Njoya & 6 others *v* Attorney General & another

High Court, at Nairobi March 3, 2004
Ringera, Kubo JJ & Kasango Ag J

Miscellaneous Civil Application 82 of 2004 (OS)

Constitutional law *– constitutional reference – locus standi – legal standing of a party to bring a constitutional reference – party challenging an Act of Parliament on account of its alleged inconsistency with the Constitution – whether such a party has to demonstrate a personal interest in order to have legal standing – subject matter of a constitutional reference – interpretation of the Constitution.*
Separation of Powers *– Parliament and the Judiciary - power of Parliament to make, amend or repeal statutory law – power of the courts to adjudicate on an alleged inconsistency of statute law with the Constitution – whether the doctrine of separation of powers takes away the courts' power to make such adjudication – whether for a court to strike down a section of a statute for being unconstitutional would be to usurp the power of Parliament to repeal law.*
Judicial Review *– subject matter of judicial review – decisions impacting on the rights of individuals – whether mere recommendations made by a body can be the subject of judicial review.*
Civil Practice and Procedure *– preliminary objection – nature of a preliminary objection – whether points challenging the jurisdiction of the court or locus standi of a party were proper points for a preliminary objection.*

The applicants brought an originating summons in the High Court in which they named the Attorney General and the Constitution of Kenya Review Commission as the respondents and sought a total of nineteen orders. Among those orders were declarations that certain sections of the Constitution of Kenya Review Act vitiated the constituent power of the people of Kenya (including themselves) or were otherwise unconstitutional and should be struck down; that the Act was unconstitutional to the extent that it permitted a National Constitutional Conference to discuss and adopt a draft Bill to alter the Constitution; that the draft Bill did not reflect the views of Kenyans and that the National Constitutional Conference be suspended pending compliance of the review process with the Constitution.

Before the summons could be heard, the 2nd respondent raised a preliminary

objection on five points – that the originating summons did not raise any matter which required the interpretation of the Constitution; that if the court were to enter into an adjudication of the matters raised in the summons, it would be trespassing into the domain of Parliament to pronounce on matters of social and public policy contrary to the doctrine of separation of powers; that the issues raised were not justiciable and the court had no jurisdiction to entertain them; that the Constitution review process was in the hands of the National Constitutional Conference and not the 2nd respondent; and, finally, that the applicants had not shown that the matters they complained of had or were likely to contravene any rights vested upon them personally.

Held:

1. A preliminary objection consists of a pure point of law which has been pleaded, or which arises by clear implication out of the pleadings and which if argued as a preliminary point may dispose of the suit. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.
2. The objections to the summons on the grounds of want of jurisdiction on the part of the court and/or want of legal standing on the part of the applicants were true points of preliminary objection within the contemplation of procedural law and they were properly taken.
3. The first role of the court should be to uphold Constitutionalism and the sanctity of the Constitution. Such a role cannot be well performed by shutting the door of the court on the face of persons who seek to uphold the Constitution on the ground that such persons have no peculiarly personal stake in a matter which belongs to all.
4. The applicants therefore had *locus standi* to challenge the compliance of the Constitution of Kenya Review Act or any provision thereof with the Constitution. Regarding the invocation of the court's jurisdiction under section 84 of the Constitution, the applicants having deposed in the affidavit in support of the summons that their fundamental rights had been curtailed, they had sufficiently brought themselves within the jurisdiction.
5. Regarding the justiciability of the Constitutional Review Process, the recommendations of the Constitution of Kenya Review Commission are not justiciable for it is a principle of administrative law that only decisions impacting on the rights of individuals (and not recommendations) are amenable to judicial review. Accordingly, the contents of the draft Bill prepared or to be prepared by Commission would not be justiciable as they would not be conferring or taking away any one's rights.

6. However, this Court would not agree that the Review Process, being a process initiated, regulated and sheparded by Parliament, was beyond the scrutiny of courts. What Parliament did vide the Constitution of Kenya Review Act was to provide for and regulate the process of Constitutional Review and the foundation of such a prescription and regulation may be challenged on Constitutional grounds. Any alleged contravention of the Constitution for which there is a remedy is justiciable.
7. While the courts cannot usurp the legislative mandate of Parliament to make, amend, or repeal statutory law, they have power to adjudicate on any alleged inconsistency of any Act of Parliament or any provision thereof with the Constitution of Kenya. The doctrine of separation of powers does not take away the court's power to declare when the Constitution has been violated by any legislation or section thereof.
8. The applicant's prayers numbers 4 and 8 which asked the court to strike down certain sections of the Act as unconstitutional amounted to investing the court with a repealing power which it did not possess. The court could declare a provision unconstitutional but it could not strike it out. Until the offending provision is repealed by Parliament, it would remain in the statute book, impotent though it may be.
9. Any relief sought which does not involve the interpretation of the Constitution or the enforcement of fundamental rights would be misplaced in a constitutional court. Where what is complained of is the composition of a statutory body or the procedural provisions thereof or the mode and manner of the exercise of its power, without more, that matter belongs to the realm of judicial review under the special jurisdiction conferred by the court by order LII of the Civil Procedure Rules and it cannot be entertained in a constitutional court.
10. The 2nd respondent being the organ invested with corporate personality by the Act was the proper organ to sue in respect of matters concerning the Constitution of Kenya Review Process.
11. The court was not invested either by the Constitution or any statute with jurisdiction to give an advisory opinion or to make any recommendations to any one. The court's business is to issue, in appropriate circumstances, orders, declarations of rights and decrees.

Preliminary objection upheld in respect of 11 prayers and overruled in respect of 7 prayers. Each party to bear its own costs.

Cases

1. *Mukisa Biscuit Manufacturing Co Ltd v West End Distributors Ltd* [1968] EA 696
2. *Coleman v Miller* (1939) 307 US SC 433

3. Odinga, Raila v Hon Justice Majid Cockar High Court Miscellaneous Civil Application No 58 of 1997
4. Ruturi & Kenya Bankers Association v Minister for Finance [2001] EA 253
5. Nottinghamshire CC v Secretary of State for the Environment [1986] 1 All ER 199; [11986] AC 240; [1986] 2 WLR 1
6. British Railways Board v Pickin [1974] 1 All ER 609; [1974] AC 765; [1974] 2 WLR 208
7. Auditor General of Canada v Minister of Energy, Mines and Resources [1989] 2 SCR 49; 97 NR 241
8. Michuki & another v Attorney General & 2 others [2002] 1 KLR 498; [2003] 1 EA 188
9. Kesavananda v State of Kerala AIR 1973 SC 1461

Texts

1. Dicey, AV (1952) *Introduction to the Study of the Law of the Constitution* London: Macmillan and Co Ltd 9th Ed
2. Nwabueze, BO (1974) *Presidentialism in Commonwealth Africa* New York: St Martin's Press

Statutes

1. Constitution of Kenya sections 1A; 3; 47; 47(5); 47(6); 62; 70; 78; 79; 80; 82; 83; 84; 123(1); 123(b)
2. Constitution of Kenya Review Act (cap 3A) sections 3; 5; 27(1)(b); 27(2)(c); 27(2)(d); 26(4); 26(7); 27(5); 27(6); 28(3); 28(4); 34
3. Civil Procedure Act (cap 21) section 3A
4. Civil Procedure Rules (cap 21 Sub Leg) order LIII
5. Constitution of India Article 368

International Instruments

Universal Declaration of Human Rights, 1948 Article 21

Advocates

Mr Kibe Mungai for the Applicants.
Mr Oraro and *Mr Ougo* for the 2nd Respondent.
Mr. Ndubi for the Law Society of Kenya, *amicus curiae*

March 3, 2004, the following Ruling of the Court was delivered.

By an originating summons dated 27th January, 2004 and amended on 17th February 2004 which is expressed to be taken out under sections 1A, 3, 47, 84 and 123 of the Constitution and 3A of the Civil Procedure Act the Rev Dr Timothy Njoya, Kepta Ombati, Joseph Wambugu Gaita, Peter Gitahi, Sophie O Ochieng, Muchemi Gitahi and Ndungu Wainaina (the applicants) seek from this Court the following orders:-

1. That, a declaration be and is hereby issued declaring that section 26(7) and 27(1)(b) of the Constitution of Kenya Review Act transgresses dilutes and vitiates and constituent power of the people of Kenya

including the applicants to adopt a new Constitution which is embodied in section 3 of the Constitution of Kenya Review Act.

2. That, a declaration be and is hereby issued declaring that section 27(5) of the Constitution of Kenya Review Act is unconstitutional to the extent that it permits the National Constitution Conference to discuss, debate, amend and adopt a draft bill to alter the Constitution through two thirds of the members present and voting at a meeting of the National Conference.

3. That, a declaration be and is hereby issued declaring that subsection (5), (6) and (7) of section 27 are unconstitutional to the extent that they convert the applicants' right to have a referendum as one of the organs of reviewing the Kenyan Constitution into a hollow right and privilege dependent on the absolute discretion of the delegates of the National Conference.

4. That, section (5), (6) and (7) of section 27 be and is hereby struck-down as unconstitutional.

5. That, a declaration be and is hereby issued declaring that the National Constitutional Conference has carried out its mandate contrary to and in excess of its powers under section 27(1)(b).

6. That, a declaration be and is hereby issued declaring that district representatives namely delegates No 224-434 have participated and continues to participate in the National Conference unlawfully.

7. That, a declaration be and is hereby issued declaring that section 27(2) (c) and (d) infringes on the applicant's rights not to be discriminated against and their right to equal protection of the law embodied in sections 1A, 70,78,79,80 and 82 of the Constitution.

8. That, section 27(2) (c) and (d) of the Constitution of Kenya Review Act be and is hereby struck down for being null and void and inconsistent with section 82 of the Constitution of Kenya.

9. That, a declaration be and is hereby issued declaring that section 28(3) and (4) of the Constitution of Kenya Review Act is inconsistent with section 47 of the Constitution and therefore null and void.

10. That, a declaration be and is hereby issued declaring that the first and second respondents and National Constitutional Conference have

managed and carried out their respective functions contrary to the (i), (ii), (iii), and (vii) principles for a democratic and secure process for the review of the Constitution enumerated in the third schedule of the Constitution of Kenya Review Act.

11. That, a declaration be and is hereby issued declaring that the draft bill to alter the Constitution drafted by the second respondent under section 26(7) does not faithfully reflect the views and wishes of Kenyans as contemplated in section 5 of the Constitution of Kenya Review Act.

12. That, a declaration be and is hereby issued declaring that the Constitution gives every person in Kenya an equal right to review the Constitution which rights embodies the right to participate in writing and ratifying the Constitution through a constituent assembly or national referendum.

13. That, a declaration be and is hereby issued declaring that the National Constitution Conference is unconstitutionally and statutorily obligated to conduct its business fairly and democratically.

14. That, a declaration be and is hereby issued declaring that Article 21 of the Universal Declaration of Human Rights (UDHR) 1948, which is embodied and implied in section 82 of the Constitution bars the respondents from constituting the Constitutional Conference in a discriminatory manner.

15. That, the second respondent be and is hereby ordered to recommend amendments to section 47 of the Constitution and the Constitution of Kenya Review Act that have now become necessary in order to ensure that fulfillment of the objects of the review process and its strict compliance with the Constitution and the principles enumerated in the Third Schedule of the Constitution of Kenya Review Act.

16. That, a declaration be and is hereby issued declaring that the first respondent has failed, refused or neglected to advise the Government and the people of Kenya that the Constitution review process under the Act does not comply with section 47 of the Constitution and fundamental principles of democracy.

17. That, the National Conference at Bomas of Kenya be and is hereby stopped for a period of six months pending compliance of the review process with the Constitution and rectification of the defects in the Constitution of Kenya Review Act (Cap 3A).

18. That, a declaration be and is hereby issued declaring that the Constitution of Kenya Review Act (Cap 3A) or the rules made under section 34 thereof do not confer sovereign power, privileges, immunities or authority upon the National Constitutional Conference.

19. That, the first respondent be and is hereby ordered to pay the applicants' costs in any event.

The said orders are sought on the grounds:-

(a) Whereas parliament enacted the Constitution of Kenya Review Act Cap 3A of the Laws of Kenya to provide an institutional mechanism and framework for the people of Kenya to exercise their constituent power to make and adopt a new Constitution, the said Act is fraught with weaknesses, contradictions and ambiguities that impede the realization of that noble goal.

(b) The effects of sections 26(7) and 27(1) of the Act is to neuter, marginalize and alienate the views of Kenyan people not captured in the draft constitutional Bill prepared by the second respondent.

(c) The applicants right in common with other Kenyans to actively, freely and meaningfully participate in generating and debating proposals to alter the Constitution provided for in section 5 of the Act was and remains curtailed and compromised by the amendment of section 27 of the Act in 2002 which lowered the majority required for decisions in the National Conference in the absence of consensus by delegates.

(d) The applicant's constituent right in common with other Kenyans to adopt and ratify a new Constitution through a national referendum is the center-piece of a people-driven constitutional review process and fundamental to realization of comprehensive review of the Constitution by the people of Kenya.

(e) As a result of the 2002 amendments to the Act the Constitution of Kenya Review Act has become a powerful machine which gives political actors enjoying the support of majority of members of the National Constitutional Conference an unconditional licence to reconstitute the country's constitutional order irrespective of the views collected and collated by the second respondent.

(f) The Act contains a myriad of systemic rigidities whose ultimate consequence is to alienate the view of people, like the applicants herein,

who fundamentally object to the structure of government proposed by the draft Constitution prepared by the second respondent and to deprive them of a democratic or any meaningful forum to express their disapproval or conversely to lobby for consideration and inclusion of their political preferences in the proposed Constitution. The said rigidities not only makes it difficult for decision making by consensus but also reward the non-compromise attitude of the superficial majority at Bomas generally in support of the draft Constitutional Bill prepared by the second respondent.

(g) The National Constitutional Conference does not have powers or mandate to fragment and balkanize the Republic of Kenya into ethnic mini-states since the applicants and other Kenyans did not express views on the model of devolution proposed by the National Constitutional Conference. Moreover, even if the National Conference had powers to carry out the said fragmentation of the Kenyan nation, which is denied by the applicants, the decision as to which regions each Kenyan wishes to live in can only be made by direct consultation of the applicants and other Kenyans.

(h) The procedure set out under section 28 of the Act for enactment of a bill to alter the Constitution is inconsistent with section 47 of the Constitution in that it purports to take away the power of Parliament to alter the Constitution under the said section 47. Further the procedure set out by section 28 gives the National Assembly leeway to reject or change the views of the people contained in a draft bill that would result from the review process.

The respondents have discharged their respective obligations respecting the constitutional review process contrary to the following four principles enumerated in the Third Schedule of the Act:

(i) Recognize the importance of confidence building, engendering trust and developing a national consensus for the review process;

(ii) Agree to avoid violence or threats of violence or other acts of provocation during the review process;

(iii) Undertake not to deny or interfere with anyone's right to hold or attend public meetings or assemblies, the right to personal liberty, and the freedoms of expression and conscience during the review process, save in accordance with the law;

(iv) Desist from any political or administrative action which will adversely

affect the operation or success of the review process.

(j) The intolerance towards views other than those contained in the draft Bill to amend the Constitution and the unwillingness by the NCC to discuss any other interpretation of the views submitted to the second respondent have, contrary to the said principles in the Third Schedule of the Act, destroyed confidence and trust in the review process on the part of the applicants and other Kenyans who believe the draft Bill presently being debated at Bomas is not a good reflection of the views given by the Kenyan people to the second respondent and that the said rejection of alternative views amounts to political and administrative actions that have and will continue to adversely affect the operation or success of the review process.

(k) Delegates No 224-434 of the National Conference at Bomas of Kenya have no mandate to represent their purported districts in that the electoral mandate of the county councils that elected them had expired at the time when the National Conference first convened in April, 2003.

(l) The applicants are aggrieved by the gross under-representation of the Districts and Provinces with majority of residents who share views on constitutional matters. As a case in point Nakuru District with 1,187,039 people by the last census is represented by three delegates the same as Keiyo District with 143,865. Similarly, both Machakos District with 906,644 people and Lamu District with 72,686 are represented by three delegates each. The magnitude of inequality in representation is so blatantly unconstitutional.

(m) It is grossly unfair, undemocratic and unconstitutional for Nairobi Province with 2, 143, 254 residents to be deemed and treated as a county council by the Act to justify its representation by only three delegates at the National Conference whilst North Eastern Province with a population of 962,153 has twelve (12) delegates.

(n) Section 26(4) of the Constitution of Kenya Review Act empowers the second respondent to recommend, where circumstances demand, minimum amendments to the Constitution or any other law as may be necessary towards fulfillment of any of the objects of the review process. Among others the following circumstances have arisen to justify the second respondent to recommend amendments contemplated by section 26(4):-

i. The Draft Constitution that comes out of Bomas of Kenya will clearly

need ratification by all Kenyans through a national referendum for it to enjoy legitimacy and their confidence.

ii. Section 47 requires to be amended to safeguard the final Draft Constitution from being watered down in Parliament or be voted out by a self-serving parliamentary minority.

iii. The Act contains several ambiguities and democratic heresies that enable a superficial majority in the National Conference at Bomas to ride roughshod over other delegates.

iv. It is absolutely important that the provisions of the Act that impede some views from either being heard or standing a chance to success be amended in order to enhance consensus and democracy in the review process.

v. In view of the increasing polarization of the Country owing to deep-rooted grievances and mutual distrust it is important to amend the Act to level the playing field and ensure that a new Constitution which results from the process will be strictly lawful and democratic.

(o) For all intents and purposes the NCC at Bomas of Kenya is a political slaughter house for delegates who support or are perceived by the superficial majority as supporting the views of certain political factions. To the extent that applicants, by sheer coincidence, share some of the political views of certain political factions, they are apprehensive that their right to participate meaningfully in the review process is in great jeopardy unless this Honourable Court intervenes.

The application is supported by an affidavit sworn by the Reverend Dr Timothy M Njoya, the first applicant.

The respondents to the summons are the Attorney-General (first respondent) and the Constitution of Kenya Review Commission (second respondent). In the course of proceedings Mr Kiriro Wa Ngugi and Mr Koitamet Ole Kina were joined as the 3rd and 4th respondents and the Muslim Consultative Council and Chambers of Justice were allowed to appear as the first and second interest parties. And the Law Society of Kenya was allowed to appear as *Amicus Curiae.*

Before the summons could be heard the 2nd respondent took the following points of preliminary objection:-

(a) That, the originating summons does not seek or raise any matter which requires the interpretation of the Constitution but merely requires interpretation of an Act of Parliament;

(b) That, if the orders sought are granted, this Honourable Court will have usurped the powers of parliament contrary to the principles of separation of powers;

(c) That, the issues raised by the applicants are in any event not justiciable and this Court has no jurisdiction to entertain them;

(d) That, the management of the Constitution Review process is now in the hands of National Constitutional Conference and not the second respondent; and

(e) That, the applicants have not shown that the matters they complain of have or are likely to contravene any rights vested upon them personally.

Those points of objection were very fully and ably canvassed by Mr Oraro and Mr Ougo, the advocates for the 2nd respondent. Mr Kibe Mungai, the advocate for the applicants, equally, fully and ably opposed the objections. And Mr Ndubi, the *amicus curiae* also contributed his views thereon. As there was some controversy as to whether the points taken were true points of preliminary objection as understood in law, we think it is appropriate at the outset to restate what a true point of preliminary objection entails. The *Locus Classicus* on the matter is *Mukisa Biscuit Co v Wstend Distributors Ltd* [1969] EA 696. At page 700 letter D-E, Law, JA stated:-

> "So far as I am aware, a preliminary objection consists of a pure point of law which has been pleaded, or which arises by clear implication out of the pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the Court, or a plea of limitation, or a submission that parties are bound by the contract giving rise to the suit to refer the dispute to arbitration."

And at page 701, letter B Sir Charles Newbold, P Said –

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

That is the law. The applicant's point was that in the course of canvassing their points of objection, the 2nd respondent's advocates made several references to the applicant's supporting affidavit, which affidavit had been controverted by a long deposition by the 2nd respondent and, accordingly, that just demonstrated that the points taken were not true preliminary objections. On a consideration of the complaint and the answer thereto we are of the view that the points taken were true points of preliminary objection. As we understood Mr Oraro, the essence of their objection was that the applicants did not have *locus standi* to agitate the complaints they had raised and/or that the Court had no jurisdiction to entertain the matter as it was being called upon to interpret an Act of Parliament rather than the Constitution, or to adjudicate on matters not justiciable, or to trespass into the domain of Parliament contrary to the doctrine of separation of powers. Those objections to the summons on the grounds of want of jurisdiction on the part of the Court and/or want of legal standing on the part of the applicants were true points of preliminary objection within the contemplation of our procedural law and they were properly taken. However, both sides found it utterly irresistible to have a bit at the merits of the originating summons itself in the course of canvassing the points of objection. On our part we shall completely decline to have a peep into those merits at this stage. We shall only be concerned with the merits of the preliminary objections themselves. It is to that consideration that we now turn.

We think we can fairly summarize the elaborate and careful arguments advance on behalf of the applicants as follows. First, both in the United States of America and Kenya the jurisprudence of the Courts establish that a person complaining of any infringement of any provision of the Constitution must show he has a specialized personal interest to protect. Thus in *Coleman v Miller* 307 US 433 [1939], Mr Justice Frank Furter of the Supreme Court (with whom Justices Roberts, Black and Douglas concurred) wrote –

> "It is not our function, and it is beyond our power, to write legal essays or to give legal opinions however solemnly requested and however great the national emergency..... our exclusive business is litigation are not satisfied when questions of constitutionality though conveyed through the outward forms of a conventional court proceeding do not bear special relationship to a particular litigant..... No matter how seriously infringement of the Constitution may be called into question, this is not the tribunal for its challenge except

> by those who have some specialized interest of their own to vindicate apart from a political concern which belongs to all."

And in *Raila Odinga v Hon Justice Majid Cockar* [High Court Misc application No 58 of 1997] (unreported) a two judge bench of this Court (E Owour and J Mwera, JJ,) delivered themselves as follows:-

> "What therefore is the law applicable in Kenya regarding *Locus Standi*? The position in Kenya is the traditional common law one namely that a party must show sufficient personal interest in a matter in order to bring it to court and be heard on it. Various phrases are used by different judicial officers to express this position but it remains the same in substance. One has to show sufficient interest or demonstrate prejudice over and above the rest of the public in order to have a ground to stand on when complaining about a given issue in court. The central importance of the application of this concept cannot be gainsaid because if it becomes law by practice that anybody may come to court and place any matter before it for hearing, whether he has personal interest in it or not, then idlers, busy bodies, inciters or such other individuals as are given to intimidation and harassment of others will find their way to court to do just that. And what time will courts have to hear genuine and deserving cases where substantial justice ought to be done?'

The applicant in the case had sought a declaration that the respondent who was the Chief Justice of Kenya had attained the retirement age for judges under section 62 of the Constitution and ought to have vacated the office of judge.

As regards the invocation of the special jurisdiction of the High Court under section 84 of the Constitution, it was submitted that the provision was quite clear that a supplicant to the Court for relief in respect of the enforcement of the fundamental human rights of the individual under section 70 to 83 (inclusive) of the Constitution had to allege that the contravention complained of was in relation to him save in the case of detained person where any other person could allege a contravention in relation to such detainee. In that regard, although it was conceded that in paragraph 16 of the supporting affidavit the applicants rights to non discrimination, freedom of expression, freedom of conscience and

association had been curtailed by the ongoing process of Constitutional Review and they stood to suffer prejudice, the applicants had not shown how those rights had been contravened.

The applicants response to their alleged want of *locus standi* was that any person acting in good faith can move the Court to protect the sanctity of the Constitution. They rested their contention on two decisions of this Court. In *Ruturi & Another v Minister of Finance & Another* [2001] 1 EA 253, a two judge bench (Mbaluto and Kuloba, JJ,) had this to say on *locus standi* at page 262-263 letters I-J and (a) – (f):

> "In our very considered opinion carefully reached during our retirement to consider this case, like in human rights cases, public interest litigation, including lawsuits challenging the constitutionality of an Act of Parliament, the procedural trappings and restrictions, cannot bar the jurisdiction of the Court, or let justice bleed on the alter of technicality. This Court has vast powers under section 60 of the Constitution of Kenya, to do justice without restrictions and restrains, and procedures and relief's have to be moulded according to the facts and circumstances of each case and each situation. It is the fitness of things and in the interest of justice and public good, that a litigation on constitutionality, entrenched fundamental human rights and broad public interest protection has to be viewed. Narrow pure legalism for the sake of legalism will not do. We cannot uphold technicality only to allow a clandestine activity to sneak through the net of judicial vigilance in the garb of legality. Our legal system is intended to give effective remedies and reliefs whenever the Constitution of Kenya is threatened with violation. If an authority which is expected to move to protect the Constitution drags its feet, any person acting in good faith may approach the Court to seek judicial intervention to ensure the sanctity of the Constitution of Kenya is protected and not violated. We state with a firm conviction, that as a part of reasonable, fair and just procedure to uphold the constitutional guarantees, the right of access to justice entails a liberal approach to the question of *locus standi*. Accordingly, in constitutional questions, human rights cases, public interest litigation and class actions, the ordinary rule of Anglo-Saxon jurisprudence, that an action can be brought only by a person to whom

> legal injury is caused, must be departed from. In this type of case, any person or social action groups, acting in good faith can approach the Court seeking judicial redress for a legal injury caused or threatened to be caused to a defined class of persons represented, or for a contravention of the Constitution, or injury to the nation. In such cases, the Court will not insist on such a public spirited individual or social action group espousing their cause, to show his or their standing to sue in the original Anglo-Saxon conception. We must be goal oriented, that is, vigilantly uphold the Constitution of Kenya, and do justice according to the law in the context of our socio-cultural environment, and avoid paying undue attention to abstract technical strictures and procedural snares merely for the sake of technicality which may have the effect of restricting access to justice which is itself a constitutional right which cannot be abrogated or abridged by brazen or subtle schemes and maneuvers."

That reasoning was fully endorsed and adopted by another two judge bench (Mbogholi-Msagha and JVO Juma, JJ) in Hon John N Michuki & Another v Attorney-General & 2 Others [HCCC Misc Application No 975 of 2001] (unreported). Their Lordships, who had been referred to the *Raila Odinga v Abdul Cockar* (Supra) on the law regarding *locus standi* had this to say:-

> "It has to be borne in mind that the applicant is moving the Court that the Constitution of Kenya is being breached. As a citizen of Kenya and as a Member of Parliament is he barred from complaining about the breach? The respondents have argued that if there is a breach then the Attorney General should be the one to represent the interest of the public. What the respondents have carefully avoided is to answer the question, what, if as in this case, it is alleged that the Attorney General has played a part in the breaching of the Constitution will he institute proceedings against himself? The applicant is challenging the validity of the Districts and Provinces Act (1992) and the validity of the districts created thereunder. In doing this must he show his selfish nature that he has suffered more than other ordinary Kenyans? With respect, we disagree with such pronouncements. Where one challenges the validity of

> an act of Parliament, one is free to come to court and present his case. One need not prove his special loss as a result of such an Act of Parliament. Assuming one does not show the particular loss and the Attorney General does not take any action, does it therefore follow that the Act will continue to be in our statute books however invalid it might be? Surely no. We agree with our brothers Justice Mbaluto and Justice Kuloba in the "*Donde Case"* Misc Civil application No. 908 of 2001 when they held that any person who genuinely and in good faith moves to defend the Constitution of Kenya is free to come to court and he does not need to have suffered personally. The respondents have not shown any prejudice they will suffer by the applicant proceeding with his application. We hold that the issue of *locus standi* does not arise where one is challenging the validity of an Act of Parliament."

As regards the Court's want of jurisdiction on the basis that the matters canvassed in the summons are not justiciable, it was submitted on behalf of the 2nd respondent as follows. Commissions, whether administrative or statutory do not determine individual rights: they only make recommendations. Those recommendations and the manner of making them are not justiciable. The recommendations cannot affect rights until they are adopted by the relevant body. In the instant case, whatever is done under the Constitution of Kenya Review Act, (Cap 3A, of the Law of Kenya) will end up in Parliament as a draft bill to alter the Constitution: the legislative power of Parliament is not taken away. No person has any right to go to court and ask that any person, body of persons or a Member of Parliament should be prevented from presenting a bill. It was also submitted that the Court also lacked jurisdiction to entertain the summons on the basis that the Constitution making process was a legislative process under the stewardship and control of Parliament. In regard it was submitted that Parliament made specific provisions on how the Constitutional Review process was to be handled and no power was reserved to the people to determine what was the correct way of doing it. The entire Act, it was submitted was not amenable to the declarations sought. Both the Constitution of Kenya Review Commission (CKRC) and the National Constitutional Conference (NCC) were acting on the delegated authority of Parliament and their functions and procedures were not justiciable and they were not amenable to an order stopping their proceedings. The cases of *Coleman v Miller* 306 US 433 [1939] & *Nottinghamshire County Council v Secretary of State for the Environment & Another* [1936] 1 All

ER 199 were invoked as authorities for those propositions. In *Coleman v Freeman* the issue submitted to the Court's decision is whether the proper legislative procedure with respect to constitutional amendment had been followed between the time of the submission of the amendment and its final adoption by the congress of the state of Kansas. It was held that the Court had no jurisdiction to make interpretation of the exclusive constitutional authority of congress over submission and ratification of amendments. In a concurring opinion by Justice Black, the Court said:

> "Undivided control of that process [the process of amending the Constitution] has been given by the article exclusively and completely to Congress. The process itself is "political" in its entirety, from submission until an amendment becomes part of the Constitution, and is not subject to judicial guidance, control or interference at any point. Since Congress has sole and complete control over the amending process, subject to no judicial review, the views of any court upon this process cannot be binding upon the congress..... if congressional determination that an amendment has been completed and become part of the Constitution is final and removed from examination by the Courts..... surely the steps leading to that condition must be subject to the scrutiny, control and appraisal of none save congress, the body having exclusive power to make that final determination."

In *Nottinghamshire CC v Secretary of State*, the issue was whether a Minister's exercise of a statutory power requiring House of Commons approval for its validity could be reviewed by the Courts on grounds of unreasonableness after his proposals had been approved by the House. It was held that where a Minister's exercise of a statutory power required and received House of Commons approval, then as a matter of constitutional propriety, the Courts would not intervene to review the exercise of the power on grounds of unreasonableness unless the Minister had deceived the House, because if House of Commons approval was required the responsibility for overseeing the Minister's action lay with the House rather than the Courts.

The applicants answer to those contentions was that all violations of the Constitution in respect of which there was a remedy were justiciable. In the matter at hand, the Court had power to declare null and void any law inconsistent with the Constitution. Accordingly, once the applicants had placed before the Court a basis as to why certain provisions of the review

Act were unconstitutional, the matter raised become justiciable. In addition all alleged infringements of the fundamental rights preserved in the Constitution are justiciable. As regards the argument that the review process is exercising powers donated by Parliament, it was argued that Parliament could not donate a power it did not have – the power to make a new Constitution – and that all it could do was to regulate the exercise of such power by the competent body, namely the people of Kenya. Any such regulation may be challenged on constitutional grounds. As regards the contention that the Constitutional Review process was a political one beyond the purview of the Court, it was submitted that if "Bomas" (meaning the National Constitutional Conference now assembled at a location known as Bomas of Kenya) were to complete the process of writing the Constitution under a process which the applicants contend is not possible under the present Constitution, the Country might be faced with a scenario where it had two Constitutions claiming validity on different grounds. As the applicants were questioning the constitutional validity of that work in progress – the question of the validity of a Constitution being a justiciable issue – process was justiciable.

The next point of objection taken is that if the Court were to enter into an adjudication of the matters raised in the summons, it would be trespassing into the domain of Parliament to pronounce on matters of social and public policy contrary to the doctrine of separation of powers. In that regard it was submitted that a commission established by Parliament must be run according to the will of Parliament. It can only carry out its functions according to the procedures enacted by Parliament not those fancied by any one else. It was submitted that a Commission established by parliament must be run according to the will of Parliament. It can only carry out its functions according to the procedures enacted by Parliament not those fancied by any one else. It was submitted that in questioning the equity of representation at the National Constitutional Conference or the majorities needed to make decisions at the Conference the applicants in effect sought to remove the Constitution making process from Parliament to the Courts. It was urged that it was not for the Court to intervene and make declarations in respect of issues for which Parliament had made specific provisions on how they ought to be dealt with. It was further submitted that the doctrine of supremacy of Parliament was unquestioned and unquestionable. Citing vintage Professor Dicey's *Law of the Constitution*, 9th Edition, 1956, the 2nd respondent submitted that Parliament was the depository of absolute despotic power of the Country and its power and jurisdiction was so transcendent and absolute that it can do everything but make a woman a man, and a man a woman. The case of *British Railways Board v Pickin* [1974] 1 All ER 609 was also invoked in aid of the dictates of separation

of powers. The issue in the case was whether the validity of a private Act of Parliament could be challenged in the Courts on the grounds that the passage thereof had been procured by improper means and whether the Court had jurisdiction to inquire into proceedings in Parliament. A court, could not, it was submitted, disregard on Act of Parliament on any ground. At page 614 letter (c) and (d) Lord Reid – that great oracle of the common law said:

> "The idea that a court is entitled to disregard a provision in an Act of Parliament on any ground must seem strange and startling to anyone with any knowledge of the history and law of our Constitution.....
> I must make it plain that there has been no attempt to question the general supremacy of Parliament. In earlier times many learned lawyers seem to have believed that an Act of Parliament could be disregarded in so far as it was contrary to the law of God or the law of nature or natural justice but since the supremacy of Parliament was finally demonstrated by the revolution of 1688 any such idea has become absolete".

And at page 618, letter (f) to (g) the noble and learned Law Lord said:

> "The function of the Court is to construe and apply the enactments of Parliament. The Court has no concern with the manner in which Parliament or its officers carrying out its standing orders performs these functions. Any attempt to prove that they were mislead by fraud or otherwise would necessarily involve an enquiry into the manner in which they had performed their functions in dealing with the bill which became the British Railways Act, 1968".

In *Auditor-General of Canada v Mister of Energy* [1989] 2 SCR 49, the Auditor-General had been denied access to a crown corporations record and cabinet papers necessary for the performance of his auditing function. He sought a court order to enable him obtain the information. No issue affecting the Canadian Charter of Rights and Freedoms arose in the case. The Court held he had no judicially enforceable right of access to information and his only remedy was a report to Parliament. In the course of its judgment, the Supreme Court said:

> "The most basic notion of justiciability in the Canadian legal process is that referred to in *Pickin*, Supra, and inherited from the English Westminister and unitary form of government namely, that it is not the place of

the Courts to pass judgment on the validity of statutes. Of course, in the Canadian context, the constitutional role of the Judiciary with regard to the validity of laws has been much modified by the federal division of powers as well as the entrenchment of substantive protection of certain constitutional values in the various Constitution Act most notably that of 1982. There is an array of issues which calls for the exercise of judicial judgment on whether the questions are properly cognizable by the Courts. Ultimately, such judgment depends on the appreciation by the Judiciary of its own position in the constitutional scheme.

In the realm of Charter adjudication, s 1 is "the uniquely Canadian mechanism through which the Courts are to determine the justiciability of particular issues that come before it "(Wilson J in *Operation Dismantle*, supra, at P 491). Ultimately, the Courts are constitutionally charged with drawing the boundaries of justiciability, except as qualified by s 33. By way of contrast in the residual area reserved for the principle of Parliamentary sovereignty in Canadian constitutional law, it is Parliament and the legislatures, not the Courts that have ultimate constitutional authority to draw the boundaries. It is the prerogative of a sovereign Parliament to make its intention known as to the role the Courts are to play in interpreting, applying and enforcing its statutes. While the Courts must determine the meaning of statutory provisions, they do so in the name of seeking out the intention or sovereign will of Parliament however purposively, contextually or policy-oriented may be the interpretative methods used to attribute such meaning. If, then, the Courts interpret a particular provision as having the effect of ousting judicial remedies for entitlements contained in that statute, they are in principle, giving effect to Parliament's view of the justiciability of those rights. The rights are non-justiciable not because of the independent evaluation by the Court of the appropriateness of its intervention but because Parliament is taken to have expressed its intention that they be nonjusticiable".

The applicant's answer was that those grounds of preliminary objection

were misconceived. It was submitted that the objection failed to distinguish between the concepts of legislative supremacy in England and constitutional supremacy in Kenya. The British concepts of the supremacy of Parliament could not apply to Kenya, it was said. It was further submitted that the respondent has misapprehended the import of the doctrine of separation of powers. The doctrine, it was contended, separated functions of the organs of Government: it did not take away the duty of the Courts to declare where constitutional restrictions to legislation had been violated and the doctrine could not bar the Court from declaring any section of the Review Act of the entire Act as being unconstitutional. It was contended that the applicants were not asking the Court to exercise a legislative power.

As regards the point of objection that the summons did not seek or raise any matter which required the interpretation of the Constitution but merely required interpretations of an Act of Parliament, the 2nd respondent took the Court on a tour de force of all the prayers of the applicants in an attempt to demonstrate its case. In that regard it was contended that prayers 1, 6,10,11,12,13,14 and 18 did not involve constitutional application and were best left to Judicial Review procedure. In that respect it was submitted that all the prayers in which it appeared that what was sought was a judicial intervention in respect of excess of power on the part of any organ of the review or the composition of the various organ of the review or the composition of the various organs or the composition of the various organs or the manner in which they exercised power such intervention would be appropriate only in Judicial Review proceedings.

The applicants response was that the scope of prayers 1,2,7,9,10 and 12 was misunderstood. They raised clear matters of constitutional interpretation and the enforcement of fundamental rights.

As regards the ground of objection that the management of the Constitution Review process was not in the hands of the Commission but of the National Constitutional Conference, we didn't hear the applicants press the point. The applicants on their part were content to argue that CKRC convened the Conference, made regulations for its operations and is responsible for its management. Furthermore, it was pointed, it was the only organ in the Act created as a corporate body with power to sue and be sued and, accordingly it was contended, to accept the argument that CKRC was not in charge of the NCC would place the latter body beyond the jurisdiction of the Court.

In canvassing the points of preliminary objection, the protagonists took

head on the issue of the constituent power of the people which the applicants submitted was the substance of prayers 1,2,3,7 and 8 of the summons and which the 2nd respondent thought was a good philosophical idea which had not found expression in the test of the Constitution of Kenya or the CKRC Act and accordingly could not be regarded as conferring any rights on the people of Kenya which could be amenable to judicial adjudication. In the course of that interesting argument, the applicants submitted that constituent power is the power to constitute a frame of Government for the community and is based on the sovereignty to the community and is based on the sovereignty of the people.

It is the power which creates a Constitution and the Constitution in turn creates the various organs of Government and clothes them with legal powers. Reference was made to *Presidentialism in Commonwealth Africa* by B O Nwabwezi, arguably Common Wealth Africa's leading Constitutional Scholar. At P 392, the author has this to say:

> "The nature and importance of the constituent power need not be emphasized. It is a power to constitute a frame of Government for a Community, and a Constitution is the means by which this is done. It is a primordial power, the ultimate mark of a people's sovereignty. Sovereignty has three elements: the power to constitute a frame of Government, the power to choose those to run the Government, and the powers involved in governing. It is by means of the first, the constituent power that the last are conferred. Implementing a community's constituent power, a constitution not only confers powers of Government, but also defines the extent of those powers, and therefore their limits, in relation to individual members of the Community. This fact at once establishes the relation between a Constitution and the powers of Government, it is the relation of an original and a dependent or derivative power, between a superior and a subordinate authority. Herein lies the source and the reason for the Constitution's supremacy."

According to the author the process for adoption of a new Constitution on the basis of a people's constituent power would involve the framing of proposals for a Constitution, popular consultation, discussions of the proposals in an assembly of the people (a constituent assembly) and, final adoption by the constituent assembly or by the people at a plebiscite. Such a process does not cease to be relevant and applicable merely because

there already exists a Government equipped with sovereign powers. At page 407, the same author writes:-

> "The mandate conferred upon a Government by the votes that put it in power is a limited one; it is a mandate to rule in accordance with the existing Constitution. And in most democratic countries, the doctrine is accepted that no fundamental change in a political system should be made without a specific mandated from the people"

The applicants rely on such doctrine to contend that section 47 of the Constitution of Kenya does not empower Parliament to repeal the existing Constitution and replace it with a new one, which is a work in progress at Bomas of Kenya. They contend that only the people themselves can adopt a new Constitution either through a constituent assembly elected for the purpose or a referendum. They argue that to the extent that the Constitutional Review process now going on contemplates the replacement of the existing Constitution with a new one, without a referendum or a constituent assembly, it is a denial of their constituent power and the process is unconstitutional. In their stand, they appear to find succor in the decision of the Indian Supreme Court in *Kesavananda v State of Kerala* [1973] AIR S C 1461. In that case the Supreme Court in interpreting Article 368 (which we were told was similar to section 47 of our Constitution), held that the power to amend the Constitution did not include the power to alter the basic structure or framework of the Constitution. The following opinions were referred to:

> ".....although the power of amendment is wide, it is not wide enough to include the power of totally abrogating or emasculating or damaging any of the fundamental rights or the essential elements in the basic structure of the Constitution or of destroying the identity of the Constitution. Within these limits, Parliament can amend every article of the Constitution." Per Reddy.J

> "Amendment of the Constitution necessarily contemplates that the Constitution has not been abrogated but only changes have been made in it. The word "amendment" postulates that the old Constitution survives without loss of its identity despite the change..... As a result of the amendment, the old Constitution cannot be destroyed or done away with; it is retained though in the amended form. The words "amendment of the Constitution" with all their wide sweep and amplitude cannot have the effect of

> destroying or abrogating the basic structure of the Constitution. It would not be competent under the garb of amendment, for instance, to change the democratic Government into dictatorship or a hereditary monarch nor would it be permissible to abolish the Lok Sabha [the Indian Parliament]" Per Khanna, J.

The 2nd respondent dealt with that argument by pointing out that the test of Article 368 of the Indian Constitution had not been shown to the Court, that a plain reading of section 47(6) as read with section 123 (9) (b) of our Constitution shows that Parliament can change or replace any and all provisions of the Constitution and enact a new one, and that the "constituent power" of the people was not provided for in the text of the Constitution and anything outside the test could not be imported into the Constitution.
Last, but not least, both the 2nd respondent and the applicants took the Court through each and every prayer to demonstrate the solidity or hollowness, respectively, of the grounds of preliminary objection taken.

We have now considered the arguments. Having done so, we now deliver our judgment on the general points and proposition put before us and the effect of such judgment on the various prayers sought in the originating summons.

On the *locus standi* of the applicants, it is manifest that there are two schools of thought: The first is the traditional one which holds that no matter what the transgression complained of might be, a person does not have a standing to challenge it unless he has some specialized interest of his own to vindicate apart from a concern which affects several other persons or the public at large and that if the concern is a general one, he should demonstrate prejudice to himself over and above the rest of the public. That is the doctrine propounded eloquently in the cases of *Raila Odinga v Majid Cockar* and *Coleman v Freeman.* The second school of thought is what may be called the liberal school which holds that any citizen has a sufficient interest to challenge the constitutionality of any Act of Parliament or any provision thereof without proving any special loss or prejudice on his part as a result of such enactment. That is what is propounded in the cases of *Ruturi & Another v Minister of Finance and John Michuki v Attorney-General.*

Although we ourselves may not have the felicity of *dictum* and the abundance of vocabulary possessed and manifested by our brothers in the *Ruturi* Case, we are persuaded by the second school of thought for the

reasons that, in our view, the Court's first role should be to uphold Constitutionalism and the sanctity of the Constitution. We think such a role cannot be well performed by shutting the door of the Court on the face of persons who seek to uphold the Constitution on the ground that such persons have no peculiarly personal stake in a matter which belongs to all. Furthermore, if the matter were to be left to the intervention of the Attorney-General, we think that one might as well hope to reach a mirage. In this Country, it would not be realistic to expect the office of the Attorney-General to challenge the validity or constitutionality of Acts of Parliament given that the Attorney-General is often the adviser, the author and the pilot of most of the proposed legislation which finds its way into the statute book. He could not, naturally, be expected to challenge the constitutionality of his own creations. We accordingly find that the applicants have *locus standi* to challenge the compliance of the Constitution of Kenya Review Act or any provision thereof with the Constitution. As regards the invocation of the Court's jurisdiction under section 84 of the Constitution, we are of the opinion that the applicants having deposed in the affidavit in support of the summons that their fundamental rights have been curtailed, they have sufficiently brought themselves within the jurisdiction. Whether indeed the rights they claim lie and whether and how they have been contravened is a matter for argument on the merits. In short ground (e) of the preliminary objection is rejected.

On the justiciability of the Constitutional Review process, we agree that the recommendations of the Constitution of Kenya Review Commission, like the recommendations or report of any other Commission (whether established by or under an Act of Parliament or administratively) are not justiciable for it is a longstanding principle of administrative law that only decisions impacting on the rights of individuals (and not recommendations) are amenable to Judicial Review. Accordingly, the contents of the draft Bill prepared or to be prepared by the Commission would not be justiciable as they would not be conferring or taking away any one's rights. However, we are unable to agree that the Review Process being a process initiated, regulated and sheparded by Parliament is beyond the scrutiny of the Courts. First, the cases cited in support of such a doctrine do not support it. The case of *Coleman v Freeman* is authority to the effect that American Courts have no jurisdiction over the procedures in congress relating to the adoption of bills. When it is opined that the steps leading to congressional determination that a constitutional amendment is complete are not subject to judicial control, we understand it to mean that it is the steps in the congress itself which are referred to. Indeed the case is analogous to the provisions of section 47 (5) of our Constitution

which provides that a certificate of the Speaker shall be conclusive as to proceedings in the Assembly and shall not be questioned in any court. The case is irrelevant to a consideration of the justiciability of a process outside the Congress itself and indeed what was being inquired by the Court was not anything outside the Congress of the State of Kansas.

Nottingham v Secretary of State is also inapt. It concerned a minister's exercise of power in a manner approved by Parliament which was challenged on the basis that it was unreasonable. We can find nothing in that case for the broad proposition that a process sanctioned by Parliament in a specific enactment cannot be challenged on any ground. Secondly, we are of the opinion that what Parliament has done vide cap 3A is to provide for and regulate the process of Constitutional Review and the foundation of such prescription and regulation may be challenged on constitutional grounds. We are persuaded that any alleged contravention of the Constitution for which there is a remedy is justiciable. If the argument that any Parliamentary process encapsulated in an Act of Parliament was not amenable to judicial enquiry were to prevail the supremacy of the Constitution would be subverted.

In short, we are of the view that the whole process of Constitutional Review as enacted in cap 3A is amenable to judicial scrutiny. As regards the contention that the whole process is a political one and unsuitable for judicial adjudication, we are of the opinion that as the process had been anchored in law, it is very much a legal process even though it has political consequences. Indeed at the end of the day, if the process runs its course it may result in an entirely new Constitution and if the legal validity of that Constitution is raised, it may be no answer that the process was a political one as would be the case in a successful revolution. In those premises we would overrule ground (c) of objection and hold that the matters canvassed in the summons are justifiable.

As regards the objection based on the theory of separation of powers, we broadly agree that matters of social or other public policy belong to Parliament, not the Courts, and, accordingly, bodies established by Parliament, such as the organs of Constitutional Review, should operated according to the procedures prescribed by Parliament and not as the Court or anybody else would fancy. To that extent where Parliament has prescribed the composition of a body and the decision taking procedure, so it shall be. It is not open to the Court to scrutinize such matters on the grounds that public policy or public good is offended. However, if the challenge is that such prescription offends the Constitution, the Courts have a power and a duty to adjudicate. On the supremacy of Parliament

we say this: if to the English, their glorious revolution of 1688 ushered in the era of Parliamentary supremacy, as so eloquently propounded by Dicey, the attainment of our independence in 1963 ushered in Kenya the era of constitutional supremacy. Accordingly, while the Courts cannot usurp the legislative mandate of Parliament to make, amend, or repeal statutory law, we have power to adjudicate on any alleged inconsistency on any Act of Parliament or any provision thereof with the Constitution of Kenya. It follows that where the applicants are asking us to strike down a statute or a provision in it, we will not even listen to them for that is an invitation to assume legislative power. Where, however, they ask us to inquire into the compatibility of any provision of the Constitution we shall do so irrespective of the fact that those provisions, like all provisions in any law, are an enactment of social and other public policy. Parliament itself and all its enactments are subject to the Constitution. In that regard, we must state that we did not find the case of *Auditor-General of Canada v Minister of Energy* particularly illuminating. The powers of the Auditor-General and his remedies were set out in an ordinary Act of the Canadian Parliament and the Judgment of the Court makes it abundantly clear that the dispute was not within the realm of Charter adjudication – the Constitution Act of 1982. Accordingly the constitutionality or otherwise of the Government's refusal to allow the Auditor-General access to the documents he wanted was not an issue. The matter was decided on the basis of the Auditor-General's Act and in those premises the Court's emphasis on the supremacy of Parliament was apposite. Even in Kenya, it would be appropriate where a statute was not alleged to be inconsistent with the Constitution to give the fullest expression to the sovereign will of Parliament. In short, the doctrine of separation of powers (which is a doctrine for allocation of state power among the three branches of Government and which forbids any branch from purporting to exercise the entire power of another branch or other branches) does not take away the Court's power to declare when the Constitution has been violated by any legislation or a section thereof.

In the context of the summons before us, we find that the only prayers which transgress the boundary between Parliament and the Courts are Nos 4 and 8 which asks us to strike down sections 27 (2) (c) and (d), (5), (6) and (7) of the Act as unconstitutional. That is to invest the Court with a repealing power which it does not possess. The Court could declare a provision unconstitutional but it cannot strike it out. Until the offending provision is repealed by Parliament, it remains in the statute book, impotent though it definitely is. We would uphold the point of preliminary objection in respect of that prayer.

As regards the objection that the summons raises matters of statutory as opposed to constitutional interpretation and adjudication, we would agree that any relief sought which does not involve the interpretation of the Constitution or enforcement of fundamental rights is misplaced in a constitutional court. We also agree that where what is complained of is the composition of a statutory body or the procedural provisions thereof or the mode and manner of the exercise of its power – without more – that matter belongs to the realm of Judicial Review under the special jurisdiction of the Court under order LIII of the Civil Procedure Rules and it cannot be entertained in a constitutional court. Having said that, this Court is of the view that the matters canvassed in prayers 1, 3, 7, 9 and 12 were misapprehended by the second respondent. They raise clear matters of constitutional interpretation and adjudication such as the juridical status, manifestations and consequences of the constituent power of the people including an entitlement to a right to have a constituent assembly to debate proposals for a new Constitution and/or to have referendum on those proposals, the content and ambit of the right to non discrimination, the scope of the amendment power conferred on Parliament by section 47 of the Constitution and in particular whether it extends to the enactment of a new Constitution in replacement of the existing one and the constitutionality of a process which contemplates such replacement. Those are matters which the Court is entitled to hear on the merits. However, we are persuaded that the matters canvassed in prayers 2, 5, 6, 10, 11, 13 and 18 require statutory interpretation and enforcement without any constitutional import and/or call for remedies which properly belong to the realm of ordinary Judicial Review and, accordingly, the Constitutional Court has no business entertaining them. The preliminary objection is upheld to the extent it relates to them. As regards the objection that the management of the National Constitutional Conference is not in the hands of the 2nd respondent, we are persuaded that the 2nd respondent being the organ invested with corporate personality by the Act is the proper organ to sue in respect of matters concerning the Constitution of Kenya Review process. Had we been persuaded otherwise, we would have had no hesitation in ordering that the Attorney-General, who is the sword and shield of Government in its widest signification including statutory bodies, and who is in any case a party to these proceedings in another capacity, be enjoined in the summons on behalf of the National Constitutional Conference.

Last, but not least, we agree that the Court is not invested either by the Constitution or any statute with jurisdiction to give an advisory opinion or to make any recommendations to any one. Our business is to issue in appropriate circumstances, orders, declarations of rights, and decrees.

Being of that persuasion prayers 15 and 16 cannot be entertained by this Court. Furthermore, prayer 16 in particular would have called for an investigation of facts which would have been futile for the Attorney General's advice to Government is protected by laws of privilege and official secrets. And of course the Attorney-General is not the legal advisor of the people of Kenya and could not be accused of failure to discharge a duty he does not bear.

The Court having taken the above view of the matter, the result is that the preliminary objection is upheld in respect of prayers 2, 4, 5, 6, 8, 10, 11, 13, 15, 16 and 18. The objection is overruled in respect of the other prayers and, accordingly, the Court will hear the merits of prayers 1, 3, 7, 9, 12, 14 and 17. As regards the costs of the preliminarily objection, we order that the applicants and the second respondent having each partially succeeded and in the interests of the comity they expressed for each other should bear their respective costs.

Those, then, are the orders of this Court.