REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CORAM: KIMONDO, ODUNGA & MWITA JJ.

CONSTITUTIONAL PETITION NO. 209 OF 2016

[FORMERLY KISUMU PETITION NUMBER 9 OF 2016]

IN THE MATTER OF ARTICLES 1(3), 2, 3, 6(1) & (2), 10, 93(2), 94(4), 95, 104, 131(b),165 (3) (d), 174, 175(b), 179(1), 183, 186, 201(a), (b)(ii), (d) & (e), 202(2), 203, 205(1); 217; 218; 258, 259 & 261 OF THE CONSTITUTION

AND

IN THE MATTER OF THE FIFTH SCHEDULE TO THE CONSTITUTION

BETWEEN

KATIBA INSTITUTE.....1ST PETITIONER

TRANSFORM EMPOWERMENT FOR

ACTION INITIATIVE (TEAM).....2ND PETITIONER

AND

THE ATTORNEY GENERAL.....1ST RESPONDENT

THE PARLIAMENT OF THE REPUBLIC OF KENYA...2ND RESPONDENT

JUDGMENT

A. ***Introduction.***

1. This petition revolves around Article 104 of the Constitution which bestows upon voters the right to *recall* their representatives. The Article commands Parliament to enact legislation to provide for the grounds and procedures for recall. The Fifth Schedule to the Constitution required the legislation to be passed within two years of the promulgation of the Constitution.

2. Parliament enacted the ***Elections Act 2011****;* and, the ***County Governments Act 2012*** in an attempt

to meet the constitutional requirements. Sections 45, 46, 47 and 48 of the ***Elections Act 2011***; and, sections 27, 28 and 29 of the ***County Governments Act 2012*** provide for the recall of a Member of Parliament or the County Assembly respectively.

3. In this petition however, it is the petitioners' case that *no* legislation on recall was effectively passed; and, that the provisions are inimical to the letter and spirit of the Constitution.

B. ***The reliefs sought.***

4. The petitioners therefore pray for three key reliefs. Firstly, for a declaration that sections 45, 46, 47 and 48 of the ***Election Act 2011***; and, sections 27, 28 and 29 of the ***County Governments Act 2012*** are unconstitutional. Secondly, for a declaration under Article 261(6)(a) of the Constitution that Parliament has failed to pass the legislation contemplated by Article 104(2) and the Fifth Schedule of the Constitution. Thirdly, the petitioners crave for an order to *compel* Parliament to pass the legislation within ninety days of the delivery of the judgment in this matter. There is also a prayer for *costs*.

C. ***The nature of the petition and the parties.***

5. The petition is dated 14th March 2016. The substratum of the petition is that the impugned statutes run contrary to the constitutional right of citizens to recall their elected representatives. The petition is supported by the depositions of **Yash Ghai**; and, **George Collins Owuor** all sworn on 14th March 2016. The petition is contested by the respondents.

6. The 1st petitioner is a company limited by guarantee. Its certificate of incorporation is annexed marked *YG1*. The 2nd petitioner is a Community Based Organization registered as a self-help group by the former Ministry of Gender, Children and Social Development. A certificate of registration is attached marked *GCO1*.

7. The 1st respondent is the Attorney General. The office is established by Article 156 of the Constitution. The Attorney General is sued in his capacity as the principal legal adviser to the national government. The 2nd respondent is the bi-cameral legislative organ established under chapter 8 of the Constitution with the principal mandate of passing national laws.

8. **Yash Ghai** described himself as a retired law teacher and former chair of the defunct Constitution of Kenya Review Commission (CKRC). At paragraphs 5 and 6, he deposes as follows-

"(5) That during the process of constitution-making spearheaded by CKRC, members of the public were generally very firm that they wanted a provision in the Constitution that allowed them to recall their elected representatives if need be.

(6) That members of the public specifically told the CKRC that legislators should be more responsive to the people's needs; and should be subject to recall if they do not do so. A repeated complaint in public submissions to the CKRC was that candidates were seen when they were seeking votes, but were very much absent from constituencies during the term of Parliament, appearing again only to campaign for votes at the next election. In addition, the people said that candidates must satisfy moral and ethical standards for election to Parliament and work full time as legislators. Annexed herein and marked "YG2" is an excerpt of the CKRC report".

9. **Ghai** deposed further that clause 112 of the CKRC Draft Constitution contained elaborate grounds for recall: (a) incapacity; physical or mental; (b) if circumstances arise that would disqualify a person to be

elected as such; (c) misconduct likely to bring hatred, ridicule, contempt or disrepute to the office; and, (d) persistent desertion of the electorate without reasonable cause. The draft required that a petition for recall be signed by at least one-third of the voters in the relevant electoral unit. This was to be followed by a request to the Electoral Commission by the Speaker of Parliament requesting it to investigate the veracity of the motion. The Speaker would thereafter receive the report from the Electoral Commission. If he found the allegations to be justified, he would dismiss the affected MP.

D. ***Petitioners' submissions.***

10. The petitioner filed detailed submissions and a long list of authorities dated 9th February 2017. Learned counsel for the petitioners submitted that the National Constitutional Conference *(Bomas)* Draft Constitution omitted the recall clause. There is annexed an excerpt marked*YG4* from the Committee of Experts (CoE) that midwifed the present Constitution. **Ghai** avers that the CoE proposal gave birth to the current Article 104 of the Constitution. In a nutshell, the deponent avers that Parliament has not been faithful to its calling.

11. There is then the other supporting affidavit of **George Owuor**. At paragraphs 5 to 7, he deposes as follows-

"(5) That the [2nd petitioner] has considered, as part of enhancing good governance in County Assembly representation, the possibilities of assisting electorates and communities invoke the right of recall under Article 104 of the Constitution.

"(6) That [the 2nd petitioner] has, in more specific way, discussed with community members and electorates of Nyalenda A Ward, Kisumu County, the possibility of them invoking their right under Article 104 and the relevant sections of the County Government Act (CGA) because of actions taken by the Ward Member of County Assembly which are inimical to his role and in fact amount to abuse of office.

"(7) That upon studying the County Government Act and seeking legal opinion on the possibility of its application, [we] concluded that it was practically impossible to use the relevant provisions of that Act, or the Elections Act 2011 to effect the recall."

12. Learned counsel for the petitioner submitted that although Article 104 falls outside the chapter on the Bill of Rights, it is nevertheless elevated to a right by dint of Article 19 (3) (b). The latter provides that the rights in the Bill of Rights do not exclude other rights. Counsel submitted that the right to recall a member is an important facet of the political rights enshrined in Article 38 of the Constitution.

13. The petitioners' case is that the grounds for recall in the two statutes are meaningless or superfluous; or, that they fail to provide a practical and effective procedure; or, that they make it impossible for citizens to exercise the right of recall. For example, there is a multiplicity of preconditions including a finding by the High Court that the grounds have been met; or, being found "after due process of the law" to have violated the provisions of Chapter Six of the Constitution; or, to have mismanaged public resources; or, being convicted of an offence under the ***Elections Act***. Counsel submitted that those violations are already recognized by section 24 (2) of the ***Elections Act***. The section provides:

"A person is disqualified from being elected a member of Parliament if the person—

……(h) is found, in accordance with any law, to have misused or abused a State office or public office or in any way to have contravened Chapter Six of the Constitution."

14. Furthermore, Article 103 of the Constitution provides that the seat of a Member of Parliament falls vacant if he breaches the legislation enacted under Article 80; or, he is disqualified for election under Article (99) (2) (d) to (h) of the Constitution. The legislation contemplated by Article 80 is the ***Leadership and Integrity Act***. It provides a framework for enforcement of Chapter Six of the Constitution. Learned counsel submitted that such a member would automatically lose his seat upon conviction by dint of Article 103 (1) (g) of the Constitution. He advanced a similar argument for a member convicted of an offence under the ***Elections Act*** or the ***Elections Offences Act***.

15. Counsel also submitted that a voter who commits an electoral offence was also likely to be barred from participating in the elections. Furthermore, a person who is not registered as a voter cannot stand for election. Counsel also referred to Article 99 (1) (a) as read with Article 99 (2) (h) of the Constitution. In all of those situations, there would be no need for a recall election.

16. The petitioner attacked the impugned provisions as too narrow, vague or ambiguous. For example, the phrase “to have mismanaged public resources” may perhaps find grounding in section 68 of the Act. But the section relates to a person who is already a “Member of Parliament, a County Governor, a Deputy County Governor or a Member of a County Assembly” or “an employee of a statutory corporation or of a company in which the Government owns a controlling interest”.

17. Counsel submitted that mismanagement of public resources should carry a wider meaning. In any case, a person convicted under section 68 would lose the seat by dint of Article 103 (1) (b) of the Constitution. To buttress his argument, counsel cited the decisions in **Keroche Industries Ltd v Kenya Revenue Authority & others**, Nairobi High Court Misc. Appl. 743 of 2006 [2007] eKLR, **Coalition for Reform & Democracy & others v Attorney General & others**, Nairobi High Court Petitions 628 & 630 of 2014 [2015] eKLR and **Geoffrey Andare v Attorney General & others**, Nairobi, High Court Petition 149 of 2015 [2016] eKLR. In the latter case, the court held that section 29 of the Kenya Information and Communication Act was vague since the words *“grossly offensive, indecent, obscene or menacing character”* were not defined.

18. The grounds, procedures and pre-conditions for recall were also challenged. For example, section 45 (4) of the ***Elections Act*** and section 27 (4) of the ***County Governments Act*** provide that recall “shall only be initiated twenty-four months after the election of the Member of Parliament (or Member of County Assembly) and not later than twelve months immediately preceding the next general election”. Counsel submitted that the window was too small and narrow.

19. The petitioner submitted that the limitation on the number of recall motions was unconstitutional. Section 45 (5) of the ***Elections Act*** and Section 27 (5) of the ***County Governments Act*** provide that a recall petition shall not be filed against a member of Parliament (or Member of County Assembly) more than once during the term. Counsel submitted that this is inimical to Articles 24 (2) and 38 of the Constitution.

20. Reliance was placed on the decisions in **Mike Rubia & another v Moses Mwangi & others**, Nairobi, High Court Petition 70 of 2012 [2014] eKLR and **Coalition for Reform & Democracy & others v Attorney General & others**, Nairobi, High Court Petitions 628 & 630 of 2014 [2015] eKLR. In a synopsis, learned counsel submitted that the restrictions are too extensive and unjustifiable; and, that there could be less restrictive means.

21. The petitioners also contend that the impugned provisions are discriminatory. Section 45 (6) of the ***Elections Act*** and section 27 (6) of the ***County Governments Act*** provide that an unsuccessful candidate in the preceding election shall not initiate the recall. Counsel submitted that this violates

Articles 3, 10, 24 and 27 (4) and (6) of the Constitution. Section 47 (7) of the ***Elections Act*** and section 29 (7) of the ***County Governments Act*** were attacked for allowing a member who is *recalled* to run in the ensuing by-election. Counsel submitted that it violates Article 99 of the Constitution.

22. Section 48 of the ***Elections Act*** provides that a recall election shall be valid if the number of voters who concur in the recall election is at least fifty percent of the total number of registered voters in the affected county or constituency. The petitioner contended that it imposes a high and unreasonable threshold; and, that it undermines the right of recall in a free and democratic society. A similar argument was advanced for the recall election under the ***County Governments Act***.

23. Learned counsel submitted that that the right of recall constitutes an element of "direct democracy" because it is initiated by citizens. In that regard, it is intertwined with Article 38 on political rights particularly the right to campaign for a political party or cause; free, fair and regular elections based on universal suffrage; and, the free expression of the will of electors. He urged us to apply a purposive approach in interpreting Article 104 of the Constitution.

24. Reliance was placed on Articles 19 (3) (b), 20 (4), and 259 of the Constitution. Learned counsel cited a long line of authorities including **R v Big Mart M Drug Ltd** [1985] I.S.C.R 295, **Minister of Home Affairs (Bermuda) v Fisher** [1980] AC 319 and the Supreme Court of Kenya decision in **Re Interim Independent Election Commission**, Constitutional Application 2 of 2011 [2011] eKLR.

25. Counsel re-emphasized the guiding principles on governance including the rule of law; accountability; democracy; and, participation of the people enshrined in Article 10 (2) of the Constitution. He also referred us to comparative provisions on recall in other jurisdictions including the United Kingdom, Nigeria, Uganda, Ecuador, Philippines and the states of Georgia, California and Alaska in the United States.

E. ***The 1st respondent's case.***

26. As stated earlier, the petition is contested. The 1st respondent has filed grounds of opposition dated 2nd June 2016; and, supplementary grounds of opposition dated 10th April 2017. We shall condense them into seven. Firstly, that the petition offends the doctrine of presumption of constitutionality of a statute passed by parliament; secondly, that the petitioners have not reached the threshold to declare the statutes unconstitutional; thirdly, that the jurisdiction of the court under Article 261 of the Constitution has been prematurely invoked; fourthly, that the petition offends the doctrine of separation of powers; fifthly, that the prayers in the petition would defeat the very purpose of Article 104 of the Constitution; sixthly, that the petitioners have misconstrued the obligations placed upon the specific respondents regarding the initiation, formulation and enactment of legislation; and, lastly, that the 1st respondent discharged his responsibility upon passage of the statutes.

27. In short, the take of the 1st respondent is that this action is frivolous. At the hearing of the petition, learned counsel for the 1st respondent relied on submissions filed on 11th April 2017. He referred to Articles 1 and 94 of the Constitution. He submitted that the legislative authority is derived from the people; and, that at the national level, it is vested in and exercised by Parliament as a corporate entity. It follows that Members of Parliament speak on their own behalf; and, that of the people they represent. He implored us to adopt an interpretation that does not dilute the right of the people.

28. In his view, Parliament fulfilled its mandate by passing the two impugned statutes. Learned counsel submitted further that under the Fifth Schedule to the Constitution, the Attorney-General's role, in consultation with the defunct Commission for the Implementation of the Constitution (CIC), was to

prepare the relevant bills. In that regard, the Attorney-General discharged his mandate under Article 261 (4) of the Constitution by drafting and tabling the bills before Parliament. The two pieces of legislation were also enacted within the constitutional timeframe.

29. Counsel submitted that granted the circumstances, the petitioners have no valid claim against the 1st respondent. He emphasized that a writ in the nature of *mandamus* sought by the petitioners does not lie. He relied on the authorities in **Kenya National Examination Council v Republic, Ex Parte Geoffrey Gathenji & 9 Others,** Nairobi Civil Appeal No. 266 of 1996 and **Republic v the Commissioner of Lands & Another Ex Parte Kithinji Murugu M'agere**, Nairobi High Court Misc. Application No. 395 of 2012.

30. Counsel implored us to apply a purposive interpretation to the Constitution as one living instrument. He referred to Articles 1, 159 and 259 of the Constitution as well as the US Supreme Court decision in **U.S. v Butler**, 297 U.S. 1 [1936]. He also relied on the decisions in **Ndyanabo v Attorney General** [2001] 2 E.A 495 and **Susan Wambui Kaguru & Others v Attorney General Another** [2012] eKLR for the proposition that there is a general presumption of constitutional validity of legislation. The burden of rebuttal rests on the petitioners. He submitted that the petitioners failed to discharge that burden.

31. On whether the grounds for recall provide excessive restrictions or procedural hurdles, he submitted that they are justifiable in an open and democratic society. He emphasized that there had to be due process of law before condemning the elected member. As to the limitation regarding the time of recall; and, the limitation on the number of recall petitions, he submitted that they provide a window to gauge the performance of the elected member. He said it secures the sovereign will of the people to be represented by a person of their choice after an election; and, does not violate Article 24 in any manner.

32. Counsel argued that unsuccessful candidates are barred from initiating a recall to prevent potential abuse of the process. He submitted that it does not amount to discrimination as defined in Article 27 (4) of the Constitution. He argued that the participation of the recalled member in the by election; and, the high threshold of votes required are meant to give effect to political rights under Article 38 of the Constitution.

33. Learned counsel submitted that Article 261 of the Constitution can only be invoked where there is an obvious failure on the part of the respondents to enact legislation within two years. He relied on the decisions in **Centre for Rights Education & Awareness & Another v The Attorney-General & 2 Others**, Nairobi High Court Petition No. 182 of 2015 [2015] eKLR and **Centre for Rights Education and Awareness & Ano. v The Attorney-General & 2 Others**, Nairobi High Court Petition No. 371 of 2016 [2017] eKLR.

34. Finally, learned counsel submitted that the court should steer clear of the question of adequacy or otherwise of legislation. He said there are no formulae. Reliance was placed on **Kenya National Commission on Human Rights v The Attorney-General & another** [2015] eKLR; and, the decision we referred to earlier, **U.S. v Butler** 297 U.S. 1 (1936). In short, counsel was urging us to leave the matter to the legislature. He prayed for dismissal.

F. ***The 2nd respondent's case.***

35. The 2nd respondent also opposed the petition. Learned counsel associated himself fully with the submissions by the Attorney General. He relied on submissions filed on 7th June 2016; and, further submissions filed on 11th May 2017. There is also a list of authorities dated 10th May 2017.

36. Counsel submitted at length on the doctrine of separation of powers and the principle of proportionality. He relied on a ruling dated 3rd February 2011 by the Speaker of the National Assembly on the subject ***Official Hansard Report [3/2/2011]*** as well as a long line of authorities including **Kivumbi v Attorney-General** [2008] 1 EA 174, **Republic v Registrar of Societies & 5 Others ex parte Kenyatta & 6 others** Miscellaneous Civil Application No. 747 of 2006 [2007] eKLR, **Kiraitu Murungi & 6 others v Musalia Mudavadi & Another** Nairobi HCCC No. 1542 of 1997, **Bradlaugh v Gosset** (1884) 12 Q.B.D. 271 and **British Railways Board and another v Pickin** [1974] 1 All E R 609.

37. Learned counsel submitted that the petitioners failed to rebut the presumption of constitutionality of the impugned statutes. He cited the authority in **Ndyanabo v Attorney General** [2001] 2 EA 485, **Lacson v Executive Secretary** 301 SCRA 298 (1999) and **Commission for the Implementation of the Constitution v Parliament of Kenya & another** Nairobi High Court petition 454 of 2012 [2013] eKLR. We were also implored to respect the constitutional boundaries between the courts and Parliament. Counsel referred us to **Kenya Youth Parliament & 2 Others v Attorney General & Another** Nairobi High Court petition 101 of 2011 [2012] eKLR.

38. Learned counsel submitted that the petitioners presented no evidence of ever trying to initiate a recall motion; or, having been obstructed by the impugned provisions. Furthermore, if the petitioners' case is that the statutes fall short of the constitutional imperative in Article 104, they have a clear remedy under Article 119 of the Constitution to petition parliament to enact, amend or repeal the Acts. He implored us to dismiss the petition.

G. ***Analysis and determination.***

39. We are indebted to all the learned counsel for their elaborate submissions; diligence; and, courtesy to the Court. If we do not make direct reference to all the cited cases, it is not for their lack of relevance.

40. We have anxiously considered the petition, depositions, grounds of opposition, rival submissions and the precedents.

41. A good place to start is Article 2(4) of the Constitution. It provides that "*any law, including customary law, that is inconsistent with this Constitution is void to the extent of the inconsistency, and any act or omission in contravention of this Constitution is invalid".* There are also guiding values and principles of governance including the rule of law; accountability; democracy; and, participation of the people enshrined in Article 10 (2) of the Constitution.

42. Article 259 of the Constitution on the other hand enjoins this court to interpret the Constitution in a manner that (a) promotes its purposes, values and principles; (b) advances the rule of law, and the human rights and fundamental freedoms in the Bill of Rights; (c) permits the development of the law; and (d) contributes to good governance. Read together with Article 10 on guiding national values and principles, a firm basis for purposive interpretation of the Constitution has been laid.

43. Since the issue before us is the *constitutionality* of legislation, it is important to reiterate the applicable principles. In the Supreme Court of India in **Hambardda Wakhana v Union of India Air** [1960] AIR 554 it was held that:

"In examining the constitutionality of a statute it must be assumed the Legislature understands and appreciates the needs of the people and the law it enacts are directed to problems which are made manifest by experience and the elected representatives assembled in a Legislature enacts laws which they consider to be reasonable for the purpose for which they are enacted.

Presumption is therefore in favour of the constitutionality of an enactment."

44. It is important to set out the general rule that applies to such investigations. That there is a presumption of constitutionality of statutes is not in doubt. This position was affirmed by the Court of Appeal of Tanzania in **Ndyanabo v Attorney General** [2001] E. A 495, which was a restatement of the law in the English case of **Pearlberg v Varty** [1972] 1 WLR 534. In the former, the Court held that:

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

45. It is therefore clear that the constitutionality of legislation is a *rebuttable presumption;* and, where the Court is satisfied that the legislation fails to meet the constitutional muster, nothing bars the Court from declaring it to be unconstitutional.

46. In **Re Interim Independent Election Commission**, Constitutional Application 2 of 2011 [2011] eKLR, the Supreme Court of Kenya held at paragraph 86 as follows:

"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."

47. We are also guided by the Supreme Court that in order to *re-engineer* the social order, a constitution must look forward and backward, vertically and horizontally. See **Samuel Kamau Macharia and another v Kenya Commercial Bank** Nairobi, Supreme Court, Application 2 of 2011 [2012] eKLR.

48. A number of precedents from foreign jurisdictions were cited before us. They included **R v Big Mart M Drug Ltd** [1985] I.S.C.R 295, **Minister of Home Affairs (Bermuda) v Fisher** [1980] AC 319, **S v Zuma** (CCT5/94) 1995, **U.S. v Butler,** 297 U.S. 1 [1936] and **British Railways Board and another v Pickin** [1974] 1 All E R 609, **Andres Sarmiento & others v The Treasurer of the Philippines** (G.R. No. 125680 & 126313) [2001]. While the decisions are no doubt persuasive, we must place a caveat. We must bear in mind the unique circumstances of our Republic; and, the nature of the suit before us. In **Kenya Airports Authority v Mitu-Bell Welfare Society [2016] eKLR** at paragraph 124, the Court of Appeal observed as follows:

"Whereas citation and reliance on persuasive foreign jurisprudence is valuable, foreign experiences, values and aspirations of other countries should rarely be invoked in interpreting the Kenyan Constitution. The progressive needs of the Kenyan Constitution are different from those of other countries."

49. The need for caution was also succinctly captured by the Supreme Court in **Jasbir Singh Rai & 3 others v Estate of Tarlochan Singh Rai & 4 others [2013] eKLR**.

“In the development and growth of our jurisprudence, commonwealth and international jurisprudence will continue to be pivotal. However, the Supreme Court will have to avoid mechanistic approaches to precedent. It will not be appropriate to pick a precedent from India one day, Australia another day, South Africa another, the US yet another, just because they seem to suit the immediate occasion. Each of those precedents has its place in the jurisprudence of its own country.”

50. We shall first dispose of three preliminary matters. Firstly, we are satisfied that Article 258 of the Constitution broadly grants the two petitioners the right to present this action. Secondly, from an evidential standpoint, none of the two petitioners has tendered practical evidence on the inadequacies or inefficiencies of the impugned provisions.

51. Our finding is fortified by the two depositions in support of the motion. The affidavit of **George Owuor** is particularly sketchy on that aspect. He avers-

“(5) That the [2nd petitioner] has considered, as part of enhancing good governance in County Assembly representation, the possibilities of assisting electorates and communities [to] invoke the right of recall under Article 104 of the Constitution.

“(6) That [the 2nd petitioner] has, in more specific way, discussed with community members and electorates of Nyalenda A Ward, Kisumu County, the possibility of them invoking their right under Article 104 and the relevant sections of the County Government Act (CGA) because of actions taken by the Ward Member of County Assembly which are inimical to his role and in fact amount to abuse of office.”

52. Clearly no practical attempt has been made to recall the county member for *Nyalenda* A Ward, Kisumu. The deposition speaks of intended actions or possible scenarios. There is equally no evidence whatsoever that the petitioners have attempted to recall any Member of Parliament but were hindered by the impugned statute.

53. The deposition by **Yash Ghai** on the other hand recounts the *history* of constitution-making in Kenya. It details his opinions on the true epitome of a recall clause. His thrust is that the people said [to CKRC] that candidates must satisfy moral and ethical standards for election to Parliament and work full time as legislators.

54. He averred that clause 112 of the CKRC Draft Constitution provided elaborate grounds for recall: (a) incapacity; physical or mental; (b) if circumstances arise that would disqualify a person to be elected as such; (c) misconduct likely to bring hatred, ridicule, contempt or disrepute to the office; and, (d) persistent desertion of the electorate without reasonable cause.

55. **Yash Ghai** deposed that the draft constitution required that a petition for recall be signed by at least one-third of the voters in the relevant electoral unit. This was to be followed by a request to the Electoral Commission by the Speaker of Parliament requesting it to investigate the veracity of the motion. The Speaker would thereafter receive the report from the Electoral Commission. If he found the allegations to be justified, he would dismiss the affected MP.

56. So much so that, both petitioners have not presented *evidence* that the said provisions have been put into practice and have failed to provide a practical or effective procedure; or, made it impossible for citizens to exercise the right of recall. Were that to be the only consideration in determining this petition, we would have easily concluded, as the respondents did, that the court was faced with a theoretical framework of an imaginary dispute. That is the reason the petition is attacked for frivolity. Had we agreed

with the respondents, our finding on this point would have been sufficient to dispose of the petition.

57. However what is before us is a question of *interpretation* of the *Constitution* which behooves us to interrogate the *constitutionality* of the impugned provisions in the two statutes. Although the respondents contend that the petitioners have never attempted to put the impugned provisions into practice, we hold the view that that is neither a legal requirement nor is a condition precedent to filing a constitutional petition. It is not one of the tests of constitutionality of a statutory provision or statute. Article 258 of the Constitution provides as follows:

(1) Every person has the right to institute court proceedings, claiming that this Constitution has been contravened, or is threatened with contravention.

(2) In addition to a person acting in their own interest, court proceedings under clause (1) may be instituted by—

(a) a person acting on behalf of another person who cannot act in their own name;

(b) a person acting as a member of, or in the interest of, a group or class of persons;

(c) a person acting in the public interest; or

(d) an association acting in the interest of one or more of its members.

58. In **Re Kadhis' Court: Very Right Rev Dr. Jesse Kamau & Others vs. The Hon. Attorney General & Another** Nairobi High Court Misc. Appl. No. 890 of 2004. It was held:

"The general provisions governing constitutional interpretation are that in interpreting the Constitution, the Court would be guided by the general principles that; (i) the Constitution was a living instrument with a soul and consciousness of its own as reflected in the preamble and fundamental objectives and directive principles of state policy. Courts must therefore endeavour to avoid crippling it by construing it technically or in a narrow spirit. It must be construed in tune with the lofty purposes for which its makers framed it. So construed, the instrument becomes a solid foundation of democracy and the rule of law. A timorous and unimaginative exercise of judicial power of constitutional interpretation leaves the Constitution a stale and sterile document; (ii) the provisions touching fundamental rights have to be interpreted in a broad and liberal manner, thereby jealously protecting and developing the dimensions of those rights and ensuring that our people enjoy their rights, our young democracy not only functions but also grows, and the will and dominant aspirations of the people prevail. Restrictions on fundamental rights must be strictly construed."

59. We are alive that Article 3(1) of the Constitution binds and obliges every person to respect, uphold and defend the Constitution. Therefore any person who has reasonable grounds to believe that the Constitution has been contravened, or is threatened with contravention not only has the right but is constitutionally obliged to protect and defend the Constitution. One such contravention in our view would be where Parliament passes an *unconstitutional* legislation. That would call for action to protect the Constitution. The same applies where the legislature takes an action which does *not* uphold the letter or the spirit of the Constitution.

60. Obviously, such action can only be undertaken pursuant to Article 165(3)(d)(i) and (ii) of the Constitution. This position was adopted in **Doctors for Life International vs. Speaker of the National**

Assembly and Others (CCT12/05) [2006] ZACC 11; 2006 (12) BCLR 1399 (CC); 2006 (6) SA 416 (CC) where it was held that:

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

61. It is therefore our view that the petitioners did not have to wait until *actual* contravention of the Constitution to invoke Article 165(3)(d)(i) and (ii) of the Constitution.

62. The third preliminary matter relates to *laches*. It is beyond dispute that the two impugned statutes were enacted way back in the years 2011 and 2012 respectively. This petition was first lodged at the Kisumu registry of the High Court on 23rd May 2016. That is well over four years since the enactment of the last statute. There is thus substantial delay in presenting the petition. The delay has *not* been explained at all.

63. In ordinary civil suits, when delay is established, unless it is well explained, it is deemed to be inexcusable. See **Ivita v Kyumbu** [1984] KLR 441. However we are enjoined by Article 159 of the Constitution to do substantial *justice* to the parties. We remain alive to the need for proportionate justice. See ***Harit Sheth Advocate v Shamas Charania*** **Nairobi, Court of Appeal,** Civil Appeal 68 of 2008 [2010] eKLR, ***Stephen Boro Gitiha v Family Finance Bank & 3 others*****. Nairobi, Court of Appeal,** Civ. Appl. 263 of 2009 (UR 183/09) [2009] eKLR.

64. Furthermore, there is no *limitation period* within which a party should present a petition challenging the constitutionality of a statute. In our view, the Court may interrogate the constitutionality of legislation at any time and grant an appropriate remedy. The Courts have over time fashioned appropriate remedies including the *suspension* of the declaration of *unconstitutionality* of statute to enable Parliament take remedial action. Such suspended action does *not* mean that the impugned legislation is *not* unconstitutional. It simply postpones the decree that may cause more hardship to the public.

65. We are thus minded to dig a little deeper into the merits of the petition. Article 104 of the Constitution is at the centre stage of this dispute. The Article provides as follows-

"(1) The electorate under Articles 97 and 98 have the right to recall the member of Parliament representing their constituency before the end of the term of the relevant House of Parliament.

(2) Parliament shall enact legislation to provide for the grounds on which a member may be recalled and the procedure to be followed."

66. Parliament is established by Article 93 of the Constitution. Article 94 vests legislative authority on Parliament on behalf of the people of Kenya. Parliament at the national level means both the National Assembly and the Senate. Under the Fifth Schedule to the Constitution, Parliament was commanded to pass the legislation within two years from the date of promulgation of the Constitution. The Constitution also provides a mechanism for compliance. One of the sanctions is dissolution of Parliament. Article 261 (5) to (9) provide as follows:

"(5) If Parliament fails to enact any particular legislation within the specified time, any person may petition the High Court on the matter.

(6) The High Court in determining a petition under clause (5) may—

(a) make a declaratory order on the matter; and

(b) transmit an order directing Parliament and the Attorney-General to take steps to ensure that the required legislation is enacted, within the period specified in the order, and to report the progress to the Chief Justice.

(7) If Parliament fails to enact legislation in accordance with an order under clause (6) (b), the Chief Justice shall advise the President to dissolve Parliament and the President shall dissolve Parliament.

(8) If Parliament has been dissolved under clause (7), the new Parliament shall enact the required legislation within the periods specified in the Fifth Schedule beginning with the date of commencement of the term of the new Parliament.

(9) If the new Parliament fails to enact legislation in accordance with clause (8), the provisions of clauses (1) to (8) shall apply afresh."

67. It is conceded that parliament enacted the ***Elections Act 2011***; and, the ***County Governments Act 2012***. On the face of it, the legislations contain grounds and procedures for recalling a Member of Parliament or the County Assembly. See sections 45, 46, 47 and 48 of the Election Act 2011; and, sections 27, 28 and 29 of the ***County Governments Act 2012***. The petitioners contend that the provisions are hopelessly inadequate and amount to naught. The petitioners' case is that no legislation on recall was effectively passed; or, that the provisions contravene Article 104 of the Constitution.

68. It is thus important to set out the provisions *in extenso*. We shall begin with Part IV of the ***Elections Act 2011***-

"PART IV – Recall of member of Parliament

45. Right of recall

(1) The electorate in a county or constituency may recall their member of Parliament before the end of the term of the relevant House of Parliament on any of the grounds specified in subsection (2).

(2) A member of Parliament may be recalled where the member—

(a) is found, after due process of the law, to have violated the provisions of Chapter Six of the Constitution;

(b) is found, after due process of the law, to have mismanaged public resources;

(c) is convicted of an offence under this Act.

(3) A recall of a member of Parliament under subsection (1) shall only be initiated upon a judgement or finding by the High Court confirming the grounds specified in subsection (2).

(4) A recall under subsection (1) shall only be initiated twenty-four months after the election of the member of Parliament and not later than twelve months immediately preceding the next general election.

(5) A recall petition shall not be filed against a member of Parliament more than once during the term of that member in Parliament.

(6) A person who unsuccessfully contested an election under this Act shall not be eligible, directly or indirectly, to initiate a petition under this section.

46. Petition for recall

(1) A recall under section 45 shall be initiated by a petition which shall be filed with the Commission and which shall be—

(a) in writing;

(b) signed by a petitioner who—

(i) is a voter in the constituency or county in respect of which the recall is sought; and

(ii) was registered to vote in the election in respect of which the recall is sought;

(c) accompanied by an order of the High Court issued in terms of section 45(3).

(2) The petition referred to in subsection (1) shall—

(a) specify the grounds for the recall as specified under section 45(2);

(b) contain a list of such number of names of voters in the constituency or county which shall represent at least thirty percent of the registered voters; and

(c) be accompanied by the fee prescribed for an election petition.

(3) The list of names referred to in subsection (2)(b) shall contain the names, address, voter card number, national identity card or passport number and signature of the voters supporting the petition and shall contain names of at least fifteen percent of the voters in more than half of the wards in the county or the constituency, as appropriate.

(4) The voters supporting a petition under subsection (3) shall represent the diversity of the people in the county or the constituency as the case may be.

(5) The petitioner shall collect and submit to the Commission the list of names under subsection (2)(b) within a period of thirty days after filing the petition.

(6) The Commission shall verify the list of names within a period of thirty days of receipt of that list.

(7) The Commission, if satisfied that the requirements of this section are met, shall within fifteen days after the verification, issue a notice of the recall to the Speaker of the relevant House.

(8) The Commission shall conduct a recall election within the relevant constituency or county within ninety days of the publication of the question.

47. Recall elections

(1) Where a member of Parliament is to be recalled under section 45, the Commission shall frame the question to be determined at the recall election.

(2) A question referred to in subsection (1) shall be framed in such a manner as to require the answer "yes" or the answer "no".

(3) The Commission shall assign a symbol for each answer to the recall question.

(4) The voting at a recall election shall be by secret ballot.

(5) A recall election shall be decided by a simple majority of the voters voting in the recall election.

(6) Where a recall election results in the removal of a member of Parliament, the Commission shall conduct a by-election in the affected constituency or county.

(7) A member of Parliament who has been recalled may run in the by-election conducted under subsection (6).

48. Validity of recall election

A recall election shall be valid if the number of voters who concur in the recall election is at least fifty percent of the total number of registered voters in the affected county or constituency."

69. There are similar provisions in part IV of the ***County Governments Act*** *2012*. We shall also reproduce them in full-

"PART IV

27. Recall of a county assembly member

(1) The electorate in a county ward may recall their member of the county assembly before the end of the term of the member on any of the grounds specified in subsection (2).

(2) A member of a county assembly may be recalled where the member—

(a) is found, after due process of the law, to have violated the provisions of Chapter Six of the Constitution;

(b) is found, after due process of the law, to have mismanaged public resources;

(c) is convicted of an offence under the Elections Act (No. 24 of 2011).

(3) A recall of a member of the county assembly under subsection (1) shall only be initiated upon a judgment or finding by the High Court confirming the grounds specified in subsection (2).

(4) A recall under subsection (1) shall only be initiated twenty-four months after the election of the member of the county assembly and not later than twelve months immediately preceding the next general election.

(5) A recall petition shall not be filed against a member of the county assembly more than once during the term of that member in the county assembly.

(6) A person who unsuccessfully contested an election under the Elections Act (No. 24 of 2011) shall not be eligible, directly or indirectly, to initiate a petition under this section.

28. Petition for recall

(1) A recall under section 27 shall be initiated by a petition which shall be filed with the Independent Electoral and Boundaries Commission and which shall be— (a) in writing;

(b) signed by a petitioner who—

(i) is a voter in the Ward in respect of which the recall is sought; and

(ii) was registered to vote in the election in respect of which the recall is sought;

(c) accompanied by an order of the High Court issued in terms of section 27(3).

(2) The petition referred to in subsection (1) shall—

(a) specify the grounds for the recall as specified under section 27(2);

(b) contain a list of such number of names of voters in the Ward which shall represent at least thirty percent of the registered voters in that Ward; and

(c) be accompanied by the fee prescribed for an election petition.

(3) The list of names referred to in subsection (2)(b) shall contain the names, address, voter card number, national identity card or passport number and signature of the voters supporting the petition.

(4) The voters supporting a petition under subsection (3) shall represent the diversity of the people in the Ward.

(5) The petitioner shall collect and submit to the Commission the list of names under subsection (2)(b) within a period of thirty days after filing the petition.

(6) The Commission shall verify the list of names within a period of thirty days of receipt of that list.

(7) The Commission, if satisfied that the requirements of this section are met, shall within fifteen days after the verification, issue a notice of the recall to the speaker of the county assembly.

(8) The Commission shall conduct a recall election within the Ward within ninety days of the publication of the question.

29. Recall elections

(1) Where a member of the county assembly is to be recalled under section 27, the Independent Electoral and Boundaries Commission shall frame the question to be determined at the recall election.

(2) A question referred to in subsection (1) shall be framed in such a manner as to require the answer "yes" or the answer "no".

(3) The Commission shall assign a symbol for each answer to the recall question. (4) The voting at a recall election shall be by secret ballot.

(5) A recall election shall be decided by a simple majority of the voters voting in the recall election.

(6) Where a recall election results in the removal of a member of the county assembly, the Commission shall conduct a by-election in the affected Ward.

(7) A member of the county assembly who has been recalled may run in the by-election conducted under subsection (6)."

70. On a plain reading of the statutes, we disagree with the petitioners that parliament has *not* passed legislation setting out the grounds and procedures for recall. This is not the same as saying that the impugned provisions are adequate or effective. But it would be *incorrect* to say that *no* legislation has been passed at all. For example section 45(2) of the ***Elections Act 2011***; and, section 27(2) of the ***County Government Act 2012*** provide for the grounds.

71. Nevertheless, there is *ambiguity* and *vagueness* in some of the impugned provisions or their merits. The question that we must ask is: what is the effect of ambiguity and or vagueness in a statutory provision" Do they affect constitutionality of those provisions" In our view, ambiguity or vagueness in statutory provision makes that provision void. A provision will be said to be void where when the average

citizen is unable to know what is regulated and the manner of that regulation; or, where the provision is capable of eliciting different interpretations and different results. Such a provision would not meet constitutional quality.

72. For instance section 47(5) of the ***Elections Act*** provides that *"a recall election shall be decided by a simple majority of the voters voting in the recall election."* Section 29 (5) of the ***County Government Act*** has a similar provision. That notwithstanding, section 48 of the ***Elections Act*** provides that a recall election shall be valid if the number of voters who concur in the recall election is *at least fifty percent* of the *total number of registered voters* in the affected county or constituency. Clearly there is ambiguity and vagueness in the two provisions. Will the recall be decided by a simple majority or will it only be valid if fifty percent of the voters in the constituency or ward agree with the recall"

73. The Supreme Court of Canada in **Osborne v Canada (Treasury Board)** [1991] 2 SCR 69, 1991 stated that:

"**Vagueness can have constitutional significance one such significance is that a law may be so uncertain as to be incapable of being interpreted so as to constitute any restraint on governmental power. The uncertainty may arise either from the generality of the discretion conferred on the donee of the power or from the use of language that is so obscure as to be incapable of interpretation with any degree of precision using the ordinary tools."**

74. In **Grayned v City of Rockford** [1972] 408 US 104, the United States Supreme Court identified a basic principle of due process stating that:

"An enactment is void for vagueness if its prohibitions are not defined. Vagueness offends several important rules...;a vague law impermissibly delegates basic policy matters to policemen, judges and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application."

75. On his part Lord Diplock in **Black-Clawson International Ltd v Papierwerke Waldhof-Aschaffenberg AG** [1975] AC 591, 638 commented that:

"The acceptance of the rule of law as a constitutional principle requires that a citizen, before committing himself to any course of action, should be able to know in advance what are the legal consequences that will flow from it."

76. Therefore elementary justice demands legal certainty of rules affecting the citizen. A legislation or provision can also be unconstitutional on grounds of *cause and effect* otherwise known as *purpose or effect*. Where the purpose or effect results into unconstitutional effects the provision or statute may be nullified for being unconstitutional.

77. In **Olum & another v Attorney General** [2002] 2 E. A the Constitutional Court of Uganda stated:

"**To determine the constitutionality of a section of a statute or Act of Parliament, the court has to consider the purpose and effect of the impugned statute or section thereof. If its purpose does not infringe a right guaranteed by the constitution, the court has to go further and examine the effect of the implementation. If either its purpose or the effect of its implementation infringes a right guaranteed by the constitution, the impugned statute or section thereof shall be declared unconstitutional…"**

78. A similar position was taken in **Muranga Bar Operators Association & another v Minister of State for Provincial Administration and Internal Security & another** High Court Petition No. 3 of 2011, [2011] eKLR.

79. The impugned provisions in the two statutes were also attacked on the ground that their implementation would result into *discrimination*. The petitioners take up cudgels on section 45(6) of the ***Elections Act*** which provides that a person who *unsuccessfully* contested the preceding election *cannot* directly or indirectly initiate a recall. A similar caveat is found is found in section 27(6) of the ***County Government Act, 2012***. However, Sections 47(7) and 29(7) of the ***Elections Act, 2011*** and ***County Government Act, 2012***, respectively, *allow* the *recalled* member of the National Assembly or County Assembly to run in the ensuing by-election. This is contradictory. Whereas the unsuccessful contestant cannot initiate a petition for recall, the recalled representative is allowed to run. In justifying the limitation, the respondents submitted that if the unsuccessful candidates are allowed to initiate the recall, they will use the provisions to settle political scores and shorten the term of the incumbent.

80. We are not fully persuaded by that argument. Article 104 of the Constitution provides that:

(1) The electorate under Articles 97 and 98 have the right to recall the member of Parliament representing their constituency before the end of the term of the relevant House of Parliament; and

(2) Parliament shall enact legislation to provide for the grounds on which a member may be recalled and the procedure to be followed.

81. It is therefore clear that the Constitution itself empowers the *electorate* to initiate a recall process. It does not stipulate which class of the electorate has the powers to do so. In interpreting the provisions of the Constitution we associate ourselves with the views adopted in the Court of Appeal decision of **Njoya & 6 Others v Attorney General & Others (No. 2**) [2004] 1 KLR 261; [2004] 1 EA 194; [2008] 2 KLR that unlike an Act of Parliament, which is subordinate, the Constitution should be given a broad, liberal and purposive interpretation. To that extent, therefore, any person who falls within the description of the *electorate* has a constitutional right to initiate a recall petition. To hold otherwise would be to alter the letter and spirit of the Constitution.

82. In this case Parliament has been given power by the Constitution to legislate on the *grounds on which a member may be recalled and the procedure to be followed*. It cannot purport to exercise such powers to legislate on what *class* of the *electorate* can initiate the recall process. The action of the legislature in this case in akin to what faced Simpson, J (as he then was) in **Shah Vershi Devji & Co. Ltd v The Transport Licencing Board** [1970] E. A 631; [1971] E.A 289. The learned judge held:

"Under section 82(2) of the Constitution a public authority such as the Board is forbidden to treat any person in a discriminatory manner by virtue of any written law or in the performance of its functions. "Discriminatory" is defined in subsection (3) and it includes affording different treatment to different persons attributable wholly or mainly to their respective descriptions by race. By virtue of the definition of "person" in section 123(1) of the Constitution the applicant company is a person. It has been afforded different treatment attributable mainly to the race of its shareholders whereby a privilege or advantage has been refused to it which would have been accorded to it had its membership been otherwise. The treatment of the applicant by the Board is neither expressly or by necessary implication authorised by any provision of the law. Regulation 15(3) permits it to make a distinction between citizens and non-citizens but not between different classes of citizens. The Board accordingly, has treated the applicant in a discriminatory manner

in contravention of section 82 of the Constitution."

82. In **Koinange Mbiu v Rex** [1951] LRK 130, section 4 of ***Crop Production Ordinance Cap. 205*** permitted the Governor to make subsidiary legislation to fix by name area or areas to which rules for controlling and improving crop production and marketing would be applicable. Nothing in the section allowed rules to be made limited to a particular race or class in the community. However the Governor purported to make rules on crop cultivation restricted to a particular race. The Court found that such rules were *ultra vires.*

84. In our view the powers conferred upon the legislature to legislate on the *grounds on which a member may be recalled and the procedure to be followed* does not empower Parliament to legislate on *who* among the *electorate* has the right to *initiate* the recall process. It must follow that section 45 (6) of the ***Elections Act****;* and, section 27 (6) of the ***County Governments Act*** are *ultra vires* the Constitution.

85. Quite apart from that, Article 27 of the Constitution provides for *equality*; and, freedom from *discrimination*. The language is mandatory and states:

"The State shall not discriminate directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth."

86. In **Nyarangi & 3 Others v Attorney General** [2008] KLR 688, Nyamu, J (as he then was) delivered himself as follows:

"Discrimination which is forbidden by the Constitution involves an element of unfavourable bias. Thus, firstly on unfavourable bias must be shown by a complainant. And secondly, the bias must be based on the grounds set out in the Constitutional definition of the word "discriminatory" in section 82 of the Constitution. Both discrimination by substantive law and by procedural law, is forbidden by the constitution. Similarly, class legislation is forbidden but the Constitution does not forbid classification. Permissible classification which is what has happened in this case through the challenged by laws must satisfy two conditions namely:- (i) it must be founded on an intelligible differentia which distinguishes persons or things that are grouped together from others left out of the group; and (ii) the differentia must have a rational relation to the object sought to be achieved by the law in question; (iii) the differentia and object are different, and it follows that the object by itself cannot be the basis of the classification."

87. In this regard, the effect of sections 45 (6) of the ***Elections Act*** and section 27 (6) of the ***County Governments Act*** is to *limit* the rights of those who unsuccessfully contested an election from initiating a recall petition. As we have held, Article 104 of the Constitution does not provide for such *limitation*. In our view the distinction created by the legislature between the incumbent and the person who contested and lost an election is not founded on an intelligible differentia; and, that differentia has no rational relation to the object sought to be achieved by Article 104 of the Constitution.

88. To the extent, therefore, that Parliament enacted provisions not contemplated under Article 104 (2) of the Constitution. Sections 45(6) of the ***Elections Act*** and section 27(6) of the ***County Governments Act*** are unconstitutional as Parliament in enacting the same was *not* exercising its sovereign power in *accordance* with the Constitution as prescribed in Articles 1(1), (3)(a) and 93(1) of the Constitution.

89. That is not the only discriminatory effect we find in the impugned provisions. Under section 46(1) (b) (ii) of the ***Elections Act*** the person to petition for recall should be a voter who was registered to vote in

the election in respect of which the recall is sought. A similar provision is found in section 28 (1) (b) (ii) of the ***County Governments Act***. The effect of these provisions is to curtail the rights of voters who are subsequently registered. We see no rational basis for suppression of this fundamental political right. It is our view, therefore, and we so hold, that this manifest limitation cannot be justified in a democractic society. Plainly these provisions conflict with Article 24(1) of the Constitution which provides that:

"A right or fundamental freedom in the Bill of Rights shall not be limited except by law, and then only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity equality and freedom."

90. We agree with the petitioners' submission that despite Article 104 falling outside the chapter on Bill of Rights, it is nevertheless elevated to a right by dint of Article 19 (3) (b). The latter provides that the rights in the Bill of Rights do not exclude other rights. We also agree that the right to recall a representative is an important component of the political rights enshrined in Article 38 of the Constitution. To that extent therefore Articles 19, 20, 24 and 25 of the Constitution are relevant to the petition before us.

91. We however must emphasise that under Article 1 of the Constitution: All sovereign power belongs to the people; and, may be exercised directly or through their elected representatives. The electorate choose their members of Parliament or County Assembly through a popular vote. They also gave themselves the right of recall under Article 104 which in our view is a complementary right to the right conferred under Article 38 of the Constitution. It is not an alternative right to the rights under Article 38 but is a right exercised by the voters subsequent to a general election. It is in effect a *re-awakening* on the true nature and character of the person they first chose. However like all other rights under the Constitution, it must be treated on the same plane as the other rights though its exercise may be as prescribed by legislation as long as the same does not contravene the Constitution.

92. As the Court of Appeal stated in **Attorney General v Kituo Cha Sheria & 7 Others** [2017] eKLR;

"The clear message flowing from the constitutional text is that rights have inherent value and utility and their recognition, protection, and preservation is not an emanation of state largesse because they are not granted, nor are they grantable by the state. They attach to persons, all persons, by virtue of their being human and respecting rights is not a favour done by the state or those in authority. They merely fall a constitutional command to obey."

93. We remain alive to the principle of *presumption of constitutionality* of a statute; and, that the burden of rebuttal lies with the petitioners. For the reasons we have stated earlier, we are satisfied, that the petitioners have to a *limited extent* rebutted the presumption.

94. We are however of the view that the sitting Member of Parliament or County Assembly must be given some reasonable time to prove his worth or lack of it. It would be perverse to have multiple recall petitions during one term; or, to initiate a recall too close to the next election. We take judicial notice that elections have serious financial implications. It would also be theoretical, on the materials before us, to say that two years at the beginning of the term is too long; or, that the window should remain open longer than a year before the end of the term. In our view these are matters which fall within the legislative powers and we see no reason to interfere with the legislative intent as expressed therein.

95. We associate ourselves with the decision in **The Council of Governors and Others v The Senate** Petition No. 314 of 2014. The court held as follows:

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

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

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

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

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

98. It was contended, based on Article 119 of the Constitution that the petitioners have an *alternative* and express remedy to move Parliament to address the anomalies in the legislation. Article 119 states as follows:-

"(1). Every person has a right to petition Parliament to consider any matter within its authority, including enacting, amending or repealing any legislation.

(2). Parliament shall make provision for the procedure for the exercise of this right."

99. Pursuant to Article 119, Parliament enacted the ***Petition to Parliament Act No. 22 of 2012***. Section

5 (2) of the Act provides that a petition to parliament is to be considered in accordance with the *Standing Orders* of the relevant House of Parliament.

100. We must however point out that the right to recall under Article 104 of the constitution is a constitutional right of its own; and, that it is *not* subservient to Article 119. Where a petitioner approaches the court under Article 165(3) of the Constitution challenging constitutionality of a statutory provision, as opposed to mere enactment, amendment or repeal of the legislation, the Court has the mandate to deal with the question.

101. This petition challenges *constitutionality* of the impugned provisions. Our determination is based on Article 165 (3) (d) of the Constitution which empowers the Court to hear any question respecting the interpretation of this Constitution including the determination of (a) the question whether any law is inconsistent with or in contravention of this Constitution; and, (b) the question whether anything said to be done under the authority of this Constitution or of any law is inconsistent with, or in contravention of, this Constitution. Citizens still have a remedy in Article 119 of the Constitution to petition Parliament for enactment, amendment or repeal of the impugned statutes. Recourse to this court is *not* limited by availability of another remedy.

102. In our view, the *rational basis test* is not an absolute test as was recognised by Lenaola, J in **Njenga Mwangi & Another vs. The Truth, Justice and Reconciliation Commission & 4 Others** Nairobi High Court Petition No. 286 of 2013. The learned judge held:

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

103. We emphasize that under Article 2(4) of the Constitution, any law, including customary law, that is inconsistent with the Constitution is void to the extent of the inconsistency, and any act or omission in contravention of the Constitution is invalid. Under Article 165(3)(d)(i) and (ii) the High Court is clothed with the jurisdiction to hear any question respecting the interpretation of the Constitution including the determination of the question whether any law is inconsistent with or in contravention of the Constitution; and, the question whether anything said to be done under the authority of the Constitution or of any law is inconsistent with, or in contravention of, the Constitution.

104. Therefore whereas the legislative authority vests in Parliament and the County Assemblies, where a question arises as to whether an enactment is inconsistent with the Constitution or is passed in contravention of the Constitution, the High Court is the institution constitutionally empowered to determine the issue. This is of course subject to the appellate jurisdiction given to the Court of Appeal and the Supreme Court. There is nothing like supremacy of the legislative assembly *outside* the Constitution. Under Article 2(1) and (2), the Constitution is the supreme law of the Republic and binds all persons and all State organs at both levels of government. No person may claim or exercise State authority except as authorised by the Constitution.

105. Therefore there is only *supremacy of the Constitution.* Accordingly, every organ of State performing a constitutional function must perform it in conformity with the Constitution. It must follow that where any State organ fails to do so, the High Court, as the ultimate guardian of the Constitution, will point out the transgression. The contrary argument, in our view, runs counter to the constitutional provisions with respect to the jurisdiction of this Court.

106. The jurisdiction of the Court to invalidate laws that are unconstitutional is in harmony with its duty to be the custodian of the Constitution. Similarly, the general provisions of the Constitution, which are set out in Article 258 contain the express right to every person to ***"…*** *institute court proceedings, claiming that this Constitution has been contravened, or is threatened with contravention*."

107. Our position is in tandem with the decision in **Coalition for Reform and Democracy (CORD) & Another versus the Republic of Kenya & Another** (2015) eKLR where the court stated *inter alia* at paragraph 125 that:

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

108. We would add that when any of the state organs steps outside their mandate, this Court will not hesitate to intervene. The Supreme Court has ably captured this principle in ***In the Matter of the Interim Independent Electoral Commission*** **Constitutional Application No. 2 of 2011** in the following language:

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

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

"Parliament must operate under the Constitution which is the supreme law of the land. The English tradition of Parliamentary supremacy does not commend itself to nascent democracies such as ours. Where the Constitution decrees a specific procedure to be followed in the enactment of legislation, both Houses of Parliament are bound to follow that procedure. If Parliament violates the procedural requirements of the supreme law of the land, it is for the courts of law, not least the Supreme Court, to assert the authority and supremacy of the Constitution. It would be different if the procedure in question were not constitutionally mandated. This Court would be averse to questioning Parliamentary procedures that are

formulated by the Houses to regulate their internal workings as long as the same do not breach the Constitution. Where however, as in this case, one of the Houses is alleging that the other has violated the Constitution, and moves the Court to make a determination by way of an Advisory Opinion, it would be remiss of the Court to look the other way. Understood in this context therefore, by rendering his Opinion, the Court does not violate the doctrine of separation of powers. It is simply performing its solemn duty under the Constitution and the Supreme Court Act. "

110. The Court went on to state as follows:

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

111. It was in the same spirit that it was held in **Doctors for Life International vs. Speaker of the National Assembly and Others** (CCT12/05) [2006] ZACC 11; 2006 (12) BCLR 1399 (CC); 2006(6) SA 416 (CC) in paragraph 38:

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

112. In other words, where an act is alleged to have been undertaken under the Constitution, it is for the Court to determine whether this in fact is so; and; where a person alleges that the action taken is not in accordance with the Constitution it falls squarely upon this Court to investigate and determine the matter. To do otherwise would be to shirk our constitutional responsibility. Our position resonates well with the opinion of the South African Constitutional Court in ***Minister of Health and Others vs. Treatment Action Campaign and Others*** **(2002) 5 LRC 216, 248**. A**t** paragraph 99 the Court explained its duty to protect the integrity of the Constitution:

"The primary duty of courts is to the Constitution and the law, which they must apply impartially and without fear, favour or prejudice. The Constitution requires the State to respect, protect, promote, and fulfil the rights in the Bill of Rights. Where state policy is challenged as inconsistent with the Constitution, courts have to consider whether in formulating and implementing such policy the state has given effect to its constitutional obligations. If it should hold in any given case that the state has failed to do so, it is obliged by the Constitution to say so. In so far as that constitutes an intrusion into the domain of the executive that is an intrusion mandated by the Constitution itself."

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

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

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

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

115. It is therefore clear that the mere fact that Parliament has the power pursuant to a petition under Article 119 of the Constitution to enact, amend or repeal legislation, does *not* bar this Court from carrying out its constitutional mandate; or, to fashion out an appropriate remedy.

116. There are two other areas where we also agree with the petitioners. While due process is important, it would be to place too high a hurdle in all cases to require a judgment or finding of the High Court or subordinate court as the case may be. There would be obvious situations of recall that would be preceded by court action: for example for convictions of certain offences. In such situations, the affected member is entitled to due process*;* and, to exhaust his right of appeal.

117. Secondly, in view of Article 99 (2) (h) and the ***Leadership and Integrity Act*** we find that sections 45 (2) (a) and (b) of the ***Elections Act*** and section 27(2)(a)(b) and (c) are meaningless and superfluous and add little value in the statute books.

118. The petitioners contended that the *recalled* member should not participate in the ensuing by-election. We have already stated that such a posture would be *discriminatory*. There will of course be situations where the recalled member may be barred from contesting in the by-election. For instance, where the recall petition arises from violation of Chapter Six of the Constitution; or the ***Leadership and Integrity Act***; or, the ***Election Offences Act***, the recalled member may be barred by the ***Elections Act*** from participating in future elections. But if a member is recalled in circumstances that do not bar him as a candidate, it would be unreasonable to invalidate his candidature. The reason is self-explanatory: Under Articles 1 and 38 of the Constitution, all sovereign power belongs to the people. If the voters chose to recall and re-el*ect* the same representative, we must respect their political rights; unless of course where the candidate is expressly barred by law from contesting in subsequent election(s).

119. Moreover, such a scenario would have the same effect of discrimination the petitioners complained about; and, which we have addressed elsewhere in this judgment. We have to make it clear that constitutional rights cannot be limited by whims. As was stated by the Court of Appeal in **Attorney General vs. Kituo Cha Sheria & 7 Others** (supra) the Bill of Rights in Kenya's constitutional framework is not a minor, peripheral or alien thing removed from the definition, essence and character of the nation. It is integral to the country's democratic state and is the framework of all policies touching on the populace and the foundation on which the nation state is built.

120. On whether the 1st respondent bears any blame over his role in the impugned statutes, Article 261(1) and (4) of the Constitution provides:

"1) Parliament shall enact any legislation required by this Constitution to be enacted to govern a particular matter within the period specified in the Fifth Schedule, commencing on the effective date……..

"4) For the purposes of clause (1), the Attorney-General, in consultation with the Commission for the Implementation of the Constitution, shall prepare the relevant Bills for tabling before Parliament, as soon as reasonably practicable, to enable Parliament to enact the legislation within the period specified."

121. From a plain and ordinary meaning of those words, the role of the Attorney-General, in consultation with the defunct Commission for the Implementation of the Constitution (CIC), was to prepare the relevant bills to be tabled in parliament.

122. We have no evidence on the basis of which we can find the Attorney General culpable. The petitioners have not placed before us the Bill that was drafted and tabled before Parliament in order for us to determine whether the statute that was passed by Parliament was in the form that was placed before Parliament. It may well be that certain amendments were made by Parliament giving rise to the impugned provisions: We simply cannot tell.

123. In our view, the Attorney-General discharged his mandate under Article 261(4) of the Constitution. The impugned legislation was enacted within the constitutional timeframe. The blame for any inadequacies in the Acts would lie at the doorstep of Parliament.

124. We were asked to compel Parliament to pass the legislation within ninety days of the delivery of the judgment in this matter. We decline. We are in agreement with the Supreme Court in **U.S v Butler 297 U.S. 1[1936]. It was held**:

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

125. In the end Article 261 (7) and (8) of the Constitution cannot be invoked in the circumstances of this case. The coercive orders sought against the two respondents have no merit. We also find that although the petitioners presented no concrete evidence of ever trying to initiate a recall motion; or, having been

obstructed by the impugned provisions, we are persuaded that sections 45(2)(3)and (6), 46(1)(b)(ii) and (c) and 48 of the ***Elections Act*** and sections 27(2)(3) and (6) and 28(1)(b)(ii) and (c) of the ***County Governments Act*** are meaningless and superfluous; or, that they fall far short of the constitutional imperative in Article 104 of the Constitution.

126. We also find that sections 45(1)(b)(ii) and 45(6) of the ***Elections Act*** and sections 27(6) and 28(1)(b)(ii) of the ***County Government Act***, are discriminatory and therefore unconstitutional.

H. ***Our Final Orders.***

127. The upshot is that the petition is *partially* allowed in the following terms:

a. **A declaration is hereby issued declaring sections 45(2)(3)and (6), 46(1)(b)(ii) and (c) and 48 of the *Elections Act* and sections 27(2)(3) and (6) and 28(1)(b)(ii) and (c) of the *County Governments Act* are meaningless and superfluous; or, that they fall far short of the constitutional imperative in Article 104 of the Constitution and to that extent are unconstitutional.**

b. **A declaration is hereby issued declaring sections 45(1)(b)(ii) and 45(6) of the *Elections Act* and sections 27(6) and 28(1)(b)(ii) of the *County Government Act* discriminatory and therefore unconstitutional.**

c. **Costs follow the event and are at the discretion of the court. We are satisfied that this petition was lodged in the public interest. We accordingly order that each party shall bear its own costs.**

It is so ordered.

DATED and **SIGNED** at **NAIROBI** this 14th day of July 2017

KANYI KIMONDO

JUDGE

G. V. ODUNGA

JUDGE

E. C. MWITA

JUDGE

Judgment delivered in open court this 14th day of July 2017.

G. V. ODUNGA

JUDGE*In the presence of-*

Mr.Waikwa Wanyoike for the petitioners instructed by Waikwa Wanyoike & Company Advocates

Mr. Ogoso for the 1st respondent instructed by the Honourable Attorney General.

Miss Thanji for the 2nd respondent instructed by Parliament of the Republic of Kenya.

Mr. Mwangi Court Assistant.