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**Njoya & 6 others v Attorney General
& 3 others (No 2)**

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

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March 25, 2004

Miscellaneous Civil Application No 82 of 2004 (OS)

Constitutional law – Constitution making – constituent power – power to make a Constitution – incidence of the constituent power and the mode of its exercise.

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Constitutional law – interpretation of the Constitution – rules of interpretation – whether the Constitution is subject to the same rules of interpretation as Acts of Parliament.

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Constitutional law - parliament – power of Parliament – power to make and alter the law – whether section 47 of the Constitution gave Parliament power to abrogate the existing Constitution and enact a new one in its place – whether provisions of the Constitution of Kenya Review Act inconsistent with the Constitution.

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The applicants brought an originating summons in the High Court against the Attorney General and the Constitution of Kenya Review Commission seeking 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.

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The issues raised called on the Court to pronounce upon the issues of the proper approach to constitutional interpretation; the constitutional status of the concept for the constituent power of the people and its implications for the Constitutional Review Process; the constitutional right to equal protection of the law and non-discrimination; the scope of the power of Parliament under section 47 of the Constitution and whether the provisions of section 28(3) and (4) of the Act were inconsistent therewith; and the appropriateness of an injunction to stop the review process in the

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circumstances of the case. 1

Held:

1. The Constitution is not an Act of Parliament but the supreme law of the land. It is not to be interpreted in the same manner as an Act of Parliament. It is to be construed liberally to give effect to the values it embodies and the purpose for which its makers framed it. 5
2. Parliament has no jurisdiction or power under section 47 of the Constitution to abrogate the existing Constitution and enact a new one in its place. Parliament's power is limited to only alterations of the existing Constitution. 10
3. The power to make a new Constitution (the constituent power) belongs to the people of Kenya as a whole, including the applicants. In the exercise of that power, the applicants together with other Kenyans, were, in the circumstances of this case, entitled to have a referendum on any proposed new Constitution. 15
4. Subsections (5), (6) and (7) of section 27 of the Constitution of Kenya Review Act were unconstitutional to the extent that they converted the applicant's right to have a referendum as one of the organs of reviewing the Kenya Constitution into a hollow right and privilege dependent on the absolute discretion of the delegates of the National Constitutional Conference and were accordingly null and void. 20
5. Section 28(4) of the Constitution of Kenya Review Act was inconsistent with section 47 of the Constitution of Kenya and was therefore null and void. 25
6. The Constitution gave every person in Kenya an equal right to review the Constitution and that right embodied the right to ratify the Constitution through a national referendum.
7. The applicants had not established that they had been discriminated against by virtue of the composition of the National Constitutional Conference. 30
8. The applicants were not entitled to an injunction to stop the National Constitutional Conference.

Cases

1. *Michuki & another v Attorney General & 2 others* (2008) 2 KLR (EP) 423; [2002] 1 KLR 498; [2003] 1 EA 188
2. *Kesavananda v State of Kerala* AIR (1973) SC 1461; 4 SCC 225
3. *Republic v El Mann* [1969] EA 357
4. *Direct United States Cable Company v Anglo-American Telegraph Company* (1877) 2 AC 394 40
5. *Barnes v Jarvis* [1953] 1 WLR 649; [1953] 1 All ER 1061

6. <i>Keshava Menon v State of Bombay</i> [1951] SCR 228	1
7. <i>Uganda v Prisons Commissioner ex parte Matovu</i> [1966] EA 514	
8. <i>Teo So Lung v Minister for Home Affairs & others</i> [1990] LRC (Const) 490	
9. <i>Njogu v Attorney General</i> [2000] LLR 2275	5
10. <i>Githunguri v Republic</i> [1986] KLR 1	
11. <i>Adar and others v Attorney General and another</i> Civil Application No 14 of 1004	
12. <i>Nganga v Republic</i> [1984] KLR 451	
13. <i>Matiba, Kenneth Njindo Stanley v Attorney General</i> High Court Miscellaneous Application No 666 of 1990	10
14. <i>Reynolds v Simms</i> [[1963] 12 US SC 5506	
15. <i>Ndyanato v Attorney General</i> [2001] EA 485	
16. <i>Mutungu v Republic</i> [1986] KLR 167	
17. <i>Minerva Mills Limited v Union of India</i> [1981] SCR 206	15
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7. Black, HC (1990) <i>Black's Law Dictionary</i> St Paul Minnesota: West Publishing Co 6 th Edn	30
8. Garner, BA (1999) <i>Black's Law Dictionary</i> St Paul Minnesota: West Publishing Co 7 th Edn	
9. Hornby, AS <i>Oxford Dictionary</i> New York: Oxford University Press 6 th Edn	35
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1. Constitution of Kenya sections 1; 1A; 2A; 3; 21(7); 26(3); 30; 42(3); 47; 47(1)(b); 70; 78; 79; 80; 82; 82(1); 82(2); 82(3); 83; 84; 123; 123(1); 123(b)	
2. Constitution of Kenya Review Act (cap 3A) sections 2A; 3; 4; 4(1)(d); 5; 5(b); 26(7); 27; 27(1)(b); 27(2)(c); 27(2)(d); 26(7); 27(5); 27(6); 28; 28(3); 28(4)	40

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3. Constitution of Kenya Review (National Constitutional Conference) (Procedure) Regulations, 2003 regulations 16, 17, 18, 19, 20, 21	1
4. Exchange Control Act (cap 113)	
5. Criminal Procedure Code (cap 75) section 82	
6. Children Act, Act No 8 of 2001	5
7. Civil Procedure Act (cap 21) section 3A	
8. Constitution of India article 368	
International Instruments	
Universal Declaration of Human Rights, 1948 Article 21	
Advocates	
<i>Mr Kibe Mungai and Mr Kinoti Mbobua</i> for the Applicants. <i>Miss Muthoni Kimani and Ms Wanjiku Mbiyu</i> for the Attorney-General. <i>Mr George Oraro and Mr John Ougo</i> for the Constitution of Kenya Review Commission	10
<i>Mr Ababu Namwamba and Miss Eunice K Nyutu</i> for the 1 st and 2 nd Interested Parties. <i>Mr Harun Ndubi and Mr Mark Oloo</i> for the Law Society of Kenya as <i>amicus curiae</i> .	15
March 25, 2004, the following Judgments were delivered.	20
Ringera Ag J:	
A. Background	
In 1997, the Government of Kenya yielded to persistent and, at times, violent pressure by the political opposition, the civil society, the church and social movements for comprehensive changes to the Constitution. The Government published a Bill to facilitate the people of Kenya to participate in the process of Constitutional reform. That Bill was enacted as the Constitution of Kenya Review Commission Act of 1997. It was subsequently amended four times as a result of negotiations by interested stakeholders with a view to making the process all inclusive and “people driven”. The end result was the Constitution of Kenya Review Act, cap 3A, of the Laws of Kenya (the Act).	25
The long title of the Act indicated that it was an Act of Parliament to facilitate the comprehensive review of Constitution by the people of Kenya, and for connected purposes. Section 3 of the Act set out the object and purpose of constitutional review as to secure provisions therein-	30
“(a) guaranteeing peace, national unity and integrity of the Republic of Kenya in order to safeguard the well-being of the people of Kenya;	35
(b) establishing a free and democratic system of Government that enshrines good governance, constitutionalism, the rule of law, human rights and	40

gender equity;	1
(c) recognizing and demarcating divisions of responsibility among the various state organs including the Executive, the Legislature and the Judiciary so as to create checks and balances between them and to ensure accountability of the Government and its officers to the people of Kenya;	5
(d) promoting the peoples' participation in the governance of the Country through democratic, free and fair elections and the devolution and exercise of power;	
(e) respecting ethnic and regional diversity and communal rights including the right of communities to organize and participate in cultural activities and the expression of their identities;	10
(f) ensuring the provision of basic needs of all Kenyans through an establishment of an equitable frame-work for economic growth and equitable access to national resources;	15
(g) promoting and facilitating regional and international co-operation to ensure economic development, peace and stability and to support democracy and human rights;	
(h) strengthening national integration and unity;	
(i) creating conditions conducive to a free exchange of ideas;	20
(j) ensuring the full participation of people in the management of public affairs; and	
(k) enabling Kenyans to resolve national issues on the basis of consensus."	25
Section 4 of the Act provided that the organs through which the review process was to be conducted were (a) the Commission, that is to say, the Constitution of Kenya Review Commission (CKRC) established under section 6 of the Act; (b) the constituency constitutional forums (Constitutional forums) established in accordance with section 20 of the Act; (c) the National Constitutional Conference (NCC) referred to in section 27(1) (c) of the Act; (d) the referendum; and (e) the National Assembly. The main function of the CKRC was "to collect and collate the views of the people of Kenya on proposals to alter the Constitution and on the basis thereof, to draft a Bill to alter the Constitution for presentation to the National Assembly (see s 17 (b)). The Commission was given a period of twenty four months (extendable by Parliament on the strict basis of demonstrated necessity) to complete its work (s 26(1) and (3)). The work of the Commission was stated to be visiting all the Constituencies in Kenya, compiling reports of the constituency forums, the NCC, conducting and recording the decisions of the referendum referred to in section 27(6) and on the basis thereof drafting a Bill for presentation to	30
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Parliament for enactment (s 26(2)). Subsection (7) of section 26 provided that the Commission shall compile its report together with a summary of its recommendations and on the basis thereof, draft a Bill to alter the Constitution. Thereafter the process of review was to proceed as provided in sections 27 and 28 which in material parts provide as follows:-	1 5
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(a) The Commission shall-	
(1) Upon compilation of its report and preparation of the draft Bill referred to in section 26-	
(i) Publish the same for the information of the public in the manner specified in section 22, for a period of thirty days; and	10
(ii) Ensure that the report and the draft Bill are made available to the persons or groups of persons conducting civic education;	
(b) Upon the expiry of the period specified in paragraph (a) (i) – convene a National Constitutional Conference for discussion, debate, amendment and adoption of its report and draft Bill.	15
(2) The National Constitutional Conference shall consist of -	
(a) the commissioners who shall be <i>ex-officio</i> members without the right to vote;	20
(b) all members of the National Assembly;	
(c) three representatives of each District, at least one of whom shall be a woman, and only one of whom may be a councillor, all of whom shall be elected by the respective county council in accordance with such rules as may be prescribed by the Commission;	25
(d) one representative from each political party registered at the commencement of this Act, not being a Member of Parliament or a councillor;	
(e) such number of representatives of religious organizations, professional bodies, women’s organizations, trade unions and non-governmental organizations registered at the commencement of this Act and of such other interest groups as the Commission may determine;	30
Provided that –	
(i) the members under paragraph (e) shall not exceed twenty-five per cent of the membership of the National Constitutional Conference under paragraphs (a), (b) and (d); and	35
(ii) the Commission shall consult with and make regulations governing the distribution of representation among, the various categories of representatives set out in paragraph (e).	40
(3) The Chairperson of the Commission shall be the Chairperson of the	

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- National Constitutional Conference. 1
- (4) The quorum of the National Conference shall be one half of the members.
- (5) All questions before the National Constitutional Conference shall be determined by consensus, but in the absence of consensus such decisions shall be determined by a simple majority of the members present and voting; 5
- Provided that –
- (i) in the case of any question concerning a proposal for inclusion in the Constitution, the decision of the National Constitutional Conference shall be carried by at least two thirds of the members of the National Constitutional Conference present and voting and 10
- (ii) if on taking a vote for the purpose of subsection 5(i), the proposal is not supported by two thirds vote, but is not opposed by one third or more of all the members of the National Constitutional conference, present and voting then, subject to such limitations and conditions as may be prescribed by the Commission in the Regulations, a further vote may be taken, and 15
- (iii) if on taking a further vote under paragraph (ii), any question on a proposal for inclusion in the Constitution is not determined, the National Constitutional Conference may, by a resolution supported by at least two-thirds of the voting members present, determine that the question be submitted to the people for determination through a referendum. 20
- (6) The Commission shall record the decision taken by the National Constitutional Conference on the report and the draft Bill pursuant to its powers under subsection (1) (c) and shall, submit the question or questions supported by a resolution under subsection 5(iii) to the people for determination through a referendum. 25
- (7) A national referendum under subsection (6) shall be held within one month of the National Constitutional Conference. 30
- 28.
- (1) The Commission shall, on the basis of the decision of the people at the referendum and the draft Bill as adopted by the National Constitutional Conference, prepare the final report and draft Bill. 35
- (2) The Commission shall submit the final report and the draft Bill to the Attorney-General for presentation to the National Assembly.
- (3) The Attorney General shall, within seven days of the receipt of the draft Bill, publish the same in the form of a Bill to alter the Constitution. 40
- (4) At the expiry of a further period of seven days of the publication of the

Bill to alter the Constitution, the Attorney-General shall table the same together with the final report of the Commission before the National Assembly for enactment within seven days. 1

The CKRC did as directed by Parliament. It organized constituency constitutional forums and facilitated numerous other fora at which all persons who were so minded gave their views on the review process; it collected and collated the views of Kenyans and compiled a report together with a summary of its recommendations for discussion and adoption by the NCC, it afforded opportunity for intense public discussion and critique of the said report, and it prepared a draft Bill for debate and adoption by the NCC. The Commission also convened the NCC as required by Parliament. The conference which acquired the nickname of “Bomas” – the same referring to the location of the venue at a place called “the Bomas of Kenya” in the Langata area of Nairobi – started its work of debating the Commission’s report and draft Bill in April 2003. That debate was very general one. Consideration of the details of the draft Bill began in phase III of the Bomas process in January this year. During that last phase, the process encountered a legal challenge. The nature of the challenge is next outlined. 5
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B. The Legal Challenge To The Constitutional Review Process

By an originating summons dated 27th January, 2004 and amended on 17th February 2004 which was 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, Munir M Mazrui, Kepta Ombati, Joseph Wambugu Gaita, Peter Gitahi, Sophie O Ochieng, Muchemi Gitahi and Ndung’u Wainaina (the applicants) sought from this Court the following orders:- 25
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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 the 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. 35
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 Constitutional 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. 40
3. That, a declaration be and is hereby issued declaring that subsection

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- (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 Kenya Constitution into a hollow right and privilege dependent on the absolute discretion of the delegates of the National Conference. 1
4. That, subsections (5) (6) and (7) of section 27 be and are hereby struck-down as unconstitutional. 5
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). 10
6. That, a declaration be and is hereby issued declaring that District Representatives namely delegates No 224-434 have participated and continue 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. 15
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. 20
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 the 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. 25
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. 30
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 right embodies the right to participate in writing and ratifying the Constitution through a constituent assembly or national referendum. 35
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. 40
14. That, a declaration be and is hereby issued declaring that article 21

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- 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. 1
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 the 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. 5
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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. 15
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). 20
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. 25
19. That, the first respondent be and is hereby ordered to pay the applicants' costs in any event. 25
- The said orders were 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. 30
- (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. 35
- (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 absence of consensus by delegates. 40

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- (d) The applicants' constituent right in common with other Kenyans to adopt and ratify a new Constitution through a national referendum is the centre-piece of a people-driven constitutional review process and fundamental to realization of comprehensive review of the Constitution by the people of Kenya. 1
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- (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. 10
- (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 make 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. 15
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- (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 power 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. 25
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- (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. 35
- (i) 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: 40
- (i) Recognize the importance of confidence building, engendering trust

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- and developing a national consensus for the review process; 1
- (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; 5
- (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. 10 15 20
- (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 143,8645. 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. 25 30
- (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. 35
- (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 40

justify the second respondent to recommend amendments contemplated by Section 26 (4):-	1
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.	5
ii. Section 47 requires to be amended to safeguard the 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 rough shod over other delegates.	10
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.	15
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.	20 25
 The application was supported by an affidavit sworn by the Reverend Dr Timothy M Njoya, the first applicant on 27.1.04.	 30
 The respondents to the summons were the Attorney General (first respondent) and the Constitution of Kenya Review Commission (second respondent). At the scheduled first hearing of the matter on 16.2.04, Mr Kiriro Wa Ngugi and Mr Koitamet Ole Kina applied to be and were joined as the 3 rd and 4 th respondents and the Muslim Consultative Council and Chambers of the Justice were on their application allowed to appear as the first and the second interested parties on the same day the Law Society of Kenya was allowed to appear as <i>amicus curiae</i> . And Mr Mazrui's application to withdraw from the proceedings was granted.	 35 40
 Before the summons could be heard the 2 nd respondent took the following point of preliminary objection:-	

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- (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; 1
- (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; 5
- (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 the National Constitutional Conference and not the second respondent; and 10
- (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.
- We considered those points of objection and in a considered ruling delivered on 3.3.2004, we upheld the objections with regard to prayers 2,4, 5, 6, 8, 10, 11, 13, 15, 16, and 18. We directed that prayers 1,3,7, 9, 12,14, and 17 proceed to hearing on the merits. 15
- The merits of the case were canvassed before us on the 3rd, 4th, 5th, 8th, 10th, 11th, 12th, and 15th days of March 2004. The learned advocates who appeared before us as well as Mr Kiriro Wa Ngugi, the 3rd respondent, who appeared in person, ably and eloquently pressed their respective cases. We are indebted to Mr Kibe Mungai for the applicants, Mr John Ougo for the CKRC, Miss Muthoni Kimani, the Deputy Chief Litigation Counsel for the Attorney-General, Mr Namwamba for the interested parties, and Mr Harun Ndubi who appeared for the Law Society of Kenya as *amicus curiae*. 20 25
- C. The Issues Calling For Answers 30
- After conclusion of the arguments the Court retired to consider the same. In the course of our deliberations we formed the view that the arguments pressed called us to pronounce upon the issues of the proper approach to constitutional interpretation, the constitutional status of the concept of the constituent power of the people and its implications for the Constitutional Review Process, the constitutional right to equal protection of the law and non discrimination, the scope of the power of Parliament under section 47 of the Constitution of Kenya (the Constitution) and whether the provisions of section 28(3) and (4) of the Act were inconsistent therewith, and the appropriateness of an injunction to stop the review process in the circumstances of the case. We agreed that the matters raised with regard to 35 40

the constituent power of the people and the interpretation of section 47 of the Constitution were quite novel and without precedent in our jurisdiction and that indeed the question of whether Parliament could in exercise of its amendment power repeal a Constitution and enact a new one in its place was without precedent in commonwealth jurisprudence. In light of those considerations, we agreed that we would deliver our individual judgments on those matters. I now turn to a consideration of those matters.

D. The Proper Approach To Constitutional Interpretation

On behalf of the applicants, it was urged that the Constitution being the supreme law should not be interpreted as an Act of Parliament. It should be given a broad liberal and purposive construction. We were told that the Constitution embodies certain values and principles which it was the duty of the court to give effect to. In that regard we were referred to the following authorities. In *Crispus Karanja Njogu v Attorney-General* [Criminal Application No 39 of 2000], a three judge bench of this court had this to say on Constitutional interpretation:-

“We do not accept that a Constitution ought to be read and interpreted in the same way as an Act of Parliament. The Constitution is not an Act of Parliament. It exists separately in our statutes. It is supreme..... it is our considered view that, Constitutional provisions ought to be interpreted broadly or liberally, and not in a pedantic way, ie restrictive way. Constitutional provisions must be read to give values and aspirations of the people. The court must appreciate throughout that the Constitution, of necessity, has principles and values embodied in it; that a Constitution is a living piece of legislation. It is a living document.”

And later on in the same ruling, the court said:-

“We hold that, due to its supremacy over all other written laws, when one interprets an Act of Parliament in the backdrop of the Constitution, the duty of the court is to see whether that Act meets the values embodied in the Constitution.”

The Court delivered itself as above in direct response to an alternative view of Constitutional interpretation urged by counsel for the Republic. That is evident from the following passage:-

“Mr Okumu based his submission on the decision in *Republic v Elmann* [1969] EA 357 where the Court had this to say on page 360 letter D:

‘We do not deny that in certain contexts a liberal interpretation may be called for, but in one cardinal respect, we are satisfied that a Constitution is to be construed in the same way as any other legislative enactment, and that is, where the words used are precise and unambiguous, they are to be construed in their ordinary and natural sense.’

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The Court was thus in effect rejecting what may be called “the *Elmann* doctrine” of Constitutional interpretation, namely that a Constitution is to be interpreted as any Act of Parliament in that where the words are clear and unambiguous, they are to be construed in their ordinary and natural sense. In *Ndyanabo v Attorney-General* [2001] 2 EA 485, at P 493, the Court of Appeal of Tanzania had occasion to broach the issue. Samatta, CJ wrote:-

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“We propose to allude to general provisions governing constitutional interpretation. These principles may, in the interest of brevity, be stated as follows. First, the Constitution of the Republic of Tanzania is a living instrument, having a soul and consciousness of its own as reflected in the preamble and fundamental objectives and directive principles of State policy. Courts must, therefore, endeavour to avoid crippling it by construing it technically or in a narrow spirit. It must be construed in (tune) with the lofty purposes for which its makers framed it. So construed, the instrument becomes a solid foundation of democracy and the rule of law. As was stated by Mr Justice E O Ayoola, a former Chief Justice of the Gambia..... ‘A timorous and unimaginative exercise of the judicial power of constitutional interpretation leaves the Constitution a stale and sterile document.’

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Secondly, the provisions touching fundamental rights have to be interpreted in a broad and liberal manner, thereby jealously protecting and developing the dimensions of those rights and ensuring that our people enjoy their rights, our young democracy not only functions but also grows, and the will and dominant aspirations of the people prevail. Restrictions on fundamental rights must be strictly construed.”

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The counsel for the 2nd respondent urged the Court very vigorously to adopt the “*Elmann* doctrine” and interpret the pertinent provisions of the Constitution of Kenya accordingly. Counsel for the Attorney-General

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though not expressly canvassing for any doctrine of interpretation was obviously in favour of the “*Elmann* doctrine”. Counsel for the 1st and 2nd interested parties enthusiastically associated himself with the submissions of counsel for the 2nd respondent. Mr Kiriro Wa Ngugi also associated himself with what he called the “legalistic submissions” on the *Elmann* case. The *amicus curiae* did not offer any express doctrinaire view.

Having considered the rival submissions and bearing in mind that previous decisions of the High Court being decisions of a court of co-ordinate jurisdiction are not binding on us and that decisions by foreign tribunals can also only be of persuasive effect in this jurisdiction, I am wholly persuaded by the force and logic of my brethren in the *Chripus Karanja Njogu* case and the Tanzanian Court of Appeal in the *Ndyanabo* case. I shall accordingly approach constitutional interpretation in this case on the premise that the Constitution is not an Act of Parliament and is not to be interpreted as one. It is the supreme law of the land; it is a living instrument with a soul and a consciousness; it embodies certain fundamental values and principles and must be construed broadly, liberally and purposely or teleologically to give effect to those values and principles; and that whenever the consistency of any provision(s) of an Act of Parliament with the Constitution are called into question, the Court must seek to find whether those provisions meet the values and principles embodied in the Constitution. To affirm that is not to deny that words even in a constitutional text have certain ordinary and natural meanings in the English or other language employed in the Constitution and that it is the duty of the Court to give effect to such meaning. It is to hold that the court should not be obsessed with the ordinary and natural meaning of words if to do so would either lead to an absurdity or plainly dilute, transgress or vitiate constitutional values and principles. And what are those values and principles? I would rank constitutionalism as the most important. The concept of constitutionalism betokens limited Government under the Rule of Law. Every organ of Government has limited powers, none is inferior or superior to the other, none is supreme: the Constitution is supreme and they all bow to it. I would also include the thread that runs throughout the Constitution – the equality of all citizens, the principle of non-discrimination. The doctrine of separation of powers is another value of the Constitution. And so is the enjoyment of fundamental rights and freedoms. Those, to my mind, are the values and principles of the Constitution to which a Court must constantly fix its eyes when interpreting the Constitution. It is in that prism that I now turn to a consideration of the relief sought by the applicants.

E. The Constituent Power Of The People And Its Implications 1

Prayers 1, 3 and 12 of the originating summons are predicated on the premise that the applicants have along with other Kenyans what is called a constituent power to participate in the making and adoption of a new Constitution of Kenya by the machinery of a constituent assembly and a referendum. Their contention is that such power is inherent in them as part of the sovereign people of Kenya and that such power has been vitiated, diluted and transgressed by the provisions of the Act to the extent that the NCC is not a constituent assembly, as they understand it, and there is no provision for a compulsory referendum on the final draft Bill prepared by the CKRC. All this calls for an appreciation of what is the constituent power of the people. The most elaborate definition we were supplied with is by B O Nwabwezi, a leading Constitutional Scholar in Commonwealth Africa. In his book entitled *Presidentialism in Commonwealth Africa*, L Hurst & Company, 1974 the author writes at P 292:

“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.”

And F F Ridley, in an article entitled “*There is No British Constitution: A Dangerous Case of the Emperor’s Clothes*” reproduced in *Cases and Materials on Constitutional & Administrative Law*, 6th Edition, Blackstone Press Ltd, opines at pages 5-6 that the characteristic of a Constitution are as follows:-

“(1) It establishes, or constitutes, the system of

Government. Thus it is prior to the system of Government, not part of it, and its rules cannot be derived from that system.	1
(2) It therefore involves an authority outside and above the order it establishes. This is the notion of the constituent power in democracies that power is attributed to the people, on whose ratification the legitimacy of a Constitution depends and, with it, the legitimacy of the Government system.	5
(3) It is a form of law superior to other laws – because (i) it originates in an authority higher than the Legislature which makes ordinary law and (ii) the authority of the legislature derives from it and it thus bound by it.	10
(4) It is entrenched – (i) because its purpose is generally to limit the powers of Government, but also (ii) again because of its origin in a higher authority outside the system. It can thus only be changed by special procedures, generally (and certainly for major change) requiring reference back to the constituent power.”	15
Neither the respondents nor the interested parties doubted the notion of a peoples’ constituent power. What was seriously in contest was the constitutional status of such a concept and its implications for this case. The submissions by the applicants were that the concept is part of our Constitution and is to be found by implication in sections 1, 1A, 3 and 47 of the Constitution which were all invoked in aid. As section 47 will be subject of a separate treatment later on, I will content myself at this stage with a consideration of those other provisions. They read:-	20
“1. Kenya is a sovereign Republic. 1A. The Republic of Kenya shall be a multiparty democratic state.	30
3. This Constitution is the Constitution of the Republic of Kenya and shall have the force of law throughout Kenya and subject to section 47, if any other law is inconsistent with this Constitution, this Constitution shall prevail and the other law shall, to the extent of the inconsistency, be void.”	35
With respect to sections 1 and 1A counsel contended that when the Constitution declared Kenya to be a sovereign Republic it did more than just assert that Kenya was independent and was not subject to the control of any other state or body in the conduct of its external and internal affairs. In his view, the declaration of a sovereign Republic was a vesting	40

of sovereign powers in the people. And, so he argued, the sovereignty of the people embodied their constituent power. He further argued that the provision that Kenya is a multi-party democratic state meant more than just that there would be in Kenya more than one political party. It also meant that the country would be a democratic state. From that premise he derived the further principle that since in a democratic state, sovereignty was vested in the people, it followed that the constituent power was vested in them.

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As regards section 3 of the Constitution counsel argued that the assertion of the supremacy of the Constitution over other laws is a recognition of the sovereignty of the people by whom Constitutions are made. With respect to section 47, counsel argued that the makers of the Constitution in limiting the power of Parliament to only amendment of the Constitution recognized that the residual power to constitute the frame of Government is a power that belongs to the people.

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As regards how the people were to exercise their constituent power, counsel submitted that the Act was a good attempt to provide a mechanism to do so. However, he argued, it was a faulty mechanism based on the faulty premise that the alteration of a Constitution was equivalent to making of a new one – the Act was premised on the assumption that Parliament could enact a new Constitution through its power of amendment. In counsel’s view, the exercise of the constituent power could not be undertaken by any of the organs established by the existing Constitution. It could only be exercised through a constituent assembly and a referendum. The constituent assembly is so called because it exercises peoples sovereign power to constitute a framework of Government. Within the framework of the Act there was neither a constituent assembly nor a referendum. As regards want of a constituent assembly, counsel argued that NCC was not a constituent assembly strictly speaking. It was not because its membership were, on the whole, not elected directly by the people for making a new Constitution. Neither the members of the CKRC, nor the district representatives, nor the representatives of political parties and/or the other organizations represented in the NCC were directly elected by the people. And although Members of Parliament were elected, they were not elected specifically to make a new Constitution. As regards the referendum, counsel argued that the referendum provided in s 27(6) of the Act was not a compulsory but a contingent one dependent for its availability on lack of consensus or a two thirds majority of delegates present and voting to pass the constitutional proposals presented. He further submitted that in any case, a referendum was an additional organ

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which could not substitute for a constituent assembly as it was a ratifying mechanism and not a Constitution making mechanism. 1

As I understood the respondents, they all took the view that the Constitution did not provide for the constituent power of the people and the notion was an extra-constitutional one in the same plane as the law of God; a very good notion, something to be aspired for but lacking in constitutional validity. It was therefore contended that the provisions of the Act said to transgress and dilute the applicants' constituent power could not be held to be inconsistent with the Constitution in those premises. In the colourful words of Kiriro Wa Ngugi, the applicants were in effect inviting the Court to a space outside and above the Constitution and asking it to judge the constitutionality of the impugned provisions of the Act in the light of that space. That, he submitted, was not permissible. Counsel for the 2nd respondent was particularly emphatic that the Court cannot find something to be a constitutional right if it could not be found in the cold text of the Constitution. In his view, the provisions of the Constitution relied upon by the applicants could not support the existence of the constituent power in the Constitution. S 1 declaring Kenya a sovereign Republic meant plainly that Kenya was not subject to the control of any other state or body; S 1A equally plainly meant that there shall be more than one political party in Kenya; s 3 meant what it said; the Constitution was (subject to the power to amend in s 47) the supreme law and any law inconsistent with it was null and void to the extent of the inconsistency; and section 47 did not so much as mention the expression constituent power. In the alternative, it was urged that if the Court found that the provisions of the Constitution relied upon embodied the notion of constituent power, it should hold that such a power could be exercised either directly or indirectly. In the matter at hand, the power had been exercised directly through the consultation of the people at various fora and indirectly through such a body as the NCC where all shades of opinion and interest were represented. It was said that all people were represented there by their Members of Parliament and, in addition, as the applicants belonged to either certain districts or creeds or professional associations they were adequately represented by their district, religious, professional or other social interest representation. The Court was also impressed upon to consider that Parliament is the organ that exercises the peoples' constituent power in matters of legislation. It was said that what mattered was not the use of the word "constituent assembly" to describe a body making the Constitution but the fact that it was representative of the people and no law could provide for perfection. In the final analysis the respondents argued that the applicants had not demonstrated that they had a right to a constituent assembly and a referendum which had been 5
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contravened by the Act.

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The *amicus curiae* on his part submitted that the constituent power of the people pre – exists any Constitution or written law and it existed whether or not recognised by the people or the authorities. It was a power which needed not to be textualised. What was important was that when a Court looks at the supremacy of the Constitution it should bear in mind that the text thereof is a manifestation of the constituent authority of the people. He further submitted that the Act was a means by which the people of Kenya could exercise their constituent power. It was enacted to provide a mechanism for the alteration of the Constitution. In contrast, the applicants had proposed that the Constitution be replaced by a mechanism which they themselves proposed: a constituent assembly and a referendum. Counsel accepted that a constituent assembly and a referendum were the most democratic processes for making a new Constitution but submitted that they were not the only ones and they were not perfect. If the review process were to proceed as urged by the applicants, the *amicus curiae* contended, there would have to be a law providing for the process and stages of a constituent assembly and a referendum and to that extent the applicants were inviting the Court to enter into the realm of legislation by proposing to Parliament what law should be made to accommodate all that. Such recommendations were not within the jurisdiction of the court.

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I have considered all the submissions urged. I confess that no aspect of this case has so taxed my mind as the present one. Having said that, I am relieved to have come to definite conclusions. They are the following.

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With respect to the juridical status of the concept of the constituent power of the people, the point of departure must be an acknowledgment that in a democracy, and Kenya is one, the people are sovereign. The sovereignty of the Republic is the sovereignty of its people. The Republic is its people, not its mountains, rivers, plains, its *flora* and *fauna* or other things and resources within its territory. All Governmental power and authority is exercised on behalf of the people. The second stop is the recognition that the sovereignty of the people necessarily betokens that they have a constituent power – the power to constitute and / or reconstitute, as the case may be, their framework of Government. That power is a primordial one. It is the basis of the creation of the Constitution and it cannot therefore be conferred or granted by the Constitution. Indeed it is not expressly textualized by the Constitution and, of course, it need not be. If the makers of the Constitution were to expressly recognize the sovereignty of the people and their constituent power, they would

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do so only *ex abundanti cautela* (out of an excessiveness of caution). 1
 Lack of its express textualization is not however conclusive of its want
 of juridical status. On the contrary, its power, presence and validity is
 writ large by implication in the framework of the Constitution itself as
 set out in sections 1,1A, 3 and 47. In that regard I accept the broad and 5
 purposive construction of the Constitution canvassed by counsel for the
 applicants. I accept that the declaration of Kenya as a sovereign Republic
 and a democratic multi-party State are pregnant with more meaning than
 ascribed by the respondents. A sovereign Republic is a sovereign people
 and a democratic State is one where sovereignty is reposed in the people. 10
 In the immortal words of Abraham Lincoln, it is the Government of the
 people, by the people, and for the people. The most important attribute of
 a sovereign people is their possession of the constituent power. And lest
 somebody wonder why, the supremacy of the Constitution proclaimed in
 section 3 is not explicable only on the basis that the Constitution is the 15
 supreme law, the *grundnorm* in Kelsenian dictum; nay, the Constitution
 is not supreme because it says so: its supremacy is a tribute to its having
 been made by a higher power, a power higher than the Constitution itself
 or any of its creatures. The Constitution is supreme because it is made
 by they in whom the sovereign power is reposed, the people themselves. 20
 And as I shall in due course demonstrate the powers of Parliament under
 s 47 of the Constitution are a further recognition that the constituent
 power reposes in the people themselves. In short, I am of the persuasion
 that the constituent power of the people has a juridical status within the
 Constitution of Kenya and is not an extra-constitutional notion without 25
 import in constitutional adjudication.

With regard to how such power is to be exercised to make and adopt a new
 Constitution, I agree that it may be exercised directly and / or indirectly 30
 depending on what is to be done. It cannot be exercised directly in the
 process of Constitution making. In that regard, the generation of views
 by the people is not an act of Constitution making. It is their expression
 of opinion. Constitution making involves the collation of those views,
 their processing into constitutional proposals, the debate of a document 35
 which bears the form and name of a Constitution. That function cannot
 be done by the people directly as there is neither a stadium large enough
 to accommodate them nor expertise on the part of their body as a whole
 to process a Constitution. The act of Constitution making can only be
 performed by representation. That is where a constituent assembly comes 40
 in. The people are represented by those they have elected to make the
 Constitution. The thing having been made, faithful recognition of the
 sovereignty of the people requires that they check and verify that what has

been done for them and in their name is to their satisfaction. That process is the adoption or ratification of the Constitution. It is where a referendum or plebiscite comes in. The sting of the applicants in this case is that they alongside with other Kenyans have not been afforded the vehicle of the constituent assembly and a referendum. In that regard I agree with counsel for the respondents and the *amicus curiae* that whatever name is given to the vehicle is unimportant. It could be a conference, platform, constituent assembly, or even Parliament especially constituted as a constituent assembly as shown by the histories of Ghana, Uganda and Tanzania in the 1960's. What matters is the fact that the body concerned should have the people's mandate to make a Constitution. In the current review process, one can say that the acts of Constitution making have been performed at Bomas. Did the NCC have such a mandate? The applicants' complaint that it did not because none of its membership were directly elected by the people for the purpose of making a new Constitution is not without merit. The entire membership consisted of 629 delegates. Out of those only the 210 elected Members of Parliament could claim to have been directly elected by the people. Although they were not directly elected for the specific purpose of making a new Constitution, it is a notorious fact of which the Court may take judicial notice that one of the issues in the general elections of 2002 was the delivery of a new Constitution. To that extent the elected members could claim to have had the direct mandate of the people to participate in the making of a new Constitution. The other categories of membership were all unelected directly by the people. 210 of them represented Districts (whose councils were constituted into electoral colleges for purposes of selecting them) and the rest (209) consisted of 12 nominated Members of Parliament, 29 CKRC Commissioners, and 168 members representing such diverse interests as trade unions, non-governmental organizations, women organizations, religious organizations and special interest groups. Thus, on the whole, only one third of the membership of the NCC were directly elected by the people. Can such a body be said to be representative of the people for purposes of Constitution making? Strictly speaking one cannot be a representative of another if the latter has not elected him to do so. That being so it could be to turn logic on its head to describe a body largely composed of unelected membership as a representative one. So the NCC fails the test of being a body with people's mandate to make a Constitution and the applicant's case that they have been denied the exercise of their constituent power by means of a constituent assembly is in my view, unassailable. All I would want to add to that is that, as counsel for the applicants conceded, in a constituent assembly it is perfectly permissible to have some unelected membership. The reasons are these. First in Constitution making, it is necessary to

have expertise in such matters as public affairs and administration, institutional design, constitutional law and practice, comparative governmental systems, and legal drafting. Secondly, a Constitution is for all, majorities and minorities alike, men and women and other social formations. Accordingly there is need to have a representation of various interests. If one were to base membership of the constituent assembly on elections only, the expertise and the special interests we have alluded to may be absent from the deliberative body. That would not be right. Be that as it may, the bottom line is that a majority of the membership must trace their roots to direct election by the people in whose name they are participating in Constitution making. In reaching the conclusion I have I must confess that I have been tempted to affirm the validity of the NCC as a constituent assembly considering the colossal amount of time and resources expended on the process so far and the fact that all shades of political opinion and various social formations and interests had seats there. I have in the end formed the conviction that Constitution making is not an everyday or every generation's affair. It is an epoch-making event. If a new Constitution is to be made in peace time and in the context of an existing valid constitutional order (as is being done in Kenya) as opposed to in a revolutionary climate or as a cease fire document after civil strife it must be made without compromise to major principles and it must be delivered in a medium of legal - purity. Sound Constitution making should never be sacrificed at the altar of expediency.

The second element in the exercise of a people's constituent power is the mechanism for the ratification of the Constitution made by the constituent assembly. Whether it be called a referendum or a plebiscite, that facility is a fundamental right of the people in exercise of their constituent power. Having found above that the constituent power is a juridical constitutional concept, I am impelled to the conclusion that the applicants together with other Kenyans have a constitutional right to a referendum on the proposed Constitution. Indeed if the process of constitutional review is to be truly people driven, "Wanjiku" (the mythical common person) must give her seal of approval, her very *imprimatur* to the proposed Constitution. If it is to have her abiding loyalty and reverence, it must be ratified by her in a referendum. Now looking at section 27(5) and (6) of the Act, it is apparent that the right to a referendum is a contingent one depending on the absence of consensus at the NCC or the results of a vote threat. The exercise of the constituent power requires nothing less than a compulsory referendum.

In the above premises, having found that the applicants have been denied

the exercise of their constituent power to make a Constitution through a constituent assembly and to ratify it through a referendum, I hold that they succeed in prayers 3 and 12. Section 26(7) of the Act merely indicates that one of the functions of the Commission is to compile its report together with a summary of its recommendations and on the basis thereof draft a Bill to alter the Constitution. And section 27(1) (b) mandates the Commission to convene the NCC for discussion, debate, amendment and adoption of its report and draft Bill. I am unable to see how the two provisions transgress or dilute or vitiate the applicant's constitutional right. I accordingly decline to grant prayer 1.

I now turn to a consideration of the applicant's affirmation that their rights to equal protection of the law and non-discrimination have been violated.

F. The Constitutional Right To Equal Protection Of The Law And Non-Discrimination

Prayers 7 and 14 are in essence a complaint that the applicants' rights to equal protection of the law and non discrimination have been contravened by the inequality of representation evident in the composition of the NCC. In the affidavit of the Reverend Dr Timothy Njoya in support of the summons, it is deposed in material parts as follows:-

“11. That my co-applicants and I are of the considered view that owing to the grave inequality in terms of representation in the NCC at Bomas of Kenya, our objections to the draft Constitution are doomed to fail undemocratically and we, in common with other Kenyans who share our view, stand no chance to effectively lobby for inclusion of our views in the proposed Constitution.

12. That it is our considered view that inequality in representation stems from under –representation of provinces and districts with the majority of people who share our views. In particular the allocation of slots for district representatives disregarded all democratic principles in a manner clearly violative of the Constitution. Annexed hereto marked TMN3 is a true copy of the final list of delegates to the National Constitutional Conference.

16. That our constitutional rights not to be discriminated against, our right to freedom of expression, freedom

of conscience and association have been curtailed by the on-going constitutional review process and that we stand to suffer further prejudice unless the weaknesses in the review Act are urgently corrected and the process democratically reconstituted.”	1
And in grounds (l) and (m) the applicants express themselves as follows:	5
“(l) The applicants are aggrieved by the gross under representation of the Districts and Provinces with majority of residents who share their 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.	10
(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.”	15
Those complaints are further elaborated in paragraphs 10 and 11 of the further affidavit sworn by Kepta Ombati, the 2 nd applicant on 8.3.04. In those paragraphs, it is deposed as follows:	20
“10. That further to the foregoing we contend that the composition of the National Constitutional Conference is discriminatory of the applicants and other Kenyans with whom they are related in terms of residence, tribe, political beliefs and other local connections. The major group that form the bulk of the NCC delegates are MP’s and district delegates. The representation of Kenyan provinces with respect to these categories of delegates is as follows:	25
Province Population MPs delegates District delegates Total	30
Nairobi 2,143,254 8 3 11	35
Coast 2,487,264 21 33 54	40

Njoya & 6 others v Attorney General & 3 others (No 2) 685
(Ringera, Kubo JJ & Kasango Ag J)

North Eastern	962,143	11	12	23	1
Eastern	4,631,779	36	39	75	
Central	3,724,159	26	21	50	
Rift Valley	5,078,036	49	54	103	
Western	3,358,776	24	24	48	5
Nyanza	<u>4,392,136</u>	<u>32</u>	<u>36</u>	<u>68</u>	
TOTALS	26,777,547	210	222	432	
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11. That we are aggrieved by the composition of the National Constitutional Conference which is discriminatory of us within the meaning of sections 1A and 82 of the Constitution. The first applicant is the national spokesman of the NCA movement and a resident of Nairobi. I, the second applicant, work in Nairobi as the Head of Secretariat of the National Convention Executive Council (NCEC), and I am a registered voter in Gucha District of Nyanza Province. The third applicant is an advocate of Kenya who works and lives in Nairobi. The fourth applicant is a business man in Nakuru District of Rift Valley Province. The fifth applicant is a school teacher who lives and works in Nairobi. The sixth applicant is a civil engineer in Nairobi and a member of the Democratic Party of Kenya. The seventh applicant is the co-ordinator of the NCA Movement in Central Province. The sixth applicant informs me and I believe the said information to be true that he is aggrieved by the inequitable and discriminatory representation of his party at the National Constitutional Conference.”

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From the foregoing depositions and affirmations as well as the submissions of learned counsel for the applicants, it appears that the main complaint by the applicants is that in determining the composition of the NCC the principle of equality of citizens which is implicit in a multi-party democratic state (and Kenya is proclaimed as such in article 1A of the Constitution) was not honoured and accordingly the representation of Provinces and Districts was blatantly discriminatory. Indeed paragraph 10 of the further affidavit is self-explanatory. Nairobi with a population of 2.1 million people had a total of 11 delegates at the NCC while Coast Province with 2.4 million people had 54 delegates and North Eastern Province with

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962,000 people had 23 delegates. Furthermore, from ground (1) it is clear that Nakuru District with 1,187,039 had the same number of delegates (3) as Keiyo with a population of 143,865. Similarly both Machakos District with 906,644 people and Lamu with 72,686 were represented by three delegates each. And of course all political parties irrespective of their strength either in Parliament or in their registered membership were represented by one delegate each. All that, according to the applicants, negated the principle of equality and was blatantly discriminatory of the residents in some provinces and districts and of certain political opinion as embodied in political parties. They relied heavily on the decision of the Supreme Court of the United States in *Reynolds v Simms* [377 US 533, 12 L Ed] P 506. Writing for the majority, Chief Justice Warren had the following things to say about the equality of citizens at P 527-528:-

“Legislators represent people, not trees or acres. Legislators are elected by voters, not farms or cities or economic interests. As long as ours is a representative form of Government, and our Legislatures are those instruments of government elected directly by and directly representative of the people, the right to elect legislators in a free and unimpaired fashion is a bedrock of our political system.....

Weighting the votes of citizens differently, by any method or means, merely because of where they happen to reside, hardly seems justifiable. One must be ever aware that the Constitution forbids “sophisticated as well as simple-minded modes of discrimination.”

Then at P 529, he wrote in similar vein as follows:-

“Logically, in a society ostensibly grounded in representative Government, it would seem reasonable that a majority of the people of a State could elect a majority of the State’s legislators. To conclude differently and to sanction minority control of State legislative bodies would appear to deny majority rights in a way that far surpasses any possible denial of minority rights that might otherwise be thought to result.”

The essence of the decision, as I understand it, is this; equal citizenship calls for equality of the vote, to accord some votes greater weight than others for any reason is discriminatory and offensive to the character of a representative democracy, while there must be minority protection it

should not lead to minority control of legislative bodies and thereby deny the majority of their rights, and to underweight any citizen's vote is to degrade his citizenship. 1

The respondents distinguished that case by pointing out that it concerned elections to state legislatures and was decided when racial discrimination was rampant in the United States of America. It was also said that population figures relied upon by the applicants had not been authenticated (a claim quickly shot down by applicants' counsel on the basis that the figures had been extracted from a report prepared by the 2nd respondent in August 2003 and that in any case they had not been contradicted). Counsel for the 1st and 2nd interested parties for his part pointed out that the representation to the NCC had been on the basis of existing political and administrative units created over a forty year history of independence and the Court should not be asked to overturn that legacy. 5
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The respondents and the interested parties also argued that the applicants had not properly invoked the jurisdiction of the High Court under section 84 of the Constitution in respect of prayers 7 and 14 the essence of which was an allegation of contravention of fundamental rights protected by sections 1A, 70, 78 and 82 of the Constitution. In that regard it was contended that the applicants had to particularize the nature of the contravention of their rights and the manner in which those rights had been contravened. The Court was referred to the decisions of this court in *Adar & 7 Others v Attorney-General & 2 Others* [Misc Civil Application No 14 of 1994] (unreported) and *Matiba v Attorney-General* [Misc Civil Application No 66 of 1990] (unreported) in support of those propositions. 20
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The Court was also reminded that the fundamental rights guaranteed by the Constitution are all subject to such limitations as are necessary in the public interest and for the protection of the rights and freedoms of others. The case of *Mutunga v Republic* [1986] KLR 167 was cited in that regard. 30

I have now weighed the rival arguments. To my mind, the strict logic of the *Reynolds v Simms* decision is unassailable. The concept of equality before the law, citizens' rights in a democratic State and the fundamental norm of non discrimination all call for equal weight for equal votes and dictate that minorities should not be turned into majorities in decision making bodies of the State. That should be basic and it has evidently not been reflected in the composition of the NCC as demonstrated by the applicants. However, that cannot be the only consideration in a democratic 35
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society. The other consideration is that minorities of whatever hue and shade are entitled to protection. And in the context of Constitution making it is to be remembered that the Constitution is being made for all, majorities and minorities alike and, accordingly, the voice of all should be heard. Furthermore in a multi-ethnic society such as ours which is still struggling towards a sense of common nationality and unity of purpose, it is important that all tribes should participate in the process of Constitution making so that they can all own the Constitution which will be the glue binding them together. It should also be borne in mind that justice is the foundation of peace. If in the making of a new Constitution some minorities feel that they have been denied political justice, they will resent the Constitution and may, if they could, thwart it by resort to arms. Other factors which should not be ignored are the terrain and size of the various political units. Representation must be effective and it cannot be so if the representative has either too vast a territory to traverse or too many a people to attend to. In the result my conclusion is that what is called for in a society such as ours is a balance between the majoritarian principle of one person one vote and the equally democratic dictates of minority accommodation in the democratic process. Naturally the predominant principle of application should be majoritarianism. To accommodate minorities does not entail reversing the democratic equation by having minority dominance in representative forums. Viewed in that light the composition of the NCC was quite flawed and no amount of antecedent history of skewed representation in Parliament or elsewhere could wholly justify it. Do those considerations justify the grant of the prayers sought by the applicants?

I am afraid not. The scheme of protection of fundamental rights envisaged by our Constitution is one where individual as opposed to community or group rights are the ones enforced by the courts. Section 84 (1) of the Constitution is clear. It provides-

“Subject to subsection (6), if a person alleges that any of the provisions of sections 70 to 83 (inclusive) had been, is being or is likely to be contravened in relation to him (or, in the case of a person who is detained, if another person alleges a contravention in relation to the detained person), then,..... that person may apply to the High Court for redress.” (emphasis mine).

The emphasis is clear. Except for a detained person for whom someone else may take up the cudgels, every other complainant of an alleged contravention of fundamental rights must relate the contravention to

himself, as a person. Indeed the entire chapter V of the Constitution is headed “Protection of Fundamental Rights and Freedoms of the Individual”. There is no room for representative actions or public interest litigation in matters subsumed by section 70-83 of the Constitution. Bearing that in mind, the respondent’s submissions that the applicants have not brought themselves within the ambit of section 84 are irresistible. In none of the affidavits does any of the applicants demonstrate how his personal right to equality before the law or non discrimination is contravened. They appear to take up cudgels on behalf of the residents of Nairobi, Nakuru, Central Province and Gucha areas of the Republic of Kenya and on behalf of political parties. In short, I think the applicants could not, and have not, in the circumstances here brought themselves within the grace of the court in exercise of its power under section 84 of the Constitution.

Before concluding this aspect of the matter I would want to endorse and associate myself with the previous stream of authority of this court regarding adjudication under section 84 of the Constitution. In the *Dr Korwa Adar & Others v Attorney-General* case the Court said –

“As this Court stated in the case of *Matiba v Attorney-General* High Court Civil Misc App No 666 of 1990, an applicant in an application under section 84(1) of the Constitution is obliged to state his complaint, the provision of the Constitution which he considers has been infringed in relation to him and the manner in which he believes they have been infringed. Those allegations are the ones which if pleaded with particularity, invoke the jurisdiction of this court under that section. It is not enough to allege infringement without particularizing the details and manner of infringement.”

I entirely agree.

In the result, although we had overruled the preliminary objection with regard to prayers 7 and 14 of the summons, a careful scrutiny of the matter during the consideration of the merits discloses that there are no merits in those prayers in so far as the applicants as individuals are concerned. I would accordingly dismiss prayers 7 and 14 of the summons.

I now turn to a consideration of the fourth important matter in this application, namely the scope of the power of Parliament under section 47 of the Constitution.

G. Inconsistency Of Section 28(3) And (4) Of The Act With Section 47

Of The Constitution	1
This matter was hotly debated before us. The point of entry into the debate was the meaning of section 47 of the Constitution and the scope of Parliament's power under that provision. It was common ground that the product of Bomas will be a new Constitution and that what will be presented to the Attorney-General as a draft Bill to alter the Constitution and what will thereafter be presented to the National Assembly, was in effect a Bill for the enactment of a new Constitution for Kenya. Indeed "draft zero" of the Conference which was annexed to the affidavit of Kiriro Wa Ngugi bears that out. The existing Constitution is proposed to be repealed and a new one enacted in its place. So the issue was whether Parliament could in exercise of its amendment power under s 47 repeal the Constitution and enact a new one.	5
S 47 of the Constitution reads in material parts:-	10
"1. Subject to this section, Parliament may alter this Constitution.	15
2. A Bill for an Act of Parliament to alter this Constitution shall not be passed by the National Assembly unless it has been supported on the second and third readings by the votes of not less than sixty-five per cent of all the members of the Assembly (excluding the <i>ex officio</i> members).	20
6. In this section –	25
(a) references to this Constitution are references to this Constitution as from to time amended; and	
(b) reference to the alteration of this Constitution are references to the amendment, modification or re-enactment, with or without amendment or modification, of any provision of this Constitution, the suspension or repeal of that provision and the making of a different provision in the place of that provision."	30
And section 123 (9) (b) provides that in the Constitution, words in the singular shall include the plural and words in the plural shall include the singular.	35
Counsel for the applicant argued that Parliament had no power under s 47 to repeal or abrogate the Constitution and to enact another one in its place. He premised his submission on an understanding of the words of the section, the notion of the constituent power of the people and	40

principles of Constitutional interpretation. In his understanding of the text, the provisions of subsection (6) were clear that Parliament could alter by amendment, modifications, re-enactment, suspension or repeal any provision of the Constitution. However, the proposed Constitution would be a new Constitution and not an alteration of the Constitution. Section 47 was all about the amendment of the current Constitution and could not be read to include the adoption of another Constitution outside the framework of the existing Constitution. On the proposition that if Parliament could amend or repeal one provision of the Constitution it could amend or replace all of them by dint of the provision of s 123 (9) (b), counsel submitted that the proposition would produce an absurd result.

On the notion of the constituent power of the people and its implication on the power of Parliament, it was argued that the sovereign constituent power to make a Constitution was reposed in the people as a whole. In that regard he argued that there was all the difference between the power to amend a Constitution and the power to make a new one. The former was vested in Parliament and the latter reposed only in the people themselves.

On the principles of constitutional interpretation, counsel argued that the framework of governance under the Constitution recognized that sovereignty reposed in the people. The hallmark of that sovereignty was possession of the constituent power. If any organ of Government was vested with sovereign powers, it would mean that the people were not sovereign. The principle of the supremacy of the Constitution also precluded the notion of unlimited powers on the part of any organ created by the Constitution. He argued that in the light of the foregoing, Section 30 of the Constitution (which vests the legislative power of the Republic in Parliament) as read with section 47 conferred on Parliament only a limited power to enact ordinary law and amend the Constitution. He placed heavy reliance in the decision of the Supreme Court of India in the case of *Kessevananda v State of Kerala* [1973] AIR S C 1461. In that case the Supreme Court in interpreting article 368 of the Constitution of India (the article embodying the amendment power) held that the power to amend the Constitution did not include the power to alter the basic structure or framework of the Constitution. Khanna, J who was one of the majority of 9 justices out of 13 in the court delivered himself as follows:-

“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 a dictatorship or a hereditary monarchy nor would it be permissible to abolish the <i>Lok Sabha</i> [the Indian Parliament]”.	1 5 10
I may add that the above decision has since then received the unanimous endorsement of the Supreme Court of India in the case of <i>Minerva Mills Ltd v Union of India</i> [1981] 1 SCR 206.	15
Counsel for the 2 nd respondent argued that a plain reading of section 47(6) as read with section 123 (9) (b) of the Constitution shows that Parliament can change or replace any and all provisions of the Constitution and enact a new one. He argued that the word re-enact means a new Constitution could come in place of or in lieu of the existing one. In his view, it was the only sense in which the word was used in the Constitution. Counsel thought he got support for his contentions from the decision of the High Court of Singapore in the case of <i>Teo So Lung v Minister for Home Affairs</i> [1990] (R C 490) where it was held that:-	20 25
“If the framers of the Constitution had intended limitations on the power of amendment, they would have expressly provided for such limitations. But article 5, which provided that any provisions of the Constitution could be amended by a two third majority in Parliament, did not put any limitation on that amending power. For the Courts to impose limitations on the Legislature’s power of constitutional amendment would be to usurp Parliament’s legislative function contrary to section 58 of the Constitution. The <i>Kessevananda</i> doctrine.....did not apply to the Singapore Constitution as it did to the Indian Constitution.	30 35
Counsel strongly urged the Court to follow the reasoning of the High Court of Singapore and refuse to follow the <i>Kessevandanda</i> doctrine. He urged that the Court should not impose a limitation on the power of Parliament and should hold that Parliament could repeal all the provisions of the	40

Constitution and make new provisions in place of the repealed ones. To impose any limitations would offend section 30 of the Constitution. He submitted that fear of abuse of the power was no argument against the existence of such a power for if Parliament abused its power, the solution would be to reject such a Parliament. It mattered not what the Supreme Court of India had said on its own Constitution: the Court must look at what the Constitution of Kenya says. In any case, he further contended, article 13 of the Constitution of India placed a limitation on the power of Parliament, a limitation which was absent in our Constitution.

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Counsel for the Attorney-General steered clear of offering any interpretation of s 47. She observed that there was doubt on the matter and the Government had published a Bill to clear the air of doubt. Counsel for the interested parties strongly supported the position taken by the 2nd respondent. The *amicus curiae* was also supportive of the proposition that Parliament could enact a new Constitution. In his view that was because Parliament could exercise the constituent power of the people.

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In reply, counsel for the applicants submitted that s 47 (6) (b) read together with s 123 (9) only meant that Parliament could alter one or more or many provisions of the Constitution. It was still a limited power and could not be extended to mean that if Parliament could amend several provisions it could enact a new Constitution. Such an interpretation, he said, would be absurd. On whether the Court should be persuaded by the *Kessevananda* case or the *Teo So Lung* case, he submitted that under the doctrine of *stare decisis* the Court should be persuaded by decisions of courts of similar or higher jurisdiction. In that regard he noted that the Singapore case relied on the decision of Ray, J who was one of the minority in the *Kessevananda* case. He submitted that the more persuasive decision was that of the majority which had subsequently been affirmed by the Supreme Court of India in a unanimous decision. He further argued that article 2 of the Singapore Constitution required the Court to interpret the Constitution as an ordinary Act of Parliament – the *Elmann* doctrine – and that the court should not follow it in that regard. He further contended that there was no limitation on the power to amend in article 13 of the Constitution of India contrary to the 2nd respondent’s submissions. As regards the argument that adherence to the *Kessevananda* doctrine would amount to judicial legislation, counsel argued that in limiting the powers of the Parliament the makers of the Constitution did not intend to place the courts above Parliament but to ensure that all organs of Government would operate in a manner not subversive of the Constitution. That could only be done by invoking the doctrine of limited powers.

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I have weighed the heavy and elaborate submission presented to the Court. Having done so, I must begin by affirming that the Court's most sacrosanct duty is to uphold the supremacy of the Constitution. The Court must follow the clear command of the Constitution. And what is the clear command of the Constitution in this aspect of the matter? I have come to the unequivocal conclusion that Parliament had no power under the provisions of section 47 of the Constitution to abrogate the Constitution and/or enact a new one in its place. I have come to that conclusion on three premises: First, a textual appreciation of the pertinent provisions alone compels that conclusion. The dominant word is "alter" the Constitution. The modes of alteration are amendment, modification, re-enactment, suspension, repeal and the making of a different provision in the place of the repealed one. The emphasis in subsection 6 (b) is alteration by those modes of this Constitution. To my mind the provision plainly means that Parliament may amend, repeal and replace as many provisions as desired provided the document retains its character as the existing Constitution. A new Constitution cannot by any stretch of the imagination be the existing Constitution as amended. And the word re-enact does not mean, as counsel for the 2nd respondent understood it to mean, the replacement of the Constitution with a new one. It simply means to enact again, to revive. One can only re-enact a past provision, that is bring back into the Constitution a provision which had earlier been in it but had been removed in exercise of the power of amendment. For example, if Parliament were to bring back the provision that there shall be only one political party called the Kenya African National Union, that would be a re-enactment of that provision. The above textual analysis is supported by *Black's Law Dictionary*, 6th Edition. At page 77, the word "alter" is defined as:-

"To make a change in; to modify; to vary in some degree; to change some of the elements or ingredients or details without substituting an entirely new thing or destroying the identity of the thing affected. To change partially. To change in one or more respects, but without destruction of existence or identity of the thing changed."

It is thus crystal clear that alteration of the Constitution does not involve the substitution thereof with a new one or the destruction of the identity or existence of the Constitution altered. Secondly, I have elsewhere in this judgment found that the constituent power is reposed in the people by virtue of their sovereignty and that the hallmark thereof is the power to constitute or reconstitute the framework of Government, in other

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words, make a new Constitution. That being so, it follows *ipso facto* that Parliament being one of the creatures of the Constitution it cannot make a new Constitution. Its power is limited to the alteration of the existing Constitution only. Thirdly, the application of the doctrine of purposive interpretation of the Constitution leads to the same result. The logic goes this way. Since (i) the Constitution embodies the people’s sovereignty; (ii) Constitutionalism betokens limited powers on the part of any organ of Government; and (iii) the principle of the supremacy of the Constitution precludes the notion of unlimited powers on the part of any organ; it follows that the power vested in Parliament by sections 30 and 47 of the Constitution is a limited power to make ordinary laws and amend the Constitution: no more and no less.

If it were necessary to fortify those conclusions by reference to judicial *dicta* – and strictly speaking it is not – I would say this. First, the doctrine of *stare decisis* does not bind this Court to follow any decision of any foreign tribunal however highly placed. That is part of the Country’s judicial sovereignty. The Court is bound only by the decisions of the Court of Appeal. Secondly, the matter we are handling is a unique one. There is no Commonwealth decision on the issue and it does not appear from the researches of counsel or our own knowledge that any Court in the Commonwealth has been called upon to pronounce on whether Parliament can in the exercise of its amendment power under the Constitution abrogate and replace the Constitution with a new one. Indeed the two contending decisions from India and Singapore were on issues touching on the constitutionality of constitutional amendments of specific provisions of the respective Constitutions. So what is really before us are *dicta* which may or may not persuade us. Having said that, I am of the considered opinion that the *dicta* in the *Kessevandanda* case is to be preferred to that in the *Teo So Lung* case. I say so for the following reasons. First, the *Kessevandanda* case was a decision of a Supreme Court of a Commonwealth country which was affirmed nine years later. *Teo So* case is a decision of the High Court of Singapore which is not the highest Court of that Country. Secondly, the Indian case proceeded on the premise of a purposive and liberal interpretation of the Constitution – an approach which I have embraced herein before – while the Singapore case proceeded on the premise that a Constitution was to be interpreted as an ordinary Act of Parliament (an echo of the *Elmann* doctrine which I have rejected). And thirdly, the interpretation of the word “amend” in the Constitution of India completely accords with the definition of the word “alter” in the *Black’s Law Dictionary* which I have expressly approved. May I also observe that the limitation in article 13(2) of the Indian Constitution that

the State shall not make any law which takes away or abridges the rights conferred by part III of the Indian Constitution (the fundamental rights) did not colour the court's interpretation of article 368 (the amendment power). On the contrary, the Court in the *Kessevananda* case affirmed the validity of the 24th amendment to the Constitution which expressly empowered Parliament to amend any provision of the Constitution including those relating to fundamental rights and also made article 13 of the Constitution inapplicable to an amendment of the Constitution under article 368. The Court concluded that notwithstanding article 13(2), the true position was that every provision of the Constitution could be amended provided in the result the basic foundations and structure of the Constitution remained the same. With respect to fundamental rights, the Court affirmed that reasonable abridgements could be effected thereto in the public interest provided the rights were not abrogated. All in all, I completely concur with the *dicta* in the *Kessevananda* case that Parliament has no power and cannot in the guise or garb of amendment either change the basic features of the Constitution or abrogate and enact a new Constitution. In my humble view, a contrary interpretation would lead to a farcical and absurd spectacle. It would be tantamount to an affirmation, for example, that Parliament could enact that Kenya could cease to be a sovereign Republic and become an absolute monarchy, or that all the legislative, executive and judicial power of Kenya could be fused and vested in Parliament, or that membership of Parliament could be co-optional, or that all fundamental rights could stand suspended and such other absurdities which would result in there being no "this Constitution of Kenya." In my judgment, the framers of the Constitution could not have contemplated or intended such an absurdity. And it would not be an answer to that concern to say, as was said by counsel for the 2nd respondent, that the people can change their Parliament, for if Parliament had a totally free hand, it could even perpetuate itself. All in all, the limitation of Parliament's power was a very wise ordination by the framers of the Constitution which is worthy of eternal preservation.

Before I leave this aspect of the matter let me comment on the previous amendments to the Constitution of Kenya. Since independence in 1963, there have been thirty-eight (38) amendments to the Constitution. The most significant ones involved a change from Dominion to Republic status, abolition of regionalism, change from a parliamentary to a presidential system of executive governance, abolition of a bicameral legislature, alteration of the entrenched majorities required for constitutional amendments, abolition of the security of tenure for Judges and other constitutional office holders (now restored), and the making of the

Country into a one party state (now reversed). And in 1969 by Act No 5 Parliament consolidated all the previous amendments, introduced new ones and reproduced the Constitution in a revised form. The effect of all those amendments were to substantially alter the Constitution. Some of them could not be described as anything other than an alteration of the basic structure or features of the Constitution. And they all passed without challenge in the courts. 1
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Be that as it may, it is evident that in none of the various amendments did Parliament purport to or did in fact abrogate the Constitution or make a new one. Everything was done within the text and structure of the existing Constitution. Even the radical Act No 5 of 1969 which set out the authentic version of the Constitution did not purport to and did not in fact introduce a new Constitution. It was hybrid of a Consolidating Act, an Amendment Act and a Revisional Act. Section 2 thereof was clear that the “Constitution” meant the Constitution of the Republic of Kenya contained in schedule 2 of the Kenya Independence Order in Council, 1963 as amended by other Acts from 1964 to 1968. And section 6 was equally significant. The revised Constitution which was set out in the schedule to the Act was a revised version of the Constitution as amended by the same Act incorporating revisions as to form only and affecting no changes of substance. In those premises there is no precedent in the Parliamentary practice of Kenya for the proposition that Parliament can make a new Constitution. As regards alterations to the basic structure of the Constitution, that had manifestly been effected. All I can say in that respect is that, fortunately or unfortunately, the changes were not challenged in the courts and so they are now part of our Constitution. 10
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Having come to the above conclusions, it is now time to explore whether and how sections 28 (3) and (4) of the Act are inconsistent with the Constitution. 30

The case of the applicants, as we understood it, was that section 28 (3) and 9(4) was in effect a legislative direction to the Attorney-General to publish the “Bomas” product in the form of a Bill to alter the Constitution and to the National Assembly to enact such a Bill within 7 days of the Attorney-General introducing it. It was argued that that was inconsistent with section 47 of the Constitution in that the Bomas draft, though required to be published in the form of a Bill to alter the Constitution, was in reality not a Bill to alter the Constitution but one to enact a new Constitution and repeal the existing one. Since Parliament could not enact a new Constitution, so the argument went, the provisions of the Act providing 35
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for such enactment were inconsistent with the Constitution. 1

The respondents and the interested parties on their part contended that in the first place, the provisions in question were no more than a timetable of action on the part of the Attorney-General and the National Assembly - the Attorney-General to publish the 'Bomas' product as a Bill within seven days of receipt thereof and the National Assembly to enact the same within 7 days of its being tabled therein. In the second place, they contended, section 47 was not concerned with events happening outside Parliament, it had no bearing on the manner of preparation of a Bill to alter the Constitution, its operation began only after a Bill to alter the Constitution was presented. In that regard, any Member of Parliament could present a Bill to alter the Constitution, it was argued. 5 10

I have considered the rival arguments. My conclusion is that what offends section 47 of the Constitution is neither the fact that a Bill to alter the Constitution has been prepared in the manner enacted in cap 3A nor the fact that the Attorney-General is required to publish the said Bill within 7 days. What offends the Constitution is that the National Assembly is required by dint of subsection (4) of section 28 to enact the said Bill into law within 7 days. As we have previously stated, the Bill though styled as a Bill to alter the Constitution is in substance a Bill for the enactment of a new Constitution and the repeal of the existing Constitution. The Act is thus in effect directing Parliament to entertain and pass a Bill for the replacement of the Constitution with a new one. That offends section 47 of the Constitution in two major respects. First, it invites Parliament to assume a jurisdiction or power it does not have – to consider a Bill for the abrogation of the Constitution and the enactment of a new one. The provision is imposing a duty on Parliament to do that which it cannot do. Secondly, the provision takes away the constitutional discretion of Parliament to accept or reject a Bill to alter the Constitution. It directs that the National Assembly enacts the Bill presented to it into law. I recall counsel for the 2nd respondent arguing that the words “for enactment” were no more than an expression of desire or a hope that the Bill will be enacted. I am unable to agree. In my view, if that were so, those words would have been prefixed with such words as “hopefully for enactment” or “for consideration and possible enactment.” In my view what the provisions of subsection (4) of the Act do is command the National Assembly to enact the Bill. That is a patently unconstitutional presumption on the National Assembly. In short, I find nothing in subsection (3) of section 28 of the Act which is inconsistent with section 47 of the Constitution. However section 28(4) of the Act is clearly inconsistent with section 47 15 20 25 30 35 40

of the Constitution. 1

That should be the end of the consideration of prayer 9 in the summons. However, in the course of a close analysis of the text of the Act and the Constitution, I could not help but observe the following further possible inconsistencies between section 28(4) of the Act and the Constitution. First, the provision provides for a time frame of action by the National Assembly. That to my mind, offends section 47 as read with section 56 of the Constitution for the timetable of the National Assembly is provided for by the standing orders of the House made pursuant to section 56 of the Constitution. According to those orders, there is no time frame for the passage of any Bill, let alone a Bill to alter the Constitution. Secondly, the provision assumes, erroneously, that the National Assembly enacts Bills into law. It has no power to do such a thing. The power of the National Assembly is to pass bills. The enactment of them into law is the function of Parliament which according to section 30(2) of the Constitution comprises of the National Assembly and the President. A Bill is not enacted by the Parliament of Kenya into law unless it has been passed by the National Assembly and assented to by the President in accordance with section 46 of the Constitution. Those two observations were however not prompted by any of the advocates before us and are not necessary for the decision. They are strictly speaking mere *obiter dictum*. 5
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The result of my consideration of this aspect of the matter is that the applicants succeed in their contention that section 28(4) of the Act is inconsistent with section 47 of the Constitution and accordingly prayer 9 will be granted subject to the modification that reference to section 28(3) of the Act will be deleted. 25

From what I have stated so far it should be manifestly clear that the bane of the Act is the inherent presumption that the making of a new Constitution could be accommodated within the power of Parliament to alter the Constitution. As demonstrated herein the two are entirely different processes requiring the exercise of different powers. The former requires the exercise of the people's constituent power and the latter requires the exercise of Parliament's limited amendment power. 30
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I now turn to the last prayers in the summons, namely, an injunction to stop the National Constitutional Conference at Bomas of Kenya for a period of six months and the costs of the summons. 40

H. Injunction

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The Court heard elaborate and, I must say, sincerely passionate arguments for and against the stoppage of the NCC. Well, that is all water under the bridge now. The Conference has come to an end and the delegates have returned whence they came. One of the most fundamental aspects of the court's jurisdiction is that we are not an academic forum and we don't act in vain. The prayer for injunction (ie prayer 17) is declined on that ground.	5
I. Costs	10
The issues canvassed in the originating summons were important and novel in Commonwealth jurisprudence. And on both the preliminary objections taken as well as on the merits, the applicants and the respondents have each partially succeeded. The interested parties for their part entered the fray on their own application. So did the <i>amicus curiae</i> . In those circumstances, I think the just order on costs is that each party should bear own costs.	15
Final Orders	20
In view of the conclusions I have reached above and taking into account what has fallen from the lips of my brother Kubo, J and my sister Kasango, Ag J it is obvious that the judgment of this court is:-	
1. That the Parliament has no jurisdiction or power under section 47 of the Constitution to abrogate the existing Constitution and enact a new one in its place. Parliament's power is limited to only alterations of the existing Constitution. The power to make a new Constitution (the constituent power) belongs to the people of Kenya as a whole, including the applicants. In the exercise of that power, the applicants together with other Kenyans, are, in the circumstances of this case, entitled to have a referendum on any proposed new Constitution;	25
2. That the applicants have not established that they have been discriminated against by virtue of the composition of the National Constitutional Conference;	30
3. The applicants are not entitled to an injunction to stop the National Constitutional Conference; and	35
4. Every party will have to bear their own costs of the originating summons.	40
It follows, therefore, that prayer 3, prayer 9 (subject to the modification that only subsection 4 of section 28 of the Act is inconsistent with section	

47 of the Constitution) and prayer 12 of the summons are granted and prayers 1, 7, 14 and 17 are dismissed. 1

Accordingly, declarations should be and are hereby issued that:

- (a) Subsections (5), (6) and (7) of Section 27 of the Constitution of Kenya Review Act are unconstitutional to the extent that they convert the applicant's 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 Constitutional Conference and are accordingly null and void. 5 10
- (b) Section 28(4) of the Constitution of Kenya Review Act is inconsistent with section 47 of the Constitution of Kenya and is therefore null and void.
- (c) The Constitution gives every person in Kenya an equal right to review the Constitution which right embodies the right to ratify the Constitution through a national referendum. 15

And each party will bear their own costs. Those, then, are the orders of this court. 20

Kasango Ag J. This Court is considering judgment of the prayers that were left subsisting after this Court delivered its ruling on 3rd March 2004 following the 2nd respondent's preliminary objection.

The prayers under consideration in this judgment are as follows:- 25

1. That a declaration be and is hereby issued declaring that sections 26(7) and 27(1) (b) of the Constitution of Kenya Review Act transgress, dilutes and vitiates the 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. 30
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 applicant's 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. 35 40
7. That a declaration be and is hereby issued declaring that section 27(1) (c) and (d) infringes on the applicants'

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.	1
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 is therefore null and void.	5
12. That a declaration be and is hereby issued declaring that Section 47 of the Constitution gives every person in Kenya an equal right to review the Constitution which right embodies the right to participate in writing and ratifying the Constitution through a constituent assembly or national referendum.	10
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
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)	20
19. That the first respondent be and is hereby ordered to pay the applicant's costs in any event.	25
As a Country, Kenya stands at a momentous time whereby the country is going through Constitution change whilst there is in existence another Constitution. Indeed there is a quotation that aptly describes where Kenya is from the book entitled " <i>Cases and Materials on Constitutional & Administrative Law</i> By Michael J Allen & Brian Thompson 16 th Edition page 8.	30
"If we investigate the origins of modern Constitutions, we find that, practically without exception, they were drawn up and adopted because people wished to make a fresh start, so far as the statement of their system of government was concerned."	35
Counsel for the applicant in his submission stated that since Kenyans have elected to review or replace the Constitution through legal process it is important that, that process be valid within the terms of the present	40

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Constitution.	1
The applicants, even though they were described by Mr Namwamba advocate for the interested parties as “playing political ping pong”, feel aggrieved by legal issues which surround the constitutional review process and they therefore seek legal redress in terms of the prayers herein above.	5
The applicant’s case is supported by the affidavits of Reverend Dr Timothy M Njoya and Kepta Ombati.	10
Reverend Dr Timothy Njoya states that he and his co-applicants are patriotic citizens of Kenya who have participated in their private or other capacities in the on going process to review the Constitution of Kenya. He further states:-	15
- That he and his co-applicants are aggrieved by the acrimony, distrust and political brinkmanship that have conspired to dim the prospect of the review process leading to a new Constitution which Constitution would enjoy broad legitimacy and confidence of many Kenyans.	20
- That the conflicts which have been there through the review process are as much political as they are legal in their nature.	
- When the Constitution of Kenya Review Commission, hereinafter called CKRC, published a Bill in September 2001, Rev Dr Timothy Njoya and his co-applicants found that some of the views submitted to CKRC had been misrepresented in the draft Bill.	25
- Rev Dr Timothy Njoya and his co-applicants and the rest of Kenyans were not afforded an opportunity to formally express their approval or disapproval of the draft Bill.	30
- The applicants are of the considered view that there is inequality in representation at the National Constitutional Conference, hereinafter called NCC which stems from under representation of provinces and districts.	35
- Some of the districts delegates to the NCC, according to the affidavit of Dr Timothy Njoya, were elected by County Councils whose mandate had expired by the first meeting of the NCC and accordingly their participation	40

thereof was illegal.	1
- The applicants are of the view that their constitutional rights had been contravened, that is their right to freedom of expression, freedom of conscience and association, at the NCC.	5
- The applicants finally informed the Court that the discussion in the technical committees of NCC had dissipated in the light of the acrimony, hostility and intolerance for dissenting views that have characterised their proceedings.	10
 The applicants therefore beseeched this Court to intervene to prevent political instability resulting from a new Constitution opposed by a considerable section of Kenyans.	 15
 The second respondent the Constitution of Kenya Review Commission CKRC, through the affidavit sworn by their Secretary, Patrick Loch Otieno Lumumba responded to applicants' affidavit as follows:-	
- That CKRC has carried out its duty with diligence and in accordance with the provisions of the Constitutional Review Act chapter 3A of the Laws of Kenya.	20
- The CKRC organised constituency constitutional forums in each and every Constituency in the Republic of Kenya and provided forums where all persons could give their views.	25
- CKRC facilitated forums for civic education to stimulate public discussion and awareness of constitutional issues, conducted studies and evaluation of other Constitution systems which could inform the people on the review process.	30
- After collecting the views of the people, the CKRC engaged in meticulous process of collating those views and compiling a report together with a summary of its recommendations for discussion and adoption by the NCC.	35
- That report of CKRC was made public and was the subject of public discussion.	
- That the enactment of new law is the exclusive preserve of Parliament and by section 47 the procedure for alteration of the Constitution is provided.	40
 The applicants through Kepta Ombati swore a further affidavit which	

raised the following issues:-	1
- That the CKRC, as provided in chapter 3A of the Laws of Kenya, is accountable to the people of Kenya with regard to the Constitution review process.	
- That the applicants together with other Kenyans have a right to a referendum with respect to their exercise of their constituent power as embodied in sections 1, 1A, 3 and 47 of the Constitution.	5
- That Parliament has no power at all to enact a Constitution and consequently it has no power to delegate the role of preparing a draft Constitution Bill to CKRC.	10
- That Kepta Ombati has participated as an observer in the proceedings at NCC and as a result of that participation the applicants are of the view that the process is so defective that it cannot produce a legitimate Constitution for all Kenyans.	15
- That the composition of NCC is discriminatory – within the meaning of sections 1A and 82 of the Constitution of Kenya.	20
Abdulrahman Mirimo Wandati describes himself as the Founding Trustee of the first interested party in this matter.	
He filed a replying affidavit in which he denied the contents of the affidavit of Rev Dr Timothy Njoya and stated that the issues raised by the applicants are misleading the Court, frivolous and meaningless. He was on the whole apprehensive about the real motive of the applicants coming to Court with this matter.	25
The second interested party through Eunice Kagure Nyutu swore a replying affidavit which in summary states as follows:-	30
- That from inception the Constitutional review process has been all inclusive and had sought a wide representation.	
-That the applicants in their allegations that sections of chapter 3A of the Laws of Kenya were unconstitutional was misleading to the Court, frivolous and meaningless.	35
- That Section 47 mandates Parliament to come up with mechanism for amendment of the Constitution.	40
- The CKRC provided a forum of discussion by members of public.	

- The applicants had the opportunity to effectively canvass for their views through public hearing.	1
- That the applicants are out to scuttle, disrupt, disorient, mislead and misguide the constitutional review process.	5
Before the Court embarks on examining and evaluation of the arguments placed before it by counsels, the Court wishes to deal with the issue of interpretation of the Constitution which was raised by counsel for the second respondent, Mr Ougo.	10
Mr Ougo submitted that the rule of interpretation of any statutory instrument including the Constitution of Kenya is that the words used therein must be given their natural and ordinary meaning in order to determine or establish the intention of the legislature.	15
To further his argument Mr Oguo relied on the case of <i>Republic -v- El Mann</i> [1967] EA page 357.	
Mr Ougo quoted a portion to be found on page 359 as follows:-	20
“If the words of the statute are themselves precise and unambiguous, then no more can be necessary than to expound those words in their ordinary and natural sense. The words themselves alone do in such a case best declare the intention of the law giver.”	25
Mr Ougo also quoted a further portion to be found on page 360 as follows:	
“An argument founded on what is claimed to be the right spirit of the Constitution is always attractive for it has a powerful appeal to sentiment and emotion: but a Court of law had to gather the spirit of the Constitution from the language of the Constitution. What one may believe or think to be the spirit of the Constitution cannot prevail if the language of the Constitution does not support that view.”	30
“We do not deny that in certain context a liberal interpretation may be called for, but in one cardinal respect we are satisfied that a Constitution is to be construed in the same way as any other legislative enactment, and that is, where the words used are precise and unambiguous they are to be construed in	35
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their ordinary and natural sense. It is only where there is some imprecision or ambiguity in the language that any question arises whether a liberal or restricted interpretation should be put upon the words.”

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Second respondent’s counsel further argued that in seeking to find the spirit of our Constitution we need to look at the spirit as expressed and not the spirit as we would wish it to be.

In that regard counsel said that the words in the Constitution of Kenya are clear and unambiguous.

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Mr Ougo requested the Court to reject the applicants’ assumption on the intention of the Legislature in interpreting sections 1, 1A, 3 and 47 whereby they argued that therein lies the constituent power.

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Mr Mungai counsel for the applicants in response to that line of argument said that the Constitution is the supreme law whose interpretation at the end of the day, the supremacy that the maker intended, should be upheld.

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Mr Mungai relied on the unreported case of *Crispus Karanja Njogu –vs- Attorney General* HC Crim App No 39 of 2000. This case was a departure of *Republic –vs- El Mann’s* case. Mr Mungai quoted page 25 of the case as follows:-

“We do not accept the proposition that a Constitution ought to be read and interpreted in the same way as an Act of Parliament. The Constitution is not an Act of Parliament. It exists separately in our statutes. It is supreme. When an Act of Parliament is in any way inconsistent with the Constitution that Act of Parliament, to the extent of that inconsistency, becomes void. It gives way to the Constitution. It is our considered view that, constitutional provisions ought to be interpreted broadly or liberally and not in a pedantic way, ie restrictive way. Constitutional provisions must be read to give values and aspirations of the people. The Court must appreciate throughout that the Constitution, of necessity, has principle and value embodied in it, that a Constitution is a living piece of legislation. It is a living document.”

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The Court is unable to accept the submission of Mr Ougo in regard to

interpretation. The Constitution is the supreme law of this Country and clearly it so speaks of itself, in section 3 of the Constitution of Kenya.	1
Section 3 of the Constitution of Kenya states:- “This Constitution is the Constitution of the Republic of Kenya and shall have the force of Law throughout Kenya and, subject to section 47, if any other law is inconsistent with this Constitution, this Constitution shall prevail and the other law shall, to the extent of the inconsistency, be void.”	5 10
The Constitution of Kenya having so clearly stated its supremacy means that the rules of interpretation cannot be the same as other statutes which are subordinated to it.	15
In this regard and further in support of my holding I wish to rely on the case of <i>Ndyanabo –v- Attorney General</i> [2001] EA 485.	
Page 493 it states “.....the Constitution is a living instrument, having a soul and consciousness of its ownit must be construed in time with the lofty purpose for which its makers framed it A timorous and unimaginative exercise of the judicial power of constitutional interpretation leaves the Constitution a stale and sterile document.”	20 25
I therefore reject the contention that the Constitution of Kenya is to be construed in the same way as any other legislative enactment.	30
In this judgment I shall proceed to apply the rule of construction of the Constitution of Kenya in a broad and liberal manner.	
The Court in embarking on the prayers before it wishes to look at prayer No 1 and No 3 together.	35
In respect of prayer No 1 Mr Ougo was very clear that in the matter before us the applicants ought to ensure that their submissions are founded on the Constitution which he said was the bench mark for such applications before this Court.	40
He further said that if any Act can be shown to contravene any	

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provision of the Constitution it is then the duty of the court to declare it unconstitutional.	1
His further opinion was that it was incumbent for anyone claiming that any act is unconstitutional they had to clearly identify the provision of the Constitution alleged to have been contravened.	5
Mr Ougo submitted that prayer No 1 of the originating summons does not ask the Court to consider the Constitution but rather it requires the Court to consider the Constitution of Kenya Review Act chapter 3A.	10
Mr Mungai in response to that argument said that the notion of constituent power is embodied in our Constitution but the term constituent power is not defined anywhere in the Constitution.	15
The Court hears what Mr Mungai says but a party is bound by the prayer it presents to Court.	
The applicants clearly in prayer No 1 ask for a declaration that section 27(1) (b) of the Constitution of Kenya Review Act transgresses, dilutes and vitiates constituent power which is embodied in section 3 of that Act.	20
The applicant does not, as it can be seen invoke the Constitution of Kenya in this prayer but is pitting one section against another of the Constitution of Kenya Review Act.	25
This prayer for the reasons given above must fail.	
As we now embark on consideration of prayer No 3, the Court needs to consider what is a constituent power.	30
The word constituent in the pocket <i>Oxford Dictionary</i> Sixth Edition is defined as:- “able to make or change a Constitution”.	35
In a book on <i>Presidentialism in Commonwealth Africa</i> by B O Nwabueze page 292 I quote the definition of constituent power as follows:- “It is a power to constitute a frame of Government for a community, and a Constitution is the means by which it is done.”	40
The question perhaps the Court needs to answer is, can the concept of	

constituent power be found in the Constitution of Kenya?	1
The applicants in their originating summons have come under sections 1A, 3, 47, 84 and 123 of the Constitution of Kenya and section 3A of the Civil Procedure Act.	5
The court's attention has been drawn to section 1A of the Constitution of Kenya as one of the sections where this notion of constituent power is to be found.	10
S1A of the Constitution of Kenya provides:- "The Republic of Kenya shall be a multiparty democratic State."	
The word 'Republic' in the <i>Blacks Law Dictionary</i> 6 th Edition, is defined as:- "A commonwealth; that form of Government in which the administration of affairs is open to all citizens."	15
The word 'Democracy' is defined in same dictionary as: "The form of Government in which the sovereign power resides in and exercised by the whole body of free citizen directly or indirectly through the system of representation."	20
The words that jump out of these two definitions are, in the case of Republic "Open to all the citizens" and in the case of Democracy "Sovereign power resides in and exercised by the whole body of free citizens."	25
The Constitution, says Nwabueze, "is supposed to be a permanent charter which endures for ages."	30
The Constitution of Kenya which is the supreme law of this Country is the will of the people or the mandate they give to indicate the manner in which they ought to be governed.	35
That being the case the people of Kenya, having in mind the definitions given herein above, have a right embodied in section 1A of the Constitution of Kenya, to be consulted if that law is to be changed. That to the court's mind is a fundamental right which can be said to be the constituent power.	40

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That right is more poignant when one considers Nwabueze’s definition of a Constitution to be a permanent charter which endures for ages.	1
Mr Ougo’s definition of Republic was that “Kenya shall not be subject to any other State or body outside Kenya, and that Kenya shall be responsible for its own systems of independence as opposed to any other authority.”	5
In regard to democracy Mr Ougo defined it as “allowing people to express their intention by having different political parties.”	10
Mr Mungai said that democracy gives an idea of equality of citizens and the word Republic recognised a sovereign people ruled by the law.	10
Mr Ndubi appearing for Law Society of Kenya as <i>amicus curiae</i> said that constituent power is a collective power of the people to express their will.	15
He said it pre exists any written law and it pre exists the existing Constitution.	20
He concluded by saying that constituent power exists whether or not people or authorities acknowledge or recognize it.	20
The Court is inclined to accept this submission.	25
This power (constituent power) is non-tangible and yet its existence cannot to the court’s mind be denied.	25
The section which is under consideration for this prayer is section 27 (5), (6) and (7).	30
Subsection 5 states as follows:-	
“All questions before the National Conference shall be determined by consensus, but in the absence of consensus, such decisions shall be determined by a single majority of the members present and voting:	35
Provided that –	
(i) In the case of any question concerning a proposal for inclusion in the Constitution, the decision of the National Constitutional Conference shall be carried by at least two thirds of the members of the National Constitutional Conference present and voting; and	40

(ii) If on taking a vote for the purpose of subsection 5(1) the proposal is not supported by a two thirds vote, but is not opposed by one third or more of all the members of the National Constitutional Conference present and voting subject to such limitation and condition as may be prescribed by the Commission in the Regulations, a further vote may be taken; and	1 5
(iii) If on taking a further vote under paragraph (ii), any question on a proposal for inclusion in the Constitution is not determined, the National Constitutional Conference may, by a resolution supported by at least two thirds of the voting members present, determine that the question be submitted to the people for determination through a referendum.”	10 15
Subsection 6 states: “The Commission shall record the decision taken by the National Constitutional Conference on the report and the draft Bill pursuant to its powers under subsection (1) (c) and shall submit the question or questions supported by a resolution under subsection (5) (iii) to the people for determination through referendum.”	20
Subsection (7) states: “The National referendum under subsection (6) shall be held within one month of the National Constitutional Conference.”	25
The applicants are of the view that these subsections are unconstitutional because they convert the applicants’ rights to have a referendum into a hollow right which is dependent on the discretion of the delegates of the National Constitutional Conference.	30
It ought to be noted that referendum was one of the organs prescribed under section 4 of the Constitution of Kenya Review Act, through which the review process was to be conducted, and yes the Court does find that these subsections negate the right to a referendum.	35
Since the Court accepted that the notion, nay, the reality of constituent power, is embodied in the Constitution of Kenya then one needs to find out how this constituent power can be exercised.	40

Since it would not be practicable for the whole nation of Kenya to enter into one single stadium to give their views on the kind of Constitution they desire to have, the resounding answer to that question would be a referendum where every Wanjiku, Atieno, Ahmed, Patel and Korir would have a say in the review of their Constitution. 1
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Nwabueze in page 394 states:-

“If the State is a creation of the people by means of a Constitution, and derives its power of law – making from them, it may be wondered why people who constitute and grant this power cannot act directly, in a referendum or otherwise, to give the Constitution the character and force of law.” 10

The Court therefore will grant the prayer No 3 as prayed. 15

The court now turns its consideration to prayers No 9 and 12.

These two prayers are drawing the court to examine section 47 of the Constitution of Kenya. 20

As we consider the power donated by this section to amend the Constitution a quotation from the book of Nwabueze would serve as a good starting point. He states:-

“For, if Parliament is to be able to amend the Constitution in the same way as it makes ordinary law,then the supremacy of the Constitution would have become a sham.” 25

Section 47(1) of the Constitution of Kenya states:- 30

“Subject to this section, Parliament may alter this Constitution.”

And subsection (6) states:-

“In this section – 35

(a) reference to this Constitution are references to this Constitution as from time to time amended; and
(b) reference to the alteration of this Constitution are references to the amendment, modification or re enactment, with or without amendment or modification, of any provision of this Constitution, the suspension or repeal of that provision and the making of a different 40

provision in the place of that provision.”	1
The margin notation of the section states “Alternation of Constitution.”	
The <i>Blacks Law Dictionary</i> 6 th Edition defines ‘alter’ in the following terms:-	5
“To make a change in; to modify; to vary in some degree; to change some of the elements or ingredients or details without substituting an entirely new thing or destroying the identity of the thing affected. To change partially. To change in one or more respects but without destruction of existence or identity of the thing changed.”	10
Looking at section 47 one finds that, and particularly in section 47 (6) (b) the mention of the word provision. Provision is mentioned three times.	15
The subsection states alteration in this section means amendment, modification or re-enactment of any <u>provision</u> of the Constitution, suspension or repeal of that <u>provision</u> and the making of a different <u>provision</u> .	20
This clearly to the court’s mind indicates that any amendment, modification, re-enactment, suspension or repealing would be limited to provision of the Constitution and not to the whole Constitution. In other words this section does not envisage a wholesale repealing of the Constitution. It then would follow that Parliament is not even empowered to enact a statute to repeal the Constitution.	25
Mr Ougo’s argument was that since section 47 of the Constitution of Kenya does not provide how the Bill was to be prepared chapter 3A steps into that void to produce that Bill.	30
Once the draft Bill is prepared by NCC the requirements under section 47 come into play.	35
Mr Ougo was therefore very clear that there cannot be any inconsistency between section 28 of the Constitutional Review Act and section 47 of the Constitution of Kenya.	40
He said chapter 3A dealt with the situation before the Bill was present and once that Bill was present section 47 of the Constitution of Kenya is set in	

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motion to fulfill the requirements of that section and the same is enacted as provided in section 28 (4) of the Constitution of Kenya Review Act.	1
On being questioned by the Court Mr Ougo stated there was no provision for Parliament to amend the draft Bill that will come from NCC.	5
Miss Kimani for the Attorney General said that the clear reading of section 47 of the Constitution of Kenya does not show inconsistency with section 28 of chapter 3A.	10
Mr Ndubi said that use of the word alter in section 47 of the Constitution of Kenya means that the Constitution can be totally replaced by another.	
Mr Mungai submitted that sections 30 and 47 of the Constitution of Kenya confer on Parliament power to make legislation and power to amend Constitution but that power is limited.	15
He said that Parliament cannot use that power to alter the basic structure of the Constitution.	20
The basic structure of the Constitution according to Mr Mungai is:-	
(i) Kenya is a Republic	
(ii) Kenya is a democratic State	
(iii) Parliament cannot take away the supremacy of the Constitution.	25
(iv) Parliament cannot abolish doctrines in the Constitution eg separation of powers and independence of Judiciary.	
(v) The fundamental rights found in chapter 5 of the Constitution of Kenya.	30
Mr Mungai supported his argument with the case <i>Kesavananda –v- State Of Kerala</i> [1973] SC AIR page 1461.	
A quotation from that case, per Khanna J is relevant.	35
“The word ‘amendment’ postulates that the old Constitution survives without loss of its identity despite the change and continues even though it has been subjected to alterations. As a result of the amendment, the old Constitution cannot be destroyed and done away with, it is retained though in the amended form.”	40

With respect the court subscribes to the foregoing view.	1
In the court's considered view section 47 of the Constitution of Kenya does not envisage the total destruction of the Constitution but it envisages the amendment, repealing etc of certain provisions in the Constitution.	5
Mr Ougo invited the Court to consider section 123 of the Constitution of Kenya (the interpretation section) and stated that the use of the word provision in singular also means provisions in plural.	10
The Court considering that submission is of the view that even if the words can be in plural it cannot mean a complete amendment of the whole Constitution.	15
In view of the aforesaid the Court finds that there is inconsistency between section 28 (3) and (4) of the Constitution Review Act and section 47 of the Constitution of Kenya and accordingly the applicant succeeds in prayer No 9.	20
With regard to prayer No 12 the applicant prays in the alternative that the people of Kenya be entitled to participate in the review of the Constitution either by constituent assembly or by referendum.	25
The Secretary of the CKRC Mr Patrick Loch Otieno Lumumba by his affidavit sworn on 16 th February 2004 stated, that the CKRC organised constituent Constitutional Forum in each Constituency in the Republic of Kenya and also facilitated numerous other forums at which people gave their views on the Constitution amendment and all those views were compiled in a report which has been the subject of discussions at NCC.	30
Indeed the report has of now been discussed at the NCC and consequently the zero draft of a Bill to alter the Constitution has been prepared.	35
In view of the fact that the applicant sought the declaration that the people of Kenya are entitled to have constituent assembly or referendum and, since there is already a draft of the Bill as aforesaid the court is minded to grant the applicants a declaration that the people of Kenya have a right to ratify that draft Bill by means of a referendum.	40
The applicants therefore succeed in prayer 12 in that the court declares that every Kenyan has an equal right to ratify the Constitution through national referendum.	

Now moving to prayer No 7 and 14 which seek a declaration that the right of the applicants embodied in sections 1A, 70, 78,79, 80 and 82 of the Constitution of Kenya have been contravened by section 27 (1) (c) and (d) of the Constitution of Kenya Review Act as:-
Section 1A of the Constitution declares the Republic of Kenya to be a mutliparty democratic State; and sections 70,78,79,80 and 82 are the sections that deal with the protection of fundamental rights and freedoms of the individual.
The applicants have prayed that those provisions in section 27 (1) (c) and (d) of the Constitution Review Act be declared to contravene the Constitution.
The Court has looked at section 27 (1) and is unable to find subsection (c) and (d).
As said before in this judgment a party is bound by the prayers they formulate before Court and in the regard prayer No 7 would fail and is dismissed.
By prayer No 14 the applicants seek a declaration that section 82 of the Constitution of Kenya bars the respondent from constituting the NCC in a discriminatory manner.
Although the applicants in their prayer No 14 mentioned article 21 of the Universal Declaration of Human Rights the applicants did not canvass this article at the hearing.
Section 82 (1) provides:-
“Subject to subsections (4) (5) and (8) no law shall make any provision that is discriminatory either of itself or in its effect.”
Subsection (2) provides:-
“Subject to subsections (6) (8) and (9) no person shall be treated in a discriminatory manner by a person acting by virtue of any written law or in the performance of the function of a public office or a public authority.”
Essentially the two sections prohibit the enactment of any law that is discriminatory and prohibit discrimination of a person acting by virtue of

a written law or in performance of a function of a public office or public authority.	1
Section 27 (2) of the Constitution of Kenya Review Act is the one that sets out the composition of delegates to the NCC.	5
Mr Mungai restricted his argument to subsection (c) and (d).	
Section 27 (2) provides:- The National Constitutional Conference shall consist of”	10
Subsection (c) provides:- “Three representatives of each District, at least one of whom shall be a woman and only one of whom may be a councillor all of whom shall be elected by the respective county council in accordance with such rules as may be prescribed by the Commission.”	15
Subsection (d) provides:- “One representative from each political party registered at the commencement of this Act, not being a Member of Parliament or a Councillor.”	20
Mr Mungai’s argument is that section 27(2) (c) and (d) is discriminative because it does not make out a criteria of the basis of having equal treatment of all Kenyan Districts irrespective of their population and that the section required the same treatment of all registered parties despite the number of voters.	25
Mr Mungai relied on paragraph 10 of the affidavit of Kepta Ombati sworn on 8 th March 2004.	30
In that paragraph there is produced a table of population per province, the number of members of parliamentary delegates per province and the number of district delegates per province.	35
Mr Mungai therefore submitted that:- (i) The District with very many or few people sends the same number of delegates since every District is represented by 3 delegates. (ii) Political parties irrespective of their actual support at the time of enactment of chapter 3A send one	40

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representative.	1
To illustrate the latter point Mr Mungai said that Kanu party which had the majority support at the time sent the same number of representatives as the Green party which had no Member of Parliament.	5
To illustrate point (I) above Mr Mungai said that for Nairobi with a population of 2,143,254 the number of District delegates is 3 and North Eastern with a population of 962,143 has also 3 district delegates.	10
Mr Mungai said that this discrimination cannot be allowed to stand constitutionally.	
Mr Mungai relied on the United States case:- <i>B A Reynolds –v- M O Sims</i> USSC Report [1963] Vol 12 page 5506.	15
The points that the applicants relied on in this case are:- (i) That the nature of representation is that all persons must be treated equally in all representative bodies. (ii) The right to exercise the franchise in a free and unimpaired manner is a right upon which all other rights depend on.	20
The applicant’s counsel was of the view that in a sovereign Republic the right to enact a new Constitution is even more important than the right to vote.	25
Mr Ougo for the second respondent was of the view that the draft that would come from the NCC is merely a recommendation to Parliament on the proposed amendment to the Constitution and accordingly the actions of the second respondent cannot affect the rights of the applicant.	30
The Court is unable to accept this proposition because the draft Bill will either be accepted or rejected by Parliament.	35
Because there are possibilities of that Bill being enacted the applicants have a right to address this issue in Court. Mr Ougo referred the court to the case of:- <i>Adar & 7 others –vs- Attorney General & another</i> Misc Civil Application No 14 of 1994 (unreported).	40
Mr Ougo sought to rely on this case where it was held that the applicants could not succeed because they had failed to show the contravention,	

brought under section 84 of the Constitution of Kenya, was personal.	1
Indeed in that case the Court found the right to bring the action lied with the Union which was seeking registration.	5
That case can be distinguished with the present one in that the applicants have stated that they are residents of some of the provinces (see section 82 of the Constitution) that have been discriminated upon by virtue of section 27(2) of chapter 3A. Therefore the discrimination against them is personal.	10
Mr Ndubi was of the view that the issue of discrimination was a question of equity and equality.	
He said that to propose that selection of NCC delegates on the basis of one person one vote would in itself promote inequity, yet equity was a value of justice.	15
He further said that to do justice there is need of equity between the powerful and not powerful. If the process was to be based on numbers it would not bring equity to the citizens of Kenya.	20
The Court is inclined to accept the submissions of Mr Ndubi.	
Even though on face value there was discrimination on the number of delegates representing each province as argued by the applicant's advocate we are of the firm view that the number of population per province cannot be the only criteria for deciding the number of delegates to represent each province.	25
This imbalance of representation by delegates from provinces may be as a result of the creation of extra districts in certain provinces.	30
This imbalance is very glaring in Nairobi province which even though it is a province it is also a district and therefore got delegates for a District. This imbalance would probably not have been the case if delegates were distributed on province basis.	35
Kenya is a multicultural society, and when one considers that the Constitution is a permanent document it is necessary to ensure that those with less population in their province do not get denied a say in the input of that document.	40

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If the criteria was on number of population alone it would mean that the province with less population would be disadvantaged.	
What criteria should we then use?	5
As a nation we ought to remember that Constitution making is not a fight where one would try to get a larger number on his side in order to win.	
However as a nation involved in the most important task touching all of our lives, we need to have a process that will lead to a well written Constitution that will ensure good governance.	10
The Constitution of our nation ought to be broad, balanced and representative of the views of Kenyans. This representation cannot be based on number of population alone.	15
The applicants' other argument that there was discrimination to the political party with majority Members of Parliament is rejected. This is because each party is represented by the elected Members of Parliament in NCC.	20
To allocate representatives to parties again on the basis of numbers of elected members will be a basis of discrimination against the party with few elected members. Each political party having one representative is fair enough as each party represents different ideologies and a way of thinking.	25
The objects for which the Constitution Review Act was enacted are captured in section 3 thereof.	30
This section provides:-	
"The object and purpose of the review of the Constitution is to secure provisions therein –	
(a) guarantee peace, national unity and integrity of the Republic of Kenya in order to safeguard the well – being of the people of Kenya;	35
(b) establish a free and democratic system of government that enshrines good governance, constitutionalism, the rule of law, human rights and gender equity;	
(c) recognizing and demarcating divisions of responsibility among the various State organs including	40

the Executive, the Legislature and the Judiciary so as to create checks and balances between them and to ensure accountability of the government and its officers to the people of Kenya;	1
(d) promoting the peoples' participation in the governance of the country through democratic, free and fair elections and the devolution and exercise of power;	5
(e) respecting ethnic and regional diversity and communal rights including the right of communities to organise and participate in cultural activities and the expression of their identities;	10
(f) ensuring the provision of basic needs of all Kenyans through the establishment of an equitable frame – work for economic growth and equitable access to national resources;	15
(g) promoting and facilitating regional and international co-operation to ensure economic development, peace and stability and to support democracy and human rights;	20
(h) strengthening national integration and unity;	
(i) creating conditions conducive to a free exchange of ideas;	
(j) ensuring the full participation of people in the management of public affairs; and	25
(k) enabling Kenyans to resolve national issues on basis of consensus.”	
 These noble objectives we vividly subscribe to them.	 30
 In the court's considered view to ensure that the sparsely populated and over populated provinces are not discriminated it may be best that each province has an equal representation at the NCC.	 35
 The end result is that the prayer sought by the applicants, that is prayer No 14 succeeds. The court would hold that there was discrimination in the constituting of the delegates at the NCC which was done in accordance with Section 27(2) of the Constitution Review Act. The court so holds because there is indeed discrimination whereby the provinces with less population are represented by more delegates than the provinces with higher population.	 40

Njoya & 6 others v Attorney General & 3 others (No 2) 723
(Ringera, Kubo JJ & Kasango Ag J)

In regard to prayer No 17 this has now been over taken by events, in that the NCC has come to an end. The Court therefore will not issue an injunction to stop that process because such an order would be in vain. 1

The Court would like to thank all counsel including the 3rd and 4th respondents who were in person for the very valuable and detailed submission presented before us. 5

The court will grant no orders as to costs. 10

Kubo J (Dissenting).
Introduction

The above application came before this Court (Ringera J, Kubo J, and Kasango Ag J) by way of Originating Summons. 15

The background to the application is well set out in that ruling the judgment of brother Ringera J and I find no need to repeat it here.

This is an important case without a precedent in our jurisdiction as, to the best of my knowledge, the question of how the making of a new Constitution should be undertaken has not come before the Kenyan Courts for judicial adjudication before. I, therefore, consider it to be in the interests of the development of our jurisprudence to address the issues before this Court in a fair amount of detail. 20

Perhaps I should also record that initially there were eight applicants in this application. However, at the start of the hearing of the application on 16.02.04, Munir M Mazrui, who was second applicant, applied to be struck out of the application. The Court allowed his application and struck him out of the proceedings and from then on the application was prosecuted by the seven applicants named above. 25 30

There were also applications by Kiriro Wa Ngugi and Koitamet Ole Kina, delegates at the Naitonal Constitutional Conference, to be joined as parties to the proceedings. The Court allowed those applications and Kiriro Wa Ngugi and Koitamet Ole Kina were joined as third and fourth respondents, respectively. 35

Additionally, there were applications by the Muslim Consultative Council and the Chambers of Justice to be joined in the proceedings as interested parties. The Court allowed the said applications and the Muslim Consultative Council and the Chambers of Justice were joined as first and 40

second interested parties, respectively.	1
Finally, the Law Society of Kenya applied to participate in the proceedings as <i>amicus curiae</i> (a friend of the court). The Court allowed the application and the Law Society of Kenya appeared <i>amicus curiae</i> .	5
Also deserving to be recorded here is the fact that the application originally contained 19 prayers. There was a preliminary objection by the 2 nd respondent to the application being entertained by the Court. This Court upheld the preliminary objection in part and refused the bulk of the applicants' prayers at the preliminary stage. As a result, only substantive prayers 1, 3, 7, 9, 12, 14 and 17 survived to be heard and determined on merit. These are the prayers subject matter of this judgment.	10
Prayers 1, 3 and 12 have a thematic link as in essence they raise the issue of <u>constituent power or right</u> of the people including the applicants to be involved in Constitution making. I shall address the three prayers together. Prayers 7 and 14 also have a thematic link in that their basic complaint is that the applicants have been discriminated against and denied their right of involvement in the Constitution making process. I shall likewise deal with these two prayers together. As regards prayer 9, the applicants contend in it that section 28 (3) and (4) of the Constitution of Kenya Review Act (cap 3A) is inconsistent with section 47 of the Constitution of Kenya and, therefore, null and void. I shall address this prayer separately. By prayer 17, the applicants in effect seek an injunction for the National Constitutional Conference, which at the time of the application was being held at the Bomas of Kenya in Nairobi, to be stopped for six months. I shall also deal with this prayer separately.	15 20 25
The last prayer in the application, ie, prayer 19, is contingent upon the applicants' application succeeding. Naturally, a decision on this prayer will largely depend on the outcome of the application.	30
The ensuing paragraphs are devoted to examination of the surviving prayers, either in combination or singly, as indicated above.	35
Prayers 1, 3 and 12	
Under prayers 1, 3 and 12 the applicants sought the following orders:-	
1. That a declaration be and is hereby issued declaring that sections 26 (7) and 27 (1) (b) of the Constitution of Kenya Review Act transgresses, dilutes and vitiates	40

the 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. 1

3. That a declaration be and is hereby issued declaring that subsections (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 Kenya Constitution into a hollow right and privilege dependent on the absolute discretion of the delegates of the National Conference. 5 10

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 (*sic*) embodies the right to participate in writing and ratifying the Constitution through a constituent assembly or national referendum. 15

Representation of the parties to these proceedings was as follows: The applicants were represented by Mr Kibe Mungai assisted by Mr Kinoti Mbobua; the first respondent was represented by Miss Muthoni Kimani assisted by Miss Wanjiku Mbiyu; the second respondent was represented by Mr George Oraro assisted by Mr John Ougo; the third and fourth respondents appeared in person; the first and second interested parties were represented by Mr Ababu Namwamba assisted by Miss Eunice Kagure Nyutu; while the Law Society of Kenya, which participated as *amicus curiae*, was represented by Mr Haroun Ndubi assisted by Mark Oloo. 20 25

Learned counsel for the applicants made lengthy submissions and referred to many court decisions and other types of literature on constitutionalism from Kenya and outside Kenya. The 2nd respondent also cited a number of authorities. All authorities referred to by them were of persuasive authority but not binding on this Court. They were of great assistance to the Court in clarifying various issues arising from the application. I did not find it feasible or necessary to make specific reference to each and every one of them. I have, however, borne them in mind in writing this judgment. 30 35

As observed earlier, applicants' counsel's submissions were lengthy. I shall here attempt to make only a summary of them in so far as prayers 1, 3 and 12 are concerned as follows:- 40

Prayer 1

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- a) That whereas the concept of constituent power is not defined anywhere in the current Constitution (“the Constitution”) or anywhere else in Kenya laws, such power is always vested in the people through a constituent assembly or referendum. In support of this submission, he referred to the Indian case of *Kesavananda vs State of Kerala*, AIR 1973 Supreme Court 1461 (V 60 C 333) and also to *Presidentialism in Commonwealth Africa* by B O Nwabueze. 1
5
- b) That constituent power is a primordial power, ie it pre-exists a Constitution and it has to be exercised through a constituent assembly and/or a referendum. 10
- c) That a referendum is an additional organ which does not substitute a constituent assembly and that the constituent assembly precedes the referendum.
- d) That the applicants conceded that a constituent assembly may have unelected persons as its members for the basic reason that Constitution making is a complex affair. For that reason people who understand public affairs may be required to lend their expertise to the process. Further, that in every modern society there are interest groups and minorities who may not be able to secure representation by way of election and yet they must be facilitated to present their views. However, he contended that it is an essential feature of a constituent assembly that the bulk of its members must have the mandate of the people to make a Constitution and that the constituent assembly is so described because it exercises sovereign power. 15
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- e) That the National Constitutional Conference (NCC) fails the test of a constituent assembly firstly because it did not have a single member with a direct mandate from the people to make a Constitution; and secondly because at the end of its deliberations NCC will have to submit a draft bill to Parliament, which means the NCC is not a sovereign assembly: He emphasized that in his view sovereignty is a residual power vested in the people and submitted that in Kenya it is located in sections 1, 1A and 3 of the Constitution and that the legislative power vested in Parliament under sections 30 and 47 is limited to mere amendments and not making or adopting a new Constitution. 25
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- f) That the current Constitution is traceable to the British Kenya Independence Act and that in Countries which sought to legitimize such constitutions there was recourse to the people but Kenya never did this. For that reason applicants’ counsel submitted that Kenya’s Constitution is not home-grown. 35
- g) Applicant’s counsel added that amendments to the Constitution received by way of the British Kenya Independence Order in Council 1963, including the first amendment in 1964 declaring Kenya a Republic, 40

were done by Kenya's elected leaders in the name of the people without the people being consulted. Counsel referred to an extract appearing at pages 1258 – 1278 in Volume 2 of the affidavit of Patrick Loch Otieno Lumumba, Secretary to the Constitution of Kenya Review Commission (CKRC). This is an extract of chapter 3 of a book entitled *Public Law, and Political Change in Kenya – A Study of the Legal Framework of Government from Colonial Times to the Present*, authored by Y P Ghai and J P W B McAuslan and published in 1970 (Y P Ghai happens to be now the Chairman of the CKRC). In applicants' counsel's view, the upshot of that chapter is that the clamour for constitutional review sprang from discontent with the present Constitution which he (applicants' counsel) contended has been amended several times, beyond recognition, by Parliament in accordance with its powers under section 47 of the Constitution. Counsel submitted that the said discontent is the very reason for the long statement in the Constitution of Kenya Review Act (cap 3A) and that the stated object of the Act properly captures the desire of Kenyans to be involved in constitutional review. He conceded that cap 3A is a good attempt to provide a legal mechanism for Kenyans to exercise their constituent power but complained that it is not properly anchored in the Constitution. For the record, the long title to the Act states:

“An Act of Parliament to facilitate the comprehensive review of the Constitution by the people of Kenya, and for connected purposes.”

Applicants' counsel contended that the Act erred in vesting responsibility on Parliament to enact a new Constitution as Parliament does not have such power and that, therefore, sections 26 (7) and 27 (1) (b) of cap 3A transgress, dilute and vitiate the constituent power of the Kenyan people.

h) Applicants' counsel acknowledged that the most important work of the review process at the NCC was to come up with a draft Constitution and that this task was fully discharged. He observed that under section 27 (1) (b) the NCC was to discuss, debate, amend and adopt CKRC Report and Draft Bill. However, he noted that details of the decision – making process at the NCC was governed by the Constitution of Kenya Review (National Constitutional Conference) (Procedure) Regulations, 2003 which in his view did not give delegates sufficient scope to discuss the CKRC Report and Draft Bill adequately. In this connection, he referred to regulations 18 – 21 and rules 16 – 20 in the second schedule to the regulations. He read out regulations 20 and 21 with particular emphasis on regulation 20

(3) which provides:	1
“20. (3) At the consideration stage, the debate at the conference shall be confined to the Commission’s Report and Draft Bill only.”	5
He criticized the regulation as being restrictive by confining debate only to CKRC’s Report and Draft Bill. He also castigated rule 19 in the second schedule which provides:	
“19. Any amendment to the Draft Bill shall be within the scope of the subject matter of the Bill.”	10
Counsel contended that this is yet a further curtailment of meaningful debate at the NCC. All the foregoing, applicants’ counsel submitted, dilutes and vitiates the people’s constituent power.	15
Applicants’ counsel urged the Court to issue the declaration sought in prayer 1.	
Prayer 3	20
Under this prayer applicants’ counsel made the following submissions:-	
a) That subsections (5), (6) and (7) of section 27 of cap 3A are unconstitutional in that they make the people’s right to a referendum contingent upon absence of consensus at the NCC while section 4 (1) (d) makes referendum one of the organs of the constitutional review process.	25
b) That the only way section 4 (1) (d) can hold a genuine promise of a referendum is if the subsections provide for a mandatory referendum.	
c) That under section 4 (1) (d) the NCC is one of the organs of review just as referendum also is and that one organ of review (referendum) can’t depend on the wish of another (NCC).	30
d) That subsections (5) and (6) in reality make it absolutely impossible to have a 2/3 majority at NCC in order to get a referendum.	
e) That before August, 2002 amendment of cap 3A, the voting majority was 2/3 of all NCC members but the amendment reduced the majority to 2/3 of members present and voting. In his view the effect of this new voting majority requirement is to diminish the legitimacy of the Draft Bill to come out of the NCC process, especially as, in the applicants’ contention, the NCC is already not sufficiently representative of Kenyans even if all the 629 delegates are present.	35
f) That the referendum is a cardinal rule for constitutional amendment and	40

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- also for Constitution making. In this regard he referred to the *Blackwell Encyclopaedia of Political Science* which defines “referendum” as a device of direct democracy by which the electorate can pronounce upon some public measure put to it by a Government, or, in the case of sovereignty, by an international organization. According to that dictionary, a referendum is sometimes called a plebiscite. 1
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- g) After referring to the above dictionary, applicants’ counsel made the following points:-
- i. That where questions of sovereignty are to be decided, a referendum is an important constitutional device for legitimizing a constitutional process. 10
 - ii. That it is a practice in virtually every modern democracy to make use of a referendum for important public decisions. 15
- He said that in Kenya’s Independence Constitution there was a provision for contingent referendum in the sense that the Senate and the House of Representatives could not pass a constitutional amendment save via a referendum. He submitted that if a referendum is important for a constitutional amendment, it is even more important for purposes of adopting a new Constitution. 20
- Applicants’ counsel urged the Court to find that the order sought in prayer 3 should issue. 25
- Prayer 12
- Applicants’ counsel pointed out that he had dealt with much of this prayer while addressing earlier prayers. He submitted by way of emphasis:-
- a) That the applicants contend they have equal right with every other Kenyan to review and ratify the Constitution through a constituent assembly and/or referendum. 30
 - b) That in his view a constituent assembly representing the citizens is mandatory; that its purpose is to discuss constitutional proposals and adopt a new Constitution; and that it may also ratify the Constitution if the debate at that assembly is not acrimonious. He added a rider that if the debate at such assembly is acrimonious, a referendum is a must. He said that in the applicants’ view the deliberations at the NCC were acrimonious, which necessitates a referendum. In this regard he referred to *Presidentialism in Commonwealth Africa* (chapter 13) by B O Nwabueze to make the following points:- 35
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 - i. That legitimacy of a new Constitution depends on popular consultations on and approval of constitutional

proposals.	1
ii. That the debating of those proposals should take place in a representative constituent assembly specifically convened for the purpose.	
iii. That the existing Constitution does not give Parliament mandate to debate and enact a new Constitution since its mandate is to govern in accordance with the existing Constitution	5
iv. That as long as Kenya is a democracy, the referendum is a critical organ for making and adopting a Constitution and must be held as mandatory for the purpose.	10
 Applicants' counsel urged the Court to grant prayer 12. Learned counsel for the 2 nd respondent took the lead and responded to the applicants' submissions first. He said he strenuously opposed the applicants' application in its entirety. In this regard he pointed out that the 2 nd respondent had filed a replying affidavit on 16.02.04 through its secretary, Patrick Loch Otieno Lumumba and he relied on that affidavit.	15
 By way of introduction the 2 nd respondent's counsel submitted that it is a cardinal principle of interpretation of any statutory instrument including a Constitution that words used therein must be given their natural and ordinary meaning in order to determine the intention of the Legislature. For this proposition he relied principally on <i>Republic vs El Mann</i> [1969] EA 357. That was an appeal to a 3 – Judge bench of the High Court of Kenya (Mwendwa, CJ, Farrel and Chanan Singh, JJ, as they then were) from the criminal proceedings of a subordinate court under the then Exchange Control Act (cap113). The facts are not relevant here. The short point which arose for the determination of that Court was whether the then section 21 (7) of the Constitution providing that “No person who is tried for a criminal offence shall be compelled to give evidence at his trial” should be given a liberal or an extended construction. The Court said it had “reached a clear and definite conclusion based on what appears to us to be the clear words of the subsection and requiring little or no authority in its support.”	20 25 30 35
 The High Court in the <i>El Mann</i> appeal noted that counsel for both sides were in substantial agreement as to the principles of construction to be applied and each of them referred to the same passage in <i>Craies on Statute Law</i> (6 th Edn) which read as follows:	40
“The cardinal rule for the construction of Acts of Parliament is that they should be construed according	

to the intention expressed in the Acts themselves. The tribunal that has to construe an Act of a legislature, or indeed any other document, (emphasis added) has to determine the intention as expressed by the words used. And in order to understand these words it is natural to inquire what is the subject matter with respect to which they are used and the object in view.”

Their Lordships noted that the passage came from Lord Blackburn in *Direct United States Cable Co vs The Anglo – American Telegraph Co*, 2 AC 394 decided in 1877 and that the passage continued:

“In *Barnes vs Jarvis*, [1953] I WLR 649 Lord Godard, CJ said: ‘A certain amount of common sense must be applied in construing statutes. The object of the Act has to be considered.’ If the words of the statute are themselves precise and unambiguous, then no more can be necessary than to expound those words in their ordinary and natural sense. The words themselves alone do in such a case best declare the intention of the law-giver. Where the language of an Act is clear and explicit, we must give effect to it, whatever may be the consequences, for in that case the words of the statute speak the intention of the Legislature.”

It was noted by the Court in the *EI Mann* appeal that the opposing sides cited the same passage as a basis for their respective cases but laid different emphasis. Counsel for EI Mann invited the Court to apply a more liberal construction to a Constitution than should be adopted in relation to an ordinary enactment of the Legislature while counsel for the Republic contended that the same canons of construction should apply to a Constitution as to any other enactment of the Legislature. The Court adopted the dictum of Das, J in the Indian case of *Keshava Menon vs State of Bombay*, [1951] SCR 228 as follows:

“An argument founded on what is claimed to be the spirit of the Constitution is always attractive for it has a powerful appeal to sentiment and emotion: but a Court of law has to gather the spirit of the Constitution from the language of the Constitution. What one may believe or think to be the spirit of the Constitution cannot prevail if the language of the Constitution does not support that view.”

Their Lordships said they did not deny that in certain contexts a liberal interpretation may be called for, but in one cardinal respect they were satisfied that a Constitution is to be construed in the same way as any other legislative enactment, and that is, where the words used are precise and unambiguous they are to be construed in their ordinary and natural sense. The Court added that it is only where there is some imprecision or ambiguity in the language that any question arises whether a liberal or restricted interpretation should be put upon the words.

Counsel for the 2nd respondent in the present case invited this Court to follow the *El Mann* doctrine in interpreting the subject provisions of the Constitution of Kenya as the words used therein are in counsel's opinion clear and unambiguous. He disagreed with applicants' counsel's contention that in sections 1, 1A, 3 and 47 of the Constitution lies the constituent power of Kenyans. The 2nd respondents' counsel submitted that in a constitutional application like the present, the starting point is the existing Constitution. That every submission from the parties must be founded squarely on the Constitution as it is the benchmark. If a statutory provision offends the Constitution, the Court is duty bound to declare it unconstitutional; and it is incumbent upon any person claiming unconstitutionality of a statutory provision to identify clearly the constitutional provision contravened as well as the offending statutory provision. He submitted that there is no room for implications and inferences where the words of the Constitution are precise and unambiguous. He said he would deal with prayers 1, 3 and 12 together; prayers 7 and 14 together; prayer 9 separately; and prayer 17 also separately.

Prayer 1

The 2nd respondent's counsel pointed out that the gist of this prayer is that section 26 (7) and 27 (1) (b) of cap 3A vitiates the constituent power of the people of Kenya including the applicants to adopt a new Constitution and that the said power is embodied in section 3 of the same cap 3A. He noted that section 26 (7) simply provides for the CKRC to compile its report together with a summary of its recommendations and on the basis thereof to draft a Bill to alter the Constitution. That section 27 (1) (b) simply provides that after the CKRC compiles its report and prepares a Draft Bill and publishes the Bill, the CKRC should convene the NCC for discussion, debate, amendment and adoption of the CKRC Report and Draft Bill. In counsel's view, the notion of constituent power does not come into these subsections at all and that to read such notion into them is to indulge in speculation and inference which has no room in interpreting the

said subsections. Counsel also wondered whether in referring to section 3 of cap 3A, the applicants might have intended to refer to section 3 of the Constitution. He noted that section 3 of the Constitution is a declaration of the supremacy of the Constitution and that the clear words of the section simply reiterate the universal and acclaimed supremacy of the Constitution. He submitted that even if the applicants intended to refer to section 3 of the Constitution the section has nothing to do with what is contemplated in sections 26 (7) and 27(1) (b) as urged in prayer 1.

The 2nd respondent’s counsel urged the Court to find that “this fanciful notion” of constituent power of the people cannot and should not be read into the clear words of section 3 of the Constitution.

Prayers 3 and 12

These prayers revolve around referendum and constituent assembly as organs contended by the applicants to be critical for legitimization of a new Constitution. The 2nd respondents’ counsel noted the applicants’ counsel’s submission that for a Constitution to be legitimate, it must be a product of a constituent assembly and that it must also be subjected to a referendum which the applicants maintained is the ultimate mark of a people-accepted Constitution. The 2nd respondent’s counsel acknowledged that the concepts of constituent assembly and referendum are good philosophical concepts worthy of being aspired to but hastened to add that that is not what is before the Court, ie that all the 30 million Kenyans should make the Constitution. He submitted that what is before the Court is whether failure to subject the product of the NCC held at the Bomas of Kenya to a constituent assembly and referendum as perceived by the applicants is unconstitutional. In counsel’s view, to be able to determine this question, the Court has to look at the existing Constitution. He submitted that there is no section of the Constitution providing for a constituent assembly or that the Bomas product must go through a referendum. So if that product is not subjected to a constituent assembly or referendum, there is nothing unconstitutional about it. He emphasized that the duty of the Court is to declare the law as it stands today and that unlike the Indian situation alluded to via applicants’ counsel’s reference to the *Kesavananda* case, there is no reference in the Kenyan Constitution to constituent assembly, or referendum. He urged that since constituent power of the people and referendum are not rights protected by the Constitution, failing to practise them does not render the Bomas constitutional review process unconstitutional.

Regarding the applicants’ argument that constituent power resides in

sections 1 and 1A of the Constitution, the 2nd respondent's counsel submitted that the reference in section 1 to Kenya as a sovereign Republic simply means that Kenya will not be subject to control by any outside body and will be responsible for its own Government. Similarly that the reference in section 1A to Kenya being a multi-party democratic State simply means that Kenya will have more than one political party. He urged that we should not read our own wishes into these provisions.

As to the applicants' argument that a Constitution can acquire legitimacy only if it is a product of a constituent assembly, the 2nd respondent's counsel noted that the current Constitution is not the product of the pre-condition of a constituent assembly, yet its legitimacy is not in doubt. He added that it is a product of negotiations between people who said they were representatives of the people of Kenya and the British and that the said people's representatives were not elected for the purpose of a constituent assembly. So, if a Constitution can only be legitimate if a product of a constituent assembly, then even the existing Constitution would be illegitimate, yet even the applicants are not challenging the legitimacy of the present Constitution. The flip side, argued the 2nd respondent's counsel, is that if the Court finds that the constituent power of the people is embodied in the Constitution, the Court should find that such power can and is often exercised by representation. He cited the 1964 amendment to Kenya's Independence Constitution declaring Kenya a Republic as the best example of the exercise of such power by representation.

The 2nd respondent's counsel cited Ghana as another such example where Parliament converted itself into a constituent assembly and enacted the country's Constitution. He argued that the authority to do so reposed in the Ghana Parliament, not because of the name "constituent assembly" but because the parliamentarians were representatives of the people; and the Constitution was legitimate as the people had spoken through their representatives and the Constitution was accepted without any referendum.

The 2nd respondent's counsel also cited the 1966 Uganda Constitution as a further example of a Constitution which did not come into being through what he termed as "the fanciful notion" floated by the applicants but through a revolution, yet the Court found it legitimate: see *Uganda vs Commissioner of Prisons, Ex-parte Matovu* [1966] EA 514.

On the Bomas process, the 2nd respondent submitted that it allowed the people of Kenya to exercise the so-called constituent power both directly

and by representation. That the 2nd respondent provided Kenyans with the opportunity to express their view on the Constitution they wished to have. In this regard he referred to paragraphs 4, 5 and 6 in volume 1 of Lumumba's affidavit to the effect that the 2nd respondent organized constituency constitutional forums in the Republic and facilitated other forums at which all persons who were so minded gave their views on the review process. Also that the 2nd respondent facilitated numerous forums for civic education to stimulate public discussion and awareness on constitutional issues; conducted studies and evaluations of other constitutions and other constitutional systems which could inform the people on the review process; and that people who wished to express their views had the opportunity to do so. That thereafter the 2nd respondent went through the meticulous process of collecting and collating the peoples views and in preparing a Bill to go to Parliament which, in the 2nd respondent's view, is the ultimate source of exercise of constituent power by representation. The 2nd respondent's counsel submitted that Parliament has such power and that the applicants had acknowledged this when they noted that the Independence Constitution had been amended thirty-eight times by Parliament "beyond recognition".

The 2nd respondent's counsel also drew attention to the 1969 amendment to the Kenya Constitution *vide* Act No 5 of 1969 (page 996 of volume 2 in Lumumba's affidavit); that the amendment passed through Parliament by way of subsidiary legislation; that there was no constituent assembly or referendum; yet the Constitution was drastically changed by Parliament in exercise of constituent power by representation; and that this was legitimate exercise of such power.

Responding to applicant's counsel's contention that the power reposed in Parliament under section 47 of the Constitution is limited to mere amendment not repeal of the Constitution and replacing it, the 2nd respondent's counsel referred to the definition provisions in sections 47 (6) (b) and 123 (9) (b). In 2nd respondent's view, the word "re-enactment" in the definition of "alter" in section 47 (6) (b) as read with section 123 (9) (b) which provides that words in the singular shall include the plural mean that the Constitution in its entirety can be re-enacted by Parliament and that re-enactment means a new Constitution can come in *lieu* of the existing Constitution. In 2nd respondent's counsel's view, the words of sections 47 (6) (b) and 123 (9) (b) are precise, clear and unambiguous and they empower Parliament to re-enact the entire Constitution and replace it with another. Counsel invited this Court not to follow the Indian case of *Kesavananda* heavily relied on by applicant's counsel as the limitation

doctrine enunciated in that case is not embodied in the Kenya Constitution. 1
The 2nd respondents' counsel invited the Court to follow the Singapore
case of *Teo Soh Lung vs Minister for Home Affairs* [1990] LRC 490 in
which the *Kesavanda* doctrine was considered and departed from. The
gist of *Lung's* case is that if makers of the Constitution intended to limit 5
power to amend the Constitution or change and replace it with another,
Parliament would have said so. The 2nd respondent's counsel submitted
that the Kenya Constitution has not so provided and there is no limitation
on Parliament's power to change or replace the Constitution. 10

The 2nd respondent's counsel drew attention to sections 30 and 47 of the
Constitution and submitted that legislative power is vested in Parliament
thereunder and not in anyone else. That Parliament has power in law to
provide a mechanism on how a Bill to amend or change the Constitution 15
may be prepared; that this is what it has done by enacting cap 3A and
that there is nothing unconstitutional in Parliament so providing. Counsel
asked the Court to take judicial notice of the fact that Kenyans have
agitated for a long time for a comprehensive review of the Constitution;
that Parliament has responded to the agitation through cap 3A; and that 20
this was a legitimate exercise of Parliament's legislative power under
section 30 of the Constitution.

In conclusion of this part relating to prayers 2 and 3, the 2nd respondent's
counsel alluded to the *Blackwell Encyclopaedia of Political Science*
referred to by applicants' counsel and noted from it that five major 25
democracies, ie India, Israel, Japan, the Netherlands and the USA had not
used a referendum. He posed: If major democracies have not subjected
their Constitutions to referendum, are their Constitutions illegitimate?
He answered the question in the negative. In answer to the applicants' 30
complaint that cap 3A only provides for a contingent referendum and
that their right under section 4 to a referendum is diluted by making it
contingent under the section 27 (5), (6) and (7), the 2nd respondent's counsel
submitted that there is no such right under the Constitution and as such
the provision of a contingent right to a referendum in the said section 27 35
(5), (6) and (7) of cap 3A cannot be unconstitutional. There is no right to
a referendum, contingent or mandatory, under the current Constitution,
argued the 2nd respondent's counsel, and therefore no such perceived right
is capable of being violated. Neither is there a right for every Kenyan to
write the Constitution. 40

The 2nd respondent's counsel urged that the Court should not grant the
orders sought in prayers 1, 3 and 12.

Learned counsel for the 1st respondent associated herself with the submissions of the 2nd respondents' counsel on prayers 1,3 and 12.

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The 3rd respondent, a delegate at Bomas, endorsed the legalistic approach adopted by the lawyers. He noted that the applicants accepted that the consultative process ushered in by cap 3A in developing a new Constitution is a good attempt. He urged in essence that there can be no perfect system and that the good attempt should be allowed to continue to its logical conclusion. Regarding prayer 3, in which the applicants complain that their right to a referendum has been reduced to a hollow right, the 3rd respondent pointed out that a delegate at Bomas can abandon a hard stance on an issue and go along with other delegates or he can persuade other delegates to have a particular issue referred to a referendum. He too urged that prayers 1, 3 and 12 should not be granted.

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Learned counsel for the 1st and 2nd interested parties said he relied on the affidavits of Abdulrahman Mirimo Wandati and Eunice Kagure Nyutu. In the view of counsel for the 1st and 2nd interested parties, only one premise must inform the Court's judgment in this matter, ie the law as it is. He asked the Court to uphold the *EI Mann* doctrine of interpretation. He acknowledged that sovereignty remains with the people but that it is not exercisable in a vacuum. It is exercised through state organs, eg Parliament. Not every Kenyan can partake of Constitution making. He noted that there is no express constitutional provision for exercise of sovereign power by the people in Constitution making and that you cannot be denied that which does not belong to you. Exercise of sovereign power of Constitution making through Parliament may not be the best but it is the law. Ideals expressed by applicants can't inform this Court in its judgment. There are many paths to Constitution making and each country chooses its own. Kenya has at the moment chosen the Parliamentary path. It was open to Parliament to provide a mechanism for the people's involvement in assisting it with its legislative mandate, hence the enactment of cap 3A. He submitted that prayers 1,3 and 12 cannot stand. However, he commended the applicants for giving the Court an opportunity for laying to rest the ghost of uncertainty about section 47 of the Constitution. He submitted that this section gives Parliament unlimited power to amend the Constitution and re-enact it. The legal framework Kenya has may not be perfect but it is the law and it should prevail. He urged that prayers 1, 3 and 12 should not be granted.

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In reply, applicants' counsel reiterated his earlier submissions and

responded mainly to the 2nd respondent's counsel's submissions. He agreed that whatever Judgment the Court gives in this application, it will be a watershed in Kenya's jurisprudence. He invited the Court to depart from the *El Mann* doctrine of interpretation and follow the interpretation in the case of a later Constitutional Court in High Court Criminal Application No 39 of 2000, *Crispus Karanja Njogu vs Attorney – General*.

The constitutional issue which arose in the *Karanja* case was whether the Attorney-General or his agents are vested with absolute powers under section 26(3) of the Constitution and section 82 of the Criminal Procedure Code (cap 75) to enter a *Nolle Prosequi*. The Constitutional Court (Oguk, Etyang and Rawal, JJ) considered the *El Mann* case and stated, *inter alia*, as follows:

“We do not accept the proposition that a Constitution ought to be read and interpreted in the same way as an Act of Parliament. The Constitution is not an Act of Parliament. It exists separately in our statutes. It is supreme. When an Act of Parliament is in any way inconsistent with the Constitution, the Act of Parliament, to the extent of the inconsistency, becomes void. It gives way to the Constitution. It is our considered view that, constitutional provisions ought to be interpreted broadly or liberally. Constitutional provisions must be read to give values and aspirations of the people. The Court must appreciate throughout that the Constitution, of necessity, has principles and values embodied in it; that a Constitution is a living piece of legislation. It is a living document.”

Applicants' counsel reiterated that the Constitution has to be interpreted *sui generis* (of its own kind; unique; in a class by itself). He also invited this Court not to follow *Lung's* case which in his view was based on a restricted interpretation. Applicants' counsel reiterated his submission that prayers 1, 3 and 12 be granted.

The Law Society of Kenya, *as amicus curiae*, had the last word. Learned counsel for the Society re-echoed the view that this is a very important case in the history of Kenya as critical issues of constitutionalism are before the Court. That the Court's decision, whichever way it goes, will be very important. He saw the broad issues for the court's determination as follows:-

- a) Constituent power of the people.

- b) Where constituent power is located. 1
- c) Whether constituent power needs to be reduced into written text.
- d) How constituent power manifests itself in the law.
- e) Relatedly, the concept of referendum and whether it is the only way for constituent power to be manifested. 5
- f) Question of representative democracy (captured in the context of discrimination, ie inequality *vis-à-vis* equity).
- g) Meaning of injunction in a matter like this. 10

As regards constituent power, counsel for the Law Society of Kenya reiterated his submission during the preliminary objection, ie that constituent power is collective power of the people to express their will. It pre-exists any written law or Constitution. It exists whether or not the people or authorities recognize or acknowledge it. The struggle for Kenya's independence was a manifestation of the people's constituent power. It did not matter that the English law being amended to remove dominion status was superfluous. The people's constituent power had been exercised by the people's struggle. The amendment was acknowledging the sovereignty of Kenya. 15 20

Constituent power need not be written or textualised. When looking at the supremacy of the Constitution, the Court should bear in mind that the Constitution as a document is a writing of the will of the people, ie their constituent authority. The Constitution itself is fundamentally subject to the will of the people, ie the constituent authority. 25

A Constitution cannot in its body contain a death wish clause. It would be vulnerable once such clause is inserted. That is why makers of the current Constitution provided for alteration or amendment in section 47 (6) (b). In Law Society's counsel's view, alteration includes total replacement of the Constitution and that section 47 (6) (b) was written in this manner to prevent abuse from time to time. You can replace the Constitution at once over a period of time. The section is written in a manner which seems limited to avoid abuse. It would be dangerous if it was express. The political and legal processes leading to cap 3A are a continued expression of the constituent power of the people. 30 35

Cap 3A was enacted to provide a consultative mechanism for alteration of the Constitution. Applicants are asking for replacement of the Constitution by a mechanism they have not proposed. The reference to referendum is 40

only intended to check if the people's wishes have been textualised as they proposed. This is not a Constitution making process. 1

Applicants have also proposed another process, ie, constituent assembly, which they say is more democratic. A constituent assembly is just one method. Both the constituent assembly and referendum are important and attractive processes but they are not the only ones. There may be need for legislation to provide for them if that route is chosen. If the Court issues the orders sought in this regard, it would be proposing legislation and thereby enter into the realm of legislation which is outside the Court's jurisdiction. The Court in the *Michuki* case resisted the temptation to get involved in the realm of legislation on district boundaries. 5 10

If the Court in the present case grants the orders sought, it would be entering into the realm of supervision of Parliament. Despite any weakness section 27 of cap 3A may have, the Act is nevertheless a good law that would lead to a good Constitution. You can't have a perfect Constitution at any one time, however foresighted you are. Counsel for the Law Society of Kenya associated himself with the submissions of counsel for the 1st and 2nd interested parties on this and rested his submissions on constituent power, constituent assembly and referendum. 15 20

Consideration of Prayers 1, 3 and 12

Having broadly analysed the affidavit evidence and submissions from the various parties to the proceedings before this Court regarding prayers 1, 3 and 12, I now give consideration to the issues for the determination of the Court as follows:- 25

Constituent power 30

I am persuaded that this is a residual collective power of Kenyans as a sovereign people. The mode of operation of our society is such that a practice has developed and gained acceptance hitherto whereby this power has been exercised through representation by various organs via mechanisms designed for each specific purpose. It is not expressly provided for in the Constitution of Kenya or any other Kenyan law but it is an inherent power. I find the following definition of sovereignty in *A Dictionary of Law* (5th Edn) edited by Elizabeth A Martin a fair summary of what sovereignty is about: 35 40

“Sovereignty, *n* Supreme authority in a State. In any State sovereignty is vested in the institution, person

or body having the ultimate authority to impose law on everyone else in the State and the power to alter any pre-existing law. How and by whom the authority is exercised varies according to the political nature of the State. In many countries the Executive, Legislative, and Judicial powers of sovereignty are exercised by different bodies. One of these bodies may in fact retain sovereignty by having ultimate control over the others. But in some countries, such as the USA, the powers are carefully balanced by the Constitution”

Constituent assembly

I find this to be one of various alternative modes of exercising constituent power. It is not provided for in our Constitution or in ordinary law. In the context of Constitution making, if Kenyans desire to have it as their mode of Constitution making, I am of the considered view that it has to be expressly provided for. It cannot be inferred as the question will immediately arise as to why it should be impliedly given preference over other available alternatives.

Referendum

There is no provision for referendum in our Constitution. The Constitution of Kenya Review Act (cap 3A) does, however, provide for it for purposes of resolving particular issues in the consultative constitutional review and development process at the National Constitutional Conference (NCC) held at the Bomas of Kenya. Cap 3A does not, however, define the term. *Jowitts Dictionary of English Law* defines the term as follows:
“Referendum [Fr Plebiscite], a direct vote of electors upon a particular matter.”

I find this definition appropriate.

Applicants contend that it is a mandatory constitutional right. It is not. This process, important though it must be, is one of the several alternative ways of legitimizing a Constitution. I put it in the same category as constituent assembly. If Kenyans want referendum as a mandatory right, it has, in my respectful view, to be provided for expressly. The Court is ill-equipped to determine if this is the wish of Kenyans. The issue is predominantly a political one and calls for a political solution. If the Court were to make a pronouncement on it in this application, it would be venturing into the

legislative process, which is not its field of operation.	1
Sections 26(7) and 27(1) (b) <i>vis-a-vis</i> section 3 cap 3A	
It has not come out clearly how sections 26 (7) and 27 (1) (b) of cap 3A have transgressed, diluted and vitiated the applicants' or any known Kenyans' constituent power to adopt a new Constitution under section 3 of the Act. Affidavit evidence before this Court is to the effect that various fora were availed for the people's participation countrywide in making constitutional proposals. That these were collected and collated by the Constitution of Kenya Review Commission (CKRC) which compiled a report and draft Bill which it presented to the NCC for discussion, debate, amendment and adoption. The affidavit of the Commission Secretary depones at paragraph 25 as follows:	5
"25. That, contrary to the allegation of the first applicant, the Draft Bill very accurately and faithfully reflects the views of the people of Kenya and the applicants are merely expressing their personal concerns which ought to be addressed through delegates at the National Constitutional Conference."	10 15 20
The Court was told by the 3 rd respondent, Kiriro Wa Ngugi, a delegate at the NCC, that some of the applicants, notably the first applicant (Rev Dr Timothy M Njoya) and the 2 nd applicant (Kepta Ombati), participated in the conference as observers and that the 2 nd applicant addressed the conference. The CKRC Commission Secretary's affidavit (pages 1183 – 1185 in volume 2) confirms that the 2 nd applicant indeed made an address at the NCC. I am unable to see how their constituent power has been transgressed, diluted and vitiated.	25 30
I find that the applicants have not made out a case to support prayer 1. Accordingly, I would refuse to grant the order sought in prayer 1.	
Section 27 (5), (6) and (7) of cap 3A <i>vis-à-vis</i> the Constitution.	35
Applicants contend that section 27 (5), (6) and (7) cap 3A are unconstitutional to the extent that they convert their right to have a referendum as one of the organs of reviewing the Constitution into a hollow right and privilege dependent on the absolute discretion of the delegates of the NCC. I have already addressed under the subheading "Referendum" above the question of what a referendum is about and concluded that it is not a mandatory right under cap 3A and that it is not provided for in the	40

Constitution. It was also my conclusion that if Kenyans want referendum as a mandatory right, it has to be provided for expressly by law. That conclusion covers prayer 3. 1

Under prayer 12, the applicants seek a declaration that the Constitution gives every Kenyan an equal right to review the Constitution which right embodies the right to participate in writing and ratifying the Constitution through a constituent assembly or national referendum. I have already addressed under the subheading “constituent assembly” above the question of what a constituent assembly is; that it is not provided for either in our Constitution or ordinary law; and that it cannot be impliedly given preferential treatment over other available modes of Constitution making. That conclusion covers both prayers 3 and 12. 5 10

In the analysis part of this judgment I, *inter alia*, made reference to the cases of *Republic vs EI Mann* [1969] EA 537 and *Crispus Karanja Njogu vs Attorney-General* High Court Criminal Application No 39 of 2000. I would at this juncture like to say something about the *EI Mann* doctrine of interpretation *vis-à-vis* the *Crispus Karanja* doctrine of interpretation. In my view they are not mutually exclusive. As I see it, *EI Mann* did not lay down a rule carved in stone that a statute and a Constitution have to be interpreted in exactly the same way. The crux of *EI Mann*, in my construction, lies in the following part of the quotation from *Craies on Statute Law* at page 359: 15 20

“The tribunal that has to construe an Act of a Legislature, or indeed any other document, has to determine the intention as expressed by the words used.” 25

This has to be read with the following part of the quotation from *Keshava Menon vs State of Bombay* at page 360: 30

“: but a Court of law has to gather the spirit of the Constitution from the language of the Constitution.”

If *EI Mann* is given the interpretation indicated in the expressions cited above, its approach to interpretation of legal instruments, including the Constitution, is shorn of distinction from *Crispus Karanja*. And that is my interpretation of *EI Mann*. 35

The upshot is that I do not find any unconstitutionality in section 27 (5), (6) and (7) of cap 3A as alleged in prayer 3. Accordingly, I would refuse to grant the order sought in prayer 3. 40

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With regard to prayer 12, I find that all Kenyans including the applicants were given an opportunity to participate in making constitutional proposals. There were various fora for this and it was open to the applicants to use them. As far as the National Constitutional Conference is concerned, it was open to the applicants to participate through relevant delegates if they could not personally participate at the conference. In the case of the 1 st and 2 nd applicants, the Court was told they in fact participated as observers. In my respectful view, the requirements of the law were complied with. In the event that the product of the Bomas process is found not to reflect the views of Kenyans, that would be a factual issue warranting to be referred to the people for determination. This could be done under the provisions of cap 3A relating to referendum or through other legal mechanism to be designed for the purpose.	5 10
In my respectful view, the applicants have not made out a case to support prayer 12 either. Accordingly, I would refuse to grant the order sought in prayer 12.	15
Prayers 7 and 14	20
Under these prayers the applicants seek the following orders:-	
7. That a declaration be and is hereby issued declaring that section 27 (2) (c) and (d) infringes the applicants' 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.	25
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.	30
The two prayers revolve around discrimination. Applicants urge that diversity of opinion is a right respected and protected by law. They complained that section 27 (2) (c) and (d) are discriminative of themselves because:-	35
a) They don't set out criteria for equal treatment of all Kenyan districts, irrespective of their population.	40
b) They require the same treatment of all registered parties irrespective of size of membership at the time the section was enacted.	

That section 27 (2) (c) and (d) are discriminative in their effect because:- 1

- a) A district with very many people and a district with very few people send equal numbers of delegates. 5
- b) Registered political parties, irrespective of their strength, ended up sending one representative each.

That in view of the above, all Kenyans are not equal before the law under cap 3A but some are more equal than others. For instance, Coast province has about 300,000 people more than Nairobi, yet Coast has 43 delegates more than Nairobi. Another example is that the population of Nyanza is about twice that of Nairobi, yet Nyanza has six times as many delegates as Nairobi. Applicants' counsel submitted that in a democracy this type of inequality offends the entire Constitution and fundamental principle of democracy and such inequality cannot be allowed to stand. 10 15

Applicants' counsel also drew attention to representation at the NCC. He noted that all delegates are about 630; that MPs and District Delegates are 432 of the NCC membership. He submitted that the composition of more than the 2/3 at NCC of the two categories of delegates is utterly discriminatory and blatantly unconstitutional. 20

Applicants' counsel referred to the USA case of *B A Reynolds vs M O Sims* [377 US 533] decided in 1964 and made the following points:- 25

- a) The nature of representative democracy is that all persons must be treated equally in all representative bodies, whether in Parliament or at the National Constitutional Conference, and that as long as those bodies are representative, all persons should be treated equally.
- b) The right to franchise is very important and preservative of all rights and all other rights depend on this. 30

Applicants' counsel added that in a sovereign State the right to make a new Constitution is more important than the right to vote. That even Parliament is constituted in a discriminatory manner and that this is bad enough and it is worse for the NCC also to be constituted in a discriminatory manner. He also submitted that the NCC is making a new Constitution which will be equally binding on all Kenyans. That our current Constitution requires that its composition must be based on equal treatment of all citizens, which is not being observed. That the right to equal representation is related to the right to citizenship and that if citizens of one part of the Country are more represented than others, the disfavoured citizens will be less of 35 40

citizens to the extent of their discrimination. That a citizen of Nairobi is three times less a citizen than his Nyanza counterpart.	1
Applicants' counsel submitted that the discrimination alluded to by the applicants is not constitutionally permissible. He alluded to an argument by counsel for the 2 nd respondent that the composition at the NCC is a matter for Parliament and made the counter-argument that in <i>Reynold's</i> case the judges decided that denial of constitutionally protected rights demands judicial protection. He submitted that the applicants have been denied the constitutional right to protection. He noted that in High Court Miscellaneous Application No 975 of 2001, <i>Hon John Michuki & Another vs Attorney – General & 2 others</i> , <i>Reynolds'</i> case was cited with approval.	5 10
Applicants' counsel urged the Court to declare cap 3A unconstitutional to the extent that it provides in section 27 (2) (c) and (d) for unequal representation at the NCC and grant prayer 7.	15
Regarding prayer 14, applicants' counsel said it was similar to prayer 7 and that his arguments relating to prayer 7 also applied to prayer 14. He added, however, that prayer 14 makes reference to article 21 of the Universal Declaration of Human Rights (UDHR) and submitted that human rights are common heritage of all humanity. That historically chapter v of the Constitution of Kenya is traceable to the UDHR and that he referred to it because if the applicants' application is upheld, then the infringements the applicants complain of will be deemed to be against Kenyan law and international law. He urged the Court to grant prayer 14.	20 25
Counsel for the 2 nd respondent noted that the Constitution of Kenya Review Commission (CKRC) is established by an Act of Parliament to facilitate a comprehensive review of the Constitution. By its nature as a Commission, all that will result from its work are recommendations to be made before Parliament on what in the opinion of CKRC is the view of Kenyans on the constitutional order they wish to have. Parliament will be at liberty to consider them and if they find them suitable they can enact them under the provisions of section 47 of the Constitution. If Parliament considers them unsuitable, Parliament can reject them in their entirety. Therefore CKRC's recommendations cannot affect anyone's rights.	30 35
Regarding section 1A of the Constitution, counsel for 2 nd respondent reiterated earlier submissions that the reference to Kenya as a multi-party democratic state means Kenya will have more than one political party.	40

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He added that the section does not protect any right of an individual but conceded that the other sections cited as the basis for prayer 7 do make provision for protection of fundamental rights and freedoms of the individual. He noted that the applicants relied on the parts which protect individual right of conscience and drew attention to the proviso to section 70 which makes individual rights subject to the rights of others and to the public interest.

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The 2nd respondent's counsel referred to *Githunguri vs Republic* [1986] KLR 1 in support of his submission that where the public interest requires, the rights of an individual can be put aside. He also referred to *Adar & 7 others vs Attorney-General & Another* (unreported) in support of his submission that for the applicants to succeed in prayers 7 and 14, they must demonstrate violation of a right personal to themselves and that in his view they had not so demonstrated. Counsel added that it is not enough to allege, as the applicants have done, infringement without particularising details of the infringement – generalizations will not do. Their failure to particularize their rights allegedly infringed takes the applicants outside the purview of chapter V of the Constitution. In this regard the 2nd respondents counsel referred to *Nganga vs Republic* [1985] KLR 121 in which the Judge denied the application because the applicant had not brought himself within the subject "discrimination" and that failure to do so meant discrimination was proved. Counsel also referred to High Court Miscellaneous Application No 666 of 1990, *Kenneth Njindo Stanley Matiba vs The Attorney – General* in the same regard and reiterated that what comes out of the NCC deliberations at Bomas cannot affect anybody's rights and the applicants have no protection of the law in relation thereto. He submitted that the applicants' freedom of conscience had not been curtailed and they were at liberty to express their conscience in any way they please. The same goes for their freedom of expression.

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Regarding applicants' complaint about curtailment of their freedom of assembly, the 2nd respondents' counsel submitted that they had not demonstrated any curtailment either. On the contrary, the CKRC facilitated everybody's freedom of assembly including that of the applicants. In this regard, counsel for the 2nd respondent referred to Volume 2 of the CKRC Secretary's affidavit which shows at pages 1183 –1185 that the 2nd applicant, Kepta Ombati even addressed the NCC at Bomas.

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Responding to the *Michuki* case referred to by applicants' counsel, the 2nd respondents' counsel observed that Hon Michuki sought an order that the creation of districts was unconstitutional and that the Court argued

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that such order would be devastating to this country. Counsel for the 2nd respondent urged this Court to adopt a similar view. He noted that the Court was being asked to stop the NCC when it was nearing conclusion and take judicial notice of the political emotions expressed on this issue and be alive to the devastating effect stoppage of the NCC can have to this country. He submitted that the political future of Kenya is in the Court's hands and the matter required delicate balancing of rights of individuals and those of the public interest. He concluded that even if the Court finds that the applicants have been discriminated against in some way, the public interest should take precedence.

Counsel for the 2nd respondent urged the Court not to grant the orders sought under prayers 7 and 14.

Counsel for the 1st respondent basically associated herself with the submissions of the counsel for the 2nd respondent. She emphasized that particulars of the personal discrimination complained of should have been brought up by the applicants in their affidavits and that the applicants had not done so. She noted that the only attempt by them to give particulars of discrimination was by the 2nd applicant's further affidavit giving population figures. These were also figures about inequality of representation at the NCC but that the figures fell short of the required standard. She observed that representation is done in different ways. For instance, you may be a resident of Nairobi but you are also a member of a religious group or a political party. Your representation would then be through any of those fora. She urged the Court not to rely on the "so-called" population figures.

Regarding the USA case of *Reynolds*, counsel for the 1st respondent said it is distinguishable in that it related to elections while here we are dealing with proposals at the NCC which will result in a Draft Bill. She said *Reynolds'* case should be viewed in the light of the prevailing situation in the USA in 1963 when racialism was the order of the day and that Kenya's situation today is very different. She urged the Court not to apply the reasoning in *Reynolds'* case to this case.

The 3rd respondent basically associated himself with the position taken by counsel for the 2nd respondent. He drew attention to the diversity of Kenyans in terms of gender, equity, etc which had to be balanced in constituting public bodies. He wondered what criteria the applicants used in complaining about mode of computing representation of districts and political parties at the NCC but at the same time kept quiet about their

respective bodies eg religious organizations. He asked whether this was because they belonged to that segment and posed: How can applicants come to Court and complain about discrimination when the law has provided for their representation. 1

For his part, counsel for 1st and 2nd interested parties criticized the applicants for ignoring the overall effect of cap 3A, which is to provide a broadway for popular participation in the constitutional review process. He noted that all and sundry were afforded an opportunity to participate in the process and challenged the truth of the applicants' complaint of discrimination against themselves. He observed that there is no perfect legislation and that to expect such is to negate human existence. He endorsed the concession by the applicants' counsel that cap 3A is a good attempt and noted that there is no precedence to guide the process provided for under cap 3A. He added that there were several levels of participation in the constitutional review process and that the applicants had the option to choose any. Further, he noted that cap 3A did not purport to re-invent the wheel but proceeded on the basis of existing units of representation at the time it came into being and could not have upset 40 years of representative tradition. He urged the Court not to grant prayers 7 and 14. 5 10 15 20

Applicants' counsel reiterated his earlier submissions and re-emphasized various aspects thereof.

The contribution of counsel for the Law Society of Kenya regarding prayers 7 and 14 related to the *Michuki* case. In his view, the rationale for the Judges not granting the orders sought in that case was that they resisted the temptation to get involved in the realm of legislation on district boundaries. He said he saw the devastation alluded to by the Court in the *Michuki* case, ie that the Court would be entering into the supervision of Parliament. 25 30

Consideration of prayers 7 and 14

I have duly considered the applicants' prayers 7 and 14 and the submissions made by the various parties to these proceedings plus submissions of the Law Society of Kenya. The facts have been analysed well and the law relating thereto has largely been ably expounded by counsel for the various parties. I shall, therefore, cover the issues for determination broadly. 35 40

The issue of democracy came up in discussion of section 1A of the Constitution. The concept is not defined in the Constitution. A useful leaf

may be borrowed from *Black's Law Dictionary (7 Edn)* edited by Bryan A Garner where the following definition is given: 1

“democracy, n Government by the people, either directly or through representatives.”

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Applicants' counsel submitted that section 27 (2) (c) and (d) is discriminatory, *inter alia*, because it does not set out criteria for equal treatment of all Kenyan Districts and that each was to be represented at the NCC by the same number of delegates regardless of population. Political parties were also to be represented by the same number of delegates regardless of their strength. Counsel observed that the NCC was making a new Constitution which will be binding on all Kenyans; that the Constitution requires that the composition of the NCC be based on equal treatment of all citizens; and that equality was not being observed. 10

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I pause here to observe that section 27 (2) (c) provides that each District was to be represented at the NCC by three representatives while section 27 (2) (d) provides that each political party was to be represented at the NCC by one representative. On the face of it this appears discriminatory and the applicants urge this Court to find that section 82 of the Constitution has been violated. Section 82 of the Constitution defines the term discriminatory as follows:- 20

“82. (3) In this section the expression “discriminatory” means affording different treatment to different persons attributable wholly or mainly to their respective descriptions by race, tribe, place of origin or residence or other local connection, political opinions, colour, creed or sex whereby persons of one such description are subjected to disabilities or restrictions to which persons of another such description are not made subject or are accorded privileges or advantages which are not accorded to persons of another such description.’ 25

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I do not see how the applicants as individuals fall within the above definition of discrimination. 35

Applicants' counsel criticized the Court in the *Michuki* case for shying away from declaring District boundaries as unconstitutional and urged this Court to show greater courage. In this regard, it must be borne in mind that cap 3A did not mandate any of the organs it established to get involved in District boundary demarcation or review. Section 3 of cap 3A giving the objects and purposes of the review is instructive. They include promoting 40

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and facilitating regional co-operation to ensure economic development, peace and stability; to strengthen national integrity; ensuring the full participation of people in the management of public affairs; etc. And section 5 enjoins the organs through which the review process was to be conducted to see to it that the process was made to:	1 5
“5. (b) ensure that the review process accommodates the diversity of the Kenyan people including socio-economic status, race, ethnicity, gender, religious faith, age, occupation, learning, persons with disabilities and the disadvantaged”.	10
The concept is not new. Section 42 (3) of the Constitution dealing with constituencies provides for their boundaries to take into account not just population density but also population trends, means of communication, geographical features, community of interest and the boundaries of existing administrative areas. The section also provides for periodical review of boundaries.	15
The diversity of Kenya is a reality and cannot be ignored. The majoritarian principle espoused by the applicants as the only factor to inform the boundary setting process, etc cannot be the sole criterion in constituting districts or public bodies. It has to be balanced with other principles, eg equity.	20
There was a counter-argument to the applicants’ application to the effect that the final product of the NCC (Bomas) process would be a Bill to go to Parliament and that Parliament was at liberty to accept or reject such Bill. For that reason, it was submitted that the Bill may not necessarily be binding and that, therefore, the applicants were jumping the gun in talking of such Bill violating their rights. This point is not without merit.	25 30
In view of the foregoing, I find that the applicants have not proved any discrimination against them personally as our law requires and that their prayers 7 and 14 must fail. Accordingly, I would refuse to grant the orders sought in prayers 7 and 14.	35
Prayer 9	
Under this prayer the applicants seek the following order:-	
8. 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	40

Constitution and therefore null and void.	1
Applicants' counsel submitted that the power vested in Parliament is a limited power and does not include:-	
a) Power for Parliament to make, adopt or enact a new Constitution.	5
b) Power for Parliament to abrogate or repeal the existing Constitution.	
In applicants' counsel's view, Parliament has two roles:-	10
a) To make ordinary legislation under section 30 of the Constitution.	
b) Only to amend the Constitution under section 47 of the said Constitution.	
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He submitted that the power to make the Constitution belongs to the people in exercise of their constituent power and that Parliament has no power outside the Constitution.	
The purport of section 28 (3) and (4), contended applicants' counsel, is to invest Parliament with power to enact a new Constitution. He submitted that this is unconstitutional because the Constitution itself does not give Parliament that power. Counsel recalled that the deficiencies the applicants have complained about before this Court about the constitutional review process is a matter the applicants have taken issue with previously and said so. He reiterated his reliance on the Indian case of <i>Kasavananda</i> case he had alluded to earlier to the effect that the Indian Parliament had no power <i>vide</i> its amendment power under article 368 to make a new Constitution. In applicants' counsel's view, the power vested in the Kenyan Parliament by section 47 of the Constitution does not include changing the basic structure of the Constitution, let alone replacing it. He added that article 368 of the Indian Constitution is equivalent to section 47 of the Constitution of Kenya.	20 25 30
Applicants' counsel urged the Court to declare section 28 (3) and (4) unconstitutional and, therefore, null and void.	35
Counsel for the 2 nd respondent submitted that the contention by the applicants' counsel that section 47 of the Constitution simply allows Parliament to amend the Constitution but not to repeal or replace it is erroneous. In his view, that contention is based on a wrong interpretation of the meaning of supremacy of the Constitution under section 3 thereof.	40

He contended that the supremacy of the Constitution under section 3 is expressly made subject to section 47. He argued that the makers of the Constitution recognized that from time to time the need may arise for the Constitution to be revisited, by amendment or repeal. That is why everything is subject to section 47. He drew attention to the definition of “alter” in section 47 (6) (b) and submitted that the word “re-enactment” used there means that the Constitution in its entirety can be re-enacted by Parliament and that re-enactment means a new Constitution can come in *lieu* of the existing Constitution. In this connection he referred to section 123 (9) (b) of the Constitution which provides that words in the singular shall include the plural while words in plural shall include the singular. He submitted that section 47 (6) (b) and 123 (9) (b) are clear and unambiguous and that there are no limitations on what Parliament can do. He invited the Court not to follow the Indian case of *Kasavananda* but follow the Singapore case of *Teo Soh Lung vs Minister for Home affairs & others* [1990] LRC 490.

Counsel for the 2nd respondent urged the Court not to grant prayer 9.

Counsel for the 1st respondent invited the Court to look at the Constitution as it is and not to read into it or imply any matters not provided for there. She saw no inconsistency of section 28 (3) and (4) of cap 3A with section 47 of the Constitution. She observed that section 28 (3) and (4) merely provides a time frame for the Attorney-General to publish the Bill from Bomas and wondered how the subsections can be termed as inconsistent with section 47 of the Constitution which does not deal with procedures prior to a Bill getting to Parliament. She posed: Would failure of the Attorney-General to comply with section 28 (3) and (4) contravene section 47 of the Constitution? She answered the question in the negative and submitted that no inconsistency exists to warrant granting of the order sought under prayer 9.

The 3rd respondent said the Bomas process was preparing a Bill for consideration by Parliament under section 47 of the Constitution. That is the intention. He wondered how an intention can be unconstitutional. In his view, there is limitation on Parliament to make law but it is not imposed by the Constitution but by the constituent authority of the people.

Counsel for the 1st and 2nd interested parties submitted that section 47 of the Constitution authorises Parliament to alter the Constitution. That section 28 (3) and (4) of cap 3A relates to the ordinary process of legislation. He noted that there was nothing new in the consultative process ushered in by

cap 3A as a similar process had been used in the development of a children Bill which led to the new Children Act, No 8 of 2001 which came into force on 01.03.02. He also made reference to the mass movement which led in 1991 to the repeal of section 2 A of the Constitution. He submitted that the Court can't find for the applicants in prayer 9.

In reply, applicants' counsel reiterated his earlier submissions on prayer 9. With regard to the Singapore case of *Lung*, he drew attention to article 9 of the Constitution of the Republic of Singapore which provides as follows:

“9. Subject to this article, the Interpretation Act shall apply for the purpose of interpreting this Constitution and otherwise in relation thereto as it applies for the purpose of interpreting and otherwise in relation to any written law within the meaning of the Act.”

He submitted that this article requires the Singapore Constitution to be interpreted like an ordinary statute and that such interpretation is narrow and inappropriate in Kenya. He also submitted that this Court should depart from the *EI Mann* doctrine of interpreting the Constitution which in his view is also narrow and that instead the Court should follow the liberal interpretation in the *Crispus Karanja* case. In answer to the argument by counsel for the 1st and 2nd interested parties that there had been other consultative processes leading to enactments before, he said that the applicants' problem with cap 3A is not the outside consultations but that cap 3A does not comply with the Constitution. He submitted that Parliament does not have power even to amend the Constitution to provide that it can make a new Constitution. Applicants' counsel reiterated his prayer that the court grants prayer 9.

Counsel for the Law Society of Kenya expressed the view that the definition of “alteration” in section 47 (6) (b) of the Constitution includes total replacement. He reiterated that the section was written like this to prevent abuse; that you can replace the Constitution at once or over a period of time; and that section 47 (6) (b) was written in the present form because it would be dangerous to make an express provision for replacement.

Consideration of prayer 9

I have given due consideration to the interpretation issue raised by prayer 9. The matter is not without difficulty.

<i>Black's Law Dictionary</i> (6 th Edn 1990) defines the words alter and alteration, <i>inter alia</i> , as follows:	1
"Alter. To make a change in; to modify; to vary in some degree; to change some of the elements or ingredients or details without substituting an entirely new thing or destroying the identity of the thing affected. To change partially. To change in one or more respects, but without destruction of existence or identity of the thing changed; to increase or diminish."	5
"Alteration. Variation; changing; making different. A change of a thing from one form or state to another; making a thing different from what it was without destroying its identity ..."	10
Among the terms used in section 47 (6) (b) of the Constitution to define "alteration" is the word re-enactment.	15
<i>Black's Law Dictionary</i> (7 th Edn 1999) defines enact and enactment as follows:	20
"enact, <i>vb</i> 1 To make into law by authoritative act ..."	
"enactment, <i>n</i> 1 The action or process of making into law ..."	25
Another term used in section 47 (6) (b) in defining "alteration" is the word repeal. The above dictionary defines it as follows:	
"repeal, <i>n</i> Abrogation of an existing law by legislative act."	30
The applicants contended, among other things, that Parliament cannot under section 47 abrogate the existing Constitution and replace it with a new one. As can be seen above, the dictionary definitions are giving somewhat conflicting signals as to what the term "alteration" means. Where do we go from there?	35
The full text of section 47 (6) (b) states:	
"47. 6 (b) references to the alternation of this Constitution are references to amendment, modification, re-enactment, with or without amendment or modification, of any provision of this Constitution, the suspension or	40

repeal of that provision and the making of a different provision in place of that provision.”	1
It is noted that there is constant reference to a provision of this Constitution in the singular. Section 123 (9) (b) provides:	5
“9. In this Constitution, unless the context otherwise requires –	
(b) Words in the singular shall include the plural, and words in the plural shall include the singular.”	10
The Indian case of <i>Kesavananda</i> was decided by 9 out of 13 Judges of the Supreme Court of India. Article 368 of the Indian Constitution which was under discussion is fairly similar to our section 47. One of the dissenting Judges, Ray, J had this to say:	
‘The power to amend is wide and unlimited. The power to amend means the power to add, alter or repeal any provision of the Constitution. There can be or is no distinction between essential features of the Constitution to raise any impediment to amendment of alleged essential features. Parliament in exercise of constituent power can amend any provision of the Constitution. Under article 368 the power to amend can also be increased. Amendment does not mean mere abrogation or wholesale repeal of the Constitution. An amendment would leave organic mechanism providing the Constitution, organization and system for the State. Orderly and peaceful changes in a constitutional manner would absorb all amendments to all provision of the Constitution which in the end would be “an amendment of this Constitution.’	15 20 25 30
In view of sections 47 (6) (b) and 123 (9) (b) of the Constitution of Kenya, it is my respectful view that it is legitimate to interpret Parliament’s alteration power under section 47 to mean that if Parliament can alter one provision, it can alter more; and if it can alter more, it can alter all. And this conclusion flows. From the Constitution itself.	35
There is no constitutional vacuum in Kenya today. We have a Constitution negotiated by representatives of Kenyans with the colonial power, ie Britain. Applicants’ counsel acknowledged that the received Constitution has been amended many times “beyond recognition” by the representatives of Kenyans. The people have not been involved directly before. The	40

Bomas Constitutional Review process is the first of its kind to involve Kenyans directly in Constitution making. There is no defined procedure for the development of any Bills in for presentation to Parliament in this Country. Bills can take the form of public Bills or private Bills. They still end up in Parliament and it is up to Parliament to decide how to treat them. Why should the Bill expected from the Bomas process be discriminated against?

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It is not lost on me that the Bomas delegates expect Parliament to accept the Bill without change but Parliament is not bound by this. It can reject the Bill. And I think the rationale for the delegates' wish is that they have bared it on what they understand to be the wishes of Kenyans. Of course if the question arises whether the Bill does or does not represent the views and wishes of Kenyans, the best way to resolve that question is by referring what is considered not to represent Kenyans' views and/or wishes to Kenyans themselves.

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I am of the considered opinion that section 47 of the Constitution of Kenya does not limit the power of Parliament to amend or repeal the Constitution and replace it with a new Constitution. The words in section 47 do not in my respectful view impose any limitations as contended by the applicants.

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As was observed in the Singapore case of *Lung*:

“If the framers of the ... Constitution had intended limitations on the power of amendment, they would have expressly provided for such limitations.”

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I have noted the contention of the counsel for the applicants that he thinks *Lung*'s case was decided the way it was because the Singapore Constitution provided for it to be interpreted like an ordinary statute. That may be so. In this regard I wish to revisit my discussion on the *El Mann* case earlier on in this judgment and reaffirm my view that where the words of the Constitution are clear and unambiguous, they should be given their natural meaning. And in my view the words of section 47 of the Constitution of Kenya are adequately clear and do not impose limitations on the power of Parliament to amend, re-enact, repeal and/or replace the Constitution with a new Constitution.

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Section 28 (3) and (4) is not in my view purporting to confer any power on Parliament but it is merely acknowledging Parliament's Legislative power.

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I note that section 28(4) talks of the Bill from Bomas being presented to the National Assembly for “enactment”. The correct position is that the National Assembly passes Bills: See section 46(1) of the Constitution. The legislative power of the Republic is by virtue of section 30 of the Constitution vested in the Parliament of Kenya, which shall consist of the President and the National Assembly.	5
I have come to the clear finding that the applicants have not made out a case to support their prayer that sub sections (3) and (4) of section 28 of the Constitution of Kenya Review Act (cap 3A) be declared inconsistent with section 47 of the Constitution.	10
Accordingly, I would refuse to grant prayer 9.	15
Prayer 17 Under this prayer the applicants seek an order:-	
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).	20
As I understand the National Constitutional Conference held at the Bomas of Kenya to have concluded its deliberations, this prayer is overtaken by events and I shall not consider it.	25
Prayer 19 Under this prayer the applicants asked that the 1st respondent be ordered to pay costs in any event. I would order that the parties bear their own respective costs.	