In the matter of Council of Governors & 47 others (Reference 3 of 2019)
[2020] KESC 65 (KLR) (Civ) (15 May 2020) (Advisory Opinion) (with dissent)

Council of Governors & 47 others v Attorney General & 3 others (Interested Parties); Katiba Institute & 2 others (Amicus Curiae) [2020] eKLR

Neutral citation: [2020] KESC 65 (KLR)

REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA

CIVIL

REFERENCE 3 OF 2019

DK MARAGA, CJ & P, MK IBRAHIM, SC WANJALA, N NDUNGU & I LENAOLA, SCJJ

MAY 15, 2020

BETWEEN

COUNCIL OF GOVERNORS ..... 1ST APPLICANT

THE COUNTY GOVERNMENT OF KAKAMEGA ..... 2ND APPLICANT

THE COUNTY GOVERNMENT OF BUNGOMA ..... 3RD APPLICANT

THE COUNTY GOVERNMENT OF MURANG'A ..... 4TH APPLICANT

THE COUNTY GOVERNMENT OF TRANS NZOIA ..... 5TH APPLICANT

THE COUNTY GOVERNMENT OF WEST POKOT ..... 6TH APPLICANT

THE COUNTY GOVERNMENT OF NAKURU ..... 7TH APPLICANT

THE COUNTY GOVERNMENT OF TAITA TAVETA ..... 8TH APPLICANT

THE COUNTY GOVERNMENT OF EMBU ..... 9TH APPLICANT

THE COUNTY GOVERNMENT OF NYERI ..... 10TH APPLICANT

THE COUNTY GOVERNMENT OF MARSABIT ..... 11TH APPLICANT

THE COUNTY GOVERNMENT OF SIAYA ..... 12TH APPLICANT

THE COUNTY GOVERNMENT OF KISUMU ..... 13TH APPLICANT

THE COUNTY GOVERNMENT OF HOMA BAY ..... 14TH APPLICANT

THE COUNTY GOVERNMENT OF BUSIA ..... 15TH APPLICANT

THE COUNTY GOVERNMENT OF KILIFI ..... 16TH APPLICANT

THE COUNTY GOVERNMENT OF MACHAKOS ..... 17TH APPLICANT

THE COUNTY GOVERNMENT OF KITUI ..... 18TH APPLICANT

THE COUNTY GOVERNMENT OF WAJIR ..... 19TH APPLICANT

THE COUNTY GOVERNMENT OF TURKANA ..... 20TH APPLICANT

THE COUNTY GOVERNMENT OF BARINGO ..... 21ST APPLICANT

THE COUNTY GOVERNMENT OF MOMBASA ..... 22ND APPLICANT

THE COUNTY GOVERNMENT OF MANDERA ..... 23RD APPLICANT

THE COUNTY GOVERNMENT OF GARISSA ..... 24TH APPLICANT

THE COUNTY GOVERNMENT OF ISIOLO ..... 25TH APPLICANT

THE COUNTY GOVERNMENT OF VIHIGA ..... 26TH APPLICANT

THE COUNTY GOVERNMENT OF NANDI ..... 27TH APPLICANT

THE COUNTY GOVERNMENT OF KIAMBU ..... 28TH APPLICANT

THE COUNTY GOVERNMENT OF KWALE ..... 29TH APPLICANT

THE COUNTY GOVERNMENT OF MIGORI ..... 30TH APPLICANT

THE COUNTY GOVERNMENT OF NAROK ..... 31ST APPLICANT

THE COUNTY GOVERNMENT OF MARAKWET ..... 32ND APPLICANT

THE COUNTY GOVERNMENT OF THARAKA NITHI ..... 33RD APPLICANT

THE COUNTY GOVERNMENT OF LAIKIPIA ..... 34TH APPLICANT

THE COUNTY GOVERNMENT OF SAMBURU ..... 35TH APPLICANT

THE COUNTY GOVERNMENT OF LAMU ..... 36TH APPLICANT

THE COUNTY GOVERNMENT OF KAJIADO ..... 37TH APPLICANT

THE COUNTY GOVERNMENT OF NYANDARUA ..... 38TH APPLICANT

THE COUNTY GOVERNMENT OF TANA RIVER ..... 39TH APPLICANT

THE COUNTY GOVERNMENT OF BOMET ..... 40TH APPLICANT

THE COUNTY GOVERNMENT OF KERICHO ..... 41ST APPLICANT

THE COUNTY GOVERNMENT OF KIRINYAGA ..... 42ND APPLICANT

THE COUNTY GOVERNMENT OF KISII ..... 43RD APPLICANT

THE COUNTY GOVERNMENT OF MAKUENI ..... 44TH APPLICANT

THE COUNTY GOVERNMENT OF NYAMIRA ..... 45TH APPLICANT

THE COUNTY GOVERNMENT OF NAIROBI CITY ..... 46TH APPLICANT

THE COUNTY GOVERNMENT OF NYERI ..... 47TH APPLICANT

THE COUNTY GOVERNMENT OF UASIN GISHU ..... 48TH APPLICANT

AND

THE HONOURABLE ATTORNEY GENERAL ..... 1ST INTERESTED PARTY

SPEAKER OF THE NATIONAL ASSEMBLY ..... 2ND INTERESTED PARTY

CABINET SECRETARY,NATIONAL TREASURY ..... 3RD INTERESTED PARTY

COMMISSION ON REVENUE ALLOCATION ..... 4TH INTERESTED PARTY

AND

THE HONOURABLE ATTORNEY GENERAL ..... INTERESTED PARTY

SPEAKER OF THE NATIONAL ASSEMBLY ..... INTERESTED PARTY

NATIONAL TREASURY ..... INTERESTED PARTY

COMMISSION ON REVENUE ALLOCATION ..... INTERESTED PARTY

AND

KATIBA INSTITUTE ..... AMICUS CURIAE

KATIBA INSTITUTE ..... AMICUS CURIAE

INSTITUTE FOR SOCIAL ACCOUNTABILITY ..... AMICUS CURIAE

INSTITUTE FOR SOCIAL ACCOUNTABILITY ..... AMICUS CURIAE

LAW SOCIETY OF KENYA ..... AMICUS CURIAE

LAW SOCIETY OF KENYA ..... AMICUS CURIAE

How a failure between the Senate and the National Assembly to agree on a Division of Revenue Bill would be resolved.

Reported by Beryl Ikamari

Constitutional Law *- public finance – revenue allocation - role of the Commission on Revenue Allocation (CRA) - nature of the recommendations of the CRA in the legislative process relating to the annual Division of Revenue Bill and the Appropriation Bill - whether the recommendations of the CRA in the legislative process were binding on both the National Assembly and Senate - Constitution of Kenya 2010, articles203(1), 204(4), 205,216(1)and 218.*

Constitutional Law *- legislature - role of the Senate in the passage of a Division of Revenue Bill - where the National Assembly and the Senate failed to agree on a Division of Revenue Bill - whether the High Court could be asked to give orders whose basis was the recommendations of the Commission on Revenue Allocation on the proposed legislation and whether Parliament would be dissolved - Constitution of Kenya 2010, articles 222 and 261(7).*

Constitutional Law *- interpretation of the Constitution – transfer of equitable shares of revenue to county governments - time within which money should be released from the National Treasury to the county governments for each financial year - meaning of the constitutional requirement that the money should be released without undue delay - whether the court could set a precise timeline within which the money should be released - Constitution of Kenya 2010, article 219.*

Constitutional Law *- public finance - division and allocation of revenue Bills - whether the National Assembly could enact an Appropriation Act before enacting a Division of Revenue Act - Constitution of Kenya 2010, articles 218(1) and 221; Public Finance Management Act, No 18 of 2012, section 39.*

Brief facts

The applicants were the Council of County Governors and all the 47 County Governments of Kenya. They sought an advisory opinion pursuant to article 163(6) of the Constitution from the Supreme Court with respect to four main issues. All the issues revolved around division of revenue.

Issues

i. Whether the recommendations of the Commission on Revenue Allocation were binding on both Senate and the National Assembly when they deliberated on the Division of Revenue Bill and the Appropriation Bill.

ii. What was the effect of a failure between the Senate and the National Assembly to agree on a Division of Revenue Bill?

iii. Whether there ought to be precise timelines within which the National Government should release equitable shares of revenue to county governments.

iv. Whether the National Assembly could enact an Appropriation Act before enacting a Division of Revenue Act.

Held

1. The Commission on Revenue Allocation (CRA) was established under article 215 (1) of the Constitution. Under article 216(1) of the Constitution, its principal function was to make recommendations for the equitable sharing of revenue raised by the National Government between the national and county governments and among the county governments.
2. The term recommendation as used in article 216 of the Constitution should first and foremost be given its literal and natural meaning. A recommendation was a suggestion or proposal for a certain cause of action. Such a proposal would not ordinarily bind the person or entity that it addressed. However, categories of recommendation differ in their meaning, nature and effect, depending on the context in which they were deployed.
3. It would be inappropriate to categorize the recommendations of the CRA on the sharing of national revenue as mere suggestions or proposals. The recommendations had to be accorded serious consideration by both Houses while debating the Division of Revenue Bill.
4. A reading of articles 205, 204(4) and 218 of the Constitution left no doubt that the Constitution placed a very high premium on the recommendations of the CRA. Once those recommendations were tabled in Parliament, they had to be accorded due consideration before voting took place in either of the Houses, on the Division of Revenue Bill and the County Allocation of Revenue Bill. Therefore, if either of the two Houses passed a Bill envisaged under article 205 of the Constitution without considering the recommendations of the CRA, the resultant legislation would be unconstitutional.
5. Article 218(2) of the Constitution provided that both the Division of Revenue Bill and the County Allocation of Revenue Bill, had to be accompanied by a memorandum setting out, *inter alia*, a summary of any significant deviation from the Commission on Revenue Allocation's recommendations, with an explanation for each such deviation. Therefore, there was no doubt that Parliament could deviate from the recommendations of the CRA while debating any of the two revenue sharing Bills. Not every deviation from those recommendations had to be explained; only the significant deviations had to be explained.
6. The recommendations of the CRA were not binding on the National Assembly or the Senate. However, the two Houses could not ignore or casually deal with the recommendations.
7. The Constitution ensured that Parliament would benefit from the technical insights of the CRA when debating revenue sharing and allocation Bills by requiring Parliament to consider the CRA's recommendations without being bound. That ensured that the entities involved in the budget making process were able to critically apply their collective mind to the process. Parliament and the CRA could fail to agree on revenue allocation but they had to be guided by the objective criteria set in article 203(1) of the Constitution.

8. In *the Matter of the Speaker of Senate & Another v the Attorney General & Another & 4 Others*; Ref. No 2 of 2013, the Supreme Court opined that the Senate had a clear role to play, in the processing of the Division of Revenue Bill. The Speaker of the National Assembly invited the court to depart from that decision in order to clear an impasse between Senate and the National Assembly on a Division of Revenue Bill by excluding Senate from the process of passing the Bill into law. For the Supreme Court to depart from a prior decision, there had to be a clear and well-reasoned justification.
9. A litigant could not urge the Court to depart from its previous decision simply because he disagreed with it, or that the decision, militated against his case. The application would have to be served on all respondents who would then respond to it. None of the parties were given an opportunity to respond to the invitation by the Speaker of the National Assembly for the court to depart from its previous decision and an application was not made. The court was moved in a perfunctory manner and it was unable to consider the merits of the Speaker's invitation in circumstances where the other parties were not heard on the same.
10. The preposition that in order to resolve the impasse, an application be made to the High Court under article 165 (3) (d), for orders compelling the National Assembly to provide for the equitable share of revenue due to the counties on the basis of the recommendations by the Commission on Revenue Allocation, was untenable for two reasons:- adopting such a course of action would defeat the finding that the recommendations of the CRA were not binding; and, it would fundamentally shift the revenue allocation function from the legislature to the judiciary, thus radically upsetting the doctrine of separation of powers.
11. The preposition of using the Revenue Allocation Act of the previous Financial Year as a fallback position to solve the impasse appeared practical and logical but it did not have its basis on any principle or provision of the Constitution.
12. The Constitution contemplated a scenario where the National Government would be unable to access funding due to the absence of enabling legislation. Article 222 of the Constitution provided that the National Assembly had power to authorise the withdrawal of money from the Consolidated Fund. It would be for purposes of meeting expenditure necessary to carry on the services of the National Government during that year until such time as the Appropriation Act was assented to. The withdrawal would not exceed one-half of the amount included in the estimates as expenditure for that year that had been tabled in the National Assembly and be included under separate votes for the several services in respect of which they were withdrawn, in the Appropriation Act.
13. While the withdrawal of money for the purpose of the National Government expenditure under article 222 of the Constitution was based on a percentage of the estimates of expenditure for that year, the same method could not apply to the County Government, since the estimates did not include the equitable revenue share due to counties. Logic would require that the percentage of the money to be withdrawn would be based on the Division of Revenue Bill; yet this would be legally untenable, given the fact that the Bill, was not only the subject matter of controversy, but was also yet to pass into law. In the circumstances, in the event of an impasse, the percentage of the money to be withdrawn would be based on the equitable allocation to counties in the Division of Revenue Act of the preceding financial year. The legislature should pass legislation to give normative form to that arrangement.
14. Legislation for the implementation of the national budget and allocation of revenue to both the National Government and county governments had specific and rigid timelines within which they should be enacted because they operationalized the financial existence of the country. Failure by Parliament to discharge such a critical legislative function, in the absence of an emergency, or any other disaster that disrupted parliamentary business, would not only violate the Constitution, but also expose the country to existential danger. Such a Parliament had to be considered to have run its course and be dissolved.

15. Under article 261(7) of the Constitution, Parliament could be dissolved for failure to enact certain legislation within a specific period of time. That provision would not only apply to legislation listed in the Fifth Schedule to the Constitution but also to other legislation such as the Division of Revenue Act. Failure to enact such legislation by Parliament, in the absence of an emergency or other disaster, would invite the enforcement of sanctions envisaged under article 261 of the Constitution. Therefore, if Parliament failed to agree on division of revenue during a second mediation under article 113 of the Constitution, any person could petition the High Court for a declaration to the effect that Parliament had violated the Constitution.
16. Under article 219 of the Constitution, a county's share of revenue raised by the National Government had to be transferred to the county without undue delay and without deduction, except when the transfer had been stopped under article 225 of the Constitution. Unless there were timelines set by the Constitution or the law, a court had to consider each case on its own merits to determine whether there had been undue delay in the performance of an act by the concerned entity.
17. By not prescribing a specific time limit, article 219 of the Constitution allowed for a degree of flexibility on the part of the National Treasury in effecting monetary transfers to counties. The court was not the appropriate forum for a determination on precisely when monies due to counties should actually be transferred to the counties. However, the fact that the Constitution had not prescribed a specific timeline did not give the National Treasury the latitude to capriciously decide when to disburse funds to the counties.
18. Counties operated within rigid budgetary cycles and any delay in releasing funds to counties had to be justifiable and explained in good time. Releasing funds at a time when they could not be realistically utilized in the implementation of county projects in accordance with their budgets constituted a violation of the Constitution.
19. A reading of article 218(1) and 221 of the Constitution did not provide for which of the two bills, namely the Division of Revenue Bill and the Appropriation Bill, should be enacted before the other. It was clear that once enacted the Division of Revenue Act divided the revenue raised nationally between the two levels of Government while the Appropriation Act authorized the withdrawal and application of monies from the Consolidated Fund by the National Government.
20. Both the Division of Revenue Bill and the County Allocation of Revenue Bill were to be introduced in Parliament at least two months before the end of each financial year. The estimates of revenue and expenditure of the National Government were also to be submitted to the National Assembly, at least two months before the end of each financial year. That sequence of events would lead to the following conclusions:-
21. The Appropriation Bill was incapable of being introduced unless the estimates of revenue and expenditure had been approved and passed by the House.
22. The Appropriation Bill came into life after the Division of Revenue Bill since the latter would already have been introduced into Parliament at least two months before the end of the financial year.
23. The estimates of revenue and expenditure had to logically be based on or at the very least be in tandem with, the equitable share of revenue due to the National Government as provided for in the Division of Revenue Bill.
24. The Appropriation Act had to be based on the equitable share of revenue due to the National Government as provided in the Division of Revenue Act.
25. In an ideal situation, the enactment of an Appropriation Act could not precede the enactment of a Division of Revenue Act. The Cabinet Secretary responsible for finance would submit the estimates of revenue and expenditure to the National Assembly, in his capacity as the Chief Budget Officer of the Executive. In that capacity, the Cabinet Secretary had to base his/her estimates on the National Government's share as provided for in the Division of Revenue Bill. Additionally, section 39 of

the Public Finance Management Act left no doubt that the National Assembly, could not enact an Appropriations Act before enacting the Division of Revenue Act.

Per DK Maraga CJ [concurring]

1. Under article 259(1) of the Constitution, the Constitution was to be interpreted in a manner that promoted its purposes, values and principles, advanced the rule of law, human rights and fundamental freedoms in the Bill of Rights, permitted the development of the law and contributed to good governance. Under article 259(3) of the Constitution, the Constitution would also be interpreted in accordance to the doctrine that the law was always speaking.
2. A holistic interpretation of the Constitution meant that the entire Constitution had to be read as an integrated whole with no one particular provision destroying the other but each sustaining the other.
3. Under article 93(1) of the Constitution Parliament consisted of the National Assembly and the Senate. The discharge of legislative functions was shared by the two Houses. Under article 95(1) and 95(2) the members of the National Assembly represented the people of the constituencies and special interests and deliberated in the National Assembly and resolved issues of concern to the people. Under article 96(1) of the Constitution, the Senate represented the counties and served to protect the interests of the counties and their government. Article 96(2) of the Constitution clearly stated that Senate would participate in the law-making function of Parliament by considering, debating and approving Bills concerning counties as provided in articles 109 to 113 of the Constitution.
4. Under article 217 of the Constitution the passing of legislation on division of revenue was a shared mandate between the National Assembly and the Senate. Further, the principles of public finance set out in article 201 of the Constitution included the equitable sharing of national revenue and consultation on financial legislation and they related to both Houses of Parliament. Therefore, there was a joint role shared between the National Assembly and the Senate in the annual division and allocation of revenue Bills.
5. The Division of Revenue Bill and the County Allocation of Revenue Bill were not money Bills within the definition of article 114(3) of the Constitution. They were therefore not within the exclusive competence of the National Assembly.
6. A purposive interpretation of articles 95(4)(a) & 95(4)(b), 96(2), 110(1)(c), 114(3), 205 and 218(1)(a) of the Constitution read together with sections 38 to 41 of the Public Finance Management Act, made it quite clear that both the National Assembly and the Senate played a role in the division of revenue between the two levels of Government.

Dissenting opinion

Per NS Ndungu [dissenting]

1. A formal application for the court to depart from a previous decision was not a requirement where the matter at hand was an advisory opinion. In advisory opinions there were no interests at stake as would normally be the case in adversarial proceedings. Advisory opinions did not arise from any contests of rights or claims disposed of by regular process. In exercising advisory opinion jurisdiction, the court should not be constrained by procedures required in ordinary proceedings.
2. The Constitution under article 167(3) anticipated that there would be occasional need for the Supreme Court to depart from its previous decisions. The Supreme Court was not bound by its decision in the *Senate Matter 2013*.
3. While rendering an advisory opinion, under article 163(6) of the Constitution, the Supreme Court could undertake any necessary interpretation of the Constitution. The court's revision of its prior decision relating to a similar matter to the one under consideration, would not occasion prejudice to any party. It would clarify and outline a harmonious and comprehensive picture of the requirements for the legislative process and roles for the two Houses as provided under the Constitution.

4. The request to depart from the decision in *Senate Matter 2013* was not casually made. A lot of thought, real interest and effort went into making that proposition.
5. The decision of the Majority in the *Senate Matter 2013* ought to be reviewed especially because it did not take into account the architectural design of the Constitution and the legislative processes that arose from that design, with regard to the roles of the two Houses of Parliament as set out in articles 95 and 96 and part 4 of Chapter 12 of the Constitution. That design was intended to avoid situations where disputes between the two Houses of Parliament defeated or delayed important aspects of public finance and potentially threw the country into chaos by rendering operations by either level of government impossible or impractical.
6. The design as drawn by the drafters of the Constitution, established which House would originate the Division of Revenue (DOR) Bill, as a money bill and what was to happen when there was an impasse over a money bill. In most jurisdictions, where there was a deadlock between two Houses, the resolution was to allow the final determination to be made by the house with veto powers, which was the house that originated the Division of Revenue Bill. Further, in other democratic and bicameral jurisdictions, the Division of Revenue Bill was considered to be a money bill and therefore legislative processes that applied to money bills applied to it.
7. The Division of Revenue Bill was a money bill that could only be introduced by the National Assembly in accord to article 109 (5) of the Constitution. Article 95(4)(a) of the Constitution reinforced that position. It stated that the National Assembly determined the allocation of national revenue between levels of Government as provided in part 4 Chapter 12.
8. The National Assembly as the people's representative budgeted, collected, shared between the levels of government and audited revenue and it was knowledgeable on the finances of the country. The National Assembly was best placed to originate the Division of Revenue Bill as it financed the revenue share and proposed revenue collection forecasts in the requisite division. In the event of a deadlock between the Senate and National Assembly, then the National Assembly as the originating house should have final say or even veto powers.
9. Article 203(2) of the Constitution guaranteed county governments an equitable allocation of a minimum of fifteen percent of all national revenue collected by the National Government. That amount ought to be readily available to county governments as it was already allocated under the Constitution. Obtaining those funds ought not to be a bicameral legislative process. All that was required, pursuant to article 206(4) of the Constitution was to seek the approval of the Controller of Budget to authorize the withdrawal of that amount from the Consolidated Fund. Hence, in the event of a delay in the passage of the Division of Revenue Bill, article 206(4) of the Constitution provided a tidy and efficient solution.
10. The proposal of the majority with respect to how to deal with the impasse on revenue allocation was untenable as it constituted a major breach of the doctrine of separation of powers. Allocation of revenue was a task that fell squarely on the Executive and the Legislature. Any proposal from the court, directing or recommending action to be taken by Parliament and what percentage should be allocated to the counties, was not only an attempt to amend the Constitution but was tantamount to supervising the work of parliament and endangering the institutional comity between the three arms of government. The core function of the Judiciary was to interpret and apply laws and not to make them.
11. Although the majority were of the view that they were protecting the Constitution, they were in fact re-writing the Constitution or meddling with a political and budgetary process in which they had no expertise. The simple solution for the issue was to point out to Parliament that they needed to solve it with finality by enacting relevant legislation including amending the Constitution if necessary.
12. Under the circumstances Parliament had the option of making necessary constitutional and legislative amendments to clarify whether the Division of Revenue Bill was a money bill and what legislative

processes should apply to its passage including the resolution of disagreements between the two Houses.

13. Under section 191(1) of the Public Finance Management Act, each year when the Budget Policy Statement was introduced, the Cabinet Secretary had to submit to Parliament a Division of Revenue Bill and County Allocation of Revenue Bill prepared by the National Treasury. The Budget Policy Statement, under section 25 of the Public Finance Management Act would be introduced to Parliament by February 15. Under article 218 of the Constitution, a Division of Revenue Bill and a County Allocation of Revenue Bill, had to be introduced in Parliament at least two months before the end of each financial year. Effectively, there was a conflict between the Public Finance Management Act and the Constitution in that the statute altered constitutional timelines set for the introduction of Division of Revenue Bill and a County Revenue Allocation Bill in Parliament.
14. In an ideal situation where the two Houses agreed on a Division of Revenue Bill and a County Allocation of Revenue Bill, the process ought to end by June 30. Where the two Houses of Parliament failed to agree on an ordinary Bill, the Bill would be referred to a Mediation Committee under article 113 of the Constitution. The Committee would be comprised of an equal number of members form each House and it would create a version of the Bill that was acceptable to both Houses. If the Committee failed to agree on the Bill then that Bill would be defeated. That also meant that even after a single mediation process, Parliament would not meet the constitutional timelines of passing the two Bills.
15. There were a number of conflicting timelines that existed within the legal framework that needed to be brought to the attention of Parliament for corrective action. There was need to clarify on the exact timelines within which the Division of Revenue Bill and the County Allocation of Revenue Bill could be introduced to Parliament. That would call for amendments to articles 218 and 221 of the Constitution, and section 190 and 191(1) of the Public Finance Management Act.

The Advisory Opinion, as rendered by the Majority of the Bench, conclusively disposed of the following four issues in the manner determined;

Orders

i. *the recommendations of the Commission on Revenue Allocation are not binding on Parliament;*
ii. *in the event of an Impasse over the Division of Revenue Bill, the solution prescribed in paragraphs 81 to 91 of this Opinion shall apply;*
iii. *the Supreme Court or any other court for that matter, is not the appropriate forum for setting timelines as to when the National Treasury must transfer the equitable share of revenue to counties; and*
iv. *Parliament could not enact the Appropriation Act before the enactment of the Division of Revenue Act.*

Citations

Cases

Kenya

1. *Commission on Administrative Justice v The Kenya Vision 2030 Delivery Board and others* Civil Appeal 141 of 2015; [2019] eKLR – (Explained)
2. *Communication Commission of Kenya & others v Royal Media Services Limited & others* [2015] 2 EA 104 –(Explained)
3. *In re Speaker, County Assembly of Embu* Reference 1 of 2015[2018] eKLR – (Followed)
4. *In the Matter of Kenya National Human Rights Commission* Reference 1 of 2012;[2014] eKLR - (Followed)
5. *In the Matter of the 47 County Assemblies and others;* Petition No 368 of 2014; [2015]eKLR – (Applied)
6. *In the Matter of the National Land Commission* Advisory Opinion Reference 2 of 2014; [2015] eKLR – (Explained)

7. *In the Matter of the Speaker of the Senate & another* Advisory Reference No 2 of 2013 – (Followed)
8. *Law Society of Kenya v Attorney General & 2 others* Constitutional Petition 3 of 2016;[2016] eKLR -(Followed)
9. *National Assembly of Kenya & another v Institute for Social Accountability & 6 others* Appeal 92 of 2015;[2017] eKLR - (Explained)
10. *Rai & 3 others v Rai & 4 others* [2014] 2 KLR 253 – (Followed)
11. *Re the Matter of the Interim Independent Electoral Commission* [2011] 2 KLR 32 - (Explained)
12. *Teachers Service Commission (TSC) v Kenya Union of Teachers (KNUT) & 3 others* Civil Appeal 196,195 & 203 of 2015 (Consolidated); [2015] eKLR – (Explained)

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Hadkinson v Hadkinson [1952] 2 ALL ER 567 – (Applied)

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Kenya

1. Constitution of Kenya, articles 6(2); 10; 20(3)(a); 47; 93(3); 94(1); 95(4)(a)(b)(5); 96(1)(2)(3)(4); 105; 109(5); 110(1)(c); 113; 114(3); 116; 128(1)(b); 131; 149; 159(1); 163(6); 165(3)(b)(c)(d)(iii); 174; 175; 183; 185(1); 189(1)(a)(3); 190(1); 201; 202(1); 203(1)(2); 204(4); 205; 206; 207(1); 215(1); 216; 217; (3)(4)(5); 218(1)(a)(b)(2)(c); 219; 221(6); 222(2)(b); 224; 225; 230(4)(b); 249; 258; 259(1)(8); 260; 261(5)(6)(7)(8)(9) –(Interpreted)
2. Appropriation Act, 2019 (Act No 10 of 2019) In general – (Cited)
3. Division of Revenue Act, 2019 (Act No 18 of 2019) In general – (Cited)
4. Public Finance Management Act, 2012(Act No 18 of 2012) sections 8(1)(b); 17; 25(2)(7)(9); 38; 39(3)(4); 41; 42; 190; 191(1) - (Interpreted)
5. Supreme Court Rules, 2012 (Act No 7 of 2011 Sub Leg) rule 41(4)(c) - (Interpreted)

South African

1. Constitution of Republic of South Africa, 1996 sections 73(2)(b); 214 - (Interpreted)
2. South African Money Bills Amendment Procedure and Related Matters Act, Act No 9 2009 (as amended by Act No 13 of 2018: Money Bills Amendment Procedure and Related Matters Amendment Act, 2018) section 9 – (Interpreted)

Japan

Constitution of Japan 1947, articles 59,60 – (Interpreted)

Australia

Commonwealth of Australia Constitution Act 1900 (Imp) sections 53, 57 – (Interpreted)

India

Constitution of India articles 198, 199 – (Interpreted)

United States of America (US)

US Constitution, article I, section 7, clause 1- (Interpreted)

United Kingdom

Parliament Act 1911 sections 1(1)(2) – (Interpreted)

Advocates:

Mr Kaluma for the 2nd respondent

Mr Wanyama & Mr Ngatia assisting counsel for the Applicants
Mr Kiragu, counsel for the Attorney General
Mr Kitonga SC appearing for the Law Society of Kenya

ADVISORY OPINION

A. Introduction

1. On 15th July 2019, the Council of County Governors and all the 47 County Governments, (the Applicants herein) moved this court under Certificate of Urgency, via a Reference dated on even date, seeking an Advisory Opinion pursuant to article 163(6) of Constitution. The Reference was supported by an affidavit sworn by Hon. Wycliffe Ambetsa Oparanya, the Chairman of the Council of Governors and Governor of Kakamega County, on 26th July 2019. The Applicants initially sought an opinion on 25 issues, which were later reframed and reduced to eight on 29th July 2019. These would be further reduced to four, after the intervention of this court, following a Preliminary Objection filed by the 2nd Interested Party.

   The Preliminary objection was premised on the following grounds:

   i. That the Applicants were not seeking an Advisory Opinion but the interpretation of various Constitutional and statutory provisions. Thus, argued the 2nd respondent, the Applicants should have invoked the jurisdiction of the High Court under article 165(3)(b) and (c) of Constitution;

   ii. That the issues raised in the Reference were subject matters of pending proceedings before the High Court;

   iii. That the Applicants had not exhausted the dispute resolution mechanisms set out in article 189(3) of Constitution, before resorting to court; and

   iv. That the Applicants had not demonstrated that they had sought the advice of the Attorney-General, as stipulated in rule 41(4)(c) of the Supreme Court Rules, 2012.

2. In a Ruling delivered on 8th October 2019, the court dismissed the Preliminary Objection holding that, not only did it have jurisdiction, it would actually exercise its discretion to render the Opinion sought. Subsequently on 16th October 2019, the Court issued directions in which it delineated the four issues pursuant to which it would deliver an Advisory Opinion.

   i. Whether the recommendation by the Commission on Revenue Allocation, is binding upon both Houses during deliberations concerning the Division of Revenue Bill and the Appropriation Bill;

   ii. What happens when the National Assembly and the Senate fail to agree on a Division of Revenue Bill, thereby triggering an impasse?;

   iii. Whether there should be timelines within which the National Government should release the equitable share of revenue to County Governments;

   iv. Whether the National Assembly can enact an Appropriation Act prior to the enactment of a Division of Revenue Act?

All the Parties were therefore invited to address the Court on the four issues as framed.

B. Submissions By Respective Parties

a. The Applicants' Submissions

i. On whether the recommendation by the CRA is binding upon both Houses during deliberations concerning the Division of Revenue Bill and the Appropriation Bill

3. Both in their written and oral submissions, the Applicants maintain that the recommendations by the Commission for Revenue Allocation, regarding the equitable sharing of revenue between the National and County Governments, and among the County Governments, are binding upon the National Assembly and the Senate. Mr Ngatia for the Applicants argues that the functions of the CRA are clearly set out in article 216 of Constitution. The same Constitution, submits counsel, provides for objective criteria in article 203(1) by which the Commission must be guided in making its recommendations for the equitable sharing of revenue to both houses. According to counsel, the consideration of these objective criteria is deliberately located outside the Parliament and the National Treasury while being reserved for the CRA. Therefore, as long as the CRA is guided by these criteria in arriving at its recommendations, the same binds both the Senate and National Assembly. Counsel submits that contrary to the letter and spirit of Constitution, the National Assembly has been disregarding the recommendations of CRA, not on the basis of the objective criteria set out in article 203(1) of Constitution, but on extraneous considerations.

4. Mr Wanyama, assisting counsel for the Applicants, supports Mr Ngatia in this view. Counsel submits that the recommendations by the CRA are obligatory because they are highly technical in nature. As such, argues Mr Wanyama, any deviations therefrom by Parliament, must be rationalized on the basis of the objective criteria set out in article 203(1) of Constitution. Counsel for the CRA, Mr Waiganjo is also categorical that the recommendations by his client are binding on both houses. Counsel submits that the CRA was established by Constitution for the purpose of ensuring the effective allocation of resources to the Counties. If the National Assembly and Treasury, can whimsically ignore the recommendations of the CRA, argues counsel, then the whole purpose of devolution as envisaged by Constitution will be defeated.

5. Of a contrary view is the 2nd respondent (National Assembly), which strenuously contends that the recommendations by the CRA cannot be binding. Mr Kaluma for the 2nd respondent is categorical that, the CRA cannot supplant the legislative authority of the National Assembly, by issuing binding recommendations. Counsel submits that a careful reading of articles 95 and 96 of Constitution, leaves no doubt as to where legislative authority lies in the present context, as between the National Assembly and the Senate. According to counsel, the non-binding nature of the recommendations by the CRA is clearly highlighted in article 218(2)(c) of Constitution, which permits deviation from the said recommendations by the National Assembly. Counsel argues that if the recommendations of the CRA were to be considered as binding, this would render the National Assembly a mere conveyor belt, in the allocation of resources between the National Government and County Government.

6. Counsel further submits that the Senate has no role to play in the deliberations concerning the Division of Revenue Bill. Recognizing that such a contention runs contrary to the decision of this court, in the Advisory Reference No 2 of 2013 Speaker of the National Assembly v. The Honourable the Attorney General & 4 others, Mr Kaluma urges the Court to depart therefrom as the same, in his view, was rendered per incuriam. For good measure, counsel urges this court to adopt the dissenting opinion of Lady Justice Njoki Ndungu as the correct statement of the law. In support of Mr Kaluma's

submissions regarding the non-binding nature of the CRA recommendations, is Mr Kiragu, counsel for the Attorney General. Towards this end, counsel submits that the word "recommendation" must be accorded its natural meaning. Mr Kiragu argues that if the recommendations by CRA were binding, there would be no need for any debates in the National Assembly regarding the Division of Revenue Bill.

7. The Amicus Curiae advises the court that the recommendations by the CRA are not binding. Mr Kitonga SC, appearing for the Law Society of Kenya, submits that the recommendations are weighty and persuasive, but not binding. It is the view of Senior Counsel that both the National Assembly and the Treasury must pay due regard to the recommendations in their deliberations before arriving at the final allocation.

8. On their part, Katiba Institute and the Institute for Social Accountability, jointly submit that this issue must be considered within the context of the legal regime of Independent Commissions under Chapter 15 of Constitution. They cite this court's pronouncement in the Matter of the National Land Commission[2015] eKLR on the place of Chapter 15 commissions, wherein the Court stated that the said commissions "ought to protect the sovereign power of the people, from which the Executive, the Judiciary and the Legislature derive their authority: hence their depiction as 'peoples' watchdogs' or Constitutional watchdogs".

9. Reference is also made to the case of Teachers Service Commission (TSC) v. Kenya Union of Teachers (KNUT) & 3 Others [2015] eKLR, wherein the Court of Appeal considered the nature of recommendations of the Salaries and Remuneration Commission (SRC), and held that such recommendations setting the remuneration and benefits of all public officers under article 230(4)(b) are binding upon whichever state organ that sought them. Also cited is the High Court's decision in The Commission on Administrative Justice v The Kenya Vision 2030 Delivery Board and others, [2019] eKLR, wherein the Court held that the recommendations of the CAJ have the force of law.

10. On this basis, the amici therefore submit that as a general rule, the recommendations of the CRA are binding on all State organs without exception. The National Treasury cannot therefore depart therefrom. However, they concede that, Parliament may depart from such recommendations in terms of article 218(2) of Constitution. Such deviation by Parliament, submit the Amici, if significant must be accompanied by a memorandum of explanation on the basis of the criteria set out in article 203 of Constitution.

11. They further argue that a deviation must also obtain the concurrence of both the National Assembly and Senate, as they undertake their respective roles in the division of revenue process under articles 95 and 96 of Constitution. In their view, where there is no concurrence by both Houses on any deviation by the National Treasury, then the CRA recommendations prevail. It is urged that such an interpretation sustains the respective roles of the CRA, National Assembly and the Senate in a holistic reading of articles 95, 96, 203, 205, 216 and 218.

ii. What happens when the National Assembly and the Senate fail to agree on a Division of Revenue Bill thereby triggering an Impasse?

12. The Applicants submit that while this court In the Matter of the Speaker of Senate & Another v. Hon. Attorney-General & Another & 4 Others, Reference No. 2 of 2013 [2013] eKLR, signaled that the Speakers of the two Houses must consult and resolve any differences regarding the Division of Revenue Bill through mediation as provided for under article 113 of Constitution, the Court was silent on what happens if the mediation did not yield results and the impasse persisted. Mr. Issa, counsel for the Applicants, contends that there cannot be a vacuum in the business of Government. If the two

Houses fail to agree on the Division of Revenue Bill at the mediation stage, urges counsel, extraordinary measures must come into play to avoid a Constitutional crisis.

13. Counsel submits that in the event the mediation fails, there are two feasible solutions. Firstly, that the High Court would be called upon to resolve the impasse, under article 165(3)(d)(iii) and make a declaration as to the allocation to be made to each level of Government as recommended by the CRA. The High Court would thus give directions, on how the Controller of Budget would for a limited time, authorize the allocations to the National and County Governments pursuant to the recommendation by the CRA, until such a time when the contents of the Division of Revenue Bill would be agreed upon by the two Houses.

14. Secondly, counsel submits that the Supreme Court should adopt the proposition that, pending the agreement and passing of the Division of Revenue Bill, the Division of Revenue Act, passed by the two Houses in the preceding year, forms the basis for allocation of revenue to the two levels of Government subject to a certain limitation, to ensure that the impasse is not prolonged. In this regard, urges counsel, a minimum of 25% of the previous year's Appropriation Act would be a reasonable sum. In support of this proposal, counsel cites this court's decision in Communication Commission of Kenya & Others v. Royal Media Services Limited & Others [2015]2 EA 104 (SCK), to the effect that failure by the Legislature to enact legislation ought not to paralyze the business of Government. Counsel however cautions that this second option, should not be confused with the Vote on Account contemplated under article 222 which can only be triggered after the Division of Revenue Act has been passed and the National Government's share of revenue confirmed under article 218.

15. On its part, the CRA contends that a plain reading of articles 112 and 113 leaves no doubt that Constitution, envisages the possibility of an impasse occurring between the two Houses of Parliament. Such impasse is to be resolved through a mediation process as provided for in article 113. Mr. Waiganjo for the CRA submits that where mediation fails to resolve a dispute between Senate and the National Assembly, the responsibility lies on the Judiciary, to device means of protecting and ensuring compliance with Constitutional purposes, values and principles.

16. Counsel further submits that article 261(5), (6), (7), (8) and (9) of Constitution, makes provision for what should happen, if the National Assembly fails to enact particular legislation within a specified time. The High Court was granted jurisdiction to make specific Orders in the event of failure to enact legislation specified in the Fifth Schedule. It is counsel's argument that article 261, though limited to legislation prescribed in the Fifth Schedule, is a pointer to how the Courts should view any other failure by Parliament, to enact such critical legislation as the Division of Revenue Act. Counsel therefore urges this court, to adopt an "impasse breaking" interpretation that not only compels both the Senate and National Assembly to discharge their Constitutional responsibilities, but also protects the spirit, values and purposes of Constitution.

17. Counsel urges that in view of the current impasse between the National Assembly and Senate over the Division of Revenue Bill, the dispute should be referred to the High Court, for resolution within the framework of articles 261(5), (6), (7), (8) and (9) of Constitution, as a basis for sustaining the design and purpose of Constitution.

18. In opposition to the foregoing arguments, the National Assembly is categorical that it has the exclusive mandate to consider, deliberate upon, and enact all Money Bills in accordance with the relevant provisions of Constitution. Mr Kaluma identifies such Money Bills as the Appropriation Bill under article 221, the Division of Revenue Bill under article 95 (4) (a) and 218 (1), and the Finance Bill, among others. Counsel submits that such Money Bills are insulated by Constitution from the vagaries of the processes of ordinary legislation. It is counsel's view that the National Assembly enacts laws

under article 95 of Constitution while the Senate merely "participates" in the law-making function of Parliament under article 96 of Constitution.

19. Counsel argues that the Senate has legislative authority over the enactment of the County Allocation of Revenue Bill, which determines the sharing of revenue between the Counties. On the other hand, submits counsel, the National Assembly has the exclusive mandate to determine the allocation of National revenue between the two levels of Government as provided in Part Four of Chapter Twelve of Constitution. It is his contention that, the drafters of Constitution, could not have intended that the Senate would override, the resolution of the National Assembly regarding the Division of Revenue Bill. In his opinion, if that were the intention of the drafters, they would have provided a safeguard, requiring a two-thirds majority vote in the Senate, for any amendment to the Division of Revenue Bill to have effect. This kind of safeguard, submits counsel, can be seen in Constitutional provision which requires a two-thirds majority vote in the National Assembly for any amendments to the County Allocation Bill to have effect.

20. Based on the foregoing, the 2nd Interested Party invites the Court to depart from its previous interpretation of articles 218 and 224 of Constitution in the Matter of Speaker of the Senate and Another v. The Honourable Attorney-General & 4 Others, in so far as it held that the Senate has a role in the enactment of the Division of Revenue Bill. Mr Kaluma submits that it would be in the public interest, for this court to depart from that decision since the mediation process envisaged under article 113 of Constitution, is not applicable to the Division of Revenue Bill. According to counsel, there ought not to be any impasse given that the National Assembly has the exclusive mandate to deliberate upon the Division of Revenue Bill, while the Senate has no role to play in those deliberations.

21. On his part, the Speaker of Senate submits that Constitution does not envisage a situation where Parliament fails to pass the Division of Revenue Bill, a lacuna he submits was acknowledged by Rawal DCJ in the Matter of the Speaker of the Senate & Another [2013] eKLR. However, as devolution is one of the principles of governance under article 10 of Constitution, he urges that Constitution under Chapter 12 requires that Parliament must ensure that the devolved Governments have sufficient resources allocated to them. The Speaker of the Senate urges the Court to exercise its jurisdiction under article 163(6) of Constitution to set Constitutional framework to ensure that the County Governments get their equitable share as required by Constitution. Ms. Thanji, counsel for the Speaker of the Senate, emphasizes the need for the National Government to release the allocated resources to the County Governments in a timely manner.

22. Both Katiba Institute and the Institute for Social Accountability submit that the Division of Revenue Bill is a time-bound legislation aimed at ensuring reliability, stability and predictability of revenue allocation to County Governments. It is their view that the content and timing of the Division of Revenue Bill, are provided for in article 218 of Constitution. In support of their argument, they recall the Advisory Opinion by this court in The Speaker of the Senate v. The Attorney General [2013] eKLR, wherein it was emphasized that the Division of Revenue Bill is a sine qua non and mandatory part of the legislative process. The Court also reminded both houses of Parliament about their solemn duty to resolve any disagreement over the Bill through mediation as mandated by Constitution.

23. The amici submit that frustration of the mediation process by any of the two houses is a violation of Constitution. Towards this end, they invoke article 6(2) of Constitution which obligates the two levels of government, to conduct their mutual relations on the basis of consultation and cooperation. They submit that Constitution does not contemplate a failure of the mediation process in relation to the Division of Revenue Bill as the Bill is a mandatory and time-bound part of revenue sharing between the National and County Governments.

24. It is therefore submitted that one way of eliminating the stalemate is elevating the recommendations of Commission on Revenue Allocation to a binding status, in the event of an impasse between the two Houses. This, they urge, would incline the two houses to pursue the mediation process to its logical conclusion.

25. However, they also submit that where for any reason, a stalemate cannot be unlocked through a singular cycle of mediation, then the duty devolves to the Supreme Court or the High Court to resolve the stalemate, as was set out in paragraph 146 of the Advisory Reference No.2 of 2013, In the Matter of Speaker of the Senate (Supra).

iii. Whether there should be timelines within which the National Government should release the equitable share of revenue to County Governments

26. The Applicants submit that the National Treasury has persistently failed to release the equitable share of revenue to the County Governments in a timely manner, as required by article 219 of Constitution. They argue that the unpredictability of releasing the allocated funds can only defeat the noble objectives of devolution. There is no way, submit the Applicants, County Governments can discharge their Constitutional responsibilities, if the funds allocated to them are released, not in accordance with Constitution, but at the behest of the National Treasury. It is impossible to implement the county budgets, when the allocated funds are released at the end of the Financial Year.

27. The Applicants urge that in conformity with the clear language of article 259(8) of Constitution, the funds allocated to Counties should always be released "without unreasonable delay and as soon as the occasion arises." Consequently, they submit that under article 219 of Constitution, the equitable share of revenue for County Governments ought to be released within a period of fourteen (14) days, which is the reasonable Constitutional period as held by the High Court in Law Society of Kenya v. Attorney General & 2 Others [2016] eKLR. The Applicants submit that the 14-day timeline begins to run immediately after the Division of Revenue Act and the Appropriation Act have been assented to by the President. The disbursement of the funds should be strictly in accordance with Section 17 of the Public Finance Management Act.

28. The Applicants also take issue with the administration and application of IFMIS to their financial management processes by the National Treasury. They argue that the System violates articles 6(2) and 189(1a) of Constitution, as it infringes upon their institutional autonomy in the execution of their budgets.

29. The CRA on its part submits that the sustainability of devolved governance depends on predictable and timely expenditure releases. As such, the release of funds must be made within reasonable time, in order to facilitate the effective execution of County Governments' recurrent and development budgets. The CRA also proposes a timeline of 14 days in support of the Applicants.

30. Katiba Institute and the Institute for Social Accountability submit that, article 219 of Constitution requires a county's share of revenue to be transferred to the county without undue delay and without deduction, except when the transfer has been stopped under article 225. The amici submit that while delay is a question of degree, based on the facts and circumstances of each case, a purposive interpretation of articles 47, 174, 175, 206, 207, 219 and 259(8) would lead to the conclusion that once the Division of Revenue Act and County Allocation of Revenue Act have been passed, then the amounts become due and should be transferred from the Consolidated Fund as a direct charge under article 206.

31. In the alternative, the Amici submit that since the division of revenue is based on accrued income and projections, the National Treasury could agree with the National Government on payment schedules, dividing the amounts due to reasonable periodic tranches, taking into account all relevant factors, including the need to ensure that County Governments are able to perform their functions. They argue that unexplained departures from the agreed schedule would amount to undue delay contrary to Constitution.

iv. Whether the National Assembly can enact an Appropriation Act prior to the enactment of a Division of Revenue Act?

32. The applicants submit that the National Assembly can only enact the Appropriation Act, after the enactment of the Division of Revenue Act. Towards this end, they contend that the design and structure of Chapter 12 Part 4 of Constitution, envisages a scenario where agreement upon the Division of Revenue Bill, must precede the tabling of the annual estimates of revenue and expenditure by the Cabinet Secretary of the National Treasury. Therefore, the Applicants submit that as a matter of prudence and Constitutional imperative, the Division of revenue Bill has to be agreed upon and passed before the National Assembly can approve the budget or authorize a vote on account or withdrawal from the Consolidated Fund under article 222 of Constitution.

33. The Applicants further contend that a County Allocation of Revenue Bill in terms of article 218(1)(b) of Constitution, cannot be enacted to "divide among Counties", revenue which is not only yet to be allocated, but whose quantum is unknown. They submit that under article 224 of Constitution, Counties can only prepare their respective budgets and appropriation Bills, on the basis of the Division of Revenue Bill passed by Parliament under article 218. It is the contention of the Applicants that the sequencing of the budgetary processes means that the enactment of the Division of Revenue Bill must precede the Appropriation Act.

34. The CRA supports the proposition that the enactment of the Division of Revenue Bill must precede any appropriation by the National Government. Mr. Waiganjo, counsel for the CRA, submits that on basis of articles 218(1) and 221, the introduction of the Division of Revenue Bill, and the tabling of the Estimates of the Revenue and Expenditure of the National Government for the next financial year, in the National Assembly, takes place at the same time. The same timing, according to counsel, is provided for by Section 8(1)(b) of the Public Finance Management Act. Counsel argues that it was the intention of the drafters of Constitution, that both the Division of Revenue Bill and the Appropriation Bill be enacted before the commencement of the next financial year.

35. Counsel makes reference to article 221(6) of Constitution, which provides that the Appropriation Bill is to be presented after the estimates of National Government expenditure, and the estimates of expenditure for the Judiciary, and Parliament have been approved by the National Assembly. Reference is also made to article 224, which provides that each County Government, based on the Division of Revenue Bill passed by Parliament under article 218 of Constitution, shall prepare and adopt its own annual budget and appropriation Bill in the form, and according to the procedure prescribed in an Act of Parliament.

36. Counsel urges the Court to adopt a contextual interpretation of the foregoing Constitutional provisions. Such an approach in the view of counsel, would lead to the inescapable conclusion that, the Division of Revenue precedes appropriation. In support of this proposition, counsel cites as persuasive authority, the High Court decision in the case of National Assembly of Kenya & Another v. Institute for Social Accountability & 6 Others [2017] eKLR wherein it was held that, the enactment of the Division of Revenue Act precedes all other statutory allocations and appropriations.

37. The Speaker of Senate, in support of the Applicants, submits that Constitution does not envisage a situation where, County Governments would be deprived of their share of revenue, from the revenue raised nationally. This being the case, urges the Speaker, there must first be a National Division of Revenue, before the National and County Governments, can proceed to appropriate their respective shares. Mr. Omogeni, counsel for the Speaker of Senate, submits that it is mandatory that there first be a vertical division of revenue, before the National and County Governments can proceed to pass their respective appropriation Bills. He observes that article 222 of Constitution insulates the National Government in the event that the Appropriation Act is not assented to, by providing for emergency withdrawal of funds from the Consolidated Fund. Counsel submits that there being no similar provision with regard to County Governments, it follows that the Division of Revenue Bill must be agreed upon and enacted into law before the end of each Financial Year, to pave way for appropriation by the counties. Counsel argues that given the wording of article 224 of Constitution, the National Assembly cannot pass the Appropriation Act before there is a Division of Revenue Act.

38. Counsel submits that this court's pronouncement in Advisory Opinion No.2 of 2013, Speaker of the Senate and Another v. The Attorney General, leaves no doubt that there cannot be a Division of Revenue Act, without the input or concurrence of the Senate. Given the current impasse, counsel urges the Court to render a similar authoritative Advisory Opinion regarding issues raised in the Reference.

39. On the other hand, the Speaker of the National Assembly argues that it is perfectly in order, for the Assembly to enact the Appropriation Bill into law before the enactment of the Division of Revenue Act. Counsel for the Speaker submits that the revenues contained in the Division of Revenue Bill, are mere estimates or forecasts, the basis upon which, the National Treasury prepares and submits to the National Assembly, the estimates of expenditure for the National Government. The National Government's budget process is allowed to proceed with the indicative amounts of revenue and approve the Appropriation Bill under article 221(1) of Constitution.

40. Counsel submits that the enactment of the Appropriation Act, does not affect the figures set aside for the counties in the Division of Revenue Bill, since the same cannot be altered as stipulated in article 219. Counsel therefore contends that the failure to approve the Division of Revenue Bill, occasioned by disagreements during the Mediation Process, should not stop the enactment of the Appropriation Act by the National Assembly. In addition, counsel submits that the failure to agree on the Division of Revenue Bill does not trigger a Vote-on-Account as the same is not an Appropriation Instrument. The Bill is exclusively a proposal for division of revenue between the two levels of Government.

41. Counsel faults the argument that the courts have jurisdiction, to determine allocations of resources to the two levels of Government. He submits that the authority to determine the allocation of national revenue is an exclusive preserve of the National Assembly, under article 95 (4) (a) of Constitution. In his view, the budget making and legislative processes should be allowed to continue in the State organ mandated to undertake the said tasks by Constitution. Counsel contends that the suggestion that courts can involve themselves in the allocation of national revenue is based on the false assumption that the only disagreement that can occur between the two Houses, during deliberations on the Division of Revenue Bill, is limited to the equitable share of revenue due to Counties.

42. On their part, Katiba Institute and the Institute for Social Accountability jointly submit that, the vertical division of revenue must precede any appropriation by the two levels of government. They urge that otherwise, enabling the National Assembly to appropriate for National Government while holding the share of the County Government would distort the reliability, stability and predictability of County Government revenue. Such a situation, they argue, is not the one contemplated by article 222 of Constitution. The amici therefore urge that either level of government can only prepare and

pass its own budget and appropriation Bill on the basis of the Division of Revenue Bill enacted by Parliament.

C. Analysis

i. The Context

43. The genesis of this Reference lies in a dispute between the National Assembly and Senate, regarding the Division of Revenue Bill for the Financial Year 2019/2020. Had this Bill been enacted into law, in accordance with Constitution and the Advisory Opinion of this court in The Speaker of Senate and Another v. The Attorney General & 4 Others, Advisory Reference No. 2 of 2013, it is highly unlikely that the Applicants herein, would have approached this court, seeking yet another Advisory Opinion.

44. In exercise of the powers conferred upon it under article 216 of Constitution, the Commission for Revenue Allocation made recommendations concerning the basis for the equitable sharing of revenue, between the National and County Governments for the Financial Year 2019/2020. Towards this end, the Commission proposed inter alia that, the equitable sharable revenue for the counties would be Kshs. 335.7 Billion. These recommendations were submitted to the Senate, National Assembly, the National Treasury, County Assemblies and Executives.

45. The Cabinet Secretary responsible for the National Treasury on his part, published the Budgetary Policy Statement in which he set the equitable sharable revenue for Counties at Kshs. 310 Billion. The BPS was tabled in the National Assembly on 14th February 2019, pursuant to Section 25(2) of the Public Finance Management Act. According to the Affidavit sworn by Wycliffe Ambetsa Oparanya, the Applicants were seriously aggrieved by the National Treasury's proposal, which if adopted, would result in a significant reduction of the equitable revenue for Counties. They therefore rejected the proposal and urged both the Senate and National Assembly, to go by the CRA's recommendation, which had set the county equitable share for 2019/20 at Kshs. 335.7 Billion. However, while the Senate was in full agreement with the Applicants' position, both the National Treasury and National Assembly would have none of it. The negotiations that followed between the Houses of Parliament and the Applicants were long and protracted. With both houses adopting hardline positions regarding the equitable share due to counties, the impasse persisted well into the beginning of the Financial Year 2019/2020. At a meeting held on 28th June 2019, the Applicants resolved to seek an Advisory Opinion from this court pursuant to article 163 (6) of Constitution.

46. In the intervening period, the National Assembly enacted the Appropriation Act based on the estimates of revenue and expenditure that had been tabled in Parliament by the National Treasury. It is worth noting, that the Appropriation Act was passed before agreement upon, and enactment of the Division of Revenue Bill into law. An earlier version of the Division of Revenue Bill approved by the National Assembly based on the Budget Policy Statement had been lost, having been rejected by the Senate, and the resultant mediation having failed to produce concurrence between the two Houses. Between the 16th and 17 of July 2019, when the Court was already seized of this matter, two different versions of the Division of Revenue Bill were published by the two Houses namely, the Division of Revenue Bill No. 2 of 2019 published by the National Assembly on 16th July 2019, and the Division of Revenue Bill of 2019, Published by the Senate on 17th July 2019. The National Assembly version of the Bill set the equitable share for Counties at Kshs. 316.5 Billion while the Senate version set the equitable share for Counties at Kshs. 335.67 Billion.

(d) Issues For Determination

47. this court therefore, in its Ruling dated 8th October 2019, derived the four issues from the foregoing scenario. In its version of the Bill, the National Assembly did not go by the recommendation of the Commission on Revenue Allocation, while the Senate went by the said recommendation, in setting the equitable share of revenue for the Counties. This divergence between the two Houses, gave rise to the issue as to whether the recommendations of the CRA, are binding on the former in the determination of the equitable share of revenue for the Counties. The failure of the mediation process under article 113 of Constitution, during the deliberations regarding the earlier National Assembly version of the Division of Revenue Bill, resulted in an unprecedented impasse that almost ground the operations of the Counties to a halt. This gave rise to the second issue with which we are faced, namely, what happens in the event of such an impasse? Likewise, the National Assembly enacted the Appropriation Bill into law, while the Division of Revenue Bill was stuck in the disagreements between the two Houses of Parliament, giving rise to the issue as to whether it was Constitutional for the National Assembly to enact the Appropriation Act before the Division of Revenue Bill. The Applicants also submitted that the National Treasury, more often than not, held them at ransom by delaying the exchequer releases of their share of revenue, thus negatively impacting upon their Constitutional responsibilities. This gave rise to the issue as to whether there should be fixed timelines within which the National Treasury must release the allocated funds to the counties.

48. Although in the end, there would finally be an agreement between the two Houses following this most confounding standstill, the four issues had already crystallized, hence this Advisory Opinion.

i. Whether the recommendations by the Commission for Revenue Allocation are binding on both the National Assembly and Senate

49. We have set out in adequate detail, the arguments by the parties regarding the issue as to whether the recommendations by the CRA are binding or not. The starting point for our consideration of this question must be Constitutional text, which establishes the Commission in the first place. Towards this end, article 215 (1) of Constitution establishes the Commission for Revenue Allocation. article 216 of Constitution provides that:

> (1) "The principal function of the Commission on Revenue Allocation is to make recommendations concerning the basis for the equitable sharing of revenue raised by the National Government-
>
> a. between the national and County Governments ; and
>
> b. among the County Governments
>
> (2) The Commission shall also make recommendations on other matters concerning the financing of, and the financial management by, County Governments, as required by this Constitution and national legislation.
>
> (3) In formulating recommendations, the Commission shall seek-
>
> (a) to promote and give effect to the criteria set out in article 203 (1)
>
> (b) when appropriate, to define and enhance the revenue sources of the national and County Governments; and
>
> (c) encourage fiscal responsibility."

Sub-article 5 of article 216 provides that:

> " The Commission shall submit its recommendations to the Senate, the National Assembly, the national executive, County Governments, and county executives."

50. On the one hand, we have been urged to consider and adopt the position that recommendations by the Commission for Revenue Allocation are binding. The proponents of this line of reasoning, have predicated their argument on the ground that, being a Constitutional organ, the Commission was established for a reason and hence, its recommendations can neither be whimsically disregarded nor wished away. Further, they argue that the Commission's recommendations are of a highly technical nature, and as such, have to be accorded obligatory attention by Parliament. In their view, as long as the Commission is guided by the objective criteria outlined in article 203 (1) of Constitution in arriving at its recommendations, the same cannot be disregarded.

51. On the other hand, are those who insist that the recommendations by the Commission, are not binding on the National Assembly. The proponents of this position maintain that if the Commission's recommendations were binding, there would be no need for the National Assembly, to debate the Division of Revenue Bill before its enactment into law. Such a situation would be anachronistic to the legislative authority vested upon the National Assembly by Constitution. In their view, to hold that the Commission's recommendations are binding would supplant the legislative authority of Parliament.

52. In our considered opinion, the term "recommendation" is the operational yardstick in this entire debate. In this regard, we agree with those who have submitted that this term should first and foremost, be accorded its literal and natural meaning. Towards this end, generally speaking, a recommendation is a suggestion or proposal, for a certain cause of action. Such proposal does not ordinarily bind the person to whom, or entity to which, it is addressed. It is for the recipient of a recommendation, to determine what import he should attach to it. However, the categories of recommendations are never closed. Recommendations may differ, in their meaning, nature and effect, depending on the context in which they are deployed.

53. In the matter before us, it is to be appreciated that we are dealing with recommendations emanating from a Chapter Fifteen Commission. Constitution accords Commissions under this Chapter, an important place in the country's governance. article 249 provides that the objects of the Commissions and 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.

54. Since the principal function of the Commission on Revenue Allocation is to make recommendations concerning the equitable sharing of revenue between the National Government and County Governments, it would be inappropriate in our view, to categorize such recommendations as "mere suggestions or proposals". There can be no doubt therefore, that the Commission has a central role to play in the Division of Revenue Bill, the latter being the legislative instrument, that actualizes the equitable revenue sharing of revenue between the two levels of Government. Such recommendations are to be accorded serious consideration by both Houses while debating the Division of Revenue Bill. However, the question as to whether the Commission's recommendations are binding upon the National Assembly still remains unresolved. Are the said recommendations so weighty as to be binding?

55. In order to determine the nature of the Commission's recommendations, reference must be made to the relevant provisions of Constitution. Of immediate note, is article 205 of Constitution, which provides that:

1. When a Bill that includes provisions dealing with the sharing of revenue, or any financial matter concerning County Governments is published, the Commission on Revenue Allocation shall consider those provisions and may make recommendations to the National Assembly and the Senate. (Emphasis added)"

2. Any recommendations made by the Commission shall be tabled in Parliament, and each House shall consider the recommendations before voting on the Bill. (Emphasis added)"

article 204 (4) of Constitution provides that:

> " The Commission on Revenue Allocation shall be consulted and its recommendations considered before Parliament passes any Bill appropriating money out of the Equalization Fund. (Emphasis added)"

article 218 of Constitution provides that:

1. At least two months before the end of each financial year, there shall be introduced in Parliament-

   a. A Division of Revenue Bill, which shall divide revenue raised by the National Government among the national and county levels of government in accordance with this Constitution; and

      A County Allocation of Revenue Bill, which shall divide among the counties the revenue allocated to the county level of government on the basis determined in accordance with the resolution in force under article 217

2. Each Bill required by clause (1) shall be accompanied by a Memorandum setting out-

   a. an explanation of revenue allocation as proposed by the Bill;

   b. an evaluation of the Bill in relation to the criteria set out in article 203 (1); and

   c. a summary of any significant deviation from the Commission on Revenue Allocation's recommendations, with an explanation for each such deviation. [Emphasis added].

56. A critical reading of the provisions cited above, leaves no doubt that Constitution places a very high premium on the recommendations by the Commission for Revenue Allocation. Such recommendations once tabled in Parliament, must be accorded due consideration before a vote takes place in either of the Houses, on the Division of Revenue Bill and the County Allocation of Revenue Bill. This is the unequivocal prescription in article 205 of Constitution. Even where the National Government intends to appropriate money from the Equalization Fund, the Commission must still be consulted, and if following such consultation, it makes recommendations, the National Assembly must consider the same before passing an Appropriation Bill.

57. In view of the foregoing, it is our considered opinion that, where either of the two Houses passes a Bill envisaged under article 205 of Constitution, without considering the recommendations of the Commission on Revenue Allocation, the resultant legislation would be unconstitutional. By the same token, where the National Government appropriates money from the Equalization Fund without consulting the Commission, the resultant legislation would suffer a similar fate. The same result would obtain were the National Assembly passes legislation authorizing the National Government to

appropriate money from the Equalization Fund without considering the recommendations, if any, by the Commission on Revenue Allocation.

58. Having determined that the recommendations by the Commission for Revenue Allocation are no ordinary suggestions or proposals, we must consider whether, they are binding upon all the entities to which they are addressed. Simply put, can an entity to which the Commission of Revenue Allocation's recommendations are addressed deviate from them? What meaning is to be ascribed to the term "consider"? In other words, does "consider" mean the same as "to be bound?" article 218 (2) of Constitution provides that both the Division of Revenue Bill and the County Allocation of Revenue Bill, must be accompanied by a memorandum setting out-

    a. an explanation of revenue allocation as proposed by the Bill;

    b. an evaluation of the Bill in relation to the criteria set out in article 203 (1); and

    c. a summary of any significant deviation from the Commission on Revenue Allocation's recommendations, with an explanation for each such deviation. [Emphasis added].

59. From the wording of article 218 (2), it is not in doubt that Parliament can indeed deviate from the recommendations of the Commission on Revenue Allocation while debating any of the two revenue sharing Bills. In fact, not every deviation from the Commission's recommendations has to be explained. Only a significant deviation has to be accompanied with a memorandum explaining the deviation. Both Houses of Parliament are given considerable latitude by Constitution to not only explain the revenue allocation in the Bill(s), but also to critique the Bill(s) in the context of the objective criteria set out in article 203 (1). Even the Commission of Revenue Allocation itself has to be guided by the said criteria in making its recommendations.

60. Taking all these into account, it is our considered opinion that the recommendations by the Commission on Revenue Allocation are not binding upon either the National Assembly, or the Senate. What the two Houses cannot do however is to ignore or casually deal with such recommendations. To hold otherwise, would elevate the Commission above Parliament in the legislative chain. We therefore agree with both the Speaker of the National Assembly and the Law Society in their submissions to the effect that, it could not have been the intention of the makers of Constitution to supplant the legislative authority of Parliament in matters Finance, by establishing the Commission on Revenue Allocation.

61. By the same token, we affirm as a correct statement of the law regarding this issue, the pronouncement by the High Court in its decision, In the Matter of the 47 County Assemblies and Others; Petition No. 368 of 2014. Faced by the question as to whether the recommendations addressed to all the 47 County Assemblies and County Executives, by the Commission on Revenue Allocation were binding upon the former, Lenaola J, (as he then was) having extensively considered the applicable law on the subject matter, rendered himself thus at paragraph 53:

> "...the 1st respondent (Commission on Revenue Allocation) is the body charged with the responsibility of making recommendations inter alia to the Senate, the National Assembly, the National Executive, County Assemblies and County Executives on the basis upon which revenue would be shared equitably between the National and County Governments... None of the Parties disputed these facts but the point of disagreement is whether those recommendations on all the organs to which they are made."

At paragraph 57, the learned judge held, and we quote:

> " The import of these provisions (article 218 (2)) is that a recommendation made by the 1st respondent to the Senate is not binding but for good order, reasons for a deviation must be given."

62. We agree with this statement of the law save to add that, the non-binding nature of the Commission's recommendations is not limited to the Senate but is also applicable to the National Assembly, and indeed, to any other entity to which they may be directed. Additionally, as already stated in paragraph 48 of this Opinion, not every deviation from the Commission's recommendations is to be explained away in a memorandum, only a significant deviation. What constitutes a significant deviation is a matter to be determined on a case-to-case basis.

63. In conclusion, we note that Constitution, through several of its provisions, professionalizes and democratizes the budget making process. On the one hand, it ensures that Parliament benefits from the technical insights of the Commission's recommendations, while debating the revenue sharing and allocation Bills. On the other hand, it safeguards the legislative authority of Parliament by requiring that both Houses, pay due regard to the recommendations without necessarily being bound. This flexibility ensures that both entities are able to critically apply their collective minds to the very crucial yet complex process of budget making. It is against this background, that one must appreciate the fact that, Parliament and the Commission may not always agree inter alia, on the equitable share of revenue due to County Governments. What is critical is that all the parties in this process, including the Applicants herein, must be guided by the objective criteria set out in article 203 (1) of Constitution. Given this reality, it cannot always be assumed that the Commission on Revenue Allocation will always recommend a higher figure of equitable revenue for the Counties than that recommended by either the National Assembly or the Senate. A time may very well come, when the Applicants would rather go by the National Assembly's proposals than the Commission's. What would happen for example, if the Commission, guided by the prevailing circumstances at the time, recommends a much lower figure, than what the National Assembly eventually proposes in the Division of Revenue Bill? Would the proponents of the binding nature of the Commission's proposals still stand their ground? We hardly think so.

ii. What happens when the National Assembly and the Senate fail to agree on a Division of Revenue Bill thereby triggering an Impasse?

64. The question as to what happens in the event of an impasse between the two Houses of Parliament over a Division of Revenue Bill is not a theoretical one. It is the reality that informed the Applicants' decision to seek this Advisory Opinion under article 163 (6) of Constitution. Never before, since the promulgation of the 2010 Constitution, had there occurred such an ugly and protracted stalemate between the National Assembly and the Senate over proposed legislation as crucial as the Division of Revenue Bill.

65. It is worth repeating that the first Division of Revenue Bill passed by the National Assembly on 26th March of 2019 and transmitted to the Senate, was eventually lost following its rejection by the latter. The Mediation process that was triggered by the said rejection pursuant to article 113 of Constitution did not yield any concurrence between the Houses, hence the impasse. This impasse was to last until July 2019, when both the Assembly and Senate republished their versions of the Bill. For good measure, the Senate's version of the Bill was also rejected by the National Assembly on 8th August 2019, thus triggering yet another Mediation, and not before this court had issued an Order directing the protagonist chambers, to activate and exhaust Constitutional process under article 113. It was not

until the 16th of September 2019 that the Court was informed that the two Houses had finally agreed on a mediated version of the Division of Revenue Bill that was eventually passed into law.

66. By the time the impasse was resolved, the Country was three months into the Financial Year of 2019/2020. Needless to say, the stalemate not only led to delayed exchequer releases to the Counties, but also seriously affected their budgetary and programme implementation cycles. Indeed, the effects of this gridlock are still being felt in the entire financial system of County Government. It is unsettling to imagine what would have happened, had the impasse defied the second mediation process. Thus, we must still grapple with the issue as to what happens in the event of a failed mediation.

67. In navigating the issue at hand, we have taken cognizance of the arguments by both the Attorney General and the Speaker of the National Assembly, urging this court to exercise restraint, and avoid delving into political and budgetary disputes. They submit that it is not for the Courts to make allocations of revenue to Counties, neither is it for this court to re-write Constitution and the law, under the guise of rendering an Advisory Opinion. While these arguments cannot be casually dismissed, it is not lost to us that what we are confronted here with, is not a case of judicial over-reach, but a real Constitutional crisis, which if not resolved judicially, has the potential to cripple the operations of the entire County Government. It would be remiss of this court to look on helplessly, in the face of a legislative paralysis that not only subverts Constitution, but also threatens the sovereignty and security of the Country. It could not have been lost on a keen observer of these proceedings, that when the Court became seized of this Reference, it initially exercised extreme restraint, by urging the two Houses to undertake their Constitutional responsibilities through mediation under article 113 of Constitution.

68. The Applicants and the Speaker of Senate, submit that the business of Government should not come to a standstill, because of disagreement between the two Houses over the Division of Revenue Bill. Towards this end, the Applicants urge that two options are feasible in resolving the problem. The first option is for this court to refer the matter to the High Court for resolution under article 165 (3) (d) of Constitution. The High Court once so moved, would then issue directions for the allocation of the equitable revenue due to counties, on the basis of the recommendations by the Commission on Revenue Allocation. The second option is for this court to fall back on the Division of Revenue Act of the preceding Financial Year and order that 25% of the equitable revenue due to the Counties in that Year, be immediately released to the Counties pending resolution of the impasse. The Speaker of Senate supports the Applicant's first option of seeking binding Orders from the High Court on the basis of recommendations by the Commission on Revenue Allocation. The Commission on its part, urges the Court to devise what we have characterized as "an Impasse bursting Opinion", which safeguards the principles and values of Constitution.

69. The Speaker of the National Assembly invites the Court to depart from its decision in In the Matter of the Speaker of Senate & Another v. the Attorney General & Another & 4 Others; Ref. No 2 of 2013, wherein the Court held that Senate has a role to play in the Division of Revenue Bill. Once the Court departs from its decision as invited by the Speaker, there would be no impasse in the future, as the National Assembly would have the exclusive legislative mandate to pass the Bill, un-encumbered by the input of Senate.

70. We consider it necessary to address at the outset, the Speaker's invitation to us to depart from our decision. It follows that if we should agree with the Speaker's proposition, then there would be no need to consider the submissions by the Applicants regarding what should happen in the event of

an impasse. In that Advisory Opinion, after extensive analysis, this court, in a majority decision, pronounced itself thus:

> "It is clear to us that the Senate had a clear role to play, in the processing of the Division of Revenue Bill. The Speaker of the National Assembly should have complied with the terms of article 112 of Constitution; and the National Assembly should have considered the deliberations of the Senate on record and, failing concurrence on legislative choices, the matter should have been brought before a mediation committee, in accordance with the terms of article 113 of Constitution"

71. The above pronouncement remains the law as far as the question in reference to which it was made is concerned. While it is not in doubt that the Supreme Court may depart from its previous decisions as per article 163 (7) of Constitution, such departure must be premised upon a clear and well-reasoned justification. The circumstances that may inform this court's departure from its previous decisions were well articulated in Jasbir Singh Rai v. Tarlochan Singh Rai & Others. Asking the Court to depart from its previous decision is not a cause of action to be pursued casually.

72. A litigant cannot urge the Court to depart from its previous decision simply because he disagrees with it, or that the decision, militates against his case. Departing from a previous pronouncement of the law is a momentous course of action, which by its very nature must fundamentally upset pre-existing legal relations. As such, any party intending to steer the Court in that direction, ought to ideally make a formal application in which he states the reasons in justification of such a motion. The Application has to be served upon all the respondents who in turn will urge their case either in support or opposition thereto. At the end of the day, the Court will have benefitted from the reasoned submissions of counsel before rendering a decision.

73. In the instant matter, we are being asked to depart from a previous decision, not in the manner signaled above, but in the course of a response to the Reference. None of the parties herein, including the Amicus Curiae, had the opportunity to respond to the submissions of counsel for the Speaker of the National Assembly on this issue. The Speaker was content, both in the written and oral submissions by counsel, to invite the Court to depart from its previous decision on grounds that the same was rendered Per Incuriam. The Speaker also invites the Court to adopt the dissenting opinion of Lady Justice Njoki as the correct statement of the law. The perfunctory manner in which the Court is being moved to depart from a previous decision does not commend itself to us. Consequently, we are unable to consider the merits of the Speaker's arguments in circumstances where none of the other parties were heard on the same.

74. Having taken the foregoing stand, we must now turn to the propositions made by the Applicants as possible resolutions following an impasse between the two Houses of Parliament. As a first option, the Applicants submit that following such a stalemate, an application be made to the High Court under article 165 (3) (d), for Orders compelling the National Assembly to provide for the equitable share of revenue due to the Counties on the basis of the recommendations by the Commission on Revenue Allocation. Having considered the submissions of counsel in this regard, we find this proposition untenable on two grounds. Firstly, adopting such a course of action would defeat our holding to the effect that recommendations by the Commission on Revenue Allocation are not binding. Secondly, to approach the High Court in this manner would fundamentally shift the revenue allocation function from the legislature to the Judiciary, thus radically upsetting the doctrine of separation of powers. Budget making and allocation of revenue, are functions essentially reserved for the executive and the legislature. Courts of law should only come in to protect the authority of Constitution and the law where necessary.

75. This leads us to the second option suggested by the Applicants, and that is, to use the Revenue Allocation Act of the previous Financial Year as a fallback position. Counsel for the Applicants submitted that in the event of an impasse, 25% of the equitable share of revenue under that Act should immediately be released to counties pending the enactment of the Division of Revenue Bill. On the face of it, this proposition appears not only practical but also logical; however, the proponents of this idea did not derive it from any Principle or deeming provisions of Constitution. Conscious of the fact that even an Advisory Opinion, must be anchored within the general value system and architecture of Constitution, we must seek direction from the relevant Constitutional provisions as we navigate this vexed question.

76. The starting point in this regard is article 259 (1), which provides that Constitution shall be interpreted in a manner that-

a. promotes its purposes, values and principles;

b. advances the rule of law and the human rights and fundamental freedoms in the Bill of Rights;

c. permits the development of the law; and

d. contributes to good governance.

77. With regard to the budget making process and appropriation of money from the Consolidated Fund, Constitution itself envisages a scenario where, the National Government may not be able to access funding due to the absence of enabling legislation. In the event of such an eventuality, article 222 of Constitution provides that-

> 1. "If the Appropriation Act for a financial year has not been assented to, or is not likely to be assented to by the beginning of that financial year, the National Assembly may authorize the Withdrawal of money from the Consolidated Fund;
>
> 2. Money Withdrawn under clause (1) shall-
>
> a. be for the purpose of meeting expenditure necessary to carry on the services of the National Government during that year until such time as the Appropriation Act is assented to:
>
> b. not exceed in total one-half of the amount included in the estimates of expenditure for that year that have been tabled in the National Assembly; and
>
> c. be included under separate votes for the several services in respect of which they were withdrawn, in the Appropriation Act."

78. It is therefore clear from the foregoing provisions that if for whatever reason, the President does not assent to an Appropriation Act passed by the National Assembly, the business of the National Government must none-the-less continue. Constitution does not countenance a paralysis in Government, hence the interim measures set out in article 222. Is it conceivable that the same Constitution would condone the crippling of the affairs of County Government, occasioned by a

gridlock in the two Houses over the Division of Revenue Bill? article 224 of Constitution provides that-

> "On the basis of the Division of Revenue Bill passed by Parliament under article 218, each County Government shall prepare and adopt its own annual budget and appropriation Bill in the form, and according to the procedure, prescribed in an Act of Parliament."

79. It follows therefore that, in the absence of a Division of Revenue Act, County Governments cannot prepare and adopt their own budgets and appropriation laws. Where does such an eventuality leave the Counties? A total freeze of the functions of the entire level of County Government. Such a freeze must of necessity, in turn lead to a serious disruption of the business of National Government, given the fact that the two levels of Government are inter-dependent. All the County Government functions set out in the Fourth Schedule of Constitution would have to be suspended. The consequential effect upon the business of the National Government would equally be devastating. The purpose of Constitution of preserving the continuity in Government business as envisaged in article 222 would be subverted. Yet as consistently asserted by this court in a long line of its decisions, Constitution cannot subvert itself. Therefore, although there appears to be a lacuna in Constitution as to what should happen, in the event of an impasse in Parliament such as the one we have witnessed, article 222 provides albeit by implication, a practical way forward. It shall be remembered that not so long ago, in In the Matter of the Speaker of the County Assembly of Embu, when confronted by a similar question, as to what should happen in the event of the resignation, impeachment, or death of a Deputy Governor, in view of the absence of a specific provision in Constitution, this court fashioned its Advisory Opinion, not in a vacuum, but on the basis of the analogous provisions in article 149 of Constitution.

80. It is therefore our considered opinion that should an impasse occur due to the failure of the mediation process, occasioned by the lack of concurrence between the two Houses over the Division of Revenue Bill, the National Assembly shall, for the purpose of meeting the expenditure necessary to carry on the services of the County Government during that year until such time as the Division of Revenue Act is assented to, authorize the withdrawal of money from the Consolidated Fund. The monies so withdrawn shall be included, under separate vote(s) for the several services in respect of which they were withdrawn. It is to be expected that each County Assembly, would have to re-adjust their respective budgets and appropriation bills accordingly.

81. This leaves us with the question regarding the percentage to be withdrawn from the Consolidated Fund. While the withdrawal of money for the purpose of the National Government under article 222 is based on a percentage of the estimates of expenditure for that year, the same method cannot apply to the County Government, since the estimates do not include the equitable revenue share due to Counties. Logic would require that the percentage of the money to be withdrawn be based on the Division of Revenue Bill; yet this would be legally untenable, given the fact that the Bill, is not only the subject matter of controversy, but is also yet to pass into law. In the circumstances, it is our view that in the event of an impasse, the percentage of the money to be withdrawn be based on the equitable allocation to Counties in the Division of Revenue Act of the preceding financial year. In keeping with the spirit of article 222 (2) (b) of Constitution, the money to be withdrawn shall be 50% of the total equitable share allocated to the Counties in the Division of Revenue Act.

82 Assuming for purposes of argument, that 50% of the total equitable share allocated to Counties in the preceding year exceeds the total equitable share proposed in the Division of Revenue Bill, then the percentage to be withdrawn from the Consolidated Fund shall not be less than 15% of all revenue

collected by the National Government. The 15% recommended in case of such an eventuality is derived from article 203 (2) of Constitution which provides that-

> " For every financial year, the equitable share of the revenue raised nationally that is allocated to County Governments shall not be less than fifteen percent of all revenue collected by the National Government."

83. It is our perception that this way forward, safeguards the functionality of County Governments, while affording Parliament an opportunity to resolve the impasse through a second mediation under article 113 of Constitution. It preserves the authority of Constitution by protecting its principles and values. Finally, it promotes the doctrine of separation of powers by locating the solution to a potential impasse squarely within the arena of Parliament. Our opinion in this regard, is inspired by a contextual reading of the provisions of Constitution as a living Charter.

84. Towards this end, we would urge the Speakers of Parliament, to initiate requisite legislative action so as to give normative form to this arrangement. Such legislative action clearly finds favour with article 190 (1) of Constitution, which provides that "parliament shall by legislation ensure that county governments have adequate support to enable them to perform their functions". While we are cognizant of the fact that the initial legislation envisaged under this article is what can be termed "a Fifth Schedule Legislation", with a time limit of 3 years after the promulgation of Constitution, the article is not necessarily spent, taking into account the fact that, the architecture and functionality of Counties is always an ongoing process. We hasten to add that the absence of such legislation shall not act as a bar or postponement of the implementation of this Opinion.

85. What then should happen if, even after this painstakingly constructed route, the two Houses of Parliament fail to reach an agreement thus reigniting the stalemate? In The Speaker of the Senate & Another v. Hon. Attorney General & 4 Others [2013] eKLR; having held that the Senate had a role to play in the processing of the Division of Revenue Bill, we stated that failure to agree upon the Bill by the two Houses, should be resolved through the mediation process prescribed under article 113 of Constitution. It was our assumption that Parliament would not fail in the discharge of one of its most solemn legislative responsibilities i.e., the passage of the Division of Revenue Bill. Indeed, the mediation process appears to have unlocked any disagreements between the two Houses over the years, until the Financial Year 2019/2020, hence this Reference for an Advisory Opinion.

86. The main function of Parliament, which consists of the National Assembly and the Senate, is to enact legislation in the manner provided for by Constitution. The legislative authority of the Republic is derived from the people and, at the national level is vested in and exercised by Parliament (article 94). article 94 (5) of Constitution provides that-

> " No person or body, other than Parliament, has the power to make provision having the force of law in Kenya except under authority conferred by this Constitution or by legislation."

87. The main reason Parliament exists as one of the arms of Government is to represent the people in matters of public interest, and to legislate on diverse questions of national interest. Every five years, the electorate gets an opportunity to pass judgment on the performance of Parliament through democratic, free and fair elections. But elections are not a barometer for the collective measurement of the performance of Parliament. They afford citizens an opportunity to re-elect or reject individual members at the ward, Constituency and County levels. Elections cannot offer a way out when Parliament fails in its responsibilities during its five-year term. It is not every failure or dereliction of duty on the part of Parliament that triggers a motion to end its life before its five-year term elapses. Indeed, under Chapter Eight, Constitution does not contemplate a scenario where the life of

Parliament may be cut short before the end of its term. However, article 261 as read with the Fifth Schedule of Constitution clearly provides that the life of Parliament may be discontinued due to failure to enact specific legislation within a specified time.

88. Given the exigencies of national life, it should not be expected that Parliament will always enact legislation in time. The 2010 Constitution has transformed law making from a technical exercise to a democratic and participatory process. It is therefore possible that some pieces of proposed legislation may straddle between two terms of Parliament before being passed into law. NOT SO with legislation for the implementation of the national budget and allocation of revenue to both National and County Government. In this category are to be found, the Division of Revenue Act, the County Allocation of Revenue Act, and the Appropriation Act, among others. Constitution sets specific and rigid timelines within which these pieces of legislation must be enacted, since they operationalize the financial existence of the country. Without a budget and consequent financial appropriation, there would be no Executive, Legislature, Judiciary, or County Government. Budget processing and the enactment of consequential legislation are some of the most solemn responsibilities vested upon Parliament in any given financial year. Failure by Parliament to discharge such a critical legislative function, in the absence of an emergency, or any other disaster that disrupts parliamentary business, not only violates Constitution, but also exposes the country to existential danger. Such a Parliament must be considered to have run its course, hence its dissolution.

It is in this spirit that article 261 of Constitution provides that-

> 1. "Parliament shall enact any legislation required by this Constitution to be enacted to govern a particular matter within the period specified in the Fifth Schedule, commencing on the effective date."
>
> 5. If Parliament fails to enact any particular legislation within the specified time, any person may petition the High Court on the matter.
>
> 6. The High Court in determining a petition under clause (5) may-
>
> a. make a declaratory order on the matter
>
> b. transmit an order directing Parliament and the Attorney General to take steps to ensure that the required legislation is enacted, within the period specified in the order, and to report the progress to the Chief Justice.
>
> 7. If parliament fails to enact legislation in accordance with an order under clause (6) (b), the Chief Justice shall advise the President to dissolve Parliament and the President shall dissolve Parliament."

89. It may be argued that article 261 only applies to legislation specified in the Fifth Schedule, or that once such legislation is indeed enacted, then the said article ceases to have effect. But what happens if a specified legislation in the Fifth Schedule is not enacted within the specified time? The answer lies in article 261 (6) and (7) of Constitution. It means that neither article 261 nor the Fifth Schedule becomes spent by the inaction of Parliament. Indeed, there are certain pieces of legislation under the Fifth Schedule that remain un-enacted to this day. However, the High Court retains residual jurisdiction, which may be activated by a petition under article 261 to ensure that the specified law is enacted.

90. By implication, it could be argued that, where Constitution sets strict timelines for the enactment of any other legislation not included in the Fifth Schedule, such as the Division of Revenue Act, failure to enact such legislation by Parliament, in the absence of an emergency or other disaster, must invite the

same enforcement sanctions as envisaged under article 261. Such a conclusion would therefore mean that where the two Houses of Parliament fail to agree during a second mediation under article 113 of Constitution, any person may petition the High Court for a declaration to the effect that Parliament has violated Constitution. Upon the transmittal of such declaration, the Chief Justice would advise the President to dissolve Parliament and the President would dissolve Parliament.

91. Yet as logical and attractive as the suggested course of action above may be, we are not unmindful of the limitations of the caution required while exercising our advisory opinion jurisdiction. While this jurisdiction is not an idle one, as emphasized in our earlier decisions, its exercise must be contextualized within the deeming provisions of Constitution and the law. In this regard, we would have had no hesitation to invoke the provisions of article 261 of Constitution, had the Division of Revenue Act, been one of the legislations unequivocally or at least tangentially included in the Fifth Schedule. This leaves us with the need to signal Parliament, which we hereby do, to urgently seal this lacuna, in exercise of its legislative authority of which it has a monopoly. We hasten to add that in the absence of remedial parliamentary action as recommended, any future resurgence of an impasse, is capable of activating the provisions of article 258 of Constitution, thus exposing Parliament to court proceedings in the High Court.

iii. Whether there should be set timelines within which the National Government should release the equitable share of revenue to the County Government

92. Apart from the disruption in their operations occasioned by disagreements between the two Houses over the Division of Revenue Bill, the Applicants also decry the inordinate delay in releasing the equitable revenue by the National Treasury. They submit that so serious are the delays, that they at times receive their exchequer releases at the end of the financial year, when for all practical purposes, they can hardly utilize the funds. It is their contention that this unpredictable and discretionary release of funds by the Treasury violates article 219 of Constitution.

93. The Applicants argue that in order to resolve this recurrent problem and so as to give effect to article 219 of Constitution, the Court should set strict timelines within which the National Treasury must release funds to County Governments. Unless strict timelines are set, submit the Applicants, the entire devolution enterprise will be sabotaged. The Applicants therefore propose that funds should be released within 14 days after the Division of Revenue Act and the County Allocation of revenue Act have been assented to. They cite as authority in support of their submission, the principle established by this court in electoral disputes, to the effect that Constitutional timelines are neither negotiable nor alterable. Also cited as persuasive authority is the decision by the High Court in Law Society of Kenya v. Hon. Attorney General & 2 Others [2016] eKLR in which the Court held that a 14-day time limit would be in concordance with the term "reasonable".

article 219 of Constitution provides that-

> " A county's share of revenue raised by the National Government shall be transferred to the county without undue delay and without deduction, except when the transfer has been stopped under article 225".

94. The uncontestable requirement of article 219 is that the transfer of equitable revenue to Counties shall be affected "without undue delay" [Emphasis added]. Constitution does not set a specific timeline within which the National Government must transfer the funds to Counties. Yet in their submissions, the Applicants contend that without a specific timeline, the National Government has largely disregarded this Constitutional edict. In our view, it all depends on what in this context, constitutes "undue delay". In this regard, unless there are set timelines in Constitution or the law, a

Court has to consider each case on its own merits to determine whether there has been undue delay in the performance of an act by the concerned entity.

95. By stopping short of prescribing a specific time limit, article 219 allows for a degree of flexibility on the part of the National Treasury in effecting monetary transfers to Counties. We would be hesitant to interfere with this arrangement, given the complexity and elasticity of the subject matter. We don't think that this court is the appropriate forum to determine with precision, when monies due to counties, should be actually transferred. However, the fact that Constitution has not prescribed a specific timeline, does not give the National Treasury the latitude to capriciously decide when to disburse funds to the counties. Just like the National Government, Counties operate within rigid budgetary cycles. Any delay in releasing funds to Counties, has to be justifiable and must be explained in good time at a forum convened for that purpose by the National Government. To release funds at a time when the same cannot be realistically utilized in the implementation of county projects as per their budgets constitutes a violation of Constitution.

iv. Whether the National Assembly can enact an Appropriation Act prior to the enactment of the Division of Revenue Act

96. The issue as to whether the National Assembly can enact an Appropriation Act before the enactment of a Division of Revenue Act, arose from the fact that before the resolution of the Impasse between the two Houses of Parliament over the Division of Revenue Bill, the National Assembly nonetheless proceeded to enact the Appropriation Act pursuant to article 221 (6) of Constitution. The enactment had the potential of unlocking funds from the Consolidated Fund for expenditure by the National Government while the Counties remained in limbo as long as the impasse over the Division of Revenue Bill persisted.

97. The arguments by the parties regarding this issue are comprehensively set out in paragraphs 32-42 of this Opinion. It is important to note at the outset that these two pieces of legislation are inextricably linked to the budget making process as provided for by Constitution and the Public Finance Management Act. Thus, any determination of which of them takes priority over the other, must keep track of the sequencing of the budget making process. The actual budgeting is itself a consultative process, involving the National Treasury, Parliament, County Assemblies and the Public. articles 201 and 202 of Constitution provide that revenue raised nationally shall be shared equitably among national and County Governments. article 218 (1) of Constitution provides that-

> "At least two months before the end of each financial year, there shall be introduced in Parliament-
>
> a. a Division of Revenue Bill which shall divide revenue raised by the National Government among the national and county levels of government in accordance with this Constitution; and
>
> b. a County Allocation of Revenue Bill, which shall divide among the counties the revenue allocated to the county level of government on the basis determined in accordance with the resolution in force under article 217".
>
> article 221 0f Constitution provides that-
>
> 1. "At least two months before the end of financial year, the Cabinet Secretary Responsible for finance shall submit to the National Assembly estimates of the revenue and expenditure of the National Government for the next financial year to be tabled in the National Assembly

2. .....

3. The National Assembly shall consider the estimates submitted under clause (1) together with the estimates submitted by the Parliamentary Service Commission and the Chief Registrar of the Judiciary under articles 127 and 173 respectively

4. ....

5. ....

6. When the estimates of National Government expenditure, and the estimates of expenditure for the Judiciary and Parliament have been approved by the National Assembly, they shall be included in an Appropriation Bill, which shall be introduced into the National Assembly to authorize the withdrawal from the Consolidated Fund of the money needed for the expenditure, and for the appropriation of that money for the purposes mentioned in the Bill."

98. It is not overtly clear from the foregoing provisions as to which of the two Bills, takes precedence in the enactment order. What is not in doubt however is that once enacted, the Division of Revenue Act divides the revenue raised nationally between the two levels of Government, while the Appropriation Act authorizes the withdrawal and application of monies from the Consolidated Fund by the National Government. Both the Division of Revenue Bill and the County Allocation of Revenue Bill are to be introduced in Parliament at least two months before the end of each financial year; while the estimates of revenue and expenditure of the National Government are also to be submitted to the National Assembly, at least two months before the end of each financial year.

99. On the basis of the sequencing outlined in the foregoing paragraph, we can derive a number of conclusions. Firstly, the Appropriation Bill cannot be introduced into the National Assembly, unless the estimates of revenue and expenditure have been approved and passed by that House. Secondly, the Appropriation Bill comes into life after the Division of Revenue Bill since the latter would already have been introduced into Parliament at least two months before the end of the financial year. Thirdly, the estimates of revenue and expenditure must logically be based on or at the very least be in tandem with, the equitable share of revenue due to the National Government, as provided for in the Division of Revenue Bill. Fourthly, the Appropriation Act must be based on the equitable share of revenue due to the National Government as provided for in the Division of Revenue Act. Otherwise, what would the National Government be appropriating, if not its share as determined by the latter? It is for this reason that even respective County Governments, must prepare and adopt their annual budget and Appropriation Bills, on the basis of the Division of Revenue Bill passed by Parliament under article 218 of Constitution.

100. It follows in our view that in an ideal situation, the enactment of an Appropriation Act cannot precede the enactment of a Division of Revenue Act. This view is based on the premise that the cabinet Secretary responsible for finance submits the estimates of revenue and expenditure to the National Assembly, in his capacity as the Chief Budget Officer of the Executive. In that capacity, the Secretary must surely base his/her estimates on the National Government's share as provided for in the Division of Revenue Bill. The National Assembly on its part has to approve the estimates of National Government expenditure and the estimates of expenditure for the Judiciary and Parliament on the

basis of the Division of Revenue Act. We are fortified in this position by our reading of Section 39 (3) and (4) of the Public Finance Management Act 0f 2012. Towards this end, sub-section 3 provides that-

> The National Assembly may amend the budget estimates of the National Government only in accordance with the Division of Revenue Act and the resolutions adopted with regard to the Budget Policy Statement ensuring that-
>
> a. an increase in expenditure in a proposed appropriation is balanced by a reduction in expenditure in another proposed appropriation; or
>
> b. a proposed reduction in expenditure is used to reduce the deficit. [Emphasis added]

Similarly, sub-section of 4 provides that-

> Where a Bill originating from a member of the National Assembly proposes amendments after passing the budget estimates and the Appropriations Bill by Parliament, the National Assembly may only proceed in accordance with-
>
> a. the Division of Revenue Act
>
> b. article 114 of this Constitution; and
>
> c. any increase in expenditure in a proposed appropriation is balanced by a reduction in expenditure in another proposed appropriation or any proposed reduction in expenditure is used to reduce the deficit. [Emphasis added]

101. Thus, Section 39 of the Public Finance Management Act leaves no doubt that the National Assembly, cannot enact an Appropriations Act before enacting the Division of Revenue Act. This conclusion therefore dispenses with any submissions to the contrary. Does this determination mean that the current Appropriations Act is unconstitutional? To this, our response is that, in view of the not very precise provisions of Constitution regarding the subject matter, the effect of this determination is prospective and not retroactive. What if Parliament enacts an Appropriation Act before the Division of Revenue Act in future? Our answer is that such an Act, would be of doubtful constitutional validity.

E. Concurring Opinion Of D.k. Maraga, Chief Justice & President Of The Court

102. I have had the advantage of reading in draft the majority Judgment in this Reference. While I entirely concur with it, I would like to make some observations of my own.

103. The four issues identified as the basis of our Advisory Opinion in this Reference revolve around the interpretation, implementation and enforcement of the Kenya Constitution, 2010. They revolve around the realization of the devolution dream in the 2010 Constitution. In a nutshell, they revolve around the perennial issue of the inequitable distribution of the National cake. Sadly, as was the case with the independence Constitution, the implementation of the 2010 Kenyan Constitution is starting to be lopsided. Those upon whom the Kenyans people have bestowed the power and authority to implement the 2010 Constitution and the political elite, safeguarding their personal and often sectarian interests, are cherry picking what to implement.

104. Any Constitution is as good as its implementation. Unless it achieves some measure of Constitutionalism, in abstract, a Constitution is a dead document. A Constitution which provides for respect for human rights but has no effective mechanism of implementation and enforcement of those rights is a hollow Constitution with no Constitutionalism.

105. Constitutionalism entails limited Government and the commitment to be governed by limitations enshrined in each democratic Constitution; Constitutionalism entails implementation that succeeds in reflecting the desires and aspirations of the people; Constitutionalism entails a vibrant implementation that positively "affects and ... improves the reality of people's [lives]."[1] Kenya typifies the best exemplification of what the late Prof. Okoth Ogendo referred to as a Constitutional democracy "without Constitutionalism." Why do I say that?

106. It is common knowledge that in most African countries, the paradox of Constitutions without Constitutionalism is evident. With the end of colonialism, the realization of the African people's dreams, held for decades if not centuries, was "anchored" on their respective independence Constitutions. Sadly, however, to this day, those dreams continue to mere aspirational platitudes.

107. Although, like those of most other African States, the Kenyan independence Constitution embraced the doctrine of separation of powers that mainly focused on securing the sovereignty of State and setting up the governance machinery. After that was achieved, shortly after independence, the political elite, driven by greed and selfish ambitions, jettisoned the concept of Constitutional implementation and instead embarked on, and succeeded in, making numerous amendments, the overall objective of which was to consolidate all state power and authority in the Executive arm of Government, and in particular the Presidency. That led to patrimonialism that did not tolerate any form of opposition, and established what, in the Kenyan parlance, is referred to as the 'imperial presidency'.

108. Instead of entrepreneurs being in the private sector and seeking a reliable legal framework to govern their contracts, in Kenya "the entrepreneurs were those who used, [for selfish gain], State mechanisms which they did not want fettered or questioned, and preferably not accountable to any legal regime."[2] State institutions, including the Judiciary, were subjugated and subordinated to the Executive. Laws that were used for colonial oppression were retained and others introduced to support the State's excesses. The country witnessed some of the monumental plunders of its resources through corruption and outright theft.

109. On the sharing of the National cake, soon after independence, the Executive embarked on a skewed discriminative and exclusionary developmental agenda premised on Sessional Paper No 10 of 1965 on African Socialism and its Application to Planning in Kenya. That created widespread disenchantment among the Kenyan people.[3] In his concurring opinion in The Matter of Speaker of the Senate and Another [2013] eKLR, retired Chief Justice Mutunga gave a litany of the Government's lame duck and poorly conceived initiatives to address the unrelenting demands for equity all of which fell a cropper.

110. As a result of the said acts of impunity, authoritarianism and skewed development, "Kenyans lost respect for ... [their] Constitution and confidence in the political system. Few public institutions enjoyed legitimacy and most [of them] lost the ability to resolve differences among the people or political parties ...."[4] The December 2007 post-election violence for example, was as a result of the opposition parties' refusal to challenge the results of the disputed Presidential election in court on

1 Y Ghai, "Kenyan Constitution: History in the Making: The Challenges of Implementation." Pambazuka News (2010). Available at www.pambazuka.org/en/category/features/66501 (accessed on...

2 Y Ghai, Constitutionalism: African Perspective in The Giant Academic, Essays in Honour of H.W.O.Okoth Ogendo, at page 159-160

3 CKRC Final Report, 2005 p.237.

4 CKRC Final Report (2005), at p. 31.

account of their lack of confidence in the Kenyan Judiciary to effectively and impartially resolve electoral disputes, a critical aspect of Constitutionalism.

111. The decline of public confidence in the Government and public institutions had, long before 2007, led to a clamor for reforms. Kenyans demanded for transparency and independent institutions with legitimate roles in a governance structure that adhered to the rule of law and Constitutionalism. In this regard, they demanded first for a multi-party democracy which led to the first multi-party elections in 1992, and, secondly, for Constitutional reforms which culminated in the promulgation of a new Constitution in 2010.

112. In their views to Constitution of Kenya Review Commission (CKRC), recounting their frustrations, many Kenyans felt they were "subjects ... [and] not citizens" of their own country. To accommodate everyone, they demanded for devolution, which, as is clear from its objects in article 174 of Constitution, would recognize and protect, inter alia, the rights of minorities and marginalized communities; promote social and economic development; and, most importantly, ensure equitable sharing of the National and local resources.

113. To ensure achievement of these dreams, the Kenyans also demanded for the establishment of the Senate that would, as Dr. Mutakha Kangu wrote, represent and protect "the counties and their Governments as well as their interests in the decision-making processes at the National level .... In effect the Senate [was to] represent both the people organized along the lines of the counties and the County Governments ...."[5]

114. Given the chequered history of skewed development, Kenyans did not trust the Executive or Parliament to equitably distribute the National resources. To ensure equity, Kenyans also demanded for the establishment of the Commission on Revenue Allocation.[6] These and other demands were incorporated in the new 2010 Constitution.

115. To pre-empt absolutist exercise of State authority, in its architecture, Kenya's 2010 Constitution also paid fealty to the doctrine of separation of powers, which is the holy grail of modern democratic Constitutionalism, and delegated the exercise of the people's power to, mainly, the three arms of Government.[7] article 1 thereof provides that "All sovereign power belongs to the people of Kenya and shall be exercised only in accordance with [the] Constitution."[8] articles 94(1) and 185(1) respectively vest the Kenyan people's legislative power, at the National level in Parliament and at the County level in County assemblies. Chapter 9 of Constitution vests the people's executive authority at the National level in the National Executive while article 183 vests the people's executive authority at the County level in the County executive committees. article 159(1) of the 2010 Kenyan Constitution delegates the exercise of the people's judicial power to "the courts and tribunals established by or under [the same] Constitution."

116. Besides entrenchment of the doctrine of separation of powers, the Kenya Constitution, 2010, has an elaborate Bill of Rights, including the second-generation Bill of Rights and the concept of devolution. This has led to its billing as one of the world's most progressive and transformative Constitutions which

5 Mutakha Kangu, Constitutional Law of Kenya on Devolution, Strathmore University Press (2015) p. 346.

6 See Final Report of the Committee of Experts on Constitutional Reform (2010), P.72

7 The others are Independent Commissions established under Constitution

8 article 1(1) of the 2010 Kenyan Constitution.

entrenches the doctrine of Constitutional supremacy and binds all persons and organs of State. It is a model Constitution being adopted by nascent democracies in Africa and other parts of the world.

117. In promulgating the 2010 Constitution therefore, especially with elaborate provisions on devolution, the people of Kenya were optimistic that they had put in place institutions, processes and procedures that would facilitate a just and effective governance mechanism for the realization of their hopes and aspirations for a just and equitable society. But has it worked well for Kenyans? Has the 2010 Kenyan Constitution enabled the Kenyan people to realize their dreams of devolution and equitable share of the National cake?

118. Though the Legislature and the Judiciary play critical roles, the primary responsibility of implementing Constitution rests with the Executive arm of Government. It is mainly the Executive that has to formulate and execute appropriate implementing policies. It is mainly the Executive that has to originate various pieces of legislation, amendments and realignments of existing legislations to implement, in particular, non-self-executing provisions of Constitution. Has the Executive arm of Government endeveavoured to thus implement Constitution? Has Parliament played its role in the implementation of Constitution? In my respectful view, they have not.

119. With the above manifest and inescapable historical background in mind and the hankering dreams of the Kenya people pegged on the 2010 Constitution, what is the role of the Judiciary? What is expected of this court in a matter like this the fulcrum of which is equitable distribution of the National resources? Are we supposed to look at it as one of "run-of the mill" cases? I do not think so.

120. As the apex Court in this country, it behoves us, nay, we are obligated by article 259 of Constitution, to have a global view of the problem giving rise to this Reference and give the country appropriate direction. To do otherwise would be a dereliction of our duty and obligation to the Kenyan people.

121. The delegation, by articles 1 and 159(1) of Constitution, of the people's judicial power to "the courts and tribunals established by or under [the same] Constitution" renders the Judiciary the custodian of Constitution.[9] The notion of "delegation", which in most cases is lost sight of, is one of trusteeship, thus rendering the Judges and Judicial Officers trustees or stewards of the people's judicial authority. That position of stewardship obliges the courts and tribunals, in their adjudication of disputes that come before them, to ensure that their interpretation and application of Constitution gives effect to the values and aspirations of the Kenyan people enumerated in that Constitution and other statutory provisions, especially those enacted to implement it. articles 20(3)(a) and 259 (1) succinctly speak to this. Even in the penumbral areas, Constitution has to be interpreted in a manner that: "promotes its purposes, values and principles; advances the rule of law, and the human rights and fundamental freedoms in the Bill of Rights; permits the development of the law; and contributes to good governance."[10]

122. This calls for a purposive interpretation of Constitution. A purposive interpretation recognizes the fact that a Constitution is a living and durable instrument meant to withstand the test of time and serve not only the present but also future generations. As such, it has to be given, not only a holistic and

[9] Yash Ghai and Jill Cottrell Ghai; https:www.standardmedia.co.ke/article/2000024468/judiciary-is-custodian-of-the-new-Constitution. See also Law Society of Kenya & 2 others v Attorney General & 2 others [2018] eKLR where it was stated: "The Judiciary as the custodian of the Judicial authority of the People of Kenya under article 1 (3) (c) of Constitution must take lead role, when applying and interpreting Constitution, to uphold and promote the National Value and principle of the Rule of Law entrenched under article 10 of Constitution and, through it, help combat the spectre as well as reality of impunity in the State and society of Kenya."

[10] article 259(1) of Constitution.

flexible, but also a dynamic, progressive and liberal interpretation unfettered by technicalities and in tandem with societal changing conditions in the broader historical and social context of its enactment.

123. To achieve this aspiration Judges must courageously rise to the occasion and live up to their oaths of office by ensuring that "commitments, duties and obligations contained in the fundamental law of the land [are] scrupulously respected and enforced", otherwise the "political stability [of our country] and [the] confidence required to attract investment" will be in jeopardy.[11] The Judges must keep reminding the political class that there is no absolute Constitutional right[12] and that Constitutional power is constrained power.

124. Most of the issues raised in this Reference were raised in The Matter of Speaker of the Senate and Another (Advisory Opinion No. 2 of 2013); [2013] eKLR. That reference was occasioned by the act of the National Assembly ignoring the Senate in the enactment of the Division of Revenue Bill on the ground the division of revenue between the two levels of Government was not a matter concerning County Governments but a money Bill which fell within the National Assembly's exclusive legislative authority. In that regard, both the Speaker of the National Assembly and the Attorney General contended that the division of revenue fell entirely within the legislative remit of the National Assembly and as such the Senate had no role to play in the matter. That is one of their contentions in this Reference. They also argued, as they have done in this Reference, that the division of revenue is not a matter for this court's advisory opinion.

125. In the said 2013 Reference, referring to its earlier decision in Re the Matter of the Interim Independent Electoral Commission, Sup. Ct. Const. Appl. No. 2 of 2011, at para. 40 of its Judgment, this court opined that "'any matters touching on County Government' [include] ... any National-level process bearing a significant impact on the conduct of County Government." As such, the Division of Revenue Act is a matter that "has a significant impact on the County Governments" which per force requires the full participation of the Senate; that the division of revenue is "...[an urgent] matter of great public importance which may not be suitable for conventional mechanisms of justiciability ..." progressing from the lowest to the highest court and is therefore a matter "in which the Supreme Court's Advisory-Opinion ...[is] most propitious".

126. Instead of complying with those clear pronouncements of this court, the two Houses of Parliament have been taking the country in a circus in their unnecessary tuff wars. Instead of obeying those clear pronouncements of this court, the National Assembly has, in subsequent years, repeated what

11 Charles M. Fombad, Problematising the Issue of Constitutional Implementation in Africa, in the Implementation of Modern African Constitutions, Challenges and Prospects, at p.14.

12 article 19(3)(c) of Constitution contemplates limitation of rights when it provides that, "the rights and fundamental freedoms in the Bill of Rights-are subject only to the limitations contemplated in this Constitution". Further article 24 provides for limitation of rights and fundamental freedoms thus:

1. A right or fundamental freedom in the Bill of Rights shall not be limited except by law, and then only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including-

    a. The nature of the right or fundamental freedom;

    b. The importance of the purpose of the limitation;

    c. The nature and extent of the limitation;

    d. The need to ensure that the enjoyment of rights and fundamental freedoms by any individual does not prejudice the rights and fundamental freedoms of others; and

    e. The relation between the limitation and its purpose and whether there are less restrictive means to achieve the purpose.

provoked the said 2013 Reference for advisory opinion. That is a dangerous course of action which should not be allowed.

127. All State organs and State officers must understand that law comprises not only the provisions of Constitutions and Acts of Parliament but also decisions of Superior Courts. It is trite that until they are set aside, court decisions have to be obeyed by all and sundry; court orders are part of the law of this country and must be obeyed by all. The words of Romer LJ in Hadkinson vs. Hadkinson (1952)2 ALL ER 567, a decision that has been endorsed and applied in many cases in our jurisdiction, succinctly speak to this:

> " It is the plain and unqualified obligation of every person against, or in respect of whom, an order is made by a court of competent jurisdiction to obey it unless and until that order is discharged. The uncompromising nature of this obligation is shown by the fact that it extends even to cases where the person affected by an order believes it to be irregular or even void."

128. As such, the Government as well as State organs and State officers should be in the forefront in obeying and complying with court decisions. As a country, we cannot and should not allow the Government to demand obedience by its citizenry of the law of the land which it is itself disregarding with abandon. No State organ or State officer should be allowed to do that as that will be courting anarchy.

129. This reference was precipitated by, inter alia, the impasse that arose between the two Houses of Parliament on the division of revenue between the two levels of Government during the budget making process of the 2019/2020 financial year. As stated, one of the main points of contention giving rise to that impasse was whether or not the Senate has a role to play in that division.

130. As further stated, like they did in the 2013 reference, the Speaker of the National Assembly (SNA) the Attorney General (AG) and the National Treasury forcibly submitted that the Senate has no role to play in the sharing of revenue between the two levels of Government. According to trio, the Senate's role is restricted to the sharing of revenue among the 47 counties as provided by articles 96(3), 218(1)(b) and 224 of Constitution read together with Section 42 of the Public Finance Management Act (PFMA). Accordingly, the issue of an impasse in the division of revenue between the two levels of Government should never arise. Their position in effect is that the mediation under article 113 does not apply to the division of revenue between the two levels of Government.

131. The AG, in addition submitted that though the term "Parliament" comprises both the National Assembly and the Senate, in article 218, it refers to the two Houses separately. In his view, in Paragraph (a) of Clause (1) of article 218, the term "Parliament" refers to the National Assembly while in Paragraph (b) of that Clause, the term refers to the Senate.

132. On those submissions, both the SNA and the AG invited this court to depart from its previous interpretation on articles 218 and 224 of Constitution in The Matter of Speaker of the Senate and Another, [2013] eKLR where it held that the Senate has a significant role to play in the enactment of the Division of Revenue Act.

133. With profound respect, both the SNA and the AG have misapprehended the role of the Senate with regard to the division of revenue between the two levels of Government in our Constitution. I would like to observe at the outset that article 259(1) and (3) of Constitution obliges everyone to construe Constitution "in a manner that—

> " a. promotes its purposes, values and principles;

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

c. permits the development of the law; and

d. contributes to good governance.

(2) .....

(3) Every provision of this Constitution shall be construed according to the doctrine of interpretation that the law is always speaking...."

134. By this provision therefore, Constitution itself calls for its holistic interpretation. What does holistic interpretation of Constitution entail? In the words of the Ugandan Court of Appeal in the case of Tinyefuza v. Attorney-General, Const. Pet. No. 1 of 1996 (1997 UGCC3), "[T]he entire Constitution has to be read as an integrated whole and no one particular provision destroying the other but each sustaining the other." This means that provisions bearing on the same subject matter must be brought together and given a purposive interpretation[13]. Authorities from other jurisdictions can only be useful and persuasive if they are interpreting provisions of other countries' Constitutions which are in pari materia to ours.

And in the case of Kenya Human Rights Commission & another v Attorney General & 6 others [2019] eKLR the Court of Appeal held that: "In interpreting the provisions of Constitution, courts are called upon to apply the principles aptly set out in the case of Kigula & others vs Attorney General [2005] 1 E.A. 132 at page 133 in the following terms;

> "The principles applicable in the interpretation of Constitution include the widest construction possible in its context, should be given according to the ordinary meaning of the words used, the entire Constitution has to be read as an integrated whole and no one particular provision destroying the other, all provisions bearing on a particular issue should be considered together to give effect to the purpose of the instrument, Constitution should be given a generous and purposive interpretation to realize the full benefit of the guaranteed rights, Constitution of Uganda enjoins Courts in the country to exercise judicial power in conformity with law and with the values, norms and aspirations of the people."

135. With this principle in mind, a careful perusal of articles 95 and 96 of Constitutions makes it clear that the two Houses of Parliament share in the performance of quite a number of functions thus "creating an arrangement in which the two houses represent different interests of the people."[14]

136. article 93(1) defines Parliament as consisting "of the National Assembly and the Senate." So, contrary to the AG's submissions, where the term "Parliament" appears in the Kenyan Constitution, it should always be understood to incorporate both Houses. article 94(1) vests the Kenyan people's legislative authority, at the National level, in Parliament. articles 95 and 96 of Constitution set out the legislative roles of the National Assembly and the Senate respectively. Even a casual perusal of these articles reveals, as stated, that, though separately provided for, the discharge of those functions overlaps and is, in most

[13] In the Matter of Kenya National Human Rights Commission [2014] eKLR, this court stated thus, "... But what is meant by a 'holistic interpretation of Constitution'? It must mean interpreting Constitution in context. It is the contextual analysis of a Constitutional provision, reading it alongside and against other provisions, so as to maintain a rational explication of what Constitution must be taken to mean in light of its history, of the issues in dispute, and of the prevailing circumstances. Such scheme of interpretation does not mean an unbridled extrapolation of discrete Constitutional provisions into each other, so as to arrive at a desired result."

[14] Mutakha Kangu, Constitutional Law of Kenya on Devolution, Strathmore University Press (2015) p. 346.

cases, shared by the two Houses. For instance, under article 95(1) & (2) the Members of the National Assembly, representing the people of the constituencies and special interests, deliberate in the National Assembly and resolve issues of concern to the people. As constituencies are in counties, this is more or less what the Senate does under article 96(1): "The Senate represents the counties, and serves to protect the interests of the counties and their Governments."

137. Under articles 95(5) and 96(4), both Houses exercise oversight of State organs and State officers including the President and his or her the Deputy in the discharge of their respective mandates.

138. The overlap and shared mandate is even more explicit in the two Houses' legislative role. Under article 95(3), the National Assembly enacts legislation in accordance with Part 4 of Chapter 8 of Constitution. That Part runs from articles 109 to 116 of Constitution and deals with the legislative procedure; who and where Bills can be originated; what is "a money Bill" that can only be originated and exclusively passed by the National Assembly; the definition of a "Bill concerning County Government"; special and ordinary Bills concerning counties; mediation where the two Houses of Parliament cannot agree on a Bill; Presidential assent and referral; and the coming into effect of Acts passed by Parliament.

139. The Senate has been given more or less the same roles. Save for the Money Bills, the definition of which I will deal with in a moment, the Senate also participates in the legislation of all the Acts of Parliament in accordance with the self-same Part 4 of Chapter 8 of Constitution. article 96(2) makes this clear: "The Senate participates in the law-making function of Parliament by considering, debating and approving Bills concerning counties, as provided in article 109 to 113."

140. Hon. Kaluma, appearing for the Speaker of the National Assembly, laid particular emphasis on article 95(4)(a) which provides that "The National Assembly—(a) determines the allocation of National revenue between the levels of Government, as provided in Part 4 of Chapter Twelve." He submitted that this provision settles the controversy as to whether the division of revenue between the two levels of Government is a shared function of both Houses. In his view, this provision renders that role an exclusive function of the National Assembly.

141. Part 4 of Chapter 12 of Constitution, which article 95(4)(a) makes reference to, runs from articles 215 to 219. article 215 establishes the Commission on Revenue Allocation and article 216 sets out its functions. article 217 deals with the division of revenue among the counties of the National revenue that is annually allocated to the County level of Government.

142. Although article 96(3) assigns to the Senate the role, in article 217, of division of revenue among counties, that mandate is not exclusive to the Senate. article 217(3), (4) and (5) ropes in the National Assembly in that division. More significantly, one of the criteria employed in the division of that revenue, is the Commission on Revenue Allocation's recommendations which, under article 216 as read with articles 202(1) and 203(1), are submitted to Parliament.

143. Chapter 12 is on Public Finance. The principles of public finance are set out in article 201 while matters of the equitable sharing of National revenue; the equitable share and other laws; the equalization fund; as well as consultation on financial legislation affecting counties are stated in articles 202, 203, 204 and 205 and are addressed to both Houses of Parliament. On the sharing of revenue, article 205 is even more explicit on the involvement of the two Houses:

> "(1) When a bill that includes provisions dealing with the sharing of revenue, or any financial matter concerning County Governments is published, the Commission on Revenue Allocation shall consider those provisions and may make recommendations to the National Assembly and the Senate.

(2) Any recommendations made by the Commission shall be tabled in Parliament, and each House shall consider the recommendations before voting on the Bill." [Emphasis supplied]

144. When it comes to the consideration of the annual division and allocation of revenue Bills, I cannot express better the joint role of the two Houses than article 218 has done:

"

"(1) At least two months before the end of each financial year, there shall be introduced in Parliament—

(a) a Division of Revenue Bill, which shall divide revenue raised by the National Government among the National and County levels of Government in accordance with this Constitution; …."

(b) a County Allocation of Revenue Bill, which shall divide among the counties the revenue allocated to the County level of Government on the basis determined in accordance with the resolution in force under article 217.

(2) Each Bill required under clause (1) shall be accompanied by a memorandum setting out—

(a) an explanation of revenue allocation as proposed by the Bill;

(b) an evaluation of the Bill in relation to the criteria set out in article 203(1); and

(c) a summary of any significant deviation from the Commission on Revenue Allocation's recommendations, with an explanation for each such deviation." [Emphasis supplied]

The Division of Revenue Bill and the Allocation of Revenue Bill are submitted, not to the National Assembly only, but to Parliament.

145. Earlier on I said I would revert to the definition of a "money Bill". article 114(3) of Constitution states that "'a money Bill" means a Bill, other than a Bill specified in article 218…." [emphasis supplied]. I have reproduced verbatim, the provisions of article 218. They relate to the Division of Revenue Bill between the National and County levels of Government and the County Allocation of Revenue Bill which shares among the 47 counties the revenue allocated to the County level of Government.

146. On these clear provisions, it follows that the annual Division of Revenue Bills which divide revenue between the two levels of Government and the County Allocation of Revenue Bills which share out among the counties the revenue allocated to the County level of Government are not "money Bills" for the exclusive consideration of the National Assembly as required by article 109(5) of Constitution. As is clear from article 114(3), a money Bill is one which deals with imposition of taxes and investment of Government money as well as borrowing by the Government. With the unequivocal provision of article 114(3) of our Constitution, authorities from other jurisdictions which are not in pari materia t0 ours are, with respect, not applicable or useful in the determination of what a money Bill is in our law.

147. Heavy weather was also made of what a matter or Bill "concerning a County Government" means. On finances, article 110(1)(c) defines "a Bill concerning County Government" as "a Bill referred to in Chapter Twelve affecting the finances of the County Governments." As stated, Chapter Twelve of

Constitution is on finances. article 218(1)(a) which relates to the Division of Revenue Bill between the two levels of Government and the sharing of revenue among the counties, is in Part 4 of that Chapter. It will be recalled that article 96(1) & (2) provides that the Senate "represents the counties, and serves to protect the interests of the counties and their Governments." The Senate also "participates in the lawmaking function of Parliament by considering, debating and approving Bills concerning counties, as provided in articles 109 t0 113."

148. With these explicit provisions, how can anyone claim that the Senate, created for the sole purpose of protecting interests of counties and ensuring the success of devolution, has no role to play in the enactment of the Division of Revenue Act which divides revenue between the two levels of Government? How can anyone argue that the Senate has no role to play in allocation of revenue to the County level of Government "which ... [allocation] certainly affects the functioning of County Governments."[15] With these explicit provisions, how can anyone claim that the division of revenue between the two levels of Government is an exclusive function of the National Assembly?

149. I reiterate what this court said in 2013:

> "It is quite clear to us that the Division of Revenue Bill is a Bill bearing provisions that deal with the equitable sharing of revenue – which will certainly affect the functioning of County Government .... The Bill deals with equitable allocation of funds to the counties, and so any improper design in its scheme will certainly occasion inability on the part of the County-units to exercise their powers and to discharge their functions as contemplated under Constitution."[16]

150. In my view, a purposive interpretation of articles 95(4)(a) & (b); 96(2); 110(1)(c); 114(3); 205; and 218(1)(a) of Constitution read together with Sections 38 to 41 of the PFMA, makes it quite clear that both the National Assembly and the Senate play a role in the division of revenue between the two levels of Government.

151. And with those findings, I join the majority in dismissing the pleas by the Speaker of the National Assembly, the Cabinet Secretary for Finance and the Attorney General that we depart from this court's 2013 decision in The Matter of Speaker of the Senate and Another [2013] eKLR. To the contrary, the majority and I reaffirm that decision. I hope this is the last time this or any other court is called upon to pronounce itself on the issue that, in our current Constitutional architecture, the division of revenue between the two levels of Government is one of the central issues concerning County Governments demanding the full participation of the Senate as required by articles 96(2) of our Constitution. The National Assembly should never again subject the country to the anxiety it did last year.

152. Let me add that, as representatives of the people of Kenya, the National Assembly should join hands with the Senate to ensure equitable distribution of the National cake. The National Assembly should ensure that enough resources are devolved to counties to guarantee equitable development. Parliament should ensure that the plunder of National resources, both at the County and National level, is firmly dealt with to enable Kenyans realize their dream of devolution. Parliament should ensure equity in sharing of the meagre National resources that we have.

153. Unless decisive action is taken to address the historical injustices engendered by the skewed development founded on Sessional Paper No. 10 of 1965 and subsequent policies; unless decisive action is taken to address the income and resource allocation inequalities in this country; unless decisive

15 The Matter of Speaker of the Senate and Another v. The Honourable Attorney General & 4 others, [2013] eKLR at par. 114

16 The Matter of Speaker of the Senate and Another v. The Honourable Attorney General & 4 others, [2013] eKLR at par. 114

action is taken to address the soaring unemployment; and unless decisive action is taken to address the looting of public resources through corruption; only the naïve will fail to see that we are sitting on a powder keg the detonation of which will render the 2007/08 post-election skirmishes child play.

E. Dissenting Opinion of Njoki S. Ndungu, SCJ

154. The Court has given its opinion on four issues as were identified in this court's Ruling of 8th October 2019. I concur on two of those issues and agree with my fellow brother Judges as regards the questions as to:

    v. Whether the recommendation by the Commission on Revenue Allocation, is binding upon both Houses during deliberations concerning the Division of Revenue Bill and the Appropriation Bill; and

    vi. Whether there should be timelines within which the National Government should release the equitable share of revenue to County Governments;

155. I however find that I am unable to agree with the reasoning and the consequential conclusion of the majority of the Court on the two other issues for the reasons stated below. I shall proceed to illuminate the principles that lead to my conclusion without reiterating the submissions of counsel on the underscored issues, since these are elaborately elucidated in the majority-opinion.

i. What happens when the National Assembly and the Senate fail to agree on a Division of Revenue Bill thereby triggering an Impasse?

a. Invitation to depart from the Court's previous decision with regard to the process relating to the Division of Revenue.

156. My brother Judges in the Majority are of the view that this court is being moved in a perfunctory manner to depart from their previous decision in The Matter of Speaker of the Senate and Another (Advisory Opinion No.2 of 2013); [2013] eKLR, (hereinafter referred to as the Senate matter 2013). They are of the opinion, that any party contemplating such action ought to have made a formal application to depart from that previous decision, based on which application this court would be empowered to arrive at a considered decision. As this was not done, the bench-majority states that it was unable to consider the merits of the Speaker's arguments.

157. With respect, I do not agree that a formal application to depart is required where the matter at hand is an Advisory Opinion; primarily because in Advisory Opinions, there are no interests at stake, as would normally be the case in adversarial proceedings. The nature of the Court's Advisory Opinion jurisdiction does not flow from any contest of rights or claims disposed of by regular process. As such, in exercising this jurisdiction, this court should not be constrained by procedures required in ordinary proceedings before this court.

158. Firstly, the Supreme Court is not bound by its decision in the Senate Matter 2013 because Constitution anticipates that there will be occasional need for the Supreme Court to depart from its own previous decisions. article 167(3) of Constitution buttresses this assertion.

159. Secondly, this court has previously stated with clarity that 'while rendering an Advisory Opinion under article 163(6) of Constitution, it may undertake any necessary interpretation of Constitution.' (In the Matter of Interim Independent Electoral Commission, Constitutional Application No. 2 of 2011 [2011] eKLR, at paragraphs 43 and 44). Therefore, the Court's revision of its prior decision relating to a similar matter to the current one before it, would not cause prejudice to any party but rather clarify

and outline a harmonious and comprehensive picture of the requirements for the legislative process and roles for the two Houses as provided under Constitution.

160. In addition, I disagree with the majority position that this court was moved on this review issue without real interest or effort. The Speaker of the National Assembly filed his written submissions on the reframed issues on 3rd December 2019. A large portion of his submissions (pages 12-19) focus on persuading this court to depart from its decision in the Senate Matter 2013.

161. The Speaker of the National Assembly's submissions expounded on the architecture of Constitution of Kenya as far as the roles of the National Assembly and the Senate are concerned, outlining the exclusive role of the National Assembly in the Division of Revenue between the National and County Governments and pointing out how the Senate's role is restricted to County Allocation Bill, as per articles 96(3) and 128 (1) (b) and 224 of Constitution as well as the Public Finance Management Act.

162. The Speaker submits that the Court should depart from its Advisory Opinion in the Senate Matter 2013 because it was per incuriam. Counsel urges that it is therefore in the public interest for the Court to depart from that decision, and that this court can depart from its decision where it is right to do so.

163. The Attorney General and Cabinet Secretary Treasury's submissions on the reframed issues filed on 20th January 2020 also address this issue on pages 8-10. Both Parties reiterate and support the submissions of the Speaker of the National Assembly that pursuant to article 163(7) of Constitution the Supreme Court is not bound by its decisions. They also cite the Jasbir Singh Rai Case and urge the Court to depart from its Opinion in Senate Matter 2013. They submit that according to the Jasbir Singh Rai Case, the only thing the Court must do is to find whether there is good cause, and there is good cause here: in that, in order to effectively address the second issue before the Court, (what happens in the event of an impasse?), the Senate Opinion of 2013 must be reviewed.

164. Both the Attorney General and Cabinet Secretary Treasury urge the Court to depart from its opinion in the Senate matter 2013, and hold that only the National Assembly ought to be involved in the discussion of the Division of Revenue Bill and the enactment of the Division of Revenue Act.

165. It is also submitted that should the Court fail to depart from the foregoing opinion, conflicts between the two Houses of Parliament in the division of revenue process will remain a real - and perhaps inevitable - possibility.

166. I am convinced, on the basis of the foregoing submissions, that the request to depart from the Senate matter 2013 was not casually done. In my opinion, a lot of thought, real interest, and effort went into making that proposition.

167. I am of the opinion that the decision of the Majority in the Senate matter 2013 ought to be reviewed especially because it did not take into account the architectural design of Constitution and the legislative processes that derive from that design, with regards to the roles of the two Houses of Parliament as set out in articles 95 and 96 and part 4 of Chapter 12 of Constitution. This design is intended to avoid situations where disputes between the two Houses of Parliament defeat or delay important aspects of public finance and potentially throw the country into chaos by rendering operations by either level of government impossible or impractical. In particular, that architecture and design as drawn by the drafters of Constitution, established which House originates the Division of Revenue (DOR) Bill, as a money bill and what is to happen when there is an impasse over a money bill.

168. It is imperative to look at how this design has been utilized in other jurisdictions and what is considered best practice in legislative terms. One finds that where a deadlock or impasse between two houses exists, in most jurisdictions, resolution is found by allowing the final determination to be made by the

house with veto powers, which is the house that originates the Division of Revenue Bill. Also, in other democratic and bicameral jurisdictions, the DOR Bill is considered to be a money bill and therefore the legislative processes that apply to money bills apply to it.

169. In my view, a review of the 2013 decision and a detailed, exhaustive analysis would have established that this court overstepped its bound by allocating to the Senate a role which the drafters of Constitution had not envisioned nor anticipated; that role of participating as an equal partner to the National assembly in the legislative processes regarding the Division of Revenue Bill.

In the Senate Matter 2013 Decision, the bench-Majority declared (at paragraph 117):

> " [117] ..... Upon reflecting on this question, taking into account the comparative material placed before us by counsel, we came to the conclusion that the Division of Revenue Bill is not a "money Bill," in the terms of article 114(3) of Constitution. It has become clear to us that a "money Bill", in a proper case, may only be introduced in the National Assembly, though it is not a settled question whether the Senate may subsequently participate in the relevant legislative deliberations."

170. I do believe that a review of, and departure from, the 2013 decision would have allowed this court to make some observations on bicameral Parliaments such as ours particularly with regards to the origination of Bills. It has consistently been my stance that the Division of Revenue Bill is a money Bill that can only be introduced by the National Assembly in accord to article 109 (5) of Constitution.

171. This view is reinforced by Constitution, which outlines the Role of the National Assembly in article 95 in the following terms:

Role of the National Assembly

95.(1) The National Assembly represents the people of the constituencies and special interests in the National Assembly.

(2) The National Assembly deliberates on and resolves issues of concern to the people.

(3) The National Assembly enacts legislation in accordance with Part 4 of this Chapter.

(4) The National Assembly -

(a) determines the allocation of national revenue between the levels of government, as provided in Part 4 of Chapter Twelve;

(b) appropriates funds for expenditure by the national government and other national State organs; and

(c) exercises oversight over national revenue and its expenditure...

172. article 95 of Constitution is categorical that the National Assembly budgets, collects, shares between the levels of government, and audits revenue. It also has a general oversight function which of necessity means it has to be in constant communication with the National Treasury over the finances of the Country. In addition, article 218 of Constitution provides that a Division of Revenue Bill shall divide revenue raised by the National Government among the National and County levels of government in accordance with Constitution.

173. Accordingly, to my mind, the House which originates the Division of Revenue Bill is the National Assembly, the people's representatives. In other words, it is the National Assembly as the people's

representative that budgets, collects, shares between the levels of government and audits revenue and it is knowledgeable on the finances of the Country. Thus, with the benefit of such knowledge it is the House best placed to originate the Division of Revenue Bill as it finances the revenue share and proposes revenue collection forecasts in the requisite division. In the event of a deadlock between the Senate and National Assembly, then the National Assembly as the Originating house should have final say or even veto powers. Comparative jurisprudence on this issue is also persuasive.

174. In the United States of America (U.S), article I, Section 7, clause 1 of the U.S. Constitution, is known generally as the "Origination Clause" because it requires that:

> " All Bills for raising Revenue shall originate in the House of Representatives; but the Senate may propose or concur with amendments as in other Bills."

175. The idea that money Bills should originate in the popularly elected chamber of the legislature was not a novel one, rather it was a product of the colonial experience, which is replicated in the entire Commonwealth. The overarching view being that taxation and representation are firmly linked and only the people's representatives were accorded that duty.

176. In the U.S, as the House of Representatives is most frequently called upon to enforce the Origination Clause, its precedents have played a primary role in defining what makes a bill for raising revenue. Although the US Senate's role in determining what constitutes a bill for raising revenues is less prominent than that of the House of Representatives, its precedents have, nevertheless, also shaped the application of the Origination Clause. The primary impact of Senate practices, however, has been to underscore the House's interpretation of what constitutes revenue in a Constitutional sense.

177. article I, Section 7, provides that the Senate may propose or concur with amendments as on other bills, but there have been occasions on which either the House or Senate has debated the question of how expansively the Senate's amending authority should be interpreted. Some of the earliest precedents show that in the 19th century the House sometimes exhibited a fairly restrictive view of the Senate's authority to amend a revenue bill and regarded the Origination Clause as limiting the Senate only to germane amendments. Enforcement of the Origination Clause is a Constitutional privilege of the House of Representatives and as such it has ultimate control.

178. In the United Kingdom, Section 1(1) of the Parliament Act 1911 provides that the House of Lords may not delay a money bill for more than a month. It is at the discretion of the Speaker of the House of Commons to certify which bills are money bills, and his decision is final and is not subject to challenge. Section 1(2) of the Act states:

> " A Money Bill means a Public Bill which in the opinion of the Speaker of the House of Commons contains only provisions dealing with all or any of the following subjects, namely, the imposition, repeal, remission, alteration, or regulation of taxation; the imposition for the payment of debt or other financial purposes of charges on the Consolidated Fund, the National Loans Fund or on money provided by Parliament, or the variation or repeal of any such charges; supply; the appropriation, receipt, custody, issue or audit of accounts of public money; the raising or guarantee of any loan or the repayment thereof; or subordinate matters incidental to those subjects or any of them. In this Sub-section the expressions "taxation," "public money," and "loan" respectively do not include any taxation, money, or loan raised by local authorities or bodies for local purposes."

179. It is useful to note that this Act was enacted following Constitutional crisis which had begun in November 1909 when the Conservative-dominated House of Lords rejected the Liberal Government's

'People's Budget'. The Parliament Bill sought to remove the power of the House of Lords to reject money Bills and to replace the Lords' veto over other public bills with the power of delay. It also proposed the reduction of the maximum duration of a Parliament from seven years to five. The House of Lords passed the Parliament Act by a 131-114 vote in August 1911.

180. Canada also has a bicameral Parliament. The Senate, or upper House, is composed of 105 Senators appointed by the Governor-General on the advice of the Prime Minister—subsequent to a recommendation by the Independent Advisory Board for Senate Appointments—to represent Canada's regions, provinces, and territories. The House of Commons, or lower House, is the elected assembly of the Parliament of Canada. Its members are elected by Canadians to represent defined electoral districts or constituencies, also known as ridings.

181. Bills calling for the spending of public revenues or for the imposing of taxes must originate in the House of Commons. Once introduced, a bill is subjected to a detailed process of review, debate, examination, and amendment through both Houses before it is ready to receive final approval.

182. India's Parliament is comprised of three constituents, namely the President of India, the Rajya Sabha (Council of the States), and the Lok Sabha (House of the People). articles 198 and 199 of Constitution of India lay out the procedure for legislating on money Bills. A Money Bill, which deals with inter alia, taxation, expenditure, and credits of the union government, consolidated funds, may only be introduced in Lok Sabha, on the recommendation of the President. It must be passed in Lok Sabha by a simple majority of all members present and voting. Following this, it may be sent to the Rajya Sabha for its recommendations, which recommendations the Lok Sabha may reject if it chooses to. In other words, the Rajya Sabha cannot amend the bill; it can only recommend amendments. The absolute powers are vested in Lok Sabha. If Rajya Sabha's recommendations are not given within 14 days, it will be deemed to be passed by Parliament.

183. The South African Constitution on which Constitution of Kenya is largely modeled is also persuasive in this aspect. Section 73 (2) (b) provides:

> " National Legislative Process
>
> All Bills
>
> 73. (1) Any Bill may be introduced in the National Assembly.
>
> (2) Only a Cabinet member or a Deputy Minister, or a member or committee of the National Assembly, may introduce a Bill in the Assembly, but only the Cabinet member responsible for national financial matters may introduce the following Bills in the Assembly:
>
> (a) a money Bill; or
>
> (b) a Bill which provides for legislation envisaged in Section 214."

184. Section 214 provides:

> " Equitable shares and allocations of revenue
>
> 214. (1) An Act of Parliament must provide for—
>
> (a) the equitable division of revenue raised nationally among the national, provincial and local spheres of government;

(b) the determination of each province's equitable share of the provincial share of that revenue; and....

185. The South African Money Bills Amendment Procedure and Related Matters Act, Act No. 9 2009 (as amended by Act No. 13 of 2018: Money Bills Amendment Procedure and Related Matters Amendment Act, 2018) provides at Section 9:

> " Passing the Division of Revenue Bill
>
> 9. (1) After the adoption of the fiscal framework the Division of Revenue Bill must be referred to the committee on appropriations of the National Assembly for consideration and report.
>
> (2) After the Division of Revenue Bill is passed by the National Assembly and referred to the National Council of Provinces, the Bill must be referred to the committee on appropriations of the National Council of Provinces for consideration and report.
>
> (3) The Division of Revenue Bill must be passed no later than within 35 days after the adoption of the fiscal framework by Parliament or as soon as reasonably possible thereafter..."

186. These provisions are instructive that a Bill under Section 214 that provides for equitable division of revenue may only be introduced by the Cabinet Member responsible for national financial matters and only in the National Assembly, which then passes it. This bolsters my opinion that any legislation with regard to sharing of revenue between two or more levels of government is originated in the House charged with the responsibility of national revenue collection.

187. In Japan, the Diet is the highest organ of state power and is the sole law-making organ of the State. It consists of two Houses, namely, the House of Representatives and the House of Councillors. Members of both Houses are elected representatives of all the people. article 59 of Constitution of Japan provides that:

> " A bill becomes a law on passage by both Houses, except as otherwise provided by Constitution. A bill which is passed by the House of Representatives, and upon which the House of Councillors makes a decision different from that of the House of Representatives, becomes a law when passed a second time by the House of Representatives by a majority of two-thirds or more of the members present. The provision of the preceding paragraph does not preclude the House of Representatives from calling for the meeting of a joint committee of both Houses, provided for by law."

article 60 further provides:

> " The budget must first be submitted to the House of Representatives. Upon consideration of the budget, when the House of Councillors makes a decision different from that of the House of Representatives, and when no agreement can be reached even through a joint committee of both Houses, provided for by law, or in the case of failure by the House of Councillors to take final action within thirty (30) days, the period of recess excluded, after the receipt of the budget passed by the House of Representatives, the decision of the House of Representatives shall be the decision of the Diet."

188. It is arguable that the veto power granted to the House of Representatives on budgetary and revenue issues is premised on the fact that that is the House best placed to serve the interests and aspirations of the people.

189. In conclusion, from the above global practice and Constitutional design and I reiterate as I so stated in my dissent in the Senate Matter 2013, that the DOR bill is a money bill and that the legislative processes relating to it as such ought to be followed under article 105. If this is done, then the solution where there is disagreement between the houses is resolved as it was so intended by the drafters of our Constitution. It is my considered opinion that the decision by the Majority to find otherwise in the Senate Matter 2013, threw the anticipated Constitutional processes relating to the passage of the DOR Bill into disarray. Having upset this architectural design and related Constitutional processes, the Senate 2013 Decision inevitably means that Parliament will always be plagued by the deadlocks such as are before this court. It is, therefore, my considered view that it was in the public interest for this court to review its Opinion in the Senate Matter 2013.

(ii) On the question of allocating revenue to the County Governments where the enactment of DOR has been delayed?

190. It is not in dispute that the business of Government should not come to a standstill because of disagreement between the two Houses over the Division of Revenue Bill. Indeed, the question of how to deal with expenditure necessary to carry on the services of the County Government during that year until such time as the Division of Revenue Act is assented to is a pertinent one.

191. In my view the answer is to be found within the existing laws. article 203 (2) of Constitution guarantees County Governments an equitable allocation of a minimum of fifteen percent of all national revenue collected by the National Government. As such, this amount ought to be readily available to the County Governments as it is already allocated under Constitution and is readily ascertainable. Further, obtaining these funds ought not to be subjected to the bicameral legislative process. As it is a direct charge on the behest of Constitution, all that needs to be done, pursuant to article 206 (4) of Constitution, is to seek the approval of the Controller of Budget to authorize the withdrawal of this amount from the Consolidated Fund. In the event of delay in the passage of the DOR, use of article 206(4) provides a tidy and efficient solution.

192. In my view, it would not be appropriate to approach the issue as has been done by the Majority in this matter. The bench-majority are of the view that in the event of an impasse between the two houses of Parliament:

> " the National Assembly shall, for the purpose of meeting the expenditure necessary to carry on the services of the County Government during that year until such time as the Division of Revenue Act is assented to, authorize the withdrawal of money from the Consolidated Fund."

Further they state that:

> " it is our view that in the event of an impasse, the percentage of the money to be withdrawn be based on the equitable allocation to Counties in the Division of Revenue Act of the preceding financial year. In keeping with the spirit of article 222 (2) (b) of Constitution, the money to be withdrawn shall be 50% of the total equitable share allocated to the Counties in the Division of Revenue Act." (emphasis added)

193. With respect to the majority, this is untenable because, in the simplest terms, such a proposal renders itself as a major breach of the doctrine of separation of powers. Allocation of revenue is a task that falls squarely on the Executive and the Legislature. Any proposal from this court, directing or recommending action to be taken by Parliament and what percentage should be allocated to the Counties, is not only an attempt to amend Constitution, but is tantamount to supervising the work of Parliament and endangering the institutional comity between the three arms of government. It must always be remembered that the core function of the Judiciary is to interpret and apply laws; not make them. It is my considered opinion that to ask this court to direct Parliament on how and when it should allocate monies to the counties, outside of any Constitutional provision - and when in plain language the powers to do so rests with the National Assembly - would amend Constitution in a manner not recognized by the Supreme law. As I stated in my opinion in In the Matter of the Speaker of the Senate & Another, Advisory Opinion Reference No. 2 of 2013 [2013] eKLR (see para. 285):

> "…. An option that is not open to the parties in this matter is for an amendment of Constitution through an edict or opinion of this court. I must be categorical and repeat for reasons of certainty, that whatever the case may be, the tools for reviewing Constitution to address restructuring of authority, power and functions of the Legislature and the roles of the Senate and the National Assembly lie squarely in a political and not judicial process."

194. It therefore follows that although the bench-majority are of the view that they are protecting Constitution, they are in fact, in my opinion, re-writing Constitution and dare I say, for lack of a better term, meddling, with a political and budgetary process in which they have no expertise. The simple solution for this issue is to point out to Parliament that they need to solve this with finality by enacting relevant legislation, including - if necessary – by amending Constitution. The Supreme Court cannot supplant this Parliamentary role through a judgment edict of its own.

195. Further, it is my considered opinion that article 10 of Constitution provides in mandatory terms that:

> "10. (1) The national values and principles of governance in this article bind all State organs, State officers, public officers and all persons whenever any of them–
>
> (a) applies or interprets this Constitution;
>
> (b) enacts, applies or interprets any law; or
>
> (c) makes or implements public policy decisions."...

196. In the Senate Matter 2013 I observed, "...judicial resolution is not appropriate where it is clear in a matter such as this that the political question doctrine will apply. Under this doctrine, the interpretation of Constitution is left to the politically accountable branches of government." The interpretation of Constitution, therefore, is not an exclusive duty and preserve of the Courts but applies to all State organs including Parliament. Neither the Senate nor the National Assembly are oblivious to this fact as is evident in the pleadings before this court. The Speaker of the National Assembly in Communication from the Chair No. 44 0f 2019 dated 2nd August 2019 (see Senate's Replying Affidavit sworn on 13th August 2019 pages 299-310) makes pertinent legal observations in his communication. Key among them (pg. 303):

> "Hon. Members, you will agree with me that no single provision of Constitution can be read or interpreted in isolation. Indeed, article 259 provides that Constitution must be interpreted in a manner that, among others, promotes its purposes, values and principles, advances the rule of law; and permits the development of the law.....Therefore it goes

> without saying that interpretation of Constitution must be done in a holistic manner. Parliament must lend credence to the doctrine of interpretation that the law is always speaking. The framers of Constitution did not envisage a situation where the various articles of Constitution would be construed in the form of a staccato speech consisting of various disjointed provisions. Rather, the manner of the speech contemplated by Constitution is that of a logical sequence, with a smooth ebb and flow.....Parliament must be at the forefront in demonstrating the respect of the Rule of Law. As the institution in which the legislative authority is vested, Parliament has a higher threshold with regard to the obligation to respect, uphold and defend Constitution."

197. Certainly then, what is exclusive to the Courts is the interpretation of Constitution in a dispute resolution process. Disputes, however, do exist in other forms that do not require judicial intervention and determination, but rather the resolution of a political nature. The issues of an inter-Parliamentary deadlock or impasse, the division and allocation of revenue are matters that require political and not judicial intervention.

198. this court ought to have taken judicial notice that there currently exists a National Assembly Bill, The Public Finance Management (Amendment) Bill, 2019. This Bill seeks to "put into place interim measures to allow county governments to access their minimum share of revenue already guaranteed and granted to them by article 206(2) of Constitution to enable them offer services to the public pending enactment of the Division of Revenue Bill by Parliament in the event the Bill is not enacted within the timelines set."

199. The Senate, cognizant that County Governments can also boost their revenue collection prowess pursuant to article 207 (1) of Constitution, also have a pending Bill, The Public Finance Management (Amendment) Bill, 2019. This seeks to design, develop and implement a county revenue collection system.

200. These Bills point to the fact that the Legislature is acutely aware of the consequences of failing to pass the Division of Revenue Bill. They also show the incremental steps Parliament can and is taking to mitigate the problem. I believe the majority ought to steer clear of this Legislative and political process because Parliament itself can and will alleviate the problem.

vii. On the proposal for dissolution of Parliament in the event of a disagreement between the two Houses

201. I am in agreement with the majority that there exists a lacuna on what should happen [if] the two Houses of Parliament fail to reach an agreement [on the DOR] thus reining the stalemate. In doing so, I only agree to the extent that I have stated above, that that particular lacuna has been created by this court in the Senate Matter 2013 and if that decision was rescinded then the legal path would be clear and no lacuna would exist. However, under the circumstances, as the Majority has declined to review that decision, the only path left is for Parliament to make the necessary Constitutional and legislative amendments to clarify whether the DOR is a money bill and what legislative processes then should apply to its passage including the resolution of disagreements between the 2 Houses. There are other, alternative, Constitutional solutions to a bicameral Parliamentary system impasse that can be found in line with accepted global practice.

202. A case in point is Australia's Federal Parliament, which consists of the Senate, and the House of Representatives. The Senate is elected by proportional representation. Members of the House of Representatives are elected through the preferential voting system, under which voters rank candidates in order of preference.

203. All proposed laws (bills) must be passed by both houses. The Senate's law-making powers are equal to those of the House of Representatives except that it cannot introduce or amend proposed laws that authorize expenditure for the ordinary annual services of the government or that impose taxation. Section 53 of the Australian Commonwealth Constitution is instructive in this regard:

> " Powers of the Houses in respect of legislation
>
> Proposed laws appropriating revenue or moneys, or imposing taxation, shall not originate in the Senate. But a proposed law shall not be taken to appropriate revenue or moneys, or to impose taxation, by reason only of its containing provisions for the imposition or appropriation of fines or other pecuniary penalties, or for the demand or payment or appropriation of fees for licences, or fees for services under the proposed law.
>
> The Senate may not amend proposed laws imposing taxation, or proposed laws appropriating revenue or moneys for the ordinary annual services of the Government.
>
> The Senate may not amend any proposed law so as to increase any proposed charge or burden on the people.
>
> The Senate may at any stage return to the House of Representatives any proposed law which the Senate may not amend, requesting, by message, the omission or amendment of any items or provisions therein. And the House of Representatives may, if it thinks fit, make any of such omissions or amendments, with or without modifications.
>
> Except as provided in this Section, the Senate shall have equal power with the House of Representatives in respect of all proposed laws."

204. Since the Senate cannot amend such laws, it can request that the House of Representatives make amendments to financial legislation and it can refuse to pass any bill. If a proposed law passed by the House is rejected by the Senate or passed with amendments to which the House will not agree, or the Senate fails to pass the bill, then Constitutional means for resolving the disagreement between the Houses commences, with a 'double dissolution' provided for by Section 57 of Constitution whereby both Houses are dissolved simultaneously.

205. Australia's Commonwealth Constitution Section 57 provides:

> " Disagreement between the House
>
> If the House of Representatives passes any proposed law, and the Senate rejects or fails to pass it, or passes it with amendments to which the House of Representatives will not agree, and if after an interval of three months the House of Representatives, in the same or the next session, again passes the proposed law with or without any amendments which have been made, suggested, or agreed to by the Senate, and the Senate rejects or fails to pass it, or passes it with amendments to which the House of Representatives will not agree, the Governor-General may dissolve the Senate and the House of Representatives simultaneously. But such dissolution shall not take place within six months before the date of the expiry of the House of Representatives by effluxion of time.
>
> If after such dissolution the House of Representatives again passes the proposed law, with or without any amendments which have been made, suggested, or agreed to by the Senate, and the Senate rejects or fails to pass it, or passes it with amendments to which the House of Representatives will not agree, the Governor-General may convene a joint sitting of the members of the Senate and of the House of Representatives.

> The members present at the joint sitting may deliberate and shall vote together upon the proposed law as last proposed by the House of Representatives, and upon amendments, if any, which have been made therein by one House and not agreed to by the other, and any such amendments which are affirmed by an absolute majority of the total number of the members of the Senate and House of Representatives shall be taken to have been carried, and if the proposed law, with the amendments, if any, so carried is affirmed by an absolute majority of the total number of the members of the Senate and House of Representatives, it shall be taken to have been duly passed by both Houses of the Parliament, and shall be presented to the Governor-General for the Queen's assent."

206. A fundamental feature of Section 57 is that in the process of settlement of deadlocks, it operates in one direction only: it applies to legislation passed by the House of Representatives, which has failed to pass, or been rejected by the Senate. It does not apply to legislation initiated in and passed by the Senate to which the House of Representatives disagrees with. As such, Constitution asserts the primacy of the House of Representatives as the 'people's house' and the chamber of Government. While it is the actions of the Senate, which create the grounds for a double dissolution, the decision to resort to Section 57 is taken by the Government.

207. An essential purpose of Section 57 is that in the exclusive powers of the House of Representatives with regard to the initiation and amendment of money bills, there is a predominating national element; which is emphasized in the 'deadlock clause', which is designed to ensure that a decisive and determined majority in the national chamber shall be able to overcome the resistance of a majority in the Senate.

208. In a nutshell, Section 57 is to the effect that legislative conflict must be resolved either within the Parliament, through negotiation and compromise on specific issues, or outside it, by means of an election to decide who is to govern. Therefore, the resolution of legislative deadlock must happen either through the formal Constitutional processes or through the practical workings of the political system. Perhaps this is one route our Parliament can consider as they engage on a solution to our current problem.

viii. On Budget Processes and timelines: a reflection and proposal for resolution

209. Finally, I would like to make some observations on the budgetary time-lines and related provisions that are to be found in Constitution, in Statute and subsidiary legislation, and which invariably have contributed to some of the untidiness that has been reflected in the delivery of the DOR Bill and other related legislation.

210. Section 191(1) of the Public Finance Management Act (PFM) stipulates that each year when the Budget Policy Statement is introduced (as per Section 25 of the PFM Act, the Budget Policy Statement is introduced to Parliament by the 15th February), the Cabinet Secretary shall submit to Parliament a Division of Revenue Bill and County Allocation of Revenue Bill prepared by the National Treasury as provided in this Act for the financial year to which budget relates. Specifically, that Section states:

> 191. (1) Each year when the Budget Policy Statement is introduced, the Cabinet Secretary shall submit to Parliament a Division of Revenue Bill and County Allocation of Revenue Bill prepared by the National Treasury as provided in this Act for the financial year to which that Budget relates.
>
> (2) The Division of Revenue Bill shall specify the share of each level of government of the revenue raised nationally for the relevant financial year.
>
> (3) The County Allocation of Revenue Bill shall specify— (a) each county's share of that revenue under subsection (2); and (b) any other allocations to the counties, from the national

government's share of that revenue, and any conditions on which those allocations shall be made.

(4) Before the submission of the Division of Revenue Bill and County Allocation of Revenue Bill, the Cabinet Secretary shall notify- (a) the Intergovernmental Budget and Economic Council; and (b) the Commission on Revenue Allocation.

(5) When the Division of Revenue Bill or County Allocation of Revenue Bill is submitted, it shall be accompanied by a memorandum which explains— (a) how the Bill takes into account the criteria listed in article 203(1) of Constitution; (b) the extent of the deviation from the Commission on Revenue Allocation's recommendations; (c) the extent, if any, of deviation from the recommendations of the Intergovernmental Budget and Economic Council; and (d) any assumptions and formulae used in arriving at the respective shares mentioned in Sub-sections (2) and (3).

211. However, Constitution under article 218, provides that at least two months before the end of each financial year, there shall be introduced in Parliament a Division of Revenue Bill and a County Allocation of Revenue Bill. It provides that:

> "(1) At least two months before the end of each financial year, there shall be introduced in Parliament–
>
> (a) a Division of Revenue Bill, which shall divide revenue raised by the national government among the national and county levels of government in accordance with this Constitution; and
>
> (b) a County Allocation of Revenue Bill, which shall divide among the counties the revenue allocated to the county level of government on the basis determined in accordance with the resolution in force under article 217.
>
> (2) Each Bill required by clause (1) shall be accompanied by a memorandum setting out–
>
> (a) an explanation of revenue allocation as proposed by the Bill;
>
> (b) an evaluation of the Bill in relation to the criteria mentioned in article 203 (1); and
>
> (c) a summary of any significant deviation from the Commission on Revenue Allocation's recommendations, with an explanation for each such deviation."

212. A financial year is defined under article 260 of Constitution to mean the period of twelve months ending on the 30th day of June or other day prescribed by national legislation. Therefore, if one was to calculate backwards from the end of each financial year, as per Constitution, a Division of Revenue Bill and a County Allocation of Revenue Bill ought to be introduced in Parliament by the 30th April each year.

213. This means from the onset there is a conflict between the PFM Act and Constitution on the timelines within which a Division of Revenue Bill and a County Revenue Allocation Bill ought to be introduced and adopted by Parliament. Consequently, the PFM Act 'reduces' the timelines as set by Constitution.

214. According to Section 25(7) of the PFM Act, Parliament shall, not later than fourteen days after the Budget Policy Statement is submitted to Parliament, table and discuss a report containing its recommendations and pass a resolution to adopt it with or without amendments. The Cabinet Secretary shall take into account resolutions passed by Parliament in finalizing the budget for the relevant financial year.

215. Once Parliament approves the Budget Policy Statement, the National Treasury, as per Section 25(9) of the PFM Act, shall publicize the Budget Policy Statement not later than fifteen days.

216. Thereafter, and upon the introduction in Parliament of a Division of Revenue Bill and a County Revenue Allocation Bill, (pursuant to article 218 of Constitution that is, at least 2 months before the end of each financial year), each Bill shall be accompanied by among other documents, a summary of any significant deviation from the Commission on Revenue Allocation Recommendations with an explanation for such deviation. It should be noted that article 218 is silent on the House that should originate a Revenue Bill.

217. Each House of Parliament has its own procedures for proceeding and concluding a Division of Revenue Bill and a County Allocation of Revenue Bill. According to the Senate Standing Orders of the 12th Parliament No. 181(3), the Senate shall proceed upon and conclude consideration of an Annual Division of Revenue Bill not later than fourteen days after the Bill has been introduced with a view to approving it, with or without amendments. The Division of Revenue Bill having been passed by the Senate shall then stand referred to the National Assembly in accordance with Standing Order 156.

218. The National Assembly Standing Order, 4th edition, Standing Order 233, states that every year, not later than 10th March, there shall be introduced in the National Assembly a Division of Revenue Bill, which shall divide revenue raised by the National Government among the National and County levels of Government in accordance with Constitution. According to the said Order, the National Assembly shall proceed upon and conclude its consideration of a Division of Revenue Bill not later than ten sitting days after the Bill has been introduced with a view to passing it, with or without amendments. The Division of Revenue Bill, having been passed by the National Assembly, shall stand referred to the Senate in accordance with Standing Order 142.

219. In an ideal situation, where the two Houses agree on a Division of Revenue Bill and a County Allocation of Revenue Bill, the process ought to end by 30th June.

220. Suppose the two Houses of Parliament fail to agree, what then happens? article 112 of Constitution provides that if one House passes an Ordinary Bill concerning counties, and the second House rejects the Bill, it shall be referred to a Mediation Committee appointed under article 113. (Since the Supreme Court made its decision the Senate 2013 matter, and declared the DOR an ordinary bill instead of a money bill, then this is the path the legislative processes will follow). Mediation Committees, under article 113, comprise of equal members of each House and are supposed to attempt to develop a version of the Bill that both Houses will pass. article 113(4) of Constitution provides that if the Mediation Committee fails to agree on a version of the Bill within 30 days, or if a version proposed by the committee is rejected the Bill is defeated. This, therefore, means that by the time even a single mediation process is concluded, both Houses cannot meet Constitutional timelines of passing the two Bills.

221. It is prudent to note also that from May 1 to June 30, there are other activities that take place within the last quarter with no specific timelines including: public hearings on budget proposals by Budget Committees; publication by the Cabinet Secretary for Finance and the County Executive Member of national and county budget estimates after they are tabled in Parliament and the County Assemblies respectively; consideration of budget estimates by the National and County Government

by the National Assembly and the County Assembly respectively which shall be approved with or without amendments by 30th June in each year; and consolidation, publication and publicization of budget estimates by the National and the County Treasury shall consolidate the estimates, publish, and publicize them respectively. Publication of 3rd quarter budget implementation report by the National Government should also be done within this quarter.

222. Regarding the procedure for adopting an annual Appropriation Bill, article 221 of Constitution provides that the same has to be commenced at least two months before the end of each financial year. Sections 39 of the PFM Act limits the time within which the Appropriation Bill must be enacted to 30th June of each financial year. However, a County Appropriation Bill, in view of article 224 of Constitution can only be prepared and adopted on the basis of the Division of Revenue Bill passed by Parliament under article 218 which process has to end by 30th June of a particular year pursuant to Section 131 of the PFM Act. This therefore means that the timelines for adopting and concluding an Appropriation Bill runs concurrently with those of adopting and concluding the Division of Revenue Bill and a County Allocation of Revenue Bill.

223. The foregoing strict and overlapping timelines notwithstanding, the President may upon receiving the Bills return the same with amendments before assent – again this has to be factored within the 60-day period - which is not possible.

224. As such, there are a number of conflicting timelines that exist within the legal framework that need to be brought to the attention of Parliament for corrective action. There is need to clarify on the exact timelines within which the Division of Revenue Bill and the County Allocation of Revenue Bill can be introduced to Parliament. This may call for amendments to articles 218 and 221 of Constitution, and Section 190 and 191(1) of the PFM Act. The Senate and the National Assembly also need to ensure uniformity in their standing orders, as to when the two Bills may be introduced in Parliament.

225. In conclusion, and most regretfully, I am of the opinion that the Majority decision in this advisory is woefully misinformed and has brought little or no resolution to the legislative conundrum that has been presented before us by the Parties. However, as my learned brother Judges are of a different opinion, then, theirs must be the decision of this court.

E. Final Determination

226. This Advisory Opinion, as rendered by the Majority of this Bench, conclusively disposes of the four issues in the manner determined; namely, the recommendations of the Commission on Revenue Allocation are not binding on Parliament; in the event of an Impasse over the Division of Revenue Bill, the solution prescribed in paragraphs 81 to 91 of this Opinion shall apply; the Supreme Court or any other court for that matter, is not the appropriate forum for setting timelines as to when the National Treasury must transfer the equitable share of revenue to counties; and Parliament cannot enact the Appropriation Act before the enactment of the Division of Revenue Act.

227. Before signing off, we would like to remind the Applicants and all the parties to this Reference and indeed all other public functionaries, entities, and the public at large, that this Advisory Opinion is not a "mere advice or opinion". On the contrary, it has the same binding effect as a Judgment in rem of this court. Finally, we would like to profoundly record our appreciation of all Counsel for the parties including the Amici Curiae for their insightful and robust contributions to the vexed questions raised in the Reference.

DATED AND DELIVERED AT NAIROBI THIS 15TH DAY OF MAY, 2020.

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D. K. MARAGA

CHIEF JUSTICE & PRESIDENT OF THE SUPREME COURT

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M. K. IBRAHIM

JUSTICE OF THE SUPREME COURT

.....

S. C. WANJALA

JUSTICE OF THE SUPREME COURT

.....

NJOKI NDUNGU

JUSTICE OF THE SUPREME COURT

.....

I. LENAOLA

JUSTICE OF THE SUPREME COURT

I certify that this is a true copy of the original

REGISTRAR

SUPREME COURT OF KENYA