REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYAAT NAIROBI

(Coram: Mutunga, CJ;Rawal, DCJ;Tunoi, Ibrahim, Ojwang, Wanjala&Ndungu, SCJJ,)

ADVISORY OPINION REFERENCE NO. 2 OF 2013

-BETWEEN-

THE SPEAKER OF THE SENATE.....APPLICANT

THE SENATE OF THE REPUBLIC OF KENYA.....APPLICANT

-AND-

THE HON. THE ATTORNEY-GENERAL.....INTERESTED PARTY

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

THE LAW SOCIETY OF KENYA.....AMICI CURIAE

THE COMMISSION ON THE IMPLEMENTATION

OF THE CONSTITUTION.....AMICI CURIAE

KATIBA INSTITUTE.....AMICI CURIAE

ADVISORY OPINION

A. INTRODUCTION

[1] The Reference herein was occasioned by the act of the Speaker of one parliamentary Chamber, the National Assembly, reversing his action of referring a legislative matter to the other Chamber, the Senate, and having the National Assembly alone conclude deliberations on a Bill, which was then transmitted to the President for assent and which thereafter became enacted law. This was the Division of Revenue Bill, providing for a sharing in finances between the national and the county governments. Whereas the National Assembly's stand was that the Bill was only concerned with the financing of county government by the national government, and therefore was the exclusive legislative responsibility of the National Assembly, the applicants maintained that as the county governments had a major interest in the monies in question, service of that interest, by the Constitution, involved the Senate's legislative contribution; and that no valid law could be enacted without such legislative contribution.

[2] Being anxious about the due functioning of the several institutions established under the Constitution of Kenya, 2010 and in particular, about the Senatorial function, as a safeguard for the principle of devolved government, the applicants moved the Supreme Court by virtue of Article 163(6) of the Constitution which stipulates:

"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."

B. CONTEST OF JURISDICTION

a. Submissions of Counsel

[3] The interested parties contested this Court's jurisdiction in rendering an Advisory opinion. **The first question in this regard was whether it was appropriate for the Court to render an Advisory Opinion in this matter. And the second question was: whether this Court has jurisdiction to render an Advisory Opinion regarding the constitutional process attending the enactment of the Division of Revenue Act, 2013 (Act No. 31 of 2013).**

[4] Jurisdiction, in any matter coming up before a Court, is a fundamental issue that must be resolved at the beginning. It is the fountain from which the flow of the judicial process originates. The position is clear from the words of Nyarangi, J.A. in ***Owners of the Motor Vessel "Lillian S" v. Caltex Oil (Kenya) Ltd.*** [1989] KLR 1 (at p. 14):

"Without jurisdiction, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction."

The consequence of a Court proceeding without jurisdiction is stated, in unambiguous terms, in ***Words and Phrases Legally Defined***, Vol 3: 1 – N (at p.113): *"Where a court takes it upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing."*

[5] Learned counsel, Mr. Kilukumi for the applicants urged that this Court has the competence and should exercise its advisory jurisdiction on the issues arising. He submitted that the applicants duly satisfied the requirements set out in Article 163(6) of the Constitution: firstly, the applicants are State organs, entitled to move the Court for an Advisory Opinion; and secondly, the subject-matter, in this instance, should be one concerning *county government*. It was submitted that the first applicant is a State organ, as defined in Article 260 of the Constitution: the office of Speaker of the Senate is established under Part 3 of Chapter 8 ("Offices of Parliament") and in particular, Article 106(1) of the Constitution. And the second applicant is also a State organ, being a body established under Article 93(1) of the Constitution.

[6] Counsel urged to be further relevant to the jurisdictional point, that the several agreed issues on which Advisory Opinion is sought, concern the constitutional process of enacting legislation that divides nationally-collected revenue between the governments at the national and county levels. Counsel submitted that the financing of county governments is founded upon the division of nationally-raised resources: and therefore, the Advisory Opinion sought, is *"with respect to matters concerning county government."*

[7] Besides, counsel submitted, the Division of Revenue Bill is a matter that "concerns county government". On this point, and for effect, counsel invoked the content of this Court's Ruling in ***Re the Matter of the Interim Independent Electoral Commission,*** Sup. Ct. Const. Appl. No.2 of 2011 (para.40):

"…any national level activity that has a significant impact on county government would come within the purview of a matter concerning the county governments."

[8] Learned counsel submitted that the division of revenue that has been collected nationally and is to be divided between two levels of government, obviously affects the running of county governments.

[9] To buttress the argument, Mr. Kilukumi considered the effect of Article 224 of the Constitution, which deals with county-government budgets and the County Appropriations Act. He urged that the county governments will be unable to prepare their budgets unless the Division of Revenue Bill has been enacted by Parliament; hence,the effect of Article 224 is that the Division of Revenue Bill ***is*** a matter that "concerns county government".

[10] Regarding the appropriateness of the question for an Advisory Opinion, learned counsel submitted that the Supreme Court's competence in this regard, flows directly from Article 163(6) of the Constitution; and the Court's jurisdiction is *discretionary*, being exercised as it considers fit. He urged that the Court to adopt its guidelines for the exercise of jurisdiction, set out in the earlier matter, ***Re the Matter of the Interim Independent Electoral Commission***, Sup. Ct. Const. Appl. No. 2 of 2011 (at para.83):

"(1) 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.

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

"(3) 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….

"(4) 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…."

[11] Learned counsel invoked the Supreme Court's mandate in the interpretation of the Constitution: a dispute had arisen between the two Parliamentary Chambers, with a bearing on the interpretation of key Articles of the Constitution; the Supreme Court as the apex Court operating in accordance with the Supreme Court Act, 2011 (Act No. 7 of 2011), is empowered to give authoritative and final interpretation of the Constitution; the Supreme Court was the most suitable forum to render a pronouncement on the constitutional conflict raised in the instant matter; only the Supreme Court will be able to provide expeditious resolution to the disputed question which entails a matter of great public importance.

[12] Counsel recalled that the Supreme Court on an earlier occasion, in ***Re the Matter of the Interim Independent Electoral Commission*** (Application No. 2 of 2011), had already indicated that it may undertake constitutional interpretation while rendering Advisory Opinion [paras. 43 and 44]:

"The Supreme Court…, for the purpose of rendering an Advisory Opinion, may take its position guided by its own interpretation of the Constitution…

"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."

[13] The foregoing principle was reiterated in another matter, ***In the Matter of the Principle of Gender Representation in the National Assembly and the Senate***, Sup. Ct. Appl. No. 2 of 2012 [para. 25]:

"It is clear to us that this Court, while rendering Advisory Opinion, will almost invariably engage in the exercise of constitutional interpretation, and it is not precluded from such an exercise. It does not follow, therefore, that the Court will decline a proper request for an Advisory Opinion, merely because rendering such Opinion will entail constitutional interpretation. The basic requirement for an application for an Advisory Opinion is that it should, as contemplated by Article 163(6) of the Constitution, be seeking to unravel a legal uncertainty in such a manner as to promote the rule of law and the public interest."

[14] Mr. Kilukumi submitted, from the authority of the earlier decisions, that the Supreme Court's Opinion in this case, will, in law and in constitutional principle, be binding on all State organs and on all persons, as its design is to bring certainty and to deliver closure on relevant issues. Learned counsel urged that such an Opinion would bring positive effect upon the nation's legislative organs, insofar as they would be able to focus their agenda on the values of clarity, civility, decorum and etiquette.

[15] Counsel urged that the delivery of the Supreme Court's Advisory Opinion, in the circumstances of the instant matter, falls in line with constitutional principle, and, furthermore, would be duly proportionate to the gravity of the issues, and would be appropriate, just, fair and meet, in every respect.

[16] Learned counsel glanced back at the troubled constitutional history of the country with a devolved governance system, in the 1960s, being phased out by a central-government scheme which removed the local units together with their agency of representation and safeguard at the centre, namely, the Senate (Y.P. Ghai and J.P.W.B. McAuslan, ***Public Law and Political Change in Kenya: A***

Study of the Legal Framework of Government from Colonial Times to the Present (Nairobi: Oxford University Press, 1970) (pp.213-14). He urged that the people's political choice of retracing their constitutional path to the 1960s model, be upheld, and that the Supreme Court bears responsibility for directing the path of governance on that course; and the Court should, in this regard, safeguard the constitutional processes designed to secure the county governments. Counsel urged such an object to be in keeping with the Supreme Court's obligations as set out in section 3 of the Supreme Court Act, 2011 (Act No. 7 of 2011), which provides in particular that [s.3(c)]:

"…the Supreme Court as a court of final judicial authority [shall] among other things –

…

c. develop rich jurisprudence that respects Kenya's history and traditions and facilitates its social, economic and political growth…."

[17] In the contest of jurisdiction, it was the position of the interested parties that the relevant issues properly fell within the domain of the litigated cause, rather than that of the Advisory Opinion. However, learned senior counsel Mr. Nowrojee, for the applicants maintained that this was not a matter suitable for the ordinary dispute-resolution mechanism – with pleadings, and progressing from the lowest to the highest Court: the matter was urgent, and entailed the danger of paralysis to the Parliamentary process of law-making. The matter, counsel submitted, involved the national legislative agenda – a matter of great public importance. He submitted that the public interest called for expeditious resolution of the stalemate: and an Advisory Opinion was the best recourse.

[18] Such a perception by counsel had been anticipated in an earlier Advisory Opinion, ***In the Matter of the Principle of Gender Representation in the National Assembly and the Senate***, Sup. Ct. Appl. No. 2 of 2012, in which the following passage appears:

"The Court recognizes…that its Advisory Opinion is an important avenue for settling matters of great public importance which may not be suitable for conventional mechanisms of justiciability. Such novel situations have clear evidence under the new Constitution, which has come with far-reaching innovations, such as those reflected in the institutions of county government. The realization of such a devolved governance scheme raises a variety of structural, management and operational challenges unbeknown to traditional dispute settlement. This is the typical situation in which the Supreme Court's Advisory-Opinion jurisdiction will be most propitious; and where such is the case an obligation rests on the Court to render an Opinion in accordance with the Constitution."

[19] Learned senior counsel advanced another justification for preferring the Advisory Opinion to the normal course of litigation: trial of fact was unnecessary; all the issues revolved around the correct interpretation of specified Articles of the Constitution; and in any case, if any facts at all were to be a relevant question, all the facts were matters of permanent record in both Chambers of Parliament, werewell agreed, and could most readily be ascertained.

[20] Learned senior counsel also urged the jurisdictional point on the basis of the broader context of the Constitution, and the inarticulate, general perceptions on the governance-role of the Supreme Court: the Court should render its Advisory Opinion as part of the function of *promoting constitutionalism and the rule of law*, values that are apt to be impaired whenever there is disagreement and stalemate between primary State organs. He submitted that the Advisory Opinion is a special device under the Constitution, for safeguarding the devolved governance system. He proposed that the Court should lay down the proper procedure for the enactment of differing categories of legislation.

[21] The learned Attorney-General, while conceding that the Court indeed had jurisdiction to give an Advisory Opinion, submitted that its due exercise of discretion should exclude the instant matter. He proceeds by past example, contending that the stalemate in question was in respect of a live matter in progress within the ranks of the Legislature and the Executive; whereas in ***In the Matter of the Principle of Gender Representation in the National Assembly and the Senate,*** Sup. Ct. Appl. No. 2 of 2012 the focus was on the gender quota in the membership of Parliament, a basic *interpretational question;* and in ***Re the Matter of the Interim Independent Electoral Commission***, again, the question was essentially as to the *interpretation* of the Constitution. The Attorney-General submitted that the ultimate answer to the applicant's question was *judgment*: and hence the proper forum was the Constitutional Division of the High Court – and a party who remains aggrieved has a straight path leading to the Court of Appeal. The Attorney-General urged that this was not a proper matter for the Supreme Court at this stage.

[22] By the submissions of learned counsel, Mr. Ngatia for the second interested party, the jurisdiction of the Supreme Court has not been properly invoked: it is a matter involving competing rights and claims, and so cannot be resolved without the benefit of *pleadings* and *evidence*; since the Senate and the National Assembly have taken opposite stances regarding the interpretation of the Constitution and the Parliamentary Standing Orders, what is sought is not a "plain opinion statement" on the powers conferred upon each Chamber; the parties seek a *judicial determination* of the various claims and cross-claims. Counsel submitted that the true intendment of the Opinion Reference is to obtain a set of *declarations and orders*, the effect of which would be to declare the newly-enacted Division of Revenue Act *unconstitutional* and a *nullity*. He urged that the competing claims by the parties require a *full hearing*, attended with normal *rights of appeal*. Counsel disputed the contention that the High Court cannot dispose of the matter expeditiously, and contended that if the Supreme Court were to render an Advisory Opinion, then the "litigants" would be deprived of the benefits of a normal trial process. Mr. Ngatia urged that an Advisory Opinion was an inappropriate short-cut recourse; and instead, the parties should have a first opportunity to arrive at a consensus, or settle the matter through the alternative dispute-resolution mechanism, failing which a normal suit should be filed in the High Court.

[23] Mr. Ngatia submitted that an Advisory Opinion was inapposite, as the legislative process contested has already *matured into an enactment*; and he sought to draw from comparative lessons favouring *judicial restraint*, in such a situation. The relevant material is the article by Oliver P. Field, "The Advisory Opinion: An Analysis," ***Indiana Law Journal,*** Vol. 24 (1949) – at p. 205:

"Advisory Opinions are given on pending [legislation] or contemplated action by the Executive, while decisions are on Acts passed or actions taken earlier, sometimes much earlier."

- *At p. 41:*

"…the determining factor is that the Advisory Opinion is conceived to be Advisory in the process of making statutes rather than as a device adoptable to the settlement of rights affected by enacted statutes."

- *At p. 42:*

"Despite this advantage on the part of [the] Advisory Opinion, it must be concluded that Advisory Opinion practice even at its best is a supplement to, not a substitute for Judicial Review."

Learned counsel urged the Court not to prefer the Advisory Opinion and, by this, take a position that affects the rights and acts realized, since the Division of Revenue Bill has taken the form of an Act of Parliament.

[24] Learned Senior Counsel for first *amicus curiae*, Professor Ojienda, began from first principles as expressed by this Court in ***Samuel Kamau Macharia and Another v. Kenya Commercial Bank and Two Others***, Sup. Ct. Appl. No. 2 of 2011: namely, that jurisdiction emanates from the Constitution, or the ordinary law, or both. He urged that the Supreme Court's jurisdiction to render an Advisory Opinion is donated by Article 163(6) of the Constitution, and should be exercised on the basis of two considerations: (i) the competence of the party seeking an Opinion – whether this party is a national government, a State organ, or a county government; and (ii) the nature of the subject – whether it concerns county government. By these principles, learned counsel urged, the Court has a proper basis in law for proceeding to give an Advisory Opinion. But learned counsel submitted that the Court, in giving an Opinion, should take into account the fact that by the time it was moved, the subject Division of Revenue Bill had already evolved and attained the status of statute law. By counsel's submission, the subject is one of great public importance, which merits the Court's Advisory Opinion: devolution itself was a crucial democratic course which the people had chosen; harmonious operation of the two Chambers of Parliaments was a vital process under the new Constitution; profound conflict in the workings of the two Chambers, especially in relation to devolution, was a major challenge; and such course of resolution as may be adopted, would have impacts on the scheme of implementation of Chapters 11 and 12 of the Constitution.

[25] Still canvassing the broad principle justifying the case for an Advisory Opinion, Professor Ojienda typified Kenya's current phase of political attainment as constitutional democracy: and this bears the precept that even the majoritarian entity that is Parliament, cannot claim *sovereignty*, and is subject to the terms of the *constitutional document* as it is interpreted and applied within the *judicial process.* The principle is born out by the universal acceptance that the Supreme Court can declare null any legislative measures that offend the Constitution: ***Speaker of the National Assembly and Others v. De Lille MP and Another*** (297/98) [1999] ZASCA 50; ***Democratic Alliance v. The President of South Africa and Others*** (263/11) [2011] ZASCA 241. These decisions, of comparative relevance, have: affirmed the supremacy of the Constitution over Parliament; exemplified the role of the Courts in interrogating the legislative authority of Parliament, in a constitutional democracy; and upheld the principle that, in

a constitutional democracy, the Courts have both the *power and the duty to pronounce on the compliance of legislation with the terms and objects of the Constitution.*

[26] Learned counsel concluded that the Supreme Court, indeed, has the jurisdiction, as well as the duty, to inquire into the procedure that had been adopted by the National Assembly and the Senate, in respect of the passing of the Division of Revenue Bill.

[27] Such a position, on broad terms, was taken too by learned counsel, Mr. Nderitu for the second *amicus curiae.* He proceeded from the threshold that the Division of Revenue Act itself, as passed, provides for "the equitable division of revenue raised nationally between the national and county governments in [the] 2013/14 financial year"; and he urged that the objects of the Act, the issues raised by all the parties and, in particular, whether that legislation was constitutionally deliberated upon, enacted and assented to, were plainly matters "concerning county government" – and consequently, the Supreme Court has jurisdiction to render an Advisory Opinion.

[28] Mr. Nderitu proceeded, however, to submit that the Court, rather than settle the issues by way of Advisory Opinion, should give direction leading to *mediation* and *extra-judicial process*, by virtue of Articles 110(3), 112 and 113 of the Constitution. Learned counsel submitted that such a process, by its *non-adversarial nature*, would best suit the requirements of *good governance*.

[29] For the third *amicus curiae*, learned counsel, Mr. Wanyoike urged that while the issue in hand was a "matter of county government," the Court should decline to render an Advisory Opinion: because the *question has already fallen under controversy*, and therefore it belongs properly to the *adjudicatory jurisdiction* of the High Court, by virtue of Article 165 of the Constitution.

(b) Analysis

[31] Are the applicants proper persons or entities in whom the right to seek an Advisory Opinion reposes" By Article 163(6) of the Constitution, such an Opinion can only be sought by the national government, a State organ, or any county government. After considering the relevant Articles, namely 93, 96, 106 and 260, and also Part 3 of the Sixth Schedule to the Constitution, we have come to the conclusion that the Office of the Speaker *is* a State organ, *as is also* the Senate.

[32] Is it a "matter concerning county government"" The answer is *in the affirmative*, as may be perceived from this Court's Ruling in ***Re the Matter of the Interim Independent Electoral Commission,*** Sup. Ct. Const. Appl. No. 2 of 2011 [para.40]:

"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."

Now in the case of the Division of Revenue Bill (now an Act), it makes provision for the division of revenue that is *nationally collected*, and for its *sharing between the two levels of government*. It certainly has a *significant impact on the county governments.* We hold, in the circumstances, that the Reference herein properly falls under Article 163(6) of the Constitution, as a "matter that concerns county governments."

[33] The next issue then becomes: whether, in all the circumstances of this case, the Court should exercise its *discretion* in favour of rendering an Advisory Opinion. The criteria for exercising this discretion were set out in our Ruling in ***Re the Matter of the Interim Independent Electoral Commission*** (2011) [para.83]:

"(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 a 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….

"(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 maybe required to demonstrate that*** *the matter in question would not be amenable to expeditious resolution through adversarial Court process."*

[34] It emerges that a matter qualifies to be regarded as one of county government only where: that is the case *in the terms of the Constitution*; it is the case *in the terms of statute law;* it is the case in *the perception of the Court*, in view of the function involved or the relation created as between the national government and its processes, on the one hand, and the county governments and their operations, on the other. In the last instance, the Court will conscientiously consider the relationship between the two units as this emerges from *the governance operation in question*, or from any pertinent *scenarios of fact.*

[35] Mr. Kilukumi submitted that, subject to such controlling factors as the situation of county government, or the intended party moving the Court, there is a *discretionary scope* entrusted to the Court: judicious considerations will determine whether or not an Advisory Opinion is to be given. And in the prevailing circumstances, learned counsel urged the Court to render an Opinion – for the purpose of giving *full meaning and effect to the terms of Article 163(6) of the Constitution.*

[36] The first and second interested parties as well as the third *amicus curiae* took the common position that the relevant questions herein be laid before the High Court, as these are contentious and so, befit ordinary dispute settlement. The first interested party, though conceding that this Court indeed has jurisdiction to render an Advisory Opinion, urged that this was not a proper case for such an Opinion: as the Senate and the National Assembly were in essence, seeking a judgment. As for the second interested party, the contest raised facts-in-issue in respect of which there were divergent opinions: and consequently it was a matter for resolution by litigation in the High Court. The third *amicus curiae* raised yet another justification for such a preference: since the legislative measure in question had already been assented to as an Act of Parliament, any issues as to its legality fell to be determined on the basis of the validity criteria of the Constitution, a task which fell in the first place to the jurisdiction of the High Court.

[37] We have considered the merits of such argumentation, but arrived at a contrary perception. Upon examining the affidavits sworn by the two Speakers of the Chambers of Parliament, which are in agreement as to the events preceeding the passage of the Division of Revenue Bill, 2013 we have been of the perception that the disagreement between the two would have been stoked by misconceptions as to the *nature of that Bill*, and as to the *constitutional process* governing its passage. A question relating to the constitutional validity of such a process, in our view, cannot be said to be an issue of fact: and so, there is no appearance of *fact* or *evidence* that would predispose the contest to ordinary trial.

[38] Both the first and second interested parties urged further that the disagreement was for ordinary litigation procedure, as it related to a live controversy set for final determination by way of judgment. Learned counsel, Mr. Ngatia relied on cases which showed related matters, in various jurisdictions, to have been brought before the High Court. But in our opinion, such examples provide no compelling case in this instance, nor in Kenya's current constitutional and statutory context. It is our conviction that this Court would not be constrained by such a limited perspective of procedure culled from the said examples emanating from other jurisdictions. This Court's mandate is in the terms of the Constitution, which provides [Article 1(1)] that –

"All sovereign power belongs to the people of Kenya and shall be exercised only in accordance with this Constitution."

The broad scheme of the Supreme Court's interpretive approach is laid out in the Supreme Court Act, 2011 (Act No. 7 of 2011), section 3(c):

"….[to] develop rich jurisprudence that respects Kenya's history and traditions and facilitates its social, economic and political growth…."

[39] The matter before this Court bears novelty, and ill-fits the conventional dispute-settlement scheme, which is most appropriate in a matter involving two individuals, or one between State and individual. What comes before us is a "dispute" or "dilemma", regarding the *procedure for executing a public legal obligation.* It is not normal dispute settlement, but is a *broader constitutional question* of great public interest, which can only be best resolved by a substantial, legitimate forum of resolution of public-interest questions, namely *the Judiciary*, and more specifically, *the Supreme Court*.

[40] From the seven issues formulated by the parties, and from the depositions filed, it is clear that what is required of this Court is

not a *judgment*, but an *Advisory Opinion. As no declarations, orders or reliefs* are sought by the parties, we fall back on our perception in an earlier matter, ***Re the Matter of the Interim Independent Electoral Commission,*** Sup. Ct. Const. Appl. No. 2 of 2011 [para.33]:

"…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- claims, or claims disposed of by regular process, it does not fall in the class of *judgment,* ***or*** *ruling,* ***or*** *order,* ***or*** *decree."*

[41] Just as in the principle thus stated, what is required in this instance, in our opinion, is *constitutional guidance,* in respect of the agreed issues. The seven issues in question are by no means abstract, having been formulated on the basis of a clear factual background. The main issue is the *Senate's role in the legislative process for every Bill concerning county government* – regardless of the Chamber of origin.

[42] On that question an *Opinion from this Court, we believe, will not only resolve procedural uncertainties in the deliberation upon and passing of Bills, but will also chart out the proper constitutional path, and establish lines of legality.* This is not a proper matter for litigation in the High Court.

[43] The "*public interest*" consideration is a relevant factor as to the issue whether this Court will, in the circumstances of the case, proceed to give an Advisory Opinion. This is clear from the decision in ***Re the Matter of the Interim Independent Electoral Commission*** (2011) in which the following passage appears [para.83]:

"…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."

[44] The same principle is expressed in yet another Opinion of the Court, ***In the Matter of the Principle of Gender Representation in the National Assembly and the Senate***, Sup. Ct. Appl. No. 2 of 2012 [at para.19]:

"The Court recognizes, however, that its Advisory Opinion is an important avenue for settling matters of great public importance which may not be suitable for conventional mechanisms of justiciability. Such novel situations have clear evidence under the new Constitution, which has come with far-reaching innovations, such as those reflected in the institutions of county government. The realization of such a devolved governance scheme raises a variety of structural, management and operational challenges unbeknown to traditional dispute settlement. This is the typical situation in which the Supreme Court's Advisory-Opinion jurisdiction will be most propitious; and where such is the case, an obligation rests on the Court to render an Opinion in accordance with the Constitution."

[45] Entirely consistent with the foregoing principles, in our perception, is the matter now before this Court. The *issues of law and of principle raised are weighty, peculiar and unique, and are focused on devolution, a key pillar of governance in the new constitutional order.*

[46] Judicial notice is to be taken of the fact that a Division of Revenue Bill, as conceived under the Constitution, will, now and in the future, constantly bear *significant financial implications for the operations of county governments.*

[47] It was the second Interested Party's position that Advisory Opinions are applicable only at early stages of legislation, or at the Executive's law-making policy stage, but not after statutory status has been realized. Learned counsel, Mr. Odera, also submitted that the Courts have no jurisdiction to rule on a Parliamentary Chamber's compliance or non-compliance with law-making procedure. He was relying on the National Assembly (Powers and Privileges) Act (Cap. 6, Laws of Kenya), which contains two relevant provisions [ss.4 and 29, respectively]:

"No civil or criminal proceedings shall be instituted against any member for words spoken before, or written in a report to, the Assembly or a committee, or by reason of any matter or thing brought by him therein by petition, bill, motion or otherwise";

"…that neither the Speaker nor any officer of the Assembly shall be subject to the jurisdiction of any court in respect of the exercise of any power conferred on or vested in the Speaker or such officer by or under this Act or the Standing Order."

[48] For supporting principle to the foregoing provisions, learned counsel invoked the rationalization by scholars, notably H. M. Seerval, ***Constitutional Law of India: A Critical Commentary,*** 3rd ed. The author of that work argues that Parliaments have the right to be guardians of their internal affairs, relying on judicial precedents favouring that inference: ***Richard William Prebble v. Television New Zealand Ltd*** [1994] 3WLR 970; ***British Railways Board and Another v. Pickin***[1974] 1 All E.R. 609; ***British Airways Board v. Lakers Airways Ltd*** [1984] QB 142.

[49] Upon considering certain discrepancies in the cases cited, as regards the respective claims to legitimacy by the judicial power and the legislative policy – each of these claims harping on the separation-of-powers concept – we came to the conclusion that it is a debate with no answer; and this Court in addressing actual disputes of urgency, must begin from the terms and intent of the Constitution. Our perception of the separation-of-powers concept must take into account the *context, design and purpose of the Constitution; the values and principles enshrined in the Constitution; the vision and ideals reflected in the Constitution.*

[50] The South African case, ***State v. Makwanyane&Another*** (CCT3/94) (1995) ZACC3 [para.262 – per Mahomed, J.] sheds light on our perception:

"All Constitutions seek to articulate, with differing degrees of intensity and detail, the shared aspirations of a nation; the values which bind its people, and which discipline its government and its national institutions; the basic premises upon which judicial, legislative and executive power is to be wielded; the constitutional limits and the conditions upon which that power is to be exercised; the national ethos which defines and regulates that exercise; and the moral and ethical direction which that nation has identified for its future."

[51] Kenya's Constitution of 2010 is a transformative charter. Unlike the conventional "liberal" Constitutions of the earlier decades which essentially sought the control and legitimization of public power, the avowed goal of today's Constitution is to institute *social change* and *reform*, through values such as *social justice, equality, devolution, human rights, rule of law, freedom and democracy.* This is clear right from the preambular clause which premises the new Constitution on –

*"**RECOGNISING the aspirations of all Kenyans for a government based on the essential values of human rights, equality, freedom, democracy, social justice and the rule of law."***

And the principle is fleshed out in Article 10 of the Constitution, which specifies the "national values and principles of governance", and more particularly in Chapter Four (Articles 19-59) on the Bill of Rights, and Chapter Eleven (Articles 174-200) on devolved government.

[52] The transformative concept, in operational terms, *reconfigures the interplays between the States majoritarian and non-majoritarian institutions*, to the intent that the desirable goals of governance, consistent with dominant perceptions of *legitimacy*, be achieved. A depiction of this scenario has been made in relation to the unique processes of constitution-building in South Africa, a country that was emerging from an entrenched racialist governance system. Karl Klare, in his article, "*Legal Culture and Transformative Constitutionalism,*"***South African Journal of Human Rights***, Vol. 14 (1998), 146 thus wrote [at p.147]:

"At the most superficial level, South Africans have chosen to compromise the supremacy of Parliament, and correspondingly to increase the power of judges, each to an as-yet unknowable extent."

The scholar states the object of this South African choice:

"By transformative constitutionalism I mean a long-term project of constitutional enactment, interpretation, and enforcement committed…to transforming a country's political and social institutions and power relationships in a democratic, participatory, and egalitarian direction. Transformative constitutionalism connotes an enterprise of inducing large-scale social change through non-violent political processes grounded in law."

[53] The history of political change in South Africa will remain highly relevant for those African countries, like Kenya, seeking to evolve democratic constitutional systems out of a past of skewed and repressive governance. And by the settled technique of the comparative method in law, we draw from that country's achievements in constitutional precedent. We in this Court, conceive of today's constitutional principles as incorporating the transformative ideals of the Constitution of 2010: we bear the responsibility for casting the devolution concept, and its instruments in the shape of county government, in the legitimate course intended by the

people. It devolves upon this Court *to signal directions of compliance by State organs, with the principles, values and prescriptions of the Constitution;* and as regards the functional machinery of governance which expresses those values, such as devolution and its scheme of financing, this Court bears the legitimate charge of showing the proper course.

[54] The context and terms of the new Constitution, this Court believes, vests in us the mandate when called upon, to consider and pronounce ourselves upon the *legality and propriety of all constitutional processes and functions of State organs*. The effect, as we perceive it, is that the Supreme Court's jurisdiction includes resolving any question touching on the *mode of discharge of the legislative mandate.*

[55] The foregoing principle emerges clearly from a logical interpretation, for instance, of **Article 109** of the Constitution:

"(1) Parliament shall exercise its legislative power through Bills passed by Parliament and assented to by the President.

"(2) Any Bill may originate in the National Assembly.

"(3) A Bill not concerning county government is considered only in the National Assembly….

"(4) A Bill concerning county government may originate in the National Assembly or the Senate, and is passed in accordance with Articles 110 to 113, 122 and 123 and the Standing Orders of the Houses."

It is clear to us that it would be illogical to contend that as the Standing Orders are recognized by the Constitution, this Court, which has the mandate to authoritatively interpret the Constitution itself, is precluded from considering their constitutionality merely because the Standing Orders are an element in the "internal procedures" of Parliament. We would state, as a legal and constitutional principle, that Courts have the competence to pronounce on the compliance of a legislative body, with the processes prescribed for the passing of legislation.

[56] Such a perception is vindicated in comparative experience. The Supreme Court of Zimbabwe, in ***Biti& Another v. Minister of Justice, Legal and Parliamentary Affairs and Another*** (46/02) (2002) ZWSC10, was called upon to determine the constitutional validity of the General Laws Act, 2002 (Act No. 2 of 2002). It had been claimed that the passing of the said statute was characterized by irregularities that constituted a breach of the Standing Orders as well as the Constitution of Zimbabwe and that, consequently, the statute was unconstitutional. The Court thus held:

"In a constitutional democracy ***it is the Courts****, not Parliament, that determine the lawfulness of actions of bodies, including Parliament….In* ***Smith v. Mutasa*** *it was specifically held that the* ***Judiciary is the guardian of the Constitution and the rights of citizens****…."*

[57] The position is not different in the case of Canada, as emerges from ***Amax Potash Ltd. v. government of Saskatchewan*** [1977] 2 S.C.R. 576 [at p.590]:

"*A state, it is said, is sovereign and it is not for the Courts to pass upon the policy or wisdom of legislative will. As a broad statement of principle that is undoubtedly correct, but the general principle must yield* ***to the requisites of the constitution in a federal state. By it the bounds of sovereignty are defined and supremacy circumscribed****. The Courts will not question the wisdom of enactments which, by the terms of the Canadian Constitution are within the competence of the Legislatures, but it is the high duty of this Court to insure that the Legislatures do not transgress the limits of their constitutional mandate and engage in the illegal exercise of power."*

This principle is clearly stated in other Canadian cases as well; for instance, ***Re Manitoba Language Rights*** (1985) 1 SCR 721.

[58] It is a long-established principle in the United States, by the well-known decision in ***Marbury v. Madison,*** 5 U.S. 137 (1803), where Marshall, C.J. thus held:

"So, if a law be in opposition to the Constitution, if both the law and the Constitution apply to a particular case, so that the Court must either decide that case conformably to the law, disregarding the Constitution, or conformably to the Constitution,

disregarding the law, the Court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty.

"If then, the Courts are to regard the Constitution, and the Constitution is superior to any ordinary act of the Legislatures, the Constitution, and not such ordinary act, must govern the case to which they both apply."

[59] And in the South African case, ***Doctors for Life International v. Speaker of the National Assembly and Others*** (CCT 12/05) [2006] ZACC 11, it was held [para.38]:

"…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."*

On the possibility of the Court intervening in the process of legislation at any of its several stages of enactment, the Court in the ***Doctors for Life International case***, thus held [para.55]:

"If Parliament and the President allow an unconstitutional law to pass through, they run the risk of having the law set aside and the law-making process commence afresh at great cost."

Is it conceivable that the Court may countermand ongoing legislative processes" This question is answered in the ***Doctors for Life case*** [para.68]:

"Courts [in the Commonwealth] have traditionally resisted intrusions into the internal procedures of other branches of government. They have done this out of comity and, in particular, out of respect for the principle of separation of powers. But at the same time they have claimed the right as well as the duty to intervene in order to prevent the violation of the Constitution. To reconcile their judicial role to uphold the Constitution, on the one hand, and the need to respect the other branches of government, on the other hand, courts have developed a 'settled practice' or general rule of jurisdiction that governs judicial intervention in the legislative process."

[60] It makes practical sense that the scope for the Court's intervention in the course of a running legislative process, should be left to the discretion of the Court, exercised on the basis of *the exigency of each case*. The relevant considerations may be factors such as: the likelihood of the resulting statute being valid or invalid; the harm that may be occasioned by an invalid statute; the prospects of securing remedy, where invalidity is the outcome; the risk that may attend a possible violation of the Constitution.

[61] It emerges that Kenya's legislative bodies bear an obligation to discharge their mandate in accordance with the terms of the Constitution, and they cannot plead any internal rule or indeed, any statutory scheme, as a reprieve from that obligation. This Court recognizes the fact that the Constitution vests the legislative authority of the Republic in Parliament. Such authority is derived from the people. This position is embodied in Article 94(1) thereof. The said Article also imposes upon Parliament the duty to protect the Constitution and to promote the democratic governance of the Republic. Article 93(2) provides that the national Assembly and the Senate shall perform their respective functions in accordance with the Constitution. It is therefore clear that while the legislative authority lies with Parliament, the same is to be exercised subject to the dictates of the Constitution. While Parliament is within its general legislative mandate to establish procedures of how it conducts its business, it has always to abide by the prescriptions of the Constitution. It cannot operate besides or outside the four corners of the Constitution. This Court will not question each and every procedural infraction that may occur in either of the Houses of Parliament. The Court cannot supervise the workings of Parliament. The institutional comity between the three arms of government must not be endangered by the unwarranted intrusions into the workings of one arm by another.

[62] However, where a question arises as to the interpretation of the Constitution, this Court, being the apex judicial organ in the land, cannot invoke institutional comity to avoid its constitutional duty. We are persuaded by the reasoning in the cases we have referred to from other jurisdictions to the effect that Parliament must operate under the Constitution which is the supreme law of the land. The English tradition of Parliamentary supremacy does not commend itself to nascent democracies such as ours. Where the Constitution decrees a specific procedure to be followed in the enactment of legislation, both Houses of Parliament are bound to

follow that procedure. If Parliament violates the procedural requirements of the supreme law of the land, it is for the courts of law, not least the Supreme Court to assert the authority and supremacy of the Constitution. It would be different if the procedure in question were not constitutionally mandated. This Court would be averse to questioning Parliamentary procedures that are formulated by the Houses to regulate their internal workings as long as the same do not breach the Constitution. Where however, as in this case, one of the Houses is alleging that the other has violated the Constitution, and moves the Court to make a determination by way of an Advisory Opinion, it would be remiss of the Court to look the other way. Understood in this context therefore, by rendering this 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.

[63] The vital and strategic governance-role of the Supreme Court, under the Constitution of 2010, is all evident, and is perceptible without any strain beyond a basic reflection on the import of Article 2:

(i) "This Constitution is the Supreme law of the Republic and binds all persons and all State organs at both levels of government" [Article 2(1)];

(ii) "No person may claim or exercise State authority except as authorised under this Constitution" [Article 2(2)];and

(iii) "The validity or legality of this Constitution is not subject to challenge by or before any court or other State organ" [Article 2(3)].

[64] Whereas all State organs, for instance, the two Chambers of Parliament, are under obligation to discharge their mandates as described or signalled in the Constitution, a time comes such as this, when the prosecution of such mandates raises *conflicts touching on the integrity of the Constitution itself*. It is our perception that all reading of the Constitution indicates that the ultimate judge of "right" and "wrong" in such cases, short of a resolution in plebiscite, is only *the Courts* and, ultimately, *the Supreme Court*. On this account, we now declare that, indeed, the Supreme Court *has* the jurisdiction to hear and determine the dispute which has arisen between the two Chambers of Parliament. And from that threshold, we have considered the appropriateness of an Advisory Opinion. We have come to the conclusion that the Advisory-Opinion jurisdiction is well merited, in all the circumstances prevailing.

[65] By the relatively open texture of an Opinion, the Court is able to lay down *broad constitutional principles*, and to hold out the foundation structures and the reinforcing matter that will sustain the growth of a democratic constitutional tradition.

C. PARLIAMENTARY BILLS: THE COMPETENCES OF THE TWO CHAMBERS

The third issue for consideration by this Court was framed thus:***What is the role of the National Assembly*** *vis-à-vis* ***the Senate in the origination, consideration and enactment of the division and allocation of revenue bills"***

[66] Learned Senior Counsel, Mr. Nowrojee submitted that one of the functions of the National Assembly was to "[determine] the allocation of national revenue between the levels of government" [Article 95(4)(a)]; but "determine" is the operative word, rather than "enact": and hence the Constitution did not empower that Chamber to assume single-handedly the task of *enacting* the revenue-division or allocation law. Counsel drew analogy, in this regard, with Article 218 which is concerned with "annual division and allocation of revenue Bills", and which lodges no differentiated responsibility between the two Chambers, only prescribing that:

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

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

b. a County Allocation of Revenue Bill, which shall divide among the counties the revenue allocated to the county level of government…."

[67] Learned counsel urged that it was necessary to safeguard the place ofbothChambersof Parliament, in the legislation for both revenue *division* and *allocation* – and that this was the spirit and general intent of the Constitution.

[68] Learned counsel anchored the foregoing argument on this Court's Opinion in ***In the Matter of the Principle of Gender Representation in the National Assembly and the Senate,*** Sup. Ct. Appl. No. 2 of 2012 [para.83]:

"We would state that the Supreme Court, as a custodian of the integrity of the Constitution as the country's charter of governance, is inclined to interpret the same holistically, taking into account its declared principles, and to ensure that other organs bearing the primary responsibility for effecting operations that crystallize enforceable rights, are enabled to discharge their obligations, as a basis for sustaining the design and purpose of this Constitution."

[69] Counsel submitted that the division of nationally-collected revenue between the two levels of government has a direct fiscal bearing and impact on the *capacity and the ability of county governments,* in discharging the functions bestowed upon them by the Constitution. He urged that the process of effecting a vertical division of revenue between the two levels of government, bears a *direct correlation to the efficacy of county government;* and that this consideration ought to inform the approach adopted in interpreting the Constitution, so as to sustain the scheme of devolution of governance.

[70] Counsel also urged the Senate's legislative role on the basis of the principle of financial equity, as provided for in Article 201(b)(ii) of the Constitution:

"The following principles shall guide all aspects of public finance in the Republic –

a. ….

b. the public finance system shall promote an equitable society, and in particular –

(i) ….

(ii) revenue raised nationally shall be shared equitably among national and county governments…."

He also invoked Article 202(1) which provides that:

"Revenue raised nationally shall be shared equitably among the national and county governments."

[71] Counsel submitted that the Constitution's intent, is that Senate be involved in the equitable division of national resources, between the national government and county governments: and hence the Senate's role in the requisite financial checks-and-balances should be upheld.

[72] The basic relationship in the assignment of legislative roles, as between the two Chambers, is stated in Article 109 of the Constitution, as follows:

"(1) Parliament shall exercise its legislative power through Bills passed by Parliament and assented to by the President.

"(2) Any Bill may originate in the National Assembly.

"(3) A Bill ***not concerning county government*** *is considered only in the* ***National Assembly****, and passed in accordance with Article 122 and the Standing Orders of the Assembly.*

"(4) ***A Bill concerning county government may originate in the National Assembly or the Senate,*** *and is passed in accordance with Articles 110 to 113, Articles 122 and 123 and the Standing Orders of the Houses.*

"(5) A Bill may be introduced by any member or committee of the relevant House of Parliament, but a money Bill may be introduced only in the ***National Assembly*** *in accordance with Article 114."*

[73] Mr. Nowrojee submitted that the provision of Article 109(5) is to be apprehended against the background of history, and in the

context of the clear intent of the Constitution in its safeguard for devolved government. He urged that the provision for the "introduction" of money Bills in the National Assembly is but an unintended reflection of the English legislative experience; the House of Commons had resolved in ***1671:***

"That in all aids given to the King by the Commons, the rate of tax ought not to be altered by the Lords."

That dictate had been affirmed by the House of Commons by a resolution of 3 July 1968:

"That all in aids and supplies, and aids to His Majesty in Parliament, are the sole gift of the Commons; and all bills for granting any such aids and supplies ought to begin with the Commons; and that it is the undoubted and sole right of the Commons to direct, limit and appoint in such bills the end, purposes, considerations, limitations and qualifications of such grants, which ought not to be changed or altered by the House of Lords."

[74] But "a Bill concerning county government" certainly entails the Senate's legislative role. Such a Bill is defined in Article 110(1) as:

"(a) a Bill containing provisions affecting the functions and powers of the county governments set out in the Fourth Schedule;

"(b) a Bill relating to the election of members of a county assembly or a county executive; and

"(c) a Bill referred to in Chapter Twelve affecting the finances of county governments."

[75] Bills of such a kind are subject to a prescribed procedure under Article 110(3), (4) and (5), as follows:

"(3) Before either House considers a Bill, the Speakers of the National Assembly and Senate shall jointly resolve any question as to whether it is a Bill concerning counties and, if it is, whether it is a special or an ordinary Bill.

"(4) When any Bill concerning county government has been passed by one House of Parliament, the Speaker of that House shall refer it to the Speaker of the other House.

"(5) If both Houses passthe Bill in the same form, the Speaker of the House in which the Bill originated shall, within seven days, refer the Bill to the President for assent."

[76] Learned counsel submitted that the Speaker of the National Assembly, which had initiated the Bill in question in the matter herein, ought to have referred it to the Speaker of the Senate after it had been passed – as was also required by the Senate's Standing Orders.

[77] Mr. Nowrojee urged that a Division of Revenue Bill is an ordinary Bill concerning county government and which, therefore, should be dealt with as provided under Article 112 of the Constitution:

"(1) If one House passes an ordinary Bill concerning counties, and the second House –

a. rejects the Bill, it shall be referred to mediation committee appointed under Article 113; or

b. passes the Bill in an amended form, it shall be referred back to the originating House for reconsideration.

"(2) If, after the originating House has reconsidered a Bill referred back to it under clause (1)(b), that House –

a. passes the Bill as amended, the Speaker of that House shall refer the Bill to the President within seven days for assent; or

b. rejects the Bill as amended, the Bill shall be referred to a *mediation committee under Article 113****."***

[78] The procedure set out in Article 112 (2) (b) had not been followed, and the Senate's voice had been overlooked. The Bill originated in the National Assembly and was then referred to the Senate, which amended it and sent it back to the National Assembly: but the National Assembly refused the Senate version, declined to comply with the resolution procedure under **Article 113**, and dispatched it directly to and secured the assent of the President. The Speaker of the National Assembly, in so acting, had embraced the belated perception that it was an error in the first place, to forward the Bill as passed to the Senate. Counsel urged that such failure to engage the mediation mechanism of Article 113, constituted a breach of the terms of the Constitution.

[79] This was contested by the learned Attorney-General, Prof. GithuMuigai, who submitted that the Bill in question wholly fell within the expansive legislative powers of the National Assembly and that, in this regard, "the Senate had very little legislative competence." Prof. Muigai submitted that the National Assembly "represented the people of Kenya in their full range" in contrast to the Senate, the scope of which was restricted to powers specially donated for named purposes, under the Constitution.

[80] Still advancing the point on Senate's constricted mandate, the Attorney-General submitted that it does not fall within this Chamber's mandate to appropriate funds for expenditure by the national government, nor has Senate any oversight-competence as regards the national revenues. Prof. Muigai submitted that the Senate's competence was limited to participating in law-making and approval of Bills that *concerned county government*: and so it follows that the procedures of the Division of Revenue Bill fell well outside the remit of the Senate.

[81] In further illustration of the argument, the Attorney-General submitted that the real issue herein was one of financial policy touching on the national revenue and the national allocation of funds – and that these issues were the preserve of the National Assembly. The learned Attorney-General urged that the *division of revenue* fell entirely within the legislative remit of the National Assembly, the Senate's proper sphere being only in respect of "county allocation" which in any case, fell to the legislative competence of both Chambers.

[82] The Attorney-General submitted that it was the exclusive responsibility of the National Assembly to allocate national revenue to the two levels of government – by way of the **Division of Revenue Bill** – and that it fell squarely within the mandate of the national government to finance the processes of county government; so that only the task of *dividing finances between the several counties* was shared with the Senate.

[83] To fortify that argument, the Attorney-General cited the role of the State's independent Commission on Revenue Allocation, provided for in Article 215: this Commission functions as a check on the *National Assembly* by making recommendations regarding the equitable sharing of revenues generated by the national government, as between that government and county government.

[84] The Attorney-General submitted that the budgetary process as conceived could not have incorporated the Senate-function as annexed to county government. He submitted that the Public Finance Management Act, 2012 (Act No. 8 of 2012) requires the responsible Cabinet-Secretary to submit to Parliament the Division of Revenue Bill and the County Allocation of Revenue Bill prepared by the National Treasury, at the time of introducing the Budget Policy. And section 42 of that Act provides:

"Parliament shall consider the Division of Revenue and County Allocation of Revenue Bills not later than thirty days after the Bills have been introduced, with a view to approving them, with or without amendments."

The Attorney-General urged that the Division of Revenue Bill transcends conception just by the National Assembly, and incorporates the role of the Commission on Revenue Allocation which operates under specified constitutional prescriptions; the Bill is then expressed in a policy framework by the National Treasury, before taking the form that is laid before the National Assembly for enactment.

[85] The**County Allocation of Revenue Bill** by contrast, the Attorney-General submitted, lies squarely within the control of the two Houses of Parliament – and so does not have the constraints bearing upon the **Division of Revenue Bill**.

[86] For the second interested party, learned counsel, Mr. Ngatia submitted that even though the Constitution repeatedly refers to *Parliament* in relation to the initiation of legislation, this does not always point to both Chambers at the same time; and he gave the example of Article 109(3) which shows that the mandate in the enactment of certain Bills lay with the *National Assembly exclusively* – the Senate being concerned only with matters of *county government*. Arguing on the same lines, learned counsel, Mr. Odera submitted that while the Constitution's reference to "National Assembly" and "Parliament" lacked perfect consistency, there

were clear instances in which the term "Parliament" as applied, must have been intended to mean "National Assembly" – as will be the case with Article 223(3).

[87] Of Article 217(1) of the Constitution which provides that "*Once every five years the Senate shall, by resolution, determine the basis for allocating among the counties the share of national revenue that is annually allocated to the county level of government,"* Mr. Odera submitted that the relevant Senatorial task was not a *legislative process*; and that the legislative process begins with the introduction of the Bill in the National Assembly, "this being a money Bill."

[88] By contrast, counsel for the first *amicus curiae*, Prof. Ojienda submitted that the enactment of the **Division of Revenue Bill** and the **County Allocation of Revenue Bill** is a *shared mandate* between the two Chambers.

[89] Prof. Ojienda urged that the term "Parliament" wherever used in the Constitution, implied the roles of both Chambers. He urged that the Court should not adopt an interpretation which would imply that the drafters of the Constitution had been ignorant of the tenor and effect of the phraseology they adopted. In aid of this argument, counsel relied on a passage from the Ugandan case, ***Tinyefuza v. Attorney-General,*** Const. Pet. No. 1 of 1996 (1997 UGCC3), in which the Court of Appeal thus remarked:

"[T]he entire Constitution has to be read as an integrated whole and no one particular provision destroying the other but each sustaining the other."

Counsel urged that the said principle had been pronounced widely, in comparative judicial experience; and he cited the South African example, ***Stephen SegopostoTongoane and Three Others v. National Minister for Agriculture and Land Affairs and Others,*** (CCT100/09) [2010] ZACC 10.

[90] Learned Senior Counsel, Prof. Ojienda urged that *both* the National Assembly and Senate are constitutionally required to participate in the enactment of *both* the **Division of Revenue Bill** and **the Allocation of Revenue Bill**.

[91] For the second *amicus curiae*, learned counsel, Mr. Nderitu urged that the Constitution incorporated a *political principle* which dictated that *both* Chambers had a role in respect of both the Division of Revenue Bill and the Allocation of Revenue Bill: the Senate serves to protect the devolved system of government – by ensuring the representation of county interest. And there is a common denominator, counsel urged, between the National Assembly and the Senate: both are *representative Chambers*, their membership being derived from direct election for the most part. Counsel submitted that the legislative authority "is derived from the people and, at the national level, is vested in and exercised by Parliament": hence the legislative authority is vested in the National Assembly and the Senate jointly and wholly – these being the constituent organs of Parliament.

[92] The burden of Mr. Nderitu's submission was that both Chambers of Parliament were required to comply with the terms of Articles 109(4) and (5), 110-113, 122 and 123 of the Constitution, as well as Parts IX, XIX and XX of the Senate Standing Orders and Parts IX, XIX and XXIV of the National Assembly Standing Orders – the effect being that the passing by the National Assembly of the Division of Revenue Bill, 2013 and the subsequent assent thereto by the President, was unconstitutional, and consequently, was a nullity.

[93] For the third amicus curiae, learned counsel, Mr. Wanyoike also shared with other *amici* on a level of principle: the two Chambers as members of the legislative branch of government, had an obligation to work in co-operation, in the discharge of their constitutional mandate.

D. THE SENATE AND THE LEGISLATIVE PROCESS: "BILL CONCERNING COUNTY GOVERNMENT"

The Court was then to consider the meaning of a Bill concerning County Government as provided for under the Constitution.

[94] For the applicants, learned counsel, Mr. Kilukumi submitted that, on *prima facie* perception, Article 109 of the Constitution signals that a Bill in Parliament that does not entail issues of county government, steers clear of the Senate's mandate; but that any Bill touching on the scheme or functions of county government, falls squarely within the legislative remit of the Senate. The relevant clauses of Article 109 thus provide:

"(3) A Bill not concerning county government is considered only in the National Assembly, and passed in accordance with Article 122 and the Standing Orders of the Assembly.

"(4) A Bill concerning county government *may originate in the National Assembly or the Senate****and is passed in accordance with Articles 110 to 113, Articles 122 and 123 and the Standing Orders of the Houses."***

[95] It was common cause that Article 110 of the Constitution provides the essential definition of the phrase, "Bill concerning county government," as follows:

"(a) a Bill containing provisions affecting the functions and powers of the county governments set out in the Fourth Schedule;

"(b) a Bill relating to the election of members of a county assembly or a county executive; and

"(c) a Bill referred to in Chapter Twelve affecting the finances of a county government."

[96] Such a Bill may be categorized as "special" or "ordinary". And Article 110(3) provides that prior to a consideration of the Bill, "the Speakers of the National Assembly and Senate shall jointly resolve any question as to whether it is a Bill concerning counties and, if it is, whether it is a special or an ordinary Bill."

[97] In the category of "a Bill concerning county government" are Bills referred to in Chapter Twelve of the Constitution, as affecting the finances of county governments. The said Chapter Twelve deals with *public finance*; but it also deals with certain categories of Bills: Division of Revenue Bill; County Allocation of Revenue Bill; County Appropriation Bill. Such Bills, to qualify as "Bills concerning county government", must relate to the finances of county governments.

[98] Article 110(3), (4) and (5) lays down special procedures to guide the passing of "Bills concerning county government." As regards these Bills, *neither* Chamber of Parliament is to take a unilateral course. By Article 110(3), the two Speakers are *required* to consult between themselves, and jointly resolve any emerging difference.

[99] It emerges from the submissions of learned counsel that on issues of finance, and as regards monetary legislation, the separation of roles between the National Assembly and the Senate is blurred. The effect is to place an obligation on the Court, to consider the facts and circumstances, and to rely on established principle, in determining the situation in each case.

[100] Such uncertainty, and the case for guidance by principle, are foreshadowed in an earlier matter before the Supreme Court: ***Re the Matter of the Interim Independent Electoral Commission,*** Sup. Ct. Const. Appl. No. 2 of 2011 [para.40]:

"There is…, in reality, a close connectivity between the functioning of national government and county government ….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…."

[101] It was urged for the *amici curiae* that there does exist a link between the national government and the 47 counties – and that this necessitated a clear definition of what "concerns or affects county government." This is necessary, it was urged, as there is the possibility – or indeed, likelihood – that prospective petitioners will label certain matters as "matters concerning county government", merely on account of trifling connections between the two levels of government.

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

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

This is a very broad definition which ***creates room for the Senate to participate in the passing of bills in the exclusive functional areas of the national government, for as long as it can be shown that such bills have provisions affecting the functional areas of the county governments.*** *For instance, it may be argued that although security and policing are national functions, how security and policing services are provided affects how county governments discharge their agricultural functions. As such, a bill on security and policing would be a bill concerning counties….With a good Speaker, the Senate should be able to find something that affects the functions of the counties in almost every bill that comes to Parliament, making it a bill that must be considered and passed by* ***both Houses."***

[103] Caution, therefore, must attend the determination of the status of the Division of Revenue Bill. Certainly, such is an issue of significant public interest, that requires informed deliberations, and that merits an Advisory Opinion from the Supreme Court.

E. THE DIVISION OF REVENUE BILL: IS THIS A BILL CONCERNING COUNTY GOVERNMENT"

[104] Of the nature and effect of the Division of Revenue Bill, the applicants, through learned counsel, Mr. Kilukumi urged that this Bill effects a vertical division of the finances collected on a national scale, from all the 47 counties – as between the two levels of government. It was urged that the Senate, for its safeguard-role over vital county interests in such resources, is the veritable guardian-angel of the counties, especially in relation to the principle of devolved government. Accordingly, learned counsel submitted, the Senate *must* be involved in the process of sharing-out of the *national* financial resources.

[105] Even on elementary consideration, Mr. Kilukumi urged, the Division of Revenue Bill bore the masthead-object: a Bill "to finance the functions of county assemblies." It deals with finances as provided under Article 110 of the Constitution; each county's receipt is to be seen as a share of the national revenue that *belongs to county government*; the success of the very constitutional scheme of devolution, and of county government, is crucially dependent on the monetary plans and disbursements; therefore, a Bill that apportions and disburses financial resources to the counties, is indeed "a Bill concerning county government."

[106] This was a case, counsel urged, in which the legislative responsibility, as attributed to Parliament under Article 224 of the Constitution, merits proper interpretation as signifying *Parliament in its two constitutive Chambers*, and not just the National Assembly. Counsel submitted that the Senate's role, in the contemplation of Article 224, admits of no doubt:

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

[107] Learned counsel submitted, for greater effect, that the Court should consider whether the Division of Revenue Bill affects the functions and operations of county government. Indications of the appropriate inference, Mr. Kilukumi urged, are embedded in the ***Final Report by the Task Force on Devolved Government,*** Vol. 1: ***A Report on the Implementation of Devolved Government in Kenya*** [at page 19]:

"*The role of the Senate in the vertical and horizontal sharing of revenue is provided by Article 218 as read together with Article 96(2). Article 218 provides for both the* ***Division of Revenue Bill*** *and the* ***County Allocation of Revenue Bill,*** *which are required to be introduced in Parliament at least two months before the end of each financial year. It is notable that the Article provides for the introduction of the two Bills in* ***Parliament and not just in one of the two Houses of Parliament****. This may mean that the Bills should be introduced and processed in Parliament* ***at a joint sitting of the two Houses*** *or that they should be introduced and processed* ***in each of the two Houses of Parliament*** *separately. Furthermore, these being Bills to be passed into Acts of Parliament, they must be read within the context of the provisions of Article 96(2)* ***which requires that Bills concerning counties be considered, debated and approved by the Senate. Bills which deal with the equitable sharing of revenue both vertically and horizontally*** *within the meaning of Articles 202, 203 and 204 are* ***definitely Bills that affect the functions of county governments*** *and, therefore, Bills concerning counties in whose consideration, debate and approval* ***the Senate has a role to play."***

[108] The learned Attorney-General, by contrast, maintained that the National Assembly alone has the role of financing county government – by *allocating the national revenue,* through the Division of Revenue Bill. He submitted that the Senate's role is limited to some other regime of law-making, one that *allots to different counties* the finances already disbursed by the National Assembly by virtue of the latter's exclusive law-making competence.

[109] The Attorney-General submitted that a perception of the Division of Revenue Bill as a Bill concerning county government, would entail an erroneous outcome: that the Senate, while participating in the disbursement of national revenue to counties, would *also* be taking part in the determination of the revenue-portion going to the national government – and this would entail conflict in the respective legislative powers of the two Parliamentary Chambers.

[110] Learned counsel, Mr. Ngatia concurred in the foregoing perception, urging that in the terms of Article 110 of the Constitution, the Division of Revenue Bill is not "a Bill concerning county government": because it carries no provisions on the functions and powers of county governments as set out in the Fourth Schedule. The controlling factor, Mr. Ngatia urged, was the conduct of national economic policy and planning, under which falls "division of revenue", and which fell outside the remit of county government. Mr. Ngatia submitted that the Division of Revenue Bill fell outside the competence of county government as it did not relate to the election of members of a county assembly or a county executive. This position was supported by learned counsel, Mr. Odera, though not by learned counsel, Mr. Nderitu, who urged that the Division of Revenue Bill, insofar as it entailed the allocation of a share of the national revenue among county-government units, should be viewed as "a Bill concerning county government."

[111] From such perceptions, we have endeavoured to crystallize the points of merit. The Division of Revenue Bill declares in clause 3 that it is to provide for:

"(b) additional resources to facilitate the proper functioning of county governments in accordance with Article 202 of the Constitution…."

The Memorandum to the Bill also states that:

"The principle object of the Bill is to provide for the equitable division of revenue raised nationally among the national and county levels of government as required by Article 218 of the Constitution and to provide for resources to facilitate the proper functioning of county governments and to ensure that ongoing services are provided for."

[112] The learned Attorney-General in his submissions, called for a broad, purposive approach to the interpretation of the Constitution, and conceded that such an unconstrained mode of interpretation may take into account relevant secondary documents. A significant such document is the ***Final Report of the Task Force on Devolved Government;*** and this states (at p.19) that the Division of Revenue Bill deals with the vertical equal sharing of national revenue and, therefore, it is definitely a Bill affecting the functions of county government and comes within the competence of the Senate. The emerging picture is plain, though unsupported by learned counsel, Mr. Ngatia who contends that the provisions of the Division of Revenue Bill have relevance only for national economic policy and planning, a matter reserved to the national government. Such a position is not free of controversy: for the Division of Revenue Bill provides for the allocation of national revenue to the county-units, for the facilitation of county government.

[113] This Court, in ***Re the Matter of the Interim Independent Electoral Commission*** (2011), had observed that there are certain functions shared between the national and county governments, that give rise to a *concurrent jurisdiction* between the two levels; and *finance* is one such function [para.39]:

"Many offices established by the Constitution are shared by the two levels of government, as is clear from the Fourth Schedule…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."

[114] It is quite clear to us that the Division of Revenue Bill is a Bill bearing provisions that deal with the *equitable sharing of revenue* – which will certainly affect the functioning of county government. We have found no justification in the contention that the Division of Revenue Bill deals strictly with "national economic policy and planning" and so, on this account, it is a measure unrelated to county government. The Bill deals *with equitable allocation of funds to the counties*, and so any improper design in its scheme will certainly occasion inability on the part of the county-units to exercise their powers and to discharge their functions as contemplated under the Constitution.

[115] This is a critical test which will require that the Division of Revenue Bill be perceived as *"a Bill concerning county*

government" and, therefore, a subject of the legislative competence of *both* the National Assembly and the Senate.

[116] We find merit, therefore, in upholding the stand of the applicants, on this question. It is clear to us that the Senate had a clear role to play, in the processing of the Division of Revenue Bill. The Speaker of the National Assembly should have complied with the terms of Article 112 of the Constitution; and the National Assembly should have considered the deliberations of the Senate on record and, failing concurrence on legislative choices, the matter should have been brought before a *mediation committee*, in accordance with theterms of Article 113 of the Constitution.

IS THE DIVISION OF REVENUE BILL A 'MONEY BILL' UNDER THE CONSTITUTION"

[117] It had been urged for the interested parties that the said Division of Revenue Bill fell exclusively within the National Assembly's competence on the ground of its proper rubric being "money bill". Counsel for the applicants raised no doubts as to the validity of the legal principle thus raised, but submitted that the Division of Revenue Bill fell under the terms of **Article 218** of the Constitution rather than **Article 114(3)** which provided for "money Bill." And learned *amicus* counsel, Mr. Nderitu weighed in, submitting that the Division of Revenue Bill is *not* a "money Bill", as it does not directly deal with the raising or spending of government revenue: it only deals with the manner in which the revenue once raised, shall be divided between the national and the county governments. Upon reflecting on this question, taking into account the comparative material placed before us by counsel, we came to the conclusion that the Division of Revenue Bill is not a "money Bill," in the terms of Article 114(3) of the Constitution. It has become clear to us that a "money Bill", in a proper case, may only be introduced in the National Assembly, though it is not a settled question whether the Senate may subsequently participate in the relevant legislative deliberations.

[118] The Court's ultimate task, in the circumstances, is to consider the position of the Speakers of the respective Chambers of Parliament, and to render an Advisory Opinion regarding their options.

F. PARLIAMENTARY CONFLICT: THE ROLE OF THE SPEAKERS

When and how does a question for the consideration of the two Speakers arise under Article 110(3) of the Constitution"

[119] Of the management function of the Speakers of Parliament, in relation to the process of legislation, Article 110(3) of the Constitution thus provides:

"Before either House considers a Bill, the Speakers of the National Assembly and Senate shall jointly resolve any question as to whether it is a Bill concerning counties and, if it is, whether it is a special or an ordinary Bill."

[120] Was this preliminary condition complied with, before the National Assembly proceeded to deliberate upon and to pass the Division of Revenue Act, 2013 which has occasioned the conflict in question"

[121] The common course on fact is that the National Assembly published the Division of Revenue Bill on 29 April 2013, and the Speaker of that Chamber then wrote a letter to the Speaker of Senate on 3 May 2013, "seeking the latter's concurrence to the effect that the Division of Revenue Bill was a Bill concerning County Government". The Senate Speaker concurred, by his letter of 9 May 2013; and on that very day the Bill was debated and passed by the National Assembly, with several amendments being effected. The Clerk of the National Assembly, on 13 May 2013, forwarded the Bill as passed, to the Speaker of the Senate, for debate. The Senate deliberated upon the Bill fully, and passed it with amendments, on 23 May 2013; and it was forwarded to the National Assembly for consideration of the amendments on 24 May 2013. Indeed, the National Assembly entered upon a second round of deliberations on the Bill; but the Speaker then had a change of mind, taking the position that it was an error of judgment to have involved the Senate in the process of legislation. He had taken into account the objections of members of the National Assembly raised during the second round of debate. The essence of the objections was that the Division of Revenue Bill was not "a Bill concerning county government".

[122] Not only did the National Assembly reject Senate's amendments and exclude Senate's legislative participation entirely, but the Speaker forwarded the National Assembly's earlier-approved version of the Bill to, and obtained the assent of, the President on 10 June 2013.

[123] The emerging constitutional crisis occasioned genuine anxiety to the Speaker and members of Senate, and they moved this

Court to find a solution in the form of an authoritative Advisory opinion.

[124] Although the Constitution has special provisions in Articles 110(3) and 113 for orderly, internal conflict resolution in the law-making process, these had not been resorted to; and it became clear the two Chambers and their respective Speakers were at odds, in a mode incompatible with the spirit of harmony required for the due discharge of State functions under the Constitution.

[125] The internal parliamentary mechanism for consultation, co-ordination and harmony, though a constitutional prescription and a device of the democratic dispensation, must be engaged in the first place by individual persons, in the shape of *the two Speakers* who, however, in this case, have disempowered the institutional design, by simply showing a disinclination to reach out to each other. We are touching on a mischief to the due functioning of Kenya's chosen constitutional mechanisms: and it becomes clear that such is nota question justiciable by the scheme of litigation, as was proposed by counsel for the interested parties. It is quite clear that this is a matter for the authoritative Advisory Opinion of this Court, as it fulfils the intent expressed in the Supreme Court Act, 2011 (Act No.7 of 2011, to [section 3(a)] "assert the supremacy of the Constitution and the sovereignty of the people of Kenya".

[126] This fundamental point is implicitly recognised by the Speaker of the National Assembly, who is one of the interested parties. In his deposition responding to the Senate's Reference, the National Assembly's Speaker avers:

"I now request the Supreme Court to also provide an Advisory Opinion with regard to when and how the question shall arise under Article 110 of the Constitution together with the Opinion sought by the applicants herein.'

[127] Learned Senior Counsel, Mr. Nowrojee, on the requirement of consultation between the two Chambers, submitted that the critical starting point is Article

110(3) of the Constitution:

"Before either House considers a Bill, the Speakers of the National Assembly and the Senate shall jointly resolve any question as to whether it is a Bill concerning counties and, if it is, whether it is a special or an ordinary Bill".

This provision, Mr. Nowrojee submitted, is the very fulcrum of the Constitution's scheme of devolution: it seeks to *guarantee the participation of Senate* in the origination, determination and enactment of laws that affect the operations of the counties, which are the basic units of devolved government. Learned counsel notes that Article 110 (3) is buttressed by operational Standing Orders *of both the National Assembly and the Senate:* in the case of the former, Standing Order Nos.121,122and 123; in the case of the latter, Standing Order No. 116.

[128] Standing Order No.122 of the National Assembly thus provides:

"(1) *Upon publication of a Bill, and before the First Reading, the Speaker shall determine whether:*

a. It is a Bill concerning county governments and if it is, whether it is a special or an ordinary Bill or,

b. It is not a Bill …. concerning county governments.

"(2)The Speaker shall communicate the determination under paragraph (1) to the Speaker of the Senate for concurrence.

*"(3) Where the Speaker of the Senate does not concur with the determination of the Speaker under paragraph (1), the Speaker shall, **jointly with the Speaker of the Senate**, resolve any question whether it is a Bill concerning counties and, if it is, whether it is a special or an ordinary Bill".*

[129] Prescriptions in similar terms are found too in the Senate's Standing Order No.116:

"(1) Upon publication of a Bill, and before the first reading of the Bill, the Speaker shall, jointly with the Speaker of the National Assembly, resolve any question as to whether it is a Bill concerning counties and, if it is , whether it is a special or an

ordinary Bill.

(2) For the purposes of paragraph (1), upon publication of a Bill, and before the First Reading, the Speaker shall, by way of communication, seek the concurrence of the Speaker of the National Assembly whether it is a Bill concerning counties and, if it is, whether it is a special or an ordinary Bill".

[130] Is it in doubt, in view of the formal provisions of the law, when and how a question for the consideration of the two Speakers arises under Article 110(3) of the Constitution" We do not think so. As Mr. Nowrojee submitted, the requirement for a joint resolution of the question whether a Bill is one concerning counties, is a mandatory one; and the legislative path is well laid out: it starts with a determination of the question *by either Speaker* – depending on the origin of the Bill; such a determination is communicated *to the other Speaker*, with a view to obtaining *concurrence;* failing a concurrence, *the two Speakers are to jointly resolve the question.*Both sets of Standing Orders are crystal clear on this scenario, and both, on this point, as we find, faithfully reflect the terms of the Constitution itself.

[131] Mr. Nowrojee submitted, for eminently good cause, that the legislative path thus laid out should apply to each and every Bill coming up before either Chamber of Parliament; and it is the constitutional task of the two Speakers to*jointly* determine the route to be followed by legislative proposals. Wherethe *Speakers* determine that a Bill is not one "concerning county government", such a Bill is then rightly considered and passed exclusively by the National Assembly, and then transmitted to the President for assent. The emerging, broader principle is that both Chambers have been entrusted with the people's public task, and the Senate, even when it has not deliberated upon a Bill at all the relevant stages, has spoken through its Speaker at the beginning, and recorded its perception that a particular Bill rightly falls in one category, rather than the other. In such a case, the Senate's initial filtering role, in our opinion, falls well within the design and purpose of the Constitution, and expresses the sovereign intent of the people: this cannot be taken away by either Chamber or either Speaker thereof.

[132] Learned counsel for the *amici curiae,*Prof. Ojienda, Mr. Nderitu and Mr. Wanyoike expressed concurrence in the main lines of argument canvassed by Mr. Nowrojee, while the interested parties, through learned counsel Mr. Ngatia and Mr. Odera, expressed disagreement. The two counsel submitted that all Bills in the legislative process are not required to follow the path laid out in Article 110(3) of the Constitution, as reflected in the Standing Orders of the two Chambers. Rather than elaborate the fundamentals of this argument, both counsel focused attention on a perception that the Senate's legislative role is greatly limited, as compared to the National Assembly; it was urged that the National Assembly's unlimited competence rests in its ability to originate and consider any Bill at all, whether it concerns county government or not – whereas the Senate's legislative role is limited to matters "concerning county government".

[133] On the basis of the submissions of counsel, and upon a broad view of the question which led to this Court being moved, it has become clear that the proper functioning of the legislative process is one of the teething problems attending the consolidation and operationalisation of the democratic concept of the new Constitution. The question coming up before us, therefore, is one of great public importance. Not only have we determined that this, indeed, is a proper question for an Advisory Opinion, but we have re-examined the broader scope of the Supreme Court's place in the constitutional order, when complex challenges to the functioning of governance institutions arise.

[134] Reflecting on the role of the Courts, and *in particular of the Supreme Court,* and in relation to the long-established American governance system, Prof. Archibald Cox [in ***The Warren Court: Constitutional Decision as an Instrument of Reform****(*Cambridge, Mass: Harvard University Press, 1968), at p.118] thus observed:

"[G]overnment is more pragmatic than ideal. In a practical world there is, and I suspect had to be, a good deal of play at the joints. *If one arm of government cannot or will not solve an insistent problem, the pressure falls upon another. Constitutional adjudication must recognize that the peculiar nature of the Court's business gives it a governmental function which cannot be wholly discharged without the simple inquiry, 'which decision will be the best for the country"'*

"…[T]he Court can seldom be wholly neutral upon the social, political, or philosophical questions underlying constitutional litigation. *Its opinions shape as well as express our national ideals."*

[135] We are in a similar position. By a Constitution achieved after many false starts, the people have declared that "*All sovereign power belongs to the people of Kenya"* [Article 1(1)]; and they have established institutions of governance committed to named functions: the Executive; the National Assembly; the Senate; and numbers of others.

[136] The mandate of governance established by the people is defined by particular concepts, principles and values. One of these is *devolution,* which is defined in ***Black's Law Dictionary***, 8th ed (2004) [p.484] as:

"The act or an instance of transferring … rights, duties, or powers to another; the passing of such rights, duties, or powers by transfer or succession ..."

The Kenyan people, by the Constitution of Kenya, 2010 chose to de-concentrate State power, rights, duties, competences – shifting substantial aspects to county government, to be exercised in the county units, for better and more equitable delivery of the goods of the political order. The dominant perception at the time of constitution-making was that such a deconcentration of powers would not only give greater access to the social goods previously regulated centrally, but would also open up the scope for political self-fulfilment, through an enlarged scheme of actual participation in governance mechanisms by the people – thus giving more fulfilment to the concept of *democracy*.

[137] By Article 1 of the Constitution, the people's sovereign power is delegated to Parliament and the legislative assemblies in the county units, the national and county executives, the judiciary and independent tribunals.

[138] Devolution as a required constitutional practice runs in parallel with an attendant set of values, declared in Article 10 of the Constitution: the rule of law, democracy, participation of the people, human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination, the protection of the marginalized.

[139] A fundamental element in the scaffolding structure for the said constitutional principles and values, is the institutional scheme of *bicameralism* in the legislative arrangement; and this is the dual-Chamber set-up in the institutions of law-making. The Constitution provides for a bicameral system, with each unit playing its role as prescribed. Article 93 stipulates:

"(1) There is established a Parliament of Kenya, which shall consist of the National Assembly and the Senate.

"(2) The National Assembly and the Senate shall perform their respective functions in accordance with this Constitution."

[140] In the operations of each of the Chambers of Parliament, the role of the presiding officer, namely the *Speaker*, is critical. In respect of this office, the Constitution [Article 106 (1)] thus provides:

"(1) There shall be –

a. A Speaker for each House of Parliament, who shall be

elected by that House in accordance with the Standing Orders, from among persons who are qualified to be elected as members of Parliament but are not such members …."

[141] It is quite clear, though some of the counsel appearing before us appeared to overlook this, that the business of considering and passing of any Bill is *not* to be embarked upon and concluded before the two Chambers, acting through their Speakers, address and find an answer for a certain particular question:*What is the nature of the Bill in question"* The two Speakers, in answering that question, ***must*** settle ***three*** sub-questions – before a Bill that has been published, goes through the motions of *debate*, *passage*, and *final assent* by the President. The sub-questions are:

a. is this a Bill concerning county government" And if it is, is it a ***special****or an* ***ordinary*** *bill"*

b. is this a bill ***not*** *concerning county government"*

c. is this a ***money Bill****"*

[142] How do the two Speakers proceed, in answering those questions or sub-questions" They must consider the content of the Bill. They must reflect upon the objectives of the Bill. This, by the Constitution, is not a *unilateral exercise*. And on this principle, it is obvious that the Speaker of the National Assembly by abandoning all engagement or consultation with the Speaker of the

Senate, and proceeding as he did in the matter before this Court, had acted contrary to the Constitution and its fundamental principles regarding the *harmonious motion of State institutions.*

[143] Neither Speaker may, to the exclusion of the other, *"determine the nature of a Bill"*: for that would inevitably result in usurpations of jurisdiction, to the prejudice of the constitutional principle of the harmonious interplay of State institutions.

[144] It is evident that the Senate, though entrusted with a less expansive legislative role than the National Assembly, stands as the Constitution's safeguard for the principle of *devolved government*. This purpose would be negated if the Senate were not to participate in the enactment of legislation pertaining to the devolved units, the counties [Article 96(1), (2) and (3)].

[145] It is clear to us, from a broad purposive view of the Constitution, that the intent of the drafters, as regards the exercise of legislative powers, was that any disagreement as to the nature of a Bill should be harmoniously settled through *mediation.* An *obligation* is thus placed on the two Speakers, where they cannot agree between themselves, to engage the mediation mechanism. They would each be required each to appoint an equal number of members, who would deliberate upon the question, and file their report within a specified period of time. It is also possible for the two Chambers to establish a *standing mediation committee*, to deliberate upon and to resolve any disputes regarding the path of legislation to be adopted for different subject-matter.

[146] Had such an approach to the dispute been adopted, it is our opinion, this Court would probably not have been asked to give an Advisory Opinion, as a fitting solution would most likely have been found. What precipitated the current situation, as is clear from the facts, is the National Assembly Speaker's non-recourse to the provisions of Articles 110(3), 12 and 113 of the Constitution, thus improperly excluding the prospects of consultation and mediation. Such a course of action is precisely what Archibald Cox had in mind: *"If one arm of government cannot or will not solve an insistent problem, the pressure falls upon another"*. The pressure now falls on the Supreme Court. As we hereby render an Advisory Opinion, we categorically affirm that lawful public-agency conduct under Kenya's Constitution, *requires* every State agent to grapple, in good faith, with assigned obligations, and with a clear commitment to inter-agency harmony and co-operation. No State agency, especially where it is represented by *one person,* should overlook the historical trajectory of the Constitution, which is clearly marked by transition from narrow platforms of ideosyncrasy or sheer might, to a scheme of progressive, accountable institutional interplays.

G. CONCLUSION

[147] In this Advisory Opinion, we have re-visited the conditions under which the Supreme Court will exercise the jurisdiction to render such an Opinion, and we have reviewed on merit the submissions of counsel, on the important question of the functioning of the legislative mechanisms instituted under the new constitutional dispensation. In all such issues, our inclinations, and the grounds therefore, emerge, and may serve as reference-points in future matters of a constitutional nature.

[148] But our specific Advisory Opinion, which culminates from the detailed review, is as follows:

(a) The Division of Revenue Bill, 2013 was an instrument essential to the due operations of county governments, as contemplated under the Constitution, and so was a matter requiring the Senate's legislative contribution. Consequently, the Speaker of the National Assembly was under duty to comply with the terms of Articles 110(3), 112 and 113 of the Constitution, and should have co-operated with the speaker of the Senate, as necessary, to engage the mediation forum for resolution of the disagreement.

(b) With regard to any future lack of accord of a similar nature, between the two Chambers of Parliament, there shall be an obligation resting on the State organs in question to resort to mediation, as a basis for harmonious functioning, as contemplated by the Constitution.

[149] Although this was not a litigious matter and, thus, is not an occasion for an order or decree in the conventional sense, we must revert to the submissions made by two *amici*-counsel, Prof. Ojienda and Mr. Wanyoike, that if the Court were to find that the National Assembly acted in violation of Articles 112 and 113 of the Constitution, then the outcome of its legislative process, in the shape of the Division of Revenue Act, 2013 should be declared unconstitutional.

[150] Earlier in this Advisory Opinion we have considered the proper scope of judicial discretion, where a failing is attributed to the internal procedures of Parliament during legislation; and our position is that while the Court has all the powers when such a course

of conduct is set against the terms of the Constitution, it is necessary for the Court to have a sense of the prevailing *state of fact*; thus, the Court has a *discretion in appraising each instance*, and taking a decision as may be appropriate. Now guided by this principle, would the instant case be one in which the Court should make orders as urged by counsel"

[151] We do not think so, for several reasons. The judicial process, essentially, is the Constitution's answer to any controversial question arising, and is initiated and stoked by proper invocation, with the relevant gravamina plainly laid out. In the instant case, only the Court's *guidance* on critical constitutional questions was sought; but the Court was not asked to make a conventional *judicial order* annulling the Division of Revenue Act, 2013. So it is our sense that the applicants' options in the rectification of a problematic statute, such, for instance, as regular amendment procedures, remain uncompromised.

[152] Learned counsel, Mr. Nowrojee submitted before the Court that what was sought was an authoritative opinion, in answer to the several issues agreed between the parties. The object, as it emerges from his submissions, is a clarification of the proper course of legislation, where county matters safeguarded by the Senate are concerned.

[153] We take cognizance of certain practical situations in the legislative process: in particular, of the fact that since the misunderstanding between the two Chambers came to light, yet another Bill, namely the County Allocation of Revenue Bill, has been deliberated upon and passed by the Senate, culminating in the Presidential assent. In the light of that development, it is our perception that the object of efficacy in law-making, as a constitutional task, stands in favour of sustaining the legislation already achieved. The Court's inclination in this respect, however, would not compromise its options in the future, in any matter akin to the instant one.

THE CONCURRING OPINION OF MUTUNGA, CJ & PRESIDENT

A. PRINCIPLE AND CONTEXT

[154] I concur with the majority Advisory Opinion, but write separately to give a historical background that clarifies the central goals and the significance of devolution in Kenya's Constitution.

[155] In both my respective dissenting and concurring opinions, ***In the Matter of the Principle of Gender Representation in the National Assembly and Senate,*** Sup. Ct. Appl. No. 2 of 2012; and ***Jasbir Singh Rai and 3 Others v. Tarlochan Singh Rai and 4 Others*** Sup. Ct. Petition No. 4 of 2012, I argued that both the Constitution, 2010 and the *Supreme Court Act*, 2011 provide comprehensive interpretive frameworks upon which fundamental hooks, pillars, and solid foundations for interpreting our Constitution should be based. In both opinions, I provided the interpretive coordinates that should guide our jurisprudential journey, as we identify the core provisions of our Constitution, understand its content, and determine its intended effect.

[156] The Supreme Court of Kenya, in the exercise of the powers vested in it by the Constitution, has a solemn duty and a clear obligation to provide firm and recognizable reference-points that lower courts and other institutions can rely on, when they are called upon to interpret the Constitution. Each matter that comes before the Court must be seized upon as an opportunity to provide high-yielding interpretive guidance on the Constitution; and this must be done in a manner that advances its purposes, gives effect to its intents, and illuminates its contents. The Court must also remain conscious of the fact that constitution-making requires compromise, which can occasionally lead to contradictions; and that the political and social demands of compromise that mark constitutional moments, fertilize vagueness in phraseology and draftsmanship. It is to the Courts that the country turns, in order to resolve these contradictions; clarify draftsmanship-gaps; and settle constitutional disputes. In other words, constitution-making does not end with its *promulgation;* it continues with its *interpretation*. It is the duty of the Court to illuminate legal penumbras that constitutions borne out of long drawn compromises, such as ours, tend to create. The constitutional text and letter may not properly express the minds of the framers, and the minds and hands of the framers may also fail to properly mine the aspirations of the people. The limitations of mind and hand should not defeat the aspirations of the people. It is in this context that the spirit of the Constitution has to be invoked by the Court as the searchlight for the illumination and elimination of these legal penumbras.

[157]Section 3 of the *Supreme Court Act* provides:

"*The object of this Act is to make further provision with respect to the operation of the Supreme Court as a court of final authority to, among other things –*

(a) ….

(b) ….

(c) develop rich jurisprudence that ***respectsKenya's history and traditions*** *and* ***facilitates*** *its* ***social, economic and political growth****;*

(d) enable important constitutional and other legal matters, including matters relating to the transition from the former to the present constitutional dispensation, ***to be determined having due regard to the circumstances, history and cultures of the people of Kenya."***

In my opinion, this provision grants the Supreme Court a near-limitless, and substantially-elastic interpretive power. It allows the Court to explore interpretive space in the country's history and memory that, in my view, goes even beyond the minds of the framers whose product, and appreciation of the history and circumstance of the people of Kenya, may have been constrained by the politics of the moment.

[158] The provisions of the Act are reinforced by the Preamble to the Constitution,"[***PROUD*** *of our ethnic, cultural and religious diversity, and determined to live in peace and unity as one indivisible sovereign nation; and* ***COMMITTED*** *to nurturing and protecting the well-being of the individual, the family, communities and the nation*]", and by Articles 1(4), 174, 175 (b), 189, 202, 203 (2) and (3), 204, 215, 217 and 218. I will consider the provisions of Article 174 in more detail later.

[159] Devolution falls neatly within the ambit of 'important constitutional and other legal matters,' by the meaning of Section 3(d) of the *Supreme Court Act.* That is why Advisory Opinions under Article 163 (6) are one of the two matters in which the Supreme Court is entrusted with exclusive jurisdiction. The other matter is the determination of disputes relating to election to the office of the President (Article 163 (3) (a)). Both the determination of Presidential election disputes, and the rendering of Advisory Opinions on devolution by the Supreme Court, are given the same jurisdictional status in Kenya's constitutional design.*In my opinion, this speaks quite eloquently as to the order of importance of devolution.*

[160] The Constitution of 2010 was a bold attempt to restructure the Kenyan State. It was a radical revision of the terms of a social contract whose vitality had long expired and which, for the most part, was dysfunctional, unresponsive, and unrepresentative of the peoples' future aspirations. The success of this initiative to fundamentally restructure and reorder the Kenyan State is not guaranteed. It must be nurtured, aided, assisted and supported by citizens and institutions. This is why the *Supreme Court Act* imposes a *transitional burden and duty on the Supreme Court.* Indeed, constitutional relapses occur in moments of social transition, when individual or institutional vigilance slackens.

[161] The Supreme Court has a restorative role, in this respect, assisting the transition process through interpretive vigilance. The Courts must patrol Kenya's constitutional boundaries with vigor, and affirm new institutions, as they exercise their constitutional mandates, being conscious that their very infancy exposes them not only to the vagaries and fragilities inherent in all transitions, but also to the proclivities of the old order. This principle is well depicted in the words of Mahomed, AJ in the Namibian case, ***S v. Acheson,*** 1991 (2) SA 805 (NM):

"The law requires me to exercise a proper discretion having regard, not only to all the circumstances of the case and the relevant statutory provisions, but against the backdrop of the constitutional values now articulated and enshrined by the Namibian Constitution of 1990.

The constitution of a nation is not simply a statute which mechanically defines the structures of government and the relations 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…"

[162] It is in recognition of this duty to nurture Kenya's new order, that the *Supreme Court Act,* in Section 3(d), has extended an open invitation to the Supreme Court to pronounce itself in constitutional and legal *'matters relating to the transition from the former to the present constitutional dispensation…having due regard to the circumstances, history and cultures of the people of Kenya'.* The creation of the Supreme Court as the apex Court in the new Constitution was itself informed by a desire and a need to have a fresh Court oversee the constitutional birth of a new order, and also respond to the risks that our judicial history posed to this

new Constitution.

[163] In executing its mandate the Court must, therefore, be appreciative of its unique constitutional mission as a substantive rather than a decorative device, deliberately created to oversee Kenya's successful constitutional and institutional transition.

[164] *Devolution* is one of the main fulcrums on which Kenya's newly renegotiated social contracts turns. The Court's operative statute invites it to take judicial notice of Kenya's history, in order to develop rich jurisprudence on the issue of devolution. Therefore, it is essential that I paint a historical canvas that helps to illuminate the discourse, and the resultant determination of the question at hand.

B. HISTORICAL BACKGROUND: INEQUALITY AND CENTRALISM

[165] The Kenyan state was founded on a partisan, sectarian, and exclusionary logic. It is this logic that the Constitution of Kenya, 2010 sought to deconstruct. There is no doubt that Kenya is a diverse and unequal country.[1] The inequalities within groups and between regions are manifested in the class structure of society, ethno-regional differences, rural-urban divides, and gender biases.

[166] When one examines the development-indicators that are periodically produced by the Ministry of Planning, one sees sharp disparities in development outcomes.[2] There are large differentials in development-indicators between regions: life expectancy (at times, of over 15 years between two regions in the country)[3]; infant and maternal mortality rates; under-five mortality; literacy rates; number of hospitals; doctor-patient ratios; and household incomes, among others.

[167] Kenya has been a highly centralized political and economic entity. The fusion of political and economic power has led to the emergence of *state-made*rather than *market-created*economic elites. Indeed, Kenya's socio-economic character is a product of public-policy choices made and pursued by the government. State behaviour, flowing from this politico-economic fusion, and expressed mainly through official policy, markedly shape the specific character of Kenya's development outlook. Additionally, the colossal ethnic mobilization in the acquisition and retention of state power has led to an illiberal and undemocratic practice, whereby the allocation of development resources tends to favour the ethnic base, to the exclusion of other factors of merit. Thus, the *burden* of taxation is shared and remains political-choice-neutral, but the *benefit* of public expenditure is skewed, and remains politically partisan.

[168] It is, therefore, rightly argued that the country's developmental imbalance is a product of what policy researchers, Duncan Okello and Kwame Owino, have termed a "rigged-development" approach. The two researchers observe that the "rigging" character and orientation of the state, especially in the development arena, was inherent in the colonial bearings of the state. Its constitutive values were partisan, divisive and sectarian.[4]

[169] The Independence Constitution attempted to correct these inherited defects through an elaborate devolution design, but these were soon frustrated by the central government. Having constitutionally dismantled the devolved system of government, the immediate post-independence government quickly moved to consolidate its political-constitutional 'gains' in the policy realms, and in a manner that re-validated the sectarian, partisan and exclusionary nature of the colonial state itself. In Kenya's founding policy paper, *Sessional Paper No 10 of 1965 on African Socialism and its Application to Planning in Kenya*, the government gave official state approval to developmental segregation, discrimination, and exclusion. Under the section titled "*Provincial Balance and Social Inertia"*, the Paper proclaimed this policy bias [in paragraph 133] thus:

One of our problems is to decide how much priority we should give in investing in less developed provinces. To make the economy as a whole grow as fast as possible, development money should be invested where it will yield the largest increase in net output. This approach clearly favours the development of areas having abundant natural resources, good land and rainfall, transport and power facilities and people receptive to and active in development.

[170] Premised on the colonial divisions of the country into agro-ecological zones, the Paper privileged investments in high-potential areas, while neglecting low and middle-endowment lands, most of which were used for livestock farming.

[171] Before and after independence, policy and practice positioned the government as the engine of development. Centralized planning was in vogue. The state was seen as capable of mobilizing capital for major investments, and as holding the wisdom and entitlement to allocate developmental resources. Not only did this state-led development model fail, leading to the introduction of

Structural Adjustment Programmes (SAPs) in the late 1980s, but it also occasioned distinct political costs. Centralized state power, and the fusion of economic and political power, led to the discriminatory investment and decision-making, in public policy.

[172] Thus, in 1986, *Sessional Paper No 1 of 1986 on Economic Management for Renewed Growth* was introduced. It made the private sector, rather than the state, the engine of development. However, in spite of the privatization programme, the influential power of the state in determining the destination of private capital flows and investment, still remained considerably strong. In other words, whether it remains 'the engine' (pre-SAPs model), or is in retreat (SAPs model), the state remains animmensely important player in the development arena.

[173] The Constitution's provisions on *Devolution* were key pillars in the deconstruction process. Indeed, a reading of the ***Final Report of the Constitution of Kenya Review Commission*** (CKRC) shows that, vast segments of the Kenyan population felt that they were victims of the state, either in terms of *political repression*, or in terms of *developmental exclusion*. Thus, the Constitution of Kenya, 2010 was attractive to a large number of Kenyans for many reasons. In particular, *devolution* was instrumental in mobilizing support for the Constitution in the referendum, because many people perceived its dispersal of economic and political power as an act of *liberation*. There is a large section of our society for whom the new Constitution is coterminous with *devolution.* It denotes *self-empowerment, freedom, opportunity, self-respect, dignity* and *recognition*. This perception is captured succinctly in the principles and objects of devolution, in Article 174.[5] *Devolution* is thus a positively emotive capsule, in the political dispensation.

[174] Devolution was predicated on the understanding that even though equality of opportunity may not necessarily lead to equality in development outcomes inevitably, inequality of opportunity (which is Kenya's historical experience) would necessarily result in inequality in outcomes. This is the logic behind giving every Kenyan and every region a fair and equal chance, to succeed or fail.

[175] The centralized politicaland economic model that we have experimented with for 50 years has not elevated Kenyafrom its status at independence, as a third-world country, into a first or second-world power – an achievement realized by many other countries during the same period. Instead, we have witnessed significantly high poverty levels, asymmetrical development patterns, and highly ethnicised politics – basically a failed political culture, and a failed development paradigm.

C. DECENTRALISATION IN KENYA: HISTORICAL NOTE

[176] Kenya has had a long but chequered history with decentralisation. The country has experienced all three main aspects of decentralisation: *deconcentration, delegation* and now,*devolution*. These have had political, administrative, and fiscal dimensions. Most of these efforts have been inspired by the fear of domination and discomfort with rising horizontal inequalities, on the one hand, and on the other, a desire to take resources and services closer to the people. In this respect, decentralisation has been a product of both *fear* and *aspiration* – an emotionally mixed venture; and this fact has been a major element in the country's political tribulations.

[177]At independence, Kenya adopted the most radical form of decentralisation, which had Regional Assemblies, Regional Governors, and a Senate, to protect the process at the national level – the so-called *majimbo* system of government. However, this was soon undermined and subsequently abolished in the mid-60s, by the first post-independence regime whose antipathy for this system was all manifest. Its abolition coincided with the expansion of the power and influence of the Provincial Administration (PA), a staunch colonial-era law-and-order institution. The collapse of the initiatives of political decentralisation was followed in subsequent years by attempts at administrative decentralisation, and various gradations of delegation and deconcentration.[6]

[178]The Special Rural Development Programme (SRDP) of 1971 was the first attempt at administrative decentralisation. Another attemptwas the failed effort to reorient the Provincial Administration into an instrument of *development.* The establishment of the Local Authorities (LAs) through the *Local Government Act*(Cap. 265, the Laws of Kenya), was an attempt at delegation, as was the establishment of several state-owned enterprises through legislation, or administrative action.

[179] In 1983, an ambitious, though poorly designed decentralization programme, was launched, through the creation of the District Focus for Rural Development Strategy (DFRS), which sought to make the district 'the hub of development'. This failed for a number of reasons, including the dominance of the Provincial Administration and the Central Government in its operations; poor setting of priorities; delays in disbursement; low absorptive capacity; and lack of a governing legal framework.

[180]After a long history of failure with initiatives of a*dministrative and political decentralisation*, the country refocused its attention on '*fiscal decentralisation'*. In 1994, the Road Maintenance Fuel Levy (RMFL) was established and, soon thereafter, the Rural Electrification Programme Levy, (REPLE) in 1998. In 1999, the Local Authorities Transfer Fund (LATF) was created by an Act of Parliament, to transfer 5% of the income tax to the 175 local authorities. This was followed by the establishment of the Constituency Development Fund (CDF), through an Act of Parliament in 2004. Many other local-level funds have been established, such as the Community Development Trust Funds (CDTF), Constituency Bursary Fund, and the Constituency HIV/AIDS Fund.

[181]This avalanche of initiatives is evidence that, historically, the national demand and popular craving for *decentralization* has been outstanding, in spite of the unrelenting centralising instincts of the state, and despite the problems of design that have characterized the various initiatives. No wonder that when Kenya reached what may be described as its *secondconstitutional moment on devolution*(that is, from the forum of the Constitution of Kenya Review Commission (CKRC), to that of the Committee of Experts (CoE)), *it became one of the most contentious issues, an important fibre in defining our new nationhood.*Such contention was not unexpected; and that is why the Constitution, in **Article 163(6),** provided for *Supreme Court intervention*. We are, therefore, not surprised that this matter is now before us for determination and issuance of constitutional guidance.

[182]The current devolution provisions in Chapter 11 of the new Constitution are a *major shift from the fiscal and administrative decentralisation initiatives* that preceded it. *It encompasses elements of political, administrative and fiscal devolution.* There is a *vertical and horizontal dispersal of power that puts the exercise of State powerin check.* Importantly, the Constitution has created a *Senate, an institution that enjoys direct legitimacy and a popular mandate*, commanding it to be the *protector of devolution*.

D. DEVOLUTION: CONSTITUTIONAL SIGNIFICANCE

[183]*Devolution* is the *core promise of the new Constitution. It reverses the system of control and authority established by the colonial powers and continued by successive Presidents.* The large panoply of institutions that play a role in devolution-matters, evidences the *central place of devolution* in the deconstruction-reconstruction of the Kenyan state. Thus, a "*Chapter 11-Only*" approach would wrongly obscure the *interlocking nature of devolution with other aspects and institutions of the Constitution,*an element which is critical to its success. These other elements include *Treasury*, which plays a significant role in public finance matters; *Parliament*, which requires a functional Senate to provide sufficient protection to the devolved governments, and ensure that there is no gridlock in the budgetary or legislative processes; *Judiciary, particularly the Supreme Court*, whose mandate under Article 163(6) is to give *'advisory opinion… on any matter concerning county government'*,and which is an arena for arbitrating conflicts between the National Government and County Governments; *Independent Commissions and Offices*, such as *Controller of Budget* and *Auditor General*, which are crucial in ensuring *probity and accountability.*

[184]If an interpretive framework were required to buttress this position, it would be the one reflected in the Ugandan case, ***Tinyefuza v Attorney-General*** Const. Pet. No 1 of 1996 (1997 UGCC 3). The Court of Appeal thus stated:

"[T]he entire Constitution has to be read as an integrated whole, and no one particular provision destroying the other but each sustaining the other. This is the rule of harmony, rule of completeness and exhaustiveness and the rule of paramountcy of the written Constitution."[7]

[185] This is the same rule of interpretation that I previously alluded to in the Advisory Opinion on *Gender*, in stating that a Constitution does not subvert itself. I therefore reiterate what the majority opinion has stated – that *it would be completely out of order for the Speaker of the National Assembly to interpret the powers of the National Assembly by only looking at Article 95 of the Constitution, without paying regard to Articles 96 and 110 of the Constitution which unequivocally incorporate the role of the Senate and of its Speaker.*

[186] Given Kenya's history, which shows the central government to have previously starved decentralized units of resources, the extent to which the Constitution endeavours to guarantee a financial lifeline for the devolved units is a reflection of this experience and, more specifically, an insurance against recurrence. Indeed, in practically all its eighteen Chapters, only in Chapter Twelve (*on public finance with respect to devolution*)does the Constitution express itself in the most precise mathematical language. This is not in vain. It affirms the "*constitutional commitment to protect*"; and it acknowledges an inherent need to assure sufficient resources for the devolved units.

E. "CONSTITUTIONAL COMMITMENT TO PROTECT"

[187]The “constitutional commitment to protect”, and its signal of the search for a more perfect devolution, implies that, in interpreting the devolution provisions, where contestations regarding power and resources arise, the Supreme Court should take a generous approach. Fixing the full meaning of devolution, especially in this operational phase, will continue to be characterised by contestation, as is normal with political issues. The competing claims should not, however, descend into institutional anarchy or dysfunctionality, as that would compromise the developmental aspirations invested by the people, in devolution. The Supreme Court will not hesitate to pronounce itself with final authority, by laying down the proper juridical structures consolidating the devolution-concept where they are required, and stabilizing our Constitution, as is expected.

[188]The Supreme Court, in this reference, bears a duty of care to ensure that the Senate shall realize its constitutional “duty to protect” the devolution process.Kenya’s history and heritage rings with a consistent demand for decentralization;but the power-elite has been unable to agree on the character, design and mechanics of devolution.[8]

[189] The fact that the constitutional clauses on devolution were founded on political compromise by the elite, is not sufficient reason to compromise the popular desire for a devolved system of government, that *empowers communities*, and *unlocks the developmental potential of this country*. The unity, development and security of this country are unlikely to be preserved by the old political logic of exclusion, discrimination and sectarianism; the country is set to flower only if we respect its *diversity* and pursue policies of *inclusivity* and *belonging*.[9]*Devolution is one important constitutional instrument for achieving this objective.*

[190] Article 96 of the Constitution represents the *raison d'être* of the Senate as “to protect”*devolution.* Therefore, when there is even a scintilla of a threat to devolution, and the Senate approaches the Court to exercise its advisory jurisdiction under Article 163 (6) of the Constitution, the Court has a duty to ward off the threat. The Court’s inclination would not be any different if some other State organ approached it. Thus, if the process of devolution is threatened,whether by Parliamentary or other institutional acts,a basis emerges for remedial action by the Courts in general, and by the Supreme Court in particular.

[191]The real issue regarding the passing of the Division of Revenue Act, 2013 was:*what amount* of revenue would be given to the counties" In providing [Article 203 (2)] that the revenue allocated to counties *‘shall be not less than fifteen per cent of all revenue collected by the national government’*, the framers of the Constitution were making an important statement, namely: “we are aware that this is not enough, and as we work towards a more perfect devolution, the fifteen per cent will constitute the ***minimum*** bundle of financial goods for counties even though certainly, more is desirable”. The array of functions of county governments, as listed in the Fourth Schedule in the Constitution, wouldconfirm this.

[192]The“politics of formulae”yielded the minimum allocation-provision *of not less than fifteen per cent*, a plain indication that *more* was anticipated. If there was no expectation for more, the framers would have prescribed not a floor, but an upper ceiling or, in the alternative, a specific and static percentage. However, the “justice of formulae”, which is the arena of the Supreme Court, moves the Court’s interpretative indicatorin the direction of the Senate’s application,which stands for more resources to the counties, in the future.

[193]It is relevant to consider the range of responsibilities shouldered by these nascent county governments. The Bill of Rights (Chapter 4 of the Constitution) is one of the most progressive and most modern in the world. It not only contains political and civil rights, but also expands the canvas of rights to include cultural, social, and economic rights. Significantly, some of these second-generation rights, such as food, health, environment, and education,[10] fall under the mandate of the county governments, and will thus have to be realized at that level. This means that county governments will require substantial resources, to enable them to deliver on these rights, and fulfil their own constitutional responsibilities.

[194] Kenya’s renowned constitutional law Professors, Yash Ghai and Jill Cottrell Ghai, commenting on the provisions of Article 174, observe that:

*“These objectives are elaborations of the national values and principles and show the importance of devolution to the new system of government. An essential purpose of devolution is to spread the power of the state throughout the country; and reduce the centralisation of power which is the root of our problemsof authoritarianism, marginalization of various communities, disregard of minority cultures, lack of accountability, failure to provide services to people outside urban areas and even within them.”***[11]**

[195] National values and principles are important anchors of interpretive frameworks of the Constitution, under Article 259 (a). *Devolution* is a fundamental principle of the Constitution. It is pivotal to the facilitation of Kenya’s social, economic and political growth, as the historical account clearly indicates.

[196] In my view, the constitutional duty imposed on the Supreme Court to promote devolution is not in doubt. The basis of *developing rich jurisprudence on devolution* could not have been more clearly reflected than in the provisions of the Constitution and the *Supreme Court Act.*

F. CONCLUSION

[197]One of the cardinal principles of the Constitution that can be gleaned from its architecture and wording is,"*the more checks and balances, the better"* for good governance. The relationship between the two Parliamentary Chambers should be reinforced by this principle. After all, legislative authority is derived *from the people*. Both Houses of Parliament represent the same*people,*and the resources at the core of this dispute, are *owned by the people of Kenya*. In the equitable distribution of resources *owned* by the people of Kenya,*the principles of checks and balances, mediation, dialogue, collaboration, consultation, and interdependence are not necessarily conflictual,* granted that they are all invoked in the interests of *the people* of Kenya. Since *judicial authority is also derived from the people of Kenya*, the constitutional duty of the Supreme Court in this Reference is to reinforce these principles, so as to ensure that the *rights and interests* (economic, social, political, and cultural) *of the people of Kenya trump once and for all, the narrative of which of the two Houses is superior.*

THE CONCURRING OPINION OF K.H.RAWAL, DCJ & VICE-PRESIDENT

[198] I concur with the opinion of the majority in this matter and must express my commendation of the meticulous, dexterous, and incisive scholarship expressed therein.

[199] In addition to the reasons articulated by the Court, I wish to put forth certain points to complement the emerging picture of the legislative process, as provided under the Constitution, and to propose further paths such as may advance the growth of our indigenous jurisprudence.

[200] I will begin by addressing the question of jurisdiction, which has already received detailed consideration in the majority opinion. To that analysis, I wish only to append further concepts and thoughts, as follows:

Firstly the jurisdiction of this Court to give Advisory Opinions is declared in Article 163 (6) of the Constitution, which states 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."

Thus, such an Opinion *would not ordinarily flow from any contest of rightsor claims disposed of by regular process*, but would, instead, involve *providing advice on serious issues on governance* at two levels, i.e., national and county government. It is trite essence that the term "government" includes the legislative arm of governance;this is apposite in the instant matter. It is also expected that the matters brought under the said constitutional provision may have *political dimensions*, which this apex Court is well placed to consider, as part of its remit in the elaboration of *constitutional principles.*

[201] In comparative judicial experience, the South African case, ***The President of the Republic of South Africa & Others v. South African Rugby Football Union & Others*** (CCT 16/98) 1998 ZACC 21, gives a fitting example. The court accepted the submissions of counsel which stated:

"To preserve the comity between the judicial branch of government, on the one hand, and the legislative and executive branches of government, on the other hand, …ensuring that only the highest Court in constitutional matters intrudes into the domain of the principal legislative and executive organs of State" [para.29].

Further, the court in ***Doctors for Life International*** referred to in the majority opinion above stated that since the Constitutional Court bears 'the responsibility of being the ultimate guardian of the Constitution and its values', sec. 167(4) vests it with exclusive jurisdiction in 'crucial political areas', and it bears the duty 'to adjudicate finally in respect of issues which would inevitably have important political consequences. [paras. 22-23]

[202] It is for certain, as this emerges from Article 163 of our Constitution, that this Court is the apex Court, and has authority to interpret the Constitution conclusively. It may be stated, in line with a broader interpretation to the said Article, that this Court also

has the exclusive power to decide on the "application" of the Constitution (see Article 163(4)(a)). This is because the High Court, under Article 165(3)(d), only has the powers "of interpretation" of the Constitution. By virtue of the broader powers, this Court is entitled to deploy its full capacity, and to consider the *values and principles of the Constitution*, at all times.

[203] ***Secondly,*** I advert to the separate issue of the *supremacy of the Constitution*, as admirably reflected in the majority opinion. I would add thereto the observations made by Justice Kanyeihamba (JSC) in his judgment on appeal, in the case of ***Paul Ssemogerere and Another v. Attorney-General*** [2004] 2 E.A. noted that counsel for the Attorney-General relied heavily on authorities derived from English Courts while applying and interpreting the unwritten English Constitution which operates under a sovereign parliament. He further noted that in Uganda, it is not Parliament but the Constitution which is Supreme.

The learned Judge further stated:

"[t]hat if Parliament is to claim and protect its powers and internal procedures, it must act in accordance with constitutional provisions which determine its composition and the manner in which it must perform its functions."

[204]In my view, the above observations are echoed under Article 2 (1) and (3) of our Constitution, which provides thus:

"(1) This Constitution is the supreme law of the Republic and binds all persons and all State organs at both levels of government.

"(2)…

"(3) The validity or legality of this Constitution is not subject to challenge by or before any court or other State organ."

[205] Against this background, what processes should have been undertaken, leading to the enactment of the Division of Revenue Act, 2013"

[206] The item before us is *not an adversarial matter,* and the Court has a broad-based obligation to consider all relevant provisions of the Constitution, even though these are not specifically referred to by the parties.

[207] In my view, the relevant provisions in the Constitution touching on the issues at hand are:Articles 95 (*role of the National Assembly*); 96 (*role of the Senate*); 109 (*exercise of legislative powers*); 110 (*Bills concerning county government* [specifically 110 (2) (a) (ii) and (b)]; 111(*special Bills concerning county governments*); 112 (*ordinary Bills concerning county governments); 114 (Money Bills* [particularly the definition of Money Bill in 114 (3)); 175 (*principles of devolved government*); 186 (*4th Schedule* –respective powers and functions of national and county governments); 189 (*co-operation between national and county governments*); 202 (*equitable sharing of national revenue*); and Chapter 12, Part 4 (*revenue allocation*).

[208] The Court was not informed whether the Senate's county division of revenue resolution, contemplated under Article 217 (division of revenue) had been made; but in relation to the process of legislation, it is necessary to consider this provision, along with Article 218 (annual division and allocation of revenue Bills).

[209] Due for first-place consideration are Articles 110 and 218 of the Constitution. Under Article 110 (2)(a)(ii), the annual County Allocation of Revenue Bill mentioned in Article 218 is described as a *special Bill*, meaning that it must follow *the processes*established *under Article 111.*Article 111 *limits the powers of the National Assembly to amend or veto a special Bill;* it requires at least a two-thirds majority, to amend. Failing this, the Bill as passed *by Senate* must be forwarded to the President for assent.

[210] The *Division of Revenue Bill*, on the other hand, is neither classified as an ordinary Bill nor a special Bill, in clear contrast to the *County Allocation of Revenue Bill.*

[211] Article 218 distinguishes the purposes of the two Bills. Article 218(1)(a) provides that the Division of Revenue Bill shall *divide revenue raised by national government amongst the two levels of government,* in accordance with the Constitution. On the other hand, the County Revenue Allocation Bill shall *divide among the counties the revenue allocated to the county level of government,* on a basis determined by Senate resolution in force under Article 217.

[212] It is to be recalled that Article 95 (4) (a), provides that the *National Assembly* "determines" the *allocation of revenue between the two levels of government*, as provided in Part 4 of Chapter Twelve of the Constitution.

[213] Chapter Twelve of the Constitution contains provisions relating to *Public Finance.* Article 202 provides that the National Revenue shall be shared equitably among the national and county governments. Article 203 prescribes the criteria to be taken into account while determining *equitable sharing.*

[214] Article 205 has an important bearing on the process of financial legislation. It stipulates:

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

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

[215] Thus, the process of financial legislation begins with recommendations from the Commission on Revenue Allocation, which are to be *considered by both Houses*, before voting takes place on those Bills. Article 216 provides for recommendations on the allocation process, being made by the said Commission.

[216)This process is further provided for in Article 218(2), which lays down the required content of the memorandum to accompany the Division of Revenue Bill and the County Allocation of Revenue Bill.

[217] The Constitution, upto this stage, has made clear provisions on the legislative process, as well as on the functions of the National Assembly and theSenate in that process.

[218] It is necessary to consider the budget process, as provided for in Articles 220, 221 and 224. Article 221 stipulates that it is the *National Assembly* which is to be presented with *estimates of revenue and expenditure*, and it is the *National Assembly* which prepares the *Appropriation Bill***.**

[219] Article 220(2) specifies what national legislation shall prescribe, including the form and manner of consultation required between the national government and county governments in relation to the preparation of their budgets. And Article 224 stipulates that each county shall prepare and adopt its own annual budget and Appropriation Bill, in the form prescribed by an Act of Parliament, on the basis of the *Division of Revenue Bill passed by Parliament under Article 218.*

[220] The crucial nature of Article 218(1) is to be remarked: in view of the observations made in respect of the County Allocation Bill; considering that it is a *special Bill;* and in view of the limitation on the National Assembly's veto power as regards a special Bill, it does appear that the *Allocation of Revenue Bill* stands to be introduced *by the Senate.*

[221] Both these Bills are required to be introduced "***at least two months before the end of each financial year".***Submissions before the National Assembly of the estimate by the Finance Cabinet Secretary, in accordance with Article 221, is also required to take place "***at least two months before the end of each financial year."***

[222] A critical view of Article 223 suggests that clauses (2) and (3) should not have used the word ***"Parliament"***, especially when Article 223(4) refers to only *National Assembly*.

[223] An overview of the foregoing provisions raises a question as to the practicability of finalizing the budgetary process in time, for the presentation of the two Bills before the Parliamentary Chambers including the time-allowance for mediation as stipulated under the Constitution.

[224] Upon a careful reflection on these provisions, I am of the opinion that they fall short of giving a clear and comprehensive picture of the requirements for the legislative process for the two Bills, as provided under the Constitution.

[225] In the circumstances, I would suggest that the process be reviewed by the legislative arm of government, with a view to achieving clarity and harmony, in keeping with the *spirit of devolution*; actionon these lines may help to stave off the prospect of a financial crisis such as would undermine the functioning ofestablished governance mechanisms.

[226] The Court, in the circumstances, should adopt a *holistic approach to interpretation, with a view to protecting and promoting the purpose, effect, intent and principles of the Constitution.*

[227] The majority opinion has fully dealt with the provisions of Articles 10 and 174 of the Constitution, regarding the values, purposes and objectives of the system of devolved government. Article 175, in particular, deals with the principles of devolved government; and Article 189 enshrines the principle *of co-operation between the national and county governments.*

[228] I wish to add, in light of the foregoing provisions, that the *core value of devolution* is hinged upon the twin principles of *co-operation and interdependence*. The beads in a chain may have different appearances; however, when joined by a thread, they all become part of one ring; one cannot stand without the other. It is clearly articulated in Article 6(2) of our Constitution: ***"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".***

[229] It is well to remember that the revenue collected is from and for *the people*, for whose benefit the three arms of the government have been entrusted with power and authority, under the Constitution. Further, the wisdom of our Constitution is its *categorical rejection of exclusionary claims to powers of governance:* its letter and spirit is suffused with the call for *accountability, co-operation, responsiveness and openness.*

[230] I reiterate the vitality of appropriate remedial action by making coherent and decisive provisions on the process of enactment of the two Bills which have a special operational role, in the conduct of two levels of government.

DISSENTING OPINION OF NDUNGU NJOKI, SCJ

[231] This Court has been asked to exercise its jurisdiction in giving an advisory opinion with respect to seven issues, agreed upon by the parties, and which revolve around the substance and process of enactment of the Division of Revenue Act, No. 31 of 2013. I have read the majority decision and, with respect, concur with it on only one of the issues to be determined.

[232] I agree with my fellow brothers and sister judges, that Article 163 (6) of the Constitution confers jurisdiction upon the Supreme Court to give an advisory opinion in matters concerning county government and that this provision requires the Supreme Court to exercise its advisory-opinion jurisdiction within certain guidelines that were outlined in ***Re the Matter of the Interim Independent Electoral Commission,*** Sup. Ct. Const. Appl. No 2 of 2011 [at para.83] [2011] eKLR as follows:

"(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) …

(iv) …"

[233] Within the ruling of the same Advisory Opinion the Court had, with regard to the expression "county government", observed that (at para.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. *(emphasis added).*

[234] The matter at hand is an application for an advisory opinion by the Senate, which is a State organ, and whose primary role as articulated in Article 96(1) of the Constitution is to **"represent the counties, and serves to protect the interests of the counties and their governments"**. The overall key issue in question before us is whether the process of enactment of the Division of Revenue Act principally impacts the conduct of county government. In this regard, the application, in terms of the standing of parties, and the nature of the question involved, qualifies *prima facie*, within the advisory jurisdiction of this Court.

The Exercise of Jurisdiction.

[235] However, upon hearing the submission of the parties and a clear reading of the provisions of the Constitution, it is my conclusion that the matter before us is not one where this court's advisory jurisdiction is exercisable. My departure from the majority decision on the exercise of advisory opinion jurisdiction stands on four key broad policy questions that I shall endeavor to address below though not sequentially.

1. Is the advisory opinion jurisdiction of the Supreme Court discretionary and if so when is it applicable"

2. Should this court exercise its advisory jurisdiction where an established dispute already exists"

3. Should the Supreme Court exercise judicial restraint in a matter where the applicability of the doctrine of separation of powers is apparent"

4. Should the Court invoke the 'political question' doctrine in recognition of the limits of judicial intervention in specific cases"

Is the Supreme Court's advisory opinion jurisdiction discretionary"

[236] Article 163(6) of the Constitution in conferring jurisdiction to the Supreme Court to render an advisory opinionprovides as follows:

"163(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".

The drafters of the Constitution no doubt knowingly used the term "may", implying that the exercise of this jurisdiction is discretionary. This Court observed as much in ***Re the Matter of the Interim Independent Electoral Commission*** where the Court stated; (paragraphs 34 and 82):

"In so far 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…"

"…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."

This discretion, to my mind, then is to be exercised in a manner that ascribes to the institutional architecture of the Constitution while protecting the authority of this Court and, effectively utilizing the principle of judicial restraint whenever necessary.

Judicial Restraint and the doctrine of Separation of Powers.

[237] Indeed, this Court in ***Re the Matter of the Interim Independent Electoral Commission*** cautioned on the need to exercise restraint in exercising its Advisory-Opinion jurisdiction. At paragraph71 it outlined:

"… 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."

In the same ruling, at paragraphs 76 and 84, this Court opined, that it would exercise its advisory-opinion jurisdiction with appropriate restraint and in reference to the exercise of the advisory-opinion jurisdiction by the Supreme Court of Canada it observed:

"… it is noteworthy that the Judicial Committee signaled 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…'"

[238] Cesare Pinelli in his article, ***"The Concept and Practice of Judicial Activism in the Experience of Some Western Constitutional Democracies,"*** Juridica International XIII 2007, explains judicial restraint as the approach taken by judges to the text that they are expected to interpret when the meaning or the words used or the intention of the drafters is deemed insufficient. He describes it as follows (at p.31):

"The more a judge feels himself free, in such circumstances, to give the text further meanings, the more he is considered 'activist'. Conversely, the more a judge prevents himself from giving the text those meanings, the more he is deemed to be following a 'restraint-based' approach."

He further opines that given a broader approach "restraint" covers other activities of judges such as applying strictly the rules of standing, declining to consider a case until the applicant has exhausted other remedies, and*avoidance of determinations on 'political questions'*.

[239] The Supreme Court of India in ***Asif Hameed & Others v. State of Jammu & Kashmir & Others (1989)*** AIR 1899, 1989 SCR (3) 19 observed that the exercise of powers by the Legislature and the Executive is subject to judicial restraint. However, the court's exercise of such power can only be subject to the self-imposed discipline of judicial restraint. The court further observed that (at paragraphs 3 and 4):

"When a State action is challenged, the function of the court is to examine the action in accordance with law and to determine whether the legislature or the executive has acted within the powers and functions assigned under the Constitution and if not, the court must strike down the action. While doing so the court must remain within its self-imposed limits.

"…The Constitution does not permit the court to direct or advise the executive in matters of policy or to sermonize qua any matter which under the Constitution lies within the sphere of legislature or executive, provided these authorities do not transgress their constitutional limits or statutory powers."

[240] The court proceeded to hold that the Legislature was supreme in its own sphere under the Constitution and it was solely upon the Legislature to determine when and in respect of what matter the laws were to be enacted.

[241] Accordingly, it is my considered opinion that to render an advisory opinion in this reference will inevitably interfere with the principle of separation of powers between the Judicial and the Legislative arms of government. Whereas, I agree with the submissions of counsel for the 1st*amicus curiae*, Prof. Ojienda, that Kenya is a constitutional democracy where courts have both the power and duty to determine whether legislation has been enacted as required by the Constitution, I am of the view that the Judiciary is only obliged to consider the constitutionality of the substance of the impugned statute butnot the legislative process. It is noted that this present matter only raises issues of *process* of arriving at, and not the constitutionality of the *content* of the subject statute - the Division of Revenue Bill.

[242] As this Court pursues the development of indigenous jurisprudence, particularly on the delicatebalance with regard to the

doctrine of separation of powers, much can be learned from the experiences of foreign apex courts that have existed much longer than ours. Mr. Ngatia, Learned Counsel for the 1st interested party, cited several decisions from foreign courts, which are persuasive in nature, including ***US v. Butler* 297** U.S. 1 (1936) in which the U.S. Supreme Court observed that:

"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 statue 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."

[243] The majority decision of this Court in this present matter cites the Supreme Court of Canada case of ***Amax Potash Ltd. vs Government of Saskatchewan*** [1977] 2 SCR in support of the argument that the courts may question the legislative processes of Parliament. It is my opinion that this decision actually *supports* the view that courts will not question the legitimacy of a statute whose substance is constitutional. The observation of the Canadian court clearly indicates that the court's role is to check that the legislature does not overstep its mandate and legislate on matters it is not mandated to legislate on, but the court does not delve into the legislative process to find out whether the Parliamentary proceedings were carried on as required. This, for the obvious reason, that the separation of powers between the legislative and judicial arm of government must be preserved.

[244]Again, the decision of the Supreme Court of Canada in ***Re Manitoba Language Rights*** [1985] 1 SCR also cited in the majority decision in this matter,speaks only to the substance of the statute impugned since it did not contain both the English and French version as constitutionally required. This was properly within the jurisdiction of the courts to determine. Similarly, with regard to the decision of the United States of America Supreme Court in ***Marbury v. Madison*** 5 U.S. 137 (1803), my observation is that the statements of Marshall C.J., distinguish between the superior nature of constitutional provisions to the subordinate nature of statutory provisions when a court is called upon to interpret the law. This authority does not apply in the current circumstance where the issue is whether the court should advice on the legislative process.

[245] My Learned brother and sister Judges in their majority decision also refer to the decision of the Constitutional Court of South Africa in ***Doctors for Life International v Speaker of the National Assembly and Others*** (CCT 12/05) [2006] ZACC 11 in support of their opinion that this Court should exercise jurisdiction in this present matter. I however, with respect, believe that this is a narrow interpretation of the findings of that case. That would result in an invalid statute. This reiterates my view that what this Court may question is the substance of the disputed statute but not the legislative process.

[246] On the contrary, the South African case clearly indicates that courts must strive to strike a balance between their duty as the custodians of the Constitution and respect for the doctrine of separation of powers. Indeed that ruling unequivocally states at paragraph 37 that the judicial arm of government should not interfere in the processes of other arms of government except as mandated by the Constitution.

[247] This is a clear indication that the courts ought not to indiscriminately take up all matters that come before them but must exercise caution to avoid interfering with the operations of the other arms of government save for where 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, under Article 261(6) and (7) of the Constitution, to direct, query or interfere with alegislative process by Parliament.

[248] It is true and I do agree with the majority opinion of my learned brothers and sister judges and their reference to the observations of the South African court in ***Speaker of the National Assembly and others v De Lille MP& Another*** (297/98) [1999] ZASCA that Parliament is subject to the supremacy of the Constitution. I am in no way suggesting that the Legislature can disregard constitutional provisions.The Constitution however does not oust the doctrine of separation of powers between the three arms of government.

[249] Just as Parliament is expected to operate within its constitutional powers as an arm of government so must the Judiciary. The system of checks and balances that prevents autocracy, restrains institutional excesses and prevents abuse of power apply equally to the Executive, the Legislature and the Judiciary. Noone arm of government is infallible and all are equally vulnerable to the dangers of acting *ultra vires* the Constitution. Whereas, the Executive and the Legislature are regularly tempered and safeguarded through the process of regular direct elections by the people, the discipline of an appointed and unelected Judicial arm of Government is

largely self-regulatory. The parameters of encroachment on the powers of other arms of government must be therefore clearly delineated, limits acknowledged and restraint fully exercised. It is only through practice of such cautionary measures that the remotest possibility of judicial tyranny can be avoided.

[250] I am persuaded that the Court's jurisdiction to render an advisory opinion in a reference of this nature that directly questions internal workings of the legislature, in the current instance a legislative process, should not be exercised as it will encroach on separation of powers between the legislative and judicial arm of government. Moreover, even if the courts were to intervene, which I do not think they should in the current instance, they ought to satisfy themselves that formal and informal dispute resolution mechanisms have first been fully exhausted.

Does an established unresolved dispute already exist"

[251] This Court has severally in past decisions, stated that as the court of last resort, it will not entertain a matter that is in dispute, if that matter has not followed the hierarchy of the courts in the determination of its resolution. ***In the Matter of the Principle of Gender Representation in the National Assembly and the Senate***, Sup. Ct. Appl. No. 2 of 2012 [at p. 9para.17] this Court advised that:

"Only a truly deserving case will justify the Court's Advisory Opinion, as questions amenable to ordinary litigation must be prosecuted in the normal manner; and the Supreme Court ought not to entertain matters which properly belong to first instance-Court litigation. Only by due deference to the assigned jurisdiction of the different Courts, will the Supreme Court rightly hold its mandate prescribed in section 3 (c) of the Supreme Court Act, 2011 of developing "rich jurisprudence" that respects Kenya's history and traditions and facilitates its social, economic and political growth."

This point was further emphasized in ***The Kenya Section of the International Commission of Jurists v Attorney General,*** Crim. Appeal 1 of 2012, [at p. 4, paras.24-26]where this Court pronounced:

"We recognize that generally, the entry into the sphere of emerging jurisprudence is located at the High Court which bears original jurisdiction to interpret the Constitution and which has an appellate jurisdiction from lower Courts that address the basic scenarios of fact that spawn issues of jural character.

The Supreme Court all by itself and without the benefit of such other Courts would be insufficiently resourced and empowered to develop rich jurisprudence as provided for. The law-making chain indeed goes back to the Subordinate Courts, which constitute the "grassroots" entry-point into the varied intellectual dimensions of law that will guide the process of construction of legal ideas.

It follows that the Supreme Court, to best situate itself so as to address the complexity of the construction of law, must safeguard the proper jurisdiction of the Courts below it."

[252] It is evident from both oral and written submissions of the partiesin the present case and it is a matter of public knowledge that a dispute exists between the two Houses of Parliament. It is also apparent that, other than an exchange of letters between the two Speakers, there has been no attempt to use any structured formal or informal mechanism to resolve the disagreement either internally with the institution of the Legislature or, if deemed appropriate for judicial resolution, through the judicial system at the correct point of entry for interpretation of the constitution, which is at the High Court. The High Court under the terms of **Article 165(3)(d)** of the Constitution has:

"(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 the Constitution;

ii. 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;

iii. Any matter relating to constitutional powers of State organs in respect of country governments and any matter relating to the constitutional relationshipbetween levels of government..,"

[253] The decision to seek an advisory opinion of this Court, as the first recourse, by the Speaker of the Senate therefore appears to be misguided. I agree with Mr. Ngatia, Counsel for the 2nd interested party, in his submission citing ***Re The Matter of the Interim Independent Electoral Commission*** that this is a matter in which the Court should decline to render an advisory opinion due to the nature of the matter. In that advisory opinion this Court observed as follows [at para.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."

[254] I am in no doubt that what is before us is a dispute requiring an interpretation of the Constitution, and which has been either erroneously or deliberately disguised as a matter for an advisory opinion, in order to come before the Supreme Court. The Applicants request for an advisory opinion, on a matter which is (1) clearly adversarial and which (2) should have followed a number of political or, (if appropriate), judicial processes before reaching the apex court, is clearly misplaced. It leaves no room for any appeal or review, and in my opinion places this Court in the difficult and inappropriate position of being arbiter in a dispute in the first and not last instance. This is a clearly a situation in which this Court should exercise its discretion ***not*** to give an advisory opinion.

If the existence of a dispute is established, is it a political or judicial question"

[255] It is my considered view that judicial resolution is not appropriate where it is clear in a matter such as this that the *political question doctrine* will apply. This doctrine was well established by, and has been in practice since, the decision of ***Marbury v. Madison*** 5 U.S. 137 (1803), in which the US Supreme Court deemed a question of law inappropriate for judicial review because it should be resolved by the political and not judicial process. Under this doctrine, the interpretation of the Constitution is left to the politically accountable branches of government. Although it may be argued in some quarters, that it is the Judiciary's sole responsibility to interpret the Constitution, this is a misapprehension of legal provisions that must be contextualized within all corners and provisions of the Constitution. Indeed, Article 10 of the Constitution on national values and principles of governance states as follows:

"10. (1) The national values and principles of governance in this Article bind all State organs, State officers, public officers and all persons whenever any of them—

(a) applies or interprets this Constitution;

(b) enacts, applies or interprets any law; or

(c) makes or implements public policy decisions."…

[256] The interpretation of the Constitution, therefore, is not an exclusive duty and preserve of the Courts but applies to all State organs including Parliament. What is exclusive to the Courts is interpretation of the Constitution within a legal dispute brought in the normal manner before a superior court and which is afforded the necessary processes of appeals, right up to the Supreme Court. Disputes, however,do exist in other forms that require not judicial intervention and determination, but rather resolution of a *political* nature.

[257] Political disputes are formally resolved in Parliament, which is the national arbitration forum for resolving such disagreements. Politics is a primary tool for squaring out many issues within society but outside of formal judicial channels. Courts should never become arbiters of political differences as the boundaries between what is law and what is politics must be faithfully observed. The matter before this Court raises issues regarding the process of enactment of the Division of Revenue Bill 2013. Before this Court proceeds to address itself on it, it is my opinion, that it must first answer the fundamental enquiry as to whether the division of revenue in itself, is a political or a judicial question" If the answer is to the latter, then by all means the relevant courts may proceed to deal with the issue. If, however, the former is true, then the Supreme Court or any other court for that matter, should not concern itself with this case any further.

[258] To my mind, the division of revenue is a process that concerns the application of national resources to development and indeed how the resources will be allocated. The nature of the question is one of perennial debate and argumentative character. It requires a combination of several political processes of demands, negotiations, debates, stand-offs, retreats and finally resolution. These disputes will also be multi-layered; inter-party, intra-party, inter-regional and even as in this case before us inter-chamber or internal institutional disagreements.

[259] The subject matter of disputes will also be varied and not limited to power sharing, resource sharing, issues of inclusion and exclusion, a plethora of diverse commercial and public/private interests and equitable political representation. Should the courts be involved in these disputes at a policy level" From where I sit, the only response is a ***resounding negative.***

[260]Nevertheless, since it is the majority decision, that this court should exercise its advisory opinion jurisdiction in this matter, I will then proceed to expound my opinion on the substantive questions in the present matter.

Article 95 of the Constitution provides for the role of the National Assembly as follows:

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

(2) The National Assembly –

a. determines the allocation of national revenue between the levels of government as provided for in Part 4 of Chapter Twelve;

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

c exercises oversight over national revenue and its expenditure."

Senior counsel, Pheroze Nowrojee suggests that the word *"determine"* does not mean the same as *"enact"*and therefore does not give the National Assembly the sole responsibility of enacting the revenue division law. I disagree. In fact, the definition of the word *"determine"* according to the **Legal Thesaurus "The Lawyers Roget's" edited by William C. Burton. Macmillan. 1980,** includes the meanings, *"adjudge, arrive at a conclusion, bring to an end, conclude, decide, declare, decree,make a resolution, pronounce, seal"* and so forth. The use of the word *"determine*" in Article 95, therefore, denotes a much wider scope of powers than the word *"enact"* which merely signifies a singular action. This, to me, confirms the sole command and authority of the functions given to the National Assembly therein.

A clear articulation of the role of the Senate is also to be found under the provisions ofArticle 96 of the Constitution which states:

"(1) The Senate represents the counties, and serves to protect the interests of the counties and their governments.

(2) The Senate participates in the law-making function of Parliament by considering, debating and approving Bills concerning counties, as provided in Articles 109 to 113.

(3) The Senate determines the allocation of national revenue among counties, as provided in Article 217, and exercises oversight over national revenue allocated to the county governments.

(4) …"

[261] The plain meaning of the two above-mentioned Articles is unambiguous and clear. It is the National Assembly that determines the appropriation and allocation of revenue at the national level and between the levels of government; conversely it is the Senate that allocates revenue among counties. There is certainly no doubt in my mind that the drafters of the Constitution intended on drawing a clear distinction between the functions of the National Assembly and the functions of the Senate with regard to division of revenue between the national government and the county government.

[262] I do agree with the submissions of the Attorney General that the Constitution recognizes that there are two levels of government which are distinct as well as inter-dependent and that they are not expected to duplicate functions, as doing so would

undermine the bipartite nature of Parliament.

[263] My reading of the legal provisions as to the roles of both Houses of Parliament including the wider functioning and interrelationships between national and county governments in both the Public Finance and Devolution Chapters of the Constitution, clearly demarcate a separation of legislative and other functions between the national and county governments.

Further, Article 109 of the Constitution on how legislative powers are to be exercised by the Houses of Parliament, stipulates:

1. Parliament shall exercise its legislative power through Bills passed by Parliament and assented to by the President.

2. Any Bill may originate in the National Assembly.

3. A Bill not concerning county government is considered only in the National Assembly, and passed in accordance with Article 122 and the Standing Orders of the Assembly.

4. A Bill concerning county government may originate in the National Assembly or the Senate, and is passed in accordance with Articles 110 to 113, Articles 122 and 123 and the Standing Orders of the Houses.

5. A Bill may be introduced by any member or committee of the relevant House of Parliament, but a money Bill may be introduced only in the National Assembly in accordance with Article 114.

[264] It follows therefore that the only Bills that concern county government will be considered by Senate. All other Bills are to be originated in and considered by the National Assembly, exclusively. This being the case, the central question in the present matter is – "*what then is a bill to be considered as one concerning county government*""

[265]It is important from the onset to put into context, the structure of the county unit within the model of devolution crafted under the Constitution. The devolved system in Kenya is based on a unitary system of Government that decentralizes key functions and services to the county unit. The Kenyan State model is not federal in nature and does not envisage the workings of a county as a politically and financially independent state. The role of the counties then is laid out in precise and exact terms under Chapter Ten of the Constitution. Article 186 states:

186. (1) Except as otherwise provided by this Constitution, the functions and powers of the national government and the county governments respectively, are as set out in the Fourth Schedule.

(2) 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.

(3) A function or power not assigned by this constitution or national legislation to a county is a function or power of the national government

(4) …

[266] Further, the Fourth Schedule, Part 2, comprehensively sets out the functions and powers of the county as those relating to *agriculture; county health services; control of pollution, nuisances and outdoor advertising; cultural activities, public entertainment and public amenities; county transport, including county roads; animal control and welfare; trade development and regulation, county planning and development, preprimary education, implementation on national government policies on natural resources and environmental protection; county public works and services, water sanitation services; firefighting and disaster management; control of drugs and pornography and the participation of communities in governance* at the local level.

[267] These functions are completely *separate and distinct* from those of the national government set out in Part 1 of the same schedule. There are recognised exceptions where functions of the respective levels of government dovetail into one another. For example, the National Government is in charge of Health policy but where that policy impacts on county health services then both levels of Government should rightly be involved in its development. In such a case the Senate would rightly be involved in the

enactment of national legislation affecting such policy. On the other hand, legislation concerning the issuance of identity cards can only be determined by the National Assembly even though all residents of counties are required to possess such documents, as issues of immigration and citizenship is a function of the National Government. Similarly national legislation relating to construction of county roads or legal management of restaurants and cinemas would fall under the legislative mandate of the Senate.

[268] I am persuaded that for any Bill to be deemed as one concerning county government it must specifically affect the functions and powers of the county governments as set out in the Fourth Schedule of the Constitution. In addition, the provisions of the Bill must be limited to the ambit of Part 2 of that Schedule which provides for the functions and powers of county governments. In the event that such a Bill goes beyond the scope of Part 2 of that Schedule it cannot in any way be deemed to be a Bill concerning county government. Accordingly, a Bill that concerns the funding of functions outside of those specified to the Counties under the Fourth Schedule, such as the Division of Revenue Bill would, in my opinion fail the test of being considered as a Bill relating to county government. To my mind, allowing the Senate to participate in the enactment of a Bill that goes beyond the parameters of what counties may do within the Fourth Schedule, would certainly then be unconstitutional.

Division of Revenue Bill: Is it a 'Money Bill' under the Constitution"

[269] It was agreed byCounsel that Article 218 of the Constitution provides for the introduction in Parliament of the Division of Revenue Bill and the County Allocation of Revenue Bill at the end of each financial year. It is also agreed that Article 109(5) confers powers to the National Assembly to deal with a 'Money Bill' to the exclusion of the Senate. However, counsel differed on the issue as to whether the Division of Revenue Bill was a 'Money Bill'. Counsel for the Applicant, Mr. Kilukumi, argued that the Division of Revenue Bill was not a 'Money Bill' as is provided for in Article 114(3) of the Constitution. Mr. Nderitu, for the 2nd *Amicus Curiae* agreed with him that the Division of Revenue Bill did not deal with the raising or spending of money of the Consolidated Fund but rather an indication of the manner in which revenue will be shared between the two levels of government. Mr. Ngatia, counsel for the 2nd Interested Party differed, submitting that the Division of Revenue Bill was indeed a 'Money Bill' and could therefore only be introduced in the National Assembly.

[270] To comprehensively understand the universal meaning of a 'Money Bill' it is important to make a comparative analysis of parliamentary definitions, traditions and practice in other jurisdictions. Indeed in both the Westminster system as practiced in most of the Commonwealth and in the United States, a **Money Bill** or, as it is alternatively called a **Supply Bill** is one concerning taxation, appropriation or government spending as opposed to those bills that make changes in public law.

[271] In India, a 'Money Bill', as defined by Article 110(1) of theConstitution of India, is one that contains provisions on the imposition or any alteration of tax, regulation of borrowing by the government, custody of the consolidated fund, appropriation of moneys out of the consolidated fund, declaration of any expenditure as one charged on the consolidated fund or receipt of money as part of the consolidated fund.

[272] Article 110(3) of the Constitution of India further provides that "if any question arises whether a Bill is a Money Bill or not, the decision of the Speaker of the House of the People thereon shall be final." The Indian Parliament is bicameral. It comprises of the *LokSabha* which is the House of the People, (similar to the National Assembly) and the *RajyaSabha* which is the Council of States (similar to the Senate). A Money Bill can be introduced only in the *LokSabha* after which it is transmitted to *RajyaSabha* for its concurrence or recommendations. *RajyaSabha* cannot amend a Money Bill instead it only makes recommendations for amendment of the Money Bill by *LokSabha* which may accept or reject such recommendations.

[273] In the United Kingdom a Money Bill is defined under section 1 of the Parliament Act, 1911 as follows:

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

In the United Kingdom the Speaker of the House of Commons determines whether a Bill is a Money Bill or not and his ruling on that issue is final.

[274] In view of these examples of parliamentary practice it is clear that a Money Bill is one that provides for levying taxes, altering taxes or appropriation of the consolidated funds. It is also clear that in quite a number of countries the Speaker of the House that corresponds to the Kenyan National Assembly is the final determinant of what Bill will be considered to be a Money Bill and his decision is final.

[275] Is the Division of Revenue Bill 2013, then, a money Bill" Article 114(3)of the Constitution of Kenya defines a money Bill as follows:

"In this Constitution, "a money Bill" means a Bill, <u>other than,</u>a Bill specified in Article 218, that contains provisions dealing with—

(a) taxes;

(b) the imposition of charges on a public fund or the variation or repeal of any of those charges;

(c) the appropriation, receipt, custody, investment or issue of public money;

(d) the raising or guaranteeing of any loan or its repayment; or

(e) matters incidental to any of those matters."

Sub-article 4 further provides thus:

"In clause (3), "tax", "public money", and "loan" do not include any tax, public money or loan raised by a county."

[276] The maininquiry here then is whether the Division of Revenue Bill as specified in Article 218 is indeed a money Bill. The answer to this will lie in the definition of the words ***"other than"***which are in the first sentence of Article 114(3) and as underlined above. **The Merriam-Webster online Thesaurus** defines the phrase "*other than*" as synonymous with the words "*apart from, aside from, beside, besides, save for*". It gives the example of its use in the following sentence: *"other than a new jacket, I bought no special clothes for the wedding*". Similarly the **Oxford Dictionaries online** describes synonyms for phrase "*other than"* as "*apart from*" or *except for*". It also gives a sample of the proper use of the words "other than" in this phrase: "*he claims not to own anything, other than his home*". If this definition, then is applied in the context of Article 114, it would then mean that the Bills under Article 218 are also to be considered as money Bills **<u>in addition</u> to** those falling under the scope of Article 114. A safe conclusion then, would be that the Division of Revenue Bill may be considered a money bill and is subject to the same procedure as a 'Money Bill' under Article 114, which is the purview of the National Assembly is therefore subject to the provisions of **Article 109(5)** as read together with **Article 114** of the Constitution.

[277] In the same context the County Allocation of Revenue Bill may also be considered a money or supply Bill but is a Special Bill as the procedure for dealing with it is completely different. It is specifically provided for as a process within the Senate and not the National Assembly under Article 217.

[278] What then is the role of the Senate in the origination, consideration and enactment of the Division of Revenue Bill and the County Allocation of Revenue Bill" With regard to allocation of revenue to the *counties*, the role of the Senate is carefully detailed in **Articles 217 and 218 (1)(b).** However, my reading of the relevant provisions of the Constitution is that once the Division of Revenue Bill - that divides revenue between the national and county levels of Government - is ***introduced*** in the National Assembly, Senate has no role to play. The Supreme law clearly gives the Senate an opportunity to make input into the Division of Revenue Bill but only ***before*** it is introduced into the National Assembly for debate. The Constitution establishes the Commission on Revenue Allocation whose primary function under Article 216 is to:

(1) …. make recommendations concerning the basis for the equitable sharing of revenue raised by the national government –

a. between the national and county governments;

and

b. among the county governments.

(2) The Commission shall also make recommendations on other matters concerning the financing of, and financial management by, county governments, as required by this Constitution and national legislation.

[279] Under Article 215 the Senate commands a majority in the nine-member commission that has five representatives from Senate alone, compared with only two from the National Assembly and only two from the Executive arm of Government. This means that the Senate commands a decisive vote with regard to the recommendations that go into the drafting of the Division of Revenue Bill, long before it reaches the National Assembly for determination. Any significant deviation from such recommendations will require a written explanation from the Cabinet Secretary responsible for finance. It must be notedhere that in providing for a skewed and unequal representation of the Senate *vis-a-vis* the National Assembly, within the Commission of Revenue Allocation, the intention and the rationale of the drafters of the Constitution was to ensure that the Senate has comprehensive input into the allocation of revenue at that stage, deeming unnecessary any more activity at the legislative stage. The arguments, put forward by counsel for the Applicant, that the Senate is excluded from participating in the entire process of allocation therefore is a misapprehension of the law and holds no water.

Conclusion

[280] The Senate, has in this matter, raised its concerns relating to its participation in the allocation of the national cake beyond the limited provisions in Article 215 of the Constitution, in relation to the Commission on Revenue Allocation. I believe such concerns pose political questions requiring political answers.

[281] Given the nature and character of politics, political contests and allocation of political resources, as in this case before us, it is often necessary to employ various scientific techniques that remove arbitrariness or minimize opportunities to unfairly skew outcomes. To my mind there are only two ways for the Senate to canvass for an expansion of its constitutional role and mandate on the issue of allocation of national revenue.

[282] The first route is the establishment, through the process of inter-chamber negotiations or legislation including through the Standing Orders of each house, of a joint consultative committee with clear mechanisms to deal with a deadlock, in the event of which, one house must give way to the other. This is common practice in many bicameral jurisdictions such that in the instant case, for example, and in the event of a deadlock, the Senate would give way to the National Assembly, whose constitutional responsibility ultimately it is to determine the division of revenue between levels of government.

[283] It is to be observed, however, that the process of dealing with inter-chamber deadlock as applies to other Bills under Article 110(3) is not suitable for the Division of Revenue Bill as the mediation process under that Article presupposes a Bill that reaches deadlock between the two houses, can fail, with the possibility of reintroduction after six months. This cannot be done with regard to the Division of Revenue Bill as it is not a Bill that can be shelved without precipitating a constitutional financial crisis that would paralyze the workings of the entire Government and even cause its collapse. Nevertheless, wherever possible, including informal or formal discussions around the Division of Revenue Bill, Parliament should encourage internal consultative processes. The how, where and when such a formal or informal mechanism, based on mutual understanding and respect, will be set up lies in the hands of the leadership of both houses, with only one rider: Mediation is not something one can command – it is all about managing relationships between disputing parties. The law itself, therefore, will have very little to do with a successful mediation outcome. Thus, any hiccups that may occur in the mediation process, including the one defined under Article 110(3), will have to be ironed out through the development of a culture of consultation, the progression of mutual respect between the two chambers and the practice of collegiality between the Speakers of each House. This Court, I humbly submit, may not go further than to suggest this, as to delve into further details would border dangerously on giving direction to a different arm of Government on its internal processes. This would fly in the face of the doctrine of separation of powers.

[284] The second way, in which the Senate may canvass for expansion of its mandate, is to initiate an amendment of the Constitution through referendum as articulated under **Article 255(1)** of the Constitution, which states:

"A proposed amendment to this Constitution shall be enacted in accordance with Article 256 or 257, and approved in accordance

with clause (2) by a referendum, if the amendment relates to the following matters –

….

h. ***Functions of Parliament;...”***

Such an amendment could introduce common constitutional measures as practiced in other bicameral jurisdictions such as the introduction of a suspensive veto, joint sessions of the houses and even the possibility of dissolution of both houses in the event of deadlock. Such a proposal could also seek the redesign of the Commission on Revenue Allocation including a scientific review of the proportion percentage of revenue allocation between the two levels of government.

[285] Alternatively, a question for referendum, if the Senate so desires to be more intimately involved in national matters, could seek its participation in selected or all types of legislation or even radically propose a return to a unicameral system where representatives from counties would sit together in the same house with those elected from constituencies, and in doing so remove the delineation of tasks between the Senate and the National Assembly as presently constituted. Again, all these possibilities are really up to the Parties here present to consider.

[286] An option that is *not* open to the parties in this matter is for an amendment of the Constitution through an edict or opinion of this Court. It is my considered opinion that to ask this Court to give Senate powers that belong in plain language to the National Assembly would be to seek an amendment to the Constitution in a manner not recognized by the supreme law. I must be categorical and repeat for reasons of certainty, that whatever the case may be, the tools for reviewing the Constitution to address restructuring of authority, power and functions of the Legislature and the roles of the Senate and the National Assembly lie squarely in a *political* and not *judicial* process.

[287] Consequently on my part, I would have dismissed this reference in its entirety. However, as my learned brothers and sister Judges are of a different opinion, theirs must be the decision of this court.

DATED and **DELIVERED** at **NAIROBI** this 1st day of November 2013

..... **……**

WILLY MUTUNGA **K.H. RAWAL**

CHIEF JUSTICE & PRESIDENT **DEPUTY CHIEF JUSTICE/**

OF THE SUPREME COURT **DEPUTY PRESIDENT OF THE SUPREME COURT**

…… **……..**

P.K. TUNOI **M.K. IBRAHIM**

JUSTICE OF THE SUPREME COURT **JUSTICE OF THE SUPREME COURT**

……... **……..**

J.B. OJWANG **S. C. WANJALA**

JUSTICE OF THE SUPREME COURT **JUSTICE OF THE SUPREME COURT**

……...

N.S. NDUNGU

JUSTICE OF THE SUPREME COURT

I certify that this is a true copy of the original

REGISTRAR

SUPREME COURT OF KENYA

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[1]Government of Kenya, *Geographical Dimensions of Well Being in Kenya: Where Are the Poor" Volume 1 and 11*, Ministry of Planning and National Development Nairobi, 2005; Society for International Development (SID), *Readings on Inequality in Kenya: Sectoral Dynamics and Perspectives*: SID, Nairobi, 2006.

[2]Government of Kenya, *Welfare Monitoring Surveys (1994 and 1997), the Kenya Demographic and Health Surveys (various issues); National Population Census.*

[3]*Ibid.*

[4]Duncan Okello and Kwame Owino, *'Socio-Economic Context of Governance in Kenya'*, in BujraAbdallah (ed), *Democratic Transition in Kenya: The Struggle from Liberal to Social Democracy*, African Centre for Economic Growth and Development Policy Management Forum, Nairobi, 2005, p. 205.

[5]*These are: promoting democratic and accountable exercise of power; fostering national unity amidst diversity; enabling self-governance of the people towards their interrogation of the State; recognising the right of communities to self-management and development; protecting and promoting the rights and interests of minorities and marginalised groups; promoting socio-economic development; ensuring equitable sharing of national and local resources; rationalising further decentralisation of State organs; and enhancing checks and balances.*

[6]Government of Kenya, *Final Report of the Taskforce on Devolved Government*, Office of the Deputy Prime Minister and Ministry of Local Government: Nairobi, 2011.

[7]Cited also in, *Commission for The Implementation of the Constitution v Parliament of Kenya & Another* [2013]eKLR.

[8]Ghai, Y. &McAuslan, P., *Public Law and Political Change in Kenya: A Study of the Legal Framework of Government from Colonial Times to the Present*, Oxford University Press, (1970).

[9]Ghai, Y., &Ghai, J. L, *Ethnicity, Nationhood and Pluralism: Kenyan Perspectives*, Global Centre for Pluralism, Ottawa, Katiba Institute, Nairobi, 2013.

[10]This is with respect to pre-primary education and village polytechnics only.

[11]Ghai, Y.P. &Ghai, J. C., *Kenya's Constitution: An Instrument for Change*, Katiba Institute, 2011, p. 119.