely; functional independence, operational independence, financial independence and perception of independence. He argued that the Taskforce purports to establish what allegedly 'ails" our country, which has already been established and documented in a raft of reports and previous Taskforces as well as commissions. He argued that its functions would be to sweep under the carpet atrocities that have been repeatedly committed every electioneering period. To him, the Taskforce is institutionalizing the commission of electoral offences, politically instigated ethnic antagonism and excuses political perpetrators hence creating impunity in the management of elections.

140. Mr. Kuria's rejoinder was that there is no evidence that the Taskforce is meant to sweep away the alleged atrocities documented in the various Commissions of inquiry and added that establishing the Taskforce is in conformity with article 131 (1) (e) of the *Constitution*.

141. On his part, Mr. Awele argued that no person can claim exclusivity in the promotion of the values and principles enshrined in the *Constitution* nor does the *Constitution* or any law suggest so. He submitted that it is incumbent upon a Petitioner to point to an explicit provision of the *Constitution* that is alleged to have been violated and that can lead to the conclusion that the framers of the *Constitution* and the people clearly intended that the relevant role(s) be exclusively exercised. He submitted that the mere fact that there have been or there are taskforces or independent commissions that have documented 'what perennially ails our country' is of itself not a sufficient basis to presume such exclusivity. He argued that the petitioners' arguments in this regard is fallacious, regressive, unreasonable and flawed. He submitted that the President's Constitutional responsibilities under articles 131 (2) and 132(1)

[76] {2011} e KLR

[77] Sup. Ct. Petition Nos. 14, 14A, 14B and 14C of 2014; [2014] eKLR [CCK]

[78] Supreme Court Advisory opinion 2 of 2014.

(c) (i) of the *Constitution* is to inter-alia uphold and safeguard the *Constitution* and to promote and enhance the unity of the nation, hence he had legal authority to establish the Taskforce.

142. He argued that the outcome of the work of the Taskforce's forms part of the common reservoir from which ideas, plans, strategies etc can be borrowed for the attainment of shared objectives for the public good. It was his position that the petitioners' reasoning that the solutions to Kenya's perennial problems can only be found in past taskforce reports undermines the supremacy of the *Constitution* and would practically bring to a halt the obligations of efforts of state officers, offices and independent commissions and offices to continuously strive to find better solutions for the implementation of the *Constitution*. He submitted that like each of those reports, the work of the Taskforce should be considered in light of the unique circumstances that informed its establishment. He cited Rtd. Chief Justice Willy Mutunga in *Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others* statement that in order to maintain a rational explication of what the *Constitution* must be taken to mean and in order to mine the aspirations of the people, the prevailing circumstances are relevant and key considerations that have to be taken into account.

143. The petitioners argument that the establishment and the mandate of the Taskforce duplicates the functions and the mandate of other constitutional commissions fails to appreciate the well accepted and deep rooted cannon of constitutional interpretation which requires constitutional provisions to be construed holistically without lifting one provision over the others or even destroying some as opposed to sustaining each provision so as to get the meaning, purpose and effect of the entire Constitution. The petitioners' argument ignores the fact that the President's mandate and executive powers are distinct from the powers of independent Commissions or any other bodies established under the *Constitution*.

144. The other ground upon which the petitioner's argument collapses is that their argument if accepted would amount to suggesting that the provisions of article 132 of the *Constitution* contradict the provisions article 252 of the *Constitution*. Such an argument is legally frail and unsustainable because the *Constitution* cannot contradict itself. The question that falls to be determined is the interrelation between the provisions of article 132 of the *Constitution* and article 252 of the *Constitution*. There are two principles of interpretation that are relevant in this regard.

145. The first is that where there are provisions in the *Constitution* that appear to be in conflict with each other, the proper approach is to examine them to ascertain whether they can reasonably be reconciled.[79] And they must be construed in a manner that gives full effect to each. Provisions in the *Constitution* should not be construed in a manner that results in them being in conflict with each other. Rather, they should be construed in a manner that harmonises them. In *S v Rens*,[80] the Constitutional Court of South Africa held that "it was not to be assumed that provisions in the same constitution are contradictory" and that "the two provisions ought, if possible, to be construed in such a way as to harmonise with one another."[81]

146. The other principle of construction to keep in mind in this regard is that where there are two provisions in the *Constitution* dealing with the same subject, with one provision being general and the other being specific, the general provision must ordinarily yield to the specific provision. In this regard, it is useful to recall that the title to article 252 of the *Constitution* reads "General functions and powers" as opposed to the heading of articles 131 which reads "Authority of the President" and Article 132 of the *Constitution* which reads "Functions of the President." A reading of the title to articles 131 and 132 shows that the

79 See *Matatiele Municipality and Others v President of the Republic of South Africa and Others* 2006 (5) BCLR 622 (CC) at para 51

80 1996 (2) BCLR 155 (CC)

81 Ibid Id at 156F-G.

authority and functions conferred upon the President is specific while the heading to Article 252 shows that the functions of the commissions are general. I am fortified by the decision in *Ex parte Speaker of the KwaZulu-Natal Provincial Legislature: In re Certification of the Constitution of the Province of KwaZulu-Natal,* 1996[82] in which the Constitutional discussing tensions in constitutional provision held that a "general provision . . . would not normally prevail over the specific and unambiguous provisions."[83] The specific provision must be construed as limiting the scope of the application of the more general provision. Therefore, if a general provision is capable of more than one interpretation and one of the interpretations results in that provision applying to a special field which is dealt with by a specific provision, in the absence of clear language to the contrary, the specific provision must prevail should there be a conflict.

147. The question then is whether the provisions of articles 131 and 132 of the *Constitution* and 252 of the *Constitution* are capable of being reconciled. I find no contradiction in the said provisions. Articles 131 and 132 are specific while article 252 is general. The general provision yields to the specific provisions. At the time the drafters of the *Constitution* enacted article 252, they were already aware of the specific provisions of articles 131 and 132 hence he wisdom in the title to the article 252.

148. Article 165 (3) (d) of the *Constitution* confers vast jurisdiction to this court to hear any question respecting the interpretation of the *Constitution* including inter alia the determination of— (i) the question whether any law is inconsistent with or in contravention of the *Constitution*; (ii) 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*. However, the vast jurisdiction conferred by the said Article does not confer power to this court to destroy or emasculate the basic elements or fundamental features of the *Constitution*. The basic foundation of the *Constitution* is to be protected and brought out by adhering to the great command in article 259 of the *Constitution*. Additionally, this court is obliged under article 159 (2) (e) of the *Constitution* to protect and promote the purposes and principles of the *Constitution*. the *Constitution* should be given a purposive, liberal interpretation. 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.[84] the *Constitution* is an effective document that is the basis of our laws.

149. The command in article 259 is instrumental in shaping the constitutional jurisprudence of in this country. Call it by any name, basic structure or whatever, but article 259 provides the manner in which the *Constitution* is to be interpreted to maintain its fabric which cannot be dismantled by any authority created by the *Constitution* itself be it the Parliament, the executive or the judiciary. The power to interpret the *Constitution* is power given by the *Constitution* to the court and nevertheless it is a power within and not outside the *Constitution*.

Disposition

150. In view of my analysis of the issues distilled and discussed above and the conclusions arrived at, I find and hold that this Petition fails in its entirety. Accordingly, I hereby dismiss the petitioners' Petition dated December 13, 2018 with no orders as to costs.

Right of appeal

SIGNED AND DATED AND AT NAIROBI THIS 4TH DAY OF MARCH 2020

82 1996 (4) SA 1098 (CC); 1996 (11) BCLR 1419 (CC).

83 Ibid at para 28.

84 See Tinyefunzavs A G of Uganda, Constitutional Petition No. 1 of 1997 { 1997}, UGCC 3

JOHN M. MATIVO

JUDGE