In the Matter of the Interim Independent Electoral Commission (Applicant)
(Constitutional Application 2 of 2011) [2011] KESC 1 (KLR) (20 December 2011) (Ruling)

In the Matter of Interim Independent Electoral Commission [2011] eKLR

Neutral citation: [2011] KESC 1 (KLR)

REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA

CONSTITUTIONAL APPLICATION 2 OF 2011

WM MUTUNGA, CJ, NANCY MAKOKHA BARASA, DCJ & V-P, PK TUNOI, MK IBRAHIM, JB OJWANG, SC WANJALA & NS NDUNGU, SCJJ

DECEMBER 20, 2011

IN THE MATTER OF ADVISORY OPINIONS OF THE COURT UNDER ARTICLE 163(3) OF THE CONSTITUTION

-AND-

IN THE MATTER OF SECTION 21(2) OF THE SIXTH SCHEDULE OF THE CONSTITUTION

-AND-

IN THE MATTER OF THE INTERIM INDEPENDENT ELECTORAL COMMISSION AS THE APPLICANT

Jurisdiction of the Supreme Court to issue an advisory opinion.

The Supreme Court laid out guidelines with respect to the exercise of its advisory opinion jurisdiction. It elaborated on the extent of its advisory opinion jurisdiction in article 163(6) of the Constitution. The Supreme Court held that an advisory opinion was a decision of the court which was of a binding nature. It was not mere advice. The party making a request for it had to abide by the advisory opinion. The Supreme Court found the application for an advisory opinion inappropriate as it was about matters on the date of the first general election under the Constitution of Kenya 2010 which were pending before the High Court and made the determination that it was appropriate for them to be determined by the High Court.

Reported by Njeri Githang'a

Civil Practice and Procedure *– advisory opinion – application seeking advisory opinion on the issue of first election date under the Constitution (2010) – where there were contradictory provisions on the issue - objection on the ground that the Supreme court lacked the jurisdiction - High Court's jurisdiction in relation to the interpretation of the Constitution - whether the Supreme Court had a parallel jurisdiction with the High Court - Constitution of Kenya, 2010, articles 163(3), (4), (5) and (6).*

Advisory opinions *– the Supreme Court's advisory opinion - jurisdiction of the Supreme Court to issue an advisory opinion - procedure in seeking an advisory opinion from the supreme court - Supreme Courts guidelines*

on the matter - proceedings in references for an advisory opinion - where the application before the court sought the "correct" interpretation of the different constitutional provisions -whether the question placed before the court was a normal one within the advisory opinion jurisdiction as envisaged under article 163(6) of the Constitution - the juridical status and or precedent of advisory opinions - value in the Supreme Court's advisory opinion - Constitution of Kenya, 2010, article 163(6); Supreme Court Rules, 2011, rule 40(4) (c).

Brief facts

While various petitions had been filed at the High Court for purposes of seeking a determination on the correct date for the first general elections under the Constitution of Kenya 2010, an application was filed at the Supreme Court seeking an advisory opinion on the same question on the election date.

A preliminary objection was raised challenging the invocation of the Supreme Court's advisory jurisdiction. Jurisdictional questions were also raised on the basis that there were other bodies involved in the implementation of the Constitution and advice on the questions raised could be sought, for example from the Attorney General.

Issues

i. Whether the Supreme Court had a parallel jurisdiction with the High Court
ii. Whether the question placed before the court was a normal one within the advisory opinion jurisdiction as envisaged under Article 163(6) of the Constitution.
iii. The juridical status and or precedential value of advisory opinions.

Held

1. Jurisdiction flows from the law, and the recipient-court was to apply the same, with any limitations embodied therein. Such a court may not arrogate to itself jurisdiction through the craft of interpretation, or by way of endeavours to discern or interpret the intentions of Parliament, where the wording of legislation was clear and there was no ambiguity. In the case of the Supreme Court, the Court of Appeal and the High Court, their respective jurisdictions were donated by the Constitution.
2. The Supreme Court was established under article 163 of the Constitution, and its jurisdiction was laid out in article 163(3),(4),(5) and (6). Sub-article (6) stated "The Supreme Court may give an advisory opinion at the request of the national government, any State organ, or any county government with respect to any matter concerning county government." In addition, the Supreme Court Act, 2011 (Act No. 7 of 2011), under section 14, conferred "special jurisdiction" upon the Supreme Court.
3. An advisory opinion in the context of article 163(6) of the Constitution, meant legal advice rendered by the court to the public body or bodies seeking the same, by virtue of scope created by law. Since such an opinion did not flow from any contest of rights or claims disposed of by regular process, it did not fall in the class of a judgment, or ruling, or order, or decree.
4. Jurisdiction reposed in the Supreme Court, under article 163(6) of the Constitution, employed the directory term "may", it was hence purely discretionary, at the instance of the Supreme Court.
5. The applicant was a "State organ" under the Constitution of Kenya, 2010 and so, the applicant indeed had the capacity to seek the Supreme Court's advisory opinion by virtue of Article 163(6).
6. Article 163(6) required that any request for an advisory opinion was to be "with respect to any matter concerning county government." There was a close connectivity between the functioning of the national government and the county governments hence the expression "any matters touching on county government" should be so interpreted as to incorporate any national-level process bearing a significant impact on the conduct of county governments. However, interpretation in that category was to be made cautiously, and on a case-by-case basis, so as to exclude matters which fell outside the court's advisory opinion jurisdiction.
7. The election date was a question so central to county government, as to lie within the jurisdiction of the court, in relation to the request for an advisory opinion.

8. The High Court had been entrusted with the mandate to interpret the Constitution. That empowerment by itself, however, did not confer upon the High Court an exclusive jurisdiction for, by the appellate process, both the Court of Appeal and the Supreme Court were equally empowered to interpret the Constitution, certainly in respect of matters resolved at first instance by the High Court.
9. While the advisory opinion jurisdiction was exclusively entrusted to the Supreme Court, the Constitution did not provide that the court while rendering an opinion may not interpret the Constitution. It followed that the Supreme Court could, while rendering an advisory opinion under article 163(6) of the Constitution, undertake any necessary interpretation of the Constitution.
10. In the matter before the court, similar questions, entailing constitutional interpretation, had been brought simultaneously before the High Court and the Supreme Court and such a move by parties was apt to precipitate contretemps in resolving the question of jurisdiction. In principle, the Supreme Court committed itself to order and efficacy in the administration of justice, and to that end it could require that the process of litigation commenced in the High Court, and entailing constitutional interpretation, be exhausted and, if need be, followed by appellate procedures. In such circumstances, the court would be cautious in considering a request for an opinion, to ensure the two jurisdictions did not come into conflict and each case would be carefully considered on its merits.
11. The application amounted to a request for an interpretation of articles 101(1), 136(2) (a), 177 (1)(a) and 180(1) of the Constitution, and clause 9 of the Sixth Schedule to the Constitution. Conflict in the provisions sought the "correct" interpretation of the provisions; hence the question placed before the court was not a normal one within the advisory opinion jurisdiction as envisaged under article 163(6) of the Constitution.
12. In the light of the several petitions pending before the High Court, the application was inappropriate. The cases sought the interpretation of the Constitution, with the object of determining the date of the next elections. Those petitions raised substantive issues that required a full hearing of the parties; and those matters were properly lodged and the parties involved had filed their pleadings and made claims to be resolved by the High Court. To allow the application would constitute interference with due process, and with the rights of parties to be heard before a court duly vested with jurisdiction and also constitute an impediment to the prospect of any appeal from the High Court up to the Supreme Court. The court had to protect the jurisdiction entrusted to the High Court.
13. The Attorney- General was the "chief lawperson" of Government in its diverse dimensions. The various departments of the Government had the liberty to seek the Attorney-General's opinion on any legal question of relevance to their day-to-day operations. The applicant should have sought the advice of the Attorney- General before moving the Supreme Court to give an advisory opinion as provided for under Rule 40(4) (c) of the Supreme Court Rules.
14. Seeking the advice of the Attorney-General did not compromise the independence of a State organ in any way, nor did it vest a veto power in that office. While the applicant after obtaining advice from the office of the Attorney-General was not necessarily bound by the same, for the purpose of the court, the fact that such advice was sought in the first place, would demonstrate the applicant's commitment, as well as fidelity to due process.
15. While the advisory jurisdiction of the Supreme Court of Kenya was granted by the Constitution, for the court to properly address the question before it, it had to be the court seized with the facts. The advisory jurisdiction of the Supreme Court under article 163(6) was discretionary in nature. That being the case, and further, given the fact that the advisory jurisdiction was a novel phenomenon in Kenya, it was expedient that the court progressively develop guidelines for the exercise of this discretion. The broad guidelines for the exercise of the Supreme Court's advisory opinion jurisdiction would be;
    a. For a reference to qualify for the Supreme Court's advisory opinion discretion, it must fall within the four corners of article 163(6): it must be "a matter concerning county

government." The question as to whether a matter is one "concerning county government", will be determined by the court on a case-by-case basis.

b. The only parties that could make a request for an advisory opinion were the national government, a State organ, or county government. Any other person or institution may only be enjoined in the proceedings with leave of the court, either as an intervener (interested party) or as amicus curiae.

c. The court would be hesitant to exercise its discretion to render an advisory opinion where the matter in respect of which the reference has been made was a subject of proceedings in a lower court. However, where the court proceedings in question have been instituted after a request has been made to the Supreme Court for an advisory opinion, the court may if satisfied that it was in the public interest to do so, proceed and render an advisory opinion.

d. Where a reference had been made to the court the subject matter of which was also pending in a lower court, the court may nonetheless render an advisory opinion if the applicant could demonstrate that the issue was of great public importance and requiring urgent resolution through an advisory opinion. In addition, the applicant may be required to demonstrate that the matter in question would not be amenable to expeditious resolution through adversarial court process.

16. The guidelines coincided with the conviction that the plain terms of the Constitution should be read in the broader context of its spirit and philosophy; and on that basis, applications seeking advisory opinion had to be resolved as necessitated by the merits of each case. In view of the practical and legal constraints attendant on advisory opinions, the court would in principle exercise that jurisdiction with appropriate restraint.

17. In common with other final courts in the Commonwealth, Kenya's Supreme Court was not bound by its decisions, even though the court had to remain alive to the need for certainty in the law. The rules of constitutional interpretation did not favour formalistic or positivistic approaches under articles 20(4) and 259(1). The Constitution had incorporated non-legal considerations, which had to be taken into account, in exercising its jurisdiction. Judicial authority was derived from the people under article 159(1) and hence that authority had to be reflected in the decisions made by the courts.

18. Article 163(7) of the Constitution stated that "[a] all courts, other than the Supreme Court, are bound by the decisions of the Supreme Court."The subordinate courts were bound by decisions of superior courts. The Supreme Court, while observing the importance of certainty of the law, had to nurture the development of the law in a manner that eschewed formalism, in favour of the purposive approach. Interpreting the Constitution was a task distinct from interpreting the ordinary law. The very style of the Constitution compelled a broad and flexible approach to interpretation.

19. Kenya's Constitution provided expressly for advisory opinions, under article 163(6); and that called for a new approach to rationalization. In the case before the court, several parties had joined the proceedings, to argue points of law and of fact. The Supreme Court had to listen to competing interpretations of the law advanced by the parties to the case; and it then was to decide on the issue of interpretation, making a reasoned choice.

20. The Supreme Court's opinion could not be on the same plane as that of law officers from the Attorney-General's Chambers, or, indeed, of any other State organs that could appear before the court pleading for an Advisory Opinion. Although the proceedings were not adversarial, the involved robust intellectual rigour, reflected in the focused, written submissions the illuminating authorities and contributions in scholarly journals, as well as submissions that reflected the spirit of the Constitution were all as powerful as though the reference was adversarial in nature.

21. An advisory opinion, in the context before the court was a "decision" of the court, within the terms of article 163(7), and was thus binding on those who brought the issue before the court, and upon lower courts, in the same way as other decisions. It was inappropriate that the Supreme Court's advisory

opinion should be sought as mere advice. Where a government or State organ made a request for an opinion, it was to be supposed that such organ would abide by that opinion; the opinion was sought to clarify a doubt, and to enable it to act in accordance with the law. If the applicant were not to be bound, then it would be seeking an opinion merely in the hope that the court would endorse its position and, otherwise, the applicant would consider itself free to disregard the opinion.

22. While an Advisory Opinion may not be capable of enforcement in the same way as ordinary decisions of the courts (in the shape of rulings, judgments, decrees or orders), it had to be treated as an authoritative statement of the law. The opinion must guide the conduct of not just the organ(s) that sought it, but all governmental or public action thereafter otherwise it would reduce article 163(6) of the Constitution to an "idle provision" of little juridical value. The binding nature of advisory opinions was consistent with the values of the Constitution, particularly the rule of law. An opinion of the Supreme Court was hence as binding as much as any other decision of the Court.

Preliminary objections upheld.

Orders

The High Court to proceed to hear and determine the several petitions pending before it.

RULING

A. Introduction

1. The purpose of this Ruling is to incorporate and account for Orders issued extempore by this Court on 15th November, 2011, in resolving a preliminary objection brought by several parties, in response to an early invocation of the Advisory-Opinion jurisdiction under Article 163(6) of the Constitution of Kenya, 2010.

2. The application for an Advisory Opinion came in the wake of several causes lodged in the High Court, the most direct one of which was Milton Mugambi Imanyara and Two Others v. The Attorney-General and Two Others, Nairobi H.C. Const. Petition No. 65 of 2011, dated 19th April, 2011, seeking a declaration that the next general election for President, National Assembly, County Assemblies and County Governors "shall be held at the same time, on the second Tuesday of August, 2012."

3. When the said petition came up for mention before Majanja, J on 13th October, 2011 counsel informed the learned Judge that an application had already been filed seeking the Supreme Court's Advisory Opinion on the question of election dates; and immediately it became apparent that an issue had arisen as to the respective jurisdictions of the two Courts, and this touched on the future conduct of proceedings before the High Court. The learned Judge held at bay any possible contretemps, on interpretations of jurisdiction, by making several Orders as follows:

    "(1) That the issue of [the] jurisdiction of the Supreme Court under Article 163(6) is a matter [for] the Supreme Court to decide.

    "(2) That it is proper that in [view of] the hierarchy of the Courts, ...the Supreme Court shall deal with the issue first.

    "(3) That in the circumstances, the matter be mentioned on a date that is agreed."

4. The issues arising before the High Court partly featured in a first mention of the matter before two Judges (Ojwang, Ndung'u, SC.JJ) of the Supreme Court on 27th October, 2011 when the following were admitted as Interested Parties: Mr. Milton Mugambi Imanyara; Mr. John Harun Mwau – both being parties in related causes before the High Court. The Supreme Court, on that occasion, admitted

Professor Yash Pal Ghai and his Katiba Institute to the status of amicus curiae. At a second mention before a two-Judge Bench (Ibrahim, Ndung'u, SC.JJ) on 3rd November, 2011 the Kenya Institute of Governance was also admitted to the status of amicus curiae.

B. Invoking The Supreme Court's Advisory-opinion Jurisdiction

5. The applicant, the Interim Independent Electoral Commission, moved the Supreme Court by Constitutional Application No.2 of 2011, dated 28th April, 2011. It is necessary to set out the essence of this application, as it raised the very issues that elicited preliminary objections: and it is these that fall to the Supreme Court for resolution at this stage.

6. The applicant began by citing the content of Articles 101(1), 136(2) (a), 177(1)(a) and 180(1) of the Constitution, as providing that elections for Members of the National Assembly and the Senate, the President, Members of County Assemblies and Governors "shall be held on the second Tuesday in August in every fifth year"; and the application then posited that the election date thus stated was equivocal, in the light of clause 9(1) of the Sixth Schedule to the Constitution which states that:

> "The first elections for the President, the National Assembly, the Senate, county assemblies and county governors under this Constitution shall be held at the same time, within sixty days after the dissolution of the National Assembly at the end of its term."

The applicant cited clause 10 of the Sixth Schedule to the Constitution, as further evidence of such ambiguity; this provides:

> "The National Assembly existing immediately before the effective date shall continue as the National Assembly for the purposes of this Constitution for its unexpired term."

The applicant's plea is thus set out:

"8. It appears that the aforesaid constitutional provisions give two apparently contradictory formulae for determining the date of the next general election for the aforesaid offices, which include matters concerning county government.

"9. The applicant accordingly prays for the Opinion of the Court on the following question:

'What, in the light of the above provisions and the other provisions of the Constitution of Kenya and the other continuing applicable provisions of the former Constitution, is the date or are the contingent dates, for the next election for the aforesaid offices of President, Members of the National Assembly and the Senate, Members of County Assemblies and Governors?"

7. Although the application is accompanied by substantial evidence in the form of depositions and annexures, it is not necessary to consider these, in a preliminary objection, in relation to which the law is well settled since the meritorious Court of Appeal decision, Mukisa Biscuit Manufacturing Co. Ltd. v. East End Distributors Ltd [1969]E.A. 696 in which Sir Charles Newbold, P had laid the principle that (p.701):

> "A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion."

Upon this building-block, we have drawn up the boundaries of our task in determining the preliminary objection herein.

C. The Preliminary Objection

1. The Broad Issues in Contest

8. It emerges that those raising the preliminary objection have two main points: firstly, that the original grievance in the High Court Petition of 19th April, 2011 is a justiciable question, entailing constitutional interpretation, and belonging first and foremost, to the jurisdiction of the High Court; and that such a matter ought to be litigated and resolved in the High Court. The High Court's decision in that respect is, of course, subject to the appellate procedure running through the Court of Appeal, to the Supreme Court. The contention, in its essence, is that the Supreme Court, at this stage, lacks jurisdiction – and so it ought not to entertain the election-date question.

9. Secondly, such a jurisdiction-question calls for a decision by the Supreme Court as to the effect, and the juridical character of its Advisory-Opinion competence. Such an opinion, it is being urged, is merely advisory to other arms of government, and does not relieve recipients of the same of their primary duty to discharge their constitutional functions ordinarily, by means of the public agencies availed to them by law.

2. Initial Submissions of Counsel

10. Learned counsel, Mr. Nyamodi for the applicant, submitted that the application had been properly made, within the terms of Article 163(6) of the Constitution of Kenya, 2010 which provides:

> "The Supreme Court may give an advisory opinion at the request of the national government, any State organ, or any county government with respect to any matter concerning county government."

Counsel urged that the application was proper, because the applicant had not sought interpretation of any provision of the Constitution, but merely "posed a specific question for the Advisory Opinion"; he submitted that "the appellate jurisdiction and the advisory jurisdiction are equal and compatible and neither is superior to the other on the grounds of being 'discretionary' or 'as of right', there being no such jurisdictional hierarchy."

11. Counsel submitted that no Interested Party herein would be prejudiced by the rendering of an Advisory Opinion by the Supreme Court; for "the applicant has no adverse claim against the Intervener or any other party"; and that, consequently, "the applicant's question...falls within the Advisory [Opinion]jurisdiction of the Supreme Court and not within the interpretive jurisdiction of the High Court....."

12 Learned counsel submitted that the applicant is a State organ within the meaning of Article 163(6) of the Constitution and, therefore, "has standing to move the Supreme Court for an Advisory Opinion."

13. Mr. Nyamodi urged that since the election date sought to be established was in respect of Members of County Assemblies, Governors and Members of the Senate, this was part of "matters concerning county government" and, therefore, properly falling under the terms of Article 163(6) of the Constitution. Counsel urged, for effect, that "county government" was at the very core of the application herein, because "the duties of the President and the Members of the National Assembly constantly and critically affect county government in matters such as, for instance, financial devolution and the implementation of central [government] and county [programmes]".

14. Learned counsel, Mr. Nowrojee who appeared with Mr. Nyamodi, apart from holding brief for Professor Yash Ghai as amicus curiae, urged that it was manifest from the terms of Article 163(6) of the

Constitution, that the Supreme Court has jurisdiction to render an Advisory Opinion as requested. Firstly the applicant, the Interim Independent Electoral Commission, is a State organ in the terms of Articles 1(3), 248(2) (c) and 260 of the Constitution – and so it may move the Supreme Court for an Advisory Opinion on any matter regarding county government. Counsel submitted that the county set-up as contemplated in the Constitution (Article 176, concerned with county government; Article 177, with county assembly; and Articles 179 and 180, with county executive) was relevant in ascertaining the next election date – hence the request for an Advisory Opinion.

15. The application is contested by the Interested Parties, and is not supported by the amici curiae. The first element in contest is founded on the standing of the High Court in terms of jurisdiction, in relation to the interpretation of the Constitution, and whether, in that regard, the Supreme Court has a parallel jurisdiction. The second element is the juridical status and/or precedent-value in the Supreme Court's Advisory Opinion. It is, therefore, on the basis of the two questions that we will resolve the contest occasioned by the preliminary objection.

3. Constitutional Interpretation, Advisory Opinion, the High Court, the Supreme Court: Submissions of Counsel

16. The second Interested Party, Mr. John Harun Mwau who is the current Member of Parliament for Kilome Constituency, has taken the position that his Petition in the High Court, of 19th April, 2011 is a justiciable claim that merits a judicial process culminating in a hearing and determination of right and duty. On this point, learned counsel, Mr. Maina urged: "the second Interested Party has rights and freedoms under the Bill of Rights which are threatened or intended to be violated or infringed by any attempt to tamper with his term as a Member of the National Assembly..." Counsel submitted that Mr. Mwau had filed the High Court Petition on the terms of Articles 23 and 165 of the Constitution, which confer jurisdiction upon the High Court; and the said jurisdiction is not qualified by the permissive terms of Article 163(6) regarding the Supreme Court's Advisory-Opinion jurisdiction. Mr. Maina submitted that the Supreme Court lacks original jurisdiction to interpret the Constitution, and it only has an appellate jurisdiction.

17. For the foregoing argument, counsel found support in the Supreme Court Rules, 2011, clause 40(4) (c) of which appears to limit admission for an Advisory Opinion where –

> " the matter in respect of which the reference is made can, in the opinion of the Court, be resolved by the Attorney-General and such advice has not been sought."

Counsel submitted that those coming to seek the Supreme Court's Advisory Opinion should first have exhausted the schemes of remedy available within the ambit of the Executive.

18. Such, precisely, was the line of submission taken by the Attorney-General, represented by learned counsel Ms. M. Kimani, Senior Deputy Solicitor-General. Counsel urged: "The High Court under Article 165(3)(d) has original jurisdiction to hear any question respecting the interpretation of the Constitution. The Supreme Court in its appellate jurisdiction under the provision of Article 163(3), subject to clauses (4) and (5) and [Article] 163(4) (a) is the final Court on matters involving the interpretation and application of the Constitution."

19. Counsel submitted that the Supreme Court's Advisory-Opinion jurisdiction is not a binding one, but a purely discretionary one; and she urged that Article 163(6) of the Constitution could only have contemplated that the Supreme Court, by its Advisory-Opinion jurisdiction, should "advise on matters that could entail confusion at the levels of county government and national government." Counsel submitted that it was plain even from the depositions in support of the application herein,

that it was perceived an ambiguity existed in the terms of the Constitution, thus necessitating a regular interpretation rather than an Advisory Opinion.

20. Ms. Kimani submitted that, had the matter herein been one necessitating an Advisory Opinion, then the applicant's first line of recourse would have been to obtain the advice of the State Law Office, within the setting of the Executive Branch – and this would preclude the invocation of the jurisdiction of the Supreme Court.

21. By contrast, Mr. Havi, learned counsel for 1st Interested Party, submitted that there exists, under the Constitution as it stands, a concurrence of jurisdiction between the High Court and the Supreme Court, with regard to the subject-matter of the application; and so the Supreme Court as the higher Court, ought to prevail.

22. The position of the first amicus curiae, Professor Yash Ghai, is that the Supreme Court "has no jurisdiction to hear and/or make a substantive determination in the application"; but, if this Court holds that it does indeed, have jurisdiction, it should decline to give an Advisory Opinion. Professor Ghai urged that the several organs of Government entrusted with the implementation of the Constitution "including the office of the Attorney-General and the Kenya Law Reform Commission have sufficient authority, technical skills and resources to resolve and provide guidance on the issues raised by the question without recourse to the Court for an Advisory Opinion."

23. The Professor considered the inappropriateness of making this application an Advisory-Opinion matter, arising partly from the fact that the questions raised are "too abstract and not founded on any clear factual background"; "an Advisory Opinion by the Court under the circumstances and the factual background presented may only add to uncertainty, and may not resolve the issues"; "[it] will also not insulate the process from possible future litigation, and would hence be a waste of [the]Court's time and resources and cause delay in the implementation of the Constitution"; "if concrete issues arise over the application of the provisions identified by the applicants, they can and should be best raised in the High Court, in the context of the facts of the specific cases."

24. Learned counsel, Mr. Njiru for the second amicus curiae also supported the preliminary objection, urging that the common law tradition, which is Kenya's heritage in the functioning of the judicial process, favours the adversary approach, rather than the more-limited Advisory Opinion. Counsel asked for restraint by the Supreme Court in this matter, in favour of a normal hearing in the High Court, which would permit of a better decision on the basis of evidence.

25. Learned counsel Mr. Nowrojee, however, submitted that the Supreme Court has jurisdiction to render an Advisory Opinion as requested, and the basis of jurisdiction is Article 163(6) of the Constitution. Firstly the applicant is a proper party before the Court; and secondly the request relates to a matter of county government, as provided for in the Constitution.

26. Counsel contested the argument that the question before the Court ought to be resolved in the first place through consultations with the State Law Office: for the Constitution does not, in terms, make such a provision. Indeed, counsel urged, a requirement for such prior consultation with the Executive Branch, would be contrary to the provision of the Constitution for "Independent Commissions" (Article 248); "it is not true the applicant is part of the Executive"; and so, in law, there will be "no pre-conditional reference to the Attorney-General"; "the Executive must be independent of the process of renewing itself." Mr. Nowrojee, for effect, recounted the aspect of Kenya's constitutional history which shows that there has been progress from a position of lodgment of the office of "Supervisor of Elections" within the Executive Branch, to that of constitutional entrenchment of an "Independent Electoral Commission." Counsel cited Article 249 of the Constitution, bearing the

rubric "Objects, authority and funding of commissions and independent offices", and in particular clause (2) thereof, which provides:

> " The commissions and the holders of independent offices –
>
> (a) are subject only to this Constitution and the law; and
>
> (b) are independent and not subject to direction or control by any person or authority."

On the strength of these provisions, Mr. Nowrojee urged that the independent Commissions, such as the applicant herein, have been designed "to promote constitutionalism"; thus, the Attorney-General's position in the instant matter "is forbidden and cannot be sustained"; and the Attorney-General's position "constitutes a veto on the independence of the Electoral Commission." Counsel submitted that it was not right that the applicant should first seek the opinion of the Attorney-General before moving the Supreme Court as it has done.

27. Mr. Nowrojee contested the call by the amici curiae for restraint by the Supreme Court, in interpreting the law regarding its Advisory-Opinion jurisdiction; he urged in broad terms: "Restraint is not in character juristic; [one should not]confuse what ought to be done (on account of work-load) with issues of jurisdiction. The Court has jurisdiction – but within that jurisdiction it exercises discretion."

28. Counsel urged that a distinction is to be drawn between constitutional interpretation, and Advisory Opinion; and that it was not for the applicants to specify the distinction; rather, only the Supreme Court's Opinion was being sought; and such Opinion, being provided for in the Constitution, should be given, as all provisions of the Constitution have an equal status of superiority.

D. The Supreme Court, Jurisdiction, Advisory Opinion:

Analysis

1. Jurisdiction

29. Assumption of jurisdiction by Courts in Kenya is a subject regulated by the Constitution, by statute law, and by principles laid out in judicial precedent. The classic decision in this regard is the Court of Appeal decision in *Owners of Motor Vessel 'Lillian S' v. Caltex Oil (Kenya) Limited* [1989] KLR 1, which bears the following passage (Nyarangi, JA at p.14):

> " I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the Court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a Court has no power to make one more step."

30. The Lillian 'S' case establishes that jurisdiction flows from the law, and the recipient-Court is to apply the same, with any limitations embodied therein. Such a Court may not arrogate to itself jurisdiction through the craft of interpretation, or by way of endeavours to discern or interpret the intentions of Parliament, where the wording of legislation is clear and there is no ambiguity. In the case of the Supreme Court, Court of Appeal and High Court, their respective jurisdictions are donated by the Constitution.

31. The Supreme Court is established under Article 163 of the Constitution, and its jurisdiction laid out in Article 163(3),(4),(5) and (6), as follows:

> " (3) The Supreme Court shall have –
>
> (a) exclusive original jurisdiction to hear and determine disputes relating to the elections to the office of President arising under Article 140; and
>
> (b) subject to clause (4) and (5), appellate jurisdiction to hear and determine appeals from –
>
> (i) the Court of Appeal; and
>
> (ii) any other Court or tribunal as prescribed by national legislation.
>
> (4) Appeals shall lie from the Court of Appeal to the Supreme Court –
>
> (a) as of right in any case involving the interpretation or application of this Constitution; and
>
> (b) in any other case in which the Supreme Court, or the Court of Appeal, certifies that a matter of general public importance is involved, subject to clause (5).
>
> (5) A certification by the Court of Appeal under clause 4(b) may be reviewed by the Supreme Court, and either affirmed, varied or overturned.
>
> (6) The Supreme Court may give an advisory opinion at the request of the national government, any State organ, or any county government with respect to any matter concerning county government."

32. In addition, the Supreme Court Act, 2011 (Act No. 7 of 2011), under s.14, confers "special jurisdiction" upon the Supreme Court. The relevant provisions read as follows:

> " 14(1) To ensure that the ends of justice are met, the Supreme Court shall, within twelve months of the commencement of this Act, either on its own motion or on the application of any person, review the judgments and decisions of any judge –
>
> (a) removed from office on account of a recommendation by a tribunal appointed by the President, whether before or after the commencement of this Act; or
>
> (b) removed from office pursuant to the Vetting of Judges and Magistrates Act, 2011; or
>
> (c) who resigns or opts to retire, whether before or after the commencement of this Act, in consequence of a complaint of misconduct or misbehavior.
>
> (2) To qualify for review under subsection (1), the judgment or decision shall have been the basis of the removal, resignation or retirement of, or complaint against, the judge."

2. The Supreme Court's Advisory-Opinion Jurisdiction

33. Article 163(6) of the Constitution provides that:

> " The Supreme Court may give an advisory opinion at the request of the national government, any State organ, or any county government with respect to any matter concerning county government."

The term "advisory opinion" is not defined, but it bears the following meaning, by Black's Law Dictionary, 8th ed:

> " A non-binding statement by a court of its interpretation of the law on a matter submitted for the purpose."

Building on this general sense of "advisory opinion," we consider that such an opinion, in the context of Article 163(6) of the Constitution, means legal advice rendered by the Court to the public body or bodies seeking the same, by virtue of scope created by law. Since such an opinion does not flow from any contest of rights or claims disposed of by regular process, it does not fall in the class of judgment, or ruling, or order, or decree. Two scholars, James R. Rogers and Georg Vanberg, in their article entitled "Judicial Advisory Opinions and Legislative Outcomes in Comparative Perspective" [Published in American Journal of Political Science, Vol. 46 No.2 (2002), pp. 379-397]have thus written, of Advisory Opinions (at p.380):

> " Advisory opinions are answers provided by the members of a high court to questions posed by the executive or a legislative body on a legal question pending before that authority...Currently in the United States, the constitutions of Colorado, Florida, Maine, Massachusetts, Michigan, New Hampshire, Rhode Island, and South Dakota authorize their supreme courts to give advisory opinions".

Such opinions, in character, stand quite apart from the situation in a normal judgment or judicial decision, which will be marked by pleadings, causes of action, parties, evidence, issues for determination.

34. Insofar as the jurisdiction reposed in the Supreme Court, under Article 163(6) of the Constitution, employs the directory term "may", it is, in our opinion, purely discretionary, at the instance of this Court. None of the parties appearing before this Court has contended otherwise.

35. To whom may such Advisory Opinion be given? To

(i) the national government;

(ii) to any State organ; and to

(iii) any county government.

Does the applicant, the Interim Independent Electoral Commission, fall in that category? Yes, if it is a "State organ," a term defined in Article 260 of the Constitution as: "a commission, office, agency, or other body established under the Constitution." The Interim Independent Electoral Commission was established under s.41 of the Constitution of Kenya (Amendment) Act, 2008 (Act No. 10 of

2008); and clause 28(1) of the Sixth Schedule to the Constitution of Kenya, 2010 (on transitional and consequential provisions) thus provides:

> " The Interim Independent Electoral Commission established under section 41 of the former Constitution shall continue in office in terms of the former Constitution for its unexpired term or until the Independent Electoral and Boundaries Commission established under this Constitution is established, whichever is the later."

36. It is clear to us that the applicant is a "State organ" under the Constitution of Kenya, 2010: and so, the applicant indeed has the capacity to seek the Supreme Court's Advisory Opinion by virtue of Article 163(6).

37. The said Article 163(6) requires too that any request for an Advisory Opinion is to be "with respect to any matter concerning county government." In this respect, the relevant question is whether the issue as to "the date of the next general election" relates to county government.

38. Learned counsel, Mr. Nowrojee was clear, that this is a question of county government: for the elections the due date of which calls for confirmation, are the very device for establishing county assemblies, and county executives – and that is "county government". On this point, other counsel, Ms. Kimani, Professor Ghai and Mr. Njiru, were in agreement.

39. On the question whether election date is a matter of "county government", we have taken a broader view of the institutional arrangements under the Constitution as a whole; and it is clear to us that an interdependence of national and county governments is provided for – through a devolution-model that rests upon a unitary, rather than a federal system of government. Article 6(2) of the Constitution provides that:

> " The governments at the national and county levels are distinct and inter-dependent and shall conduct their mutual relations on the basis of consultation and co-operation."

Many offices established by the Constitution are shared by the two levels of government, as is clear from the terms of the Fourth Schedule which makes a "distribution of functions between the national government and county governments". Article 186(2), for instance, typifies the concurrence of operations, providing thus:

> " A function or power that is conferred on more than one level of government is a function or power within the concurrent jurisdiction of each of those levels of government."

We have taken note too that the Senate (which brings together County interests at the national level) and the National Assembly (a typical organ of national government) deal expressly with matters affecting county government; and that certain crucial governance functions at both the national and county level – such as finance, budget and planning, public service, land ownership and management, elections, administration of justice – dovetail into each other and operate in unity.

40. There is, therefore, in reality, a close connectivity between the functioning of national government and county government: even though the amicus curiae Professor Ghai urged that the term "county government" is not defined in the Constitution; and that the expression "county government" should not be too broadly interpreted. We consider that the expression "any matters touching on county government" should be so interpreted as to incorporate any national-level process bearing a significant impact on the conduct of county government. However, interpretation in this category is to be made cautiously, and on a case-by-case basis, so as to exclude matters such as fall outside this Court's Advisory-Opinion jurisdiction.

41. Now on the facts of the instant case, we would hold that election date is a question so central to county government, as to lie within the jurisdiction of this Court, in relation to the request for an Advisory Opinion. We are not, on this point, in agreement with counsel for 2nd Interested Party, that the request for an Advisory Opinion is beyond jurisdiction because no county government has as yet been set up, and so no party has locus to seek such an opinion.

3. The Competence to Interpret the Constitution

42. One of the objections to the Advisory-Opinion application is that "the applicants are [improperly]seeking a constitutional interpretation by way of an Advisory Opinion." The point of objection is that the competence to interpret the Constitution has been entrusted (in the first instance) to the High Court; for Article 165(3) of that document provides:

> " Subject to clause (5), the High Court shall have –
>
> .....
>
> (d) jurisdiction to hear any question respecting the interpretation of this Constitution including the determination of –
>
> (i) the question whether any law is inconsistent with or in contravention of this Constitution;
>
> (ii) the question whether anything said to be done under the authority of this Constitution or any law is inconsistent with, or in contravention of, this Constitution;
>
> (iii) any matter relating to constitutional powers of State organs in respect of county governments and any matter relating to the constitutional relationship between the levels of government; and
>
> (iv) a question relating to conflict of laws under Article 191...."

43. Quite clearly, the High Court has been entrusted with the mandate to interpret the Constitution. This empowerment by itself, however, does not confer upon the High Court an exclusive jurisdiction; for, by the appellate process, both the Court of Appeal and the Supreme Court are equally empowered to interpret the Constitution, certainly in respect of matters resolved at first instance by the High Court. And while the Advisory-Opinion jurisdiction is exclusively entrusted to the Supreme Court, the Constitution does not provide that this Court while rendering an opinion, may not interpret the Constitution. Indeed, interpretation of the Constitution stands to be conducted, for different purposes and at different stages, by a vast array of constitutional organs: so, for instance, the State Law Office in advising Government Ministries, is entitled to interpret the Constitution as may be necessary; and the several independent Commissions under the Constitution are similarly entitled to interpret the Constitution as part of the performance of their respective mandates. The Supreme Court too, for the purpose of rendering an Advisory Opinion, may take its position as guided by its own interpretation of the Constitution. Only where litigation takes place entailing issues of constitutional interpretation, must the matter come in the first place before the High Court, with the effect that interpretation of the Constitution by both the Court of Appeal and the Supreme Court will have been limited to the appellate stages.

44. It follows that the Supreme Court may, indeed, while rendering an Advisory Opinion under Article 163(6) of the Constitution, undertake any necessary interpretation of the Constitution.

45. In this instance similar questions, entailing constitutional interpretation, have been brought simultaneously before the High Court and the Supreme Court; and, as already noted, such a move by parties is apt to precipitate contretemps in resolving the question of jurisdiction. In principle, the Supreme Court commits itself to order and efficacy in the administration of justice, and to that end it may require that the process of litigation commenced in the High Court, and entailing constitutional interpretation, be exhausted and, if need be, followed by appellate procedures. In such circumstances, this Court will be cautious in considering a request for an opinion, to ensure the two jurisdictions do not come into conflict; and each case will be carefully considered on its merits.

46. Although the applicant, in this instance, avowedly seeks an Advisory Opinion, the application amounts to a request for an interpretation of Articles 101(1), 136(2)(a), 177 (1)(a) and 180(1) of the Constitution, and clause 9 of the Sixth Schedule to the Constitution. As the applicant apprehends conflict in the said provisions, it is to be taken to be seeking the "correct" interpretation of the said provisions: it is not seeking a plain opinion-statement on the date of the next election. We find, therefore, that the question placed before us is not a normal one, within the Advisory-Opinion jurisdiction as envisaged under Article 163(6) of the Constitution.

47. The application is still more inappropriate in the light of the several petitions pending before the High Court: Constitutional Petition No.65 of 2011 – Milton M. Imanyara & Others -vs- Attorney-General & Others; Constitutional Petition No.123 of 2011 – John Harun Mwau -vs- Attorney-General. The two cases seek the interpretation of the Constitution, with the object of determining the date of the next elections. Those petitions raise substantive issues that require a full hearing of the parties; and those matters are properly lodged, and the parties involved have filed their pleadings and made claims to be resolved by the High Court. To allow the application now before us, would constitute an interference with due process, and with the rights of parties to be heard before a Court duly vested with jurisdiction; allowing such an application would also constitute an impediment to the prospect of any appeal from the High Court up to the Supreme Court. This is a situation in which this Court must protect the jurisdiction entrusted to the High Court.

4. Jurisdiction, Separation of Powers, and the Role of the Attorney-General Ought the applicant to have sought the opinion not of the Supreme Court, but of the Attorney-General?

48. Learned counsel, Ms. Kimani had urged that the applicant ought to have solved it's grievance by seeking the Attorney-General's opinion. We advert to this issue, as it has a significance which emerges particularly in the light of the response made for the applicant. Learned counsel, Mr. Nowrojee urged that there was no requirement of the Constitution or any law, that the applicant, before moving this Court for an Advisory Opinion, should first seek the advice of the Attorney-General. Mr. Nowrojee's point was that such a prior reference to the Attorney-General before coming to Court would amount to an unauthorized "amendment" to the Constitution, which empowers the national government, State organ or county government to seek the Courts Advisory Opinion in respect of any matter concerning county government. Mr. Nowrojee objected too that the applicant had sought to confer upon the Attorney-General a "veto power" over a constitutional Commission, the Interim Independent Electoral Commission (now the Independent Electoral and Boundaries Commission), which is an independent organ subject only to the Constitution and the law. The applicant's position, counsel submitted, was all the more meritorious, as documents on file showed that the Interim Independent Electoral Commission had first written to the Attorney-General seeking his opinion, but there was no response.

49. The question of principle arising is as regards the doctrine of the separation of powers, and the standing of Independent Commissions under the Constitution. As the new Constitution settles in the public perception as the basis of rights-claims, its centrality in an enhanced pace of litigation is becoming apparent; and in this instance, this Court would advert to the issue as to the positions of the Attorney-General and the Independent Commissions, in relation to Advisory Opinions.

50. It was submitted by the Attorney-General that the application was an invitation to the Court to detract from the separation-of-powers foundation of the Constitution; for the policy-making function, regarding the strategies adopted by the Executive and the Legislature, belonged to the Executive – the Court being restricted to determining whether there was compliance with the Constitution.

51. The Attorney-General's contention, in our view, bears a particular perception of the meaning of constitutional interpretation. To enable us to clarify the matter, we have taken cognizance of relevant persuasive authority. In the Namibian case, S. v. Acheson, 1991 (2) S.A. 805 the following passage (Mahomed, A.J.) appears (at p.813):

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

Subsequently, the Namibian Supreme Court, in Minister of Defence, Namibia – vs – Mwandinghi, 1992(2) SA 355 (at p.362) thus held:

> " The Namibian Constitution must therefore be purposively interpreted, to avoid the 'austerity of tabulated legalism.'"

52. We would adopt the same principle, as to the spirit of the Constitution lying at the core of all constitutional interpretation; and we bear this in mind, in relation to the doctrine of the separation of powers as it applies under the Constitution of Kenya, 2010.

53. Separation of powers is an integral principle in Kenya's Constitution: for instance, Chapter 8 is devoted to the Legislature; Chapter 9 to the Executive; and Chapter 10, on the Judiciary, provides (Article 160(1)) that:

> " In the exercise of judicial authority the Judiciary as constituted by Article 161, shall be subject only to this Constitution and the law and shall not be subject to the control or direction of any person or authority".

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

55. The Attorney-General's role is to be seen against the foregoing background. By Article 156(4), (5) and (6) of the Constitution, the Attorney-General is designated the principal advisor of the Government; he represents the national Government in non-criminal proceedings, in Court; with the leave of the

Court, he may appear in civil proceedings as amicus curiae. The Constitution places an obligation upon the Attorney-General to promote, protect and uphold the rule of law and to defend the public interest. It can be said that the Attorney- General bears the mantle of the "chief lawperson" of Government in its diverse dimensions. The various departments of the Government have the liberty to seek the Attorney-General's opinion on any legal question of relevance to their day-to-day operations.

56. Learned counsel, Ms. Kimani thus submitted – and with justification, we believe – that the applicant should have sought the advice of the Attorney- General, before moving the Supreme Court to give an Advisory Opinion. Counsel's position is, indeed, quite consistent with Rule 40(4)(c) of the Supreme Court Rules, which thus provides:

> "(4) A two-Judge Bench may after giving the parties an opportunity to be heard reject a reference in whole or in part if –
>
> .....
>
> (c) the matter in respect of which the reference is made can...in the opinion of the Court be resolved by the Attorney-General and such advice has not been sought".

57. Is it then the case, as urged by Mr. Nowrojee, that Rule 40(4)(c) of the Supreme Court Rules if applied to references for an opinion, would confer upon the Attorney-General a veto power over an Independent Commission?

58. The independence of Commissions is secured by Article 249(20) of the Constitution which provides that such Commissions and holders of office therein (Article 248), are subject only to the Constitution and the law and are independent and not subject to direction or control by any person or authority. It is a question before this Court whether the mere act of seeking advice from the Attorney-General, or the requirement for seeking such advice before moving the Court for an Advisory Opinion, would be tantamount to interference with the independence of the applicant.

59. It is a matter of which we take judicial notice, that the real purpose of the "independence clause", with regard to Commissions and independent offices established under the Constitution, was to provide a safeguard against undue interference with such Commissions or offices, by other persons, or other institutions of government. Such a provision was incorporated in the Constitution as an antidote, in the light of regrettable memories of an all-powerful Presidency that, since Independence in 1963, had emasculated other arms of government, even as it irreparably trespassed upon the fundamental rights and freedoms of the individual. The Constitution established the several independent Commissions, alongside the Judicial Branch, entrusting to them special governance-mandates of critical importance in the new dispensation; they are the custodians of the fundamental ingredients of democracy, such as rule of law, integrity, transparency, human rights, and public participation. The several independent Commissions and offices are intended to serve as 'people's watchdogs' and, to perform this role effectively, they must operate without improper influences, fear or favour: this, indeed, is the purpose of the "independence clause".

60. While bearing in mind that the various Commissions and independent offices are required to function free of subjection to "direction or control by any person or authority", we hold that this expression is to be accorded its ordinary and natural meaning; and it means that the Commissions and independent offices, in carrying out their functions, are not to take orders or instructions from organs or persons outside their ambit. These Commissions or independent offices must, however, operate within the terms of the Constitution and the law: the "independence clause" does not accord them carte blanche to act or conduct themselves on whim; their independence is, by design, configured to the execution

of their mandate, and performance of their functions as prescribed in the Constitution and the law. For due operation in the matrix, "independence" does not mean "detachment", "isolation" or "disengagement" from other players in public governance. Indeed, for practical purposes, an independent Commission will often find it necessary to co-ordinate and harmonize its activities with those of other institutions of government, or other Commissions, so as to maximize results, in the public interest. Constant consultation and co-ordination with other organs of government, and with civil society as may be necessary, will ensure a seamless, and an efficient and effective rendering of service to the people in whose name the Constitution has instituted the safeguards in question. The moral of this recognition is that Commissions and independent offices are not to plead "independence" as an end in itself; for public-governance tasks are apt to be severely strained by possible "clashes of independences".

61. In the instant matter, it is our opinion that, seeking the advice of the Attorney-General, or being required to do so by a rule of procedure, does not compromise the independence of a State organ in any way, nor does it vest a veto power in that office. While the applicant after obtaining advice from the office of the Attorney-General is not necessarily bound by the same, for the purpose of this Court, the fact that such advice was sought in the first place, will demonstrate the applicant's commitment, as well as fidelity to due process.

E. Advisory Opinions In General

1. Advisory Opinions in Comparative Perspective

62. Even as we address the preliminary objection raised in this matter, we find it propitious to consider the question of Advisory Opinions more broadly, and to lay certain guidelines in this sphere of jurisdiction, as we foresee that applications of a similar kind may be expected in the future. We will, in this regard, guide ourselves on the basis of relevant comparative perspectives.

63. As already recorded herein, only a handful of States within the United States of America have made provisions for Advisory Opinions to be given by their respective Supreme Courts; for in that country, there is a general bar on Advisory Opinions, dating as far back as 1793 when Thomas Jefferson who was Secretary of State, on behalf of President Washington, wrote to the Justices of the Supreme Court seeking an opinion on a list of specific questions on America's obligations towards Great Britain and France which were at war, in the context of international law. Jefferson's letter to Chief Justice Jay and his fellow Justices requested "in the first place, their opinion whether the public may with propriety, be availed of their advice on these questions?" The Justices rejected the President's request, on the ground that it would be improper for them to answer legal questions "extra-judicially"; they rested their refusal upon –

> " .....the lines of separation drawn by the Constitution between the three departments of the government. These being in certain respects checks upon each other, and our being judges of a court of last resort, are considerations which afford strong arguments against the propriety of our extra-judicially deciding the questions alluded to...."

64. In so doing, the Supreme Court was asserting its role as a judicial, not advisory one, as well as protecting the constitutional doctrines of the separation of powers and judicial independence.

65. Later, in Re Pacific R. Commission, 32 Fed. 241, 255 the Supreme Court asserted that the US Constitution confers jurisdiction only in "cases and controversies", a position underlined again in Muskrat -v- United States, 219, U.S. 346 (1911), thus:

> " ....that judicial power, as we have seen it, is the right to determine actual controversies arising between adverse litigants, duly instituted in courts of proper jurisdiction...[T]his attempt to obtain a judicial declaration of the validity of the act of Congress is not presented in a 'case' or 'controversy',...under the Constitution of the United States...."

The same line of judicial reasoning recurs in a much later decision, Steel Co., aka Chicago Steel & Pickling Co. -v- Citizens for a Better Environment, 523 U.S. 83 (1998) in which the U.S. Supreme Court thus stated:

> " Article 111 (2) of the Constitution extends the 'judicial power' of the United States only to 'Cases' and 'Controversies'. We have always taken this to mean cases and controversies of the sort traditionally amenable to and resolved by the judicial process."

66. In a nutshell, the bar on Advisory Opinions in the United States of America is typically justified by reference to five issues: firstly, the doctrinal justifications of separation of powers and judicial restraint; when courts answer legal questions outside the legal dispute-resolution process, they go beyond the judicial role, and assume a quasi-legislative task. It has been suggested that the bar on Advisory Opinions serves as a microcosm of the larger political orientation, which is characterised by largely representative government, but with a circumscribed countermajoritarian element. The decision of the Jay Court, that the Federal judiciary ought not to provide advisory opinions to the elected branches of government, is only one of the many choices made in the design of the institutions, that signifies the ability of the Supreme Court to depart from the will of the elected branches of government.

67. Secondly, the Court's constitutional power to decide only concrete cases, and not abstract legal issues: as Advisory Opinions are seen as expressions of the views of the individual justices, rather than the decision of the Court, it is considered an extra-judicial function of the judges. Consequently, the view taken is that an Advisory Opinion does not bind the requesting branch of government to act in accordance with the advice rendered. Neither the justices themselves, nor parties, are bound by the conclusions reached in an advisory opinion when the same subject matter arises in subsequent litigation. Thus, because Advisory Opinions are generally non-binding and purely advisory, neither stare decisis nor res judicata applies. In the Muskratcase, the Supreme Court observed that in the famous case of Marbury v Madison, Marshall CJ –

> " ...was careful to point out that the right to declare an act of Congress unconstitutional could only be exercised when a proper case between the opposing parties [was] submitted for judicial determination...'

68. Thirdly, the institutional capacities of the Courts, with limited establishment, and limited fact-finding capacities than the other branches, render the Courts unsuited for inquiries into hypothetical questions.

69. Fourthly,constitutional questions cannot be answered in the abstract, because they sometimes depend on the application of law to precise facts that cannot be known until the challenged statute has been implemented.

70. The US Supreme Court has also placed particular emphasis on the fact of its being the final Court of appeal; it is the Court which would normally be the last to hear a case, after the facts have been fully

aired in lower Courts. In the response to President Washington in 1793, that Court referred to "being judges of a court of last resort", the Court to which any actual dispute might finally be brought. It is clear that the Courts refuse to advise on abstract legal questions; they give their views only in the course of deciding actual cases or controversies. Hence 'case or controversy', as a requirement, is fundamental in American jurisprudence. In the case of Aetna Life Ins. Co. Vs. Haworth, 300 U.S. 227, the Court has defined justiciable controversy as being distinct from –

> " a difference or dispute of a hypothetical or abstract character; from one that is academic or moot – one that is definite and concrete, touching the legal relations of parties having adverse legal interests,....a real and substantial controversy admitting specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts."

71. Fifthly, the Court's preference for judicial restraint: if judges decide only those cases that meet certain justiciability requirements, they respect the spheres of their co-equal branches, and minimise the troubling aspects of countermajoritarian judicial review, in a democratic society, by maintaining a duly limited place in government.

72. In Australia, the term 'matter' has been held to require concrete dispute and not to permit advisory jurisdiction. In the case of Re Judiciary Act 1903-1920 & In re Navigation Act 1912-1920 (1921) 29 CLR 257, the Court rejected a submission that "matter" meant no more than legal proceeding, and that Parliament might at its discretion create or invent a legal proceeding in which the Court might be called on to interpret the Constitution by a declaration at large. The High Court in defining what a 'matter' is said:

> " ...we do not think that the word 'matter'...means a legal proceeding, but rather the subject matter for determination in a legal proceeding. In our opinion there can be no matter... unless there is some right, duty or liability to be established by the determination of the Court..."

73. When charged with drawing up the Constitution, the Australian Federal Convention decided against the conferring of advisory jurisdiction. This was described by Professor Helen Irving (in the article, "Advisory Opinions, the Rule of Law, and the Separation of Powers" [2004] Macquarie Law Journal, p. 6) as a "strong policy argument against such jurisdiction," a perception that arguments on both or more sides are best brought out in litigation where there are competing interests. The learned scholar states:

> " ...ex parte interpretations of the law, without the thorough examination of the interested parties and their counsel, are apt to be unsatisfactory and unauthoritative...[and] the practice would be, at least, open to serious abuse. The one advantage it would have – that of obtaining a prompt decision upon questions which are in doubt, but which no one is ready to litigate – is more than balanced by other considerations. The Judges would be liable to be hindered in the discharge of their appropriate duties by being employed, in this manner, as the lawadvisers of the Crown – a position which might lead to the undesirable entanglement of the Bench in political matters...'

74. When considering the establishment of its own Supreme Court to replace the Judicial Committee of the Privy Council, an advisory group to the Attorney- General of New Zealand wrote:

> " ...one of the difficulties of the reference procedure is that the Court is often presented with a relatively abstract question divorced from the factual setting which would be present in a specific case. It has been a common complaint that some of the opinions rendered in references have propounded doctrine that was too general and abstract to provide a satisfactory rule..."

75. In England, judges had a long-standing practice of issuing Advisory Opinions, upon the monarch's request. In this regard, English superior Courts of first instance gave Advisory Opinions; these were rendered by common law and admiralty judges, but not by the House of Lords (now the Supreme Court), which was the English Court of last resort. The current attitude of English Courts is one of reluctance to deliver Advisory Opinions. Munby J observed in the case of The Queen (on the application of (1)A(2)B (by their litigation friend the Official Solicitor) (3) X(4)Y Claimants v East Sussex County Council [2003] EWHC 167 (Admin):

> " ...the fact remains that courts exist to resolve real problems and not disputes of merely academic significance. Judges do not sit as umpires on controversies of the Academy. Nor is it the duty of a judge when sitting judicially...to set out to write a textbook or practice manual or to give advisory opinions...it is no function of the court...to give advisory opinions on questions raised in the abstract. The proper application of the law can only be determined in the context of a particular factual situation, decided on the facts of a concrete case..."

76. The Supreme Court of Canada takes a boldly different stand on Advisory Opinions. In Attorney-General of Ontario v Attorney-General of Canada [1912] 1 AC 571, that Court held that there is nothing in the Constitution of Canada to exclude Advisory Opinions. This is not to say that the Court assumes jurisdiction as an inherent matter, but it has held that the Constitution did not preclude the grant of such jurisdiction by statute, and indeed the Judicial Committee of the Privy Council was of the same view. However, it is noteworthy that the Judicial Committee signalled a warning against excessive use of Advisory Opinions:

> " ...No one who has experience of judicial duties can doubt that, if an act of this kind were abused, manifold evils might follow, including undeserved suspicion of the course of justice and much embarrassment and anxiety to the judges themselves..."

77. In the Republic of Nauru, Article 55 of the Constitution has been put to use on six occasions, and on one such occasion, a constitutional Reference, In re Dual Nationality and Other Questions (2004), Barry Connell C.J. made the following remarks:

> " The referral provision in the Constitution is an unusual process, not always available under other written Constitutions but, nevertheless, Article 55 has been used on a number of occasions in Nauru. It is unusual in that Courts will not normally exercise jurisdiction in a case without a justiciable matter. Courts normally will not conduct a case on a hypothetical question. However, under Article 55, the Court is enjoined to give an Opinion where the Cabinet desires an interpretation or effects of a provision of the Constitution, where the question has arisen or appears to the Cabinet likely to arise...On account of the nature of Article 55, the Court must limit itself to the questions asked. Whilst the Court gives what is termed an Opinion, one must realise that it is a constitutional opinion based on law. Such

an opinion carries legal weight, so far as it goes, but it must itself be susceptible to the normal cannons of interpretation in the event of a particular disputed question brought before the Court."

78. The Inter-American Court of Human rights has observed that its advisory jurisdiction extends to all parts and provisions of the American Convention, including questions of the Convention's entry into force and the compatibility of reservations with the treaty. In hearing contentious cases arising under the Convention, the Court has broad advisory jurisdiction extending to all Organisation of American States (OAS), member states, who may consult the Court on the interpreting of the Convention or other treaties concerning the protection of human rights in the Americas. They also may request an opinion on the compatibility of any domestic laws with such instruments. However, petitioners to the Court for advisory opinions have to demonstrate a "legitimate institutional interest" in the questions posed by the request.

79. Within the United Nations, Article 65(1) of the Statute of the International Court of Justice (ICJ) provides that:

> " ...the Court may give an advisory opinion on any legal question at the request of whatever body may be authorized by or in accordance with the Charter of the United Nations to make such a request..."

Article 96 of the UN Charter authorizes the General Assembly, Security Council, and certain specialized agencies to seek Advisory Opinions from the ICJ. It is noteworthy that since 1945, in over 65 years, only 26 such opinions have been issued and, of these, only two in the last decade. It has been argued that the legal reasoning embodied in the opinions reflects the Court's authoritative views on important issues of international law; and in arriving at them, the Court follows essentially the same rules and procedures that govern its binding judgments delivered in contentious cases submitted to it by sovereign states. It has further been argued that most of the opinions sought of the ICJ, have been for 'housekeeping issues'.

80. Article 36 of the Treaty for the Establishment of the East African Community gives the East African Court of Justice the jurisdiction to give Advisory Opinions, at the request of the Summit, the Council of Ministers, or a Partner State, regarding a question of law arising from the Treaty which affects the Community. The Court has already exercised this jurisdiction.

81. In India, Article 143(1) of the Constitution gives considerable discretion to the Supreme Court, in deciding whether to deliver an Advisory Opinion to the President:

> " If at any time it appears to the President that a question of law or fact has arisen, or is likely to arise, which is of such a nature and of such public importance that it is expedient to obtain the opinion of the Supreme Court upon it, he may refer the question to that Court for consideration and the Court may, after such hearing as it thinks fit, report to the President its opinion thereon."

Between 1949 and 1962, the Indian Supreme Court received three requests for Advisory Opinions from the President, and delivered all three. It is significant that the Supreme Court gave advice on hotly contested matters, including the scope of delegation of legislative power, the reorganization of the national primary and secondary education system, and the procedure for ceding territories to other states. It is also noteworthy that these Advisory Opinions were given during the years immediately following the installation of a new government. In the history of the Indian Supreme Court, Presidents

have sought about a dozen Advisory Opinions, and the Court has acquiesced in all but one, which was on a religious dispute over the ownership of a Hindu temple.

82. While the advisory jurisdiction of the Supreme Court of Kenya is granted by the Constitution, the wisdom of the cases cited indicates that, for us to properly address the question at hand, we must be the Court that is seized with the facts. We also must perceive the matter with a sense of appropriateness, in relation to the applicable facts and circumstances. It must be emphasized that the advisory jurisdiction of the Supreme Court under Article 163(6) is discretionary in nature. This being the case, and further, given the fact that the advisory jurisdiction is a novel phenomenon in Kenya, it is expedient that this Court should progressively develop guidelines for the exercise of this discretion.

83. With the benefit of the submissions of learned counsel, and of the comparative assessments recorded herein, we are in a position to set out certain broad guidelines for the exercise of the Supreme Court's Advisory-Opinion jurisdiction.

(i) For a reference to qualify for the Supreme Court's Advisory-Opinion discretion, it must fall within the four corners of Article 163(6): it must be "a matter concerning county government." The question as to whether a matter is one "concerning county government", will be determined by the Court on a case-by-case basis.

(ii) The only parties that can make a request for an Advisory Opinion are the national government, a State organ, or county government. Any other person or institution may only be enjoined in the proceedings with leave of the Court, either as an intervener (interested party) or as amicus curiae.

(iii) The Court will be hesitant to exercise its discretion to render an Advisory Opinion where the matter in respect of which the reference has been made is a subject of proceedings in a lower Court. However, where the Court proceedings in question have been instituted after a request has been made to this Court for an Advisory Opinion, the Court may if satisfied that it is in the public interest to do so, proceed and render an Advisory Opinion.

(iv) Where a reference has been made to the Court the subject matter of which is also pending in a lower Court, the Court may nonetheless render an Advisory Opinion if the applicant can demonstrate that the issue is of great public importance and requiring urgent resolution through an Advisory Opinion. In addition, the applicant may be required to demonstrate that the matter in question would not be amenable to expeditious resolution through adversarial Court process.

84. The foregoing guidelines coincide with our conviction that the plain terms of the Constitution should be read in the broader context of its spirit and philosophy; and on that basis, applications seeking Advisory Opinion shall be resolved as necessitated by the merits of each case. In view of the practical and legal constraints attendant on Advisory Opinions, this Court will, in principle, exercise that jurisdiction with appropriate restraint.

(2) The Effect of Advisory Opinions

85. Although the effect of advisory opinions in general was not an issue pleaded in the reference, it has become necessary to consider it especially in light of the principles enunciated herein. Article 163(7) of the Constitution states that "[a]ll courts, other than the Supreme Court, are bound by the decisions of the Supreme Court." This provision is the constitutional validation of the Kenyan common-law position, long established in Dodhia v. National and Grindlays Bank [1970] EA 195, although the Supreme Court did not then exist. That case held that subordinate Courts are bound by decisions of

superior courts; that Courts of Appeal are bound by their own previous decisions; that, as a matter of judicial policy, the Court of Appeal as the final Court in East Africa, while normally bound by its previous decisions, should be free in both criminal and civil cases to depart from such decisions if it appears right to do so. The same principles applied to decisions of the Judicial Committee of the Privy Council, which then entertained appeals from East Africa.

86. In common with other final Courts in The Commonwealth, Kenya's Supreme Court is not bound by its decisions, even though we must remain alive to the need for certainty in the law. The rules of constitutional interpretation do not favour formalistic or positivistic approaches (Articles 20(4) and 259(1)). The Constitution has incorporated non-legal considerations, which we must take into account, in exercising our jurisdiction. The Constitution has a most modern Bill of Rights, that envisions a human-rights based, and social-justice oriented State and society. The values and principles articulated in the Preamble, in Article 10, in Chapter 6, and in various other provisions, reflect historical, economic, social, cultural and political realities and aspirations that are critical in building a robust, patriotic and indigenous jurisprudence for Kenya. Article 159(1) states that judicial authority is derived from the people. That authority must be reflected in the decisions made by the Courts.

87. In Article 259(1) the Constitution lays down the rule of interpretation as follows: "This Constitution shall be interpreted in a manner that –

(a) promotes its purposes, values and principles;

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

(c) permits the development of the law; and

(d) contributes to good governance."

Article 20 requires the Courts, in interpreting the Bill of Rights, to promote:

(a) the values that underlie an open and democratic society based on human dignity, equality, equity and freedom; and

(b) the spirit, purport and objects of the Bill of Rights.

88. These constitutional imperatives must be implemented in interpreting the provisions of Article 163(6) and (7), on Advisory Opinions. Article 10 states clearly the values and principles of the Constitution, and these include: patriotism, national unity, sharing and devolution of power, the rule of law, democracy, participation of the people, human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalized, good governance, integrity, transparency and accountability, and sustainable development.

89. It is for these reasons that the Supreme Court, while observing the importance of certainty of the law, has to nurture the development of the law in a manner that eschews formalism, in favour of the purposive approach. Interpreting the Constitution, is a task distinct from interpreting the ordinary law. The very style of the Constitution compels a broad and flexible approach to interpretation.

90. It has been argued by the second Interested Party that Article 163(7) of the Constitution does not include Advisory Opinions in the Supreme Court's sphere of decision-making. The Constitution itself has no definition of the word "decision" (Article 260). Black's Law Dictionary (2nd Edition) defines an Advisory Opinion as "[a] nonbinding statement by a Court of its interpretation of the law on a matter submitted for that purpose." The Dictionary defines 'decision' as "[a] judicial determination after consideration of the facts and the law, especially a ruling, order or judgment pronounced by a Court when considering or disposing of a case." These definitions underpin the reasoning in many

cases that have been cited by the amicus curiae, from jurisdictions with no constitutional or statutory provisions on Advisory Opinions. The argument is that adversarial proceedings in Court reflect the consideration of facts and the law that, collectively, result in a determination invariably referred to as: an order, a ruling or a judgment. The implication is that an Advisory Opinion does not follow such a route, and may lack the intellectual rigour, or the professional and juristic quality that attends a Court decision. There is also the implication that no interests are at stake, as would normally be the case in adversarial proceedings. However, this approach is not universal, and in some jurisdictions, Advisory Opinions are binding. In any case, while these considerations may be relevant in other jurisdictions, Kenya's Constitution provides expressly for Advisory Opinions, under Article 163(6); and this calls for a new approach to rationalization. In the instant case, several parties have joined the proceedings, to argue points of law and, sometimes, of fact. The Supreme Court listens to competing interpretations of the law advanced by the parties to the case; and it then decides on the issue of interpretation, making a reasoned choice.

91. Our task now is to decide whether an Advisory Opinion is simply that – advice which does not bind anyone; or whether it is a 'decision', within the meaning of Article 163(7), and thus, binding on any Court or parties. If the Kenyan Constitution had the same provision as Section 19(2) of the Constitution of Papua New Guinea, namely, that "[a]n opinion given under Subsection (1) [that is the Advisory Opinion] has the same binding effect as any other decision of the Supreme Court", we would not have to undertake this inquiry.

92. It may be useful to look at decided cases, in jurisdictions that provide for Advisory Opinions either under the Constitution or by statute. Canada is a common law jurisdiction where provision exists for an advisory jurisdiction. In the case of Attorney-General of Ontario v. Attorney-General of Canada [1912] 1 AC 571, the Judicial Committee of the Privy Council stated, in relation to Advisory Opinions of the Supreme Court of Canada, that "[t]he answers are only advisory and will have no more effect than the opinions of the Law Officers." The amicus curiae, Professor Yash Pal Ghai,in his profound submissions, lays bare the common law's hostility to Advisory Opinions: a stand attributable to issues of separation of powers and the independence of the judiciary. But these are not the only reasons. Courts have for a long time used both arguments to disguise their political, ideological and partisan inclinations. Fortunately, in our view, Kenya's Constitution has taken the first steps in demystifying judicial functions, as well as the administration of justice in Kenya. The Constitution has signalled a movement from the 'judicial-convent' setting, to the people's Courts of Justice. We consider that the Supreme Court's opinion cannot be on the same plane as that of law officers from the Attorney-General's Chambers, or, indeed, of any other State organs that could appear before this Court pleading for an Advisory Opinion. The application, in this case, is one where, although the proceedings were not adversarial, they, in fact, involved robust intellectual rigour, reflected in the focused, written submissions of the amici curiae, and in-depth written and oral submissions of all learned counsel. The rich content of the arguments, the illuminating authorities and contributions in scholarly journals, as well as submissions that reflected the spirit of the Constitution, were all as powerful as though the reference was adversarial in nature. We will, therefore, not lay undue weight on the dichotomy between adversarial proceedings and proceedings in references for Advisory Opinion. We are also of the view that, on the issue of the effect of an Advisory Opinion on the contrast between legal and political policy, the distinction may not be as sharp as in sometimes assumed; because, as we have indicated, the Constitution requires its provisions to be interpreted in accordance with its stated guidelines, or its policy. All these aspects of the Constitution are critical, in considering the effect of an Advisory Opinion. We, therefore, hold that an Advisory Opinion, in this context, is a "decision" of the Court, within the terms of Article 163(7), and is thus binding on those who bring the issue before the Court, and upon lower Courts, in the same way as other decisions.

93. In our discussion of the advisory jurisdiction, we have adopted a circumscribed mandate in relation to the exercise of that jurisdiction. From such a reserved position, and in view of the pragmatic and discretionary nature of the mandate as we conceive it, we perceive that the Supreme Court's decisions in this domain may significantly touch on legal, policy, political, social and economic situations. On this account, it is inappropriate that the Supreme Court's Advisory Opinion should be sought as mere advice. Where a government or State organ makes a request for an Opinion, it is to be supposed that such organ would abide by that Opinion; the Opinion is sought to clarify a doubt, and to enable it to act in accordance with the law. If the applicant were not to be bound in this way, then it would be seeking an Opinion merely in the hope that the Court would endorse its position and, otherwise, the applicant would consider itself free to disregard the Opinion. This is not fair, and cannot be right. While an Advisory Opinion may not be capable of enforcement in the same way as ordinary decisions of the Courts (in the shape of Rulings, Judgments, Decrees or Orders), it must be treated as an authoritative statement of the law. The Opinion must guide the conduct of not just the organ(s) that sought it, but all governmental or public action thereafter. To hold otherwise, would be to reduce Article 163(6) of the Constitution to an "idle provision", of little juridical value. The binding nature of Advisory Opinions is consistent with the values of the Constitution, particularly the rule of law.

94. For the above reasons, we decide that an Opinion of the Supreme Court is binding as much as any other decision of the Court, as herein indicated. We agree with the Chief Justice of Nauru – another common law State that provides for the advisory jurisdiction – who thus observed in an Advisory Opinion,In the Matter of Article 55 of the Constitution Reference re Dual Nationality and other Questions (Constitutional Reference No.01/2004):

> " Such an Opinion carries legal weight, so far as it goes, but it must itself be susceptible to the normal canons of interpretation in the event of a particular disputed question brought before court."

F. Orders

95. We have read the reference application and the attendant depositions from the parties; we have considered the detailed written submissions from counsel, apart from hearing their oral submissions; we have focused our attention, firstly, on the nature of the jurisdiction of the High Court in determining a justiciable matter running in parallel with a subsequent invocation of the Supreme Court's Advisory Opinion Jurisdiction; then we have considered whether the Applicant ought to have sought the opinion of the Attorney-General before going to the Supreme Court, and the conditions in which, by the Constitution, an Advisory Opinion may be given; and we have addressed the practical considerations which should guide the Court in allowing a request for an Advisory Opinion; we have addressed the issue as to the effect in law of the Supreme Court's Advisory Opinion; and we have taken into account relevant comparative judicial experience.

96. In that context, and responding to the preliminary objection before us, our Orders are as follows:

    1. Notwithstanding that the Supreme Court, indeed, has the jurisdiction to hear the reference application, we uphold the preliminary objections, and decline to give an Advisory Opinion on the date of the next general election.

    2. The High Court shall proceed, on the basis of priority, and on the basis of the Orders of 15th November, 2011 to hear and determine the several petitions pending before it, in which the issue as to the date of the next general election has been raised in substantive pleadings.

DATED AND DELIVERED AT NAIROBI THIS 20TH DAY OF DECEMBER, 2011.

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W.M. MUTUNGA

CHIEF JUSTICE AND PRESIDENT OF THE SUPREME COURT

.....

NANCY BARAZA

DEPUTY CHIEF-JUSTICE AND VICE-PRESIDENT OF THE SUPREME COURT

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P.K TUNOI

JUDGE OF THE SUPREME COURT

.....

M.K. IBRAHIM

JUDGE OF THE SUPREME COURT

.....

J.B. OJWANG

JUDGE OF THE SUPREME COURT

.....

S.C. WANJALA

JUDGE OF THE SUPREME COURT

.....

N.S. NDUNGU

JUDGE OF THE SUPREME COURT